Date and Time: Monday, October 23, 2023 10:34:00 AM CST

Job Number: 208659556

Documents (100)

1. [Nat'l Black Expo v. Clear Channel Broad., Inc., 2007 U.S. Dist. LEXIS 9783]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

2. [Dippin' Dots, Inc. v. Mosey, 476 F.3d 1337]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

3. [Silicon Servs. Consortium v. Applied Materials, 2007 U.S. Dist. LEXIS 117588]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

4. [In re Dynamic Random Access Memory Dram Antitrust Litig., 2007 U.S. Dist. LEXIS 107598]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

5. [Gaines v. Strayhorn, 2007 U.S. Dist. LEXIS 11856]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

6. First Am. Title Co. v. Devaugh, 480 F.3d 438

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

7. Abbott Labs. v. Mylan Pharms., Inc., 2007 U.S. Dist. LEXIS 12839

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

8. Wholesale Electricity Antitrust Cases I & II, 147 Cal. App. 4th 1293

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

9. Marin v. Evans, 2007 U.S. Dist. LEXIS 13492

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

10. Smith Wholesale Co. v. R.J. Reynolds Tobacco Co., 477 F.3d 854

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

11. *Gibson v. Office of the AG of Cal., 2007 U.S. Dist. LEXIS 105204*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

12. *In re K-Dur Antitrust Litig., 2007 U.S. Dist. LEXIS 100238*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

13. *Flowers v. Exxonmobil Corp., 2007 U.S. Dist. LEXIS 112966*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

14. *Paul v. Intel Corp. (In re Intel Corp. Microprocessor Antitrust Litig.), 476 F. Supp. 2d 452*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

15. *Amado v. Microsoft Corp., 2007 U.S. Dist. LEXIS 96487*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

16. [In re Tableware Antitrust Litig., 484 F. Supp. 2d 1059]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

17. [Del Junco v. Hufnagel, 2007 Cal. App. Unpub. LEXIS 2134]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

18. [Correa Miranda v. Caribbean Petro. Corp., 2007 TSPR 48]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

19. [Kinderstart.com, LLC v. Google, Inc., 2007 U.S. Dist. LEXIS 22637]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

20. [Person v. Google, Inc., 2007 U.S. Dist. LEXIS 22499]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

21. [Waters v. Sigmon, 2007 U.S. Dist. LEXIS 105073]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

22. *Wilson v. General Motors Corp., 190 N.J. 336*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

23. *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 241 F.R.D. 77*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

24. *Lori Rubinstein Physical Therapy, Inc. v. PTPN, Inc., 148 Cal. App. 4th 1130*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

25. *Washington v. Haupert, 481 F.3d 543*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

26. *Vitacost.com, Inc. v. Gaia Herbs, Inc., 2007 U.S. Dist. LEXIS 22266*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

27. United States v. SBC Communs., Inc., 489 F. Supp. 2d 1

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

28. Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 480 F. Supp. 2d 471

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

29. Fox Hollow of Turlock Owners' Ass'n v. Sinclair, 2007 U.S. Dist. LEXIS 27762

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

30. Jim Hood ex rel. Miss. v. Microsoft Corp., 2007 Miss. Trial Order LEXIS 1

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

31. Stolfa v. Arnold Sales Co., 2007 U.S. Dist. LEXIS 114969

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

32. *In re Bulk Extruded Graphite Prods. Antitrust Litig., 2007 U.S. Dist. LEXIS 25070*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

33. *Rhino Sports v. Sport Court, Inc., 2007 U.S. Dist. LEXIS 25687*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

34. *Bartholomew v. Bail Bonds Unlimited, Inc., 2007 U.S. Dist. LEXIS 25506*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

35. *In re Ins. Brokerage Antitrust Litig., 2007 U.S. Dist. LEXIS 25633*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

36. *Gibson v. Office of the AG of Cal., 2007 U.S. Dist. LEXIS 105205*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by

Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

37. [Reilly v. Medianews Group, Inc., 2007 U.S. Dist. LEXIS 29419]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

38. [Trollinger v. Tyson Foods, Inc., 2007 U.S. Dist. LEXIS 26611]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

39. [FTC v. Foster, 2007 U.S. Dist. LEXIS 34203]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

40. [Capital City Cab Serv. v. Susquehanna Area Reg'l Airport Auth., 2007 U.S. Dist. LEXIS 28527]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

41. [In re K-Dur Antitrust Litig., 2007 U.S. Dist. LEXIS 97508]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

42. *S&M Brands, Inc. v. Summers, 228 Fed. Appx. 560*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

43. *Olde Monmouth Stock Transfer Co. v. Depository Trust & Clearing Corp., 485 F. Supp. 2d 387*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

44. *Roberson v. Medtronic, Inc., 494 F. Supp. 2d 864*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

45. *Southwire Co. v. J.P. Morgan Chase & Co., 528 F. Supp. 2d 908*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

46. *Freightliner of Knoxville, Inc. v. DaimlerChrysler Vans, LLC, 484 F.3d 865*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

47. *Catch Curve, Inc. v. Venali, Inc., 519 F. Supp. 2d 1028*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

48. *Midland Glass Co. v. Aluma Spec, Inc., 2007 Minn. App. Unpub. LEXIS 397*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

49. *Flying J Inc. v. TA Operating Corp., 2007 U.S. Dist. LEXIS 32518*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

50. *Static Control Components, Inc. v. Lexmark Int'l, Inc., 487 F. Supp. 2d 861*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

51. *Recetas Por Menos, Inc. v. Five Dev. Corp., 2007 U.S. Dist. LEXIS 57974*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

52. *Moore v. State Farm Mut. Auto. Ins. Co., 520 F. Supp. 2d 815*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

53. *Teague v. Bayer AG, 2007 NCBC 12*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

54. *In re Rubber Chems. Antitrust Litig., 486 F. Supp. 2d 1078*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

55. *Jones v. City of McMinnville, 244 Fed. Appx. 755*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

56. *In re Ditropan XL Antitrust Litig., 529 F. Supp. 2d 1098*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

57. *Bradburn Parent Teacher Store, Inc. v. 3M, 513 F. Supp. 2d 322*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by

Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

58. Borough of Lansdale v. PP&L, Inc., 503 F. Supp. 2d 730

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

59. Silicon Image, Inc. v. Analogix Semiconductor, Inc., 2007 U.S. Dist. LEXIS 39599

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

60. Bell Atl. Corp. v. Twombly, 550 U.S. 544

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

61. Merck & Co. v. Apotex, Inc., 488 F. Supp. 2d 418

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

62. One Indus. v. Jim O'Neal Distrib., 2007 U.S. Dist. LEXIS 112738

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

63. [Dailyedeals.com, Inc. v. Ecoupons Inc., 2007 U.S. Dist. LEXIS 106872]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

64. [In re Dynamic Random Access Memory Antitrust Litig., 516 F. Supp. 2d 1072]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

65. [LiveUniverse, Inc. v. MySpace, Inc., 2007 U.S. Dist. LEXIS 43739]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

66. [Cole v. Champion Enters., 496 F. Supp. 2d 613]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

67. [Kessel v. Monongalia County Gen. Hosp. Co., 220 W. Va. 602]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

68. [Belton v. Comcast Cable Holdings, LLC, 151 Cal. App. 4th 1224]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

69. *The People ex rel. Edmund G. Brown v. Powerex Corp., 2007 Cal. App. Unpub. LEXIS 4656*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

70. *County of Milwaukee v. Williams, 2007 WI 69*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

71. *Shane v. Humana, Inc., 228 Fed. Appx. 927*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

72. *In re Netflix Antitrust Litig., 506 F. Supp. 2d 308*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

73. *Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

74. *Craftsmen Limousine, Inc. v. Ford Motor Co., 491 F.3d 380*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

75. *Republic of Colom. v. Diageo N. Am. Inc., 531 F. Supp. 2d 365*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

76. *United States v. Stanko, 491 F.3d 408*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

77. *In re Ocwen Loan Servicing, LLC, 491 F.3d 638*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

78. *Southard v. Visa U.S.A. Inc., 734 N.W.2d 192*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by

Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

79. Deich-Keibler v. Bank One, 243 Fed. Appx. 164

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

80. Lucas v. Citizens Communs. Co., 244 Fed. Appx. 774

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

81. Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

82. Jabo's Pharm., Inc. v. Becton Dickinson & Co. (In re Hypodermic Prods. Antitrust Litig.), 2007 U.S. Dist. LEXIS 47438

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

83. Medstar Health, Inc. v. Becton Dickinson & Co. (In re Hypodermic Prods. Antitrust Litig.), 2007 U.S. Dist. LEXIS 47439

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**

Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

84. Nat'l Recycling v. Waste Mgmt. of Mass., Inc., 2007 U.S. Dist. LEXIS 107664

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

85. Am. Needle, Inc. v. New Orleans La. Saints, 496 F. Supp. 2d 941

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

86. Paul v. Intel Corp. (In re Intel Corp. Microprocessor Antitrust Litig.), 496 F. Supp. 2d 404

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

87. Meyers v. Bayer AG, 2007 WI 99

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

88. Austrian v. United Health Grp., Inc., 2007 Conn. Super. LEXIS 1949

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

89. *Invacare Corp. v. Respironics, Inc., 2007 U.S. Dist. LEXIS 52321*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

90. *In re Polyester Staple Antitrust Litig., 2007 U.S. Dist. LEXIS 52525*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

91. *Linzer Prods. Corp. v. Sekar, 499 F. Supp. 2d 540*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

92. *Jennings v. Auto Meter Prods., 495 F.3d 466*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

93. *Champagne Metals v. Ken-Mac Metals, Inc., 2007 U.S. Dist. LEXIS 88773*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

94. *P&G Co. v. Stone Container Corp. (In re Linerboard Antitrust Litig.), 497 F. Supp. 2d 666*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

95. *Been v. O.K. Indus., 495 F.3d 1217*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

96. *In re Endosurgical Prods. Direct Purchaser Antitrust Litig., 2007 U.S. Dist. LEXIS 103725*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

97. *Lorix v. Crompton Corp., 736 N.W.2d 619*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

98. *U.S. Info. Sys. v. IBEW Local Union No. 3, 2007 U.S. Dist. LEXIS 56229*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

99. *Klickads, Inc. v. Real Estate Bd. of N.Y., 2007 U.S. Dist. LEXIS 57305*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

100. *Nilavar v. Mercy Health System-Western Ohio, 244 Fed. Appx. 690*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

Nat'l Black Expo v. Clear Channel Broad., Inc.

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

February 8, 2007, Decided

No.03 C 2751

Reporter

2007 U.S. Dist. LEXIS 9783 *; 2007 WL 495307

THE NATIONAL BLACK EXPO, Plaintiff, vs. CLEAR CHANNEL BROADCASTING, INC., et al., Defendants.

Core Terms

statute of limitations, expo, defendants', motion to dismiss, relevant market, allegations, fraudulent concealment, monopolize, plaintiff's claim, discovery rule, equitable tolling, market power, Sherman Act, anti-competitive, antitrust, concealed, violations, tolled, equitable estoppel, franchise tax, advertising, due diligence, radio station, Additionally, discovery, venture, attempt to monopolize, motion to strike, limitations, conspiracy

LexisNexis® Headnotes

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

HN1[] **Motions to Dismiss, Failure to State Claim**

Fed. R. Civ. P. 12(b) states that on a motion to dismiss for failure to state a claim upon which relief can be granted, any matters outside the pleadings that are presented to and not excluded by the court require the court to convert the motion to one for summary judgment under *Fed. R. Civ. P. 56*, and the court must then allow both parties to present all relevant evidence in its support.

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

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

On a motion to dismiss, the well-pleaded allegations of the complaint must be accepted as true. The court must draw all reasonable inferences in favor of plaintiff. Dismissal is only proper when it appears beyond doubt that plaintiff can prove no set of facts in support of plaintiff's claim that would entitle plaintiff to relief.

Business & Corporate Law > ... > Corporate Finance > Franchise Tax > General Overview

Civil Procedure > Parties > Capacity of Parties > General Overview

HN3[] **Corporate Finance, Franchise Tax**

Fed. R. Civ. P. 17(b) provides that the capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. Fed. R. Civ. P 17(b). Illinois law requires all domestic corporations to pay various taxes, including franchise taxes, for the privilege of operating in the state. *805 Ill. Comp. Stat. 5/15.35* (2001). The relevant statute provides: No corporation required to pay a franchise tax, license fee or penalty under this Act shall maintain any civil action until all such franchise taxes, license fees, and penalties have been paid in full. *805 Ill. Comp. Stat. 5/15.85* (2001). Illinois courts have held, however, § 15.85 does not require dismissal of a suit for failure of the corporation to pay taxes. Instead, if a corporation, which is delinquent in the payment of franchise taxes, has started a suit, it may, by subsequent compliance with the statute, continue prosecution of that suit.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Governments > Legislation > Statute of Limitations > Pleadings & Proof

HN4[] **Complaints, Requirements for Complaint**

A complaint is not required to allege all or any of the facts entailed in the claim, nor is it required to anticipate or attempt to defuse potential defenses. However, a plaintiff may plead herself out of court by pleading facts which show that her claim is barred by the statute of limitations.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

Claims for violations of the Sherman Act and the Roberston-Patman Act must be brought within four years of the alleged antitrust injury. *15 U.S.C.S. § 15b*. Generally, the statute of limitations begins to run at the time the alleged injury occurs.

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN6[] **Statute of Limitations, Equitable Estoppel**

There are three ways that the statute of limitations can be tolled: the discovery rule, equitable tolling, and equitable estoppel.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN7[] **Regulated Practices, Price Fixing & Restraints of Trade**

Antitrust law provides that, in the case of a continuing violation, say a price fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff, e.g., each sale to the plaintiff, starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.

Governments > Legislation > Statute of Limitations > Time Limitations

HN8[] **Statute of Limitations, Time Limitations**

Application of the discovery rule alters the moment that the claim actually accrues, thereby altering when the statute of limitations begins to run. The discovery rule is based on the general rule that accrual occurs when the plaintiff discovers that he has been injured and who caused the injury, and it is at that point that the statute of limitations begins to run.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN9[] **Statute of Limitations, Time Limitations**

Equitable tolling allows the plaintiff to avoid the bar of the statute of limitations if despite all due diligence she is unable to obtain vital information bearing on the existence of her claim. This differs from the discovery rule in that the plaintiff is assumed to know that she has been injured, but she cannot obtain information necessary to decide whether the injury is due to wrongdoing and caused by or due to the defendant. This determination is made on an objective basis using a reasonable person in the plaintiff's position exercising due diligence. Furthermore, the plaintiff can only suspend the statute of limitations under this doctrine for such time as is reasonably necessary to conduct the necessary inquiry into a possible (but not certain) claim. The notion of possibility is key because a need for certainty would require the statute of limitations to be tolled infinitely.

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Governments > Legislation > Statute of Limitations > Tolling

HN10[] **Statute of Limitations, Equitable Estoppel**

Equitable estoppel, also called fraudulent concealment, presupposes that the plaintiff has discovered or, as required by the discovery rule should have discovered, that the defendant injured her. Fraudulent concealment denotes efforts by the defendant, above and beyond the wrongdoing upon which the plaintiff's claim is founded, to prevent, by fraud or deception, the plaintiff from suing in time. Any deliberate or otherwise blameworthy conduct by the defendant which causes the plaintiff to miss the statutory deadline to file her claim may be the basis for asserting the equitable estoppel defense. However, just as with equitable tolling, here plaintiff must show that he neither knew nor, in the exercise of due diligence, could reasonably have known of the offense.

Governments > Legislation > Statute of Limitations > Time Limitations

HN11[] **Statute of Limitations, Time Limitations**

Under the discovery rule, the statute of limitations begins when the plaintiff knows that it was injured and who injured it.

Governments > Legislation > Statute of Limitations > Tolling

HN12[] Statute of Limitations, Tolling

To qualify for equitable tolling, a plaintiff must demonstrate that it exercised due diligence in discovering the necessary information to file a claim, and in promptly filing the claim thereafter.

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN13[] Motions to Dismiss, Failure to State Claim

A federal complaint does not fail to state a claim simply because it omits facts that would defeat a statute of limitations defense.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN14[] Heightened Pleading Requirements, Fraud Claims

Unlike the other doctrines, fraudulent concealment must be pled with particularity in compliance with *Fed. R. Civ. P. R. 9(b)*. A complaint should distinctly state what the discovered fraud actually was and when the plaintiff discovered it, so that the court may evaluate whether he could have discovered it through the exercise of due diligence.

Governments > Legislation > Statute of Limitations > Time Limitations

HN15[] Statute of Limitations, Time Limitations

The Illinois Supreme Court has held that the discovery rule postpones the commencement of the relevant statute of limitations until the injured plaintiff knows or reasonably should know that he has been injured and that his injury was wrongfully caused. This differs from the federal discovery rule in that in the Illinois rule the injury does not accrue until the plaintiff knows that the injury was wrongly caused, not just that she was injured and who injured her. However, the term "wrongfully caused" does not denote knowledge of negligent conduct or knowledge of the existence of a cause of action. A plaintiff is deemed to know that his injury is wrongfully caused when she possesses sufficient information concerning the injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved. Thus, this standard appears very similar to the federal standard for equitable tolling.

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Governments > Legislation > Statute of Limitations > Tolling

HN16[] Statute of Limitations, Equitable Estoppel

Equitable tolling in Illinois is more akin to equitable estoppel and has been defined as a rule that, like equitable estoppel, works to suspend the limitations period when the defendant has actively misled the plaintiff, or if the plaintiff has been prevented from asserting his or her rights in some extraordinary way. Similarly, equitable estoppel tolls the statute of limitations during any period in which the defendant took certain active steps to prevent the plaintiff from suing. Examples of this include where the defendant has "lulled" the plaintiff into delaying suit, either by promising not to plead a limitations defense or by concealing evidence that the plaintiff needed to determine the existence of her claim. Plaintiff must both plead and prove affirmative acts by the defendant designed to prevent discovery of the action.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN17[] Heightened Pleading Requirements, Fraud Claims

Illinois has codified fraudulent concealment under *735 Ill. Comp. Stat. 5/13-215*. The statute states that if a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards. To plead fraudulent concealment, a party must allege (1) there was concealment of a material fact; (2) the concealment was intended to induce a false belief, under circumstances creating a duty to speak; (3) the innocent party could not have discovered the truth through a reasonable inquiry or inspection and relied upon the silence as a representation that the fact did not exist; (4) the concealed information was such that the injured party would have acted differently had she been aware of it; and (5) reliance by the person from whom the defendant concealed the fact led to her injury.

Antitrust & Trade Law > Sherman Act > General Overview

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN18[] Antitrust & Trade Law, Sherman Act

In the context of a motion to dismiss for failure to state a claim, while a plaintiff need not plead facts or legal theories, and specifying an incorrect theory is not fatal, the court need not strain to find inferences favorable to the plaintiff which are not apparent on the face of the complaint, nor need the court accept plaintiff's legal conclusions as true. If the facts do not at least outline or adumbrate a violation of the Sherman Act, the plaintiff will get nowhere merely by dressing them up in the language of antitrust.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN19[] Regulated Practices, Monopolies & Monopolization

See *15 U.S.C.S. § 2*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN20[] **Attempts to Monopolize, Elements**

To allege an attempt to monopolize, plaintiff must show (1) that the defendant has engaged in predatory or anti-competitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of obtaining monopoly power. The elements for conspiracy to monopolize are similar: (1) the existence of a combination or conspiracy, (2) overt acts in furtherance of the conspiracy, (3) an effect upon a substantial amount of interstate commerce, and (4) the existence of specific intent to monopolize. Both claims require plaintiff to define the relevant market that defendant is attempting, or conspiring, to monopolize. The relevant market is defined as the market area in which the seller operates, and to which the purchasers can practicably turn for supplies. Then the complaint must allege facts sufficient to create an inference that the defendant has the market power to create a monopoly.

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

HN21[] **Market Definition, Relevant Market**

The relevant market contains both product and geographical components.

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

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

HN22[] **Market Definition, Relevant Market**

Whether the market described is the relevant one or not is a determination of fact not proper for disposal on a motion to dismiss.

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

HN23[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Predatory conduct may be broadly defined as conduct that is in itself an independent violation of the antitrust laws or that has no legitimate business justification other than to destroy or damage competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN24[] **Per Se Rule & Rule of Reason, Sherman Act**

The rule-of-reason standard contains a threshold requirement where plaintiff must first show defendants' market power. If plaintiff fails to do so, then the inquiry is ended.

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

HN25[] **Sherman Act, Scope**

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN26[] **Sherman Act, Claims**

In order to state a claim under *15 U.S.C.S. § 1*, a plaintiff must first show that defendants had market power. There are some *§ 1* violations that do not require a showing of market power, such as horizontal price-fixing between actors in the same market.

Antitrust & Trade Law > Sherman Act > Claims

HN27[] **Sherman Act, Claims**

One fundamental requirement for showing a *15 U.S.C.S. § 1* violation is a sufficient allegation of anti-competitive effects that would result or have resulted from the defendants' actions; the absence of such allegations is ordinarily fatal to the existence of a cause of action.

Antitrust & Trade Law > Sherman Act > General Overview

HN28[] **Antitrust & Trade Law, Sherman Act**

The purpose of the Sherman Act is to rectify injuries to consumers caused by diminished competition. Therefore, it follows that plaintiff must allege an injury, not only to itself, but to the market as well.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

HN29[] **Robinson-Patman Act, Coverage**

The Robinson-Patman Act's prohibition on price discrimination extends only to transactions involving commodities. Courts have strictly construed this term, holding that it denotes only "tangible products of trade," and advertising has been explicitly excluded from this definition.

Civil Procedure > Preliminary Considerations > Removal > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

HN30[] **Preliminary Considerations, Removal**

28 U.S.C.S. § 1367 grants a court jurisdiction to hear pendent state claims. A court may decline to exercise this jurisdiction for several reasons, including instances such as this, where the court has dismissed all claims over which it exercises original jurisdiction. *28 U.S.C.S. § 1367(c)(4)*. When the district court dismisses all federal claims before trial, the usual and preferred course is to remand the state claims to the state court unless there are countervailing considerations. These exceptions include the running of the state law cause of action's statute of limitations, and instances where sending the case to another court will cause a substantial duplication of effort.

Counsel: [*1] For National Alliance of Black Expo, Plaintiff: Beauregard Maximally Harvey, LEAD ATTORNEY, The Harvey Law Group, Toledo, OH.

For National Black Expo, Inc., Plaintiff: Beauregard Maximally Harvey, LEAD ATTORNEY, The Harvey Law Group, Toledo, OH; Arlene Yvette Coleman, Arlene Y. Coleman & Associates, Chicago, IL; Sabrina R Wilkins-Brown, Law Office of Sabrina R. Wilkins-Brown, Chicago, IL.

For Clear Channel Communications, Inc., WVAZ, AM/FM, Marv Dyson, individually, Clear Channel Broadcasting, Inc., Clear Channel Radio, Inc., Merry Green Promotions Group, Inc., Merry Green, individually, Defendants: Beverly Cassandra Bryant, LEAD ATTORNEY, Peters, Brown & Bonner LLC, Chicago, IL; Jessica Tovrov, R. Delacy Peters, Jr., Shekar Adiga, Arnstein & Lehr, Chicago, IL.

For WGCI, Defendant: Beverly Cassandra Bryant, LEAD ATTORNEY, Peters, Brown & Bonner LLC, Chicago, IL; R. Delacy Peters, Jr., Shekar Adiga, Arnstein & Lehr, Chicago, IL.

For Chris Augmon, individually, Defendant: Jessica Tovrov, Shekar Adiga, Arnstein & Lehr, Chicago, IL.

Judges: JAMES B. MORAN, Senior Judge.

Opinion by: JAMES B. MORAN

Opinion

MEMORANDUM OPINION AND ORDER

Plaintiff National Alliance of Black Expos, **[*2]** Inc. ("NBE"), instituted the present action in the Circuit Court of Cook County, Illinois, on April 3, 2003 (03 L 4044), and defendant Clear Channel Communications subsequently removed it to this court invoking diversity jurisdiction under *28 U.S.C. § 1332*. Plaintiff then added other defendants: non-diverse parties. Plaintiff having alleged violations of federal law, we retain jurisdiction under *28 U.S.C. § 1331*. It filed its first amended complaint on May 28, 2003; its second amended complaint on October 1, 2003; and its third amended complaint on March 27, 2006. Defendants thereafter filed a motion to dismiss the third amended complaint, and, additionally, filed a motion to strike an exhibit attached to plaintiff's response to defendants' motion to dismiss. For the reasons set forth below, we grant defendants' motion to strike and their motion to dismiss.

BACKGROUND

Since its removal, this case has developed a long and complicated history, much of which is not relevant to this motion. For our present purposes, we will discuss the background only to the extent that it relates to plaintiff's third amended complaint. The following **[*3]** facts are taken from that complaint and are considered true for the purposes of this motion. *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)*.

In 1990, plaintiff NBE organized and debuted a large African American-centered trade exposition, the Chicago "Black Expo" ("BE"), which was modeled after an earlier exposition created by Rev. Jesse Jackson and Operation PUSH in the 1970s. The plaintiff worked with numerous vendors and sponsors, including a number of radio stations with heavy African-American listenership in Chicago. One of those radio stations was defendant WVAZ, owned by defendant Clear Channel Communications. At this time, defendant Merry Green was a consultant to the then president and CEO of NBE, Suzanne Stantly.

Following the success of BE, plaintiff and WVAZ entered into discussions as to how to increase WVAZ's role in BE. Eventually, WVAZ became a full partner and joint venturer in BE. WVAZ was responsible for numerous facets of BE, including making sales calls, contacting previously contracted vendors, providing client development assistance and providing radio air time for advertising BE locally and nationally. Plaintiff provided defendant WVAZ **[*4]** with contact information for numerous clients who had previously worked with NBE, and held meetings with WVAZ to discuss plaintiff's vision for the future of BE.

The 1991 BE was very successful, and generated over $ 700,000 in gross revenue. WVAZ was given a prominent place at BE -- its logo was placed on the entryway to the exhibit, and it was given as much floor space as it desired to gain visibility in the hall.

At the same time, without plaintiff's knowledge, defendant WVAZ was working to create a competing African-American-targeted consumer trade expo. During the continued partnership with plaintiff, defendants WVAZ and Clear Channel created "An Expo for Today's Black Woman" ("ETBW"). WVAZ worked with defendants Merry Green and her promotion company, Merry Green Promotions Group, Inc. ("MGPG"), to place an African-American face on the expo. This expo debuted in 1992 and contained the same elements as BE. Additionally, WVAZ used the confidential information and contacts gained from its partnership with plaintiff to secure sponsors and vendors for ETBW. Using its partnership with plaintiff, WVAZ claimed that ETBW was a spin-off from BE, when in fact it was in competition with **[*5]** BE.

WVAZ, backed by Clear Channel, used its influence in the media to entice plaintiff's sponsors and vendors to sever tics with plaintiff and begin supporting ETBW. As a result, numerous sponsors and vendors declined to renew their relationship with BE and began working with ETBW.

WVAZ began providing air time at discounted rates to ETBW - rates that were lower than the rates they were charging BE. Additionally, it only provided plaintiff air time at periods of low listenership, and air time for ETBW at times of high listenership.

In its third amended complaint, plaintiff claims defendants' actions constitute illegal restraint of trade in violation of *section 1* of the Sherman Act, and conspiracy and attempt to monopolize, in violation of *section 2* the Act. Plaintiff also alleges illegal price discrimination and discrimination of discounts, rebates, or advertising service charges in violation of the Robinson-Patman Antidiscrimination Act, as well as interference with prospective business advantage, intentional interference with contractual relations, breaches of contract and fiduciary duty, unjust enrichment and fraudulent concealment.

Plaintiff claims that defendants committed **[*6]** these violations when they acquired the confidential information while present at meetings with plaintiff, and then exploited that information to create and sustain ETBW. Plaintiff further alleges that defendants, with the specific intent of monopolizing the expo market, illegally discriminated against plaintiff in the sale of air time on WVAZ. Additionally, plaintiff claims that while these actions occurred in 1992, defendants continue to conspire to monopolize the expo market. Finally, plaintiff alleges it did not discover the violations until a later date -- a date that is not specifically alleged in the complaint -- and that as a result of defendants' fraudulent concealment its claims are not barred by the statute of limitations.

Defendants subsequently filed a motion to dismiss the third amended complaint. Defendants put forth four arguments: (1) plaintiff does not have the capacity to maintain this suit because it has been involuntarily dissolved by the State of Illinois for failure to pay its franchise taxes; (2) all of plaintiff's claims are time-barred by the relevant statutes of limitations and plaintiff has not sufficiently plead fraudulent concealment in order to toll **[*7]** the limitation periods; (3) plaintiff has not sufficiently alleged an antitrust injury, relevant market, or made a sufficient showing of monopolization; and (4) the Robertson-Patman Act does not apply to the sale of radio advertising time.

Plaintiff's response to defendants' motion contained an exhibit not originally a part of the pleadings, and which defendants move to strike.

ANALYSIS

Motion to Strike

Defendants attached an exhibit to their motion to dismiss referring to plaintiff's dissolved corporate status. This exhibit was in support of defendants' contention that plaintiff could not maintain a suit because it was not current on its franchise taxes. Plaintiff's response to defendants' motion to dismiss contains an exhibit as well, which plaintiff claims is evidence of defendants' specific intent to monopolize, in violation of the Sherman Act. Defendants then filed a motion to strike plaintiff's exhibit.

HN1[] *Federal Rule of Civil Procedure 12(b)* states that on a motion to dismiss for failure to state a claim upon which relief can be granted, any matters outside the pleadings that are presented to and not excluded by the court **[*8]** require the court to convert the motion to one for summary judgment under *Rule 56*, and the court must then allow both parties to present all relevant evidence in its support.

Here, both parties' briefs contain exhibits which are neither part of plaintiff's complaint nor referred to within it. The defendants, but not the plaintiff, have filed a motion to strike the exhibit. Regardless, we deem both exhibits as outside the pleadings and decline to consider either of them as part of the motion to dismiss. *Berthold Types Ltd. v. Adobe Sys. Inc., 242 F.3d 772, 775 (7th Cir. 2001)*.

Motion to Dismiss

HN2[] On a motion to dismiss, the well-pleaded allegations of the complaint must be accepted as true. *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)*; *McMillan v. Collection Prof'ls, Inc., 455 F.3d 754, 758 (7th Cir. 2006)*. We must draw all reasonable inferences in favor of plaintiff. *McMillan, 455 F.3d at 758*. Dismissal is only proper when it appears beyond doubt that plaintiff can prove no set of facts in support of plaintiff's claim that would entitle plaintiff to relief. *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*; **[*9]** *McCready v. eBay, Inc., 453 F.3d 882, 888 (7th Cir. 2006)*.

Plaintiff's Capacity to Sue

Defendants first claim that plaintiff does not have the capacity to maintain this suit against defendants because NBE has been involuntarily dissolved by the State of Illinois for failure to pay its franchise taxes. In support of this allegation, defendants attach an exhibit to their motion to dismiss, which is a matter outside the pleadings, and which, if we were to consider it, would convert this motion to dismiss into one for summary judgment. We need not consider this exhibit, however, because plaintiff has conceded the fact of its involuntary dissolution in its response to the motion to dismiss. Plaintiff contends, however, that the proper action in this instance under Illinois law is not to dismiss the complaint, but merely to stay the proceedings until plaintiff pays its taxes.

HN3[] *Federal Rules of Civil Procedure 17(b)* provides that "[t]he capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." *Fed. R. Civ. P 17(b)*. Illinois law requires **[*10]** all domestic corporations to pay various taxes, including franchise taxes, for the privilege of operating in the state. *805 ILCS 5/15.35* (2001). The relevant statute provides: "No corporation required to pay a franchise tax, license fee or penalty under this Act shall maintain any civil action until all such franchise taxes, license fees, and penalties have been paid in full." *805 ILCS 5/15.85* (2001). Illinois courts have held, however, *§ 15.85* does not require dismissal of a suit for failure of the corporation to pay taxes. *Lease Ptnrs. Corp. v. R & J Pharms., Inc., 329 Ill. App. 3d 69, 73, 768 N.E.2d 54, 56, 263 Ill. Dec. 294 (Ill. App. Ct. 2002)*. Instead, "if a corporation, which is delinquent in the payment of franchise taxes, has started a suit, it may, by subsequent compliance with the statute, continue prosecution of that suit." *Merchants Environmental Industries, Inc. v. Montgomery Ward & Co., Inc., 252 Ill. App. 3d 906, 911, 625 N.E.2d 689, 692, 192 Ill. Dec. 534 (Ill. App. Ct. 1993)*(quoting *Jorgensen v. Baker, 21 Ill. App. 2d 196, 203, 157 N.E. 2d 773, 777 (Ill. App. Ct. 1959)*.

On the facts before **[*11]** us, then, it would seem that we should stay these proceedings. However, upon this court's investigation, we found that plaintiff had been reinstated as a corporation in good standing by the State of Illinois on September 29, 2006, which must mean that it brought its franchise taxes up to date. Therefore, we find that plaintiff has the capacity to maintain this suit.

Statutes of Limitations

Defendants assert that all of plaintiff's claims are time-barred. Plaintiff counters that the various statutes of limitations have been tolled by plaintiff's failure to discover the injury during the relevant time frame, and/or by defendants' alleged fraudulent concealment. We first deal with the federal antitrust claims, followed by the state claims.

Federal Law Claims

HN4[] A complaint is not required to allege all or any of the facts entailed in the claim, nor is it required to anticipate or attempt to defuse potential defenses. *Kolupa v. Roselle Park Dist., 438 F.3d 713, 714 (7th Cir. 2006)*; *Doe v. Smith, 429 F.3d 706, 709 (7th Cir. 2005)*. However, a plaintiff may plead herself out of court by pleading facts which show that her claim is barred by **[*12]** the statute of limitations. *United States v. Lewis, 411 F.3d 838, 842 (7th Cir. 2005)*.

HN5[] Claims for violations of the Sherman Act and the Roberston-Patman Act must be brought within four years of the alleged antitrust injury. *15 U.S.C. § 15b*. Generally, the statute of limitations begins to run at the time the alleged injury occurs. *In re Copper Antitrust Litigation, 436 F.3d 782, 789 (7th Cir. 2006)*. In the instant case, this would be sometime in 1992, and therefore the statute of limitations would have run in 1996, seven years prior to the commencement of this litigation.

However, *HN6*[] there are three ways that the statute of limitations can be tolled: the discovery rule, equitable tolling, and equitable estoppel. [1] These three common law doctrines are read into every federal statute of limitations

---

[1] Plaintiff also argues that its claims are not barred by the statute of limitations because of the continuing violation doctrine.*HN7*[] "***Antitrust law*** provides that, in the case of a continuing violation, say a price fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff, e.g., each sale to the plaintiff, starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (U.S. 1997)*. Plaintiff claims that it is suffering a continuing violation because defendants "continue to conspire" and continue "to claim ownership" of ETBW, and that the defendants "continue to profit" from ETBW. (plf. response to def. motion at 6). However, because we find, as discussed below, that none of these alleged actions constitutes an antitrust violation, we find that the continuing violation doctrine does not apply to these facts.

in the absence of a contrary directive from Congress. *Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450-51 (7th Cir. 1991)*.

[*13] ***HN8***[] Application of the discovery rule alters the moment that the claim actually accrues, thereby altering when the statute of limitations begins to run. *In re Copper Antitrust Litig., 436 F.3d at 789*. The discovery rule is "based on the general rule that accrual occurs when the plaintiff discovers that he has been injured and who caused the injury," and it is at that point that the statute of limitations begins to run. *Id.*

The second doctrine, equitable tolling, is slightly different. ***HN9***[] It allows the plaintiff to avoid the bar of the statute of limitations if despite all due diligence she is unable to obtain vital information bearing on the existence of her claim. *Cada, 920 F.2d at 451*. This differs from the discovery rule in that the plaintiff is assumed to know that she has been injured, but she cannot obtain information necessary to decide whether the injury is due to wrongdoing and caused by or due to the defendant. *Id.* This determination is made on an objective basis using a reasonable person in the plaintiff's position exercising due diligence. *Id.; Shropshear v. Corp. Counsel of the City of Chicago, 275 F.3d 593, 595 (7th Cir. 2001).* **[*14]** Furthermore, the plaintiff can only suspend the statute of limitations under this doctrine for such time as is reasonably necessary to conduct the necessary inquiry into a possible (but not certain) claim. *Cada, 920 F.2d at 451*. The notion of possibility is key because a need for certainty would require the statute of limitations to be tolled infinitely. *Id.*

The third doctrine, ***HN10***[] equitable estoppel, also called fraudulent concealment, "presupposes that the plaintiff has discovered or, as required by the discovery rule should have discovered," that the defendant injured her. *Shropshear, 275 F.3d at 595*. Fraudulent concealment "denotes efforts by the defendant, above and beyond the wrongdoing upon which the plaintiff's claim is founded, to prevent, by fraud or deception, the plaintiff from suing in time." *Id.* Any deliberate or otherwise blameworthy conduct by the defendant which causes the plaintiff to miss the statutory deadline to file her claim may be the basis for asserting the equitable estoppel defense. *Id. at 597*. However, just as with equitable tolling, here plaintiff must show "that he neither knew nor, in the exercise **[*15]** of due diligence, could reasonably have known of the offense." *In re Copper Antitrust Litig., 436 F.3d at 791*.

Although not in so many words, plaintiff argues that its claims should survive the statute of limitations under either the discovery rule or equitable tolling because plaintiff has not alleged a date when the injury was discovered. Defendants argue that by not pleading a date of discovery, plaintiff has artfully plead its complaint to avoid the statute of limitations, and while it need not anticipate affirmative defenses, it must sufficiently plead averments of time and place, which it has not done. Defendants further argue that, even drawing all inferences in favor of plaintiff, it is impossible to conclude that plaintiff discovered the alleged wrongdoing as late as 1999, allowing plaintiff to file its complaint in 2003.

We believe that plaintiff cannot utilize the discovery rule to alter the date its injury accrued. ***HN11***[] Under the discovery rule, the statute of limitations begins when the plaintiff knows that it was injured and who injured it. *In re Copper Antitrust Litig., 436 F.3d at 789*. By plaintiff's own complaint, it knew that it was **[*16]** injured in 1992, when ETBW debuted, marketing itself in exactly the same way as BE. Further, by its complaint, plaintiff knew who injured it at that very same time, because that is when WVAZ cancelled its relationship with plaintiff and Merry Green moved from being the assistant to the director of NBE to being the face of ETBW. Therefore, at the latest, plaintiffs injury accrued in 1992, which started the running of the statute of limitations.

Plaintiff does, however, find relief in the equitable tolling doctrine. ***HN12***[] To qualify for equitable tolling, plaintiff must demonstrate that it exercised due diligence in discovering the necessary information to file a claim, and in promptly filing the claim thereafter. *Ashafa v. City of Chicago, 146 F.3d 459, 464 (7th Cir. 1998)*. We take as true, as we must in a motion to dismiss, plaintiff's allegation in its complaint that it exercised due diligence in all aspects of its dealings with the defendants, including the discovery of the operative facts which led to the filing of the complaint. Furthermore, plaintiff has not alleged when it discovered the injury, nor need it have.***HN13***[] "[A] federal complaint does not fail to state a claim **[*17]** simply because it omits facts that would defeat a statute of limitations defense." *Hollander v. Brown, 457 F.3d 688, 692 n.1 (7th Cir. 2006)*. Through this accident of pleading, we therefore cannot infer from this omission a lack of due diligence on the part of plaintiff to bring this claim within a reasonable time. *See Clark v. City of Braidwood, 318 F.3d 764 (7th Cir. 2003)* (plaintiff's failure to plead date of discovery of injury not fatal to complaint because the possibility existed that a potential set of facts, if proven, would establish defense to the statute of limitations). Therefore, at this time plaintiff has sufficiently plead an equitable tolling defense to the federal antitrust statute of limitations. [2]

The reasons that allow plaintiff to survive the statute of limitations by way of equitable tolling, by contrast, **[*18]** force plaintiff's claim of fraudulent concealment (equitable estoppel) to fail. ***HN14***[] Unlike the other doctrines, fraudulent concealment must be pled with particularity in compliance with *Fed. R. Civ. P. R. 9(b)*. *Spann v. Cmty. Bank of N. Va., 2004 U.S. Dist. LEXIS 5148, 2004 WL 691785, *8 (N.D. Ill. 2004)*; *Triple Canopy, Inc. v. Moore, 2005 U.S. Dist. LEXIS 14219, 2005 WL 1629768, *12 (N.D. Ill. 2005)*. "A complaint should distinctly state what the discovered fraud actually was and when the plaintiff discovered it, so that the Court may evaluate whether he could have discovered it through the exercise of due diligence." *Greer v. Bank One, 2002 U.S. Dist. LEXIS 13715, 2002 WL 1732366, *3 (N.D. Ill. 2002)*. Plaintiff here has merely alleged the bare conclusion that "defendants wrongfully concealed their actions against the Plaintiff." Plaintiff has not alleged any detail regarding the alleged fraudulent concealment, such as which defendants took part in the concealing, how they concealed their actions, when the concealing took place, or when plaintiff discovered defendants' alleged fraud. Because plaintiff fails to allege fraudulent concealment with the required particularity, the statutes **[*19]** of limitations cannot be tolled on that basis. [3]

[*20] State Law Claims

Plaintiff's other claims arise out of contract and tort and are thereby governed by Illinois statutes of limitations and Illinois tolling provisions. *Reed v. Mokena Sch. Dist. No. 159, 41 F.3d 1153, 1155 (7th Cir. 1994)*. Illinois courts acknowledge the existence of the tolling doctrines discussed above, but define them in a slightly different manner, and thus those provisions apply differently to the case before us.

HN15[] The Illinois Supreme Court has held that the discovery rule "postpone[s] the commencement of the relevant statute of limitations until the injured plaintiff knows or reasonably should know that he has been injured and that his injury was wrongfully caused." *Hollander, 457 F.3d at 692* (citing *Golla v. Gen. Motors Corp., 167 Ill.2d 353, 657 N.E.2d 894, 898, 212 Ill. Dec. 549 (Ill. 1995))*. This differs from the federal discovery rule in that in the Illinois rule the injury does not accrue until the plaintiff knows that the injury was wrongly caused, not just that she was injured and who injured her. However, the term "wrongfully caused" does not denote knowledge of negligent conduct or knowledge of the existence **[*21]** of a cause of action. *Knox College v. Celotex Corp., 88 Ill. 2d 407, 430 N.E.2d 976, 980-81, 58 Ill. Dec. 725 (Ill. 1981)*. A plaintiff is deemed to know that his injury is wrongfully caused when she possesses "sufficient information concerning [the] injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved." *Id.* Thus, this standard appears very similar to the federal standard for equitable tolling.

HN16[] Equitable tolling in Illinois, however, is more akin to equitable estoppel and has been defined as "a rule that, like equitable estoppel, works to suspend the limitations period when 'the defendant has actively misled the

---

[2] We note that though plaintiff has survived the statute of limitations at the pleading stage, its likelihood of survival past this point is remote.

[3] Plaintiff claims that its failure to plead fraudulent concealment with particularity should not prove fatal to its claim. Plaintiff relies on *Fine v. Jansen, 1986 U.S. Dist. LEXIS 21991, 1986 WL 8731 (N.D. Ill. 1986)*, for this proposition. In Fine, the court held that a plaintiff alleging corporate fraud could survive a motion to dismiss, where the plaintiff made a number of the fraud allegations upon information and belief. The court reasoned that in situations such as this, where most of the information necessary will be in the hands of the defendants, the plaintiff cannot be required to know all the details of the alleged fraudulent scheme. The court found that the plaintiff had alleged sufficient facts within its knowledge to support the fraud claim, and therefore, the pleading of the specifics of the scheme upon information and belief was sufficient to state a claim upon which relief could be granted. That case is inapposite here. Plaintiff here has not alleged any of the facts deemed to be within its knowledge, nor has it alleged any of the specifics of the fraudulent concealment scheme, upon information or belief, or otherwise. Therefore, plaintiff's claim must fail.

plaintiff, or if the plaintiff has been prevented from asserting his or her rights in some extraordinary way.'" *Hollander, 457 F.3d at 694 n.3* (citing *Clay v. Kuhl, 189 Ill. 2d 603, 727 N.E.2d 217, 244 Ill. Dec. 918 (Ill. 2000))*. Similarly, equitable estoppel tolls the statute of limitations "during any period in which the defendant took certain active steps to prevent the plaintiff from suing." Examples of this include "where the defendant has 'lulled' the plaintiff into delaying suit, either by **[*22]** promising not to plead a limitations defense or by concealing evidence that the plaintiff needed to determine the existence of her claim." *Id.* Plaintiff must both plead and prove affirmative acts by the defendant designed to prevent discovery of the action. *Clay, 727 NE 2d at 223*.

Additionally, ***HN17***[] Illinois has codified fraudulent concealment under *735 5/13-215*. The statute states that "[i]f a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards." To plead fraudulent concealment, a party must allege "(1) there was concealment of a material fact; (2) the concealment was intended to induce a false belief, under circumstances creating a duty to speak; (3) the innocent party could not have discovered the truth through a reasonable inquiry or inspection and relied upon the silence as a representation that the fact did not exist; (4) the concealed information was such that the injured party would have acted differently had she been **[*23]** aware of it; and (5) reliance by the person from whom the defendant concealed the fact led to her injury." *Jones v. Hoosman, 2006 U.S. Dist. LEXIS 31807, 2006 WL 1302524 (N.D. Ill. 2006)*.

Under Illinois law, then, it appears that the discovery rule, rather than equitable tolling, allows the plaintiff here to avoid the statutes of limitations for the various tort and contract claims alleged. Because plaintiff has not alleged the date when it discovered the injury, we cannot infer that plaintiff reasonably should have known of it earlier, and therefore, at this stage, the discovery rule applies, which defers the date of accrual to the point of discovery. Equitable tolling, equitable estoppel and the fraudulent concealment statute would not apply because plaintiff has not alleged sufficient facts, nor plead those theories with the required specificity. *Schacht v. Baccala & Shoop Ins. Services, 1993 U.S. Dist. LEXIS 16093, 1993 WL 469909, *7 (N.D. Ill. 1993)*; *Feng v. Sandrik, 636 F.Supp. 77, 84 n.8 (N.D. Ill.1986)*; *Curry v. A.H. Robins Co., 775 F.2d 212, 218 (7th Cir. 1985)*; *Bush v. Continental Casualty Co., 116 Ill. App. 2d 94, 253 N.E.2d 619, 622 (Ill. App. Ct. 1969).* **[*24]** Therefore, plaintiff's claims survive the defense of the statute of limitations, but plaintiff's fraudulent concealment claim (count XI) is dismissed. [4]

Sufficiency of Antitrust Claims

Finding that at this stage plaintiff's claims are not barred by the statute of limitations, we turn to whether plaintiff has sufficiently plead a claim for violations of the Sherman Act and the Robertson-Patman Act. We remain mindful that ***HN18***[] while a plaintiff need not plead facts or legal theories, (*Nance v. Vieregge, 147 F.3d 589, 590 (7th Cir. 1998))*, and specifying an incorrect theory is not fatal, (*Bartholet v. Reishauer A.G., 953 F.2d 1073, 1078 (7th Cir. 1992))*, we need not strain to find inferences favorable to the plaintiff which are not apparent on the face of the complaint, (*Coates v. Illinois State Bd. of Ed., 559 F.2d 445, 447 (7th Cir. 1977)),* **[*25]** nor need we accept plaintiff's legal conclusions as true. *R.J.R. Services, Inc. v. Aetna Casualty & Surety Co., 895 F.2d 279, 281 (7th Cir. 1989)*. If the facts "do not at least outline or adumbrate" a violation of the Sherman Act, the plaintiff "will get nowhere merely by dressing them up in the language of antitrust." *Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984)*.

Sherman Act Violations

Defendants take issue with plaintiff's allegations and argue that plaintiff has not adequately plead a claim under *sections 1* and *2* of the Sherman Act. We discuss each of these sections in turn.

---

[4] Again we note, as above, that plaintiff's chances of survival beyond the pleading stage are remote, based on these allegations.

We begin with *section 2*. It states that ***HN19***[] "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony…," *15 U.S.C. § 2*. Plaintiff here has alleged defendants conspired and attempted to monopolize the African-American trade and consumer expo market. ***HN20***[] To allege an attempt to monopolize, plaintiff must show (1) that the defendant has engaged **[*26]** in predatory or anti-competitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of obtaining monopoly power. *Spectrum Sports, Inc. V. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. The elements for conspiracy to monopolize are similar: (1) the existence of a combination or conspiracy, (2) overt acts in furtherance of the conspiracy, (3) an effect upon a substantial amount of interstate commerce, and (4) the existence of specific intent to monopolize. *Goodloe v. Nat. Wholesale Co., Inc., 2004 U.S. Dist. LEXIS 13630, 2004 WL 1631728, *6 (N.D. Ill. 2004)*. Both claims require plaintiff to define the relevant market that defendant is attempting, or conspiring, to monopolize. *Goodloe, 2004 U.S. Dist. LEXIS 13630 2004 WL 1631728 at *6*. The relevant market is defined as "the market area in which the seller operates, and to which the purchasers can practicably turn for supplies." *Tampa Elec. Co. v. Nashville Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*. Then the "complaint must allege facts sufficient to create an inference that the defendant has the market power to create a monopoly." *Goodloe, 2004 U.S. Dist. LEXIS 13630, 2004 WL 1631728, at *5*.

Defendants argue that plaintiff's delineation **[*27]** of the relevant market to this action is not sufficiently plead. ***HN21***[] The relevant market contains both product and geographical components. *Nobody in Particular Presents, Inc. v. Clear Channel Communications, 311 F. Supp. 2d 1048, 1075 (D.Co. 2004)*. Plaintiff's complaint alleges that the relevant product market is "those consumer trade shows and exhibitions that target 'urban' African-American audiences, communities or businesses." This is a sufficient allegation of a relevant product market. *See Seabury Management v. Professional Golfers' Ass'n of Am, 878 F. Supp. 771, 779-80 (D. Md. 1994)* (golf trade shows constituted a relevant market - their appeal to buyers and the products and services offered differ from those of other marketing and distribution methods) *aff'd in part, rev'd & remanded in part on other grounds 52 F.3d 322 (4th Cir.))*.

Plaintiff has also sufficiently alleged a relevant geographical market "in several states and metropolitan areas that boast high or significant concentrations of 'urban' or African-American listeners, including but not limited to Chicago, Illinois and portions of Indiana, Michigan, Wisconsin, Houston, Texas; Norfolk, Virginia; **[*28]** Memphis, Tennessee; and Raleigh, North Carolina, St. Louis and Pittsburgh." While this description is broad as compared with plaintiff's factual allegations in the complaint, ***HN22***[] whether the market described is the relevant one or not is a determination of fact not proper for disposal on a motion to dismiss. *AG Fur Industrielle Elektronik Agie v. Sodick Company Ltd., 748 F. Supp. 1305, 1316 (N.D. Ill. 1990)* (conclusory allegations of relevant market are sufficient to withstand a motion to dismiss). Therefore, we find plaintiff has sufficiently plead the relevant market.

Both allegations also require a specific intent to monopolize. *The Great Escape. Inc. v. Union City Body Co., Inc., 791 F.2d 532, 541 (7th Cir. 1986)*. We take as true plaintiff's allegation that defendants' conduct was specifically intended to monopolize.

Additionally, both claims require a showing that "the alleged monopolist possess[es] enough power or potential power in this relevant market in order to harm competition." *Spanish Broadcasting System of Florida, Inc. v. Cleark Channel Communications, Inc., 376 F.3d 1065 (11th Cir. 2004)*. Plaintiff must show both defendants' **[*29]** market power, and that there is a dangerous probability of monopolization of the relevant market. *Goodloe, 2004 U.S. Dist. LEXIS 13630, 2004 WL 1631728, at *6*. Plaintiff has failed to allege that defendants possess market power in the relevant market, or that there is a dangerous probability of defendants acquiring monopoly power. Plaintiff has made no allegation in its complaint regarding these elements. It claims, in its response to defendant's motion to dismiss, that it sufficiently alleged these elements when it pointed out that Clear Channel owned 1200 radio stations in 300 markets. [5] Even drawing the inference in favor of the plaintiff, creating an allegation out of this statement suffers from two flaws. First, the market that plaintiff claims defendant is dominant in, the national market, is not the

[5] Plaintiff extracts this statement from a portion of the complaint introducing the parties generally, and does not reference this act anywhere in its claims.

relevant market that plaintiff itself delineated. Plaintiff has made no allegations as to Clear Channel's radio dominance in the relevant market. [6] However, even if it had made such allegations, Clear Channels' radio dominance is irrelevant. Plaintiff is not alleging that the injury stems from market power of radio stations, but from an attempt to monopolize the African-American trade exposition **[*30]** industry. Plaintiff has made no allegation that defendants have market power over this industry in the relevant market. Plaintiff has alleged nothing which allows us to infer that Clear Channel owns any other expos in other parts of the relevant market, or that other expos have been driven out by defendants' actions. Plaintiff's only fact regarding such market power deals solely with the metropolitan Chicago area, where, since plaintiff's expo ceased doing business, ETBW is the only expo left standing. Therefore, plaintiff has failed to allege market power, or a dangerous probability of obtaining monopoly power.

[*31] Although we find from the above analysis that plaintiff has not sufficiently plead either conspiracy or attempt to monopolize, we turn to the remaining factor of attempt to monopolize, specifically, anti-competitive conduct. Plaintiff has also failed to allege that defendants engaged in predatory or anti-competitive conduct. ***HN23***[] "Predatory conduct may be broadly defined as conduct that is in itself an independent violation of the antitrust laws or that has no legitimate business justification other than to destroy or damage competition." *The Great Escape, Inc., 791 F.2d at 541*. Plaintiff makes conclusory statements of law that the conduct alleged is anti-competitive, but we need not accept plaintiff's conclusions of law as true.

Plaintiff first claims that defendants Clear Channel and WVAZ misappropriated confidential information acquired at meetings with plaintiff, and then conspired with defendants Merry Green and MGPG to create ETBW. It is clear that regardless of the spin plaintiff attempts to place on this conduct, defendants working together to create a competing expo to BE is not anti-competitive conduct. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977).* **[*32]** It is in fact pro-competitive conduct in that it is creating competition between expos not previously present. *Id.*

Secondly, plaintiff alleges defendants conspired to and did sell advertising space to ETBW at a discount, and at better listening hours than awarded BE. As a preliminary note, it is not clear from the pleadings who actually owns ETBW. [7] Regardless, the outcome is the same. If Merry Green does not have any ownership in ETBW, and the expo is simply a client of hers, then the money paid for advertising goes from ETBW to Clear Channel, which is also the owner of the radio station. This is merely a case of a company using its own resources to promote a new product. Even if Merry Green claims some ownership in ETBW, she is at most a joint venturer with Clear Channel, and the use of one joint venturer's resources (in this case, a radio station) to promote the joint venture, is not illegal conduct, but merely part of the definition of a joint venture. *See Scandinavian Airlines Sys. Denmark-Norway-Sweden v. McDonald's Corp., 947 F. Supp. 1257, 1259 (N.D. Ill. 1996)*(one factor determining existence of joint venture is a joint interest, as shown by contribution **[*33]** of property, natural resources, effort, skill, or knowledge). [8]

---

[6] In para. 21 of plaintiff's third amended complaint it notes that five radio stations were involved in the planning of the black expo, two of which allegedly belonged to defendants. Plaintiff does not allege that these five stations are the only ones in the Chicago metropolitan area with heavy African-American listenership, nor allege misconduct by defendants' other radio station not a party to this action.

[7] At one point plaintiff's complaint alleges that defendant Merry Green and MGPG "continue to count WVAZ and [ETBW] as clients," but three paragraphs later states that "Merry Green continues to conspire with WVAZ and the Clear Channel Defendants to claim ownership of [ETBW]."

[8] We have found no cases that hold that using one party's resources to promote a joint venture constitutes anti-competitive conduct or an antitrust violation. However, even if such conduct was considered anti-competitive, at most it would be evaluated under the rule-of-reason standard. *See Car Carriers, 745 F.2d at 1108*. ***HN24***[] This standard contains a threshold requirement where plaintiff must first show defendants' market power. *Valley Liquors, Inc. v. Renfield Importers. Ltd., 822 F.2d 656, 666 (7th Cir. 1987)*. If plaintiff fails to do so, as plaintiff here has, then the inquiry is ended. *Id.*

An analogy can be drawn here. A clothier **[*34]** operates a store offering a number of brands of clothes. The clothier decides to design clothes of her own, and, once produced, places her clothes in the front of the store. This requires her to move other competing clothes to the back of the store. Can she do this? We believe so. She owns the store. Can she display her line of clothing in her store, without paying a fee, while other designers have to pay? Again, we believe so because the money paid by her as the designer would simply remain with the same entity. We think this would be true even if she was designing the clothes in a joint venture with another.

Plaintiff alleges that through Clear Channel's media leverage in the radio market, it coerced NBE's sponsors to abandon NBE and begin sponsoring ETBW. Plaintiff makes no specific allegation regarding how Clear Channel effected this coercion, nor how this coercion affected competition in the relevant market. Plaintiff's allegations relate solely to its own injury. Even if Clear Channel's conduct in this arena would be deemed unfair, "an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993).* **[*35]** Therefore, we dismiss counts II and III of plaintiff's complaint.

Plaintiff's *section 1* allegations fare no better. *Section 1* of the Sherman Act proscribes ***HN25***[] "every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 1*.

HN26[] In order to state a claim under this Act, plaintiff must first show that defendants had market power. *The Great Escape, Inc. v. Union City Body Co., Inc., 791 F.2d 532, 537 (7th Cir. 1986)*. While there are some *section 1* violations that do not require a showing of market power, such as horizontal price-fixing between actors in the same market, we do not believe this is one of those *per se* violations. As stated above, plaintiff has failed to allege defendants have market power in the relevant market. Plaintiff's factual claims center solely around the Chicago metropolitan area, and its sole claim regarding defendants' market power is on a nationwide scale and refers to defendants' control of radio stations, not of expos.

HN27[] The other fundamental requirement for showing a *section 1* violation is a "sufficient allegation **[*36]** of anti-competitive effects that would result or have resulted from the defendants' actions; the absence of such allegations is ordinarily fatal to the existence of a cause of action." *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984)*. These anti-competitive effects must necessarily come from anti-competitive conduct, which plaintiff has failed to allege, as demonstrated above. Even if plaintiff had shown actionable anti-competitive conduct, it could not make a claim under this Act. ***HN28***[] The purpose of the Sherman Act is to rectify injuries to consumers caused by diminished competition. *Id.* Therefore, it follows that plaintiff must allege an injury, not only to itself, but to the market as well. *Id.* Plaintiff has failed to do this. All of plaintiff's factual allegations merely show injury that defendants committed on plaintiff's expo. Plaintiff has made no allegations as to how this alleged anti-competitive conduct has affected the market as a whole. Plaintiff makes vague statements about the injury to the African-American community when the money from these expos is filtered out to a conglomerate such as Clear Channel, rather than staying **[*37]** in the community. This may be true. However, it is not the type of injury that Congress sought to remedy with the antitrust laws. *Car Carriers, Inc., 745 F.2d at 1107* ("purpose of the Sherman Act is to rectify the injury to consumers caused by diminished competition"). There are no allegations that defendants' dominance in the expo market has had any effect on the prices consumers pay for admittance to the expo, or for goods purchased therein. The inferences we draw in favor of plaintiff can only be drawn so far. We are unable to bridge the giant chasm left by plaintiff's pleadings. Therefore, plaintiff's *section 1* claim must fail and we dismiss count I of the complaint. [9]

---

[9] Plaintiff claims, in its response to defendants' motion to dismiss, that it has sufficiently alleged an antitrust violation, and that it has consistently alleged that Clear Channel and its radio stations fixed prices and interfered with sponsorships in order to make non-Clear Channel expos unappealing to vendors, sponsors and consumers. We first note that a complaint may not be amended by the brief in opposition of the motion to dismiss. *Car Carriers, 745 F.2d at 1107*. However, even if we were to look at these statements as being consistent with the well-pleaded allegations in the complaint, none of plaintiff's allegations is evidence of price-fixing. At most, plaintiff has alleged price discrimination, an allegation that falls under the Robertson-Patman Act, which we discuss below.

[*38] By our holding here we do not say that defendants' conduct was honorable, nor do we say that plaintiff has no avenues of relief from other areas of law, such as tort and contract. We merely hold, consistent with the cases in our circuit and the Supreme Court, and consistent with Congress' intent that tortious conduct (here in the form of unfair competition) that does not otherwise contravene the antitrust laws, is not actionable under the Sherman Act.

Robertson-Patman Act Violations

Plaintiff also asserts violations of the Robertson-Patman Act, specifically illegal price discrimination under *15 U.S.C. § 13*, and discrimination in rebates, discounts, or advertising service charges under *15 U.S.C. § 13a*. These claims fail as a matter of law.

HN29[] The Robinson-Patman Act's prohibition on price discrimination extends only to transactions involving commodities. *Baum v. Investors Diversified Services, Inc., 409 F.2d 872, 873 (7th Cir. 1969)*. Courts have strictly construed this term, holding that it denotes only "tangible products of trade," and advertising has been explicitly excluded from this definition. *See Columbia Broadcasting System, Inc. v. Amana Refrigeration, Inc, 295 F.2d 375 (7th Cir. 1961)*; **[*39]** *Ambook Enterprises v. Time, Inc., 612 F.2d 604 (2nd Cir. 1979)*; *Advo Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191, 1195 n.3 (3rd Cir. 1995)*; *National Tire Wholesale, Inc. v. Washington Post Co., 441 F. Supp. 81, 85-86 (D. D. C. 1977)*. Therefore, plaintiff's allegations of discrimination in the sale of radio advertising time do not fall under the Act, and counts IV and V are dismissed.

Supplemental Jurisdiction

Plaintiff's remaining claims are pendent state law claims. ***HN30***[] *28 U.S.C. § 1367* grants this court jurisdiction to hear these pendent state claims. We may decline to exercise this jurisdiction for several reasons, including instances such as this, where we have dismissed all claims over which we exercise original jurisdiction. *§ 1367(c)(4)*. In Payne for Hicks v. Churchich, the Seventh Circuit stated that when the district court dismisses all federal claims before trial, "the usual and preferred course is to remand the state claims to the state court unless there are countervailing considerations." *161 F.3d 1030, 1043 (7th Cir. 1998)*. These exceptions include the running of **[*40]** the state law cause of action's statute of limitations, and instances where sending the case to another court will cause a substantial duplication of effort. *Williams v. Seniff, 342 F.3d 774, 793 (7th Cir. 2003)*. Because plaintiff has not plead a date of discovery of its injury, we cannot say that the state claims' statutes of limitations have expired. Additionally, just as in Williams, discovery has been completed and transfer to state court would not permit plaintiff to uncover additional facts to support its claims. *Id.* Consequently, we dismiss the pendent state law claims.

CONCLUSION

For the foregoing reasons, we grant defendants' motion to strike plaintiff's exhibit, and grant defendants' motion to dismiss plaintiffs complaint.

JAMES B. MORAN

Senior Judge, U. S. District Court

Feb. 8, 2007.

End of Document

Dippin' Dots, Inc. v. Mosey

United States Court of Appeals for the Federal Circuit

February 9, 2007, Decided

2005-1330, -1582

Reporter

476 F.3d 1337 *; 2007 U.S. App. LEXIS 2909 **; 81 U.S.P.Q.2D (BNA) 1633 ***; 2007-1 Trade Cas. (CCH) P75,590

DIPPIN' DOTS, INC. and CURT D. JONES, Plaintiffs-Appellants, v. THOMAS R. MOSEY, DOTS OF FUN, INTERNATIONAL LASER EXPRESSIONS, INC. (also known as I.L.E., Inc.), Defendants-Cross Appellants, and NICHOLAS ANGUS, Defendant/Counterclaimant-Cross Appellant, and FROSTY BITES DISTRIBUTION LLC, Defendant-Appellee, and FROSTY BITES DISTRIBUTOR OF FLORIDA, INC., FROSTY BITES DISTRIBUTOR OF GEORGIA, INC., FROSTY BITES OF MICHIGAN, INC., J&J CONCESSIONS OF NEW JERSEY, INC., FROSTY BITES ICE CREAM COMPANY, LLC, FROSTY BITES SOUTH, INC., INTERNATIONAL ASSOCIATION OF AMUSEMENT PARKS AND ATTRACTIONS, FROSTY BITES OF NEW YORK, LLC, and FROSTY BITES ICE CREAM DEVELOPMENT, LLC, Defendants, v. F. ROBERT ESTY, JR., BARRY JAY BASS, VICTOR BAUER, JACK MILLER, DANIEL KILCOYNE, SHAWN P. KILCOYNE, and DANIEL DOPKO, Counterclaim Defendants, and FROSTY BITES, INC. (now known as Mini Melts, Inc.), Counterclaim Defendant-Cross Appellant.

Subsequent History: Rehearing denied by *Dippin' Dots, Inc. v. Mosey, 2007 U.S. App. LEXIS 9603 (Fed. Cir., Apr. 6, 2007)*

Rehearing denied by, Rehearing, en banc, denied by *Dippin' Dots, Inc. v. Mosey, 2007 U.S. App. LEXIS 9604 (Fed. Cir., Apr. 6, 2007)*

US Supreme Court certiorari denied by *Mosey v. Dippin' Dots, Inc., 552 U.S. 948, 128 S. Ct. 375, 169 L. Ed. 2d 260, 2007 U.S. LEXIS 11329 (U.S., 2007)*

US Supreme Court certiorari denied by *Dippin' Dots, Inc. v. Mosey, 552 U.S. 948, 128 S. Ct. 391, 169 L. Ed. 2d 260, 2007 U.S. LEXIS 11457 (U.S., 2007)*

On remand at, Costs and fees proceeding at *Dippin' Dots, Inc. v. Mosey, 2007 U.S. Dist. LEXIS 80553 (N.D. Tex., Oct. 30, 2007)*

Prior History: [1]** Appealed from: United States District Court for the Northern District of Texas. Judge Thomas W. Thrash, Jr.

Dippin' Dots, Inc. v. Mosey, 2005 U.S. Dist. LEXIS 39623 (N.D. Tex., Aug. 4, 2005)
In re Dippin' Dots Patent Litig., 249 F. Supp. 2d 1346, 2003 U.S. Dist. LEXIS 8516 (N.D. Ga., 2003)
Dippin' Dots, Inc. v. Mosey, 2005 U.S. Dist. LEXIS 39652 (N.D. Tex., Aug. 4, 2005)

Disposition: AFFIRMED-IN-PART, REVERSED-IN-PART, VACATED-IN-PART, AND REMANDED.

Core Terms

patent, sales, inequitable conduct, antitrust, district court, beads, prior art, omission, ice cream, temperature, steps, counterclaim, patentee, infringement, fraudulent, serving, unenforceability, summary judgment, attorney's fees, critical date, Clayton Act, noninfringement, invalid, comprising, practiced, disclose, misrepresentation, free-flowing, alimentary, deceptive

LexisNexis® Headnotes

Evidence > Inferences & Presumptions > Presumptions

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

HN1[] **Inferences & Presumptions, Presumptions**

The term "comprising" raises a presumption that a list of elements is nonexclusive. However, "comprising" is not a weasel word with which to abrogate claim limitations.

Patent Law > Jurisdiction & Review > Standards of Review > De Novo Review

Patent Law > Jurisdiction & Review > Standards of Review > Substantial Evidence

Patent Law > Nonobviousness > Elements & Tests > Ordinary Skill Standard

Patent Law > Nonobviousness > Elements & Tests > Prior Art

Patent Law > ... > Elements & Tests > Graham Test > Secondary Considerations

HN2[] **Standards of Review, De Novo Review**

When reviewing a district court's judgment notwithstanding the verdict determination as to obviousness in a patent, an appellate court reviews a jury's conclusions on obviousness, a question of law, without deference, and the underlying findings of fact, whether explicit or implicit within the verdict, for substantial evidence. Those factual underpinnings include the scope and content of the prior art, differences between the prior art and the claims at issue, and the level of ordinary skill in the art. Precedent requires that the party urging obviousness demonstrate a teaching, suggestion, or motivation to combine references. This test is a flexible one which may find motivation to combine in the knowledge of one skilled in the art or in the nature of the problem to be solved. Secondary indicia of nonobviousness, such as commercial success, long-felt need, or failure of others are also relevant.

Patent Law > Statutory Bars > On Sale Bar > Elements

Patent Law > Nonobviousness > Elements & Tests > General Overview

HN3[] **On Sale Bar, Elements**

The public sale of goods produced by a process more than one year before a patent is filed places that process in the *35 U.S.C.S. § 102(b)* prior art. Prior art under the *§ 102(b)* on-sale bar is also prior art for the purposes of obviousness under *35 U.S.C.S. § 103*.

Patent Law > Statutory Bars > On Sale Bar > Elements

HN4[] **On Sale Bar, Elements**

The experimental use exception to *35 U.S.C.S. § 102(b)* does not include market testing where the inventor is attempting to gauge consumer demand for his claimed invention.

Patent Law > Statutory Bars > On Sale Bar > Elements

Patent Law > ... > Elements & Tests > Graham Test > Secondary Considerations

HN5[] **On Sale Bar, Elements**

The asserted commercial success of a product must be due to the merits of the claimed invention beyond what was readily available in the prior art.

Patent Law > Jurisdiction & Review > Standards of Review > Abuse of Discretion

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

Patent Law > ... > Defenses > Inequitable Conduct > Elements

Patent Law > Jurisdiction & Review > Standards of Review > Clearly Erroneous Review

HN6[] **Standards of Review, Abuse of Discretion**

A patent may be rendered unenforceable for inequitable conduct if an applicant, with intent to mislead or deceive the examiner, fails to disclose material information or submits materially false information to the Patent and Trademark Office during prosecution. The party urging unenforceability must show by clear and convincing evidence that the applicant met thresholds of both materiality and intent. Where those factual findings were made by the district court, an appellate court reviews them for clear errors. The ultimate determination of inequitable conduct is committed to the sound discretion of the trial court. The appellate court reviews for abuse of that discretion.

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

HN7[] **Defenses, Inequitable Conduct**

The "reasonable examiner" standard remains sufficient ground for inequitable conduct materiality even after 1992 amendment of *37 C.F.R. § 1.56*.

Evidence > Inferences & Presumptions > Inferences

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

HN8[] **Inferences & Presumptions, Inferences**

Smoking gun evidence is not required in order to establish an intent to deceive. Rather, this element of inequitable conduct must generally be inferred from the facts and circumstances surrounding an applicant's overall conduct.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Failure to Fulfill Duties

Patent Law > ... > Defenses > Inequitable Conduct > Elements

HN9[] **Inequitable Conduct, Failure to Fulfill Duties**

Absent explanation, the evidence of a knowing failure to disclose sales that bear all the earmarks of commercialization reasonably supports an inference that the inventor's attorney intended to mislead the Patent and Trademark Office. The concealment of sales information can be particularly egregious because, unlike an applicant's failure to disclose, for example, a material patent reference, the examiner has no way of securing the information on his own.

Patent Law > ... > Defenses > Inequitable Conduct > Elements

HN10[] **Inequitable Conduct, Elements**

Once threshold findings of materiality and intent are established, a court must weigh them to determine whether the equities warrant a conclusion that inequitable conduct occurred.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN11[] **Sherman Act, Claims**

Proof that a patentee has obtained the patent by knowingly and willfully misrepresenting facts to the Patent and Trademark Office is sufficient to strip the patentee of its exemption from the antitrust laws.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN12[] **Sherman Act, Claims**

A party who asserts such a fraudulently obtained patent may be subject to an antitrust claim. If a patentee asserts a patent claim and the defendant can demonstrate the required fraud on the Patent and Trademark Office, as well as show that the other elements necessary to a § 2 of the Sherman Act case are present, a defendant-counterclaimant is entitled to treble damages under the antitrust laws.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Burdens of Proof > General Overview

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

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

HN13[] **Sherman Act, Claims**

The first barrier for a Walker Process claimant to clear is the requirement that the patent be obtained through actual fraud upon the Patent and Trademark Office (PTO). This question is governed by Federal Circuit law. A finding of inequitable conduct does not by itself suffice to support a finding of Walker Process fraud, because inequitable conduct is a broader, more inclusive concept than the common law fraud needed to support a Walker Process counterclaim. To demonstrate Walker Process fraud, a claimant must make higher threshold showings of both materiality and intent than are required to show inequitable conduct. A Walker Process claimant must make a greater showing of scienter and materiality than when seeking unenforceability based on conduct before the PTO. Furthermore, a finding of Walker Process fraud cannot result from an equitable balancing between the two factors; a strong showing of one cannot make up for a deficiency in the other. The difference in breadth between inequitable conduct and Walker Process fraud admits the possibility of a close case whose facts reach the level of inequitable conduct, but not of fraud before the PTO.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN14[] **Sherman Act, Claims**

The heightened standard of materiality in a Walker Process case requires that the patent would not have issued but for the patent examiner's justifiable reliance on the patentee's misrepresentation or omission.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN15[] **Sherman Act, Claims**

While Walker Process intent may be inferred from the facts and circumstances of a case, a mere failure to cite a reference to the Patent and Trademark Office will not suffice. This is not to say that an omission always reduces to mere failure to cite. Omissions, as well as misrepresentations, may in limited circumstances support a finding of Walker Process fraud because a fraudulent omission can be just as reprehensible as a fraudulent misrepresentation. To find a prosecution omission fraudulent there must be evidence of intent separable from the simple fact of the omission. A false or clearly misleading prosecution statement may permit an inference that the statement was made with deceptive intent. For instance, evidence may establish that a patent applicant knew one fact and presented another, thus allowing the factfinder to conclude that the applicant intended by the misrepresentation to deceive the examiner. That is not the case with an omission, which could happen for any number of nonfraudulent reasons-the applicant could have had a good-faith belief that disclosure was not necessary, or simply have forgotten to make the required disclosure.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

HN16[] **Sherman Act, Claims**

Weighing intent and materiality together is appropriate when assessing whether the patentee's prosecution conduct was inequitable. However, when Walker Process claimants wield that conduct as a sword to obtain antitrust damages rather than as a mere shield against enforcement of the patent, they must prove deceptive intent independently.

Counsel: Daniel J. Warren, Sutherland Asbill & Brennan LLP, of Atlanta, Georgia, argued for plaintiffs-appellants, Dippin Dots, Inc. and Curtis D. Jones. With him on the brief were Candice C. Decaire, Erin C. Witkow, and Troy R. Covington. Of counsel was Todd Stockwell, Stockwell & Associates, of Lexington, Kentucky.

Robert G. Oake, Jr., Oake Law Office, of Allen, Texas, and Rudolf O. Siegesmund, Siegesmund & Associates, of Dallas, Texas, argued for defendants-cross-appellants, Thomas R. Mosey et al., defendant/counterclaimant-cross appellant, Nicholas Angus, and counterclaim defendant-cross appellant, Frosty Bites, Inc. (now known as Mini Melts, Inc.).

Keith E. Broyles, Alston & Bird LLP, of Atlanta, Georgia, argued for defendant-appellee. With him on the brief were Stacey A. Mollohan and William R. Hubbard.

Judges: Before MAYER, RADER, and GAJARSA, Circuit Judges.

Opinion by: GAJARSA,

Opinion

[*1634]** **[*1339]** GAJARSA, *Circuit Judge*.

This is a patent infringement and antitrust case dealing with a unique ice cream product. **[**2]** Plaintiffs Dippin' Dots, Inc. and Curt D. Jones (collectively "DDI") appeal from the district court's claim construction and summary judgment of noninfringement of U.S. Patent No. 5,126,156 ("the '156 patent") and from the judgment following jury trial that all claims of **[***1635]** that patent are obvious, that the patent is unenforceable due to inequitable conduct during prosecution, and that DDI violated the antitrust laws by asserting a patent that had been procured through fraud on the Patent Office. We affirm the judgments of noninfringement, obviousness, and unenforceability, but reverse as to the antitrust counterclaim.

[*1340] I. BACKGROUND

A. *The Technology and Patent*

The '156 patent, covering subject matter invented by plaintiff Jones and exclusively licensed to plaintiff Dippin' Dots, is directed to a process for making a form of cryogenically prepared novelty ice cream product. Claim 1, the only independent claim, reads:

> A method of preparing and storing a free-flowing, frozen alimentary dairy product, comprising the steps of:
>
> [(1)] preparing an alimentary composition for freezing;
>
> [(2)] dripping said alimentary composition into a freezing chamber; **[**3]**
>
> [(3)] freezing said dripping alimentary composition into beads;
>
> [(4)] storing said beads at a temperature at least as low as -20 degrees F. so as to maintain said beads free-flowing for an extended period of time;
>
> [(5)] bringing said beads to a temperature between substantially -10 degrees F. and -20 degrees F. prior to serving; and
>
> [(6)] serving said beads for consumption at a temperature between substantially -10 degrees F. and -20 degrees F. so that said beads are free flowing when served.

'156 patent col.6 ll.41-57 (numbering added for reference). DDI has commercialized this process. The ice cream it produces, sold under the Dippin' Dots brand, is known to patrons of amusement parks, stadiums, shopping malls, and the like.

The initial application that eventually issued as the '156 patent, filed on March 6, 1989, omitted the final "serving" step from Claim 1. The examiner rejected all of the claims as obvious in light of Canadian Patent No. 964,921, of Aref et al. DDI appealed the rejections to the Board of Patent Appeals and Interferences ("Board"), which affirmed the rejection. DDI then filed a continuation application, amending Claim 1 by **[**4]** adding the "serving" step. The examiner again rejected over the Aref reference, noting that "dependent on the food product being served," it would be obvious to serve the product in a cold, free-flowing state. DDI then submitted a declaration pursuant to 37 C.F.R. § 1.132 in which it submitted evidence of the significant commercial success of its method. It argued that its commercial success should weigh against a finding of obviousness. *See* Graham v. John Deere Co., 383 U.S. 1, 17-18, 86 S. Ct. 684, 15 L. Ed. 2d 545 (1966) (noting that commercial success is one of the "secondary considerations" that may serve as "indicia of . . . nonobviousness"). The examiner agreed and the '156 patent issued in June 1992.

B. *The Festival Market Sales*

Much of the debate in this case centers on the import of sales made at the Festival Market mall in Lexington, Kentucky, more than a year before DDI filed its patent application. Sales made more than one year before the patent's priority date implicate the on-sale bar of 35 U.S.C. § 102(b). For the '156 patent, this critical date is March 6, 1988. Starting on July 24, 1987, Jones sold cryogenically-prepared, **[**5]** largely beaded ice cream at the Festival Market. During Jones's time at Festival Market, which lasted at least until July 29th, over 800 customers purchased his beaded ice cream and others received free samples. The customers were permitted to leave with the product and were not restricted by any kind of confidentiality agreement. Jones later testified that his main goal at the Festival Market was to "get . . . test-marketing information" and not to further develop technical aspects of his product such as particular temperature ranges for storage and service.

It is undisputed that the Festival Market sales were never disclosed to the Patent **[*1341]** and Trademark Office ("PTO") during prosecution of the '156 patent. The declaration of commercial success which ultimately persuaded the examiner to grant the patent contained a sworn statement by Jones that "[t]he initial sales were in March of 1988," which was on or after the critical date.

Jones testified that at Festival Market he only practiced the first three steps of the claimed method, not the storing, bringing, or serving steps. He testified that he considered the evidence of what had happened at Festival **[***1636]** Market to be irrelevant to **[**6]** patentability. The attorney who prosecuted the '156 patent, Warren Schickli, testified that he considered the sales to have been experimental since the process as practiced at Festival Market could not be feasibly commercially exploited. He also testified that the Festival Market ice cream was not sold for "direct consumption" under the meaning of Claim 1, because the ice cream was too cold to eat comfortably when initially given to the consumer.

C. *Prior Litigation*

The controversy in this case began when several of DDI's distributors severed their relationship, found alternative manufacturing sources, and entered into competition against DDI. DDI initiated a series of patent infringement lawsuits against its new competitors in various judicial districts. In this appeal, the defendants fall into two primary categories: the "manufacturing parties" who make the competing ice cream product and the "distributing parties" who sell it to consumers. [1] **[**8]** The defendants counterclaimed for violation of *§ 2 of the Sherman Act* due to DDI's allegation of patent infringement based on a fraudulently acquired patent. This type of antitrust claim has become known as a "*Walker Process* **[**7]** " claim, named for the Supreme Court's decision in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*. The various suits were consolidated by the Judicial Panel on Multi-District Litigation for pretrial proceedings before the United States District Court for the Northern District of Georgia, with Judge Thomas W. Thrash presiding. That court adopted in large part an earlier-recommended claim construction by a special master. *In re Dippin' Dots Patent Litig., 249 F. Supp. 2d 1346, 1366 (N.D. Ga. 2003)*. It issued summary judgment of noninfringement both literally, *id. at 1368*, and via the doctrine of equivalents, *id. at 1370-71*. It refused to grant summary judgment to any party on invalidity, *id. at 1362, 1364*, or on inequitable conduct, *id. at 1365*. [2]

After the pretrial proceedings in the Northern District of Georgia were completed, the case was remanded to the United States District Court for the Northern District of Texas. Judge Thrash, sitting by designation, continued to preside over the Northern District of Texas proceedings. **[*1342]** That court conducted a jury trial on the issues of invalidity, unenforceability, and antitrust violations by DDI. By special verdict, the jury found that the sales by Jones prior to March 1988 could be asserted against the patent as prior art and that all claims of the '156 patent were invalid as obvious. The jury also found that both Jones and Schickli had, with **[**9]** intent to deceive, made material misrepresentations or omissions in violation of the duty of candor to the PTO. It also determined that defendants Mini Melts, Inc. and Frosty Bites Distribution had proven all required elements of their antitrust counterclaim, including the requisite fraud on the PTO. However, it found no antitrust damages, granting the counterclaim plaintiffs zero dollars in damages on their Sherman Act counterclaim. The district court denied DDI's motion for judgment notwithstanding the verdict (JMOL), finding that there was sufficient evidence for the jury to find all claims obvious and that DDI had withheld a material reference with the deceptive intent required for *Walker Process* liability. The district court then weighed that same evidence of intent and materiality itself and found the patent unenforceable due to inequitable conduct before the PTO. In its final judgment dated February 28, 2005, it awarded attorney fees under the Clayton Act to defendant Frosty Bites Distribution ("FBD") in the amount of $ 676,675.46.

The defendants appealed to this court on March 25, 2005. After the notice of appeal was filed, the district court made two additional rulings. **[**10]** On August 4, 2005, it granted defendant Mosey's motion for attorney fees **[***1637]** under the Clayton Act, which had been outstanding at the time of the final judgment. On August 18,

---

[1] The manufacturing parties are Defendants Thomas Mosey, Dots of Fun, International Laser Expressions, Inc., Nicholas Angus, and Frosty Bites, Inc. (now known as Mini Melts, Inc.). Defendant Frosty Bites Distribution, its various local affiliates, and individuals such as founder Victor Bauer are the distributing parties. The issues in this case are not generally resolved in a manner unique to particular defendants, so we refer collectively to "the defendants" where appropriate.

[2] The district court also granted summary judgment in favor of the defendants as to claims of trade dress infringement, *id. at 1374-75*, and trade secret violations, *id. at 1376*. It granted summary judgment to the plaintiffs on a minor contract issue. *Id. at 1378*. These issues are not before us on appeal. The trade dress issue was appealed separately to the Eleventh Circuit, which affirmed. *Dippin' Dots, Inc. v. Frosty Bites Distrib., 369 F.3d 1197 (11th Cir. 2004)*.

2005, FBD moved for an amendment of the attorney fee order to add fees under 35 U.S.C. § 285, the patent statute's fee-shifting provision. We deactivated the appeal while that motion was pending. On October 13, 2005, the district court granted FBD's motion and awarded it an additional $ 504,158.16 in fees under § 285. On November 18, 2005, this court reactivated the appeal and set a briefing schedule. DDI's opening brief included challenges to the August 4 and October 13 fee awards. A motions panel of this court ruled that, since DDI had failed to amend its March 25 notice of appeal to include references to the later district court orders, we lacked jurisdiction to hear DDI's challenge to those later orders. *Dippin' Dots v. Mosey*, No. 05-1330, slip op. at 3 (Fed. Cir. May 1, 2006). DDI was directed to file a replacement brief omitting the arguments held to be jurisdictionally barred. Id., slip op. at 4.

In its amended brief, DDI appeals the claim construction and summary judgment **[**11]** of noninfringement, the refusal to overturn the jury verdict of obviousness and liability under the antitrust laws, the finding of inequitable conduct, and the award of attorneys' fees under the Clayton Act granted to FBD. We have jurisdiction under 28 U.S.C. § 1295(a)(1).

II. DISCUSSION

A. *Claim Construction and Infringement*

DDI challenges the summary judgment of noninfringement on the grounds that the district court [3] construed the claims of the '156 patent erroneously. Its primary arguments relate to the appropriate reach of the term "beads" in Claim 1, which the district court construed to mean "small frozen droplets . . . which have a smooth, **[*1343]** spherical (round or ball shaped) appearance." The district court's construction also excluded processes which produce any "irregular or odd shaped particles such as 'popcorn.'" The district court correctly found that the claim steps mentioning "beads" were limited to covering processes that produce beads and only beads. The accused process produces both spheres and irregular particles, so under this construction, the defendants do not infringe. DDI objects both to the definition of "beads" and to **[**12]** the district court's refusal to use the word "comprising" to extend the coverage of the claim beyond a beads-only process. As to the definition of "beads," the district court correctly noted that the written description specifically describes "beads" as having a "smooth, spherical appearance." '156 patent col.5 ll.22-23. Indeed, DDI argued to the Special Master before whom the construction issue was originally presented that a "bead" was "a small round ball or round drop." There is no error in the district court's definition of this term.

As to DDI's second argument, we acknowledge that ***HN1***[] the term "comprising" raises a presumption that the list of elements is nonexclusive. *See* Genentech, Inc. v. Chiron Corp., 112 F.3d 495, 501 (Fed. Cir. 1997). However, "'[c]omprising' is not a weasel word with which to abrogate claim limitations." Spectrum Int'l, Inc. v. Sterilite Corp., 164 F.3d 1372, 1380 (Fed. Cir. 1998). **[**13]** "Comprising" appears at the beginning of the claim-"comprising the steps of"-and indicates here that an infringing process could practice other steps in addition to the ones mentioned. Those six enumerated steps must, however, all be practiced as recited in the claim for a process to infringe. The presumption raised by the term "comprising" does not reach into each of the six steps to render every word and phrase therein open-ended-especially where, as here, the patentee has narrowly defined the claim term it now seeks to have broadened. The district court's limitation of the claim scope to exclude processes that produce some irregularly shaped particles is correct.

DDI also objects to the district court's definition of "free flowing," but the court did not rely on that definition to support its summary judgment ruling. Dippin' Dots, 249 F. Supp. 2d at 1367 ("Since Defendants' process produces beads and irregularly shaped particles of ice cream, Defendants' method does not literally infringe the '156 patent."). Since that basis of the district court's decision was based on a properly construed claim term, we affirm the summary judgment of no literal infringement. **[**14]** DDI does not appeal the summary judgment of

[3] As described *supra*, the claim construction and summary judgment phases of this litigation were handled by the United States District Court for the Northern District of Georgia. "The district court" as used in this section refers to that court.

noninfringement under the doctrine of **[***1638]** equivalents, so the court need not consider the doctrine of equivalents.

B. *Obviousness*

The case was transferred to the Northern District of Texas and tried to a jury, which found all claims of the '156 patent to be obvious. ***HN2***[↑] When reviewing a district court's JMOL determination as to obviousness, "[t]his court reviews a jury's conclusions on obviousness, a question of law, without deference, and the underlying findings of fact, whether explicit or implicit within the verdict, for substantial evidence." *LNP Eng'g Plastics, Inc. v. Miller Waste Mills, Inc., 275 F.3d 1347, 1353 (Fed. Cir. 2001)*. Those factual underpinnings include the scope and content of the prior art, differences between the prior art and the claims at issue, and the level of ordinary skill in the art. *Graham, 383 U.S. at 17*. Our precedent requires that the party urging obviousness demonstrate a teaching, suggestion, or motivation to combine references. *C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1351 (Fed. Cir. 1998)*. This test is a flexible one **[*1344]** which may find motivation **[**15]** to combine in the knowledge of one skilled in the art or in the nature of the problem to be solved. *Alza Corp. v. Mylan Labs., Inc., 464 F.3d 1286, 1291 (Fed. Cir. 2006)*. Secondary indicia of nonobviousness, such as commercial success, long-felt need, or failure of others are also relevant. *Graham, 383 U.S. at 17-18*.

To find obviousness in light of the Festival Market sales requires two conclusions: first, those sales must have been in the prior art; second, the process practiced at Festival Market combined with any other relevant prior art must render the claims of the '156 patent obvious. Substantial evidence existed for the jury to find the facts necessary to support both conclusions.

The first question is whether the sales at Festival Market constitute prior art that can be asserted against the '156 patent claims in an obviousness analysis. It is undisputed that those sales occurred before the patent's critical date of March 6, 1988. Sales made before the critical date would render invalid any claims that they anticipate, but the defendants do not allege here that the Festival Market sales embodied every element of any claim of the '156 patent. **[**16]** Instead, they argue that the claims are obvious in view of the Festival Market sales combined with the prior art cited by the examiner during prosecution. Those sales may indeed be considered when determining whether the claims are invalid for obviousness. ***HN3***[↑] The public sale of goods produced by a process more than one year before a patent is filed places that process in the *§ 102(b)* prior art. *See Invitrogen Corp. v. Biocrest Mfg., 424 F.3d 1374, 1382 (Fed. Cir. 2005)* (citing *Metallizing Eng'g Co. v. Kenyon Bearing & Auto Parts Co., 153 F.2d 516, 520 (2d Cir. 1946)* (Learned Hand, J.)). Prior art under the *§ 102(b)* on-sale bar is also prior art for the purposes of obviousness under *§ 103*. *See LaBounty Mfg. v. United States ITC, 958 F.2d 1066, 1071 (Fed. Cir. 1992)* ("*Section 102(b)* may create a bar to patentability . . . in conjunction with [*§ 103*], if the claimed invention would have been obvious from the on-sale device in conjunction with the prior art."). DDI argues that the sales at Festival Market were experimental in nature and therefore avoid the on-sale bar. In light of Jones's testimony that his purpose was to determine **[**17]** the marketability of his ice cream product and not to improve it technically, the jury could have found facts supporting a conclusion that the sales were not experimental. *See In re Smith, 714 F.2d 1127, 1135 (Fed. Cir. 1983)* (***HN4***[↑] "The experimental use exception . . . does not include market testing where the inventor is attempting to gauge consumer demand for his claimed invention."); *see also Paragon Podiatry Lab, Inc. v. KLM Labs., Inc., 984 F.2d 1182, 1193 (Fed. Cir. 1993)*. The Festival Market sales are therefore prior art citable against the patent claims for obviousness purposes.

The second question is whether the Festival Market sales, considered as prior art to the '156 patent, render its claims invalid for obviousness. We conclude that they do. The first three steps of the patented process (preparing, dripping, and freezing) were concededly practiced at Festival Market. The last two-bringing to a higher temperature and then serving at that temperature for direct consumption-were at least very closely approximated. No evidence of the exact temperature of any product served at Festival Market has been presented, but it would have been obvious in **[**18]** light of the activity there to measure that temperature and serve the product within an easily determined range of palatability. **[***1639]** The fourth step, "storing" at a very cold temperature for an extended period of time, may not have been present, but extended cold storage was an obvious **[*1345]** elaboration on the Festival Market sales in order to distribute and retail the product. The motivation for DDI to make these trivial modifications is readily apparent from the problem to be solved. Someone of ordinary skill in the art of ice cream retailing, seeking to commercially develop the inventive kernel found at Festival Market, would immediately seek the appropriate temperature ranges within which to store and serve the product. *See* Alza, 464 F.3d at 1291 (noting that teaching, motivation, or suggestion can come from nature of problem to be solved).

The jury could reasonably have found that the secondary factor of commercial success advanced by Jones to obtain the '156 patent was obviated by the Festival Market sales. If the factors that led to DDI's later commercial success were largely present at Festival Market, later changes to the process encompassed by the '156 patent could **[**19]** reasonably be seen as not improving the prior art's commercial appeal much, if at all. *See* *J.T. Eaton & Co. v. Atlantic Paste & Glue Co., 106 F.3d 1563, 1571 (Fed. Cir. 1997)* (***HN5***[] "the asserted commercial success of the product must be due to the merits of the claimed invention beyond what was readily available in the prior art.").

The factual underpinnings implicit in the jury's verdict are supported by substantial evidence, and based on those facts, we affirm the judgment of obviousness.

C. *Inequitable Conduct*

We have stated that ***HN6***[] "[a] patent may be rendered unenforceable for inequitable conduct if an applicant, with intent to mislead or deceive the examiner, fails to disclose material information or submits materially false information to the PTO during prosecution." *Digital Control Inc. v. The Charles Mach. Works, 437 F.3d 1309, 1313 (Fed. Cir. 2006)*. The party urging unenforceability must show by clear and convincing evidence that the applicant met "thresholds of both materiality and intent." *Molins PLC v. Textron, 48 F.3d 1172, 1178 (Fed. Cir. 1995)*. Where, as here, those factual findings were made by the district court, **[**20]** we review them for clear error. *Id.* The ultimate determination of inequitable conduct is committed to the sound discretion of the trial court. We review for abuse of that discretion. *Union Pac. Res. Co. v. Chesapeake Energy Corp., 236 F.3d 684, 693-94 (Fed. Cir. 2001)*.

The first prong of the inequitable conduct test, materiality, is clearly met here. As discussed *supra*, the Festival Market sales render the '156 patent invalid for obviousness. Had those sales been disclosed to the PTO, the patent may or may not have issued. At the very least, the existence of such sales prior to the critical date is a matter that "a reasonable examiner would have considered. . . important in deciding whether to allow the . . . application." *Dayco Prods., Inc. v. Total Containment, Inc., 329 F.3d 1358, 1363 (Fed. Cir. 2003)*; *see also* *Digital Control, 437 F.3d at 1316* (holding that ***HN7***[] "reasonable examiner" standard remains sufficient ground for inequitable conduct materiality even after 1992 amendment of *37 C.F.R. § 1.56*).

The question of deceptive intent is a more difficult one, but we find no clear error in the district **[**21]** court's determination on this point. ***HN8***[] "'Smoking gun' evidence is not required in order to establish an intent to deceive . . . . Rather, this element of inequitable conduct[] must generally be inferred from the facts and circumstances surrounding the applicant's overall conduct." *Paragon Podiatry Lab, Inc. v. KLM Labs., Inc., 984 F.2d 1182, 1189 (Fed. Cir. 1993)*. We have noted that omission of sales made before the critical date is especially problematic:

> ***HN9***[] **[*1346]** Absent explanation, the evidence of a knowing failure to disclose sales that bear all the earmarks of commercialization reasonably supports an inference that the inventor's attorney intended to mislead the PTO. The concealment of sales information can be particularly egregious because, unlike the applicant's failure to disclose, for example, a material patent reference, the examiner has no way of securing the information on his own.

Id. at 1193. While DDI wholly neglected to disclose the Festival Market sales to the PTO, it enthusiastically touted sales made after the critical date as evidence of the commercial appeal of its process. That combination of action and omission permits **[**22]** an inference of the minimum, threshold level of intent required for inequitable conduct. The evidence to support **[***1640]** a finding of intent may not be particularly strong here (a point we discuss further in Part II.D, *infra*.) However, the district court was permitted to balance the relatively weak evidence of intent together with the strong evidence that DDI's omission was highly material to the issuance of the '156 patent and to find that on balance, inequitable conduct had occurred. [4] Such a finding, as an exercise of the district court's equitable powers, is within its discretion. *See* Molins, 48 F.3d at 1178 (**HN10**[] "Once threshold findings of materiality and intent are established, the court must weigh them to determine whether the equities warrant a conclusion that inequitable conduct occurred."). We perceive no abuse of discretion here. The district court's inequitable conduct finding is correct.

[23]** D. *Walker Process Antitrust Claim*

The defendants in this case counterclaimed against DDI for violation of § 2 of the Sherman Act, and the same jury that found the patent obvious found DDI liable on that counterclaim. **HN11**[] Proof that a patentee has "obtained the patent by knowingly and willfully misrepresenting facts to the Patent Office . . . [is] sufficient to strip [the patentee] of its exemption from the antitrust laws." *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*. **HN12**[] A party who asserts such a fraudulently obtained patent may be subject to an antitrust claim. If a patentee asserts a patent claim and the defendant can demonstrate the required fraud on the PTO, as well as show that "the other elements necessary to a § 2 case are present," the defendant-counterclaimant is entitled to treble damages under the antitrust laws. *Id. at 175*.

HN13[] The first barrier for a *Walker Process* claimant to clear is the requirement that the patent be obtained through actual fraud upon the PTO. This question is governed by Federal Circuit law. *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1068 (Fed. Cir. 1998)* **[**24]** (*en banc* in relevant part). A finding of inequitable conduct does not by itself suffice to support a finding of *Walker Process* fraud, because "inequitable conduct is a broader, more inclusive concept than the common law fraud needed to support a *Walker Process* counterclaim." *Nobelpharma, 141 F.3d at 1069*. To demonstrate *Walker Process* fraud, a claimant must make higher threshold showings of both materiality and intent than are required to show inequitable conduct. *Id. at 1070-71*; *C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1364 (Fed. Cir. 1998)* (*Walker Process* **[*1347]** claimant "must make a greater showing of scienter and materiality than when seeking unenforceability based on conduct before the Patent Office"). Furthermore, a finding of *Walker Process* fraud cannot result from an equitable balancing between the two factors; a strong showing of one cannot make up for a deficiency in the other. *Nobelpharma, 141 F.3d at 1071*. The difference in breadth between inequitable conduct and *Walker Process* fraud admits the possibility of a close case whose facts reach the level of inequitable conduct, but **[**25]** not of fraud before the PTO. This is such a case.

HN14[] The heightened standard of materiality in a *Walker Process* case requires that the patent would not have issued but for the patent examiner's justifiable reliance on the patentee's misrepresentation or omission. *C.R. Bard, 157 F.3d at 1364*. The defendants have established materiality even under this strict threshold, since the evidence supports a finding that the patent would not have issued if DDI had disclosed the Festival Market sales to the PTO. The difficulty comes in establishing that the omission of those sales was done with fraudulent intent. DDI did make certain statements to the PTO that would have been more completely accurate had it included information about the Festival Market sales. For instance, it suggested that its method was "the first method to allow serving of a completely free flowing frozen alimentary dairy product for direct consumption by consumers." That statement would have been more helpful to the PTO if it had also disclosed that the first free-flowing sales had arguably happened at Festival Market, but the statement was not actually false. Likewise, DDI argued against obviousness by **[**26]** pointing out that none of the cited references taught free-flowing service. Again, this statement would have better informed the PTO if it had clarified that elsewhere in the prior art, such service arguably existed, but again, the statement was true. The **[***1641]** problem was not with its falsity but with its incompleteness.

Ultimately, the defendants' fraud case here is built only upon DDI's omission of the Festival Market sales from the prosecution record. **HN15**[] While *Walker Process* intent may be inferred from the facts and circumstances of a case, "[a] mere failure to cite a reference to the PTO will not suffice." *Nobelpharma, 141 F.3d at 1071*. This is not to say that an omission always reduces to "mere failure to cite." We acknowledged in *Nobelpharma* "that omissions,

[4] The district court characterized DDI's intent to deceive as "of a high nature." We disagree, but believe that in light of the high materiality of the nondisclosure, inequitable conduct can still be found here even though the evidence reveals less than an egregiously willful intent to deceive.

as well as misrepresentations, may in limited circumstances support a finding of *Walker Process* fraud . . . because a fraudulent omission can be just as reprehensible as a fraudulent misrepresentation." *141 F.3d at 1070*. We believe, though, that to find a prosecution omission fraudulent there must be evidence of intent separable from the simple fact of the omission. A false or clearly **[**27]** misleading prosecution statement may permit an inference that the statement was made with deceptive intent. For instance, evidence may establish that a patent applicant knew one fact and presented another, thus allowing the factfinder to conclude that the applicant intended by the misrepresentation to deceive the examiner. That is not the case with an omission, which could happen for any number of nonfraudulent reasons-the applicant could have had a good-faith belief that disclosure was not necessary, or simply have forgotten to make the required disclosure. In this case, DDI argues that it did not disclose the Festival Market sales to the PTO because it believed that the product there was made without practicing the "storing," "bringing," or "serving" steps of the claim within the specified temperature ranges, and that therefore the Festival Market sales were merely cumulative to other prior **[*1348]** art references which also lacked those three steps. The jury was of course allowed to disbelieve or discount evidence tending to support this claim. However, the defendants submitted no evidence of their own-aside from the absence of the Festival Market sales from the prosecution record-which **[**28]** affirmatively shows DDI's fraudulent intent. That intent cannot be shown merely from the absence of evidence which would come about from the jury's discounting DDI's explanation.

Nobelpharma serves as a good example of the sort of facts that do prove *Walker Process* fraud by omission. In that case, the inventors had transmitted to their Swedish patent agent a draft patent application which included a citation to a book written by the patentee in 1977. *141 F.3d at 1062*. That book was eventually held to anticipate the patent. *Id. at 1072*. The agent "deleted all reference to the 1977 Book from the patent application that was ultimately filed in Sweden" and then also failed to mention the book in the U.S. application that led to the patent at issue. *Id. at 1062*. When pressed on the issue at trial, the agent "could not explain, even in retrospect, why he deleted all reference to the 1977 Book." *Id. at 1072*. We found that the evidence of actual deletion by the patent agent gave the jury reasonable ground to find intent to defraud by the patentees. *Id.*

There is no similarly strong evidence that the omission in this **[**29]** case was fraudulent. It might be argued that because the omitted reference was so important to patentability, DDI must have known of its importance and must have made a conscious decision not to disclose it. That argument has some force, but to take it too far would be to allow the high materiality of the omission to be balanced against a lesser showing of deceptive intent by the patentee. ***HN16***[] Weighing intent and materiality together is appropriate when assessing whether the patentee's prosecution conduct was inequitable. *Molins, 48 F.3d at 1178*. However, when *Walker Process* claimants wield that conduct as a "sword" to obtain antitrust damages rather than as a mere "shield" against enforcement of the patent, *Nobelpharma, 141 F.3d at 1070*, they must prove deceptive intent independently. The defendants have not done so here to the extent necessary for a reasonable jury to find *Walker Process* fraud. The finding of fraud on the PTO is therefore reversed.

DDI also argues that the antitrust judgment must be reversed because the jury was not presented with sufficient evidence of the definition of the relevant market. Fraudulent acquisition of the asserted **[**30]** patent strips the *Walker Process* defendant [5] of its antitrust immunity, but that is the beginning, not the end, of the inquiry. The counterclaimant must also show the basic elements of an antitrust violation defined by the regional circuit's law, including that the patentee's behavior was directed **[***1642]** to a relevant product market. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 375 F.3d 1341, 1363 (Fed. Cir. 2004)*, *rev'd on other grounds*, *546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006)*. [6] In this case, DDI's antitrust immunity remains intact due to insufficient evidence of fraud. We therefore reach neither DDI's argument on this point nor the defendants' argument that DDI **[*1349]** waived the market definition issue by failing to raise it below.

---

[5] Here that defendant is the plaintiff DDI, which is defending against a *Walker Process* counterclaim.

[6] *Unitherm* applied Tenth Circuit ***antitrust law***. *Id.* (citing *United States v. AMR Corp., 335 F.3d 1109, 1113 (10th Cir. 2003)*; *Telecor Communs., Inc. v. Southwestern Bell Tel. Co., 305 F.3d 1124, 1130-31 (10th Cir. 2002))*. Fifth Circuit law also requires proof of a relevant market. *Doctor's Hosp. v. Se. Med. Alliance, 123 F.3d 301, 311 (5th Cir. 1997)*.

[31]** E. *Attorney Fees*

With the judgment of antitrust liability reversed, the grant of attorney's fees under *§ 4 of the Clayton Act* must be vacated. As mentioned *supra*, a motions panel of this court has found that we lack jurisdiction to hear DDI's challenge of that fee grant as to defendant Mosey. *Dippin' Dots v. Mosey, No. 05-1330, slip op. at 3 (Fed. Cir. May 1, 2006)*. However, our vacatur of fees is entirely derivative of our ruling on the merits, not based on an acceptance of DDI's jurisdictionally barred direct challenge to the fee award. The vacatur therefore extends to all defendants, including Mosey. [7]

DDI argued as a separate ground for reversal of the attorney fee award that a jury verdict indicating zero dollars in antitrust damages cannot support a Clayton Act fee award. Since the judgment of liability is reversed, we do not reach this argument.

The district court indicated that if it were to reduce **[**32]** its Clayton Act fee grant, it would increase the fees under the Patent Act to compensate. With the Clayton Act fee grant vacated, the district court may review the award of fees under the patent statute. On remand, the district court may determine whether and to what extent fees under *35 U.S.C. § 285* are appropriate.

III. CONCLUSION

We affirm the findings of noninfringement, obviousness, and unenforceability due to inequitable conduct. We reverse the district court's denial of JMOL as to the antitrust counterclaim, vacate the grants of attorneys' fees under the Clayton Act, and remand for the district court to consider whether an additional fee award under the patent statute is available.

AFFIRMED-IN-PART, REVERSED-IN-PART, VACATED-IN-PART, AND REMANDED

No costs.

---

[7] Defendants move to strike the portions of DDI's amended brief which argue that the fee awards should be vacated if DDI prevails on the merits. Br. of Mosey et al. at 1; Br. of Frosty Bites Distribution LLC at 1. Their objections are denied.

Silicon Servs. Consortium v. Applied Materials

United States District Court for the Western District of Texas, Austin Division

February 16, 2007, Decided; February 16, 2007, Filed

CAUSE NO. A-06-CA-051-LY

Reporter

2007 U.S. Dist. LEXIS 117588 *

SILICON SERVICES CONSORTIUM, INC., SEMICONDUCTOR SUPPORT SERVICES COMPANY, OEM SURPLUS, INC., PRECISION TECHNICIAN INCORPORATED, SEMICONDUCTOR EQUIPMENT SPECIALISTS, INC., PLAINTIFFS, v. APPLIED MATERIALS, INC., DEFENDANT.

Core Terms

tools, relevant market, manufacturing, amended complaint, antitrust, brand, motion to dismiss, microchip, interchangeable, refurbished, monopolization, buyers, Sherman Act, monopoly, products, allegations, tortious, pleaded

Counsel: **[*1]** For Silicon Services Consortium, Inc., Plaintiff: Barry Kent Bishop, LEAD ATTORNEY, Clark, Thomas, & Winters, Austin, TX USA; David M. Gottfried, LEAD ATTORNEY, The Law Office of David M. Gottfried, P.C., Austin, TX USA; Edward William Allred, LEAD ATTORNEY, Watts Guerra LLP, San Antonio, TX USA; Francisco Guerra, IV, LEAD ATTORNEY, Watts Guerra LLP, 4 Dominion Drive, San Antonio, TX USA; Mikal C. Watts, LEAD ATTORNEY, Watts Guerra LLP, San Antonio, TX USA; Pamela J. Madere, LEAD ATTORNEY, Coats, Rose, P.C., Austin, TX USA; Dwayne K. Goetzel, Kowert, Hood, Munyon, Rankin & Goetzel, PC, Austin, TX USA; Eric B. Meyertons, Meyertons, Hood, Kivlin, Kowert & Goetzel, P.C., Austin, TX USA; Ryan Tyler Beard, Akerman LLP, Austin, TX USA.

For Semiconductor Support Services Company, Plaintiff: Barry Kent Bishop, LEAD ATTORNEY, Clark, Thomas, & Winters, Austin, TX USA; David M. Gottfried, LEAD ATTORNEY, The Law Office of David M. Gottfried, P.C., Austin, TX USA; Dwayne K. Goetzel, LEAD ATTORNEY, Kowert, Hood, Munyon, Rankin & Goetzel, PC, Austin, TX USA; Edward William Allred, LEAD ATTORNEY, Watts Guerra LLP, San Antonio, TX USA; Francisco Guerra, IV, LEAD ATTORNEY, Watts Guerra LLP, 4 Dominion **[*2]** Drive, San Antonio, TX USA; Mikal C. Watts, LEAD ATTORNEY, Watts Guerra LLP, San Antonio, TX USA; Pamela J. Madere, LEAD ATTORNEY, Coats, Rose, P.C., Austin, TX USA; Ryan Tyler Beard, LEAD ATTORNEY, Akerman LLP, Austin, TX USA; Eric B. Meyertons, Meyertons, Hood, Kivlin, Kowert & Goetzel, P.C., Austin, TX USA.

For Oem Surplus, Inc., Plaintiff: Barry Kent Bishop, LEAD ATTORNEY, Clark, Thomas, & Winters, Austin, TX USA; David M. Gottfried, LEAD ATTORNEY, The Law Office of David M. Gottfried, P.C., Austin, TX USA; Dwayne K. Goetzel, LEAD ATTORNEY, Kowert, Hood, Munyon, Rankin & Goetzel, PC, Austin, TX USA; Edward William Allred, LEAD ATTORNEY, Watts Guerra LLP, San Antonio, TX USA; Francisco Guerra, IV, LEAD ATTORNEY, Watts Guerra LLP, 4 Dominion Drive, San Antonio, TX USA; Mikal C. Watts, LEAD ATTORNEY, Watts Guerra LLP, San Antonio, TX USA; Pamela J. Madere, LEAD ATTORNEY, Coats, Rose, P.C., Austin, TX USA; Ryan Tyler Beard, LEAD ATTORNEY, Akerman LLP, Austin, TX USA; Eric B. Meyertons, Meyertons, Hood, Kivlin, Kowert & Goetzel, P.C., Austin, TX USA.

Precision Technician Incorporated, Plaintiff, Pro se.

For Precision Technician Incorporated, Plaintiff: Barry Kent Bishop, LEAD ATTORNEY, **[*3]** Clark, Thomas, & Winters, Austin, TX USA; David M. Gottfried, LEAD ATTORNEY, The Law Office of David M. Gottfried, P.C., Austin, TX USA; Edward William Allred, LEAD ATTORNEY, Watts Guerra LLP, San Antonio, TX USA; Francisco Guerra, IV, LEAD ATTORNEY, Watts Guerra LLP, 4 Dominion Drive, San Antonio, TX USA; Lisa A. Shannon, LEAD ATTORNEY, Shannon Law Firm, Phoenix, AZ USA; Mikal C. Watts, LEAD ATTORNEY, Watts Guerra LLP, San Antonio, TX USA; Pamela J. Madere, LEAD ATTORNEY, Coats, Rose, P.C., Austin, TX USA.

For Semiconductor Equipment Specialists, Inc., Plaintiff: Barry Kent Bishop, LEAD ATTORNEY, Clark, Thomas, & Winters, Austin, TX USA; David M. Gottfried, LEAD ATTORNEY, The Law Office of David M. Gottfried, P.C., Austin, TX USA; Dwayne K. Goetzel, LEAD ATTORNEY, Kowert, Hood, Munyon, Rankin & Goetzel, PC, Austin, TX USA; Edward William Allred, LEAD ATTORNEY, Watts Guerra LLP, San Antonio, TX USA; Francisco Guerra, IV, LEAD ATTORNEY, Watts Guerra LLP, 4 Dominion Drive, San Antonio, TX USA; Mikal C. Watts, LEAD ATTORNEY, Watts Guerra LLP, San Antonio, TX USA; Pamela J. Madere, LEAD ATTORNEY, Coats, Rose, P.C., Austin, TX USA; Ryan Tyler Beard, LEAD ATTORNEY, Akerman LLP, Austin, TX **[*4]** USA; Eric B. Meyertons, Meyertons, Hood, Kivlin, Kowert & Goetzel, P.C., Austin, TX USA.

For Applied Materials Inc., Defendant: Alan D Albright, LEAD ATTORNEY, Bracewell LLP, Austin, TX USA; David M. Gottfried, LEAD ATTORNEY, The Law Office of David M. Gottfried, P.C., Austin, TX USA; David J. Miclean, LEAD ATTORNEY, Fish & Richardson, P.C., Redwood City, CA USA; George A. Nicoud, III, LEAD ATTORNEY, Gibson, Dunn & Crutcher, LLP, One Montgomery St. 31st Floor, San Francisco, CA USA; Joel S. Sanders, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, One Montgomery St., 31st Floor, San Francisco, CA USA; John F. Horvath, LEAD ATTORNEY, Fish & Richardson, P.C., Austin, TX USA; Robert E. Cooper, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, Los Angeles, CA USA; Thomas L. Halkowski, LEAD ATTORNEY, Fish & Richardson P.C., Wilmington, DE USA; W. Thomas Jacks, LEAD ATTORNEY, Fish & Richardson P.C., Austin, TX USA.

For Applied Materials Inc., Counter Plaintiff: Alan D Albright, LEAD ATTORNEY, Bracewell LLP, Austin, TX USA; David J. Miclean, LEAD ATTORNEY, Fish & Richardson, P.C., Redwood City, CA USA; John F. Horvath, LEAD ATTORNEY, Fish & Richardson, P.C., Austin, TX USA; Michael Chibib, LEAD ATTORNEY, **[*5]** Bracewell LLP, Austin, TX USA; Patrick S. Richter, LEAD ATTORNEY, Jackson Lewis PC, Austin, TX USA; Thomas L. Halkowski, LEAD ATTORNEY, Fish & Richardson P.C., Wilmington, DE USA; W. Thomas Jacks, LEAD ATTORNEY, Fish & Richardson P.C., Austin, TX USA.

For Semiconductor Support Services Company, Counter Defendant: Dwayne K. Goetzel, LEAD ATTORNEY, Kowert, Hood, Munyon, Rankin & Goetzel, PC, Austin, TX USA; Ryan Tyler Beard, LEAD ATTORNEY, Akerman LLP, Austin, TX USA.

For Oem Surplus, Inc., Counter Defendant: Dwayne K. Goetzel, LEAD ATTORNEY, Kowert, Hood, Munyon, Rankin & Goetzel, PC, Austin, TX USA; Edward William Allred, LEAD ATTORNEY, Watts Guerra LLP, San Antonio, TX USA; Ryan Tyler Beard, LEAD ATTORNEY, Akerman LLP, Austin, TX USA.

For Precision Technician Incorporated, Counter Defendant: Lisa A. Shannon, LEAD ATTORNEY, Shannon Law Firm, Phoenix, AZ USA.

For Semiconductor Equipment Specialists, Inc., Counter Defendant: Dwayne K. Goetzel, LEAD ATTORNEY, Kowert, Hood, Munyon, Rankin & Goetzel, PC, Austin, TX USA; Ryan Tyler Beard, LEAD ATTORNEY, Akerman LLP, Austin, TX USA.

Judges: LEE YEAKEL, UNITED STATES DISTRICT JUDGE.

Opinion by: LEE YEAKEL

Opinion

ORDER

Before the Court are Defendant Applied Materials, Inc.'s **[*6]** ("Applied Materials's") Motion to Dismiss Plaintiffs' First Amended Complaint filed April 7, 2006 (Clerk's Document 25), Plaintiffs' Response to Motion to Dismiss Plaintiffs' First Amended Complaint filed May 9, 2006 (Clerk's Document 31), and Defendant's Reply to Plaintiffs' Response to Motion to Dismiss Plaintiffs' First Amended Complaint filed May 19, 2006 (Clerk's Document 33). A hearing was held before the Court on the motion on August 22, 2006, after which Applied Materials filed a letter brief regarding recent authority (Clerk's Document 39). Having considered the motion, response, reply, arguments of counsel, supplemental briefing, along with the applicable law in this cause, the Court is of the opinion that Applied Materials's motion to dismiss should be denied.

I. Background

Applied Materials makes and sells equipment that is used to manufacture microchips (commonly referred to in the industry as "tools"). Plaintiffs are five independently owned companies that purchase and recondition used tools for the purpose of selling them to microchip manufacturers. Plaintiffs filed this action against Applied Materials on January 19, 2006. Plaintiffs' First Amended Complaint makes claims **[*7]** for antitrust violations under the Sherman Antitrust Act, in addition to tortious interference with prospective business relationships and tortious interference with existing contracts under state law. Plaintiffs claim that Applied Materials's actions amount to monopolization or attempted monopolization in violation of the Sherman Antitrust Act. *See* *15 U.S.C. § 2*. Additionally, they allege that Applied Materials has interfered with Plaintiffs' business relations and existing contracts with microchip manufacturers that previously purchased or agreed to purchase Plaintiffs' refurbished tools.

II. Analysis

In ruling on a motion to dismiss for failure to state a claim, a court must test the formal sufficiency of the statement of the claim for relief. *See* *Doe v. Hillsboro ISD, 81 F.3d 1395, 1401-02 (5th Cir. 1996)*. All well-pleaded facts must be accepted as true and viewed in the light most favorable to the plaintiff. *Spivey v. Robertson, 197 F.3d 772, 774 (5th Cir. 1999)*; *Hillsboro ISD, 81 F.3d at 1401-02* (citing *Campbell v. City of San Antonio, 43 F.3d 973, 975 (5th Cir. 1995))*. The court should dismiss for failure to state a claim only if the court can determine to a certainty that the plaintiff cannot prove any set of facts that would allow relief under the allegations in the complaint. *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)*. The issue is not whether a plaintiff will ultimately prevail, but whether it is entitled to offer evidence to support **[*8]** its claims. *Hillsboro ISD, 81 F.3d at 1401*. The court applies this standard equally to antitrust cases, for which there is no heightened pleading requirement. *Todd v. Exxon Corp., 275 F.3d 191, 198 (2nd Cir. 2001)*.

In determining whether a claimant has pleaded sufficient facts, only specific facts, not mere conclusory allegations or unwarranted deductions, are accepted as true and are considered. *See* *Tuchman v. DSC Commc 'ns Corp., 14 F.3d 1061, 1067 (5th Cir. 1994)*. The court may consider matters subject to judicial notice, as well as the entire contents of documents referred to or incorporated in the complaint. *See* *Lovelace v. Software Spectrum, Inc., 78 F.3d 1015, 1018 (5th Cir. 1996)*.

Applied Materials seeks dismissal of Plaintiffs' amended complaint on the ground that it fails to allege sufficient facts to state a valid claim. *See* *Fed. R. Civ. P. 12(b)(6)*. Specifically, Applied Materials contends that Plaintiffs are required to plead a relevant market in order to make a claim under the Sherman Antitrust Act (the "Sherman Act"), and that Plaintiffs fail to allege an economically plausible relevant market. *See* *15 U.S.C. § 2*; *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 455, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. Applied Materials argues that the market alleged by Plaintiffs is overbroad, because it consists of a variety if noninterchangeable types of tools and the servicing of those tools. Applied Materials also argues that the proposed relevant market is legally insufficient, because it includes only Applied Materials's **[*9]** brand of tools. Further, as to Plaintiffs' state law claims, Applied Materials contends that Plaintiffs have failed to allege a legal duty to Plaintiffs, other than a duty established under ***antitrust law***. Because the ***antitrust-law*** claim fails, it argues, the state-law claims lack a crucial element and must also be dismissed.

Plaintiffs contend that Applied Materials committed antitrust violations by (1) imposing discriminatory conditions on independent refurbishers, such as quantity limits on parts orders, delays in filling and shipping orders, and other requirements that add extra time and burden; followed by (2) almost complete cessation of Applied Materials's longstanding practice of selling parts to independent refurbishers; and (3) implementing policies that discourage customers from dealing with independent refurbishers, such as requiring Plaintiffs' customers to pay Applied Materials a "software license fee" and refusing to sell microchip manufacturers parts to install on tools purchased from independent refurbishers. Plaintiffs claim that these acts are violations of the Sherman Act, because they constitute monopolization or attempted monopolization of "refurbished/reconfigured **[*10]** Applied Materials microchip manufacturing tools and associated service." In the alternative, Plaintiffs allege that these acts constitute monopolization or attempted monopolization of "new and refurbished/reconfigured Applied Materials microchip manufacturing tools."

In response to Applied Materials's contention that Plaintiffs' relevant market is too broad, Plaintiffs contend that either of these two relevant markets are sufficient under the Sherman Act, because the microchip manufacturing tools described in their complaint are "reasonably interchangeable." *See* *Apani Southwest, Inc. v. Coca-Cola Enters., Inc., 300 F.3d 620, 628 (5th Cir. 2002)*. Specifically, although the parts at issue may be configured in numerous ways, any given tool in the alleged relevant market is interchangeable from the buyer's perspective, because a buyer can have that tool configured in a number of different ways, starting with a core part and adding other components to make it function a specific way.

Further, Plaintiffs argue, even if they have not alleged that each type of tool made by either Plaintiffs or Applied Materials is interchangeable within the relevant market, their claims will succeed based on a "cluster market" theory of various types of microchip manufacturing tools, fulfilling **[*11]** the applicable standard for such a market. *See* *JBL Enters. v. Jhirmack Enters., 698 F.2d 1011, 1016-17 (9th Cir. 1983)*.

Additionally, Plaintiffs respond that they have properly alleged a single-brand market by claiming that microchip manufacturers become committed to using Applied Materials tools once they have previously used Applied Materials tools, because of the cost-prohibitive nature of integrating two different brands into the manufacturing process or switching altogether to another brand of tools. *See* *Eastman Kodak Co. v. Image Tech. Servs, Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. Plaintiffs also assert that defining the relevant market affected by Applied Materials's actions is a fact-intensive issue that should not be decided based on the pleadings. *See* *Dimmit Agric., Indus. Inc. v. CPC Int 7 Inc., 679 F.2d 516, 525 (5th Cir. 1982)*.

As to their state-law claims, Plaintiffs recognize that they are dependent upon this Court's determination that Plaintiffs' antitrust claims survive the motion to dismiss.

A. Sherman Act Claims

Section two of the Sherman Act prohibits monopolies, attempts to form monopolies, and combinations and conspiracies to do so. *15 U.S.C. § 2*. Attempted monopolization requires proof: (1) the defendant engaged in predatory or exclusionary conduct, (2) with specific intent to monopolize the relevant market, and (3) there was a dangerous probability the defendant would achieve monopoly power. *Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003)*. For **[*12]** a claim of monopoly, Plaintiffs must establish: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Alcatel USA, Inc. v. DGI Techs, Inc., 166 F.3d 772, 781 (5th Cir. 1999)*. For both claims, proof of the relevant market is an essential element. *Spectrum Sports, Inc., 506 U.S. at 459*. The relevant market is the field in which meaningful competition is said to exist. *United States v. Continental Can Co., 378 U.S. 441, 449, 84 S. Ct. 1738, 12 L. Ed. 2d 953 (1964)*. It consists of products that are "interchangeable in use" and for which there is a "cross-elasticity of demand" between the product and substitutes for it. *Apani Southwest, Inc., 300 F.3d at 626*. An antitrust claim will be dismissed because the relevant legal market is legally insufficient if "the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiffs favor." *Id at 628*.

A single brand's products may constitute a relevant market for purposes of an antitrust violation, but one brand does not necessarily constitute a relevant market **[*13]** if substitutes are available. *Eastman Kodak Co., 504 U.S. at 481 n. 30*. Because the relevant market is determined from the perspective of the buyer, the Court determines if a single brand's products constitute a relevant market by considering if services or parts for the single brand's equipment is interchangeable with the equipment for other brands. *Id.* Such a relevant market has been upheld where the potential buyers for the product are "locked in" to purchase of a single brand because changing from one brand to another involves prohibitive cost. *Id.*

The amended complaint alleges that it is unfeasible for buyers of new or refurbished microchip manufacturing tools to change from one brand of tools to another because the cost of such a change would be prohibitive, and further specifies that microchip manufacturers must use only one brand's tools in order for the manufacturing processes to function together "seamlessly." Plaintiffs allege that Applied Materials's service and parts are not interchangeable with the services and parts offered by other manufacturers. *See id. at 482*.

Construing all factual allegations in the amended complaint in favor of Plaintiffs, this Court holds that the amended complaint specifically alleges a circumstance **[*14]** in which manufacturers are "locked in" to Applied Materials's product, and whereby Applied Materials's single brand constitutes a relevant market. *See id.* This Court disagrees with Applied Materials that any language in the amended complaint contradicts this theory, and finds that the validity of the theory will be tested through discovery performed by the parties, rather than through this Court's consideration of dismissal for failure to state a claim.

Plaintiffs have properly alleged their claims with sufficient reference to the standard of "reasonable interchangeability" between the tools offered to buyers by Applied Materials compared to those offered by Plaintiffs. *See Apani Southwest, Inc., 300 F.3d at 628*. Although the amended complaint does not allege that all tools made by either Applied Materials or Plaintiffs in this market are reasonably interchangeable, such an allegation is not necessary to survive a motion to dismiss. *See e.g. United States v. E. I. Du Pont de Nemours & Co., 353 U.S. 586, 595, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957)* (upholding relevant market consisting of automotive finishes *and* fabrics); *General Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 805-06 (8th Cir. 1987)* (affirming relevant market of "pet supplies," consisting of non-interchangeable goods, as "pragmatic and realistic description of the level at which [antitrust defendant's products and plaintiff's products] **[*15]** were in competition"). Furthermore, this Court holds that Plaintiffs have properly pleaded a "cluster market" that survives a motion to dismiss. *See JBL Enters., 698 F.2d at 1016-17*. The Court disagrees that, because Plaintiffs have described each tool as unique, customer demand is necessarily directed at individual tools rather than a cluster of tools. Whether buyers tend to purchase a package of tools rather than individual tools is precisely the type of factual dispute that the parties will develop and resolve as the case progresses. Plaintiffs are entitled to discovery to determine such "commercial realities" of microchip manufacturing. *See United States v. Grinnell Corp., 384 U.S. 563, 572, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)* ("We see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities"). Plaintiffs' description of a market in which tools are combined with the associated refurbishment services also passes facial muster, for these may constitute a "cluster market" in which buyers seek purchase of both tools and the associated services together.

The Court considers all of Applied Materials's arguments in light of the general rule that definition of the relevant market in antitrust cases is a fact-intensive determination. **[*16]** *Todd, 275 F.3d at 198*. Applied Materials's arguments are fact-based and are insufficient to support a motion to dismiss. The Court therefore finds that Plaintiffs have adequately pleaded attempted monopoly and monopoly under Section Two of the Sherman Act and will deny Applied Materials's motion to dismiss.

B. State Law Claims

The elements of a cause of action for tortious interference with an existing contract are "(1) the existence of a contract subject to interference, (2) the act of interference was willful and intentional, (3) such intentional act was a proximate cause of plaintiffs damage and (4) actual damage or loss occurred." *Johnson v. Hospital Corp. of Am.*, 95 F.3d at 394 (citing *Victoria Bank & Trust Co. v. Brady, 811 S.W.2d 931, 939 (Tex. 1991))*. Applied Materials does not contest that Plaintiffs have stated a claim under these elements; rather, it argues that the face of the amended complaint establishes the affirmative defense of justification, and that the claim therefore should be dismissed.

The Court declines to find that the amended complaint establishes that Applied Materials acted in accordance with its "own legal rights or a good-faith claim to a colorable legal right, even though that claim ultimately proves to be mistaken." *See Texas Beef Cattle Co. v. Green, 921 S.W.2d 203, 211 (Tex. 1996)*. As Plaintiffs have sufficiently pleaded a claim for a Sherman Act **[*17]** violation, the Court cannot find that the face of the complaint establishes that Applied Materials acted as a matter of right.

To state a claim for tortious interference with prospective contract or business relationships, Plaintiffs must prove (1) reasonable probability that the parties would have entered into a contractual relationship, (2) an independently tortious or wrongful act by the defendant performed by the defendant with a conscious desire to prevent the relationship from occurring or with knowledge that the interference was certain or substantially likely to occur as a result of its conduct, (3) the defendant lacked privilege or justification to do the act, and (4) actual harm or damage resulted from the defendant's interference." *Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 726 (Tex. 2001)*; *Bradford v. Vento, 48 S.W.3d 749, 757 (Tex. 2001)*. Applied Materials disputes only whether Plaintiffs have stated a claim as to "independently tortious or wrongful acts" of Applied Materials. Applying the relevant standard to Plaintiffs state law claims and having found that Plaintiffs have stated a claim as to antitrust violations, this Court finds that Plaintiffs have sufficiently pleaded to overcome Applied Materials's *Rule 12(b)(6)* motion to dismiss.

III. Conclusion

IT IS THEREFORE ORDERED that Applied **[*18]** Materials's Motion to Dismiss Plaintiffs' First Amended Complaint (Clerk's Document 25) is **DENIED**.

IT IS FURTHER ORDERED that the parties are to submit to the Court a Proposed Agreed Scheduling Order, in accordance with *Federal Rule of Civil Procedure 26(f)*, that follows the form scheduling order of this Court located on the website for the United States District Court for the Western District of Texas (www.txwd.uscourts.gov), the "Forms" tab, "Austin Division," **on or before March 16, 2007**. The proposed order is to include proposed dates, not general provisions tied to the ultimate date of trial or the date of entry of a scheduling order. The proposed order is not to include, however, a date for the final pretrial conference or for trial of the matter.

SIGNED this 16th day of February, 2007.

/s/ Lee Yeakel

LEE YEAKEL

UNITED STATES DISTRICT JUDGE

In re Dynamic Random Access Memory Dram Antitrust Litig.

United States District Court for the Northern District of California

February 20, 2007, Decided; February 20, 2007, Filed

No. M 02-1486 PJH

Reporter

2007 U.S. Dist. LEXIS 107598 *

In re DYNAMIC RANDOM ACCESS MEMORY (DRAM) ANTITRUST LITIGATION. This Document Relates to: All Direct Purchaser Actions

Core Terms

conspiracy, prices, cost-plus, plaintiffs', purchaser, communications, output, antitrust, contracts, summary judgment, defendants', collusive, alleged conspiracy, direct evidence, emails, pre-existing, circumstantial evidence, competitors, summary judgment motion, manufacturers, participated, overcharge, exhibits, seal, market share, auction, pass-on, price-fixing, Declaration, hearsay

Counsel: **[*1]** For Charles B. Renfrew, Special Master: Josef Deen Cooper, Tracy R. Kirkham, Cooper & Kirkham, P.C., San Francisco, CA. For Internet Integration Inc., on its own behalf and on behalf of all others similarly situated, Plaintiff: Cadio R. Zirpoli, LEAD ATTORNEY, Saveri & Saveri, Inc., San Francisco, CA; Fred Taylor Isquith, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman&Herz LLP, New York, NY; Joseph J. Tabacco, Jr., LEAD ATTORNEY, Berman Tabacco, San Francisco, CA; Merrick Scott Rayle, LEAD ATTORNEY, Lovell Stewart Halebian LLP, Pacific Grove, CA; Adam C Briggs, PRO HAC VICE, Godfrey & Kahn SC, Madison, WI; Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Anthony J. Gaughan, Godfrey & Kahn, S.C., Madison, WI; Anthony D. Shapiro, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Christopher Lovell, Lovell Stewart Halebian LLP, New York, NY; Donald Scott Macrae, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Eugene A. Spector, Spector Roseman & Kodroff, PC, Philadelphia, PA; Francis A. Bottini, Jr., Bottini & Bottini, Inc., La Jolla, CA; Francis M. Gregorek, Wolf Haldenstein Adler Freeman & Herz LLP, Symphony Towers, San Diego, CA; Garrett **[*2]** D. Blanchfield, Jr., Reinhardt Wendorf & Blanchfield, St. Paul, MN; Geoffrey Conrad Rushing, Saveri & Saveri Inc., San Francisco, CA; Guido Saveri, Saveri & Saveri, Inc., San Francisco, CA; Jeffrey J. Corrigan, SPECTOR ROSEMAN & KODROFF, P.C., Philadelphia, PA; Joel Cary Meredith, Meredith & Associates, Philadelphia, PA; John A. Macoretta, SPECTOR ROSEMAN & KODROFF, P.C., Philadephia, PA; Kevin J. O'Connor, Godfrey & Kahn, S.C., Madison, WI; Linda S. Schmidt, One East Main Street, Madison, WI; Mark Reinhardt, Reinhardt Wendorf Blanchfiel, St. Paul, MN; Paul J. Stancil, Milwaukee, WI; Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA; Steve W. Berman, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Steven J. Greenfogel, Lite DePalma Greenburg, LLC, Philadelphia, PA; Steven A. Kanner, Freed Kanner London & Millen LLC, Bannockburn, IL; Susan Gilah Kupfer, Glancy Prongay & Murray LLP, Berkeley, CA.

For William Breck Seiniger, Jr., Plaintiff: Joseph J. Tabacco, Jr., Berman Tabacco, San Francisco, CA; Steve W. Berman, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Craig Ripley Spiegel, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Eugene A. Spector, **[*3]** Spector Roseman & Kodroff, PC, Philadelphia, PA; Garrett D. Blanchfield, Jr., Reinhardt Wendorf & Blanchfield, St. Paul, MN; Jeffrey J. Corrigan, SPECTOR ROSEMAN & KODROFF, P.C., Philadelphia, PA; Joel Cary Meredith, Meredith & Associates, Philadelphia, PA; John A. Macoretta, SPECTOR ROSEMAN & KODROFF, P.C., Philadephia, PA; Mark Reinhardt, Reinhardt Wendorf Blanchfiel, St. Paul, MN; Philip Howard Gordon, Gordon Law Offices Chartered, Boise, ID; Steven J.

Greenfogel, Lite DePalma Greenburg, LLC, Philadelphia, PA; Steven A. Kanner, Freed Kanner London & Millen LLC, Bannockburn, IL; Susan Gilah Kupfer, Glancy Prongay & Murray LLP, Berkeley, CA.

For C3 Information Technology LLC, Midland Solutions Group Inc., Plaintiffs: Joseph J. Tabacco, Jr., LEAD ATTORNEY, Berman Tabacco, San Francisco, CA; Steven A. Kanner, LEAD ATTORNEY, Freed Kanner London & Millen LLC, Bannockburn, IL; Anthony D. Shapiro, Steven J. Greenfogel, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Eugene A. Spector, Spector Roseman & Kodroff, PC, Philadelphia, PA; Garrett D. Blanchfield, Jr., Reinhardt Wendorf & Blanchfield, St. Paul, MN; Jeffrey J. Corrigan, John A. Macoretta, SPECTOR ROSEMAN & KODROFF, P.C., Philadelphia, **[*4]** PA; Joel Cary Meredith, Meredith & Associates, Philadelphia, PA; Mark Reinhardt, Reinhardt Wendorf Blanchfiel, St. Paul, MN; Philip Howard Gordon, Gordon Law Offices Chartered, Boise, ID; Steve W. Berman, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Susan Gilah Kupfer, Glancy Prongay & Murray LLP, Berkeley, CA.

For Continental Promotion Group Inc., Plaintiff: Joseph J. Tabacco, Jr., LEAD ATTORNEY, Berman Tabacco, San Francisco, CA; Mark Reinhardt, LEAD ATTORNEY, Reinhardt Wendorf Blanchfiel, St. Paul, MN; Anthony D. Shapiro, Steven J. Greenfogel, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Eugene A. Spector, Spector Roseman & Kodroff, PC, Philadelphia, PA; Garrett D. Blanchfield, Jr., Reinhardt Wendorf & Blanchfield, St. Paul, MN; Jeffrey J. Corrigan, John A. Macoretta, SPECTOR ROSEMAN & KODROFF, P.C., Philadelphia, PA; Joel Cary Meredith, Meredith & Associates, Philadelphia, PA; Mark A. Wendorf, Reinhardt Wendorf & Blanchfield, St. Paul, MN; Philip Howard Gordon, Gordon Law Offices Chartered, Boise, ID; Steve W. Berman, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Steven A. Kanner, LEAD ATTORNEY, Freed Kanner London & Millen LLC, Bannockburn, IL; Susan **[*5]** Gilah Kupfer, Glancy Prongay & Murray LLP, Berkeley, CA.

For Web Ideals LLC, Plaintiff: Eugene A. Spector, LEAD ATTORNEY, Spector Roseman & Kodroff, PC, Philadelphia, PA; Joseph J. Tabacco, Jr., LEAD ATTORNEY, Berman Tabacco, San Francisco, CA; Anthony D. Shapiro, Steven J. Greenfogel, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Garrett D. Blanchfield, Jr., Reinhardt Wendorf & Blanchfield, St. Paul, MN; Jeffrey J. Corrigan, John A. Macoretta, SPECTOR ROSEMAN & KODROFF, P.C., Philadelphia, PA; Joel Cary Meredith, Meredith & Associates, Philadelphia, PA; Mark Reinhardt, Reinhardt Wendorf Blanchfiel, St. Paul, MN; Philip Howard Gordon, Gordon Law Offices Chartered, Boise, ID; Steve W. Berman, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Steven A. Kanner, LEAD ATTORNEY, Freed Kanner London & Millen LLC, Bannockburn, IL; Susan Gilah Kupfer, Glancy Prongay & Murray LLP, Berkeley, CA.

For 5207 Inc., Plaintiff: Daniel W. Krasner, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLP, New York, NY; Joseph J. Tabacco, Jr., LEAD ATTORNEY, Berman Tabacco, San Francisco, CA; Laurence D. King, LEAD ATTORNEY, Kaplan Fox & Kilsheimer LLP, San Francisco, CA; Mary Jane Edelstein, LEAD **[*6]** ATTORNEY, Wolf Heldenstein Alder Freeman & Herz, Chicago, IL; Richard Michael Hagstrom, LEAD ATTORNEY, Hellmuth & Johnson, PLLC, Edina, MN; Richard L. Voelbel, LEAD ATTORNEY, Zelle Hofmann Voelbel Mason & Gette LLP, Minneapolis, MN; Thomas Joseph O'Reardon, II, LEAD ATTORNEY, Blood Hurst O'Reardon LLP, San Diego, CA; Anthony D. Shapiro, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Daniel E. Gustafson, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN; Emilio Eugene Varanini, IV, State Attorney General's Office, San Francisco, CA; Eugene A. Spector, Spector Roseman & Kodroff, PC, Philadelphia, PA; Francis A. Bottini, Jr., Bottini & Bottini, Inc., La Jolla, CA; Garrett D. Blanchfield, Jr., Reinhardt Wendorf & Blanchfield, St. Paul, MN; Gary Laurence Specks, Kaplan Fox & Kilsheimer LLP, New York, NY; Jason Allen Zweig, Hagens Berman Sobol Shapiro LLP, New York, NY; Jeffrey J. Corrigan, John A. Macoretta, SPECTOR ROSEMAN & KODROFF, P.C., Philadelphia, PA; Joel Cary Meredith, Meredith & Associates, Philadelphia, PA; Lori Sambol Brody, Browne George Ross LLP, Los Angeles, CA; Mark Reinhardt, Reinhardt Wendorf Blanchfiel, St. Paul, MN; Renae Diane Steiner, Heins Mills & Olson, P.L.C., **[*7]** Minneapolis, MN.

For 5207 Inc., Plaintiff: Richard Jo Kilsheimer, Kaplan Fox And Kilsheimer LLP, New York, NY; Steve W. Berman, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Steven J. Greenfogel, Lite DePalma Greenburg, LLC, Philadelphia, PA; Steven A. Kanner, Freed Kanner London & Millen LLC, Bannockburn, IL; Susan Gilah Kupfer, Glancy Prongay & Murray LLP, Berkeley, CA.

For JEM Electronics Distributors Inc, Plaintiff: Bonny E. Sweeney, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA.

For PC Doctor Inc., Plaintiff: Alfred Glenn Yates, Jr., LEAD ATTORNEY, Law Office of Alfred G. Yates Jr, P.C, Pittsburgh, PA; Stephen E. Connolly, LEAD ATTORNEY, Faruqi & Faruqi, LLP, Jenkintown, PA.

For Network Business Solutions, Plaintiff: Susan Gilah Kupfer, LEAD ATTORNEY, Glancy Prongay & Murray LLP, Berkeley, CA; Joseph J. Tabacco, Jr., Berman Tabacco, San Francisco, CA.

For Advanced Technology Distributors Inc., Plaintiff: Fred A. Silva, LEAD ATTORNEY, Damrell Nelson Schrimp Pallios, Pacher & Silva, Modesto, CA; Roger M. Schrimp, LEAD ATTORNEY, Clinton Paul Walker, Damrell, Nelson, Schrimp, Pallios, Pache, Modesto, CA; Anthony D. Shapiro, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Bonny **[*8]** E. Sweeney, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; Bruce Lee Simon, Pearson Simon & Warshaw, LLP, San Francisco, CA; Gene J. Stonebarger, Stonebarger Law, APC, Folsom, CA; Kathy Lee Monday, Damrell, Nelson, Schrimp, Pallios, Pacher & Silva, Modesto, CA; Steven Noel Williams, Joseph Saveri Law Firm, San Francisco, CA.

For Michael Wilkser, Plaintiff: Willem F. Jonckheer, LEAD ATTORNEY, Schubert Jonckheer & Kolbe LLP, San Francisco, CA; Bernard Persky, Robins Kaplan LLP, New York, NY; Juden Justice Reed, Schubert & Reed LLP, San Francisco, CA; Marvin Alan Miller, Miller Law LLC, Chicago, IL.

For Dolphin Consulting Inc., Plaintiff: Kevin Bruce Love, LEAD ATTORNEY, Hanzman Criden & Love, P.A., South Miami, FL.

For Gregory M. Nespole, Plaintiff: Mary Jane Edelstein Fait, LEAD ATTORNEY, Chicago, IL; Fred Taylor Isquith, Wolf Haldenstein Adler Freeman&Herz LLP, New York, NY.

For Onshore Inc., Plaintiff: Francis A. Bottini, Jr., LEAD ATTORNEY, Bottini & Bottini, Inc., La Jolla, CA; Mary Jane Edelstein Fait, LEAD ATTORNEY, Chicago, IL; Francis M. Gregorek, Wolf Haldenstein Adler Freeman & Herz LLP, San Diego, CA; Fred Taylor Isquith, Wolf Haldenstein Adler Freeman&Herz LLP, New York, NY. **[*9]**

For Daniel E. Clement, Plaintiff: Ryan M. Hagan, Alexander Hawes & Audet, LLP, San Jose, CA.

For Dawn Thompson, Plaintiff: Kenneth George Gilman, LEAD ATTORNEY, Gilman and Pastor, LLP, Boston, MA.

For Bernard Weisburgh on behalf of himself and all others similarly situated, Plaintiff: Allan Steyer, LEAD ATTORNEY, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Dennis James Johnson, LEAD ATTORNEY, Peter John McDougall, Johnson & Perkinson, South Burlington, VT; Ian Otto, Straus & Boies LLP, Fairfax, VA; Lisa Marie Black, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA.

For Mike Kinkade, Plaintiff: Allan Steyer, LEAD ATTORNEY, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; C. Dewey Branstetter, Jr., LEAD ATTORNEY, Sherrard Roe Voigt & Harbison, Nashville, TN; Dennis Stewart, Gustafson Gluek PLLC, San Diego, CA; Ian Otto, Straus & Boies LLP, Fairfax, VA; James G. Stranch, III, Branstetter Stranch & Jennings, PLLC, Nashville, TN; James Gerard Stranch, IV, Branstetter Stranch & Jennings, Nashville, TN; Lisa Marie Black, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA.

For Lance Jennings, Plaintiff: C. Dewey Branstetter, **[*10]** Jr., LEAD ATTORNEY, Sherrard Roe Voigt & Harbison, Nashville, TN; James Gerard Stranch, IV, LEAD ATTORNEY, Branstetter Stranch & Jennings, Nashville, TN; James G. Stranch, III, Branstetter Stranch & Jennings, PLLC, Nashville, TN.

For Jeff Lindsey, on behalf of themselves and all, others similarly situated, Plaintiff: C. Dewey Branstetter, Jr., LEAD ATTORNEY, Sherrard Roe Voigt & Harbison, Nashville, TN; James G. Stranch, III, Branstetter Stranch & Jennings, PLLC, Nashville, TN; James Gerard Stranch, IV, Branstetter Stranch & Jennings, Nashville, TN.

For Don Greene, on behalf of himself and all others, similarly situated in Tennessee, Plaintiff: Allan Steyer, LEAD ATTORNEY, Lisa Marie Black, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Douglas S. Johnston, LEAD ATTORNEY, Barrett, Johnston & Parsley, Nashville, TN; Dennis Stewart, Gustafson Gluek PLLC, San Diego, CA; Ian Otto, Straus & Boies LLP, Fairfax, VA; Jeffrey A. Bartos, Guerrieri EdmondClayman & Bartos PC, Washington, DC; Wyatt B. Durrette, Jr., DurretteBradshaw, Richmond, VA.

For Chiengthong Kongkham, Plaintiff: Allan Steyer, LEAD ATTORNEY, Lisa Marie Black, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, **[*11]** San Francisco, CA; Brooke Elizabeth West, LEAD ATTORNEY, Gergosian & Gralewski, San Diego, CA; Edward M. Gergosian, LEAD ATTORNEY, Gergosian & Gralewski LLP, San Diego, CA; James F. Wyatt, III, LEAD ATTORNEY, Wyatt & Blake LLP, Charlotte, NC; Robert J. Gralewski, Jr., LEAD ATTORNEY, Kirby McInerney LLP, San Diego, CA; Ian Otto, Timothy D. Battin, Straus & Boies LLP, Fairfax, VA.

For John G. Elias, on behalf of himself and all other, similarly situated in Tennessee, Plaintiff: Allan Steyer, LEAD ATTORNEY, Lisa Marie Black, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Brooke Elizabeth West, LEAD ATTORNEY, Gergosian & Gralewski, San Diego, CA; Edward M. Gergosian, LEAD ATTORNEY, Gergosian & Gralewski LLP, San Diego, CA; Matthew Patrick Maniscalco, LEAD ATTORNEY, Straus & Boies LLP, Davis, CA; David Boies, Boies Schiller and Flexner, Armonk, NY; Dennis Stewart, Gustafson Gluek PLLC, San Diego, CA; Hal Hardin, Nashville, TN; Ian Otto, Timothy D. Battin, Straus & Boies LLP, Fairfax, VA; Michael N. Widener, Bonnett Fairbourn Friedman & Balint PC, Signal Mountain, TN; Robert J. Gralewski, Jr., Kirby McInerney LLP, San Diego, CA; Van Bunch, Bonnett Fairbourn, et al., Phoenix, **[*12]** AZ.

For Petro Computer Systems, Inc., Plaintiff: Christine Pedigo Bartholomew, LEAD ATTORNEY, Finkelstein Thompson LLP, San Francisco, CA; Craig C. Corbitt, LEAD ATTORNEY, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; John Dmitry Bogdanov, LEAD ATTORNEY, Cooper & Kirkham, P.C., San Francisco, CA; Adam C. Belsky, Gross & Belsky P.C., San Francisco, CA; Alan R. Plutzik, Bramson Plutzik Mahler & Birkhaeuser, LLP, Walnut Creek, CA; Alexander Michael Schack, Law Offices of Alexander M. Schack, San Diego, CA; Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Anna C. Conley, Zelle Hofmann Voelbel Mason & Gette LLP, San Francisco, CA; Chad M. McManamy, The Mogin Law Firm, PC, San Diego, CA; Christopher Le, Straus & Boies, LLP, Fairfax, VA; Christopher L. Lebsock, Hausfeld LLP, San Francisco, CA; Christopher Thomas Micheletti, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Daniel Edward Birkhaeuser, Bramson, Plutzik, Mahler & Birkhaeuser, Walnut Creek, CA; Daniel S. Glaser, McNulty Law Firm, Bel Air, CA; Daniel Jay Mogin, MoginRubin LLP, San Diego, CA; Douglas Graham Thompson, Jr., Finkelstein Thompson LLP, Washington, DC; Francis Onofrei Scarpulla, **[*13]** Law Offices of Francis O. Scarpulla, San Francisco, CA; Jenelle Welling, Bramson, Plutzik, Mahler & Birkhaeuser, Walnut Creek, CA; Josef Deen Cooper, Tracy R. Kirkham, Cooper & Kirkham, P.C., San Francisco, CA; Joseph Mario Patane, Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Laura Ann Guillen, Winston & Strawn LLP, San Francisco, CA; Lisa Marie Black, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Lisa Jean Frisella, FRISELLA LAW APC, San Diego, CA; Lynnette D. Chen, Janssen Malloy Needham Morrison & Reinholtsen, LLP, Eureka, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Mark Punzalan, Chan Punzalan LLP, San Mateo, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Mila F Bartos, Finkelstein Thompson LLP, Washington, DC; Monique Van Yzerlooy Alonso, Messing Adam and Jasmine LLP, San Francisco, CA; Peter J. McNulty, McNulty Law Firm, Bel Air, CA; Ralph B. Kalfayan, Krause Kalfayan Benink & Slavens, San Diego, CA; Richard Michael Hagstrom, Hellmuth & Johnson, PLLC, Edina, MN; Richard G. Urquhart, Zelle Hofmann Voelbel Mason & Gette LLP, Dallas, TX; Richard L. Voelbel, Zelle Hofmann Voelbel **[*14]** Mason & Gette LLP, Minneapolis, MN; Robert S. Green, Green & Noblin, P.C., Larkspur, CA; Scott Ames, Steven J. Serratore, Serratore & Ames, Los Angeles, CA; Shannon P. Cereghino, Finkelstein Thompson & Loughran, San Francisco, CA; Terry Gross, Gross & Belsky P.C., San Francisco, CA; William Timothy Needham, Janssen Malloy LLP, Eureka, CA.

For Gary Petersen, Plaintiff: Craig C. Corbitt, LEAD ATTORNEY, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Henry A. Cirillo, LEAD ATTORNEY, Smith Dollar PC, Santa Rosa, CA; Kimberly Ann Kralowec, LEAD ATTORNEY, Kralowec Law, P.C., San Francisco, CA; Robert C. Schubert, LEAD ATTORNEY, Schubert Jonckheer & Kolbe LLP, San Francisco, CA; Thomas Patrick Dove, LEAD ATTORNEY, The Furth Firm LLP, San Francisco, CA; Adam C. Belsky, Terry Gross, Gross & Belsky P.C., San Francisco, CA; Alan R. Plutzik, Bramson Plutzik Mahler & Birkhaeuser, LLP, Walnut Creek, CA; Alexander Michael Schack, Law Offices of Alexander M. Schack, San Diego, CA; Anna C. Conley, Zelle Hofmann Voelbel Mason & Gette LLP, San Francisco, CA; Chad M. McManamy, The Mogin Law Firm, PC, San Diego, CA; Christopher Thomas Micheletti, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; **[*15]** Daniel Edward Birkhaeuser, Jenelle Welling, Bramson, Plutzik, Mahler & Birkhaeuser, Walnut Creek, CA; Daniel S. Glaser, Peter J. McNulty, McNulty Law Firm, Bel Air, CA; Douglas Graham Thompson, Jr., Mila F Bartos, Finkelstein Thompson LLP, Washington, DC; Francis Onofrei Scarpulla, Law Offices of Francis O. Scarpulla, San Francisco, CA; John Dmitry Bogdanov, Josef Deen Cooper, Tracy R. Kirkham, Cooper & Kirkham, P.C., San Francisco, CA; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lisa Jean Frisella, FRISELLA LAW APC, San Diego, CA; Lynnette D. Chen, Janssen Malloy

Needham Morrison & Reinholtsen, LLP, Eureka, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Monique Van Yzerlooy Alonso, Messing Adam and Jasmine LLP, San Francisco, CA; Ralph B. Kalfayan, Krause Kalfayan Benink & Slavens, San Diego, CA; Richard Michael Hagstrom, Hellmuth & Johnson, PLLC, Edina, MN; Richard G. Urquhart, Zelle Hofmann Voelbel Mason & Gette LLP, Dallas, TX; Richard L. Voelbel, Zelle Hofmann Voelbel Mason & Gette LLP, Minneapolis, MN; Robert S. Green, Green & Noblin, P.C., Larkspur, CA; Scott **[*16]** Ames, Steven J. Serratore, Serratore & Ames, Los Angeles, CA; Shannon P. Cereghino, Finkelstein Thompson & Loughran, San Francisco, CA; William Timothy Needham, Janssen Malloy LLP, Eureka, CA.

For Pamela Uglem, Dale Dickman, Michael Juetten, Plaintiffs: Craig C. Corbitt, LEAD ATTORNEY, Christopher Thomas Micheletti, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Adam C. Belsky, Terry Gross, Gross & Belsky P.C., San Francisco, CA; Alan R. Plutzik, Bramson Plutzik Mahler & Birkhaeuser, LLP, Walnut Creek, CA; Alexander Michael Schack, Law Offices of Alexander M. Schack, San Diego, CA; Anna C. Conley, Zelle Hofmann Voelbel Mason & Gette LLP, San Francisco, CA; Chad M. McManamy, The Mogin Law Firm, PC, San Diego, CA; Daniel Edward Birkhaeuser, Jenelle Welling, Bramson, Plutzik, Mahler & Birkhaeuser, Walnut Creek, CA; Daniel S. Glaser, Peter J. McNulty, McNulty Law Firm, Bel Air, CA; Daniel Jay Mogin, MoginRubin LLP, San Diego, CA;Douglas Graham Thompson, Jr., Mila F Bartos, Finkelstein Thompson LLP, Washington, DC; Francis Onofrei Scarpulla, Law Offices of Francis O. Scarpulla, San Francisco, CA; John Dmitry Bogdanov, LEAD ATTORNEY, Josef Deen Cooper, Tracy R. Kirkham, Cooper & Kirkham, **[*17]** P.C., San Francisco, CA; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lisa Jean Frisella, FRISELLA LAW APC, San Diego, CA; Lynnette D. Chen, Janssen Malloy Needham Morrison & Reinholtsen, LLP, Eureka, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Ralph B. Kalfayan, Krause Kalfayan Benink & Slavens, San Diego, CA; Richard Michael Hagstrom, LEAD ATTORNEY, Hellmuth & Johnson, PLLC, Edina, MN; Richard G. Urquhart, Zelle Hofmann Voelbel Mason & Gette LLP, Dallas, TX; Richard L. Voelbel, LEAD ATTORNEY, Zelle Hofmann Voelbel Mason & Gette LLP, Minneapolis, MN; Robert S. Green, Green & Noblin, P.C., Larkspur, CA; Scott Ames, Steven J. Serratore, Serratore & Ames, Los Angeles, CA; Shannon P. Cereghino, Finkelstein Thompson & Loughran, San Francisco, CA; William Timothy Needham, Janssen Malloy LLP, Eureka, CA.

For Blumenthal & Associates, Heather Delaney, Plaintiffs: Craig C. Corbitt, LEAD ATTORNEY, Christopher Thomas Micheletti, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Adam C. Belsky, Terry Gross, Gross & Belsky P.C., San Francisco, CA; Alan R. Plutzik, Bramson **[*18]** Plutzik Mahler & Birkhaeuser, LLP, Walnut Creek, CA; Alexander Michael Schack, Law Offices of Alexander M. Schack, San Diego, CA; Anna C. Conley, Zelle Hofmann Voelbel Mason & Gette LLP, San Francisco, CA; Chad M. McManamy, The Mogin Law Firm, PC, San Diego, CA; Daniel Edward Birkhaeuser, Jenelle Welling, Bramson, Plutzik, Mahler & Birkhaeuser, Walnut Creek, CA; Daniel S. Glaser, Peter J. McNulty, McNulty Law Firm, Bel Air, CA; Daniel Jay Mogin, MoginRubin LLP, San Diego, CA;Douglas Graham Thompson, Jr., Mila F Bartos, Finkelstein Thompson LLP, Washington, DC; Francis Onofrei Scarpulla, Law Offices of Francis O. Scarpulla, San Francisco, CA; John Dmitry Bogdanov, LEAD ATTORNEY, Josef Deen Cooper, Tracy R. Kirkham, Cooper & Kirkham, P.C., San Francisco, CA; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lisa Jean Frisella, FRISELLA LAW APC, San Diego, CA; Lynnette D. Chen, Janssen Malloy Needham Morrison & Reinholtsen, LLP, Eureka, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Ralph B. Kalfayan, Krause Kalfayan Benink & Slavens, San Diego, CA; Richard Michael Hagstrom, **[*19]** LEAD ATTORNEY, Hellmuth & Johnson, PLLC, Edina, MN; Richard G. Urquhart, Zelle Hofmann Voelbel Mason & Gette LLP, Dallas, TX; Richard L. Voelbel, LEAD ATTORNEY, Zelle Hofmann Voelbel Mason & Gette LLP, Minneapolis, MN; Robert S. Green, Green & Noblin, P.C., Larkspur, CA; Scott Ames, Steven J. Serratore, Serratore & Ames, Los Angeles, CA; Shannon P. Cereghino, Finkelstein Thompson & Loughran, San Francisco, CA; William Timothy Needham, Janssen Malloy LLP, Eureka, CA.

For Ben Stewart, Plaintiff: Adam C. Belsky, Gross & Belsky P.C., San Francisco, CA; Alan R. Plutzik, Bramson Plutzik Mahler & Birkhaeuser, LLP, Walnut Creek, CA; Alexander Michael Schack, Law Offices of Alexander M. Schack, San Diego, CA; Anna C. Conley, Zelle Hofmann Voelbel Mason & Gette LLP, San Francisco, CA; Chad M. McManamy, The Mogin Law Firm, PC, San Diego, CA; Craig C. Corbitt, LEAD ATTORNEY, Christopher Thomas Micheletti, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Daniel Edward Birkhaeuser, Bramson, Plutzik, Mahler & Birkhaeuser, Walnut Creek, CA; Daniel S. Glaser, McNulty Law Firm, Bel Air, CA; Daniel Jay Mogin, MoginRubin LLP, San Diego, CA; Douglas Graham Thompson, Jr., Finkelstein Thompson LLP, Washington, **[*20]** DC.

Francis Onofrei Scarpulla, Law Offices of Francis O. Scarpulla, San Francisco, CA; John Dmitry Bogdanov, LEAD ATTORNEY, Josef Deen Cooper, Tracy R. Kirkham, Cooper & Kirkham, P.C., San Francisco, CA; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lisa Jean Frisella, FRISELLA LAW APC, San Diego, CA; Lynnette D. Chen, Janssen Malloy Needham Morrison & Reinholtsen, LLP, Eureka, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Ralph B. Kalfayan, Krause Kalfayan Benink & Slavens, San Diego, CA; Richard Michael Hagstrom, LEAD ATTORNEY, Hellmuth & Johnson, PLLC, Edina, MN; Richard G. Urquhart, Zelle Hofmann Voelbel Mason & Gette LLP, Dallas, TX; Richard L. Voelbel, LEAD ATTORNEY, Zelle Hofmann Voelbel Mason & Gette LLP, Minneapolis, MN; Robert S. Green, Green & Noblin, P.C., Larkspur, CA; Scott Ames, Steven J. Serratore, Serratore & Ames, Los Angeles, CA; Shannon P. Cereghino, Finkelstein Thompson & Loughran, San Francisco, CA; William Timothy Needham, Janssen Malloy LLP, Eureka, CA.

For Melissa Barron, Johnson & Jennings, Plaintiffs: Craig C. Corbitt, LEAD ATTORNEY, Christopher **[*21]** Thomas Micheletti, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Adam C. Belsky, Terry Gross, Gross & Belsky P.C., San Francisco, CA; Alan R. Plutzik, Bramson Plutzik Mahler & Birkhaeuser, LLP, Walnut Creek, CA; Alexander Michael Schack, Law Offices of Alexander M. Schack, San Diego, CA; Anna C. Conley, Zelle Hofmann Voelbel Mason & Gette LLP, San Francisco, CA; Chad M. McManamy, The Mogin Law Firm, PC, San Diego, CA; Daniel Edward Birkhaeuser, Jenelle Welling, Bramson, Plutzik, Mahler & Birkhaeuser, Walnut Creek, CA; Daniel S. Glaser, Peter J. McNulty, McNulty Law Firm, Bel Air, CA; Daniel Jay Mogin, MoginRubin LLP, San Diego, CA;Douglas Graham Thompson, Jr., Mila F Bartos, Finkelstein Thompson LLP, Washington, DC; Francis Onofrei Scarpulla, Law Offices of Francis O. Scarpulla, San Francisco, CA; John Dmitry Bogdanov, LEAD ATTORNEY, Josef Deen Cooper, Tracy R. Kirkham, Cooper & Kirkham, P.C., San Francisco, CA; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lisa Jean Frisella, FRISELLA LAW APC, San Diego, CA; Lynnette D. Chen, Janssen Malloy Needham Morrison & Reinholtsen, LLP, Eureka, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, **[*22]** San Francisco, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Ralph B. Kalfayan, Krause Kalfayan Benink & Slavens, San Diego, CA; Richard Michael Hagstrom, LEAD ATTORNEY, Hellmuth & Johnson, PLLC, Edina, MN; Richard G. Urquhart, Zelle Hofmann Voelbel Mason & Gette LLP, Dallas, TX; Richard L. Voelbel, LEAD ATTORNEY, Zelle Hofmann Voelbel Mason & Gette LLP, Minneapolis, MN; Robert S. Green, Green & Noblin, P.C., Larkspur, CA; Scott Ames, Steven J. Serratore, Serratore & Ames, Los Angeles, CA; Shannon P. Cereghino, Finkelstein Thompson & Loughran, San Francisco, CA; William Timothy Needham, Janssen Malloy LLP, Eureka, CA.

For G.C.A. Strategies, Inc., Plaintiff: Craig C. Corbitt, LEAD ATTORNEY, Christopher Thomas Micheletti, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Adam C. Belsky, Terry Gross, Gross & Belsky P.C., San Francisco, CA; Alan R. Plutzik, Bramson Plutzik Mahler & Birkhaeuser, LLP, Walnut Creek, CA; Alexander Michael Schack, Law Offices of Alexander M. Schack, San Diego, CA; Anna C. Conley, Zelle Hofmann Voelbel Mason & Gette LLP, San Francisco, CA; Chad M. McManamy, The Mogin Law Firm, PC, San Diego, CA; Daniel Edward Birkhaeuser, Jenelle Welling, Bramson, **[*23]** Plutzik, Mahler & Birkhaeuser, Walnut Creek, CA; Daniel S. Glaser, Peter J. McNulty, McNulty Law Firm, Bel Air, CA; Daniel Jay Mogin, MoginRubin LLP, San Diego, CA;Douglas Graham Thompson, Jr., Mila F Bartos, Finkelstein Thompson LLP, Washington, DC; Francis Onofrei Scarpulla, Law Offices of Francis O. Scarpulla, San Francisco, CA; John Dmitry Bogdanov, LEAD ATTORNEY, Josef Deen Cooper, Tracy R. Kirkham, Cooper & Kirkham, P.C., San Francisco, CA; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lisa Jean Frisella, FRISELLA LAW APC, San Diego, CA; Lynnette D. Chen, Janssen Malloy Needham Morrison & Reinholtsen, LLP, Eureka, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Ralph B. Kalfayan, Krause Kalfayan Benink & Slavens, San Diego, CA; Richard Michael Hagstrom, LEAD ATTORNEY, Hellmuth & Johnson, PLLC, Edina, MN; Richard G. Urquhart, Zelle Hofmann Voelbel Mason & Gette LLP, Dallas, TX; Richard L. Voelbel, LEAD ATTORNEY, Zelle Hofmann Voelbel Mason & Gette LLP, Minneapolis, MN; Robert S. Green, Green & Noblin, P.C., Larkspur, CA; Scott Ames, Steven J. Serratore, Serratore **[*24]** & Ames, Los

Angeles, CA; Shannon P. Cereghino, Finkelstein Thompson & Loughran, San Francisco, CA; William Timothy Needham, Janssen Malloy LLP, Eureka, CA.

For Leonard Kaplan, Plaintiff: Allan Steyer, LEAD ATTORNEY, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; William F. Patterson, Jr., LEAD ATTORNEY, Forman Rossabi Black P.A., Greensboro, NC; Dennis Stewart, Gustafson Gluek PLLC, San Diego, CA; Ian Otto, Straus & Boies LLP, Fairfax, VA; Lisa Marie Black, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA.

For Microprocessor Designs, Inc., Plaintiff: Allan Steyer, LEAD ATTORNEY, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Daniel R. Karon, LEAD ATTORNEY, Karon LLC, Cleveland, OH; Dennis Stewart, Gustafson Gluek PLLC, San Diego, CA; Ian Otto, Straus & Boies LLP, Fairfax, VA; Lisa Marie Black, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Mary Gilmore Kirkpatrick, Lisman Webster Kirkpatrick & Leckerling, P.C., Burlington, VT.

For Centerprise International, Ltd., Plaintiff: Kevin Peter Roddy, LEAD ATTORNEY, Wilentz Goldman & Spitzer, PA, Woodbridge, NJ; Gary Kostow, Media, PA; Henry Huntington Rossbacher, **[*25]** The Rossbacher Firm, Los Angeles, CA; Ira Neil Richards, PRO HAC VICE, Sscnader Harrison Segal & Lewis LLP, Philadelphia, PA; James Edward Miller, Shepherd Finkelman Miller & Shah, LLP, Chester, CT; James Craig Shah, Media, PA; Natalie Finkelman Bennett, Shepherd, Finkelman, Miller & Shah, LLP, Philadelphia, PA; Scott Rhead Shepherd, Shepherd, Finkelman, Miller Shah, LLP, Media, PA.

For Geraldine Brown, Plaintiff: Charlene Haught Johnson, Jeremiah F. Hallisey, John St. John, Hallisey and Johnson, San Francisco, CA.

For Franza Giffen, Linda Harrington, Mary McDevitt, Plaintiffs: John St. John, Hallisey & Johnson, San Francisco, CA.

For Lawrence Alder, Ashley Pritchett, Anna Underwood, Brighid Flaherty, Kimberly Moore, Sandra Sardinha, Jeromi Quade, Edward Battitori, Andrew James Maclenna, John McKinnon, Vincent Fagan, Donna Siler, Jacqueline Bendoraitif, Derek Patterson, John Brushia, Prokofiew, Julie J. Vargas, Ingrid Gomez, Charles Draughn, Kevin O. Denver, David Meyer, Bethanne Hasson, Monica Browne, Laura Stewart, Kimberly Shea Dowden, GeorgeValton Jones, Donna McCann, Joseph Batwinus, Mark B. Richards, Frank Pasvola, Plaintiffs: Robert J. Bonsignore, LEAD ATTORNEY, Bonsignore Trial **[*26]** Lawyers, PLLC, Las Vegas, NV.

For John McKinnon individually and on behalf of himself and all others similarly situated, Todd Hill individually and on behalf of himself and all others similarly situated, Plaintiffs: D. Michael Noonan, LEAD ATTORNEY, Dover, NH; Robert J. Bonsignore, Bonsignore Trial Lawyers, PLLC, Las Vegas, NV; Steven M. Gordon, Concord, NH.

For Shelly Smith on behalf of herself and all others similarly situated, Plaintiff: D. Michael Noonan, LEAD ATTORNEY, LEAD ATTORNEY, Dover, NH; William Shaheen, Shaheen & Gordon, Dover, NH.

For Donna McCann on behalf of herself and all others similarly situated, Plaintiff: D. Michael Noonan, LEAD ATTORNEY, Dover, NH.

For Thomas K. Maher on behalf of himself and all others similarly situated in North Carolina, Plaintif: Adam Stein, LEAD ATTORNEY, Ferguson Stein Wallas Adkins Gresham & Sumter, PA, Chapel Hill, NC; Jeffrey A. Bartos, Guerrieri Edmond Clayman & Bartos PC, Washington, DC; Wyatt B. Durrette, Jr., DurretteBradshaw, Richmond, VA.

For Michael Solomon, Notice of Motion for Administrative Relief to Determine That the Instant Case Is A Related Case, Plaintiff: Lingel Hart Winters, LEAD ATTORNEY, Law Offices of Lingel H. Winters, **[*27]** San Francisco, CA.

For Corabell B. Arps, Plaintiff: Brett D Baber, LEAD ATTORNEY, Lanham & Blackwell & Baber P.A., Bangor, ME; Samuel W. Lanham, Jr., LEAD ATTORNEY, Lanham & Blackwell, Bangor, ME; Ian Otto, Straus & Boies LLP, Fairfax, VA.

For Gayle Helwani, on behalf of themselves and all others similarly situated and the public, Plaintiff: Lingel Hart Winters, LEAD ATTORNEY, Law Offices of Lingel H. Winters, San Francisco, CA.

For Maritza Mass-Carrero, Plaintiff: Arturo Luciano-Delgado, LEAD ATTORNEY, Arturo Luciano Law Office, San Juan, PR; David Boies, III, Straus & Boies, LLP, Fairfax, VA; Ian Otto, Timothy D. Battin, Straus & Boies LLP, Fairfax, VA. Kenneth G. Walsh, Kirby McInerney LLP, New York, NY.

For Sandra Bishop, On Behalf of Herself and All Others Similarly Situated in Mississippi, Plaintiff: LeRoy Davis Percy, LEAD ATTORNEY, Tollison Law Firm P.A., Oxford, MS.

For Jason Neeley, on behalf of themselves and all others similary situated in the State of Utah, Aaron Stobbe, on behalf of themselves and all others similarly situated in the State of Utah, Plaintiffs: Allan O. Walsh, LEAD ATTORNEY, Jeremy C. Sink, McKay Burton & Thurman, Salt Lake City, UT.

For Stuart Schupler, On **[*28]** behalf of himself and all others similarly situated, Plaintiff: Scott Alan George, LEAD ATTORNEY, Seeger Weiss LLP, Philadelphia, PA; Marc Howard Edelson, Edelson & Associates, LLC, Doylestown, PA.

For Honeywell International, Inc., Plaintiff: James M. Lockhart, LEAD ATTORNEY, Lindquist & Vennum, P.L.L.P., Minneapolis, MN; James J. Ficenec, Newmeyer & Dillion LLP, Walnut Creek, CA; Mark Alan Jacobson, Cozen O'Connor, Minneapolis, MN.

For State of California et al, Plaintiff: Emilio Eugene Varanini, IV, State Attorney General's Office, San Francisco, CA; Paul Andrew Moore, LEAD ATTORNEY, Attorney at Law, San Francisco, CA; Charles M. Kagay, Spiegel Liao & Kagay, LLP, San Francisco, CA; Kathleen E. Foote, Office of the Attorney General, San Francisco, Laura Ann Guillen, Winston & Strawn LLP, San Francisco, CA.

For State of Oregon, Plaintiff: Tim David Nord, LEAD ATTORNEY, Oregon Department of Justice, Financial Fraud/Consumer Protection, Salem, OR.

For State of New York, Plaintiff: Jay L. Himes, LEAD ATTORNEY, Labaton Sucharow LLP, New York, NY; Richard Leonard Schwartz, LEAD ATTORNEY, Office of NY Atty Gen'l, New York, NY; Craig C. Corbitt, LEAD ATTORNEY, Zelle Hofmann Voelbel & Mason LLP, **[*29]** San Francisco, CA; Jeremy Raphael Kasha, Office of NY Attorney General, New York, NY; Laura Ann Guillen, Winston & Strawn LLP, San Francisco, CA.

For State of Alaska, Plaintiff: Clyde E Sniffen, Jr, LEAD ATTORNEY, State of Alaska, Department of Law, Anchorage, AK.

For State of Michigan, Dram Claims Liquidation Trust, Plaintiffs: D. J. Pascoe, LEAD ATTORNEY, Michigan Department of Attorney General, Lansing, MI.

For Mega Comm Technologies, Inc., Plaintiff: Stephen Thomas Erb, Stephen Thomas Erb, APC, San Diego, CA.

For Alan Preis, Plaintiff: Anthony D. Shapiro, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Guido Saveri, Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA.

For Oracle America, Inc., Plaintiff: David Daniel Cross, PRO HAC VICE, Crowell & Moring LLP, Washington, DC; Suzanne E. Rode, Crowell & Moring LLP, San Francisco, CA.

For Chemical Valley Pension Fund of West Virginia, Charter Township of Clinton Police & Fire Retirement System, Intervenor Plas: Brian P. Murray, Glancy Prongay & Murray LLP, New York, NY; Christopher Martin Wood, John K. Grant, Robbins Geller Rudman & Dowd LLP, San Francisco, CA; Marc Schiefer, TILP PLLC, New York, NY; Michael J Vanoverbeke, **[*30]** Vanoverbeke Michaud & Timmony, P.C., Detroit, MI; Thomas C. Michaud, Vanoverbeke Michaud and Timmony, P.C., Detroit, MI.

For Kimball Electronics Tampa, Inc. FKA Reptron Electronics, Inc., Intervenor Pla: Lance Burrow, LEAD ATTORNEY, Burrow $ Shimane, San Jose, CA; Ryan M Hurley, Indianapolis, IN.

For Micron Technology Inc., Defendant: Debra L. Bouffard, LEAD ATTORNEY, Sheehey Furlong & Behm PC, Burlington, VT G. Michael Barnhill, LEAD ATTORNEY, Womble Carlyle Sandridge & Rice PLLC Charlotte, NC; Joel Steven Sanders, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Rebecca Justice Lazarus, LEAD ATTORNEY, Gibson, Dunn & Crutcher, San Francisco, CA; Christine Hart Clay, Gibson, Dunn & Crutcher, LLP, San Francisco, CA; Christopher James Flack, Arnold & Porter LLP, Washington, DC; Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC Charlotte, NC; Jonathan L Stern, Arnold Porter LLP, Washington, DC; George

Charles Nierlich, III, Michael Cecchini, Rachel S. Brass, Gibson Dunn & Crutcher LLP, San Francisco, CA; R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT; Ronald Charles Redcay, Arnold & Porter LLP, Los Angeles, CA; Timothy Michael Martin, O'Melveny & Myers LLP, Los **[*31]** Angeles, CA; William J. Baer, Arnold and Porter Kaye Scholer LLP, Washington, DC; Wilson D. Mudge, Arnold and Porter LLP, Washington, DC.

For Micron Semiconductor Products Inc., Defendant: Debra L. Bouffard, LEAD ATTORNEY, R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT; G. Michael Barnhill, LEAD ATTORNEY, Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC; Joel Steven Sanders, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Rebecca Justice Lazarus, LEAD ATTORNEY, Gibson, Dunn & Crutcher, San Francisco, CA; Christine Hart Clay, Gibson, Dunn & Crutcher, LLP, San Francisco, CA; Christopher James Flack, Arnold & Porter LLP, Washington, DC; George Charles Nierlich, III, Michael Cecchini, Rachel S. Brass, Gibson Dunn & Crutcher LLP, San Francisco, CA; Jonathan L Stern, Arnold Porter LLP, Washington, DC; Joshua David Hess, Dechert LLP, San Francisco, CA; Ronald Charles Redcay, Arnold & Porter LLP, Los Angeles, CA; Timothy Michael Martin, O'Melveny & Myers LLP, Los Angeles, CA; William J. Baer, Arnold and Porter Kaye Scholer LLP, Washington, DC; Wilson D. Mudge, Arnold and Porter LLP, Washington, DC.

For Infineon Technologies AG, Defendant: Christopher **[*32]** J. Heck, LEAD ATTORNEY, Kirkland & Ellis, Los Angeles, CA; Debra L. Bouffard, LEAD ATTORNEY, R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT; Jim D. Cooley, LEAD ATTORNEY, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC; Aton Arbisser, Tanja K. Shipman, Kaye Scholer LLP, Los Angeles, CA; Joshua Stewart Stambaugh, Costell & Cornelius Law Corporation, Santa Monica, CA; Julian Brew, Kaye Scholler LLP, Los Angeles, CA; Karen Walker, Tefft W. Smith, Kirkland & Ellis LLP, Washington, DC; Sarretta McDonough, Kirkland & Ellis LLP, Los Angeles, CA; Timothy Michael Martin, O'Melveny & Myers LLP, Los Angeles, CA.

For Infineon Technologies North America Corp., Defendant: Alexander Fraser MacKinnon, LEAD ATTORNEY, Christopher J. Heck, Eileen Barish, Kirkland & Ellis, Los Angeles, CA; Debra L. Bouffard, LEAD ATTORNEY, R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT; Aton Arbisser, Tanja K. Shipman, Kaye Scholer LLP, Los Angeles, CA; Jeffrey Scott Davidson, Sarretta McDonough, Kirkland & Ellis LLP, Los Angeles, CA; Joshua Stewart Stambaugh, Costell & Cornelius Law Corporation, Santa Monica, CA; Julian Brew, Kaye Scholler LLP, Los Angeles, CA; Karen Walker, Tefft W. Smith, **[*33]** Kirkland & Ellis LLP, Washington, DC; Timothy Michael Martin, O'Melveny & Myers LLP, Los Angeles, CA.

For Hynix Semiconductor Inc., Defendant: Albert J. Boro, Jr., LEAD ATTORNEY, San Francisco, CA; Debra L. Bouffard, LEAD ATTORNEY, R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT; Jane Yang Chang, Kenneth Ryan O'Rourke, Michael Frederick Tubach, Peter Bruce Nemerovski, Timothy Michael Martin, LEAD ATTORNEYS, O'Melveny & Myers LLP, Los Angeles, CA; Steven H. Bergman, LEAD ATTORNEY, Richards Brandt Miller Nelson, Salt Lake City, UT; Cecil S. Chung, Terrence A. Callan, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA; Daniel Lee Alexander, Los Angeles, CA; Paul R. Griffin, Winston & Strawn LLP, San Francisco, CA; Peter Manfred Bransten, Glaser Weil Fink Howard Avchen & Shapiro LLP, San Francisco, CA.

For Hynix Semiconductor Inc., Defendant: Timothy Michael Martin, LEAD ATTORNEY, O'Melveny & Myers LLP, Los Angeles, CA; Cecil S. Chung, Terrence A. Callan, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA; Daniel Lee Alexander, Los Angeles, CA; Paul R. Griffin, Winston & Strawn LLP, San Francisco, CA; Peter Manfred Bransten, Glaser Weil Fink Howard Avchen & Shapiro LLP, **[*34]** San Francisco, CA; R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT.

For Hynix Semiconductor America Inc., Defendant: Albert J. Boro, Jr., LEAD ATTORNEY, San Francisco, CA; Debra L. Bouffard, LEAD ATTORNEY, Sheehey Furlong & Behm PC, Burlington, VT; G. Michael Barnhill, LEAD ATTORNEY, Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC; Jane Yang Chang, Peter Bruce Nemerovski, Timothy Michael Martin, LEAD ATTORNEYS, Kenneth Ryan O'Rourke, O'Melveny & Myers LLP, Los Angeles, CA; Michael Frederick Tubach, LEAD ATTORNEY, O'Melveny & Myers LLP, San Francisco, CA; Steven H. Bergman, LEAD ATTORNEY, Richards Brandt Miller Nelson, Salt Lake City, UT; Cecil S. Chung, Terrence A. Callan, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA; Daniel Lee Alexander, Los Angeles, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Paul R. Griffin, Winston & Strawn LLP, San Francisco, CA; Peter Manfred Bransten, Glaser Weil Fink Howard Avchen & Shapiro LLP, San Francisco, CA; R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT.

For Samsung Electronics Co. Ltd., Defendant: Debra L. Bouffard, LEAD ATTORNEY, Sheehey Furlong & Behm PC, Burlington, VT; Mona Solouki, **[*35]** LEAD ATTORNEY, James Landon McGinnis, Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; David A. Donohoe, Akin Gump Strauss Hauer & Feld LLP, New York, NY; David Sohn, SOHN LEGAL GROUP, P.C., San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jonathan M. Jacobson, Wilson Sonsini Goodrich & Rosati, New York, NY; R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT; Stephen Albert Mansfield, Akin Gump Strauss Hauer & Feld LLP, San Francisco, CA.

For Samsung Semiconductor Inc., Defendant: Debra L. Bouffard, LEAD ATTORNEY, Sheehey Furlong & Behm PC, Burlington, VT; G. Michael Barnhill, LEAD ATTORNEY, Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC; David A. Donohoe, Akin Gump Strauss Hauer & Feld LLP, New York, NY; David Sohn, SOHN LEGAL GROUP, P.C., San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; James Landon McGinnis, Michael W. Scarborough, Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jonathan M. Jacobson, Wilson Sonsini Goodrich & Rosati, New York, NY; R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT; Stephen **[*36]** Albert Mansfield, Akin Gump Strauss Hauer & Feld LLP, San Francisco, CA.

For Nanya Technology Corporation USA, Defendant: Debra L. Bouffard, LEAD ATTORNEY, Sheehey Furlong & Behm PC, Burlington, VT; G. Michael Barnhill, LEAD ATTORNEY, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC; Robert E. Freitas, LEAD ATTORNEY, Freitas Angell & Weinberg LLP, Redwood Shores, CA; Cynthia Wickstrom Zuniga; E. Anne Hawkins, Orrick, Herrington & Sutcliffe LLP, San Francisco, CA.

Howard Mark Ullman, Orrick Herrington & Sutcliffe LLP, San Francisco, CA; Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC; Na'il Benjamin, Benjamin Law Group, P.C., Hayward, CA; R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT; Timothy Michael Martin, O'Melveny & Myers LLP, Los Angeles, CA.

For Elpida Memory USA Inc., Defendant: Debra L. Bouffard, LEAD ATTORNEY, Sheehey Furlong & Behm PC, Burlington, VT; G. Michael Barnhill, LEAD ATTORNEY, Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC; Gabriel Neil Rubin, LEAD ATTORNEY, Jackson Lewis P.C., San Francisco, CA; James Glenn Kreissman, LEAD ATTORNEY, Simpson Thacher and Bartlett, Palo Alto, CA; Robert Bernard Pringle, LEAD ATTORNEY, **[*37]** Winston & Strawn LLP, San Francisco, CA; Harrison J. Frahn, IV, Simpson Thacher & Bartlett, Palo Alto, CA; Jonathan Edward Swartz, Winston & Strawn LLP, San Francisco, CA; Kevin J. Arquit, Weil, Gotshal & Manges LLP, New York, NY; Peter Bach-y-Rita, Chapman and Cutler LLP, San Francisco, CA; Peter F. Burns, Thelen Reid & Priest LLP, San Francisco, CA; R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT; Timothy Michael Martin, O'Melveny & Myers LLP, Los Angeles, CA.

For Mosel Vitelic Corporation USA, Defendant: Debra L. Bouffard, LEAD ATTORNEY, Sheehey Furlong & Behm PC, Burlington, VT; G. Michael Barnhill, LEAD ATTORNEY, Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC; David C. Brownstein, Farmer Brownstein Jaeger & Goldstein LLP, San Francisco, CA; Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC; R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT.

For Winbond Electronics, Corporation America, Defendant: Debra L. Bouffard, LEAD ATTORNEY, Sheehey Furlong & Behm PC, Burlington, VT; R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT; Steven H. Morrissett, Finnegan, Henderson, Farabow, Garrett & Dunner LLP, Palo Alto, CA; William **[*38]** S Farmer, Farmer Brownstein Jaeger & Goldstein LLP, San Francisco, CA.

For NEC Electronics America Inc., Defendant: Debra L. Bouffard, LEAD ATTORNEY, Sheehey Furlong & Behm PC, Burlington, VT; G. Michael Barnhill, LEAD ATTORNEY, Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC; Paul R. Griffin, Winston & Strawn LLP, San Francisco, CA; Robert Bernard Pringle, LEAD ATTORNEY, Jonathan Edward Swartz, Laura Ann Guillen, Winston & Strawn LLP, San Francisco, CA; Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC.

For Crucial Technology Inc., Defendant: Debra L. Bouffard, LEAD ATTORNEY, Sheehey Furlong & Behm PC, Burlington, VT; R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT.

For NEC Electronics Corporation, Defendant: Debra L. Bouffard, LEAD ATTORNEY, Sheehey Furlong & Behm PC, Burlington, VT; Paul R. Griffin, Winston & Strawn LLP, San Francisco, CA; Robert Bernard Pringle, LEAD ATTORNEY, Winston & Strawn LLP, San Francisco, CA; R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT.

For Mosel Vitelic Inc., Defendant; R. Dale Grimes, LEAD ATTORNEY, Matthew J. Sinback, Bass Berry & Sims PLC, Nashville, TN; David C. Brownstein, Farmer Brownstein **[*39]** Jaeger & Goldstein LLP, San Francisco, CA; David R. Esquivel, Bass Berry & Sims, Nashville, TN; Timothy Michael Martin, O'Melveny & Myers LLP, Los Angeles, CA.

For Elpida Memory Inc., Defendant: Debra L. Bouffard, LEAD ATTORNEY, Sheehey Furlong & Behm PC, Burlington, VT; G. Michael Barnhill, LEAD ATTORNEY, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC; James Glenn Kreissman, LEAD ATTORNEY, Simpson Thacher and Bartlett, Palo Alto, CA; R. Dale Grimes, LEAD ATTORNEY, Matthew J. Sinback, Bass Berry & Sims PLC, Nashville, TN; Robert Bernard Pringle, LEAD ATTORNEY, Winston & Strawn LLP, San Francisco, CA; David R. Esquivel, Bass Berry & Sims, Nashville, TN; Harrison J. Frahn, IV, Simpson Thacher & Bartlett, Palo Alto, CA; Jonathan Edward Swartz, Winston & Strawn LLP, San Francisco, CA; Kevin J. Arquit, Weil, Gotshal & Manges LLP, New York, NY; Paul R. Griffin, Winston & Strawn LLP, San Francisco, CA; Peter Bach-y-Rita, Chapman and Cutler LLP, San Francisco, CA; Sheehey Furlong & Behm PC, Burlington, VT; Timothy Michael Martin, O'Melveny & Myers LLP, Los Angeles, CA.

For Nanya Technology Corporation, Defendant: Catherine Yunshan Lui, LEAD ATTORNEY, Orrick, Herrington & Sutcliffe LLP, **[*40]** San Francisco, CA; Debra L. Bouffard, LEAD ATTORNEY, Sheehey Furlong & Behm PC, Burlington, VT; G. Michael Barnhill, LEAD ATTORNEY, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC; R. Dale Grimes, LEAD ATTORNEY, Matthew J. Sinback, Bass Berry & Sims PLC, Nashville, TN; Robert E. Freitas, LEAD ATTORNEY, Freitas Angell & Weinberg LLP, Redwood Shores, CA; Cynthia Wickstrom Zuniga; David R. Esquivel, Bass Berry & Sims, Nashville, TN; E. Anne Hawkins, Orrick, Herrington & Sutcliffe LLP, San Francisco, CA. Howard Mark Ullman, Orrick Herrington & Sutcliffe LLP, San Francisco, CA; Na'il Benjamin, Benjamin Law Group, P.C., Hayward, CA; Sheehey Furlong & Behm PC, Burlington, VT; Timothy Michael Martin, O'Melveny & Myers LLP, Los Angeles, CA.

For Winbond Electronics Corporation, Defendant: Debra L. Bouffard, LEAD ATTORNEY, R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT; David R. Esquivel, Bass Berry & Sims, Nashville, TN; Steven H. Morrissett, Finnegan, Henderson, Farabow, Garrett & Dunner LLP, Palo Alto, CA; William S Farmer, Farmer Brownstein Jaeger & Goldstein LLP, San Francisco, CA.

For Mosel Vitelic Corporation, Defendant: David C. Brownstein, Farmer Brownstein **[*41]** Jaeger & Goldstein LLP, San Francisco, CA; Timothy Michael Martin, O'Melveny & Myers LLP, Los Angeles, CA.

For Hitachi, Ltd., Defendant: Craig P. Seebald, LEAD ATTORNEY, Vinson & Elkins LLP, Washington, DC; Matthew J. Jacobs, LEAD ATTORNEY, Vinson & Elkins LLP, San Francisco, CA.

For Samsung Electronics America, Inc., Defendant: Jonathan M. Jacobson, Wilson Sonsini Goodrich & Rosati, New York, NY.

For NEC Corporation, Defendant: Jonathan Edward Swartz, LEAD ATTORNEY, Winston & Strawn LLP, San Francisco, CA; Paul R. Griffin, LEAD ATTORNEY, Winston & Strawn LLP, San Francisco, CA.

For Samsung Electronics, Inc., Ltd., Defendant: Jonathan M. Jacobson, LEAD ATTORNEY, Wilson Sonsini Goodrich & Rosati, New York, NY David Sohn, SOHN LEGAL GROUP, P.C., San Francisco, CA; Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC.

For Hynix Semi., Inc., Defendant: G. Michael Barnhill, LEAD ATTORNEY, Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Kenneth Ryan O'Rourke, O'Melveny & Myers LLP, Los Angeles, CA; Steven H. Bergman Richards Brandt Miller Nelson, Wells Fargo Center, Salt Lake City, UT.

For Winbond Electronics **[*42]** Corporation, Defendant: G. Michael Barnhill, LEAD ATTORNEY, Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC; William S Farmer, Farmer Brownstein Jaeger & Goldstein LLP, San Francisco, CA.

For Winbound Electronics Corporation America, Defendant: G. Michael Barnhill, LEAD ATTORNEY, Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC; William S Farmer, Farmer Brownstein Jaeger & Goldstein LLP, San Francisco, CA.

For Micron Technology Puerto Rico Inc., Defendant: Edward W. Hill-Tollinche, LEAD ATTORNEY, Humberto Guzman-Rodriguez, San Juan, PR.

For Mortgage Ramp, on behalf of themselves and all others similarly situated in the State of Utah, Defendant: Allan O. Walsh, LEAD ATTORNEY, Jeremy C. Sink, McKay Burton & Thurman, Salt Lake City, UT.

For Toshiba America Electronic Components, Inc., Toshiba Corporation, Defendants: Belinda S Lee, Brendan Andrew McShane, LEAD ATTORNEYS, Latham & Watkins LLP, San Francisco, CA.

For Chip-Tech, Ltd., Respondent: Joseph Michael Barton, LEAD ATTORNEY, Law Offices of Joseph M. Barton, Ross, CA.

For Sun Microsystems, Inc., Movant: Christine Elaine Cwiertny, Crowell & Moring LLP, Irvine, CA; Jerome A. Murphy, Kathryn D. Kirmayer, **[*43]** Kent A. Gardiner, Crowell & Moring LLP, Washington, DC.

For Unisys Corporation, JACO Electronics, Inc, Edge Electronics, Inc., Movants: Christine Elaine Cwiertny, Crowell & Moring LLP, Irvine, CA.

For All American Semiconductor Inc., Movant: Christine Elaine Cwiertny, Crowell & Moring LLP, Irvine, CA; Scott N. Wagner, Bilzin Sumberg Baena Price & Axelrod LLP, Miami, FL.

For Oak Point Partners, Inc., Claimant: Janice A. Alwin, LEAD ATTORNEY, Palatine, IL.

For Erwin Bruder, Richline Technical Services, Objectors: Edward Frank Siegel, Attorney at Law, Cleveland, OH.

For Mike Richline, doing business as Richline Technical Services, Objector: Christopher Andress Bandas, LEAD ATTORNEY, Bandas Law Firm, P.C., Corpus Christi, TX; Frank Christian Liuzzi, Liuzzi, Murphy & Solomon, LLP, San Francisco, CA.

For Thomson Inc., Objector: Richard A. Huser, LEAD ATTORNEY, Thomson Inc., Indianapolis, IN.

For Sean Hull, Objector: Timothy Ricardo Hanigan, LEAD ATTORNEY, Lang Hanigan & Carvalho, LLP, Woodland Hills, CA.

For Bryan Marcus, Barbara Cochran, James Glase, Objectors: John Jacob Pentz, LEAD ATTORNEY, PRO HAC VICE, Sudbury, MA.

For Shannon Cashion, Objector: Steve A Miller, LEAD ATTORNEY, Steve A. Miller, **[*44]** P.C., Denver, CO.

For norman d palmer, Objector: Joseph Darrell Palmer, Carlsbad, CA.

For David C. Marlow, Objector: W. Allen McDonald, LEAD ATTORNEY, Lacy,Price and Wagner, Knoxville, TN.

For Norman D. Palmer, Estate of Fern Cook, Objectors: Joseph Darrell Palmer, LEAD ATTORNEY, Carlsbad, CA.

For Mitsubishi Electric and Electronics USA, Inc., Mitsubushi Electric Corporation, Miscellaneouss: Michael T. Brody, Jenner & Block LLP, Chicago, IL.

For IBM Corporation, Miscellaneous: David Eiseman, IV, Quinn Emanuel Urquhart & Sullivan, San Francisco, CA.

For Hewlett-Packard Company, Miscellaneous: Kenneth M. Vorrasi, Robert A. Skitol, Rodney Michael Hudson, Tracie C. Militano, Drinker Biddle & Reath LLP, Washington, DC.

For Dell, Inc., Miscellaneous: Daniel Tadeusz Dobrygowski, Peter Nels Larson, Jessica Lynn Repa, LEAD ATTORNEYS, Jones Day, San Francisco, CA.

For United States of America, Intervenor: Niall Edmund Lynch, LEAD ATTORNEY, Latham & Watkins LLP, San Francisco, CA; Charles Philip Reichmann, Law Offices of Charles Reichman, Kensington, CA; May Lee Heye, United States Department of Justice, San Francisco, CA; Nathanael M. Cousins, United States Attorney's Office, Northern District of California, **[*45]** San Jose, CA.

Byron Farrington, Intervenor, Pro se, Lexington, KY.

Jonathan Lee Riches, Intervenor, Pro se, Lexington, KY.

Patrick J. Simpson, Intervenor, Pro se, Lexington, KY.

Daniel Anthony Weymouth, Intervenor, Pro se, Lexington, KY.

Andre Cowley, Intervenor, Pro se, Lexington, KY.

Richard Galietti, Intervenor, Pro se, Lexington, KY.

Jermod Holmes, Intervenor, Pro se, Lexington, KY.

Justin Laube, Intervenor, Pro se, Lexington, KY.

Jeffrey Pierre, Intervenor, Pro se, Lexington, KY.

Maurice Shelly, Intervenor, Pro se, Lexington, KY.

Isong Akpan, Intervenor, Pro se, Lexington, KY.

Mario Alvarado, Intervenor, Pro se, Lexington, KY.

Judges: PHYLLIS J. HAMILTON, United States District Judge.

Opinion by: PHYLLIS J. HAMILTON

Opinion

ORDER GRANTING SUMMARY JUDGMENT IN PART AND DENYING SUMMARY JUDGMENT IN PART

Defendants' motions for summary judgment came on for hearing on January 10, 2007 before this court. Plaintiffs, the direct purchaser class ("plaintiffs"), appeared through their class counsel, Guido Saveri, Anthony Shapiro, Fred T. Isquith, R. Alexander Saveri, Frank A. Bottini, Bruce L. Simon, George W. Sampson, Geoffrey C. Rushing, and Clinton P. Walker. Defendants appeared through their counsel, Paul R. Griffin, Robert B. **[*46]** Pringle, Robert E. Freitas, Na'il Benjamin, Howard Ullman, Joel S. Sanders, Ronald C. Redcay, William M. Goodman, Stephen V. Bomse, Harrison J. Frahn, William S. Farmer, and Steven H. Morrissett. Having read all the papers submitted and carefully considered the relevant legal authority, the court hereby GRANTS the motions for summary judgment in part and DENIES the motions for summary judgment in part, for the reasons stated at the hearing, and as follows.

BACKGROUND

The instant action is part of a larger multidistrict litigation proceeding, and arises under *section 1* of the Sherman Act.

A. Background Facts

Dynamic random access memory ("DRAM") is an electronic memory microchip that is used to store digital information and provide high-speed storage and retrieval of data. DRAM is commonly used in a wide assortment of electronic devices, including personal computers, printers, digital cameras, and wireless telephones. It is also the most common kind of random access memory chip sold in both new computers and computer upgrades in the

United States. DRAM is primarily sold in two forms, component and module, both of which come in different densities, speeds, and frequencies. The defendants[1] in the instant **[*47]** action are all engaged in the manufacture and/or sale of DRAM on the worldwide market.

Collectively, they are the leading manufacturers of DRAM, and control the majority of the DRAM market. Beginning in May 2002, the Antitrust Division of the Department of Justice ("DOJ") began investigating the existence of price-fixing in the DRAM industry — specifically, the existence of a conspiracy to restrict supply and raise prices for DRAM among the largest makers and sellers of DRAM globally. Several defendants were targeted by the DOJ as part of this larger investigation. As a result of the investigation, four defendants — Infineon, Hynix, Samsung, and Elpida — have pled guilty to participation in a price-fixing conspiracy in violation of federal ***antitrust law***. In addition, several of their employees and agents have also pled guilty to criminal antitrust violations, and have been sentenced accordingly.

B. The Instant Action

On June 21, 2002, on the heels of the DOJ's antitrust investigation, plaintiffs filed a class action lawsuit in the Southern District of New York, alleging federal antitrust violations by defendants. Plaintiffs are a class comprised of all persons and/or entities who purchased **[*48]** DRAM in the United States market directly from defendants during the period April 1, 1999 through June 30, 2002 (the "class period"). The original action, along with numerous subsequently-filed actions, was later transferred to this court for consolidated pre-trial proceedings, pursuant to the multidistrict litigation ("MDL") procedures set forth in *28 U.S.C. § 1407*. After the cases were transferred and consolidated, plaintiffs filed a consolidated class action complaint on October 1, 2003. The most recent and operative complaint — the Third Consolidated Amended Class Action Complaint — was filed on June 30, 2005.

In their complaint, plaintiffs generally allege that defendants engaged in a global conspiracy to "fix, raise, maintain and stabilize the prices of, and/or allocate the market for, DRAM they sold in the United States" during the class period, and that plaintiffs were injured by this activity when they were forced to pay artificially inflated prices for DRAM. See, e.g.,Third Consolidated Amended Class Action Complaint ("Complaint"), ¶¶ 2, 55, 61-65, 73-74. As part of that conspiracy, plaintiffs allege that the defendants participated in meetings and conversations to discuss the price of DRAM; **[*49]** agreed to manipulate prices and supply so as to boost sagging DRAM sales; issued price announcements and price quotations in accordance with the agreements reached by defendants; and sold DRAM to customers in the United States at non-competitive prices. See id. at ¶ 64.

Now post-discovery, plaintiffs present these allegations in more concrete form. In sum, they assert that defendants effectuated the alleged price-fixing conspiracy in two ways: first, plaintiffs allege that defendants coordinated an industry-wide reduction in DRAM production, or else created the appearance of such a reduction, in order create an artificial DRAM shortage that would ultimately drive up the price of DRAM on the US market. See, e.g., Pl. Opp. Br. re Nanya MSJ at 2:23-3:8. Second, plaintiffs contend that, in connection with creating a supply shortage that would have the effect of increasing the market price for DRAM, the defendants coordinated with each other — through frequent high-level communications and meetings — to raise and keep the DRAM prices artificially high to all DRAM purchasers. See id. at 3:9-16. All these actions, assert plaintiffs, resulted in harm to DRAM purchasers, and render defendants **[*50]** liable to those purchasers under the Sherman Act.

C. The Instant Motions

---

[1] Defendants are: Micron Technology, Inc., and Micron Semiconductor Products, Inc. (collectively "Micron"); Infineon Technologies AG, and Infineon Technologies North America Corp. (collectively "Infineon"); Hynix Semiconductor, Inc., and Hynix Semiconductor America, Inc. (collectively "Hynix"); Samsung Electronics Co., Ltd., and Samsung Semiconductor, Inc. (collectively "Samsung"); Mosel-Vitelic Corporation, and Mosel-Vitelic Corporation (USA)(collectively "Mosel-Vitelic"); Nanya Technology Corporation, and Nanya Technology Corporation USA ("NTC" and "NTC USA," respectively); Winbond Electronics Corporation, and Winbond Electronics Corporation America (collectively "Winbond"); Elpida Memory, Inc., and Elpida Memory (USA) Inc. (collectively "Elpida"); and NEC Electronics America, Inc. ("NEC"). To date, however, seven of these nine defendant groupings have entered into settlement agreements with plaintiffs. Accordingly, only two defendant entities remain, and proceed before the court here on the instant motions for summary judgment — Nanya, and Mosel-Vitelic.

The remaining defendants in this action now move for summary judgment. There are four motions in total, as follows: (1) Nanya Technology Corporation's ("NTC") motion to determine liability under the Sherman Act; (2) Nanya Technology Corporation USA's ("NTC USA") companion motion to determine liability under the Sherman Act; (3) defendants' motion for partial summary judgment based on pre-existing cost-plus contract purchases; and (4) defendants' motion for partial summary judgment based on DRAM purchases from April 1, 2001 to November 30, 2001. In addition, the parties have both filed motions to seal certain documents.

DISCUSSION

A. Summary Judgment Standard

Generally speaking, normal summary judgment standards apply. That is to say, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The court must view the facts in the light most favorable to the non-moving party **[*51]** and give it the benefit of all reasonable inferences to be drawn from those facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

Where, as here, concerted price-fixing is alleged, the plaintiffs bear the ultimate burden of presenting sufficient evidence to prove that an agreement to fix prices existed. See, e.g., *In re Citric Acid Litig., 191 F.3d 1090, 1093 (9th Cir. 1999)*(noting that price-fixing is a per se violation of *section 1* of the Sherman Act). In order for them to survive defendants' motion for summary judgment, therefore, plaintiffs must establish that there is a genuine issue of material fact as to whether defendants entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. See *Matsushita, 475 U.S. at 585-86*. Plaintiffs can establish a genuine issue of material fact by producing either direct evidence that defendants participated in an agreement to fix prices, or circumstantial evidence from which a reasonable fact finder could conclude the same. See, e.g., *Movie 1 & 2 v. United Artists Commc'ns, 909 F.2d 1245, 1251-52 (9th Cir. 1990)*; *United States v. Gen. Motors Corp., 384 U.S. 127, 142-43, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*.

With respect to proof by way of circumstantial evidence in *section 1* cases, special rules apply. In Matsushita Elec. Indus. Co., the Supreme Court noted that "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a [*section 1*] case...". See *475 U.S. at 588*. In addressing plaintiff's burden in proving that an issue **[*52]** of material fact exists on the conspiracy question, the court stated, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy...". See id. In sum, to survive a motion for summary judgment, "a plaintiff seeking damages for a violation of *[section] 1* must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently ...." Id.

The Ninth Circuit has embraced Matsushita and has outlined a two-part test to be applied whenever a plaintiff rests its case entirely on circumstantial evidence. First, the defendant can rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice. Second, the burden then "shifts back to the plaintiff to provide specific evidence tending to show that the defendant was not engaging in permissible competitive behavior." See, e.g., *In re Citric Acid Litig., 191 F.3d at 1094*.

These standards apply here, to the extent that plaintiffs seek to defeat summary judgment as to *section 1* liability on the basis of circumstantial evidence, whether in whole or in part. The court now turns to the four summary judgment motions **[*53]** before it, and addresses each in turn.

B. NTC's Motion for Summary Judgment

NTC attacks plaintiffs' ability to prove that NTC — as distinguished from its subsidiary, NTC USA — is liable for participation in any agreement to fix prices, reduce output, or engage in any other prohibited activity under *section 1* of the Sherman Act. Focusing on its own conduct, NTC argues that plaintiffs cannot prove either (1) that NTC itself is guilty of any unlawful activity, or (2) that NTC is guilty as a co-conspirator, by virtue of its' participation in *other* defendants' unlawful activities. In response, plaintiffs marshal what they claim is both direct and circumstantial evidence of NTC's participation in the alleged *section 1* conspiracy.

Regardless of the parties' differing characterizations of their arguments — i.e., conduct v. nature of evidentiary proof — the fundamental issue raised by the parties is the same: whether there is sufficient direct and/or circumstantial evidence to create a triable issue of fact as to whether NTC participated in the alleged conspiracy to "fix", via output reduction and/or price manipulation, the market for DRAM. In analyzing this issue, the court must consider: (1) the preliminary issue **[*54]** whether plaintiffs may attempt to create a triable issue as to NTC's participation in the overarching conspiracy vis-a-vis NTC's relationship with its wholly owned subsidiary, NTC USA; (2) the direct evidence of NTC's participation in the alleged conspiracy; and (3) the circumstantial evidence of NTC's participation in the same.

1. NTC's Vicarious Liability Based on Relationship with NTC USA

NTC claims that it has a separate legal existence from its wholly owned subsidiary, NTC USA, and that NTC has not engaged in any direct sales of DRAM within the United States since 1998, the year after NTC USA was incorporated. See Declaration of Kenneth M. Hurley ("Hurley Decl."), ¶ 2. In view of this distinction, NTC asserts that plaintiffs cannot offer evidence of NTC USA's conduct in attempting to create a material dispute with respect to NTC's participation in any unlawful activity. See NTC MSJ Op. Br. at 4:18-7:14. Specifically, NTC argues: (1) that under principles of basic corporate law, a parent corporation is not liable for the acts of its subsidiary; (2) that plaintiffs have not and cannot establish liability through an alter ego theory; (3) that vicarious liability also may not be established **[*55]** through the "single entity" doctrine applicable to antitrust cases; and (4) that, even assuming that NTC USA participated in any unlawful acts, there is no evidence that NTC knowingly participated in those unlawful acts. Plaintiffs challenge these contentions, asserting that the evidence of NTC's individual participation in the alleged conspiracy is plentiful, but even if it weren't, NTC could still be found vicariously liable based on NTC USA's conduct, since NTC is the alter ego and marketing conduit for NTC USA.

First, NTC is generally correct that corporate law prohibits a parent corporation from being held liable on the basis of its subsidiary's actions. See, e.g., *U.S. v. Bestfoods, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998)*("It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries."). However, a parent corporation *may* be held liable for the acts of its subsidiary "where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose of controlling a subsidiary **[*56]** company so that it may be used as a mere agency or instrumentality of the owning company." See *id. at 62-63*. Accordingly, NTC may be held vicariously liable for NTC USA's actions, but only if plaintiffs can establish that NTC USA is a mere 'agency or instrumentality' of NTC's.

This brings the court to NTC's second argument, for plaintiffs have chosen to rely on the alter-ego doctrine as an independent theory that would justify the imposition of vicarious liability here. In order to prove that the alter-ego theory applies, plaintiffs must show that there is "such unity of interest and ownership that the separate personalities [of the two entities] no longer exist." See *Doe v. Unocal Corp., 248 F.3d 915 (9th Cir. 2001)*. An alter ego or agency relationship is specifically proven up by facts that demonstrate "parental control of the subsidiary's internal affairs or daily operations." See *Doe, 248 F.3d at 927* (alter ego test also satisfied where the record indicates that the parent dictates "[e]very facet [of the subsidiary's] business - from broad policy decisions to routine matters of day-to-day operation [.]").

Here, plaintiffs attempt to satisfy the alter-ego test by showing that NTC had full operational control over NTC USA and owned 100% of its stock; that NTC manufactured **[*57]** all the DRAM sold by NTC USA; that certain of NTC USA's officers reported directly to NTC; that two of the three directors on NTC USA's board of directors were from NTC; that NTC had ultimate authority over, and made, all of NTC USA's pricing decisions; and that NTC was merely NTC USA's "marketing conduit" during the alleged time period. See Opp. Br. at 32:23-33:7.

The undisputed evidence that plaintiffs rely on, however, discloses only that NTC USA's president, Kenneth Hurley, reported directly to NTC officers; that NTC USA's executives had orders not to deviate from pricing policies set by NTC; and that NTC in fact set the pricing policies that drove NTC USA's DRAM prices. See Declaration of George Sampson in Support of Oppositions ("Sampson Decl."), Exs. 104 at 22:13-16, 23:17-19, 24:18-27:24; 105 at 14; see also Plaintiffs' Slide Presentation in Opp. to NTC MSJ at 36. Even combining this evidence with NTC's undisputed evidence that NTC USA is, in fact, wholly owned by NTC, this evidence is insufficient to prove that NTC USA is NTC's alter ego. See, e.g., Hurley Decl., ¶ 1. This is because the evidence as a whole does not sufficiently speak to whether NTC actually controls the day to day operations and internal affairs of NTC USA, even **[*58]** if NTC does control decisions regarding pricing, nor does it demonstrate that NTC dictates "every facet of NTC USA's business." In the absence of evidence establishing these factors, the alter ego theory is unavailable to plaintiffs as a means of holding NTC vicariously liable for NTC USA's actions.[2]

Nor can plaintiffs demonstrate NTC's liability on the basis of NTC USA's conduct through application of the single entity doctrine. That doctrine, announced in *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*, holds that parent and subsidiary corporations are to be considered a single collective entity for purposes of conspiracy liability under *section 1* of the Sherman Act, and as such, they are incapable of conspiring together under the Act. The doctrine, however, is inapplicable here. Although it deals with the question whether a parent and subsidiary corporation may be charged with conspiring with each other, it says nothing about whether a parent and subsidiary may, collectively or individually, be charged with conspiring with *other* unaffiliated members of an alleged conspiracy. That is the issue before this court. As such, the doctrine cannot be used to invoke NTC's liability with respect to the global conspiracy alleged by plaintiffs. **[*59]**

Finally, NTC argues that no liability can possibly exist via NTC USA, because there are no ties connecting NTC to any unlawful activity by NTC USA, to the extent NTC USA engaged in such activity. NTC USA acted independently, posits NTC, and without NTC's participation. In making this argument, NTC preemptively targets the deposition testimony of Steven Hsu, an NTC USA employee, arguing that his testimony — which confirms NTC's influence over NTC USA's pricing policies — cannot be used to demonstrate NTC's participation in NTC USA's allegedly unlawful activity. Plaintiffs, for their part, fail to rebut NTC's argument in this regard, and they rely on Hsu's testimony for proof of alter ego liability only. In the absence of argument by plaintiffs, the court finds, as NTC urges, that Mr. Hsu's testimony standing alone does not form the basis for vicarious liability.

In conclusion, the court finds that plaintiffs have not created a triable issue of material fact with respect to NTC's vicarious liability for the overarching conspiracy alleged by plaintiffs, on the basis of its relationship with NTC USA. NTC's participation in the alleged overarching conspiracy must be independently proven, **[*60]** either through direct or circumstantial evidence.

2. Direct Evidence of Conspiracy

NTC asserts that there is a general absence of any evidence proving that it (a) participated in a price-fixing agreement with other defendants; (b) reduced its DRAM output in order to drive up prices for DRAM; or (c) engaged in any exchange of price information with any competitor that resulted in an increase or stabilization of market prices.[3] See NTC Op. Br. at 8-13. Plaintiffs, however, assert that there is sufficient direct evidence of NTC's

---

[2] Plaintiffs also drop a footnote in their opposition brief, and further argued at the hearing on this matter, that NTC "could also be held vicariously liable for the acts of [NTC USA] under an agency theory," as distinguished from an alter ego theory. See Opp. Br. at 33 fn. 27. Plaintiffs cited no evidence in support of this assertion, however, relying only on the bald assumption that "without [NTC USA], the parent company [NTC] would have to perform" the marketing and sales functions that Nanya USA engages in. Such conclusory argument, with no supporting evidence, is unpersuasive, and the court declines plaintiffs' invitation to find an agency theory of liability applicable to NTC on the record before it.

[3] NTC also makes the somewhat baffling argument that it does not stand accused of price fixing. Plaintiffs' complaint explicitly charges that defendant — among others — entered into a contract, combination or conspiracy to unreasonably restrain trade, the substantial terms of which were to fix and maintain the price for DRAM. See Third Consolidated Amended Complaint, ¶¶ 61, 63. It is difficult to conclude from this that NTC does not stand "accused" of price fixing, for it is clear from the complaint that this

participation in the alleged conspiracy to raise a genuine issue of material fact on the issue. See *In re Citric Acid Litig., 191 F.3d at 1093* (where a plaintiff produces direct evidence that a defendant entered into an illegal price-fixing agreement, summary judgment will be denied).

Direct evidence in a *section 1* conspiracy case "must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." See *id. at 1094*, citing *In re Baby Food Antitrust Litig., 166 F.3d 112, 118 (3d Cir. 1999)*. Here, plaintiffs contend that they have direct evidence that NTC participated in secret price-fixing meetings with its competitors to discuss DRAM pricing and to coordinate output reduction, and furthermore, that NTC did in fact reduce its DRAM **[*61]** production.

a. emails

Plaintiffs claim that secret meetings among the defendants, including NTC, took place in June and July 2001. For the June meeting(s), plaintiffs first rely on email communications sent in June 2001 by defendant Micron's Managing Director of International Sales, Linda Turner, in which Ms. Turner reports that "the Taiwanese DRAM dudes are pow-wowing next week on how to set a floor" regarding DRAM price, and notes that "Sammy/Infineon/Hynix have had pricing discussions recently." See Sampson Decl., Ex. 14, 15. With respect to the alleged July 2001 meeting(s), plaintiffs point to a July 2001 bulletin to which all DRAM manufacturers subscribe (forwarded via email), which reported that there was "a secret meeting hosted by Taiwanese DRAM companies in Taipei in early July to coordinate a cut in output or at least try to hold the line on prices." See id. at Ex. 86. Although neither source specifically refers to either NTC or NTC USA, plaintiffs contend by way of a separate article identifying NTC as a "local DRAM die manufacturer" that NTC qualifies as one of the "Taiwanese" entities referred to in the above exhibits. See id. at Ex. 85.

This evidence is neither direct nor **[*62]** persuasive. Preliminarily, the court notes that NTC has objected to each of the above exhibits submitted by plaintiffs, on grounds that each constitutes impermissible hearsay. NTC is correct. Plaintiffs are seeking to introduce out of court statements contained in individual emails and industry news bulletins, noting the existence of so-called secret meetings between Taiwanese DRAM manufacturers, as proof that the meetings actually took place. This constitutes hearsay under *Federal Rule of Evidence 801(c)*. Plaintiffs attempt to overcome the objections by invoking the co-conspirator provision to *Rule 801*, which refuses to qualify as hearsay the statements made by co-conspirators of a party during the course and in furtherance of the conspiracy. See *Fed. R. Evid. 801(d)(2)(E)*; see also *Bourjaily v. United States, 483 U.S. 171, 175-81, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987)*. However, as Bourjaily and the Ninth Circuit's subsequent interpretation of that case in United States v. Silverman make clear, in order for such statements to be admissible, there must be evidence beyond the statements in question, that demonstrate by a preponderance of the evidence the underlying conspiracy and NTC's connection to it. *Silverman, 861 F.2d 571, 576 (9th Cir. 1988)*; see also *United States v. Tamez, 941 F.2d 770 (9th Cir. 1991)*. Here, plaintiffs do not attempt to argue, and the court does not attempt to scour the record for, the existence of any **[*63]** such independent evidence that would satisfy the Silverman and Tamez standards. As such, the hearsay objections lodged by NTC to the above exhibits are sustained. Furthermore, to the extent that plaintiffs would attempt to meet their burden in establishing the co-conspirator definition under *FRE 801(d)(2)(E)* by pointing to other sources of evidence that may itself be subject to hearsay objections, the court would find such attempts similarly unpersuasive.

Moreover, even if the court did not sustain NTC's objections herein, the evidence would still not prove persuasive as direct evidence of NTC's participation in secret meetings to fix DRAM prices. Ms. Turner, for example, was a *Micron* employee, not an NTC employee, thereby diminishing the directness of the evidence as far as NTC is concerned. But even if her emails were considered as direct evidence of NTC's own actions, the emails are simply not dispositive of NTC's participation in any agreement or conspiracy. Ms. Turner states in one of her emails only that "the Taiwanese DRAM dudes" will be meeting. Sampson Decl., Ex. 15. She never references NTC specifically, but only defendants Samsung, Infineon and Hynix. And in her second email, while Ms. Turner **[*64]** states that she has "heard rumors from one of the Taiwan DRAM makers that there is a meeting scheduled with all of the Taiwan

---

is precisely what plaintiffs accuse. To the extent, however, that NTC really means simply that plaintiffs have not successfully *proven* the actual existence of any agreement to actually fix prices, this argument is dealt with in the body of this section.

DRAM makers over the next week to discuss raising their pricing," there is again no mention of NTC specifically, just an allegation of a "rumor" told to Ms. Turner by an unnamed "Taiwan DRAM maker." See Sampson Decl., Ex. 14.

In short, this evidence is not explicit, and would require that the court make certain inferences unsupported by the record to conclude that NTC participated in any of the alleged secret meetings, or for that matter in the conspiracy. Accordingly, the court concludes that the emails are not direct evidence sufficient to defeat NTC's motion for summary judgment.

b. Mr. Kau's testimony

Plaintiffs also rely on the deposition testimony of NTC Vice President Charles Kau, as direct evidence that NTC participated in meetings and discussions with its Taiwanese rivals regarding a DRAM production cut. According to plaintiffs, Mr. Kau testified that there was a local conference that took place around 2001, at which he recalls discussing a DRAM production cut with NTC's competitors. See Sampson Decl., Ex. 88 at 107:14-24.

Here, too, however, plaintiffs' **[*65]** reliance on this testimony as direct evidence of NTC's participation in secret meetings to raise DRAM prices or cut production, is misplaced. For as NTC points out, plaintiffs have completely — and disingenuously — omitted Mr. Kau's follow-up explanation with respect to the very statement upon which plaintiffs rely. To wit, when asked during follow-up deposition questioning about the 2001 conference at which the production cut was discussed, Mr. Kau clarified that, while a discussion was in fact raised about reducing DRAM output, the discussion was also immediately halted when someone present during the discussion noted that cutting production would be illegal. See Benjamin Reply Decl., Ex. A at 160-161. Mr. Kau then went on to testify that, at any rate, NTC did not reduce production following that discussion. Id.

In view of the complete testimony offered by Mr. Kau on the subject, Mr. Kau's statements cannot be considered direct evidence of NTC's involvement in meetings to fix DRAM prices or to cut production of DRAM in order to raise DRAM prices.

c. industry news and articles

Finally, plaintiffs rely on a series of three news articles written in 2001, in which Mr. Kau was quoted, and **[*66]** that refer to discussions about joint efforts by defendants to cut DRAM production. See Opp. Br. at 10:20-21. First, on August 14, 2001, an EBN article entitled "Taiwan DRAM makers may cut output" was published, in which Mr. Kau is quoted as stating that NTC is "willing to cooperate" in a production cut. See Sampson Decl., Ex. 22. Second, on October 1, 2001, a Financial Times article entitled "Nanya raises the prospect of cuts in DRAM output," quoted Mr. Kau as saying that NTC was "willing to cut production voluntarily, once we have got the right signal." See id. at Ex. 23. Finally, in a separate Financial Times article also dated October 1, 2001, Mr. Kau purportedly stated that "Taiwanese strategies include ... exploring the possibility of joint production cuts...", and he furthermore joked that the DRAM industry might one day be called "D-Pec," like the "Global oil cartel OPEC." See id. at Ex. 24; see also Ex. 88 at 125:6-127:23.

Preliminarily, as with the emails discussed above, NTC has raised hearsay objections to the three articles in question. Plaintiffs seek to use statements in each article attributed to Mr. Kau, to the effect that NTC was willing to participate in joint efforts **[*67]** to cut DRAM production. In the court's view, plaintiffs offer Mr. Kau's statements for the truth of the matter asserted therein, and as such, the statements uttered by Mr. Kau are inadmissible hearsay. Furthermore, none of the hearsay exceptions relied on by plaintiffs — i.e., co-conspirator or party admission exceptions — apply. The co-conspirator exception fails for the same reasons already enunciated above. As for the party admission exception, while it is true that the statements at issue were made by Mr. Kau in his representative capacity for NTC, the statements as relayed in the newspaper articles simply do not bear sufficient indicia of reliability such that the party admission exception is warranted. The court finds newspaper articles, even the direct quotes contained within them, to be inherently unreliable. Moreover, there is proof of such unreliability here. As Mr. Kau testified, his comments were translated into English from the Chinese language, and the content of the statements as written does not accurately reflect the content of Mr. Kau's statements to the articles' authors. See

Benjamin Reply Decl., Ex. A at 112-15. Accordingly, NTC's objections to the articles on **[*68]** hearsay grounds, are sustained.

Even if Mr. Kau's statements in the newspaper articles in question were to be considered substantively, the court would nonetheless find that they do not constitute direct evidence of NTC's participation in a conspiracy to cut DRAM production or fix DRAM prices. It is true enough that the statements attributed to Mr. Kau in the articles deal with the concept of cutting DRAM production. See Sampson Decl., Exs. 22-24. However, Mr. Kau's statements are not statements that explicitly concede the existence of any actual agreement to limit production of DRAM, nor are they statements that would lead to such a conclusion without need of any inferences. For example, in the first EBN article, Mr. Kau said only that everyone was feeling the need to cut production, but that "as of how to engage in the cut is an issue that needs to be discussed." See id. at Ex. 22. This statement expressly leaves open the question of whether NTC would choose to limit production, and if so, how it would do so. Similarly, in the first Financial Times article, Mr. Kau is referenced as stating that DRAM rivals had approached NTC about coordinating output cuts, but he is also referenced **[*69]** as stating that any moves would have to be led by other producers, that "leading by example was more important than attempts to coordinate, and that [NTC] would be 'willing to cut production voluntarily, once we have got the right signal.'" See id. at Ex. 23. This, too, expressly leaves open the possibility of a voluntary production cut *independent of* any joint attempt to coordinate production cuts.[4] Finally, with respect to the last article Financial Times article cited by plaintiffs, while Mr. Kau may have engaged in the unwise strategy of joking about the future existence of a "D-Pec", there is simply nothing in the article that indicates NTC's participation in an actual agreement or conspiracy to limit production or raise prices.

In sum, as with the emails and the evidence of Mr. Kau's deposition testimony, none of the news articles or Mr. Kau's statements therein constitute direct evidence of NTC's participation in the conspiracy alleged by plaintiffs. Accordingly, the court finds that plaintiffs have not presented any direct evidence that successfully defeats NTC's motion for summary judgment.

3. Circumstantial Evidence of Conspiracy

The above conclusion brings the court **[*70]** to the central issue raised by the parties — whether there is sufficient circumstantial evidence of NTC's participation in an agreement to fix the ultimate price of DRAM, whether via participation in a coordinated output reduction or discussions regarding pricing. Keeping in mind the Matsushita standards enunciated above, the critical question in evaluating this issue is "whether all the evidence considered as a whole can reasonably support the inference that [NTC] conspired with the admitted conspirators to fix prices." See *In re Citric Acid, 191 F.3d at 1097*.

Plaintiffs generally point to three categories of evidence that they claim supports an "inference" of collusive conduct sufficient to preclude summary judgment: (a) economic evidence; (b) evidence of NTC's "frequent, high-level communications" correlated to specific collusive behavior; and (c) evidence of several co-defendants' guilty pleas in the DOJ's related criminal antitrust proceedings.

a. economic evidence

Plaintiffs contend that two types of economic evidence in this case demonstrate that a conspiracy makes economic sense and is plausible. First, plaintiffs point to evidence regarding the structure of the DRAM market as a whole, and specifically to their **[*71]** expert, Dr. Roger Noll, whose report and testimony plaintiffs assert establishes that the conditions of the DRAM market made NTC's participation in the alleged conspiracy economically viable and productive.[5] Second, plaintiffs point to evidence that they claim proves that NTC's behavior was consistently

---

[4] As defendants note, even conscious parallelism — i.e., a company's independent and voluntary decision to track prices and production of competitors — is not unlawful standing alone. See, e.g., *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1032 (8th Cir.)*.

[5] Originally, Dr. Noll's report was submitted in connection with the Winbond entity defendants' accompanying motion for summary judgment, and plaintiffs relied on that submission in citing to the report. Winbond withdrew its motion, however,

anticompetitive and against its own economic self interest — thereby further supporting the inference of NTC's participation in the conspiracy. See, e.g., *Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 884 (9th Cir. 1982)*("plaintiff must demonstrate that [allegedly parallel acts] were against each conspirator's self-interest").

i. structure of the DRAM market

Dr. Noll, plaintiffs' expert, analyzed five key characteristics of the DRAM industry — concentration in the industry, defendants' market share, DRAM's commodity status, the size of DRAM buyers/transactions, and the effect of US anti-dumping restrictions on DRAM pricing — and concluded that the DRAM industry was favorable to successful collusion during the relevant class period. See Saveri Decl., Ex. A at 31-46. Although this testimony standing alone does not necessarily implicate NTC's individual participation in any such collusion, plaintiffs also point to the testimony of NTC's expert, Dr. Alan **[*72]** Cox, on which plaintiffs rely for support of their claim that NTC's increasing technological advantages at the time of the conspiracy provided an economic reason for the top DRAM manufacturers to include NTC in their conspiracy, even if NTC was a smaller player in the market for DRAM. See, e.g., Declaration of Alan Cox in Support of Nanya's Motion for Summary Judgment ("Cox Decl.,"), Ex. A at ¶ 78 (noting that "Nanya/Nanya USA gained a significant advantage" due to "product innovation" in 2001). Given both the DRAM market's receptiveness to collusion and the significance of NTC's position in the market, plaintiffs contend that the economic evidence regarding the structure of the market supports NTC's participation in the alleged conspiracy.

As plaintiffs note, persuasive authority suggests that evidence bearing on the economic structure of the market, and evidence specifically suggesting that particular characteristics of the market are conducive to the creation of, and participation in, an overarching price-fixing conspiracy, can be relevant in supporting an inference that a defendant participated in such a conspiracy. See, e.g., *In re Flat Glass Antitrust Litig., 385 F.3d 350, 360 (3d Cir. 2004)*("[e]vidence that the defendant had a motive to enter **[*73]** into a price-fixing conspiracy means evidence ... that the structure of the market was such as to make secret price-fixing feasible"); *In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651, 655-56 (7th Cir. 2002)*. Nonetheless, while relevant, the economic evidence surrounding the DRAM market is not, in and of itself, a sufficient basis upon which to infer a conspiracy here. See, e.g., *In re Flat Glass, 385 F.3d at 360 n. 12* ("this type of economic evidence is neither necessary nor sufficient to conclude that sufficient proof of an agreement exists to preclude summary judgment, but it is relevant and courts should as a general matter consider it"). This conclusion is strengthened by the observation that, despite plaintiffs' reliance on Dr. Cox's testimony regarding NTC's technological capacities, Dr. Cox's actual conclusion was that it was *unlikely* that other defendants would have wanted to include NTC in the conspiracy, since NTC's capacity for DRAM production was never greater than 6% of industry capacity during the class period, and less than 1.5% when the conspiracy purportedly began. See Cox Decl., Ex. A at ¶ 14. Plaintiffs present no other testimony that supports the conclusion that the structure of the market would have been receptive to *NTC itself* engaging in a conspiracy.

In sum, plaintiffs' **[*74]** evidence regarding the structure of the DRAM market, even if relevant to the larger question whether an inference of conspiracy may be made on the whole cannot, standing alone, conclusively establish an inference of conspiracy.

ii. anticompetitive behavior

Plaintiffs also claim that the economic evidence discloses that NTC behaved in an anticompetitive manner during the conspiracy period, such that an inference of conspiracy is reasonable. Specifically, plaintiffs assert that during the conspiracy period, NTC reduced its DRAM output in coordination with the top 5 DRAM producers in the industry; that NTC failed to price aggressively and consistently passed up opportunities to undercut its competitors and grow its market share; and that NTC refused to bid in an auction held by Compaq in November 2001. See Opp. Br. at 19:13-22:17.

---

following its settlement with plaintiffs, thereby withdrawing the Noll report from consideration as well. In order to cure this problem, and at the court's request, plaintiffs re-submitted Dr. Noll's report by way of a separate declaration. The Nanya entity defendants have now filed objections to the re-submission of Dr. Noll's expert report, in part based on timeliness issues. The court hereby OVERRULES defendants' objections.

Output reduction. Plaintiffs assert that NTC reduced its DRAM output during the fourth quarter of 2001 ("2001Q4") and the first quarter of 2002 ("2002Q1"), in step with the top DRAM producers and other co-conspirators. They rely specifically on Exhibit 10 of Dr. Cox's expert report, which consists of a chart comparing NTC's DRAM output growth during the conspiracy **[*75]** period with that of the top 5 DRAM manufacturers (defined as Elpida, Hynix, Infineon, Micron and Samsung). See Cox Decl., Ex. A at Ex. 10. The chart demonstrates that, during 2001Q4 and 2002Q1, NTC's DRAM output growth dropped, at the same time that the top 5 DRAM producers' output growth also collectively dropped. Id. Plaintiffs argue that this supports an inference of conspiracy, since the timing of NTC's output reduction coincided with the conspiracy period.

Naturally, NTC disputes the significance of the evidence. NTC points out that NTC's own actual output data — which was not used in compiling Dr. Cox's exhibit 10 — indicates that between October 2001 and March 2002 (e.g., during 2001Q4 and 2002Q1), NTC's output of finished DRAM wafers ("wafer outs") actually increased, with the exception of only November 2001 and February 2002. See Reply Declaration of Vincent O'Brien in Support of Nanya's Motions for Summary Judgment ("O'Brien Reply Decl."), Ex. A, E. Similarly, NTC's sales grew, instead of fell, from the fourth quarter of 2001 to the first quarter of 2002. See id. at Ex. B. To the extent that November 2001 and February 2002 saw any decline in "wafer outs," NTC submits that **[*76]** the declines were due in part to "yield" issues (i.e., a decline in the amount of viable DRAM chips that NTC was able to produce from raw wafers), as NTC shifted production from 128 Mb of DRAM to 256 Mb of DRAM. See O'Brien Reply Decl., Ex. A.; Ex. C at NTC 65-00006200; Ex. E at NTC 73-00022899-22922; Ex. F at NTC 73-00037436.

Generally speaking, evidence that a defendant reduced production at the same time as other admitted members of an alleged conspiracy may be relevant on the question of conspiratorial conduct. See *In re Petroleum Prod. Antitrust Litig., 906 F.2d 432, 460-62 (9th Cir. 1990)* (considering conspiracy allegations based in part on supply reduction); see also, e.g., *In re Citric Acid, 191 F.3d at 1102* (evidence of parallel pricing decisions undertaken by defendant also relevant to conspiracy question, in conjunction with other "plus" factors). Here, however, the evidence ultimately does not support the inference of a conspiracy. This is because defendants have articulated a plausible competitive justification for any production cut. As they point out, although there were wafer out production declines in November 2001 and February 2002 — periods that fall within 2001Q4 and 2002Q1 as indicated in exhibit 10 to the Cox report — those production declines appear to be attributable **[*77]** to root causes. The November 2001 decline, for example, corresponded with NTC's decreased production of 128 Mb DRAM chips, as its second fabrication plant switched over to 256 Mb DRAM chips, and its first fabrication plant, which was focusing on the 128 Mb DRAM chips, experienced yield problems. See O'Brien Reply Decl., A; Ex. C at NTC 64-00006200; Ex. E at NTC 73-00022899-22922; Ex. F at NTC 73-00037436. The February 2002 decline also occurred in tandem with reported yield problems. See id. at Ex. D at NTC 64-00012021; Ex. G at NTC 73-00008704-8709.

Not only does this evidence demonstrate a plausible justification for NTC's 2001Q4 and 2002Q1 decreased wafer out DRAM production, but the justification is made more plausible by Mr. Kau's testimony, noted elsewhere herein, that NTC did not cut its DRAM production pursuant to any agreement to do so. See Benjamin Reply Decl., Ex. A at 160-161.

In the face of this evidence, plaintiffs must "provide specific evidence tending to show that the defendant was *not* engaging in permissible competitive behavior." See, e.g., *In re Citric Acid Litig., 191 F.3d at 1094*. In other words, as explained in the legal standard section above, plaintiffs' evidence must tend to *exclude* the possibility **[*78]** of independent behavior. *Id. at 1096*. Here, plaintiffs' evidence of output reduction — the sum total of which appears to be evidenced by Exhibit 10 to the Cox report — does not, in the face of the evidence demonstrating a production shift to 256 Mb chips at one of NTC's fabrication plants, and yield problems, tend to exclude the possibility that NTC, acting independently, suffered declines as a result of internal decision-making, rather than a coordinated effort at output reduction.

NTC's failure to price aggressively and grow market share. Plaintiffs also contend that NTC failed to price aggressively during the conspiracy period and consistently passed up opportunities to undercut competitors and grow its market share, something NTC would have done if it had been behaving competitively. See Opp. Br. at 20:23-24. Plaintiffs rely for support on three exhibits produced from non-NTC sources, relaying through emails and spreadsheet notes, NTC's supposed price quotes for DRAM at different points in November and December 2001.

Plaintiffs point out that the prices quoted therein show that NTC's DRAM price was among the highest among competitors, and that NTC would not come down from the price of DRAM **[*79]** it was quoting to Dell Computers, despite Dell's desire to negotiate a lower price. See Sampson Decl., Exs. 63, 116, 118.

Preliminarily, the court once again confronts NTC's hearsay objections, which NTC has submitted in response to all three exhibits. The court is of the opinion that all three constitute inadmissible hearsay. For the reasons already described in connection with plaintiffs' direct evidence of conspiracy, plaintiffs' invocation of the co-conspirator exception does not save the evidence. See *Fed. R. Evid. 801(d)(2)(E)*. Nor does plaintiffs' invocation of other hearsay exceptions, as the court finds that the statements contained in the exhibits do not bear on the declarants' state of mind, and there is insufficient foundational testimony upon which to base application of the business records exception. See, e.g., Plaintiffs' Summary Responses to Winbond and Nanya Defendants' Objections to Exhibits, Ex. C. Furthermore, none of the documents exhibit any indicia of reliability that would incline the court toward admitting the documents. Accordingly, the court hereby sustains NTC's objections to the documents.

Even if the court were to consider the documents substantively, it would still decline to find **[*80]** that the evidence supports an inference of collusive behavior. To begin with, none of the documents compel the conclusion that plaintiffs urge upon the court — i.e., that NTC consistently passed up opportunities to grow market share by lowering prices. The statements contained in the documents show only that: (1) on December 19, 2001, David Lin, an Elpida employee, had been told by one of his "buddies" that NTC was quoting a "$21/$42" DRAM price that NTC wanted to raise in January; (2) that Mr. Lin was also aware that back on November 23, 2001, NTC had tried to "increase pricing" but failed; and (3) that earlier still, on November 8, 2001, Mr. Lin had "polled the market" and discovered that NTC would not be moving on price. See Sampson Decl., Exs. 63, 116, 118. These statements indicate, at most, that someone at NTC told Mr. Lin that NTC had a desire to raise prices. But they do not establish or even suggest whether NTC actually did, in fact, raise prices, or, to the contrary, whether NTC refused to raise prices, or refused to compete for Dell's business by lowering price. Nor does the evidence indicate whether NTC had a habit of passing up opportunities to increase market share, as **[*81]** plaintiffs contend. Indeed, NTC points to evidence that demonstrates the opposite — that, during the same time period, NTC *increased* both overall DRAM production and total sales of DRAM (accomplished through NTC USA). See O'Brien Decl., Ex. B; O'Brien Reply Decl., Ex. E.

Moreover, plaintiffs do not rely on any legal authority that requires a defendant to have affirmatively engaged in undercutting competitors in order for the court to consider that defendant as having acted competitively. Although plaintiffs cite most persuasively to In re Citric Acid, the Ninth Circuit there did not hold that undercutting competitors is generally evidence of competitive behavior, let alone did it hold that lack of evidence as to a defendant affirmatively undercutting its competitors supports an inference of uncompetitive behavior. It simply held that, in the case before it, evidence that defendant priced aggressively in its actual contracts and had gained market share by consistently underpricing its competitors in the price-fixed market, was sufficient to demonstrate the possibility that defendant acted legally in its pricing decisions. See *191 F.3d at 1103*.

Here, by contrast, plaintiffs' evidence — which does not **[*82]** conclusively indicate whether NTC priced aggressively with respect to Dell, or whether it had a policy of pricing aggressively — fails to exclude the possibility that NTC was acting competitively as a whole, particularly in view of the fact that the evidence does indicate that NTC's sales and production were increasing. As such, it simply cannot be said that, based on the three exhibits relied on by plaintiffs, they have sufficiently excluded the possibility that NTC was acting competitively and in its own self-interest.

Compaq auction. Finally, plaintiffs point to NTC's purported refusal to bid in a DRAM auction held by Compaq, as proof that NTC was engaged in behavior against its own self-interest, and therefore that an inference of conspiratorial activity may be made. See Sampson, Ex. 93 at 173:4-177:2 (deposition testimony of Ken Hurley, Nanya USA's President). On its face, however, this evidence cannot support an inference of collusive activity by NTC. The evidence — which is the sole basis for plaintiffs' claim — refers to *NTC USA*'s refusal to participate in the Compaq auction, not NTC's. And since, as discussed previously, NTC USA's actions here may not be imputed to NTC for **[*83]** liability purposes, the evidence fails to raise a material dispute of fact with respect to NTC's participation in the alleged conspiracy.

In sum, the court concludes that none of the 'economic' evidence relied on by plaintiffs supports an inference of collusive activity on NTC's part. This is true whether the evidence is viewed independently, or in the aggregate, as the evidence simply does not tend to exclude the possibility that NTC acted in a competitive manner.

b. NTC's "frequent, high-level communications"

Besides the economic evidence, plaintiffs also rely on evidence of NTC's allegedly frequent communications with the other co-defendants as circumstantial evidence that supports an inference of collusive activity. Specifically, plaintiffs point to communications that took place throughout five different periods: summer 2001; fall 2001; November 2001; December 2001/January 2002; and early 2002 through June 2002. All of these communications, argue plaintiffs, corresponded with collusive activity taking place in the DRAM market.

The communications themselves are extensive. For each of the periods mentioned, plaintiffs cite to numerous emails or correspondence between the Nanya defendants **[*84]** and various other defendants, detailing alleged exchanges of information and meetings between the parties, all of which purportedly track the defendants' alleged production cuts and price increases. See, e.g., Sampson Decl., Exs. 15, 22, 46, 55, 57, 86, 94, 103 Appendix A, 105-112, 114-125, 127-129, 132-34.

Despite its volume, however, there exist fundamental problems with the evidence. Namely, the communications relied on by plaintiffs are largely irrelevant as far as NTC is concerned. For the vast majority of the "high-level" communications relied upon by plaintiffs concern NTC USA, not NTC. See, e.g., id. at Exs. 94, 103 Appendix A, 105, 106, 111-12. Once again, for the reasons already outlined, NTC USA's contacts cannot be imputed to NTC. As such, to the extent this is true, the court disregards those communications dealing with NTC USA.

This leaves the court with exhibits such as 46, 57, and 120 to the Sampson Declaration. These exhibits are communications made within Mosel Vitelic, discussing or reiterating the prices applicable to "Nanya's" DRAM. Preliminarily, it is not clear whether the communications even refer to NTC as opposed to NTC USA, as they by refer only to "Nanya" **[*85]** generally. More importantly, however, these exhibits do not constitute probative information that tends to exclude the possibility of permissible competitive conduct. At best, they merely repeat pricing information that has presumably been relayed to the sender by a marketing director at NTC. See id. at Ex. 46. But there is nothing inherently wrong with a company's marketing director sharing pricing information with another company. See *In re Citric Acid, 191 F.3d at 1103*, citing *In re Baby Food, 166 F.3d 112, 126 (3d Cir. 1999)*("[C]ommunications between competitors do not permit an inference of an agreement to fix prices unless 'those communications rise to the level of an agreement, tacit or otherwise.'"); *Rutledge v. Elec. Hose & Rubber Co., 327 F. Supp. 1267, 1271 (C.D. Cal. 1971)*("Absent an agreement to fix prices, there is nothing unlawful about competitors meeting and exchanging price information or discussing problems common in their industry, or even exchanging information as to the cost of their product.").

This same analysis applies to other exhibits relied on by plaintiffs, which constitute communications and correspondence that do not expressly implicate NTC — or even come from NTC — but at most refer to "Nanya" generally. See, e.g., Sampson Decl., Exs. 116-119.

Accordingly, even crediting the three exhibits as **[*86]** referring to NTC rather than NTC USA as evidence, they still do not provide a basis from which the court may infer conspiratorial activity. Thus the court rejects the evidence of "high-level" communications as circumstantial proof that NTC engaged in collusive activity.

c. guilty pleas

Finally, plaintiffs urge the court take notice of certain guilty pleas that other co-defendants have entered into, as well as the fact that NTC USA's employees invoked the *Fifth Amendment* during their depositions.

First, as NTC points out, it is improper for the court accept evidence of the co-defendants' guilty pleas as evidence tending to support an inference of NTC's collusive activity when none of those guilty pleas implicated NTC in their criminal activity. Given that NTC was not implicated, the court declines to consider these pleas as evidence bearing on NTC's participation in the alleged unlawful activity.

Second, and with respect to any adverse inferences to be drawn from the testimony of NTC USA's employees, the fact remains, as noted above, that there is simply no basis here upon which to impute NTC USA's actions or testimony to NTC. Accordingly, the court similarly declines to draw an adverse inference as to **[*87]** NTC's participation in the alleged conspiracy, based on testimony or lack of testimony of NTC USA employees.

Accordingly, the court does not find that the evidence of other co-defendants' guilty pleas, or the invocation of *5th Amendment* protection by NTC USA employees, supports an inference of collusive activity with respect to NTC.

* * *

In conclusion, and having considered plaintiffs' circumstantial evidence, individually and in the aggregate, the court simply cannot find that the evidence relied on by plaintiffs supports an inference of collusive activity on NTC's part, under the standard contemplated by Matsushita. Accordingly, the court hereby GRANTS summary judgment in NTC's favor.

C. NTC USA's Motion for Summary Judgment

NTC USA makes the same general argument that NTC made — i.e., that there is no evidence of NTC USA's involvement in the alleged conspiracy to fix the market prices for DRAM. NTC USA's focus, however, is slightly different than NTC. Since NTC USA does not actually manufacture DRAM, but only buys and sells the DRAM manufactured by its parent corporation, NTC USA does not address proof of conspiracy via concerted output reduction. Rather, it focuses on plaintiffs' ability to prove **[*88]** a *section 1* violation via an actual agreement to fix prices, or an exchange of price information among defendants. NTC USA argues that plaintiffs cannot demonstrate NTC USA's participation in either activity. It contends that, not only is the evidence insufficient to prove an agreement or an exchange of information, but the evidence does not even support the conclusion that DRAM pricing was affected by any of NTC USA's actions.

Before weighing the evidence of NTC USA's participation in conspiratorial activity, the court preliminarily addresses two of the arguments raised by NTC USA. First, whether the court should employ a rule of reason analysis. NTC USA relies on Dr. Noll's report and testimony, and argues that the analysis therein demonstrates that plaintiffs have rejected a price-fixing claim in favor of alleging an unlawful exchange of price information. This type of activity, asserts NTC USA, is not subject to per se treatment, but rather to a rule of reason analysis.

The court declines this invitation, however. Plaintiffs have alleged that all defendants participated in an agreement to fix, raise, and maintain the price of DRAM, and that, in order to effectuate that agreement, defendants **[*89]** engaged in numerous actions, including a coordinated reduction in DRAM output, as well as engaging in meetings and discussions with each other regarding price. See Third Consolidated Amended Class Action Complaint, ¶ 61-64. Dr. Noll's expert report is but one of the types of evidence on which plaintiffs rely to support the allegation of collusive activity. See, e.g., Saveri Decl., Ex. A at 2-6. And while NTC USA is correct, as stated in Dr. Noll's report and testimony, that plaintiffs assert that NTC USA unlawfully exchanged price information, such testimony and evidence is consistent with plaintiffs' allegation that NTC USA did so *in a manner consistent with an overriding agreement* to fix price and reduce supply.[6] And such allegations, if proven, support per se treatment. See *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*; see also *In re Petroleum Prods. Antitrust Litig., 906 F.2d 432, 445-50 (9th Cir. 1990)*(proof that competitors shared price information treated as evidence of per se illegal conspiracy to fix prices). In sum, while plaintiffs' ability to prove NTC USA's involvement in the alleged conspiracy remains to be seen, there is simply no basis upon which to deviate from the

[6] Moreover, contrary to NTC USA's characterization of Dr. Noll's testimony, what Dr. Noll actually said was that plaintiffs' collusion allegations can include the exchange of information regarding price, *in addition to* "a naked price fixing agreement." See Benjamin Decl., Ex. W at 164:3-17. This supports, rather than undercuts, the application of per se analysis here. To the extent, therefore, that NTC USA's arguments address the need for plaintiffs to establish harm or impact on the market, as part of a rule of reason analysis, NTC USA's arguments are irrelevant. See, e.g., *National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 690, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*(rule of reason requires analysis of alleged conduct's effect on market).

well-accepted principle that a conspiracy to fix prices — even if effectuated in part by an exchange of information regarding **[*90]** price — is worthy of per se treatment.

Second, the court addresses NTC USA's intimation that it cannot be held liable for an unlawful conspiracy to reduce output, as alleged by plaintiffs in their complaint, because it does not actually manufacture any DRAM, but rather buys and sells DRAM obtained from its parent company NTC. While this may be true, it is not exculpatory. It is well-settled, as a principle of co-conspirator liability, that even if NTC USA did not itself engage in a reduction in DRAM output, it may nonetheless be held liable for the actions of other codefendants in reducing their DRAM output, if it is proven that NTC USA otherwise participated in an unlawful conspiracy with those defendants. See, e.g., *BBD Transp. Co., Inc. v. Southern Pac. Transp. Co., 627 F.2d 170, 173 (9th Cir. 1980)*("To be liable as a coconspirator for the anticompetitive acts of [other co-conspirators], the railroads need not have known of or participated in those acts themselves.").

Having dispensed with these preliminary issues, the salient issue as to NTC USA remains: whether there is any direct or circumstantial evidence that NTC USA participated in any unlawful conspiracy to fix, maintain, or stabilize, the price of DRAM.

NTC USA asserts, not only **[*91]** that the evidence does not support plaintiffs' allegations against it, but that the evidence affirmatively answers this question in the negative. NTC USA points, for example, to the various testimony of other co-defendants' employees, in which every single one states that they had no pricing communications with NTC USA. See Benjamin Decl., Exs. A-S. It also points to the testimony of its expert, Dr. Cox, noting NTC USA's small market share, stating that NTC USA was expanding its business during the relevant time period, rather than restricting it — as would be consistent with anticompetitive behavior — and further opining that NTC USA was committed to aggressive and competitive pricing. See Hurley Decl., ¶ 7. NTC USA even relies on Dr. Hall's testimony, in which he acknowledges that Micron, an admitted co-conspirator, testified that it was *unsuccessful* in getting Nanya USA President Ken Hurley to go along with it in its bid to raise prices. See Benjamin Decl., Ex. Y. All of which, according to NTC USA, points to an utter lack of evidence tying it to the conspiracy alleged by plaintiffs.

This evidence is sufficient to switch the burden to plaintiffs to come forward with either direct **[*92]** or circumstantial evidence that creates a material issue of fact regarding NTC USA's involvement in the alleged *section 1* conspiracy. Plaintiffs attempt to meet this burden with the same argument and evidence that was submitted in response to NTC's motion. As it did in connection with NTC's motion, the court has attempted to distinguish the evidence where it is clear that it relates to NTC USA specifically.

1. Direct Evidence of Conspiracy

Plaintiffs' "direct" evidence of NTC USA's participation in the overarching DRAM conspiracy is largely the same as that which was discussed in connection with NTC's motion. Namely, that NTC USA participated in "secret" meetings with its fellow Taiwanese manufacturers to discuss cutbacks and price increases.

For support, plaintiffs rely for the most part on the same evidence already discussed — i.e., Micron emails, and news articles in which NTC's president, Mr. Kau, is quoted. See Sampson Decl., Exs. 13-15, 22-24, 86. Substantively, this evidence fails for the same reasons discussed in connection with NTC's motion. In addition, however, the evidence fails because it relates to the actions of NTC and NTC's President, *not* directly to NTC USA, or NTC USA's president, **[*93]** Kenneth Hurley. And, as stated above, NTC USA cannot be liable for NTC's acts and events without proving some theory of liability that would allow such a conclusion, which plaintiffs have not done.

This is not to say that plaintiffs have submitted *no* evidence specific to NTC USA. For plaintiffs also rely on an email that indicates that a meeting was scheduled for November 2001 between Mr. Kau, Mr. Hurley, and Mike Sadler, among others. See Sampson Decl., Ex. 87. Mr. Sadler was a Micron executive, alleged by plaintiffs to be the "ringleader" of the conspiracy.

The court does not find this email, however, to be direct evidence of NTC USA's participation in the alleged conspiracy. To begin with, it requires the court to draw the inference that the alleged meeting actually took place, for the email itself only indicates that such a meeting was scheduled. See *In re Citric Acid Litig., 191 F.3d at 1093* (direct evidence of conspiracy requires no inferences). Although this deficiency is not critical, given that NTC USA has conceded the meeting's existence, see NTC USA Reply Br. at 3:1-9, the fact that NTC USA points to evidence establishing a legitimate business reason for the meeting *is* critical. Specifically, NTC USA points to the **[*94]** deposition testimony of Mr. Kau, Mr. Hurley, and Mr. Appleton — Micron's president who was also at the meeting. All testify that the purpose of the meeting was to discuss the possibility of technological collaboration between the two entities, since NTC USA's original licensor was exiting the DRAM business. See Benjamin Reply Decl., Ex. A at 76-80; Ex. I at 72-75; Ex. K at 187 88. Moreover, none of the deponents recall that any discussions regarding DRAM pricing took place at the meeting. See id. Plaintiffs submit no evidence that actually refutes these facts. In view of this, the court does not find that the email relied on by plaintiffs constitutes direct evidence of NTC USA's participation in the overarching conspiracy.

Accordingly, with no other evidence to rely on, the court concludes that plaintiffs have not submitted sufficient direct evidence of NTC USA's participation.

2. Circumstantial Evidence of Conspiracy

The court next turns to plaintiffs' circumstantial evidence connecting NTC USA to the alleged conspiracy. In turning to this evidence, the court is mindful once again that the principles espoused in Matsushita, as reaffirmed by the Ninth Circuit in In re Citric Acid, apply. **[*95]**

Preliminarily, NTC USA has come forward with evidence that its participation in the alleged conspiracy would be economically implausible. It points to its small market share, which ranged from 1.4% in 1999 to 5.5% in 2002 at the end of the class period; the fact that with such a small market share NTC USA could not be expected to have had an impact on the market for DRAM by its participation in any conspiracy; Dr. Noll's supporting explanation that price collusion is not possible unless a seller involved in the collusion represents a significant portion of the market share (e.g., 40 to 60 percent); and the fact that NTC USA was pricing aggressively during the time period in question. See, e.g., Cox Decl., Ex. A at 10, ¶¶ 7-11; Benjamin Decl., Ex. Y at 7, Ex. W at 183:16-22; Hurley Decl., ¶ 7. The court finds this evidence sufficient to shift the burden to plaintiffs, who must, in order to defeat summary judgment, come forward with evidence tending to exclude the possibility that NTC USA was engaging in permissible competitive behavior. See *In re Citric Acid, 191 F.3d at 1094*. In other words, plaintiffs must introduce evidence sufficient to exclude the possibility of independent conduct by NTC USA, such that an inference **[*96]** of collusion is reasonable. See *id. at 1096*.

Here, too, plaintiffs' circumstantial evidence largely overlaps with that already discussed in connection with NTC's motion for summary judgment. This includes plaintiffs' (a) economic evidence; (b) evidence of NTC USA's "frequent, high-level communications" correlated to specific collusive behavior; and (c) evidence of co-defendants' guilty pleas in the DOJ's related criminal antitrust proceedings. Each category, as it relates to NTC USA, is discussed in turn.

a. economic evidence

Generally speaking, plaintiffs rely on the same economic evidence here as they did with NTC — i.e., evidence relating to the structure of the DRAM market, and evidence relating to NTC USA's anticompetitive behavior.

With respect to its evidence relating to the structure of the DRAM market, plaintiffs again rely on Dr. Noll's report and testimony, as well as Dr. Cox's testimony regarding increasing technological advances exhibited by NTC and NTC USA. The merits of the parties' competing arguments on this point — and whether NTC USA's collusion in the market would make economic sense — need not be repeated here. It is sufficient for the court to reiterate only that this evidence, **[*97]** while relevant, is not in and of itself a sufficient basis upon which to infer a conspiracy. See *In re Flat Glass, 385 F.3d at 360 n. 12*.

With respect to plaintiffs' evidence regarding NTC USA's anticompetitive behavior, however, the arguments and evidence related to NTC USA are slightly different. Contrary to their arguments with respect to NTC, plaintiffs here do not submit evidence that NTC USA reduced its output of DRAM. As already noted, they cannot, since NTC USA did not actually manufacture DRAM, but rather purchased it from NTC.

Plaintiffs do argue that, as with NTC, NTC USA (1) failed to grow its market share by pricing aggressively, and (2) failed to compete by refusing to bid in an auction held by computer manufacturer Compaq. However, the analysis of these two claims is slightly different with respect to NTC USA.

Failure to grow market share/price aggressively. For proof of NTC USA's failure to price aggressively and grow market share during the relevant time period, plaintiffs rely on the same documents as they did with respect to NTC's motion — i.e., the three exhibits produced from non-NTC sources, relaying through emails and spreadsheet notes NTC's supposed price quotes for DRAM at different points in November **[*98]** and December 2001. Plaintiffs, once again, are seeking to prove that the prices quoted therein show that NTC USA's DRAM price was the highest among competitors, and that NTC USA would not come down from the price of DRAM it was quoting to Dell Computers. See Sampson Decl., Exs. 63, 116, 118.

As the court has already found, these documents constitute inadmissible hearsay, and are therefore inadmissible. Moreover, even if substantively admitted, they would not support an inference of conspiracy, as they do not actually demonstrate NTC USA's failure to price aggressively and grow market share.

Most significantly, however, plaintiffs' argument on this point fails because they have not disputed the most fundamental point argued by NTC USA — that, during the class period, NTC USA actually succeeded in *increasing* sales and market share. See, e.g., Cox Decl., ¶¶ 13-14. Without disputing this point, plaintiffs cannot demonstrate NTC USA's failure to grow market share, or otherwise support any inference of conspiracy whatsoever. See *In re Citric Acid, 191 F.3d at 1102* (lack of evidence in record establishing that defendant's market share stayed the same required conclusion that inference of conspiracy was "necessarily unreasonable"). **[*99]**

Accordingly, plaintiffs' lack of evidence on this point does not enable the court to infer that NTC USA conspired with any co-defendants in unlawful *section 1* activity.

Compaq auction. Plaintiffs assert that NTC USA's anticompetitive behavior with respect to the Compaq auction supports an inference of conspiracy. Specifically, plaintiffs contend that NTC USA refused to bid in the Compaq auction — which was held in order to attempt to procure DRAM at lower prices — pursuant to the DRAM cartel's goal of ensuring that no competitor bid in the auction, thereby keeping the prices for DRAM high. See Opp. Br. at 21:13-14.

This evidence, too, fails. NTC USA's president, Mr. Hurley, specifically states that NTC USA had a policy in place that forbid it from bidding in auctions, including the Compaq auction. See Hurley Decl.,¶¶ 8-9. Mr. Hurley testified that the no-bid policy was prompted by the potential for market forces to intervene between auction and delivery of DRAM to create a loss for the manufacturer. See id. This is a plausible explanation for NTC USA's refusal to bid in the auction.

In response, plaintiffs contend that the no-bid policy was inherently anticompetitive, but present no authority for **[*100]** this conclusion. Nor do they submit contrary evidence establishing that Mr. Hurley's explanation is purely pretextual. Indeed, plaintiffs offer only speculation, and a series of rhetorical questions (i.e., why wouldn't Nanya USA make an "exception" in the case of the Compaq auction?), in their attempt to create an issue of material fact on the issue. See Opp. Br. at 21:19-21.

Based on the record before it, the court cannot conclude that plaintiffs' evidence regarding the Compaq auction sufficiently overcomes NTC USA's plausible explanation for its no-bid policy, such that an inference of collusive activity is reasonable.

b. NTC USA's "frequent, high-level communications"

Plaintiffs again rely on proof of numerous communications between and among NTC USA employees and competitors, in their effort to establish an inference of conspiracy. The communications purportedly took place throughout five different periods in 2001 and 2002, and plaintiffs assert that all can be tied to NTC USA's pricing decisions.

As a preliminary matter, the court notes that the evidence of communications relied on by plaintiffs with respect to NTC USA is of a different character than that relied on in connection **[*101]** with NTC. Whereas plaintiffs' submission of actual evidence with respect to NTC's contacts was slim, this is not the case with respect to NTC USA. Plaintiffs have submitted evidence with respect to the latter that indicates a much higher volume of communication and contact with other defendants.

Having reviewed all evidence submitted by plaintiffs in connection with this issue, the court finds that the evidence can generally be classified into two general categories: (i) communications from or to NTC USA regarding NTC USA's contacts with defendants; and (ii) communications from or to non-NTC USA sources regarding NTC USA's contacts with defendants.

The correspondence from or to NTC USA sources demonstrates that numerous contacts and communications took place during the relevant period between NTC USA executives — namely, Mr. Hurley and North American Sales Director Mike Walsh — and other defendants. See Sampson Decl., Ex. 103 Appendix A, Ex. 105, Exs. 106,109-112, 114, 124; see also Benjamin Reply Decl., Ex. R. While it seems apparent that some of the evidence, when viewed for its substance, conveys only innocent information, it is equally apparent that some of the evidence conveys actions **[*102]** taken by NTC USA executives that may, in fact, be suggestive of collusive behavior. See, e.g., id. at Ex. 105 at 39 (describing Mr. Hurley's "chance encounter" with alleged co-conspirators), cf. Ex. 130 at 103-05 (Steve Thorsen deposition testimony re discussions with Mr. Hurley re DRAM pricing); see also *In re Citric Acid, 191 F.3d at 1103* (suggesting that specific discussions between competitors regarding price may give rise to inference of conspiracy).

This also holds true with respect to the communications relied from or to non-NTC USA sources regarding NTC USA's communications with defendants. See Sampson Decl., Exs. 15, 22, 46, 55, 57, 86, 107-08, 115-123, 125, 127-129, 132-34. Some of these communications indicate innocent conduct. See id. at Ex. 133 (email from Elpida employee merely noting he had "polled the market place and found that most suppliers have moved to $38 for 128MB SDR"). Some are more suggestive. Id. at Ex. 134 (Hynix notes conveying detailed product information purportedly learned from "Nanya", including price info).[7]

As such, and given the volume of communications present, and the varying degrees to which the communications may suggest collusive activity by NTC USA, the court **[*103]** finds that plaintiffs have, in fact, successfully met their burden in arguing that the evidence, considered as a whole, might reasonably support the inference that NTC USA conspired with the admitted conspirators in this action, to fix the actual prices for DRAM in the marketplace. The volume of contact and communications, and the presence of at least some discussion regarding pricing, when viewed in the aggregate, and considering the fact that some of the defendants and individuals with whom NTC USA was communicating are admitted conspirators in this action, support this inference.

Accordingly, the court concludes that plaintiffs have presented a disputed issue of fact as to proof of NTC USA's involvement in the overarching conspiracy alleged by plaintiffs.

c. guilty pleas

---

[7] Defendants have lodged numerous objections to the documents discussed herein. The court notes that some of the documents relied on by plaintiffs and objected to by defendants — particularly those belonging to the first category of communications from or to NTC USA — are admissible. See, e.g., Sampson Decl., Exs. 106, 111-12. By contrast, it is unlikely that many of the documents belonging to the category of communications from or to non-NTC USA sources are admissible. See, e.g., Sampson Decl., Exs. 46, 57. The court need not rule on the admissibility of all documents submitted and at issue, however; it is enough that it finds some documents admissible and sufficient to raise a triable issue of material fact, as described above. The parties are, of course, entitled to raise objections to evidence not ruled on herein at trial.

Finally, plaintiffs once again argue that the guilty pleas entered into by other codefendants, and the fact that three of NTC USA's employees invoked the *Fifth Amendment* at their depositions, further supports an inference of conspiracy. For the reasons already discussed in connection with NTC's motion, the court declines to accept the former — i.e., other co-defendants' guilty pleas — as evidence of conspiracy.

The court also comes **[*104]** to the same conclusion with respect to the latter. However, the court's analysis in doing so, is different than before. This is because, whereas it would *not* have been proper to draw adverse inferences against NTC based on *NTC USA* employees' invocation of the *5th Amendment*, it *may* be proper draw those inferences against NTC USA.

The seminal case on the issue, *Baxter v. Palmigiano, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976)*, holds that adverse inferences are permissible in certain situations. However, lower courts interpreting Baxter have been uniform in suggesting that the key to the Baxter holding is that such adverse inference can only be drawn when independent evidence exists of the fact to which the party refuses to answer. See, e.g., *LaSalle Bank Lake View v. Seguban, 54 F.3d 387, 391 (7th Cir.1995)*; *Peiffer v. Lebanon Sch. Dist., 848 F.2d 44, 46 (3d Cir.1988)*. Thus, an adverse inference can be drawn when silence is countered by independent evidence of the fact being questioned, but that same inference cannot be drawn when, for example, silence is the answer to an allegation contained in a complaint. See *Nat'l Acceptance Co. v. Bathalter, 705 F.2d 924, 930 (7th Cir.1983)*. This interpretation is, however, premised on the basic notion that, prior to drawing any adverse inference, there must be, at a minimum, a foundation laid by the party seeking the adverse inference, as to the fact upon which such an inference should be taken.

Here, plaintiffs **[*105]** have not made a sufficient foundational showing regarding the specific questions and facts upon which they would like adverse inferences to be drawn. Accordingly, the court will not grant them a sort of generic adverse inference based on the mere fact that three of NTC USA's employees asserted the *5th Amendment*.

* * *

In conclusion, and based on all the above, the court DENIES NTC USA's motion for summary judgment regarding its liability pursuant to *section 1* of the Sherman Act. Plaintiffs have successfully demonstrated that disputed issues of fact are present with respect to NTC USA's participation in the alleged conspiracy, based on circumstantial evidence of NTC USA's contacts and communications with competitors.

D. Motion for Summary Judgment re DRAM Purchases from April 1, 2001 to November 30, 2001

Defendants seek an order declaring that plaintiffs' claims based on DRAM purchases made during the period April 1, 2001 through November 30, 2001, fail as a matter of law. Defendants contend that plaintiffs have admitted they cannot prove impact for this eight month period, and that as a result, all claims based on purchases made during this period are doomed.

Plaintiffs who bring suit for antitrust violations **[*106]** pursuant to *section 4 of the Clayton Act* must satisfy antitrust standing requirements. This standing requirement means that a plaintiff must prove that he or she has been (1) "injured in his business or property; and (2) "by reason of anything forbidden in the antitrust laws...". See *15 U.S.C. § 15(a)*. The first of these two elements, which is at issue here, refers to 'impact,' whereby plaintiffs must demonstrate the 'fact of damage', or the existence of injury to themselves.

The parties here do not actually dispute the fundamental legal standards applicable for analyzing antitrust 'impact'. Defendants, for instance, note the well-established maxim that impact, or injury itself, is the "sine qua non" for stating a cause of action based on antitrust conspiracy. See, e.g., *McClure v. Undersea Indus., Inc., 671 F.2d 1287, 1289 (11th Cir. 1982)*. Plaintiffs, for their part, cite to legal authority indicating that antitrust impact is satisfied by proof that the antitrust violation alleged is a material and substantial cause of plaintiffs' injury. See, e.g., *Rossi v. Standard Roofing, Inc., 156 F.3d 452, 483 (3d Cir. 1998)*; see also *Supermarkets of Marlinton, Inc. v. Valley Rich Dairy, 161 F.3d 3, 161 F.3d 3, 1998 WL 610648, **2 fn. 18 (4th Cir. Va. 1998)*(unpublished opinion)(citing with approval notion that "in order to establish the fact of injury, an antitrust plaintiff must demonstrate that it suffered 'some damage' as a causal result of the defendant's violation"). **[*107]** Both are accurate statements of the law. For it is true here that, in order to show impact, plaintiffs must demonstrate both that they have been injured, and that their injuries were caused by the alleged antitrust violation in question. See also *In re Tamoxifen Citrate Antitrust Litigation, 466 F.3d 187, 2006 WL 2401244, *26 (2d Cir. 2006)*(injury in fact must "flow[] from that which makes defendants' acts unlawful").

Having noted the applicable legal standards, the court must decide whether, in light of certain statements made by plaintiffs' experts, Dr. Noll and Dr. Liu, plaintiffs' claims based on DRAM purchases made from April 1, 2001 to November 30, 2001, fail for plaintiffs' inability to establish impact.

First, the court considers the evidence upon which defendants base their motion. Defendants rely almost entirely on statements made by two of plaintiffs' experts, Dr. Noll and Dr. Liu. To begin with, defendants point to: Dr. Noll's expert report in which he states that "during most of 2001," the defendants were engaged in activity with "a different character" than that which resulted in higher prices for other periods of the alleged conspiracy; Dr. Noll's statement that this activity consisted of defendants' concerted attempt to lower DRAM prices in order to drive co-defendant **[*108]** Hynix out of the market; and Dr. Noll's statement that during this period, "DRAM buyers did not suffer harm from the price war" because although "[c]oordinated action to set prices below cost in order to drive a firm from the market is a form of collusion, ... an industry's customers are not harmed during the period while the concerted attempt to drive prices down takes place." See Declaration of Ross S. Goldstein in Support of MSJ re DRAM Purchases ("Goldstein Decl."), Ex. A. Second, defendants rely on Dr. Liu's expert report stating that the April 2001 to October 2001 period of the alleged conspiracy was a "predatory" period in which Dr. Liu failed to find "price elevation" and failed to find "damages." See id. at Ex. B.

The question for the court to address is what effect, if any, these statements have on plaintiffs' ability to demonstrate antitrust impact. Defendants argue that the above statements amount to judicial admissions that, for the eight month period in question, not a single member of the class suffered any injury in fact, since there was no artificially raised price at issue that could have harmed plaintiffs. Plaintiffs respond that defendants confuse proof of impact, **[*109]** which requires only that plaintiffs prove that the conspiracy as a whole caused some damage to plaintiffs, with proof of damages, which requires plaintiffs to demonstrate overpayments for DRAM at artificially high prices in order to recover damages. According to plaintiffs, the above statements are only relevant to the damages issue.

Neither party presents legal authority that is directly on point. Nonetheless, the court finds plaintiffs' arguments more persuasive. To begin with, defendants' request that the court carve out an eight month period from the broader three-year conspiracy period that has always been alleged by plaintiffs is counter-intuitive. See, e.g., Third Consolidated Amended Class Action Complaint, ¶¶ 1, 37, 72. As the US Supreme Court has said in the past with respect to Sherman Act antitrust cases, and as plaintiffs point out, "[i]n cases such as [these], plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.... [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking **[*110]** at it as a whole." See *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*. Accordingly, the court must view the conspiracy alleged by plaintiffs in its entirety.

Second, viewing the conspiracy in question as a whole, plaintiffs are correct that the question is simply whether plaintiffs can prove 'some damage' as a result of the alleged antitrust violation by defendants — i.e., whether plaintiffs can prove some damage *as a result of the alleged three-year conspiracy* engaged in by defendants. See, e.g., *Supermarkets of Marlinton, Inc. v. Valley Rich Dairy, 161 F.3d 3, 1998 U.S. App. LEXIS 33534, 1998 WL 610648, **2 fn. 18*; *In re Tamoxifen Citrate Antitrust Litigation, 466 F.3d 187, 2006 WL 2401244, *26* (injury in fact must "flow[] from that which makes defendants' acts unlawful"). Here, defendants do not dispute that plaintiffs have done so with respect to the three year conspiracy as a whole. See Def. Reply Br. ISO MSJ re DRAM Purchases at 3 n.1. For purposes of this motion, this satisfies plaintiffs' burden of proving that antitrust impact is present.

Moreover, plaintiffs' expert Dr. Noll also testified that the eight month period in question formed an integral part of the overall 3 year conspiracy alleged by plaintiffs, as it represents the period of time during which defendants conspired in an ultimately unsuccessful attempt to drive Hynix out of the market, in order to decrease total DRAM supply, thereby raising prices for DRAM. **[*111]** As such, the period in question, even though marked by lower prices on the surface that may not give rise to damages, nonetheless forms a critical part of the conspiracy that led to plaintiffs' actual injury. See, e.g., Declaration of Guido Saveri in Support of the Re-Submission of the Expert Report of Roger G. Noll ("Saveri Decl."), Ex. A at 5, 50-51 (Noll Report).

Indeed, as plaintiffs point out, In re NASDAQ Market -Makers Antitrust Litig. is instructive. There, the court specifically found that even where some class members escape injury altogether, impact may still be found on the basis of the class members' injury as a whole. See *169 F.R.D. 493, 523 (S.D. N.Y. 1996)*. The district court in that case said that "unless it is clear that no ultimate consumers were damaged, the exact amount each may have sustained is an issue to be treated at the damages phase of the litigation," not at the preliminary stage in deciding whether plaintiffs had adequately made out a prima facie case of impact. See id. This reasoning is relevant here. For when considering the conspiracy as alleged in its entirety, all indications are that there were at least some "ultimate consumers" who were harmed at the end of the conspiracy period by **[*112]** paying artificially high prices. And since plaintiffs assert that those high prices stem from all conspiratorial acts detailed by their experts — including the strategy to drive Hynix out of the market, even if it involved lower prices for awhile — there is simply no justification for finding, as defendants urge, that no liability can be premised on claims that are based on that "kill Hynix" period.

Moreover, to the extent that — as defendants point out — there are some plaintiffs who made purchases limited only to the eight month period in question and therefore truly did not suffer any impact or injury, the above reasoning is also helpful. In short, this is a factor to be taken into account at the damages phase. In other words, the lack of harm to those individual plaintiffs whose claims are limited to the eight month period at issue does not cause plaintiffs' class claims as a whole to fail where impact is undisputedly present for other class members for the whole conspiracy period. That lack of harm would, however, prevent those plaintiffs whose claims are limited to the eight months in question from recovering any damages on their individual claims, as none are present. Furthermore, **[*113]** as plaintiffs point out, this is an issue that is specifically contemplated — and dealt with — by Dr. Liu. Accordingly, the issue poses no barrier to allowing plaintiffs' class claims to proceed as alleged.

In conclusion, defendants present no reason for overlooking the more apt principles relied on by plaintiffs, which dictate that defendants' motion for summary judgment as to all claims based on purchases from April 1, 2001 to November 30, 2001 be, and hereby is, DENIED.

E. Motion for Summary Judgment re Purchases Based on Pre-Existing Cost Plus Contracts

Defendants seek summary judgment on all claims brought by direct purchasers who bought DRAM pursuant to pre-existing cost-plus contracts. The gist of defendants' argument is that these purchasers, who buy and then resell DRAM to indirect purchasers at a fixed mark-up over the price paid for the DRAM, have not suffered actual injury for purposes of recovery under *section 1*. While they acknowledge such argument would normally be ineffective under the Supreme Court's well-established prohibition on the use of "pass-on" defenses in antitrust cases, defendants rely on the narrow exception that the court has specifically carved out for qualifying **[*114]** cost-plus contracts.

Resolution of defendants' motion requires determination of three issues: (1) the applicable legal standards involved; (2) whether plaintiffs or defendants bear the burden of proof on this issue; and (3) whether there is, in fact, any evidence of claims brought pursuant to pre-existing cost-plus contracts.

1. Legal Standards

The general argument that a direct purchaser plaintiff does not suffer injury where that plaintiff passes on all or part of an illegal overcharge to subsequent purchasers is not new. This is frequently referred to as the "pass-on defense," and was first considered by the Supreme Court in *Hanover Shoe, Inc., v. United Machinery Corp., 392 U.S. 481, 491 493, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*. There, the court held that a pass-on defense cannot be relied on by defendants seeking to prove that a direct purchaser plaintiff was not actually injured by a violation of the antitrust laws. See *392 U.S. at 491-493*. The court adhered to the "general principle" that the victim of an overcharge "is damaged within the meaning of [the antitrust standing statute] to the extent of the overcharge." *Id. at 491*. It ruled against the pass-on defense, in part based on concerns that use of the defense could complicate antitrust litigation (due to problems of proof) and reduce incentives for private **[*115]** plaintiffs to sue.

The Supreme Court followed this holding with Illinois Brick Co. v. Illinois, in which it considered the pass-on defense, but this time from a plaintiff's perspective. See *431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. In Illinois Brick, plaintiffs were indirect purchasers who argued that they had antitrust standing to sue because the illegal overcharge that resulted from defendants' antitrust conspiracy had been passed on to them by direct purchasers of defendants'. Consistent with its holding in Hanover Shoe, the Supreme Court held that the principles of that earlier case also bar indirect purchasers' claims, in addition to pass-on defenses employed by defendants. The court again expressed concerns with the complexity of proof involved in any contrary rule, as well as the risk of multiple liability for defendants. See *id. at 731-35*.

Despite having twice rejected the use of pass-on theories — whether to demonstrate lack of injury or to allow indirect purchaser standing — the Supreme Court noted, in both cases, that an exception to the general rule is possible. That exception, at issue here, is contemplated "when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been **[*116]** damaged." See *Hanover Shoe, 392 U.S. at 494*; see also *Illinois Brick, 431 U.S. at 736* (reiterating Hanover Shoe exception for fixed quantity, pre-existing, cost-plus contracts). The theory is that, pursuant to a pre-existing cost-plus contract, it may be possible to easily prove that 100% of an overcharge is directly passed through to an indirect purchaser, pursuant to pre-negotiated terms by which a price-fixed product is charged at cost to the indirect purchaser, the end result of which eliminates any injury borne by the direct purchaser.

The cost-plus contract exception was expressly considered in *Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)*. There, the Supreme Court held that the direct purchaser is the appropriate plaintiff in virtually every case, and that the opening for the cost-plus exception is extremely narrow. The court was dealing with a parens patriae action brought by state attorneys general ("AG"s), who sued defendant utility corporation on behalf of natural gas consumers. The AG plaintiffs argued that state regulations ensured that the utility corporation passed on 100% of the overcharge directly to the state consumers in the form of increased rates — thereby invoking the cost-plus contract exception. The court, however, declined to place the case within the cost-plus **[*117]** contract exception, holding that in the absence of any such physical contract, the case only "resembled" the cost-plus contract exception, which contemplates that a 100% overcharge may be proven with certainty. See *497 U.S. at 218*.

The Kansas court expressly reaffirmed its adherence to the prohibition on pass-on theories, as well as the court's prior precedent regarding availability of the cost-plus contract exception. The court specifically noted and implied that the cost-plus contract exception applies where the contract in question commits the buyer to purchasing "a fixed quantity regardless of price," with the end result that "the effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination" of pass-on cost in the usual situation. *Id. at 217*. In other words, the court noted that it "might allow indirect purchasers to sue only when, by hypothesis, the direct purchaser will bear no portion of the overcharge and otherwise suffer no injury." *Id. at 218*.

Since Kansas, some circuit courts have expressed the opinion that it is doubtful whether the cost-plus exception can ever truly be used to get around the prohibition on pass-on **[*118]** theories. See, e.g., *McCarthy v. Recordex Servs., 80 F.3d 842, 855 (3d Cir. 1996)*(the "vitality of the pre-existing cost-plus contract exception is doubtful, however, in view of Utilicorp); *Illinois ex rel. Burris v. Panhandle E. Pipe Line Co., 935 F.2d 1469, 1478 (7th Cir. 1991)*("The Court's interpretation of the cost-plus exception appears so narrow (setting up as it does a demand for rigorous proof of a 100% pass through and then suggesting an unwillingness to consider such detailed evidence) as to preclude its application in any case.").

There is no Ninth Circuit decision directly on point. However, prior Ninth Circuit precedent would appear to indicate that the Ninth Circuit continues to recognize the validity of the pre-existing cost-plus exception to the prohibition on pass-on theories, although this conclusion is to be inferred from dicta, as the court never actually discussed the applicability of the exception. See *Lucas Automotive Engineering v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1234 (9th Cir. 1998)*(noting existence of exception for pre-existing, "*fixed quantity*, cost-plus contract[s]", but refusing to discuss it as appellant failed to offer any evidence that any purchases were made pursuant to such a contract)(emphasis added).

Accordingly, based on review of controlling precedent, the court concludes that, while there *is* a pre-existing cost-plus contract exception that may theoretically be stated, the exception **[*119]** is to be applied extremely narrowly. It requires proof of a pre-existing cost-plus contract, pursuant to which a subsequent purchaser purchased a fixed quantity of goods. And it should only be applied where it is absolutely clear that the direct purchaser in question will bear no portion of the overcharge and will otherwise suffer no injury as a result of defendants' alleged antitrust violations.

2. Burden of Proof

Having determined that the exception for pre-existing cost-plus contracts is still legally viable, and having established the contours of the exception, the question remains whether plaintiffs or defendants have the burden of burden of proof with respect to the issue. Defendants argue that plaintiffs bear the burden of proof, since the cost-plus contract exception goes to the issue of injury in fact, an essential element for *section 1* recovery, upon which plaintiffs undisputably bear the burden. Plaintiffs, by contrast, argue that defendants have it backwards: Hanover Shoe established that plaintiffs make out a prima facie case of injury merely by showing that they have been illegally overcharged, and by demonstrating the amount of the overcharge. Thereafter, it is *defendants* who bear **[*120]** both the burden of production and proof as to the exception, and who must come forward here with evidence of any qualifying cost-plus contracts.

The court has found no cases that squarely address the question of who bears the burden of proof in establishing the cost-plus contracts exception. However, the language of the controlling cases themselves suggest that it is defendants, and not plaintiffs, who have the burden here of proving that this exception to the Hanover Shoe/Illinois Brick doctrine applies. A review of Hanover Shoe — the case that considered the *defensive* use of the pass-on theory — makes clear, even obvious, that the court considered that it would be defendants' burden to meet the "normally ... insurmountable" task of proving that the pass on defense applies. See, e.g., *392 U.S. at 493* (in rejecting use of pass-on defense, noting that, "if the existence of the defense [were to be] generally confirmed, antitrust *defendants* [would] frequently seek to *establish its applicability*") (emphasis added). Similarly, since defendants here seek to establish an exception that would allow a narrow form of the pass-on defense, defendants should also bear the burden of establishing its applicability. **[*121]** [8]

Moreover, as plaintiffs correctly point out, the Hanover Shoe court also expressly held that a plaintiff's "prima facie case of injury and damage" is satisfied "when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge." See *id. at 489*. As such, plaintiffs satisfy their prima facie case of injury here by demonstrating simply that plaintiffs paid an illegally inflated amount for DRAM, and by showing the amount of that overcharge. It would step beyond the boundaries of the Hanover Shoe ruling to require plaintiffs to do more than what the court there required — i.e., by forcing plaintiffs to establish

[8] The court's conclusion is also guided in part by the fact that the Supreme Court has specifically recognized two types of "pass-on" theories that may be used — defensive, and offensive. The defensive pass-on theory was first discussed in Hanover Shoe, where *defendants* attempted to use it to demonstrate that the direct purchaser plaintiffs had not established true antitrust injury. See *392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231*. In Illinois Brick, by contrast, the offensive use of the pass-on theory was utilized by indirect purchaser *plaintiffs* trying to establish antitrust injury for standing purposes under the Sherman Act. See *431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. As a practical matter, it makes intuitive sense that where — as here — defendants utilize the defensive pass-on theory, they should bear the burden of proof (and where plaintiffs employ offensive use of the pass-on theory, it is plaintiffs who bear the burden).

the *absence* of any exception to the prohibition on use of the pass-on defense, in addition to demonstrating the amount of any illegal overcharge that was paid due to defendants' unlawful activities.

Furthermore, defendants' reliance on Burkhalter Travel Agency v. MacFarms Int'l, Inc. for the contrary proposition is unpersuasive. See *141 F.R.D. 144 (N.D. Cal. 1991)*. It is true that in that case, the court considered the cost-plus contract exception post-Kansas, and held that the exception **[*122]** applied. However, the court did not engage in any discussion related to the burden of proof with respect to its application. Accordingly, it does not aid the analysis here.

In conclusion, the court holds that it is defendants who must prove that the cost-plus contract exception applies. In seeking summary judgment as to this issue, therefore, defendants must produce admissible evidence demonstrating that there are no triable issues of fact regarding application of the exception. It then falls to plaintiffs to overcome defendants' evidence, with proof of materially disputed facts.

3. Evidence of Pre-existing Cost-plus Contracts

This brings the court to the final issue presented by the instant motion: whether defendants have presented sufficient evidence of qualifying cost-plus contracts to warrant application of the exception. In accordance with the standards enunciated above, to be successful, defendants must specifically point to evidence of *pre-existing* cost-plus contracts, pursuant to which subsequent purchasers purchased a *fixed quantity* of goods. See *Lucas Automotive Eng'g, 140 F.3d at 1234*.

Defendants rely on three sources of evidence in their attempt to meet this burden. First, they point to deposition testimony purportedly **[*123]** demonstrating that "several plaintiffs package DRAM as one item among a bundle of goods and services that they provide to their customers...". See Declaration of Christopher Flack ("Flack Decl."), Exs. A-E. Second, they point to "one example uncovered through discovery," of a purported qualifying cost-plus contract between Apple computer and Solectron Corporation — Solectron directly buys DRAM from entities like defendants and uses it to manufacture products for Apple under a cost-plus pricing formula. See Flack Decl., Ex. H. According to defendants, this single contract demonstrates that Apple, as the final OEM to whom Solectron sells its products, is charged the full cost that Solectron pays for the DRAM it purchases, plus a one-percent margin over that cost. See id. at SOL000196, 163. Finally, defendants also cite to the Declaration of Michael Bokan — a director of sales for Micron — in which Mr. Bokan claims that he knows of numerous customers who purchase DRAM for resale in accordance with "cost-plus" contracts. See Bokan Decl., ¶¶ 3-4.

This evidence, however, is deficient. First, the deposition testimony relied on by defendants do not say what defendants say it does. Presumably, **[*124]** defendants hope to prove with the testimony that the DRAM packaged as an item can be separately tracked through to the ultimate purchaser of the item — thereby providing a foundation for application of the cost-plus contract rule. But actual review of the deposition testimony demonstrates that the deponents are nearly all testifying as to general job duties and descriptions for what their companies do. See Flack Decl., Exs. A-E. They are in no way affirmatively stating that DRAM is sold, or can be characterized, as a separate item within a bundle of goods and services. Furthermore, even if the testimony *did* support this interpretation, it would still fall short of establishing the existence of any physical, preexisting, fixed quantity cost-plus contracts that qualify for application of the exception. Indeed, to the contrary, the testimony of one of the deponents, Steven Coraluzzi, expressly states that Mr. Coraluzzi had *no contracts whatsoever* with Crucial Technologies, a division of defendant Micron. See id. at Ex. A.

Second, with respect to the Apple/Solectron contract, neither Apple nor Solectron are named plaintiffs in the instant action. Assuming, therefore, that defendants attempt **[*125]** to use the Apple/Solectron contract as evidence of unnamed class members' cost-plus contracts, defendants provide no legal or other authority that would justify imputing the existence of this single agreement to other unnamed class members, or to the class as a whole. Nor is there any reason to assume, based on this one agreement, that other unnamed class members had similar agreements. Moreover, plaintiffs raise valid arguments regarding the agreement itself. Notably, they point out that the contract does not appear to require the purchase of a fixed quantity of DRAM. See Flack Decl., Ex. H.

Defendants, for their part, fail to overcome this with any evidence to the contrary. As such, it simply cannot be said that the Apple/Solectron contract qualifies as a valid pre-existing cost-plus contract.

Finally, to the extent that defendants rely on the Bokan Declaration for added support of its argument that cost-plus contracts exist, the Bokan Declaration is wholly unpersuasive. Mr. Bokan does not affirmatively point to any cost-plus contracts whatsoever. He merely states that he "believe[s] that contract manufacturers frequently agree to take no profit, or to take a fixed, cost-plus profit, **[*126]** on DRAM purchased for use in an OEM's products." See Bokan Decl., ¶ 3. Not only is this insufficient proof of the existence of any cost-plus contracts, but as plaintiffs point out, most of this testimony is objectionable as inadmissible hearsay. To that end, the court disregards the testimony contained therein.

In sum, it simply cannot be said that defendants have met their burden in pointing to evidence establishing that there are valid pre-existing, fixed quantity, cost-plus contracts that warrant imposition of the exception in this case.

Nor does Burkhalter Travel Agency, discussed above, require a contrary conclusion. In Burkhalter, the court considered a situation in which the plaintiff directly purchased macadamia nuts from defendants, and subsequently passed the entire cost of the macadamia nuts on to a subsequent purchaser pursuant to an existing agreement between them. Defendants argued that the cost-plus contract exception applied, and the court agreed. The court, however, assumed the existence of a qualifying cost-plus agreement. Here, by contrast, as analysis of the above evidence demonstrates, defendants have not proven the existence of any qualifying agreement, either between **[*127]** a named plaintiff and a subsequent purchaser, or even between an unnamed plaintiff and a subsequent purchaser. As such, there is simply no proof that the exception applies.

Defendants attempt to avoid this inevitable conclusion by arguing that, if they lack sufficient evidence, it is only because plaintiffs thwarted their prior discovery efforts to obtain relevant evidence going to this issue. They note that, despite their seeking information relating to cost-plus contracts during discovery, plaintiffs refused to produce any, and after a motion to compel, the magistrate judge refused to order its production. See Flack Decl., Exs. F, G. To that end, defendants also seek an order from the court "soliciting the information needed to determine whether the cost-plus contract rule applies." Plaintiffs strenuously oppose this request, asserting that discovery has closed, that only one defendant — Micron — ever sought discovery on the cost-plus contracts issue in the first place, and that defendants failed to timely object to the magistrate judge's discovery ruling.

As the court stated at the hearing on this motion, these facts do present cause for concern. The court is particularly troubled **[*128]** by the fact that plaintiffs' counsel appears to have engaged in the practice of regularly instructing clients and deponents not to answer deposition questions regarding the existence of qualifying cost-plus contracts. See, e.g., Sampson Decl., Ex. 138 at 184. As counsel for plaintiffs is undoubtedly aware, instructions not to answer are not proper in practice before this court, unless made in response to inquiries that would require the disclosure of privileged information. The impropriety of such instructions here is made all the more striking because evidence with respect to the existence of cost-plus contracts is, as demonstrated above, unquestionably relevant to this case. As such, had the issue been properly raised before the court — and there is no indication that the issue as presently framed before the court was even raised with the magistrate judge — the court would have provided defendants with timely relief. As it stands, however, the court is left only with the present discovery record. For having made a strategic decision not to challenge the magistrate judge's earlier decision, or to raise the issue prior to the close of discovery, defendants are bound by their actions, **[*129]** unfortunate though the result may be.

As such, the court is left with no choice but to conclude, based on the evidence submitted before it, that defendants have failed to present, as is their burden, evidence that there are qualifying cost-plus contracts that warrant application of the exception here. Having failed to so demonstrate, it is irrelevant whether plaintiffs present any facts that materially dispute the exception's application, as the exception itself is not before the court. Accordingly, summary judgment on the issue is DENIED.

F. Motions to Seal

The parties have also filed numerous administrative requests to seal certain documents and portions of briefs filed in connection with the present motions for summary judgment. The court has made a good faith effort to review these requests, alongside the actual exhibits to which the requests purportedly refer. However, after trying unsuccessfully to match each document sought to be filed under seal with a corresponding administrative request referring to the specific document and setting forth good cause, the court concludes that the parties' motions to seal are simply too piecemeal to lend themselves to a satisfactory determination **[*130]** by the court. Moreover, as the supporting declarations themselves indicate, it is not wholly clear that many of the documents justify a sealing order, under the standard enunciated in *Kamakana v. City of Honolulu, 447 F.3d 1172 (9th Cir. 2006)*.

As such, if the parties wish the court to grant sealing requests covering certain documents or portions thereof in connection with the instant motions, the parties must (1) withdraw all pending administrative requests to seal that have been filed in connection with the instant motions; and (2) each re-file one comprehensive administrative request to seal, which specifically sets forth each individual exhibit, document, or portion thereof that the parties wish to have sealed, and which sets forth, by way of accompanying declaration, a "compelling reason" for the sealing of each individual document. See id. at 1136. Any revised request to seal filed pursuant to these instructions must be filed no later than February 28, 2007.

If the parties' re-filed administrative requests to seal do not comply with the above, the court will deny the parties' sealing request. Alternatively, if the parties do not withdraw their pending motions or file any revised administrative requests to seal by February 28, 2007, it will treat **[*131]** the pending motions to seal as either denied or moot.

G. Conclusion

For the reasons stated above, the court hereby GRANTS summary judgment in part and DENIES summary judgment in part, as follows: (1) NTC's motion for summary judgment on liability under the Sherman Act is GRANTED; (2) NTC USA's motion for summary judgment on liability under the Sherman Act is DENIED; (3) defendants' motion for partial summary judgment based on DRAM purchases from April 1, 2001 to November 30, 2001 is DENIED; and (4) defendants' motion for partial summary judgment based on pre-existing cost-plus contract purchases is DENIED.

IT IS SO ORDERED.

Dated: February 20, 2007

/s/ Phyllis J. Hamilton

PHYLLIS J. HAMILTON

United States District Judge

Gaines v. Strayhorn

United States District Court for the Western District of Texas, Austin Division

February 21, 2007, Decided ; February 21, 2007, Filed

A-06-CA-673 LY

Reporter

2007 U.S. Dist. LEXIS 11856 *

BETTY LOU GAINES, v. CAROLE STRAYHORN, ET AL.

Prior History: Gaines v. Strayhorn, 2007 U.S. Dist. LEXIS 11854 (W.D. Tex., Feb. 21, 2007)

Core Terms

Recommendation, Defendants', license, property interest, conscience, shock, district court, due process, substantive due process, violations, rights, procedural due process claim, shutdown, immunity, camps, motion to dismiss, retaliation claim, deprived, substantive due process claim, foster child, allegations, antitrust, employees, contends, lobbying, grounds, entity, foster

Counsel: **[*1]** For Betty Lou Gaines, Plaintiff: Susan Henricks, LEAD ATTORNEY, Hull Henricks & MacRae, L.L.P., Austin, TX.

For Carole Strayhorn, Vickie Anderson, Ruthie Ford, Defendants: Christopher D. Sileo, Jane Webre, Stephen E. McConnico, LEAD ATTORNEYS, Scott, Douglass & McConnico, L.L.P., Austin, TX.

For Darla Jean Shaw, Sherry Lloyd, Jan Martin, Charlene Bateman, Diana Spiser, Karen Eells, Thomas Chapmond, Defendants: Kathlyn C. Wilson, LEAD ATTORNEY, Attorney General Of Texas, Austin, TX.; Terrence L. Thompson, LEAD ATTORNEY, Office of the Attorney General, Austin, TX.

Judges: ANDREW W. AUSTIN, UNITED STATES MAGISTRATE JUDGE.

Opinion by: ANDREW W. AUSTIN

Opinion

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE LEE YEAKEL

UNITED STATES DISTRICT JUDGE

Before the Court are the Comptroller Defendants' Rule 12(b)(6) Motion to Dismiss, filed October 11, 2006 (Clerk's Doc. No. 22); and Motion to Exclude Report filed by Comptroller Defendants, filed December 13, 2006 (Clerk's Doc. No. 40). The District Court referred the dispositive motion to the undersigned Magistrate Judge for a Report and Recommendation as to the merits pursuant to 28 U.S.C. § 636 (b)(1)(B) **[*2]** , Federal Rule of Civil Procedure 72, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges. After reviewing the parties' briefs, relevant case law, as well as the entire case file, the undersigned issues the following Report and Recommendation to the District Court. The Court held a hearing on the motion on January 23, 2007. [1]

I. BACKGROUND

The Comptroller Defendants are Carole Strayhorn, Vicki Anderson, and Ruthie Ford. At the time of the events on which this suit is based, Strayhorn was the Comptroller for the State of Texas, and Anderson and Ford worked for her at the Comptroller's office. The events which precipitated this suit was Woodside Trails (or "the Camp") -- where Plaintiff was Executive Director (and, apparently, **[*3]** administrator and President) -- being shut down by the Texas Department of Family and Protective Services (TDFPS) [2]. The crux of Defendants' *12(b)(6)* motion is whether Plaintiff's Complaint pleads facts sufficient to state a claim that Strayhorn's involvement in the process of shutting down the Camp violated Plaintiff's constitutional rights.

Plaintiff worked at the Camp on and off for 20 years, held a Child Care Administrator's license (through TDFPS), and served on a number of boards dealing with what might be called children's behavioral counseling organizations; one board she chaired. Plaintiff asserts that she is "intimately and totally identified with Woodside Trails, both in Texas and nationally." *See* Plaintiff's Second Amended Complaint, at 5. In 2003, Plaintiff was voted by the Board -- consisting of her friends and family -- to be Executive Director **[*4]** of Woodside Trails; this process was repeated in June 2004. The Camp's mission was to serve severely emotionally disturbed adolescent boys, many of whom were sexual offenders. In the jargon, the Camp was known as a "primitive therapeutic camp" because it utilized the natural environment to provide therapy for the boys, such as having them construct semi-permanent structures (which they would later sleep in, at least some of the time).

At about the same time that Plaintiff became Executive Director of the Camp in 2003, Strayhorn became aware, via a story in the *Dallas Morning News,* of what she perceived to be a major problem in the state of foster care facilities in Texas. Strayhorn criticized TDFPS for lax regulation of these facilities and, according to Plaintiff, "bombarded [TDFPS] with multiple, extensive, and burdensome demands for information, analyses, and action," much of it focused on Woodside Trails. *See* Plaintiff's Response at 7. Subsequently, the Comptroller's office released "A Special Report on the Texas Foster Care System" entitled "Forgotten Children." [3] In that Report, Strayhorn depicted the worst of the foster care facilities, and included pictures of Woodside **[*5]** Trails (although neither the camp nor Plaintiff were mentioned by name in the Report).

Strayhorn's Report sparked intensified media interest; a local television reporter did a story on Woodside Trails that portrayed the Camp in a positive light. Plaintiff contends that after the Report's issuance, the Defendants (specifically Strayhorn) took a particularly nefarious obsession with Woodside Trails, attacking it for not meeting "permanent camp" standards even though it is a "primitive camp." Strayhorn's **[*6]** recommendation to shut down all camps not meeting the licensing standards for permanent therapeutic camps would have immediately shut down Woodside Trails.

The Defendants, Plaintiff alleges, went further: they called a child abuse hotline 40 times to make deceitful reports of violations at the Camp. They also reported to TDFPS that Plaintiff was "exposing children to sexual assault and

---

[1] Due to multiple requested extensions of time, the Plaintiff's response to the Comptroller's motion was not filed until December 13, 2006.

[2] This is the latest name change *cum* acronym for TDFPS which was previously known as the Texas Department of Protective and Regulatory Services.

[3] The Plaintiff filed a Motion to Exclude from the Court's consideration the contents of this report, which the Defendants' had originally attached to their *Rule 12(b)(6)* Motion. The Defendants, in response to Plaintiff's Motion to Exclude, assented, stating that they "do not object to this court excluding the report from consideration when deciding their *Rule 12(b)(6)* motion." *See* Comptroller Defendants' Response to Motion to Exclude at 2 (Clerk's Doc. No. 46). Therefore, the Court will not consider the report.

to imminent danger" and leaned on TDFPS to explain why it had not closed any of the camps in light of the Report. Defendants further allowed, or instructed their employees to allow, reporters from a San Antonio TV station to accompany them on a "follow up inspection" of Woodside Trails by posing as state employees. The Defendants also authorized the reporters and crew to fly a helicopter over the Camp and film the children. They contacted former Camp employees talking in depth only to those who were disgruntled and willing to disparage the Camp. They reported violations to OSHA and to the Bastrop County Health and Sanitation Department. They questioned local pharmacists about pharmaceuticals taken by the children. They obtained a copy of Plainitfr s marriage certificate and her husband's expunged juvenile **[*7]** record.

On August 25, 2004, TDFPS revoked the Camp's license -- thereby effectively shutting it down -- citing 32 violations of "minimum standards." *See* Plaintiff's Response at 15. Other camps, which had four and nearly five times the number of violations as Woodside Trails were not shut down. As an alternative to revocation of its licence, the Camp was not allowed the option of utilizing a "corrective action plan," despite the fact that other camps were given this option. Plaintiff contends that the only reason her camp was shut down was because TDPFS decided that kowtowing to Defendants' pressure was the only way to avoid political recriminations. On February 18, 2005, via a letter from an employee, TDFPS revoked Plaintiff's Child Care Administrator's license.

In August 2006, Plaintiff filed this suit, claiming (via *§§ 1983* and *1985*) violations of her procedural and substantive due process, equal protection, First *Amendment, Fourth* Amendment, and *Fifth Amendment* rights. On October 11, 2006, the Comptroller Defendants filed their motion to dismiss what at that time was the First Amended Complaint. After several extensions of time to respond were granted, on December 13, 2006, the **[*8]** Plaintiff responded to the *12(b)(6)* motion, and also filed a motion seeking leave to file her Second Amended Complaint. With regard to the Comptroller Defendants, the Second Amended Complaint seeks to add one claim and two new defendants. Further, it adds a little more "flesh" to the *First Amendment* retaliation claim, as well as to the equal protection claim. The Comptroller Defendants have objected to the amendment, arguing that the amendment would be futile because the proposed *Fourth Amendment* claim to be added against them is time-barred and fails to state a claim. In a separate Report & Recommendation issued today, the Court has concurred with this argument. For purposes of this motion, therefore, the Court focuses on the claims stated in the Second Amended Complaint (other than the *Fourth Amendment* claim) and the arguments made in the Plaintiff's response. Notably, with the Second Amended Complaint, the Plaintiff decided to drop all of her pendent state law claims against the comptroller Defendants, and thus the claims before the Court on this motion are only the federal claims made against the Comptroller Defendants. [4]

[*9] II. DISCUSSION

Under *Federal Rule of Civil Procedure 12(b)(6)*, "a claim will not be dismissed unless the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief" *Gen. Elec. Capital Corp. v. Posey, 415 F.3d 391, 395 (5th Cir. 2005)*. "A district court cannot dismiss a complaint for failure to state a claim 'unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief. '" *United States ex rel. Bain v. Georgia Gulf Corp., 386 F.3d 648, 653-54 (5th Cir. 2004)*. The complaint must be liberally construed in favor of the plaintiff and all facts pleaded therein must be taken as true. *Kane Enters. v. MacGregor (USA) Inc., 322 F.3d 371, 374 (5th Cir. 2003)*. "However, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Jones v. Alcoa, Inc., 339 F.3d 359, 362 (5th Cir. 2003)*.

A. Procedural Due Process Claim

[4] In her Response to the *Rule 12(b)(6)* Motion Plaintiff contends that she is also advancing a *§ 1986* cause of action. There is not, however, a *§ 1986* claim made in either the First or Second Amended Complaints, and the Court will treat this statement in the response as an error.

The Comptroller Defendants make a number of arguments regarding Plaintiff's procedural due process claims. Each is taken up in turn.

1. [*10] Plaintiff's Property Interest in Woodside Trails

The Defendants first argue that Plaintiff does not have a constitutionally protected property interest in Woodside Trails, and therefore her procedural due process claim against them should be dismissed. Because the Constitution protects -- rather than creates -- property interests, the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law. *Phillips v. Washington Legal Foundation, 524 U.S. 156, 164, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998)*. "The hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except for cause." *Woodard v. Andrus, 419 F.3d 348, 354 (5th Cir. 2005)*.

Defendants, in support of their proposition that Plaintiff does not have a property interest in Woodside Trails, cite *Gregory v. Mitchell,* a 1981 Fifth Circuit case that held that the district court properly dismissed a *§ 1983* claim brought by the shareholders in a state chartered bank because the plaintiffs did not have standing: "neither officers nor stockholders . . . can maintain an action to redress an injury to **[*11]** the corporation even though the value of their stock is impaired as a result of the injury." *Gregory v. Mitchell, 634 F.2d 199, 202 (5th Cir. 1981)*. They also cite a recent First Circuit case noting that it is a "tenet" of the law of corporations that "[a]ctions to enforce corporate rights or redress injuries to [a] corporation cannot be maintained by a stockholder in his own name . . . even though the injury to the corporation may incidentally result in the depreciation or destruction of the value of the stock." *Pagan v. Calderon, 448 F.3d 16, 28 (1st Cir. 2006)*.

Plaintiff, in her Second Amended Complaint, states that "Woodside Trails is a Texas non-profit corporation." *See* Second Amended Complaint, P 23 at 6. Under Texas law, just as non-profit corporations do not differ from the more traditional, profit-based model in their capacity to sue and be sued, *see Macedonia Baptist Church v. Gibson, 833 S.W.2d 557, 559 (Tex. App. -- Texarkana, 1992)* (writ denied), an officer, owner, or executive of a non-profit corporation may not sue individually to recover for injuries done to the corporation. *Pagan, 448 F.3d at 28*; **[*12]** *see also Gregory, 634 F.2d at 202*. Plaintiff contends that her rights and duties in connection with the Camp "cover[] all the incidents of ownership that title would convey." *See* Plaintiff's Response at 29 (Clerk's Doc. No. 43) (stating that Plaintiff was the Executive Director elected by family members, and the Camp "could not be closed or transferred without her consent"). Even granting that all of Plaintiff's assertions are true, her argument misses the point. She has no constitutionally protected property interest for the very reason the *Pagan* and *Gregory* courts noted: the *corporation* must sue to vindicate its own rights, and a shareholder or executive cannot stand in its shoes. *Pagan, 448 F.3d at 28*. Therefore, the Court recommends that Plaintiff's procedural due process cause(s) of action, insofar as they claim a property interest in Woodside Trails, be dismissed.

2. Plaintiff's Property Interest in Her Job and License

Defendants next arguments are that: (1) Plaintiff has no property interest in her employment status at Woodside Trails, and (2) they did not deprive Plaintiff of her property interest in her child care **[*13]** license.

Texas is an at-will employment state and the issue of whether there is "[a] property interest in employment . . . must be decided by reference to state law." *Bishop v. Wood, 426 U.S. 341, 344, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976)*. In Texas, there exists a presumption that employment is at-will unless that relationship has been expressly altered in one of two ways: (1) via contract; or (2) express rules or policies limiting the conditions under which an employee may be terminated. *Muncy v. City of Dallas, 335 F.3d 394, 398 (5th Cir. 2003)*. Defendants point out that Plaintiff does not plead or allege that either alteration took place, and further point out that Plaintiff was never fired (and is still a member of the Camp's Board). In response, at the hearing regarding this motion, Plaintiff pointed the Court to P 21 of Second Amended Complaint where she alleges that "There was a universal explicit understanding and agreement among the board members that she was not an employee at will, but was guaranteed employment at Woodside Trails . . . [from] year to year." *See* Second Amended Complaint at 5-6. [5]

[*14] While Plaintiff may have a recognizable property interest in her job for purposes of a procedural due process claim, Plaintiff is overlooking the fact that the *Comptroller Defendants* are incapable of having violated that property interest, in that they were not the agency that revoked the Camp's license. At bottom, Plaintiff is complaining that, when the Camp was effectively shut down by TDFPS, her employment *de facto* terminated because she had no more clients. Put differently, while Plaintiff may allege that the Comptroller Defendants caused her to lose her job, that is not enough to state a procedural due process claim against the Comptroller Defendants. It would have been impossible, by virtue of their very position in the structure of Texas state government, for the Comptroller Defendants to provide Plaintiff any procedures that would satisfy due process *at all.* The Comptroller's Office and its employees did not, and could not, unilaterally shut Woodside Trails down, and therefore cause Plaintiff to lose her job (if in fact she has lost that job). Rather, the entity with a due process duty under the Constitution is the entity that revoked the Camp's and the Plaintiff's **[*15]** licenses - TDFPS. Thus, the procedural due process claim against the Comptroller Defendants is groundless. Thus, to the extent the Plaintiff has a claim against the Comptroller Defendants, the claim must be a substantive due process cause of action (which are taken up below).

This same issue bleeds into the Defendants' next argument: Plaintiff's allegations that she was deprived of procedural due process, because of the state administrative (SOAH) proceedings accorded her were inadequate. Plaintiff contends that the SOAH process "did not provide meaningful due process to Plaintiff because [the hearings] did not occur before the state had already damaged her reputation, closed her camp, abruptly removed foster children in her care and prohibited her from contacting those children and deprived her of the use and benefit of her child care administrator's license." *See* Plaintiff's Response, at 31 (Clerk's Doc. No. 43).

As with the prior issue, there is no need to get into the niceties of procedural due process law in a *§ 1983* cause of action to resolve this issue. [6] Instead, it only needs to be noted that it was TDFPS, not the Defendants, that deprived Plaintiff and her Camp of **[*16]** licenses, and it was *only* TDFPS that had the statutory power to do so, and thus it was only TDFPS that had the corresponding legal duty to provide due process to Plaintiff. It is worth noting here that the Court is not saying that its eyebrows have not been raised by the treatment of Plaintiff in this case. Nor is the Court intimating that Plaintiff can assert no procedural due process claims against any of the named defendants. The Court is merely making clear that the defendants tagged with depriving Plaintiff of her procedural due process rights must be those who actually had a hand in depriving Plaintiff of her license.

Given the foregoing, **[*17]** the Court recommends that all claims Plaintiff has made against the Comptroller Defendants regarding her license or employment at Woodside Trails be dismissed.

B. Substantive Due Process

Defendants contend that Plaintiff's claims under the other wing of *Fourteenth Amendment* due process jurisprudence -- substantive due process -- must also fail, because their conduct cannot be classified as arbitrary or conscience shocking. The Supreme Court's last major pronouncement on the contents of a substantive due process claim came in *County of Sacramento v. Lewis, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)*.

---

[5] Defendants' cite a Texas Supreme Court case for the proposition that the "employer must unequivocally indicate a definite intent to be bound not to terminate the employee except under clearly specified circumstances." *Montgomery County Hosp. Dist. v. Brown, 965 S.W.2d 501, 502, 41 Tex. Sup. Ct. J. 537 (Tex. 1998)*. While this is no doubt the case, the Court would be engaging in weighing just how "unequivocal" or "definite" the intent of the Camp's agreement with Plaintiff was if it were to grant the motion to dismiss on this issue. This is not appropriate at this stage of the litigation.

[6] The issue, it seems, would turn on availability of pre-verus post-deprivation notice and hearing. *See, e.g., Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)* ("The root requirement of the *Due Process Clause* is that an individual be given an opportunity for a hearing before he is deprived of any significant protected interest").

The Court reiterated and reinforced its half-century old "shock the conscience" test, *see* Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952), stating that "conduct that shocks the conscience and violates the decencies of civilized conduct" in turn violates due process rights. Lewis, 523 U.S. at 847. *See also* Breithaupt v. Abram, 352 U.S. 432, 435, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957) (reiterating that conduct that "'shocked the conscience' and was so 'brutal' and 'offensive' that it did not comport with traditional ideas of fair play and decency" would violate substantive **[*18]** due process); Whitley v. Albers, 475 U.S. 312, 327, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986) (same); United States v. Salerno, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) ("So-called substantive due process prevents the government from engaging in conduct that shocks the conscience . . . or interferes with rights implicit in the concept of ordered liberty"). Squarely put, Justice Souter, writing for the Court, stated that, "the substantive component of the Due Process Clause is violated by executive action only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." Lewis, 523 U.S. at 847 (citations omitted).

The phrase "in a Constitutional sense" is important. Substantive due process is not meant as "a 'font of tort law to be superimposed upon whatever systems may already be administered by the States.'" Id. at 848 (quoting Paul v. Davis, 424 U.S. 693, 701, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976)). Put differently, "the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Id.* (quoting Daniels v. Williams, 474 U.S. 327, 328, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). **[*19]** Instead, only "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Id.*

In her pleading, Plaintiff lists the following actions -- worth reiterating here -- that she argues rise to the level of conscience-shocking behavior, as a matter of law:

. Strayhorn lacked legal authority to carry out her investigation into Texas's foster care system.

. The investigation was motivated solely by Strayhorn's gubernatorial ambitions.

. Defendants have refused to retract or modify the many alleged inaccuracies and falsehoods in the "Forgotten Children" report.

. Defendants, angry that Plaintiff spoke out against them and defended herself, retaliated against her.

. In order to get TV reporters onto the grounds at Woodside Trails to secretly film Plaintiff and some of the foster children, Defendants lied about their affiliation.

. Acting as Defendants' agents, TV reporters flew over the Camp in a helicopter at a low attitude to film the Camp and its inhabitants.

. Defendants, during the course of their investigation, obtained Plaintiff's marriage **[*20]** license and her husband's expunged juvenile record.

. Defendants contacted the Camp's local pharmacy to obtain confidential drug prescription information about the Camp's employees and the foster children there.

. Defendants used local law enforcement agents in a similar manner.

. The Defendants made false reports to OSHA about working conditions at the Camp.

. Defendant Ford threatened a chairwoman of the Camp, who also happened to be a state employee, with negative employment actions because of her service with the Camp.

Plaintiff is of course correct that Defendants' burden in a motion to dismiss is high, but the same holds true for her burden in advancing a substantive due process claim. The Fifth Circuit has held, for example, that a county hospital's failure to screen blood such that plaintiff was infected with HIV is only negligent behavior, and does *not* shock the conscience. Kinzie v. Dallas County Hosp. Dist., 106 Fed. App'x 192, 194 (5th Cir. 2003). Conversely, the Fifth Circuit held that where a teacher fabricated a charge of sexual abuse against a student's father -- the girl was four years old and the teacher guided her hands **[*21]** over a keyboard to type out the allegation -- *did* shock the conscience. Morris v. Dearborne, 181 F.3d 657, 668 (5th Cir. 1999).

No doubt much of the Defendants' behavior in this case, delineated above, is untoward and petty. No doubt much of the behavior is (much) less than one would expect from an elected official or her staff However, the Court cannot go further than that. It cannot say, even with all of the excesses and misjudgments of this investigation, that Defendants' "conduct *intended to injure* [Plaintiff] in some way *unjustifiable by any government interest.*" Lewis, 523

U.S. at 848 (emphasis added). Put differently, Defendants' conduct here does not, in the same way the teacher's fabrication of sexual abuse claim did, shock the judicial conscience. *See* Perez v. Unified Govt. Of Wyandotte County/Kansan City, Kan., 432 F.3d 1163, 1168 n.4 (10th Cir. 2005) (issue of conscience-shocking behavior as it pertains to substantive due process is a question of law for the Court, not a question of fact for the jury). That is to say, Texas surely has a governmental interest in being aware of and vigilantly investigating **[*22]** the state of foster child care in Texas, particularly given that foster children are a politically powerless constituency saddled with the burden of being unable to vote or champion their own cause. Because the Court finds that, even taking as true all of the Plaintiff's allegations regarding the Comptroller Defendants' actions, that the conduct does not shock the conscience, the substantive due process claim should be dismissed.

Defendants also argue that the substantive due process claim must be dismissed under the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine is grounded in the First Amendment right to petition the government. Originally, it provided that parties who petition the government for governmental action favorable to them cannot be prosecuted under the antitrust laws even though if their petitioning is motivated by anti-competitive intent. Gibbes v. Ameristar Casino Vicksburg Inc., 137 F. App'x 673, 674 n.2 (5th Cir. 2005). The doctrine has its origins in two U.S. Supreme Court cases: Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961) and United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626(1965). **[*23]** Plaintiff argues that the Fifth Circuit has not applied the *Noerr-Pennington* doctrine outside the field of ***antitrust law***, and urges the Court to follow the Fifth Circuit case Video International Production, Inc. v. Warner-Amex Cable Communications, Inc., 858 F.2d 1075 (5th Cir. 1988). There, the Fifth Circuit noted that the "point of the *Noerr-Pennington* doctrine is to protect private parties when they petition the government for laws or interpretations of its existing laws even though those private parties are pursuing their goals with anticompetitive intent." 858 F.2d at 1083.

This argument ignores the more recent case of *Bayou Fleet, Inc. v. Alexander,* a Fifth Circuit case from 2000. There, the Circuit stated that "[a]lthough the Supreme Court has limited its discussion of *Noerr-Pennington* immunity to cases involving antitrust litigation, this Court has extended the *Noerr-Pennington* doctrine to include claims under section 1983." Bayou Fleet, Inc. v. Alexander, 234 F.3d 852, 859 (5th Cir. 2000). [7] Plaintiff's argument also fails to recognize the clear trend among the federal courts to extend the Noerr-Pennington **[*24]** doctrine beyond ***antitrust law***. *See e.g.,* Herr v. Pequea Township, 274 F.3d 109, 115 (3d Cir. 2001) (*overruled on other grounds,* United Artists Theatre Circuit, Inc. v. Township of Warrington, PA, 316 F.3d 392, 400 (3d Cir. 2003) ("principles relied upon [under the *Noerr-Pennington* doctrine] are not limited to antitrust liability" and "[t]he First Amendment right to petition extends to all departments of government . . . [t]he protection it affords thus applies . . . to petitioning state agencies."); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 615 (8th Cir. 1980) (section 1983) (landowners' secret meetings with city officials to petition for enactment of city ordinance to rezone plaintiffs property within doctrine); Sawmill Products, Inc. v. Town of Cicero, 477 F. Supp. 636, 642 (N.D. 111.1979) (section 1983) (protesting presence of plaintiff's sawmill which was then shut down by town ordinance); Weiss v. Willow Tree Civic Ass'n, 467 F. Supp. 803, 816-18 (S.D.N.Y. 1979) (section 1983) (lobbying town officials and filing groundless judicial and administrative complaints to oppose zoning **[*25]** permit); Aknin v. Phillips, 404 F.Supp. 1150, 1153 (S.D.N.Y. 1975), *aff'd,* 538 F.2d 307 (2d Cir. 1976) (section 1983) (urging officials to enforce unconstitutionally vague noise ordinance against plaintiff's discotheque); Sierra Club v. Butz, 349 F. Supp. 934, 938-39 (N.D. Cal. 1972) (contractual interference) (filing lawsuit and administrative appeals to halt plaintiff's logging operation; filings constitutionally privileged even if motivated by malice)). [8]

---

[7] There is also authority for the proposition that the Supreme Court has applied *Noerr-Pennington* outside of the antitrust context. *See e.g.,* Barnes Foundation v. Township Lower Merion, 242 F.3d 151 (3d Cir. 2001).

[8] Plaintiff also argues that the *Noerr-Pennington* doctrine only applies to private persons, not government officials. Defendants cogently argue that Plaintiff is suing them in their individual, not official, capacities -- as they must, *see* Esteves v. Brock, 106 F.3d 674, 677 (5th Cir. 1997) ("As a state officer acting in her official capacity, however, Brock is protected by the Eleventh Amendment from suit under section 1983 for money damages") -- therefore she cannot deny that *Noerr-Pennington* applies in this case because the case law *infra,* e.g. Herr, 274 F.3d 109 (3d Cir. 2001), holds that the immunity attaches to officials sued in

[*26] Plaintiff's other argument regarding the *Noerr-Pennington* doctrine is that "the actions of the Comptroller Defendants went well beyond appropriate petitioning activity" that the *Noerr-Pennington* Doctrine would protect. [9] **[*27]** The Third Circuit has squarely held that *Noerr-Pennington* immunity protects the petitioning activity of public entities, at least so long as the protected petitioning activity constitutes the petitioning of a distinct public entity authorized by state law to resolve the issue at stake. *See* *Herr, 274 F.3d at 119*; *Mariana v. Fisher, 338 F.3d 189 (3d Cir. 2003)*. A publicity campaign directed at the general public and seeking government action is covered by *Noerr-Pennington* immunity. *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499-500, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)*. In *Manistee Town Center v. City of Glendale, 227 F.3d 1090 (9th Cir.2000)*, the Ninth Circuit held that Glendale, the city, was protected by *Noerr-Pennington* immunity for its lobbying of the county (*Maricopa). Id. at 1093*. [10]

Here, the Defendants lobbied TDPFS to take action on a problem they thought important: the state of foster care in Texas. *Stern v. United States Gypsum, Inc., 547 F.2d 1329 (7th Cir. 1977)*, a *§ 1985* case, is also enlightening. [11] There, *Noerr-Pennington* immunity was extended to executives at the defendant company even though they made charges they knew to be false about an IRS agent to his superiors. *Id. at 1342-46*. Given this, whether Defendants are viewed as government officials lobbying another branch of government or private citizens (who are employed by the government) **[*28]** their lobbying for action on a cause celebre, is a petitioning activity protected by *Noerr-Pennigton's* grant of immunity. *Bayou Fleet, 234 F.3d at 859* ("*Noerr-Pennington* immunity applies to any concerted effort to sway public officials regardless of the private citizen's intent"). This is an additional reason for dismissal of Plaintiff's substantive due process claims against the Comptroller Defendants.

C. Equal Protection

Defendants also argue that Plaintiff's *Equal Protection clause* claim must be dismissed because Plaintiff fails to identify a similarly situated person or entity that was treated differently. Plaintiff counters that she has stated a claim under the *Equal Protection clause* because she was not offered so-called "risk evaluation" -- a procedure "which might have allowed her to remain in contact with children [who were removed by TDFPS] after the evaluation was completed" -- that was offered to other counselors similarly situated. *See* Plaintiff's Response at 32 (Clerk's Doc. No. 43). Plaintiff further contends that Woodside Trails was subjected to increased scrutiny than were other camps, and, moreover, camps that had more regulations **[*29]** violations -- both in quantity and in quality -- were given more lenient compliance options. [12]

Defendants question, rightly, how the *Equal Protection clause* violation can be laid at their feet, when the injuries complained of are injuries to Woodside Trails, not Plaintiff, and, moreover, the complained-of actions were taken by TDFPS, not the Comptroller's Office. "A party who wishes to make out an Equal Protection claim must prove 'the

---

the individual capacity (and even the dissent, whose reasoning the Plaintiff champions, agrees with this point). Therefore, the whole issue of whether *Noerr-Pennington* immunity is only available to private parties is moot because all the Defendants *are* private parties being sued in their individual capacity.

[9] That is, Plaintiff argues, some of the activity enumerated above cannot be classified as petitioning activity. This is true, but, as the Court has just found, that activity, in any event, does not violate her substantive due process rights.

[10] The Court is aware of the "sham" litigation exception to *Noerr-Pennington* immunity, however, it is difficult to see how that exception would apply to this case and neither party briefed this point. *See* *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* (defining the "sham" exception to *Noerr-Pennington* immunity to include "only lawsuits that are both objectively baseless and subjectively intended to abuse process").

[11] It is worth noting the peculiar nature of the facts in this case. As discussed in the text, Defendants, even though government employees when the “campaign” against Woodside Trails took place, are for purposes of this suit private citizens. See infra note 7. Therefore, cases where the defendants are government officials and cases where the defendants are private citizens are instructive for present purposes.

[12] While Plaintiff includes perfunctory language about equal protection violations in each of her first six counts, the only legal *arguments* she makes in her Response are those delineated above.

existence of purposeful discrimination' motivating the state action which caused the complained-of injury.'" *McCleskey v. Kemp, 481 U.S. 279, 292-293, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987)* (citation omitted); *Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-266, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)*. "Discriminatory purpose in an equal protection context implies that the decisionmaker **[*30]** selected a particular course of action at least in part because of, and not simply in spite of, the adverse impact it would have on an identifiable group." *Johnson v. Rodriguez, 110 F.3d 299, 306-07 (5th Cir. 1997)*.

Plaintiff cannot state a valid Equal Protection claim against the Defendants. The charges she levels in her Second Amended Complaint are, in the first place, injuries sustained by the Camp, and, as noted above, Plaintiff cannot sue to recover for injuries to the Camp. Second, even if Plaintiff is referring to the revocation of *her* license -- an argument she does not make in the *Equal Protection clause* context -- this was action taken by TDPFS, not the Defendants. [13] The complained of "state actions" were made by the officials other than the Defendants here, *see McCleskey, 481 U.S. at 292-93*. For these reasons, it is recommended that the Comptroller Defendants' summary judgment motion on Plaintiff's *Equal protection clause* claim be granted.

[*31] F. *First Amendment* Retaliation Claim [14]

Defendants' contend that Plaintiff's *First Amendment* retaliation claims fails. They put forth a number of different arguments. However, the central point here is this: The Fifth Circuit has set forth the framework for determining when a public employee's speech rights have been violated. To prevail on a *§ 1983* *First Amendment* retaliation claim, a public employee must establish the following: (1) he suffered an adverse employment action; (2) his speech involved a matter of public concern; (3) his interest in commenting on matters of public concern outweighs the employer's interest in promoting efficiency; and (4) his speech motivated the employer's adverse action. *Oscar Renda Contracting, Inc. v. City of Lubbock, Texas, 463 F.3d 378, 382 (5th Cir. 2006)*. Plaintiff cannot bring a *First Amendment* **[*32]** retaliation claim because she was not a public employee, and, for that matter, was not an employee of Strayhorn's or the Comptroller's office. She is not, in other words, a member of the possible universe of plaintiffs that could bring a *First Amendment* retaliation claim. [15] Therefore, it is recommended that this claim be dismissed.

[*33] G. State Law Claims

Plaintiff, in her Second Amended Complaint, agreed to drop all her pending state law claims against the Comptroller Defendants. Therefore, the Court will recommend that Defendants' Motion to Dismiss be granted as to the state law claims.

---

[13] Although it is not entirely clear from her Response, it appears that Plaintiff, when she complains that the children at the Camp were removed without the option of "risk evaluation" (a process that was offered to others accused of abuse) is arguing about an equal protection violation personal to her. *See* Plaintiff's Response at 35-36. However, even if that is the case, the point remains that the "risk evaluation" was a TDFPS decision, not one made by the Comptrollers.

[14] Contrary to Defendants' assertion, in Count I of her Second Amended Complaint, Plaintiff pleads a *First Amendment* retaliation claim. *See* Complaint at 39.

[15] For example, one of Defendants' arguments here is that because Plaintiff's license was restored after the administrative hearing, and because she has no protected interest in her employment, she cannot uphold her burden because the Fifth Circuit has construed *Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976)*, to require "a *section 1983* plaintiff to show stigma plus an infringement of some other interest." *Blackburn v. City of Marshall, 42 F.3d 925, 935-36 (5th Cir. 1995)*. In other words, Defendants contend Plaintiff cannot show the "plus" because all of her other claims fail. This argument, however, puts the cart before the horse. The Fifth Circuit, in *Breax v. City of Garland,* noted that "Stigma, by itself, without an impact on one's employment, does not constitute an adverse *employment action.*" *205 F.3d 150, 158 n. 14 (5th Cir. 2000)* (citing *Blackburn, 42 F.3d at 935-36*) (emphasis added).

III. RECOMMENDATIONS

Based on the above, the Magistrate Court **RECOMMENDS** that the District Court **GRANT** Defendants' *Rule 12(b)(6)* Motion to Dismiss (Clerk's Doc. No. 22) and dismiss all of the claims against Carole Strayhorn, Vicki Anderson, and Ruthie Ford for failure to state a claim on which relief may be granted.

IV. WARNINGS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See* *Battle v. United States Parole Comm'n, 834 F.2d 419, 421 (5th Cir. 1987)*.

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within ten (10) days after the party is served with a copy of the Report shall bar that **[*34]** party from *de novo* review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* *28 U.S.C. § 636(b)(1)(C)*; *Thomas v. Arn, 474 U.S. 140, 150-53, 106 S. Ct. 466, 88 L. Ed. 2d 435, (1985)*; *Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1428-29 (5th Cir. 1996)* (en banc).

To the extent that a party has not been served by the Clerk with this Report & Recommendation electronically pursuant to the CM/ECF procedures of this District, the Clerk is directed to mail such party a copy of this Report and Recommendation by certified mail, return receipt requested.

SIGNED this 21<st> day of February 2007.

ANDREW W. AUSTIN

UNITED STATES MAGISTRATE JUDGE

End of Document

First Am. Title Co. v. Devaugh

United States Court of Appeals for the Sixth Circuit

December 7, 2006, Argued ; February 22, 2007, Decided ; February 22, 2007, Filed

File Name: 07a0073p.06

No. 06-1171

Reporter

480 F.3d 438 *; 2007 U.S. App. LEXIS 3801 **; 2007-1 Trade Cas. (CCH) P75,604; 2007 FED App. 0073P (6th Cir.)

FIRST AMERICAN TITLE COMPANY, a California Corporation; TRANSNATION TITLE INSURANCE COMPANY, an Arizona Corporation; LAWYERS TITLE INSURANCE CORPORATION, a Virginia Corporation; and CHICAGO TITLE INSURANCE COMPANY, a Missouri Corporation, Plaintiffs-Appellants, v. MELISSA R. DEVAUGH, in her capacity as the LAPEER COUNTY REGISTER OF DEEDS; FRAN FULLER, in her capacity as the EATON COUNTY REGISTER OF DEEDS; MILDRED DODAK, in her capacity as the SAGINAW COUNTY REGISTER OF DEEDS; VIRGINIA MCLAREN, in her capacity as the TUSCOLA COUNTY REGISTER OF DEEDS; and LINDA M. LANDHEER, in her capacity as the NEWAYGO COUNTY REGISTER OF DEEDS, Defendants-Appellees.

Subsequent History: Rehearing, en banc, denied by *First Am. Title Co. v. Devaugh, 2007 U.S. App. LEXIS 16861 (6th Cir., July 12, 2007)*

Summary judgment granted by, Injunction granted at *First Am. Title Co. v. DeVaugh, 2008 U.S. Dist. LEXIS 75595 (E.D. Mich., Sept. 25, 2008)*

Prior History: *First Am. Title Co. v. Devaugh, 2005 U.S. Dist. LEXIS 60708 (E.D. Mich., Dec. 22, 2005)*

Disposition: The appellate court affirmed the dismissal of the complaint against the fifth county register, but reversed the decision of the district court as to the remaining four county registers, and remanded for further proceedings that were consistent with the opinion.

Core Terms

registers, copies, records, Sherman Act, immunity, deeds, public body, state-action, district court, enhanced, public record, anticompetitive, authorizes, bulk, non-paper, contracts, reproduction, municipality, discount, state policy, articulated, foreseeable, purchasers, inspection, powers, anticompetitive conduct, unofficial, no-resale, digital, challenged practice

LexisNexis® Headnotes

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN1[] **Motions to Dismiss, Failure to State Claim**

An appellate court reviews de novo a dismissal under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim. To survive the 12(b)(6) motion, the complaint must allege facts which, if proved, would entitle it to relief. The court construes the complaint in the light most favorable to plaintiff, accept its factual allegations as true, and determine whether it can prove no set of facts in support of its claims that would entitle it to relief. Although this is a liberal pleading standard, it requires more than the bare assertion of legal conclusions. Rather, the complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.

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

HN2[] **Sherman Act, Scope**

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN3[] **Scope, Exemptions**

The Parker doctrine exempts anticompetitive conduct engaged in as an act of government by the state as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service from Sherman Act control. The United States Supreme Court later established a two-part test for determining whether Parker state-action immunity saves a state statute or a county practice from preemption by the Sherman Act: First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself.

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

HN4[] **Sherman Act, Scope**

The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe, is whether the activity is required by the State acting as sovereign.

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

HN5[] **Sherman Act, Scope**

A state policy that expressly permits, but does not compel, anticompetitive conduct may be clearly articulated within the meaning of Midcal.

Governments > Legislation > Interpretation

HN6[] **Legislation, Interpretation**

One of the most basic canons of statutory interpretation is that a more specific provision takes precedence over a more general one. This is true even when there is no direct conflict between the general statute and the specific one.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN7[] **Preliminary Considerations, Federal & State Interrelationships**

A state court's opinion on an issue of federal law is entitled to no deference whatsoever.

Governments > Local Governments > Duties & Powers

HN8[] **Local Governments, Duties & Powers**

As a matter of Michigan law as interpreted by the Michigan Court of Appeals, a county's state-granted general powers to make contracts and manage its own business affairs implicitly encompass the power to condition bulk public record sales on relinquishment of the right to resell the records.

Antitrust & Trade Law > Sherman Act > Claims

HN9[] **Sherman Act, Claims**

Plainly the requirement of clear articulation and affirmative expression is not satisfied when the state's position is one of mere neutrality respecting the actions challenged as anticompetitive.

Counsel: [1]** ARGUED: David A. Ettinger, HONIGMAN, MILLER, SCHWARTZ & COHN, Detroit, Michigan, for Appellants. Bonnie G. Toskey, COHL, STOKER, TOSKEY & McGLINCHEY, Lansing, Michigan, for Appellees.

ON BRIEF: David A. Ettinger, HONIGMAN, MILLER, SCHWARTZ & COHN, Detroit, Michigan, for Appellants. Bonnie G. Toskey, COHL, STOKER, TOSKEY & McGLINCHEY, Lansing, Michigan, Marcia L. Howe, JOHNSON, ROSATI, LaBARGE, ASELTYNE & FIELD, Farmington Hills, Michigan, Christina M. Grossi, GILBERT, SMITH & BORRELLO, Saginaw, Michigan, for Appellees.

Judges: Before: BATCHELDER and GRIFFIN, Circuit Judges; PHILLIPS, District Judge.*

Opinion by: McGLINCHEY

Opinion

[*439] GRIFFIN, Circuit Judge. The plaintiffs-appellants are four title insurance companies that do business in Michigan: First American Title Company (a subsidiary of First American Corporation), Transnation Title Insurance Company (a subsidiary of LandAmerica Financial Group, Inc.), Chicago **[**2]** Title Insurance Company (a subsidiary of Fidelity National Financial, Inc.), and Lawyers Title Insurance Company (a subsidiary of LandAmerica Financial Group, Inc.), collectively referred to as "First American." **[*440]** The defendants-appellees are the

* The Honorable Thomas W. Phillips, United States District Judge for the Eastern District of Tennessee, sitting by designation.

Registers of Deeds of five counties in Michigan: Lapeer, Eaton, Saginaw, Tuscola, and Newaygo, collectively referred to as "the registers."

First American alleges that the Lapeer, Eaton, Saginaw, and Newaygo County registers refuse to provide duplicate records in non-paper formats, or to provide duplicate paper records at a bulk discount, unless First American agrees not to sell or give the duplicate records, unofficial copies of the copies, or the information therein, to anyone else. First American contends that this no-resale condition is an anticompetitive practice that violates the Sherman Antitrust Act, *15 U.S.C. § 1 et seq.* First American also alleges that the Tuscola County Register violated the Sherman Act by refusing to provide official title record copies in non-paper format, and by refusing to provide paper copies at a bulk discount; First American does not allege that the Tuscola County Register imposed **[**3]** a no-resale condition on the availability of such copies.

The registers moved to dismiss the Sherman Act claims for failure to state a claim on which relief can be granted, *FED. R. CIV. P. 12(b)(6)*, on the ground that the challenged practices qualify for state-action immunity. The district court granted the registers' motion, and First American appeals. For the reasons that follow, we affirm the dismissal of the Sherman Act claims with regard to the challenged practices of the Tuscola County Register because those practices are covered by state-action immunity from antitrust liability. But we reverse the dismissal of the Sherman Act claims with regard to the challenged practices of the other four county registers and remand for further proceedings consistent with this opinion.

I.

Because First American asserted claims under *section 2* of the Sherman Act, *15 U.S.C. § 2*, and the United States Constitution, the district court had federal-question jurisdiction under *28 U.S.C. § 1331*. The district court had supplemental jurisdiction over First American's state-law claims under *28 U.S.C. § 1367(a)* **[**4]** because they "so related" to First American's federal-law claims as to "form part of the same case or controversy." *Id.*; *Davet v. City of Cleveland, 456 F.3d 549, 553 (6th Cir. 2006)*. Because the appellants filed timely notices of appeal, we have jurisdiction pursuant to *28 U.S.C. § 1291*.

II.

In general, a register of deeds ("register") is a government official charged with the tasks of (1) recording all deeds, mortgages, and other instruments that convey an interest in land in the register's county, and (2) maintaining copies of those records for public inspection and reproduction. In Michigan, a register operates only in the county in which she has been elected; each county register therefore has an effective monopoly because obtaining a complete listing of real estate title documents otherwise entails obtaining title records directly from every person and entity engaged in real estate transactions within the county. As First American explains without contradiction from the registers, this "task would be essentially impossible, since there would be no incentive for individuals to identify themselves or provide documents concerning their **[**5]** transactions to a private party [such as plaintiff title companies], and the cost of collecting this data would be prohibitive."

As a title insurer, First American's business includes compiling, inspecting, and researching each document that is recorded and maintained by the registers in the **[*441]** counties where First American provides title insurance. Based on information in those documents, First American creates, maintains, and provides indices and abstracts of that information. The development of such a document index -- called a tract index or a title plant -- enables First American to retrieve title documents more quickly and accurately than it could if it used the registers' grantor-grantee indices. This is because a tract index, unlike a register's grantor-grantee index, lists records by parcel of real estate. First American provides its tract indices to title insurance customers and to other companies that do not have their own indices, thus providing a superior source of title information. This enables title insurers and parties to real estate transactions to identify and resolve defects in title.

The Michigan Legislature ("the Legislature") requires registers, upon payment **[**6]** of a fee, to record "reproductions . . . of all deeds, mortgages, maps, and instruments or writings authorized by law to be recorded in his or her office, and left with him or her for that purpose." *M.C.L. § 565.491*; *see also* *M.C.L. § 565.583*. Since 1921, the Legislature has authorized the counties by statute

> to purchase or make, establish and maintain a system of abstracts of title to all lands in said county; to make and sell abstracts of title and furnish information concerning the conditions of title to such lands and to charge such fees therefor as shall be from time to time determined by the proper authorities of said counties as hereinafter provided.

M.C.L. § 53.141; *see also* *M.C.L. § 565.201(1)* (specifying the information that an instrument must contain in order to be recorded with a register of deeds); *M.C.L. §§ 565.411* and *565.412* (register may receive and record a sealed, certified copy of any final judgment by a court of competent jurisdiction that affects or relates to the title of real estate that is situated within **[**7]** his county, and it may collect the same fee as charged for recording a conveyance).

Perhaps most relevant, the statute governing reproduction of registers' records, now *M.C.L. § 565.551*, provides, in full:

> Sec. 1. (1) A register of deeds shall furnish proper and reasonable facilities for the inspection and examination of the records and files in his or her office, and for making memorandums or transcripts from the records and files during the usual business hours, to an individual having a lawful purpose to examine the records and files. However, the custodian of the records and files may make reasonable rules and regulations with reference to the inspection and examination of the records and files as is necessary to protect the records and files and to prevent interference with the regular discharge of the duties of the register of deeds.
> (2) If an individual requests a reproduction of a record or file of a register of deeds, the register of deeds shall do 1 of the following, at the register of deeds' option:
>
> (a) Reproduce the record or file for the individual pursuant to . . . *sections 24.401 to 24.403 of the Michigan Compiled Laws*, **[**8]** using a medium selected by the register of deeds. Unless a different fee is provided for by law, the fee for a reproduction under this subdivision other than a paper copy shall not exceed the reasonable costs to the register of deeds.
>
> (b) Provide equipment for the individual to reproduce the record or file pursuant to [same statutory sections noted above], using a medium selected by the register of deeds. Unless a different fee is provided for by law, the fee for a reproduction **[*442]** under this subdivision other than a paper copy shall not exceed the reasonable costs to the register of deeds.
> (c) Authorize the individual to reproduce the record or file on the premises using equipment provided by that individual. This subdivision does not apply unless the individual requests authorization to reproduce the record or file using equipment provided by that individual.
> (3) A register of deeds may prohibit the reproduction of an instrument temporarily left with the register of deeds to be recorded in the register of deeds' office.

M.C.L. §§ 565.551(2)(a) and *(b)* incorporate *M.C.L. §§ 24.401 through 24.403*, which are **[**9]** part of the Records Reproduction Act of 1992. In turn, *M.C.L. § 24.402* provides that a Michigan governmental entity or official may reproduce a record via photograph, photocopy, microreproduction, optical media, data transfer, digitization, digital migration, digital imaging, magnetic media, printing, and any other method or medium that is approved by the Department of History, Arts, & Libraries. When a register makes a paper copy of a record, *M.C.L. §§ 600.2567(1)(b)* and *(4)* authorizes him or her to charge $1.00 per page.

None of these statutory provisions, nor any others identified by the registers, addresses the registers' authority to regulate or restrict private parties' re-sale of record copies or their sale of unofficial copies of those record copies or of information contained therein.

III.

In February 2005, First American filed a three-count complaint in the United States District Court for the Eastern District of Michigan. Count one alleges that the registers committed antitrust violations under *§ 2* of the Sherman Act and seeks injunctive relief. Specifically, First American alleged that the registers used their monopoly **[**10]** power to restrict competition in the provision of title information in their counties by imposing license restrictions and anticompetitive contracts on title companies and, in some cases, by refusing to provide discounted rates for the bulk purchase of title records. First American alleged that the registers intended these restrictions to hamper the title companies' long-standing practice of re-selling title record copies as part of "title plants" and title searches to companies and to people engaged in real estate transactions.

First American further alleged that the registers abused their positions as public repositories of land title records, in contravention of Michigan statutes that are intended to make title information readily available to buyers and sellers of real estate. First American contends that the registers' practices have increased title insurance costs for home buyers and sellers and raised barriers to entry into the title insurance market in these five counties, thereby preventing title insurers from offering faster, higher-quality title searches.

Count two is a *42 U.S.C. § 1983* claim alleging that the registers violated First American's **[**11]** federal constitutional rights to procedural due process, substantive due process, and equal protection. Count three alleges that the registers established and maintained systems of indices or tracts in violation of *M.C.L. § 53.141 et seq.*

The registers moved to dismiss the plaintiffs' claims pursuant to *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim on which relief could be granted, and First American filed opposition briefs. In June 2005, the district court dismissed First American's Sherman Act claims (count one) and its federal due-process and equal-protection claims (count **[*443]** two) for failure to state a claim. The district court declined to dismiss First American's state statutory claim (count three) at that juncture. [1]

With regard to count one, the district **[**12]** court held that the registers qualified for state-action immunity from Sherman Act antitrust liability, citing a Michigan statute that granted the registers the general power to make contracts. Relying on *Michigan Paytel Joint Venture v. City of Detroit, 287 F.3d 527 (6th Cir. 2002)*, the district court concluded that, because the state had granted the registers the general power to contract, the registers had "antitrust immunity in setting terms within a contract." [2]

[13]** In June 2005, First American moved for reconsideration with regard to the dismissal of its Sherman Act antitrust claim, contending that the district's court's "ruling on the State Action Immunity doctrine established a new, virtual *per se* immunity rule, which is contrary to controlling Supreme Court and Sixth Circuit precedent and confounds the basic premises of the doctrine." In August 2005, the district court denied reconsideration, stating that

> a tension exists between the United States Supreme Court['s] reasoning in *Community Communications Company, Inc. v. City of Boulder, 455 U.S. 40, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982)*, and the subsequent Sixth Circuit reasoning in *Michigan Paytel Joint Venture v. City of Detroit, 287 F.3d 527 (6th Cir. 2002)*. Given this tension, the court's conclusion that Defendants' actions are protected by the state action exception to the Sherman Act is certainly debatable. However, the court's decision did not constitute palpable error. It was an attempt to faithfully construe the broad language used in a recently published Sixth Circuit decision. Plaintiffs['] arguments, which are quite persuasive, are best directed **[**14]** at the Sixth Circuit if the Plaintiffs seek appellate review and further explanation of that court's reasoning in *Michigan Paytel*.

In January 2006, First American and the other plaintiffs filed a timely notice of appeal with regard to the dismissal of their Sherman Act claims.

---

[1] The district court rejected the registers' abstention and preclusion arguments, and the registers have not appealed.

[2] With regard to count two's procedural due-process claim, the district court held that First American failed to establish a liberty or property interest in the ability to purchase public records at a bulk rate with the right to resell them. With regard to the substantive due-process and equal protection claims, the district court held that the registers' practices bore a rational relation to the legitimate state interest in maintaining and increasing revenue from public record sales. Regarding count three, the district court denied summary judgment, finding "a genuine issue of material fact as to whether the Registers are indeed illegally maintaining a system of abstract of title" in violation of Michigan statute. The district court later issued a separate opinion dismissing count three, holding that the relevant state statute did not provide a private right of action. First American has not appealed the dismissal of counts two and three.

IV.

HN1[] We review de novo a dismissal under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim. *S.E. Texas Inns, Inc. v. Prime Hospitality Corp., 462 F.3d 666, 671 (6th Cir. 2006)* (citation omitted). To survive the 12(b)(6) motion, First American's complaint must allege facts which, if proved, would entitle it to relief. *Id.* (citing *Conley v. Gibson, 355 U.S. 41, 45, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*. We construe the complaint in the light most favorable to First American, accept its factual allegations as true, and **[*444]** determine whether it can prove no set of facts in support of its claims that would entitle it to relief. *Id.* "Although this is a liberal pleading standard, it requires more than the bare assertion of legal conclusions. Rather, the complaint must contain either direct or inferential allegations respecting **[**15]** all the material elements to sustain a recovery under some viable legal theory." *Id. at 671-72* (citation omitted).

V.

First American brings its claim under *§ 2* of the Sherman Act, which provides that *HN2*[] "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." *15 U.S.C. § 2*. The sole issue on appeal is whether these registers' challenged practices are exempt from the Sherman Act under the "state action" immunity doctrine, which was first set forth in *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. *Parker* held that

> nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its **[**16]** officers and agents is not lightly to be attributed to Congress.
> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The act is applicable to "persons" including corporations . . . .
>
> There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations." [citations to Cong. Rec. omitted] That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history.

Parker, 317 U.S. at 351 (citations omitted). *HN3*[] The *Parker* doctrine "exempts 'anticompetitive conduct engaged in as an act of government by the state as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service' from Sherman Act control." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 442 F.3d 410, 440-41 (6th Cir. 2006)* (quoting *City of No. Olmsted v. Greater Cleveland Reg'l Transit Auth., 722 F.2d 1284, 1287 (6th Cir. 1983)* **[**17]** (quoting *City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 413, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)* (Brennan, J. [3] (" *Lafayette* "))), *cert. granted on other grounds*, *-- U.S. --, 127 S. Ct. 852, 166 L. Ed. 2d 681 (2007)*.

[*445] The Supreme Court later "established a two-part test for determining whether [*Parker* state-action immunity] saves a state statute [or a county practice] from preemption by the Sherman Act: 'First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself.'" *Tritent Int'l Corp. v. Kentucky, 467 F.3d 547, 554-55 (6th Cir. 2006)* (quoting *Calif.*

---

[3] In Parts II and III of his opinion, which we quote and rely on here, Justice Brennan spoke only for four Justices: himself and Justices Marshall, Powell, and Stevens. Several of the registers attack *Lafayette* as "merely a plurality opinion having no precedential force." Their attempt to escape *Lafayette* is unavailing. As the Supreme Court noted twenty-five years ago, the *Lafayette* plurality's "standard has since been adopted by a majority of the Court." *City of Boulder, 455 U.S. at 51* (citing *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co., 439 U.S. 96, 109, 99 S. Ct. 403, 58 L. Ed. 2d 361 (1978)* and *Midcal, 445 U.S. at 105*).

Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980) ("*Midcal*")); *see also* Brentwood, 442 F.3d at 441. Both *Midcal* elements "are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." FTC v. Ticor Title Ins. Co., 504 U.S. 621, 636, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992) (" *Ticor* ") (citing Patrick v. Burget, 486 U.S. 94, 100, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988)). **[**18]**

The Supreme Court has held that *Midcal* 's second prong does not apply to municipalities:

> [T]he requirement of active state supervision [*Midcal* 's second prong] serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy. In **[**19]** *Midcal* we stated that the active state supervision requirement was necessary to prevent a State from circumventing the Sherman Act's proscriptions "by casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." 445 U.S., at 106 . . . . Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy [*Midcal* 's first prong]. Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.

Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46-47, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985) **[**20]** (" *Hallie* ").

Finally, like other judicially-imposed exemptions from the antitrust laws, the state-action immunity doctrine must be narrowly construed. Brentwood, 442 F.3d at 441 (citing Ticor, 504 U.S. at 636) ("[W]e have held that state-action immunity is disfavored . . . .")).

VI.

We hold that the challenged practices of the Saginaw County, Eaton County, Lapeer County, and Newaygo County registers do not qualify for Parker state-action immunity because they are not "clearly articulated and affirmatively expressed as state policy," Midcal, 445 U.S. at 105.

First, the registers do not claim that the state of Michigan *requires* them to follow the challenged practices. The registers do not claim that a state statute or regulation requires them to prohibit purchasers from re-selling or otherwise providing title record copies or information to other private parties. [4] They do not claim that a state **[*446]** statute or regulation prohibits them from offering a bulk discount on paper copies without a no-resale restriction. Nor do they claim that a state statute or regulation prohibits them from making title records available in **[**21]** more convenient and readily searchable non-paper formats, such as microfiche or digital images or information on a compact disc or "memory key," without a no-resale restriction.

Nonetheless, in order to establish **[**22]** that the challenged practices are "clearly articulated and affirmatively expressed as state policy" per Midcal, the registers need not show that the Legislature *required* the practices.

---

[4] As a condition for continuing to sell title records to First American, the Lapeer register required First American to sign an agreement that prohibited it from using the documents for any purpose other than internal underwriting. First American signed the agreement for 2001 but refused to renew for 2002. The Lapeer register then refused to sell title records to First American at a bulk discount and in non-paper form as it had previously done. Beginning in 2003, the Eaton register required First American to sign a similar agreement and likewise stopped providing title records at a bulk discount and in non-paper formats when First American refused to agree to the restrictions on resale. The Newaygo and Saginaw registers took similar measures beginning in December 2004 and January 2005, respectively.

McCarthy v. Middle Tenn. Elec. Membership Corp., 466 F.3d 399, 414 n.25 (6th Cir. 2006) ("With regard to the first prong of the *Midcal* test, we do not require explicit authorization . . . .") (citations and quotation marks omitted). [5]

In Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975), **[**23]** the Supreme Court stated that ***HN4***[] "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe[,] is whether the activity is required by the State acting as sovereign." *Id. at 790*. The Supreme Court later cited *Goldfarb* with approval in Midcal, 445 U.S. at 104. The Supreme Court has since clarified that:

> *Goldfarb*, however, is not properly read as making compulsion a *sine qua non* [of] state action immunity. In that case, [it was undisputed that] the Virginia State Bar, a state agency, compelled Fairfax County lawyers to adhere to a minimum fee schedule. *421 U.S., at 776-78* . . . . The *Goldfarb* court therefore was not concerned with the necessity of compulsion - its presence in the case was not an issue. The focal point of the *Goldfarb* opinion was the *source* of the anticompetitive policy, rather than whether the challenged conduct was *compelled* . The Court held that a State Bar, *acting alone*, could not immunize its anticompetitive conduct. Instead, the Court held that private parties, acting alone, were entitled to **[**24]** *Parker* immunity only if the State "acting as sovereign" intended to displace competition. *421 U.S., at 790* . . . .
>
> Although *Goldfarb* did employ language of compulsion, it is beyond dispute that the Court would have reached the same result had it applied the two-pronged test later set forth in *Midcal*. . . . Although we recognize that the language in *Goldfarb* is not without ambiguity, we do not read that opinion as making compulsion a prerequisite to a finding of state action immunity.

[*447] *Southern Motor Carriers Rate Conference, Inc. v. U.S., 471 U.S. 48, 105 S. Ct. 1721, 1728-29, 85 L. Ed. 2d 36 (1985)* (" *Southern Motor* "). In short, ***HN5***[] "a state policy that expressly *permits*, but does not compel, anticompetitive conduct may be 'clearly articulated' within the meaning of *Midcal* ." *Southern Motor, 105 S. Ct. at 1729*. Thus, the registers "need not point to a specific, detailed legislative authorization for [their] challenged conduct." *Southern Motor, 105 S. Ct. at 1730* (citation and internal quotation marks omitted). But the registers must show that "the State as sovereign [the Legislature] **[**25]** clearly intends to displace competition in a particular field with a regulatory structure . . . ." *Id.*

The parties' disagreement can be seen as a divergence on how to define the relevant particular field" in which the Legislature "clearly intend[ed] to displace competition," *id.* As noted above, it is effectively impossible for private parties (such as the plaintiff companies) to induce the parties to all real estate transactions in a county to provide them with grantor/grantee and other title information. And all parties to a real estate transaction must report the transaction and record the change of title with the register, who alone keeps the original documents thus generated. The Legislature understood these obvious and uncontested realities when it enacted the legislation that defined the powers and responsibilities of the registers. Therefore, we conclude that for purposes of the Sherman Act, the Legislature intended that the registers have a monopoly on (1) mandatory acquisition of real estate transaction information from the parties to the transaction, and (2) recordation of the transaction and possession of the *original, official* title documents thus generated. **[**26]** We hold that the Legislature "clearly intend[ed] to displace competition" with the registers to that extent.

However, we cannot conclude from this that the Legislature further intended to displace competition in the provision of *unofficial duplicate* title documents or title *information*, which is all that First American seeks to do. On the

---

[5] On a related note, First American cannot defeat state-action immunity by showing that the registers' imposition of a no-resale condition was a misuse of or exceeded their legal authority. *Stringham v. Hubbard, No. Civ-S-05-0898, -- F. Supp. 2d --, 2006 U.S. Dist. LEXIS 78154, 2006 WL 3053079, at *3 (E.D. Cal. Oct. 26, 2006)* (U.S.M.J.) (citing *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 402 & n.10 (9th Cir. 1991))*, *R&R adopted*, *-- F. Supp. 2d --, 2006 U.S. Dist. LEXIS 87921, 2006 WL 3498405 (E.D. Cal. Dec. 5, 2006)* (U.S.D.J.).

contrary, if the Legislature wished to grant the county registers a broader monopoly -- a monopoly on the provision even of duplicate title documents or mere title *information* -- it could have done so. It has not.

This does not yet conclude the inquiry in First American's favor. The question remains, even though the Legislature has not *expressly* given the registers a monopoly on the provision of duplicate title documents and title information, does such a monopoly "logically result from" the powers that the State *did* expressly give the registers? Put another way, is the imposition of a no-resale condition by these registers a "foreseeable result" of the monopoly or anticompetitive powers that the Legislature did expressly give the registers?

The "foreseeable result" and "logical result" formulations stem from the Supreme Court's **[**27]** opinion in *Hallie*. There, the Supreme Court considered a Wisconsin statute that authorized cities to build, add to, alter, and repair sewage systems, including the power to "describe with reasonable particularity the district to be served." *Hallie, 471 U.S. at 41*. The Wisconsin Legislature had also enacted a statute providing that a city operating a public utility "may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated." *Id.* A third Wisconsin statutory provision authorized the Department of Natural Resources ("DNR") to require a city to construct its sewage system so that other areas could connect to it. *Id.* It **[*448]** also provided, however, that the DNR's order would be void if the area seeking to connect to the sewer system refused to be annexed by the municipality; in other words, the Wisconsin Legislature effectively authorized municipalities to condition connection to its sewage system on an agreement to be annexed. *Id.*

The city of Eau Claire refused to provide sewer **[**28]** service to neighboring townships unless they agreed to be annexed, and the townships contended that this violated the Sherman Act. The Supreme Court held that the city's practice qualified for state-action immunity from antitrust liability:

> The Towns contend that these statutory provisions do not evidence a state policy to displace competition in the provision of sewage services because they make no express mention of anticompetitive conduct. [But] . . . the statutes clearly contemplate that a city may engage in anticompetitive conduct. Such conduct is a foreseeable result of empowering the City to refuse to serve unannexed areas. . . . [I]t is sufficient that the statutes authorized the City to provide sewage services and also to determine the areas to be served. We think it is clear that anticompetitive effects logically would result from this broad authority to regulate.

Hallie, 471 U.S. at 41-42 (internal citations omitted).

Here, by contrast, it was decidedly *not* foreseeable that the powers expressly granted to the registers would result in any of these four registers' challenged practices. In reaching this conclusion, we have considered **[**29]** Michigan statutes governing county powers generally, statutes governing access to public records, and statutes governing county register records specifically.

First, the Legislature authorized and required the registers to record deeds and related instruments that affect or pertain to real property title -- such as mortgage satisfactions, [6] **[**30]** tax liens or certificates, [7] and court

---

[6] *See M.C.L. § 565.42* ("Any mortgage shall also be discharged upon the record thereof by the register of deeds, in whose custody it shall be, whenever there shall be presented to him a certificate executed by the mortgagee . . . specifying that such mortgage has been paid, or otherwise satisfied or discharged; or upon the presentation to such register of deeds of the certificate of the circuit court . . . certifying . . . that said mortgage has been duly paid, or upon the presentation to such register of deeds of a certificate of the register in chancery of the county . . . certifying that a decree of foreclosure of any such mortgage has been duly entered in his office, and that the records in his office shows [sic] that such decree has been fully paid and satisfied.").

M.C.L. § 565.43 provides, in part, "Every certificate described in [*M.C.L. § 565.42*], and the proof or acknowledgment of the certificate, shall be recorded at full length, and a reference shall be made to the book and page containing the certificate, in the minute of the discharge of the mortgage made by the register upon the mortgage."

judgments [8] -- and to store the *original* records thus generated. *See* M.C.L. § 53.94 (providing, in pertinent part, "The board of supervisors of each county shall, from time to time, provide suitable books, at the expense of the county, for the entering and recording of all deeds and matters required by law to be entered and recorded by the register of deeds."). The Legislature also authorizes county boards to **[*449]** authorize registers to make copies of the records and keep the copies on hand. *See* M.C.L. § 691.1102 (if the county board of commissioners instructs the register to do so, the register may make copies of the original records in her possession, keeping one copy in her office, and storing one copy in a separate building).

As the Lapeer register correctly points out, "Based on this myriad of statut[es], the register is *the* only official with the authority to store and make a copy from its [original] record . . . . The Plaintiffs, as with all the public, may obtain a copy of the register's record . . ., but they can never store or copy *the* official record . . . ." But none of these powers and obligations of the register foreseeably or logically results in the registers conditioning non-paper copies or bulk-discounted paper copies on a no-resale restriction -- let alone on the sale of *unofficial (uncertified) copies* **[**31]** (i.e. "copies of copies") or of the title information contained therein.

Second, the Legislature authorized the registers to "make reasonable rules and regulations with reference to the inspection and examination of the records and files as is necessary to protect the records and files and to prevent interference with the regular discharge of the duties of the register of deeds." M.C.L. § 565.551(1). The registers present no evidence or reason to believe that the sale of unofficial copies of the certified copies, or the sale of the information contained therein, would somehow affect the integrity of the originals or interfere with the registers' discharge of their duties. Therefore, we hold that it is not foreseeable that the powers granted in M.C.L. § 565.551(1) would logically result in the challenged practices. *Cf.* Lapeer Cty. Abstract & Title Co. v. Lapeer Cty. Register of Deeds, 264 Mich. App. 167, 691 N.W.2d 11, 16 (Mich. Ct. App. 2004) ("MCL 565.551(1) generally pertains only to the in-office inspection of records, [not] . . . the reproduction of those records. More specifically, **[**32]** the 'reasonable rules and regulations' language . . . only pertains to the inspection and examination of records, not their reproduction and distribution. . . . It has nothing to do with the making of contracts for the sale of copies, let alone entering into contracts that provide only for the restricted use of such copies.").

Third, when a party requests a copy of a record held by a register, the Legislature authorizes the register to choose whether to reproduce the record itself or provide equipment for the requestor to make the reproduction. *See* M.C.L. §§ 565.551(2)(a) and (b). It is not foreseeable that granting the registers this discretion would logically result in the challenged practices.

Fourth, when a party requests a copy of a record held by a register, the Legislature authorizes the register to choose whether to reproduce the record on paper or in some other format. *See* M.C.L. § 565.551(2)(a) (register may "[r]eproduce the record or file for the individual pursuant to . . . [M.C.L. §§ 24.401 - 24.403], using a medium selected by the register of deeds."). That is, a register may permissibly **[**33]** have a policy of not making non-paper copies available to anyone. It is not foreseeable, however, that merely granting registers discretion as to the medium of the copies would result in the registers discriminating between purchasers who wish to use the information in the marketplace and purchasers who do not. That is, the discretion to provide all purchasers with only paper copies does not logically result in providing *some purchasers* with non-paper copies but denying them to others who might compete with the registers in the provision of title information.

Fifth, the Legislature authorizes the registers to charge a statutorily fixed fee for each copy. For paper copies, the registers **[*450]** may charge $ 1.00 per 8.5-inch by 11-inch single-sided page, M.C.L. §§ 600.2567(1)(b) and (4), and, for non-paper copies, the register may charge enough to recoup its "reasonable costs," M.C.L. §§ 565.551(2)(a) and (b). It is not foreseeable that granting a register the discretion to charge a fee to cover its costs

---

[7] *See* M.C.L. § 211.135 (before recording deed or contract, register must obtain certificates confirming that taxes have been paid and all tax liens satisfied on the property for past five years).

[8] *See* M.C.L. §§ 600.6055(1) and (2) (whenever real estate is sold by execution of a judgment, the executing officer must file a certificate of sale with the county register within ten days, and the register must record it).

would result in the register refusing to make non-paper copies, despite payment of the fee, unless the purchaser agreed to relinquish **[**34]** his right to re-sell the copies or the information they contain.

Sixth, in 1996, the Legislature enacted the Enhanced Access to Public Records Act, *M.C.L. §§ 15.441 - 15.443* ("the enhanced access act"). The enhanced access act provides that, "[u]pon authorization of the governing body of the public body, [a public body may] provide enhanced access for the inspection, copying, or purchasing of a public record that is not confidential or otherwise exempt by law from disclosure." *M.C.L. § 15.443(1)(a)*. The act defines enhanced access as "a public record's immediate availability for public inspection, purchase, or copying *by digital means*," and it cautions that "[e]nhanced access does not include the transfer of ownership of a public record." *M.C.L. § 15.442(a)* (emphasis added). The act further provides that if a public body does provide enhanced (i.e., digital) access to a public record, it may "charge a reasonable fee established by the public body's governing body" for doing so, *M.C.L. § 15.443(1)(b)*, which is defined as "a charge calculated to enable a public body to recover **[**35]** over time only those operating expenses directly related to the public body's provision of enhanced access." *M.C.L. § 15.442(g)*.

We first note our uncertainty with regard to whether the enhanced access act even applies to county registers. [9] The enhanced access act claims blanket coverage of all entities that are considered public bodies and all records that are considered public records under the Michigan Freedom of Information Act ("FOIA"), *see* *M.C.L. § 15.442(e)* and *(f)*. [10] By contrast, the Inspection of Records Act, *M.C.L. § 565.551*, by its terms, applies specifically and only to county registers.

[36]** This difference in the two statutes' coverage is significant. ***HN6***[] "One of the most basic canons of statutory interpretation is that a more specific provision takes precedence over a more general one." *United States v. Perry, 360 F.3d 519, 535 (6th Cir. 2004)* (citations omitted); *see also* *Simpson v. United States, 435 U.S. 6, 15, 98 S. Ct. 909, 55 L. Ed. 2d 70 (1978)* [11] **[**37]** (referring with approval to "the principle that gives precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern, *even if the general provision was enacted later*") (emphasis added). [12] This **[*451]** is true even when there is no direct conflict between the general statute and the specific one. *See* *Green v. Bock Laundry Mach. Co., 490 U.S. 504, 524, 109 S. Ct. 1981, 104 L. Ed. 2d 557 (1989)* ("A general statutory rule usually does not govern unless there is no more specific rule.") (citing *D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204, 208, 52 S. Ct. 322, 76 L. Ed. 704 (1932))*.

Because the question of whether the enhanced access act applies to county registers is a question of state law, we note that the Michigan courts follow this same rule of statutory construction. *See* *People v. Bewersdorf, 181 Mich. App. 430, 450 N.W.2d 271, 272 (Mich. Ct. App. 1989)* (holding that the Motor Vehicle Code's specific sentencing scheme applicable to convictions for operating under the influence of intoxicating liquor "prevails to the exclusion of the general habitual-offender statute"), *aff'd in pt & rev'd in pt on other grounds*, *438 Mich. 55, 475 N.W.2d 231*

[9] The Michigan courts have not yet had occasion to provide guidance on this issue.

[10] The Michigan FOIA definition of public body excludes the judiciary but includes every state officer, employee, or agency in the executive branch, except the Governor and Lieutenant Governor and their executive offices and executive office employees; every agency or other body in the legislative branch; and every county, regional, or local body or agency. *M.C.L. §§ 15.232(d)(i-v)*. It defines public record as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created" and defines "writing" to include every "means of recording or retaining meaningful content." *M.C.L. §§ 15.232(e)* and *(h)*.

[11] *Simpson* was superseded by statute, but on other grounds. *See* *United States v. Moore, 917 F.2d 215 (6th Cir. 1990)*.

[12] *See, e.g.,* *Sherrod v. Genzyme Corp., 170 F. App'x 375, 378 (6th Cir. 2006)* ("*M.C.L. § 445.774a(1)*'s specific authorization of non-compete agreements trumps the other statutes' inclusion of such agreements within their general prohibition on 'consideration' as a condition of employment.").

(Mich. 1991) (reading general provision and specific provision not to conflict with one another). It seems, then, that the enhanced access act may not apply to county registers. **[**38]** [13]

Even assuming, without deciding, that the enhanced access act applies to county registers, it does not help the registers' case for state-action immunity. [14] **[**39]** The registers emphasize that "the Enhanced Access to Records Act . . . permits, but does not mandate Counties to provide 'enhanced access' to public records." That is correct, [15] but irrelevant. It does not change the fact that it is not reasonably foreseeable that simply allowing a register to make records available for digital copying would lead a register to refuse to do so unless the purchaser gives up his right to sell unofficial copies of those copies or the information therein.

Several of the registers seize upon the enhanced access act's statement that "[e]nhanced access does not include the transfer of ownership of a public record." Registers Fuller, McLaren, and Landheer argue, "Plaintiffs ignore that the Enhanced Access to Records Act not only foresees such restrictions on sale or transfer, **[*452]** but, actually, specifically contemplates them." They also argue that "the requestor does not, by statute, secure an ownership interest in the documents, and the requestor thus cannot convey or sell to others what it does not own." But this provision of the enhanced access act has nothing to do with registers' right to restrict the sale or transfer of certified copies (provided by a register), let alone the sale or transfer of uncertified "copies of copies" **[**40]** (made by a title insurance company from the certified copy) or the title information therein. *M.C.L. § 15.442(a)*'s caveat about ownership of public records obviously refers to the *original* public record, which remains owned and possessed by the public body, regardless of how many digital copies of the record are sold. First American uses in the marketplace only what it owns -- not the original public record, but unofficial "copies of copies" and the title information contained therein. The registers also attempt to bolster their case for state-action immunity by reference to yet another provision of the enhanced access act. *M.C.L. § 15.443(d)* authorizes public bodies to

> [p]rovide *another public body* with access to or output from its geographical information system for the official use of that other public body, without charging a fee to that other public body, if the access to or output from the system is provided in accordance with a written intergovernmental agreement that contains all of the following:
>
> (i) A statement specifying that the public body receiving access to or output from the system without **[**41]** charge is prohibited from providing access to the system's output to a third party unless that public body does both of the following:

---

[13] The Lapeer register admits as much: "Actually, the more specific statute, *MCL 565.551*, controls. * * * *MCL 15.443* is not relevant."

[14] Conversely, we are not persuaded by First American's argument that the enhanced access act shows that the registers are *not* entitled to state-action immunity.

First American asserts, "The Enhanced Access Act not only did not contemplate pricing structures to punish competition . . . it prohibits them." But the enhanced access act does no such thing; it authorizes public bodies to provide copies to *other public bodies* free of charge, not to private parties free of charge, and it says nothing about prohibiting or allowing private parties to re-sell copies or the information therein.

First American also asserts, "The language in the Enhanced Access Act relating to pricing confirms that restrictions against resale not only were not contemplated by the Legislature, but are contrary to the goals of the Act. This Act limits the fees public bodies may charge to 'an amount that enables the public body providing access to or output from its system to recover over time its operating expenses directly related to providing access to output from its system to a third party.'" We fail to see how a limitation on the fees that public bodies may charge for digital copies evinces an intent to prohibit public bodies from imposing no-resale conditions on private purchasers of those copies.

[15] The last subsection of the act provides: "This act does not require a public body to provide enhanced access to a specific public record if that public body has not established an enhanced access policy in accordance with subsection (5) with respect to that specific record." *M.C.L. § 15.443(6)*.

(A) Collects from the third party a fee described in subsection (2), or waives that fee in accordance with the written terms of the intergovernmental agreement.

(B) Conveys to the providing public body that [a] portion of any fee collected under subsection (2) that is directly attributable to the operating expenses of the providing public body in furnishing the output from the system to the third party.

. . . .

(iii) A statement specifying the portion of any fee collected under subsection

(2) and collected from a third party that the receiving public body shall convey to the providing public body.

Id. (emphasis added). The registers' reliance on this provision is misplaced. The existence of this provision actually undermines the registers' argument that the Legislature "specifically contemplate[d]" restrictions on *private purchasers'* sale or transfer of uncertified record copies ("copies of copies") or the title information therein. The Legislature authorized public bodies to enter into such agreements only with **[**42]** *other public bodies.* That is why M.C.L. § 15.443(d) repeatedly refers to *intergovernmental* agreements, and *only* intergovernmental agreements, through which a public body can obtain geographical information without a fee if it promises either not to resell the information or to turn over part of any monies it receives by reselling the information.

The existence of M.C.L. § 15.443(d) shows that, when the Legislature wished to authorize a public body to impose a no-resale condition to the provision of public record copies, the Legislature knew how to do so and did so explicitly. *Cf.* Marx v. Centran Corp., 747 F.2d 1536, 1545 (6th Cir. 1984) (after noting that 12 U.S.C. § 93(a) contained an express cause of action and § 93(b) did not, this court remarked, "[t]his difference between the two **[*453]** subsections leads to the conclusion that 'when Congress wishes to provide a private damages remedy, it knew how to do so and did so expressly.'") (quoting Touche Ross & Co. v. Redington, 442 U.S. 560, 572, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979)).

If anything, the registers' case is undermined **[**43]** by the fact that the Legislature chose *not* to enact a similar provision authorizing public bodies to impose a no-resale condition on the provision of public record *to private parties.* This reasoning comports with the long-established canon of statutory construction, *expressio unius est exclusio alterius*, "the mention of one thing implies the exclusion of another." *See* Millsaps v. Thompson, 259 F.3d 535, 546 (6th Cir. 2001) ("Under the *expressio unius* principle, '[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'") (quoting Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 458, 94 S. Ct. 690, 38 L. Ed. 2d 646 (1974)). [16] The Michigan courts also follow this canon of construction. *See* People v. Jahner, 433 Mich. 490, 446 N.W.2d 151, 155 n.3 (Mich. 1989) (citing, *inter alia*, Stowers v. Wolodzko, 386 Mich. 119, 191 N.W.2d 355 (Mich. 1971)).

[44]** In any event, the rationale of M.C.L. § 15.443(d) is inapposite when the recipient of public records is a private party. That provision contemplates that a public body give up its right to resell public record information (or agree to share the fee from such resale) precisely because the public body received the information *free of charge*. Here, by contrast, First American is not entitled to receive, and does not seek to receive, title record copies for free in any quantity or format.

Moreover, the registers should *hope* that the enhanced access act does not apply to them because one of its provisions recognizes and assumes that private parties sell information obtained from digital copies of public records. Section 4 provides that "[a]n individual elected or appointed to a board of governing body of a city, village, township or county *shall not have an ownership interest in*, or accept compensation from, *a person who sells information that is obtained from a public record* of that city, village, township or county." M.C.L. § 15.444 (emphasis added). As First American points out, one can obtain an "ownership interest" **[**45]** in a private company, but not in a local or county government.

---

[16] *See, e.g.,* Cavanaugh v. Cardinal Local Sch. Dist., 409 F.3d 753, 756 (6th Cir. 2005) ("Applying the canon of *exclusio unius est exclusio alterius*. . . we conclude . . . .").

Finally, even if the enhanced access act does not apply to county registers, its fourth section still undermines the registers' claim that the Legislature contemplated restrictions on the resale of public record copies or information contained therein. At least for digital copies provided under the enhanced access act, the Legislature contemplated precisely the opposite, i.e., that private parties would buy copies and sell them (or their information) as they have long done.

The district court began its Sherman Act discussion by correctly noting that the state Legislature's "intention to authorize [the challenged] anticompetitive behavior need not be express in a statute. It is enough that it is the foreseeable result of acts [that] the statute [expressly] authorizes." June 13, 2005, Dist. Ct. Op. at 7 (citing *City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 373, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)* and *Michigan Paytel Joint Venture v. City of Detroit, 287 F.3d 527, 535-36 (6th Cir. 2002))*. But the district court did not meaningfully discuss, let alone apply, the **[*454]** standard for **[**46]** state-action immunity enunciated by the Supreme Court in *Omni* and *Hallie* and by this court in *Michigan Paytel*. [17]

Namely, the district court did not independently determine whether, *for purposes of the Sherman Act*, the challenged anticompetitive practices were a foreseeable or logical result of the statutory authority that the Legislature did give the registers. Rather, the district court simply followed a Michigan Court of Appeals decision that did not involve the Sherman Act or any antitrust statute, *Lapeer Cty. Abstract & Title Co. v. Lapeer Cty. Register of Deeds, 264 Mich. App. 167, 691 N.W.2d 11 (Mich. Ct. App. 2004)*. As the Michigan Court of Appeals remarked, "The complaint also alleged an antitrust violation and a violation of federal constitutional rights contrary to *42 USC 1983*, but *those claims are not at issue in this appeal*." *Id., 691 N.W.2d at 14 n.2* **[**47]** (emphasis added).

The district court uncritically adopted *Lapeer* as follows:

> The Michigan Inspection of Records Act provides that the Registers have the option to produce requested records using a medium the Registers select. M.C.L. § 545.551 [sic, *§ 565.551(2)*]. The Registers can also make reasonable regulations regarding their examination. *Id.* The Registers argue that these statutory provisions give them the authority to make conditions on bulk sales of records. However, the Michigan Court of Appeals expressly rejected the notion that M.C.L. § 545.551 [sic, *§ 565.551*] gave Registers the authority to enter contracts that restrict the resale of public records. . . . At the same time, [however,] the court found that this statute did not prohibit Registers from entering into such contracts. [citation omitted] The Court held that Registers have the ability to restrict the dissemination of information provided in bulk form under a county government's general power to make contracts and a county's general power to manage its own business affairs. *Id. at 176-77* (citing *M.C.L. §§ 45.3* [18] **[**49]** , *46.11* [19]). The **[**48]** court noted,
>
>> Simply as an exercise of the general power to contract, defendant has the authority to propose and enter into contracts in which it provides concessions, such as a reduced bulk rate fee or copies in microfilm form, in return for a purchaser agreeing to special conditions, such as a restriction on the use of the copies provided. Such a quid pro quo arrangement is a usual and inherent part of the contracting process.

[17] The district court did not cite *Southern Motor, 471 U.S. 48, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985)*.

[18] *M.C.L. § 45.3* is extremely general, providing, "Each organized county shall be a body politic and corporate, for the following purposes . . . to make all necessary contracts, and to do all other necessary acts in relation to the property and concerns of the county." This provision does not refer to the register of deeds, let alone to the provision of duplicate title records or title information.

[19] *M.C.L. § 46.11(l)* provides that a county board of commissioners may "[r]epresent the county and have the care and management of the property and business of the county if other provisions are not made." *M.C.L. § 46.11(m)* provides that a county board of commissioners may "[e]stablish rules and regulations in reference to the management of the interest and business concerns of the county as the board considers necessary and proper in all matters not especially provided for in this act or under the laws of this state." These provisions do not refer to the register of deeds, let alone to the provision of duplicate title records or title information.

> Further, the negotiation of such contracts is within the broad statutory grant of authority provided **[*455]** for the care and management of the property and business concerns of a county.

> *Id.* This court will not question the judgment of the Michigan Court of Appeals regarding the statutory authority under which the Registers are acting when they make conditions on bulk sales. The very policy reason behind the *Parker* [state-action] exception, respect for state sovereignty, cautions the court against delving too deeply into state law matters to determine whether the *Parker* exception applies.

June 13, 2005, Dist. Ct. Op. at 7-8.

If this were a question of state law, the federal courts would indeed be obligated to defer to the decisions of the Michigan courts. But we are not deciding a question of state law; as noted above, First American has not appealed the dismissal of its state-law claim. ***HN7***[] A state court's opinion on an issue of federal law -- or, in our case, a state court's opinion on a state-law issue that also arises **[**50]** in federal law -- is entitled to no deference whatsoever. *See* *Wallace v. Cranbrook Educ. Cmty., No. 05-73446, -- F. Supp. 2d --, 2006 U.S. Dist. LEXIS 71251, 2006 WL 2796135, *6 (E.D. Mich. Sept. 27, 2006)* ("Although federal courts must defer to a state court's interpretation of its own law, federal courts 'owe no deference' to a state court's interpretation of federal law.") (quoting *United States v. Miami Univ., 294 F.3d 797, 811 (6th Cir. 2002))*; *accord* *Hawkman v. Parratt, 661 F.2d 1161, 1166 (8th Cir. 1981)*. [20]

HN8[] *As a matter of Michigan law* as interpreted by the Michigan Court of Appeals, a county's state-granted general powers to make contracts and manage its own business affairs implicitly encompass the power to condition bulk public record sales on relinquishment of the right to re-sell the records. That tells us nothing, **[**51]** however, about whether a county's exercise of that latter power qualifies for state-action immunity from Sherman Act liability. *See, e.g.,* Philip Areeda & Herbert Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application 455 (2d ed. 2000) ("We would therefore disagree . . . with decisions holding . . . that the bare power to make contracts implies the power to enter into anticompetitive exclusive arrangements [for purposes of federal ***antitrust law***].").

Because the Michigan Court of Appeals was interpreting *only Michigan law* in *Lapeer County Abstract*, it was not bound by the principles and presumptions that govern federal ***antitrust law***. Following the Supreme Court, this court has emphasized that the state-action immunity doctrine, like other judicially imposed exemptions from the antitrust laws, must be narrowly construed. *Brentwood, 442 F.3d at 441* (citing *Ticor, 504 U.S. at 636*). The Michigan Court of Appeals labored under no such stricture when it decided what implicit powers can be inferred from the registers' explicit powers under Michigan law.

Moreover, in the Sherman Act context, the Supreme Court has **[**52]** made clear that a "neutral" state view towards a state subdivision's allegedly anticompetitive conduct is insufficient to trigger state-action immunity. This, too, is a rule of law that did not apply to the Michigan Court of Appeals's interpretation of Michigan law in *Lapeer County Abstract*.

The Supreme Court has provided a helpful contrast between a "neutral" state view of anticompetitive conduct and a state's **[*456]** requirement or endorsement of the anticompetitive conduct. Considering whether a Mississippi agency's setting of transportation prices was exempt from the Sherman Act, the Supreme Court explained,

> The Mississippi statute stands in sharp contrast to the Colorado Home Rule Amendment, which we considered in *Community Communications Co. v. Boulder, 455 U.S. 40, 102 S. Ct. 835, 70 L. Ed. 2d 810 . . . (1982)*. In *Boulder*, the State Constitution gave municipalities extensive powers of self-government. *Id., at 43-44* . . . . Pursuant to this authority, the city of Boulder prohibited a cable television company from expanding its operations. The Court held that because the Home Rule Amendment did not evidence an intent to displace competition in the cable **[**53]** television industry, *id. at 55* . . ., Boulder's anticompetitive ordinance was not

[20] *See* *Wayne v. Vill. of Sebring, 36 F.3d 517, 526 (6th Cir. 1994)* ("We reject the state court of appeals' interpretation of federal law.").

> enacted pursuant to a clearly articulated state policy. This holding was premised on the fact that Boulder, as a "home rule municipality," *was authorized to elect free-market competition as an alternative to regulation.* *Id. at 56* . . . .
>
> In this case, on the other hand, the Mississippi Public Service Commission *is not authorized to choose free-market competition* . Instead, it is required to prescribe rates for motor common carriers on the basis of statutorily enumerated factors. [state statutory citation omitted] These factors bear no discernible relationship to the prices that would be set by a perfectly efficient and unregulated market. Therefore, the Mississippi statute clearly indicates that the legislature intended to displace competition in the intrastate trucking industry with a regulatory program.

Southern Motor, 471 U.S. at 65 n.25, 105 S. Ct. at 1731 n.25 (emphasis added).

The registers' situation here is akin to the situation in *City of Boulder*: Michigan statute gives the counties the power to make contracts, but it **[**54]** leaves the counties free to allow competition in the provision of duplicate title records and the information contained therein. In other words, Michigan statutory law leaves the counties free to provide duplicate title records to purchasers, in any format or quantity, without mandating that the purchasers give up their right to re-sell the official copies (or to sell unofficial copies of those copies, or the information therein). Unlike *Hallie*, the state statutes do not "plainly show that 'the legislature contemplated *the kind of action complained of.*'" *Hallie, 471 U.S. at 44* (quoting *Lafayette, 435 U.S. at 415*). So far as Michigan statutory law shows, the Legislature is neutral towards the anticompetitive condition these registers have imposed on purchasers of title records. The Legislature does not contemplate the displacement of competition in the unofficial-copy / title information market any more than it contemplates free competition in that secondary market.

This is fatal to the *Rule 12(b)(6)* motion to dismiss for failure to state a claim with regard to these four registers because the Supreme Court holds that ***HN9***[] "plainly the requirement **[**55]** of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the . . . actions challenged as anticompetitive." *City of Boulder, 455 U.S. at 55*. Contrary to the district court's conclusion, granting counties the general power to contract or manage their business affairs cannot imply state authorization to impose this anticompetitive restriction: "[a]cceptance of such a proposition -- that the general grant of power to enact ordinances necessarily implies state authorization to enact specific **[*457]** anticompetitive ordinances - would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." *Id. at 56*. [21]

[56]** The district court appears to have acknowledged that the Supreme Court's decision in *City of Boulder* rendered the registers ineligible for state-action immunity:

> In *Community Communications Company, Inc. v. City of Boulder, 455 U.S. 40, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982)*, the Supreme Court held that the City of Boulder was not immune to the Sherman Act when its alleged anticompetitive actions were made pursuant to the general Home Rule Amendment to the Colorado Constitution. A general grant of power to a local government was not a sufficiently articulated state policy that would make its actions immune to Sherman Act prohibitions. *Id.*. . . *The general power to make contracts is a general grant of authority similar to Home Rule authority*.

June 13, 2005, Dist. Ct. Op. at 8-9 (emphasis added). The district court went on to assert, "[h]owever, more recent decisions of the Supreme Court and the Sixth Circuit have broadened *Parker* immunity for local governments since the *City of Lafayette* and *City of Boulder* decisions." *Id. at 9*. For this proposition, the district court cited *Hallie, 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24*; *Omni Outdoor Advertising, 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382*; **[**57]** and *Michigan Paytel, 287 F.3d 527*.

---

[21] *See also* *Hertz Corp. v. City of N.Y., 1 F.3d 121 (2d Cir. 1994)* (holding that in Sherman Act § 1 action, state-action immunity did not apply to city ordinance that prohibited basing vehicle rental fees and decisions on the renter's residence; city acted pursuant to general home-rule powers, not any specific grant of authority over vehicle rentals).

The district court provides no explanation, however, as to how these two Supreme Court decisions overruled or modified *City of Boulder*. We conclude that neither Hallie nor City of Columbia expanded *City of Boulder* 's standard for municipal/county state-action immunity so as to cover the allegedly anticompetitive conduct challenged here.

As discussed above, *Hallie* predicates municipal/county state-action immunity on whether the particular anticompetitive conduct was a foreseeable or logical result of the powers actually expressly granted to the municipality/county, and the imposition of a no-resale condition was not a foreseeable or logical result of the powers that the Legislature granted to the registers.

The district court's reliance on our decision in *Michigan Paytel* to sustain state-action immunity here is also unpersuasive. First, to the extent that a Sixth Circuit decision allegedly conflicts with a Supreme Court decision, the district court is obligated to follow the Supreme Court decision. *See, e.g.,* Harries v. Bell, 417 F.3d 631, 635 (6th Cir. 2005).

In any event, our decision **[**58]** in *Michigan Paytel* is consistent with the Supreme Court decisions discussed above: *Lafayette* (1978), *City of Boulder* (1982), *Southern Motor* (1985), *Hallie* (1985), *Omni* (1991), and *Ticor* (1992). In *Michigan Paytel,* we reaffirmed the rule that "[g]rants of general or neutral authority to govern local affairs will not satisfy the 'clear articulation' component of the state action exemption from antitrust liability." *287 F.3d at 534*. There, Michigan Paytel and Ameritech submitted competing bids for an exclusive contract to provide the Detroit Police Department with in-cell telephones for use by prisoners. Ameritech won the contract, and Paytel sued **[*458]** under the Sherman Act, contending that Ameritech and the City of Detroit had acted "to maintain Ameritech's dominance in the pay telephone service market in the Detroit metropolitan area" by entering into the exclusive contract. *Id.* The *Michigan Paytel* panel reasoned that

> [n]o Michigan statute expressly authorizes the City to execute an exclusive contract with a telephone service provider for telephone service in its prisons. However, the Home Rule City Act does grant the City **[**59]** the authority to bid out public contracts and to contract for the maintenance of its prisons. Under the Michigan Constitution, these provisions must be "liberally construed in the[] favor" of municipalities. We therefore conclude that the City is immune from antitrust liability because anticompetitive effects are the logical and foreseeable result of the City's broad authority under state law and the Michigan Constitution to bid out public contracts for the maintenance of City prisons. As the district court observed, " *Under the bidding process, there would be only one successful bidder. Thus, only one bidder would have the right to install and service the pay telephones.* "

Id. at 535-36 (emphasis added) (internal citations omitted); *see* *M.C.L. § 117.3(j)* (permitting city to bid out services, such as prison phone service, to " *a* private organization") (emphasis added). In other words, the Legislature expressly authorized the city of Detroit to bid out contracts for city services such as the maintenance of city jails, and it is inherent in that process that only one bidder can win the right to provide the service. In our **[**60]** case, by contrast, there is no bidding process, and the applicable statutory provisions do not inherently result in or contemplate an exclusive or favored position for the county registers in the provision of unofficial copies or title information.

Finally, we note that allowing these four registers to be potentially held liable for violating the Sherman Act would not thwart the purpose of the *Parker* state-action exception -- respect for state sovereignty. As the Supreme Court explained in *Lafayette*,

> [T]he fact that the governmental bodies sued are cities, with substantially less than statewide jurisdiction, has significance. When cities, each of the same status under state law, are equally free to approach a policy decision in their own way, the anticompetitive restraints adopted as policy by any one of them, may express its own preference, rather than that of the State. Therefore, in the absence of evidence that the State authorized or directed a given municipality to act as it did, the actions of a particular city hardly can be found to be . . . restraints that "the state . . . as sovereign" imposed.

435 U.S. at 414 (footnotes omitted) (quoting **[**61]** *Parker, 317 U.S. at 352*).

VII.

Unlike the other four registers, the Tuscola County register is not alleged to have imposed a no-resale condition on its sale of bulk-discounted paper records or its sale of records in non-paper format. First American alleges only that the Tuscola register "refuses to provide copies of land title records at a reasonable rate or in a cost-effective medium. The only way for title insurers to purchase land title records in Tuscola County today is to make copies of all records recorded, on paper, at the much higher rate of $1.00 per page." In the context of the rest of the complaint and the other filings in this case, we take this to mean that the Tuscola register refuses to (1) make title record copies available in non-paper form, such as microfiche or digital/computer format, and (2) **[*459]** offer a discount for the bulk purchase of paper copies of title records. The district court correctly held that these two practices of the Tuscola County register qualify for state-action immunity from Sherman Act liability.

As noted above, the Legislature has expressly granted the registers discretion to determine the medium in which original records are **[**62]** reproduced. *M.C.L. § 565.551(2)(a)*. Under *Hallie* (U.S.), *Michigan Paytel* (6th Cir.), and other precedents, the Legislature could easily foresee that a register could exercise this discretion to refuse to provide copies in non-paper form. To put it another way, the Legislature took more than merely a "neutral" stance toward the refusal to provide non-paper copies; it *expressly* authorized and endorsed that practice as the register's option. *See* *Southern Motor, 105 S. Ct. at 1729* ("a state policy that *expressly permits*, but does not compel, anticompetitive conduct may be 'clearly articulated' within the meaning of *Midcal*.") (emphasis added). Thus, in refusing to make non-paper copies available, the Tuscola County register acted pursuant to a clearly articulated state policy and cannot be sued under the Sherman Act.

The Tuscola County register's alleged refusal to provide a bulk discount for paper copies presents a less obvious question, but the answer is ultimately the same. Unlike the registers' discretion to provide copies in paper or non-paper form, the Legislature has not expressly granted registers the discretion whether **[**63]** or not to offer a bulk discount. At first blush, then, Tuscola County's refusal to provide a bulk discount might seem to run afoul of the rule that "the requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the . . . actions challenged as anticompetitive." *City of Boulder, 455 U.S. at 55*.

On the other hand, the Legislature did not merely grant counties the general power to contract; it enacted statutes that address the registers' provision of title record copies in some detail. The Legislature required registers to make title records available for inspection, required them to provide certified copies of title records upon request, authorized them to provide copies in non-paper form, and specified a $1.00 per-page fee for paper copies -- yet it chose not to require them to provide bulk discounts. In fact, of the many title record details addressed by the Legislature, it did not even mention the registers' discretion to offer bulk discounts, let alone specify how such discounted rates might be calculated if the registers chose to offer them. In this context, it is reasonably **[**64]** foreseeable that a register accorded the discretion to provide paper copies at such a hefty per-page fee would choose to reap the revenues generated by that fee rather than forgo them. Accordingly, we hold that the Tuscola register's refusal to provide a bulk discount qualifies for state-action immunity.

VIII.

For the foregoing reasons, we affirm the dismissal of the Sherman Act claims with regard to defendant Tuscola County Register of Deeds.

We reverse the dismissal of the Sherman Act claims, however, with regard to the no-resale condition imposed by defendants Registers of Deeds of Lapeer County, Saginaw County, Eaton County, and Newaygo County, and remand for further proceedings consistent with this opinion.

We hold only that the registers' practice of conditioning bulk discounts, non-paper reproduction, or reproduction of records generally, on the purchaser's agreement not to sell the official certified copies (or unofficial "copies of copies," or the information therein) to third parties, does not **[*460]** qualify for state-action immunity. We intimate no opinion on the merits of the Sherman Act claims. Moreover, even if the district court determines that the registers have violated **[**65]** the Sherman Act, that will mean only that the registers may not condition bulk discounts, non-paper reproduction, or reproduction of records generally, on the purchaser giving up his right to sell the official certified copies (or unofficial "copies of copies," or the information therein) to third parties. [22]

[66]**

End of Document

[22] Furthermore, a finding of a Sherman Act violation will *not* obligate the registers to (1) reproduce records for First American or anyone else, rather than merely providing equipment for the purchaser to reproduce the records himself; (2) offer a bulk discount to First American or anyone else for the reproduction of paper or non-paper records; or (3) make records available to First American or anyone else in non-paper format in the first place. The Legislature has expressly granted the registers discretion to determine the medium in which original title records are reproduced, i.e., paper or non-paper. *M.C.L. § 565.551(2)(a)*. The Legislature has also expressly granted the registers discretion to fulfill a title record request *either* by reproducing the record itself *or* by providing equipment for the purchaser to do the reproduction (or, if the purchaser requests it, by letting the purchaser bring in his own equipment and doing the reproduction). *M.C.L. §§ 565.551(2)(a)-(c)*.

The registers will still have the authority, under *M.C.L. § 565.551(2)(a)*, to offer *non-paper* reproduction, in any of the formats prescribed by the records reproduction act, *M.C.L. § 24.402*, to *all* purchasers or to *no* purchasers. Nor will the district court's decision affect the registers' authority to offer bulk discounts to *all* purchasers or to *no* purchasers.

[Abbott Labs. v. Mylan Pharms., Inc.](#)

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

February 23, 2007, Decided

Case No. 05 C 6561

Reporter

2007 U.S. Dist. LEXIS 12839 *; 2007-1 Trade Cas. (CCH) P75,617

ABBOTT LABORATORIES, Plaintiff, v. MYLAN PHARMACEUTICALS, INC., Defendant.

Prior History: *Abbott Labs. v. Mylan Pharms., Inc., 2006 U.S. Dist. LEXIS 13782 (N.D. Ill., Mar. 28, 2006)*

Core Terms

patents, antitrust, Counterclaims, alleges, sham, patentee, infringement, tests, motion to dismiss, misrepresentation, antitrust violation, anti-competitive, declarations, procurement, compounds, immunity, generic

Counsel: **[*1]** For Abbott Laboratories, an Illinois corporation, Plaintiff: Daniel E. Reidy, LEAD ATTORNEY, James R. Daly, Jason G. Winchester, Melissa B. Hirst, Jones Day, Chicago, IL.

For Mylan Pharmaceuticals, Inc., a West Virginia corporation, Defendant: Brian S. Roman, Morgantown, WV; Jill M. Ondos, Canonsburg, PA; John A. Leja, McGuireWoods LLP, Chicago, IL; Lynn E. Eccleston, Richard S Meyer, McGuire Woods, LLP - McLean, McLean, VA; Robert J. Waddell, Timothy H. Kratz, McGuire Woods LLP - Atlanta, Atlanta, GA.

For Mylan Pharmaceuticals, Inc., a West Virginia corporation, Counter Claimant: t: Brian S. Roman, Morgantown, WV; Jill M. Ondos, Canonsburg, PA; Lynn E. Eccleston, McGuire Woods, LLP - McLean, McLean, VA; Robert J. Waddell, McGuire Woods LLP - Atlanta, Atlanta, GA.

Judges: Virginia M. Kendall, United States District Judge.

Opinion by: Virginia M. Kendall

Opinion

MEMORANDUM OPINION AND ORDER

Plaintiff Abbott Laboratories ("Abbott") has brought suit against Defendant Mylan Pharmaceuticals, Inc., ("Mylan") for alleged infringement of two patents used in the manufacture of the pharmaceutical "Depakote." Mylan has filed several counterclaims, two of which allege that Abbott's procurement and **[*2]** enforcement of the patents constitute federal antitrust violations. Abbott moves to dismiss these two counterclaims pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. Because Mylan has adequately stated a claim for *Walker Process* fraud, Abbott's Motion to Dismiss is denied.

Facts

For purposes of a motion to dismiss, the Plaintiff's version of the facts of the case is taken as true. In the late 1980's and early 1990's, Abbott procured a number of patents from the United States Patent and Trademark Office ("PTO") in connection with production of the drug Depakote. Abbott has sued Mylan for infringement of two of these patents, Nos. 4,988,731 ("the '731 patent") and 5,212,326 ("the '326 patent"). [1] Mylan counterclaims that during the prosecution of these two patents, two individual employees of Abbott made misrepresentations to the PTO that were material to Abbott's procurement of the patents.

[*3] Specifically, Mylan alleges that Abbott employee Dr. Bauer submitted a declaration to the PTO during prosecution of the '731 and the '326 patents in which he testified that he had prepared certain compounds or "ionic oligomers" in accordance with the process detailed in the patent, and then tested the compounds. Dr. Bauer testified to the weight and structure of the compounds based on the results of the tests he performed. But Mylan alleges that the tests performed were known to be incapable of measuring the type of oligomer detailed in the patents and that Dr. Bauer could not have reached the conclusions to which he testified on the basis of the tests he performed. Mylan alleges that Dr. Bauer mislead the PTO by suggesting that his tests supported his conclusions and by failing to disclose that the tests he performed were inappropriate for the compounds that he tested. Mylan alleges that Dr. Lambert's declaration corroborated Dr. Bauer's testimony and that a person of Dr. Lambert's skill in the relevant art would have known that the tests were inappropriate and the results inaccurate.

Mylan also alleges that Dr. Bauer's and Dr. Lambert's misrepresentations before the PTO were material **[*4]** to the PTO's decision to grant Abbott the patents. The PTO examiner rejected the continuation-in-part applications for the '731 and the '326 because they were not supported by the specification of the originally-filed application as required by *35 U.S.C. § 112*. The Patent Appeals Board reversed the examiner's decision and stated in its opinion that it based its decision to reverse on the declarations of Drs. Bauer and Lambert.

Finally, Mylan alleges that as a result of the fraudulent procurement of the '731 and '326 patents, Mylan has not been able to enter the market for generic Depakote and has been subject to suit by Abbott.

Legal Standard

A motion to dismiss pursuant to *Federal Rule of Civil Procedure ("Rule") 12(b)(6)* tests the legal sufficiency of the claims alleged in the complaint. *See* *Cler v. Illinois Educ. Ass'n., 423 F.3d 726, 729 (7th Cir. 2005)*. A complaint will not be dismissed for failure to state a claim unless there is no set of circumstances that could be proved that would entitle the plaintiff to relief. *See* *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)*; *DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000).* **[*5]** But a plaintiff may plead facts that show that he has no claim, meriting dismissal. *See* *McCready v. Ebay, 453 F.3d 882, 888 (7th Cir. 2006)*.

Immunity from Antitrust Suit

Generally, a patentee suing to enforce statutory rights is immune from suit for antitrust violations even if the suit has an anti-competitive effect. *See* *Glass Equip. Dev., Inc. v. Besten, Inc., 174 F.3d 1337, 1343 (Fed. Cir. 1999)*. A patentee who brings suit for patent infringement may be subject to antitrust liability if the alleged infringer can prove either: (i) that the infringement suit was "sham litigation" designed to interfere with legitimate business relationships; or (ii) that the patent was obtained through knowing and willful fraud, known as *"Walker Process"* fraud. *See* *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1068 (Fed. Cir. 1998)*; *citing* *Walker Process Equip., Inc. v. Food Machinery & Chem. Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*. Sham litigation and *Walker Process* are independent legal theories; if the elements of *Walker Process* liability have been met, liability can be imposed without the additional requirements **[*6]** for sham litigation. *See* *Nobelpharma, 141 F.3d at 1071*. Because antitrust actions against patentees are almost always brought as counterclaims to a patent

[1] The facts underlying Mylan's Complaint have been summarized in this Court's June 13, 2006 Memorandum Opinion and Order.

infringement action, Federal Circuit precedent governs determination of whether the patentee's conduct constitutes an antitrust violation. *Id. at 1067-68*.

Abbott argues that Mylan's Third and Fourth Counterclaims as alleged do not fall within either of these exceptions to immunity. Because Mylan has properly pled a claim for *Walker Process* fraud, and because any similarity between this litigation and prior litigation between Abbott and other generic manufacturers is a factual issue for discovery, Mylan's Third and Fourth Counterclaims of *Walker Process* fraud will not be dismissed. Because existence of prior successful litigation to enforce these patents as well as Mylan's own answers to the Complaint and allegations in the Counterclaims foreclose allegations that Mylan's suit is a sham, Mylan may not proceed on a sham litigation theory.

1. Walker Process Fraud

In order to succeed on a claim of *Walker Process* fraud and defeat immunity, an antitrust plaintiff must show: (1) that **[*7]** the patentee obtained the patent through knowing and willful misrepresentation of facts to the PTO; (2) that the patentee was aware of the fraud at the time it brought suit; (3) independent evidence of the patentee's deceptive intent toward the PTO; (4) that the PTO relied upon the misrepresentation, such that it would not have issued the patent but for the misrepresentation. *See* *C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1364 (Fed. Cir. 1998)*; *accord* *Unitherm Food Sys. v. Swift-Eckrich, Inc., 375 F.3d 1341, 1358 (Fed. Cir. 2004)*, *rev'd in part on other grounds,* *546 U.S. 394, 126 S.Ct. 980, 163 L. Ed. 2d 974 (2006)*. Additionally, as discussed in the following section, a plaintiff who demonstrates the elements of fraud must independently allege antitrust injury.

Walker Process claims are fraud claims and are subject to the heightened pleading requirements of *Rule 9(b)*. *See* *Medimmune, Inc. v. Genentech, Inc., 427 F.3d 958, 967 (Fed. Cir. 2005)*, *rev'd on other grounds,* *549 U.S. __, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007),* . In order to plead a *Walker Process* claim in accordance with *Rule 9(b)*, Mylan must identify "with particularity the reference or group of **[*8]** references that, but for their omission from [Abbott's] patent applications, the PTO would not have granted the applications." *Netflix Inc. v. Blockbuster, Inc., 2006 U.S. Dist. LEXIS 63154, 2006 WL 2458717 (N.D. Cal. Aug. 22, 2006)*.

At this early stage in the litigation, Mylan has pleaded sufficiently the elements of a *Walker Process* claim. Mylan specifically alleges that Abbott presented two declarations to the PTO that relied upon scientific methods that were known at the time to be inappropriate for testing the specific compounds in Abbott's material. Mylan also specifically alleges, with citation to the proceedings before the Patent Board of Appeals, that but for the declarations containing the misrepresentations Abbott's '731 and '326 patents would not have been approved. While Mylan generally avers Abbott's intent to defraud the PTO, it does not do so in isolation; rather, Mylan supports the inference of intent with the specific actions before the PTO and specific allegations of the state of the art at the time of the actions supporting intent to defraud. Abbott relies heavily upon a prior determination by another court in this district that Abbott's conduct before the PTO did not **[*9]** constitute inequitable conduct. *See* *Abbott v. Torpharm, 309 F. Supp. 2d 1043 (N. D. Ill. 2004)*. Mylan was not a party to that litigation. While the Court may take judicial notice of the existence of such litigation, the Court may not take the facts stated in that opinion to be true for application to a different plaintiff. *See* *GE Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1083 (7th Cir. 1997)* (finding that a court "cannot achieve through judicial notice what it cannot achieve through collateral estoppel" when the plaintiff in a subsequent action was not a party to the previous action and "has never been afforded an opportunity to present its evidence and arguments on the claim").

Abbott will have an opportunity at summary judgment to offer to this Court the same evidence as it offered before the court in *Torpharm;* for purposes of a motion to dismiss, however, the Court takes Mylan's well-pleaded allegations as true and therefore denies the motion to dismiss the claims.

2. Sham Litigation

"In order to prove that a suit was within [the] "sham" exception to immunity, an antitrust plaintiff must prove that the suit was both **[*10]** *objectively* baseless and *subjectively* motivated by a desire to impose collateral, anti-competitive injury." *Nobelpharma, 141 F.3d at 1071*, *citing* *Professional Real Estate Investors, Inc. v. Columbia*

Pictures Indus., Inc. ("PRE"), 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993). To invoke the 'sham' exception the claimant must show "some abuse of process" and show "more than a failed legal theory." C.R. Bard, 157 F.3d at 1368 (internal citations omitted). If an antitrust defendant had probable cause to institute proceedings, requiring only "a reasonable belief that there is a chance that a claim may be held valid upon adjudication," the antitrust defendant cannot be found to have engaged in sham litigation. *See* PRE, 508 U.S. at 62-63.

As discussed above, Abbott has been sued for antitrust violations concerning the '731 and '326 patents previously by other generic drug manufacturers. *See, e.g.,* Torpharm, 309 F. Supp. 2d 1043 (and previous opinions in same litigation); Abbott v. Alra, 1997 U.S. Dist. LEXIS 16611, 1997 WL 667796 (N.D. Ill. 1997). Both these proceedings ultimately resolved in Abbott's favor and found the patents valid. **[*11]** "A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham." PRE, 508 U.S. at 61 n.5; *accord* In re Ciprofloxacin Hydrochloride Antitrust Litig., 363 F. Supp. 2d 514, 517 (E.D.N.Y. 2005) (relying on evidence of successful prior litigation against other competitors to enforce same patent in finding no evidence of sham litigation).

Additionally, the conduct precipitating Abbott's patent infringement suit, admitted by Mylan, was Mylan's decision to file an Abbreviated New Drug Application ("ANDA") in which Mylan specifically challenged the validity, enforceability, and/or scope of Mylan's '731 and '326 Patents. See Answer at PP 15-17. On the basis of the prior litigation upholding the same patents, and on the basis of Mylan's own averments in its Answer and Counterclaims, Mylan cannot proceed on a sham litigation theory.

Antitrust Injury

In the alternative, Abbott argues that even if the pleading requirements for an antitrust violation have been satisfied, Mylan lacks standing to bring these antitrust claims against Abbott because Mylan cannot allege antitrust injury. While Federal Circuit law governs **[*12]** antitrust suits arising out of a patentee's conduct in enforcing its patent, the Federal Circuit continues "to apply the law of the appropriate regional circuit to issues involving other elements of ***antitrust law*** such as relevant market, market power, damages, etc." Nobelpharma, 141 F.3d at 1068. To establish antitrust injury, an antitrust plaintiff must show that "claimed injuries are of the type the antitrust laws were intended to prevent and reflect the anti-competitive effect of either the violation or of anticompetitive acts made possible by the violation." Kochert v. Greater Lafayette Health Services, Inc. 463 F.3d 710, 716 (7th Cir. 2006) *quoting* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977).

By the terms of the Hatch-Waxman Act, an infringement action by a patentee against an ANDA Paragraph IV filer tolls the effectiveness of an approved ANDA to allow for resolution of the suit. *See* 21 U.S.C. § 355(j)(5)(B)(iii) (describing the moratorium on effectiveness of a generic application pending resolution of infringement suit based on the application). A patentee has only a limited **[*13]** period in which to commence suit after infringement action after an ANDA has been filed; the period in which to commence suit starts from the date of ANDA filing, not ANDA approval. *See id.* [2] Taking Mylan's allegations of fraudulent conduct before the PTO as true for purposes of this motion, using the regulatory advantage afforded via a fraudulently-procured patent to prevent Mylan's entrance into the relevant market is the type of anti-competitive effect that the antitrust laws were designed to prevent.

[*14] Mylan has adequately alleged that it is prepared to enter the market for generic Depakote but for Abbott's actions in fraudulently procuring the patents. While Abbott makes clear its belief that Mylan cannot carry its burden to demonstrate injury, "a prediction that the plaintiff will be unable to meet its challenges is not a good reason to

[2] As discussed in detail in Bristol-Myers Squibb Co. v. Ben Venue Lab., 90 F. Supp. 2d 540 (D.N.J. 2000), the structure of these statutes means that, if antitrust injury were tied to the status of FDA approval relative to the required timing of the suit, antitrust injury would be "wholly contingent on the vagaries of timing of agency action" and go against the purpose of the Hatch-Waxman Act. Id. at 545. If the FDA approved the ANDA before the patentee filed its motion to dismiss the antitrust counterclaim, then antitrust injury would exist; but if the FDA took too long to complete the approval process, the generic company would be unable to establish injury to support its antitrust counterclaim.

dismiss a complaint under *Rule 12(b)(6)*." *Xechem, Inc. v. Bristol-Myers Squibb Co., 372 F.3d 899, 902 (7th Cir. 2004)* (denying patentee's motion to dismiss counterclaim of generic manufacturer for failure to allege injury). Mylan's Third and Fourth Counterclaims will not be dismissed for failure to allege antitrust injury.

Finally, both parties have referenced minor differences between the Answer and Counterclaims filed before this Court and the Answer and Counterclaims filed in a related action that was transferred to this district. To cure these differences, Mylan has leave to amend its Answer and Counterclaims to include the information in the related action that was not in the document filed in the action before this Court.

Conclusion

Because Mylan has adequately pleaded the elements of an antitrust counterclaim on the **[*15]** basis of *Walker-Process* fraud, Abbott's Motion to Dismiss Mylan's Third and Fourth Counterclaims is denied. The Court grants Mylan leave to file an Amended Answer and Counterclaims to consolidate the papers from prior related actions.

Virginia M. Kendall, United States District Judge

Northern District of Illinois

Date: February 23, 2007

Wholesale Electricity Antitrust Cases I & II

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

February 26, 2007, Filed

D047697

Reporter

147 Cal. App. 4th 1293 *; 55 Cal. Rptr. 3d 253 **; 2007 Cal. App. LEXIS 261 ***; 2007 Cal. Daily Op. Service 2045; 2007 Daily Journal DAR 2645; 2007-1 Trade Cas. (CCH) P75,616

WHOLESALE ELECTRICITY ANTITRUST CASES I & II

Prior History: [*1]** Judicial Council Coordination Proceeding Nos. 4204 and 4205, Superior Court of San Diego County, Nos. GIC758487, GIC758565, GIC760743, Joan M. Lewis, Judge, Superior Court of San Francisco County, Nos. 318189, 318343, Superior Court of Los Angeles County, No. BC249705.

Core Terms

electricity, wholesale, rates, regulation, antitrust, energy, preemption, damages, market-based, filed rate doctrine, tariffs, prices, anti trust law, federal preemption, defendants', plaintiffs', principles, markets, demurrer, refunds, preempted, trial court, court of appeals, charges, manipulation, federal court, anticompetitive conduct, transmission, interstate, violations

LexisNexis® Headnotes

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

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

An appellate court reviews a trial court's sustaining of a demurrer without leave to amend de novo, exercising its independent judgment as to whether a cause of action has been stated as a matter of law. The appellate court gives the complaint a reasonable interpretation, reading it as a whole and its parts in their context. A judgment based on a dismissal must be affirmed if any of the grounds for demurrer raised by the defendant is well-taken and disposes of the complaint.

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

Constitutional Law > Supremacy Clause > Federal Preemption

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN2[] Standards of Review, De Novo Review

When the issues regarding federal preemption involve undisputed facts, it is a question of law whether a federal statute or regulation preempts a state law claim and, on appeal, an appellate court independently reviews a trial court's determination on that issue of preemption.

Constitutional Law > Supremacy Clause > Federal Preemption

Evidence > Inferences & Presumptions > Presumptions

HN3[] Supremacy Clause, Federal Preemption

Courts apply a presumption against federal preemption unless the State attempts to regulate an area in which there is a history of significant federal regulation.

Constitutional Law > Supremacy Clause > Federal Preemption

HN4[] Supremacy Clause, Federal Preemption

A reviewing court's task is to examine the precise language of the federal law or regulation to determine whether a particular state law claim is preempted. As to each state law claim, the central inquiry is whether the legal duty that is the predicate of the claim constitutes a requirement or prohibition of the sort that federal law expressly preempts.

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Civil Actions > Jurisdiction

HN5[] US Federal Energy Regulatory Commission, Authorities & Powers

The Federal Power Act (FPA) grants the Federal Energy Regulatory Commission (FERC) exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce. Through the FPA, Congress has meant to draw a bright line easily ascertained, between state and federal jurisdiction. This was done in the FPA by making FERC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the states. This power includes the exclusive authority to determine the reasonableness of wholesale rates.

Energy & Utilities Law > Administrative Proceedings > Preemption

HN6[] Administrative Proceedings, Preemption

Preemption-related doctrines will continue to apply when market-based electric energy rates are involved.

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

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Civil Actions > Jurisdiction

HN7[] **Private Actions, Remedies**

Injunctive relief under the unfair competition law, *Bus. & Prof. Code, § 17200 et seq.*, in the context of energy regulation is preempted, because it would encroach upon the substantive provisions of the tariff, an area reserved exclusively to the Federal Energy Regulatory Commission, both to enforce and to seek remedy.

Antitrust & Trade Law > General Overview

HN8[] **Antitrust & Trade Law**

The central purpose of the antitrust laws, state and federal, is to preserve competition. It is competition--not the collusive fixing of prices at levels either low or high--that these statutes recognize as vital to the public interest.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN9[] **Standing, Requirements**

One of the elements of standing to seek antitrust damages for anticompetitive conduct is a sufficient showing of injury, with respect to: (1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages. A court must evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.

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

Evidence > Burdens of Proof > General Overview

HN10[] **Private Actions, Remedies**

Damages awards in antitrust cases may not be based upon sheer guesswork or speculation. Rather, a plaintiff seeking such damages must establish to a reasonable probability that there was some causal connection between the defendant's wrongful act and the damages alleged, such as lost profits. Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

HN11[] **US Federal Energy Regulatory Commission, Authorities & Powers**

See *16 U.S.C. § 824d(a)*.

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

HN12[] **US Federal Energy Regulatory Commission, Authorities & Powers**

In *16 U.S.C. § 824d(c)*, the Federal Energy Regulatory Commission is authorized to require public utilities to file and disclose schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

HN13[] **US Federal Energy Regulatory Commission, Authorities & Powers**

See *16 U.S.C. § 824e(a)*.

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

Energy & Utilities Law > Antitrust Issues > General Overview

HN14[] **US Federal Energy Regulatory Commission, Authorities & Powers**

In *16 U.S.C. § 824e(b)*, the Federal Energy Regulatory Commission is entitled to prescribe the effective dates of refunds that it orders. The broad scope of *16 U.S.C. § 824d(a)*, *(c)*, and *§ 824e(a)*, *(b)*, must invoke the rule that antitrust damages will not be proper where there is a risk of duplicative recovery.

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Administrative Proceedings > Preemption

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Civil Actions > Jurisdiction

HN15[] **Energy & Utilities Law, Antitrust Issues**

Even considering its difficult history, the Federal Energy Regulatory Commission has been provided with sufficient regulatory authority such that federal preemption principles must be applied to antitrust/unfair competition law challenges arising from wholesale electricity market activities.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

HN16[] **Exemptions & Immunities, Filed Rate Doctrine**

The filed rate doctrine provides that state law, and some federal law (e.g. ***antitrust law***), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question. The filed rate doctrine has prohibited not just a state court (or a federal court applying state law) from setting a rate different from that chosen by the Federal Energy Regulatory Commission (FERC), but also from assuming a hypothetical rate different from that actually set by FERC.

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

HN17[] **US Federal Energy Regulatory Commission, Authorities & Powers**

Application of the filed rate doctrine to market-based rates that have not been filed with the Federal Energy Regulatory Commission (FERC) would be an unwise and unprecedented expansion of the doctrine. The market-based rate regime established by FERC continues FERC's oversight of the rates charged. FERC only permits power sales at market-based rates after scrutinizing whether the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. According to FERC, these conditions assure that the market-based rates charged comply with the Federal Power Act's requirement that rates be just and reasonable. This oversight is ongoing. Further, FERC contends that such procedures effectively constitute review of rates prior to their implementation. FERC also has a remedies provision regarding refunds in *16 U.S.C. § 824e(a)* and *(b)*. While market-based rates may not have historically been the type of rate envisioned by the filed rate doctrine, they do not fall outside of the purview of the doctrine.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court dismissed the coordinated actions of plaintiffs, a group of public entities and retail purchasers of electricity, for damages and other relief against defendants, a number of companies and their subsidiaries which were generators, sellers, or traders of electricity at wholesale. The trial court sustained defendants' joint demurrer to the master complaint on the grounds of lack of jurisdiction. Plaintiffs alleged violations of California’s antitrust laws (*Bus. & Prof. Code, § 16720*), as well as violations of California's unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*). The allegations arose out of market conditions and events during the California energy crisis of 2000 and onward, relating to claims for damages and injunctive relief for anticompetitive activity and/or unfair competition in the wholesale electricity market. (Superior Court of San Diego County, JCCP Nos. 4204 and 4205, Joan Marie Lewis, Judge.)

The Court of Appeal affirmed the judgment, holding that the trial court correctly applied the doctrines of field and conflict preemption. Plaintiffs’ claims and prayer for relief would impermissibly require a “fair price” determination, already found to be barred by preemption principles in prior case law. Antitrust damages will not be proper where there is a risk of duplicative recovery. The nature of plaintiffs’ alleged injury (equivalent to an entitlement to refunds) was apparently inseparable from the type of injury the antitrust laws were intended to forestall. The Federal Energy Regulatory Commission (FERC) has been provided with sufficient regulatory authority such that federal preemption principles must be applied to plaintiffs' antitrust/UCL challenges arising from wholesale electricity market activities. Plaintiffs acknowledged that FERC refunds were a potential remedy and offset for their claims. Moreover, they were unable to show how any damages from defendants’ conduct, recoverable under an antitrust theory, would be separate in nature from the allegedly overpaid rates that they paid for power, which would also give rise to any refund requests. The court found that the filed rate doctrine, relied on by the trial court as an alternate ground for its ruling on demurrer, reinforced the court’s conclusions regarding preemption. (Opinion by Huffman, J., with McConnell, P. J., and Irion, J., concurring.) **[*1294]**

Headnotes

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

Constitutional Law § 32—Distribution of Governmental Powers—Between Federal and State Governments—Express and Implied Powers of Federal Government—Preemption.

A reviewing court's task is to examine the precise language of the federal law or regulation to determine whether a particular state law claim is preempted. As to each state law claim, the central inquiry is whether the legal duty that is the predicate of the claim constitutes a requirement or prohibition of the sort that federal law expressly preempts.

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

Electricity, Gas, and Steam § 2—Regulation and Control—Federal Preemption—Authority of Federal Energy Regulatory Commission—Rates.

The Federal Power Act (FPA) grants the Federal Energy Regulatory Commission (FERC) exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce. Through the FPA, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction. This was done in the FPA by making FERC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the states. This power includes the exclusive authority to determine the reasonableness of wholesale rates. Preemption-related doctrines will continue to apply when market-based rates are involved.

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

Unfair Competition § 10—Actions—Damages and Injunctive Relief—Context of Energy Regulation—Federal Preemption.

Injunctive relief under the unfair competition law (*Bus. & Prof. Code, § 17200 et seq.*) in the context of energy regulation is preempted, because it would encroach upon the substantive provisions of the tariff, an area reserved exclusively to the Federal Energy Regulatory Commission, both to enforce and to seek remedy.

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

Unfair Competition § 1—Purpose of Antitrust Laws.

The central purpose of the antitrust laws, state and federal, is to preserve competition. It is competition—not the collusive fixing of prices at levels either low or high—that these statutes recognize as vital to the public interest.

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

Unfair Competition § 8—Actions—Standing to Seek Antitrust Damages for Anticompetitive Conduct—Elements.

One of the elements of standing to seek antitrust damages for anticompetitive conduct is a sufficient showing of injury with respect to: (1) the nature of the **[*1295]** plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages. A court must evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.

CA(6)[] **(6)**

Unfair Competition § 10—Actions—Damages and Injunctive Relief—Establishing Entitlement.

Damages awards in antitrust cases may not be based upon sheer guesswork or speculation. Rather, a plaintiff seeking such damages must establish to a reasonable probability that there was some causal connection between the defendant's wrongful act and the damages alleged, such as lost profits. Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.

CA(7)[] **(7)**

Electricity, Gas, and Steam § 2—Regulation and Control—Federal Energy Regulatory Commission—Availability of Antitrust Damages.

16 U.S.C. § 824d(c) authorizes the Federal Energy Regulatory Commission to require public utilities to file and disclose schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services. *16 U.S.C. § 824e(b)* entitles the Federal Energy Regulatory Commission to prescribe the effective dates of refunds that it orders. The broad scope of *16 U.S.C. § 824d(a)*, *(c)*, and *§ 824e(a)*, *(b)*, must invoke the rule that antitrust damages will not be proper where there is a risk of duplicative recovery.

CA(8)[] **(8)**

Electricity, Gas, and Steam § 2—Regulation and Control—Federal Preemption—Federal Energy Regulatory Commission—Application to Antitrust and Unfair Competition Claims—Wholesale Electricity Market Activities.

Even considering its difficult history, the Federal Energy Regulatory Commission (FERC) has been provided with sufficient regulatory authority such that federal preemption principles must be applied to these antitrust/unfair competition law challenges arising from wholesale electricity market activities. In coordinated actions brought by plaintiffs, a group of public entities and retail purchasers of electricity, for damages and other relief against defendants, a number of companies and their subsidiaries who were generators, sellers, or traders of electricity at wholesale, plaintiffs acknowledged that FERC refunds are a potential remedy and offset for their claims. Moreover, they were **[*1296]** unable to show how any damages from defendants' conduct, recoverable under an antitrust theory, would be separate in nature from the allegedly overpaid rates that they paid for power, which would also give rise to any refund requests. Accordingly, the trial court correctly applied the doctrines of field and conflict preemption in sustaining defendants' demurrer to the master complaint without leave to amend.

[7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, §§ 19, 22.]

CA(9)[] **(9)**

Electricity, Gas, and Steam § 2—Regulation and Control—Filed Rate Doctrine.

The filed rate doctrine provides that state law, and some federal law (e.g., ***antitrust law***), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question. The filed rate doctrine has prohibited not just a state court (or a federal court applying state law) from setting a rate different from that chosen by the Federal Energy Regulatory Commission (FERC), but also from assuming a hypothetical rate different from that actually set by FERC. Application of the filed rate doctrine to market-based rates that have not been filed with FERC would be an unwise and unprecedented expansion of the doctrine. The market-based rate regime established by FERC continues FERC's oversight of the rates charged. FERC only permits power sales at market-based rates after scrutinizing whether the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. According to FERC, these conditions assure that the market-based rates charged comply with the Federal Power Act's requirement that rates be just and reasonable. This oversight is ongoing. Further, FERC contends that such procedures effectively constitute review of rates prior to their implementation. FERC also has a remedies provision regarding refunds in *16 U.S.C. § 824e(a)* and *(b)*. While market-based rates may not have historically been the type of rate envisioned by the filed rate doctrine, they do not fall outside of the purview of the doctrine.

Counsel: Lerach, Coughlin, Stoia, Geller, Rudman & Robbins, Leonard B. Simon, Pamela M. Parker and Frank J. Janecek, Jr., for Plaintiffs and Appellants Ruth Hendricks, People of the City and County of San Francisco, City of Oakland and County of Santa Clara.

Best, Best & Krieger, C. Michael Cowett, Robert J. Hanna, Mary E. Coburn, James P. Gilpin and William C. Pate for Plaintiffs and Appellants Borrego **[*1297]** Water District, Fallbrook Public Utility District, Helix Water District, Padre Dam Municipal Water District, Ramona Municipal Water District, Sweetwater Authority, Valley Center Municipal Water District, Vista Irrigation District, Yuma Municipal Water District, Metropolitan Transit Development Board, San Diego Trolley, Inc., and San Diego Transit Corporation.

Levine, Steinberg, Miller & Huver, Harvey R. Levine, Richard A. Huver; Patricia A. Meyer & Associates, Patricia A. Meyer, Marisa Janine-Page and **[***2]** Matthew T. Poelstra for Plaintiffs and Appellants Cruz Bustamante, Ruth Hendricks and Barbara Matthews.

Kiesel, Boucher & Larson and Raymond P. Boucher for Plaintiffs and Appellants Cruz Bustamante and Barbara Matthews.

Krause, Kalfayan, Benink & Slavens, James C. Krause, Ralph B. Kalfayan, David B. Zlotnick; Keegan, Macaluso & Baker, Patrick N. Keegan; and Hoyt E. Hart II for Plaintiff and Appellant Pamela Gordon.

Lieff, Cabraser, Heimann & Bernstein, William Bernstein, Joseph R. Saveri and Barry Himmelstein for Plaintiffs and Appellants Oscars Photo Lab, Pier 23 Restaurant and Mary L. Davis.

Dennis J. Herrera, City Attorney, and Theresa L. Mueller, Deputy City Attorney, for Plaintiff and Appellant City and County of San Francisco.

John A. Russo, City Attorney, Barbara Parker and Izetta C. R. Jackson, Deputy City Attorneys, for Plaintiff and Appellant City of Oakland.

Ann Miller Ravel, County Counsel, and Cheryl A. Stevens, Deputy County Counsel, for Plaintiff and Appellant County of Santa Clara.

Pillsbury, Winthrop, Shaw & Pittman, Douglas R. Tribble, Connie J. Wolfe, John M. Grenfell and Michael J. Kass for Defendants and Respondents Cabrillo Power I, LLC, **[***3]** Cabrillo Power II, LLC, Louis J. Dorey, Dynegy, Inc., Dynegy Marketing & Trading, Dynegy Power Marketing, Inc., El Segundo Power, LLC, Long Beach Generation, LLC, Matt K. Schatzman and Charles Watson.

Latham & Watkins, Daniel Murray Wall, Michael J. Weaver and Kimberly A. Hicks for Defendants and Respondents Sempra Energy, Inc., Sempra Generation and Sempra Energy Trading Corporation.

Coughlan, Semmer & Lipman, R. J. Coughlan, Jr.; Williams & Connolly and Stephen D. Raber for Defendant and Respondent AES Corporation. **[*1298]**

Kirkland & Ellis, Tony L. Richardson, Jeffrey S. Davidson and James B. Ransom for Defendant and Respondent Morgan Stanley Capital Group, Inc.

Judges: Huffman, J., with McConnell, P. J., and Irion, J., concurring.

Opinion by: Huffman

Opinion

[256]**

HUFFMAN, J.—Plaintiffs and appellants Borrego Water District et al. (Borrego), a group of public entities and retail purchasers of electricity, filed this action for damages and other relief against defendants and respondents AES

Corporation et al. (AES), a number of companies and their subsidiaries which are generators, sellers, or traders of electricity at wholesale (defendants). In their master complaint filed in 2002 in these **[***4]** coordinated actions, plaintiffs allege violations of California's antitrust laws (*Bus. & Prof. Code,* [1] § 16720; hereafter the Cartwright Act), as well as violations of California's unfair competition law (*§ 17200 et seq.*; hereafter the UCL). [2] These allegations all arise out of market conditions and events during the California energy crisis of 2000 and onward, relating to claims for damages and injunctive relief for anticompetitive activity and/or unfair **[**257]** competition in the wholesale electricity market.

In response to the filing of this action, and after a delay of several years due to removal to federal court and remand to state court, all defendants brought and renewed a joint demurrer to the master complaint, on the grounds of lack of **[***5]** jurisdiction. Defendants argued the subject matter of the master complaint was preempted by federal law that had occupied the field of wholesale electricity market control and regulation, because plaintiffs' theories of recovery would inevitably require the superior court to determine reasonable rates for wholesale power sales. Defendants further argued that a regulatory doctrine, the filed rate doctrine, barred the filing of this action for damages. (See *Public Utility v. Dynegy Power Marketing (9th Cir. 2004) 384 F.3d 756* (*Snohomish*); *Public Utility, Grays Harbor, WA v. IDACORP (9th Cir. 2004) 379 F.3d 641, 647* (*Grays Harbor*).) The trial court agreed and sustained the demurrer without leave to amend.

Plaintiffs appeal, contending the ruling was erroneous because California case law, *Younger v. Jensen (1980) 26 Cal.3d 397 [161 Cal. Rptr. 905, 605 P.2d 813]* (*Younger*) and *Spielholz v. Superior Court (2001) 86 Cal.App.4th 1366 [104 Cal. Rptr. 2d 197]* (*Spielholz*), should support a finding that state law can provide an independent ground for regulation of the anticompetitive **[***6]** or unfair **[*1299]** conduct of defendants, through an award of antitrust damages, such that there should be no finding of federal preemption. Plaintiffs found further support for their theory of general applicability of state antitrust laws in the context of electricity market disputes in the United States Supreme Court case of *Otter Tail Power Co. v. United States (1973) 410 U.S. 366 [35 L. Ed. 2d 359, 93 S. Ct. 1022]* (*Otter Tail Power*).

Our analysis of the master complaint and pertinent case law convinces us that the trial court correctly applied the doctrines of field and conflict preemption in sustaining the demurrer without leave to amend. We find additional support for that conclusion in the filed rate doctrine, relied on by the trial court as an alternate ground for its ruling on demurrer. (*California ex rel. Lockyer v. Dynegy, Inc. (9th Cir. 2004) 375 F.3d 831, 852–853* (*Dynegy*).) We affirm the judgment of dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

A

Master Complaint; Coordinated Proceedings

Since 2001, these coordinated proceedings have included a total of six actions originating both in San Diego and in other counties. Plaintiffs, the **[***7]** People of the State of California (suing through city attorneys) and 21 retail purchasers of electricity, filed their master complaint in 2002. These plaintiffs did not purchase power directly from defendants, which are wholesalers, but rather from several investor-owned utilities, including San Diego Gas & Electric and Southern California Edison. Although several of the plaintiffs originally sought class certification, those matters were apparently stayed pending the demurrer proceedings and are not before us on this appeal. [3]
[258]**

---

[1] All statutory references are to this code unless otherwise stated.

[2] *Sections 17200 through 17209* are commonly referred to as the unfair competition law or *UCL*. *(Stop Youth Addiction, Inc. v. Lucky Stores, Inc. (1998) 17 Cal.4th 553, 558, fn. 2 [71 Cal. Rptr. 2d 731, 950 P.2d 1086]*.)

[3] Certain of the plaintiffs, public officials whom we denote the Bustamante group, do not join in the antitrust claims but make additional UCL claims based on Penal Code violations. (*Pen. Code, §§ 395*, *396*.) The same basic theories pertain to all the causes of action and we need not discuss these additional distinctions separately.

A number of major named defendant groups have settled this case and are not participants in this appeal (Reliant **[***8]** Energy, Duke Energy, Williams Energy Marketing & Trading, and Mirant Americas Energy, etc.). [4] The remaining defendants, and their subsidiaries for whose activities they are sued, are four **[*1300]** groups of generators, sellers, or traders of electricity at wholesale (Dynegy, Inc.; Morgan Stanley Capital Group, Inc.; AES Corporation; and Sempra Energy, Inc.). [5]

Plaintiffs assert a number of alleged violations of the *Cartwright Act* (first cause of action) and the unfair and/or unlawful prongs of the *UCL* statute (second and third causes of action), **[***9]** occurring around 2000, during a period of intense governmental and commercial activity to deregulate the electricity markets pursuant to 1996 state legislation, *Public Utilities Code section 330 et seq.* (*Dynegy, supra, 375 F.3d 831, 835* ["Noting the energy industry restructuring already underway, the California Legislature decided that reshaping the market for California energy could help provide competitive, lower cost and reliable electricity service, while preserving the state's commitment to developing diverse, environmentally sensitive electricity resources. [Citation.] Assembly Bill 1890 ('AB 1890') established the legal structure for the deregulation and restructuring plan"].)

In the introductory allegations of the master complaint, plaintiffs allege that they are entitled to recover damages and other equitable and injunctive relief, based on injuries incurred during this period and "arising from defendants' manipulation, distortion, and corruption of California's deregulated wholesale electricity market. Defendants' unfair and unlawful business practices and illegal restraints of trade included combining to withhold supply from **[***10]** electricity markets and colluding to fix electricity prices. This conduct forced electricity users to pay electricity prices based not on competitive market forces, but prices which were grossly inflated due to defendants' conduct. [¶] This action seeks to remedy that conduct, which caused widespread electricity shortages and astronomical prices. Defendants' manipulation of what was supposed to be a competitive market for wholesale electricity harmed all Californians and destabilized the California economy, which depends on a reliable supply of competitively priced energy. The total harm caused by defendants' conduct is, at this point, unknown. …"

Plaintiffs' master complaint cites to several examples of defendants' alleged exploitation of the changes since 1996 in the energy market's new regulatory and economic structure. These include practices of "conspiring to withhold the supply of energy into the PX and ISO [power exchange and Independent System Operator, nonprofit public benefit corporations established by the Legislature] markets and to manipulate the price at which **[*1301]** wholesale energy was sold." Plaintiffs allege this constituted "gaming the market" to create false **[***11]** shortages and prevent the **[**259]** sale of electricity at competitive rates. [6]

The master complaint describes how the ISO was charged with balancing the supply of energy offered for sale into the market with demand at certain points in time, and was required to purchase energy on the spot market to meet any shortfalls. This spot market was susceptible to manipulation regarding the price of wholesale energy, which was set by the "market clearing price," or the highest price offered for sale of energy necessary to meet the load. This scheme was supposed to promote competition to attract new sources of power and lower the price of electricity, but according to plaintiffs, it was subject to abuse.

Additionally, defendants' communications and information sharing were alleged to be made for the purpose of and having the **[***12]** effect of manipulating supply and fixing prices. Defendants "manipulated supply such that the ISO was forced to issue shortage warnings during the Summer of 2000 even though the State had sufficient generating capacity. Defendants accomplished this by withholding supply from the PX and ISO markets, thus

---

[4] Apparently, those settlements with those other defendants also included other related claims, and are not informative with regard to the issues on this appeal.

[5] In addition to suing these four major employers in the business of wholesale electric trading and marketing, plaintiffs named three individual defendants, who were management employees of the Dynegy group. No separate allegations are made about the individual defendants and we refer to all defendants collectively.

[6] The ISO continues to manage the wholesale electricity market, but the PX is no longer in operation. Plaintiffs' allegations relate to the period during which the PX was still participating in the market.

creating artificial shortages of electricity which, in turn, raised the market clearing prices on the wholesale energy markets. Much of this withholding was executed by simply shutting down or restricting the output of operational electricity generators. … [¶] This sort of activity provided the pretext—electricity shortages—for defendants' collusive and outrageous sales prices offered into the wholesale energy markets operated by the PX and ISO. From their respective trading floors, defendants coordinated the prices for electricity they offered for sale, otherwise known as 'bid rigging.' "

Plaintiffs therefore alleged that defendants' conduct departed from a competitive model, and they could "wield 'market power,' *i.e.*, the ability to control the market price." This conduct "materially raised electricity prices in the PX and ISO markets, which in turn, resulted in higher **[***13]** retail prices to consumers." The relief sought included actual and treble damages, restitution, civil penalties, and injunctive relief.

B

Demurrer/Opposition

In June 2005, after remand from federal court, defendants renewed their joint demurrer, asserting a lack of jurisdiction in the superior court, based on **[*1302]** federal preemption, as well as failure to state the causes of action. Defendants asserted plaintiffs' claims, based on conduct occurring in the wholesale energy market, cannot be adjudicated in state court because that is a field which is regulated by the federal government through the Federal Power Act (FPA; *16 U.S.C. § 791a et seq.*) and placed within the exclusive authority of the Federal Energy Regulatory Commission (FERC). Defendants relied on federal case law holding that state law claims arising from wholesale transactions in the interstate electricity market are preempted under the FPA and that the filed rate doctrine applies to rates regulated under the FPA. (*Snohomish, supra, 384 F.3d 756*; *Grays Harbor, supra, 379 F.3d 641, 647*.)

Defendant argued the cases cited by plaintiffs as precluding a finding of preemption, such as *Younger, supra, 26 Cal.3d 397,* **[***14]** and *Spielholz, supra, 86 Cal.App.4th 1366*, were distinguishable **[**260]** and more limited than plaintiffs believed. Opposition and reply papers were filed, supported by extensive judicially noticeable material from FERC records. [7]

[*15]** At oral argument in the trial court, defendants responded to plaintiffs' theories with the observation that there were ongoing refund requests before FERC by one of the defendants' subsidiaries, San Diego Gas & Electric, and defendants contended FERC was the proper forum. Plaintiffs continued to argue that in light of the various changes in the FERC regulatory process, from filed rates to a market-based type of regulation, Congress could not have intended to preempt the field when it enacted the FPA. Plaintiffs relied on *Younger, supra, 26 Cal.3d 397,* to contend concurrent state antitrust regulation in the wholesale market was appropriate, also citing to a related case in which a federal district court judge had observed that it was possible to establish a violation of the *Cartwright Ac*t without reference to the FPA's " 'just and reasonable' " rates standard. (*Hendricks v. Dynegy Power Marketing, Inc. (S.D.Cal 2001) 160 F. Supp. 2d 1155, 1163* (*Hendricks*).) In plaintiffs' view, it was possible to establish damages for anticompetitive conduct by defendants that were not measured by rate regulation standards. Plaintiffs contended that antitrust damages should be measured **[***16]** by what price the market would have set if anticompetitive forces were not operating, as distinguished from the **[*1303]** FERC standard of a just and reasonable rate, which was tied to how much money defendants were entitled to be making. The matter was taken under submission.

C

---

[7] Plaintiffs appropriately request judicial notice on appeal of various FERC proceedings and decisions in the record, outlining the scope of its jurisdiction as granted by the FPA (*16 U.S.C. § 791a et seq.*). These orders and decisions deal with rate schedules and proposed market-based rates and tariffs, and are submitted by plaintiffs to provide examples of FERC's duties to review whether rates and rate-related practices are just and reasonable, and to provide remedies for violations. (*16 U.S.C. §§ 824d*, *824e*.) We need not discuss several of plaintiffs' arguments made below, which are not pursued on appeal, such as the purported distinction between the roles of sellers and other participants in the market, such that "at a minimum the case should proceed against traders and generators."

Ruling

After oral argument, the trial court issued its order, setting forth its reasoning as follows. First, the court granted the respective requests for judicial notice of rulings and orders issued by FERC. The demurrer was sustained on the basis that all claims were preempted and *Younger, supra, 26 Cal.3d 397,* was distinguishable. The court primarily relied on the authority of a Ninth Circuit Court of Appeals decision, *Snohomish, supra, 384 F.3d 756*, to conclude that plaintiffs' claims and prayer for relief would impermissibly require a "fair price" determination, already found to be barred by preemption principles in *Grays Harbor, supra, 379 F.3d 641*. The court concluded the field preemption and conflict preemption principles barred each of plaintiffs' claims.

Further, the trial court rejected plaintiffs' argument that *Otter Tail Power, supra, 410 U.S. 366* **[***17]** , would bar a finding of preemption, "because that case concerned federal antitrust laws and not state antitrust laws as Plaintiffs allege in their Master Complaint." The court further noted that in light of its finding that preemption bars plaintiffs' claims, it was not required to reach the issue of the applicability of the filed rate doctrine; nevertheless, those **[**261]** principles would bar these claims (relying on, e.g., *Snohomish, supra, 384 F.3d 756*; *Grays Harbor, supra, 379 F.3d 641*; *Dynegy, supra, 375 F.3d 831*). These rulings were dispositive and the master complaint was dismissed.

Plaintiffs, through liaison counsel, timely filed their notice of appeal.

DISCUSSION

The main thrust of the complaint is that defendants' conduct, their alleged "manipulation, distortion and corruption" of the wholesale electricity market in California, "forced electricity users to pay electricity prices based not on competitive market forces, but prices which were grossly inflated due to defendants' conduct," thereby giving rise to an entitlement to antitrust damages and unfair competition remedies in favor of plaintiffs. To avoid the effect of **[***18]** federal preemption in this heavily regulated area, plaintiffs seek to distinguish between the regulatory authority granted to FERC to order compliance with its policies, such as by ordering refunds to electricity **[*1304]** consumers, and the types of damages and other relief recoverable under the *Cartwright Act* and/or the *UCL*.

We first set forth rules regarding federal preemption in this factual and legal context. We then address the filed rate doctrine.

I

QUESTIONS OF LAW PRESENTED

To address these issues as resolved on demurrer, we apply basic standards of review. ***HN1***[] "We review the trial court's sustaining of a demurrer without leave to amend de novo, exercising our independent judgment as to whether a cause of action has been stated as a matter of law. [Citations.] We 'give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]' [Citation.] A judgment based on a dismissal must be affirmed if any of the grounds for demurrer raised by the defendant is well-taken and disposes of the complaint. [Citation.]" (*Gallivan v. AT&T Corp. (2004) 124 Cal.App.4th 1377, 1381 [21 Cal. Rptr. 3d 898]*.)

HN2[] "When the issues regarding federal **[***19]** preemption involve undisputed facts, it is a question of law whether a federal statute or regulation preempts a state law claim and, on appeal, we independently review a trial court's determination on that issue of preemption. [Citations.]" (*Smith v. Wells Fargo Bank, N.A. (2005) 135 Cal.App.4th 1463, 1476 [38 Cal. Rptr. 3d 653]* (*Smith*).)

A preliminary question of law we must address is whether plaintiffs are entitled to claim the benefit of "the general rule disfavoring implied preemption." (*Southern Cal. Edison Co. v. Public Utilities Com. (2004) 121 Cal.App.4th 1303, 1311–1312 [18 Cal. Rptr. 3d 435]* (*Southern California Edison*).) This is sometimes termed a "presumption against preemption. ***HN3***[] 'We apply a presumption against federal preemption unless the state attempts to regulate an area in which there is a history of significant federal regulation.' [Citation.]" (*Grays Harbor, supra, 379*

F.3d 641, 648, fn. 7.) Plaintiffs rely on Smith, supra, 135 Cal.App.4th 1463, to argue that the Cartwright Act may provide alternative schemes of regulation of wholesale electricity markets, to the extent that such claims are not inconsistent with federal preemption **[***20]** in this area. They hinge this claim upon their perception that antitrust damages arising from defendants' anticompetitive conduct are different in nature from any penalties or refunds that FERC might order resulting from the same type **[**262]** of conduct. They argue the party claiming federal preemption (defendants) have the burden to show specific state law claims are preempted. (Smith, supra, at p. 1475.)

[*1305]

In response, defendants cite to Southern California Edison, supra, 121 Cal.App.4th 1303, to say that the "presumption against preemption" is "characteristically applied where the field is one that the states have traditionally occupied and regulated. [Citation.] The presumption 'is not triggered when the state regulates in an area where there has been a history of significant federal presence. [Citation.]' [Citation.] Inasmuch as the field of interconnection [wholesale electricity distribution] agreements has a history of significant federal presence, the presumption against preemption is not applicable here." (Id. at pp. 1311–1312.) We agree with those observations and those of the court in Grays Harbor, supra, 379 F.3d 641, 648, footnote 7, **[***21]** that "[t]his presumption is almost certainly not applicable here because the federal government has long regulated wholesale electricity rates."

We therefore seek to examine, free from any such presumption against preemption, the respective merits of the arguments by both plaintiffs and defendants regarding the application of preemption principles here.

II

PREEMPTION PRINCIPLES

CA(1)[] **(1)** As set forth in Smith, supra, 135 Cal.App.4th 1463, 1476, **HN4**[] our task is to examine "the precise language of the federal law or regulation to determine whether a particular state law claim is preempted. [Citations.] 'As to each state law claim, the central inquiry is whether the legal duty that is the predicate of the [claim] constitutes a requirement or prohibition of the sort that federal law expressly preempts. [Citations.]' [Citation.]" (*Ibid.*)

To carry out this analysis of the scope of preemption in the energy/electricity context, we first outline the leading case authority dealing with similar claims arising out of the California energy crisis in the wholesale electricity market, as issued by the Ninth Circuit Court of Appeals. We then compare the **[***22]** nature of the antitrust/UCL damages requested, to the remedial powers allocated by the FPA (16 U.S.C. § 791a) to FERC (formerly the FPC (Federal Power Commission) [see hist. & stat. notes, 16 U.S.C.A. (2000) foll. § 792, p. 78]). We note that although preemption principles are closely intertwined with the "filed rate doctrine," which is central to FERC's operations, we may nevertheless discuss them separately. (California ex rel. Lockyer v. F.E.R.C. (9th Cir. 2004) 383 F.3d 1006, 1011 (*Lockyer*).) The reason is that the historic filed rate doctrine is undergoing fast-paced evolution in the context of energy deregulation, such as the aftermath of the 1996 California legislation with which we are dealing. (Pub. Util. Code, § 330 et seq.; Dynegy, supra, 375 F.3d 831, 852–853.) We will address this evolution to the extent necessary in part III, *post*.

[*1306]

Finally, with this background set forth, we will analyze plaintiffs' arguments that certain alternative federal and state authority shows that antitrust relief in the state courts is not inconsistent with the grant of federal authority to regulate **[***23]** the wholesale electricity market. (E.g., Younger, supra, 26 Cal.3d 397; Otter Tail Power, supra, 410 U.S. 366.)

A

Recent Ninth Circuit Authority

CA(2)[] **(2)** In Grays Harbor, supra, 379 F.3d 641, 644, the Ninth Circuit Court of Appeals **[**263]** built upon earlier authority (Dynegy, supra, 375 F.3d 831), to address "contract-related claims against energy wholesalers by a public utility which contends it was forced to pay exorbitant prices for electricity." (Grays Harbor, supra, at p. 644.) The court upheld a district court dismissal of such contract claims on preemption grounds. It first set forth basic preemption principles: "As an initial matter, it is clear that **HN5**[] the Federal Power Act (the 'FPA') grants FERC ' "*exclusive* authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce." ' [Citations.] Through the FPA, ' "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction. … This was done in the Power Act by making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except **[***24]** those which Congress has made explicitly subject to regulation by the States." ' [Citation.] This power includes the exclusive authority to determine the reasonableness of wholesale rates. [Citations.]" (Grays Harbor, supra, 379 F.3d 641, 646–647.)

In Dynegy, supra, 375 F.3d 831, 839, the court explained the operation of the ISO tariffs filed with FERC, and said that "the ISO tariff binds the companies to important obligations and duties that are relevant and necessary to the state law claim." (*Ibid.*) For example, "the ISO must file schedules showing its rates and charges, and the practices and regulations affecting such charges. [Citation.] The filing enables FERC to determine whether the ISO rules and regulations pertaining to those charges are reasonable, as required by the FPA. [Citation.] Once filed with a federal agency, such tariffs are the 'equivalent of a federal regulation.' [Citations.] … Besides specifying the generators' responsibilities, the tariff also details penalties and remedies for non-compliance." (*Ibid.*)

Even though the unsuccessful plaintiff in *Grays Harbor* was claiming contract damages (nominally **[***25]** state law causes of action), the court of appeals read its complaint as seeming, impermissibly, "to require the district court, at some point, to determine the fair price of the electricity that was delivered under the contract. This determination is clearly within FERC's jurisdiction **[*1307]** for determining the reasonableness of wholesale rates. [Citations.] At the very least, the requested relief intrudes on an 'identifiable portion' of a field that the federal government has occupied and addresses a matter that is 'in any way regulated by the federal government.' [Citation.]" (Grays Harbor, supra, 379 F.3d at p. 648.)

The court of appeals also rejected the plaintiff's claim that "market-based rates are not within FERC's exclusive jurisdiction over wholesale rates." (Grays Harbor, supra, 379 F.3d 641, 649.) The federal court acknowledged that FERC had changed its policies from requiring filed rates to allowing market-based rates. However, traditional preemption principles continue to apply because, "by asking the court to set a fair price, Grays Harbor is invoking a state rule (specifically, contract law) that would interfere with the method by which **[***26]** the federal statute was designed to reach its goals (specifically, FERC regulation of wholesale electricity rates). To permit Grays Harbor to receive in its court action what is essentially a refund would create a conflict with FERC's authority over wholesale rates. And such a result would make state law stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under the FPA." (Id. at p. 650, fn. omitted.) The court ruled the contract **[**264]** claims would interfere with FERC's exclusive jurisdiction to set wholesale rates and were barred by field preemption, conflict preemption, and the filed rate doctrine. (Id. at pp. 648, 650, 651.)

In the next case, Snohomish, supra, 384 F.3d 756, the court extended the reasoning in Grays Harbor, supra, 379 F.3d 641, from the contract field to the antitrust field. The federal court found that preemption rules applied to preclude a California state law antitrust court action that was essentially challenging market-based rates. The court explained its reasoning: "The fundamental question in this case is *whether, under the market-based* **[***27]** *system of setting wholesale electricity rates, FERC is doing enough regulation to justify federal preemption of state laws*. The answer to this question is controlled by two recent decisions of this court: Dynegy, [supra,] 375 F.3d 831, and Grays Harbor, [supra,] 379 F.3d 641. Under the system at issue here, FERC has waived many of the requirements that applied under the cost-based system. For example, the actual prices are no longer filed with FERC 60 days before they can be charged and the utilities do not provide FERC with detailed schedules of their costs. Instead, the price of wholesale electricity is determined in the markets operated by the PX and the ISO. [¶] FERC continued to oversee wholesale electricity rates, however, by reviewing and approving a variety of documents filed by the defendants, the PX, and the ISO." (Snohomish, supra, 384 F.3d 756, 760, italics added.)

[*1308]

The federal court of appeals then gave several examples of how FERC was continuing to exercise its regulatory power to a sufficient degree to justify continued federal preemption. These included considering applications for approval of **[***28]** market-based tariffs upon a showing that the seller lacked or had mitigated its market power; requiring power sellers to file quarterly reports, which contained certain required information including the minimum and maximum rate charged and the total amount of power delivered during the quarter; and reviewing "detailed tariffs filed by the PX and the ISO, which described in detail how the markets operated by each entity would function." (*Snohomish, supra, 384 F.3d 756, 761*.)

Next, the court in *Snohomish, supra, 384 F.3d 756*, described how FERC had taken action to order wholesalers to disgorge profits that resulted from the anticompetitive practices involved in that particular case. From all of these factors, the federal court decided that ***HN6***[] preemption-related doctrines would continue to apply when market-based rates are involved, as laid out in *Grays Harbor, supra, 379 F.3d 641*. (*Snohomish, supra, 384 F.3d at pp. 760–761*.) Even though *Grays Harbor* was a contract case, the same reasoning applied to the claims by Snohomish, alleging violations of state antitrust and unfair competition law. The court concluded **[***29]** that both types of claims sought to have the district court "determine the rates that 'would have been achieved in a competitive market.' This is the same determination as the 'fair price' determination that we held was barred by preemption principles in *Grays Harbor.* We therefore hold that Snohomish's claims are barred by the filed rate doctrine, by field preemption, and by conflict preemption." (*Snohomish, supra, at p. 761*.) The plaintiff's proper course of action was to apply to FERC to redress its claims that the prices in the wholesale electricity markets were not just and reasonable or that the defendants sold electricity in violation of the filed tariffs. Snohomish's state antitrust claims were **[**265]** dismissed for lack of jurisdiction. (*Id. at p. 762*.)

B

Nature of Remedies: FERC Regulatory Scheme/Antitrust Damages

CA(3)[] **(3)** Notwithstanding the above authority, plaintiffs contend that they may continue to pursue their claims for relief, damages pursued under the *Cartwright Act* and the *UCL* (alleging unlawful or unfair conduct), as alternative theories of recovery. However, in their reply brief, plaintiffs appear to admit that injunctive relief **[***30]** is not available, although their position is unclear. In any case, in *Snohomish, supra, 384 F.3d 756*, the court noted **[*1309]** such injunctive relief has been held to be barred in this context by preemption principles, as well as the filed rate doctrine. (*Id. at pp. 761–762*; *Dynegy, supra, 375 F.3d at pp. 849–853*.) Ninth Circuit cases have held that ***HN7***[] injunctive relief under the UCL in this context of energy regulation is preempted, because it would " 'encroach[] upon the substantive provisions of the tariff, an area reserved exclusively to FERC, both to enforce and to seek remedy.' " (*Snohomish, supra, at p. 762*; see *Dynegy, supra, at pp. 836, 852*.)

CA(4)[] **(4)** We therefore focus upon plaintiffs' remaining claims for antitrust damages for the defendants' anticompetitive conduct. ***HN8***[] "[T]he central purpose of the antitrust laws, state and federal, is to preserve competition. It is competition—not the collusive fixing of prices at levels either low or high—that these statutes recognize as vital to the public interest." (*Knevelbaard Dairies v. Kraft Foods, Inc. (9th Cir. 2000) 232 F.3d 979, 988* (*Knevelbaard*).) **[***31]**

CA(5)[] **(5)** Plaintiffs' arguments require a comparison of antitrust relief to the remedies available from FERC under the FPA. ***HN9***[] One of the elements of standing to seek antitrust damages for anticompetitive conduct is a sufficient showing of injury with respect to: " '(1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages.' " (*Knevelbaard, supra, 232 F.3d 979, 987*.) A court must " 'evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.' [Citation.]" (*Ibid.*; see *Kolling v. Dow Jones & Co. (1982) 137 Cal. App. 3d 709, 723 [187 Cal. Rptr. 797]* [antitrust standing is required under the *Cartwright Act*].)

CA(6)[] **(6)** It is well accepted that *HN10*[] damages awards in antitrust cases may not be based upon "sheer guesswork or speculation." (*Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc. (1980) 101 Cal. App. 3d 532, 545 [161 Cal. Rptr. 811]*.) Rather, a plaintiff seeking such **[***32]** damages must establish to a reasonable probability that there was some causal connection between defendant's wrongful act and the damages alleged, such as lost profits. (*Ibid.*) "Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' [Citation.]" (*Ibid.*)

Plaintiffs say they can prove an entitlement to antitrust damages in state court, on the basis that the injuries they sustained as consumers from the **[*1310]** anticompetitive acts of defendants are mainly unrelated to FERC's normal duties of regulating rates and tariffs for the delivery of electricity on a wholesale basis. Plaintiffs believe they can show all the elements of "antitrust injury," i.e., " '(1) unlawful conduct, (2) causing an injury to the plaintiff, **[**266]** (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent.' " (*Knevelbaard, supra, 232 F.3d 979, 987*.) Plaintiffs believe that the injury they allege is distinct from the high energy prices allegedly caused by defendants' **[***33]** actions in creating collusive supply, demand, and price manipulation. They say their claims "are based on duties and obligations that arise entirely independently of any 'tariff' relevant to this case." However, they admit that if FERC were to award any refunds, these would have to be offset against any court award of antitrust or UCL damages, and vice versa.

Defendants rely on the FPA statutory scheme as preempting the field, according to the basic principles explained in *Lockyer, supra, 383 F.3d 1006, 1011*, as follows: "The Federal Power Act governs the transmission and wholesale sales of electrical energy in interstate commerce. [Citation.] Pursuant to its authority under the FPA, FERC has exclusive jurisdiction over interstate wholesale power rates. [Citations.] The FPA requires that all rates for the transmission and sale of wholesale electricity be filed with FERC and published for public review. [Citation.] FERC is obligated to ensure that wholesale power rates are 'just and reasonable,' [citation], and applied in a non-discriminatory manner, [citations]. Indeed, FERC's authority to determine whether wholesale rates are 'just and reasonable' is exclusive. **[***34]** [Citation.]" (*Lockyer, supra, at p. 1011*.) As explained in *Dynegy*, the wholesale producers' filings will enable FERC "to determine whether the ISO rules and regulations pertaining to those charges are reasonable, as required by the FPA. [Citation.] Once filed with a federal agency, such tariffs are the 'equivalent of a federal regulation.' [Citations.]" (*Dynegy, supra, 375 F.3d at p. 839*.)

CA(7)[] **(7)** Defendants accordingly argue that the FPA preempts this field and requires that any such relief be requested from FERC, such as refunds to purchasers. They point to *16 United States Code section 824d(a)*, providing that FERC is charged with regulating and disclosing "just and reasonable rates" as follows: *HN11*[] "All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." (*16 U.S.C. § 824d(a)*.) **[***35]** Likewise, *HN12*[] in *16 United States Code section 824d(c)*, FERC is authorized to **[*1311]** require public utilities to file and disclose "schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services."

FERC also has the power under *16 United States Code section 824e(a)* to prohibit "[u]njust or preferential rates, etc." and to order remedies as follows: *HN13*[] "Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affected such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, **[**267]** practice, or **[***36]** contract to be thereafter observed and in force, and shall fix the same by order." *HN14*[] In *16 United States Code section 824e(b)*, the commission is entitled to prescribe the effective dates of refunds that it orders. We believe the broad scope of these statutes must invoke the rule that antitrust damages will not be proper where there is a risk of duplicative recovery. The nature of plaintiffs' alleged injury (equivalent to an entitlement to refunds) is apparently inseparable from the type of injury the antitrust laws were intended to forestall. (*Knevelbaard, supra, 232 F.3d 979, 987*.)

Plaintiffs, however, offer several reasons why these applications of preemption theory were wrongly decided or distinguishable from their claims, as we next discuss.

C

Alternative Approaches Relied on by Plaintiffs to Preclude a Preemption Finding

Plaintiffs rely on California law (*Younger, supra, 26 Cal.3d 397*; *Spielholz, supra, 86 Cal.App.4th 1366*) to argue no federal preemption principles apply here. They also cite to *Otter Tail Power*, as representing the concept that activities coming under the jurisdiction **[***37]** of a regulatory agency "nevertheless may be subject to scrutiny under the antitrust laws." (*Otter Tail Power, supra, 410 U.S. 366, 372*.) Plaintiffs seemingly argue for a "back to basics" approach to preemption, based on this older case law focusing on congressional intent. Further, they point to language in the *Lockyer* opinion (*Lockyer, supra, 383 F.3d 1006*) as showing that the federal courts here recognized that FERC is not doing a good enough job, such that alternative remedies should **[*1312]** now be allowed through this state antitrust action. We discuss these theories in turn.

In *Younger, supra, 26 Cal.3d 397,* the court explained that an agency such as the FPC (now FERC) must take antitrust considerations into account when it determines " 'public interest' " and " 'public convenience and necessity,' " but the agency "has 'no power to insulate utilities under its regulation from the operation of the antitrust acts, or to determine when an antitrust violation has taken place. *Otter Tail Power[, supra,] 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359* … .' [Citations.]" (*Younger, supra, at pp. 407–408*.) The Supreme Court decided that **[***38]** a parallel piece of legislation, the Natural Gas Act (*15 U.S.C. § 717 et seq.*), did not preclude the state Attorney General from investigating possible violations of California ***antitrust law***. It reasoned that the act did not expressly prohibit investigation or other activity regarding state antitrust laws, and that such practices could be consistent with the federal counterparts. (*Younger, supra, 26 Cal.3d at p. 408*.) The Supreme Court therefore found no federal preemption of the state Attorney General's investigation of alleged conduct such as " 'price fixing, monopolization, divisions of markets, and restraint of trade,' " and said "[h]ypothetical conflict between federal law and enforcement of California antitrust provisions within the scope of the investigation, even if assumed, is not ground for preemption since it may never arise in fact. [Citations.]" (*Ibid.*) Instead, state investigations into possible violations of California statutes that were in harmony with federal antitrust laws were deemed to be permissible and not preempted. (*Id. at p. 409*.)

Plaintiffs argue the authority of *Younger, supra, 26 Cal.3d 397, 409,* is not restricted to **[**268]** authorizing state antitrust investigation **[***39]** procedures, but should also extend to authorizing state antitrust enforcement actions, such as this complaint. We disagree, because more than a "[h]ypothetical conflict between federal law and enforcement of California antitrust provisions" (*id. at p. 408*) is present here, in light of the extensive nature of the FERC regulatory scheme over the wholesale electricity market. In the FPA, we are presented with " ' "a bright line easily ascertained, between state and federal jurisdiction. … This was done in the Power Act by making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." ' [Citations.] This power includes the exclusive authority to determine the reasonableness of wholesale rates. [Citations.]" (*Grays Harbor, supra, 379 F.3d 641, 646–647*.) Plaintiffs cannot explain why the trial court would not have to second-guess FERC rate determinations in fixing antitrust damages to punish defendants for the alleged anticompetitive conduct, because such conduct would directly affect the reasonableness of the rates charged.

[*40]** **[*1313]**

In the UCL context, in *Spielholz, supra, 86 Cal.App.4th 1366*, those plaintiffs were allowed to proceed with false advertising allegations that a telecommunications carrier had falsely advertised a "seamless calling area" existed, where in reality, there were gaps where wireless telephone users were unable to connect calls. The Court of Appeal found no federal preemption of such claims, because the main allegations dealt with false advertising, such that any effect on rates was merely incidental. Here, however, as stated by the trial court, "This can be contrasted to the instant case, involving the FPA, where Plaintiffs' allegations concern conduct directly related to rates charged and ultimately paid." We agree with the trial court's analyses of the California case law claims, because plaintiffs have been unable to show why the alleged anticompetitive conduct by defendants inflicted any different kind of injury on them, that is separate from the rates charged and ultimately paid. This is not a case in which incidental damages are claimed to arise from conduct that is not covered by the federal legislation, such as false advertising.

In its ruling, the trial court **[***41]** also rejected the argument that *Otter Tail Power* would bar a finding of preemption, since that case concerned federal antitrust laws and not state antitrust laws. There, the Supreme Court relied on legislative history to find nothing in the FPA that would "insulate electric power companies from the operation of the antitrust laws." (*Otter Tail Power, supra, 410 U.S. 366, 374–375*.) Rather, to the extent that voluntary business relationships are utilized to control the interstate distribution of power (as opposed to governmental regulation), "courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws." (*Ibid*.) The court in *Otter Tail Power* held there is no basis to conclude that the limited power granted to the FPC/FERC to regulate certain aspects of electrical supply (e.g., ordering interconnections of power lines) "was intended to be a substitute for, or to immunize Otter Tail from, antitrust regulation for refusing to deal with municipal corporations." (*Ibid.*) This authority is distinguishable because these plaintiffs are attempting to claim injury by invoking the same subject **[***42]** matter covered by the government regulatory authority, but recharacterizing it as antitrust injury, all the while seeking to recover damages **[**269]** for overcharged payments and allegedly excessive rates. This is a distinction without a difference.

Plaintiffs next argue that the authority of *MCI Telecommunications Corp. v. American Telephone & Telegraph Co. (1994) 512 U.S. 218 [129 L. Ed. 2d 182, 114 S. Ct. 2223]* and *Maislin Industries, U. S. v. Primary Steel (1990) 497 U.S. 116 [111 L. Ed. 2d 94, 110 S. Ct. 2759]* should indicate that the kind of market-based tariffs that are in use here are not properly regulated solely by the FPA and FERC. In *Lockyer, supra, 383 F.3d at p. 1013*, the court of appeals summarized and distinguished those same holdings in a closely analogous factual context (regulatory challenges by the state to the actions of **[*1314]** the federal agency). The court explained the nature of these different market-based regulatory schemes as follows: "In *MCI,* the Supreme Court held that the FCC could not eliminate rate-filing requirements for any class of carrier, even when necessary to promote competitive markets. In *Maislin,* the Court held that the ICC could **[***43]** not allow common carriers to charge unfiled, privately negotiated rates lower than the filed rates, even when the carriers were in highly competitive markets. [Citation.] As the Court stated in *Maislin,* the existence of a competitive market 'cannot provide the ICC authority to alter well-established statutory filed rate requirements.' [Citation.]" (*Lockyer, supra, 383 F.3d 1006, 1013*.) The court of appeals then distinguished the FERC regulatory scheme from those schemes, in the course of rejecting an argument that the FERC procedures were fatally defective: "The agencies in *MCI* and *Maislin* relied on market forces alone in approving market-based tariffs. In contrast, FERC's system consists of a finding that the applicant lacks market power (or has taken sufficient steps to mitigate market power), coupled with strict reporting requirements to ensure that the rate is 'just and reasonable' and that markets are not subject to manipulation. Here, FERC required the wholesale seller to file a market analysis every four months, and quarterly reports summarizing its transactions during the preceding three months. These transaction summaries include both **[***44]** long and short-term contracts, purportedly with reports of some sales for intervals as small as ten minutes. FERC has affirmed in its presentation before us that it is not contending that approval of a market-based tariff based on market forces alone would comply with the FPA or the filed rate doctrine. *Rather, the crucial difference between MCI/Maislin and the present circumstances is the dual requirement of an ex ante finding of the absence of market power and sufficient post-approval reporting requirements. Given this, FERC argues that its market-based tariff does not run afoul of MCI or Maislin, and we agree.*" (*Ibid*., italics added.)

Plaintiffs have provided no reason to depart from the above analysis, and disregard the fact that the FPA includes certain safeguards to oversee the reasonableness of rates for the wholesale electricity market. It does not make any difference that in *Lockyer, supra, 383 F.3d 1006, 1013*, the court of appeals reached those conclusions but nevertheless went on to criticize the regulatory efforts of FERC as "abdicating its regulatory responsibility." (*Id. at pp. 1014–1015*.) **[***45]** At that time, the court of appeals accepted the argument that "even if market-based tariffs are lawful in concept, FERC failed to administer the tariffs in accordance with their terms and abused its discretion in limiting available remedies for regulatory violations." (*Id. at p. 1014*.) Specifically, in *Lockyer,* **[**270]** the court found fault with FERC's past policies as follows. First, it had implemented market-based tariffs so as to virtually deregulate the wholesale electricity industry and remove it from statutorily required oversight, but without providing appropriate safeguards, such as "enforceable **[*1315]** post-approval reporting that would enable FERC to determine whether the rates were 'just and reasonable' and whether market forces were truly determining the price." (*Ibid.*) Second, these crucial transactional reporting requirements were not followed during the subject time period: "Indeed, non-compliance with FERC's reporting requirements was rampant throughout California's energy crisis. FERC itself has acknowledged that during the height of the energy crisis the quarterly reports of several major wholesalers failed to include the transaction-specific data **[***46]** through which the agency at least theoretically could have monitored the California energy market … .[¶] … [¶] Thus, the very mechanism that distinguished FERC's tariff from those prohibited by the Supreme Court in *MCI* and *Maislin* was, for all practical purposes, non-existent while energy prices skyrocketed and rolling brown-outs threatened California's businesses and citizens." (*Ibid.*)

Notwithstanding those past institutional failures on the part of FERC, the court of appeals in *Lockyer, supra, 383 F.3d 1006,* acknowledged that FERC possessed "broad remedial authority to address anti-competitive behavior" (*id. at p. 1015*), such as ordering refunds in instances where utilities violated FPA provisions (exceeding approved rates or charging unapproved rates; *FPA, § 205*, *16 U.S.C. § 824d*). [8] FERC can also order profits to be disgorged when a regulated utility fails to comply with requirements for posting rates and nondiscrimination requirements. Such remedial power (e.g., the power to order retroactive refunds) "is inherent in FERC's authority to approve a market-based tariff in the first instance." (*Lockyer, supra, 383 F.3d at pp. 1015–1016*.) **[***47]** This result was required in order to avoid having only an illusory remedy available from FERC under a market-based tariff system. The court of appeals therefore returned the matter to FERC "to reconsider its remedial options in the first instance." (*Id. at p. 1018*.)

CA(8)[] **(8)** Plaintiffs interpret all these authorities as showing that state antitrust regulation should be allowed in this instance, to fill the gaps left when FERC scaled back its activities and abdicated its regulatory responsibilities. We cannot agree, because ***HN15***[] even considering its difficult history, FERC has been provided with sufficient regulatory authority such that federal preemption principles must be applied to these antitrust/UCL challenges arising from wholesale electricity market activities. Plaintiffs acknowledge that FERC refunds are **[***48]** a potential remedy and offset for their claims. Moreover, they have been unable to show how any damages from defendants' conduct, recoverable under an antitrust theory, would be separate in nature from the allegedly overpaid rates that they paid for power, which would also give rise to any refund requests. The authority of *Hendricks, supra, 160 F. Supp. 2d, 1155, 1163* (decided in 2001), regarding permissible concurrent theories of **[*1316]** relief, lacks persuasiveness in light of more recent case law such as *Snohomish, supra, 384 F.3d 756* and *Grays Harbor, supra, 379 F.3d* ***[**271]*** *641* (decided in 2004). [9] Similarly, although plaintiffs rely on *Younger, supra, 26 Cal.3d 397* to contend concurrent state antitrust regulation in the wholesale market is appropriate, that case has not been extended beyond its facts pertaining to permissible investigations regarding matters within antitrust state jurisdiction, and this is not the right case to do so. (*Id. at pp. 406–409*.)

[*49]** Plaintiffs' attempts to rely on fundamental case law from the 1970's and 1980's are unsuccessful because they cannot bring themselves within those general exceptions to well-established preemption principles. Rather, the logic of the recent Ninth Circuit authority in this area is persuasive and should be followed here. (*Snohomish, supra, 384 F.3d 756*.) The trial court properly sustained the demurrers on preemption grounds.

III

---

[8] The *FPA, § 205*, cited in *Lockyer, supra, 383 F.3d 1006, 1015–1016*, is now codified at *16 United States Code section 824d*. (U.S.C.A. Tables, vol. I, p. 251.)

[9] See also *T & E Pastorino v. Duke Energy Trading (9th Cir. 2005) 123 Fed.Appx. 813*, holding UCL allegations regarding transactions in the wholesale energy market fell within the exclusive jurisdiction of FPA, where tariffs approved by FERC would provide the context for determination of any violations of the UCL.

EFFECT OF FILED RATE DOCTRINE

The trial court's ruling stated that in light of its finding that federal preemption bars plaintiffs' claims, it was not required to reach the issue of the applicability of the filed rate doctrine. However, it concluded those principles would nevertheless bar these claims (relying on, e.g., *Snohomish, supra, 384 F.3d 756*; *Grays Harbor, supra, 379 F.3d 641*; *Dynegy, supra, 375 F.3d 831, 851–853)*. All these issues have been fully briefed on appeal. Although the preemption ground alone would provide a sufficient basis to uphold the ruling on demurrer, in an abundance of caution, we will also address the closely related filed rate doctrine issues. Commentators **[***50]** have referred to this line of case law as applying and/or conflating the filed rate doctrine together with field and conflict preemption. (Cal. Antitrust and Unfair Competition Law (Cont.Ed.Bar 3d ed. 2005 supp.) § 7.06, p. 41.)

CA(9)[] **(9)** " 'At its most basic, ***HN16***[] the filed rate doctrine provides that state law, and some federal law (e.g. ***antitrust law***), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question.' [Citations.] '[T]he filed rate doctrine has prohibited not just a state court (or a federal court applying state law) from setting a rate different from that chosen by FERC, but also from assuming a hypothetical rate different from that actually set by FERC.' " (*Grays Harbor, supra, 379 F.3d 641, 650–651*.)
[*1317]

Also in *Grays Harbor*, the court addressed contemporary concerns that ***HN17***[] application of "the filed rate doctrine to market-based rates that have not been filed with FERC would be an unwise and unprecedented expansion of the doctrine." (*Grays Harbor, supra, 379 F.3d 641, 651*.) The court found no such barrier to the use of this doctrine, for the following **[***51]** reasons: "[T]he market-based rate regime established by FERC continues FERC's oversight of the rates charged. FERC only permits power sales at market-based rates after scrutinizing whether 'the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry.' [Citation.] According to FERC, these conditions assure that the market-based rates charged comply with **[**272]** the FPA's requirement that rates be just and reasonable. [Citations.] This oversight is ongoing … . [¶] … Further, FERC contends that such procedures effectively constitute review of rates prior to their implementation. [Citation.]" (*Ibid.*) FERC also has a remedies provision regarding refunds in *16 United States Code section 824e(a)* and *(b)*.

Based on those factors, the court of appeals stated that "while market-based rates may not have historically been the type of rate envisioned by the filed rate doctrine, we conclude that they do not fall outside of the purview of the doctrine." (*Grays Harbor, supra, 379 F.3d 641, 651*.) Although this analysis of the evolution of this regulatory **[***52]** method is very general in nature, it is nevertheless persuasive and we have been given no reason to depart from it here. Instead, the allegations of the master complaint amount to requests for penalties for alleged anticompetitive conduct by defendants, and these potentially would interfere with FERC supervision of market-based rates and any enforcement activities allowed under FERC procedures. We are reluctant to engage in policy analysis to the extent that plaintiffs request in this fast-changing and highly regulated area.

Moreover, in light of these conclusions, we need not address in detail plaintiffs' limitations argument, that FERC was without jurisdiction as to conduct occurring prior to October 2, 2000, due to its own rulings about its assertion of jurisdiction as depending on the timing of events giving rise to claims filed. We find the filed rate doctrine to be instructive in this context and conclude that it reinforces our conclusions regarding preemption. (*Dynegy, supra, 375 F.3d at pp. 852–853*; *Entergy La., Inc. v. Louisiana Pub. Ser. Comm'n (2003) 539 U.S. 39, 47 [156 L. Ed. 2d 34, 123 S. Ct. 2050]* [filed rate doctrine may apply to state **[***53]** regulators through federal preemption under the supremacy clause].) The trial court correctly sustained the demurrer without leave to amend on this ground as well.
[*1318]

DISPOSITION

The judgment of dismissal is affirmed. Plaintiffs are to pay the ordinary costs on appeal.

McConnell, P. J., and Irion, J., concurred.

Marin v. Evans

United States District Court for the Eastern District of Washington

February 27, 2007, Decided ; February 27, 2007, Filed

NO. CV-06-3090-RHW

Reporter
2007 U.S. Dist. LEXIS 13492 *

AMBROSIO MARIN and MIGUEL SANCHEZ, individually and on behalf of all others similarly situated, Plaintiffs, v. WILLIAM EVANS and JUAN MARIN, Defendants.

Core Terms

affirmative defense, matter of law, antitrust, duty to mitigate, Preservation, notice, mitigate, enterprise, preempts, courts

Counsel: [*1] For Ambrosio Marin, individually and on behalf of all others similarly situated, Plaintiff: Howard W. Foster, LEAD ATTORNEY, Johnson & Bell LTD - IL, Chicago, IL.; Terry P Abeyta, LEAD ATTORNEY, Abeyta Nelson, Yakima, WA.

For Miguel Sanchez, individually and on behalf of all others similarly situated, Plaintiff: David Roger Hevel, LEAD ATTORNEY, David Hevel Law Office, Kennewick, WA.; Howard W. Foster, LEAD ATTORNEY, Johnson & Bell LTD - IL, Chicago, IL.; Terry P Abeyta, Abeyta Nelson, Yakima, WA.

For William Evans, Defendant: Brendan Victor Monahan, Velikanje Moore & Shore PS, Yakima, WA.

For Juan Marin, Defendant: Ryan M Edgley, Edgley & Beattie PS, Yakima, WA.

Judges: ROBERT H. WHALEY, Chief United States District Judge.

Opinion by: ROBERT H. WHALEY

Opinion

ORDER DENYING PLAINTIFFS' MOTION FOR A PRESERVATION ORDER; DENYING, IN PART, AND GRANTING, IN PART, PLAINTIFFS' MOTION TO STRIKE

Before the Court is Plaintiffs' Motion to Strike Defendants' Affirmative Defense (Ct. Rec. 15) and Plaintiffs' Motion for a Preservation Order (Ct. Rec. 18). The motions were heard without oral argument.

I. Plaintiffs' Motion for Preservation Order

Plaintiffs ask the Court to enter **[*2]** a Preservation Order for two separate pieces of evidence: (1) Plaintiffs' class 1-9 forms; and (2) all of Evans Fruit Co.'s employees' e-mails. In support of their motion, Plaintiffs rely on the fact that in a separate case involving *Zirkel Fruit Co,* the plaintiffs in that case alleged that the defendants destroyed evidence. The connection to this case is the same attorneys that represented the defendants in that case are representing Defendants in this case.

Here, it is undisputed that Defendants have taken steps to prevent destruction or spoilation of the evidence. Moreover, Plaintiffs have failed to establish that there is any evidence of past evidence destruction concerning the parties to the current case. Accordingly, a preservation order is not necessary. *See* *Capricorn Power Co. v. Siemens Westinghouse Power Corp., 220 F.R.D. 429, 433-34 (W.D. Pa. 2004)* (recognizing that in the absence of significant concern that evidence will be destroyed, preservation order is rarely justified).

II. Plaintiffs' Motion to Strike Defendants' Affirmative Defenses

Rule 12(f) provides that "the court may order stricken from any pleading any insufficient defense or **[*3]** any redundant, immaterial, impertinent, or scandalous matter." *Fed. R. Civ. R. 12(f)*. The primary purpose of *12(f)* is to "avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." A defense may be stricken if it is insufficient as a matter of law, *Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 347 (4th Cir. 2001)* or if it fails to adequately give notice to the opposing party. *Wyshak v. City Nat'l Bank, 607 F.2d 824, 827 (9th Cir. 1979)*. A decision to strike material from the pleadings is vested to the sound discretion of the trial court. *Nurse v. United States, 226 F.3d 996, 1000 (9th Cir. 2000)*.

Plaintiffs ask the Court to strike the Defendants' duty to mitigate defense, statute of limitations defense, and preemption defense on the grounds that these affirmative defenses: (1) do not provide adequate notice; and (2) are legally insufficient as a matter of law.

A. Adequacy of Notice

Plaintiffs argue that Defendants' assertions of these affirmative defenses failed to provide them with adequate notice. **[*4]** The Federal Rules of Civil Procedure provide that a party must state "in short and plain terms" its "defenses to each claim asserted." *Fed. R. Civ. P. 8(b)*. The key to determining the sufficiency of pleading an affirmative defense is whether it gives the plaintiff fair notice of the defense. *Wyshak, 607 F.2d at 827*. A defendant need not set out in detail the facts upon which he bases his claim, but rather, must only provide fair notice of the claim and the grounds upon which it rests. *Id.*

Here, although Defendants have provided a fairly short and succinct listing of their affirmative defenses, it cannot be said that Plaintiffs were not given fair notice of the defense.

B. Legally Sufficiency

Plaintiffs assert that Defendants' affirmative defenses are not sufficient as a matter of law. An affirmative defense is legally insufficient as a matter of law when it does not constitute a valid defense under the claims and facts alleged. *Gilmore, 252 F.3d at 347*. If the issue is a pure legal question, courts are generally disinclined to grant a motion to strike if there are "disputed and substantial questions **[*5]** of law," especially where there is no showing of prejudicial harm. *Augustus v. Bd. of Pub. Instruction of Escambia County, Florida, 306 F.2d 862, 868 (5th Cir. 1962)*. Under such circumstances, the court should defer ruling on the motion and leave the sufficiency of the allegations for determination on the merits. *Id.*

1. Duty to Mitigate

Plaintiffs argue that a duty to mitigate defense cannot be asserted against a RICO claim. RICO prohibits individuals or enterprises from engaging in a pattern of racketeering activity. *Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1168 (9th Cir. 2002)*. The purpose of RICO is to protect: (1) lawful enterprises from being utilized by individuals for unlawful purposes; and (2) the public from individuals who would use an enterprise as a tool to facilitate illegal activity. *Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 164, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001)*. *Rotella v. Wood, 528 U.S. 549, 557, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000)*.

The Court did not find any federal case law dealing with the precise issue of whether a duty to mitigate is a legally sufficient defense against a RICO claim. Generally, when there is an unsettled **[*6]** area in RICO law, the federal courts can turn to ***antitrust law*** for guidance. *Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d 1303, 1311 (9th Cir. 1992)*. In dealing with the question of whether broad common law defenses are allowed in antitrust claims, the courts examine whether the common law defense controverts the primary purposes underlying the particular federal statute in question. *Perma Life Mufflers Inc. v. Int'l Parts Corp., 392 U.S. 134, 138, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968) rev'd on other grounds, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*.

Plaintiffs cite to *Perma Life and Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 105 S. Ct. 2622, 86 L. Ed. 2d 215 (1985)*, for the proposition that a failure to mitigate "is not a recognized affirmative defense to RICO claims." In *Perma Life,* the Supreme Court rejected the idea that courts have the power to undermine the antitrust acts by denying recovery to injured parties merely because they were *in pari delicto,* i.e., mutually or equally at fault. *392 U.S. at 137*. There, the Supreme Court indicated that it would be inappropriate to invoke broad common-law barriers **[*7]** to relief where a private suit served important purposes. *Id.* More importantly, however, the Court reserved ruling on whether truly complete involvement and participation could be a basis for barring a plaintiff's antitrust action because the record before the Court did not support such a finding. *Id. at 140*.

In so ruling, the Supreme Court in *Perma Life* implied that a factual inquiry would be necessary to determine whether an affirmative defense based on the plaintiff's culpability could be asserted against an antitrust claim. This conclusion finds further support in *Bateman.* Indeed, the Supreme Court in *Bateman* explicitly held that a *in pari delicto* could be asserted in a federal securities case when certain factual circumstances were present. *472 U.S. at 310-11*.

Moreover, other courts have recognized the affirmative defense of failure to mitigate in claims brought under federal statutes. *See In re Visa Check/MasterMoney Antitrust Litigation 280 F.3d 124, 149-50 (2nd Cir. 2001)* (noting that a duty to mitigate in antitrust claims serves the important purpose of preventing plaintiffs from seeking treble damages and **[*8]** profiting by refusing to mitigate) (Jacobs, CJ., dissenting); *Fishman v. Estate of Wirtz, 807 F.2d 520, 559 (7th Cir. 1987)* (the plaintiff is required to mitigate damages, but the plaintiff is not required to engage in an undue risk to mitigate); *Litton Systems v. AT & T, 700 F.2d 785, 820 n.47 (2nd Cir. 1983)* (stating without explanation that a defendant has a duty to mitigate in an antitrust claim); *see also Bieter Co. v. Blomquist, 987 F.2d 1319, 1329 (8th Cir. 1993)* (appearing to operate under the assumption that a duty to mitigate is a valid defense in RICO claims).

Here, there is no case law on point that directly supports the argument that the Court should rule, as a matter of law, that the affirmative defense of failure to mitigate can never be asserted in a civil RICO claim. Even if the Court were to analogize to an antitrust case, those cases relied upon by Plaintiffs do not establish that such an affirmative defense can never be asserted as a matter of law. Instead, these cases support the conclusion that the Court should consider the facts of the case in determining whether a defendant can assert an affirmative defense **[*9]** at trial. Thus, the Court declines to strike this affirmative defense at this stage in the proceedings.

2. Statute of Limitations

Plaintiffs argue that Defendants' statute of limitation defense is legally sufficient as a matter of law and should be stricken. The statute of limitations period for a RICO civil action is four years. *Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 156, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987)*. The Ninth Circuit follows the "injury discovery" rule which has two components. *Grimmett v. Brown, 75 F.3d 506, 510-512 (9th Cir. 1996)*. First, the four year statute of limitations period begins to run when a plaintiff knows, or should have known, of his or her injury. *Id. at*

510. Second, "a new cause of action accrues for each new and independent injury, even if the RICO violation causing the injury happened more than four years before." *Id.*

Plaintiffs' complaint alleges that "defendants have depressed their wages by knowingly employing vast numbers of illegal immigrants, more than 5,000 in the last four years." (Ct. Rec. 1). Plaintiffs' complaint was filed on September 29, 2006. Given that it is possible that there may be **[*10]** questions of fact regarding when Plaintiffs knew about the injury, and whether Plaintiffs are relying on the "new and independent injury" to assert the basis for the RICO violations that occurred prior to 2002, it is premature to strike this affirmative defense at this stage of the proceedings.

3. Preemption

Plaintiffs argue that Defendants' defense that the Immigration Reform Control Act (IRCA) preempts Plaintiffs' civil RICO claim is legally insufficient as a matter of law and should be stricken. A RICO violation is established when the claimants show that they have suffered an injury caused by a pattern of racketeering activity that was perpetrated by either an (a) enterprise or (b) individual in control of an enterprise. *§ 1962(a)-(d)*. RICO defines "racketeering activity" as "any act which is indictable under the Immigration and Nationality Act, section 774 . . . committed for the purpose of financial gain." *18 U.S.C.A. § 1961(1)*. Section 774 is codified as *§ 1324* of the IRCA. *8 U.S.C.A. § 1324*.

Here, Defendants' affirmative defense that the IRCA preempts RICO is legally insufficient. The Court adopts Judge Van Sickle's **[*11]** reasoning in *Mendoza v. Zirkle Fruit Co., 2000 U.S. Dist. LEXIS 21126, 2000 WL 33225470 (E.D. Wash. 2000)*, that Congress would not have included violations of the immigration laws, including *8 U.S.C. § 1324(a)*, as a predicate act under RICO if had intended the IRCA to preempt civil RICO actions. Therefore, the Court strikes Defendants' affirmative defense that IRCA preempts Plaintiffs' civil RICO claims.

Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiffs' Motion for a Preservation Order (Ct. Rec. 18) is **DENIED.**

2. Plaintiffs' Motion to Strike Defendants' Affirmative Defense (Ct. Rec. 15) is **DENIED** in part; and **GRANTED,** in part. The Court strikes Defendants' affirmative defense that IRCA preempts Plaintiffs' civil RICO claims.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and forward copies to counsel.

DATED this 27<th> day of February, 2007.

s/ Robert H. Whaley

Chief United States District Judge

End of Document

Smith Wholesale Co. v. R.J. Reynolds Tobacco Co.

United States Court of Appeals for the Sixth Circuit

April 21, 2006, Argued ; February 27, 2007, Decided ; February 27, 2007, Filed

File Name: 07a0082p.06

No. 05-6053

Reporter

477 F.3d 854 *; 2007 U.S. App. LEXIS 4254 **; 2007 FED App. 0090P (6th Cir.) ***; 2007-1 Trade Cas. (CCH) P75,619

SMITH WHOLESALE COMPANY, INC., RICE WHOLESALE CO., INC., ANDALUSIA DISTRIBUTING CO., INC., DIXIE TOBACCO & CANDY CO., GEORGE WHOLESALE CO., LTD., INDEPENDENT WHOLESALE INC., L.P. SHANKS CO., MCCARTY-HULL CIGAR CO., INC., R.C. TAYLOR DISTRIBUTING CO., REIDSVILLE GROCERY CO., INC., A.B. COKER CO., INC., AFFILIATED FOODS, INC., ACADIA WHOLESALE & TOBACCO CO., CALDWELL WHOLESALE CO., INC., NOVELART MANUFACTURING CO., YAKIMA DISTRIBUTING CO., INC., HUNTSVILLE WHOLESALE GROCERY, PELICAN STATE CIGAR & TOBACCO, INC., Plaintiffs-Appellants, STATE OF MISSISSIPPI, and STATE OF TENNESSEE, Intervenor Plaintiffs, M.K. GROCERY CO., INC., and CORSO, INC., Plaintiffs, v. R.J. REYNOLDS TOBACCO COMPANY, Defendant-Appellee.

Subsequent History: US Supreme Court certiorari dismissed by, in part *Andalusia Distrib. Co. v. R.J. Reynolds Tobacco Co., 128 S. Ct. 38, 168 L. Ed. 2d 810, 2007 U.S. LEXIS 9964 (U.S., Sept. 28, 2007)*

US Supreme Court certiorari denied by *Andalusia Distrib. Co. v. R.J. Reynolds Tobacco Co., 128 S. Ct. 356, 169 L. Ed. 2d 24, 2007 U.S. LEXIS 10307 (U.S., Oct. 1, 2007)*

Prior History: [1]** Appeal from the United States District Court for the Eastern District of Tennessee at Greeneville. No. 03-00030--J. Ronnie Greer, District Judge.

Smith Wholesale Co. v. R. J. Reynolds Tobacco Co., 2005 U.S. Dist. LEXIS 31961 (E.D. Tenn., Nov. 29, 2005)

Disposition: Affirmed.

Core Terms

discount, wholesalers, distributors, cigarettes, customers, brands, purchasers, sales, target, price discrimination, pricing, competitors, plaintiffs', savings, volume, products, manufacturer, fourth-tier, Robinson-Patman Act, retail, dealers, quantity, buyer, favored, district court, best price, formula, levels, take advantage, commodities

LexisNexis® Headnotes

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

HN1[] **Appellate Review, Standards of Review**

An appellate court reviews a district court's decision granting summary judgment de novo.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

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

HN2[] Summary Judgment, Evidentiary Considerations

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The evidence must be viewed in a light most favorable to the party opposing the motion, giving that party the benefit of all reasonable inferences. However, the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. It must present significant probative evidence in support of its complaint to defeat the motion for summary judgment. A mere scintilla of evidence is insufficient; there must be evidence on which the jury could reasonably find for the non-moving party.

Antitrust & Trade Law > General Overview

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

HN3[] Antitrust & Trade Law

In the United States Court of Appeals for the Sixth Circuit, motions for summary judgment are disfavored in antitrust litigation. This general rule, however, does not preclude the use of summary judgment in an antitrust case in which there clearly are no genuine issues of fact to try, indeed, the very purpose of a motion for summary judgment, to eliminate a trial where it would be unnecessary and merely result in delay and expense, warrants summary disposition of such cases when appropriate. Accordingly, the absence of any relevant probative evidence in support of a litigant's antitrust claims will expose such claims to summary judgment disposition.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > Commerce Requirement

HN4[] Coverage, Commerce Requirement

See *15 U.S.C.S. § 13(a)*.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > Commerce Requirement

HN5[] Coverage, Commerce Requirement

Essentially, *15 U.S.C.S. § 13(a)* makes it unlawful for a seller to discriminate in price between purchasers of the same or similar goods actually sold, whether to the ultimate purchaser or for resale, if the effect of such price discrimination may be to lessen competition substantially in a line of commerce or with the competitors of the seller or its customers.

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN6[] **Robinson-Patman Act, Claims**

Three categories of competitive injury may give rise to a Robinson-Patman claim: primary-line cases involve conduct that injures competition at the level of the discriminating seller and its direct competitors; secondary-line cases, implicate price discrimination that injures competition among the discriminating seller's customers, typically referred to as favored and disfavored purchasers; and tertiary-line cases entail injury to competition at the level of the purchaser's customers. A viable secondary-line price discrimination claim brought pursuant to the Act requires proof that (1) the relevant sales were made in interstate commerce; (2) the commodities at issue were of 'like grade and quality; (3) the defendant discriminated in price between different purchasers of the like commodities; and (4) the effect of such discrimination may be to injure, destroy, or prevent competition to the advantage of the favored purchaser, i.e., one who received the benefit of such discrimination.

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN7[] **Robinson-Patman Act, Claims**

In the context of quantity discounts, that an inference of competitive injury arises from evidence that some purchasers had to pay their supplier substantially more for their goods than their competitors had to pay.

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN8[] **Robinson-Patman Act, Claims**

Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***. The United States Court of Appeals for the Sixth Circuit has preferred to resolve antitrust claims on a case-by-case basis, focusing on the particular facts disclosed by the record. Regardless of the mechanics of a pricing structure, if there is evidence of discrimination in price between different purchasers of the same commodities, and if the effect of that discrimination may be to substantially lessen competition, then there is a prima facie violation of the Robinson-Patman Act.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN9[] **Robinson-Patman Act, Coverage**

A price discrimination within the meaning of *15 U.S.C.S. § 13(a)* is merely a difference in price. This fundamental, understated principle is by no means simplistic. Although the Robinson-Patman Act proscribes unequal treatment of different customers in comparable transactions, Congress did not intend to outlaw price differences that result from or further the forces of competition, and the Act should be construed consistently with broader policies of the antitrust laws. The Act does not bar a distributor from ever offering lower prices or discounts; instead, it prohibits distributors from discriminating among purchasers in doing so. Thus, a manufacturer may utilize promotional arrangements and provide financial incentives to favor its product or even to disfavor competing brands, and manufacturers need not guarantee that all customers benefit to the same degree. Indeed, by definition, an incentive-based program will lead to different outcomes for different purchasers. Incentives and concessions provide greater benefits to those purchasers who choose to align their own competitive objectives with those of their supplier.

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

HN10[] **Robinson-Patman Act, Defenses**

Functional availability is technically not an affirmative defense, but the negation of an element of the plaintiff's case.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN11[] **Robinson-Patman Act, Coverage**

From a practical standpoint, the doctrine of functional availability is, where quantity discounts are concerned, nothing more than judicial recognition that cheaper by the dozen is a too well-accepted practice of commerce to be anti-competitive in every instance.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN12[] **Robinson-Patman Act, Coverage**

Courts have refused to find price discrimination under *15 U.S.C.S. § 13(a)* when the purchaser's decision or capacity to take advantage of the best discount made available on a reasonably equivalent basis to all dealers who made the commitment to obtain them was determined by elements within its control, i.e., unrelated investments; poor credit ratings; management issues, inventory decisions, or marketing strategies; or a decision to promote the competitor's product, and not by disproportionately small purchasing power or the pricing structure itself.

Counsel: ARGUED: Kyle M. Keegan, ROY, KIESEL, KEEGAN & DeNICOLA, Baton Rouge, Louisiana, for Appellants. Thomas Demitrack, JONES, DAY, REAVIS & POGUE, Cleveland, Ohio, for Appellee.

ON BRIEF: Kyle M. Keegan,Chris D. Kiesel, ROY, KIESEL, KEEGAN & DeNICOLA, Baton Rouge, Louisiana, Earl R. Booze, HERRIN, BOOZE, RAMBO, JENKINS & WHEELER, Johnson City, Tennessee, for Appellants. Thomas Demitrack, Robert S. Walker, Michelle K. Fischer, JONES, DAY, REAVIS & POGUE, Cleveland, Ohio, William C. Bovender, HUNTER, SMITH & DAVIS, Kingsport, Tennessee, Eric P. Berlin , JONES DAY, Chicago, Illinois, for Appellee.

Judges: Before: MOORE, GRIFFIN, and CUDAHY, Circuit Judges.*

Opinion by: Griffin

Opinion

[*2]** **[*856]** GRIFFIN, Circuit Judge. In this case alleging illegal price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Price Discrimination Act ("the Act"), *15 U.S.C § 13(a)* **[**2]** , the plaintiffs-appellants, eighteen full-service wholesalers who are also direct distributors for defendant R.J. Reynolds Tobacco Company ("RJR"), appeal the district court's order of summary judgment entered pursuant to **[*857]** *Federal Rule of Civil Procedure 56(c)* in favor of defendant RJR. We affirm.

---

* The Honorable Richard D. Cudahy, Senior Circuit Judge of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

I.

The eighteen plaintiffs-appellants in this case, lead by plaintiff Smith Wholesale Company, are full-service distributors serving grocery and convenience stores and other retail outlets in a multi-state region, primarily in the southeastern United States. Tobacco products constitute 50% or more of their revenues. All of the plaintiffs are direct distributors of defendant RJR, some having distributed RJR's products for more than fifty years. Plaintiffs also purchase cigarettes from all other major manufacturers, as well as fourth-tier manufacturers.

Cigarettes are divided into four price categories or tiers. The most expensive, first-tier or premium, cigarettes are manufactured by defendant RJR (Camel and Winston cigarettes), as well as Philip Morris USA, Inc., Lorillard Tobacco Company, Liggett-Vector Brands, and Commonwealth Brands. Second-tier **[**3]** and third-tier cigarettes are also produced by the major manufacturers, but their prices are substantially lower than first-tier cigarettes. Fourth-tier brands are produced by smaller manufacturers (including Liggett and Commonwealth) and sell at prices somewhat lower than third-tier brands. All of RJR's discounted, non-premium brands are collectively classified as "savings" brands. RJR's second-tier product is Doral; its third-tier cigarettes include Monarch, Best Choice, Citation, and Cardinal. RJR does not price any of its savings brands at the fourth-tier level.

RJR is the second largest cigarette manufacturer in the United States, with a market share of approximately 22% prior to its July 2004 merger with the United States operations of Brown & Williamson. [1] The newly formed Reynolds American now has a market share of approximately 31%. At the other end of the spectrum, the fourth-tier segment has grown from 0.89% of all cigarette sales in 1998 to around 15% in 2003, making it the fastest growing portion of the cigarette market. **[***3]** Competitive pressure increased following the industry's 1998 Master Settlement Agreement, which settled smoking and health litigation by requiring per **[**4]** carton payments to the settling states. That agreement led to the rapid growth of producers of fourth-tier cigarettes that did not make settlement payments. RJR's market share has decreased in this competitive environment.

In April 2000, in an effort to allay its declining market share, RJR sought to enlist wholesalers in RJR's marketing efforts by providing financial incentives to wholesalers willing to focus on RJR savings brands. The new Wholesale Partners Program ("WPP") emphasized its savings brands because of the importance of RJR's Doral savings brand to its overall business. The WPP revised RJR's wholesale pricing structure through a three-level pricing system, ranging from Level 1 (the least favored), Levels 2 "A" through "H," to Level 3 (the most favored), which based price discounts **[**5]** and back-end monies [2] on a comparison of the distributor's sales of RJR's savings brands to its sales of non-RJR savings brands. All wholesalers could earn a base discount by participating in Level 1, although the amount of the Level 1 discount diminished over time until it ended in June 2003. To earn discounts at Level 2 or payments at Level 3, wholesalers **[*858]** were required to meet quarterly targets based on their sales of RJR savings brands as a percentage of their total savings brand sales.

Wholesalers that met their share targets earned the same Level 2 discounts. [3] **[**6]** For five quarters beginning in the third quarter of 2002, wholesalers also earned additional, progressively higher quarter-end payments (so-called Levels 2A through 2H rebates), depending on the extent to which their RJR savings share exceeded the base share targets. [4]

---

[1] Philip Morris USA, Inc., by contrast, accounted for nearly 50 of all cigarette sales in 2000. Marlboro, Philip Morris's largest brand, commanded a 38 share, over 50 higher than the combined shares of all of RJR's brands.

[2] Rebates paid to distributors at the close of each quarter.

[3] Wholesalers received certain Level 3 payments (received as quarterly rebates) once they qualified for Level 2 discounts, as long as changes in their RJR share during the relevant quarter did not differ meaningfully from changes in RJR's statewide share during the same period. Level 2 wholesalers also earned other Level 3 rebates to the extent they performed additional functions that RJR sought to reward.

[4] RJR modified the WPP several times from August 2000 to the present. From the second quarter of 2002 through the third quarter of 2003, Level 2 contained the eight price categories (Levels A-H). Level 2A was set at the minimum Level 2 RJR share of savings ("SOS") brands threshold to 1.5 share points above this minimum SOS threshold; only when a distributor exceeded

The discount/rebate structure of the WPP is best summarized by the magistrate judge in his Report and Recommendation in this case:

> First, in each state the defendant ascertained what *percentage* of each wholesaler's total sales of savings brand cigarettes consisted of RJR's savings brand cigarettes. Each wholesaler was then ranked in descending order, with the wholesaler having the highest percentage of RJR cigarettes listed at the top, and the wholesaler selling the smallest percentage of defendant's products **[**7]** (relative to the total sales of savings brand cigarettes) at the bottom. The defendant thereupon listed the *volume* of its savings brand cigarettes sold by each of the distributors. It is important to note that the distributor listed at the top, which sold the highest percentage of defendant's products, did not necessarily sell the highest *volume* of defendant's products; indeed, the distributor with the highest percentage of defendant sales very easily could have been the distributor that sold the lowest volume of defendant's products.
>
> After determining the volume of defendant's cigarettes sold by each distributor in the descending order discussed in the preceding paragraph, [defendant] ascertained the **[***4]** *total volume of RJR savings cigarettes sold in each state*. Defendant then selected as its state target the RJR *percentage* of that wholesaler whose volume sales, when added to all those above it, equaled eighty-five percent (or as close thereto as possible) of defendant's total wholesale volume in the state. Defendant thereafter calculated a "share-of-savings" target for each wholesaler, using the state targets described above. The target was stated in terms of defendant's **[**8]** "savings brands" as a percentage of the total sales of cheap cigarettes sold by a distributor. For those wholesalers doing business in more than one state (and there were several), defendant had yet another formula that adjusted a multi-state wholesaler's target goals to reflect the different states in which that wholesaler does business. The closer a wholesaler comes to the goal established for it, the higher the incentive level applicable to it. And the higher the incentive level, the lower the price it pays for defendant's **[*859]** cigarettes. It is at first difficult to understand, and even more difficult to describe in words, but it does have a mathematical logic to it, and the resulting state target is intended to capture eighty-five percent of the volume of defendant's savings brand in any particular state.
>
> As noted, the incentive level in which any wholesaler was placed determined the amount that wholesaler paid for defendant's savings brand cigarettes. Obviously, some wholesalers participated at higher levels than others, which meant that they purchased their cigarettes from defendant at a cheaper price. This price differential resulted in this litigation.

Because participation **[**9]** in the WPP did not depend on the volume of a wholesaler's RJR sales, small wholesalers were treated ostensibly the same as large wholesalers. From August 2000 through the first quarter of 2004, all discounts and rebates received under RJR's WPP were based solely on a distributor's RJR SOS brands. Beginning in the second quarter of 2004, RJR adopted a "share of market" approach, whereby WPP quotas, and resultant discount/rebate levels, were thereafter based on the distributor's total RJR sales (savings and premium) as a percentage of all cigarettes it sold. [5]

The WPP's per carton premium brand price differences between Level 1 and **[**10]** the best price from August 2000 to present were approximately: ($0.55) August 2000 - April 2001; ($0.50) May 2001 - May 2002; ($0.57) June 2002 - December 2002; ($0.85) January 2003 - June 2003; ($1.12) July 2003 - September 2003; ($0.75) October 2003 - March 2004; and ($0.74) April 2004 - present. All wholesalers entered the program at Level 2. A Level 2 wholesaler that missed Level 2 in any quarter received a three-month grace period to maintain its Level 2 status. The WPP placed no limit on the volume that wholesalers could sell to any customer and capped quarterly increases

---

its Level 2A SOS quota by 30.1 points would it then qualify for Level 2H back-end monies. In 2003, RJR again modified the WPP to further reduce the Level 2 and 3 back-end monies available to Level 2A distributors.

[5] Only the WPP for the years 2000-2003 are at issue in the present case. The 2004-2005 WPP is identical to that of its competitor, Philip Morris USA, Inc.'s Wholesale Leaders Program, which has been similarly challenged as a violation of the antitrust laws and is currently pending before this court. *See Smith Wholesale Co. et. al. v. Philip Morris USA, Inc.*, Case # 05-6481.

in a wholesaler's target at 0.5%, even if RJR's actual share increased by a larger percentage, while reducing a wholesaler's target by the full amount of any decrease in RJR's actual share.

Fifteen of the eighteen plaintiffs have participated at Levels 2 and 3 at some point since 2000. However, plaintiffs complain that to attain the best price on RJR products -- achieved by fewer than 8% of RJR's direct distributors in 2002 and 2003 -- a distributor's RJR savings brand sales were required to meet ever higher percentage quotas. Plaintiffs allege that it was impossible to meet RJR's SOS targets because they sell **[**11]** to retailers in rural, lower income areas that had a uniquely high demand for the cheapest, fourth-tier cigarettes. Plaintiffs complain that because RJR's highest share quotas, and its most favored prices, are not practically and realistically achievable by **[***5]** plaintiffs, all have been classified as Level 1 distributors (some for the entire complaint period) under the WPP.

On January 31, 2003, plaintiff Smith Wholesale Company filed suit in federal court against defendant RJR alleging that, through implementation of the WPP, RJR engaged in illegal price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, **[*860]** *15 U.S.C. § 13(a)*, and further, that RJR wrongfully terminated its direct purchasing status in retaliation for raising antitrust complaints about the WPP to its retail customers. On February 18, 2003, Smith amended its complaint to add another wholesaler, Rice Wholesale Company ("Rice"), after RJR ended its wholesale agreement with Rice. Smith and Rice filed preliminary injunction motions, seeking reinstatement of their wholesale agreements, which were granted on February 7 and March 4, 2003, respectively. [6]

[12]** On June 11, 2003, Smith and Rice amended their complaint for the third time, adding nine additional plaintiffs. Ten of these plaintiffs simultaneously sought a preliminary injunction against the further 1% discount reduction at Level 1 under the 2003 WPP. On July 3 and 14, 2003, the district court granted motions by the states of Tennessee and Mississippi to intervene in the litigation on behalf of their consumers, wholesalers, manufacturers, and the economies of their states. [7] On August 6, 2003, the district court enjoined the 2003 WPP's 1% discount reduction for Level 1 distributors, but later stayed it. Following issuance of the preliminary injunction, additional distributors joined the litigation, and the complaint was amended for the fifth time, to bring the total number of plaintiffs to twenty-two. Plaintiffs seek damages for loss of profits, customers, sales, goodwill, and business value that allegedly resulted from RJR's discriminatory pricing. Plaintiffs also seek permanent injunctive relief.

[13]** After discovery concluded, RJR filed a motion for summary judgment, which the district court referred to the magistrate judge who, after hearing extensive argument by the parties, issued a Report and Recommendation advising that RJR's motion for summary judgment should be granted and plaintiffs' complaint dismissed. On June 3, 2005, after full briefing of plaintiffs' objections, the district court issued a Memorandum Opinion and Order, in which it adopted and approved the magistrate judge's Report and Recommendation and granted summary judgment in favor of RJR. In its decision, the district court concluded that summary judgment was appropriate because RJR's discounts were "functionally available" to the plaintiffs, i.e., "[t]he practice of conditioning price concessions and allowances upon the customer's purchase of a specific quantity of goods will not give rise to a Robinson-Patman violation if the concessions are available equally and functionally to all customers." *Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319, 1326 (6th Cir. 1983)*. The district court opined, in pertinent part:

> [T]his case does not involve a quantity discount, the plaintiffs' **[**14]** [sic] were told about the discount, and the plaintiffs were permitted to participate in the program. The Court FINDS that RJR's discount is available to all customers using a nondiscriminatory formula, even though different customers may pay different prices, and that there is no evidence that the program was not evenly administered. Therefore, this Court FINDS that RJR's discount was functionally available to the plaintiffs in both theory and in fact.

---

[6] RJR appealed, but voluntarily dismissed its consolidated appeal of those preliminary injunctions on June 27, 2005, after the entry of summary judgment in its favor in the instant case.

[7] The States have not joined in the present appeal from the order granting summary judgment to defendant.

[*861] * * *

> **[***6]** Although the plaintiffs contend that RJR's discounts are not functionally available to them because of the demands of their customers, applicable case law does not support the plaintiffs' conclusion that the demands of a purchaser's customer can render a discount functionally unavailable. Courts have refused to find discrimination when the buyer's inability to take advantage of the best discount was within the control of the buyer, such as poor credit, management choices, decisions not to hold inventory, or particular marketing strategies. *See* *Bouldis, 711 F.2d at 1327*; *[Shreve*Equipment, Inc. v. Clay Equipment Corp.], 650 F.2d [101], 105 [(6th Cir. 1981)]; *Edward J. Sweeney* [& Sons Co. v. Texaco, Inc.], 637 F.2d [105], 121 [(3d Cir. 1980)]; **[**15]** *Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635, 643 (9th Cir. 1969)*.
> The Court FINDS that the undisputed fact that an outside influence, not in the control of RJR, i.e. plaintiffs' customer demands, frustrated their performance does not render the discount functionally unavailable. Therefore, because RJR's discount was functionally available, under the undisputed facts of this case, the defendant has demonstrated the lack of an essential element of the plaintiffs' case, i.e. price discrimination.
>
> In this case, the Court also FINDS that there is no causal link between RJR's practices and the plaintiffs' alleged injuries. Plaintiffs contend that they did not make a voluntary choice to emphasize fourth-tier or other non-RJR brand[s] over RJR'[s] products, but that they have simply responded to the demands of their customers. Therefore, by their own admission, the plaintiffs' inability to participate in WPP is attributable to an outside influence over which RJR had no control. In effect, the plaintiffs seek to reap the rewards of the WPP without furthering the **[**16]** purpose of that program, i.e., increasing the demand for RJR products.
> The Court FINDS that, because the plaintiffs did not take advantage of a lower price or discount which was functionally available on an equal basis, no price discrimination has occurred. In the alternative, the Court FINDS that any alleged discrimination was not the proximate cause of the plaintiffs' injuries.

Plaintiffs' timely appeal followed.

II.

HN1[] This court reviews a district court's decision granting summary judgment de novo. *Kessler v. Visteon Corp., 448 F.3d 326, 329 (6th Cir. 2006)*. ***HN2***[] Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *FED. R. CIV. P. 56(c)*. The evidence must be viewed in a light most favorable to the party opposing the motion, giving that party the benefit of all reasonable inferences. *Kessler, 448 F.3d at 329*. However, "the nonmoving party must do more than simply show that **[**17]** there is some metaphysical doubt as to the material facts, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, it must present significant probative evidence in support of its complaint to defeat the motion for summary judgment." *Expert Masonry, Inc. v. Boone County, Ky., 440 F.3d 336, 341 (6th Cir. 2006)*. "A mere scintilla of evidence is insufficient; there must be evidence on which the jury could reasonably find for the non-moving party." *Kessler, 448 F.3d at 329*.

HN3[] **[*862]** In this circuit, motions for summary judgment are disfavored in antitrust litigation. *Expert Masonry, Inc., 440 F.3d at 341*. This general rule, however, does not preclude the use of summary **[***7]** judgment in an antitrust case in which there clearly are no genuine issues of fact to try -- "[i]ndeed, the very purpose of a motion for summary judgment, to eliminate a trial where it would be unnecessary and merely result in delay and expense, warrants summary disposition of such cases when appropriate." *Bouldis, 711 F.2d at 1324*. "Accordingly, 'the absence of any relevant probative evidence in support **[**18]** of a litigant's antitrust claims will expose such claims to summary judgment disposition.'" *Id.* (quoting *Davis-Watkins Co. v. Serv. Merch., 686 F.2d 1190, 1197 (6th Cir. 1982))*.

III.

A.

Plaintiffs contend that the district court erred in dismissing their claims of illegal price discrimination under § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. *15 U.S.C. § 13(a)* provides, in pertinent part:

> ***HN4***[] It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences **[**19]** in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . .

HN5[] "Essentially, this section makes it unlawful for a seller to discriminate in price between purchasers of the same or similar goods actually sold, whether to the ultimate purchaser or for resale, if the effect of such price discrimination may be to lessen competition substantially in a line of commerce or with the competitors of the seller or its customers." *Bouldis, 711 F.2d at 1325*.

HN6[] Three categories of competitive injury may give rise to a Robinson-Patman claim: "primary-line" cases involve conduct that injures competition at the level of the discriminating seller and its direct competitors; "secondary-line" cases, like the instant case, implicate price discrimination that injures competition among the discriminating seller's customers, typically referred to as "favored" and "disfavored" purchasers; and "tertiary-line" cases entail injury to competition at the level of the purchaser's customers. *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc. (" Volvo Trucks "), 546 U.S. 164; 126 S. Ct. 860, 870, 163 L. Ed. 2d 663* **[**20]** .

A viable secondary-line price discrimination claim brought pursuant to this Act requires proof that "(1) the relevant . . . sales were made in interstate commerce; (2) the [commodities at issue] were of 'like grade and quality'; (3) [the defendant] 'discriminate[d] in price between' [different purchasers of the like commodities]; and (4) 'the effect of such discrimination may be . . . to injure, destroy, or prevent competition' to the advantage of the favored purchaser, *i.e.*, one who 'receive[d] the benefit of such discrimination.'" *Volvo Trucks, 126 S. Ct. at 870* (quoting *15 U.S.C. § 13(a)*).

[*863] **[***8]** In the recent *Volvo Trucks* decision, the Supreme Court addressed the issue of secondary-line price discrimination under *§ 13(a)*, albeit in a very narrow context. [8] The *Volvo Trucks* decision nonetheless yields

---

[8] The precise issue addressed by the Court was "whether a manufacturer offering its dealers different wholesale prices may be held liable for price discrimination proscribed by Robinson-Patman, absent a showing that the manufacturer discriminated between dealers contemporaneously competing to resell to the same retail customer[?]" *126 S. Ct. at 866*. Reeder, a Volvo dealer, commenced suit against Volvo alleging that its sales decreased because Volvo offered other favored dealers price concessions not offered to Reeder. At issue were specially ordered heavy-duty trucks supplied by Volvo and sold by franchised dealers through a competitive bidding process by which the retail customer stated its specifications and invited bids from dealers franchised by different manufacturers. When a Volvo dealer received the customer's specifications, it contacted Volvo and requested a discount off the wholesale price. Volvo then decided, on a case-by-case basis, whether to offer a discount and, if so, what the discount would be, taking into account such factors as industry-wide demand and the retail customer's history of purchasing certain brands of trucks. The dealer then incorporated the discount offered by Volvo into its bid and purchased the trucks only if the retail customer accepted the bid.

In 1997, Volvo announced a projected reduction in the number of authorized dealers. Coincidentally, Reeder learned that Volvo had given another dealer a price concession greater than the concessions Reeder typically received. Reeder suspected that it was one of the dealers Volvo targeted for elimination. Reeder filed suit, alleging losses attributable to Volvo's purported violations of state law and the Robinson-Patman Act. Reeder prevailed at trial and on appeal to the Eighth Circuit Court of Appeals. The Supreme Court, however, reversed and remanded, concluding that "[a]bsent actual competition with a favored Volvo dealer . . . Reeder cannot establish the competitive injury required under the Act." *126 S. Ct. at 870*. The Supreme Court held that Reeder's proffered comparisons fell short of showing price discrimination, because in none of the specific instances important observations about the underlying policy and purpose of the Robinson-Patman Act that are relevant to the present appeal. Justice Ginsburg, writing for the majority, noted that:

> Section 2, "when originally enacted as part of the Clayton **[**21]** Act in 1914, was born of a desire by Congress to curb the use by financially powerful corporations of localized price-cutting tactics which had gravely impaired the competitive position of other sellers." *FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 543, 80 S. Ct. 1267, 4 L. Ed. 2d 1385*, and n. 6 . . . . Augmenting that provision in 1936 with the Robinson-Patman Act, Congress sought to target the perceived harm to competition occasioned by powerful buyers, rather than sellers; specifically, Congress responded to the advent of large chain stores, enterprises with the clout to obtain lower prices for goods than smaller buyers could demand.
> * * *
>
> Mindful of the purposes of the Act and of the antitrust laws generally, we have explained that Robinson-Patman does not "ban all price differences charged to **[*864]** different purchasers of commodities of like grade and quality," *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 220, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* (internal quotation marks omitted); rather, the Act proscribes "price discrimination only to the extent that it threatens to injure competition," *ibid*.
> * * *
>
> **[***9]** A hallmark of the **[**22]** requisite competitive injury, our decisions indicate, is the diversion of sales or profits from a disfavored purchaser to a favored purchaser. *FTC v. Sun Oil Co., 371 U.S. 505, 518-519, 83 S. Ct. 358, 9 L. Ed. 2d 466 (1963)*. . . . We have also recognized that a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time. *See* *FTC v. Morton Salt Co. [" Morton Salt "], 334 U.S. 37, 49-51, 68 S. Ct. 822, 92 L. Ed. 1196, 44 F.T.C. 1499 (1948)* . . . .

126 S. Ct. at 869-70.

[23]** The *Volvo Trucks* Court further explained:

> Interbrand competition, our opinions affirm, is the "primary concern of ***antitrust law***." *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51-52, n.19, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. The Robinson-Patman Act signals no large departure from that main concern. Even if the Act's text could be construed in the manner urged by Reeder and embraced by the Court of Appeals, we would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*. In the case before us, there is no evidence that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations, and the supplier's selective price discounting fosters competition among suppliers of different brands. . . . By declining to extend Robinson-Patman's governance to such cases, we continue to construe the Act "consistently with broader policies of the antitrust laws." *Brooke Group, 509 U.S. at 220, 113 S. Ct. 2578* (quoting *Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. 69, 80, n.13, 99, 59 L. Ed. 2d 153 S. Ct. 925, 440 U.S. 69, 99 S. Ct. 925, 59 L. Ed. 2d 153 (1979))* **[**24]** . . . .

---

upon which Reeder relied did Reeder compete with beneficiaries of the alleged discrimination for the same customer. Moreover, Reeder failed to demonstrate that the compared dealers were consistently favored vis-a-vis Reeder; Reeder merely cited occasions when it competed with non-Volvo dealers for a sale to a customer. The Court noted that "[t]he Act centrally addresses price discrimination in cases involving competition between different purchasers for resale of the purchased product. Competition of that character ordinarily is not involved when a product subject to special order is sold through a customer-specific competitive bidding process." *Id. at 866*. "Here, there is no discrete 'favored' dealer comparable to a chain store or a large independent department store -- at least, Reeder's evidence is insufficient to support an inference of such a dealer or set of dealers." *Id. at 871*.

Id. at 872-73 (footnote omitted).

The Supreme Court's discussion in *Volvo Trucks* regarding the underpinnings of the Robinson-Patman Act serves as a backdrop for our evaluation of plaintiffs' secondary-line price discrimination claim. As the *Volvo Trucks* Court explained and this court has noted, the Robinson-Patman Act was originally enacted in part to "prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power," Lewis v. Philip Morris, Inc., 355 F.3d 515, 520 (6th Cir. 2004), and, hence, it is well established, **HN7**[] in the context of quantity discounts, that an inference of competitive injury arises from "evidence that some purchasers had to pay their supplier 'substantially more for their goods than their competitors had to pay.'" Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 559, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990) (quoting Morton Salt, 334 U.S. at 46-47).

The WPP, however, is not a quantity discount program; rather, its market-share targets are calculated using a percentage of its savings brand **[**25]** sales rather than a designated quantity, thus distinguishing it from volume discount programs. Such market-share discount pricing structures present different concerns than volume-based discounts. Market-share discounts theoretically level the **[*865]** playing field by allowing competing purchasers of like commodities to participate on equal terms, regardless of size, because such discounts depend not on volume purchases, but on the percentage of purchases of a particular category of products.

There is a dearth of precedent addressing the legality of market-share discount programs under the Act; heretofore, legal challenges to secondary-line pricing practices under § 13(a) have arisen in the original context contemplated by the Act -- discriminatory pricing arising from standard quantity discounts. We nonetheless would be remiss if we were to suggest that market-share **[***10]** discounts are immune from Robinson-Patman scrutiny. It is certainly conceivable that under certain circumstances, as alleged here by plaintiffs, market-share discounts could be administered in such a manner that such incentives cross the fine line from pro-competitive incentives to exclusionary, anti-competitive price discrimination. **[**26]** Indeed, the Supreme Court has noted that price discrimination may arise under various pricing structures, not limited to volume-based discounts:

> While, as noted, the immediate and generating cause of the Robinson-Patman amendments [to the Clayton Act] may have been a congressional reaction to what were believed to be predatory uses of mass purchasing power by chain stores, neither the scope nor the intent of the statute was limited to that precise situation or set of circumstances. Congress sought generally to obviate price discrimination practices threatening independent merchants and businessmen, presumably from whatever source.

FTC v. Sun Oil Co., 371 U.S. 505, 520, 83 S. Ct. 358, 9 L. Ed. 2d 466 (1963). *See also* Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1422 n.16 (11th Cir. 1990) ("Though the birth of the RPA was motivated by a desire to place 'big' purchasers on par with 'small' ones, the Act's applicability is not limited to big buyer/small buyer cases. . . . It is one of general applicability and prohibits discriminations generally." (internal citations and quotation marks omitted)).

Consequently, the Supreme Court has prescribed **[**27]** a case-by-case evaluation of antitrust claims: **HN8**[] "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the particular facts disclosed by the record." Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 466-67, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992) (internal quotation omitted). In sum, regardless of the mechanics of a pricing structure, if there is evidence of discrimination in price between different purchasers of the same commodities, and if the effect of that discrimination may be to substantially lessen competition, then there is a prima facie violation of the Robinson-Patman Act.

B.

HN9[] "'[A] price discrimination within the meaning of [§ 13(a)] is merely a difference in price.'" Texaco, Inc., 496 U.S. at 558 (quoting Anheuser-Busch, Inc., 363 U.S. at 549). This fundamental, understated principle is by no means simplistic. Although the Robinson-Patman Act "proscribes unequal treatment of different customers in comparable transactions," FTC v. Borden Co., 383 U.S. 637, 643, 86 S. Ct. 1092, 16 L. Ed. 2d 153 (1966), **[**28]** "Congress did not intend to outlaw price differences that result from or further the forces of competition[,]" and the

Act "should be construed consistently with broader policies of the antitrust laws." *Brooke Group, 509 U.S. at 220* (quotation omitted). **[*866]** The Act "do[es] not bar a distributor from ever offering lower prices or discounts; instead, [it] prohibit[s] distributors from discriminating among purchasers in doing so." *Krist Oil Co., Inc. v. Bernick's Pepsi-Cola of Duluth, Inc., 354 F. Supp. 2d 852, 856 (W.D. Wis. 2005)* (citing *Borden, 383 U.S. at 646*). Thus, a manufacturer may utilize promotional arrangements and provide financial incentives to favor its product or even to disfavor competing brands, and manufacturers need not "guarantee that all customers benefit to the same degree," *Comcoa, Inc. v. NEC Tel., Inc., 931 F.2d 655, 664 (10th Cir. 1991)*. Indeed, by definition, an incentive-based program will lead to different outcomes for different purchasers. Incentives and concessions provide greater benefits to those purchasers who choose to align their own competitive objectives with those of their supplier. **[**29]** Commitment to a particular product is the sine qua non of an incentive program. *Precision Printing Co. v. Unisource Worldwide, Inc., 993 F. Supp. 338, 352 (W.D. Pa. 1998)*.

[*11]** C.

In an effort to better define the parameters of "a difference in price" in secondary-line price discrimination claims under *§ 13(a)*, numerous courts, including this court and the district court herein, have utilized the doctrine of "functional availability," a theory that "'is a judicial graft on § 2(a) and is not explicitly embodied in the text of the statute.'" *Metro Ford Truck Sales, Inc. v. Ford Motor Co., 145 F.3d 320, 326 (5th Cir. 1998)* (quoting *Precision Printing Co., 993 F. Supp. at 350*). [9] **[**31]** "According to this court-created rule, the plaintiff in a Robinson-Patman Act suit cannot recover damages for lower prices paid by its competitors to the defendant if those same prices were available to the plaintiff from a practical standpoint and on equal terms with its competitors." *American Tara Corp. v. Int'l Paper Co., No. 79C1470, 1981 U.S. Dist. LEXIS 14211, 1981 WL 375752, at *1 (N.D. Ill. July 30, 1981)* (unpublished). [10] The rationale underlying the doctrine is that **[**30]** functional availability negates two essential elements of a *§ 13(a)* claim: "Where a purchaser does not take advantage of a lower price or discount which is functionally available on an equal basis, it has been held that either no price discrimination has occurred, or that the discrimination is not the proximate cause of the injury." *Shreve Equipment, Inc. v. Clay Equip. Corp. [" Shreve "], 650 F.2d 101, 105 (6th Cir. 1981)*. *See also* *American Tara Corp., 1981 U.S. Dist. LEXIS 14211, 1981 WL 375752 at *2* ("If the lower prices afforded its competitor were equally available to the plaintiff, any discrimination and competitive advantage suffered by the plaintiff is attributed not to the defendant's program but to the plaintiff's failure to take advantage of its opportunity to receive those prices.").

Plaintiffs maintain that functional availability is an affirmative defense, with the burden of proof placed squarely on defendant **[*867]** to show that RJR's favored price was practically available to all customers. Although several courts have referred to functional availability as a "defense," *see* *Comcoa, Inc., 931 F.2d at 664*, *DeLong Equip. Co. v. Washington Mills Abrasive Co., 887 F.2d 1499, 1516 (11th Cir. 1989)*, *Allied Sales and Serv. Co., 2000 U.S. Dist. LEXIS 7774, 2000 WL 726216 at *17*, *Calumet Breweries, Inc. v. G. Heileman Brewing Co., 951 F. Supp. 749, 753-55 (N.D. Ind. 1994)*, and *Cain v. Chevron U.S.A., Inc., 757 F. Supp. 1120, 1123 (D. Ore. 1991),* **[**32]** we agree with the Fifth Circuit Court of Appeal's assessment, obviously shared by this court in *Shreve*, that ***HN10***[] functional availability "is technically not an affirmative defense, but the negation of an element of the plaintiff's case." *Metro Ford Truck Sales, Inc., 145 F.3d at 326 n.17* (citing Kintner & Bauer, 3 *Federal* ***Antitrust Law***, § 25.7

[9] "By statute, an otherwise illegal discriminatory payment for, or furnishing of, services or facilities is permissible if made available on proportional terms to all purchasers. *15 U.S.C. §§ 13(d)*, *(e)*. *Section 13(a)* contains no comparable language, but the 'functional availability' [doctrine] has been judicially extended to that section." *Allied Sales & Serv. Co. v. Global Indus. Techs., Inc., No. Civ. A. 97-0017-CB-M, 2000 U.S. Dist. LEXIS 7774, 2000 WL 726216, at *17 (S.D. Ala. May 1, 2000)* (unpublished).

[10] The doctrine of functional availability is not to be confused with the issue of "functional discounts" -- i.e., discounts based upon a particular marketing or distribution function, such as warehousing or delivery services, performed by the customer receiving the discount. *See* *Texaco, Inc., 496 U.S. at 571* ("A functional discount that constitutes a reasonable reimbursement for the purchaser's actual marketing functions will not violate the Act.").

(1983)). *See also* *Sweeney & Sons, Inc. v. Texaco, Inc. [" Sweeney "], 637 F.2d 105, 120 (3d Cir. 1980)* ("[A] uniform pricing formula applicable to all customers is not a price discrimination under the act[,]" if the favorable "price was available, not only in theory but in fact, to all purchasers. "); *Precision Printing Co., 993 F. Supp. at 350* ("Although often referred to as a defense, [functional availability] really is not a defense at all . . . ."). Consequently, if an essential element of the plaintiff's case (i.e., discrimination in price between purchasers of like commodities) is negated by evidence showing that a pricing or discount scheme is functionally available to all participants on an equal basis, summary judgment is appropriate. If, however, proof has been made **[**33]** that there has been discrimination in price, then "§ 2(b) of the Act specifically imposes the burden of showing justification upon one who is shown to have discriminated in prices." *Morton Salt, 334 U.S. at 45*.

[*12]** ***HN11***[] From a practical standpoint, the doctrine of functional availability "is, where quantity discounts are concerned, nothing more than judicial recognition that 'cheaper by the dozen' is a too well-accepted practice of commerce to be anti-competitive in every instance." *Calumet Breweries, Inc., 951 F. Supp. at 753*.

The doctrine of "functional availability" stems from *Morton Salt*, in which the Supreme Court deemed a volume discount program to be illegal under the circumstances because the manufacturer set the minimum purchase requirement so high that it was impossible for small buyers to obtain the discounts received by large buyers. In so holding, the Court noted that "[t]heoretically, these discounts are equally available to all, but functionally they are not." *Morton Salt, 334 U.S. at 42*.

This court has applied the functional availability doctrine in two cases in which the plaintiffs challenged volume discounts under **[**34]** *§ 13(a)*. In *Shreve,* the plaintiff, a farm equipment retailer, brought suit against the defendant manufacturer, alleging price discrimination due to its preclusion from the defendant's volume discount plan. *650 F.2d at 102*. The defendant offered the volume discount to all of its dealers on a sliding scale -- the more equipment a dealer purchased during the year, the higher the percentage of discount it received at the end of that year. The plaintiff's president, who was also its primary stockholder, voluntarily signed a contract to act as the territorial manager for the defendant and thereby received special advantages which were unavailable to other dealers. The contract also contained a condition that the acceptance of such employment would prevent the plaintiff from receiving the volume discount given to other dealers. The *Shreve* Court held that, under the circumstances, the plaintiff's president clearly understood that the plaintiff would not receive the discount. **[*868]** Therefore, it was not the existence of the discount program which caused the plaintiff's alleged injury, but the president's voluntary choice of an employment relationship with the defendant which **[**35]** caused the loss of the discount. Under such circumstances, "[t]he discount was functionally available to Shreve but it chose not to take advantage of the discount plan. Therefore, the discount plan was not the proximate cause of any alleged injury suffered by Shreve." *Id. at 107*. Accordingly, the *Shreve* Court reversed, in pertinent part, a judgment awarded to the plaintiff.

In *Bouldis*, the plaintiff, Bold-Morr, Inc., a former Suzuki motorcycle dealership, appealed a summary judgment dismissing its claims that the defendant manufacturer Suzuki's promotional programs and business policies constituted forms of price discrimination in violation of the Robinson-Patman Act. Suzuki maintained that participation in its programs was contingent upon a dealer's overall credit worthiness and presented evidence that its adverse credit decisions with respect to the plaintiff were based upon Bold-Morr's poor financial condition. The testimony of the plaintiff's officer indeed indicated that he experienced cash flow and inventory problems which, at various times, prevented him from participating in the promotional sales. In affirming the district court's order granting **[**36]** summary judgment, this court stated:

> The practice of conditioning price concessions and allowances upon the customer's purchase of a specific quantity of goods will not give rise to a Robinson-Patman violation if the concessions are available equally and functionally to all customers. . . . Further, a claim of price discrimination will not lie if the buyer failed to take advantage of a price concession which was realistically and functionally available. *See* *Shreve Equipment, Inc., supra, 650 F.2d at 105*. The legislative history reveals that the aim of the Act is to prevent a large buyer from gaining discriminatory preferences over the small buyer solely because of the large buyer's greater purchasing power. *See* *Federal Trade Comm. v. Henry Broch & Co., 363 U.S. 166, 168-69, 80 S. Ct. 1158, 4 L. Ed. 2d 1124 (1960)*; *Morton Salt Co., supra, 334 U.S. at 43*[.]

> **[***13]** In granting summary judgment on this claim, the district court found that the various concessions and allowances made available by Suzuki's promotional programs were practically and realistically available to Bold-Morr. We agree. A review of the record demonstrates that the purchasing **[**37]** conditions imposed were well within the means of the average Suzuki dealer.
> * * *
>
> It is also important to note that the promotional packages were intended to enhance the sale of products to dealers by providing economic incentives to purchase the promoted models. Moreover, Suzuki did not expect a dealer to participate in every promotional program. It was a matter of discretion with each dealer, in the exercise of its business judgment, whether to take advantage of the promotion. Appellant Pete Bouldis testified that on some occasions he participated in the promotional programs and at other times he did not, despite the fact that he had the financial ability to do so. Bouldis testified that he had cash flow and inventory problems which prevented him, at times, from participating in the promotional sales. Accordingly, by appellant's own admission, there is no causal link between Suzuki's practices and appellant's alleged injuries. *See generally*, 16C Von Kalinkowski, [*Business Organizations*], *supra*, at § 31.01[5][c] [(1982)].
>
> **[*869]** Accordingly, we conclude that Suzuki's promotional programs were equally and functionally available to Bold-Morr, and, therefore, **[**38]** § 2(a) of the Clayton Act, as amended, was not violated.

Bouldis, 711 F.2d at 1326-27.

The courts of other circuits have likewise determined the viability of *§ 13(a)* secondary-line price discrimination claims by using the functional availability doctrine. For instance, in *Sweeney,* the defendant oil company, Texaco, sold its gasoline to various wholesale distributors, including the plaintiff. When Texaco unilaterally altered the location where the plaintiff could load his delivery trucks with defendant's gasoline, causing the plaintiff to incur higher distribution costs and eliminate its locational advantage, the plaintiff filed suit, claiming that this action was tantamount to discriminatory pricing in violation of the Robinson-Patman Act. The Third Circuit Court of Appeals, citing *Morton Salt* and noting that price discounts must be available not only in theory, but in fact, to all purchasers, held that the plaintiff had failed to establish that the hauling allowance formula constituted unlawful price discrimination under *§ 13(a)*:

> In the case before us, it is the distributors, not Texaco, who determine where to place their bulk storage **[**39]** plants, and it is the distributors, not Texaco, who decide which retail stations they will supply. Texaco has no control over those decisions; it calculates the hauling allowance solely on the bulk plant's location in relation to the nearest pickup point. On this record, we cannot conclude that Texaco's formula forecloses any distributor from an advantageous hauling allowance. The record also fails to show that small buyers, whom the act was primarily intended to protect, are disadvantaged by the formula.

Sweeney, 637 F.2d at 121.

In *Krist Oil Co.,* the defendant supplied the plaintiff's retail outlets with Pepsi products. The plaintiff claimed that the defendant engaged in price discrimination because it linked its price to the retailer to the retailer's price to its customers. The plaintiff had chosen to increase its retail price on Pepsi to pay for certain capital investments, which then led the defendant to charge the retailer a higher price. In granting the defendant's motion to dismiss the Robinson-Patman allegations for **[***14]** failure to state a claim, the court rejected the plaintiff's argument that the pricing structure was functionally unavailable to **[**40]** it, finding instead that "the lowest case price is unavailable to plaintiff not because of its disproportionately small purchasing power but because of other unrelated investments plaintiff made." *Krist Oil Co., 354 F. Supp. 2d at 857*. The court noted that the plaintiff faced a choice that was "not an inequity imposed by the pricing structure but a fundamental economic conundrum faced by all sellers," i.e., "purchasers are left with a choice between selling more bottles at a lower per bottle profit or selling fewer bottles at a higher profit for each." *Id*. The district court added, "It is curious that plaintiff has instituted a lawsuit seeking to free itself from the shackles of lower profits." *Id*.

In *Capital Ford Truck Sales, Inc. v. Ford Motor Co., 819 F. Supp. 1555 (N.D. Ga. 1992)*, the court held that there was no violation of *§ 13(a)* of the Robinson-Patman Act when the defendant manufacturer offered special discount incentives for trucks remaining in inventory at its plant, without applying the discount to vehicles that were in dealer stock at the time the incentives were announced, where the discounts on the manufacturer's inventory **[**41]** **[*870]** were made available to the complaining plaintiff dealership on an equal basis with other dealers, and discounts were not applied retroactively to trucks held in any other dealer's inventory. *819 F. Supp. at 1571*. The court further held that the defendant's pricing system, which granted standard quantity discounts and conditioned price concessions on the number of trucks a dealer sold in a single transaction, did not give rise to price discrimination where the discounts were functionally and realistically available to all customers:

> Ford Motor avers in its motion for summary judgment that the maximum purchase quantity discounts . . . were realistically available to all dealers.
>
> Plaintiffs respond by adducing evidence which indicates that, because Capital Ford was not selling to large quantity purchasers, it did not qualify for the maximum price assistance under the [discount] program. This appears, however, to be the result of a marketing decision by Capital Ford to concentrate on sales to smaller volume customers as opposed to large fleet purchasers. Plaintiffs do not allege that Defendant in any way restricted the customers to whom Capital Ford could **[**42]** sell, and Plaintiffs have adduced absolutely no evidence that the purchase quantity discounts offered under the [discount] program were not realistically available to all dealers if they chose to bid larger volume buyers. *See* *Bouldis, 711 F.2d at 1326*; *Shreve Equipment, 650 F.2d at 105*.

Id. at 1578-79.

Finally, in *American Tara Corp.*, the defendant paper company, which produced a type of tissue paper used for one-time carbon paper, initiated a discount program based upon a percentage of past purchases of its product rather than a specific quantity. *1981 U.S. Dist. LEXIS 14211, 1981 WL 375752 at *1*. If, in 1978 or 1979, a manufacturer purchased from defendant an amount of tissue equal to 25% of the total tissue it purchased from all suppliers in 1977, that manufacturer would receive a 2.5% rebate on all of its one-time carbonizing tissue purchases from defendant during 1978 or 1979; a purchase of 26-40% of its 1977 purchase total from defendant in 1978 or 1979 would result in a percentage rebate based on a sliding scale. *1981 U.S. Dist. LEXIS 14211, 1981 WL 375752 at *1*. The program further provided that a manufacturer who expressed an intention to participate in **[**43]** the program would not be affected by price increases during the program. The plaintiff manufacturer did not qualify for the rebate and brought suit alleging price discrimination against the defendant pursuant to § 2(a), arguing that the defendant's rebate program was not functionally available to it "not because, as in *Morton Salt*, plaintiff was too small to buy the amount necessary to qualify for a rebate but because plaintiff could not buy that amount from defendant without placing itself in extreme jeopardy." *1981 U.S. Dist. LEXIS 14211, [WL] at *2*. Citing *Sweeney* and **[***15]** *Shreve*, the district court nonetheless upheld the pricing formula and granted summary judgment in favor of the defendant, stating:

> Although this dispute over the repercussions of choosing to participate in the program creates an issue of fact, the issue is not material and does not preclude granting summary judgment. Even if the facts were as plaintiff states, defendant did not discriminate against plaintiff. The factors which plaintiff claims made the program disadvantageous to plaintiff are not unique to plaintiff. If in 1978 plaintiff could not have bought from defendant 25% of the amount it bought from all suppliers **[**44]** in 1977 "without placing itself in extreme jeopardy," plaintiff's competitors could not have bought that percentage from defendant without taking the same risk. Defendant's program may have been, as **[*871]** plaintiff argues, a bad bargain. As long as defendant offered the same bad bargain to plaintiff as to its competitors, however, defendant did not violate the Robinson-Patman Act.
>
> * * *
>
> The holdings in [*Shreve* and *Sweeney*] reflect the rationale for the functional availability defense and control our holding in this case. The plaintiffs in those cases and in this case could have qualified to receive the lower

> prices but chose based on their business judgment, to suffer competitive injury if their competitor's purchased at the lower price rather than assume the disabilities or risks in the commitment necessary to purchase at the lower price.
>
> Since plaintiff's competitors had to make the same decision, Tara's choice, not defendant's program, was responsible for the price discrimination. Therefore, the rebates which defendant gave plaintiff's competitors were functionally available to plaintiff and did not violate the Robinson-Patman Act.

*1981 U.S. Dist. LEXIS 14211, [WL] at *3*. [11]

[45]** Conversely, other courts have held that, under certain circumstances, pricing mechanisms may render a quantity discount practically unavailable to the plaintiff. *See* *DeLong Equipment Co., 887 F.2d at 1516-17* (citing *Shreve* and acknowledging the functional availability doctrine, but reversing district court order granting summary judgment to defendant manufacturer where the plaintiff distributor presented substantial evidence that it was not given an opportunity to buy the "special" lower-priced item); *Allied Sales and Serv. Co., 2000 U.S. Dist. LEXIS 7774, 2000 WL 726216 at *18* (denying summary **[***16]** judgment to the defendant where issues of fact existed as to whether the challenged repair discount was functionally available to the plaintiff, i.e., what the criteria for discount actually were and whether the plaintiff knew about the discount); *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745, 752 (1st Cir. 1994)* (reversing district court's order dismissing complaint for failure to state a **[*872]** claim where allegations that the plaintiff retailer did not know that its competitors were receiving favored treatment from the defendant manufacturer **[**46]** were sufficient to establish that favored treatment was not functionally available: "[W]e do not see how ordinarily one could say that a seller has made favored treatment 'available' to a disfavored customer if the disfavored customer *does not know* about the favored treatment."); *Calumet Breweries, Inc., 951 F. Supp. at 754-55* (in the context of granting a preliminary injunction, concluding that there was ample evidence that volume discount was only theoretically, but not functionally, available to the plaintiff because retroactive quantity adjustments in effect resulted in a secret discount that only the favored wholesaler could obtain, and the defendant handicapped the plaintiff by limiting the array of product choices available to it and by imposing restrictive inventory requirements); *National Dairy Products Corp. v. Federal Trade Com., 395 F.2d 517, 523 (7th Cir. 1968)* (affirming Federal Trade Commission order requiring dairy distributor to cease unlawful price practices where evidence showed that discriminatory quantity discounts favoring chain store customers and "[w]e also cannot accept National's argument that the disfavored independents should have joined **[**47]** voluntary or cooperative groups and thus obtained higher discounts.").

As reflected in the above cases, the functional availability doctrine has been applied historically in the context of quantity discounts, yet its underlying rationale -- that a discount equally and realistically available to all purchasers

---

[11] *See also* *Metro Ford Truck Sales, 145 F.3d at 326* (Fifth Circuit Court of Appeals held that wholesale discount program, offered by the defendant manufacturer to all of its authorized truck dealers to help with bidding for large volume purchasers, did not constitute unlawful price discrimination because program was in fact, and not merely theoretically, available to all dealers and the plaintiff conceded that the discounts were available to it on an equal basis with other Ford dealers); *Comcoa, Inc., 931 F.2d at 664* (Tenth Circuit Court of Appeals held that availability "defense" applied to special volume discounts offered on technologically obsolescent equipment; court approved jury instruction that stated for the availability doctrine to apply, "the implementation of a discount program need not guarantee that all customers benefit to the same degree as other customers, as long as the program is evenly administered"); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 929 (9th Cir. 1980)* (summary judgment proper where it was undisputed that defendant manufacturer made contested discounts "equally available to any qualified purchaser in any market"); *FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019, 1024-25 (2d Cir. 1976)* ("[W]hile the incentive payment plan did not set a single uniform price for all types of sales made by Ford to its dealers, it was administered with an even hand, without any discrimination among the dealers who purchased from Ford."); *Rod Baxter Imports, Inc. v. Saab-Scania of America, Inc., 489 F. Supp. 245, 247 (D. Minn. 1980)* (no price discrimination occurred where bonus payments under Sell-a-Bration sales incentive program were "available on a reasonably equivalent basis to all dealers who made the commitment to obtain them" and the failure of some dealers to reach their quotas was the result of factors other than program, such as low inventory, poor financing, reduced sales forces, and poor management).

of a like commodity does not constitute discrimination in price within the meaning of § 13(a) -- is no less relevant in judging the legality of market-share discount formulas such as the WPP.

The doctrine seemingly defies the logic that a rational purchaser of goods will always seek to obtain the best discount or concession that is available to it; if a higher discount is realistically and practically available, why would a reasonable purchaser *not* take advantage of the best possible price? However, the functional availability doctrine reflects the realities of the marketplace and recognizes that purchasers in competitive markets, particularly multi-brand distributors or wholesalers, must make difficult economic choices, prioritize brand sales and often decline conditional discounts for reasons unrelated to their actual ability to obtain them. Thus, as reflected in the **[**48]** above cases, the ***HN12***[] courts have refused to find price discrimination under § 13(a) when the purchaser's decision or capacity to take advantage of the best discount made "available on a reasonably equivalent basis to all dealers who made the commitment to obtain them," *Rod Baxter Imports, Inc., 489 F. Supp. at 249*, was determined by elements within its control -- i.e., unrelated investments (*Krist*); poor credit ratings (*Bouldis*); management issues, inventory decisions, or marketing strategies (i.e., *Shreve*, *Capital Ford* and *Sweeney*); or a decision to promote the competitor's product (*Amer. Tara Corp.* -- and not by disproportionately small purchasing power or the pricing structure itself.

The doctrine also underscores the fact that the Robinson-Patman Act neither ensures success nor excuses purchasers from making difficult decisions about which competing brands to carry, market, or promote:

> In any competitive economy we cannot avoid injury to some of the competitors. The law does not, and under the free enterprise system it cannot, guarantee businessmen against loss. That businessmen lose money or even go bankrupt does not necessarily **[**49]** mean that **[*873]** competition has been injured. H.R. Rep. No. 1422, 81st Cong., 1st Sess. 5-6.

[17]*** *Sun Oil Co., 371 U.S. at 519*. [12]

---

[12] Plaintiffs cite the *Caribe*, *Calumet Breweries*, and *National Dairy* decisions for the proposition that, pursuant to § 13(a), a seller cannot legally condition price concessions on self-damaging sacrifices by a buyer, particularly where sacrifices of equal magnitude would not be required of the buyer's more favored competitors. However, we find these cases to be inapposite to the present circumstances. All of these cases involved inherently suspect volume discounts which permitted large buyers to secure a competitive advantage over a small buyer because of the large buyer's quantity purchasing ability. In *Caribe*, allegations that the plaintiff retailer did not know that its competitors were receiving favored treatment from the defendant manufacturer were sufficient to establish that the favored treatment was unavailable to the retailer so as to allow a claim to proceed under § 13(a). Contrary to the present plaintiffs' assertion, the case did not turn upon the plaintiff's argument that it should not be required to give up various advantages of its importer's contract. Rather, the *Caribe* court specifically declined to endorse that argument and made clear that "if a seller makes its favorable prices and terms available to an otherwise disfavored customer, that customer has no legal right to complain." *19 F.3d at 751*.

The present case bears little resemblance to *Calumet Breweries, Inc.*, a case of "blatantly discriminatory" favoritism, where the defendant supplier structured its volume discount program to specifically favor its largest customer, by effectively granting a secret discount, imposing inventory restrictions, and limiting the array of products available to the disfavored customer. *951 F. Supp. at 754*. Noting that, pursuant to *Morton Salt*, an inference of competitive injury arises from any quantity discount, the court stated, "[n]othing in the Robinson-Patman Act or the cases interpreting it suggests that [the disfavored purchaser's] decision to emphasize other brands and remain a (relatively) small seller of [the defendant's] products *ipso facto* means [the defendant] may charge [the disfavored purchaser] a higher price." *Id. at 755*. As noted by Barbara O. Bruckman in *Discounts, Discrimination, and Exclusive Dealing: Issues Under the Robinson-Patman Act*, 68 Antitrust L.J. 253, 270 (2000), *Calumet* "should not be read to weaken the general principle that if a customer can take advantage of a discount but chooses for its own reasons not to do so, the seller is not later liable under Section 2(a) for losses that the customer may suffer by virtue of that choice."

Finally, in *National Dairy,* the Seventh Circuit Court of Appeals held that an order of the Federal Trade Commission requiring a dairy product distributor using volume discount schedules in various states to cease unlawful price practices was not an abuse of discretion, noting that "[w]e also cannot accept National's argument that the disfavored independents should have joined voluntary or cooperative groups and thus obtained higher discounts. The Robinson-Patman Act does not force them to sacrifice

[50]** Here, the district court, acknowledging this court's *Bouldis* and *Shreve* decisions, applied the functional availability doctrine to the present circumstances, concluding that summary judgment in favor of RJR was warranted because the undisputed evidence demonstrated that the WPP program was nondiscriminatory, evenly administered, and therefore functionally available on an equal basis to all of RJR's direct distributors. Plaintiffs dispute this conclusion. [13]

[51]** **[*874]** IV.

A.

Despite the fact that the SOS formula of the WPP is uniformly applied to all of RJR's wholesale distributors, plaintiffs nonetheless maintain that the WPP results in price discrimination **[***18]** because the share targets are grossly inflated, arbitrary, unrealistic, and impossible for plaintiffs to meet. Plaintiffs broadly claim that they are pawns in RJR's battle against fourth-tier cigarette manufacturers and that RJR, rather than compete lawfully against its fourth-tier competition by lowering prices on certain of its cigarette brands, adopted the WPP in 2000 to foreclose distributors from selling fourth-tier brands altogether to their retail customers. Such sweeping complaints about the cigarette industry are, however, not the appropriate focus of this secondary-line price discrimination suit.

More to the point, plaintiffs allege that the WPP disfavors them because, unlike RJR's other distributors, they operate largely in rural "low-end" segments of the market where their retail customers demand fourth-tier brands, and RJR does not price any of its brands at the fourth-tier price level. The gravamen of plaintiffs' price discrimination claim is set forth in PP 26-28 of their **[**52]** Fifth Amended Complaint, in which plaintiffs aver:

> 26.
>
> In August 2000, in response to competition from lower-priced 4th tier cigarette manufacturers, RJR dramatically changed the discount pricing structure of its products for its distributors by implementing the WPP. The WPP set up three separate price tiers for distributors, Levels 1, 2, and 3. Under the WPP, if a distributor's sales of RJR "value priced" brands, as compared with its sales of 4th tier brands and the value priced brands of other manufacturers, do not meet a pre-determined goal in terms of RJR market share of sales, the pricing structure penalizes such distributors on their net (discounted) price. RJR does not price any of its cigarettes at the 4th tier level. This scheme by RJR is aimed at coercing distributors to limit sales of 4th tier brands and other competitors' brands, and designed to force sales of RJR products at higher prices. In implementing the WPP, RJR set the standard for the best discount and back-end monies at such an extreme level that for an overwhelming majority of distributors, including Plaintiffs, the WPP's best price could never be achieved.
>
> 27.
>
> RJR's products are indispensable **[**53]** to Plaintiffs' wholesaler business because their customers (i.e., retail stores) demand that the wholesaler carry a full range of tobacco products so that they can buy all manufacturers' cigarettes from one wholesaler. However, because Plaintiffs service retailers who sell to poorer consumers, they must offer cheaper 4th tier cigarettes to compete as a distributor. This has resulted in [the] inability to obtain the WPP's best price from RJR. Plaintiffs are forced to compete directly against distributors

---

their independence." *395 F.2d at 523*. The present case, unlike *National Dairy*, neither involves a volume discount nor avers that plaintiffs must join forces and sacrifice their independence in order to protect themselves from large distributors.

In sum, none of these cases support plaintiffs' assertion that *§ 13(a)* does not require them to change their business structure, reconfigure their customer base, or undertake an expensive and risky business plan. To the contrary, a discount program may be functionally available even when the choice "would have threatened [the plaintiff's] very existence," *Amer. Tara, 1981 U.S. Dist. LEXIS 14211, 1981 WL 375752 at *2*, or when the choice "would not be economically possible." *The Iams Co. Litigation, No. C-3-90-014, 1992 U.S. Dist. LEXIS 22759, 1992 WL 1258514, at *2 (S.D. Ohio July 24, 1992)* (unpublished).

[13] To the extent plaintiffs argue that the district court's order granting summary judgment in favor of defendant is improper because it is inconsistent with the court's earlier preliminary injunction ruling, this argument is without merit. It is well established that "[t]he purpose of a preliminary injunction is simply to preserve the status quo; thus, findings of fact and conclusions of law made by a district court in granting a preliminary injunction are not binding at a trial on the merits." *United States v. Edward Rose & Sons, 384 F.3d 258, 261 (6th Cir. 2004)*.

> receiving substantially better prices and whose markets overlap with various portions of Plaintiffs' markets. Critically, Plaintiffs have no significant control **[*875]** over consumer demand, and cannot reduce their sales of 4th tier cigarettes, or other RJR competitors' products, without losing retailer customers. Given Plaintiffs' customers and market for sales, the best price under RJR's WPP is impossible for them to achieve.
> 28.
>
> Through the WPP, RJR penalizes distributors, including Plaintiffs, who sell 4th tier and other RJR competitors' cigarettes, by reducing allowed discounts and back-end monies as a means of preventing them from distributing cigarettes of RJR's competitors. **[**54]** As a result, Plaintiffs must pay substantially more than their own **[***19]** competitors for the same RJR products, which places Plaintiffs at a severe competitive disadvantage and has resulted in substantial competitive injury.

The WPP's pricing formula thus purportedly places plaintiffs in a no-win situation -- either accede to RJR and destroy their business or meet customer demands and attempt to absorb RJR's discriminatory price differences while suffering debilitating lost profits. Plaintiffs contend that the alleged price disadvantage instigated by the WPP "has caused Plaintiffs to experience millions of dollars in lost profits," and has "caused a loss of customers and threatened the viability of Plaintiffs' businesses." (Complaint, P 29). According to plaintiffs, the "very existence" of the allegedly favored competitors is not similarly threatened because these competitors have a pre-existing "higher-end" customer base that does not demand fourth-tier cigarettes, thus allowing the competitors to qualify for the WPP's best prices.

In response, defendant contends that its best price is as functionally available to each plaintiff as it is to any of that plaintiff's competitors and the **[**55]** relative size of the competitors is irrelevant because all are treated the same in a market-share-based program. Defendant posits that plaintiffs have a choice, albeit difficult: either they can attempt to attain defendant's marketing goals by curtailing their sales of fourth-tier cigarettes or they can continue to promote fourth-tier cigarettes and receive a lower discount on defendant's products.

Plaintiffs counter that this purported "choice" is unpalatable -- because most retailers prefer to buy their stock from a single distributor, if plaintiffs curtail the sale of fourth-tier cigarettes, their customers will take their entire business elsewhere. Thus, dropping competitor products from inventory would result in an immediate loss of customers because they operate as full-line, full-service distributors. Plaintiffs maintain that "§ 2(a) does not require buyers to attempt . . . to drastically change their business structure and radically reconfigure their customer base in order to avoid price discrimination, particularly when such an expensive and risky business plan would lead at best to massive losses."

Plaintiffs further assert that genuine issues of material fact exist regarding **[**56]** whether the WPP's best discounts were functionally available to them, first arguing that in granting summary judgment, the district court erroneously concluded that plaintiffs' "inability to take advantage of the best discount" was because of "an outside influence, not in the control of RJR . . . ." Plaintiffs maintain that in so holding, the district court failed to recognize that the WPP's principal mechanism of discrimination - grossly inflated share targets -- is solely within RJR's control. [14]

[57]** **[*876]** In this regard, plaintiffs presented evidence allegedly showing that in the first quarter of 2003, the WPP's Level 2H share target in states where plaintiffs conduct their business exceeded RJR's alleged state savings brands market share in such states and that RJR's market-share figures used for the WPP calculations were inflated above RJR's actual state market share. The Level 2H target was, according to plaintiffs, as much as 22.5 points higher than RJR's actual market share in the pertinent areas. Plaintiffs allege that RJR's representation that

---

[14] Plaintiffs also suggest that the district court's pronouncement in this regard fails as a matter of law to the extent it suggests that factors outside of the seller's (RJR's) control, such as consumer demand, are irrelevant to the functional availability issue. Otherwise stated, although plaintiffs agree that certain circumstances solely within the buyer's control, such as poor credit, *see* Bouldis, 711 F.2d at 1325, cannot render a program functionally unavailable, *any circumstances not within the buyer's control* are relevant to a determination whether the qualifications for the best price can be met as a functional or practical matter. Plaintiffs maintain that none of the circumstances making the WPP's best prices functionally unavailable in the instant matter are within plaintiffs' control.

the WPP share target was set around 30% below RJR's actual savings brands state share is deceptive, because the particular target used as the basis for this computation is the Level 2A target, the second worst of ten price levels, and thus it would not entitle a distributor to RJR's best discounts.

[*20]** Plaintiffs' economic expert opined that RJR's best prices were not practically available to most distributors, including all plaintiffs. Nine of the original plaintiffs competed against Level 2H distributors, ten plaintiffs competed against Level 2G distributors, and one plaintiff competed against Level 2F distributors. From the second quarter **[**58]** 2002 through the third quarter 2003, only 7 - 8% of RJR's 700 direct distributors reached their Level 2H targets under the WPP. During this same time period, only an additional 4% of RJR distributors achieved Level 2G or higher, and only an additional 6.5% of RJR distributors reached Level 2F or higher. Most distributors failed to reach even Level 2C or higher. Plaintiffs claim that this inability of over 90% of RJR wholesalers to achieve the WPP's best price applies throughout the complaint period. Consequently, plaintiffs maintain that a share target set well in excess of RJR's actual market share is not "well within the means of the average" distributor, *Bouldis, 711 F.2d at 1326*, and also favors those competitor distributors with a pre-existing customer base that already purchase a greater share of RJR products. Plaintiffs further allege that there are serious flaws in the methodology used by RJR to compute its share targets. Plaintiffs complain that the data does not accurately capture non-reporting members, cash and carry purchases, or sales volume in certain counties within a state. [15] The mean per capita income provided by RJR is allegedly of little probative **[**59]** value because it masks relevant information about variations in income between different areas of a given county and does not account for the presence of nationwide convenience store chains in those areas (selling a higher percentage of RJR's second-tier Doral brand and other expensive products) and smaller, independent and rural retailers (selling a higher percentage of discount cigarettes to primarily local consumers). **[*877]** Finally, plaintiffs produced evidence in the form of letters and testimony that when they attempted to qualify for RJR's best price, they suffered a substantial decline in the financial welfare of their businesses.

[60]** In sum, according to plaintiffs, the record evidence indicates that: (1) distributors cannot measurably increase the demand for RJR products; (2) plaintiffs do everything they can to sell as many RJR products as possible; (3) RJR's own data shows that the WPP's best price is practically achievable by only 8% of all distributors; and (4) plaintiffs and their most favored competitors did not face the same bad business choice in attempting to qualify for the WPP's best price. Plaintiffs argue that each of these genuine issues of material fact on the functional availability issue warrants reversal of the district court's order granting summary judgment to defendant.

B.

As previously noted, a secondary-line price discrimination claim brought under *§ 13(a)* of the Robinson-Patman Act requires proof that the defendant discriminated in price between different purchasers of commodities of like grade and quality, in interstate sales, and the effect of that discrimination was to substantially lessen competition or tend to create a monopoly in any line of commerce. *Volvo Trucks, 126 S. Ct. at 870*. The parties do not dispute that the relevant sales were made in interstate commerce **[**61]** and that the commodities were of like grade and quality.

Accepting as true plaintiffs' allegations in the context of this summary judgment review, we nonetheless conclude that summary judgment is warranted because the undisputed material facts **[***21]** demonstrate that RJR's best discount under the WPP was functionally available to plaintiffs on an equal basis, thus affirmatively disproving the element of discrimination in price.

---

[15] Specifically, plaintiffs assert as follows:

> Perhaps even more glaring a deficiency in RJR's experts' per capita income comparison is the binary classification of each county within a state as either "served" or "unserved." RJR's methodology fatally makes no provision for sales volume (in units or dollars) in any "served" county. A county in which a Plaintiff sells 10 cartons of cigarettes per month was given equal weight to one in which that same Plaintiff sold 10,000 cartons per month. This analysis made no effort to accurately reflect concentrations in Plaintiffs' business.

We initially note that the WPP does not bear any of the obvious hallmarks of a discriminatory pricing program. RJR developed a share-based program, not a quantity-based program of the sort condemned by the Supreme Court in *Morton Salt*. Plaintiffs do not claim that they are too small to take advantage of the discount [16] or allege that they, unlike other wholesalers, were ignorant of its terms or deprived of access to the WPP. Further, there is no evidence that RJR manipulated the WPP to favor certain wholesalers. To the contrary, the evidence shows that RJR has evenhandedly applied the WPP, treating all of its wholesalers equally and offering all of them the same qualification terms. Each wholesaler performed equivalent functions to obtain the discounts.

[62]** To determine the share-of-savings targets, RJR first calculated an overall state target by ranking all of its wholesalers in the state, starting with the wholesaler with the highest RJR savings share (which, as RJR points out, was not necessarily the wholesaler with the highest volume) and ending with the wholesaler with the lowest RJR savings share. RJR then selected as the state target the RJR savings percentage of the wholesaler whose volume, when added to the volume of the wholesalers **[*878]** with higher savings brands shares, accounted for approximately 85% of RJR's wholesale volume in the state. RJR then calculated a share-of-savings target for each wholesaler, using the previously calculated state targets and weighting them to reflect the percentage of the wholesaler's business in different states. Because participation in the program did not depend on the volume of a wholesaler's RJR sales, small wholesalers were treated the same as large wholesalers.

Reiterating plaintiffs' core argument that RJR's best share-of-savings targets were unattainable (1) because they serviced retailers who sold to poorer customers, (2) resulting in a uniquely high demand for fourth-tier cigarettes, **[**63]** plaintiffs have proffered neither statistical evidence nor expert testimony to support these allegations. No plaintiff presented evidence both (1) that it sold only in lower-income areas in the states within its service area and (2) that the demand for fourth-tier cigarettes was higher in its sales area than in other areas of the state.

RJR, on the other hand, presented comparisons of the average per capita income in the counties served by each plaintiff to the average per capita income in the remaining counties in the states in which the plaintiff sold. This evidence, in the form of U.S. Department of Commerce data on county income levels, showed that the average per capita income in the served counties exceeded that of the counties not served for most plaintiffs. Only three of the original plaintiffs (Smith, Rice, and Pelican) sold in counties that had statistically lower average income levels than the remaining counties in the states in which they sold. Two of the plaintiffs (Rice and Smith) sold in virtually the same areas as another allegedly favored wholesaler, Virginia Wholesale, that earned discounts at an upper level of the WPP. Another plaintiff, Pelican, admitted that higher-income **[**64]** areas existed within its own sales area. In sum, the data showed that plaintiffs sell in a range of counties, from some that have relatively low incomes to others that have relatively high incomes.

Plaintiffs' expert conducted no analysis of this issue and admitted that he did not plan to offer an opinion on whether plaintiffs sold in lower-income areas. He did not factor income levels **[***22]** into a computation of lost profits. Two plaintiffs (A.B. Coker and Yakima) conceded that their sales areas included entire states, not merely low-income pockets in those states. Other plaintiffs [17] conceded that they served higher-income portions of their sales areas or that higher-income areas existed in their sales areas. Some plaintiffs conceded that they had no evidence that they served lower-income areas or that their perception that they served lower-income areas was simply conjecture. [18]

---

[16] Although not alleged in their complaint, plaintiffs broadly argue that WPP favors the largest distributors -- "[T]he fact that 85 of RJR's volume may have qualified for Level 2 "A" pricing did not translate into 85 of RJR's distributors qualifying for that price. The 21 largest distributors (of around 700 direct accounts) control 50 of RJR's sales volume and are at the WPP's highest program levels." This vague assertion is insufficient to support a claim that the WPP favors larger distributors by virtue of their greater purchasing power.

[17] Plaintiffs A.B. Coker, Andalusia, Caldwell, Church Point, Huntsville, Independent, Bates, Shanks, Pelican, Taylor, Reidsville, and Yakima.

[18] Plaintiffs Affiliated, Dixie, George, Shanks, McCarty-Hull, Pelican, Rice, and Topicz.

[65]** Further, because plaintiffs failed to substantiate, with comparative data, differences in fourth-tier demand between the areas of states where they sell and those states as a whole, plaintiffs have thus failed to show that actual demand for fourth-tier cigarettes was, in fact, higher in their sales areas. Again, plaintiffs' expert did not address this issue. Moreover, plaintiffs presented no evidence that RJR's share in areas where plaintiffs sold was any different than RJR's statewide shares in the states where the allegedly less-affluent areas were located. In sum, plaintiffs are unable to verify the grounds for their price discrimination claim -- that they predominantly **[*879]** service retailers who sell to poorer customers, resulting in a uniquely high demand for fourth-tier cigarettes -- in turn foreclosing proofs that the WPP actually disfavored plaintiffs on the basis of these characteristics. In any event, there is no evidence that anything other than plaintiffs' marketing decisions impacted their ability to obtain the WPP's best prices. The undisputed evidence demonstrates that plaintiffs faced a choice that was "not an inequity imposed by the pricing structure but a fundamental **[**66]** economic conundrum faced by all sellers." *Krist Oil Co., 354 F. Supp. at 857*.

Plaintiffs could alter their sales mix at any time so as to qualify for the varying discount levels. Plaintiffs complain that only a small percentage of wholesalers actually reached Level 2H. However, this is a neutral fact, not a material issue, which simply reflects the outcome of different choices made by different wholesalers. The legality of RJR's incentive program does not turn on whether, in fact, each wholesaler actually achieved the highest level in the WPP program. The very nature of an incentive program necessarily leads to different outcomes based on performance. *See, e.g.* *Comcoa, 931 F.2d at 664*; *Sweeney, 637 F.2d at 121-22*. As long as defendant offered the same best price to plaintiffs as to their competitors, using a nondiscriminatory pricing formula, defendant did not violate the Robinson-Patman Act.

Finally, with regard to plaintiffs' allegations of inflated shares, plaintiffs' proofs are lacking in a demonstration or appropriate comparison regarding how any discrepancy between actual and reported market share affected plaintiffs more than **[**67]** other supposedly favored wholesalers. Moreover, importantly, plaintiffs have failed to demonstrate how this allegedly improper calculation detrimentally affected competition. In essence, plaintiffs suggest that RJR did not have to set its discount levels in the particular manner set in the WPP: "RJR could set share targets that are reasonably related to each distributor's past sales and market share. This design, contrary to RJR's WPP, would treat all distributors equally at the outset because targets would be set according to the cigarette demands of each distributor's actual market and available customer base." However, we will not entertain plaintiffs' invitation to re-engineer the uniformly applied WPP incentive program to make it more reasonable for some participants. *See* *Sweeney, 637 F.2d at 121-22* (declining to impose a "station by station" formula "[g]iven the evenhanded application of the formula" and the "substantial administrative burden" on the defendant); *Rod Baxter Imports, Inc., 489 F. Supp. at 249* ("The evidence presented by plaintiff tending to indicate that some dealers would have been better or worse off if a longer base period **[**68]** was used, does not in the court's view establish that the program **[***23]** was unfair or that it may have had the effect of substantially limiting competition."). As the magistrate judge noted in his Report and Recommendation in the instant case:

> [T]he Court disagrees with the plaintiffs that defendant's decision to set the target goals on a statewide basis was arbitrary and improper. To be sure, there are two "arbitrary" factors in defendant's calculation. Using a state to set its targets, as opposed to some other geographical or demographical area, was arbitrary, but no other geographical area would have been any less arbitrary. And using eight-five percent as the baseline target also could be said to be arbitrary, since defendant could have chosen ninety percent, or seventy-five percent, or any other percentage. But picking a number fifteen percent *below* defendant's market share in a given state was not unreasonable. Plaintiffs **[*880]** essentially argue that defendant should have set the targets on a per-distributor basis which, of course, would be tantamount to having no market-share-based incentive program at all. These targets treat all distributors equally; each has the same opportunity **[**69]** to achieve higher discount levels. From the fact that unpleasant, even draconian, business decisions might be required, it does not follow that the discount scheme is *discriminatory*.
>
> Admittedly, the "reasonableness of choice" issue is troublesome. . . . But if the reasonableness or unreasonableness of business decisions is a factor that must be considered with respect to functional availability of a market-share-based discount program, then such a discount program always will be as

> inherently suspect as a volume-based discount program. Any given distributor could claim that it could not meet a market-share goal because it would be required to alter its business in some fashion which the distributor subjectively determines to be unreasonable. No seller could ever know if its program was lawful under Robinson-Patman; the legality of any market-share-based discount program only could be ascertained with respect to each and every buyer after a jury decides whether the business decisions forced upon that buyer were reasonable or not. Although plaintiffs argue they are not challenging market-share-based discount programs *per se*, in reality they are, simply because any distributor **[**70]** could challenge the target goal as unreasonable *as to it*; and if that distributor prevails, the entire discount program would collapse as unworkable. The result would be "tailor-made" discounts which themselves presumptively violate the Robinson-Patman Act.
> * * *
> Defendant's program is designed to promote its financial welfare at the expense of that of the wholesalers. Perhaps it is unfair, but it is not illegal.

The Robinson-Patman Act proscribes price discrimination only to the extent that it threatens to injure competition, and, in the absence of such a showing, we will not intercede so as to micromanage the distribution system of defendant. As the Supreme Court noted in *Volvo Trucks,* the Robinson-Patman Act does not bar a manufacturer from restructuring its distribution system to refine productivity:

> The dissent assails Volvo's decision to reduce the number of its dealers. . . . But Robinson-Patman does not bar a manufacturer from restructuring its distribution networks to improve the efficiency of its operations. If Volvo did not honor its obligations to Reeder as its franchisee, "any remedy . . . lies in state laws addressing unfair competition and **[**71]** the rights of franchisees, not in the Robinson-Patman Act." Brief for United States as *Amicus Curiae* 28.

[24]*** *Volvo Trucks, 126 S. Ct. at 873 n.4*.

C.

Under the circumstances, we affirm the district court's order granting summary judgment in favor of defendant. As the district court properly found, the WPP's market-share discount was offered to all wholesalers using a non-discriminatory formula. It was therefore functionally available to plaintiffs not only in theory, but in fact. The capacity of plaintiffs to qualify for the WPP's best discount was a matter of marketing strategy and brand prioritization, a choice inherent and unavoidable in multi-brand incentive programs. Because the WPP discount was functionally available to plaintiffs, a requisite **[*881]** element of a prima facie secondary-line price *§ 13(a)* claim, price discrimination has not been established, and plaintiffs' claim therefore fails as a matter of law.

Application of the WPP program may ultimately cull the number of RJR's distributors. However, the functional availability doctrine does not require a supplier to ensure the success of its customers. Whether this potential loss of participating wholesalers **[**72]** will ultimately benefit *defendant* remains to be seen.

Affirmed.

End of Document

Gibson v. Office of the AG of Cal.

United States District Court for the Central District of California

February 28, 2007, Decided; February 28, 2007, Filed

CV 07-00838 FMC (JCx)

Reporter
2007 U.S. Dist. LEXIS 105204 *

PAULA LAUREN GIBSON, ESQ., and ANNETTE D. GOODE-PARKER, Plaintiffs, vs. OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; BILL LOCKYER; RICHARD M. FRANK; JAMES THOMAS GREENE; KATHLEEN FOOTE; LOUIS MAURO; JACOB APPLESMITH; BARBARA MOTZ; and DOES 1-10, Defendants.

Subsequent History: Dismissed by, Dismissed by, Without prejudice, in part, Motion denied by, As moot *Gibson v. Office of the AG of Cal., 2007 U.S. Dist. LEXIS 105205 (C.D. Cal., Apr. 10, 2007)*

Dismissed by *Gibson v. Office of the AG of Cal., 2007 U.S. Dist. LEXIS 105202 (C.D. Cal., June 5, 2007)*

Motion granted by, in part, Motion denied by, in part, Costs and fees proceeding at *Gibson v. Office of the Ag of Cal., 2007 U.S. Dist. LEXIS 110660 (C.D. Cal., Oct. 10, 2007)*

Core Terms

Plaintiffs', allegations, permission, rights, Defendants', conspiracy, employees, limitations, damages, reasonable accommodation, breach of contract, motion to dismiss, cause of action, contractual, complaints, exhaustion, grievances

Counsel: **[*1]** Paula Lauren Gibson, Pro se, Los Angeles, CA USA.

For Paula Lauren Gibson, Annette D Goode-Parker, Plaintiffs: Mark A McBride, LEAD ATTORNEY, Law Offices of Mark McBride PC, Beverly Hills, CA USA.

Annette D Goode-Parker, Pro se, Los Angeles, CA USA.

For Office of The Attorney General State of California, Bill Lockyer, Richard M Frank, James Thomas Greene, Kathleen Foote, Louis Mauro, Jacob Applesmith, Barbara Motz, Defendants: Stephanie L Quinn, LEAD ATTORNEY, Murphy Campbell Alliston and Quinn, Sacramento, CA USA; Thomas Allen Cregger, LEAD ATTORNEY, Cregger and Chalfant, Sacramento, CA USA.

Judges: FLOKENCE-MARIE COOPER, UNITED STATES DISTRICT JUDGE.

Opinion by: FLOKENCE-MARIE COOPER

Opinion

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND DENYING MOTION TO STRIKE

This matter is before the Court on Defendants' Motion to Dismiss and Motion to Strike (docket no. 12), filed on February 9, 2007. The Court has read and considered the moving, opposition, and reply documents submitted in connection with the motion. The Court deems this matter appropriate for decision without oral argument. *See* *Fed. R. Civ. P. 78*; *Local Rule 7-15*. Accordingly, the hearing set for March 5, 2007, is removed from the Court's calendar. For the reasons and in the manner set forth **[*2]** below, the Court hereby GRANTS the Motion to Dismiss and DENIES the Motion to Strike as MOOT.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On December 11, 2006, Plaintiffs Paula Lauren Gibson and Annette D. Goode-Parker (collectively "Plaintiffs") filed their Complaint in the Superior Court of the State of California, County of Los Angeles. The Complaint states that Plaintiffs' action is "for breach of contact [sic] and under *42 U.S.C. § 1981*, *§ 1983* to recover damages against defendant for violation of plaintiffs federal constitutional or statutory rights to assembly and free speech and to petition for redress of grievances, to privacy and to contract without interference under color of state law, guaranteed by the *First*, *Fourth* and *Fourteenth Amendments to the United States Constitution*, and also under the California State Constitution for violations of *Article 1, Sections 1*, 2 and 7." (Compl. ¶ 4.)

The Complaint alleges, *inter alia*, that Plaintiff Gibson ("Gibson") is the sole African-American Deputy Attorney General in the statewide ***Antitrust Law*** Section of the California Department of Justice, Office of the Attorney General ("OAG"). *(Id.* at ¶ 5.) In or about 2001, Gibson was transferred to the Antitrust Section from the Health, Education and Welfare Section as part of an agreement **[*3]** (the "2001 Agreement") entered into by Gibson and OAG to resolve complaints of disability discrimination and denial of reasonable accommodation made by Gibson to the State Personnel Board and Department of Fair Employment and Housing. *(Id.* at ¶¶ 25-27.) Plaintiff Goode-Parker ("Goode-Parker") is a Senior Legal Analyst (paralegal) in the statewide ***Antitrust Law*** Section and provides many of the "reasonable accommodation" services required by Gibson. *(Id.* at ¶¶ 6, 25.)

On June 25, 2003, Gibson filed a private legal malpractice action in the Los Angeles Superior Court, on behalf of Goode-Parker and against California attorney Harold Greenberg ("Greenberg"). *(Id.* at ¶ 31.) Although the OAG has a policy of requiring attorneys within its employ to receive permission to engage in the private practice of law, Gibson did not seek such permission in connection with her representation of Goode-Parker until April 21, 2004. *(Id.* at ¶¶ 32-33, 35, 72-73.) Gibson's request was ultimately denied by Defendant Kathleen Foote ("Foote"), Senior Assistant Attorney General for the Antitrust Section, on the alleged grounds that the existence of a separate and pending claim filed by Greenberg against Gibson **[*4]** with the State Board of Control created a "conflict of interest." *(Id.* at ¶ 37.)

In June 2004, Gibson filed a grievance concerning the denial of permission. *(Id.* at ¶ 40.) In the interim, she continued with her representation of Goode-Parker and defended against a separate action brought against her (by Greenberg) in the Los Angeles Superior Court. *(Id.* at ¶ 41.)

On November 19, 2004, Gibson was advised that she would be terminated if she did not withdraw from representing Goode-Parker, notwithstanding the fact that there had not yet been any formal action regarding her grievance. *(Id.* at ¶ 46.) Although Gibson protested to Defendant Foote, she ultimately withdrew as requested on December 9, 2004. *(Id.* at ¶¶ 47-48.) The Complaint alleges that, as a result of her forced withdrawal, Gibson was required to pay another, private attorney to substitute into the case and Goode-Parker "was denied the assistance of the attorney of her choice who was knowledgeable about the case. . . ." *(Id.* at ¶ 49.)

Around this same time, Gibson allegedly requested two reasonable accommodations to her own and Goode-Parker's work schedules, which Gibson believed to be encompassed by the 2001 Agreement. *(Id.* at **[*5]** ¶¶ 42-43.) However, these requests were denied by Defendant Jacob Applesmith. *(Id.* at ¶ 44.)

In or about December 2005, Gibson requested—and was given permission-to file a malicious prosecution action against Greenberg. *(Id.* at ¶ 54.) Such permission was granted on the condition that Gibson was prohibited from arguing that the OAG's requirement that she seek permission prior to filing any private legal action "was unlawful, unconstitutional or otherwise improper." *(Id.)* However, subsequent to her filing of the suit, Gibson received "threatening" communications from Defendant James Thomas Greene, Chief Assistant Attorney General for the

Public Rights Division, requesting her to explain her authority for having filed the malicious prosecution action. *(Id.* at ¶¶ 58, 60.)

In the interim, Greenberg filed a demurrer to Gibson's malicious prosecution action, which was sustained on the grounds that Gibson had "unclean hands" because of her failure to seek permission from her employer to represent Goode-Parker in the related malpractice action. *(Id.* at ¶ 62.) Gibson did not appeal the decision sustaining the demurrer "because she did not want to have to ask for permission to file an appeal" from **[*6]** her employer and/or because she feared further adverse action. *(Id.* at ¶ 63.) Apart from Gibson's failure to file the appeal, the Complaint alleges that Gibson and Goode-Parker have "foregone various opportunities to petition for redress in the form of filing lawsuits" because of the need to obtain prior permission from their employer. *(Id.* at ¶ 65.)

Defendants removed the action to this Court on February 5, 2007. By means of the instant motion, they seek to dismiss all causes of action against all of them, pursuant to *Fed. R. Civ. P. 12(b)(6)*. In the alternative, they move to strike Plaintiffs' prayer for punitive damages pursuant to *Fed. R. Civ. P. 12*(0.

DISCUSSION

I. Motion to Dismiss

A. Legal Standard

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a defendant to seek dismissal of a complaint that "fail[s] to state a claim upon which relief can be granted." *Fed. R. Civ, P. 12(b)(6)*. The Court will not dismiss claims for relief unless the plaintiff cannot prove any set of facts in support of the claims that would entitle him to relief. *Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002)*; *see also* *Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295 (9th Cir. 1998)*. All material factual allegations in the complaint are assumed to be true and construed in the light most favorable to the plaintiff. *Nursing Home Pension Fund, Local 144 v. Oracle Corp., 380 F.3d 1226, 1229 (9th Cir. 2004)* ("The general rule for *12(b)(6)* motions is that allegations of material fact made in the complaint should be **[*7]** taken as true and construed in the light most favorable to the plaintiff.") (citing *Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000))*. However, the Court "is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network, 18 F.3d 752, 755 (9th Cir. 1994)* (internal citations omitted).

If the Court dismisses the complaint, it must decide whether to grant leave to amend. Denial of leave to amend is "improper unless it is clear that the complaint could not be saved by any amendment." *Livid Holdings Ltd. v. Salomon Smith Barney, Inc., 416 F.3d 940, 946 (9th Cir. 2005)*.

B. Plaintiffs' Claims for Relief

1. First Cause of Action—Violation of Rights under *42 U.S.C. § 1983*

Plaintiffs' first cause of action is styled as a claim for "violation of *first amendment* right to assembly and petition for redress" and "violations of the California State *Constitution, Article 1, sections 1*, 2, and 7," pursuant to *42 U.S.C. § 1983*. Specifically, Plaintiffs allege that the OAG's policy of requiring that attorneys within its employ obtain permission prior to engaging in the private practice of law, embodied in a comprehensive "Incompatible Activities

Statement," constitutes a prior restraint and a violation of Plaintiffs' rights to privacy and to petition the Government for redress of grievances. (Coml. ¶ 76.)[1]

As a threshold matter, Plaintiffs' *§ 1983* claims against Defendant **[*8]** OAG are barred because, as a "state agency," it is not a "person" subject to liability under the statute. *See, e.g., Maldonado v. Harris, 370 F.3d 945, 951 (9th Cir. 2004)* ("State agencies. . . are not 'persons' within the meaning of *§ 1983*, and are therefore not amenable to suit under that statute.") (citing *Will v. Mich. Dep 't of State Police, 491 U.S. 58, 70, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989))*.[2] Defendants Lockyer, Frank, Applesmith and Mauro, to the extent that they are being sued in their official capacities, are also not amenable to suit under *§ 1981* *See, e.g., Will, 491 U.S. at 71*.[3] Contrary to Plaintiffs' arguments, the fact that said Defendants removed this action to this Court does not constitute a waiver of their "immunity" from suit, as that "immunity" derives not from the *Eleventh Amendment* but from the fact that Defendants are not "persons" within the meaning of the statute. *See Bank of Lake Tahoe v. Bank of Am., 318 F.3d 914, 917 (9th Cir. 2003)*; *see also Lapides v. Bd. of Regents, 535 U.S. 613, 617, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002)*.

To the extent that the individual Defendants are being sued in their *individual* capacities, Defendants argue, *inter alia*, that Plaintiffs' claims are nonetheless barred by the applicable statute of limitations, which is two years. *See, e.g., Jones v. Blanas, 393 F.3d 918, 927 (9th Cir. 2004)* ("[A] *§ 1983* action filed in California today would clearly be governed by California's new two-year statute of limitations for personal injury actions."). Specifically, Defendants argue, Plaintiffs' claims for violation of their *First Amendment* speech **[*9]** and petition rights, if any, necessarily accrued no later than the date(s) on which Gibson was denied permission to represent Goode-Parker in the malpractice action and/or when she decided to withdraw "under protest." Defendants are correct in pointing out that these events all took place more than two years prior to the filing of the Complaint.

In their Opposition, Plaintiffs do not address Defendants' statute of limitations arguments in any way, nor is it clear from the Complaint that they are complaining about any activity—imposition of restrictions on speech or other violations of rights—that took place after December 9, 2004 (the date of Gibson's withdrawal). Plaintiffs unequivocally had knowledge of any cognizable injury to their ability to assemble and petition for grievances at the time that Gibson received notice that her request for permission to continue with her representation of Goode-Parker was definitively denied, i.e., no later than November 19, 2004. *RK Ventures, Inc. v. City of Seattle, 307 F.3d 1045, 1058 (9th Cir. 2002)* ("A statute of limitations under *§ 1983*. . . begins to run when the cause of action accrues, which is when the plaintiffs know or have reason to know of the injury that is the basis of their action.") (citing *Cabrera v. City of Huntington Park, 159 F.3d 374, 379 (9th Cir. 1998))*. For this reason **[*10]** alone, the Court agrees that Plaintiffs' first cause of action is subject to dismissal against all remaining Defendants. However, such dismissal should be without prejudice, as the Court finds that amendment could serve to clarify the specific unlawful

---

[1] As Plaintiffs recognize, the OAG's promulgation of an "Incompatible Activities Statement" is required by *Cal. Govt. Code § 19990*, which provides that "[a] state officer or employee shall not engage in any employment, activity, or enterprise which is clearly inconsistent, incompatible, in conflict with, or inimical to his or her duties as a state officer or employee." *Cal. Govt. Code § 19990* further provides that "[e]ach appointing power shall determine, subject to approval of the department, those activities which, for employees under its jurisdiction, are inconsistent, incompatible or in conflict with their duties as state officers or employees."

[2] "'To sustain an action under *section 1983*, a plaintiff must show (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived the plaintiff of a federal constitutional or statutory right.'" ***Hydrick v. Hunter, 466 F.3d 676, 689 (9th Cir. 2006)*** (quoting *Wood v. Ostrander, 879 F.2d 583, 587 (9th Cir. 1989))*.

[3] In addition, because he is no longer serving as Attorney General, Defendant Lockyer is no longer a proper Defendant in his official capacity. *See* Defs' Request for Judicial Notice ¶1; *Fed. R. Civ. P. 25(d)*.

actions at issue and the nature of the Constitutional violations (Federal and State) alleged. *See, e.g., Cabrera, 159 F.3d at 380* ("The accrual of a *§ 1983* claim depends upon the substantive basis of the claim.").[4]

2. Second Cause of Action—Breach of Contract

Plaintiffs' Second Cause of Action for "breach of contract" is brought against Defendant OAG only. A claim for breach of contract under California law consists of the following elements: (1) the existence of a contract; (2) performance by the plaintiff or excuse for nonperformance; (3) breach by the defendant; and (4) damages. *First Commercial Mortgage Co. v. Reece, 89 Cal. App. 4th 731, 745, 108 Cal. Rptr. 2d 23 (2001)* (citing 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 476, p. 570)); *see also Amelco Electric v. City of Thousand Oaks, 27 Cal. 4th 228, 243, 115 Cal. Rptr. 2d 900, 38 P.3d 1120 (2002)* ("Under a breach of contract theory, the plaintiff must demonstrate a contract, the plaintiff's performance or excuse for nonperformance, the defendant's breach, and damage to the plaintiff.").

Here, Plaintiffs have identified and alleged the existence of a written contract between Gibson and the OAG—the 2001 **[*11]** Agreement—and a separate "oral" agreement with Goode-Parker, which allegedly encompassed the same terms. (Compl. ¶¶ 85-86.) However, Plaintiffs have failed to allege any facts giving rise to a breach. As Defendants point out, Plaintiffs simply allege that the contract(s) were "breached" when OAG representative Adrian Randolph Esq. made statements that the 2001 Agreement would not be enforced unless Gibson agreed to retire. *(Id.* at ¶ 91.) However, such statements alone do not constitute a "breach," absent allegations that actual actions were taken in violation of the Agreement's terms. *See, e.g., Romano v. Rockwell Int?, Inc., 14 Cal. 4th at 488(1996)* ("A cause of action for breach of contract does not accrue before the time of breach.").

The only other allegations pertaining to Defendant OAG's "breach" of contract are contained in paragraph 93 of the Complaint, in which Plaintiffs allege that they were denied their promised "fresh start" with the Antitrust Section because they had been subjected to negative terms and conditions of employment, including but not limited to denial of challenging work assignments, reduction in job responsibilities, and "miscellaneous threats and actions." (Compl. ¶ 93.) However, the **[*12]** 2001 Agreement, attached as an Exhibit to the Complaint, expressly provides that nothing in its provisions "modifies Gibson's classification, salary, benefits or other terms or conditions of employment," except to the extent that it provides for certain reasonable accommodations for her disability. (Compl., Exh. 1, at 2.) Moreover, it is well-established under California law that state civil service employees cannot sue their employers for "breach of contract" for the imposition of unfavorable terms and conditions of employment. *See, e.g., Kim v. Regents of University of California, 80 Cal. App. 4th 160, 164, 95 Cal. Rptr. 2d 10 (2000)* ("[O]ur Supreme Court has made it clear that civil service employees cannot state a cause of action for breach of contract or breach of the implied covenant of good faith and fair dealing.") (citing *Shoemaker v. Myers, 52 Cal. 3d 1, 23-24, 276 Cal. Rptr. 303, 801 P.2d 1054 (1990))*; *see also Miller v. State, 18 Cal. 3d 808, 814, 135 Cal. Rptr. 386, 557 P.2d 970 (1977)* ("Nor is any vested contractual right conferred on the public employee because he occupies a civil service position since it is equally well settled that the terms and conditions of civil service employment are fixed by statute and not by contract.") (internal quotations omitted). Accordingly, Plaintiffs have failed to state a claim for breach of contract arising out of the 2001 Agreement or any other "employment" agreement.

3. Third Cause [*13] of Action—Interference with Contract

Plaintiffs third cause of action purports to be both a claim for interference with contract and contractual advantage and a claim for conspiracy to interfere with constitutional rights pursuant to *42 U.S.C. §1985(3)*, against Defendants Mauro and Motz.[5] However, as discussed below, Plaintiffs have failed to state a claim under either legal theory.

---

[4] Defendants' additional arguments vis avis Plaintiffs' first cause of action are directed to the issues of qualified immunity and Goode-Parker's lack of standing. The Court determines that these arguments will be more appropriate for consideration after amendment of the Complaint, if any.

Enacted as the Ku Klux Klan Act of 1981, *42 U.S.C. § 1985(3)* prohibits conspiracies "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws[.]" *Holgate v. Baldwin, 425 F.3d 671, 676 (9th Cir. 2005)* (quoting *42 U.S.C. § 1985(3)*). Accordingly, to state a claim for relief under *§ 1985(3)*, a plaintiff must allege: (1) the existence of a conspiracy to deprive the plaintiff of the equal protection of the laws; (2) an act in furtherance of the conspiracy; and (3) a resulting injury. *See Addisu V. Fred Meyer, Inc., 198 F.3d 1130, 1141 (9th Cir. 2000)* (citing *Scott v. Ross, 140 F.3d 1275, 1284*, *rehearing den.*, *151 F.3d 1247 (9th Cir. 1998))*.[6]

Here, Plaintiffs Complaint is entirely devoid of any substantive allegations concerning the existence of a conspiracy between Mauro and Motz. Rather, it simply alleges that, on July 27, 2005, Mauro faxed a copy of the 2001 Agreement to Motz, "in breach of the agreement to keep the same confidential," and that Motz "commenced to interfere with **[*14]** the terms of the contract to plaintiffs' detriment." (Compl. ¶¶ 99-100.) These allegations are insufficient to show the requisite "meeting of the minds" between Mauro and Motz. *See, e.g., Woodrum v. Woodward County, 866 F.2d 1121, 1126 (9th Cir. 1989)* ("To prove conspiracy between Rosson and the social services employees under *§ 1983*, an agreement or meeting of minds to violate the Woodrums' constitutional rights must be shown."); *see also Hoefer v. Fluor Daniel, Inc., 92 F. Supp. 2d 1055, 1057 (CD. Cal. 2000)* ("A conspiracy requires a meeting of minds.").[7]

To the extent that Plaintiffs seek to state a claim for the common law tort of intentional inference of contract, they are required to allege (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. *Quelimane Co. v. Stewart Title Guaranty Co., 19 Cal. 4th 26, 55, 77 Cal. Rptr. 2d 709, 960 P.2d 513 (1998)* (citations omitted). However, because both Defendant Mauro and Defendant Motz are employees of the OAG, Plaintiffs cannot meet even the first element. As Defendants point out, it is well established that a party cannot state a claim for interference with contract against a party to the alleged contract and/or the party's agents **[*15]** or employees. *See Shoemaker v. Myers, 52 Cal. 3d 1, 24, 276 Cal. Rptr. 303, 801 P.2d 1054 (1990)* ("[C]orporate agents and employees acting for and on behalf of a corporation cannot be held liable for inducing a breach of the corporation's contract.") (citations omitted). In their Opposition, Plaintiffs provide no argument as to why this principle should not equally apply to their claims, where the Defendants alleged to have interfered with their contractual rights are employees and/or agents of the contracting party—i.e., the OAG.

4. Fourth Cause of Action—Whistleblower Retaliation

Plaintiffs' final cause of action is for "Violation of California Whistleblower Protection Acts" (*Cal. Govt. Code §§ 8547-8547.12*), against Defendants OAG, Greene, Applesmith and Motz. Plaintiffs allege that, starting in November 2004, Defendants took numerous adverse actions against them (including the denial of the requests for additional, reasonable disability accommodations) in retaliation for their exercise of statutory and constitutional rights (including their *First Amendment* "petitioning" activities). (Compl. ¶¶ 109-110.) Plaintiffs further allege that, on or about December 12, 2004, Gibson filed complaints with the State Personnel Board ("SPB"), alleging the denial of two

---

[5] Defendant Mauro was the Senior Assistant Attorney General for the Government Law Section. Defendant Motz was Plaintiffs' immediate supervisor. (Compl. ¶¶ 12, 15.)

[6] Although the Complaint also references *42 U.S.C. § 1981*, in their Opposition. Plaintiffs implicitly concede that *42 U.S.C. § 1985(3)* is the only section under which their "conspiracy" claim can be brought. *(See* Opp'n at 8.)

[7] In addition, although not yet addressed in the Ninth Circuit, numerous other circuit and district courts have held that, pursuant to the application of the "infra-corporate conspiracy doctrine," individual employees of a single employer/governmental agency cannot conspire with one another for the purposes of giving rise to liability under *§ 1985(3)*. *See Hoefer, 92 F.Supp.2d at 1057-58* (collecting cases). Given the weight of the case law in favor of applying the doctrine, the Court agrees that it serves as an additional bar to Plaintiffs' claims as currently alleged.

reasonable accommodation requests and "whistle-blower" **[*16]** retaliation. Gibson filed additional complaints pertaining to additional acts of retaliation at some point thereafter. *(Id.* at ¶¶ 111-112.) Plaintiffs acknowledge that all of these complaints remain pending with the SPB at this time. *(Id.* at ¶ 115).[8]

The exhaustion of administrative remedies before the SPB is a statutory prerequisite to the filing of a suit for damages under the California Whistleblower Protection Act. *See* *Cal. Govt. Code § 8547.8(c)* ("[A]ny action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the State Personnel Board pursuant to *subdivision (a)*, and the board has issued, or failed to issue, findings pursuant to *Section 19683*."). Moreover, "in California, a requirement that administrative remedies be exhausted is jurisdictional." *California Correctional Peace Officers Assn. [CCPOA] v. State Personnel Bd., 10 Cal. 4th 1133, 1151, 43 Cal. Rptr. 2d 693, 899 P.2d 79(1995)* (citation omitted); *see also* *Hood v. Hacienda La Puente Unified School Dist., 65 Cal. App. 4th 435, 441, 76 Cal. Rptr. 2d 448 (1998)*.

In their Opposition, Plaintiffs offer no explanation as to why they have met the exhaustion requirements in their case, notwithstanding their failure to obtain a final decision from the SPB, other than the blithe assertion that the filing of an SPB claim is *not* a condition precedent to suit. *(See* Opp'n at 8.) At the same time, the Complaint **[*17]** itself alleges that the SPB has failed to issue timely findings as required by *Cal. Govt. Code § 18671.1* (Compl. ¶ 115), which may be deemed to constitute an exhaustion of "all available administrative remedies" in the absence of a waiver. *See* *Cal. Govt. Code § 18671.1*[9] Nevertheless, the facts as alleged indicate that there *has* been a waiver of the statutory time limits on Plaintiffs' part, given that they have waited more than two years from the date of filing of the SPB complaints to file this lawsuit, and more than a year and a half after the expiration of the statutory time period for issuance of a decision. *See, e.g., CCPOA, 10 Cal. 4th at 1156 n.6* (failure to object to SPB's failure to issue a decision "within a reasonable time after expiration of the statutory time limit" constitutes an implicit waiver thereof). Accordingly, absent additional allegations regarding actions taken to protect against waiver of the statutory time limits, Plaintiffs cannot circumvent the statutory exhaustion requirements by virtue of their objections to the SPB's failure to issue timely findings. Concomitantly, they cannot bring a claim for violation of the California Whistleblower Protection Act at this time.[10]

II. Motion to Strike

Because Defendants' motion to dismiss is granted **[*18]** in its entirety, their alternative motion to strike Plaintiffs' prayer for punitive damages is moot.

CONCLUSION

---

[8] In addition, Defendants have requested the Court to take judicial notice of the pending SPB actions. Over Plaintiffs' objections, the Court agrees that these matters are the proper subject of judicial notice and are proper for consideration on a motion to dismiss under *Rule 12(b)(6)*. *See* *Fed R. Evid. 201*; *Parrino v. FHP, Inc., 146 F. 3d 699, 706 (9th Cir. 1998)* ("A district court ruling on a motion to dismiss may consider documents whose contents are alleged in a complaint and whose authenticity no party questions. . .") (internal quotation marks omitted). At the same time, the Court sustains Defendants' objections to Plaintiffs' "exhibits" to their Opposition to the Motion, as they are not the proper subject for judicial notice.

[9] Specifically, *Cal Govt. Code § 18671.1* provides that "the period from the filing of the petition to the decision of the board shall not exceed six months or 90 days from the time of the submission, whichever time period is less, and except that the board may extend the six-month period up to 45 additional days" and that "the provisions relating to the six-month or the 90-day periods for a decision maybe waived by the employee but if not so waived, a failure to render a timely decision is an exhaustion of all available administrative remedies."

[10] In addition, the Court is cognizant of the fact that the pending SPB complaints appear to be directed only to retaliatory action taken against Gibson, and not Goode-Parker. Any amended Complaint must include allegations sufficient to establish exhaustion by both Plaintiffs.

Based on the foregoing, Defendants' Motion to Dismiss (docket no. 12) is GRANTED, without prejudice to Plaintiffs' filing of an amended complaint to cure, if possible, the defects identified herein, except that Plaintiffs' *§ 1983* claims against the OAG and Defendants Lockyer, Frank, Applesmith and Mauro in their official capacities are dismissed without leave to amend. Said amended complaint shall be filed no later than ten (10) days from the date of entry of this Order.

Defendants' Motion to Strike is DENIED as MOOT.

IT IS SO ORDERED.

February 28, 2007

/s/ Flokence-Marie Cooper

FLOKENCE-MARIE COOPER, JUDGE

UNITED STATES DISTRICT COURT

In re K-Dur Antitrust Litig.

United States District Court for the District of New Jersey

March 1, 2007, Decided; March 1, 2007, Filed

Civil Action No. 01-1652 (JAG); MDL Docket No. 1419

Reporter
2007 U.S. Dist. LEXIS 100238 *; 2007 WL 5297755

IN RE K-DUR ANTITRUST LITIGATION; This Document Relates To: All Actions

Subsequent History: Later proceeding at *In re K-Dur Antitrust Litig., 2007 U.S. Dist. LEXIS 102182 (D.N.J., Mar. 12, 2007)*

Prior History: *In re K-Dur Antitrust Litig., 2007 U.S. Dist. LEXIS 96066 (D.N.J., Jan. 2, 2007)*

Core Terms

patent, Plaintiffs', purchasers, indirect, preempted, argues, sham, cases, competitors, federal patent law, standing to bring, parties, antitrust, motion to dismiss, inequitable conduct, lack standing, patent holder, patent law, Defendants', state law, infringement, customers, Consolidated, antitrust claim, monopolization, marketplace, bad faith, cause of action, federal law, allegations

Counsel: **[*1]** For STEPHEN M. ORLOFSKY, Special Master: STEPHEN M. ORLOFSKY, LEAD ATTORNEY, BLANK, ROME, LLP, PRINCETON, NJ.

For HIP HEALTH PLAN OF FLORIDA, INC., on behalf of itself and all others similarly situated, Plaintiff: DANIEL BERGER, LEAD ATTORNEY, BERGER & MONTAGUE, PC, PHILADEPHIA, PA; LISA J. RODRIGUEZ, LEAD ATTORNEY, TRUJILLO, RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ.

For Indirect Purchaser Plaintiffs, Plaintiff: SHELLY L. FRIEDLAND, COHEN, MILSTEIN, HUSFLD & TOLL, P.L.L.C., NEW YORK, NY; THEODORE M. LIEVERMAN, SPECTOR, ROSEMAN & KODROFF, PC, PHILADELPHIA, PA; ALLYN ZISSEL LITE, LITE DEPALMA GREENBERG, LLC, NEWARK, NJ.

For Direct Purchaser Plaintiffs, Plaintiff: BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY, ARONCHICK, SEGAL & PUDLIN, PHILADELPHIA, PA.

For AMY REICHERT, on behalf of herself and all others similarly situated, GREAT LAKES HEALTH PLAN, INC., on behalf of itself and all others similarly situated, JOSEPH J. MORGAN, on behalf of himself and all others similarly situated, CARL M. WALLACE, NORMA SEABROOK, ISRAEL REXACH, ELIAS HUSAMUDEEN, WILLIAM WASNICKI, GUY ANDERSON, ROBERT SEABROOK, STEVEN ROBINSON, On behalf of Correction officers benevolent association security benefits fund, **[*2]** on behalf of themselves and all other similarly situated, Consol Plaintiffs: LISA J. RODRIGUEZ, LEAD ATTORNEY, TRUJILLO, RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ.

For JACQUELINE CUNDIFF, Consol Plaintiff: DAVID K. LIETZ, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, COALE, COOLEY, LIETZ & MCINERNY, ESQS., WASHINGTON, DC; FREDERICK P. FURTH, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, THE FURTH FIRM LLP, SAN FRANCISCO, CA.

For ESTELLE TRAVERS, on Behalf of Herself and all Others Similarly Situated, Consol Plaintiff: GUIDO SAVERI, RICHARD ALEXANDER SAVERI, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, SAVERI & SAVERI, INC., SAN FRANCISCO, CA.

For MECHANICAL CONTRACTORS-UA LOCAL 119 WELFARE PLAN, by and through its Trustees, Danny Price, William Morrison, Phillip Holloway, J. Bradley Donaghey, Glen Reed Jr. and Stanley Small, IBEW-NECA LOCAL 505 HEALTH & WELFARE PLAN, by and through its Trustees, Donnie Adams, Terry N. Adams, Fred J. Moore, Charles S. Belk, Charles Freeman and Larry Smith, A.F. OF L.-A.G.C. BUILDING TRADES WELFARE PLAN, by and through its Trustees, Larry Fincher, Gordon Parmer, Charles Loftin, Gene Stokely, Jack Terry and Andy Joiner, Consol Plaintiffs: **[*3]** JOSEPH J. DEPALMA, LEAD ATTORNEY, LITE, DEPALMA, GREENBERG, LLC, NEWARK, NJ.

For ESTATE OF STANLEY NEMSER, Consol Plaintiff: ALLYN ZISSEL LITE, LEAD ATTORNEY, LITE DEPALMA GREENBERG, LLC, NEWARK, NJ; ANN D. WHITE, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, ANN D. WHITE LAW OFFICES, P.C., JENKINTOWN, PA.

For CONSUMERS FOR AFFORDABLE HEALTHCARE COALITION, Consol Plaintiff: STEVEN J. PFEFFERLE, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, TERHAAR ARCHIBALD PFEFFERLE & GRIEBEL, MINNEAPOLIS, MN.

For WALGREEN CO., Consol Plaintiff: DEBORAH S. CORBISHLEY, LEAD ATTORNEY, KENNY, NACHWALTER, SEYMOUR, ARNOLD, CRITCHLOW & SPECTOR, PA, MIAMI, FL.

ECKARD CORPORATION, THE KROGER CO., ALBERTSON'S INC., SAFEWAY, INC., HY-VEE, INC., Consol Plaintiffs, Pro se.

For NATALIE SUTIN, on behalf of herself and all others similarly situated, Consol Plaintiff: LIONEL Z GLANCY, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, Los Angeles, CA.

For ROSE LIPSCOMB, NEW YORK STATE-WIDE SENIOR ACTION COUNCIL, INC., MASSACHUSETTS SENIOR ACTION COUNCIL, on behalf of themselves and all others similarly situated, Consol Plaintiffs: ALLYN ZISSEL LITE, LEAD ATTORNEY, LITE DEPALMA GREENBERG, LLC, NEWARK, NJ.

For **[*4]** GEORGE BURNS, Individually and on behalf of all others similarly situated, Consol Plaintiff: ANDREW ROBERT JACOBS, LEAD ATTORNEY, BERMAN, SAUTER, RECORD & JARDIM, P.C., MORRISTOWN, NJ.

For MILDRED GROSSMAN, on her own behalf and on behalf of all others similarly situated, Consol Plaintiff: C. OLIVER BURT, III, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, BURT & PUCILLO, PC, NORTHRIDGE CENTRE, WEST PALM BEACH, FL.

For LOUISIANA WHOLESALE DRUG CO. INC, on behalf of itself and all others similarly situated, Consol Plaintiff: PETER S. PEARLMAN, LEAD ATTORNEY, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, SADDLE BROOK, NJ; REBEKAH R. CONROY, WALDER HAYDEN & BROGAN, ROSELAND, NJ.

For UNITED FOOD AND COMMERCIAL WORKERS LOCAL 56 HEALTH & WELFARE DEPARTMENT, on behalf of itself and all others similarly situated, PATRICK J. LYNCH, Consol Plaintiffs: LISA J. RODRIGUEZ, LEAD ATTORNEY, TRUJILLO, RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ; THEODORE M. LIEVERMAN, SPECTOR, ROSEMAN & KODROFF, PC, PHILADELPHIA, PA.

For FRANCES IRENE STEADMAN, Consol Plaintiff: FREDERICK T. KUYKENDALL, III, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, GARDNER, MIDDLEBROOKS, FLEMING, GIBBONS & KITTRELL, PC, **[*5]** MCADORY BUILDING, BIRMINGHAM, AL; JAMES H MCFERRIN, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, SOUTHEASTERN LEGAL GROUP, BIRMINGHAM, AL; S C MIDDLEBROOKS, III, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, GARDNER, MIDDLEBROOKS, FLEMING & GIBBONS, PC, MOBILE, AL.

For DAWN MAFFEI, Consol Plaintiff: MICHAEL G. NAST, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, RODA & NAST, PC, LANCASTER, PA.

For LEONARD BROWN, Consol Plaintiff: JENNIFER SHARON ABRAMS, JOSEPH J. TABACCO, JR., LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, BERMAN, DEVALERIO, PEASE & TABACCO, PC, SAN FRANCISCO, CA.

For ARKANSAS CARPENTERS HEALTH & WELFARE FUND, On its own behalf & on behalf of all others similarly situated, Consol Plaintiff: GREG THOMPSON, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, PROVOST & UMPHREY, BEAUMONT, TX.

For MARY MARGARET PIETSCH, individually and on behalf of a class of persons similarly situated, Consol Plaintiff: LYNN L. SARKO, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, KELLER & ROHRBACK, LLP, SEATTLE, WA; RON KILGARD, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, DALTON, GOTTO, SAMSON & KILGARD, PLC, PHOENIX, AZ.

For DONALD W. HANNU, on behalf **[*6]** of himself and all others similarly situated, Consol Plaintiff: NEIL A. MCEWEN, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, INVER GROVE HEIGHTS, MN.

For BETTY SAAD, Consol Plaintiff: DIANE A. NYGAARD, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, LEAWOOD, KS.

For EVELYN BARCZAK, ANTHONY DEBELLA, on behalf of himiself and others similiarly situated, Consol Plaintiffs: MICHAEL J. FLANNERY, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, CAREY & DANIS, ST. LOUIS, MO.

For AGATHA AGATHA "NIKKI&quo MCCUTCHON, Consol Plaintiff: THOMAS M. SOBOL, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, HAGENS BERMAN SOBOL SHAPIRO LLP, CAMBRIDGE, MA.

For RITE AID CORPORATION, Consol Plaintiff: BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY, ARONCHICK, SEGAL & PUDLIN, PHILADELPHIA, PA; JERRY L. TANENBAUM, LEAD ATTORNEY, SCHNADER HARRISON SEGAL & LEWIS LLP, CHERRY HILL, NJ; STEVE D. SHADOWEN, COUNSEL NOT ADMITTED TO USDC-NJ BAR, HANGLEY ARONCHICK SEGAL & PUDLIN, HARRISBURG, PA.

For COBALT CORP., Consol Plaintiff: CHARLES J. BARNHILL, JR., WILLIAM P. DIXON, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, MINER, BARNHILL & GALLAND, ESQS., MADISON, WI; MARY C. NASH, LEAD ATTORNEY, COUNSEL NOT **[*7]** ADMITTED TO USDC-NJ BAR, COBALT CORPORATION, MILWAUKEE, WI; RICHARD W. COHEN, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, LOWEY, DANNENBERG, BEMPORAD & SELINGER, ESQS., THE GATEWAY, WHITE PLAINS, NJ.

For CVS MERIDIAN, INC., Consol Plaintiff: BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY, ARONCHICK, SEGAL & PUDLIN, PHILADELPHIA, PA; STEVE D. SHADOWEN, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, HANGLEY ARONCHICK SEGAL & PUDLIN, HARRISBURG, PA.

For ROBERT MITCHELL, Consol Plaintiff: DAVID J. SHEA, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, MANTESE, MILLER & SHEA, PLLC, TROY, MI; KENNETH J. MCINTYRE, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, DICKINSON WRIGHT, ESQS., DETROIT, MI; ROBERT L. MICHELS, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, WINSTON & STRAWN LLP, CHICAGO, IL.

Judges: STEPHEN M. ORLOFSKY, SPECIAL MASTER.

Opinion by: STEPHEN M. ORLOFSKY

Opinion

SPECIAL MASTER'S REPORT AND RECOMMENDATIONS ON DEFENDANTS' SCHERING-PLOUGH CORPORATION, KEY PHARMACEUTICALS, INC., UPSHER-SMITH LABORATORIES, INC., WYETH AND ESI

LEDERLE APPLICATIONS TO THE SPECIAL MASTER TO DISMISS CERTAIN CLAIMS IN INDIRECT PURCHASERS' AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

ORLOFSKY, SPECIAL MASTER

INTRODUCTION

This **[*8]** consolidated antitrust action has been transferred to the District of New Jersey by the Judicial Panel on Multidistrict Litigation pursuant to *28 U.S.C. § 1407*. Pursuant to *Rule 53 of the Federal Rules of Civil Procedure*[1] and by consent of all parties in the above-captioned action, I have been appointed by order of this Court, dated April 12, 2006, to preside as a Special Master to review and decide all currently pending and future motions directed to Judge Joseph A. Greenaway, Jr, and Magistrate Judge Madeline Cox Arleo including, but not limited to discovery disputes, class certification and summary judgment (the "Appointment Order") (Docket No. 316). The Appointment Order provides that the decision of the Special Master on any matter before the Special Master will conclusively resolve that matter unless an appropriate objection is filed pursuant to *Fed. R. Civ. P. 53(g)*.

This Report **[*9]** and Recommendation will decide Defendants' Schering-Plough Corporation, Key Pharmaceuticals, Inc., Upsher-Smith Laboratories, Inc., Wyeth and ESI Lederle Applications to the Special Master to Dismiss Certain Claims in the Indirect Purchasers' Amended Consolidated Class Action Complaint (the "Partial Motion to Dismiss"). This Report and Recommendations is based upon the parties' written submissions in support of and in opposition to the Partial Motion to Dismiss and the oral argument presented by the parties at a January 24, 2007 hearing before me.

BACKGROUND

The factual background of this consolidated action and the underlying motions have been set forth in detail in Judge Greenaway's decision in this case, *see In re K-Dur Antitrust Litig., 338 F.Supp.2d 517 (D.N.J. 2004)*, and my Report and Recommendation on: (1) Defendants Schering-Plough Corporation, Key Pharmaceuticals, Inc. and Upsher-Smith Laboratories, Inc.'s Motion for Sanctions against Plaintiff Commonwealth of Pennsylvania; (2) Plaintiff Commonwealth of Pennsylvania's Cross-Motion to Dismiss; and (3) Motion of James Morgan to Intervene as Class Representative (Docket No. 328). Familiarity with that factual background is presumed **[*10]** and will not be repeated in this Report and Recommendation except where necessary to resolve this motion.

DEFENDANTS' APPLICATION TO DISMISS CERTAIN CLAIMS IN THE INDIRECT PURCHASER PLAINTIFFS' AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

Pending before me are the Applications of Defendants, Schering-Plough Corporation ("Schering"), Key Pharmaceuticals, Inc. ("Key"), Upsher-Smith Laboratories, Inc. ("Upsher"), Wyeth and ESI Lederle ("ESI") (collectively, "Defendants"), to dismiss certain claims in the Indirect Purchasers' Amended Consolidated Class Action Complaint (the "Partial Motion to Dismiss"). The relief sought from the Court is a determination that, *inter*

---

[1] **(a) Appointment.**

(1) Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

***

(C) address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

alia, the Indirect Purchaser Plaintiffs' (the "IP Plaintiffs") lack standing to bring the *Walker Process* and "sham litigation" claims contained in their Amended Consolidated Class Action Complaint (the "Amended Complaint") and, therefore, those claims should be dismissed. Alternatively, Defendants seek a determination that the IP Plaintiffs' *Walker Process* and "sham litigation" claims are preempted by Federal law and, therefore, cannot be considered by this Court.

At an earlier stage of this litigation, when the IP Plaintiffs moved **[*11]** to amend the original Complaint, the parties stipulated that the Defendants had reserved the right to raise the defense of "futility" with respect to any claims raised in the IP Plaintiffs' Amended Consolidated Class Action Complaint. *See* Transcript of Oral Argument of January 24, 2007, at 4. For purposes of this Report and Recommendations (the "Report"), I shall treat Defendants' respective Applications as the Defendants' exercise of the reserved "futility" defense with respect to those claims in the Indirect Purchasers' Amended Consolidated Class Action Complaint to which the respective Applications to Dismiss specifically apply.

I.LEGAL STANDARD GOVERNING MOTIONS TO DISMISS ANTITRUST CLAIMS

When considering a motion to dismiss under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, a court is "required to accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in a light most favorable to the non-movant." *Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994)* (citation omitted). However, a court need not accept a plaintiff's "bald assertions or legal conclusions." *Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir. 1997)*. **[*12]** "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *In re Burlington Coat Factory Securities Litig., 114 F.3d 1410, 1420 (3d Cir. 1997)* (citation omitted). Thus, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*.

However, summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Lum v. Bank of Am., 361 F.3d 217, 228 (3d Cir. 2004)* (citing *Poller v. Columbia Broad. Sys., 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962))*; *see also* *Brotech Corp. v. White Eagle Int'l Tech. Group, 2004 U.S. Dist. LEXIS 11552, 2004 WL 1427136, at *3 (E.D. Pa. June 21, 2004)* (citation omitted) ("The dismissal standard is higher in antitrust cases than generally"). Moreover, the Third Circuit Court of Appeals has directed that "[courts] should be extremely liberal in construing antitrust complaints." *See* *Lum, at 228* (quoting **[*13]** *Knuth v. Erie-Crawford Dairy Co-op. Ass'n, 395 F.2d 420, 423 (3d Cir. 1968)*, *cert. denied*, *410 U.S. 913, 93 S. Ct. 966, 35 L. Ed. 2d 278 (1973)*).

II.DISCUSSION

A.Schering and Key's Application to Dismiss Certain Claims in the Amended Complaint

On September 8, 2006, Schering-Plough Corporation and Key Pharmaceuticals, Inc. (collectively "Schering") submitted an application to the Special Master to dismiss certain claims in the Indirect Purchasers' Amended Consolidated Class Action Complaint (the "Schering Motion"). In support of the Schering Motion, Schering simultaneously filed a memorandum in support of the Schering Motion (the "Schering Opening Brief").

In its opening brief, Schering notes that the Indirect Purchaser Plaintiffs' ("IP Plaintiffs" or "Plaintiffs")[2] original complaint challenged the legitimacy of the Schering-Upsher and Schering-ESI Lederle settlement agreements, but did not claim that the Schering patent was invalid. By comparison, Schering argues that the Amended Complaint contains "an entirely new cause of action" ("Count III") that does not depend on the legality of the settlement agreements, rather it states a *Walker Process* monopolization claim exclusively against Schering, Schering contends that **[*14]** Count III alleges that the Schering patent was obtained by fraud on the Patent and Trademark Office ("PTO") or inequitable conduct, and maintained through sham litigation. (Schering Op, Br. at 1.)[3] Finally, Schering notes that this claim does not rely upon the settlement agreements, but seeks damages from a time period long before the settlements were entered into. Thus, Schering argues that the Plaintiffs essentially seek the right to bring a *Walker Process* claim and litigate the validity of Schering's patent notwithstanding the lawfulness of the settlement agreements. Schering argues that such relief is not permitted under existing law. (*Id.* at 2.)

First, Schering argues that Plaintiffs' *Walker Process* claims should be dismissed because Plaintiffs lack standing to bring them. Instead, Schering argues that only competitors have standing to bring such claims. (Schering Op. Br. at 2.) In particular, Schering contends that it is "settled patent law" that only parties who have been threatened with a patent infringement suit have standing to bring an action pursuant to *Walker Process Equip. v. Food Machinery & Chemical Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)* ("*Walker Process*"). (*Id.* at 6.) Moreover, Schering asserts that two cases from the District Court for the District of New Jersey have confirmed this principle of law, *see, In re Remeron Antitrust Litig., 335 F.Supp.2d 522 (D.N.J. 2004)* ("*Remeron*") and *Carrot Components Corp. v. Thomas & Betts Corp., 229 U.S.P.Q. 61 (D.N.J. 1986)* ("*Carrot Components*"). (*Id.*) In addition, Schering cites to a number of additional cases in support of its argument that only competitors have standing to bring *Walker Process* claims. Further, Schering argues that the limitations placed on standing are based on "sound policy considerations" and notes that even the *Walker Process* **[*16]** court "expressed concern about subjecting patent holders to a proliferation of suits challenging the validity of their patents." (*Id.* at 7.) Schering adds that if parties such as the Indirect Purchasers are given standing, it would essentially precipitate a situation where consumers would have standing to challenge the validity of the patents. Schering argues that such a situation would "undermine settled principles of patent law" which provide that a patent holder may only be subject to *Walker Process* suits by those against whom the patent holder takes action. Finally, Schering argues that it is "particularly inappropriate" to permit the Indirect Purchasers to relitigate the patent validity issues that were settled in the underlying action. (*Id.* at 8.)

Second, Schering argues that the Plaintiffs' monopolization claims, although brought under state law, are preempted by federal patent law. (Schering Op. Br. at 2.) Specifically, Schering argues that because Plaintiffs' *Walker Process* claims are based on, *inter alia*, Schering's conduct before the PTO, the claims are preempted by federal patent law. (Schering Op. Br. at 9.) Schering relies, in particular, on *Semiconductor Energy Lab. Co., Ltd. v. Samsung Electronics, Co., Ltd., 204 F.3d 1368 (Fed. Cir. 2000)* **[*17]** ("*Semiconductor Energy*") in support of its preemption argument. Schering argues that the *Semiconductor Energy* court rejected that plaintiff's argument that it had avoided preemption by alleging a claim that required proof of elements "beyond bad faith misconduct before the PTO." (*Id.* at 10.) Schering argues that the *Semiconductor Energy* court ultimately dismissed that plaintiff's state law claim precisely because it had failed to allege more than the elements found in the patent law cause of action for inequitable conduct. Based on this precedent, Schering contends that in *In re Ciprofloxacin Hydrochloride Antitrust Litig., 363 F.Supp.2d 514 (E.D.N.Y. 2005)* ("*Cipro*"), the Court had similarly dismissed inequitable conduct and sham litigation claims brought under state antitrust and consumer protection law. (*Id.* at 10.) Schering argues that in *Cipro*, the court dismissed indirect purchaser's *Walker Process* and "sham litigation" claims because the success of those claims was dependent on proving that the patent holder had withheld or misrepresented information before the PTO and, therefore, the court determined that the claims rested entirely on patent law and,

---

[2] This reference to the Indirect Purchaser Plaintiffs as "Plaintiffs" is limited to the discussion contained in this section of the Report. Subsequent references to "Plaintiffs," that is, as contained in the "Analysis" section of this Report, is intended to refer to the Indirect Purchaser Plaintiffs and the Direct Purchaser Plaintiffs collectively.

[3] References to Schering's Memorandum in Support of its Application to the Special Master to Dismiss Certain Claims in the Indirect Purchasers' Amended Consolidated Class Action Complaint shall **[*15]** be cited as "Schering Op, Br. at __."

thus, were preempted. (*Id.* at 10-11.) **[*18]** Schering urges that the IP Plaintiffs' sham litigation claims fail for the same reasons. Schering contends that these claims in this case are wholly dependent on proof of Schering's enforcement of a patent that was allegedly procured by fraud on the PTO and, therefore, are simply an extension of Plaintiffs' *Walker Process* claims. (*Id.* at 11.) Schering notes that in *Cipro*, the court held that the indirect purchaser's sham litigation claims were preempted because federal patent law controls conduct before the PTO, conduct upon which the instant claims are similarly based. According to Schering, the fact that the IP Plaintiffs claim that Schering's patent suits were "objectively" baseless does not change this result. (Schering Op. Br. at 12.) Finally, Schering asserts that the IP Plaintiffs admit that their sham litigation claims are based on the merits of Schering's patent and contend that this fact further supports the conclusion that these claims are preempted under federal patent law (*Id.*)

As a consequence, Schering argues that Count III of the Amended Complaint, and any claims in Counts I, II and IV that purport to state *Walker Process* **[*19]** or sham litigation claims should be dismissed.[4]

B.<u>Wyeth and ESI Lederle's Application to Dismiss Certain Claims in the Amended Complaint</u>

Contemporaneous with Schering's submission of the Schering Motion, Wyeth and ESI Lederle (collectively "ESI") submitted an application to the Special Master to dismiss portions of the Amended Consolidated Class Action Complaint filed by the Indirect Purchaser Plaintiffs (the "ESI Motion"). In the memorandum accompanying ESI's motion, ESI similarly **[*20]** contends that the IP Plaintiffs assert a *Walker Process* monopolization claim in Count III of the Amended Complaint based on Schering's alleged fraud upon the PTO. (ESI Op. Br. at 1.)[5] However, ESI further argues that the IP Plaintiffs also incorporate *Walker Process* claims into Count II of the Amended Complaint which seeks restitution, disgorgement, constructive trust, and unjust enrichment under state law and Count IV which seeks damages for restraint of trade under state law. (*Id.*) As a result, ESI moves for dismissal of the IP Plaintiffs' *Walker Process* claims in Count III of the Amended Complaint and to the extent they appear in other counts of the Amended Complaint. (ESI Op. Br. at 1.)

First, ESI argues that Count III and all other *Walker Process* claims should be dismissed for lack of standing. ESI contends that federal court decisions from the District of New Jersey and other federal courts provide that *Walker Process* claims are **[*21]** reserved to parties who are competitors of a patent holder, or parties against whom a patent holder has tried to enforce its patent. By comparison, ESI notes that the IP Plaintiffs are simply purchasers of K-Dur and, further, do not allege that Schering enforced or threatened to enforce its patent against them. Therefore, ESI argues that the IP Plaintiffs lack standing to bring *Walker Process* claims. (*Id.* at 2.) Like Schering, ESI cites *Remeron* and *Carrot Components* as decisions from the District of New Jersey which support the argument that a party lacks standing to bring a *Walker Process* claim unless that patent holder has enforced or threatened to enforce their patent against that party. (*Id.* at 8.) ESI also cites a number of cases, including *Remeron* and *Cipro*, for the premise that standing to allege a *Walker Process* claim can only be exercised by a patent holder's competitors. (*Id.* at 9.) In addition, ESI argues that the IP Plaintiffs' *Walker Process* claims should be dismissed because the IP Plaintiffs have not alleged and cannot allege that they were competitors of Schering and, further, that they do not allege that Schering enforced or threatened to enforce the patent for K-Dur **[*22]** against them. (*Id.* at 13.) Accordingly, ESI contends that the claims in this case suffer from the same defects as those claims brought in the *Remeron* case. Further, ESI adds that the IP Plaintiffs' "more remote status" as indirect purchasers of K-Dur

---

[4] Schering has also objected to Count III of the Indirect Purchasers Plaintiffs' Amended Complaint on the basis that no states recognize *Walker Process* claims under state law, that the instant *Walker Process* claims are barred by the applicable statutes of limitation and that the IP Plaintiffs do not allege injury prior to the date that generic entry occurred. I have given due consideration to these additional arguments. However, as discussed in more detail below, because I have resolved the instant motions to dismiss based on the litigants' respective standing and preemption arguments, I find that it is unnecessary to address the substance of these remaining arguments for purposes of this Report and Recommendations.

[5] References to Wyeth and ESI Lederle's Memorandum in Support of their Application to Special Master to Dismiss Portions of the Amended Consolidated Class Action Complaint on behalf of Indirect Purchaser Plaintiffs shall be cited as "ESI Op. Br. at __."

weakens any argument that they have standing to bring a *Walker Process* claim. (*Id.*) ESI also challenges the decision of the District Court of the District of Columbia in *Molecular Diagnostics Labs. v. Hoffman LaRoche, Inc., 402 F.Supp.2d 276 (D.D.C. 2005)* ("*Molecular Diagnostics*") claiming that the court's conclusion that *direct* purchasers have standing to bring *Walker Process* claims is an "anomaly" among courts that have considered the issue and argues that, in any event, the decision does not provide support for the IP Purchasers' assertion of their claims. (ESI Op. Br. at 14.) Finally, ESI contends that the *Walker Process* claims asserted against ESI are particularly problematic because the Amended Complaint fails to allege that ESI did anything to help obtain the Schering patent and notes that ESI was, in fact, a defendant in a patent infringement action brought by Schering against ESI. ESI argues that the IP Plaintiffs' *Walker Process* **[*23]** claim "turns standing on its head" because not only do the IP Plaintiffs lack standing to bring such a claim, but they purport to bring this action against one of the few entities that might actually have standing to bring such a claim. Therefore, ESI reiterates that the IP Plaintiffs' *Walker Process* claim should be dismissed for lack of standing. (*Id.* at 15.)

Second, ESI argues that, even if the IP Plaintiffs have standing, their *Walker Process* and "sham litigation" claims should be dismissed because they are based on alleged misconduct before the PTO and, therefore, are preempted by federal patent law. (*Id.*) In support of its preemption argument, ESI relies upon several cases, including *Cipro, Semiconductor Energy and Abbott Labs. v. Brennan, 952 F.2d 1346 (Fed. Cir. 1991)*, in each of which, ESI notes, the courts dismissed state law causes of action that were based on misconduct before the PTO. (*Id.* at 16.) Similarly, ESI argues that because the IP Plaintiffs' state law *Walker Process* and "sham litigation" claims are based "exclusively" on Schering's alleged fraudulent activity before the PTO, they are preempted by federal patent law and should be dismissed. (Id. at 17-18.) ESI further **[*24]** argues that to allow these claims to go forward would constitute "an inappropriate collateral intrusion on the regulatory procedures of the PTO" and a usurpation of Congressional authority that was reserved to federal patent law. (Wyeth Op. Br. at 18.)

Therefore, ESI argues that the IP Plaintiffs' *Walker Process* and "sham litigation" claims should be dismissed.[6]

C. Upsher's Application to Dismiss Certain Claims in the Amended Complaint

Like Schering and ESI, Upsher has also made an application to dismiss certain claims in the IP Plaintiffs' **[*25]** Amended Complaint (the "Upsher Motion"). In support of the Upsher Motion, Upsher asserts that under Count III the Amended Complaint, the IP Plaintiffs assert a wholly new cause of action alleging *Walker Process* and "sham litigation" claims, but argues that these claims are alleged against Schering only. (Upsher Op. Br. at 1.)[7] Upsher further argues that because the IP Plaintiffs have failed to allege facts reflecting that Upsher is liable for Schering's conduct, as alleged in Count III, Upsher cannot be held liable for any damages arising from that count of the Amended Complaint. (*Id.* at 1-2.) Accordingly, Upsher moves to dismiss Count III of the Amended Complaint pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. (*Id.* at 2.)

D. Indirect Purchaser Plaintiffs' Response in Opposition to the Applications

[6] ESI also argues that the IP Plaintiffs' claims for damages beginning in 1989 should be dismissed and that the claims should be limited to a period beginning in March 2002. ESI also incorporated certain sections of Schering and Upsher's respective memoranda in support of their motions to dismiss. I have given due consideration to these additional arguments, However, as discussed in more detail below, because I have resolved the instant motions to dismiss based on the litigants' respective standing and preemption arguments, I find that it is unnecessary to address the substance of these remaining arguments for purposes of this Report and Recommendations.

[7] References to the opening brief in support of Upsher-Smith's Application to the Special Master to Dismiss Certain Claims in the Indirect Purchasers' Amended Consolidated Class Action Complaint shall be cited as "Upsher Op. Br. at __."

On October 23, 2006, the Indirect Purchaser Plaintiffs ("IP Plaintiffs" or "Plaintiffs")[8] filed a memorandum of law in opposition to the respective **[*26]** Defendants'[9] motions to dismiss (the "IP Plaintiffs Answering Brief"). The IP Plaintiffs argue, *inter alia*, that they have standing to assert their monopolization claims (*see* IP Plfs, Ans. Br. at 2)[10] and that those claims are not preempted by patent law. (*Id.* at 6.)

First, Plaintiffs contend that Defendants' standing argument is focused exclusively on the *Walker Process* component of their monopolization claim, and not the *Orange Book* and "sham litigation" allegations. **[*27]** (*Id.* at 1-2.) With respect to *Walker Process*, the Plaintiffs argue that the "gist" of the case was that "proof that the patent holder obtained the patent through knowing and willful misrepresentation of facts to the PTO 'would be sufficient to strip [the holder] of its exemption from the antitrust laws.'" (*Id.* at 3 (citing *Walker Process, 382 U.S. at 176*).) Plaintiffs argue that in this case, their goal is to strip Defendants of *Noerr-Pennington* antitrust immunity, rather than to "annul" the patent in question. (*Id.*) Plaintiffs claim that, consistent with *Walker Process*, they have standing to bring an antitrust action notwithstanding the fact that the underlying facts in support of the claim include fraudulent procurement of a patent. (*Id.* at 4.) Plaintiffs add that the rationale articulated by the court in *Molecular Diagnostics* reflects why the Defendants' standing arguments are incorrect. Plaintiffs further note that Defendants' reliance on *Remeron* in support of their standing argument is misplaced. Plaintiffs argue that the court's rationale for the decision in *Remeron* decision is "sparse" and note further that the decision was even criticized by the court in *Molecular Diagnostics*. **[*28]** (*Id.* at 4-5.) Therefore, Plaintiffs argue that if their fraud on the PTO or sham litigation claims are proven, then the Defendants antitrust immunity will be "stripped away" and the Indirect Purchasers will be able to pursue their antitrust claims of monopolization. (*Id.* at 6.)

Second, Plaintiffs argue that their claims are not preempted by federal patent law. Plaintiffs assert that when monopolization claims are "properly viewed," they do not conflict with federal patent law, and are not preempted. (IP Plfs. Ans. Br. at 6.) Plaintiffs argue, based on Supreme Court precedent that state ***antitrust law*** "is a uniquely inappropriate context in which to find preemption by federal law." (*Id.*) Instead, Plaintiffs argue that their monopolization claims would only be preempted if they posed an obstacle to execution of federal patent law. (*Id.*) Further, Plaintiffs argue that the case of *Dow Chem. Co. v. Exxon Corp., 139 F.3d 1470 (Fed. Cir. 1998)* ("*Dow*") stands for the principle that "even if a court is required to adjudicate a question of federal patent law in connection with resolving a state law claim, the patent laws will not preempt the state-law claim if the plaintiff must also prove additional **[*29]** elements not found in a federal patent law cause of action." (*Id.* at 7-8.) Plaintiffs argue that unlike the cases cited by the Defendants, their claims are actually state law antitrust claims, not patent claims masquerading in "state law garb." Plaintiffs note that while their claims do require consideration of conduct before the PTO, they also require proof of elements specific to antitrust claims, which, in effect, take these claims out of the realm of claims that would otherwise be preempted by federal patent law. (*Id.* at 8.) In addition, Plaintiffs contend that Defendants' preemption argument rests solely on the decision in *Cipro*. However, Plaintiffs argue that the *Cipro* decision is unpersuasive for the reasons articulated by the Federal Circuit Court of Appeals in *Zenith Elect. Corp. v. Exzec, Inc., 182 F.3d 1340, 1355 (Fed. Cir. 1999)* ("*Exzec*"), in which the court stated that "'asserting [a] patent in the marketplace allegedly having known that the patent was unenforceable due to inequitable conduct' is a sufficient species of 'bad faith marketplace conduct' to defeat a preemption defense." (*Id.* at 9.) Thus, Plaintiffs argue that the *Cipro* Court's attempt to distinguish *Dow* on **[*30]** the basis that the patent holder threatened plaintiff's customers, fails because that activity was "no more wrongful" than the prosecution of the sham litigation that occurred in this case. (IP Plfs. Ans. Br. at 10.) Furthermore, Plaintiffs argue that *Walker Process* provides that the mere maintenance of a fraudulently procured patent would be sufficient "marketplace conduct" to give rise to

---

[8] This instant reference to the Indirect Purchaser Plaintiffs as "Plaintiffs" is limited to the discussion contained in this section of the Report. Subsequent references to "Plaintiffs," that is, as contained in the "Analysis" section of this Report, is intended to refer to the Indirect Purchaser Plaintiffs and the Direct Purchaser Plaintiffs collectively.

[9] The term "Defendants" as used here is consistent with the IP Plaintiffs' use of that term in their Reply Brief, which is understood to apply to all of the defendants in this action (i.e., Schering, Key, Upsher, Wyeth and ESI Lederle).

[10] References to the Indirect Purchasers' Memorandum in Opposition to Defendants' Motion to Dismiss shall be cited as "IP Plfs. Ans. Br. at __."

antitrust liability and, therefore, their antitrust claims, as pled, would not be preempted by federal patent law. (*Id.* at 10-11.)

Finally, Plaintiffs argue that state law consistently recognizes monopolization claims similar to those asserted in this case. In particular, Plaintiffs observe that state antitrust laws, which are patterned after federal antitrust laws, allow monopolization claims, a fact which Defendants do not dispute. (*Id.* at 11-12.) Thus, Plaintiffs contend that there is no reason to treat these monopolization claims differently because they rely upon *Walker Process* allegations, since such state law claims have no more deleterious public policy impact than similarly situated federal claims.

In light of the foregoing, the IP Plaintiffs argue that the Defendants' respective motions **[*31]** to dismiss should be denied.[11] (*Id.* at 29.)

E.Direct Purchaser Plaintiffs' Response in Opposition to the Applications

Contemporaneous with the submission of the IP Plaintiffs' Reply Brief, the Direct Purchaser Plaintiffs (the "DP Plaintiffs") similarly filed a memorandum opposing the motions to dismiss Count III of the IP Plaintiffs Amended Complaint (the "DP Plaintiffs' Answering Brief"). The DP Plaintiffs challenge the Defendants' collective reasoning and their reliance **[*32]** upon *Remeron* as a basis to dismiss the IP Plaintiffs' claims. (DP Plfs. Ans. Br. at 2.)[12] Specifically, the DP Plaintiffs argued that the *Remeron* decision had been criticized for having failed to provide sufficient justification for its result. By comparison, the DP Plaintiffs argued that other decisions had "affirm[ed] an overcharged purchaser's standing to assert such claims" and cited two cases in support of this argument. (*Id.* at 3.) As a consequence, the DP Plaintiffs argued that the respective applications to dismiss should be denied, (*Id.* at 4.)

F.Schering's Reply in Support of the Application to Dismiss

In further support of its application to dismiss certain claims in the IP Plaintiffs' Amended Complaint, Schering reasserts the arguments made in its Opening Brief.

First, Schering contends that the IP Plaintiffs concede that under federal *patent* law "they lack standing to force **[*33]** a patent holder to litigate the validity of his patent." Further, Schering argues that under federal ***antitrust law***, the IP Plaintiffs also lack standing to sue an "alleged monopolist" for damages. (Schering Reply Br. at 1.)[13] Schering contends that notwithstanding the IP Plaintiffs' claim that under state law they have standing to assert a *Walker Process* monopolization claim, prevailing case law contradicts this argument and cites *Remeron, Cipro* and *In re DDA VP Direct Purchaser Antitrust Litig.*, No. 05-CV-2237 (S.D.N.Y.) ("*DDAVP*") in support of the argument that purchasers of a patented product simply do not have standing to bring a *Walker Process* monopolization claim. (*Id.* at 2.) In addition, Schering argues that *Molecular Diagnostics*, a case heavily relied upon by the Plaintiffs, cannot overcome this contrary precedent. Schering argues that not only does *Molecular Diagnostics* represent a minority view on the issue, but that it arguably draws a distinction between direct and indirect purchasers and

[11] Like Schering and ESI, the Indirect Purchasers have made additional arguments in opposition to the motions to dismiss. In particular, they have argued that the subject claims are not time barred, that the length of the damages period has no bearing on the motions to dismiss and that ESI's argument that it cannot be liable for pre-joinder injuries is incorrect. I have given due consideration to these additional arguments. However, as discussed in more detail below, because I have resolved the instant motions to dismiss based on the litigants' respective standing and preemption arguments, I find that it is unnecessary to address the substance of these remaining arguments for purposes of this Report and Recommendations.

[12] References to the Direct Purchaser Plaintiffs' Memorandum in Opposition to Defendant Schering-Plough, Wyeth and ESI Lederle's Applications to Special Master to Dismiss Portions of the Indirect Purchaser Plaintiffs' Amended Consolidated Class Action Complaint shall be cited as "DP Plfs. Ans. Br. at __."

[13] References to Schering's Reply Memorandum in Support of its Application to the Special Master to Dismiss Certain Claims in the Indirect Purchasers' Amended Consolidated Class Action Complaint shall be cited as "Schering Reply Br. at __."

"strongly impl[ies]" that indirect purchasers of a patented product would lack standing. (Schering Reply Br. at 3.) Furthermore, Schering argues that a significant number of cases limit **[*34]** "competitor standing" under *Walker Process* to entities that have actually been sued for patent infringement or "face a *serious threat of suit* for infringement" and counsel that *Walker Process* standing should be "narrowly construed." (*Id.*) Finally, Schering argues that the IP Plaintiffs' standing argument, if adopted, would "radically rewrite well-established patent law." (*Id.* at 4.) Schering urges that, under the Plaintiffs' theory, any patent could be the target of numerous challenges by consumers and, further, any actual or potential competitor of a patent holder, who otherwise was not under threat of suit, could buy the patented product and bring a consumer *Walker Process* claim.

Second, Schering emphasizes that state law causes of action that are based on fraud or inequitable conduct before the PTO are preempted by federal patent law. (*Id.*) Based on this precedent, Schering again argues that the IP Plaintiffs' monopolization claim is preempted **[*35]** because the only wrongful conduct alleged is conduct before the PTO. Furthermore, with respect to the IP Plaintiffs' contention that their claims are not preempted because they require elements of proof beyond those required to substantiate patent invalidity, Schering argues that all of the Federal Circuit's preemption cases involve state law claims which contain elements beyond those necessary to invalidate a patent. Citing *Semiconductor Energy*, Schering notes that the Federal Circuit held that the plaintiff's RICO claim was preempted because the wrongful conduct alleged in that matter related to the patent holders' efforts to obtain the patent and targeting the plaintiff for a patent infringement suit. (*Id.* at 6.) Thus, Schering argues that the issue of preemption hinges on the nature of the wrongful conduct alleged, noting that if the conduct alleged is conduct before the PTO or related to the initiation of litigation against an alleged infringer, the claim will be preempted, whereas if the claim is also predicated on marketplace conduct, then the claim might not be preempted. (Schering Reply Br. at 6.) Schering's position is that the resolution of this motion is governed by *Semiconductor* ***[*36]*** *Energy* because here, as in *Semiconductor Energy*, the only conduct alleged by the IP Plaintiffs in the Amended Complaint is conduct before the PTO and the filing of infringement suits, not "marketplace conduct." Thus, Schering argues that because the IP Plaintiffs have failed to allege any "bad faith misconduct in the marketplace," Plaintiffs' claims challenging Schering's conduct before the PTO and Schering's alleged filing of "sham litigation" are preempted and should be dismissed. (*Id.* at 7.) Finally, Schering argues that, in order to preserve the "careful balance" in patent law between the rights of patent holders and the rights of challengers, the group of prospective challengers has been intentionally restricted to direct competitors. Schering argues that to open the door to competitors would markedly change patent law and patent policy, a result that existing case law counsels against. (*Id.* at 7-8.) Thus, Schering requests that the Court grant its motion to dismiss.[14]

G.<u>ESI's Reply in Support of the Application to Dismiss</u>

ESI has also submitted a reply brief in support of its application to dismiss portions of the Amended Complaint. ESI reiterates that the Amended Complaint still does not allege that ESI was involved, in any way, in obtaining the Schering patent, (ESI's Reply Br. at 1.)[15] Having reviewed the IP Plaintiffs' Answering Brief, ESI argues that the IP Plaintiffs have conceded that ESI and Upsher are not defendants to Count III of the Amended Complaint. ESI notes that Upsher's Opening Brief asserts that Count III asserts *Walker Process* and "sham litigation" claims against Schering *only* and that the IP Plaintiffs made no effort to oppose or even respond to Upsher's motion in this regard. Thus, ESI argues that the IP Plaintiffs have apparently conceded that Count III of the Amended Complaint raises claims against Schering alone and, as such, the IP Plaintiffs are barred from seeking recovery from ESI under Count III of the Amended Complaint. (ESI's Reply Br. at 1.)

---

[14] As noted above, Schering has sought dismissal of these claims on grounds not discussed in the above summary. However, because I have resolved the pending motions to dismiss based on the litigants' respective standing **[*37]** and preemption arguments, I find that it is unnecessary to address the substance of these remaining arguments for purposes of this Report and Recommendations.

[15] References to Wyeth's **[*38]** and ESI Lederle's Reply Brief in Support of their Application to the Special Master to Dismiss Portions of the Amended Consolidated Class Action Complaint on behalf of Indirect Purchaser Plaintiffs shall be cited as "Schering Reply Br. at __."

Next, ESI argues that the *Walker Process* claim contained in Count III of the Amended Complaint and any other allegations of the Amended Complaint that purport to independently allege or incorporate a *Walker Process* claim should be dismissed for lack of standing. To this end, ESI reiterates that federal courts in New Jersey and elsewhere have held that unless a patent holder has enforced or threatened to enforce its patent against a party, that party does not have standing to pursue a *Walker Process* claim. ESI cites *Remeron* and *Carrot Components* in support of its argument on this point. Further, ESI notes that Plaintiffs' primary argument in response to this case law is simply that these cases have been wrongly decided. In response, ESI cites to a recent decision in the *DDAVP* case and argues that the *DDAVP* decision strongly contradicts Plaintiffs' assertion that these other cases were wrongly decided. ESI also challenges the IP Plaintiffs' assertion **[*39]** that Defendants have tried to mischaracterize Plaintiffs' claims as "arcane patent law claims." (*Id.* at 3-4.) Rather, ESI concedes that the IP Plaintiffs' claims are, in fact, antitrust claims, but argues that indirect purchasers simply do not have standing to pursue antitrust claims based on *Walker Process*. In addition, ESI argues that Plaintiffs are wrong in asserting that courts that have denied standing in *Walker Process* cases have applied some unique standing rule. Rather, ESI contends that these courts have simply applied "general antitrust standing principles" in determining that only parties against whom a patent has been enforced have standing to bring *Walker Process* claims. (ESI's Reply Br. at 4.) ESI also notes that the IP Plaintiffs "misleadingly argue" that "purchasers" have standing to pursue *Walker Process* claims, but argue that the IP Plaintiffs do not cite a single case which reflects that indirect purchasers have standing to pursue *Walker Process* claims. (*Id.* at 5.) Further, ESI notes that the one case upon which Plaintiffs base their standing claims — *Molecular Diagnostics* — only ruled that direct purchasers had standing to bring a *Walker Process* claim, but did not **[*40]** articulate a general rule applicable to "purchasers." (*Id.*) Thus, Plaintiffs argue that Count III of the Amended Complaint should be dismissed for lack of standing. (*Id.* at 7.)

Finally, ESI argues that the *Walker Process* claim in Count III and the related allegations in Counts II and IV should be dismissed because they are preempted by federal patent law. ESI contends, however, that the IP Plaintiffs misrepresent ESI's position with respect to preemption. Instead, ESI argues that, pursuant to a *Walker Process* claim, the only theory upon which damages could be recoverable for a period dating back to 1989 is based upon misconduct before the PTO. Under these circumstances, ESI argues that Plaintiffs' *Walker Process* claims are preempted. In addition, ESI notes that it is not seeking dismissal of all of the IP Plaintiffs' claims that implicate issues of patent law, rather it is seeking dismissal of those claims dating back to the 1989 time period, claims which ESI contends necessarily rely upon Schering's conduct before the PTO. Therefore, ESI requests that the Court dismiss all *Walker Process* claims asserted by the IP Plaintiffs against ESI.[16]

II.<u>Upsher's Reply in Support of the Application to Dismiss</u>

In response to the Plaintiffs' support for Count III of the IP Plaintiffs' Amended Complaint, Upsher reiterated certain points made in its Opening Brief. In addition, Upsher noted that neither the IP Plaintiffs, nor the DP Plaintiffs have raised any opposition to the Upsher Motion, and that neither set of plaintiffs have asserted that Upsher could be held liable for any *Walker Process* or "sham litigation" claims lodged against Schering. (Upsher Reply Br. at 2.)[17] Thus, Upsher argued that it is appropriate to dismiss Count III of the Amended Complaint to the extent that it relates to, or is intended to relate to Upsher. (*Id.*)

I.<u>Analysis</u>

---

[16] Like Schering, ESI has also sought dismissal **[*41]** of these claims on grounds not discussed in the above summary. However, because I have resolved the instant motions to dismiss based on the litigants' respective standing and preemption arguments, I find that it is unnecessary to address the substance of these remaining arguments for purposes of this Report and Recommendations.

[17] References to Upsher-Smith's Reply in Support of its Application to the Special Master to Dismiss Certain Claims in the Indirect Purchasers' Amended Consolidated Class Action Complaint **[*42]** shall be cited as "Upsher Op. Br. at __."

The Defendants[18] have moved to dismiss certain claims contained in the IP Plaintiffs' Amended Complaint. Motions to dismiss are governed by *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. Although neither the Defendants, nor the IP Plaintiffs or the Direct Purchaser Plaintiffs (the "DP Plaintiffs") (collectively "Plaintiffs") have specifically articulated a standard of review on a *Rule 12(b)(6)* motion, it is well settled that the standard of review articulated on page 4 of this Report and Recommendation governs these motions to dismiss.

The Defendants and the Plaintiffs agree that this matter is fundamentally governed by the decision of the United States Supreme Court in *Walker Process Equip., Inc. v. Food Machinery and Chem. Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*. However, the parties disagree as to how *Walker Process* is to be construed and applied to the claims that are the subject of the Motions to Dismiss. **[*43]** Therefore, an analysis of the prevailing case law for each of the "futility" defenses raised by the Defendants in the respective Motions to Dismiss is in order.

i.Standing

Defendants claim that under *Walker Process* and other prevailing case law, the IP Plaintiffs lack standing to bring the *Walker Process* and "sham litigation" claims raised in Count III of the Amended Complaint. (*See* Schering Op. Br. at 5-8; ESI Op. Br. at 8-12; Upsher Op. Br. at 1-2.) In contrast, the Plaintiffs argue that, as consumers of K-Dur, the Indirect Purchaser Plaintiffs have been unduly affected by Schering's fraudulent and/or "inequitable conduct" before the PTO, Schering's "sham litigation" actions against Upsher and ESI, and the resulting settlement agreements entered into by the Defendants and, as such, have standing to bring these claims against the Defendants. (*See* IP Plfs. Ans. Br. at 1-6; DP Plfs. Ans. Br. at 1-4.)

a.*Walker Process*

In *Walker Process*, respondent brought a patent infringement action claiming that defendant had infringed respondent's patent for a process used in aeration equipment for sewage treatment systems. *382 U.S. at 173*. In turn, petitioner counterclaimed for a declaratory judgment **[*44]** on the ground that the patent was procured by fraud on the Patent and Trademark Office ("PTO") and was, therefore, invalid. *Id. at 174*. Further, petitioner argued that if respondent's patent was procured by fraud on the PTO and then was consciously used to exclude petitioner from the marketplace, it would constitute a *prima facie* violation of Section 2 of the Sherman Act, *15 U.S.C. § 2*. *Id. at 175*.

The Supreme Court found, initially, that "a person sued for infringement may challenge the validity of [a] patent on various grounds, including fraudulent procurement." *Id. at 176*. The Court went on to note that a party need not actually be sued in the first instance, rather the validity of a patent may be challenged under the Declaratory Judgment Act. *Id.* In addition, the Court added that, "we have recognized that an *injured party* may attack the misuse of patent rights." *Id.* (emphasis added). Finally, the Court concluded that actual proof that respondent "knowingly and willfully misrepresented" facts to the PTO would be sufficient to remove respondent's exemption from the antitrust laws, *see id. at 177*, and subject respondent to a claim under Section 2 of the Sherman Act.

Ultimately, *Walker* ***[*45]*** *Process* stands, in relevant part, for the principle that a party other than the United States may sue "to cancel or annul a patent." *Id. at 175*. While *Walker Process* does not define the precise scope of the class of "injured part[ies]" who "may attack the misuse of patent rights," the facts of the case certainly reflect that direct competitors — *i. e.*, parties against whom "threats of suit" for infringement may be raised and/or an action for patent infringement may be brought — are legally cognizable claimants.

b.District of New Jersey decisions

[18] The use of the term "Defendants" in this section of this Report refers to all of the named defendants in this action (i.e., Schering-Plough Corporation, Key Pharmaceuticals, Inc., Upsher-Smith Laboratories, Inc., Wyeth and ESI Lederle).

i.*Carrot Components*

Since *Walker Process* was decided, numerous courts have examined the issue of which "injured parties" have standing to bring a *Walker Process* claim. However, there are few directly applicable cases that have been decided in the District of New Jersey. In 1986, the District Court for the District of New Jersey decided *Carrot Components Corp. v. Thomas & Betts Corp., 229 U.S.P.Q. 61 (D.N.J. 1986)* ("*Carrot Components*"). In *Carrot Components*, plaintiff sought a declaration of invalidity on two patents held by the defendant or a declaration of non-infringement and for damages related to defendant's monopolistic business practices. **[*46]** Defendant, in turn, moved to dismiss the complaint.

During the course of the litigation the parties agreed that in order to seek declaratory relief in the context of a patent related antitrust action, a plaintiff must demonstrate both "a reasonable apprehension that it will face an infringement suit if it commences or continues the activity in question" and that it has "actually produced the accused device or [is] actually prepared to produce such a device." *Carrot Components, 229 U.S.P.Q. at 63*. The court determined that plaintiff could not support its claims for relief. First, with respect to the declaratory judgment claim, the court found, *inter alia*, that as a *distributor* of the allegedly infringing product, plaintiff "[had] not demonstrated the imminence of conflict with the defendant," *see id. at 64*, and, thus, could not meet the jurisdictional prerequisites for a declaratory judgment action. Second, with respect to plaintiff's monopolization claim, the court found, *inter alia*, that the complaint was deficient in that plaintiff had failed to demonstrate that defendant "[had] wielded exclusionary power through the use of his patent in a relevant market, *to the detriment of the* ***[*47]*** *plaintiff*." *Id.* (emphasis in original). Ultimately, the court found that plaintiff lacked standing to sue based on the conclusion that "plaintiff must at least be able to allege facts that indicate that the defendant has enforced, or has sought to enforce, or has threatened to enforce its fraudulently obtained patent against the plaintiff itself." *Carrot Components, at 64* (citing *Indium Corp. of Am. v. Semi-Alloys, Inc., 566 F. Supp. 1344, 1352-53 (N.D.N.Y. 1983)*).

Thus, *Carrot Components*' basic contribution to the issue of *Walker Process* standing is the conclusion that, with respect to declaratory judgment claims, only parties that have been directly threatened with suit or who can demonstrate that they reasonably anticipate a patent infringement suit or some effort by the patent holder to enforce the subject patent against them will have standing to bring such a claim for relief.

ii.*Remeron*

Eighteen years later, the District Court revisited the issue of *Walker Process* standing in the context of a patent litigation in *In re Remeron Antitrust Litig., 335 F.Supp.2d 522 (D.N.J. 2004)* ("Remeron"). In *Remeron*, a multi-district litigation, the plaintiffs, each a direct purchaser of the drug **[*48]** mirtazapine, filed separate actions against the defendants alleging "'an overall scheme' to monopolize the relevant market" for the drug. *Remeron, at 526*. Among other things, plaintiffs alleged that defendant Organon had obtained the subject patent through fraud on the PTO and brought *Walker Process* claims pursuant to Section 2 of the Sherman Act. Defendants moved to dismiss. The *Remeron* court acknowledged that fraudulent procurement of a patent or enforcement of a patent obtained by fraud could form the basis of a claim under Section 2 of the Sherman Act if the other elements of the claim were present. However, the court concluded that the plaintiffs, as direct purchasers of mirtazapine, did not have standing to bring a *Walker Process* claim. In support of this conclusion, the court noted that: (1) plaintiffs had never had the patent enforced against them; (2) were not threatened with enforcement; and (3) were not in a position to manufacture a competing version of the drug. *Remeron, at 529*.

The *Remeron* court reached this conclusion based, in part, on its acceptance of the legal principles emanating from *Carrot Components*. In fact, the court found that "[a] plaintiff does not have standing **[*49]** to assert a *Walker Process* claim unless '[the] defendant had sought to enforce the patent against the plaintiff, or that plaintiff had some reasonable basis for fearing such attempted enforcement.'" *Remeron, 335 F.Supp.2d at 529*. The court went on to observe that "*Walker Process* and its progeny involve antitrust counterclaimants who where potential or actual competitors in patent infringement suits." *Id.* Relying on this precedent, the court concluded that because plaintiffs, as direct purchasers of mirtazapine, did not produce the drug nor were prepared to do so, and were not party to the initial patent infringement suits, they lacked standing to bring a *Walker Process* fraud claim.[19] *Id.*

Like *Carrot Components*, *Remeron* stands for the proposition that only a party that has had a patent enforced against it, or has been threatened with suit, has standing to bring a *Walker Process* or "sham litigation" claim. Moreover, the *Carrot Components* and *Remeron* decisions certainly suggest that parties who are not actually or prepared to be direct competitors of parties holding a patented product lack **[*50]** standing to bring such claims. Thus, the conclusion to be drawn from *Carrot Components* and *Remeron* is that direct and indirect purchasers of a patented product simply lack standing to bring *Walker Process* and "sham litigation" claims.

c.Other federal decisions

A number of federal cases outside the District of New Jersey have analyzed *Walker Process* and its progeny in an attempt to ascertain and/or define the parameters of standing for prospective *Walker Process* claimants. The results of these cases, while mixed, favor limiting the number of potential *Walker Process* claimants. I now turn to an examination of those cases.

i.*DDAVP*

The issue of *Walker Process* standing was most recently addressed in *In re DDAVP Direct Purchaser Antitrust Litig.*, No. 05-Civ.-2237 (CLB) (S.D.N.Y.) ("*DDAVP*"). In *DDAVP*, the plaintiffs, direct and indirect purchasers of the drug desmopressin acetate ("DDAVP"), filed separate class actions alleging violations of federal and state ***antitrust law*** and charging that defendants had unlawfully maintained a monopoly over the market for desmopressin acetate by, *inter alia*, allegedly procuring the applicable patent by fraud or inequitable conduct before the PTO and "instituting **[*51]** and prosecuting" a "sham litigation" action against certain prospective competitors. *In re DDAVP Direct Purchaser Antitrust Litig., No. 05-Civ.-2237 (CLB), 2006 U.S. Dist. LEXIS 96201, slip op. at 2-3 (S.D.N.Y. Nov. 2, 2006)*. Defendants moved to dismiss the complaints on the grounds that, *inter alia*, plaintiffs lacked standing to bring the antitrust claims and that the state law antitrust claims were preempted by federal law. Specifically, Defendants argued that plaintiffs lacked standing because "they are purchasers and not competitors or would be competitors of [the defendants], and because neither [defendant] ha[d] ever threatened to enforce the patents against [the] [p]laintiffs...." *2006 U.S. Dist. LEXIS 96201, Id. at 5*.

While the *DDAVP* court concluded that the plaintiffs' respective complaints could be dismissed based solely on their failure to plead fraud with particularity, the court went on to consider whether plaintiffs were "proper" antitrust plaintiffs and, as such, whether they had standing to bring a *Walker Process* claim. Following a review of applicable case law respecting *Walker Process* standing, the court noted that:

> Plaintiffs have not alleged and cannot, that they did compete or would have competed with Defendants, nor that **[*52]** they have been sued or threatened with an infringement lawsuit by Defendants. Rather, they allege that they have paid higher prices for desmopressin acetate by virtue of Defendant's misconduct before the PTO and subsequent actions, which prevented the lower prices, which would have ensued from generic competition.

2006 U.S. Dist. LEXIS 96201, Id. at 9.

Noting that there was no binding precedent from the Southern District of New York with respect to this issue, the court examined other cases that had addressed this issue. Citing *Remeron* and *Cipro*, the court noted that those courts had found, respectively, that absent a threat of suit or the reasonable anticipation of suit, a party does not have standing to bring a *Walker Process* claim and that non-infringing consumers of patented products similarly

---

[19] The *Remeron* court also dismissed, without significant comment, plaintiffs' "sham litigation" claim.

lacked standing. The court contrasted *Remeron* and *Cipro*, with the decision of the District Court for the District of Columbia in *Molecular Diagnostics*, in which the court found that customers, who are direct purchasers of a patented product, have standing to bring a *Walker Process* claim. *DDAVP, 2006 U.S. Dist. LEXIS 96201, at 10-11*. Having reviewed these cases, the *DDAVP* court concluded that the better argument was articulated in the *Remeron* and *Cipro* **[*53]** cases. As a consequence, the court held that, as consumers, plaintiffs simply lacked standing to bring a *Walker Process* claim against the defendants, and that this defect was a sufficient alternative basis for dismissing the complaints.

Although certainly not binding precedent in the District of New Jersey, *DDAVP* adds further support to the existing body of case law holding that *consumers* of patented products lack standing to bring *Walker Process* claims.

ii.*Molecular Diagnostics*

In support of their argument that the IP Plaintiffs, as indirect purchasers of K-DUR, have standing to bring a *Walker Process* claim, Plaintiffs rely primarily on the decision in *Molecular Diagnostics Labs. v. Hoffman-LaRoche, Inc., 402 F. Supp. 2d 276 (D.D.C. 2005)* ("Molecular Diagnostics"). *Molecular Diagnostics* is emblematic of the dispute among federal courts regarding which parties have standing to bring a *Walker Process* claim. In *Molecular Diagnostics*, plaintiff, Molecular Diagnostics Laboratories ("MDL"), a direct purchaser of the subject patented product, *Thermus aquaticus* DNA polymerase ("*Taq*"), brought suit under Section 1 of the Sherman Act charging that they had been forced to pay artificially inflated **[*54]** prices for *Taq* as a result of defendants' enforcement of the patent, which plaintiffs allege was obtained by fraud on the PTO. *Molecular Diagnostics, 402 F.Supp.2d at 278*. Defendants moved to dismiss the complaint on a number of grounds, including but not limited to lack of standing.

In defense of the complaint, MDL argued it had standing to bring a *Walker Process* claims due to its status as a *direct consumer* of *Taq*. In response, defendants argued that only competitors or entities against whom a fraudulently obtained patent had been or could be enforced would have standing to bring a *Walker Process* claim. *Id. at 279*. Defendants specifically relied on *Carrot Components* and *Remeron* in support of their position.

As a result, the *Molecular Diagnostics* court undertook a review and analysis of these key decisions. First, the court found *Carrot Components* factually distinguishable from the facts at issue in *Molecular Diagnostics*. The court noted that the plaintiff in *Carrot Components* was a *competitor*, not a customer of the defendant in the case. Further, the court found that the ruling in *Carrot Components* was limited to the facts of that particular case and concluded that the case "did not **[*55]** purport to establish a rule of general applicability." *Id. at 280*. Second, with respect to *Remeron*, the court found that although the plaintiff in that case was a customer of the defendants, the *Remeron* court had offered "little justification" for its holding. *Id.* The court concluded that, in the absence of any compelling justification for the *Remeron* decision, the court need not follow the *Remeron* precedent. Moreover, the court surmised that the *Remeron* court may have confused the harm to be addressed through a *Walker Process* claim. In the opinion of the *Molecular Diagnostics* court, "[a] *Walker Process* claim is not a fraud claim, as the [*Remeron*] court intonates, but an antitrust violation. The harm is not the invalid patent, but the use of the invalid patent to establish a monopoly." *Molecular Diagnostics, at 280*. Thus, the court concluded that "there is little reason to think that standing requirements for *Walker Process* claims differ from standing requirements in more conventional antitrust actions." *Id. at 281*. Accepting plaintiffs' argument that direct purchasers generally have standing to prosecute antitrust claims, the court concluded that there was "no reason to limit [*Walker* ***[*56]*** *Process*] standing to competitors." *Id.* Thus, the court found that "direct purchasers have standing to pursue *Walker Process* claims." *Id. at 282*.

In contrast to *Carrot Components* and *Remeron*, cases which *Molecular Diagnostics* criticizes, *Molecular Diagnostics* stands for the principle that, like competitors, direct purchasers are equally well-suited to pursue *Walker Process* claims against both patent holders, whose patents are obtained through fraud or "inequitable conduct" on the PTO and those who collude with them. However, *Molecular Diagnostics* cannot reasonably be construed to have held that consumers, regardless of their station, have standing to pursue *Walker Process* claims.

iii.*Asahi Glass*

A predecessor to both *Remeron and DDAVP, Asahi Glass Co. Ltd. v. Pentech Pharma., Inc., 289 F. Supp. 2d 986 (N.D. Ill. 2003)* ("*Asahi Glass*"), is also representative of that line of cases holding that only competitors have standing to prosecute *Walker Process* claims.

In *Asahi Glass*, plaintiff, Asahi, who was a supplier of the active ingredient[20] in a generic version of the drug Paxil, sued the defendant, Glaxo, the patent holder, in an effort to have the patent for Paxil declared invalid. Through the **[*57]** suit, plaintiff sought to prevent defendant from interfering with Asahi's sales of its amorphous paroxetine hydrochloride product to other potential manufacturers of generic Paxil. Plaintiff also sought to challenge a settlement agreement between Glaxo and Pentech, a former customer of Asahi, which Asahi believed violated ***antitrust law*** by restraining trade in the antidepressant market. In particular, Asahi believed that potential customers were not purchasing its paroxetine product because they feared being sued by Glaxo. *Id. at 989*. Defendants moved to dismiss.

The court noted several problems in plaintiff's case, not the least of which was the fact that it was highly unlikely that Glaxo, as the patent holder, would have reason to sue a party in the plaintiff's position; *i.e.*, a supplier of amorphous paroxetine. The court observed that if plaintiff's potential customers (*i.e.*, generic competitors of Glaxo) were deterred by Glaxo's threat of suit, then those customers had a cause of action against Glaxo, but Asahi had no right to bring an action on that basis. In addition, the court noted that "not being under a serious, **[*58]** palpable, foreseeable, imminent threat of being sued, Asahi cannot obtain a judicial declaration that the patent is invalid or if valid not infringed...by the sale of the amorphous product." *Asahi Glass, at 990*. The court went on to note that since Asahi did not sell an antidepressant drug, it was not in the "market" for that drug and, therefore, lacked standing to sue. "The general rule is that suppliers do not have 'standing'...to complain about a violation of the antitrust laws at the customer level." *Id.* Further, the court noted that "[i]f suppliers of targets of antitrust violators...were allowed to sue, potential plaintiffs would be stumbling over each other and the targets themselves, though their claim to relief is primary, might find themselves unable to obtain any relief." *Id. at 991*.

Thus, like *Remeron* and *DDAVP, Asahi Glass* provides support for the principle that a party who is not a direct competitor, *e.g.*, a supplier, or is not the target of a suit by a patent holder, simply does not have standing to bring a *Walker Process*—styled antitrust claim.

d.The IP Plaintiffs' lack standing to sue

Although other cases were cited and relied upon by the parties in support of and in **[*59]** opposition to the IP Plaintiffs' claim of standing to bring *Walker Process* claims, the cases discussed above form the basic foundation for the arguments upon which the respective parties have relied. Having thoroughly reviewed the above-referenced cases, as well as a number of the other cases that have been cited by the parties, I conclude, as the did the court in *DDAVP*, that the Courts in *Cipro* and *Remeron* have the better side of the argument on the issue of *Walker Process* standing.

First, although none of the cases cited above, or that I have otherwise reviewed for purposes of deciding the respective motions are binding on this Court (excepting, of course, *Walker Process*), the majority of decisions which have considered the issue, have reached the conclusion that, unlike competitors, *customers* (e.g., indirect purchasers) do not, generally speaking, suffer exposure to the type of harm that *Walker Process* claims are specifically designed to remedy. In analyzing the *Walker Process* fraud claim, the *Remeron* court undertook a review of the extant *Walker Process* jurisprudence and distilled that body of case law to a conclusion that these cases "involve antitrust counterclaimants who were **[*60]** potential or actual competitors in patent infringement suits." *Remeron, 335 F.Supp.2d at 529*. In so concluding, the court simply accepted the narrow holding of *Walker*

[20] That active ingredient was amorphous paroxetine hydrochloride.

Process itself, and similar cases which have followed *Walker Process. See Walker Process, 382 U.S. at 174* ("We have concluded that the *enforcement* of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided that the other elements necessary to a § 2 case are present") (emphasis added); *see also Bourns v. Raychem Corp., 331 F.3d 704, 711 (9th Cir. 2003)* ("Only an actual competitor or one ready to be a competitor can suffer antitrust injury"); *Indium Corp., 566 F.Supp. at 1352-53* ("[I]n order to establish *antitrust* standing to assert a *Walker Process* claim, the plaintiff must at least be able to allege facts that indicate that the defendant has enforced, or has sought to enforce, or has threatened to enforce its fraudulently obtained patent against the plaintiff itself") (emphasis added).

Since *Walker Process* was decided, federal courts have fairly consistently measured a party's standing to assert such claims by their status as a competitor in the marketplace. This view has prevailed **[*61]** in cases where courts have been confronted with plaintiffs who were suppliers of such allegedly infringing products, *see Asahi Glass*[21] *and Carrot Components, supra*, or were consumers of such products. *See In re Ciprofloxacin Hydrochloride Antitrust Litig., 363 F.Supp.2d 514 (E.D.N.Y. 2005)* (recognizing a "serious question [as to] whether indirect plaintiffs have standing to assert a *Walker Process* claim"), *Remeron, supra* and *DDAVP, supra.* Furthermore, if anything, the Supreme Court's decision in *Associated Gen. Contractors of California, Inc. v. California State Council, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* ("AGC"), stands for the proposition that not every party connected with a violation of federal antitrust laws has standing to bring an antitrust claim. Indeed, as the Court noted in *AGC*, "[t]he existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party." *Id. at 542*.

Against the backdrop of this case law, I conclude that *Molecular Diagnostics* is an isolated anomaly. The fact that the *Molecular Diagnostics* court found an exception to the general rule of antitrust standing in that case certainly does not mean that the "rule" has lost sway in cases where antitrust claims are based on *Walker* Process-type allegations. *See Molecular Diagnostics, 402 F.Supp.2d at 279 n.4* (admitting that with the exception of *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059 (Fed. Cir. 1998)* and *Argus Chem. Corp. v. Fibre Glass-Evercoat Co., 812 F.2d 1381 (Fed. Cir. 1987)*, "neither the parties nor the court have been able to identify an instance in which a *customer* litigated a *Walker Process* claim").

This is, by no means, an exceptional case. In this case, Upsher and Wyeth represent the "identifiable class **[*63]** of 'persons' whose self-interest would normally motivate them to vindicate the public interest." The fact that, at the end of the day, they chose settlement over litigating the underlying patent dispute to a conclusion does not change their role in this dynamic. Nor does it alter the status of the Indirect Purchasers. In the context of this case, the Indirect Purchasers are the "more remote party" whose interest in "antitrust enforcement" is diminished by the presence of both competitors.

Second, I am persuaded by Defendants' argument that antitrust policy, generally speaking, does not support a legal theory which would allow parties having the most tenuous relationship with a particular patent holder's or licensee's attempt to enforce a fraudulently procured patent against its competitors to assert claims that parties who may have suffered more direct injury have settled, or simply chosen not to pursue. Clearly, the boundaries of standing, even in the context of antitrust claims of monopolization based upon *Walker* Process-type allegations, simply cannot be stretched as far as the Plaintiffs would have this Court extend them. If this Court were to conclude that *indirect* purchasers had **[*64]** standing to bring *Walker Process* claims, it would turn antitrust policy on its head, and extend antitrust standing to an extraordinary level. Furthermore, I am sensitive to the Defendants' concerns that expanded standing may open the door to additional rounds of litigation on matters that have conclusively and *lawfully* been resolved. I do not believe that antitrust policy or patent law contemplates a scenario in which parties only

---

[21] *See Asahi*, 289 F.Supp. at 990 (noting that because supplier of active ingredient contained in an allegedly infringing product was not "under a serious, palpable, foreseeable, imminent **[*62]** threat of being sued" by the patent holder, they lacked standing to obtain a judicial declaration of invalidity); *see also Aventis Enviro. Science U.S.A. v. Scotts Co.*, 383 F.Supp.2d 488, 496 (S.D.N.Y. 2005) ("It is equally well-established that mere suppliers of products to the targets of antitrust violations do not have standing to assert antitrust claims").

tangentially affected by a patent holder's suit to enforce a patent against its competitors, regardless of whether the patent was fraudulently procured, which is ultimately settled by the original litigants, may be relitigated by consumers or indirect purchasers. Not only would such a result likely discourage settlement and inject a significant level of uncertainty into the process of adjudicating patent disputes, it would become exponentially more costly for all parties involved.

Moreover, although Plaintiffs rely heavily on *Molecular Diagnostics* for their conclusion that the IP Plaintiffs have standing to bring *Walker Process* claims, *Molecular Diagnostics* is not as helpful to Plaintiffs' position as they suggest. Importantly, even the *Molecular Diagnostics* **[*65]** court was aware that "[c]onferring standing upon every individual tangentially affected by an alleged antitrust violation presents the risk of duplicative recovery, and may subject defendants to an onslaught of litigation." *Molecular Diagnostics, 402 F.Supp.2d at 281*. Thus, the *Molecular Diagnostics* court counseled that courts should "examine other factors in addition to antitrust injury, such as the potential for duplicative recovery, the complexity of apportioning damages, and the existence of other parties that have been more directly harmed, to determine whether a party is a proper plaintiff...." *Id.* Surely, the IP Plaintiffs can take little comfort from this statement. As the Court noted, indirect purchasers do not have "frequent interactions" with patent holders and do not have a "strong incentive to discover and litigate [an] offense." In addition, there is considerable "difficulty in determining damages" for indirect purchasers. Moreover, because indirect purchasers are two steps removed from the underlying injury (*i.e.*, to competitors), ascertaining their damages is a far more speculative endeavor. Finally, as compared to competitors and direct purchasers, indirect purchasers **[*66]** have certainly been *less* "directly harmed" than their counterparts.

For these reasons, I conclude that the IP Plaintiffs lack standing to bring *Walker Process* claims in Count III of the Amended Complaint and in the other Counts of the Amended Complaint whether explicitly asserted, or incorporated by reference.

ii.Preemption

In addition to arguing that the IP Plaintiffs' *Walker Process* claims fail for lack of standing, Defendants also contend that the *Walker Process* and "sham litigation" claims fail because they are preempted by federal law. In response, Plaintiffs argue that prevailing case law provides that the IP Plaintiffs' claims are not, in fact, preempted by federal law. As a result, an analysis of the key cases cited by the parties is in order.

a.Federal Circuit cases

i.*Semiconductor Energy*

In support of their argument that the IP Plaintiffs claims are preempted by federal law, Defendants have relied, in part, on a decision from the Federal Circuit Court of Appeals (the "Federal Circuit") in *Semiconductor Energy Lab. Co., Ltd. v. Samsung Elect. Co., Ltd., 204 F.3d 1368 (Fed. Cir. 2000)* ("*Semiconductor Energy*"). In *Semiconductor Energy*, plaintiff, Semiconductor Energy Laboratory ("SEL") **[*67]** sued defendants, several Samsung entities ("Samsung"), alleging that Samsung's production and sale of competing technology infringed a patent held by SEL. Initially, the district court granted SEL's motion for summary judgment and dismissed Samsung's federal and state law based Racketeer Influenced and Corrupt Organizations ("RICO") counterclaims. Following a bench trial, the court found SEL's patent unenforceable due to inequitable conduct before the PTO. The parties appealed the respective judgments.

On appeal to the Federal Circuit, the court had to determine whether the district court had, in any way, abused its discretion in its dismissal of Samsung's state law RICO claims. After analyzing Samsung's New Jersey RICO counterclaims, the court concluded that they were preempted by federal patent law. In particular, the court noted that the counterclaims were more closely analogous to a state law-based abuse of process counterclaim that had been found preempted in *Abbott Labs. v. Brennan, 952 F.2d 1346 (Fed. Cir. 1991)*, than to the intentional interference with contractual relationship claims that had been addressed in *Dow Chem. Co. v. Exxon Corp., 139 F.3d 1470 (Fed. Cir. 1998)*. The **[*68]** court also noted that "the wrong alleged and for which state tort damages [are] sought [is] no more than bad faith misconduct before the PTO," and found that the counterclaims, as pled by Samsung, "occup[ied] a field identical in scope with the inequitable conduct defense." *Semiconductor Energy, 204 F.3d at 1382*. Therefore, the court concluded that there was no distinction between the required elements of proof for a state law RICO claim and the defense of inequitable conduct under federal law. Accordingly, the court ultimately found that, "[a]...state cause of action predicated so squarely on the acts of inequitable conduct would be 'contrary to Congress' preemptive regulation in the area of patent law.'"

Thus, *Semiconductor Energy* stands for the proposition that, in the context of an antitrust action, where there is no fundamental difference between the required elements of proof in a state law-based claim and claims or defenses arising under federal patent law, the state law-based claims will be found to be preempted by federal law.

ii.*Dow*

In defense of their position that the IP Plaintiffs have standing to pursue *Walker Process* and "sham litigation" claims against the Defendants, **[*69]** Plaintiffs rely, in part, on a decision from the Federal Circuit in *Dow Chem. Co. v. Exxon Corp., 139 F.3d 1470 (Fed. Cir. 1998)* ("Dow"). In *Dow*, plaintiff-appellant, the Dow Chemical Company ("Dow Chemical"), appealed from the judgment of a district court which, *inter alia*, dismissed Dow Chemical's state law unfair competition claim against defendant, Exxon Corporation ("Exxon"), the holder of a patent for wire and cable devices manufactured with a particular insulating polymer. *Dow, 139 F.3d at 1471*. In the underlying action, Dow Chemical had filed a two-count complaint against Exxon seeking a declaratory judgment of non-infringement or, alternatively, invalidity and unenforceability (Count I) and for unfair competition, under state law, based on Exxon's alleged threats to customers of Dow Chemical for alleged infringement of Exxon's patent (Count II). *Id. at 1472*. As a result of certain developments in the case, the district court ultimately dismissed both Counts I and II of the complaint. Dow Chemical appealed, alleging that the district court should have decided its state law unfair competition claim and that the court erred in dismissing the claim because it implicated the issue **[*70]** of inequitable conduct. Exxon cross-appealed.

Upon review, the Federal Circuit framed the issue this way: "whether state courts, or federal courts adjudicating state law claims, may hear a state law tort claim for intentional interference with...contractual relations that implicates the patent law issue of inequitable conduct or, alternatively, whether such a claim is preempted by federal patent law." *Id. at 1473*. Having framed the issue, the court found that, "provided the state law cause of action includes additional elements not found in the federal patent law cause of action and is not an impermissible attempt to offer patent-like protection to [a] subject matter addressed by federal law," such a claim would not be preempted. *Id.* The court's finding was based, in part, on its analysis of Supreme Court precedent and its conclusion that the state cause of action at issue did not "present an 'obstacle' to the execution and accomplishment of the patent laws." *Id. at 1475*. In addition, the court concluded that the intent of the particular cause of action was to address an issue that was "traditionally [in] the domain of state law" (*i.e.*, ensuring the integrity of commercial contracts) **[*71]** and that the cause did not seek "to offer patent-like protection to intellectual property...." *Dow, at 1475*. Moreover, the court added that, "a tort claim for intentional interference with contractual relations requires elements *entirely different* from those required for inequitable conduct before the PTO." *Id. at 1477* (emphasis added). Thus, based on its review of the facts and law, the court was convinced that a state law tort claim of intentional interference with contractual relations was a different animal than a state law claim relying upon proof of inequitable conduct and, therefore, concluded that the lower court's judgment should be reversed. "[B]ecause it requires entirely different elements to establish a prima facie state tort action for intentional interference with contractual relations, it plainly is not a preempted alternative or additional state law remedy for inequitable conduct," *see Dow, at 1477*, therefore, "we must reverse the judgment of the district court." *Id. at 1479*.

Thus, in contrast to *Semiconductor Energy, Dow* holds that a state law claim that implicates issues of patent law, is not preempted where the elements of proof underlying the claim do not rely, **[*72]** in their entirety, on issues of patent law.

iii.*Exzec*

Plaintiffs also rely on the Federal Circuit's decision in *Zenith Elect. Corp. v. Exzec, Inc., 182 F.3d 1340 (Fed. Cir. 1999)* ("*Exzec*") to support their argument that the IP Plaintiffs "monopolization claims are not patent claims, do not conflict with patent law, and are not preempted." (IP Plfs. Ans. Br. at 6.)

In *Exzec*, plaintiff-appellants, Zenith Electronics Corp. ("Zenith"), the assignee of a patent for touch panel systems for computers, and Elo Touch, the licensee of Zenith's patent, sued Exzec, alleging that Exzec's competing touch panel system infringed Zenith's patent. *Exzec, 182 F.3d at 1343*. Exzec, in turn, filed two counterclaims, both for unfair competition, one arising under federal law[22] and the other arising under Illinois common law. In support of these claims, Exzec alleged that Elo Touch knew that Exzec's touch panels utilized a different technology than the patented touch panels and, therefore, did not infringe Zenith's patent. Exzec further alleged that, despite this knowledge, Elo Touch "falsely stated" to Exzec's customers that Exzec had infringed the Zenith patent and was incapable of producing a non-infringing **[*73]** touch panel. *Id.* Elo Touch moved to dismiss Exzec's counterclaims. The district court found that Exzec had pleaded viable claims in both cases, and denied the motion to dismiss. In particular, with respect to the state law claim, the district court found that dismissal was inappropriate because defendant had "sufficiently alleged" that Elo Touch had "acted in bad faith" and, as such, the defense of "privilege" was not available to Elo Touch. *Id. at 1344*. Elo Touch subsequently filed a motion for reconsideration, which was denied. Elo Touch then petitioned for permission to appeal and the Federal Circuit granted the petition.

On appeal, the Federal Circuit undertook an analysis of the substance of Exzec's state law-based unfair competition claims in light of certain recent Federal Circuit precedent. Citing *Dow*, the court noted that it had previously held that tortious interference with contractual relations claims were not preempted by federal patent law "because the claims involved allegations of bad faith marketplace conduct by the patentee." *Id. at 1355*. The court added that, although the claim **[*74]** in *Dow* involved inequitable conduct, where a patent holder "knowingly makes baseless infringement assertions against a competitor's customers" the patent holder may be subject to liability. *Exzec*, 182 at 1355. Further, citing *Hunter Douglas v. Harmonic Design, Inc., 153 F.3d 1318 (Fed. Cir. 1998)* ("*Hunter Douglas*"), the court noted that it had concluded that state tort claims that were based on publicizing a patent, were not preempted by federal patent law "if the claimant can show that the patent holder acted in bad faith in its publication of the patent." *Id.* Thus, the court distilled *Hunter Douglas* to mean that "to avoid patent law preemption of...state tort law claims, bad faith must be alleged and ultimately proven, even if bad faith is not otherwise an element of the tort claim." *Id.* Based on its understanding of this case law, the court found that "bad faith [was] a prerequisite to Exzec's state-law tortious interference claim [and, that] without it, the claim was preempted by patent law."

Thus, *Exzec* construed *Dow* and like cases to permit exceptions to automatic patent preemption where a party brings state law-based claims which rely upon facts implicating issues of patent law, **[*75]** provided that acts of "bad faith" conduct in the marketplace are alleged and, ultimately, proven.

b.Other decisions

i.*Cipro*

In re Ciprofloxacin Hydrochloride Antitrust Litig., 363 F.Supp.2d 514 (E.D.N.Y. 2005) ("*Cipro*"), was a multi-district litigation in which plaintiffs, direct and indirect purchasers of the drug ciprofloxacin hydrochloride, brought an action against the brand-name manufacturer of the drug and prospective generic manufacturers, alleging that defendants had illegally agreed to restrain trade in the relevant market in violation of Section 1 of the Sherman Act. Initially,

[22] That particular claim was brought under § 43(a) of the Lanham Act, *15 U.S.C. § 1125(a)*.

plaintiffs moved to have certain agreements between the defendants declared *per se* unlawful under Section 1 of the Sherman Act. These motions were denied by the court. Following that denial, the indirect plaintiffs amended their complaint to add a new count (Count V) alleging *Walker Process* and "sham litigation" claims. The substance of these claims was that Defendant Bayer had made certain misrepresentations to the PTO in order to obtain its patent for ciprofloxacin hydrochloride and then, knowing that the patent was invalid, enforced the patent against its competitors. *Cipro, at 542-43*. Bayer subsequently **[*76]** moved to dismiss Count V on two bases: (1) that the indirect plaintiffs' state law-based *Walker Process* claims were preempted by federal law; and (2) that they were barred by the applicable statute of limitations. *Id. at 543*.

In analyzing Bayer's motion to dismiss, the court noted that "[o]rdinarily, antitrust claims premised on the enforcement of a fraudulently procured patent are brought by an accused infringer as a counterclaim to the original charge of infringement." *Id. at 543*. The court found the indirect purchasers' *Walker Process* and "sham litigation" claims to be "unusual" because "they [were] brought by indirect purchasers of the patented item and because they [were] asserted under state law." *Id. at 543*. Upon review of the indirect plaintiffs' *Walker Process* and "sham litigation" claims, the court concluded that the claims, although allegedly based on state law, actually rested entirely upon federal patent law because if the plaintiffs were unable to demonstrate that Bayer intentionally withheld information from or misrepresented material aspects of the product to the PTO, their *Walker Process* and "sham litigation" claims could not survive. "There is simply no theory for **[*77]** proving a *Walker Process* antitrust violation in this case that would not require a showing of misconduct before the PTO." *Id.* Based on its factual finding that the indirect plaintiffs' claims were dependent on a showing of misconduct before the PTO, the court ultimately concluded, *inter alia*, that the indirect plaintiffs' state antitrust claims were preempted by federal law. *Id. at 544*. As a result, the court also concluded that those claims should be dismissed. "Whatever the reasons for indirect plaintiffs bringing *Walker Process* and sham litigation claims under state law, those claims are preempted by federal patent law and must, therefore, be dismissed." *Id. at 543*.

Therefore, *Cipro* holds that in circumstances where a party brings *Walker Process* or "sham litigation" claims based on state ***antitrust law***, but those claims are ultimately dependent upon proof of a violation of federal patent law, those claims are automatically preempted by federal law and, as a result, are subject to dismissal.

c. IP Plaintiffs' claims are preempted

As discussed in detail above, I have concluded that the IP Plaintiffs lacked standing to bring *Walker Process* claims against the Defendants and those claims **[*78]** should be dismissed. However, assuming, as did the court in *Asahi Glass*, that my analysis of that issue is incorrect, *see Asahi Glass, 289 F.Supp.2d at 991*, I further conclude that Plaintiffs' *Walker Process* and "sham litigation" claims are subject to dismissal because they are preempted by federal patent law.

I reach this conclusion based on the determination that, as with my resolution of the issue of standing, the Defendants also have the more persuasive argument on the question of preemption. Having given due consideration to *Semiconductor Energy, Dow, Exzec*, and *Cipro*, I conclude, in light of the circumstances of this case, that the "better" and more persuasive reasoning may be found in *Semiconductor Energy* and *Cipro*.

In *Semiconductor Energy*, the Federal Circuit found Samsung's New Jersey RICO counterclaims were preempted because "the wrong alleged and for which state tort damages [were] sought [was] no more than bad faith misconduct before the PTO." *Semiconductor Energy, 204 F.3d at 1382*. In so finding, the *Semiconductor Energy* court specifically distinguished *Dow* on the grounds that, in *Dow*, not only did the state cause of action contain elements of proof that were not elements **[*79]** of the defense of "inequitable conduct," but that "the state tort *as applied* was not an impermissible attempt to offer patent-like protection." *Id.* (emphasis added). In this case, the IP Plaintiffs purport to bring claims pursuant to twenty-four states' respective antitrust and/or consumer protection laws. Although these respective statutes do not contain identical language or identical elements of proof, they all suffer from the same defect; *i.e.*, they fundamentally rely upon evidence of fraud or "inequitable conduct" before the

PTO, or evidence derivative of those actions to satisfy their respective elements of proof.[23] Stated another way, these state statutes, as the IP Plaintiffs would have this Court *apply* them, would, in fact, constitute an "impermissible attempt to offer patent-like protection."[24]

In this regard, I take note of Count III of the Amended Complaint and, in particular, the IP Plaintiffs' allegation that "Schering's '743 Patent was obtained through material, intentional misrepresentations and material, intentional omissions in Schering's communications with the PTO...." *See* Amd. Complt. ¶ 215. In making this claim, **[*82]** the IP Plaintiffs draw upon allegations made earlier in the Amended Complaint that specifically relate to Schering's alleged unlawful conduct in obtaining the '743 patent through fraud on the PTO. *See* Amd. Complt. ¶¶ 62-122. Thus, in this case, just as in *Semiconductor Energy*, it is apparent that "the wrong[s] alleged and for which and for which state law...damages [are] sought [is] no more than bad faith misconduct before the PTO." This conclusion is ultimately fatal to Count III, because, as presently pled, Count III ends up "occupy[ing] a field identical in scope" to issues already reserved to and adequately addressed by federal patent law. Therefore, on this basis alone, the *Walker Process* and "sham litigation" claims contained in Count III and other Counts of the Amended Complaint are preempted by federal law. *See* *Semiconductor Energy, 204 F.3d at 1382* ("[a]...state cause of action predicated so squarely on the acts of inequitable conduct would be 'contrary to Congress' preemptive regulation in the area of patent law'") (citing *Abbott Labs. v. Brennan, 952 F.2d 1346, 1357 (Fed. Cir. 1991))*.

Even if reasonable people could disagree about the extent to which IP Plaintiffs' state **[*83]** law antitrust claims rely upon conduct before the PTO, evidence of marketplace conduct, as Defendants have argued (*see* Hrg. Tr. at 24-25), is sorely lacking. As the parties are already aware, evidence of marketplace conduct can revive a claim otherwise subject to preemption under federal patent law. *See e.g.,* *Semiconductor Energy, at 1382*. As construed by the Federal Circuit in *Dow* and reaffirmed in *Semiconductor Energy*, "marketplace conduct" is intentional conduct having a direct impact upon non-competitors (i.e., customers). *See* *Dow, 139 F.3d at 1477*; *Semiconductor Energy, at 1382*. *See also* *Exzec, 182 F.3d at 1340* ("While the tortious interference claims in *Dow Chemical* involved inequitable conduct, we also noted that a holder of a valid and enforceable patent who knowingly makes baseless infringement assertions against a competitor's customers may also be subject to...liability"); *Hunter Douglas, 153 F.3d at 1334 (Fed. Cir. 1998)* ("The state law remedies in *Dow Chemical* were directed to allegedly tortious conduct in the marketplace"); *Cipro, 363 F.Supp.2d at 544-45* ("The marketplace conduct in *Dow* was Exxon's threats to *Dow's* customers, not activity that occurred before the PTO **[*84]** or in the context of a litigation").

---

[23] For example, in order to state a claim under the New Jersey Consumer Fraud Act, a party must prove the following three elements: "1) unlawful conduct by the defendants; 2) an ascertainable loss on the part of the plaintiff; 3) a casual relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss." *N.J. Citizen Action v. Schering-Plough Corp.*, 2002 WL 32344594, at *2 (N.J. Super. L. May 12, 2002). **[*80]** Further, in order to state a monopolization claim under the New Jersey Antitrust Act, a party must prove the following four elements: "1) relevant geographic and product market; 2) high probability of success of monopolization, 3) specific intent, and 4) conduct to further an attempt to monopolize." *D'Arrigo v. South Jersey Hosp.*, 2006 WL 2795337, at * 11 (N.J. Super. L. Aug. 25, 2006). By comparison, "[i]n order to state a claim for abuse of process, the moving party must show: (1) an ulterior motive and (2) some further act after an issuance of process representing the perversion of the legitimate use of the process." *Falzo v. County of Essex, 2005 U.S. Dist. LEXIS 19468, 2005 WL 2129927, at *4 (D.N.J. Aug. 31, 2005)* (citation omitted). Although the elements of these respective claims are different, the means of proof is effectively the same because the "issue[s] at bar relate[] directly to administrative proceedings before the PTO ...." *see* *Abbott Labs. v. Brennan, 952 F.2d 1346, 1356 (Fed. Cir. 1991)* or are derivative of administrative proceedings before the PTO. Similarly, because the state law claims posed by the IP Plaintiffs in this matter relate directly to or are derivative of Schering's alleged fraudulent **[*81]** activities or "inequitable conduct" before the PTO, there is essentially no difference between the instant claims for relief and the claims brought in *Abbott Labs*. or *Semiconductor Energy*, as each set of claims ultimately challenges conduct before the PTO.

[24] The "as applied" test is the proper test for evaluating state law claims. *See* *Hunter Douglas, Inc. v. Harmonic Design, Inc., 153 F.3d 1318, 1335 (Fed. Cir. 1998)* ("If a plaintiff bases its tort action on conduct that is protected or governed by federal patent law, then the plaintiff may not invoke the state law remedy, which must be preempted for conflict with federal patent law.... This approach, which considers whether a state tort, 'as-applied,' conflicts with federal patent law, is consistent with that employed by the Supreme Court in cases involving preemption of state unfair competition law").

Thus, what plainly distinguishes the claims in this case from those in *Dow*, and like cases, is the absence of any legally cognizable allegations of "marketplace conduct." *See* *Exzec, 182 F.3d at 1355* (affirming lower court denial of motion to dismiss counterclaims where patent licensee was alleged to have acted in "bad faith" by making false representations to competitor's customers"); *Dow, 139 F.3d at 1477* (reversing lower court judgment dismissing state law unfair competition claim where complaint alleged threats made by patent holder to sue competitor's customers for patent infringement). By comparison, in cases where claims have been found preempted, allegations (or evidence) of "marketplace conduct" have been noticeably absent. *See* *Semiconductor Energy, 204 F.3d at 1382* ("[T]he wrong alleged and for which and for which state law tort damages [are] sought [is] no more than bad faith misconduct before the PTO"); *Cipro, 363 F.Supp.2d at 545* ("Indirect plaintiffs' Count V does not allege any malfeasance in the marketplace such as threats to Barr or its customers, but instead rests entirely upon actions that occurred before the PTO"); *CardioVention, Inc. v. Medtronic, Inc., 430 F.Supp.2d 933, 941 (D. Minn. 2006)* **[*85]** ("Accordingly, federal patent law preempts [plaintiff's] Count III claim, because the claim does not allege any actionable conduct except conduct before the PTO. As the allegations are coextensive with patent law, they are preempted by patent law"). In light of the allegations contained in the Amended Complaint, the IP Plaintiffs' *Walker Process* and "sham litigation" claims clearly belong with this latter group of cases.

Therefore, even assuming, *arguendo*, that the IP Plaintiffs had standing to bring their *Walker Process* claims, I find that these same *Walker Process* and "sham litigation" claims, as asserted in Count III and, either explicitly or by reference, in other Counts of the Amended Complaint, are preempted by federal patent law because they rely, either directly or derivatively, upon allegedly fraudulent or inequitable conduct before the PTO to substantiate those claims.

d.Direct Purchaser Plaintiffs' opposition to the Defendants' Motions to Dismiss

Although the pending motions to dismiss do not address the DP Plaintiffs' claims, the DP Plaintiffs have raised several arguments in opposition to the pending motions which must be considered.

On October 23, 2006, Mr. Pearlman filed **[*86]** the Direct Purchaser Plaintiffs' Memorandum In Opposition to Defendants Schering-Plough, Wyeth, and ESI Lederle's Applications to Special Master to Dismiss Portions of the Indirect Purchaser Plaintiffs' Amended Consolidated Class Action Complaint (the "DP Plaintiffs' Answering Brief"). In that Answering Brief, the DP Plaintiffs essentially took the position that "overcharged purchasers" have standing to assert *Walker Process* claims. At the oral argument at the January 24, 2007 hearing before me, Mr. Sorenson (incorrectly identified in the transcript as Mr. Lieverman), speaking on behalf of the DP Plaintiffs, presented oral argument on the Motions to Dismiss, limiting himself to two minutes. *See* Transcript of January 24, 2007 Oral Argument at 78-79. Thereafter, on January 26, 2007, I received a letter from Mr. Refsin, submitted on behalf of the DP Plaintiffs. Mr. Refsin's January 26, 2007 letter indicated that he was writing because my ruling on the pending Motions to Dismiss "could affect the DP Plaintiffs' pending challenge to the exclusionary payments made by Schering even though we do not have *Walker Process* claims and were not afforded an opportunity to participate fully in Wednesday's **[*87]** argument." (Refsin Letter, at 1.)

Although Mr. Refsin was present at the oral argument on January 24, 2007, he did not at that time request an opportunity to be heard. While I was somewhat surprised by Mr. Refsin's letter stating that the DP Plaintiffs "were not afforded an opportunity to participate fully in Wednesday's argument," particularly in light of Mr. Pearlman's Answering Brief filed on October 23, 2006, and Mr. Sorenson's presentation at the oral argument on January 24, 2007, I overruled the Defendants' objections to the submission of Mr. Refsin's letter and agreed to consider it. I also gave the Defendants an opportunity to reply to Mr. Refsin's letter of January 26, 2007, which they did in a February 1, 2007 letter from Mr. Nields, addressed to me. I have now considered Mr. Pearlman's Answering Brief, filed October 23, 2006, Mr. Refsin's letter of January 26, 2007, and Mr. Nields' letter of February 1, 2007 in response.

In Mr. Refsin's letter of January 26, 2007, the DP Plaintiffs contend that if this Court were to adopt Defendants' argument that patent policy dictates that purchasers not be afforded standing to assert antitrust claims involving a challenge to the validity **[*88]** of a patent, "a glaring gap" would be created in the protections provided by the antitrust laws. (Refsin Letter, at 1.)

Mr. Refsin also noted in his letter that ". . . in ruling on Defendants' motion to dismiss the Indirect Plaintiffs' Walker Process claims, we ask the Court to consider the effect that its ruling may have on the pending challenges to the exclusionary payments that Schering made to settle the underlying patent litigation." (*Id.* at 3.)

In his letter of February 1, 2007 in response to Mr. Refsin's letter, Mr. Nields pointed out: "Schering does not contest a purchaser's standing to bring a claim challenging the lawfulness of settlements based on an allegation of improper payments." Mr. Nields goes on to note:

> What we contest is a purchaser's standing to bring a *Walker Process* and sham litigation claims based solely on patent issues. The cases hold that purchasers lack standing to bring such claims. And a contrary rule would lead to the absurd result that purchasers could re-litigate patent issues that were compromised in a perfectly lawful settlement.

(Nields Letter, at 1.)

The record is clear that the pending motions filed by Defendants to dismiss portions of the Indirect **[*89]** Purchaser Plaintiffs' Amended Consolidated Class Action Complaint relate solely to the question of whether the IP Plaintiffs have standing to assert *Walker Process* and sham litigation claims. Given the narrow issue that I must decide, I express no view on the DP Plaintiffs' "pending challenges to the exclusionary payments that Schering made to settle the underlying patent litigation" and expressly limit my holding to the precise issues raised by Defendants' motions to dismiss portions of the Indirect Purchaser Plaintiffs' Amended Consolidated Class Action Complaint. I express no view as to the merits of the claims asserted by the DP Plaintiffs, or the defenses which Defendants may advance to defeat those claims.

III. CONCLUSION

For the reasons set forth above, I conclude that the respective Applications of Defendants Schering-Plough Corporation, Key Pharmaceuticals, Inc., Upsher-Smith Laboratories, Inc., Wyeth and ESI Lederle to dismiss certain claims contained in the Indirect Purchaser Plaintiffs' Amended Consolidated Class Action Complaint should be granted. Accordingly, Count III of the Indirect Purchaser Plaintiffs' Amended Consolidated Class Action Complaint is dismissed with prejudice. **[*90]** To the extent that other Counts of the Indirect Purchaser Plaintiffs' Amended Consolidated Class Action Complaint incorporate and/or allege, either explicitly or by reference, the claims contained in Count III, those claims are also dismissed with prejudice.

As provided in the Order entered by Magistrate Judge Arleo in this matter, the Special Master's decision on any motion can be appealed to Judge Greenaway in the manner, and subject to the standards of review set forth in *Rule 53 of the Federal Rules of Civil Procedure* and applicable Local Rules.

ENTERED this

1st day of March, 2007

/s/ Stephen M. Orlofsky

STEPHEN M. ORLOFSKY

SPECIAL MASTER

ORDER

The Special Master having considered the Applications of Defendants Schering-Plough Corporation, Key Pharmaceuticals, Inc., Upsher-Smith Laboratories, Inc., Wyeth and ESI Lederle to Dismiss Certain Claims Contained in the Indirect Purchaser Plaintiffs' Amended Consolidated Class Action Complaint, the briefs filed by all parties in support of and in opposition to the Applications, as well as the oral argument of counsel, for the reasons set forth in the foregoing Report and Recommendations;

IT IS HEREBY ORDERED, this 1st day of March, 2007, that:

(1) **[*91]** the Defendants' respective Applications are **GRANTED**; and,

(2) Pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, Count III of the Indirect Purchaser Plaintiffs' Amended Consolidated Class Action Complaint, and any other portion of the Amended Complaint which purports to state a *Walker Process* or sham litigation claim that is not dependent on the legality of the settlement agreements challenged in the initial Complaint, are **DISMISSED** with prejudice.

ENTERED this

1st day of March, 2007

/s/ Stephen M. Orlofsky

STEPHEN M. ORLOFSKY

SPECIAL MASTER

[Flowers v. Exxonmobil Corp.](#)

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

March 2, 2007, Decided; March 2, 2007, Filed

CV-05-CO-02317-W

Reporter

2007 U.S. Dist. LEXIS 112966 *

ROSETTA G. FLOWERS, et al., Plaintiffs, vs. EXXONMOBIL CORPORATION, et al., Defendants.

Core Terms

royalties, antitrust, lease, settlement, Plaintiffs', mineral, Ownership, anti trust law, anticompetitive, summary judgment, competitors, sections, Stream, allegations, consumers, lessor, oil, antitrust claim, drainage, extract, genuine, parties, lessee, seller, terms

Counsel: [*1] For Rosetta G Flowers, Stanley Godwin, Shellye Stanley Mccarty, Fred Stanley, Jr., Sandra Ziglar Wilson, Autry Ziglar, Bobby Ziglar, Clark Ziglar, Plaintiffs: C Knox McLaney, III, LEAD ATTORNEY, MCLANEY & ASSOCIATES PC, Montgomery, AL USA; John W Sharbrough, III, LEAD ATTORNEY, THE SHARBROUGH LAW FIRM, Mobile, AL USA; George W Walker, III, BOLES HOLMES PARKMAN and WHITE, LLC, Auburn, AL USA; Richard Hamilton Gill, COPELAND FRANCO SCREWS & GILL, P.A., Montgomery, AL USA.

For Gladden Smith, Ruthie Smith, Elizabeth T Vinson, Kathy Holiday, Sheila Holiday, Patsy Alexander, Voncile Holiday, Connie Holiday-Buggs, Jimmy C Vinson, Willanette M Troutman, Gladys M Stanton, Robert H Maxwell, Pumpelly Mineral Trust of 1990, Harry H Riddick, Dorothy A Riddick, Renee Riddick Wilbur, Earl E Manning, JR, Darrell Fink, Norma Fink, Gertrude Smith, Henry Oneal Mckinley, Claude Moye, Rodger Parker, Frances Parker, Estelle M Hinote, John L Player, Stoney W Daw, Doris Daw Godwin, Eula Horn, David E Myrick, Trudy O Shackelford, Gary Helton, Donald Ray Helton, Roy Helton, Irma Helton, Marion Kyser, V David Jellenc, Altmayer Limited Partership, Julia S King, Christopher Stallworth King, Jean S Maxwell, Thomas **[*2]** H Stallworth, JR, Mary L Helton, Sandra O Montgomery, Rita Harper, Carolyn R Hassebrock, Elizabeth R Ellis, Bill Rigby, Ruth R Jackson, Debra Milligan, Patty Muhl, Theresa R Harding, Terry J Rigby, Victor Mitchell, Wanda Sue Carlson, Lanier M Myrick, Pumpelly Mineral Trust of 1990, Patrick M. Kingsmill for Regions Bank as Trustee, Bessie Mae Turner, Hazel Higdon, Annie H Troutman, Annie Ruth Nolin, Charlotte T Miller, Claudine W Mcmullen, Laura Jane Trammell, Willie James Wearren, Minnie Louise Guin, W, Benjamin H Watson, Mary Loucinda W Daniels, Cynthia W Tate, Mattie Frances Watson Brown Lisenby, Lester Jackson Watson, JR, Kathleen B Reaves, Hope Miller Zeanah, Martha Troutma Yim, Todd Troutman, Yvonne Wearren, James E Trammell, James Lee Miller, James O Tatro, Jeanette S Farror, Carey F Stanley, Thomas Harvey, Shellye Stanley Mccarty, Fred Edwin Stanley, JR, Carolyn Etheridge, Geneva S Wearren, Harold L Davis, David M Turner, John R Turner, Scott, Rozanne Truscott Turner, Phillip Rigby, Selby O Eidson, Linda E Farrior, Bobbie E King, Delton Smith, Plaintiffs: C Knox McLaney, III, LEAD ATTORNEY, MCLANEY & ASSOCIATES PC, Montgomery, AL USA; George W Walker, III, LEAD ATTORNEY, BOLES **[*3]** HOLMES PARKMAN and WHITE, LLC, Auburn, AL USA; John W Sharbrough, III, LEAD ATTORNEY, THE SHARBROUGH LAW FIRM, Mobile, AL USA; Richard Hamilton Gill, LEAD ATTORNEY, COPELAND FRANCO SCREWS & GILL,P.A., Montgomery, AL USA.

For Exxonmobil Corporation, Defendant: C Meade Hartfield, LEAD ATTORNEY, BRADLEY ARANT BOULT CUMMINGS LLP, Birmingham, AL USA; M Christian King, LEAD ATTORNEY, LIGHTFOOT FRANKLIN & WHITE LLC, Birmingham, AL USA.

For Burlington Resources Oil And Gas Company, L.P., Louisiana Land & Exploration Co., Defendants: Jarrod White, Sandy G Robinson, CABANISS JOHNSTON GARDNER DUMAS & O'NEAL, Mobile, AL USA.

Judges: L. SCOTT COOGLER, UNITED STATES DISTRICT JUDGE.

Opinion by: L. SCOTT COOGLER

Opinion

MEMORANDUM OF OPINION

I. Introduction.

The Court has for consideration Defendant ExxonMobil Corporation's (hereinafter referred to as "ExxonMobil") Motion for Summary Judgment (Doc. 42), filed on August 14, 2006.[1] Plaintiffs filed this class action[2] suit against ExxonMobil, Louisiana Land & Exploration Co. (hereinafter referred to as "LL&E"), and Burlington Resources Oil & Gas Company, L.P. (hereinafter referred to as "Burlington"), on November 10, 2005, to "redress the devaluation and drainage[3] of Plaintiffs' mineral **[*4]** interests caused by ExxonMobil's operation of Big Escambia Creek field." Plaintiffs amended their Complaint on December 16, 2005, (Doc. 22), and they filed their Second Amended Complaint (Doc. 63) on January 11, 2007, to include allegations of conspiracy to fix prices and abuse of monopsony power under the Sherman Antitrust Act, as well as claims for breach of implied covenants related to their drainage theory of recovery against all three defendants. Plaintiffs also allege claims against defendants LL&E and Burlington for breach of contract, breach of implied covenants and duties, and unjust enrichment related to the underpayment of royalties. *Id.* The issues raised in ExxonMobil's motion have been fully briefed by the parties and are now ripe for decision. For the reasons set forth herein, ExxonMobil's motion is due to be granted in part and denied in part.

II. Facts.[4]

---

[1] On January 19, 2006, defendant ExxonMobil filed its Motion to Dismiss First Amended Complaint. (Doc. 23.) The Court entered a briefing schedule (Doc. 25), and the parties fully briefed the motion. On June 16, 2006, ExxonMobil filed a Supplemental Motion to Dismiss Plaintiffs' First Amended Complaint (Doc. 34), and this Court again ordered the parties to brief the motion. Because ExxonMobil relied on several affidavits, along with Plaintiffs' cancelled settlement checks, in support of its Supplemental Motion to Dismiss, this Court determined that the motion would be more appropriately considered as a motion for summary judgment. (Doc. 40.) ExxonMobil then filed the instant Motion for Summary Judgment in response to the Court's Order.

[2] Plaintiffs define the proposed class as:

> All sole proprietorships, partnerships, corporations, other entities, and natural person in the United States, its territories, possession and protectorates who have received royalty payments from one or more of the Defendants or one of their co-conspirators on gas and other substances produced from the Big Escambia Creek Field **[*5]** ("BEC") under leases which, (a) provide gas royalty payments on a "market value at the well" or "market value at the mouth of the well" basis and (b) are "standard" leases for royalty payment purposes.

(Doc. 63, p. 36.) Plaintiffs allege that the class exceeds six hundred individuals nationwide.

[3] When Plaintiffs use the term "drainage" they are referring to "the migration of oil or gas in a reservoir due to pressure reduction caused by production from a nearby well bottomed in the reservoir." (Doc. 63, p. 10.)

[4] The facts set out in this opinion are gleaned from the parties' submissions of facts claimed to be undisputed, the plaintiffs' complaint, and the Court's own examination of the evidentiary record. All reasonable doubts about the facts have been resolved in favor of the nonmoving party. *See* *Info. Sys. & Networks Corp. v. City of Atlanta, 281 F.3d 1220, 1224 (11th Cir. 2002)*. These are the "facts" for summary judgment purposes only. They may not be the actual facts. *See* *Cox v. Adm'r U.S. Steel & Carnegie Pension Fund, 17 F.3d 1386, 1400 (11th Cir. 1994)*.

The plaintiffs in this case own mineral interests in the Big Escambia Creek field (hereinafter referred to as "BEC"), which is located in Escambia County, Alabama, and is comprised of thirty-five sections. There are approximately eighteen wells presently in production within the BEC. Numerous wells have been plugged and abandoned over the years, and the field is not considered "unitized." Some of the plaintiffs in this case have leases with ExxonMobil for gas units that are still in production, while at least one other plaintiff receives royalties on a lease for a gas unit that has been plugged and abandoned.[5]

The Royalty Owner Plaintiffs' property interests in this case are created by virtue of an oil and gas lease whereby the Ownership Group, including ExxonMobil, obtained the exclusive right to explore and extract the minerals, including all the constituent parts of the Full-Well Stream as defined in Plaintiffs' Second Amended Complaint. In the BEC, the Ownership Group **[*6]** buys for its own account and then accumulates and sells the product to third parties. The lease agreements require the Ownership Group to pay the Royalty Owner Plaintiffs payments based on the "market value at the well." Under the terms of most of the leases, the Royalty Owner Plaintiffs are entitled to receive between 12.5% and 16.66% of the market value of the gas substances produced from the leased land. The Operator and Ownership Group are responsible for the proper determination, calculation, distribution, and payment of royalties due and owing to the Royalty Owner Plaintiffs on the market value of the Full-Well Stream and gas substances produced in the BEC or in connection therewith.

The production from each BEC well flows into a central gathering system, as well as primary separators, which removes condensate and water. The gas from the wells is then commingled into a single stream and delivered to the Gas Treating Facility where hydrogen sulfide is extracted and converted into elemental sulfur. The gas stream exiting the "tailgate" of the Gas Treating Facility is composed primarily of hydrocarbons, which are then compressed and moved to a dehydration facility, where water is **[*7]** removed. The gas stream then enters the BEC Gas Plant, which extracts the valuable hydrocarbons, such as ethane, propane, butane, and natural gasoline. The marketable products produced at the BEC include sulfur, residue gas, carbon dioxide, and natural gas.

The Ownership Group employs a "cost netting rate" to fix the price of the Full-Well Stream and impose proper and legal costs on the royalty owners. The plaintiffs in this case allege that additional and unreasonable costs are passed down to them through this system of determining royalty payments. From January 1988 through June 2005, Plaintiffs allege that the Royalty Owner Plaintiffs were paid $12,050,454.53 in royalties. The class owns a decimal interest in the BEC Field production in the amount of 0.04002928, which, according to Plaintiffs, means that the Ownership Group paid the Royalty Owner Plaintiffs royalties based upon total field production valued at $301,040,501.60. Plaintiffs contend that the actual value of the total field production for that period was in excess of $3 billion.

On January 26, 1998, Ms. Aline Moye commenced the action entitled *Aline Moye, etc., et al. v. ExxonMobil Corporation, et al.*, Civil Action No. **[*8]** CV-98-20, in the Circuit Court of Monroe County, Alabama. (Doc. 12.) The *Moye* action alleged claims against ExxonMobil arising out of its royalty calculation practices with respect to gas and gas substances produced from the BEC. *Id.* On March 24, 2003, the Monroe County Circuit Court certified a voluntary, opt-out litigation class of royalty owners in the BEC, pursuant to *Alabama Rules of Civil Procedure 23(a)* and *23(b)(3)*. *Id.* After approximately seven years of litigation, mediation, and settlement negotiation, the class representatives in *Moye*, class counsel, and ExxonMobil reached a proposed settlement. (Doc. 24.) On June 1, 2005, the Monroe County Circuit Court entered an order preliminarily approving the settlement and conditionally certifying a settlement class. *Id.* Notice of the settlement was both published and mailed to class members. *Id.* After the time for objecting to or opting out of the class settlement had expired and this Court denied Plaintiff's motion for an injunction under the All Writs Act, the State Court conducted a settlement fairness hearing on December 20, 2005. *Id.* That court then entered its Final Judgment approving the settlement.

---

[5] Plaintiffs Rosetta G. Flowers, Stanley C. Godwin, Clark Ziglar, Bobby Ziglar, Autry Ziglar, and Sandra Wilson are plaintiffs who receive royalties for gas units that are still in production, while plaintiff Fed Stanley, Jr., receives royalties for a gas unit that has been plugged and abandoned.

Plaintiffs chose not to opt out of the *Moye* settlement, thus participating **[*9]** in the benefits of that agreement. *Id.* Plaintiffs Flowers and Godwin were ultimately the only members of the more than six hundred member settlement class who objected to the proposed settlement in any form. *Id.* Their objections were overruled by the State Court.

III. Summary Judgment Standard.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The party moving for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the evidence] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The movant can meet this burden by presenting evidence showing that there is no genuine dispute of material fact, or by showing that the nonmoving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof. *Id. at 322-23*. In evaluating the arguments of the movant, the court must view the evidence in **[*10]** the light most favorable to the nonmoving party. *Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 742 (11th Cir. 1996)*.

Once the moving party has met his burden, *Rule 56(e)* "requires the nonmoving party to go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex, 477 U.S. at 324* (quoting *Fed. R. Civ. P. 56(e)*). "A factual dispute is genuine only if a 'reasonable jury could return a verdict for the nonmoving party.'" *Info. Sys. & Networks Corp. v. City of Atlanta, 281 F.3d 1220, 1224 (11th Cir. 2002)* (quoting *United States v. Four Parcels of Real Property, 941 F.2d 1428, 1437 (11th Cir. 1991))*.

IV. Discussion.

According to Plaintiffs, ExxonMobil has combined and conspired with the other members of the Ownership Group to plug and abandon wells in some sections of the BEC, while draining those sections from adjacent and nearby wells, thereby devaluing and misappropriating the plaintiffs' mineral interests. (Doc. 63, p. 2.) They allege that "[i]n order to successfully drain [their] minerals, ExxonMobil together with the other Defendants exercised oligopoly powers in the field to prevent exploration, development, and production by other drillers." Id. By doing this, Plaintiffs contend that ExxonMobil and the other defendants in this case violated the antitrust laws of the United States "and generally failed to act as a reasonably **[*11]** prudent operator in connection with the [BEC]." *Id.*

Plaintiffs' remaining claims against ExxonMobil are for violations of the Sherman Antitrust Act and breach of implied covenants relating to their drainage theory. (*See* Exhibit A to January 4, 2007, Hearing.)

A. Release.

As set out in the parties' Settlement Agreement and Release, upon receipt of the settlement proceeds, all claims, asserted or unasserted, were released and discharged.[6] Like any contract, a release must be interpreted by

---

[6] The Agreement provides, in pertinent part, as follows:

> 3.17 Release and Indemnification of the Companny
>
> a. Upon the Company's payment of the Settlement Proceeds under paragraph 3.11, above, each Class Representative and Settlement Class Member shall be deemed and adjudged to release, acquit and forever discharge the Company from any and all claims, demands, damages (whether actual or punitive), debts, liabilities, accounts and causes of action of every kind and nature, whether in law or in equity, arising in contract or in tort, including but not limited to claims for alleged fraud, breach of fiduciary duties, accounting, conversion, suppression, negligence, joint enterprise, **[*13]** conspiracy, unjust enrichment, constructive trust, declaratory relief, injunctive relief, wantonness, and every other claim or theory of recovery, legal or equitable, of any type or character whatsoever, directly or indirectly, whether asserted or not, that he, she or it may have had or may now have as a result of, or arising or resulting from the calculation, payment, and reporting of royalties on natural gas . . . produced from BEC by the Company . . . .

(Doc. 43, Exhibit B.)

ascertaining the intentions of the parties expressed in the written agreement, and full effect must be given to those intentions. *See, e.g., Johnston v. Bridges, 288 Ala. 156, 258 So. 2d 866, 871 (Ala. 1972)*. Alabama law requires that releases "must have effect according to their terms and the intentions of the parties thereto." *Ala. Code § 12-21-109*. Even though the Monroe County Circuit Court did not have jurisdiction to adjudicate claims grounded in federal ***antitrust law***, it did have the jurisdiction to approve a settlement of all claims submitted to it, including antitrust claims. *See Adams v. Robertson, 676 So. 2d 1265, 1301 (Ala. 1995)* ("Even where a court does not have the power to adjudicate a claim, it may still approve release of that claim as a condition of the settlement of an action before it."). However, as Plaintiffs point out **[*12]** in their response to ExxonMobil's motion, the *Moye* release does not dispose of the claims alleged in the Second Amended Complaint.[7] (Doc. 64, p. 5.) The claims no longer arise out of the calculation, payment, and reporting of royalties. Instead, as stated above, the claims are based on ExxonMobil's alleged drainage activities, which appear to not be released under the language of the *Moye* settlement. Therefore, the endorsement on the reverse of the *Moye* settlement checks does not appear to be a general release of all Plaintiffs' claims in the Second Amended Complaint.

B. Plaintiffs' Antitrust Claims.

Plaintiffs contend that "[i]n order to completely and successfully drain Plaintiffs [sic] minerals ExxonMobil prevented competitors from drilling in those shut-in sections." (Doc. 64, p. 5.) As a result of ExxonMobil's actions, Plaintiffs allege that their mineral interests in the shut-in sections were devalued. *Id.* The "gravamen" of Plaintiffs' complaint is that ExxonMobil's drainage scheme would not have been **[*14]** possible unless they could prevent competitors from drilling in the closed sections. *Id.* Plaintiffs believe that by alleging ExxonMobil "committed acts designed to restrain competition in a market for its benefit and to the detriment of others," they have alleged "precisely the kind of injury the antitrust laws were designed to prevent." *Id.*

ExxonMobil argues that it is entitled to summary judgment on the first and second counts of the Second Amended Complaint[8] due to the fact that "[b]ecause no antitrust injury is or can be alleged, plaintiffs cannot assert a valid claim under the federal antitrust laws. Accordingly, plaintiffs are without standing to assert an antitrust cause of action against ExxonMobil." (Doc. 43, p. 23.) ExxonMobil avers that Plaintiffs' antitrust claims fail because they have not identified an antitrust injury and are without standing to assert an antitrust cause of action. (Doc. 43, p. 23.)

An analysis of standing requires the Court to examine the allegations contained within Plaintiffs' Complaint. *See Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1497 (11th Cir. 1985)*. A private plaintiff seeking to recover under the antitrust laws must have standing beyond the customary "injury in fact" and "case in controversy" required by **[*15]** Article III of the Constitution. *Florida Seed Co. v. Monsanto Co., 105 F.3d 1372, 1374 (11th Cir. 1997)* (citing *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1448 (11th Cir. 1991))*. The Eleventh Circuit follows a two-pronged approach in determining whether a plaintiff has standing to bring an antitrust suit. *Id.* First, the plaintiff must prove that it has suffered an "antitrust injury" - an injury which "the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Id.* (quoting *Brunswick v. Pueblo Bowl-*

---

[7] The Court is aware of the fact that ExxonMobil's motion for summary judgment was filed prior to the Court granting Plaintiffs' Motion for Leave to File Second Amended Complaint (Doc. 54). (Doc. 61.) However, in Plaintiffs' previously filed response to ExxonMobil's Supplement to Motion to Dismiss (Doc. 36) they directed the Court's attention to language in paragraph 3.17 of the Settlement Agreement which states:

> The Released Claims do not include claims related to oil or condensate produced from BEC, claims for *drainage*, or any other claims unrelated to the calculation, payment, or reporting of royalties on gas produced from BEC and/or on all gas substances extracted from such gas, as set forth above.

(Doc. 43, Exhibit B (emphasis added).)

[8] ExxonMobil's motion seeks summary judgment on the first through third counts of the Amended Complaint, which were all claims arising under the federal antitrust laws. However, under the Second Amended Complaint only the first two counts allege antitrust injuries, while Count Three deals with alleged breaches of implied covenants relating to Plaintiffs' drainage theory claims.

O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)) (internal quotation marks omitted); *see also* Amey, 758 F.2d at 1492-93. Second, the plaintiff is required to "establish that it is an efficient enforcer of the antitrust laws." *Id.* (citing Municipal Utilities Bd. of Albertville v. Alabama Power Company, 934 F.2d 1493, 1499 (11th Cir. 1991)). The Eleventh Circuit has adopted the "target area" test that was used by the Fifth Circuit to determine whether a plaintiff has standing and is within the market affected by the alleged antitrust violations. *See* Austin v. Blue Cross & Blue Shield of Ala., 903 F.2d 1385, 1388 (11th Cir. 1990); Amey, 758 F.2d at 1496.[9] The test requires a plaintiff to both "'prove that he is within that sector of the economy endangered by a breakdown of competitive conditions in a particular industry' and that he or she is 'the target against which anticompetitive activity is directed.'" Florida Seed, 105 F.3d at 1374 (quoting National Indep. Theatre Exhibitors, Inc. v. Buena Vista Distribution Co., 748 F.2d 602, 608 (11th Cir. 1984)). Basically, the plaintiff "must show that it is a customer or competitor in the relevant antitrust market." *Id.* (citing Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 539, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)).

ExxonMobil contends that "[i]n an effort to manufacture an effect **[*16]** on competition, plaintiffs characterize their relationship with ExxonMobil as that of a buyer and seller." (Doc. 43, p. 25.) According to ExxonMobil, this characterization is incorrect as a matter of law, as title to the gas stream upon severance at the well vests in it and not the individual Royalty Owner Plaintiffs. *Id.* Therefore, ExxonMobil believes that the correct representation of the basis of Plaintiffs' alleged injury is as a lessor owed a contractual obligation and not as a competitor or market participant. *Id.* at 26.

In Alabama, as well as several other states, title to oil and gas vests in the lessee under the non-ownership theory, "which recognizes the migratory nature of oil and gas and requires actual possession to establish ownership." NCNB Texas Nat. Bank v. West, 631 So. 2d 212, 223 (Ala. 1993). Therefore, the lessor landowner has "'the right to reduce the oil and gas to possession or to sever this right for economic consideration.'" *Id.* (quoting Sun Oil Co. v. Oswell, 62 So. 2d 783, 787 (1953)). A "royalty owner is not considered . . . to be engaged in any 'sale' of gas." Mobil Oil Corp. v. Fed. Power Comm'n, 463 F.2d 256, 260, 149 U.S. App. D.C. 310 (D.C. 1971). For states following both ownership and non-ownership theories, once the gas exits the mouth of the well, "the entire ownership of the gas is in the lessee, none being reserved in the lessor." J.M. Huber Corp. v. Denman, 367 F.2d 104, 113-14 (5th Cir. 1966). The lessor simply **[*17]** is not a seller of gas, to say otherwise would be tantamount to saying that "[t]he developer of a shopping center [becomes] a seller of food because he leases to a supermarket on percentage rental terms." Mobil Oil Corp. v. Fed. Power Comm'n, 463 F.2d 256, 262, 149 U.S. App. D.C. 310 (D.C. Cir. 1971).

ExxonMobil urges that since all Plaintiffs owned was a right to receive payments for the sale of gas pursuant to the terms of the mineral leases, Plaintiffs cannot be sellers of natural gas. (Doc. 43, p. 28.) According to ExxonMobil, Plaintiffs cannot be considered consumers in the market for gas processing services because they have no gas to sell or be processed. *Id.* Therefore, it argues that since Plaintiffs are neither suppliers nor consumers in any relevant market, they could not have suffered an antitrust injury. *Id.* ExxonMobil relies upon the Tenth Circuit opinion in Elliott Indus. Ltd. Partnership v. BP America Prod. Co., 407 F.3d 1091 (10th Cir. 2005), in which the plaintiffs argued that BP and ConocoPhillips had formed an illegal cartel to horizontally fix prices for gas processing services at anti-competitively high levels and injured the class by depressing the gas' wellhead value resulting in the underpayment of royalties. Id. at 1123. That court upheld the dismissal of the plaintiff's antitrust claims because it failed to allege a proper antitrust injury. Id. at 1125. The **[*18]** Court noted that any injury suffered by Elliott as a result of the processing fee was "not an antitrust injury because it ha[d] no adverse effect on competition or consumers." *Id.* The Tenth Circuit emphasized that "although Elliot trie[d] to characterize itself as a consumer of gas processing services and also a supplier of natural gas and NGLs, Elliott [was] a royalty interest owner in a lease to Appellees," thus concluding that "[m]ere injury as a landlord or lessor entitled to royalties would not by itself be the kind of injury to competition that the antitrust laws are designed to prevent." *Id.* (citing R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139, 148 (9th Cir. 1989) (en banc) (holding that the allegations of the lessors that

---

[9] The Eleventh Circuit adopted the case law of the former Fifth Circuit handed down as of September 30, 1981, in Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

the lessees conspired to depress production of geothermal steam and thereby reduce royalty payments were insufficient as a matter of law because the lessors were not competitors in the same market as the alleged malefactors)). Even if BP and ConocoPhillips' conduct was harmful to competition, the court did not find that Elliott's injury was a result of the alleged anticompetitive behavior. *Id.* (citing *Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1033 (9th Cir. 2001))*. "An anticompetitive injury would exist if, for example, Elliott had alleged that Appellees were conspiring with gas purchasers **[*19]** to keep downstream sales prices artificially low, such that Elliott's resulting royalty payments were reduced." *Id.*

In a previously filed response to ExxonMobil's Motion to Dismiss, Plaintiffs attempted to distinguish the decision in *Elliott* from the facts of the case at hand. They noted that in *Elliott, 407 F.3d at 1123*, the relevant market activities were post production activities "one tier removed downstream from the Plaintiffs' alleged harm," whereas in the present action Plaintiffs have alleged that the anticompetitive acts occurred at, or before, the production level. According to Plaintiffs, "ExxonMobil exercised its monopoly power and conspired with others to shut-in some sections in BEC and proceeded to drain the shut-in sections from nearby wells it owned and controlled." (Doc. 64, p. 5.)

ExxonMobil believes that the antitrust claims raised by Plaintiffs mirror those alleged in *Elliott*, and, therefore, summary judgment should be granted for the same reasons. (Doc. 43, p. 29.) It also urges the Court that the parties' relationship in this case is governed by the mineral lease and not by competition. (Doc. 43, p. 30.) The business relationship between Plaintiffs and ExxonMobil was cemented in the form **[*20]** of the mineral leases. Therefore, ExxonMobil's duties to Plaintiffs are "not derived from the antitrust laws' vision of how competitors should behave; they are derived from the [leases] it has with [P]laintiffs." *UNR Industries, Inc. v. Continental Insurance Co., 607 F. Supp. 855, 860, 46 B.R. 430 (N.D. Ill. 1984)*. Finally, ExxonMobil contends that Plaintiffs cannot state a claim based on the allegations relating to gas treating and processing costs - Plaintiffs do not own the rights to explore for, develop, or market the gas and gas related products. (Doc. 43, p. 32.) The mineral leases grant the lessee with the exclusive right to explore, remove, and dispose of the minerals. In Plaintiffs' complaint, they state "Royalty Owner Plaintiffs' property interests in this matter is created by virtue of an oil and gas lease whereby the Ownership Group and others obtained the exclusive right to explore, develop and extract (produce) the minerals, including all the constituent parts of the Full-Well Stream as defined herein." (Doc. 63, p. 13.) Plaintiffs also allege that "[t]he lessee under an oil and gas lease undertakes the exploration and development of the property to extract the product." *Id.*

Plaintiffs have previously argued that they have alleged an antitrust injury and have standing **[*21]** to bring an action alleging an antitrust violation under Section 4 of the Clayton Act. (Doc. 27, p. 9.) They turned to the Supreme Court case of *Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*, to support an expansive reading of section 4. In *McCready*, the Court "recognized, '[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.'" *Id. at 472* (quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236, 68 S. Ct. 996, 92 L. Ed. 1328 (1948))*. Relying on *McCready*, as well as the Eleventh Circuit opinion in *Amey, 758 F.2d 1486*, Plaintiffs contended that they have identified a market area that was adversely affected by the alleged antitrust activities and pleaded facts which support allegations that their alleged injury occurred within that market area. Plaintiffs have offered that they "participate in the market as both producers of Gas Substances and purchasers of Defendants' gas production services, therefore, the alleged injuries, i.e., harming the reservoir, etc., flow as a 'foreseeable' and 'necessary' step in furthering the objectives of the conspiracy . . . ." (Doc. 27, p. 13.) They believe that this puts them "squarely" within the market endangered **[*22]** by the alleged conspiracy. *Id.* Plaintiffs argue that their allegations that ExxonMobil's alleged anticompetitive activities have irreparably harmed the BEC reservoir, devalued their property, and resulted in the underpayment of royalties are collectively "antitrust injuries" within the meaning of section 4 of the Clayton Act. Plaintiffs cite to *Reiter v. Sonotone Corp., 442 U.S. 330, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)*, to support their contention, but the case states that "acquiring goods or services for personal use" is enough to show that there has been an injury to property "when the price of those goods or services is artificially inflated by reason of the anticompetitive conduct complained of." *Id. at 339*. However, as established in the preceding paragraphs, Plaintiffs are not acquiring goods or services for their own personal use. Rather, they are royalty owners who have leased away their right to the minerals in question. "In exchange for consideration, including the payment of royalt[ies], ExxonMobil was given the exclusive right to explore for and develop the leased minerals." (Doc. 68, pp. 3-4.) They are not consumers of ExxonMobil's services.

Plaintiffs simply have not alleged an antitrust injury because they are neither consumers nor competitors in the relevant **[*23]** market. Their allegations regarding the exploration, development, and production of the gas substances at the BEC does not establish that they are market participants. In fact, at most, the allegations, if proven, amount to nothing more than a breach of the lease between the parties. The rights to explore, develop, and produce gas substances at the BEC have been leased to ExxonMobil, and, therefore, Plaintiffs cannot state a claim for antitrust injury and are without standing to bring such a claim. Plaintiffs' reliance on *McCready* is misplaced because unlike the plaintiff in that case who was a customer with the right to choose her mental health care provider from the market affected by antitrust violations, Plaintiffs do not have a right to choose gas processors or leasehold developers so as to become participants in the alleged relevant market.

Plaintiffs are correct in asserting that the fact that antitrust liability may be predicated on acts that are otherwise a breach of contract does not immunize the anticompetitive activity. *See, e.g., Maris Distributing Co. v. Anheuser-Busch, Inc., 302 F.3d 1207, 1219 (11th Cir. 2002)* ("Anticompetitive actions are not immunized by virtue of being memorialized in a contract."); *City of Vernon v. Southern California Edison Co., 955 F.2d 1361, 1368 (9th Cir. 1992)*. However, a plaintiff must still have standing **[*24]** to bring the antitrust action independent of the claim based upon breach of contract. Contract power should not be automatically equated with market power because to do so "would place significant additional risks on such legitimate business practices as exclusive dealing arrangements . . . ." *Maris, 302 F.3d at 1224* (citing *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 438 (3rd Cir. 1997))*. Even though "a party who exercises contract power *may* have market power and *may* violate the antitrust laws under some circumstances, the mere existence and exercise of contract power does not show that a defendant had market power or violated the law." *Id. at 1219* (emphasis in original).

V. Conclusion.

For the reasons set forth above, ExxonMobil's Motion for Summary Judgment (Doc. 42) is due to be GRANTED IN PART AND DENIED IN PART. ExxonMobil is entitled to summary judgment as to Counts One and Two of Plaintiffs' Second Amended Complaint.

Done this 2nd day of March 2007.

/s/ L. Scott Coogler

L. SCOTT COOGLER

UNITED STATES DISTRICT JUDGE

End of Document

[Paul v. Intel Corp. (In re Intel Corp. Microprocessor Antitrust Litig.)](#)

United States District Court for the District of Delaware

March 7, 2007, Decided

MDL Docket No. 05-1717-JJF, Civil Action No. 05-485-JJF, CONSOLIDATED ACTION

Reporter

476 F. Supp. 2d 452 *; 2007 U.S. Dist. LEXIS 16134 **; 2007-1 Trade Cas. (CCH) P75,631

IN RE: INTEL CORP. MICROPROCESSOR ANTITRUST LITIGATION; PHIL PAUL, on behalf of himself and all others similarly situated, Plaintiffs, v. INTEL CORPORATION, Defendant.

Subsequent History: Magistrate's recommendation at *Paul v. Intel Corp. (In re Intel Corp. Microprocessor Antitrust Litig.), 2007 U.S. Dist. LEXIS 103979 (D. Del., May 18, 2007)*

Prior History: *Advanced Micro Devices, Inc. v. Intel Corp. (In re Intel Corp. Microprocessor Antitrust Litig.), 2007 U.S. Dist. LEXIS 3407 (D. Del., Jan. 12, 2007)*

Core Terms

allegations, commerce, subject matter jurisdiction, motion to dismiss, contends, prices, state law claim, microprocessors, antitrust, Sherman Act, domestic, reasonably foreseeable, consumer

LexisNexis® Headnotes

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

HN1[] **Defenses, Demurrers & Objections, Motions to Dismiss**

Pursuant to *Fed. R. Civ. P. 12(b)(1)*, a court is authorized to dismiss a complaint if the court lacks subject matter jurisdiction over the claims. Motions brought under *Rule 12(b)(1)* may present either a facial or factual challenge to the court's subject matter jurisdiction.

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

HN2[] **Defenses, Demurrers & Objections, Motions to Dismiss**

In reviewing a facial challenge under *Fed. R. Civ. P. 12(b)(1)*, the court must accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. The court's inquiry under *Rule 12(b)(1)* is limited to the allegations in the complaint, the documents referenced in or attached to the complaint, and matters in the public record. However, the court may consider documents attached as exhibits to a motion to dismiss without converting the motion to dismiss to a motion for summary judgment, if the plaintiff's claims are based on the documents and the documents are undisputedly authentic.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

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

HN3[] **Jurisdiction, Subject Matter Jurisdiction**

Pursuant to *Fed. R. Civ. P. 12(h)(3)*, subject matter jurisdiction may be raised at any time during the course of a case and may be raised sua sponte by the court. Once the court's subject matter jurisdiction over a complaint is challenged, the plaintiff bears the burden of persuasion to establish that subject matter jurisdiction exists.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

HN4[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The Sherman Act was amended by the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), *15 U.S.C.S. § 6a*, in 1982. The FTAIA carves out activity involving foreign commerce from the reach of the Sherman Act unless the conduct has a direct, substantial and reasonably foreseeable effect on United States commerce, and the effect gives rise to a claim under the Sherman Act.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

HN5[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), *15 U.S.C.S. § 6a*, explicitly bars antitrust actions alleging restraints in foreign markets for inputs that are used abroad to manufacture downstream products that may later be imported into the United States. Clearly, the domestic effects in such a case, if any, would obviously not be direct, much less substantial and reasonably foreseeable.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

HN6[] **International Aspects, Foreign Trade Antitrust Improvements Act**

Foreign commerce is preeminently a matter of national concern, and therefore, it is important for the Federal Government to speak with a single, unified voice. Congress has spoken under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), *15 U.S.C.S. § 6a*, with the direct, substantial and reasonably foreseeable effects test, and Congress' intent would be subverted if state antitrust laws were interpreted to reach conduct which the federal law could not.

Counsel: [1]** Michael D. Hausfeld, Esquire; Daniel A. Small, Esquire; Brent W. Landau, Esquire and Allyson B. Baker, Esquire of COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C., Washington, D.C. James L. Holzman, Esquire; J. Clayton Athey, Esquire and Laina M. Herbert, Esquire of PRICKETT JONES & ELLIOTT, P.A., Wilmington, Delaware. Interim Liaison Counsel for the Class Plaintiffs.

David M. Balabanian, Esquire; James L. Hunt, Esquire; Christopher B. Hockett, Esquire and Nora C. Cregan, Esquire of BINGHAM McCUTCHEN LLP, San Francisco, California. Richard A. Ripley, Esquire of BINGHAM McCUTCHEN LLP, Washington, D.C. Richard L. Horwitz, Esquire and W. Harding Drane, Jr., Esquire of POTTER ANDERSON & CORROON LLP, Wilmington, Delaware. Attorneys for Defendant Intel Corporation.

Judges: Joseph J. Farnan Jr., UNITED STATES DISTRICT JUDGE.

Opinion by: Joseph J. Farnan Jr.

Opinion

[*453] ***MEMORANDUM OPINION***

March 7, 2007

Wilmington, Delaware

Farnan, District Judge.

Pending before the Court is Defendant Intel Corporation's Motion To Dismiss Plaintiffs' Foreign Conduct Claims (D.I. 221 in Civil Action No. 05-485 and D.I. 311 in MDL Docket No. 05-1717). [1] For the reasons discussed the Court will grant **[**2]** Defendant's Motion.

BACKGROUND

Advanced Micro Devices, Inc. and AMD International Sales & Service, Ltd. (collectively, "AMD") filed this action against Intel Corporation and Intel Kabushiki Kaisha alleging antitrust claims under the Sherman Act, violations of the California Business and Professions Code, and tortious interference with prospective economic advantage. Following the filing of AMD's action, multiple class action lawsuits were filed. Those lawsuits have since been consolidated and a First Amended **[*454]** Consolidated Complaint (the "Amended Complaint") has been filed by Interim Liaison Counsel for Class Plaintiffs.

By their Amended Complaint, Class Plaintiffs seek to represent a class comprising United States consumers, both individuals and companies from numerous states, who purchased computers containing Intel x86 microprocessors in the United **[**3]** States at allegedly inflated prices. The allegations of Class Plaintiffs' Amended Complaint are similar to, and at times, identical to the allegations of AMD's Complaint. Like AMD, Class Plaintiffs seek relief under *Section 2* of the Sherman Act, *15 U.S.C. § 2* (Count I), alleging that Intel has engaged in anticompetitive conduct in the United States which has resulted in Intel obtaining an unlawful world-wide monopoly over the x86 microprocessor market. Class Plaintiffs allege that they have been injured and will continue to be injured by this conduct "by paying more for x86 microprocessors purchased directly from Intel than they would have paid and would pay in the future in the absence of Intel's unlawful acts, including paying more for personal computers and other products in which x86 microprocessors are a component, as a result of higher prices paid for x86 microprocessors by the manufacture of those products." (D.I. 49 at P 245.) In connection with their Sherman Act claim, Class Plaintiffs request the Court to enjoin Intel from engaging in the violations alleged in the Amended Complaint.

Class Plaintiffs also raise a variety of state law claims, including: **[**4]** (1) a claim based on *Section 16720 of the California Business and Professional Code* for Intel's alleged participation with other co-conspirators in "a continuing unlawful trust in restraint of . . . trade and commerce" (Count II); (2) a claim based on *Section 17200 et seq.* of the California Business and Professional Code for unfair competition (Count IV); (3) a claim based on violation of California state tort law prohibiting monopolies (Count III); (4) a claim under the laws of twenty states,

[1] In citing to additional documents throughout this Memorandum Opinion, the Court will refer to the docket item numbers used in Civil Action No. 05-485-JJF.

including the state of California, for antitrust and restraint of trade violations (Count V); (5) a claim under the laws of twenty-three states for violations of state consumer protection and unfair competition laws (Count VI); and (6) a claim under California common law for unjust enrichment and disgorgement of profits (Count VII). In connection with these claims, Class Plaintiffs seek a variety of relief, including punitive damages, treble damages, disgorgement of profits, the establishment of a constructive trust from which the Class Plaintiffs can seek restitution based on the disgorgement of profits, the costs of bringing this lawsuit, and reasonable attorneys' fees.

By the instant Motion, **[**5]** Intel requests the Court to dismiss the foreign conduct claims alleged in the Amended Complaint for lack of subject matter jurisdiction. [2] The parties have fully briefed Intel's Motion, and therefore, this matter is ready for the Court's review.

STANDARD OF REVIEW

HN1[] Pursuant to *Federal Rule of Civil Procedure 12(b)(1)*, the Court is authorized to dismiss a complaint if the Court lacks subject matter jurisdiction over the claims. Motions brought under *Rule 12(b)(1)* may present either a facial or factual challenge to the Court's subject matter jurisdiction.

[*455] In this case, the Court is presented with a facial challenge to subject matter jurisdiction. ***HN2***[] In reviewing a facial challenge under *Rule 12(b)(1)*, the Court must accept all factual allegations **[**6]** in the complaint as true and draw all reasonable inferences in favor of the plaintiff. The Court's inquiry under *Rule 12(b)(1)* is limited to the allegations in the complaint, the documents referenced in or attached to the complaint, and matters in the public record. *Gould Elecs., Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000)*. However, the Court may consider documents attached as exhibits to a motion to dismiss without converting the motion to dismiss to a motion for summary judgment, if the plaintiff's claims are based on the documents and the documents are undisputedly authentic. *Pension Benefit Guaranty Corp. v. White Consolidated Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993)*.

HN3[] Pursuant to *Rule 12(h)(3)*, subject matter jurisdiction may be raised at any time during the course of a case and may be raised *sua sponte* by the Court. Once the Court's subject matter jurisdiction over a complaint is challenged, the plaintiff bears the burden of persuasion to establish that subject matter jurisdiction exists. *Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406 (3d Cir. 1991)*.

DISCUSSION

I. The Parties' Contentions

[7]** By its Motion, Intel contends that the allegations of foreign conduct contained in Class Plaintiffs' Amended Complaint should be dismissed for lack of jurisdiction under the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"). Intel contends that Class Plaintiffs' foreign conduct allegations are virtually identical to the allegations that the Court struck from AMD's Complaint, and therefore, these allegations should also be stricken here. *Advanced Micro Devices, Inc. v. Intel Corporation, 452 F. Supp. 2d 555 (D. Del. 2006)*. Intel contends that Class Plaintiffs' claims are even more remote than AMD's claims, because Class Plaintiffs allege the same chain of events alleged by AMD, but go on to further allege that the weakening of AMD in the market resulted in Intel charging higher prices overseas to third parties for microprocessors who then installed these higher priced Intel chips into computers that were eventually sold in the United States Market, which in turn led to higher retail prices for those computers in the United States. Intel contends that this winding chain of events does not evidence the

---

[2] Intel has also moved separately from this Motion to dismiss Class Plaintiffs' Amended Complaint for a variety of other reasons. Briefing on that Motion was completed on February 28, 2007, and the Court will address that Motion by separate Memorandum Opinion and Order.

"direct, substantial and foreseeable effect on U.S. commerce" **[**8]** that is required for subject matter jurisdiction under the FTAIA.

Intel also contends that the various state law claims asserted by Class Plaintiffs are limited by the FTAIA. Intel's argument rests on both the *Supremacy Clause*, as well as on the letter and interpretation of the various state laws, which Intel contends contain provisions making them consistent with federal law or precluding them from applying to foreign conduct.

In response, Class Plaintiffs contend that Intel's foreign conduct is relevant to proving the unlawfulness of Intel's domestic conduct, and therefore, Class Plaintiffs can base their claims on foreign misconduct, even if Intel cannot ultimately be held liable for that foreign misconduct. In support of its position, Class Plaintiffs direct the Court to the Special Master's discovery decision concluding that foreign conduct was relevant to AMD's domestic claims.

Class Plaintiffs also contend that Intel's foreign conduct satisfies the FTAIA's domestic commerce exception. Specifically, Class Plaintiffs contend that Intel's foreign conduct has a direct, substantial and reasonably foreseeable effect on domestic **[*456]** commerce and gives rise to Plaintiffs' antitrust claims.

[**9] II. Whether The Court Has Jurisdiction Over Class Plaintiffs' Sherman Act Claims Based On Intel's Alleged Foreign Conduct

HN4[] The Sherman Act was amended by the FTAIA in 1982. The FTAIA carves out activity involving foreign commerce from the reach of the Sherman Act unless the conduct has a "direct, substantial and reasonably foreseeable effect" on United States commerce, and the effect gives rise to a claim under the Sherman Act. *F. Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)* (emphasis and brackets in original).

In its previous decision related to AMD's foreign conduct allegations, the Court analyzed the application of the FTAIA to virtually the same allegations asserted here by Class Plaintiffs. *Intel, 452 F. Supp. 2d at 559-563*. The Court finds no reason to depart from its previous analysis. Class Plaintiffs contend that the appropriate focus of the direct, substantial and foreseeable inquiry is the effect on commerce and not the effect on any particular plaintiff. However, the effect on commerce is exactly what the Court considered in the context of AMD's motion. Here, Class Plaintiffs make the same allegations as AMD, **[**10]** and therefore, Class Plaintiffs' allegations have the same "twists and turns" that the Court noted with respect to AMD's allegations, plus additional "forks in the road" concerning whether the weakened condition of rivals like AMD ultimately led Intel to charge higher prices for its microprocessors, which in turn caused original equipment manufacturers ("OEMs") to charge retailers higher wholesale prices for PCs, which in turn caused retailers to pass that price increase on to consumers in the form of higher retail prices for PCs. That this speculative chain of events is insufficient to create the direct, substantial and foreseeable effects on commerce required by the FTAIA has been confirmed by other courts who have considered similar allegations concerning the downstream effects on commerce of component products. [3] *See e.g., United Phosphorus, Ltd. v. Angus Chem. Co., 131 F. Supp. 2d 1003 (N.D. Ill. 2001)*, *aff'd* *322 F.3d 942 (7th Cir. 2003)* (***HN5***[] "The FTAIA explicitly bars antitrust actions alleging restraints in foreign markets for inputs . . . that are used abroad to manufacture downstream products . . . that may later be imported into the United States. **[**11]** Clearly, the domestic effects in such a case, if any, would obviously not be 'direct,' much less 'substantial' and 'reasonably foreseeable.'")

As for the "new" case law that Class Plaintiffs raise in their Answering Brief, the Court notes that each of these cases pre-date the Supreme Court's decision in *F. Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155, 124 S.*

[3] Though discussed in the context of the causation inquiry, the Court noted in its previous decision that allegations that Intel engaged in overseas conduct which resulted in higher PC prices and loss of consumer choice in the United States "are not direct domestic effects of any alleged foreign conduct of Intel, but secondary and indirect effects that are also the by-product of numerous factors relevant to market conditions and the like." *Intel, 452 F. Supp. 2d at 561*.

Ct. 2359, 159 L. Ed. 2d 226 (2004), the seminal case interpreting the FTAIA. Further, the Court has already addressed several of the cases cited by Class Plaintiffs in the context of AMD's **[**12]** motion to dismiss and concluded that they are inapplicable. *Intel, 452 F. Supp. 2d at 562-563*.

Class Plaintiffs also direct the Court to the Special Master's decision to allow **[*457]** AMD and Class Plaintiffs to obtain foreign discovery to prove their claims related to monopoly power and anticompetitive conduct. The Special Master's decision was rendered after this Court's decision regarding AMD's motion to dismiss and pertains to the scope of discovery concerning the parties' "domestic commerce" claims. Indeed, the Special Master acknowledged this Court's decision to dismiss AMD's foreign conduct claims and noted that he was not authorized to decide any substantive issues in connection with that decision. Accordingly, the Court finds no conflict between its decision to dismiss Class Plaintiffs' foreign conduct claims and the Special Master's discovery decision.

In sum, the Court concludes that it lacks subject matter jurisdiction under the FTAIA over Class Plaintiffs' Sherman Act claims to the extent those claims are based on the alleged foreign conduct of Intel. Accordingly, the Court will grant Intel's Motion to dismiss and strike paragraphs 145-149, 159-162, 169, 178-179, 185-187, 190, **[**13]** 193, 197-198, 204-205 and 210 of the Amended Complaint.

III. Whether The Court Has Jurisdiction Over Class Plaintiffs' State Law Claims Based On Intel's Alleged Foreign Conduct

With respect to the state ***antitrust law*** claims asserted by Class Plaintiffs, Intel contends that these claims are also limited by the FTAIA. According to Intel, a contrary approach that would run afoul of both the Foreign *Commerce Clause* and the *Supremacy Clause*. Intel also contends that Class Plaintiffs' state consumer protection claims are modeled after the Federal Trade Commission Act ("FTCA") which applies the same "direct, substantial and reasonably foreseeable test" to foreign commerce that is applied under the FTAIA.

In response, Class Plaintiffs contend that their state law claims are not limited by any statutory provisions comparable to the FTAIA. Class Plaintiffs also "dispute Intel's assertion on this motion to dismiss that application of these state laws to Intel's foreign conduct would be unconstitutional," but decline to fully address that argument in light of their assertion that Intel's foreign conduct falls within the reach of the FTAIA. (D.I. 263 at 1.)

The Court has already concluded **[**14]** that Class Plaintiffs have not satisfied the jurisdictional prerequisites of the FTAIA with respect to their foreign conduct allegations. Class Plaintiffs have also not demonstrated that their state law claims should be applied beyond the boundaries set by the FTAIA and the FTCA. As the Supreme Court has recognized, ***HN6***[↑] "[f]oreign commerce is pre-eminently a matter of national concern," and therefore, it is important for the Federal Government to speak with a single, unified voice. *Japan Line, LTD v. County of Los Angeles, 441 U.S. 434, 448, 99 S. Ct. 1813, 60 L. Ed. 2d 336 (1979)*. Here, Congress has spoken under the FTAIA with the "direct, substantial and reasonably foreseeable effects" test, and the Court is persuaded that Congress' intent would be subverted if state antitrust laws were interpreted to reach conduct which the federal law could not. Similarly, Defendants have pointed out that numerous states turn to the FTCA for guidance in applying their consumer protection laws, and the FTCA applies a standard substantially similar to that applied under the FTAIA. Plaintiff has not offered any argument to the contrary. Accordingly, in the circumstances of this case, the Court concludes that Class Plaintiffs **[**15]** state law claims are limited by the reach of their applicable federal counterparts, and therefore, the Court will dismiss Class Plaintiffs' state law claims to **[*458]** the extent that they are based upon Intel's alleged foreign conduct.

CONCLUSION

For the reasons discussed, the Court will grant Intel's Motion To Dismiss Plaintiffs' Foreign Conduct Claims.

An appropriate Order will be entered.

ORDER

At Wilmington, this 7 day of March 2007, for the reasons discussed in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. Defendant Intel Corporation's Motion To Dismiss Plaintiffs' Foreign Conduct Claims (D.I. 221 in Civ. Act. No. 05-485; D.I. 311 in Civ. Act. No. 05-md-1717) is ***GRANTED.***

2. Class Plaintiffs' claims based on upon Intel Corporation's alleged foreign conduct are ***DISMISSED,*** and paragraphs 145-149, 159-162, 169, 178-179, 185-187, 190, 193, 197-198, 204-205 and 210 of the First Amended Consolidated Complaint are ***STRICKEN.***

Joseph J. Farnan Jr.

UNITED STATES DISTRICT JUDGE

Amado v. Microsoft Corp.

United States District Court for the Central District of California

March 13, 2007, Decided; March 13, 2007, Filed

CASE NO. SA CV 03-242 DOC (ANx)

Reporter
2007 U.S. Dist. LEXIS 96487 *; 2007 WL 9837821

CARLOS ARMANDO AMADO, Plaintiff, v. MICROSOFT CORPORATION, Defendant.

Subsequent History: Affirmed in part and vacated in part by, Remanded by *Amado v. Microsoft Corp., 517 F.3d 1353, 2008 U.S. App. LEXIS 4065 (Fed. Cir., 2008)*

Prior History: *Microsoft Corp. v. Amado, 549 U.S. 1071, 127 S. Ct. 703, 166 L. Ed. 2d 547, 2006 U.S. LEXIS 8901 (2006)*

Core Terms

licenses, infringing, Software, install, sales, counts, patent, products, injunction, user, spreadsheet, per unit, escrow, royalty, customers, permanent injunction, functionality, reexamination, database, damages, dollars, eBay, irreparable harm, parties, irreparable injury, circumstances, discovery, licensees, Dissolve, contempt

Counsel: **[*1]** For Carlos Armando Amado, Plaintiff: A Max Olson, Charles S Barquiest, Hector G Gallegos, Nicole M Smith, Scott C Moore, Vincent J Belusko, LEAD ATTORNEYS, Morrison & Foerster, Los Angeles, CA.

For Microsoft Corporation, a Washington corporation, Defendant: Ali R Sharifahmadian, Joseph A Micallef, Leslie L Jacobs, Jr., Michael J Songer, Robert Jones Worrall, LEAD ATTORNEYS, Arnold & Porter, Washington, DC; Isabella E Fu, Ronald L Johnston, LEAD ATTORNEYS, Microsoft Corporation, Redmond, WA; James S Blackburn, LEAD ATTORNEY, Arnold & Porter, Los Angeles, CA.

For Microsoft Corporation, Counter Claimant: Ali R Sharifahmadian, Joseph A Micallef, Leslie L Jacobs, Jr., Michael J Songer, Robert Jones Worrall, LEAD ATTORNEYS, Arnold & Porter, Washington, DC; Ronald L Johnston, LEAD ATTORNEY, Isabella E Fu, Microsoft Corporation, Redmond, WA; James S Blackburn, LEAD ATTORNEY, Arnold & Porter, Los Angeles, CA.

For Carlos Armando Amado, Counter Defendant: A Max Olson, Charles S Barquiest, Hector G Gallegos, Scott C Moore, Vincent J Belusko, LEAD ATTORNEYS, Morrison & Foerster, Los Angeles, CA.

For Microsoft Corporation, Counter Claimant: Ali R Sharifahmadian, Leslie L Jacobs, Jr., Michael J Songer, **[*2]** LEAD ATTORNEYS, Arnold & Porter, Washington, DC; Ronald L Johnston, LEAD ATTORNEY, Isabella E Fu, Microsoft Corporation, Redmond, WA; James S Blackburn, LEAD ATTORNEY, Arnold & Porter, Los Angeles, CA.

For Carlos Armando Amado, Counter Defendant: A Max Olson, Charles S Barquiest, Hector G Gallegos, Scott C Moore, Vincent J Belusko, LEAD ATTORNEYS, Morrison & Foerster, Los Angeles, CA.

Judges: DAVID O. CARTER, United States District Judge.

Opinion by: DAVID O. CARTER

Opinion

ORDER [1] DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT, [2] GRANTING DEFENDANT'S MOTION TO DISSOLVE THE PERMANENT INJUNCTION, AND [3] GRANTING IN PART PLAINTIFF'S MOTION FOR AN ORDER AWARDING PLAINTIFF $ 2.00 PER UNIT FOR INFRINGING SALES FROM JUNE 6, 2005 THROUGH DECEMBER 3, 2006

Before the Court are (1) Defendant Microsoft's Motion for Relief from Judgment, (2) Microsoft's Motion to Dissolve the Permanent Injunction, and (3) Plaintiff Carlos Amado's Motion for an Order Awarding Plaintiff $ 2.00 per Unit for Infringing Sales from June 6, 2005 through December 3, 2006 ("Escrow Motion"). After considering the moving, opposing, and replying papers, as well as oral arguments, the Court hereby (1) DENIES Microsoft's Motion for Relief from Judgment, **[*3]** (2) GRANTS Microsoft's Motion to Dissolve the Permanent Injunction, and (3) GRANTS IN PART Amado's Escrow Motion.

I. BACKGROUND

A. General Overview and Time line

Plaintiff Carlos Armando Amado ("Amado") holds a number of United States patents related to the interaction between computer database and spreadsheet programs. Defendant Microsoft Corp. ("Microsoft") develops and sells computer software, including database and spreadsheet programs. In March 2003, Amado filed a complaint alleging that Microsoft programs infringed three of his patents. After claim construction, the case was narrowed to the alleged infringement of one patent: United States Patent Number 5,293,615 ("the '615 patent").

After trial, the jury returned a unanimous verdict on June 6, 2005. The jury found that Access 95 and Excel 95, and Office Professional 95, which includes Access 95 and Excel 95, and all subsequent forms of those products infringe claim 21 of the '615 patent both literally and under the doctrine of equivalents. The jury found that Microsoft was liable for direct infringement (*35 U.S.C. § 271(a)*), inducing infringement (*35 U.S.C. § 271(b)*), contributory infringement (*35 U.S.C. § 271(c)*), and infringement **[*4]** for shipping components outside the United States (*35 U.S.C. §§ 271(f)(1)* and *271(f)(2)*). The other asserted claims of the '615 patent were found not to be infringed. Claim 21 was found not to be invalid for obviousness. The jury also found that Microsoft's infringement was not willful. The parties had previously stipulated that the number of licenses sold between March 7, 1997 and July 31, 2003 were 109,872,000 in the United States and 113,937,800 in foreign markets. The jury awarded damages for the period from March 7, 1997 through July 31, 2003 in the amount of $ 4,400,000 for domestic sales and $ 4,560,000 for foreign sales.

On August 2, 2005, the Court found laches, which barred Amado from recovering damages during the laches period, i.e. prior to March 7, 2003. Because the damages found by the jury reflected a per unit royalty of four cents, the Court awarded Amado a four cent per unit royalty for sales of the infringing products beginning on March 7, 2003. [1] This resulted in an award of $ 5,911,269. [2] At this time, the Court also entered a permanent injunction, upon Amado's motion, enjoining the sale and distribution of:

---

[1] If the sales figures are rounded to the nearest million, they are 110 million for sales in the United States, and 114 million for foreign sales. With these rounded sales figures, the damages figures returned by the jury corresponds *precisely* to a four cent per unit royalty.

[2] Amado received this $ 5,911,269 damages award, plus interest in December **[*6]** 2006, after the Court ordered the clerk to close the damages escrow account and transfer the final balance to Amado. The balance as of the date of that order, December 12, 2006, was $ 6,145,302.79.

> any version of Microsoft's Access software or any version **[*5]** of Microsoft's Office suite of programs that includes Access, that includes the capability of, when loaded on a computer, connecting a spreadsheet program to a database program in a manner that would infringe claim 21 of the '615 patent.

Aug. 2, 2005 Order at 27:23-28. However, the Court stayed the injunction pending the resolution of any appeal in the case. Under the terms of the injunction, during the pendency of the stay, Microsoft was ordered to deposit two dollars per unit for sales of the infringing products into an interest bearing escrow account from June 6, 2005 onward. *Id.* at 28:13-15. The Court noted that "[t]he ultimate fate of the money paid into this account will depend on subsequent developments in this case, including a potential negotiated settlement between the parties, or an appeal to the Federal Circuit." *Id.* at 27:14-16.

The parties cross appealed the jury verdict and this Court's judgment to the Federal Circuit. On June 14, 2006, the Federal Circuit affirmed this Court's judgment "in all respects" in a per curiam opinion. *See* *Amado v. Microsoft Corp., 185 Fed. Appx. 953 (Fed. Cir. 2006)*. However, the Federal Circuit explicitly stated that it did not view the August 2, 2005 Order as having determined the ultimate disposition of the funds Microsoft was required to deposit into the escrow account during the pendency of the stay. *Id.* Thus, the Federal Circuit returned the issue of distributing the escrow funds to this Court. On August 23, 2006, after rejecting Microsoft's petition for a rehearing *en banc,* the Federal Circuit issued its mandate.

On September 12, 2006, Plaintiff moved to enforce the injunction on the grounds that it had become effective on August 30, 2006 and that Microsoft's continued sales of the same discs the jury found infringed the '615 patent along with a separate Service Pack 2 "fix" did **[*7]** not remove the capability of infringement from the products. The Court denied Amado's motion as premature because Microsoft's appeal was still pending as it had petitioned the Supreme Court for a writ of certiorari.

On October 2, 2006, Amado brought a motion for contempt for Microsoft's failure to make escrow deposits for Software Assurance and Recurring licenses. These license-types were included in the stipulated sales figures upon which the jury verdict was based. By entering into the stipulation as to the total sales of the accused products, Microsoft avoided having to produce the discovery Amado sought into its unit sales and revenue data. Microsoft agreed to the use of the stipulated sales figures at trial and for purposes of the accounting. Due to the stipulation, neither the Court nor the jury made a determination as to whether Software Assurance and Recurring licenses represent "sales of the infringing products." At the October 23, 2006 hearing on this motion, the parties reached a compromise, whereby Microsoft would make additional escrow deposits to bring the amount in the escrow account in line with Amado's expectations based on the stipulated sales figures. Consequently, **[*8]** the Court withheld any ruling as to whether Software Assurance and Recurring licenses represent sales of the infringing products such that Amado is entitled to a royalty for these license types during the escrow period.

On November 27, 2006, the Supreme Court denied certiorari. Accordingly, under the terms of the injunction, the injunction would have gone into effect on December 4, 2006. However, on December 1, 2006, the Court ordered that the stay remain in effect pending the resolution of the parties' motions relating to the escrow and the injunction. On December 5, 2006, the Court scheduled all such motions for hearing on February 5, 2007 and provided that the stay would remain in effect until seven days after the Court's ruling on these motions.

B. The Reexamination

Following over two years of litigation, the jury's verdict finding the '615 patent valid and that Microsoft Office and Access infringed claim 21 of this patent, and the Court's denial of Microsoft's motion for judgment as a matter of law and motion for a new trial, Microsoft petitioned the Patent and Trademark Office ("PTO") to reexamine claim 21 of the '615 patent. The petition was based on two prior art references: (1) **[*9]** a user's guide to a spreadsheet program called SuperCalc and (2) an article by Judy Duncan describing the Q+E software program. Microsoft relied upon the Duncan article at trial. Microsoft was also aware of the existence of a program called SuperCalc because the '615 patent, a copy of which was attached to Amado's Complaint, describes SuperCalc as prior art. However, Microsoft claims that it did not know the details of SuperCalc's functionality until after trial when it first located the SuperCalc User's Guide.

Microsoft's reexamination petition was granted on September 21, 2005 and the PTO preliminarily rejected claim 21 as anticipated by both the Duncan article and SuperCalc in a non-final office action on April 26, 2006. The PTO examiner concluded that claim 21 was anticipated by the SuperCalc User's Guide and the Duncan article. On July 26, 2006, Amado responded to the preliminary rejection of claim 21. The parties dispute whether Amado's response was consistent with this Court's claim construction or limited the scope of claim 21 in a way that contradicts the evidence and arguments presented at trial. As of the parties' briefing, there has been no final determination by the PTO **[*10]** regarding the validity of claim 21.

C. License Counts

As discussed above, the jury's verdict and the Court's subsequent rulings were based on the parties' stipulation regarding total sales of the accused products. For example, the jury's damages award was based on the parties' stipulation that 109,872,000 licenses were sold in the United States and 113,937,800 in foreign markets during the relevant time period, March 7, 1997 through July 31, 2003. These figures were based on spreadsheets prepared by Price Waterhouse on behalf of Microsoft and produced by Microsoft during discovery. The spreadsheet figures reflect total license counts for the accused products without any elaboration regarding what types of licenses were included in the total count.

The August 2, 2005 Order required Microsoft to "pay into [escrow] two dollars per unit for sales of the infringing products from June 6, 2005 onward." Aug. 2, 2005 Order at 28:14-15. At the hearing on this Motion, Microsoft agreed with the Court's prediction that assuming monthly sales of the infringing products were in line with the stipulated sales figure, the average sales per month would be five million licenses, resulting in an average **[*11]** monthly escrow deposit of $ 10 million. However, when Microsoft began making escrow deposits, Amado noticed that the sales numbers were lower than predicted and that Microsoft was reporting "net" license counts, instead of "total" licenses. On November 14, 2005, Amado requested an explanation. In response, Microsoft informed Amado that it was excluding Software Assurance and Recurring licenses because these license types did not represent "sales of the infringing products."

As discussed above, the parties first informed the Court of this dispute in October 2006, when Amado moved to hold Microsoft in contempt for its failure to make escrow deposits for Software Assurance and Recurring licenses. At that time, Microsoft told the Court that Software Assurance licenses and Recurring licenses are accounting mechanisms from its MS Sales database used to record additional revenue related to prior sales. *See* Decl. of James Borgman in Supp. of Def. Microsoft's Opp'n to Amado's Mot. for Contempt Re: Microsoft's Failure to Make Escrow Deposits Required by Ct. Order ("Borgman Decl."), P 9. Thus, rather than representing sales of products, Microsoft explained, Software Assurance Licenses are multi-year **[*12]** maintenance agreements and Recurring Licenses represent installment payments. *Id.* PP 6, 8. According to Microsoft, Recurring licenses relate to the second and third installments payments under volume licenses called Enterprise Agreements. These Enterprise customers purportedly receive the right to make all copies of the licensed software at the time of the first payment, such that Recurring licenses do not correspond to the delivery of additional units of Microsoft products. However, Microsoft concedes that there are circumstances in which a customer with a Software Assurance agreement is eligible to receive new releases of software. Nevertheless, Microsoft asserts that since June 6, 2005 it has not issued a new release of the infringing products, Microsoft Office and Access, and its distribution of Service Pack 2 to Software Assurance customers included a "fix" that removed the functionality found to infringe Amado's '615 patent. Thus, under these circumstances, Microsoft avers that any copy of the infringing products received by Software Assurance customers has been accounted for under other license types included in the judgment or the escrow payments. *Id.* P 7.

Amado's present Motion **[*13]** for distribution of the stay-related escrow funds asserts that Microsoft's calculations as to total licenses, net licenses and even Software Assurance and Recurring licenses have changed numerous times during the escrow period.

On November 14, 2005 Microsoft presented Amado with a spreadsheet in response to his request about the lower than expected license counts. The spreadsheet contained license counts for sales from June 6, 2005 through October 28, 2005. Specifically, the spreadsheet disclosed 28,393,892 "total" licenses (an average of 5.67 million units per month) and 16,032,866 "net" licenses, which excluded Software Assurance and Recurring licenses (an average of 3.2 million units per month). Ex. R to Oct. 2, 2006 Decl. of Scott Moore in Supp. of Pl.'s Mot for Contempt ("Oct. 2, 2006 Moore Decl."). This spreadsheet also disclosed 6,944,751 Software Assurance licenses and 5,416,275 Recurring licenses. *Id.* Of the 12,361,026 licenses excluded from the "net" license count, 56.2 percent were Software Assurance licenses and 43.8 percent were Recurring licenses.

On June 13, 2006, Microsoft provided spreadsheets for June 2005 through April 2006, showing total license counts of 60,041,098 **[*14]** (an average of 5.46 million units per month) and net licenses of 33,286,920 (an average of 2.94 million units per month). *See* Ex. AA to Oct. 2, 2006 Moore Decl. These spreadsheets did not include a breakdown of either Software Assurance or Recurring licenses. On August 18 and September 20, 2006, Microsoft provided updated spreadsheets showing only total and net license counts; again there was no breakdown of Software Assurance or Recurring licenses. *See* Exs. DD, EE to Oct. 2, 2006 Moore Decl. According to Amado the "total" license counts for the same eleven month time period (June 2005 through April 2006) "inexplicably" changed. The total licenses increased by 18,073,978 licenses or 30.10%, [3] whereas the "net" license counts remained approximately the same (increasing by only 17,924 or 0.05%). [4]

On October 30, 2006, Microsoft informed Amado **[*15]** that it "may have over-counted certain types of licenses in the license counts previously provided to you." Ex. 6 to Jan. 15, 2007 Decl. of Nicole Smith ("Smith Decl.). On November 16, 2006, Microsoft informed Amado that approximately 23 million licenses had been incorrectly added to the total license counts to all months through June 2006 because Academic licenses had been added to totals that already included these licenses. Ex. 7 to Smith Decl.

In November and December 2006, Microsoft submitted Notices of Deposit to the Court, which included spreadsheets that purportedly show the number of Software Assurance and Recurring licenses excluded by Microsoft throughout the escrow period. According to Amado, these spreadsheets show that Microsoft changed its methodology yet again following the October 2006 contempt hearing at which the Court expressed more concern about Software Assurance licenses than Recurring licenses. For the period June 2005 through October 2005, the Software Assurance and Recurring license allocations changed "radically" between the November 14, 2005 and the November 20, 2006 spreadsheets. In the 2006 version, the Recurring license count doubles, whereas the Software **[*16]** Assurance license count decreases by 50% from the counts in the 2005 spreadsheet covering the same five-month period of time (June through October 2005). [5]

Finally, according to Microsoft's December 2006 Notice of Deposit, it sold 102,117,579 "total" licenses during the eighteen-month escrow period and 52,292,108 "net" licenses, whereas the Notices of Deposit reports actually filed with the Court, according to Amado's calculation, reported 55,310,507 "net" licenses. *See* Smith Decl. P 5. These figures did not include sales between November 25, 2006 through December 3, 2006 and consequently, on January 24, 2007, Microsoft wrote to Amado to update the total license counts to include the sales for these days. "Microsoft admits that it has sold 103,115,257 Total **[*17]** licenses from the beginning of the escrow period through December 3, 2006." Jan. 29, 2007 Decl. of Scott Moore ("Moore Decl.") P 3 (internal quotations omitted).

---

[3] The June 13, 2006 spreadsheet shows 60,041,098 total licenses, whereas the August 18, 2006 spreadsheet shows 78,115,076 for the same time period (June 2005 through April 2006).

[4] The June 13, 2006 spreadsheet shows 33,286,920 net licenses, whereas the August 18, 2006 spreadsheet shows 33,304,844 for the same time period (June 2005 through April 2006).

[5] The November 2005 spreadsheet shows 6,944,751 Software Assurance licenses and 5,416,275 Recurring licenses, whereas the November 2006 spreadsheet shows 2,881,238 Software Assurance licenses and 10,171,879 Recurring licenses for the same five-month period (June through October 2005). *See* Pl. Mot. for $ 2.00 per Unit of Infringing Sales at 11:3-8; Oct. 2, 2006 Moore Decl., Ex. R; Notice of Escrow Deposit, filed Dec. 26, 2006, Ex. B.

D. Microsoft's Fix

Microsoft continues to sell versions 2002 (XP) and 2003 of Office Professional and Access, which the jury found infringed Amado's '615 patent. However, during the pendency of its appeal, Microsoft designed, implemented, and released a software fix to remove the infringing functionality from its products. Microsoft began to release the fix in the fall of 2005. As of February 2006, Microsoft included an additional Service Pack 2 ("SP2") disc in all of its distributions of the infringing products. One of the programs on SP2, shim DLL disables the infringing feature by making an open Excel spreadsheet read-only when functioning in conjunction with Access, thereby making it impossible for a user to send changed data from an Access linked table back to an open Excel spreadsheet. Decl. of Andrew M. Warden, P 7, Micallef Decl., Ex. N. In addition, if a user attempts to delete the reference to the shim DLL in the Windows registry, the SP2 code will detect this and re-write the shim DLL reference. *Id.* P 7. Amado asserts **[*18]** that adding the SP2 disc to the packaging of unmodified, infringing software does not avoid infringement or comply with the Court's injunction.

SP2 contains software wholly unrelated to the accused functionality, including updates that address potential security risks. In addition, every purchaser of Access and Office is now required to install SP2 as a condition of its license agreement. On the other hand, the shim DLL fix is not automatically installed when the user installs Office or Access, even though Microsoft could have made the fix automatic. For example, before a user can install Microsoft Outlook, they are required to install Service Pack 1. Sept. 11, 2006 Decl. of Richard Taylor ("Taylor Decl."), P 9. [6] By contrast, a user can install Office and Access without installing SP2. Moreover, when a user inserts the disc labeled "Service Pack 2," instead of installing the program, the disc displays a document titled "Office 2003 Service Pack 2 CD Installation." *Id.* P 12.

Microsoft distributes Access and Office through three **[*19]** distribution channels to three different types of customers - retail, original equipment manufacturers ("OEM") and volume or enterprise licensees. First, with regard to retail customers, the SP2 CD on its face states that its installation is a mandatory part of installation of the overall product. Moreover, an addendum to the retail customer's end user license agreement requires that these customers install all discs contained in the package in order to have a valid license to use the software. Second, OEMs install Microsoft's Office and Access software onto the computers they manufacture prior to shipping the computers to their customers. As to this distribution channel, Microsoft notified its OEM licensees that SP2 was a required supplement under the terms of their license agreements and made installation of SP2 mandatory for all OEM licensees by the end of February 2006. [7] Finally, Microsoft has shipped the SP2 disc to both new and existing volume licensees, who also received other communications indicating that installation of SP2 was mandatory to remain in compliance with the terms of their volume licenses. [8] Consequently, any user that failed to install SP2 by the end of February **[*20]** 28, 2006 is breaching its licensing agreement with Microsoft.

On the other hand, Amado has uncovered evidence that at least some fraction of Microsoft **[*21]** customers are actively seeking ways to avoid or uninstall the fix so that they can continue to use the live-link feature that was found to infringe Amado's patent. Amado has presented fourteen messages posted on various internet websites in which users discuss the fact that SP2 removes the live-link functionality between Access and Excel due to a legal

---

[6] There is sufficient space on the disc containing the domestic version of Office and Access to include all of SP2 on that disc. Sept. 11, 2006 Taylor Decl. P 14.

[7] According to Microsoft, the OEMs use a master disc from Microsoft to create a master image of the software. This master image of Office and Access is then copied onto the computers the OEMs manufacture. Therefore, once the OEMs installed the SP2 disc onto the master image, used to produce the computers, the master, as well as the copies, became a "fixed" version of Office and Access. Consequently, the end users of the OEMs' computers received their computers with SP2 already installed. However, at least some OEMs send users back-up discs of Office and Access and SP2, which can be re-installed if necessary.

[8] Volume or Enterprise licensees are business entities and other organizations. According to Microsoft, the information technology departments of these licensees will install the software in one of two ways - most likely they create a master image, like the OEMs, which is then installed on the individual computers in the office, but they may alternatively use the discs from Microsoft to install the software on each computer individually.

issue and seek advice about how to retain this functionality. [9] Jan. 13, 2007 Decl. of Richard Taylor P 17. At least some of these users state that they plan not to install SP2 or have in fact reinstalled the software without installing SP2 in order to keep the live-link feature. According to Microsoft, a user cannot selectively install SP2; thus, if someone desires to get around the fix, they must avoid installing SP2 at all.

II. DISCUSSION

A. Microsoft's *Rule 60(b)* Motion for Relief From Judgment

Federal Rule of Civil Procedure 60(b) allows a court to relieve a party or its legal representative from a final judgment in certain circumstances. The appropriate reasons for relief from the judgment are: "(1) **[*22]** mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) 'extraordinary circumstances' which would justify relief." *Sch. Dist. No. 1J, Multnomah Cty. v. Acands, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993)* (quoting *Fuller v. M.G. Jewelry, 950 F.2d 1437, 1442 (9th Cir. 1991))*.

In addition to the grounds for relief set forth in *clauses (1) through (5)*, *Rule 60(b)(6)* allows the court to relieve a party from a final judgment or order for "any other reason justifying relief from the operation of the judgment." *Fed. R. Civ. P. 60(b)(6)*. The Supreme Court has interpreted this catch-all provision narrowly, requiring the moving party to show "extraordinary circumstances suggesting that the party was faultless in the delay." *Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. 380, 393, 113 S. Ct. 1489, 1497, 123 L. Ed. 2d 74 (1993)*. Relief under *Rule 60(b)(1)*, *(2)*, or *(3)* may not be brought more than one year after the judgment was entered. *Fed. R. Civ. P. 60(b)*. By contrast, there is no time limitation for bringing a motion under *Rule 60(b)(6)*. However, the standard for setting aside a judgment under this provision is much **[*23]** higher than that for *Rule 60(b)(1) through (5)*. *See* *Pioneer Inv. Servs., 507 U.S. at 393*. Moreover, a *Rule 60(b)(6)* motion may not be premised "on one of the grounds for relief enumerated in *clauses (b)(1) through (b)(5)*." *Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 863, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)*. The extraordinary circumstances requirement of *Rule 60(b)(6)* prevents the clause "from being used to circumvent the 1-year limitations period that applies to *clause (1)*, [*(2)*, and *(3)*]." *Id. at 863 n.11*; *Fed. R. Civ. P. 60(b)*. Finally, although *Rule 60(b)(6)* does not delineate the specific factors that justify relief, the Supreme Court has observed that it provides courts with authority "to vacate judgments whenever such action is appropriate to accomplish justice." *Id. at 863-64* (quoting *Klapprott v. United States, 335 U.S. 601, 614-615, 69 S. Ct. 384, 93 L. Ed. 266 (1949)* (internal quotations omitted)).

Microsoft purports to bring its Motion for Relief from Judgment under *Rule 60(b)(6)*, asserting that Amado narrowed the claims of his '615 patent in arguments made to the PTO during the reexamination that Microsoft initiated after the entry of judgment in this case. Microsoft contends that it **[*24]** could not have brought its Motion under any other clause of *Rule 60(b)* because the context of "a patentee disclaiming a portion of his patent rights in order to distinguish prior art during the reexamination proceedings" is not covered by *Rule 60(b)(1) through (5)*. Def. Mem. of P. & A. in Supp. of Mot. for Relief from J. 10:22-23. Presumably, Microsoft brings this Motion under *Rule 60(b)(6)* to avoid the one-year time limitation for bringing motions under the other subsections of *Rule 60(b)* because the judgment in this case was entered over a year ago on August 2, 2005. Amado argues that Microsoft is attempting to disguise its *Rule 60(b)(2)* motion based on the new evidence gleaned from the reexamination proceedings as a *Rule 60(b)(6)* motion. Microsoft responds by arguing that the evidence does not qualify as "newly discovered" because it was not in existence at the time of trial. *See* *Jones v. Aero/Chem. Corp., 921 F.2d 875, 878 (9th Cir. 1990)* (*Rule 60(b)(2)* requires movant to show that "the evidence (1) existed at the time of trial, (2) could not have been discovered through due diligence, and (3) was 'of such magnitude that production of it earlier would have been likely to change **[*25]** the disposition of the case'").

---

[9] Microsoft has objected to this evidence on the grounds of lack of authentication, hearsay and prejudice. These objections are OVERRULED.

Microsoft is technically correct that Amado had not made the three statements in response to the non-final office action finding claim 21 invalid as anticipated by SuperCalc and the Duncan article at the time of trial. Nevertheless, the prior art upon which Microsoft's reexamination petition and the non-final office action are based, was in existence at the time of trial. Microsoft was aware of SuperCalc throughout this litigation as it was cited in the '615 patent, which was attached as an exhibit to Amado's March 7, 2003 Complaint. In addition, Microsoft was aware of the Q+E program that was the subject of the Duncan article at least since early 2004 as indicated by its Response to Supplemental Interrogatory No. 3, stating that Microsoft provided its expert with a copy of Q+E. In fact, the jury specifically found that the Duncan article regarding Q+E did not invalidate Amado's '615 patent. Moreover, the Court is skeptical as to Microsoft's claim that it could not have uncovered the SuperCalc User's Guide through the exercise of due diligence during the trial. *See* Decl. of Joseph Micallef in Supp. of Microsoft's Mot. for Relief from J. P 2. Microsoft **[*26]** filed its Petition for Reexamination on August 11, 2006, nine days after the Court entered judgment and only two months after the trial. Given that Microsoft was able to find the User's Guide so quickly after trial, it is likely that Microsoft could have uncovered it prior to trial through the exercise of due diligence. Microsoft had a full and fair opportunity to litigate its invalidity case both at the summary judgment stage and at trial, but was unsuccessful. Microsoft failed to appeal either the Court's denial of summary judgment or the jury's verdict rejecting its invalidity defense. Instead, Microsoft waited until the Court entered its final judgment after over two years of litigation to seek a second bite at the invalidity apple through its Request for Reexamination. Microsoft's late reexamination petition lead to the newly discovered evidence of Amado's statements to the PTO in response to the non-final office action. *Rule 60(b)(2)* motion based on newly discovered evidence must have been brought by August 2, 2006. Thus, Microsoft's Motion for Relief from Judgment filed on December 4, 2006 was four months too late.

Even if the Court were to entertain Microsoft's Motion under *Rule 60(b)(6)*, **[*27]** the present circumstances are not of the extraordinary variety dictating that the judgment in this case be vacated to accomplish justice. "'Extraordinary circumstances' do not include situations in which 'a litigant who has let the normal appeals channels lapse seeks to have a second bite at the apple.'" *Spacey v. Burgar, 207 F. Supp. 2d 1037, 1048 (C.D. Cal. 2001)* (quoting *United States v. Wyle, 889 F.2d 242, 250 (9th Cir.1989))*. Microsoft litigated its invalidity defense at trial and the jury's special verdict specifically rejected Microsoft's contention that claim 21 of the '615 patent was invalid because it was obvious in light of prior art. *See* Special Verdict Form, Dkt. no. 432, P 7 (finding Claim 21 valid). As other courts have concluded "parties should not be permitted to abuse the [reexamination] process by applying for reexamination after protracted, expensive discovery or trial preparation." *Freeman v. Minnesota Mining & Mfg. Co., 661 F. Supp. 886, 888 (D. Del. 1987)* (quoting *Digital Magnetic Systems, Inc. v. Ansley, 213 U.S.P.Q. 290 (W.D. Okla. 1982))*. Given that Microsoft waited until after the judgment in this case to file its Petition for Reexamination, while simultaneously **[*28]** failing to appeal the jury's finding of validity, Microsoft was not faultless in the delay and justice does not require overturning a jury verdict at this late stage based on statements made to the PTO. Because the Court finds that Microsoft has not satisfied the requirements of either *Rule 60(b)(2)* or *(6)*, the Court declines to examine the three statements Amado made to the PTO that purportedly narrow the scope of his patent.

The present Motion is distinguishable from that addressed by the Fifth Circuit in *Bros, Inc. v. W.E. Grace Mfg., Co., 320 F.2d 594 (1963)*. [10] In *Bros,* the issue was whether the patented invention had been described in a preprinted publication more than a year prior to the patent application. *Id. at 606*. The patent at issue was involved in three different suits in various circuits and the judgment from which the defendant sought relief in the Fifth Circuit was a grant of summary judgment on the basis of res judicata in light of findings of infringement and validity in another case. *Id. at 602*. In the related case, an employee of the patentee had previously averred in his affidavit that the brochure describing the patented machine in detail had not been prepared **[*29]** or distributed until long after the road show at which the patented machine was displayed. *Id. at 603*. It was later discovered that the brochure had been distributed at the road show which occurred more than a year prior to the patent application. *Id.* Although the motion for relief from judgment could be viewed as a motion under *Rule 60(b)(2)* for newly discovered evidence or under *Rule 60(b)(3)* for fraud, the Fifth Circuit concluded that equitably the district court should consider the motion

---

[10] The Fifth Circuit later reversed the district court's order granting relief under *Rule 60(b)(6)*, finding that an essential part of the patented invention was not disclosed in the brochure. *Bros, Inc. v. W. E. Grace Mfg. Co., 351 F.2d 208, 216 (5th Cir. 1965)*.

under *Rule 60(b)(6)* because what had occurred was "something more" than simply newly discovered evidence or fraud. *Id. at 609*.

Unlike in *Bros*, there is no evidence of fraud. Moreover, unlike the patentee in *Bros* who deliberately put the defendant off-track by averring that the brochure had not been distributed at the road show, Amado disclosed both prior art references to Microsoft. Microsoft had ample opportunity to find the SuperCalc **[*30]** User's Guide and could have filed its Request for Reexamination anytime during the two years that elapsed between the Complaint and the trial. Instead, Microsoft waited until two months after trial to seek reexamination. In addition, even if Amado's statements to the PTO are "something more" than newly discovered evidence, they do not meet the extraordinary circumstances necessary to justify relief under *Rule 60(b)(6)*. Justice does not dictate relief from a judgment based on statements made in a reexamination proceeding initiated by Microsoft over two years after the filing of Amado's complaint and two months after the jury found claim 21 of the '615 patent to be valid. Microsoft cannot circumvent the enforcement of Amado's valid patent through its *Rule 60(b)* Motion.

Finally, Amado asks the Court to award him costs and attorney's fees associated with briefing and arguing this Motion. The Court declines to make such an award.

B. Dissolving the Injunction

Microsoft also seeks an order dissolving the permanent injunction entered on August 2, 2005 on the ground that *eBay v. MercExhange, 547 U.S. 388, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006)*, changed the law regarding the issuance of permanent injunctions in patent cases. **[*31]** On May 15, 2006, the Supreme Court overruled the Federal Circuit's "general rule" that "a permanent injunction will issue once infringement and validity have been adjudged." *Id. at 1841*. The Supreme Court held "only that the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards." *Id.* The Supreme Court opinion in *eBay* does not specifically address the presumption of irreparable harm relied upon by Amado and this Court in issuing the instant injunction. However, such a presumption contradicts the explicit wording of the four-factor test the Supreme Court instructs district courts to apply and unduly constrains the equitable discretion that *eBay* confers. In particular, to obtain an injunction under well-established principles of equity "[a] plaintiff must demonstrate: (1) that it has suffered irreparable injury." *eBay, 126 S. Ct. at 1839*.

While the Court applied the traditional four factor test [11] in determining whether to grant injunctive relief in this case, the **[*32]** Court's analysis was colored by the "general rule" of "infringement equals permanent injunction" overruled in *eBay. See* Aug. 2, 2005 Order at 22:6-11. Moreover, in its analysis of irreparable harm, the Court relied on the presumption of irreparable harm that arose, *pre-eBay,* when a patent was found to be both valid and infringed, rather than placing the burden on Amado to show irreparable injury. *Id.* at 20:21-24; *cf*. *eBay, 126 S. Ct. at 1839* (the "plaintiff must demonstrate: (1) that it has suffered irreparable injury"). In addition, the Court's analysis of the public interest noted that there would be significant costs to the parties bound by an injunction that would likely be borne, ultimately, by the public. Aug. 2, 2005 Order at 21:21-28. Finally, in balancing the hardships, the Court expressed concern about the ramifications and scope of the permanent injunction, but noted the Federal Circuit's "hard line on denial of injunctive relief based on damage to businesses found to be infringers." *Id.* at 22:6-8. Thus, while the Court applied the traditional equitable factors, its decision to grant an injunction was influenced by the controlling Federal Circuit law at that time, which **[*33]** required a case to be "exceptional to justify the denial of a permanent injunction." *MercExchange, LLC v. eBay, Inc., 401 F.3d 1323, 1339 (Fed. Cir. 2005)*, *overruled by eBay v. MercExhange, 547 U.S. 388, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006)*.

---

[11] "(i) Whether the plaintiff would face irreparable injury if the injunction did not issue, (ii) whether the plaintiff has an adequate remedy at law, (iii) whether granting the injunction is in the public interest, and (iv) whether the balance of hardships tips in the plaintiff's favor." *See* Aug. 2, 2005 Order at 20:2-8 (quoting *Odetics, Inc. v. Storage Tech. Corp., 14 F. Supp. 2d 785, 794 (E.D. Va. 1998)* (citing *Weinberger v. Romero-Barcelo, 456 U.S. 305, 312, 102 S. Ct. 1798, 1803, 72 L. Ed. 2d 91 (1982))*).

Microsoft requests that the Court reexamine and dissolve the injunction previously entered in this case on the ground that *eBay* changed the law governing the issuance of a permanent injunction in a patent case by, *inter alia,* requiring the plaintiff to show irreparable injury and that public interest would not be disserved by an injunction. *See* *z4 Techs., Inc. v. Microsoft Corp., 434 F. Supp 2d 437, 440-441 (E.D. Tex. 2006)* (refusing to apply a presumption of irreparable harm because plaintiff **[*34]** could not cite to any Supreme Court or Federal Circuit case requiring the application of a rebuttable presumption of irreparable harm with regard to a permanent injunction); *Keg Techs., Inc. v. Laimer, 436 F. Supp. 2d 1364, 1371 (N.D. Ga. 2006)* (finding that the evidence adequately demonstrated irreparable injury). Microsoft argues that Amado cannot show irreparable harm because he is not in the business of selling any software that practices claim 21 of the '615 patent, is not a competitor of Microsoft, and has never sold a license of his patent or otherwise successfully commercialized it. In response, Amado argues that *eBay* did not change the law. Amado also contends that Microsoft has waived any right to challenge the injunction by failing to challenge it during the first appeal. Amado further argues that the law of the case bars this belated attack on the injunction because the Federal Circuit mandate controls.

Although *eBay* only explicitly overruled the Federal Circuit's "general rule" that a finding of patent infringement required the issuance of a permanent injunction absent special circumstances, it also altered the proper application of the traditional four-factor test in patent **[*35]** cases. For instance, in its discussion of the well-established principles of equity that the courts must follow in determining whether to issue a permanent injunction, the Supreme Court placed the burden on the plaintiff seeking a permanent injunction to prove that he has suffered irreparable injury. *eBay, 126 S. Ct. at 1839* (referencing the test from a non-patent case, *Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-12, 102 S. Ct. 1798, 72 L. Ed. 2d 91 (1982)* and concluding that "[t]hese familiar principles of equity apply with equal force to disputes arising under the Patent Act"). Consequently, by requiring that the application of this four-factor test in patent cases be consistent with its application in non-patent cases, *eBay* eliminates the presumption of irreparable harm that this Court relied on in issuing the permanent injunction in this case. Several district courts, who have applied this four factor test post-*eBay,* have refused to apply the presumption of irreparable harm relied upon by Amado and the Court. *See, e.g.* *z4 Techs., Inc., 434 F. Supp 2d at 440-441*; *Voda v. Cordis Corp., No. CIV-03-1512-L, 2006 U.S. Dist. LEXIS 63623, 2006 WL 2570614, at * 5 (W.D. Okla. Sept. 5, 2006)*; *Paice LLC v. Toyota Motor Corp., No.* ***[*36]*** *2:04-CV-211-DF, 2006 U.S. Dist. LEXIS 61598, 2006 WL 2385139, at * 4 (E.D. Tex. Aug. 16, 2006)*.

A court may revisit an equitable order upon changed circumstances. *Gilmore v. California, 220 F.3d 987, 1007 (9th Cir. 2000)* ("long-established principle of equity practice that a court may, in its discretion, take cognizance of changed circumstances and relieve a party from a continuing decree"). Contrary to Amado's assertion that the Federal Circuit mandate ties this Court's hands, "[a]n appellate mandate does not turn a district judge into a robot, mechanically carrying out orders that become inappropriate in light of subsequent factual discoveries or changes in the law." *EEOC v. Sears, Roebuck & Co., 417 F.3d 789, 796 (7th Cir. 2005)* (internal citations and quotations omitted); *see also* *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County, 466 F.3d 391, 395 (6th Cir. 2006)* ("an equitable remedy should be enforced only as long as the equities of the case require"). Rather, a court may exercise its discretion to reconsider a previously decided issue when there has been an intervening change in law. *See, e.g.* *Wopsock v. Natchees, 454 F.3d 1327, 1333 (Fed. Cir. 2006)* ("law-of-the-case principles **[*37]** do not bar a court from departing from earlier rulings when there is 'an intervening change of controlling legal authority'"). Thus, because *eBay* represents an intervening change in law, the Court finds it appropriate to revisit the propriety of the injunction in this case.

An injunction is warranted if Amado proves the following four factors:

> (1) that [he] has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay, 126 S. Ct. at 1839. After *eBay,* Amado cannot rely on a presumption of irreparable injury. Such a presumption conflicts with the Supreme Court's reasoning that the right to exclude does not automatically justify the issuance of injunction in every patent case. *Id.* Thus, post-*eBay* Amado must prove irreparable injury. *See, e.g.* *z4 Techs., Inc., 434 F. Supp 2d at 440-441*; *Voda, 2006 U.S. Dist. LEXIS 63623, 2006 WL 2570614, at * 5*; *Paice LLC, 2006 U.S. Dist. LEXIS 61598, 2006 WL 2385139, at * 4*. Irreparable harm exists only where an injury cannot be **[*38]** remedied by monetary damages. *See, e.g.* *Abbott Labs. v. Andrx Pharms., Inc., 452 F.3d 1331, 1348 (Fed. Cir. 2006)* ("in light of arguable sufficiency of monetary damages, [plaintiff] has not established that irreparable harm supports the grant of the [preliminary] injunction"). In moving for a permanent injunction, Amado relied on the now defunct presumption of irreparable harm. The Court accepted this argument because at that time, this presumption was the accepted law. *See* Aug. 2, 2005 Order 20:21-24 (citing *Richardson v. Suzuki Motor Co., Ltd., 868 F.2d 1226, 1247 (Fed. Cir. 1989)*.

In his Opposition to Microsoft's Motion to Dissolve the Permanent Injunction, Amado's only argument as to irreparable harm is that Microsoft "took Amado's invention, incorporated it into its products," and "precluded him from entering the market." Pl.'s Opp'n to Microsoft's Mot. to Dissolve the Permanent Inj. at 22:16-20. However, as Microsoft points out in its Reply, these are the same allegations of willful infringement that Amado presented to the jury, this Court and the Federal Circuit, who have all rejected this argument. By contrast the evidence at trial demonstrated that Amado does not compete with **[*39]** Microsoft, does not sell a product covered by the patent and is no longer even attempting to commercialize or license the patent. Moreover, Amado's patent only covers a very small component of the infringing products - claim 21, the only claim that the jury found Microsoft Office and Access infringed, covers a single feature linking Access and Excel. *See* *eBay, 126 S. Ct. at 1842* (Kennedy, J. concurring) ("When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest"). Thus, Amado's injury can be adequately compensated through monetary damages.

As to the public interest, even prior to *eBay,* the Court found that the public interest was disserved by granting an injunction in this case. *See* Aug. 2, 2005 Order at 21:19-28. Thus, because Amado has not proven irreparable injury, money damages are adequate to compensate any future injury and the public interest is not served by an injunction, the injunction previously issued in this case is hereby **[*40]** dissolved.

Finally, Amado asks the Court to order Microsoft to pay his costs and attorney's fees pursuant to *Local Rules 11-9* and *83-7*. The Court declines to make such an award.

C. Distribution of the Stay-Related Escrow Funds

As to the disposition of the funds in the stay-related escrow account, the parties' positions could not be further apart. Microsoft contends that Amado should receive an award of $ 1,013,110. Def.'s Opp'n 20:7. Microsoft calculates this figure based on a four cent per unit royalty and sales of 25,327,766 (for net licenses excluding Software Assurance and Recurring licenses) between June 6, 2005 and February 28, 2006. By contrast, Amado seeks an award of $ 206,230,514. Amado's calculation is based on a two dollar per unit royalty and sales of 103,115,257 (for the total licenses, including Software Assurance and Recurring licenses) sold between June 6, 2005 and December 3, 2006. Jan. 29, 2007 Moore Decl. P 3; Pl.'s Reply 3:26.

Microsoft concedes that Amado should receive an award for the net licenses sold between June 5, 2005 and February 28, 2006. Thus, the following issues must be resolved by the Court: (1) Should the escrow award be based upon the net license counts **[*41]** or the total license counts? (2) Are the units sold after February 28, 2006 "sales of the infringing products" such that Amado should receive an award for licenses sold between February 28, 2006 and December 3, 2006? and (3) How much should Amado receive per unit?

1. Net Licenses v. Total Licenses

Throughout this case, the jury's and court's findings were based upon the number of total licenses because Microsoft stipulated that these total license counts represented sales of the accused, and ultimately infringing, products. During discovery, Microsoft refused to authenticate the unit sales and revenue data it had produced. Consequently, to resolve this discovery dispute and obviate the need to produce additional sales and revenue data to Amado, Microsoft stipulated that the total license counts in the spreadsheets, prepared by Price Waterhouse on behalf of Microsoft and produced by Microsoft during discovery, represented sales of the accused products. The spreadsheets contained total license counts for sales of Office and Access without indicating what types of licenses were included in the total count. However, the total license counts included Software Assurance and Recurring licenses. **[*42]** In addition, Microsoft was aware that Software Assurance and Recurring licenses were included in these figures during discovery because these license types were discussed at the deposition of Microsoft 30(b)(6) designee Richard Smith. [12] Judicial estoppel, or the doctrine of preclusion of inconsistent positions, "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 600 (9th Cir. 1996)*. Microsoft gained an advantage by stipulating to the total license counts during discovery because this stipulation enabled Microsoft to avoid producing the detailed revenue and unit sales information requested by Amado. Microsoft allowed the jury to reach a verdict based on the stipulated figures that included Software Assurance and Recurring licenses. Microsoft, likewise, did not object when the Court used figures that included Software Assurance and Recurring licenses for the accounting.

Now, eighteen months after the judgment was entered in this case, Microsoft seeks to base the escrow award on the net license counts, rather than the total license counts used at trial and in the accounting without objection, because Microsoft contends that Software Assurance and Recurring licenses do not represent "sales of the infringing products." According to Microsoft, Recurring licenses are accounting mechanisms to track installment payments and Software Assurance licenses represent maintenance agreements. However, Software Assurance licenses entitle customers to software updates. Microsoft 30(b)(6) designee Thomas Bailey testified that Software Assurance licenses allow customers to "get the newest version" of Office Professional 2003 "automatically." Dep. of Thomas Bailey at 46:3-20, Decl. of Scott Moore in Supp. Pl.'s Undercount Mot., Ex. F, Docket No. 583. Consequently, any Software Assurance licensee who purchased version 2002(XP) of the infringing products had the right to upgrade to version 2003. If these customers upgraded to version 2003 during the escrow period, then **[*44]** their Software Assurance licenses do indeed represent "sales of the infringing products." Moreover, as Amado points out, a Software Assurance license entitles the entity licensee to give each seat (i.e. employee) an additional free copy of the software for his or her home use such that each license actually represents installation of the infringing products on two computers, even though it is only counted as a single license.

In addition, as discussed above, the parties first brought this issue of net licenses versus total licenses to the Court's attention in October 2006. At the hearing on Amado's contempt motion, the Court expressed concern over the exclusion of the Software Assurance licenses from Microsoft's escrow payments, but did not question the exclusion of Recurring licenses. Following this October 23, 2006 hearing, the number of Software Assurance licenses reported by Microsoft dropped precipitously, whereas the number of Recurring licenses increased dramatically in comparison to the numbers previously reported for the same five-month time period. Specifically, the November 2005 spreadsheet shows 6,944,751 Software Assurance licenses and 5,416,275 Recurring licenses for June **[*45]** 2005 through October 2005, whereas the November 2006 spreadsheet shows 2,881,238 Software Assurance licenses and 10,171,879 Recurring licenses for the same period. *See* Pl. Mot. for $ 2.00 per Unit of Infringing Sales at 11:3-8; Oct. 2, 2006 Moore Decl., Ex. R; Notice of Escrow Deposit, filed Dec. 26, 2006, Ex. B.

Microsoft's Opposition largely ignores Amado's evidence about its constantly changing license counts. Microsoft's only response is a footnote stating that its MS Sales database from which it derives the license and revenue information provided to Amado and the Court is a live database, which is constantly updated. [13] Def.'s Opp'n to Pl.'s

---

[12] Smith testified that "in excess of 90 percent" of the revenue reflected in the sales summaries Microsoft produced was attributable to the sale of the product license, **[*43]** and not the Software Assurance component." Dep. Tr. of Richard Smith at 23:1-6, Moore Reply Decl., Ex. I.

Mot. 18:20-28. At the February 5, 2007 hearing, the Court asked Microsoft why the licenses counts kept changing to the benefit of Microsoft. Counsel for Microsoft reiterated that MS Sales was a live database. Counsel further claimed that MS Sales was designed to track revenue and not count licenses. This explanation is inadequate. The fact that MS Sales is a live database does not explain the drastic changes in license counts for the same historical periods of time.

Microsoft stipulated to sales figures that included Software Assurance and Recurring licenses at trial and during the accounting. The jury verdict and the Court's judgment are both based on these stipulated sales figures. At no point prior to the entry of judgment, did Microsoft object to the use of these figures or in any way alert Amado or the Court to any inaccuracy or unfairness in using the stipulated sales figures, which included Software Assurance and Recurring licenses. Microsoft is correct that the question of whether Software Assurance licenses and Recurring licenses represent "sales of the infringing products" was not raised at trial. The parties stipulation as to the sales figures obviated any need for the jury to determine which licenses were properly included as "sales of the infringing products." While Microsoft has a plausible argument that Recurring licenses do not represent additional sales or installations of the infringing products, the **[*47]** same cannot be said with regard to Software Assurance licenses. Thus, the Court might be willing to exclude Recurring licenses from the license counts for purposes of the stay escrow, despite the inclusion of these licenses in the jury's award. However, in light of the constantly changing license counts and the fact that following the October 23, 2006 contempt hearing, Microsoft provided "updated" license counts, in which 4,063,513 Software Assurance licenses present in a prior spreadsheet for the same five month period vanished and 4,755,604 Recurring licenses not present in that prior spreadsheet appeared, the Court cannot confidently accept either of these counts as accurate. The inference is too strong that the disappearing Software Assurance licenses reappeared as Recurring licenses.

Doubts as to damages are resolved against the infringer. *See* *Sensonics, Inc. v. Aerosonic Corp., 81 F.3d 1566, 1572 (Fed. Cir. 1996)* ("[I]f actual damages can not be ascertained with precision because the evidence available from the infringer is inadequate, damages may be estimated on the best available evidence, taking cognizance of the reason for the inadequacy of proof and resolving doubt against **[*48]** the infringer"); *Kori Corp. v. Wilco Marsh Buggies & Draglines, 761 F.2d 649, 655 (Fed. Cir. 1985)* ("Fundamental principles of justice require us to throw any risk of uncertainty upon the wrongdoer rather than upon the injured party"). Specifically, "[w]hen the calculation of damages is impeded by incomplete records of the infringer, adverse inferences are appropriately drawn." *Sensonics, Inc., 81 F.3d at 1572* (citing *Lam, Inc. v. Johns-Manville Corp., 718 F.2d 1056, 1065, 219 U.S.P.Q. 670, 675 (Fed. Cir. 1983))*. In contrast to the unreliable counts for Software Assurance and Recurring licenses (net licenses), the total license counts have not changed and therefore, the Court can confidently use these total licenses as the basis of the escrow award.

Finally, Amado objects to the use of the reduced "net" license counts on the ground that these counts and the underlying summary spreadsheets are inadmissible because they violate the Best Evidence Rule and do not fall within any exception to the hearsay rule. [14] Under the Best Evidence Rule, a party must generally produce the original document to prove the contents of a "writing" or "recording." *Fed. R. Evid. 1002*. The MS Sales database **[*49]** qualifies as a "writing" or "recording." *See* *Fed. R. Evid. 1001(1)*. Because Microsoft has never submitted the original MS Sales database to the Court, for the Court to rely on its reduced "net" license counts, Microsoft must submit materials that satisfy an exception to the Best Evidence Rule. *See* *Fed. R. Evid. 1003-1007*. However, none of these exceptions permit Microsoft to introduce its reduced license counts. *Rule 1003* is inapplicable because Microsoft has never submitted a duplicate of the MS Sales database. *Fed. R. Evid. 1003*. *Rule 1004* is inapplicable because the original database has not been lost or destroyed and is not in the possession of a party opponent. *Fed. R. Evid. 1004*. *Rule 1005* is inapplicable because the MS sales database is not a public record. *Fed. R. Evid. 1005*. *Rule 1007* permits the introduction of written admissions of a party opponent in lieu of the original. *Fed. R. Evid.*

---

[13] This footnote also explains that there was an error in the creation of some **[*46]** spreadsheets provided to Amado because Academic licenses were double counted. However, this error is not relevant to the changes in the counts for Software Assurance and Recurring licenses because it did not affect these licenses.

[14] Microsoft did not respond to these evidentiary objections.

1007. Microsoft cannot invoke this exception to introduce its reduced "net" license counts. However, this exception permits Amado, Microsoft's party opponent, to introduce the "total" license counts. Finally, while *Rule 1006* permits the introduction of summaries in lieu of originals for voluminous **[*50]** writings or recordings "which cannot be conveniently examined in court," to invoke this exception the originals or duplicates must be made available to the other party. *Fed. R. Evid. 1006*. Microsoft has never made the MS Sales database available to Amado, despite Amado's requests for discovery of the MS Sales database before and after trial. [15] Consequently, *Rule 1006* is likewise inapplicable and the Court sustains Amado's objection to the reduced "net" license counts on the basis of the Best Evidence Rule. The Court also sustains Amado's hearsay objection to the "net" license counts. These summary spreadsheets were prepared solely for purposes of this lawsuit and therefore are not admissible under the business records exception to the hearsay rule. *See, e.g., Palmer v. Hoffman, 318 U.S. 109, 113-15 63 S. Ct. 477, 87 L. Ed. 645 (1943)* (reports prepared for use in court are not considered records of regularly conducted business); *United States v. Miller, 771 F.2d 1219, 1238 (9th Cir. 1985)* (summaries "prepared in response to litigation rather than in the regular course of business" are not admissible under *Fed. R. Evid. 803(6)*).

Therefore, for the reasons set forth above, the Court will base the escrow award on the same methodology used at trial and during the accounting - the total license counts, 103,115,257.

2. Sales of the Infringing Products

The Injunction entered in this case bars Microsoft from:

> making, using, selling, or importing any version of Microsoft's Access software or any version of Microsoft's Office suite of programs that includes Access, that *includes the capability of, when loaded on a computer, connecting a spreadsheet program to a database program in a manner that would infringe claim 21 of the '615 patent*

Aug. 2, 2005 Order 27:23-28 (emphasis added). Under the explicit terms of the Injunction, a violation occurs once Office or Access software is loaded onto a computer with the capability of connecting a spreadsheet program and database program in a manner that infringes claim '21 of the '615 patent. Microsoft does not deny that the Office **[*52]** 2003 versions of Office and Access are the same versions of the software that the jury found infringed claim 21 of Amado's '615 patent. Nor does Microsoft deny that after February 28, 2006, the installation process requires that the user first install Office and Access before inserting the separate SP2 disc to install the fix that removes the infringing functionality. Therefore, even if the user upholds its obligations under its licensing agreement with Microsoft and installs the SP2 disc, infringement has already occurred when the user installs the SP2 disc because the Injunction is violated as soon as the first disc containing Office or Access is installed onto a computer.

Microsoft argues at length in its Opposition that Amado should be required to submit new evidence of infringement. These arguments ignore the jury's verdict finding that the 2003 versions of Office and Access infringe claim 21 of Amado's 615 patent. The law of the case doctrine precludes a court from "reexamining an issue previously decided by the same court, or a higher court, in the same case." *U.S. v. Smith, 389 F.3d 944, 948 (9th Cir. 2004)*; *accord Exxon Corp. v. United States, 931 F.2d 874, 877 (Fed. Cir. 1991)*. **[*53]** Thus, because jury found that the 2003 versions of Office and Access infringed claim 21 of the '615 patent, this determination, already upheld on appeal, is not open to reexamination.

Microsoft continued to sell the infringing 2003 versions of Office and Access after February 28, 2006. There is only one difference between sales prior to February 28, 2006 and those after that date: sales of Office and Access after February 28, 2006 include a separate SP2 disc that contains, *inter alia,* a fix to remove the infringing functionality. However, this fix is not automatically installed when the user installs Office or Access. Instead, to remove the

[15] In the fall **[*51]** of 2003 Amado filed a motion to compel discovery into the MS Sales database, which resulted in the parties' stipulation to use the Price Waterhouse spreadsheets as to "total licenses," which Amado could rely on at trial as sales of the accused products.

infringing functionality, the user must install the separate SP2 disc. Moreover, when a user inserts the disc labeled "Service Pack 2," instead of installing the files, the disc displays a document titled "Office 2003 Service Pack 2 CD Installation," describing the SP2 files, without indicating that the user is required to install these files. Jan. 13, 2007 Taylor Decl. P 11. According to Amado's expert, Dr. Richard Taylor, a user must manually navigate to the shim DLL file on the SP2 disc and then manually install it in order to removed the infringing **[*54]** functionality from Office and Access. Jan. 13, 2007 Decl. P 12. Thus, Microsoft relies on both the user's decision to install SP2 and his or her technological sophistication to figure out how to manually install the files to ensure that the infringing functionality is removed. Accordingly, rather than ensuring its software is no longer "capable" of infringing Amado's '615 patent, Microsoft places the burden on its customers to remove the infringing functionality after the software containing the infringing live link-feature is already installed.

By contrast, Microsoft could have made the SP2 fix a mandatory part of the installation process, such that a user could not install Office or Access without installing the SP2 shim DLL fix. Microsoft has made at least one prior fix a mandatory part of the installation process: before a user can install Microsoft Outlook, they are required to install Service Pack 1. Sept. 11, 2006 Taylor Decl., P 9. In addition, according to Microsoft, the 2007 version of Office and Access contains a modified code disabling the infringing functionality in a single disc that is automatically installed when the customer installs Office or Access. Microsoft has, **[*55]** however, given the user two incentives to install SP2: (1) the SP2 disc contains software, wholly unrelated to the accused functionality, that addresses potential security risks and (2) installation of SP2 is required under Microsoft's licensing agreement with each Office and Access user. Nevertheless, these incentives fail to ensure that Office and Access are not capable of infringing. Unlike a mandatory fix that the customer must install as part of the installation process for Office or Access, the infringing software is already installed before it is even possible to install the voluntary fix.

Amado argues that Microsoft's voluntary "fix" is insufficient as a matter of Federal Circuit law because Microsoft cannot shift the burden of complying with the court order to its customers. In *Stryker Corp. v. Davol Inc., 234 F.3d 1252 (Fed. Cir. 2001)*, the Federal Circuit affirmed the district court's contempt finding where the infringer continued to sell the infringing product with slight modifications that relied on its customers to use the product as instructed. *Id. at 1260*. The defendant modified the spike that previously supported the infringing surgical irrigator, added clips to the **[*56]** device, and instructed its customers to use the support clips and not the spike alone to support the irrigator. At the contempt hearing, the defendant submitted an expert opinion that it would be unreasonable to use the modified device without the clips. *Id. at 1256*. In response, the plaintiff submitted test results showing that the modified spike alone could support the irrigator and anecdotal evidence that hospitals were using the modified device without the clips. *Id. at 1260*. This evidence was sufficient to hold the defendant in contempt.

Similarly, Amado has submitted anecdotal evidence that customers are ignoring their license agreement with Microsoft and deliberately avoiding installing the SP2 fix or uninstalling it to retain the infringing functionality. In addition, Dr. Taylor's unrefuted expert opinion is that it would not be unreasonable for customers not to install SP2, thereby avoiding the fix. Moreover, infringement occurs by default when Office or Access is installed and thus, regardless of whether the user ultimately disables the infringing functionality, infringement has occurred as soon as the software is downloaded, which by Microsoft's design occurs before the user **[*57]** can install the shim DLL fix on the SP2 disc.

Finally, the Court is aware that the above analysis is more applicable to retail and volume licensees than OEMs. [16] The Court is also aware that the IT departments of some volume licensees will create a master image of the software onto which the SP2 fix is downloaded prior to installing the software and use this non-infringing master to copy the software onto other computers in the organization similar to the process used by OEMs. However, there is no way to know what percentage of volume licensees install the software by using this type of master image and what percentage install the discs one by one (Office/Access, then SP2) on each computer in the organization. Moreover, the Court does not know what percentage of Microsoft's licenses are attributable to each of its three distribution channels. When the Court inquired at the February 5, 2007 hearing as to the breakdown of these

---

[16] Yet, some OEMs send discs of the software along with the computers containing the software and therefore, at least some OEM customers could uninstall Office or Access and re-install the software without the SP2 fix.

numbers, Microsoft responded that MS Sales did not separate licenses by distribution channel. Counsel for Microsoft gave the Court a rough estimate that retail likely accounted for ten percent, OEMs for thirty percent, and volume licensees for sixty percent. In **[*58]** response, counsel for Amado told the Court that he had seen a spreadsheet tracking OEMs licenses for 2003 showing that these licenses only accounted for 4.45 percent of worldwide sales (significantly lower than the thirty percent estimate). Finally, as discussed in more detail above, during the escrow period Microsoft's license counts have continually changed. In light of these ever-changing numbers, the Court is inherently skeptical as to the accuracy of the figures presented by Microsoft. Consequently, the Court is not breaking out the OEM licenses or some portion of the volume licenses from the license counts because there is not any reliable information on which to do this.

For the reasons set forth above, the Court finds that the voluntary SP2 shim DLL "fix" is ineffective. The 2003 versions of Office and Access sold along with a separate SP2 disc, like the 2003 versions sold without the SP2 disc, infringe claim 21 of the '615 patent. Accordingly, Amado is entitled **[*59]** to an award from the escrow account for the entire period of time sought in his Motion: June 6, 2005 through December 3, 2006.

3. Per Unit Award

As a condition of the stay of the Injunction, the Court ordered Microsoft to pay into an escrow account "two dollars per unit for sales of the infringing products." Aug. 2, 2005 Order 28:13-19. As the Federal Circuit correctly noted in its *per curiam* opinion, the August 2, 2005 Order did not determine the ultimate disposition of the escrow funds. In ordering the two dollar per unit escrow payments, the Court ensured that Microsoft set aside the upper limit of any eventual stay-related escrow award. The Court never indicated that Amado would receive two dollars per unit; rather the Court left the determination of how much Amado should receive per unit for another day, observing that this issue could be rendered moot by subsequent developments in the case. However, the parties have not reached a negotiated settlement and the Federal Circuit has affirmed the jury verdict and this Court's judgment "in all respects," while explicitly carving out the disposition of the escrow money as a remaining issue not covered by its appellate mandate. The question **[*60]** of the disposition of the money in the stay-related escrow account, therefore, has been returned to this Court.

Amado moves the Court for an order awarding him the full two dollars per unit. By contrast, Microsoft argues that Amado should receive the reasonable royalty found by the jury - four cents per unit. The Court begins its analysis with the jury verdict. The jury was instructed that the amount of damages must be "adequate to compensate for the infringement" and not "less than a reasonable royalty for the use made of the invention by the infringer." Jury Instruction No. 49, Ex. D to Jan. 22 Decl. of Joseph Micallef; *see* *35 U.S.C. § 284*. Amado argued at trial that he was entitled to a reasonable royalty of two dollars per unit. The jury disagreed and awarded Amado an amount that equaled precisely four cents per unit. In its August 2, 2005 Order, the Court denied Amado's motion for judgment as a matter of law on the issue of damages, finding that substantial evidence supported the jury's determination of damages. Aug. 2, 2005 Order 5:26, 6:6-8. The Court also found that the jury's award was the "appropriate measure of damages" for the accounting period, rejecting Amado's proposed **[*61]** two dollars per unit alternative. *Id.* at 17:26-27, 18:3. Amado is now asking, yet again, for an award of two dollars per unit, despite the jury's award of four cents per unit.

Amado vehemently argues that this Court cannot award him anything less than two dollars per unit. His arguments misunderstand the Court's intention in awarding two dollar per unit escrow payments. The Court ordered escrow payments representing the upper limit of any potential award if the verdict was upheld on appeal to protect against any under-counting of licenses, as in fact occurred. Amado argues that an award of anything less than two dollars per unit would result in an impermissible compulsory license, thereby constituting an unconstitutional taking and violating his *Seventh Amendment* right to a jury trial on post-verdict sales. In support of this proposition, Amado cites a Supreme Court case discussing Congress' rejection of legislation that would have given courts the "power to cancel a patent which has been used as an instrument to violate antitrust laws." *Hartford-Empire Co. v. United States, 323 U.S. 386, 416-17, 65 S. Ct. 373, 89 L. Ed. 322, 1945 Dec. Comm'r Pat. 607 (1945)* (concluding that ***antitrust law*** does not permit a court to fashion **[*62]** a remedy whereby the antitrust violators lose their rights over their patents and modifying decree to permit the reservation of reasonable royalties for the licensing of the patents). Amado also cites another Supreme Court case construing 35 U.S.C. § 271(c) and (d) and concluding that the patent holder did not engage in patent misuse and was not barred from seeking relief against contributory infringement, even though it refused to license its method patent to allow competitors to sell a nonstaple commodity, propanil, which had no use except as a herbicide (the patented method). Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176, 199, 201-02, 215, 100 S. Ct. 2601, 65 L. Ed. 2d 696 (1980) ("Compulsory licensing is a rarity in our patent system, and we decline to manufacture such a requirement out of § 271(d)").

Although theses cases show a general disfavor for compulsory licenses, they do not establish a categorical rule, barring any type of compulsory license. In fact, contrary to Amado's assertion, this Court has the authority to issue a "compulsory" license by staying an injunction pending appeal, as recognized by the Federal Circuit. *See* Standard Havens Prods. v. Genor Indus., 897 F.2d 511, 512 (Fed. Cir. 1990) **[*63]** (discussing the traditional four factors considered when determining whether to grant a stay of an injunction pending appeal). Thus, even if the stay, in effect, results in a compulsory license, there is no prohibition against allowing such a "compulsory license" pending appeal when, as in the instant case, the Court determines that such a stay is appropriate after evaluating the four factors. *See* Aug. 2, 2005 Order 22-27. In addition, the Supreme Court recently held that not all patentees are entitled to an injunction against post-trial infringement. eBay, 126 S. Ct. at 1841. As Justice Kennedy noted in his concurrence, damages may be sufficient compensation where the patented invention represents only a small component of the infringing product and the patentee licenses the patent, instead of using it to produce and sell. Id. at 1842 (Kennedy, J. concurring). District courts applying *eBay* and following the guidance of Justice Kennedy's concurrence have awarded monetary damage for future infringement based on the jury's reasonable royalty calculation. *See, e.g.* z4 Techs., Inc., 434 F. Supp. 2d at 442.

Courts granting stays pending appeal often condition the stay upon the payment of **[*64]** an amount equal to the reasonable royalty found by the jury. *See, e.g.* In re Hayes Microcomputer Prods., 766 F. Supp. 818, 823 (N.D. Cal. 1991) (conditioning stay on defendants' depositing the 1.75% royalty, awarded by the jury for sales of the infringing products, into a savings account); *Moxness Prods. v. Xomed, Inc.,* 7 U.S.P.Q. 2d 1877, 1988 U.S. Dist. LEXIS 16060, at *16 (M.D. Fla. 1988) (awarding a twenty percent royalty to plaintiff during the stay, which was the rate determined by the jury to be reasonable); *cf.* Shiley, Inc. v. Bentley Labs., Inc., 601 F. Supp 964, 966, 971 (C.D. Cal. 1985) (ordering defendant to pay plaintiff an increasing royalty amount during a six-month transition period, beginning at twelve percent which was the reasonable royalty found by the jury, and increasing to fifteen and finally eighteen percent). Instead of awarding a specific royalty to plaintiff during the stay period, the August 2, 2005 Order directed Microsoft to pay a certain amount into escrow for each sale of Office or Access, but reserved the issue of the ultimate disposition of those funds for a later date. In addition, unlike the payments ordered as conditions of the stays in these other **[*65]** cases, the two dollars collected in the escrow was fifty (50) times greater than the four cent reasonable royalty the jury awarded based on the evidence at trial. The Court ordered payment of this higher sum, without determining what percentage would ultimately be awarded to Amado, because it represented the maximum amount Amado might ultimately be awarded and thereby ensured that there would be sufficient funds to cover any eventual award. Now that the jury's verdict and this Court's judgment have been affirmed by the Federal Circuit, the issue of the disposition of these escrow funds must be resolved.

To determine how much to award Amado per sale, the Court starts with the jury's reasonable royalty of four cents. At a minimum, Amado is entitled to receive what the jury found to be a reasonable royalty. In light of the fact that following the jury's verdict and the Court's denial of its motion for judgment as a matter of law, Microsoft was aware that Office and Access infringed claim 21 of Amado's '615 patent, Amado may be entitled to more than the four cents reasonable royalty for infringement during the stay-related escrow period. Thus, because the jury found that Microsoft had infringed **[*66]** Amado's patent, Microsoft was aware that it would ultimately have to pay Amado some amount for each sale of the infringing products during the escrow period if the verdict was upheld on appeal. Moreover, while Microsoft argues that the SP2 "fix" adequately removed the infringing feature, Amado had notified Microsoft that an acceptable fix would be distributed on the same disc as the infringing products and would remove the infringing functionality automatically as part of the installation. Microsoft choose to ignore this request and distribute a voluntary fix such that the products continued to be "capable of infringement." Thus, although Microsoft's pre-trial infringement was not willful, the same cannot be said about its post-trial infringement. Under 35

U.S.C. § 284, damages may be trebled for willfulness. While not directly applicable to this post-trial stay pending appeal, the Court uses this trebling for willfulness as a guideline. Moreover, the trebling of the four cent royalty awarded by the jury represents the upper limit of any potential future jury award for infringement during the escrow period. Given that Microsoft was on notice of its infringement and chose to implement **[*67]** a "fix" that relied upon its customers to remove the infringing functionality, the Court finds that Amado is entitled to receive twelve cents per unit.

III. DISPOSITION

For the reasons set forth above, the Court makes the following rulings:

1. Microsoft's Motion for Relief from Judgment is DENIED;
2. Microsoft's Motion to Dissolve the Permanent Injunction is GRANTED;
3. Amado's Motion for an Order Awarding him a Royalty for Sales of the Infringing Products from June 6, 2005 to December 3, 2006 is GRANTED IN PART.

The Clerk is ORDERED to close the stay-related escrow account and transfer $ 12,895,348.99 to an account identified by counsel for Amado. This amount represents a twelve cent per unit royalty for the 103,115,257 total licenses sold between June 6, 2005 and December 3, 2006, together with post-judgment interest required by 28 U.S.C. § 1961 at the statutory rate of 3.77%. After transferring this amount to Amado, the Clerk is ORDERED to transfer all remaining funds in the escrow account to an account identified by counsel for Microsoft.

IT IS SO ORDERED.

DATED: March 13, 2007

/s/ David O. Carter

DAVID O. CARTER

United States District Judge

Appendix A

The twelve cent per unit royalty for sales **[*68]** of the infringing products from June 6, 2005 through December 3, 2006 and the statutory post-judgment interest through December 3, 2006 were calculated as follows:

Period	Sales	Royalty	Beginning Balance
June-05	12,743,534	$ 1,529,224.08	$ 1,529,224.08
July-05	3,202,651	$ 384,318.12	$ 1,918,280.70
August-05	2,875,953	$ 345,114.36	$ 2,269,537.24
September-05	5,353,874	$ 642,464.88	$ 2,919,268.99
October-05	4,218,985	$ 506,278.20	$ 3,434,592.92
November-05	3,184,682	$ 382,161.84	$ 3,827,752.05
December-05	8,557,666	$ 1,026,919.92	$ 4,866,532.76
January-06	5,122,022	$ 614,642.64	$ 5,496,757.63
February-06	3,380,622	$ 405,674.64	$ 5,920,032.44
March-06	6,767,586	$ 812,110.32	$ 6,749,263.82
April-06	4,655,696	$ 558,683.52	$ 7,329,557.93
May-06	4,838,779	$ 580,653.48	$ 7,932,922.99
June-06	16,930,220	$ 2,031,626.40	$ 9,989,949.96
July-06	3,901,423	$ 468,170.76	$ 10,489,075.88
August-06	3,546,867	$ 425,624.04	$ 10,948,285.08
September-06	5,320,121	$ 638,414.52	$ 11,621,755.11

Period	Sales	Royalty	Beginning Balance
October-06	4,866,449	$ 583,973.88	$ 12,241,740.51
November-06	2,650,449	$ 318,053.88	$ 12,598,991.44
December-06	997,678	$ 119,721.36	$ 12,757,752.41

Period	Interest	Ending Balance
June-05	$ 4,738.50	$ 1,533,962.58
July-05	$ 6,142.18	$ 1,924,422.88
August-05	$ 7,266.87	$ 2,276,804.11
September-05	$ 9,045.73	$ 2,928,314.72
October-05	$ 10,997.28	$ 3,445,590.21
November-05	$ 11,860.79	$ 3,839,612.84
December-05	$ 15,582.24	$ 4,882,114.99
January-06	$ 17,600.17	$ 5,514,357.80
February-06	$ 17,121.06	$ 5,937,153.50
March-06	$ 21,610.59	$ 6,770,874.41
April-06	$ 22,711.59	$ 7,352,269.51
May-06	$ 25,400.57	$ 7,958,323.56
June-06	$ 30,955.16	$ 10,020,905.12
July-06	$ 33,585.16	$ 10,522,661.04
August-06	$ 35,055.51	$ 10,983,340.59
September-06	$ 36,011.52	$ 11,657,766.63
October-06	$ 39,197.05	$ 12,280,937.56
November-06	$ 39,039.61	$ 12,638,031.05
December-06	$ 3,953.16	$ 12,761,705.57

In **[*69]** addition, Plaintiff is entitled to post-judgment interest on the $ 12,761,705.57 ending balance as of December 3, 2006 from December 4, 2006 through today, March 13, 2007, in the amount of $ 133,643.42. Thus, the total award is $ 12,895,348.99.

In re Tableware Antitrust Litig.

United States District Court for the Northern District of California

March 13, 2007, Decided ; March 13, 2007, Filed

No C-04-3514 VRW

Reporter

484 F. Supp. 2d 1059 *; 2007 U.S. Dist. LEXIS 17480 **; 2007-1 Trade Cas. (CCH) P75,678

IN RE TABLEWARE ANTITRUST LITIGATION; THIS DOCUMENT RELATES TO ALL ACTIONS

Subsequent History: Class certification granted by *In re Tableware Antitrust Litig., 241 F.R.D. 644, 2007 U.S. Dist. LEXIS 21166 (N.D. Cal., Mar. 13, 2007)*

Prior History: *In re Tableware Antitrust Litig., 2006 U.S. Dist. LEXIS 50838 (N.D. Cal., May 25, 2006)*

Core Terms

Bath, depo, plaintiffs', boycott, antitrust, conspiracy, horizontal, competitors, tableware, defendants', rollout, manufacturers, conspire, group boycott, damages, cases, alleged conspiracy, department store, summary judgment, retailers, vertical, anti trust law, products, summary judgment motion, motive, chain, circumstantial evidence, alleged agreement, collusion, suppliers

LexisNexis® Headnotes

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN1[ ] **Summary Judgment, Entitlement as Matter of Law**

In reviewing a summary judgment motion, the court must determine whether genuine issues of material fact exist, resolving any doubt in favor of the party opposing the motion. Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. And the burden of establishing the absence of a genuine issue of material fact lies with the moving party. When the moving party has the burden of proof on an issue, the party's showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party. Summary judgment is granted only if the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN2[] Entitlement as Matter of Law, Appropriateness

With regard to a motion for summary judgment, the nonmoving party may not simply rely on the pleadings, however, but must produce significant probative evidence supporting its claim that a genuine issue of material fact exists. The evidence presented by the nonmoving party is to be believed, and all justifiable inferences are to be drawn in his favor. The judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN3[] Clayton Act, Claims

Section 4 of the Clayton Act, *15 U.S.C.S. § 15(a)*, provides that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue. Although this language can be read to afford relief to all persons whose injuries are causally related to an antitrust violation, the doctrine of "antitrust standing" precludes such an interpretation. Only those who meet the requirements for "antitrust standing" may pursue a claim and to acquire "antitrust standing," a plaintiff must adequately allege and eventually prove "antitrust injury."

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN4[] Clayton Act, Claims

To determine whether the plaintiffs have standing to pursue their antitrust claim, the court considers five factors: (1) the nature of the plaintiffs' alleged injury -- whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages. To conclude that there is antitrust standing, the court need not find in favor of the plaintiffs on each factor; generally, "no single factor is decisive." Yet courts give great weight to the nature of the plaintiff's alleged injury. A showing of antitrust injury is necessary, but not always sufficient, to establish standing. To demonstrate an antitrust injury, it is not enough that the plaintiffs' claimed injury flows from the unlawful conduct; an antitrust injury must flow from that which makes the defendants' acts unlawful.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN5[] Standing, Requirements

The party alleging the antitrust injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN6[] **Standing, Requirements**

The second factor for determining whether the plaintiff have standing to assert an antitrust claim assesses whether the plaintiffs' asserted injuries were the direct result of the defendants' allegedly anticompetitive conduct. To assess the directness of this injury, courts look to the chain of causation linking the plaintiffs' injury to the alleged restraint in the market. Directness in the antitrust context means close in the chain of causation.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN7[] **Standing, Requirements**

With regard to whether plaintiff have standing to assert an antitrust claim, courts consider whether the plaintiffs' damages are speculative. A damages claim is speculative if (1) the alleged injury was indirect; and (2) the alleged effects may have been produced by independent factors.

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

HN8[] **Regulated Practices, Private Actions**

Complex antitrust cases invariably involve complicated questions of causation and damages.

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

HN9[] **Private Actions, Standing**

With regard to whether plaintiff have standing to assert an antitrust claim, damages related to lost profits are distinct from those related to increased costs.

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

HN10[] **Private Actions, Standing**

Illinois Brick Co. v. Illinois holds that a plaintiff does not state a claim for relief for an illegal overcharge due to an anticompetitive agreement if the plaintiff did not purchase directly from a member of the conspiracy.

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

HN11[] **Private Actions, Standing**

Illinois Brick Co. v. Illinois is inapplicable to claims against remote sellers when the plaintiffs allege that the sellers conspired with intermediates in the distribution chain to fix the price at which the plaintiffs purchased.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN12[] **Practices Governed by Per Se Rule, Boycotts**

Although the United States Supreme Court lists "group boycotts" among the classes of economic activity that warrant per se invalidation under *15 U.S.C.S. § 1*, the Supreme Court acknowledges that exactly what types of activity fall within the forbidden category is far from certain.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN13[] **Practices Governed by Per Se Rule, Boycotts**

With regard to group boycotts under ***antitrust law***, a per se standard generally applies to cases involving joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle. A paradigmatic boycott is defined as collective action among a group of competitors that may inhibit the competitive vitality of rivals. In these cases, the boycott often cut off access to a supply, facility or market necessary to enable the boycotted firm to compete, and frequently the boycotting firm possessed a dominant position to the relevant market. In addition, the practices are generally not justified by plausible arguments that they are intended to enhance overall efficiency and make markets more competitive.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN14[] **Practices Governed by Per Se Rule, Boycotts**

The category of restraints classed as group boycotts is not to be expanded indiscriminately, and the per se approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN15[] **Practices Governed by Per Se Rule, Boycotts**

The United States Court of Appeals for the Ninth Circuit reads Northwest Wholesale Stationers, Inc. v. Pacific Stationary Printing Co., and its progeny as establishing three criteria for determining whether the per se standard applies to a group boycott: (1) the boycott cuts off access to a supply, facility, or market necessary to enable the victim firm to compete; (2) the boycotting firm possesses a dominant market position; and (3) the practices are not justified by plausible arguments that they enhanced overall efficiency or competition. In the Ninth Circuit, these three criteria are indicative of per se illegal conduct.

Antitrust & Trade Law > General Overview

HN16[] **Antitrust & Trade Law**

Under ***antitrust law***, the term "dominant" is plainly chosen to stand for something different from antitrust's term of art "monopoly."

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN17[] **Practices Governed by Per Se Rule, Boycotts**

Under ***antitrust law***, the United States Supreme Court has expressly limited the per se rule in the boycott context to cases involving horizontal agreements among direct competitors.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN18[] **Per Se Rule & Rule of Reason, Per Se Violations**

Under ***antitrust law***, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN19[] **Per Se Rule & Rule of Reason, Per Se Violations**

Under ***antitrust law***, the modern formula by which courts determine the existence of concerted action is as follows: the correct standard is that there must be evidence that tends to exclude the possibility of independent action by the parties. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the parties had a conspicuous commitment to a common scheme designed to achieve an unlawful objective.

Antitrust & Trade Law > Sherman Act > Claims

HN20[] **Sherman Act, Claims**

Under ***antitrust law***, conspiracies may be shown either by direct or circumstantial evidence. Only rarely will there be direct evidence of an express agreement in conspiracy cases; hence, circumstantial evidence plays a pivotal role in antitrust litigation. Although interpreting such evidence and drawing inferences from it ordinarily are responsibilities of the factfinder, the United States Supreme Court mandates a threshold judicial assessment of such evidence as follows: ***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *15 U.S.C.S. § 1* case. Thus, conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of *§ 1* must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. The inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed them.

Antitrust & Trade Law > Sherman Act > Claims

HN21[] **Sherman Act, Claims**

With regard to establishing conspiracies under ***antitrust law***, two separate inquiries are relevant to this issue: (1) whether the defendant had any rational motive to join the allege conspiracy, and (2) whether the defendant's conduct was consistent with the defendant's independent interest.

Antitrust & Trade Law > Sherman Act > Claims

HN22[] **Sherman Act, Claims**

With regard to ***antitrust law***, permitting the inference of conspiratorial behavior from circumstantial evidence consistent with both lawful and unlawful conduct will deter pro-competitive conduct -- an especially pernicious danger in light of the fact that the very purpose of the antitrust laws is to promote competition. Courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter pro-competitive conduct.

Antitrust & Trade Law > Sherman Act > Claims

HN23[] **Sherman Act, Claims**

With regard to establishing conspiracies under ***antitrust law***, the United States Court of Appeals for the Ninth Circuit has crafted a two-part test to be applied whenever plaintiffs rest their case entirely on circumstantial evidence. First, defendants may rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice. The burden then shifts back to the plaintiffs to provide specific evidence tending to show that defendants were not engaging in permissible competitive behavior.

Antitrust & Trade Law > Sherman Act > Claims

HN24[] **Sherman Act, Claims**

Direct evidence in a *15 U.S.C.S. § 1* conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted.

Antitrust & Trade Law > Sherman Act > Claims

HN25[] Sherman Act, Claims

With regard to conspiracies under ***antitrust law***, a defendant is entitled to summary judgment when it provides a plausible and justifiable alternative interpretation of its conduct that rebuts the alleged conspiracy.

Antitrust & Trade Law > Sherman Act > Claims

HN26[] Sherman Act, Claims

Under ***antitrust law***, complaints by retailers regarding other retailers are natural -- and from the manufacturer's perspective, unavoidable -- reactions by distributors to the activities of their rivals.

Antitrust & Trade Law > Sherman Act > Claims

HN27[] Sherman Act, Claims

With regard to establishing conspiracies under ***antitrust law***, the plaintiffs have the burden to provide specific evidence tending to show that the defendants were not engaging in permissible competitive behavior. Such evidence must tend to exclude the possibility that the alleged conspirators acted independently. In assessing this evidence, the court also considers (1) whether the defendants had "any rational motive" to join the alleged conspiracy, and (2) whether the defendants' conduct was consistent with the defendant's independent interest.

Antitrust & Trade Law > Sherman Act > Claims

HN28[] Sherman Act, Claims

With regard to establishing conspiracies under ***antitrust law***, if the factual context renders a party's claim implausible - if the claim is one that simply makes no economic sense - the party must come forward with more persuasive evidence to support their claim than would otherwise be necessary. The plaintiffs need not demonstrate the existence of an explicit conspiracy, only that the inference of conspiracy is reasonable in light of the competing inferences of independent action.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Evidence > Inferences & Presumptions > Inferences

HN29[] Procedural Due Process, Self-Incrimination Privilege

The drawing of an adverse inference from the invocation the *Fifth Amendment* in a civil suit is proper when incriminating evidence is also presented.

Antitrust & Trade Law > Sherman Act > Claims

HN30[] **Sherman Act, Claims**

Under ***antitrust law***, complaints by competitors, standing alone, are not sufficient to show a conspiracy.

Counsel: **[**1]** For W. Scott Young, on behalf of himself & all other similarly situated, Plaintiff: Alex C. Turan, Henry A. Cirillo, Michael P. Lehmann, LEAD ATTORNEYS, Furth Lehmann & Grant LLP, San Francisco, CA.; Richard Alexander Saveri, LEAD ATTORNEY, Cadio Zirpoli, Geoffrey C. Rushing, Guido Saveri, Lisa Saveri, Saveri & Saveri Inc., San Francisco, CA.; Craig C. Corbitt, Zelle, Hofmann, Voelbel, Mason & Gene LLP, San Francisco, CA.; Joseph M. Alioto, Alioto Law Firm, San Francisco, CA.

For Federated Department Stores, Inc., Defendant: Jeffrey A. LeVee, LEAD ATTORNEY, Jones Day, Los Angeles, CA.; Phillip Aaron Proger, LEAD ATTORNEY, Toby G Singer, Jones Day, Washington, DC.; Thomas Demitrack, LEAD ATTORNEY, Jones Day, Cleveland, OH.

For The May Department Stores Company, Defendant: Catherine E. Sison, Ronald J. Dolan, LEAD ATTORNEY, The May Department Stores Company, Office of Legal Counsel, St. Louis, MO.; David Dong-In Sohn, Skadden, Arps, Slate, Meagher & Flom LLP, San Francisco, CA.

For Lenox, Inc., Defendant: Tammy Albarran, Terri Garland, Morrison & Foerster, San Francisco, Ca.

For Waterford Wedgewood, U.S.A., Defendant: Amy E. Richardson, Patrick Pearse O'Donnell, LEAD **[**2]** ATTORNEYS, Joseph Collins Cavender, Justin Emerson Dillon, Harris, Wiltshire, Grannis LLP, Washington, DC, US.; Jeffrey C. Hallam, LEAD ATTORNEY, San Francisco, CA.

For Bed Bath & Beyond, Inc, Witness: Dawn Michelle Irizarry, Proskauer Rose LLP, LA, CA.

Judges: VAUGHN R WALKER, United States District Chief Judge.

Opinion by: VAUGHN R WALKER

Opinion

[*1061] ORDER

Plaintiffs in these consolidated cases allege that May Department Stores Co ("May") and Federated Department Stores, Inc ("Federated"), which operate department stores across the United States, and Lenox, Inc ("Lenox") and Waterford Wedgwood, USA ("Waterford"), both of which produce fine tableware sold in the United States, conspired with one another to boycott Bed, Bath and Beyond, a competitor of May and Federated. Plaintiffs claim to have purchased fine tableware from May and Federated during the period of the alleged boycott and were thus injured because the boycott impaired competition in that product market. Plaintiffs bring suit under *§ 1 of the Sherman Act*, alleging that defendants' conduct is condemned *per se.*

On November 17, 2006, Federated (joined by May) and Waterford moved for summary judgment asserting a variety of grounds. **[**3]** Doc # 116; Doc # 128. For reasons discussed below, the court GRANTS Waterford's motion for summary judgment and GRANTS IN PART and DENIES IN PART Federated's and May's motion for summary judgment.

I

In early 2000, both Waterford and Lenox considered expanding the distribution channels for their high-end tableware lines to include Bed, Bath & Beyond and other specialty retailers. Doc # 183 at Ex 67 ("In a perfect world, this [Bed, Bath & Beyond partnership] is the kind of new distribution that we should be exploring; otherwise, we will be forever in the grip of the department stores. However, we will have to assess the amount of angst at Federated compared with the prize before we decide whether or not to be a part of this [Bed, Bath & Beyond] test."). See also Doc # 180, Ex 10 (Mielke depo) at 48:8-51:15.

On March 7, 2001, Bed, Bath & Beyond and Waterford executives met and agreed to proceed with a test project. Doc # 180, Ex 10 (Mielke depo) at 74:12-75:9; Ex 32 ("A * * * meeting in New York when we agreed to proceed with the test * * *"). During subsequent meetings, Bed, Bath & Beyond and Waterford personnel finalized site plans for the opening of a fine china department at **[**4]** Bed, Bath & Beyond. Doc **[*1062]** # 180, Ex 10 (Mielke depo) at 82:11-84:8; Doc # 179, Ex 5 (Johnson depo) at 144:1-16; Doc # 183, Ex 72.

Lenox also met with Bed, Bath & Beyond to discuss the prospect of distributing tableware. Doc # 179, Ex 2 (Gavin depo) at 50:19-53:6, 56:18-21, 58:15-24, 59:8-21; Ex 6 (Krangel Depo) at 94:8-98:23, 106:3-19; Doc # 180, Ex 14 (Scala depo) at 68:5-70:11, 71:12-19. Eventually, on March 30, 2001, Lenox agreed to participate in a test rollout with Bed, Bath & Beyond. Doc # 179, Ex 2 at 64:20-65:3; Doc # 183, Ex 59 ("We will be piloting a 7 store test program in Bridal tabletop products"). The parties confirmed specific product assortments at subsequent meetings. Doc # 179, Ex 2 at 139:20-142:2; Doc # 180, Ex 15 (Temares depo) at 59:9-63:22, 160:2-161:3; Doc # 179, Ex 5 (Johnson depo) at 73:20-74:9, 198:18-199:9.

Because Waterford had an interest in knowing the identities of the other manufacturers participating in the Bed, Bath & Beyond rollout, its executives had their "ear to the ground from day one about which manufacturers were going to be participating and who were not going to be participating." Doc # 179, Ex 10 (Mielke depo) at 156:8-14. Indeed, Waterford's **[**5]** Mielke testified that he probably mentioned the Bed, Bath & Beyond rollout during conversations with Lou Scala and Moira Gavin at Lennox. Doc # 179, Ex 2 (Gavin depo) at 139:20-141:9); Doc # 180, Ex 10 (Mielke depo) at 153:24-157:7; Ex 60 ("Lenox and Waterford are anchoring the department.").

On May 31, 2001, Lenox informed May about its plans to distribute through Bed, Bath and Beyond "as a '6 door test,' starting in 9/01," Doc # 182, Ex 44 at May 65281. Lenox further mentioned that Waterford would also be participating in the Bed, Bath & Beyond rollout. Doc # 179, Ex 7 (Locraft depo) at 179:13-16. The evidence suggests that this news spurred the retailers into action. Gregory Locraft, an executive at May, was "agitated, disappointed, concerned [and] upset" by this news. In a raised voice, Locraft exclaimed "you do what you have to do and we'll do what we have to do." Doc # 179, Ex 7 at 176:14-16. Soon thereafter, May executive Don Engelman called Carl Mielke at Waterford to confirm whether Waterford intended to participate in the Bed, Bath & Beyond rollout. Mielke told Engelman that Waterford was "working on something" with Bed, Bath & Beyond. Doc # 180, Ex 10 at 163:11-12.

[6]** The next day, Lenox contacted May executive Judith Hofer "to try to take care of the situation" and "settle things down." Doc # 179, Ex 6 at 206:16-25. Hofer was "very professional" in response, but reiterated Locraft's admonition, "you have to do what you need to do to grow your business and we need to do what we need to do." Id at 209:7-9.

About a week after the May 31 meeting, Federated contacted both Lenox and Waterford to complain about their participation in the rollout. Federated's Salus telephoned Lenox President Krangel and said he was "concerned" about the decision. Doc # 179, Ex 6 (Krangel depo) at 241:9-10. At the end of the conversation, Salus told Krangel: "[y]ou have to do what you have to do to grow your business and we have to do what we need to do with our business." Doc # 170, Ex 6 (Krangel depo) at 239:16-25, 236:19-244:17; Doc # 180, Ex 14 (Scala depo) at 148:5-149:19, 151:3-12.

On the same day, Federated president Terry Lundgren and executive Janet Grove telephoned Waterford CEO Chris McGillivary about the Bed, Bath & Beyond program, warning that it "was not going to help the relationship between the two companies." Doc # 179, Ex 9 (McGillivary depo) at 65: **[**7]** 5-66:11. A few days later, **[*1063]** James Zimmerman, Federated's CEO, telephoned Anthony O'Reilly, Chairman of Waterford, to discuss Waterford's participation in the Bed, Bath & Beyond rollout. According to Waterford, Zimmerman said he "would advise against it." Doc # 180, Ex 19 at FED 001223; Ex 16 (Zimmerman depo) at 24:4-26:6, 29:4-30:3.

On June 12, 2001, Federated executives held an internal meeting during which the Bed, Bath & Beyond rollout was mentioned. Doc # 179, Ex 3 (Grove depo) at 129:13-130:14. One week later, Helaine Suval, a vice-president at Federated, sent an email summarizing the meeting as relayed to her from Federated's Dawn Robertson (Suval did not attend the meeting). The email states in pertinent part:

> Waterford, Lenox and All-Clad have agreed to sell Bed, Bath & Beyond (6 stores). Major point of contention - [Federated's president] Terry Lundgren involved. Federated has threatened to drop them if they go ahead and sell BB&B. No new initiatives with them in stores[.]

Doc # 181, Ex 38. Robertson disputes the accuracy of the Suval email; although unable to recall what was said at the meeting, Robertson firmly relates what was not said. She contends that **[**8]** nobody at the meeting "stated that Lenox or Waterford, or any of their products, would be dropped by Federated or any of its stores, nor did any Federated [employee] at the meeting state that there would be no new initiatives with Lenox." Doc # 131, Ex T, P 4. The point, of course, is that the evidence discloses conflicting versions of events, albeit both from Federated personnel.

Around June 12, 2002, May executive Tom Hayes had a meeting with Scala at Lenox, the substance of which Hayes relayed to Gregory Locraft. Doc # 179, Ex 7 at 215:20-23. According to Locraft's notes, Hayes maintained that he would not distribute several Lenox and Gorham brands if Lenox sold to Bed, Bath & Beyond. Doc # 179, Ex 7 at 218:17-21; Doc # 183, Ex 57.

The concerns of Federated and May appear to have borne fruit. Waterford's McGillivary told his subordinate, Carl Mielke, "[t]his is bad * * *, [w]e need to stop the test." Doc # 180, Ex 10 (Mielke depo) at 113:5-18. McGillivary remarked to Mielke "[w]e needed to find a way to stop this and we need to tell [Bed, Bath & Beyond] we can't do this test, and we can't tell them that it is because of Federated." Doc # 180, Ex 10 (Mielke depo) at 111: **[**9]** 21-113:25, 115:22-116:10. Accordingly, Mielke drafted a script of what to tell Bed, Bath & Beyond, which McGillivary approved. Doc # 181, Ex 10 at 119:20-120:5, 130:22-131:7; Doc # 181, Ex 31-33.

On June 12, 2001, Mielke called James Peikon and Todd Johnson at Bed, Bath & Beyond and told them Waterford would not be able to participate in the test program. Doc # 179, Ex 5 (Johnson depo) at 78:3-79:18; Doc # 180, Ex 10 (Mielke depo) at 120:6-15, 130:22-134:21. According to Mielke, Peikon and Johnson told Mielke that his reasons were "bullshit," Doc # 180, Ex 10 at 133:3-25, and that "[t]hese F - - - - up department stores will promise you guys anything if you don't sell us but will go right back to F - - - - you up the - - - like they always have." Doc # 181, Ex 32.

At McGillivary's instruction, Mielke reported his conversation with Bed, Bath & Beyond to Federated's Janet Grove. Doc # 180, Ex 10 (Mielke depo) at 134:22-136:18; Doc # 181, Ex 31. According to Mielke, Grove said "[t]hat's great[,] [y]ou guys do what you have to do and we do what we have to do, but I'm glad you guys made this decision." Doc # 180, Ex 10 (Mielke depo) at 136:19-137:17; Doc # 179, Ex 3 (Grove depo) **[**10]** at 83:7-18.

[*1064] Next, Lenox called Bed, Bath & Beyond and terminated its participation in the Bed, Bath & Beyond program. Doc # 180, Ex 15 (Temares depo) at 168:5-169:22. Lenox's Krangel called Bed, Bath & Beyond President and CEO Steven Temares and told him that Lenox needed to "pull back." Doc # 180, Ex 15 (Temares depo) at 95:13-96:4, 99:15-101:14, 103:16-107:22, 109:16-110:15, 168:5-170:16). Temares thought Krangel's purported justification for pulling out of the deal "was a bunch of horse shit," sounded "scripted" and made no sense. Doc # 180, Ex 15 at 111:8-112:16, 170:17-171:7:

> It is just inconsistent with common sense since I sat with them at a meeting a month before, that I imagine people told him all along where we were in the process, that we had selected the assortment, that they approved the fixturing, that we had gone through with the selection of stores, that we involved all these people and time and effort and we had numerous meetings at all different levels in the organization, so common sense would indicate that what he said is farfetched.

Id, Ex 15 at 170:17-172:17.

Finally, on June 18, 2001, Federated's Zimmerman wrote to O'Reilly at Waterford, praising **[**11]** him for making the "right decision":

> I wanted to write and tell you I think your team made the right decision. You have a great brand and it needs to be protected and enhanced. I assume you played a role and I think you did the right thing for all partners in this game. Thanks for listening to me as I voiced my thoughts.

Doc # 180, Ex 18; Ex 16 (Zimmerman depo) at 26:13-20, 28:1-29:1.

About one year later, Waterford began to sell its Wedgwood tableware products to Bed, Bath & Beyond in August 2002 and its Waterford brand products in November 2004. Lenox followed suit in November 2002. Doc # 179, Ex 2 (Gavin depo) at 221:12-221:21, 231:2-21, 243:21-244:9; Doc # 183, Ex 62; Doc # 183, Ex 67 at 29.

II

In its order denying defendants' motion to dismiss, the court remarked that plaintiffs "appear to state claims (presumably in the alternative) for (1) vertical minimum resale price maintenance, (2) horizontal price fixing and (3) an exclusionary group boycott." Doc # 52 at 5. Since that time, plaintiffs have shed the first two theories of relief, rendering this suit, in plaintiffs' words, "a group boycott case." Doc # 161 at 8.

As a legal matter, however, this case is **[**12]** better characterized as three group boycott cases: in plaintiffs' view, the successful boycott of Bed, Bath & Beyond arose from (1) a horizontal agreement between Federated and May, (2) a horizontal agreement between Waterford and Lenox and (3) vertical agreements among all defendants. Moreover, plaintiffs presumably regard each set of agreements as independently sufficient to effect the boycott of Bed, Bath & Beyond. Although plaintiffs add these alleged agreements together to arrive at one grand (and overdetermined) conspiracy, various antitrust doctrines impel the court to distinguish among these three categories at various points along the court's analysis.

HN1[] In reviewing a summary judgment motion, the court must determine whether genuine issues of material fact exist, resolving any doubt in favor of the party opposing the motion. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v Liberty Lobby, 477 US 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202* ***[*1065]*** *(1986)*. "Only disputes over facts that might affect the outcome of the suit under the governing law **[**13]** will properly preclude the entry of summary judgment." Id. And the burden of establishing the absence of a genuine issue of material fact lies with the moving party. *Celotex Corp v Catrett, 477 US 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. When the moving party has the burden of proof on an issue, the party's showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party. *Calderone v United States, 799 F2d 254, 258-59 (6th Cir 1986)*. Summary judgment is granted only if the moving party is entitled to judgment as a matter of law. *FRCP 56(c)*.

HN2[] The nonmoving party may not simply rely on the pleadings, however, but must produce significant probative evidence supporting its claim that a genuine issue of material fact exists. *TW Elec Sery v Pacific Elec Contractors Ass'n, 809 F2d 626, 630 (9th Cir 1987)*. The evidence presented by the nonmoving party "is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson, 477 US at 255*. "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there **[**14]** is a genuine issue for trial." *Id at 249*.

III

A

HN3[] *Section 4* of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue * * *." *15 USC § 15(a)*. Although this language could be read to afford relief to all persons whose injuries are causally related to an antitrust violation, *Lucas v Bechtel Corp, 800 F2d 839, 843 (9th Cir 1986)*, the doctrine of "antitrust standing" precludes such an interpretation. *Los Angeles Memorial Coliseum Comm'n v NFL, 791 F2d 1356, 1363 (9th Cir 1986)*. "Only those who meet the requirements for 'antitrust standing' may pursue a claim * * *; and to acquire 'antitrust standing,' a plaintiff must adequately allege and eventually prove 'antitrust injury." *Glen Holly Entertainment, Inc v Tektronix Inc, 352 F3d 367 (9th Cir 2003)* (citing *Associated Fed Contractors of California, Inc v California State Council of Carpenters, 459 US 519, 530-35, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*.

HN4[] To determine whether plaintiffs have standing to pursue their antitrust claim, the court considers five factors:

(1) **[**15]** the nature of plaintiffs' alleged injury -- whether it was the type the antitrust laws were intended to forestall;

(2) the directness of the injury;

(3) the speculative measure of the harm;

(4) the risk of duplicative recovery; and

(5) the complexity in apportioning damages.

Associated General Contractors, 459 US at 538-45;

To conclude that there is antitrust standing, the court need not find in favor of plaintiffs on each factor, see *Amarel v Connell, 102 F3d 1494, 1507 (9th Cir 1996)*; generally, "no single factor is decisive." *R C Dick Geothermal Corp v Thermogenics, Inc, 890 F2d 139, 146 (9th Cir 1989)* (en banc). Yet courts give great weight to the nature of plaintiffs' alleged injury. See *Amarel, 102 F3d at 1507*. Indeed, the Supreme Court has noted that "[a] showing of antitrust injury is necessary, but not always sufficient, to establish standing." *Cargill, Inc v Monfort of Colorado, Inc, 479 US 104, 110, 107 S. Ct. 484, 93 L. Ed. 2d 427 n5 (1986).* To demonstrate an antitrust injury, it is not enough that the plaintiffs' claimed injury **[*1066]** flows from the unlawful conduct; an antitrust injury must "flow[] **[**16]** from that which makes defendants' acts unlawful." *Atlantic Richfield Co v USA Petroleum Co, 495 US 328, 334, 110 S. Ct. 1884, 109 L.Ed. 2d 333 (1990)* (quoting *Brunswick Corp v Pueblo Bowl-O-Mat, Inc, 429 US 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*.

Plaintiffs principally rely on *Blue Shield v McCready, 457 US 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*, in asserting their injury was the type the antitrust laws were intended to forestall. In McCready, the Supreme Court held that an individual had standing to sue her health insurer for reimbursement of payments to a clinical psychologist for allegedly conspiring with physicians to bar clinical psychologists from the market by excluding their services from coverage under the insurance policy. In doing so, the Court rejected the argument that the plaintiff lacked standing because she was not an actor in the relevant market and because the more appropriate plaintiffs were the psychologists. Id. The Court reasoned that antitrust remedies "cannot be restricted to those competitors whom the conspirators hope to eliminate from the market. * * * As a consumer of psychotherapy services * * * [the plaintiff] was within that area of the economy * * * endangered by [the] breakdown **[**17]** of competitive conditions." *Id at 479-80*. Even though the plaintiff "was not a competitor of the conspirators, the injury she suffered was inextricably intertwined with the injury the conspirator sought to inflict on psychologists and the psychotherapy market." *Id at 483*.

Like the plaintiff in *McCready,* plaintiffs here are consumers in the restrained market - the tableware market. And by purchasing tableware directly from the alleged co-conspirators, plaintiffs participated in the area of the economy endangered by anticompetitive conditions. See *id at 480*. See also *Glen Holly Entertainment, 352 F3d at 372* (noting that "***HN5***[] the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market") (citing *Eagle v Star-Kist Foods, Inc, 812 F2d 538 (9th Cir 1987)*. Accordingly, under *McCready,* although plaintiffs were not the direct target of defendants' boycott, their injuries were "inextricably intertwined with the injury the conspirators sought to inflict" on Bed, Bath & Beyond. See *McCready, 457 US at 483.* **[**18]**

HN6[] The second factor assesses whether plaintiffs' asserted injuries were the direct result of defendants' allegedly anticompetitive conduct. Plaintiffs contend that defendants increased the price of its tableware by boycotting expansion to Bed, Bath & Beyond. To assess the directness of this injury, courts look to the chain of causation linking plaintiffs' injury to the alleged restraint in the market. See *Associated General, 459 US at 540, 103 S. Ct. 897, 74 L. Ed. 2d 723*; *Yellow Pages Cost Consultants, Inc v GTE Directories Corp, 951 F2d 1158, 1162 (9th Cir 1991)* ("Directness in the antitrust context means close in the chain of causation."). The chain of causation vis-a-vis Federated and May is direct because the boycott of Bed, Bath & Beyond allegedly affected the price plaintiffs paid Federated and May for Lenox and Waterford tableware. See *Glen Holly, 352 F3d at 374* (antitrust injury flowed from discontinuation of a competing product). The chain of causation with respect to Waterford and Lenox, however, is more attenuated and, for reasons discussed below, implicates the so-called "direct purchaser" requirement.

Under the third factor, ***HN7***[] courts consider whether plaintiffs' **[**19]** damages are speculative. See *Associated General, 459 US at 542*. **[*1067]** In *Associated General,* the Supreme Court found the damages claim in question to be speculative because (1) the alleged injury was indirect; and (2) "the alleged effects * * * may have been produced by independent factors." *Id;* see also *Eagle v Star-Kist Foods, Inc, 812 F2d 538, 542 (9th Cir 1987)*.

The court finds that plaintiffs' alleged damages are not speculative enough to eviscerate plaintiffs' standing. First, as discussed above, plaintiffs' asserted injury flows directly from defendants' alleged decision to boycott Bed, Bath & Beyond. Second, defendants do not suggest that plaintiffs' asserted injury may have stemmed from other exogenous market factors. Third, although the extent of plaintiffs' damages hinges on a complex counterfactual (the price of tableware if Bed, Bath & Beyond had participated in the market), "this complexity is not so unusual as to distinguish this case from other complex business disputes * * *." *American Ad Management, Inc v GTE Corp, 190 F3d 1051, 1059 (9th Cir 1999)*. See also *Forsyth v Humana, Inc, 114 F3d 1467, 1478 (9th Cir 1997)* **[**20]** ("***HN8***[] Complex antitrust cases * * * invariably involve complicated questions of causation and damages.").

The fourth factor -- the risk of duplicative recovery -- also weighs in favor of plaintiffs' standing. The purpose undergirding this factor is to avoid the risk "that potential plaintiffs may be in a 'position to assert conflicting claims to a common fund * * * thereby creating the danger of multiple liability for the fund." *Eagle, 812 F2d at 542* (quoting *Associated General, 459 US at 544*). Even if Bed, Bath & Beyond could bring suit against defendants (it appears the statute of limitations has run, see *15 USC § 15(b)*), duplicative recovery is unlikely because plaintiffs' damages are distinct from Bed, Bath & Beyond's. To the extent defendants' alleged tactics raised artificially the price for tableware, plaintiffs' damages exceed -- and thus diverge from -- Bed, Bath & Beyond's lost profits. See *American Ad, 190 F3d at 1059-60* (damages***HN9***[] related to lost profits are distinct from those related to increased costs).

As discussed above with respect to the speculative measure of harm factor, the court does not find **[**21]** the apportionment of damages in this case to be exceedingly complicated. Furthermore, unlike Associated General, in which damages needed to be apportioned among "directly victimized contractors and subcontractors and indirectly affected employees and union entities," *459 US at 545*, apportioning damages in this case would require only a determination of the damages suffered by direct customers.

In sum, because all five of the *Associated General* factors weigh in plaintiffs' favor, the court finds that plaintiffs have antitrust standing in this litigation, at least with respect to Federated and May.

One issue involving standing remains: inasmuch as plaintiffs' suit targets an alleged **[*1068]** horizontal agreement between Waterford and Lennox, plaintiffs run afoul of the so-called "direct purchaser" requirement from *Illinois Brick Co v Illinois, 431 US 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. The Court in***HN10***[] Illinois Brick ruled that a plaintiff does not state a claim for relief for an illegal overcharge due to an anticompetitive agreement if the plaintiff did not purchase directly from a member of the conspiracy. In doing so, the Court precluded antitrust claims based on overcharges **[**22]** that were "passed-on" through the distribution chain to the ultimate consumer. Id.

Illinois Brick does not preclude this suit entirely because plaintiffs purchased the relevant goods directly from Federated and May. Yet the allegations concerning a horizontal agreement between Waterford and Lennox implicate Illinois Brick, as plaintiffs stand as indirect purchasers vis-a-vis this alleged agreement. Putting aside, for a moment, the alleged vertical agreements, the allegations concerning an agreement between Waterford and Lennox are probative only to the extent they substantiate horizontal agreements between Federated and May or vertical agreements among defendants. See *Arizona v Shamrock Foods, 729 F2d 1208 (9th Cir 1984)* (concluding that ***HN11***[] Illinois Brick is inapplicable to claims against remote sellers when the plaintiffs allege that the sellers conspired with intermediates in the distribution chain to fix the price at which the plaintiffs purchased). Moreover, if Federated and May succeed in obtaining summary judgment, leaving only an alleged horizontal agreement between Waterford and Lennox, then plaintiffs become indirect purchasers with respect to the **[**23]** alleged conspiracy and thereby cease to have standing to sue.

B

The next issue posed by defendants' motions is whether the alleged agreements among defendants to prevent the sale of Waterford and Lenox tableware to Bed, Bath and Beyond is properly viewed as a group boycott deserving of *per se* scrutiny. ***HN12***[] Although the Supreme Court lists "group boycotts" among the classes of economic activity that warrant *per se* invalidation under *§ 1*, the Court acknowledges that "exactly what types of activity fall within the forbidden category is * * * far from certain." *Northwest Wholesale Stationers, Inc v Pacific Stationery & Printing Co, 472 US 284, 294-95, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)*. See also *id at 295* ("There exists more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine."). Or as one court quipped, using the term "boycott" is "the equivalent of yelling 'fire' in the halls of traditional antitrust jurisprudence." *Universal Amusements Co v General Cinema Corp, 635 F Supp 1505, 1523 (SD Tex 1985)*.

The application of the *per se* rule to group boycotts developed **[**24]** from a series of cases in which the Supreme Court invalidated such boycotts as § 1 violations. In *Eastern States Retail Lumber Dealers' Association v United States, 234 US 600, 611-14, 34 S. Ct. 951, 58 L. Ed. 1490 (1914)*, for example, the Court held unlawful concerted refusals to deal with wholesalers who sold directly to customers. Similarly, in *Fashion Originators' Guild of America v FTC, 312 US 457, 61 S. Ct. 703, 85 L. Ed. 949, 32 F.T.C. 1856 (1941)*, the Court deemed unlawful a joint "program" of textile and garment manufacturers that prohibited the sale of garments to stores that sold "style pirated" garments and the sale of fabrics to manufacturers who sold to stores selling pirated goods.

The Court's predilection for designating group boycotts *per se* unlawful law reached its highwater mark in *Klor's Inc v Broadway-Hale Stores, Inc, 359 US 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*. A retailer, Broadway, entered into an agreement with suppliers of appliances "either not to sell to Klor's or to sell to it only at discriminatory and highly unfavorable prices." *Id at 209*. Broadway argued that because consumers and other competitors had access to supply, the public was not injured. The Court disagreed with Broadway, **[**25]** declaring that

> [g]roup boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited **[*1069]** production, or brought about a deterioration in quality."

Id at 212 (citing *Fashion Originators' Guild v Federal Trade Commission, 312 U.S. 457, 466, 61 S. Ct. 703, 85 L. Ed. 949, 32 F.T.C. 1856 (1941)*.

The Supreme Court has since retreated from its stance in Klor's, and has cautioned against blindly fixing the *per se* label on all concerted refusals to deal. See Richard A Posner, ***Antitrust Law*** (2d ed 2001) ("A boycott * * * used to be deemed a *per se* violation * * *; [t]he Supreme Court has wisely abandoned that position, which anyway was never taken seriously"). Indeed, in *Northwest Wholesale Stationers, Inc v Pacific Stationery Printing Co, 472 US 284, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)*, the Court rejected, except for a narrow category of cases, the *per se* characterization for concerted refusals to deal. Under this new standard, the Court declined **[**26]** to apply the *per se* approach to the expulsion of a member from a cooperative purchasing agency because the agency achieved "economies of scale in both the purchase and warehousing of wholesale supplies." *Northwest Wholesale, 472 U.S. at 295, 105 S. Ct. 2613, 86 L. Ed. 2d 202*.

According to the Northwest Wholesale Court, ***HN13***[] a *per se* standard generally applies to cases involving "joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." *Northwest Wholesale, 472 US at 294* (quoting L Sullivan, Law of Antitrust 261-62 (1977)). See also P Areeda & L Kaplow, Antitrust Analysis: Problems, Text, and Cases 333 (5th ed 1997) (defining paradigmatic boycott as "collective action among a group of competitors that may inhibit the competitive vitality of rivals"). In these cases, "the boycott often cut off access to a supply, facility or market necessary to enable the boycotted firm to compete, and frequently the boycotting firm possessed a dominant position to the relevant market. In addition, the practices were generally not justified **[**27]** by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive." *Northwest Wholesale, 472 US at 294*.

Guided by *Northwest Wholesale, the Court in FTC v Indiana Federation of Dentists, 476 US 447, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*, refused to apply the *per se* designation to an agreement by competitors, dentists, to deny patient X-rays to insurance companies. These X-rays posed a problem for Indiana's dentists because they enabled insurance companies to review the appropriateness of the dentists' charges. The Court declined to invoke the *per se* rule and "forc[e] the [dentists'] policy into the 'boycott' pigeonhole," reasoning that

> ***HN14***[] the category of restraints classed as group boycotts is not to be expanded indiscriminately, and the per se approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor.

Id at 458.

A number of courts have construed Northwest Wholesale and Indiana Federation of Dentists as holding that *per se* analysis is inappropriate unless the boycotting **[**28]** party possesses market power or exclusive access to an element in effective competition. See, e g, *Hahn v Oregon Physicians' Service, 868 F2d 1022, 1030 (9th Cir 1989)*. But in *FTC v Superior Court Trial Lawyers Association, 493 US 411, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990)*, the Supreme Court concluded that at least some group boycotts among horizontal competitors are *per se* unlawful without **[*1070]** regard to the market power of the participants. This case involved an agreement by members of a bar association not to represent indigent criminal defendants unless the District of Columbia increased their compensation. The Court held that this agreement "was unquestionably a 'naked restraint' on price and output" and, as such, was *per se* unlawful. *Id at 423*. See also *NYNEX Corp v Discon, Inc, 525 US 128, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)* (limiting *per se* scrutiny to cases "involving horizontal agreements among direct competitors").

HN15[] The Ninth Circuit reads *Northwest Wholesale* and its progeny as establishing three criteria for determining whether the *per se* standard applies to a group boycott:

> (1) the boycott cuts off access to a supply, facility, or market necessary **[**29]** to enable the victim firm to compete;
>
> (2) the boycotting firm possesses a dominant market position; and
>
> (3) the practices are not justified by plausible arguments that they enhanced overall efficiency or competition.

Adaptive Power Solutions, LLC v Hughes Missile Systems Co, 141 F3d 947, 950 (9th Cir 1998) (quoting *Hahn v Oregon Physicians' Serv, 868 F2d 1022, 1030 (9th Cir 1988))*. In the Ninth Circuit, these three criteria "are indicative of *per se* illegal conduct." *Adaptive Power Solutions, 141 F3d at 950*.

Notwithstanding the importance of this court's determination whether to apply *per se* scrutiny, neither party deals with this issue adequately. Defendants misstate the Ninth Circuit's test and portray these factors as prerequisites for adopting the *per se* approach. See Doc # 184 at 2 ("horizontal agreements are eligible for *per se* condemnation only if * * * "). Plaintiffs relegate their analysis to a footnote, asserting that (1) the boycott cut off Bed, Bath and Beyond's access to two of the principal suppliers of high-end tableware (Lenox and Waterford); (2) the firms instigating the boycott **[**30]** (Federated and May) held dominant positions in the retail tableware market; and (3) there are no plausible justifications for the boycott. Doc # 161 at n4.

With respect to the first factor, the court notes that Waterford and Lennox were suppliers of tableware products necessary to enable Bed, Bath & Beyond to compete in the high-end tableware market. Further, defendants allegedly cut off this essential supply in order to obstruct Bed, Bath & Beyond's access to this market. The second factor (whether the boycotting firm possesses a "dominant" position in the market) is difficult to assess on the present record. In 2001, Federated and May were the third and fourth largest department store chains in the United States, respectively. Doc # 181, Ex 35 at 26-27. Although this ranking among department stores does not imply market power, it may suggest that defendants held a "dominant" position. As the Seventh Circuit observed in *Toys*

"R" Us, Inc v FTC, 221 F3d 928 (7th Cir 2000), the ***HN16***[] term "dominant" was "plainly chosen to stand for something different from antitrust's term of art 'monopoly." *Id at 936*. In view of this uncertainty, the court finds that this second **[**31]** factor weighs in neither party's favor.

Most damaging to Federated's argument in favor of rule of reason review is the third factor -- whether the boycott arguably enhances efficiency or competition. In accordance with this consideration, courts have noted that in the following factual settings, the effect of a refusal to deal is "more complex" than in the "classic boycott" scenario: industry self-regulation, sports leagues, health care, noneconomic boycotts and access to joint venture facilities. ABA Section of ***Antitrust*** **[*1071]** ***Law***, ***Antitrust Law*** Developments, 114 (5th ed 2002). The conduct alleged by plaintiffs falls within none of these exceptions. Nor does Federated proffer an independent pro-competitive justification for the alleged horizontal agreements to boycott Bed, Bath and Beyond. This silence is unsurprising, as the alleged horizontal agreement falls squarely within the ambit of *per se* treatment as dictated by Northwest Wholesale: "joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." *Northwest Wholesale, 472 US at 294.* **[**32]** Accordingly, the court concludes that the alleged horizontal agreement between Federated and May constitutes a classic boycott and thus warrants *per se* treatment.

The court hastens to add that its conclusion does not extend to the alleged vertical agreements to boycott Bed, Bath & Beyond. ***HN17***[] The Supreme Court has expressly "limit[ed] the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors." *NYNEX Corp v Discon, Inc, 525 US 128, 136, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*. The vertical agreements therefore warrant *per se* treatment only to the extent they implemented the alleged horizontal agreements -- a distinction plaintiffs appear to acknowledge. See Doc # 161 at 9 ("Since, as explained above, the boycott of [Bed, Bath & Beyond] at issue here includes horizontal, as well as vertical, agreements, the *per se* rule applies.").

As such, plaintiffs need not define and support a relevant market (as they would need to do for a § 2 claim), nor do they need to demonstrate harm to competition, something which is presumed in a *per se* case, see *Fortner Enterprises, Inc v United States Steel Corp, 394 US 495, 498, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969)* **[**33]** ("' [T] here ***HN18***[] are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.'" (quoting *Northern Pacific R Co v United States, 356 US 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958))*. But plaintiffs' decision to rely on per se scrutiny comes at a cost: it renders the existence of a horizontal agreement essential to their suit.

To sum up the court's analysis heretofore, plaintiffs lack standing to rest their case on an agreement between Waterford and Lennox and lack the evidentiary wherewithal to rely alone on the alleged vertical agreements and proceed under the rule of reason. The upshot is that the alleged agreement between Federated and May is the cornerstone of plaintiffs' legal theory; without it, the case collapses. With these insights in mind, the court turns to the substance of plaintiffs' suit.

C

The essential issue propounded by defendants' summary judgment motions is whether plaintiffs adduced enough evidence of concerted action to survive summary judgment. **[**34]** In *Monsanto Co v Spray-Rite Service Corp, 465 US 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*, the Supreme Court announced ***HN19***[] the modern formula by which courts determine the existence of concerted action:

> The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the [parties]. That is, there must be direct or circumstantial evidence that reasonably tends to prove that [the parties] had a conspicuous commitment to a common **[*1072]** scheme designed to achieve an unlawful objective.

465 US at 768.

HN20[] Conspiracies may be shown either by direct or circumstantial evidence. The Court recognizes, however, that "[o] nly rarely will there be direct evidence of an express agreement" in conspiracy cases; hence, circumstantial evidence plays a pivotal role in antitrust litigation. Although interpreting such evidence and drawing inferences from it ordinarily are responsibilities of the factfinder, the Supreme Court mandates a threshold judicial assessment of such evidence as set forth in *Matsushita Electric Industrial Co v Zenith Ratio Corp, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*:

> [A]ntitrust law limits the range of permissible **[**35]** inferences from ambiguous evidence in a § 1 case. Thus, * * * conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. * * * To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of *§ 1* must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. * * the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [them].

Id at 588 (citations omitted).

Citing its earlier decision in *First National Bank v Cities Service Co, 391 US 253, 288-289, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)*, the Court in Matsushita identified *HN21*[] two separate inquiries that are relevant to this issue: (1) whether the defendant had "any rational motive" to join the allege conspiracy, and (2) whether the defendant's conduct "was consistent with the defendant's independent interest." *Matsushita, 475 US at 596-97*.

Animating the Matsushita standard is the Court's concern that "*HN22*[] permitting the inference **[**36]** of conspiratorial behavior from circumstantial evidence consistent with both lawful and unlawful conduct would deter pro-competitive conduct -- an especially pernicious danger in light of the fact that the very purpose of the antitrust laws is to promote competition." *In re Citric Acid Litigation, 191 F3d 1090, 1094 (9th Cir 1999)*. See also *Matsushita, 475 US at 593* ("Courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter pro-competitive conduct.").

Relying in part on *Matsushita,HN23*[] the Ninth Circuit has crafted a two-part test to be applied whenever plaintiffs rest their case entirely on circumstantial evidence. First, defendants may "rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice." *In re Citric Acid Litigation, 191 F3d at 1094* (citing *Richards v Neilson Freight Lines, 810 F2d 898, 902 (9th Cir 1987)*. The burden then shifts back to plaintiffs to provide specific evidence tending to show that defendants were not engaging **[**37]** in permissible competitive behavior. See *City of Long Beach v Standard Oil Co of California, 872 F2d 1401, 1406 (9th Cir 1989)*.

The present action implicates this two-part test because plaintiffs have not produced direct evidence in support of their group boycott theory. As noted by the Ninth Circuit, "[d]irect *HN24*[] evidence in a [§] 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." *In re Citric Acid Litigation, 191 F3d at 1093-94*. As plaintiffs appear **[*1073]** to concede, none of plaintiffs' evidence satisfies this test, at least with respect to an alleged agreement between Federated and May.

Turning to the Ninth Circuit's two-part test, the court first finds that defendants proffer a "plausible and justifiable reason" for acting as they did. *In re Citric Acid Litigation, 191 F3d at 1094*. *City of Long Beach v Standard Oil Co, 872 F2d 1401, 1406 (9th Cir 1989)* (defendant *HN25*[] is entitled to summary judgment when it "provides a plausible and justifiable alternative interpretation of its conduct that rebuts the alleged conspiracy"). Defendants assert **[**38]** that Federated and May were concerned that the sale of its tableware products by Bed, Bath & Beyond would broaden the distribution into a lower prestige channel, a valid and lawful concern. See *Winn v Edna Hibel Corp, 858 F2d 1517, 1520 (11th Cir 1988)* (recognizing a company's interest in avoiding the "cheapening" of the image of its products); *Richards v Neilson Freight Lines, 810 F2d 898, 902 (9th Cir 1987)* (finding independent self-interest an adequate explanation).

Prior to 2001, Bed, Bath & Beyond, a national "big-box" retailer of kitchen, bath and other items, was selling various standard tableware products, including, for example, lower-end dinner plates manufactured by Lenox. Doc # 131, Ex B, (Johnson depo) at 30:10-12, 37:24-40:2; Doc # 141, Ex C (Lundgren depo) at 38:14-21. Bed, Bath & Beyond became interested in expanding its offerings to include more expensive china and crystal manufactured by Lenox, Waterford and others. Doc # 131, Ex E (Temares depo) at 35:11-16. Federated and May opposed the broad distribution its manufacturers sought because Federated and May had made significant investments in the sale of Lenox and Waterford products. **[**39]** Doc # 141, Ex C at 39:4-40:2, 44:12-45:9. See also *Monsanto, 465 US at 763* (complaints ***HN26***[] by retailers regarding other retailers are "natural -- and from the manufacturer's perspective, unavoidable -- reactions by distributors to the activities of their rivals").

Consequently, the burden shifts back to ***HN27***[] plaintiffs to provide specific evidence tending to show that the defendants were not engaging in permissible competitive behavior. See *City of Long Beach v Standard Oil Co of California, 872 F2d 1401, 1406 (9th Cir 1989)*. Such evidence must "tend [] to exclude the possibility that the alleged conspirators acted independently." *Matsushita, 475 US at 588*. In assessing this evidence, the court also considers (1) whether the defendants had "any rational motive" to join the alleged conspiracy, and (2) whether the defendants' conduct "was consistent with the defendant's independent interest." *Id at at 596-97*.

The court focuses on the alleged agreement between Federated and May because, as established above, this suit turns on the existence of such an agreement. Plaintiffs assert that a horizontal agreement may be inferred from the following **[**40]** pieces of information:

(1) one week after May was advised by Lennox in May 2001 of Lenox's and Waterford's intent to participate in the Bed, Bath & Beyond rollout, Federated contacted both Lenox and Waterford to complain about the rollout;

(2) both Federated and May used similar language when they separately pressured Lenox and Waterford to break their deal with Bed, Bath & Beyond ("you do what you have to do, and we will do what we have to do") (Doc # 180, Ex 10 (Mielke depo) at 136:19-137:17);

[*1074] (3) in a letter from Federated's Zimmerman to a Waterford executive, written after Waterford terminated its participation in the rollout, Zimmerman thanked Waterford for doing "the right thing for all partners in the game" (Doc # 180, Ex 18); and

(4) Federated's Zimmerman "took the Fifth" when asked at deposition whether Federated and May entered into any agreements concerning their approach to the Bed, Bath & Beyond rollout (Doc # 180, Ex 16 at 48:6-13).

With respect to the first point, defendants note that that plaintiffs offer no evidence that Federated learned of the manufacturers' plans from May. Federated asserts that it probably learned about the rollout from **[**41]** the manufacturers themselves, as employees from Federated met with the employees of Lenox and Waterford regularly. Doc # 186, Ex HH, (Gavin depo) at 44:21-45:11, 48:21-49:2, 129:4-8; Ex LL, (McGillivary depo) at 153:9-21.

Defendants also dispute plaintiffs' reasoning concerning the second piece of evidence -- the allegation that employees of Federated and May, in separate conversations, used similar language in speaking to the manufacturers about the rollout ("you do what you have to do, and we will do what we have to do"). Doc # 161 at 19, 31. According to defendants, the similarity is unsurprising because the phrase is precisely what retailers should say in order to avoid implicating the antitrust laws.

Third, defendants argue that Federated's letter to Waterford did not refer to May when it thanked Waterford for doing "the right thing for all partners in the game." In support, defendants claim that Federated and Waterford frequently referred to each other as "partners." Doc # 141, Ex F, ("Grove depo") at 67:14-24, 69:9-13, 84:7. Federated's expert also used the term "partner" to describe the nature of the relationships between vendors and retailers. Doc # 131, Ex DD at PP 48, **[**42]** 64, 79.

Regarding plaintiffs' fourth point, defendants cite *Curtis v. M&S Petroleum, Inc., 174 F.3d 661, 675 (5th Cir 1999)*, for the proposition that the invocation of the *Fifth Amendment* by Federated's CEO is not sufficient to create a genuine issue of material fact. Defendants also urge the court to interpret Zimmerman's conduct in light of prior events: When the New York attorney general's office deposed Zimmerman in 2004, he testified that he could not recall a conversation he had with an executive at Waterford. In response, the attorney general's office indicted him for perjury. A New York trial court dismissed the indictment, but the attorney general's office had appealed the dismissal. As a result, when he was deposed in this action, Zimmerman invoked his *Fifth Amendment* rights. Doc # 131, Ex X (Zimmerman depo) at 20:20-22:25.

Finally, defendants aver that all witnesses pertinent to this case have denied the existence of any communications between Federated and May regarding Bed, Bath & Beyond. See Doc # 141, Ex C (Lundgren depo) at 75:25-76:7; Ex F (Grove depo) at 88:15-19, 91:10-17; Ex G, (Engelman depo) at 99:19-25; 192:24-193:4; Ex H (Locraft depo) at 181: **[**43]** 11-24, 273:20-274:6, 275:1-10; Doc # 131, Ex D (Hofer depo) at 158:24-159:2, 214:15-24. Nor were employees of Bed, Bath & Beyond, Lenox or Waterford aware of any communications between Federated and May. Doc # 131, Ex B (Johnson depo) at 239:12-14; Ex I (Mielke depo) at 158:18-159:6; Ex J (Krangel depo) at 300:14-18; Ex K (Gavin depo) at 255:12-16.

Defendants' methodical critique of plaintiffs' evidence implies that Matsushita demands a certain quantum of evidence of **[*1075]** verbal agreement to avoid summary judgment. Yet the Matsushita court never insisted that any particular kind of evidence of collusion was required. Instead, the Court demanded that the evidence be of such quality that makes collusion a likely explanation of the activity before the court. Matsushita's analysis, moreover, arose from the context of a highly improbable twenty-year-long predatory pricing conspiracy; as such, the Court required high-quality evidence to permit such a conspiracy to be presented to a jury. *Matsushita, 475 US at 587-88* ("***HN28***[] If the factual context renders respondents' claim implausible - if the claim is one that simply makes no economic sense - respondents must come forward **[**44]** with more persuasive evidence to support their claim than would otherwise be necessary."). Hence, plaintiffs need not demonstrate the existence of an explicit conspiracy, only that "the inference of conspiracy is reasonable in light of the competing inferences of independent action." *Id at 588*.

The court therefore assesses whether defendants had "any rational motive" to conspire and whether defendants' conduct was consistent with their independent interest. *Matsushita, 475 US at 596-97*. Plaintiffs correctly note that Federated and May had a "rational motive" to conspire against Bed, Bath & Beyond. The gravamen of plaintiffs' theory is that Federated and May acted together in an effort to block a new entrant's access to the market. The reasons why such behavior would be economically rational are straightforward. During the alleged conspiracy, consumers were steadily migrating from department stores to home specialty chain stores, such as Bed, Bath & Beyond, and bridal registries (which made up a significant portion of the tableware business) were following suit. Doc # 180, Ex 10 (Mielke depo) at 43:25-44:25. Federated and May, as established market participants, **[**45]** could reasonably fear that Bed, Bath & Beyond would erode their profit and market share. As one commentator remarked, "[w] here the 'victim' [of an exclusionary group boycott] is a competitor of the alleged conspirators, there is no mystery as to why the defendants would want to injure the rival. It is axiomatic that firms prefer to have fewer rather than more rivals." Kenneth L Glazer, Concerted Refusals to Deal Under *Section 1* of the Sherman Act, 70 Antitrust L J 1, 17 (2002)

But the motive to conspire articulated by plaintiffs works both ways: insofar as Bed, Bath & Beyond's competitive threat encouraged conspiracy, it also bolsters defendants' version of the events -- that Federated and May pressured the manufacturers unilaterally. Accordingly, each party's account of the events make "economic sense," see *Adaptive Power Solutions, LLC v Hughes Missile Systems Co, 141 F3d 947, 953 (9th Cir 1998)*, and the emergence of Bed, Bath & Beyond as a competitor does not weigh in either party's favor.

Yet this same economic intuition fails to account for the alleged conspiracy between Lenox and Waterford. Nothing in the present record establishes an **[**46]** economic motive for a conspiracy between Waterford and Lenox to back out of the Bed, Bath & Beyond rollout. Nor do plaintiffs articulate why Waterford and Lenox would have harbored animosity toward Bed, Bath & Beyond. Manufacturers generally lack incentives to conspire to undercut an upstart retailer like Bed, Bath & Beyond; to the contrary, such manufacturers have every reason to establish ties with these newcomers. This intuition appears to have played out here: Lennox and Waterford commenced dealings with Bed, Bath & Beyond that were ruptured at the bidding of Federated and May.

In light of plaintiffs' evidence and defendants' market conditions, the issue for the **[*1076]** court is to determine whether plaintiffs satisfy their burden and "tend [] to exclude the possibility that the alleged conspirators acted independently." *Monsanto, 465 US at 768*. That determination is clear-cut with respect to the alleged horizontal conspiracy between Lennox and Waterford. As discussed above, the theory that Lennox and Waterford conspired to boycott Bed, Bath & Beyond neither makes economic sense nor finds support in the record. See *Michael v Intracorp, Inc, 179 F3d 847 (10th Cir 1999)* **[**47]** (granting summary judgment in circumstantial evidence case because plaintiffs failed to demonstrate any motive to conspire); *Orson, Inc v Miramax Film Corp, 79 F3d 1358, 1370 (3d Cir 1996)* (affirming summary judgment for defendant in part because of lack of motive to conspire). Accordingly, the court concludes that plaintiffs' circumstantial evidence of an agreement between Lennox and Waterford falls short of the standard under *Matsushita.*

Turning to the alleged agreement between Federated and May, the court finds that plaintiffs satisfy their burden, albeit with little evidence to spare. First, the court agrees with plaintiffs that Federated's and May's simultaneous behavior within a two-week period constitutes a pattern of uniform business conduct that bespeaks a tacit agreement or even so-called "conscious parallelism." See *Petruzzi's IGA Supermarkets v Darling-Deleware Co, 998 F2d 1224, 1242-43 (3d Cir 1993)*. To be sure, that Federated learned about the rollout one week after Lenox informed May about the program hardly establishes that Federated communicated with May, as Federated met with its manufacturers on a regular basis. But defendants **[**48]** fail to explain precisely when or how Federated learned of the rollout from its manufacturers, leaving open the inference of horizontal communications. See generally *Interstate Circuit, Inc v United States, 306 US 208, 225-26, 59 S. Ct. 467, 83 L. Ed. 610 (1939)* ("When the proof supported, as we think it did, the inference of such concert, the burden rested on appellants of going forward with the evidence to explain away or contradict it.").

The parallel language ("you do what you have to do, and we will do what we have to do") used by Federated and May also carries some weight. Granted, in both situations, business executives plausibly repeated this boilerplate to clarify that each company had to act independently, not collusively. And it would be anomalous for ***antitrust law*** to regard efforts against collusion as evidence of collusion. But ***antitrust law*** does not direct executives to invoke the particular phrase at issue; as such, the striking similarity permits an inference of concerted action. See e g, *De Jong Packing Co v USDA, 618 F2d 1329 (9th Cir 1980)* (continuance of conspiracy inferred from identical letters sent separately at the same time); *Apex Oil v Di Mauro, 822 F2d 246, 255-57 (2d Cir 1987)* **[**49]** ("striking" similarity of defendants' separate notebook entries of conversations among them gives rise to reasonable inference of conspiracy).

Federated's phrase ("partners in the game") in its letter to Waterford may also suggest a collusive agreement between Federated and May. That said, if the phrase is construed to encompass May, then Federated's assertion simply offers an opinion that Waterford's exclusive relationship with the various department stores is symbiotic; it does not necessarily imply an agreement between the department stores. Nevertheless, Federated's alleged acknowledgment of May's interests tends to undercut defendants' contention that they acted independently. See *Petruzzi's IGA Supermarkets, 998 F2d at 1242-43*.

[*1077] Finally, Zimmerman's "pleading the Fifth" may be relevant to the present dispute. In *Baxter v Palmigiano, 425 US 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976)*, the Supreme Court held that ***HN29***[] the drawing of the adverse inference from the invocation the *Fifth Amendment* in civil suit is proper when incriminating evidence is also presented. See *id at 317-18*. The Ninth Circuit interprets Baxter as licensing the drawing of an adverse inference **[**50]** in the civil context only if "independent evidence exists of the fact to which the party refuses to answer." *Doe by & Through Rudy-Glanzer v Glanzer, 232 F3d 1258, 1264 (9th Cir 2000)*. This proviso is said to broker the competing interests of the party asserting the privilege and those of the adverse party, "who is deprived of a source of information that might conceivably be determinative in a search for the truth." *SEC v Graystone Nash, Inc, 25 F3d 187, 190 (3d Cir 1994)*. Here, defendants neither contend that corroborating evidence is lacking nor counsel against drawing an adverse inference based on Zimmerman's invocation of the privilege. This omission impels the court to conclude that Zimmerman's invocation of the *Fifth Amendment* may have deprived plaintiffs of probative testimony.

In view of plaintiffs' evidence and the market conditions defendants' faced, the court finds that plaintiffs satisfy their burden and tend to exclude the possibility that the Federated and May acted independently. Accordingly, the court finds that plaintiffs raise an inference of unlawful conspiracy between Federated and May sufficient to overcome defendants' summary **[**51]** judgment motion.

The court stresses that plaintiffs only survive summary judgment on the basis of the alleged horizontal agreement Federated and May: the vertical communications remain relevant to the extent they abetted the alleged horizontal agreement, but such communications cannot serve as an independent ground for antitrust liability under the rule of reason. Even if plaintiffs provided evidence under the rule of reason, which they have not, Monsanto and its progeny would require the dismissal of any vertical claims because plaintiffs' evidence suggests, at most, that Lenox and Waterford caved to complaints from Federated and May. See *Monsanto, 465 US at 763*, (explaining that distributor complaints "arise in the normal course of business and do not indicate illegal concerted action"); *OSC Corp v Apple Computer, Inc, 792 F2d 1464, 1468 (9th Cir 1986)* (holding that "[dealer] complaints followed by termination are not enough to provide sufficient proof of an antitrust conspiracy"); *The Jeanery, Inc v James Jeans, Inc, 849 F2d 1148 (9th Cir 1998), 849 F2d at 1157* ("***HN30***[] Complaints by competitors, standing alone, are not sufficient **[**52]** to show a conspiracy."); *Isaksen v Vermont Castings, Inc, 825 F2d 1158, 1162 (7th Cir 1987)* (Posner, J).("Complaints to a supplier, made by competitors of a dealer who is cutting prices below suggested levels are not, standing alone, evidence of agreement"). Hence, even if plaintiffs pursued a claim under the rule of reason, their evidence is insufficient to raise an inference of unlawful conspiracy or combination.

IV

In sum, the court GRANTS Waterford's motion for summary judgment and GRANTS IN PART and DENIES IN PART Federated's and May's motion for summary judgment. The matter is set down for trial on June 11, 2007.

IT IS SO ORDERED.

March 13, 2007

VAUGHN R WALKER

United States District Chief Judge

End of Document

Del Junco v. Hufnagel

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

March 15, 2007, Filed

B191456

Reporter

2007 Cal. App. Unpub. LEXIS 2134 *

TIRSO DEL JUNCO, JR., M.D., Plaintiff and Respondent, v. V. GEORGES HUFNAGEL et al., Defendants and Appellants.

Notice: **[*1]** NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 8.1115(a), PROHIBIT COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 8.1115(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 8.1115.

Prior History: APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC309389. Soussan G. Bruguera, Judge.

Disposition: Affirmed in part and reversed in part with directions.

Core Terms

website, trial court, counterfeit, surgeries, sanctions, default, cross-complaint, documents, damages, medicine, terminating sanctions, public affairs, preliminary injunction, patients, unfair, cause of action, propria persona, court rule, discovery, exemption, contends, likeness, training, vascular, vexatious litigant, punitive damages, attorney's fees, domain name, injunction, persuasive

Counsel: James S. Link and William H. Dailey for Defendants and Appellants.

Moore, Sorensen & Horner and Michael J. Kaufman for Plaintiff and Respondent.

Judges: ALDRICH, J.; KLEIN, P.J., CROSKEY, J. concurred.

Opinion by: ALDRICH

Opinion

INTRODUCTION

Defendant and appellant V. Georges Hufnagel created a website that looked like the website of plaintiff and respondent Tirso Del Junco, Jr., M.D. Hufnagel's website libeled Dr. Del Junco. Hufnagel appeals from the default judgment entered in favor of Dr. Del Junco. We find unpersuasive all contentions raised by Hufnagel except for the argument that the punitive damage award cannot stand. Reversal of the judgment would ordinarily be necessary because it **[*2]** includes an award of $ 200,000 in punitive damages despite the fact that Dr. Del Junco never introduced evidence of Hufnagel's financial condition. However, we are rendering a conditional appellate judgment providing Dr. Del Junco with a choice between accepting the judgment as modified or returning to the trial court to present to the trial court evidence on the issue of punitive damages.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

Dr. Del Junco was a trained general and vascular surgeon licensed in California. As part of his general surgery residency, Dr. Del Junco received rotations in female or gynecological surgery, including pre-operative management, surgery, and post operative management. He is a fully licensed, practicing doctor specializing in general and vascular surgery. Hufnagel had her medical license revoked in California and New York, and disciplinary proceedings were pending against her in the state of Hawaii. [1]

Dr. Del Junco had an internet **[*3]** web page with the domain name of "drdeljuncojr.com." The purpose of the website was to provide information about procedures performed by him for women who had significant fibroid disease or endometriosis. He promoted these surgical procedures as alternatives to hysterectomies.

On November 25, 1998, in an unrelated lawsuit, Hufnagel was declared a vexatious litigant. (*Code Civ. Proc., § 391.1*.)

In March 2003, Hufnagel began operating a counterfeit website that mimicked Dr. Del Junco's in many ways, including content, appearance, and layout. Hufnagel's website had the domain name of "drdeljunco.com." The counterfeit website had a photograph of Dr. Del Junco and a link to contact him. However, when it was engaged, the viewer was directed to a web page featuring Hufnagel and urged to contact Hufnagel. Additional links on the counterfeit website directed potential patients to contact Hufnagel for purposes of evaluation and potential surgery at her Mexican clinic.

The counterfeit website included, in large print, in the same font style as on Dr. Del Junco's website, the words, "FEMALE ALTERNATIVE SURGERY." The contact information where Dr. Del Junco could **[*4]** be reached was on both websites, as was Dr. Del Junco's address.

Hufnagel's counterfeit website contained the same logo as the one that appeared on Dr. Del Junco's website. The logo had an artistic drawing of a woman with the words "INSTITUTE for ALTERNATIVE MEDICINE" in an arc above the woman. There was a list of medical terminology underneath the logo on Dr. Del Junco's website, in rectangular boxes. Hufnagel's website also placed the identical medical terms in rectangular boxes below the logo. However, on Hufnagel's website, another box appeared in between the logo and the list of terms. The box contained the following statements:

> "Please note the Institute for Female Alternative Medicine is not registered by California State Department of Corporations. This is not a regulated entity. It pays no taxes and no Corporate records exist.
>
> "This does not officially exist. This is a fraud on the public. Furthermore, Dr. Del Junco <u>has no specialized medical training in medicine or in female medicine. He is a vascular student."</u>

Hufnagel's website duplicated a quote found on Dr. Del Junco's website that stated having a "hysterectomy for benign fibroid tumors or ovarian **[*5]** cysts is an archaic procedure . . . ." However, underneath the quote on Hufnagel's website, the following appeared:

> "This is a quote [from] Dr. Hufnagel. Del Junco has not studied hormonal sciences. He misdiagnosed Susan Bucher as a key issue. See Susan Bucher button on this site for further information.
>
> Dr. del Junco Jr. General/Vascular Surgeon
>
> "<u>He has no training at all in women's medicine</u>. <u>He is not a specialist</u>." [2]

[1] Hufnagel was also known as Vikki G. Hufnagel.

There were other differences in the two websites. As examples, at the top of Hufnagel's counterfeit website there was a box that contained a disclaimer stating that the website had been "created by the supporters of the work of Dr. Vicki Hufnagel." The box also provided information about her book and stated that chapters from the book had been "removed in the infamous raid by **[*6]** the [California Medical Board] . . . ." [3] Hufnagel's website stated that Dr. Del Junco had been using her work, for which he failed to give credit, and accused Dr. Del Junco of performing failed procedures.

[*7] Prior to April 2003, Dr. Del Junco's internet website generated a minimum of 75 email inquiries from women per month. Since Hufnagel began operating her counterfeit website, inquiries to Dr. Del Junco from potential patients dropped significantly. Further, as a result of the decline in inquires, there was a marked drop in surgeries performed by Dr. Del Junco and his receipts from surgeries decreased. The statements on the counterfeit website harmed Dr. Del Junco's reputation. Once he learned of the counterfeit website, Dr. Del Junco expended $ 3,212 in redesigning his website.

2. *Procedure.*

a. *The initial proceedings.*

On January 22, 2004, Dr. Del Junco filed a complaint for damages and for injunctive relief. Dr. Del Junco alleged causes of action for defamation, unauthorized use of name and likeness for business purposes (*Civ. Code, § 3344*), unfair business practices (*Bus. & Prof. Code, § 17200*), interference with prospective business advantage, and permanent injunction.

On January 23, 2004, the trial court entered a temporary restraining order restraining Hufnagel from operating a website with the domain name of "drdeljunco. **[*8]** com" or any variation of Dr. Del Junco's name.

Even though Hufnagel had been declared a vexatious litigant in the prior case, she initially represented herself in violation of the vexatious litigant order.

On February 11, 2004, in propria persona, Hufnagel filed approximately 140 pages purporting to respond to the request for a preliminary injunction and purporting to include allegations of a cross-complaint. These documents had no semblance of proper pleadings and did not conform to court rules.

On February 23, 2004, Hufnagel, in propria persona, filed and served an amended opposition to preliminary injunction. The pleading did not conform to court rules as it cited federal cases, but did not attach them. The opposition never addressed the issue of whether it was proper to issue a preliminary injunction.

On February 23, 2004, Hufnagel, in propria persona, filed a one-page answer that was combined with a request to dismiss Dr. Del Junco's complaint.

On February 23, 2004, Hufnagel, in propria persona, filed a cross-complaint without permission of the court. These documents were not served on Dr. Del Junco.

---

[2] The underlining did not appear in Hufnagel's counterfeit website. We have added this emphasis as the underlined statements are discussed in detail in subsequent parts of this opinion.

[3] The disclaimer at the top of the counterfeit website read: "This site was created by the supporters of the work of Dr. Vicki Hufnagel. The site is informational [and provides] full and complete disclosure which Dr. Del Junco's site does not provide. This site is to make [] aware of the politics of medicine and the economic driving forces that take place everyday that . . . drive all medical care. [P] Dr. Hufnagel had worked on a book titled Prescription for Evil which had several Chapters of Dr. Del Junco [] are posted here. These Chapter's [*sic*] were removed in the infamous raid by the [California Medical Board] on Dr. Hufnagel's home."

It appears that during its investigation of Hufnagel, the California Medical Board searched her home. We assume that the reference to a "raid" is to this search.

Dr. Del Junco filed a motion to strike the answer and cross-complaint. Hufnagel, **[*9]** in propria persona, subsequently withdrew the cross-complaint.

On March 5, 2004, Hufnagel filed a request to dismiss Dr. Del Junco's complaint.

On March 9, 2004, attorney William H. Dailey appeared in court to substitute in as counsel for Hufnagel. Upon his statements that he was going to file an opposition to the motion for preliminary injunction, the trial court continued the hearing on the motion. However, thereafter no written documents were filed. No substitution of attorney form was filed.

On April 5, 2004, Dr. Del Junco filed a motion requesting sanctions be imposed on Hufnagel. In addition to other arguments, Dr. Del Junco noted that his counsel was forced to spend considerable time because of Hufnagel's improper actions.

On April 9, 2004, the trial court issued a preliminary injunction against Hufnagel enjoining her "from operating or continuing to operate a website with the domain name of 'drdeljunco.com' or any variation of" Dr. Del Junco's name. The trial court declined to rule on Dr. Del Junco's request for sanctions.

On April 28, 2004, Dr. Del Junco filed a motion to strike Hufnagel's answer and cross-complaint. Dr. Del Junco requested sanctions. He argued that the **[*10]** answer and cross-complaint were in improper form and filed without leave of court and Hufnagel's dilatory tactics forced Dr. Del Junco's counsel to expend unnecessary time in reviewing, researching, and responding to baseless filings.

On May 24, 2004, the trial court denied the motion to strike as moot, based upon the representation that an answer and amended cross-complaint had been filed. The trial court reserved the issue of sanctions.

On May 24, 2004, Hufnagel filed an answer through attorney Dailey.

On June 3, 2004, Dr. Del Junco filed a motion for reconsideration of the May 24, 2004, ruling with regard to the issue of sanctions. The reconsideration motion informed the trial court that contrary to prior representations, no cross-complaint had been filed by Hufnagel.

Hufnagel filed no opposition to the motion for reconsideration.

In July 2004, Hufnagel filed a first amended cross-complaint. The trial court sustained Dr. Del Junco's demurrer to the first amended cross-complaint without leave to amend. No opposition to the demurrer had been filed by Hufnagel.

In a minute order dated August 17, 2004, the trial court granted the motion for reconsideration and sanctioned Hufnagel **[*11]** the sum of $ 2,036.30 for the reasons stated in the motion. Additionally, the trial court sanctioned Hufnagel $ 6,036.30 in the form of attorney fees. Pursuant to the trial court's directive, Dr. Del Junco prepared a proposed order detailing the reasons for the sanction order. On October 21, 2004, the trial court ordered Hufnagel to pay $ 6,036.30 in sanctions for (1) filing a volume of documents that purported to oppose Dr. Del Junco's motion for preliminary injunction, but the documents were not in proper form and did not conform with Court Rules; (2) filing a cross-complaint without permission of the court which violated the vexatious litigant order; (3) filing and serving an opposition to the preliminary injunction that failed to comply with the court rules as it cited federal cases but did not attach them, thus, burdening Dr. Del Junco's counsel; and (4) filing and serving on March 5, 2004, a request for dismissal form requesting Dr. Del Junco's complaint be dismissed. The trial court found Hufnagel's documents were procedurally defective and her actions were willful and without justification and improperly burdened Dr. Del Junco to incur unnecessary expense. The sanctions were **[*12]** due and payable within 45 days. (The October 2004 order did not mention the $ 2,036.30 sanction order contained in the August 2004 minute order.)

Hufnagel did not pay the sanctions, which remained unpaid as of January 10, 2005.

As of September 12, 2004, Hufnagel was still operating a website in violation of the injunction. She did so through March 2005.

On September 14, 2004, Dr. Del Junco served interrogatories on Hufnagel. Hufnagel did not respond to this discovery. Dr. Del Junco's counsel telephoned attorney Dailey in an attempt to meet and confer; attorney Dailey did not return the telephone calls.

A case management conference was held in October 2004. Hufnagel did not appear and she did not file a case management conference statement. Attorney Dailey called the court stating he would be late. However, he never made an appearance.

b. *The motion for terminating sanctions.*

On January 11, 2005, Dr. Del Junco filed a motion for terminating sanctions pursuant to *Code of Civil Procedure sections 128*, *128.6*, and former 2023. [4] The motion was supported by the declaration of attorney Michael Kaufman. The motion recounted **[*13]** the events that preceded the motion, and argued it was appropriate to strike Hufnagel's answer and enter default because she failed to respond to discovery, failed to abide by court orders and procedures, failed to pay sanctions, and violated the preliminary injunction.

On January 24, 2005, Hufnagel, through attorney Dailey, filed a single-page opposition to the motion for terminating sanctions. In the opposition document, it was stated, without evidentiary support, that Hufnagel was impoverished, discovery would be answered prior to the hearing on the motion to terminate, and Hufnagel had complied with the injunction but due to a misunderstanding the website server company had not been able to immediately deactivate the links in Hufnagel's counterfeit website.

On February 14, 2005, the trial court granted the motion for terminating sanctions. **[*14]** The trial court struck Hufnagel's answer and entered default based upon a pattern of conduct by Hufnagel and her counsel, and the violation of court rules, local rules, fast track rules, the Code of Civil Procedure, and orders of the court. The trial court did *not* base its decision on the failure to pay monetary sanctions.

On July 25, 2005, Hufnagel filed an ex parte application for an order shortening time for a hearing of a motion to set aside the default. In an attached declaration, attorney Dailey declared, with little explanation, that he caused the delays. In Hufnagel's 14 line declaration she declared that her finances had not allowed her to hire other legal counsel and her health was poor. The application was denied.

c. *Default judgment.*

On November 30, 2005, Dr. Del Junco filed an application for entry of default judgment. Dr. Del Junco supported his request with his declaration and that of his attorney. Dr. Del Junco requested damages in the total sum of $ 563,585.26.

On November 30, 2005, judgment by court after entry of default was entered against Hufnagel in favor of Dr. Del Junco in the sum of $ 558,724.90, broken down as follows: $ 200,000 in general damages; **[*15]** $ 136,212 in special damages; $ 200,000 in punitive damages; $ 21,914 in attorney fees; and $ 598.90 in costs. The trial court also entered a permanent injunction.

Hufnagel appeals from the judgment.

DISCUSSION

1. *The defamatory statements are actionable.*

Hufnagel contends that the statements in the counterfeit website are not actionable because they are not defamatory. This contention is not persuasive.

---

[4] The relevant portion of former *Code of Civil Procedure section 2023* is currently found in *Code of Civil Procedure section 2023.030*.

" 'The sine qua non of recovery for defamation . . . is the existence of falsehood.' [Citation.]" (*Franklin v. Dynamic Details, Inc. (2004) 116 Cal.App.4th 375, 384*; *Civ. Code, § 45* ["Libel is a false and unprivileged publication by writing . . . or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."].)

Dr. Del Junco received, as part of his general surgery residency, rotations in female or gynecological surgery, including pre-operative management, surgery and post operative management. He is a fully licensed, practicing doctor specializing in general and vascular surgery with **[*16]** all of the necessary medical training to perform surgeries. He is not a student. However, the counterfeit website stated that "Dr. Del Junco has no specialized medical training in medicine or in female medicine. He is a vascular student." The website also stated that Dr. Del Junco "has no training at all in women's medicine. [P] He is not a specialist." The false import of these statements is that Dr. Del Junco is not a licensed physician and does not have the educational background to perform the procedures he promotes. Even though, as Hufnagel notes in her reply brief, her website stated that Dr. Del Junco was a "General/Vascular Surgeon," any reasonable reader of her counterfeit website would conclude that Dr. Del Junco lacked the medical training to perform the surgeries he promotes and performs. As such, the statements in Hufnagel's website cast serious doubt on Dr. Del Junco's professional ability and are defamatory. (*Civ. Code, § 46(3)* [slander is a false statement that tends to injure one in his or her "profession, trade or business, either by imputing to him [or her] general disqualification in those respects which the office or other occupation **[*17]** peculiarly requires, or by imputing something with reference to his [or her] office, profession, trade, or business that has a natural tendency to lessen its profits"].)

Contrary to Hufnagel's argument, the quoted statements, taken in context and when the website is read as whole, are not statements of opinion. (*Franklin v. Dynamic Details, Inc. supra*, *116 Cal.App.4th at p. 385* [under totality of circumstances opinions are protected unless "a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact"]; see discussions in *Milkovich v. Lorain Journal Co. (1990) 497 U.S. 1, 19, 111 L. Ed. 2d 1*; *Baker v. Los Angeles Herald Examiner (1986) 42 Cal.3d 254, 260, 228 Cal. Rptr. 206*.) Accusing a physician of being untrained and lacking the proper credentials are not statements of opinion. They are statements of fact. (Compare with *Franklin v. Dynamic Details, Inc., supra, 116 Cal.App.4th 375* [emails expressed opinions].)

The statements in the counterfeit website damaged Dr. Del Junco's professional reputation and were actionable.

2. *The public affairs exemption* **[*18]** *to Civil Code section 3344 does not apply.*

Dr. Del Junco's photograph was on a link of Hufnagel's website. Hufnagel contends this knowingly use of Dr. Del Junco's likeness is not a violation of *Civil Code section 3344* because the website comes under the public affairs exemption. This contention is not persuasive.

Civil Code section 3344 provides in subdivision (a) that "[a]ny person who knowingly uses another's name, . . . photograph, or likeness, in any manner, . . . without such person's prior consent, . . . shall be liable for any damages sustained by the person or persons injured as a result thereof." Subdivision (d) provides for an exemption when the name or likeness is used in connection with any news or public affairs. [5]

---

[5] *Civil Code section 3344, subdivision (a)* and *(d)* read in pertinent part:

"(a) Any person who knowingly uses another's name, . . . photograph, or likeness, in any manner, . . . without such person's prior consent, . . . shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($ 750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs.

[*19] The exemption found in subdivision (d) of *Civil Code section 3344* is designed to protect uses that are not commercial, such as public affairs *and* news. Reports that are "public affairs" are not limited to those "covered on public television or public radio." (*Dora v. Frontline Video, Inc. (1993) 15 Cal.App.4th 536, 546*.) They are protected because they report a matter of public interest. (*Id. at pp. 545-546* [documentary on surfing addresses significant influence of sport on the popular culture and use of surfer's name, voice and likeness in the film was not actionable]; *Gionfriddo v. Major League Baseball (2001) 94 Cal.App.4th 400, 415-417* [use of former baseball players' names, images, and likenesses in websites, print and video publications, audiovisual programs and television programs come within public affairs exemption]; *Montana v. San Jose Mercury News, Inc. (1995) 34 Cal.App.4th 790* [reproduction of previously published pages depicting football player in commercial poster was not actionable].)

Here, Hufnagel did not simply "borrow" Dr. Del Junco's likeness or name to promote **[*20]** new medical procedures, or to even discuss the options available to women. She did not simply disagree with his medical judgment. Hufnagel's website was not designed to provide options to women seeking medical advice. Rather, Hufnagel's use of Dr. Del Junco's photograph and name were purposefully designed to disparage his reputation and challenge his competency. She accused him of lacking the education and credentials to practice medicine. Hufnagel cites to no case concluding that the public affairs exception applies when the information provided is false.

Hufnagel suggests that the disclaimer and the true statements about Dr. Del Junco in the website absolve her of liability. First, the disclosure actually compounds the defamatory effect. It states that the counterfeit website is designed to provide "full and complete disclosure which [Dr. Del Junco's] site does not provide." This disclaimer suggests that the information in the counterfeit website is accurate. However, as discussed above, the statements about Dr. Del Junco's qualifications to practice medicine are false. Hufnagel's counterfeit website was designed to impersonate Dr. Del Junco's website and to steal patients from **[*21]** Dr. Del Junco. The public affairs exception was not designed to protect this type of writing.

The defamatory statements in the counterfeit website are not protected by the public affairs exemption in *Civil Code section 3344, subdivision (d)*.

3. *The complaint stated a cause of action for violating the Unfair Competition Law* (*Bus. & Prof. Code, § 17200*).

Hufnagel cites *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163* (*Cel-Tech*) to argue that Dr. Del Junco was required to include allegations of anti-trust violation in order to plead a violation of *Business and Professions Code section 17200*. This contention is not persuasive.

Business and Professions Code section 17200 et seq. prohibits unfair competition, in any "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [*Business and Professions Code sections 17500-17577*]." The words in the statute are in the disjunctive. **[*22]** They list separate wrongs. (*Cel-Tech, supra, 20 Cal.4th at p. 180*.) In *Cel-Tech,* cellular telephone sellers brought an action against a company that sold cellular telephones below cost to gain subscribers for its cellular service. Hufnagel points to the following sentence found on page 187 of *Cel-Tech*: "When a plaintiff who claims to have suffered injury from a direct competitor's '*unfair*' act or practice invokes *section 17200*, the word 'unfair' in that section means conduct that threatens an incipient *violation of an **antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (Italics added, fn. omitted.) *Cel-Tech* limited this statement to the facts before it: "This case involves an action by a competitor alleging anticompetitive practices. Our discussion and this test are limited to that context. Nothing we say relates to actions by consumers or by competitors alleging other kinds of violations of the unfair competition law such as 'fraudulent' or 'unlawful' business practices or 'unfair, deceptive, **[*23]** untrue or misleading advertising.' " (*Id. at p. 187, fn. 12*.)

"(d) For purposes of this section, a use of a name, . . . photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a)."

Unlike *Cel-Tech,* the allegations in Dr. Del Junco's complaint focused on prongs in *Business and Professions Code section 17200* addressing "fraudulent," "deceptive," and "untrue" business practices.

Here, Hufnagel's website was designed to redirect prospective patients from Dr. Del Junco to Hufnagel. The counterfeit website had a domain name (drdeljunco.com) that was almost identical to the domain name of Dr. Del Junco's website (dr.deljuncojr.com). Hufnagel's website was identical to Dr. Del Junco's in its lay-out and contained the same logo, which would lead users to believe that the counterfeit website was actually Dr. Del Junco's. Yet, if a user accessed links on the counterfeit website, they were directed to information on Hufnagel and her institute in Mexico. The counterfeit website defamed Dr. Del Junco. Thus, the counterfeit website was designed to steal patients from Dr. Del Junco and to defame him. As such, it violated *Business and Professions Code section 17200* as it was likely to deceive the public. (Cf. *Olsen v. Breeze, Inc. (1996) 48 Cal.App.4th 608, 618* **[*24]** [requires showing that public is likely to be deceived]; *Standard Oil Co. of California v. F.T.C. (9th Cir. 1978) 577 F.2d 653, 658-659* [commercial speech not exempt from First Amendment protection, but comment on subject of public interest may not be misleading or deceptive]; accord, *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 211, 197 Cal. Rptr. 783*.)

Dr. Del Junco pled a violation of *Business and Professions Code section 17200*.

4. *The complaint stated a cause of action for intentional interference with prospective economic advantage.*

Hufnagel contends Dr. Del Junco failed to state a cause of action for intentional interference with prospective business advantage. [6] This contention is not persuasive.

[*25] The tort of intentional interference with prospective business advantage "consists of intentional and improper methods of diverting or taking business from another that are not within the privilege of fair competition. [Citations.] [P] . . . [P] It has been suggested that the tort of inducing breach of contact 'is merely a species of the broader tort of interference with prospective economic advantage.' [Citations.] However, interference with prospective economic advantage, unlike inducing breach of contract, requires wrongful conduct other than the act of interference itself. (*Della Penna v. Toyota Motor Sales, U.S.A.,* [*Inc.,*] *supra, 11 [Cal.4th] 393*.)" (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 741, pp. 1069-1071.) "In this context, 'an act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.' [Citation.]" (*Stevenson Real Estate Services, Inc. v. CB Richard Ellis Real Estate Services, Inc. (2006) 138 Cal.App.4th 1215, 1220*.)

Hufnagel contends no independently wrongful act was shown. This argument ignores the **[*26]** pleadings. The complaint alleged that the counterfeit website was designed to disrupt and damage Dr. Del Junco's practice by diverting potential patients to Hufnagel. Hufnagel's deceptive actions violated *Business and Professions Code section 17200*. Thus, we need not address other "independently wrongful" acts.

Dr. Del Junco stated a cause of action for intentional interference with prospective business advantage.

5. *The trial court had the jurisdiction to issue the terminating sanction.*

Hufnagel contends the trial court lacked the jurisdiction to issue the terminating sanction. She argues the court exceeded its powers in striking the answer and entering default. This contention is not persuasive.

A number of statutes provide authority for the trial court to terminate a case. For example, Code of Civil Procedure section 575.2permits dismissal of a case for the violation of fast track rules where noncompliance is the fault of the party and not counsel. (*Garcia v. McCutchen (1997) 16 Cal.4th 469*; *Tliche v. Van Quathem (1998) 66 Cal.App.4th 1054, 1061*.) Former *Code of Civil Procedure section 2023* permits trial courts **[*27]** to impose terminating sanctions and strike pleadings as a discovery sanction. Additionally, the statutes recognize that the courts have the

[6] The tort is variously known as interference with " 'prospective economic advantage,' " " 'prospective contractual relations,' " and " 'prospective economic relations.' " (*Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal.4th 376, 378*.)

inherent authority to dismiss an action. (*Code Civ. Proc., §§ 581, subd. (m)*, *583.150*; *Lyons v. Wickhorst (1986) 42 Cal.3d 911, 915, 231 Cal. Rptr. 738*; *Progressive Concrete, Inc. v. Parker (2006) 136 Cal.App.4th 540, 551*.) [7]

[*28] Trial courts should only exercise this authority in extreme situations, such as when the conduct was clear and deliberate, where no lesser alternatives would remedy the situation (*Lyons v. Wickhorst, supra, 42 Cal.3d at 917*), the fault lies with the client and not the attorney (cf. *Garcia v. McCutchen, supra, 16 Cal.4th 469*), and when the court issues a directive that the party fails to obey. (E.g., former *Code Civ. Proc., § 2023*.)

Here, from the start of the case to the time the trial court issued the terminating sanction, Hufnagel showed no interest in taking part in the case or in following orders of the court. All of her actions were those of an obstructionist, not a participant in the process. She filed documents in propria persona that did not follow proper form, were lengthy, contained irrelevant information, and violated court rules. She filed documents without serving them. She personally filed documents that violated a prior vexatious litigant order. She failed to comply with the injunction and continued to operate the counterfeit website. She did not pay sanctions when ordered. When she had counsel, things did not improve. Misrepresentations **[*29]** were made to the court, documents were not filed when promised, responses to interrogatories were never delivered, and phone calls were not returned. The actions of Hufnagel and her counsel were willful and deliberate and caused unnecessary delay and wasted the trial court's resources. The actions caused Dr. Del Junco to incur unnecessary expense. Under these circumstances the trial court had the jurisdiction to strike Hufnagel's answer and enter default.

Hufnagel correctly states she could have been held in contempt for violating court orders and the trial court could have issued other orders, such as an order compelling her to answer discovery. Thus, she suggests that the trial court had to take such actions before issuing the terminating sanctions. However, there is nothing in the record to suggest that such hearings, or sanctions, would have provided the impetus Hufnagel needed to properly prosecute this case. She had already been deemed a vexatious litigant in another case, yet she filed documents in propria persona that did not comply with court rules. Given the history of this case it would have been futile for the trial court to issue other orders before striking Hufnagel's **[*30]** answer and entering default. It is clear that Hufnagel had no intention of answering discovery, filing proper and timely papers, or complying with court orders. She and her counsel had withdrawn from the case. No lesser remedy would have changed Hufnagel's conduct.

We agree with Hufnagel that some of the responsibility for the problems fall at the feet of her counsel. However, the record suggests that attorney Dailey's actions were part and parcel of Hufnagel's strategy of delaying and throwing darts at others, rather than taking responsibility for her own actions.

The trial court had the jurisdiction to strike Hufnagel's answer and enter default.

6. *The matter must be returned to the trial court for additional evidence on damages.*

Dr. Del Junco was awarded damages in the sum of $ 558,724.90 broken down as follows: $ 200,000 in general damages; $ 136,212 in special damages; $ 200,000 in punitive damages; $ 21,914 in attorney fees; and $ 598.90 in costs.

As part of the special damages, Dr. Del Junco requested and received $ 133,000 in special damages for loss of income. This award was based upon the following evidence: Hufnagel began to operate her counterfeit website in 2003. **[*31]** In April 2003, Dr. Del Junco's internet website generated e-mail inquiries, many of which resulted in surgeries Since Hufnagel began operating her website, the inquiries Dr. Del Junco received from potential patients dropped significantly. As a result of the decline in inquiries, Dr. Del Junco performed far fewer surgeries in 2004

---

[7] *Code of Civil Procedure section 583.150* reads: "This chapter does not limit or affect the authority of a court to dismiss an action or impose other sanctions under a rule adopted by the court pursuant to Section 575.1 or by the Judicial Council pursuant to statute, or otherwise under inherent authority of the court."

Code of Civil Procedure section 581, subdivision (m) reads: "The provisions of this section shall not be deemed to be an exclusive enumeration of the court's power to dismiss an action or dismiss a complaint as to a defendant."

than he had performed in 2003, and his income from surgeries was reduced by $ 141,000. Dr. Del Junco attributed the decline in the number of surgeries and his loss of income in 2004 to the confusion caused in the minds of prospective patients by Hufnagel's website and the chilling effect it had on them. Dr. Del Junco typically booked surgeries nine months to one year in advance. Thus, the impact of the Hufnagel's website was felt in 2004. [8]

[*32] Hufnagel argues it is speculative to assume that Dr. Del Junco's drop in income for 2004 was related to the counterfeit website. She argues as follows: (1) In the first quarter of 2005, Dr. Del Junco performed 7 major surgeries and 28 major surgeries in 2003; (2) The amount of surgeries performed by Dr. Del Junco for the first quarter of 2005 was comparatively the same as those performed in 2003; (3) If her website caused Dr. Del Junco to lose income from surgeries, then the number of surgeries in the first quarter of 2005 should have been less than the number performed in 2003.

However, it is Hufnagel who speculates. She makes the assumption that the surgeries in the first quarter of 2005 correlate to the statistics provided for the full years of 2003 and 2005. Hufnagel may not take Dr. Del Junco's discussion and statistics extrapolate them to 2005, when she knows nothing about the surgeries in 2005. Without more information, Hufnagel's argument is hollow as it lacks sufficient data and information. Dr. Del Junco provided sufficient proof that he lost earnings in 2004. This evidence is not speculative.

As Hufnagel contends, *Adams v. Murakami (1991) 54 Cal.3d 105, 284 Cal. Rptr. 318* **[*33]** held that evidence of a defendant's financial condition is a prerequisite to an award of punitive damages and the burden of proof is on the plaintiff to introduce such evidence. There was no such evidence presented to the trial court by Dr. Del Junco in support of his motion for default judgment.

At oral argument, Dr. Del Junco argued for the first time that Hufnagel is foreclosed from asserting there was no evidence of her financial worth. This argument is premised upon Dr. Del Junco's statement that Hufnagel refused to respond to discovery on this issue. (*Mike Davidov Co. v. Issod (2000) 78 Cal.App.4th 597, 608-609* [by failing to abide by court's order to produce financial records defendant waived right to complain that there was no evidence of defendant's financial condition].) However, the only evidence presented to the trial court was that Hufnagel had failed to respond to form interrogatories. These interrogatories did not inquire about Hufnagel's financial condition. Further, the statement in Dr. Del Junco's brief that Hufnagel failed to appear for a deposition is unsupported by citation to the record, and thus cannot be considered by us.

The foregoing conclusion **[*34]** would normally lead to a reversal of the judgment because the $ 200,000 award for punitive damages cannot stand. However, we believe that justice will be served by issuing a conditional reversal that permits Dr. Del Junco to accept the judgment as modified or to return to the trial court for additional proceedings, during which he can present the required evidence.

---

[8] Dr. Del Junco presented the following evidence with regard to the number of surgeries he performed and the amount of income he derived therefrom:

2003

28 majors - $ 280,000 $ 328,000

16 minors - $ 48,000

2004

16 majors - $ 160,000 $ 187,000

9 minors - $ 27,000

2005 through March

7 Majors - $ 70,000

1 minor - $ 3,000

(3 minors scheduled for May)

c. *The trial court did not err in awarding attorney fees.*

Hufnagel contends we must strike the attorney fees award. This contention is not persuasive.

Civil Code section 3344 states that the "prevailing party in any action under this section shall . . . be entitled to attorney's fees and costs." (See fn. 5.) As stated above, Dr. Del Junco stated a cause of action for violating *Civil Code section 3344*. Thus, when he proved the allegations in the complaint with regard to this cause of action, he was entitled to attorney fees and costs.

Dr. Del Junco's counsel (attorney Michael J. Kaufman) declared that the attorney fees incurred by Dr. Del Junco as of April 19, 2005, the date of the motion for judgment, was $ 21,914. In a motion filed in June 2004, attorney Kaufman declared **[*35]** that his customary hourly billing rate was $ 300 per hour, based upon his over 25 years in practice and extensive trial experience, however, he was billing Dr. Del Junco $ 250 per hour. The trial court had before it the voluminous file containing many pleadings filed by Dr. Del Junco in response to the inappropriate and lengthy documents filed by Hufnagel and her attorney. Thus, the trial court had evidence of attorney Kaufman's hourly rate and the amount billed to Dr. Del Junco. Additionally, the trial court could use its own expertise in evaluating the attorney fee request. (*In re Marriage of Jovel (1996) 49 Cal.App.4th 575, 588*; *In re Marriage of Ananeh-Firempong (1990) 219 Cal.App.3d 272, 280, 268 Cal. Rptr. 83*.) Based on this record, we cannot conclude that the record lacked substantial evidence to support the attorney fee award.

DISPOSITION

The judgment is affirmed in all respects except as to the award of punitive damages. The award of punitive damages is reversed and remanded to the trial court for further proceedings only on the issue of the amount of punitive damages, unless within 20 days of the date this opinion is filed Dr. Del Junco **[*36]** files with the clerk of the court and serves on Hufnagel a written consent to modify the judgment by striking the punitive damage award of $ 200,000, in which event the judgment is modified to award Dr. Del Junco $ 363,585.26, and in such event the judgment is affirmed as modified.

Dr. Del Junco is awarded costs on appeal.

ALDRICH, J.

We concur:

KLEIN, P.J.

CROSKEY, J.

End of Document

Manuel Augusto Colón Cabrera Melba Correa Miranda, Demandantes-Apelados v. Caribbean Petroleum Corporation, et al., Demandados-Apelantes; Estado Libre Asociado de Puerto Rico, Recurrido

Tribunal Supremo De Puerto Rico

16 de marzo de 2007

AC-2006-27

Reportero
170 D.P.R. 582 *; 2007 PR Sup. LEXIS 47 **; 2007 TSPR 48

Manuel Augusto Colón Cabrera Melba Correa Miranda, Demandantes-Apelados v. Caribbean Petroleum Corporation, et al., Demandados-Apelantes; Estado Libre Asociado de Puerto Rico, Recurrido

Historia Previa: [1]** Materia: Injunction, Daños y Perjuicios por Violación a las Leyes de Monopolio y por Incumplimiento de Contrato. Tribunal de Apelaciones: Región Judicial de Bayamón-Panel VII. Juez Ponente: Hon. Rafael L. Martínez Torres.

Tesis de LexisNexis ®

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN1[] **Governmental Information, Freedom of Information**

Un derecho liberal de acceso a información pública en poder del Estado. No obstante, también tal derecho no es absoluto y cede en casos de imperativo interés público.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN2[] **Freedom of Information, Methods of Disclosure**

El Artículo 1(b) de la Ley de Documentos Públicos,*3 L.P.R.A. § 1001(b)*, define un documento público como todo documento que se origine, conserve, o reciba en cualquier dependencia del Estado Libre Asociado de Puerto Rico de acuerdo con la ley o en relación con el manejo de los asuntos públicos y que de conformidad con lo dispuesto en la*3 L.P.R.A. § 1002* se haga conservar permanentemente o temporalmente como prueba de las transacciones o por su valor legal. Conforme a ello, la documentación recopilada y conservada como parte de una investigación efectuada por la Oficina de Monopolios satisface la definición antes transcrita.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN3[] **Methods of Disclosure, Record Requests**

En Puerto Rico existe un derecho general de acceso a información pública en poder del Estado. Tal derecho surge en virtud del Artículo del Código de Enjuiciamiento Civil,*32 L.P.R.A. § 1781*. Dicha disposición establece que todo ciudadano tiene derecho a inspeccionar y sacar copia de cualquier documento público de Puerto Rico, salvo lo expresamente contrario dispuesto en ley. El derecho de acceso a información pública también surge como colorario del derecho a la libertad de expresión, ya que sin conocimiento de los hechos no hay posibilidad de expresión. Por tanto, resulta innegable que el acceso a información constituye un componente importante de una sociedad democrática en donde el ciudadano puede emitir un juicio informado sobre las actuaciones del gobierno.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN4[] **Methods of Disclosure, Record Requests**

En vista de la importancia que tiene el derecho a obtener información publica, el Estado no puede negarse caprichosamente y de forma arbitraria a permitir su acceso.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Commercial Information & Trade Secrets

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

HN5[] **Defenses & Exemptions From Public Disclosure, Commercial Information & Trade Secrets**

Si bien se ha reconocido que se debe hacer un análisis liberal al atender una solicitud de acceso a información custodiada por el Estado, se debe aclarar que tal derecho no puede ser absoluto. Se ha dejado abierta la puerta para que, llegado el momento, se haya resuelto sostener la confidencialidad de cierta información dependiendo de los intereses envueltos.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Commercial Information & Trade Secrets

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

HN6[] **Defenses & Exemptions From Public Disclosure, Commercial Information & Trade Secrets**

En el ordenamiento puertorriqueño no se cuenta con una legislación especial que disponga las excepciones en las que el Estado puede mantener ciertos documentos fuera del escrutinio público. Sin embargo, el Tribunal Supremo ha afirmado los supuestos en los que el estado validamente puede reclamar la confidencialidad, a saber: (1) cuando una ley así lo declara; (2) cuando la comunicación esta protegida por alguno de los privilegios evidenciarios que pueden invocar los ciudadanos; (3) cuando revelar la información puede lesionar derechos fundamentales de terceros; (4) cuando se trate de la identidad de un confidente y (5) cuando sea información oficial conforme laRegla

31 de Evidencia. Para mantener la confidencialidad, el Estado tiene la carga de probar que satisface cualquiera de las excepciones antes enumeradas.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Commercial Information & Trade Secrets

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

HN7[] **Defenses & Exemptions From Public Disclosure, Commercial Information & Trade Secrets**

La confidencialidad de las investigación gubermentales surge precisamente al amparo de una ley.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Commercial Information & Trade Secrets

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

HN8[] **Defenses & Exemptions From Public Disclosure, Commercial Information & Trade Secrets**

En la legislación federal se establece como una de las excepciones a la divulgación, los casos en los que se dispone la confidencialidad por virtud de una ley.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Commercial Information & Trade Secrets

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

HN9[] **Defenses & Exemptions From Public Disclosure, Commercial Information & Trade Secrets**

Véase*10 L.P.R.A. § 271*.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Commercial Information & Trade Secrets

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > State Constitutional Operation

HN10[] **Defenses & Exemptions From Public Disclosure, Commercial Information & Trade Secrets**

Toda etiqueta legislativa de confidencialidad debe evaluarse frente al derecho de acceso a información invocado por el ciudadano. En vista de que tal derecho es de carácter fundamental, la legislación debe someterse a un análisis de escrutinio estricto. Al mismo tiempo, debe ser interpretada restrictivamente a favor del acceso. En síntesis, toda ley que pretenda ocultar información a un ciudadano bajo el palio de la confidencialidad tiene que justificarse a plenitud. Ello se satisface si la legislación (1) cae dentro del poder constitucional del gobierno; (2) propulsa un interés gubernamental importante o sustancial; (3) el interés gubernamental no esta relacionado con la supresión de la libre expresión; y (4) la restricción concomitante del derecho a la libre expresión no es mayor que la esencial para propulsar dicho interés. Así pues, el Estado puede invocar el manto de secretividad en casos de imperativo interés publico.

Administrative Law > Separation of Powers > Legislative Controls > Scope of Delegated Authority

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > State Regulation

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN11[] **Legislative Controls, Scope of Delegated Authority**

Se ha delegado en la Oficina de Monopolios la labor de fiscalizar e investigar las practicas monopolisticas.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Commercial Information & Trade Secrets

Constitutional Law > Substantive Due Process > Scope

Evidence > Privileges > Trade Secrets > General Overview

Trade Secrets Law > Federal Versus State Law > ***Antitrust Law***

HN12[] **Defenses & Exemptions From Public Disclosure, Commercial Information & Trade Secrets**

La preservación de secretos de negocio constituye un interés apremiante del Estado.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Commercial Information & Trade Secrets

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Constitutional Law > Substantive Due Process > Scope

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN13[] **Defenses & Exemptions From Public Disclosure, Commercial Information & Trade Secrets**

La Ley Núm. 77 de 25 de junio de 1964, conocida como Ley de Monopolios y restricción del Comercio,*10 L.P.R.A. § 257* constituye un interés apremiante capaz de sostener la norma de confidencialidad con respecto a la información obtenida de personas privadas durante una investigación efectuada por la Oficina de Monopolios.

Abogados: Abogados de la Parte Apelante: Lcdo. Eduardo A. Vera Ramírez, Lcda. Isabel Garcés Castro, Lcda. Eileen Landrón Guadiola.

Abogados de la Parte Apelada: Lcdo. Manuel A. Colón Cabrera, Lcdo. Andrés Díaz Nieves, Lcdo. Eduardo Goitía Rodríguez.

Oficina del Procurador General: Lcda. Vanessa Ramírez, Procuradora General Auxiliar, Lcda. Mariana D. Negrón Vargas, Subprocuradora General, Lcdo. Salvador J. Antonetti Stutts, Procurador General.

Jueces: Opinión del Tribunal emitida por el Juez Presidente señor Hernández Denton. El Juez Asociado señor Rebollo López no intervino. La Jueza Asociada señora Rodríguez Rodríguez inhibida.

Opinion Por: Federico Hernández Denton

Opinion

[*586] San Juan, Puerto Rico, a 16 de marzo de 2007.

Hemos reconocido***HN1***[] un derecho liberal de acceso a información pública en poder del Estado. No obstante, también hemos reiterado que*tal derecho no es absoluto* y cede en casos de imperativo interés público. En vista de ello, nos corresponde resolver si la **[**2]** norma de confidencialidad dispuesta en el Artículo 15 de la Ley Núm. 77 de 25 de junio de 1964, conocida como Ley de Monopolios y Restricción del Comercio,*10 L.P.R.A. sec. 257* y ss. (en adelante, Ley Núm. 77) para la información obtenida durante una investigación efectuada por la Oficina de Asuntos Monopolísticos adscrita al Departamento de Justicia (en adelante, Oficina de Monopolios) responde a un interés apremiante del Estado y si el alcance de dicha norma se justifica para proteger tal interés.

El apelanteCaribbean Petroleum Corporation(en adelante, Caribbean Petroleum) recurre de una sentencia del Tribunal de Apelaciones que concluyó que Manuel Colón Cabrera y Melba Correa Miranda (en adelante, señor Colón Cabrera) tenían derecho a descubrir, tras un examen en cámara, la información producto de una investigación efectuada por la Oficina de **[*587]** Monopolios contra varios distribuidores de gasolina, entre los que figuraba el demandado. Por entender que el Estado demostró tener un interés apremiante en investigar y procesar las violaciones a la Ley Núm. 77, modificamos la sentencia recurrida para que el Tribunal de Primera Instancia, luego de un examen en cámara, y en ausencia de las **[**3]** partes, del expediente y el informe producto de la investigación realizada por la Oficina de Monopolios, ordene la divulgación de la información que no sea impertinente, no sea de naturaleza privilegiada y no revele las técnicas de investigación del Departamento de Justicia o la identidad de informantes. Asimismo, el tribunal no podrá divulgar la información que haya sido obtenida de las personas privadas sujetas al poder de investigación de la Oficina de Monopolios bajo el palio de confidencialidad. Resolvemos, por tanto, que el acceso limitado al que tiene derecho Colón Cabrera responde a los privilegios evidenciarios y al mandato legislativo recogido en el Art. 15 de la Ley Núm. 77,*supra*.

I.

El señor Colón Cabrera arrendó a Caribbean Petroleum una propiedad inmueble sobre la cual enclava una estación de servicio de gasolina. Tras varias controversias entre las partes, el señor Colón Cabrera instó una acción por daños y perjuicios e incumplimiento de contrato contra Caribbean Petroleum. Entre las alegaciones, incluyó una causa de acción al amparo de la Ley Núm. 77 por discrimen en precios.

Estando el caso pendiente de resolver ante el Tribunal de Primera Instancia, **[**4]** el Departamento de Justicia comunicó a los medios noticiosos del país que la Oficina de Monopolios había realizado una investigación sobre la industria de la gasolina. Dicha investigación reveló que los programas de incentivos de los distribuidores de gasolina eran **[*588]** contrarios a los intereses de los detallistas y violaban las disposiciones de la Ley Núm. 77. En atención a ello, y en aras de proteger el libre mercado, el Departamento de Justicia emitió órdenes de cese y desista contra los distribuidores y, en adición, presentó una querella ante el Departamento de Asuntos al Consumidor contra una de las compañías investigadas.

Al enterarse de estos hallazgos, el señor Colón Cabrera solicitó al Tribunal de Primera Instancia que ordenara al Departamento de Justicia entregarle copia del estudio y/o informe con los resultados de la investigación, en particular lo concerniente a Caribbean Petroleum. Fundamentó su solicitud en que la información recopilada era pública al haber sido divulgada a los medios y que, además, era fundamental para probar sus alegaciones ante el tribunal.

Por su parte, Cribbean Petroleum se opuso a la solicitud en base a lo dispuesto en el Art. 15 de la Ley Núm. 77 **[**5]** a los efectos de que toda información obtenida en el curso de una investigación civil efectuada por la Oficina de Monopolios debía mantenerse en estricta confidencialidad. De igual forma, el Departamento de Justicia se opuso mediante una comparecencia especial. Adujo que el acceso a la información tendría el efecto de obstaculizar la labor de investigación de la Oficina de Monopolios, ya que la mayor parte de la información obtenida es privilegiada y las personas la entregan voluntariamente bajo una expectativa de confidencialidad. El Tribunal de Primera Instancia acogió los planteamientos del Estado y denegó el acceso.

Inconforme, el señor Colón Cabrera presentó una solicitud de revisión ante el Tribunal de Apelaciones. En ella alegó que el foro de instancia debió permitirle el acceso en consideración a su derecho constitucional a la libertad de expresión. Así las cosas, y luego de la comparecencia de las partes, el Tribunal de Apelaciones revocó la determinación recurrida y ordenó el acceso a los documentos luego de efectuarse un examen en cámara con el fin de proteger **[*589]** información privilegiada sobre otras compañías, la identidad de informantes y las técnicas de investigación criminal. **[**6]** Sostuvo que en nuestro ordenamiento rige una norma liberal en cuanto al acceso a información pública en poder del Estado y que el Estado no demostró un interés apremiante que justificase la norma de confidencialidad dispuesta en la ley Núm. 77.

De esta determinación Caribbean Petroleum apela ante nos y alega como único error que el señor Colón Cabrera no tenía derecho a inspeccionar los documentos en cámara. Sostiene que tal información es confidencial a tenor con lo dispuesto en el Artículo 15 de la Ley Núm. 77 y está cobijada por los privilegios evidenciarios establecidos en las Reglas 30 y 31 de Evidencia, relativos a secretos de negocio e información oficial. 32 L.P.R.A. R. 31, R. 30.

En vista de que el recurso plantea una cuestión novel y de alto interés público, resolvimos acoger el recurso como*certiorari* y acordamos expedir. Con el beneficio de la comparecencia de las partes, procedemos a resolver.

II.

Consideramos, en primer lugar, si la información objeto de la solicitud puede catalogarse como información pública. Es necesario hacer esa determinación preliminar en vista de que, una vez un documento sea catalogado como público, cualquier ciudadano tiene derecho a solicitar **[**7]** su acceso sujeto a determinadas excepciones.

HN2[] El Artículo 1(b) de la Ley de Documentos Públicos,*3 L.P.R.A. 1001(b)*, define un documento público como "[t]odo documento que se origine, conserve, o reciba en cualquier dependencia del Estado Libre Asociado de Puerto Rico de acuerdo con la ley o en relación con el manejo de los asuntos públicos y que de conformidad con lo dispuesto en la*sec. 1002* de este título se haga conservar permanentemente o temporalmente **[*590]** como prueba de las transacciones o por su valor legal." Conforme a ello, resolvemos que la documentación recopilada y conservada como parte de una investigación efectuada por la Oficina de Monopolios satisface la definición antes transcrita.

Aclarado esto, concierne recordar que***HN3***[] en Puerto Rico existe un derecho general de acceso a información pública en poder del Estado. Tal derecho surge en virtud del Artículo del Código de Enjuiciamiento Civil,*32 L.P.R.A. 1781*.Dicha disposición establece que "todo ciudadano tiene derecho a inspeccionar y sacar copia de cualquier documento público de Puerto Rico, salvo lo expresamente contrario dispuesto en ley." El derecho de acceso a información pública también surge como colorario del derecho **[**8]** a la libertad de expresión, ya que sin conocimiento de los hechos no hay posibilidad de expresión. Por tanto, resulta innegable que el acceso a información constituye un componente importante de una sociedad democrática en donde el ciudadano puede emitir un juicio informado sobre las actuaciones del gobierno.*Pedró Juan Soto v. Miguel Giménez Muñoz, 112 D.P.R. 477 (1982)*;*David Noriega Rodríguez v. Hon. Rafael Hernández Colón, 130 D.P.R. 919 (1992)*.

HN4[] En vista de la importancia que tiene el derecho a obtener información pública,[1] el Estado no puede negarse caprichosamente y de forma arbitraria a permitir su acceso.*Ligia M. Ortiz v. Mercedes Bauemeister, 152 D.P.R. 161*;*Rolando Silva Iglesia v. Panel sobre el**Fiscal Especial Independiente, 137 D.P.R. 821 (1995)*;*Sol Luís López Vives v. Policía de Puerto Rico, 118 D.P.R. 219 (1987)*;*Soto v. Giménez, supra.* Por tanto, dicha negativa debe estar fundamentada y justificada.De darse estas circunstancias, el Estado estaría legitimado para restringir el acceso de los ciudadanos a documentos de carácter público.

[9]** ***HN5***[] Si bien hemos reconocido que- como norma general- **[*591]** se debe hacer un análisis liberal al atender una solicitud de acceso a información custodiada por el Estado, debemos aclarar que tal derecho no puede ser absoluto.*Id.* A tales efectos, hemos dejado abierta la puerta para que, llegado el momento, resolvamos sostener la confidencialidad de cierta información dependiendo de los intereses envueltos.

HN6[] En nuestro ordenamiento no contamos con una legislación especial que disponga las excepciones en las que el Estado puede mantener ciertos documentos fuera del escrutinio público. Sin embargo, este Tribunal ha afirmado los supuestos en los que el estado válidamente puede reclamar la confidencialidad, a saber: (1)*cuando una ley así lo declara*; (2) cuando la comunicación está protegida por alguno de los privilegios evidenciarios que pueden invocar los ciudadanos; (3) cuando revelar la información puede lesionar derechos fundamentales de terceros; (4) cuando se trate de la identidad de un confidente y (5) cuando sea información oficial conforme laRegla 31 de Evidencia.*Id.*,*Angueira v. J.L.B.P., 150 D.P.R. 10 (2000)*.Para mantener la confidencialidad, el Estado tiene **[**10]** la carga de probar que satisface cualquiera de las excepciones antes enumeradas.

III.

En este caso,***HN7***[] la confidencialidad surge precisamente al amparo de una ley[2].Resulta pertinente recordar nuestras expresiones en el caso de*Davila v. Superintendente de Elecciones, 82 D.P.R. 264, 281 (1960)*, a los efectos de que para resolver que el derecho reconocido en el art. 409 del Código **[*592]** de Enjuiciamiento Civil no es aplicable a una clase determinada de documentos no podemos menos que exigirle a la Asamblea Legislativa una orden clara y terminante. Entendemos que esta afirmación descansa en el hecho de que el legislador realizó un balance previo entre los intereses en conflicto: por un lado, el acceso a información por un ciudadano y, por el otro, los interés del estado en que determinada información permanezca fuera del escrutinio público.Por ende, reiteramos lo expresado en*Efraín Santiago v. Maggie Bobb, 117 D.P.R. 153 (1986)* a los efectos de que el medio más efectivo para salvaguardar la información sensitiva recopilada por el Estado en su gestión oficial es mediante legislación especial.

[11]** No cabe duda que, con respecto a la información obtenida por la Oficina de Monopolios, el legislador dio una orden inequívoca de que permanecieran en estricta confidencialidad. A tales efectos, dispuso en el Artículo 15 de la Ley. Núm. 77,*supra*, que "…***HN9***[] [l]a información**obtenida** en el uso de las facultades otorgadas en esta

---

[1] En la jurisdicción federal este derecho ha sido incorporado mediante legislación federal con el fin de someter a escrutinio público las operaciones de las agencias federales.*Freedom of Information Act*,*5 U.S.C.A. 552* ss.

[2] De hecho,***HN8***[] en la legislación federal se establece como una de las excepciones a la divulgación, los casos en los que se dispone la confidencialidad por virtud de una ley. Freedom of Information Act,*supra*.

Además, es oportuno señalar que en uno de los intentos por legislar sobre acceso a información pública, proyecto del Senado Núm. 494 de 1973, se incluyó como excepción a la divulgación aquella materia dispuesta por orden ejecutiva o*mandato expreso de ley.* Efrén Rivera Ramos,*La Libertad de Información: Necesidad de su Reglamentación en Puerto Rico*,44 Rev. Jur. UPR 67 (1975) sección se mantendrá en estricta confidencialidad, excepto en tanto sea necesaria para usarla para fines de cualquier acción judicial por parte del estado."*10 L.P.R.A. § 271* (énfasis suplido)

No obstante, en nuestro ordenamiento la clara intención del legislador de mantener ciertos documentos bajo el palio de la confidencialidad no es suficiente. Así,***HN10***[] toda etiqueta legislativa de confidencialidad debe evaluarse frente al derecho de acceso a información invocado por el ciudadano.*Soto v. Giménez, supra.*En vista de que tal derecho es de carácter fundamental, la legislación debe someterse a un análisis de escrutinio estricto. Al mismo tiempo, debe ser interpretada restrictivamente a favor del acceso.En síntesis, toda ley que pretenda ocultar información a un ciudadano bajo el palio de la confidencialidad tiene que justificarse **[**12]** a plenitud. Ello se satisface si la legislación (1) cae dentro del poder constitucional del gobierno; (2) propulsa un interés gubernamental importante **[*593]** o sustancial; (3) el interés gubernamental no está relacionado con la supresión de la libre expresión; y (4) la restricción concomitante del derecho a la libre expresión no es mayor que la esencial para propulsar dicho interés.*Ortiz v. Bauemeister, supra*;*Angueira v. J.L.B.P, supra*;*Soto v. Giménez, supra.*Así pues, el Estado puede invocar el manto de secretividad en casos de imperativo interés público.*Id*.

Por tanto, debemos examinar si el interés del Estado en este caso es lo suficientemente apremiante para justificar la norma de confidencialidad dispuesta en la Ley Núm. 77,*supra*.

IV.

De una lectura de la exposición de motivos de la Ley Núm. 77 se desprende que su objetivo primordial fue evitar la concentración económica en un grupo reducido de personas[3]. En específico, se establece que "[e]s principio fundamental de la democracia puertorriqueña- como lo expresa la Constitución del Estado Libre Asociado de Puerto Rico- que la voluntad del pueblo es la fuente del poder público, **[**13]** concibiéndose el sistema democrático como aquel que asegura la libre participación del ciudadano en las decisiones colectivas.**No es compatible con esa aspiración democrática la concentración del poder económico en unas pocas personas y entidades**, en forma tal que éstas se coloquen en posición de dominar áreas o sectores de la economía puertorriqueña[…]" (Énfasis suplido).

[*594] Así, la Ley Núm. 77 se promulgó con el fin de "evitar la confabulación entre firmas para dominar el mercado, [el] **[**14]** acaparamiento de materias primas, [los] aumentos indebidos en los precios resultantes de una posición monopolística, [las] prácticas discriminatorias en las relaciones con clientes [y] la concentración extrema de la actividad económica y de la riqueza en algunos grandes consocios de empresas."[4]

A esos fines,***HN11***[] se delegó en la Oficina de Monopolios la labor de fiscalizar e investigar las prácticas monopolísticas. Mediante esa delegación, el legislador quiso dotar al Estado con los instrumentos investigativos necesarios para identificar y erradicar las violaciones a la Ley Núm. 77. No cabe duda que dichas facultades constituyen un componente fundamental en nuestra sociedad democrática, toda vez que la concentración del poder económico resulta en la concentración del poder político y social, lo que, indiscutiblemente, contradice la aspiración de un sistema en el que **[**15]** haya participación ciudadana en igualdad de condiciones. Así lo entendieron los propulsores de la Ley Núm. 77 al expresar que "el pueblo [tiene que asegurarse] de que no han de germinar en Puerto Rico[…] concentraciones de poder económico, para no correr el riesgo de que toda la vida económica del país pueda quedar a merced de un grupo reducido de personas que actúen movidas por su puro interés privado. Ante una situación de tal naturaleza, es difícil concebir que las decisiones colectivas vayan a tomarse verdaderamente a base de la libre participación de todos los ciudadanos."[5] **[*595]** Tomando en cuenta la

---

[3] El Tribunal Supremo de Estados Unidos, explicando los propósitos de la legislación federal análoga, expresó: "the Sherman Act[…]was a populist legislation which reacted to the increasing concentrations of economic power which followed on the heels of industrial revolution. The Sherman Act was the first legislation to deal with the problems of participation of small economic units in an economy increasingly dominated by economic titans."*National Broiler Marketing Ass'n v. U.S, 436 U.S. 816 (1978)*.

[4] Vistas Públicas de la Ley Núm. 77,*supra*, celebradas el 10 de marzo de 1964 sobre el P. de la C. 909, Monopolios, Pág. 2.

dimensión del problema que quiso resolver la Asamblea Legislativa mediante la aprobación de la Ley Núm. 77 y, además, considerando que se trata de un asunto que incide sobre los cimientos de nuestra sociedad democrática, entendemos que los propósitos que subyacen dicha legislación son de la más alta jerarquía y constituyen un interés apremiante del Estado.

[16]** En su comparecencia, el Estado aduce como fundamento para oponerse al reclamo de acceso a información que revelar la misma obstaculizaría las investigaciones futuras de la Oficina de Monopolios. Sostiene que tal conclusión se deriva del hecho de que las personas privadas, de ordinario, someten voluntariamente la información, que de otra manera no estaría accesible por ser en su mayoría privilegiada, bajo la expectativa de que se mantendrá en confidencia. Entendemos dicha preocupación.

Consideramos que al Estado le sería sumamente oneroso conseguir dicha información por otros medios. Sin la información que obtiene la Oficina de Monopolios como parte de una investigación, no se pueden lograr los objetivos de la Ley Núm. 77, los cuales -como mencionamos anteriormente- son de la más alta jerarquía. En otras palabras, un menoscabo a la facultad investigativa de la Oficina de Monopolios, como el contemplado en este caso, incide sobre el interés apremiante de evitar la concentración económica en nuestro país al no poder el Estado poner en vigor las disposiciones de la Ley Núm. 77 con la efectividad y rapidez que se requiere.

En adición, la confidencialidad se sostiene en atención a que **[**17]** la información obtenida contiene datos sensitivos sobre las prácticas y métodos de mercadeo de las personas privadas sujetas al poder de investigación de la Oficina de Monopolios que, como norma general, no está accesible al público. En otras palabras, dichas personas revelan sus secretos de negocio bajo la certeza de que se mantendrán en estricta confidencialidad. En*Fulana de Tal v. Demandado A,* ***[*596]*** *138 D.P.R. 610 (1995)* sostuvimos que***HN12***[] la preservación de secretos de negocio constituye un interés apremiante del Estado.Por ende, si permitimos el acceso a la información**obtenida** por la Oficina de Monopolios se vería menoscabado dicho interés.

En vista de lo anterior, el legislador ordenó mantener fuera del escrutinio público la información**obtenida** por la Oficina de Monopolios en el curso de una investigación. De una lectura del Art. 15,*supra*, surge que la confidencialidad establecida por virtud de dicha disposición se limita a la información que voluntariamente someten personas privadas a la Oficina de Monopolios bajo el palio de confidencialidad.

Ahora bien, en el expediente o informe producto de una investigación efectuada por la Oficina de Monopolios **[**18]** puede haber otro tipo de información, ya sea información proveniente de otras fuentes o información elaborada por la Oficina de Monopolios, que no está cobijada por la confidencialidad del Art. 15,*supra*, y es, por consiguiente, divulgable. Por "información elaborada" debe entenderse el producto o resultado de la investigación efectuada por la Oficina de Monopolios, como por ejemplo, las conclusiones, impresiones o interpretaciones hechas a partir de ella. Es decir, la información contenida en cualquier documento, en el expediente o informe que sea resultado de un análisis atribuible a la propia Oficina de Monopolios.

En vista de lo anterior, el Tribunal de Primera Instancia debe realizar un examen en cámara y en ausencia de las partes con el fin de determinar lo que puede estar sujeto a divulgación. Así, el tribunal permitirá la divulgación de toda información pertinente, no privilegiada y que no revele técnicas de investigación del Departamento de Justicia o la identidad de informantes. El tribunal tampoco divulgará la información que haya sido**obtenida** por la Oficina de Monopolios de personas privadas bajo el palio de confidencialidad. En el caso de que dicha información **[**19]** **[*597]** conste en el informe final o en el expediente producto de la investigación, el tribunal deberá tomar las

---

[5] Exposición de Motivos de la Ley Núm. 77, aprobada el 25 de junio de 1964. A modo de comparación, muchos tribunales federales han expresado que el propósito principal de la legislación federal de monopolios es preservar un sistema de libre mercado en donde haya igual oportunidad de participación ciudadana. Véase por ejemplo,*Glen Holly Entertainment, Inc. v. Tektronix Inc., 343 F.3d 1000 (2003)*;*El Aguila Food Products, Inc. v. Gruma Corp, 301 F. Supp. 2d 612 (2003)*;*U.S. v. Syufy Enterprises, 903 F.2d 659 (1990)*;*Wei v. Bodner, 127 F.R.D. 91 (1989)*;*O'Neill v. Coca-Cola Co., 669 F. Supp. 217 (1987)*;*Rosenberg v. Cleary, 598 F. Supp. 642 (1984)*.

medidas cautelares necesarias para salvaguardar la norma de confidencialidad que, como mencionamos anteriormente, contribuye a lograr los objetivos de la legislación anti-monopolística.

En conclusión, resolvemos que el objetivo que promueve*HN13*[] la Ley Núm. 77 constituye un interés apremiante capaz de sostener la norma de confidencialidad con respecto a la información**obtenida** de personas privadas durante una investigación efectuada por la Oficina de Monopolios.

V.

Por los fundamentos que anteceden, se modifica la Sentencia del Tribunal de Apelaciones a los fines de que al efectuar el examen en cámara, en ausencia de las partes, también se excluya la información obtenida de las personas privadas sujetas al poder de investigación de la Oficina de Monopolios. Se devuelve el caso al Tribunal de Primera Instancia para que continúe con los procedimientos de forma compatible con lo aquí resuelto.

Se dictará Sentencia de conformidad.

Federico Hernández Denton

Juez Presidente

SENTENCIA

San Juan, Puerto Rico, a 16 de marzo de 2007.

Por los fundamentos expuestos en la Opinión **[**20]** que antecede, la cual se hace formar parte íntegra de la presente, se modifica la Sentencia del Tribunal de Apelaciones a los fines de que al efectuar el examen en cámara, en ausencia de las partes, también se excluya la información obtenida de las personas privadas sujetas al poder de investigación de la Oficina de Monopolios. Se devuelve el caso al Tribunal de Primera Instancia para que continúe con los procedimientos de forma compatible con lo aquí resuelto.

Así lo pronunció, manda el Tribunal y certifica la Secretaria del Tribunal Supremo. El Juez Asociado señor Rebollo López no intervino. La Jueza Asociada señora Rodríguez Rodríguez inhibida.

Aida Ileana Oquendo Graulau

Secretaria del Tribunal Supremo

Kinderstart.com, LLC v. Google, Inc.

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

March 16, 2007, Decided ; March 16, 2007, Filed

Case Number C 06-2057 JF (RS)

Reporter
2007 U.S. Dist. LEXIS 22637 *; 2007 WL 831811

KINDERSTART.COM, LLC, a California limited liability company, on behalf of itself and all others similarly situated, Plaintiffs, v. GOOGLE, INC., a Delaware corporation, Defendant.

Notice: [*1] NOT FOR CITATION

Prior History: *KinderStart.com, LLC v. Google Inc., 2007 U.S. Dist. LEXIS 22648 (N.D. Cal., Mar. 16, 2007)*

Disposition: Defendant's motion to dismiss granted without leave to amend. Defendant's motion to strike claim #4 granted, and motion to strike second amended complaint denied as moot.

Core Terms

alleges, website, monopolization, search engine, advertising, user, relevant market, Internet, motion to dismiss, antitrust, leave to amend, public forum, anticompetitive, competitors', sites, argues, unfair, state action, asserts, public interest, Blockage, termination, purposes, Web, Sherman Act, manipulation, exclusionary, anti-SLAPP, defamation, Deflation

Counsel: For Kinderstart.Com, LLC, a California limited liability company, on behalf of itself and all others similarly situated, Plaintiff: Gregory John Yu, LEAD ATTORNEY, Global Law Group, San Mateo, CA.

For Google, Inc., a Delaware corporation, Defendant: David H. Kramer, LEAD ATTORNEY, Bart Edward Volkmer, Esq., Colleen Bal, Wilson Sonsini Goodrich & Rosati, Palo Alto, CA.

Judges: JEREMY FOGEL, United States District Judge.

Opinion by: JEREMY FOGEL

Opinion

ORDER [1] GRANTING MOTION TO DISMISS WITHOUT LEAVE TO AMEND, DENYING SPECIAL MOTION PURSUANT TO CAL. CIV. CODE § 425.16, AND DENYING MOTION TO STRIKE AS MOOT

[re: docket nos. 16, 49, 51, 52, 54, 59]

Defendant Google, Inc. ("Google") moves to dismiss the Second Amended Complaint ("SAC") of Plaintiff KinderStart.com, LLC ("KinderStart"), pursuant to *Rules 12(b)(1)* and *12(b)(6) of the Federal Rules of Civil*

[1] This disposition is not designated for publication and may not be cited.

Procedure. [2] Google also moves **[*2]** specially to strike the fourth claim of the SAC pursuant to California's "anti-SLAPP" statute, *Cal. Code Civ. Pro. § 425.16*. Finally, Google moves to strike the entire SAC for perceived structural insufficiencies or, alternatively, to strike KinderStart's third claim as improperly filed. [3] KinderStart opposes the motions. The Court heard oral argument on October 27, 2006.

For the reasons set forth below, the Court will grant the motion to dismiss without leave to amend and will deny the "anti-SLAPP" motion. The motion to strike will **[*3]** be denied as moot.

I. BACKGROUND

1. Procedural Background

On March 17, 2006, KinderStart filed the instant action on behalf of itself and others similarly situated. On April 12, 2006, KinderStart filed a First Amended Complaint ("FAC"), alleging nine claims for relief: (1) violation of the right to free speech under the United States and California Constitutions; (2) attempted monopolization in violation of the Sherman Act; (3) monopolization in violation of the Sherman Act; (4) violations of the Communications Act, *47 U.S.C. §§ 201, et seq.;* (5) unfair competition under *California Business and Professions Code §§ 17200, et seq.;* (6) unfair practices under *California Business and Professions Code § 17045*; (7) breach of the implied covenant of good faith and fair dealing; (8) defamation and libel; and (9) negligent interference with prospective economic advantage. The Court dismissed the FAC with leave to amend in an order dated July 13, 2006 ("July 13th Order"). KinderStart filed the operative SAC on September 1, 2006, asserting six claims for relief: (1) attempted monopolization **[*4]** in violation of the Sherman Act; (2) monopolization in violation of the Sherman Act; (3) false representations in violation of the Lanham Act; (4) violation of free speech rights under the United States and California Constitutions; (5) unfair competition in violation of *California Business and Professions Code §§ 17200 et seq.*; and (6) defamation and libel.

2. Factual Allegations of the Second Amended Complaint

KinderStart alleges the following facts, which are presumed to be true for the purpose of the motion to dismiss. KinderStart operates a website, *www.KinderStart.com*, which is a directory and search engine for links to information and resources on subjects related to young children. At one point, KinderStart was "one of the choicest Internet destinations for thousands of parents, caregivers, educators, nonprofit and advocacy representatives, and federal, state and local organizations and officials in the United States and worldwide to access health, education and other vital information about infants and toddlers." SAC P 28. It launched in May 2000 and monthly page views by visitors "reached approximately 10,000,000 by 2005." *Id.* **[*5]** P 31.

Google is the world's most widely used search engine. *Id.* P 2. It is "the dominant actor in the world of searching all forms of text, Web and image content on the Internet." *Id.* P 33. It "invites anyone with an Internet connection worldwide to perform searches for Websites and Webpages" and presents results of its searches on a results page. *Id.* P 3. It "induces an entire generation of users, the public, and the cyberspace community at large to expect and believe that Search Results generated from a search every single time will be (a) objective and neutral, (b) untrammeled by human intervention or preference and (d) [sic] accompanied by a disclosure of every incidence of removal of Websites from appearing in Search Results." *Id.* P 129. Google states on its "Technology Overview" page: "There is no human involvement or manipulation of results, which is why users have come to trust Google as

---

[2] Unless otherwise indicated, references to Rules hereinafter will refer to the Federal Rules of Civil Procedure.

[3] The Court will refer to the three motions respectively as: "motion to dismiss;" "'anti-SLAPP' motion;" and "motion to strike."

KinderStart has moved for administrative relief relating to a minor delay in the submission of its opposition to the "anti-SLAPP" motion and motion to strike. The Court will grant this relief to the extent that it is not already moot.

a source of objective information untainted by paid placement." *Id.* P 116. Google represents on its website "that removal of Websites and Web Content from Google's index is not done except (a) upon request of the webmaster of the website, (b) in the case of 'spamming **[*6]** the index,' or (c) as required by law." *Id.* P 87.

Google offers a system for rating the usefulness of websites known as PageRank. According to the SAC, "[a]t one time, PageRank in its nascent form was an automated, computer algorithm to calculate and measure the extent and nature of hyperlinking within the Internet to a particular Website and its web pages. After PageRank was licensed from Stanford University, Defendant developed a system of converting the actual mathematical result into a whole number score from '1' up to '10'." *Id.* P 142. PageRank now appears on the Google Toolbar that web users may download for free. *Id.* P 78, 140. Google explains: "'Wondering whether a new website is worth your time? Use the Toolbar's format PageRank TM display to tell you how Google's algorithms assess the importance of the page you're viewing.'" *Id.* P 140. KinderStart alleges that "PageRank is not a mere statement of opinion of the innate value or human appeal of a given Website," but instead is "a mathematically-generated product of measuring and assessing the quantity and depth of all the hyperlinks on the Web that tie into a PageRanked Website, under programmatic determination **[*7]** by Defendant Google." *Id.* P 141. "PageRank as promulgated and propagated by Defendant Google throughout the Internet, is now the *de facto* and prevailing standard for rating Websites throughout the United States." *Id.* P 46.

Google also has commenced programs to make digital copies and archives of university libraries and "with the Library of Congress as financial partner, is creating a digital, searchable archive of published books, larger than nearly any library of written and published materials in the world." *Id.* P 111. "The incremental flow of revenues from Defendant Google shared and split with its library partners as state institutions, allow them to overcome their otherwise adverse shortfalls in funding and revenues." *Id.* P 113. "These financial inflows from the Google partnerships make such institutions financially entwined and dependent upon Defendant." *Id.*

KinderStart enrolled in Google's AdSense Program in 2003, and paid for a series of sponsored links from Google. *Id.* P 32. In or about August 2003, KinderStart began placing advertisements from the Google Network onto its site and receiving payments from Google for these placements. *Id.* On **[*8]** March 19, 2005, KinderStart's website "suffered a cataclysmic fall of 70% or more in its monthly page views and traffic." *Id.* P 174. KinderStart eventually "realized that common key word searches on Defendant Google's search engine no longer listed KSC.com as a result with any of its past visibility." *Id.* With this drop in search engine referrals, KinderStart's "monthly AdSense revenue suffered an equally precipitous fall by over 80%." *Id.* P 175. KinderStart's website "was officially, practically and illegally Blocked by Defendant Google." *Id.* P 176. KinderStart was not notified in advance that this would occur and has not been instructed how it can cause Google to cease the "Blockage." *Id.* P 178. To the best of its knowledge, KinderStart has never violated Google's Web Recommendations and Google has not notified KinderStart of any such violation. *Id.* P 184. KinderStart's website was given a PageRank of "0" until April 7, 2006, after which time it was raised to "7," before being dropped to "0" again on or about July 13, 2006. *Id.* P 186.

Google "artificially manipulates and deflates PageRanks downward of Websites . . . based on events, factors, impression **[*9]** and opinions having no correlation, relation or connection to the parameters, variables and factors that are naturally and normally utilized for the PageRank algorithm as managed and executed solely within the control and management of Defendant." *Id.* P 272. Google engages in the practice of "Blockage" of websites by "delisting, de-indexing and censoring" websites, including the unacknowledged practice of isolating a website from search queries, either permanently or for an unspecified probationary period. *Id.* PP 11, 154. "Blockage and/or PageRank Deflation [] occur in Search Results or Webpage views based on discriminatory political or religious content or vague and/or overbroad content guidelines." *Id.* P 100. [4] "It has been and continues to be, difficult if not impossible . . . to move [a] Website out of the probationary or permanent Blockage by calling, e-mailing or otherwise notifying Defendant Google, and there is no process to get a report of whether or why a Website might have been

[4] Google denies most, if not all, the allegations made against it by KinderStart, but denies with particular vehemence the allegation of its possession of discriminatory political or religious views. These allegations are one subject of a motion for *Rule 11* sanctions against KinderStart and its counsel, *see* Motion for Sanctions 5, which motion is addressed in a separate order filed concurrently herewith.

penalized and thereby Blocked." *Id.* P 156. Although Google initially denied engaging in "Blockage," it has admitted engaging in the "euphemistically" named practices of "'search **[*10]** quality improvement' or anti-Webspamming." *Id.* P 157. The practice of "Blockage" has been positively correlated with "the failure and/or the reduction in AdWords advertising" on multiple occasions. *Id.* P 170.

KinderStart believes that "over 1000 other sites of California and nationwide Websites that participated in AdSense suffered a loss of traffic and referrals as a result of Blockage by Defendant Google." *Id.* P 177. KinderStart also claims that Google has interfered with KinderStart's *First Amendment* rights, *see e.g. id.* P 257, and "has engaged in predatory conduct and anticompetitive **[*11]** conduct directed toward achieving the objective of controlling prices and/or destroying competition." *Id.* P 209. KinderStart asserts that the Google search engine is "an essential facility for the marketing and financial viability of effective competition in creating, offering and delivering services for search over the Internet." *Id.* P 219. Although MSN and Yahoo! also operate in the search engine market, they are losing market share. *Id.* P 48.

II. LEGAL STANDARD

For purposes of a motion to dismiss, the plaintiff's allegations are taken as true, and the Court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969)*. Leave to amend must be granted unless it is clear that the complaint's deficiencies cannot be cured by amendment. *Lucas v. Department of Corrections, 66 F.3d 245, 248 (9th Cir. 1995)*. When amendment would be futile, dismissal may be ordered with prejudice. *Dumas v. Kipp, 90 F.3d 386, 393 (9th Cir. 1996)*.

On a motion to dismiss, the Court's review is limited to the face of the complaint and matters judicially noticeable. *North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983)*; **[*12]** *MGIC Indemnity Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986)*; *Beliveau v. Caras, 873 F.Supp. 1393, 1395 (C.D. Cal. 1995)*. However, under the "incorporation by reference" doctrine, the Court also may consider documents that are referenced extensively in the complaint and accepted by all parties as authentic, even if they are not physically attached to the complaint. *In re Silicon Graphics, Inc. Securities Litigation, 183 F.3d 970 (9th Cir. 1999)*. "Under the 'incorporation by reference' rule of this Circuit, a court may look beyond the pleadings without converting the *Rule 12(b)(6)* motion into one for summary judgment." *Van Buskirk v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002)*.

III. DISCUSSION

1. Motion to Dismiss

a. Claim I: Attempted Monopolization in Violation of the Sherman Act

KinderStart's first claim alleges attempted monopolization in two markets under Section 2 of the Sherman Act, *15 U.S.C. § 2*. SAC PP 207-08. KinderStart identifies these two markets as: (1) the "Search Market," which consists of search engine design, implementation, and usage **[*13]** within the United States; SAC P 34; and (2) the "Search Ad Market," which consists of a "universe of advertisers who seek and pay for online advertising [and who] target and reach Internet browsers and users of search engines." SAC P 38. Google allegedly participates in the Search Ad Market through the AdWords and AdSense programs, *id.,* and derives at least ninety-eight percent of its total company revenue from search-related advertising. SAC P 43.

In order to make out a claim for attempted monopolization, a plaintiff must define the relevant market. *Forsyth v. Humana, Inc., 114 F.3d 1467, 1476 (9th Cir. 1997)*. The relevant market is "the field in which meaningful competition is said to exist." *Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202 (9th Cir. 1997)*. To prevail on such a claim, a plaintiff must demonstrate four elements: (1) specific intent to control prices or destroy competition, (2) predatory or anticompetitive conduct directed toward accomplishing that purpose, (3) a dangerous probability of success and (4) causal antitrust injury. *Forsyth, 114 F.3d at 1477*.

The Court concluded in its July **[*14]** 13th Order that KinderStart had failed to allege facts sufficient to support each of the four elements of an attempted monopolization claim. The Court also noted that KinderStart had not sufficiently described the markets relevant to its claim. The SAC suffers from essentially the same defects. To the extent that the Search Ad Market is severable from the Search Market, KinderStart does not have standing to bring a claim for attempted monopolization of the Search Ad market.

i. Relevant Market

Failure to allege adequately the relevant market is an appropriate ground for dismissal of a Sherman Act claim. *Tanaka v. University of Southern California, 252 F.3d 1059, 1063 (9th Cir. 2001)*. "A 'market' is any grouping of sales whose sellers, if unified by a monopolist or a hypothetical cartel, would have market power in dealing with any group of buyers." *Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995)*. The Supreme Court has explained that the relevant market for antitrust purposes is determined by the choices available to consumers. *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 481-82, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992).* **[*15]** In some instances, one brand of a product can constitute a separate market. *Id.* "The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." *Tanaka, 252 F.3d at 1063*. The allegations of the SAC are insufficient to meet this standard.

KinderStart has failed to allege that the Search Market is a "grouping of sales." It does not claim that Google sells its search services, or that any other search provider does so. Rather, it states conclusorily that "[a]ny search engine must be free to the user because of past user experience and expectations with search engines and due to the preexisting governmental and technological policy of Internet freedom and Internet neutrality." SAC P 54. KinderStart cites no authority indicating that ***antitrust law*** concerns itself with competition in the provision of free services. Providing search functionality may lead to revenue from other sources, but KinderStart has not alleged that anyone pays Google to search. Thus, the Search Market is not a "market" for purposes of ***antitrust law***.

Nor has KinderStart alleged adequately that the Search Ad Market is a **[*16]** relevant market. KinderStart argues that the Search Ad Market is distinct from other forms of advertising on the Internet and that it should be considered as such for purposes of antitrust analysis. However, there is no logical basis for distinguishing the Search Ad Market from the larger market for Internet advertising. Because a website may choose to advertise via search-based advertising or by posting advertisements independently of any search, search-based advertising is reasonably interchangeable with other forms of Internet advertising. The Search Ad Market thus is too narrow to constitute a relevant market.

KinderStart might have argued that the Search Market and the Search Ad Market combine to form one market for antitrust purposes. However, such a combined market, even if alleged, would suffer from the same lack of breadth that renders the Search Ad Market inadequate.

ii. Elements of Attempted Monopolization of the Search Market and the Search Ad Market

Because KinderStart has failed to plead a relevant market, its attempted monopolization claim is subject to dismissal. Its repeated failure to plead a relevant market, *see* July 13th Order 12, n.2, suggests strongly that **[*17]** further leave to amend the complaint would be futile. However, in order to inform the exercise of its discretion, the Court also has assessed the elements of attempted monopolization as currently pled. Based on this assessment, the Court concludes that further leave to amend is not warranted.

(1) Specific Intent to Monopolize

KinderStart argues that Google's conduct alone demonstrates the requisite intent to monopolize, pointing to the Supreme Court's dictum that "evidence that the conduct was not related to any apparent efficiency" can satisfy the requirement that an antitrust Plaintiff show predatory intent. Opposition to Motion to Dismiss 13 (citing *Aspen Skiing*

Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608 n.39, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)). [5] KinderStart makes three basic allegations regarding decisions allegedly made by Google that are not related to any apparent efficiency.

[*18] First, KinderStart alleges that Google removed from its index sites that it "unfairly and arbitrarily deemed [] in its sole discretion to be spam or marginal viewer content, . . . in order to redirect users and valuable search traffic to sites competing against such Websites." SAC P 63(a). However, it does not allege that Google engaged in this activity with an intent to gain a monopoly. It does not claim that such arbitrary conduct was part of an effort to drive KinderStart, an alleged competitor, out of the Search Market. Instead, KinderStart alleges that such arbitrary conduct pertained to an effort to direct traffic to *third-party* sites that competed with KinderStart. Nothing in the allegation refers to KinderStart's competition with Google.

Second, KinderStart alleges that Google terminated "the AdSense contracts of competitors as Class members relying upon internal and/or disclosed reasons on pretense and not related to economic sense or business justification." SAC P 62(c). It does not allege, however, that Google terminated its AdSense contract. Any injury thus was suffered by unnamed class members, not by KinderStart. Article III requires that a plaintiff identify **[*19]** a concrete injury-in-fact. *Whitmore v. Arkansas, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1991)*. If KinderStart can allege no injury to itself, it cannot achieve standing by alleging the injury of unnamed class-members. *Lierboe v. State Farm Mut. Auto. Ins. Co., 350 F.3d 1018, 1022-23 (9th Cir. 2003)*. Because KinderStart does not have standing to bring a claim for termination of an AdSense contract, the Court may not consider such alleged contract terminations in determining whether KinderStart has alleged the requisite intent for an attempted monopolization claim.

Third, KinderStart alleges that:

> Google foregoes short-term profits by completely or effectively Blocking traffic out of Blocked sites of members of the Class which host AdSense ads, which thereby reduce Google's revenue from AdSense advertisers which would otherwise pay Google which in turn shares such revenues with AdSense hosting sites. On information and belief, Google is unable to produce any legitimate economic or business justification to unilaterally terminate the course of dealing with members of the Classes which used to be listed in the Google index but was [sic] completely or effectively **[*20]** Blocked. It is contrary to business or economic sense because the inclusion of Websites of such aggrieved Class members would otherwise yield greater search results and user traffic using the Engine, which thereby generates more AdSense revenue for both Websites and for Google.

SAC P 172. This allegation does not establish predatory intent because, as the Court explained in its July 13th Order, "KinderStart's allegations that Google removed KinderStart from search results and lowered its PageRank do not suffice to allege predatory conduct as opposed to legitimate competitive actions." July 13th Order 12.

Even assuming that KinderStart has alleged arbitrary actions that are unrelated to business efficiency, the alleged actions do not demonstrate Google's intent to monopolize the Search Market or the Search Ad Market. This pleading deficiency has persisted despite the specific direction given by the Court in its July 13th Order.

(2) Anti-Competitive Conduct

KinderStart makes extensive allegations in the SAC that it identifies as relating to "anticompetitive and exclusionary practices and conduct." *See* SAC PP 58-64. KinderStart also includes a section in the SAC entitled **[*21]** "Defendant as an Unfair Competitor," in which it makes a series of further allegations. SAC PP 65-82. KinderStart summarizes these allegations as follows:

> Defendant Google has engaged in predatory conduct and anticompetitive conduct directed toward achieving the objective of controlling prices and/or destroying competition in the relevant markets of the Search Market

---

[5] This footnote references an antitrust textbook in which the author discusses situations in which the alleged antitrust violator has "overwhelming market [share], perhaps 80 or 90 percent."

> and the Search Ad Market, including the following: (a) PageRank Deflation of competitors' Websites; (b) filing misleading statements with the SEC and state securities regulatory agencies about Search Results being produced and presented for viewing; (c) Blockage of competitors' Websites; (d) unfair and uncompetitive use of the PageRank patent in promoting and practicing it as the *de facto* standard on the Internet to degrade competitors' Websites, and/or failure to practice the PageRank patent in the disclosed preferred embodiment in a lawful manner; (e) claiming disclosure of PageRank processes and calculations as a trade secret to further advance its integrity and reliability when in fact its use and publication serves in certain instances as a weapon and pretense for unfair conduct and practices; (f) false **[*22]** advertising about the purported objectivity of Search Results with the Engine; (g) willful termination and reduction of Search Engine referrals and revenues to competitors' Websites by means of PageRank Deflation or termination of AdSense contracts without business justification; and (h) sudden, sharp price escalation of AdWords Advertisements with the use of LPQ [Landing Page Quality] and price discrimination among AdWords partners with the use of LPQ.

SAC P 209. The Court concludes that these allegations do not state a claim for actionable exclusionary or anti-competitive conduct, either individually or collectively.

(a) PageRank Deflation and Blockage of Competitors' Websites

The Court previously has explained that "KinderStart's allegations that Google removed KinderStart from search results and lowered its PageRank do not suffice to allege predatory conduct as opposed to legitimate competitive actions." July 13th Order 12. KinderStart has not articulated a reason for the Court to alter this decision.

(b) Filing Misleading Statements with the SEC and False Advertising About the Objectivity of Search Results

KinderStart asserts that allegations of false advertising **[*23]** and false statements to the SEC establish a claim of anticompetitive or exclusionary conduct. However, it cites no authority indicating that the statements made to the SEC have special relevance to the antitrust inquiry. Accordingly, the Court assesses Google's alleged misrepresentations to the SEC in conjunction with KinderStart's allegations of false advertising as to the objectivity of Google's search engine, search results, and PageRanks.

The parties agree that KinderStart must allege facts that would overcome the presumption that any misrepresentation had a *de minimus* effect on competition. *See* *American Prof'l Testing Service, Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publ'n, Inc., 108 F.3d 1147, 1152 (9th Cir. 1997)*. To meet this pleading burden, KinderStart must allege that the representations were (1) clearly false; (2) clearly material; (3) clearly likely to induce reasonable reliance; (4) made to buyers without knowledge of the subject matter; (5) continued for prolonged periods; and (6) not readily susceptible to neutralization or other offset by rivals. *Id.* The SAC fails to meet at least two of these requirements. Principally, KinderStart **[*24]** fails to allege adequately that Google's representations are "clearly false." A statement by Google to the effect that its results are objective almost by definition cannot be "clearly false." Although Google has published information about manual manipulation of search results, *see* SAC P 153, a reasonable person could understand that such a statement is not in conflict with the limited, manual removal of what Google considers bad links, or other such practices. In fact, Google's statements about objectivity are more reasonably understood to pertain to Google's stated refusal to alter search results for compensation. *See* SAC P 121 (citing Google's S-1 Form, filed on April 29, 2004). In addition, KinderStart has not sufficiently alleged that Google deprived it of the ability to neutralize such statements or that it was otherwise unable to do so. [6]

[*25] Even viewing KinderStart's allegations in the light most favorable to KinderStart, any anticompetitive effect of Google's alleged false representations thus was *de minimus.* Moreover, KinderStart's allegations about false advertising lack the specificity and detail necessary to support a claim of anticompetitive or exclusionary conduct.

(c) Unfair and Uncompetitive Use of the PageRank Patent

---

[6] The Court expresses no opinion as to the adequacy of KinderStart's pleading of the other four requirements for overcoming the *de minimus* presumption.

KinderStart argues that Google's patent and copyrights cannot shield it from liability. Opposition to Motion to Dismiss 14. However, it alleges no facts indicating that Google used its patent in an anticompetitive manner. Instead, it merely restates its prior conclusory assertions that Google has behaved in an anti-competitive manner. As discussed above, these assertions are insufficient to state a claim for attempted monopolization.

(d) Claiming PageRank Processes and Calculations as a Trade Secret

KinderStart cites no authority holding that a company's claim of trade secret protection for the processes and calculations of a central aspect of the service it provides may constitute anticompetitive or exclusionary behavior. KinderStart does not argue this point in its opposition to the motion **[*26]** to dismiss.

(e) Termination of Search Engine Referrals and Revenues

KinderStart alleges conclusorily that Google willfully terminated and reduced Search Engine referrals and revenues to competitors' Websites by means of PageRank Deflation or termination of AdSense contracts without business justification. SAC P 209(g). It does not allege, however, that Google breached its AdSense contract *with KinderStart.* For the reasons discussed in the July 13th Order, PageRank Deflation does not amount to anticompetitive or exclusionary conduct. *See* July 13th Order 12. Because it does not allege a breach of its own contract with Google, KinderStart lacks standing to bring the latter claim.

(f) Price Manipulation

KinderStart claims that Google uses its LPQ website ranking system to charge exorbitant prices and also to discriminate among purchasers. This assertion is insufficient to support a claim of anticompetitive or exclusionary conduct for at least four reasons. First, because it does not allege an injury to itself as a result of the alleged conduct, KinderStart lacks standing to assert this claim. Second, charging high prices, by itself, does not constitute anticompetitive or exclusionary **[*27]** behavior. *See* *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. Third, absent predatory pricing, discriminatory pricing does not threaten competition. *See* *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. Finally, KinderStart fails to allege the nature of Google's anticompetitive conduct with any specificity. [7]

For the foregoing reasons, each of KinderStart's allegations is insufficient to establish anticompetitive or exclusionary conduct. The Court noted in order dismissing the FAC that KinderStart had failed to "allege facts sufficient to support a claim of anti-competitive conduct, such as denial of access to an essential facility or refusal-to-deal." July 13th Order 12. Despite the Court's clear direction in the July 13th Order, KinderStart still has **[*28]** failed to allege an adequate factual basis for its claim. [8]

(3) Dangerous Probability of Achievement of Monopoly Power in the Relevant Market

KinderStart alleges that Google has a dominant market share in both the Search Market and the Search Ad Market:

> [A]s of July 2006, Defendant Google has garnered in excess of 55% market share of all closed and open access search engine use on a combined basis within the Search Market and in excess of 75% market share of all open access search engine use within the Search Market.

SAC P 36.

> Within the Search Ad Market, Defendant Google carries a market share of at least 75% of the relevant market based on total revenues among advertisers in the U.S., in which Google's AdWords and AdSense programs dominate.

SAC P 39.

---

[7] The only specific allegation about Google's pricing policy or conduct relates to its creation of an auction system to allow advertisers to bid to place their advertisements. SAC P 64(a).

[8] KinderStart makes conclusory allegations that Google has denied access to an essential facility, SAC PP 219-21, and has refused to deal, SAC P 227, but it makes insufficient factual allegations to support such claims.

> In **[*29]** each of the Search Market and the Search Ad Market, Defendant Google has established and retains no less than 50% market share of the relevant markets. Such market shares demonstrate that Google has a dangerous probability of success in monopolization of such markets.

SAC P 211. [9] However, "[a] mere showing of substantial or even dominant market share alone cannot establish market power sufficient to carry out a predatory scheme. The plaintiff must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output to challenge the predator's high price." *American Professional Testing Service, 108 F.3d at 1154*. KinderStart alleges that Google's two largest competitors, Yahoo and Microsoft, are losing share of the relevant markets; SAC P 48; that massive investment requirements and entrenched buyer preferences create significant barriers to entry to the relevant markets; SAC P 53-54; and that Google's wealth of user data gives them great advantages over any new online advertising program or search engine. SAC P 57. Given these allegations, the Court concludes that, were KinderStart able to identify **[*30]** a relevant market for antitrust purposes, it might be able to allege a dangerous probability of achievement of monopoly power. However, because KinderStart is unable to allege other essential elements of its claim, the Court need not resolve this question.

(4) Causal Antitrust Injury

Because KinderStart brings suit under Section 4 of the Clayton Act, *15 U.S.C. § 15*, it must allege causal antitrust injury. *Rebel Oil Co, 51 F.3d at 1433*. The *Rebel Oil* court explained:

> Under **[*31]** Section 4, private plaintiffs can be compensated only for injuries that the antitrust laws were intended to prevent. To show antitrust injury, a plaintiff must prove that his loss flows from an anticompetitive aspect or effect of the defendant's behavior, since it is inimical to the antitrust laws to award damages for losses stemming from acts that do not hurt competition. If the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant's conduct is illegal *per se.*

Id. (citations omitted) (citing *Atlantic Richfield Co. v. USA Petroleum, Inc., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990))*. The court added: "Of course, conduct that eliminates rivals reduces competition. But reduction of competition does not invoke the Sherman Act until it harms consumer welfare." *Id.* This Court concludes, as it did in dismissing the FAC, *see* July 13th Order 12, that KinderStart still has not alleged a sufficient connection between the harms allegedly done to it by Google through PageRank and Blockage [10] and any harm to competition or consumers.

[*32] Because KinderStart has failed, despite several opportunities to do so and specific direction from the Court, to identify a relevant market for antitrust purposes, or to allege specific intent to monopolize, anticompetitive conduct, or causal antitrust injury, the Court concludes that further leave to amend the complaint would be futile. Accordingly, the attempted monopolization claim will be dismissed without leave to amend.

b. Claim II: Monopolization in Violation of the Sherman Act

KinderStart next asserts a claim for monopolization under Section 2 of the Sherman Act, *15 U.S.C. § 2*, the elements of which are: (1) possession of monopoly power in the relevant submarket, (2) willful acquisition or maintenance of that power, and (3) causal antitrust injury. *Forsyth, 114 F.3d at 1475*. As with attempted monopolization, a plaintiff claiming monopolization first must define the relevant market. *Id.* KinderStart alleges monopolization of two markets: the Search Market and the Search Ad Market. As discussed above, KinderStart

---

[9] *See also* SAC P 37 ("When AOL's market share based on the Engine in the Search Market is combined with Google's native market share derived from its own website, the Engine of Google is used in excess of 60% of all search queries among users within the Search Market in the U.S."); SAC P 41 ("Dangerous probability of success in monopolizing the two relevant and related markets exists because Google' [sic] market shares is steadily rising and is in each market upward of 60% or more.").

[10] In contrast, KinderStart does not have standing to complain of harms done to third parties.

would not have standing to assert a claim for monopolization of the Search Ad Market, even if it could distinguish that **[*33]** market from the Search Market.

i. Relevant Market

KinderStart alleges the same relevant markets as it did in its claim for attempted monopolization. For the reasons discussed previously, the Court concludes that KinderStart has failed to allege a relevant market for the purposes of its monopolization claim. As discussed above, KinderStart's repeated failure to allege a relevant market supports dismissal without leave to amend. In the interest of completeness, the Court nonetheless will address the adequacy of KinderStart's pleading with respect to the remaining elements of the monopolization claim.

ii. Elements of a Monopolization Claim

(1) Possession of Monopoly Power

KinderStart alleges that Google has monopoly power over the Search Market and the Search Ad Market, of which it controls 50% and 65%, respectively. SAC PP 216-17. The Supreme Court has explained that monopoly power exists where a company has the power to control prices or exclude competition. *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. Although it argues in its opposition brief that Google has such power, Opposition to Motion to Dismiss 15, KinderStart does not identify **[*34]** any allegations to that effect in the SAC.

KinderStart does allege that Google has control over an essential facility within the market. SAC P 219-21. The Court explained in the July 13th Order that a facility is "essential" only if control of the facility carries with it the power to eliminate competition in the downstream market. July 13th Order 14 (citing *Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 544 (9th Cir. 1991)*; *see also* *id. at 546* ("When a firm's power to exclude rivals from a facility gives the firm the power to eliminate competition in a market downstream from the facility, and the firm excludes at least some of its competitors, the danger that the firm will monopolize the downstream market is clear. In this circumstance, a finding of monopolization, or at least attempted monopolization, is appropriate, and there is little need to engage in the usual lengthy analysis of factors such as intent."). However, while KinderStart claims in its opposition brief that Google has the power to eliminate competition in the downstream market, it does not allege facts supporting its argument in the SAC. [11]

[*35] KinderStart also argues that Google has violated *Section 2* under the "refusal to deal" doctrine as set forth in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*. [12] The Court rejected this argument in its dismissal of the FAC, and KinderStart has made no additional factual allegations that would affect the Court's analysis. July 13th Order 14-15.

(2) Willful Acquisition or Maintenance of that Power

KinderStart alleges that Google willfully acquired and maintained its monopoly power. SAC PP 218, 223-24, 232-33. Google does not argue the insufficiency of these allegations in its motion or reply.

(3) Causal Antitrust Injury

---

[11] The most relevant allegation in the SAC asserts: "Defendant, through the maintenance, exercise and abuse of monopoly power, have [sic] forced Class I and Class II Plaintiffs to either surrender their business or to expend time and resources to find another means to secure Web traffic and reach and serve consumers." SAC P 229. To the extent that Plaintiffs may still "expend time and resources to find another means to secure Web traffic and reach and serve consumers," Google does not have the power to eliminate downstream competition. Google has no obligation to aid its alleged competitors, and the Court cannot relieve these alleged competitors of the effort required to compete in an apparently lucrative market.

[12] KinderStart makes this argument following its discussion of Google's alleged monopoly power. To the extent that it contributes to KinderStart's overall claims for attempted monopolization and monopolization, it provides no support for other parts of KinderStart's argument, such as its argument that Google engaged in exclusionary conduct.

KinderStart's **[*36]** pleading burden with respect to a causal antitrust injury in a monopolization claim is the same as it is with respect to an attempted monopolization claim. As discussed above, the Court concludes that even if KinderStart could allege a relevant market, its showing of antitrust injury is insufficient.

c. Claim III: False Representations in Violation of the Lanham Act

KinderStart next asserts a claim for false representations in violation of the Lanham Act. Google moves to strike this claim on the ground that it is beyond the scope of amendments permitted by the July 13th Order. Motion to Strike 6-8. [13] The July 13th Order neither expressly permitted or prohibited KinderStart from adding claims arising from the facts alleged in the FAC. While it would have been better practice for KinderStart to seek leave to add such additional claims, the Court is not required to strike such claims out of hand. Instead, the Court will exercise its discretion and assess the strength of the claim as it currently stands, in order to determine whether it should permit further amendment of the SAC.

[*37] The relevant section of the Lanham Act provides as follows:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which-- . . .
>
> > (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a).

Google argues that KinderStart lacks standing to bring an action under the Lanham Act on the basis of Google's alleged misrepresentations about the objectivity of its search results. To establish standing pursuant to the false advertising prong of the Lanham Act, *15 U.S.C. § 1125(a)(1)(B)*, a plaintiff must show: "(1) a commercial injury based upon a misrepresentation about a product; and (2) that the **[*38]** injury is 'competitive,' or harmful to the plaintiff's ability to compete with the defendant." *Jack Russell Terrier Network of Northern Ca. v. American Kennel Club, 407 F.3d 1027, 1037 (9th Cir. 2005)*. KinderStart does not allege an injury to itself from the misrepresentation as such; rather it alleges that is has been injured by Google's alleged manipulation of its allegedly objective search results. KinderStart thus lacks standing to bring a "blockage" claim under the false advertising prong of the Lanham Act.

Moreover, KinderStart has no cognizable claim relating to PageRank, because any misrepresentations made through PageRank are not made "in commercial advertising and promotion." The Ninth Circuit has held that "[w]hile the representations need not be made in a 'classic advertising campaign,' but may consist instead of more informal types of 'promotion,' the representations [] must be disseminated sufficiently to the relevant purchasing public to constituted 'advertising' or 'promotion' within that industry." *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 735 (9th Cir. 1999)*. [14] PageRank is neither a "classic advertising **[*39]** campaign," nor a "more informal type[] of promotion." Even if Google had attempted "to dilute Google's claimed objectivity with a factual assertion to reroute the public's beliefs and understanding of search results," Opposition to Motion to Dismiss 20, such an attempt would not satisfy the standard articulated by the Ninth Circuit.

d. Claim IV: Violation of Free Speech Rights Under the United States and California Constitutions

i. Free Speech Rights Under the United States Constitution

---

[13] The Court addresses Google's motion to strike the entire SAC below.

[14] The Ninth Circuit cited *Gordon & Breach Science Publishers v. American Inst. of Physics, 859 F.Supp. 1521 (S.D.N.Y.1994)*, adopted the test it set forth, and applied it to the case before it.

KinderStart alleges that Google has violated its rights under the Free Speech Clause of the First Amendment to the United States Constitution. *See* U.S. Const. amend. I. (providing that "Congress shall make no law . . . abridging the freedom of speech."). Demonstration of state action is "a necessary threshold" **[*40]** that a plaintiff must cross before a Court can consider whether a plaintiff's First Amendment rights have been infringed. George v. Furlough, 91 F.3d 1227, 1230 (9th Cir. 1996). In the case of private-party defendants, a plaintiff must show that "the private parties' infringement somehow constitutes state action." Id. at 1229 (citing *Dworkin v. Hustler Magazine, 867 F.2d 1188, 1200 (9th Cir. 1989))*. The Supreme Court has articulated four different approaches by which to identify state action in different contexts: (1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus. George v. Pacific-CSC Work Furlough, 91 F.3d 1227, 1230-32 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 939, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982)). The Ninth Circuit also has applied the "symbiotic relationship" test to identify state action. *See, e.g.,* Brunette v. Humane Society of Ventura County, 294 F.3d 1205, 1213 (9th Cir. 2002) (citing Burton v. Wilmington, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961)). "Satisfaction of any one test is sufficient to find state action, so long as no countervailing **[*41]** factor exists." Kirtley v. Rainey, 326 F.3d 1088, 1092 (9th Cir. 2003) (citations omitted).

KinderStart argues that First Amendment protections apply in the instant action because (1) there is a close nexus between or entwinement of Google and state agencies; (2) a symbiotic relationship exists between Google and state agencies; and (3) Google's search engine is a public forum. [15] For the reasons discussed below, the Court concludes that KinderStart has not sufficiently alleged state action under any of these theories. [16]

[*42] (1) Nexus/Entwinement

"[T]he nexus test asks whether 'there is a such a close nexus between the State and the *challenged action* that the seemingly private behavior may be fairly treated as that of the State itself.'" Kirtley, 326 F.3d at 1094-95 (citing Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 295, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001)) (emphasis added). The actions that form the basis of the SAC relate to the alleged manipulation of search results and PageRanks. *See, e.g.,* SAC PP 11-12, 174, 179. The actions alleged by KinderStart as a basis for a finding of state action relate to Google's digital library projects. *See, e.g., id.* PP 254-55. These two sets of actions are distinct. KinderStart cannot establish state action on the basis of actions that are peripheral to the claims articulated in the SAC. KinderStart has alleged no facts suggesting that a close nexus existed between Google and any state entity in the creation or execution of Google's alleged policy of favoring some websites over others in the results of a web search. [17] Accordingly, the nexus or entwinement test does not support a finding of state action in the present **[*43]** case.

(2) Symbiotic Relationship

---

[15] KinderStart does not explain how its discussion of Google as a public forum connects with its state actor argument. *See* Opposition to Motion to Dismiss 22-25. KinderStart provides no authority indicating that success on its public forum arguments would render the state action inquiry unnecessary. Accordingly, the Court will consider the arguments regarding the public forum to the extent that they contribute to the dispositive issue in this claim: the presence of state action.

[16] The Court explained in the July 13th Order that KinderStart had not met the public function, joint action or governmental compulsion/coercion tests. KinderStart has added no allegations in the SAC that would allow the Court to find state action on any of these bases. To the extent that KinderStart reasserts facts in the SAC that pertain to the public function, joint action, or government coercion/compulsion tests for state action, *see* SAC PP 110, 253, 255, the Court reaffirms its earlier conclusion that KinderStart's pleading is insufficient to meet any of the applicable tests.

[17] Moreover, even if KinderStart had complained of actions associated with Google's relationship with state universities, the level of entwinement might not be sufficient to establish state action. In *Brentwood,* eighty-four percent of an ostensibly private association's members were public schools which "largely provided for the Association's financial support" and whose officials, acting in their official capacity, "overwhelmingly perform[ed] all but the purely ministerial acts by which the Association exist[ed] and function[ed] in practical terms." Brentwood, 531 U.S. at 299. In addition, the state appointed members to the association's governing body, and association employees participated in the state retirement system. Id. at 300. KinderStart's allegations fall far short of the level of "entwinement" with respect to finances, organization and personnel described in Brentwood.

"[I]f a private entity . . . confers significant **[*44]** financial benefits indispensable to the government's 'financial success,' then a symbiotic relationship may exist." Brunette, 294 F.3d at 1213. Such a relationship may be sufficient to establish state action. *Id.* "In a symbiotic relationship the government has 'so far insinuated itself into a position of interdependence (with a private entity) that it must be recognized as a joint participant in the *challenged activity.*'" *Id.* (citing Burton, 365 U.S. at 725) (emphasis added). Here, Kinderstart does not allege the existence of a symbiotic relationship between Google and a government *with respect to the activities that form the basis of the SAC.* KinderStart only alleges that a symbiotic relationship exists with respect to Google's digital library projects. *See* SAC PP 254-55.

(3) Public Forum

KinderStart argues that the Google search engine "is now a public forum." Opposition to Motion to Dismiss 25. KinderStart alleges in the SAC that:

> Anyone with Internet access can go to Defendant's own website or any number of thousands of other Websites having a 'Google Search Box' as provided by Google to use the Engine without payment **[*45]** or charge. . . . Google has willfully dedicated the Engine for public use.

SAC P 91.

> Defendant Google created and now manages, with the largest search engine in history, a freely accessible, nationwide public forum for the exchange and flow of Speech Content by virtue of the Engine. Defendant Google has intentionally, willfully and openly dedicated the Engine for public use and public benefit. Defendant Google, by and through the Engine, is a speech intermediary.

SAC P 251.

These allegations repeat much of what the Court found insufficient in dismissing the FAC. *See* July 13th Order 8-9. For example, KinderStart alleged in the FAC that Google is a "speech intermediary." FAC P 104. KinderStart now argues that access to speech content on the Internet through the Google search engine warrants treatment of the search engine as a public forum, that KinderStart's goal of gaining further exposure of its speech requires as much, and that Google's search engine also should be treated as a public forum because *third-party* speech emanates from the return of search results. None of these arguments has merit.

KinderStart cites no authority suggesting that a search **[*46]** engine is a public forum for speech simply because it allows consumers to find speech on the Internet. The principal case upon which KinderStart relies, Cornelius v. NAACP, 473 U.S. 788, 800, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985), does not hold that a private space may be transformed into a public forum merely because it is used for speech. Rather, the Supreme Court explained that the manner in which a forum is used is relevant to the classification of that forum for First Amendment purposes. Nor does KinderStart's argument find support in Currier v. Potter, 379 F.3d 716, 722 (9th Cir. 2004) (concluding that the general delivery service, not the mail system as whole, is the forum at issue in a case where it was "axiomatic" that the First Amendment was implicated). Finally, KinderStart provides little argument or authority suggesting that the emanation of third-party speech from a search engine somehow transforms that privately-owned entity into a public forum. [18]

[*47] KinderStart also has failed to address the contradiction in its pleadings noted by the Court in the July 13th Order. As the Court observed,

> KinderStart's argument that "[t]he sole function and purpose of the [Google] search engine is to promote and realize 24-7 speech and communication, openly and freely'" is inconsistent with its allegation that "Defendant

[18] KinderStart cites National A-1 Advertising, Inc. v. Network Solutions, Inc., 121 F.Supp.2d 156, 179 (D. N.H. 2000), for the proposition that "third party speech emanates through the return of a 'hit' by a search engine." This appears to be a restatement of its first argument that a search engine is a public forum for speech because it allows web-users to access speech. However, *National A-1 Advertising* provides minimal support for KinderStart's argument. The case pertains to the registration of domain names and does not address the issues presented in this case.

> Google derives at least 98% of its total company revenues from [] *search-driven* advertising, which exceeded $ 3.1 billion for the year ended December 31, 2004.

July 13th Order 9 (citations omitted). KinderStart nonetheless continues to allege that Google received 98% of its revenues in 2004 from search-driven advertising. To the extent that KinderStart has amended its allegations with respect to Google's commercial purpose, it has deemphasized speech, stating: "The Engine operates 24-7 to allow any user to perform a search for Websites and Web Content and viewing and receiving speech and information of all forms." SAC P 91. KinderStart has not alleged facts tending to show that Google has dedicated its search engine for public use as a forum for *speech.*

ii. Free Speech Rights Under the California **[*48]** Constitution

The California Supreme Court has held that a "protective provision more definitive and inclusive than the *First Amendment* is contained in [California's] constitutional guarantee of the right of free speech and press." *Robins v. Pruneyard Shopping Ctr., 23 Cal.3d 899, 908, 153 Cal. Rptr. 854, 592 P.2d 341 (1979)* (citation omitted), *aff'd sub. nom. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 78, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980)*. "[S]ections *2* and *3 of article I of the California Constitution* protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." *Pruneyard Shopping Ctr., 23 Cal.3d at 910*. In *Trader Joe's Co. v. Progressive Campaigns, 73 Cal.App.4th 425, 86 Cal. Rptr. 2d 442 (Cal. Ct. App. 1999)*, the California Court of Appeal, applying *Pruneyard,* held that a trial court did not abuse its discretion by concluding that a stand-alone grocery store had the right to exclude petitioners. The *Trader Joe's* court explained that

> [*Pruneyard*] did not hold that the free speech and petitioning activity can be exercised only at large shopping centers. Nor did it hold that such activities can be exercised on any **[*49]** property except for individual residences and modest retail establishments. Rather, in resolving the specific dispute before it, the court developed a balancing test which can be applied to other situations. *Pruneyard* instructs us to balance the competing interests of the property owner and of the society with respect to the particular property or type of property at issue to determine whether there is a state constitutional right to engage in the challenged activity.

Id. at 433. The court held that because Trader Joe's, unlike the shopping center in *Pruneyard,* neither invited nor provided facilities for the public to meet friends, eat, rest, be entertained or otherwise congregate, it revealed a stronger interest in maintaining exclusive control, and that the "single structure, single-use store" was "not a public meeting place and society has no special interest in using it as such." *Id.*

A three-justice plurality of the California Supreme Court subsequently clarified the relationship between California's free speech clause and private property in ruling that the California Constitution did not guarantee petitioners access to an urban apartment **[*50]** complex:

> [W]e conclude that the actions of a private property owner constitute state action for purposes of California's free speech clause only if the property is freely and openly accessible to the public. By establishing this threshold requirement for establishing state action, we largely follow the Court of Appeal decisions construing [*Pruneyard*]. For example, our Courts of Appeal have consistently held that privately owned medical centers and their parking lots are not functionally equivalent to a traditional public forum for purposes of California's free speech clause because, among other things, they are not freely open to the public.

Golden Gateway Ctr. v. Golden Gateway Tenants Assn., 26 Cal.4th 1013, 1033, 111 Cal. Rptr. 2d 336, 29 P.3d 797 (2001) (plurality opinion). Two years later, the California Court of Appeal considered the question of what constituted a public forum (though not the question of state action) in light of *Golden Gateway:*

> Nothing in Golden Gateway can be interpreted to support the conclusion that any large business establishment is a public forum for expressive activity simply because it is 'freely and openly accessible to the public. **[*51]** ' . . . Rather, the test appears to remain whether, considering the nature and circumstances of the private property, it has become the 'functional equivalent of a traditional public forum.'

Albertson's, Inc. v. Young, 107 Cal.App.4th 106, 117-18, 131 Cal. Rptr. 2d 721 (Cal. Ct. App. 2003) (holding that the privately-owned sidewalk outside a grocery store at a shopping center was not a public forum).

This Court explained in its July 13th Order that KinderStart had not alleged sufficiently that users' freedom to use the Google search engine extends to the realm of speech. July 13th Order 10. The Court noted that "[n]owhere does KinderStart allege that Google has invited the public to speak through Google's search engine, either by enabling public editing of results/rankings or by promising that every website created by the public will be indexed, ranked, and displayed." *Id.* KinderStart alleges that Google "claims that it indexes every site it locates on the Internet," SAC P 54, but it also alleges that Google publicly acknowledges that it stops indexing pages in some circumstances. SAC P 151. As in the FAC, KinderStart does not suggest that *the public* has the ability to **[*52]** edit rankings or search results. Thus, KinderStart fails to allege facts tending to show that Google's search engine, encompassing its index, web search form, Results Pages and PageRank scores, is the "functional equivalent of a traditional public forum." *See* *Albertson's, 107 Cal.App.4th at 117-18*.

e. Claim V: Unfair Competition in Violation of California Business and Professions Code §§ 17200 et seq.

KinderStart next claims that Google has violated *California Business and Professions Code § 17200*, which prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Cal. Bus. & Prof. Code § 17200*. According to KinderStart, "Defendant Google has engaged in, and continues to engage in, [] unfair competition. Defendant's acts and practices are wrongful, arbitrary, without reasonable business or commercial justification, unethical, oppressive, and have caused substantial harm and injury to Plaintiff KSC . . . ." SAC P 264. KinderStart alleges that Google's unlawful business practices include PageRank deflation **[*53]** of competitors' websites, filing misleading statements with the SEC, blockage of competitors' websites, unfair and uncompetitive use of the PageRank patent, claiming PageRank processes as a trade secret, false advertising about the purported objectivity of the search engine, wilful termination and reduction of referrals to competitor sites, and sudden, sharp price escalation. *Id.* P 266. KinderStart alleges that it "has suffered irreparable injury in fact and have [sic] lost money, property, value, business opportunities as a result of Defendant Google's actions and practices and bring this cause of action on behalf of itself and on behalf of all other similarly situated and injured [class members]." *Id.* P 268. KinderStart also alleges that the AdSense agreement deceives the public into expecting that it can benefit by participating in the program. *Id.* P 265.

The Court dismissed the *Section 17200* claim in the FAC on the grounds that KinderStart had alleged no facts to support its conclusory allegations and that KinderStart had not adequately pled a violation of the antitrust laws. July 13th Order 17. Both inadequacies remain in the SAC.

First, Kinderstart still fails **[*54]** to identify specific terms of the AdSense agreement that are deceptive and does not indicate how the agreement as a whole is deceptive. Nor has KinderStart alleged facts in the SAC suggesting that the public would expect that participation in the program would prevent a participant's removal from Results Pages or devaluation of a participant's PageRank. Accordingly, KinderStart has failed to allege a deceptive business practice.

Second, as the Court explained in its July 13th Order, "[w]hen a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes *section 17200*, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy of spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Communications, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 186-87, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. In light of the insufficiency of KinderStart's claims for attempted monopolization and monopolization, these claims cannot form the basis of a *Section 17200* claim.

Because Kinderstart **[*55]** has failed to plead sufficient facts to allege a deceptive business practice, and because the Court will dismiss the antitrust claims in the SAC without leave to amend, the Court also will dismiss the *Section 17200* claim without leave to amend. In light of this disposition, the Court does not reach Google's alternative argument that KinderStart has failed to identify a redressable injury that would confer standing under Article III or California's Proposition 64. *See* Motion to Dismiss 33-35.

f. Claim VI: Defamation and Libel

KinderStart asserts a claim for defamation and libel against Google based on Google's public presentation of a PageRank of '0' for KinderStart.com. "The tort of defamation exists whenever a false and unprivileged statement which has a natural tendency to injure or which causes special damage is communicated to one or more persons who understand its defamatory meaning and its application to the injured party." *Jackson v. Paramount Pictures Corp., 68 Cal.App.4th 10, 26, 80 Cal. Rptr. 2d 1 (Cal. Ct. App. 1998)* (citation omitted). To prevail on these claims, KinderStart must allege a provably false statement. *See* *Edwards v. Hall, 234 Cal.App.3d 886, 901-03, 285 Cal. Rptr. 810 (Cal. Ct. App. 1991).* **[*56]**

The Court dismissed the defamation and libel claim in the FAC on the basis that KinderStart had failed to explain how Google caused injury to it by a provably false statement about the output of Google's algorithm regarding KinderStart.com, as distinguished from an unfavorable opinion about KinderStart.com's importance. The Court noted that the FAC included only the conclusory assertion that Google's actions have "cause[d] irreparable harm and damage to the goodwill, value and revenue-generating capabilities of KinderStart KSC's Website . . . ." July 13th Order 22 (citing FAC P 170).

KinderStart now alleges:

> 275. The statements of PageRank are false because Plaintiff's site KS.com and those sites of members of Class III, in spite of Defendant Google's wrongful conduct, retain Website Content and remain hyperlinked to other sites throughout the Internet, and continue to have relevance to users. Further, a 0-PR for any Website is mathematically impossible within the normal operation of the algorithm within the Engine.
>
> 276. Defendant Google holds out in public PageRank as an opinion of the value of a given Website of Class III members but the user reliably and reasonably **[*57]** believes that the numerical figure presented with PageRank is based on the application and embodiment of an issued U.S. patent and determined by objective methods, with one or more computer algorithms.
>
> . . .
>
> 278. Defendant Google has failed to disclose to the user and the public the methodology, operation and basis for a PageRank figure of a Website and has repeatedly overridden and substituted the normal, computer-determined PageRank figures with its standard methodology with a human-determined value below the calculated figure produced by the computer algorithm, in some cases all the way down to 0-PR.
>
> . . .
>
> 281. Defendant Google's defamatory and libelous statements using PageRank Deflation of KS.com and those sites of members of Class III to artificially low figures placed them from time to time temporarily and permanently inside Google-designated "bad neighborhoods" and directly and proximately caused a loss of business and revenues whereby prospective and actual business partners and viewers of such deranked sites stop or refrain from doing business or from visiting and engaging with such sites.

SAC P 275-76, 278, 281. The core of these allegations seems to be that **[*58]** KinderStart was harmed as a result of a false statement by Google that Google had determined objectively that the KinderStart website was not worth visiting, when in fact Google objectively had determined the opposite. However, the allegations are vague and ambiguous, and KinderStart makes only general claims as to the type of injury it allegedly suffered. While the defect conceivably could be cured by amendment, in this instance further leave to amend is inappropriate because materials properly before the Court under the incorporation-by-reference doctrine, *see* *In re Silicon Graphics, Inc. Securities Litigation, 183 F.3d 970, 986 (9th Cir. 1999)*, establish that Google in fact does not represent that PageRank is a purely objective process free from human involvement. In addition, KinderStart still has failed to identify a provably false statement, and Google is entitled to immunity under the common interest privilege.

KinderStart alleges that the public reasonably interprets PageRank as an objective statement. SAC P 276. According to KinderStart, PageRanks "are presented as objective facts or opinions based on provably true or false facts, and are reasonably understood **[*59]** by those to whom publications are made as objective facts and opinions based on provably true or false facts." SAC P 279. KinderStart asserts that Google has made a series of statements about the objectivity of its search results and the absence of human manipulation from these search results. SAC P 116-29. KinderStart also alleges that Google represents that in order to provide users with "thorough and unbiased search results," it will stop indexing pages "**only at the request of the webmaster who's responsible for the pages,** when it's spamming our index, or as required by law." SAC P 151 (emphasis in original). KinderStart does not allege that Google has made specific statements about the objectivity of its PageRank tool, other than to say that Google describes PageRank as explaining "how Google's algorithms assess the importance of the page [a web user is] viewing." SAC P 140. It alleges that PageRank "is a mathematically-generated product of measuring and assessing the quantity and depth of all the hyperlinks on the Web that tie into a PageRanked Website, under programmatic determination by Defendant Google." SAC P 141. It also represents that Google has stated that it will **[*60]** remove a website from its index if "it didn't conform with the quality standards necessary to assign accurate PageRank." SAC P 153.

These factual allegations do not tend to prove that Google ever has represented that PageRank is objective and free from human manipulation. Google's discussion of objectivity in its April 29, 2004, S-1 form, which properly may be incorporated by reference here, indicates that the objectivity to which Google refers is the absence of paid influence in its search results. *See* SAC P 121 ("*Objectivity.* We believe it is very important that the results users get from Google are produced with only their interests in mind. We do not accept money for search result ranking or inclusion. We do accept fees for advertising, but it does not influence how we generate our search results."). KinderStart's allegation that PageRank is subject to "programmatic determination" actually undermines its claim that Google represents PageRank as free from human manipulation. The term "programmatic determination" necessarily implies human inputs that define the parameters of the program. KinderStart's own allegations are inconsistent with a claim that PageRank is an independently-discoverable **[*61]** value free from programmatic manipulation. Moreover, KinderStart itself alleges that Google represents that it will remove a website from its index "if it didn't conform with the quality standards necessary to assign accurate PageRank." SAC P 153. KinderStart does not seriously dispute that such a statement is equivalent to a statement that Google will assign a PageRank of zero if a website does not meet Google's quality guidelines.

KinderStart's argument that it is mathematically impossible to assign a PageRank of zero presumes that Google in some way has represented that PageRank is a purely objective measure. As discussed above, PageRank is a creature of Google's invention and does not constitute an independently-discoverable value. In fact, Google might choose to assign PageRanks randomly, whether as whole numbers or with many decimal places, but this would not create "incorrect" PageRanks.

The Court noted in the July 13th Order that the question of whether a reasonable person might consider PageRank a matter of opinion or a statement of fact might not be resolvable at the pleading stage. July 13th Order 21. The Court noted that KinderStart's position would be bolstered by evidence **[*62]** that Google actually had represented that PageRank is "objective." *Id.* Despite this express direction from the Court, KinderStart has not alleged any additional facts sufficient to support its assertions. To the contrary, KinderStart has alleged that "Google holds out in public PageRank as an opinion of the value of a given Website," and that *users* reasonably believe that PageRank is objectively determined. SAC P 276. KinderStart's apparent acknowledgment that *Google itself* holds out PageRank as an opinion undermines any claim that Google has made a *provably false* statement concerning KinderStart's PageRank.

Google also asserts correctly that KinderStart fails to allege malice and that any statement by Google, even if provably false, thus is subject to California's common interest privilege and right of fair comment. Motion to Dismiss 26. KinderStart argues that its pleading gives Google fair notice that malice is claimed. Opposition to Motion to Dismiss 33. However, because the SAC does not indicate which specific actions by Google demonstrate malice toward KinderStart, KinderStart has not alleged malice sufficiently. Although malice may be proved by legitimate inferences, **[*63]** *Burnett v. National Enquirer, Inc., 144 Cal.App.3d 991, 1007-08, 193 Cal. Rptr. 206 (Cal. Ct. App. 1993)*, it still must be alleged in a discernible manner. The two sets of allegations identified by KinderStart as bases for inferring malice are inadequate. *See* Opposition to Motion to Dismiss 34 (citing SAC P 58(d); SAC PP 144-45). [19] Neither alleges facts with the required degree of specificity. One does not even appear among the allegations

[19] The term "malice" does not appear in the SAC.

pertaining to defamation, *see* SAC P 58(d) (anticompetitive behavior), and the other does not refer to KinderStart. *See* SAC PP 144-45. Because it concludes that the common interest privilege bars the instant defamation action, the Court need not decide whether the right of fair comment also applies.

Cal. Civil Code § 47(c) provides that a communication is privileged when made

> [i]n a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) **[*64]** by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.

Google argues that any statement it makes through the PageRank feature of its toolbar is privileged as a communication by a person "who is requested by the person interested to give the information." Motion to Dismiss 27-28. On September 22, 2006, Google provided the Court with a printout explaining the proactive steps that a user must take to solicit a PageRank. Volker Decl. Exh. B [20]. In order to receive PageRank information, a user must download and install the toolbar, activate the PageRank feature, navigate to a particular website, and then rest the cursor over the PR icon on the toolbar. *Id.* The Court concludes that such actions constitute a request for information within the meaning of *Cal. Civ. Code § 47(c)*. The Court also concludes that KinderStart has not alleged actions that amount to "excessive publication, [] a publication of defamatory matter for an improper purpose, or [defamation] beyond the group interest. **[*65]** " *Brewer v. Second Baptist Church, 32 Cal.2d 791, 797, 197 P.2d 713 (1948)*. [21] The *Brewer* limitations on the scope of publication do not apply in the instant action, in which the publication is limited to the PageRank shown when an individual user visits the website.

[*66] g. Google's Assertion of Immunity from Suit

Google argues that it is immune from all claims asserted by KinderStart in the SAC both under general *First Amendment* principles and under the Communications Decency Act, *47 U.S.C. § 230(c)(2)(A)*. However, because the Court will grant the motion to dismiss on other grounds, the Court need not address these arguments.

2. Special Motion Pursuant to the California "Anti-SLAPP" Statute

Google has filed a special motion to strike pursuant to California's "anti-SLAPP" Statute, *Cal. Code Civ. Proc. § 425.16*. In particular, Google moves to strike Count Four of the SAC, which alleges that Google has infringed KinderStart's freedom of speech under the United States and California Constitutions. Google also moves to strike Count Nine of the FAC, which alleges Google's negligent interference with KinderStart's prospective economic advantage. [22] Google seeks attorney's fees pursuant to the statute.

[*67] The "anti-SLAPP" staute provides that:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States of California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff will prevail on the claim.

Cal. Code Civ. Proc. § 425.16(b)(1). Actions that qualify for the remedy afforded by this statute include:

---

[20] Google requests judicial notice of this printout and other web-page printouts. The Court will grant this request.

[21] "For this conditional privilege extends to false statements of fact, although the occasion may be abused and the protection of the privilege lost, by the publisher's lack of belief, or of reasonable grounds for belief, in the truth of the defamatory matter, by excessive publication, by a publication of defamatory matter for an improper purpose, or if the defamation goes beyond the group interest. Thus the privilege is lost if the publication is motivated by hatred or ill will toward plaintiff, or by any cause other than the desire to protect the interest for the protection of which the privilege is given." *Id.* (citations omitted).

[22] Google cites no authority indicating that the Court may strike a claim from a superseded complaint. The Court need not address its power to do so because it will deny all aspects of the motion on other grounds.

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue **[*68]** of public interest.

Cal. Code Civ. Proc. § 425.16(e). Perceiving abuse of this section, the California legislature passed *Cal. Code Civ. Proc. § 425.17*, which provides generally that the "anti-SLAPP" law may not be used against actions brought solely in the public interest. *Section 425.17* also provides that the "anti-SLAPP" law does not apply to certain commercial lawsuits, although this is not true of lawsuits against a person or entity engaged in the creation, dissemination, exhibition, advertisement, or other promotion of literary work.

Google argues that it meets the threshold requirement of *Section 425.16* that its speech be protected by the United States or California Constitutions. "Anti-SLAPP" Motion 5-6. It asserts that it "speaks" in the form of PageRanks and search results, *id.,* and that it is a corporation engaged in the creation of a literary work. *Id.* at 13-14. However, the Court concludes that even if Google's characterizations of its speech are accurate, the actions that form the basis of KinderStart's claims against Google are not of public interest. *See* *Cal. Code Civ. Proc. § 425.16(e)(3)-(4)*.

"The definition of 'public interest' within the **[*69]** meaning of the "anti-SLAPP" statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity." *Damon v. Ocean Hills Journalism Club, 85 Cal.App.4th 468, 479, 102 Cal. Rptr. 2d 205 (Cal. Ct. App. 2000)*. The boundaries of 'public interest' have not been precisely defined, but the cases that have found that a party's speech to be of 'public interest' involve matters in the public eye, conduct that could directly effect a large number of people beyond the direct participants, or a topic of widespread public discussion. *Rivero v. American Federation of State, County, and Municipal Employees, 105 Cal.App.4th 913, 924, 130 Cal. Rptr. 2d 81 (Cal. Ct. App. 2003)*. The conduct at issue here does not meet these criteria. Although the instant lawsuit received media coverage after it was filed, there is no indication that a significant number of customers became aware of KinderStart's low PageRank or Google's removal of KinderStart from Google's search results prior to the filing of the lawsuit. Nor is there any indication that any debate or discussion **[*70]** arose over these matters, except between Google and KinderStart. Tellingly, KinderStart has yet to identify the similarly situated websites that it alleges suffered similar treatment at the hands of Google. [23] The Court finds it implausible that the fate or content of these websites could have been of public interest when an interested party apparently cannot identify them. [24]

[*71] Google argues that the Court should follow *New.Net, Inc. v. Lavasoft, 356 F.Supp.2d 1090 (C.D.Cal. 2004)*, and find public interest in the conduct at issue in this case. The *New.Net* court described the dispute in that case as follows:

> This case presents a dispute between two downloadable software providers, New.net whose software, NewDotNet, is downloaded onto individual computers often without the knowledge or request of the computer owner, and Lavasoft whose software, Ad-aware, is purposefully downloaded by the computer user to detect

[23] KinderStart has filed the declaration of Daniel D. Savage ("Savage"), a manager of TradeComet.com LLC. Savage asserts that a sudden increase in minimum bids for keywords under AdWords caused a dramatic drop in TradeComet.com's revenue. This single declaration of one other company does not transform the conduct in this case into a matter of public interest.

[24] The Court is unpersuaded by Google's reference to the large traffic counts claimed by KinderStart in its SAC. The Court has explained elsewhere that the "anti-SLAPP" statute covers statements made in connection with a public issue, not statements that could have an impact on the public. Order Den. Special Mot. to Strike and Den. Req. for Att. Fees, *Sherwood v. Wavecrest Corp.,* C 05-02354 (N.D.Cal., Nov. 1, 2005). The alleged volume of traffic that moved to other sites as a result of the conduct in question may indicate impact on the public, but it does not indicate that the conduct itself was a public issue.

> and remove programs like the one written by New.net. New.net complains that the injuries caused by Ad-aware's inclusion of NewDotNet in its database are actionable under both state and federal law.

New.Net, 356 F.Supp.2d at 1095-96. The court explained that "Lavasoft had its genesis in a project to notify the public that unwanted software applications were being downloaded to personal computers without the user's knowledge or consent." Id. at 1105. Lavasoft programmed its software "relying primarily on submissions from the public." *Id.* The court described Ad-aware as "a service **[*72]** akin to Consumer Reports and other consumer information, databases, but in a new form," and analogized it to a "newspaper, magazine, or other material that addresses a matter of public importance." Id. at 1106. The court emphasized the importance of evidence of an ongoing public debate about Internet privacy and the threats posed by software like NewDotNet: "[this evidence] confirm[s] that there is indeed a community concerned with internet privacy, that the subject is a matter of public discussion, and that [New.net's] surreptitious downloads are a topic of discussion and concern in that context." *Id.* The court further noted that much of the speech with which New.Net took issue was not in fact Lavasoft's speech, but rather "speech engaged in by numerous others in the internet community including individual computer users." *Id.* The court concluded:

> Because the issue of public awareness of, and protection from, the unknown are at the heart of the public information service Defendant provides and because that service is of public significance, speech in this area should not be chilled by litigation brought by Plaintiff who seeks to stifle speech **[*73]** to enhance its profits.

Id.

New.Net is distinguishable from the instant case in at least three ways. First, while the NewDotNet software was a subject of discussion, there is no evidence that there has been any public debate about the contents of the KinderStart website or that Google was contributing to such debate. Second, while the relief sought by New.Net would have stifled speech by many parties beyond the lawsuit, including other companies and members of the public, there is no risk of such a sweeping effect on speech in this case. Third, the search services Google provides do not have "the issue of public awareness of, and protection from, the unknown" at their heart.

Alternatively, the Court concludes that, even if the conduct at issue is of public interest, the interest is limited. "[W]here the issue is not of interest to the public at large, but rather to a limited, but definable portion of the public (a private group, organization, or community), the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of **[*74]** encouraging participation in matters of public significance." Du Charme v. International Broth. of Elec. Workers, Local 45, 110 Cal.App.4th 107, 119, 1 Cal. Rptr. 3d 501 (Cal. Ct. App. 2003). The *Du Charme* court contrasted such limited public interest with "widespread public interest," citing cases which involved the construction of a mall, domestic violence, a religious institution with extensive media coverage, a television show that created significant debate, and child molestation in youth sports. Id. at 117. In contrast, it is difficult to see how KinderStart's low PageRank and the exclusion of KinderStart from Google's search results are matters of public significance that merit protection by a "statute that embodies the public policy of encouraging participation in matters of public significance."

3. Motion to Strike

Finally, Google moves to strike the SAC in its entirety. Google asserts that the SAC contains structural deficiencies, irrelevant allegations, and a misleading and improper use of ellipses. Google also moves to strike KinderStart's Lanham Act claim on the basis that the Court did not grant KinderStart leave to include additional claims **[*75]** in the SAC. In light of the foregoing discussion, the motion to strike is moot.

Having concluded that it should grant the motion to dismiss, the Court must consider whether to grant leave to amend the complaint. Leave to amend may be denied for reasons including "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." Foman v.

Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). In its July 13th Order, the Court gave KinderStart explicit, detailed direction that KinderStart largely failed to follow in the SAC. Instead, KinderStart reasserted the same deficient allegations identified in the July 13th Order. The instant case has been intensively litigated for more than eleven months. Under these circumstances, the Court concludes that there is no reasonable likelihood that KinderStart will cure the defects in the SAC by further amendment. Accordingly, the motion to dismiss will be granted without leave to amend.

IV. ORDER

Good cause therefor appearing, IT IS HEREBY ORDERED THAT:

(1) **[*76]** The Motion to Dismiss is GRANTED without leave to amend. [25]
(2) The Special Motion Pursuant to Cal. Civ. Code § 425.16 is DENIED.
(3) The Motion to Strike is DENIED as moot.

DATED: March 16, 2007

JEREMY FOGEL

United States District Judge

End of Document

---

[25] KinderStart's pending motion for a preliminary injunction, filed on May 26, 2006, is denied as moot.

Person v. Google, Inc.

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

March 16, 2007, Decided ; March 16, 2007, Filed

Case Number C 06-7297 JF (RS)

Reporter
2007 U.S. Dist. LEXIS 22499 *; 2007 WL 832941

CARL E. PERSON, Plaintiff, v. GOOGLE, INC., Defendant.

Notice: [*1] NOT FOR CITATION

Subsequent History: Complaint dismissed at *Person v. Google, Inc., 2007 U.S. Dist. LEXIS 47920 (N.D. Cal., June 25, 2007)*

Prior History: *Kinderstart.com LLC v. Google, Inc., 2006 U.S. Dist. LEXIS 82481 (N.D. Cal., July 13, 2006)*

Core Terms

Google, advertising, allegations, proposed complaint, motion to dismiss, monopolization, pricing, website, relevant market, monopolies, leave to amend, Sherman Act, Internet, appears, Cartwright Act, Donnelly Act, consumer, click, amended complaint, discriminatory, practices, keyword

Counsel: For Carl E. Person, Plaintiff: Carl E. Person, LEAD ATTORNEY, Carl E. Person Law Office, New York, NY.

For Google Inc., Defendant: David H. Kramer, LEAD ATTORNEY, Wilson Sonsini Goodrich & Rosati, Palo Alto, CA; Jonathan M. Jacobson, Sara Ciarelli, Susan B. Creighton, Wilson Sonsini Goodrich & Rosati, New York, NY; Meredith K. Kotler, Wilson Sonsini Goodrich & Rosati, P.C., New York, NY.

Judges: JEREMY FOGEL, United States District Judge.

Opinion by: JEREMY FOGEL

Opinion

ORDER [1] GRANTING MOTION TO DISMISS WITH LEAVE TO AMEND

[re: docket no. 17]

Defendant Google, Inc. ("Google") moves to dismiss the First Amended Complaint ("FAC") of Plaintiff Carl E. Person [2] for failure to state a claim upon which relief can be granted. For the reasons discussed below, the motion will be granted with leave to amend.

---

[1] This disposition is not designated for publication and may not be cited.

[2] Plaintiff, acting *pro se,* states that he is an attorney.

[*2] I. BACKGROUND

1. Procedural Background

Plaintiff filed the initial complaint in this action on June 19, 2006 in the Southern District of New York. The initial complaint included six claims: (1) attempted monopolization and monopolization in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*; (2) conspiracy to restrain trade and fix prices in violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*; (3) attempted monopolization and price fixing in violation of *Section 340* of the Donnelly Act, *N.Y. Gen. Bus. Law § 340*; (4) deceptive acts and practices in violation of *N.Y. Gen. Bus. Law §§ 349*, *349-c*; (5) false advertising in violation of *N.Y. Gen. Bus. Law §§ 350*, *350-e*; and (6) monopolization, conspiracy to fix prices, and discriminatory pricing in violation of the Cartwright Act, *Cal. Bus. & Prof. Code § 16720*.

On July 27, 2006, Google moved to dismiss the complaint for improper venue and for failure to state a claim upon which relief can be granted. On August 3, 2006, Plaintiff opposed the motion and requested leave **[*3]** to amend his complaint by the addition of two paragraphs. [3] Plaintiff did not add claims to his complaint. On September 20, 2006, one week after oral argument on the motion, Plaintiff informed Judge Patterson that he wished to make further amendments to his complaint. In a letter dated September 18, 2006, Judge Patterson determined that Plaintiff had exercised his right to amend his complaint on August 3, 2006, and declined to grant Plaintiff further leave to amend. On October 11, 2006, Judge Patterson granted the motion to dismiss for improper venue without deciding whether Plaintiff stated a claim upon which relief can be granted.

[*4] On November 27, 2006, the instant case was transferred to the Northern District of California. The operative complaint at the time of the transfer was the FAC, that is, Plaintiff's original complaint as amended as of right on August 3, 2006. [4] On January 5, 2007, this Court issued an order relating the instant case to *KinderStart.Com, LLC v. Google, Inc.,* No. C 06-2057 JF (RS). On January 25, 2007, Google moved to dismiss the FAC for failure to state a claim upon which relief can be granted. On February 9, 2007, Plaintiff moved for leave to file a document that he entitled "First Amended Complaint," but that in fact would have been, in light of Judge Patterson's earlier ruling, a second amended complaint. The proposed pleading includes more factual detail and adds claims under California law. [5] On February 13, 2007, the Court granted in part and denied in part Plaintiff's motion and instructed Plaintiff

---

[3] The paragraphs were:

"95A. Google's anticompetitive activities as alleged are specifically intended to increase Google's income, profits and of the keyword-targeted internet advertising market, and to deprive competitors Yahoo, MSN and any others of income, profits and market share."

"146A. Plaintiff is a consumer as to his candidacy and part-time book selling activities and, upon information and belief, many hundreds of thousands of AdWords advertisers during the past 3 years are also consumers in their Google advertising activities, including consumers who are (i) candidates for public office, (ii) offering unwanted personal goods for resale and/or (ii) [sic] retired or self employed persons, acting part-time, offering goods or services to supplement their income."

See Google Opposition to Motion for Leave to Amend Ex. B.

[4] To the Court's knowledge, no single document exists that incorporates the amendments made to the complaint on August 3, 2006. Since the amendments do not disrupt the numbering of paragraphs in the original complaint, the Court will cite to the FAC using the numbering of the original complaint and of the amendments.

[5] The proposed complaint includes fifteen claims: (1) monopolizing and attempting to monopolize in violation of Sherman Act *§ 2*; (2) denial of use of essential facility to competitor and denial of non-discriminatory use of AdWords in violation of Sherman Act *§ 2*; (3) conspiracy to fix prices and unreasonably restrain trade in violation of Sherman Act *§ 1*; (4) violation of the California Cartwright Act, *Cal. Bus. & Prof. Code § 16720*; (5) violation of the California Unfair Practices Act, *Cal. Bus. & Prof. Code §§ 17000, et seq.;* (6) violation of the New York Donnelly Act, *N.Y. Gen. Bus. Law § 340*; (7) breach of contract; (8) rescission of contract; (9) reformation of contract; (10) violation of the California Consumer Legal Remedies Act, ***Cal. Civ. Code § 1770(a)***; (11) unfair competition in violation of *Cal. Bus. & Prof. Code § 17200 et seq.;* (12) false and misleading advertising in violation of

that he "should be prepared to argue why leave to amend should be granted in the event that the Court grants the motion [to dismiss]." February 13, 2007 Order 2. On February 20, 2007, Plaintiff filed opposition to the motion to dismiss. The Court heard oral argument on that **[*5]** motion on March 9, 2007.

[*6] 2. Factual Background

Plaintiff is an attorney, businessperson, and candidate for statewide office in New York, and a customer of Google's "AdWords" services. FAC P 8. Plaintiff alleges the following: Google is a global technology leader focused on improving the ways people connect with information. FAC P 11. Google maintains the world's largest index of web sites and other content. *Id.* AdWords is a program used by businesses to promote their products and services with targeted advertising. *Id.* Such advertisements appears either to the right of or above a searcher's displayed search results and are designated as "sponsored." FAC P 23. The advertisements are triggered by a searcher's use of a keyword designated by a Google advertiser. FAC P 20. Google auctions these keywords to potential advertisers, FAC P 24, and charges the auction winner when a user clicks on the sponsored link. FAC P 21, 27. Google previously advertised five cents as its minimum per-click price and fifty dollars as the maximum per-click price, but changed these amounts to one cent and one hundred dollars, respectively, in 2005. FAC P 24.

Plaintiff alleges that "[s]omewhere along the way, AdWords **[*7]** was able to start overcharging its smaller customers such as Plaintiff by imposing requirements that increased the cost to Plaintiff and other small-business advertisers and made advertising by them unprofitable, while at the same time reducing the cost to high-volume advertisers (generally large corporations) to increase their profitability and use of AdWords." FAC P 19. "Google is requiring Plaintiff and other small-business advertisers to pay as much as 100 times or more per click than the amount per click paid by monopolizing and other large established advertisers who by their established name or trademark are able to get a substantially higher rate of clicks (or 'clickthrough rate' or 'CTR') for the same number of times their ads are served up to Google searchers." FAC P 28. "Google is requiring each of its advertisers to be as successful as a monopolist, and charging them substantially more (or denying them use of AdWords) if not." FAC P 29. "AdWords has monopoly power for a variety of distinguishing reasons . . ., with the result that Yahoo and Microsoft/MSN keyword-targeted Internet advertising are poor, undesirable substitutes for AdWords." FAC P 30A. "Google is extending **[*8]** its market monopoly in this way to every aspect of business in the United States and making existing monopolies larger, turning potential monopolies into monopolies, and preventing small and new businesses from competing." FAC P 30. In 2005, Google introduced the "Quality Score," "quality-based minimum bids," and "landing page quality," which pertain to Google's process for determining a website's minimum bid required for a keyword to run. FAC P 31. "Google then started to charge Plaintiff and its other small-business advertisers an additional amount per click based on apparent human evaluation of the website 'landing page' created by the advertiser . . . ." FAC P 32. "Without consulting Plaintiff or other small-business advertisers, Google turns off most of the ads and labels them as 'inactive', having the effect of upsetting the advertiser's AdWords marketing program or refuses to allow ads to be placed for a variety of reasons, with the same discouraging effect." FAC P 33.

Plaintiff alleges that Google has conspired with a number of other large corporations such as Amazon.com and eBay, Inc. in an effort to "increase its sales to the major advertisers . . ., and reduce if not eliminate **[*9]** the profitable use of AdWords by the Plaintiff and other small businesses." FAC P 39. "AdWords has become an advertising boon for the large, successful, monopolizing companies, without having to compete significantly with smaller competitors." FAC P 49. "Google has a monopoly, and controls pricing, terms, and whether the Plaintiff and other small businesses are able to make any use of AdWords to compete with AdWords large corporate customers." FAC P 69.

II. LEGAL STANDARD

Cal. Bus. & Prof. Code §§ 17500-09; (13) class action claims under California law; (14) deceptive acts and practices in violation of *N.Y. Gen. Bus. Law §§ 349*, *349-c*; and (15) false advertising in violation of *N.Y. Gen. Bus. Law §§ 350*, *350-e*.

For purposes of a motion to dismiss, the plaintiff's allegations are taken as true, and the Court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969)*. Leave to amend must be granted unless it is clear that the complaint's deficiencies cannot be cured by amendment. *Lucas v. Department of Corrections, 66 F.3d 245, 248 (9th Cir. 1995)*. When amendment would be futile, dismissal may be ordered with prejudice. *Dumas v. Kipp, 90 F.3d 386, 393 (9th Cir. 1996)*.

On a motion to dismiss, the Court's review is limited to the face of the complaint and matters judicially noticeable. *North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983)*; **[*10]** *MGIC Indemnity Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986)*; *Beliveau v. Caras, 873 F.Supp. 1393, 1395 (C.D. Cal. 1995)*. However, under the "incorporation by reference" doctrine, the Court also may consider documents that are referenced extensively in the complaint and accepted by all parties as authentic, even if they are not physically attached to the complaint. *In re Silicon Graphics, Inc. Securities Litigation, 183 F.3d 970 (9th Cir. 1999)*. "Under the 'incorporation by reference' rule of this Circuit, a court may look beyond the pleadings without converting the *Rule 12(b)(6)* motion into one for summary judgment." *Van Buskirk v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002)*.

III. DISCUSSION

1. Claims Under the Sherman Act

a. Relevant Market

In order to make out a claim for attempted monopolization or monopolization, a plaintiff must define the relevant market. *Forsyth v. Humana, Inc., 114 F.3d 1467, 1476 (9th Cir. 1997)*. The relevant market is "the field in which meaningful competition is said to exist." *Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202 (9th Cir. 1997)*. **[*11]** Failure to allege the relevant market is an appropriate ground for dismissal of a Sherman Act claim. *Tanaka v. University of Southern California, 252 F.3d 1059, 1063 (9th Cir. 2001)*. "A 'market' is any grouping of sales whose sellers, if unified by a monopolist or a hypothetical cartel, would have market power in dealing with any group of buyers." *Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995)*. The Supreme Court has explained that the relevant market for antitrust purposes is determined by the choices available to consumers. *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 481-82, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. In some instances, one brand of a product can constitute a separate market. *Id.* "The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." *Tanaka, 252 F.3d at 1063*.

Plaintiff defines the relevant market in the FAC as "'keyword-targeted Internet advertising' in which advertisers pay to have their advertisements displayed (alone or among an ordered group of ads identified as such) near the search results **[*12]** obtained from Internet search engine (such as the search engines of Google and Yahoo) using the keyword(s) selected by the advertiser." FAC P 43. The Court finds no basis for distinguishing the Search Ad Market from the larger market for Internet advertising. Search-based advertising is reasonably interchangeable with other forms of Internet advertising. A website may choose to advertise via search-based advertising or by posting advertisements independently of any search. The Search Ad Market thus is too narrow to form a relevant market for antitrust purposes. Accordingly, the Court will dismiss the monopolization and attempted-monopolization claims included in the FAC.

The proposed complaint defines the relevant market as the market

> for monetizing traffic at any one or more websites through a distributed computing system enabling the auction or sale of keyword-targeted internet advertising to competing advertisers from a database of advertisers with ads triggered by the specific search words used by free or paid, online Google-powered searches, initiated by users from browsers or *www.google.com* or other websites, of User-Designated Information Databases, and payment for **[*13]** the advertising, at a price per click determined by auction and/or Google, for each click on any of the displayed ads, collected by Google on an immediate or periodic basis, from a previously-designated

> and current source of payment for the advertiser, with the payments divided by agreement among Google, the owner of the website initiating the search, the advertiser, any agencies or brokers, and any others. Hereinafter, this described system is referred to as the 'Website Traffic Monetizing Market' and Google dominates this market.

Proposed Complaint P 12. As so defined, the proposed market apparently would include almost anyone who hopes to turn a profit while either buying, selling, or consulting on the sale of keyword-advertising. Plaintiff also alleges that Google's "purpose is to foreclose competition in the business of developing website traffic and monetizing (or converting to revenue) the website traffic or hits for the benefit of the website owner, and to reduce the value of websites to their owners and enable Google to purchase or otherwise acquire them at less than their fair market value in a non-monopolized market." Proposed Complaint P 19. The allegations at the **[*14]** end of this paragraph suggest that the relevant market might include anyone who operates a website. Thus, as presently framed, Plaintiff's definition of the relevant market is vague and overbroad.

b. Exclusionary or Anticompetitive Conduct

The core of both the FAC and Plaintiff's proposed new pleading appears to be a series of allegations that Google discriminates between large corporations that purchase AdWords keywords and small businesses that make similar purchases. However, beyond making conclusory allegations that Google acts as a monopoly and has denied access to an essential facility, Plaintiff fails to allege exclusionary or anticompetitive conduct. Although Plaintiff alleges high and discriminatory pricing, high prices, by themselves, are not anticompetitive or exclusionary. *See* *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. Absent predatory practices, discriminatory pricing does not threaten competition. *See* *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*.

Perhaps because of his failure to identify a relevant market, it is difficult to determine what types of competition Plaintiff believes are **[*15]** threatened by Google's actions. It may be that the competition at issue is between Google and other major Internet advertising providers, such as MSN and Yahoo, who are "poor, undesirable substitutes for AdWords," FAC P 30A, but that does not appear to be the focus of the FAC. Instead, the FAC provides a somewhat confusing picture of Google's competitors and, as Plaintiff concedes, does not allege that Plaintiff himself is a competitor of Google. *See* Opposition 3. Nor do Plaintiff's monopolist-by-association allegations clarify his pleading, as they suggest that the competition at issue is for dominance of the Internet and the larger economy. *See e.g.* FAC P 30 (alleging that Google "mak[es] existing monopolies larger, turn[s] potential monopolies into monopolies, and prevent[s] small and new businesses from competing"), FAC P 66 (appearing to imply that Google is a monopolist because of its dealing with the "monopolist eBay"). Finally, while it appears that Plaintiff is concerned about the competition between small and large corporate advertisers who use Google's services, *see e.g.* FAC PP 49, 69, it is unclear if Plaintiff believes that Google has a stake in that **[*16]** competition. The proposed complaint suffers from similar deficiencies. While Plaintiff appears to attempt to allege more than discriminatory or high pricing, he still fails to state a claim with sufficient clarity.

c. Conspiracy to Restrain Trade

Google moves to dismiss Plaintiff's claim that Google conspires to restrain trade or monopolize on the basis that Plaintiff does not allege that Google conspires with competitors to fix prices. Indeed, as Google suggests, the FAC appears to allege that Google has agreed to high and discriminatory prices with a number of large clients. This is not actionable under the Sherman Act. *See* *49er Chevrolet, Inc. v. General Motors Corp., 803 F.2d 1463, 1468 (9th Cir. 1986)* ("[I]t is a longstanding antitrust principle that *Section 1* of the Sherman Act does not preclude a party from unilaterally determining the parties with whom it will deal and the terms on which it will transact business."). The Court finds no argument in Plaintiff's opposition explaining why this principle does not apply to the FAC; the Court concludes that it applies equally to the proposed complaint.

d. Reference to the Sarbanes-Oxley Act

Both the FAC and **[*17]** the proposed new complaint make reference to the Sarbanes Oxley Act of 2002, *P.L. No. 107-204*, and request injunctive relief thereunder. *See* FAC PP 106-08, Proposed Complaint PP 106-08. Plaintiff provides no meaningful explanation of the grounds on which he seeks relief under this act apart from stating that he believes it enables him to seek injunctive relief.

2. Claims Under New York Law

a. Claims Under the Donnelly Act

The third claim in the FAC alleges violation of the Donnelly Act, *N.Y. Gen. Bus. Law § 340*, by monopolization, attempted monopolization, price-fixing, and unreasonable restraint of trade. FAC PP 130-35. Google moves to dismiss the claim on the basis that to the extent that the statute provides any basis for relief, its scope is constrained by federal law. Motion 12-13 (citing *People v. Rattenni, 81 N.Y.2d 166, 613 N.E.2d 155, 597 N.Y.S.2d 280 (1993)*, which explains that "[t]he Donnelly Act was modeled on the Federal Sherman Act of 1890, and thus we have observed that State ***antitrust law*** should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language **[*18]** or the legislative history justify such a result." *Id. at 171* (internal citations and quotation marks omitted).). Plaintiff provides no argument in response beyond the bare assertion that the claim is actionable. *See* Opposition 14. In light of this lack of argument, the Court concludes that the Donnelly Act claim suffers from the same defects as Plaintiff's Sherman Act claims and is subject to dismissal. There appears to be no material difference between the Donnelly Act claim in the FAC and claim six of the proposed complaint.

b. Claims Under Other Sections of the General Business Law

The FAC asserts claims for deceptive acts and practices in violation of *N.Y. Gen. Bus. Law §§ 349*, *349-c* and false advertising in violation of *N.Y. Gen. Bus. Law §§ 350*, *350-e*. Google moves to dismiss these claims on numerous bases. These claims appear to be based upon a theory that, after agreeing to a certain pricing structure, Google could not terminate the agreement and offer a different pricing structure. Such allegations are not sufficient to state a claim under *N.Y. Gen. Bus. Law §§ 349*, *349-c*, **[*19]** *350*, *350-e*. These statutes require the allegation of consumer-oriented conduct, *see* *Exxonmobil Inter-America, Inc. v. Advanced Info. Eng'g Servs., Inc., 328 F.Supp. 2d 443, 447 (S.D.N.Y. 2004)* (discussing requirements of *section 349*); *Maurizio v. Goldsmith, 230 F.3d 518, 522 (2d Cir. 2000)* (discussing requirements of *section 350*), and the FAC does not contain sufficient allegations of such conduct. While Plaintiff may have paid Google to participate in the AdWords program, he is not a consumer in the sense of those sections, and he fails to state a claim upon which relief can be granted. The claims under *N.Y. Gen. Bus. Law §§ 349*, *349-c* or *§§ 350*, *350-e* that are included in the proposed complaint do not differ materially from those of the FAC. *See* Proposed Complaint PP 251-277.

3. Claims Under California Law

a. Cartwright Act Claim

The FAC asserts a claim under the Cartwright Act, *Cal. Bus. & Prof. Code §§ 16700-70*. Google moves to dismiss the Cartwright Act claim on the same basis that it moves to dismiss the Donnelly Act claim. Motion 12-13 (citing *Freeman v. San Diego Assn. of Realtors, 77 Cal. App. 4th 171, 183 n.9, 91 Cal. Rptr. 2d 534 (1999)* **[*20]** ("In analyzing [plaintiff's] Cartwright Act claims we frequently examine federal precedent because the Cartwright Act is similar in language and purpose to the Sherman Act. However, federal precedents must be used with caution because the acts, although similar, are not coextensive.")). Plaintiff offers no explanation as to how the substance of his Cartwright Act claim differs from that of his Sherman Act claims. *See* Opposition 14. The Court concludes that this claim is also subject to dismissal.

b. Other Claims Under California Law

The proposed complaint adds eight additional claims under California law, none of which is legally sufficient as presently framed.

i. Secret Rebates Injuring Competition in Violation of the California Unfair Practices Act, *Cal. Bus. & Prof. Code §§ 17000, et seq.*

Plaintiff fails to allege a secret rebate or discount that would constitute a violation of this statutory section. It is not clear from this proposed claim that Google is alleged to have done anything more than offer a bulk discount. Moreover, the claim is built on implication and lacks factual specificity.

ii. Breach of Contract and the Implied Covenant **[*21]** of Good Faith and Fair Dealing [6]

Plaintiff's proposed breach of contract claim states a number of alleged provisions of the AdWords agreement, Proposed Complaint P 172 A-O, and then alleges that "Google has intentionally failed to live up to, and has breached, each of [these] AdWords Promises." *Id. P 173*. Plaintiff does not explain how the alleged provisions relate to the specific language and terms of the AdWords agreement. Nor does Plaintiff allege exactly how Google breached the agreement. Instead, he attempts to link Google's IPO, Plaintiff's political campaigns, the complexity of AdWords, and the reasonable expectations of small business owners.

iii. Rescission of Contract Under *Cal. Civ. Code § 1689(b)*

[*22] Plaintiff's proposed rescission claim, pled in the alternative to his reformation claim, lacks factual specificity because it is built around expansive readings of what Google implied by making a number of unambiguous and uncontroversial statements. [7]

iv. Reformation of Contract to Delete Illegal Venue Provision

Plaintiff may not challenge the venue provision in the AdWords contract because Judge Patterson has found that provision **[*23]** enforceable.

v. Violation of the California Consumer Legal Remedies Act, *Cal. Civ. Code § 1770(a)*

The "underlying purpose" of the California Consumer Legal Remedies Act is "to protect consumers against unfair and deceptive business practices." *Cal. Civ. Code § 1760*. A consumer is "an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes." *Cal Civ. Code § 1761(d)*. Since Plaintiff's stated purpose for using AdWords is commercial and political, he is not a consumer under the definition of the act and may not bring an action on basis of the facts alleged.

vi. Unfair Competition in Violation of *Cal. Bus. & Prof. Code § 17200 et seq.*

Plaintiff seeks damages under *Cal. Bus. & Prof. Code § 17200 et seq.* However, that act provides for injunctive relief and penalties, not damages. *See Cal. Bus. & Prof. Code §§ 17202-03*, *17206*.

vii. False and Misleading Advertising in Violation of *Cal. Bus. & Prof. Code §§ 17500-09*

---

[6] Neither the breach of contract claim nor the reformation of contract claim identifies the law under which it is brought. Reading them in the context of the rest of the proposed complaint, the Court concludes that Plaintiff intended to bring them under California law.

[7] For example, the proposed complaint includes the following two paragraphs that describe representations by Google:

"C. That Google was conducting a legitimate auction in which the highest bidder was able to obtain the best ad position;

D. Impliedly, that Google was not manipulating the auction results through arbitrary, subjective evaluations of the Plaintiff's ad copy, website, or landing page to require the Plaintiff to bid 10, 20, 50 or 100 times the minimum price to be able to have the Plaintiff's ad run at all (in the least favorable position)."

Proposed Complaint PP 191 C-D.

The proposed **[*24]** claim for false and misleading advertising lacks factual detail in that it does not identify the false and misleading statements allegedly made by Google. Proposed Complaint PP 232-40.

viii. Class Action Claims Under California Law

As Google notes, Plaintiff may not pursue claims as a class representative and at the same time serve as counsel to that class. *See* *In re. Cal. Micro Devices Sec. Litig., 168 F.R.D. 257, 260 (N.D. Cal. 1996)*. Moreover, a purported class representative may not represent a class unless he is able to state a claim upon which relief can be granted.

4. Further Leave to Amend

Having considered the procedural history of the case, the Court concludes that it should permit Plaintiff to amend his claims. As Judge Patterson noted, "[t]hough it does appear that Plaintiff's claims will be difficult to sustain, it does not appear that they are 'clearly doomed.'" October 11, 2006 Order 14-15, Kramer Decl. Ex. G. Accordingly, Plaintiff may file a second amended complaint within thirty days of the date this order is filed. Any amended complaint shall be limited to the six claims [8] included in the original complaint. [9] Plaintiff should consider **[*25]** including only a subset of those claims. [10]

IV. ORDER

Good cause therefor appearing, IT IS HEREBY ORDERED that the motion to dismiss is GRANTED with leave to amend. Plaintiff shall file any amended complaint within thirty **[*26]** days of the issuance of this order. [11]

DATED: March 16, 2007

JEREMY FOGEL

United States District Judge

[8] The proposed complaint splits the original claim under section two of the Sherman Act into two separate claims. If Plaintiff concludes that he must split his Sherman Act *§ 2* claims and assert one claim for attempted monopolization and another for monopolization, he may do so, thereby raising the total number of claims in the amended complaint to seven.

[9] This restriction is ordered without prejudice to a future motion for leave to amend the complaint if Plaintiff is able to state a viable claim in an amended complaint.

[10] The Court did not reach Google's argument that the entire proposed complaint would be subject to dismissal under *Fed. R. Civ. P. 8*, but, if appropriate, it will consider a similar argument as to an amended complaint.

[11] To the extent that Plaintiff's motion to file an amended complaint, filed on February 9, 2007, was not disposed of by the Court's order on February 13, 2007, that motion is denied.

[Waters v. Sigmon](#)

United States District Court for the Central District of California

March 20, 2007, Decided; March 20, 2007, Filed

CV 06-2300-GHK (SSx)

Reporter
2007 U.S. Dist. LEXIS 105073 *

B. Benedict Waters v. Glenn Sigmon, et al.

Core Terms

anti-SLAPP, Defendants', alleges, counterclaim, motion to dismiss, merits, litigation privilege, termination, amended complaint, motion to strike, malicious, summary judgment motion, privacy, prong, leave to amend, personnel file, Lanham Act, retaliation, discovery, official proceedings, definite statement, abuse of process, discriminatory, quasi-judicial, declaration, motions, argues, amend, costs, facie

Counsel: **[*1]** B Benedict Waters, Plaintiff, Pro se, Los Angeles, CA USA.

For Glenn Sigmon, Robert Carey, Martha, Complete Restoration Services Inc, Mark Eugene Goodfriend, Defendants: Mark E Goodfriend, Mark E Goodfriend Law Offices, Encino, CA USA.

For Complete Restoration Services Inc, Glenn Sigmon, Complete Restoration Services Inc, Glenn Sigmon, Robert Carey, Counter Claimants: Mark E Goodfriend, Mark E Goodfriend Law Offices, Encino, CA USA.

B Benedict Waters, Counter Defendant, Pro se, Los Angeles, CA USA.

B Benedict Waters Also Known as Byron Benedict Waters, Counter Defendant, Pro se, Los Angeles, CA USA.

Judges: GEORGE H. KING, UNITED STATES DISTRICT JUDGE.

Opinion by: GEORGE H. KING

Opinion

CIVIL MINUTES - GENERAL

Proceedings: (In Chambers) Order Re: (1) Defendants' Motion to Strike; (2) Defendants' Motion to Dismiss / for a More Definite Statement / to Stay; (3) Plaintiff's Motion for Leave to File Renewed Motion for Summary Judgment

On January 17, 2007, Defendants filed a Motion to Dismiss, for a More Definite Statement, and/or to Stay or Abate. On February 20, 2007, Defendants also filed a Motion to Strike pursuant to the California anti-SLAPP statute. On February 12, 2007, Plaintiff tiled a renewed Motion for Leave to **[*2]** File a Motion for Summary Judgment. We have considered all of the papers filed in support of and opposition to these motions and deem this matter suitable for resolution without oral argument. *L.R. 7-15*.

I. Anti-SLAPP Motion

California Code of Civil Procedure *section 425.16*[1] "allows a defendant to move to strike a plaintiff's complaint if the complaint stems "from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue."' *Verizon Del., Inc. v. Covad Comrstc'ns Co., 377 F.3d 1081, 1090 (9th Cir. 2004)* (quoting *Cal. Code Civ. Pro. § 425.16(b)(1)*). These motions are known in common parlance as "anti-SLAPP motions." *Id.* "[D]efendants sued in federal courts cart bring anti-SLAPP motions to strike state law claims and are entitled to attorneys' fees and costs when they prevail." *Id. at 1091*.

A. Timeliness

Plaintiff argues that Defendants' anti-SLAPP motion is untimely. *Section 425.16(f)* provides that the "motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." The 60-day window runs anew from the service of each new amended complaint. *See Yu v. Signet Bank/Vir., 103 Cal. App. 4th 298, 314, 126 Cal. Rptr. 2d 516 (2002)* (holding that anti-SLAPP motion filed within 60 days of the filing of a Third Amended complaint, which was itself **[*3]** filed two years after the initial complaint, was nonetheless timely). In this case, the First Amended Complaint ("FAC") was deemed filed by order of the Court on December 18, 2006. The sixtieth day thereafter was February 16, 2007. Because our order was served on Defendants by mail, Defendants were entitled to an additional three days to respond. *See Fed. R. Civ. P. 6(e)*, *see also Lam v. Ngo, 91 Cal. App. 4th 832, 842, 111 Cal. Rptr. 2d 582 (2001)* (rule allowing party additional time to file when served by mail applied to time limit set by *§ 425.16(f)*).[2] And as that third day fell on the Sunday prior to Presidents' Day, Defendants were entitled to file their motion by the end of business of the next day which was not a Sunday or a federal holiday. *See Fed. R. Civ. P. 6(a)*. As that day was February 20, 2007, the date on which the motion was filed, it appears that the motion is timely.

Plaintiff raises two objections to the timeliness of the motion. First, he relies on the fact that the statutory language measures the time to file an anti-SLAPP motion from the time of the "the *service* of the complaint[.]" *§ 425.16*(0 (emphasis added). According to Plaintiff, the FAC was served on Defendants by mail on September 18, 2006, at the time Plaintiff filed his Motion for Leave to File an Amended Complaint. Contrary **[*4]** to Plaintiff's argument, however, the document he alleges was served on Defendants in September was a *proposed* First Amended Complaint. As Defendants had already answered to the original Complaint, the document served by Plaintiff could not become operative without leave of the Court. *See Fed. R. Civ. P. 15(a)*. As our Local Rules indicate "[a]n amended pleading allowed by order of the Court shall be deemed served upon the parties . . . on the date the motion to amend is granted." *L.R. 15-3*. Thus, the effective date of service of the operative FAC was December 18, 2006, the date we granted Plaintiff's motion to amend and ordered the FAC filed.

Plaintiff's second objection is that our December 18, 2006 order allowed Defendants thirty days to respond to the FAC. Thus, he argues, Defendants' delay in filing the anti-SLAPP motion until the last day of the sixty day window provided in *section 425.16(f)* was in violation of the deadline set out in our order. However, we lack the discretion to refuse to consider the merits of an anti-SLAPP motion that is timely filed under the deadline set out in the statute. *See Lam, 91 Cal. App. 4th at 840* ("[T]he statutory language certainly implies that the trial court must consider a special anti-SLAPP suit motion on the merits **[*5]** if it is filed within the 60-day deadline."). Thus, we agree with Defendants that the motion was timely filed and should be addressed on the merits.

---

[1] Unless otherwise denoted, all subsequent statutory citations arc to the California Code of Civil Procedure.

[2] State law applies a five-day extension while the Federal Rules provide a three-day extension. As the rules would be in direct conflict, the three day extension applies in federal court. *See Verizon, 377 F.3d at 1091* (holding that when procedural provision of the anti-SLAPP statute conflicts directly with a Federal Rule, the Federal Rule applies).

B. Merits of the Anti-SLAPP Motion

1. Analytical Framework

In addressing the merits of an anti-SLAPP motion, we apply a:

> two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in *section 425.16, subdivision (e)*. [¶] ... [¶] In deciding whether the initial 'arising from' requirement is met, a court considers the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

Navellier v. Sletten, 29 Cal. 4th 82, 88-89, 124 Cal. Rptr. 2d 530, 52 P.3d 703 (2002) (internal quotation marks and citations omitted).

> If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. . . . [T]he plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable **[*6]** judgment if the evidence submitted by the plaintiff is credited.

Id. at 88-89 (internal quotation marks and citations omitted).

We apply this analysis on a claim-by-claim basis. *See* *ComputerXpress, Inc. v. Jackson, 93 Cal. App. 4th 993, 1004, 113 Cal. Rptr. 2d 625 (2001)*. Here, Defendants seek to strike two claims from the FAC: the Sixth Claim, which alleges "Invasion of Privacy" against Defendant Mark Goodfriend; and the Tenth Claim, which alleges "Abuse of Process" against Defendants Goodfriend, Complete Restoration Services, Inc. ("CRS"), and Glenn Sigmon. We address each in turn.

2. The Sixth Claim for Invasion of Privacy

The Sixth Claim alleges that Defendant Goodfriend "invaded Plaintiff's privacy by deliberately and maliciously publishing to a third party Plaintiff's *entire* personnel file." (FAC 15, ¶ 101 (emphasis in original)) In support of their motion, Defendants provide a declaration indicating that the "third party" to whom Plaintiff's personnel file was provided was a "Deputy Labor Commissioner" who was presiding over a Labor Code claim that Plaintiff had filed with the California Department of Labor Standards Enforcement (the "DLSE proceeding"). (*See* Goodfriend Dec. ¶ 4.) Plaintiff does not contest this fact by contradicting it with his own declaration. He merely points **[*7]** out that the FAC does not name the third party who received the file. As noted above, we are entitled to look beyond the four corners of the FAC and to rely on affidavits in determining whether the claim "arises from" activity protected by the statute. *See* *Navellier, 29 Cal. 4th at 89*. Thus, for the sake of this analysis, we accept as a factual matter that the "publication" alleged in the Sixth Claim was to a Labor Commissioner presiding over a quasi-judicial administrative enforcement proceeding.

Included within *section 425.16(e)*'s definition of protected activities is "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law[.]" *§ 425.16(e)(1)*. The language of the provision appears to clearly encompass sending documentation in opposition to a claim in a DLSE proceeding before a Labor Commissioner. *See, e.g., Harris v. King, 60 Cal. App. 4th 1185, 1187, 70 Cal. Rptr. 2d 790 (1998)* (workers' compensation proceeding). Plaintiff does not contest that such a proceeding is an "official proceeding authorized by law," Instead he raises three apparent[3] arguments as to why the Defendants cannot satisfy the "arising from" prong of the analysis.

First, Plaintiff argues that Defendants have failed to show that their alleged **[*8]** activities constituted participation in "matters of public interest" or "in connection with a public issue." However, courts have consistently held that, provided a Defendant's activities fall within the textual ambit of *section 425.16(e)(1)*—i.e. they are "written or oral statement[s] or writing[s] made before a[n] . . . official proceeding authorized by law"—anti-SLAPP movants need not make an independent demonstration that the activity is of public interest or in connection with a public issue. *See A.F. Brown Elec. Contractor, Inc. v. Rhino Elec. Supply, Inc., 137 Cal. App. 4th 1118, 1129-30, 41 Cal. Rptr. 3d 1 (2006)*; *Navarro v. IHOP Properties, Inc., 134 Cal. App. 4th 834, 842-42, 36 Cal. Rptr. 3d 385 (2005)*; *Blackburn v. Brady, 116 Cal. App. 4th 670, 675, 10 Cal. Rptr. 3d 696 (2004)*. Thus, this argument fails.

Second, Plaintiff argues that Goodfriend was not required to submit his entire personnel file as part of the DLSE proceeding. The DLSE Notice of Claim states that Defendants were required to "bring [P]laintiff's personnel file, including all time and 'payroll records to [a] conference" in which they were to "discuss the validity of and to settle" Plaintiff's DLSE claim. In the alternative, Defendants were permitted to submit payment in the full value of Plaintiff's claim to the DLSE. Apparently, instead of undertaking either option—showing up in person with Plaintiff's records or sending payment in full—Defendants attempted to resolve the matter without a hearing by submitting **[*9]** Plaintiff's personnel records to the Labor Commissioner. (*See* Motion to Strike, Ex. 2, 4.) While we take no position on the wisdom or merits of Goodfriend's approach, we have no doubt that Plaintiff's personnel records, which the Defendants were instructed to bring with them to the conference, are "writings" that were submitted "in connection with an issue under consideration or review in the [DLSE] proceeding." *See Blackburn, 116 Cal. App. 4th at 677* (internal quotation omitted); *compare Paul v. Friedman, 95 Cal. App. 4th 853, 866, 117 Cal. Rptr. 2d 82 (2002)* (holding that scurrilous details from securities dealer's personnel file were " personal matters bearing no relationship to the claims asserted" in a securities arbitration and thus that they were not communications falling within *§ 425.16(e)(1)*). Thus, Plaintiff's second argument fails.

Third, Plaintiff argues that the activities of Defendant Goodfriend are not protected because Goodfriend was not a party to the DLSE proceeding. However, it is clear that Goodfriend's role in the proceeding was in serving as counsel for the other Defendants. (*See* Motion to Strike Ex. 2 ("We are counsel for Complete Restoration Services, Inc. Defendant in the above-referenced [DLSE] case.").) The anti-SLAPP statute protects "qualifying acts committed by attorneys **[*10]** in representing clients in litigation," including the submission of arguments and evidence in an official proceeding. *Rusheen v. Cohen, 37 Cal. 4th 1048, 1056, 39 Cal. Rptr. 3d 516, 128 P.3d 713 (2006)*. Thus, Plaintiff's third argument fails as well.

Thus, we find that Defendants have met their burden of showing that the conduct alleged in Claim Six arises from activity protected by the anti-SLAPP statute. The burden now shifts to Plaintiff to present a prima facie case of success on the merits. Plaintiff raises two arguments on this point.

Defendants' attack on the Sixth Claim is based on their argument that the litigation privilege, in *section 47(b)* of the Civil Code, bars Plaintiff's claim. If a claim is barred by such privilege, Plaintiff cannot, as a matter of law, demonstrate a prima facie case of success on the merits. *See Rusheen, 37 Cal. 4th at 1065*; *see also Healy v. Tuscany Hills Landscape & Recreation Corp., 137 Cal. App. 4th 1, 5, 39 Cal. Rptr. 3d 547(2006)* ("[S]tatements which come within the protection of the litigation privilege of Civil Code *section 47, subdivision (b)*, are equally entitled to the benefits of *section 425.16*."). "The litigation privilege is absolute; it applies, if at all, regardless whether the communication was made with malice or the intent to harm. Put another way, application of the privilege does not depend on the publisher's 'motives, morals, ethics or intent.'" *Silberg v. Anderson, 50 Cal. 3d 205, 220, 266 Cal. Rptr. 638, 786 P.2d 365 (1990)* (internal citation omitted).

---

[3] Plaintiff does not delineate which of his arguments address the "arising from" prong of the analysis and which address the "prima facie merits" prong of the anti-SLAPP analysis. As Plaintiff is *pro se*, we construe his arguments liberally and apply them to the analysis in the manner most favorable to him.

Plaintiff seeks **[*11]** to avoid this bar by arguing that the activity alleged in the Sixth Claim is "conduct, not communication" and thus is not protected by the litigation privilege. (*See* Plaintiff's Opposition to Motion to Strike 6 (citing *Drum v. Bieau, Fox & Assocs., 107 Cal. App. 4th 1009, 1024, 132 Cal. Rptr. 2d 602 (2003))*. We note initially that the case cited by Plaintiff has been expressly rejected by the California Supreme Court for applying an overbroad conception of "conduct," to the conduct/communication distinction under the litigation privilege. *See Rusheen, 37 Cal. 4th at 1065* (disapproving *Drum)*. We also note that, other than a hare assertion of the rule, Plaintiff provides no explanation regarding why Goodfriend's action—submitting evidentiary material to a quasi-judicial proceeding—should be considered conduct and not communication. Nor is this argument supported by the law. A claim whose gravamen lies in the submission of relevant documents to a judicial or quasi-judicial proceeding is considered to arise from a communicative act. *See Rusheen, 37 Cal. 4th at 1062* (holding that submission of allegedly perjured declarations of service used to procure judgment was communicative). Moreover, such a submission undertaken in connection with an official proceeding is a communication protected by the litigation privilege when it is "(1) **[*12]** made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Silberg, 50 Cal. 3d at 212*.

Here, all four elements are met. The personnel file was submitted to a quasi-judicial proceeding. It was submitted by litigants and their counsel. It was submitted to achieve the ends of the litigation.[4] And, given that Defendants were instructed to bring the file to the conference, it undoubtedly has a connection with the issues in the proceeding.

Thus, as the litigation privilege applies to the activities that form the basis of the allegations in Claim Six, Plaintiff cannot demonstrate a prima facie case of success on the merits. For this reason Plaintiff's other argument—that his privacy interest in certain material within the file is protected from disclosure by law—must fail as well.[5] As Plaintiff has not met his burden on the second prong of the anti-SLAPP analysis, Defendants' motion to strike the Sixth Claim is **GRANTED**.

Thus, as the absolute litigation privilege applies to the activities that form the basis of the **[*13]** allegations in Claim Six, Plaintiff cannot demonstrate a prima facie case of success on the merits. For this reason Plaintiff's other argument—that his privacy interest in certain material within the file is protected from disclosure by law—must fail as well. As Plaintiff has not met his burden on the second prong of the anti-SLAPP analysis, Defendants' motion to strike the Sixth Claim is **GRANTED**.

---

[4] Plaintiff points out that he prevailed in the DLSE proceeding. But the privilege does not and cannot turn on the parties' ultimate success on the merits of the proceeding.

[5] Despite the fact that in *Silberg* the California Supreme Court described the litigation privilege as "absolute," *see Silberg, 50 Cal. 3d at 220*, and that Court has held that the litigation privilege applies to claims for invasion of privacy, *see Ribas v. Clark, 38 Cal. 3d 355, 364, 212 Cal. Rptr. 143, 696 P.2d 637 (1985)*, there are a few court of appeal decisions holding that certain claims for invasion of privacy rights protected by the state constitution can overcome the litigation privilege. *See Jeffrey H. v. Imai, Tadlock & Keeney, 85 Cal. App. 4th 345, 359, 101 Cal. Rptr. 2d 916 (2000)*; *Urbaniak v. Newton, 226 Cal. App. 3d 1128, 1141, 277 Cal. Rptr. 354 (1991)*; *Cutter v. Brownbridge, 183 Cal. App. 3d 836, 844, 228 Cal. Rptr. 545 (1986)*. Others courts have disagreed. *See Jacob B. v. County of Shasta, 137 Cal. App. 4th 225, 40 Cal. Rptr. 3d 81 (2006)*; *Wise v. Thrifty Payless, Inc, 83 Cal. App. 4th 1296, 1303 n.1, 100 Cal. Rptr. 2d 437 (2000)*. The Supreme Court has granted review of a case addressing the issue. *See* ***Jacob B., 46 Cal. Rptr. 3d 605, 139 P.3d 1 (2006)*** (order granting review). Plaintiff does not press this point. Moreover, even if the cases holding the litigation privilege as nonabsolute in the face of a constitutional privacy claim are correctly decided, the decisions are distinguishable from the facts of this case. Each of these cases involved the defendants' *purely voluntary* submission of plaintiffs' private, but minimally relevant, matters to an official proceeding. In these cases, defendants' submission of the private materials was a matter of their own strategic choices. In contrast, in this case the file was affirmatively sought by the tribunal. Defendants were instructed in official correspondence to bring Plaintiff's personnel file to the conference before the Labor Commissioner. The fact that it was mailed to the Commissioner, as opposed to physically carried to the conference, is a distinction that warrants no difference. Because the Labor Commissioner required the file to be produced, Defendants are entitled to rely on that instruction in claiming the litigation privilege. *Cf. Jeffrey H., 85 Cal. App. 4th at 360* ("[It is] clear that the litigation privilege applies when the disclosure is made pursuant to a judicial determination[.]").

3. The Tenth Claim for Abuse of Process

Defendants also seek to strike the Tenth Claim, which alleges abuse of process arising from counterclaims filed by Defendants in this action. The analysis is largely the same as above. Defendants' conduct—filing a counterclaim with this Court—is petitioning activity falling under *§ 425.16(e)(1)*. *See* Navellier, 29 Cal. 4th at 90. Because the gravamen of the Claim lies in actions filed before the court, it is similarly subject to the litigation privilege in Civil Code *section 47(b)*, even if, as Plaintiff alleges, the counterclaim is wholly spurious. *See* *Ruskeen, 37 Cal. 4th at 1061*.[6] Plaintiff's opposition provides no arguments as to why the outcome for this claim should be any different. Thus, as Plaintiff cannot meet his burden on the second prong of the anti-SLAPP analysis, Defendant's motion to strike the Tenth Claim is **GRANTED**.

4. Attorney's Fees

A defendant who prevails on an anti-SLAPP motion is entitled to recover "his or her attorney's fees and costs." *§ 425.16(c)*. Thus, within fourteen days hereof, Defendants are **ORDERED** to file a declaration detailing their costs and fees. Such costs and fees shall be limited to those incurred in litigating Plaintiff's Sixth and Tenth Claims, including those incurred in the current motion. Defendants' failure to file such a declaration shall result in Defendants' waiver of their entitlement to recover their fees. Within thirty days thereafter, Plaintiff may tile objections, if any, to Defendants' fee calculations. Plaintiff's failure to timely file objections shall be deemed his waiver of any such objections.

H. Motion to Dismiss I for a More Definite Statement 1 to Stay

Defendants move: (1) to dismiss the First Claim, for racially discriminatory termination pursuant *42 U.S.C. § 1981*, as to defendant Goodfriend only; (2) to dismiss the Third Claim, for retaliation pursuant *42 U.S.C. § 1981*; (3) to dismiss the Fourth and Fifth Claims, which allege violations of the Lanham Act, *15 U.S.C. § 1125(a)*; (4) to dismiss the Sixth Claim, for invasion of privacy, or in the alternative, to require a more definite statement; (5) to dismiss the **[*15]** Tenth Claim for abuse of process; and (6) to stay all remaining claims against Defendant Goodfriend, in order to allow him to properly represent his clients without creating conflicts of interest.

A. The First Claim Against Goodfriend

The First Claim alleges that Plaintiff was terminated from his employment with CRS in a racially discriminatory manner. As to Defendant Goodfriend, the FAC merely alleges that Goodfriend "actively participated in" Sigmon and CRS's racially motivated termination of Plaintiffs' employment.

Under *42 U.S.C. § 1981*, the liability of individuals who play some role in a discriminatory termination, as opposed to the employers themselves, is unclear. No Ninth Circuit cases directly address the scenario. *See* *Bruin v. Mills College, 06-05209 WHA, 2007 U.S. Dist. LEXIS 19847, 2007 WL 419783, at *3 (N.D. Cal. February 6, 2007)* ("[T]he Ninth Circuit has not expressly authorized an employee to sue a non-employer defendant under *42 U.S.C. 1981*.").[7] Other circuits have held that *§ 1981* liability can lie against individual non-employer defendants. *See* *Whidbee v.*

---

[6] Additionally, this claim appears to be legally insufficient because a claim for abuse of process cannot arise from the mere filing of a lawsuit. *See* ***[*14]*** *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc., 42 Cal. 3d 1157, 1169, 232 Cal. Rptr. 567, 728 P.2d 1202 (1986)* ("[T]he mere filing or maintenance of a lawsuit—even for an improper purpose—is not a proper basis for an abuse of process action.").

[7] *El-Hakem v. BJY Inc., 415 F.3d 1068, 1073 (9th Cir. 2005)* held a CEO jointly liable with a corporation under *§ 1981*, but did not actually discuss the individual liability issue.

Garzarelli Food Specialties, Inc., 223 F.3d 62, 75 (2nd Cir. 2000); Cardenas v. Massey, 269 F.3d 251, 268-9 (3d Cir. 2001); Foley v. University of Houston System, 355 F.3d 333 (5th Cir. 2003); Johnson v. University of Cincinnati, 215 F.3d 561, 571 (6th Cir. 2000); Turner v. Ark. Ins. Dept., 297 F.3d 751, 754 (8th Cir. 2002); Allen v. Denver Pub. Sch. Bd., 928 F.2d 978, 983 (10th Cir. 1991).

However, this liability is generally grounded on the personal involvement of owners or managers in discriminatory decisions. Moreover, dicta in Ninth Circuit cases seems to suggest that in order for an individual to have liability under the **[*16]** statute, the individual's actions must be personally motivated by racial animus. *See* El-Hakem, 415 F.3d at 1074 (holding that there was sufficient evidence of individual's racially discriminatory intent, without specifically holding that such intent was a requisite to individual liability).

The allegations against Goodfriend, which state nothing other than his undefined "active participation," are insufficient to state a claim. Absent some allegation that Goodfriend played a role in the decision-making process that led to Plaintiff's termination, or that he carried out others' instructions to terminate Plaintiff with an intent to discriminate against Plaintiff on the basis of his race, the claim cannot stand. Thus, as to Goodfriend, the First Claim is DISMISSED. Although we allow Plaintiff leave to amend this claim, we remind him that any amendments must have a reasonable basis in fact. *See* Fed. R. Civ. P. 11(b)(3) (requiring that "allegations and other factual contentions have evidentiary support"), (c) (subjecting party who pleads facts without sufficient factual basis to sanctions). Moreover, this claim will be permitted to stand against Goodfriend only if Plaintiff can allege that Goodfriend participated in the termination as it **[*17]** occurred. Goodfriend's after-the-fact role as an attorney in defending the Defendants against Plaintiff's lawsuit cannot form the basis of his liability on this claim.

B. The Third Claim for Retaliation

The Third Claim alleges that Defendants Sigmon, CRS, and Goodfriend caused the counterclaims in the current action to be brought against Plaintiff in retaliation for his filing of the original Complaint in this case. Defendants argue that the claim should be dismissed because their conduct—petitioning the Court by filing a counterclaim—is protected by the First Amendment.

We agree. Under the *Noerr-Pennington* doctrine, "[I]hose who petition government for redress are generally immune from antitrust liability." Manistee Town Center v. City of Glendale, 227 F.3d 1090, 1092 (9th Cir. 2000). Filing a counterclaim is considered a "petition" for purposes of the application of the doctrine. *See* Freeman v. Lasky, Haas & Cohler, 410 F.3d 1180, 1184 (9th Cir. 2005). The Ninth Circuit has extended the reach of the *Noerr-Pennington* doctrine beyond its root in ***antitrust law***. Thus, the doctrine now provides an immunity from various lawsuits grounded in a defendant's petitioning activities, including actions for violations of civil rights, *see* Manistee Town Center, 227 F.2d at 1092, as well as claims for retaliation, *see* Sanghvi v. City of Claremont, 328 F.3d 532, 543 (9th Cir. 2003), and claims arising under the Federal Housing Act, *see* White v. Lee, 227 F.3d 1214, 1232 (9th Cir. 2000).

"Where a claim involves **[*18]** the right to petition governmental bodies under *Noerr-Pennington* . . . we apply a heightened pleading standard." Or. Natural Res. Council v. Mohla, 944 F.2d 531, 533 (9th Cir. 1991). Thus, a claim that grounds liability in the filing of a counterclaim can only move forward if Plaintiff sufficiently pleads that the counterclaim is a "sham." *Id.* In order to survive a motion to dismiss, the complaint must allege both that: (1) the counterclaim is "objectively baseless"; *and* (2) that the filing of the claim was improperly motivated by Defendants' intent to retaliate. *See* Manistee Town Center, 227 F.3d at 1094. Such pleading must go beyond "conclusory allegations," which are "not sufficient to strip a defendant's activities *of Noerr-Pennington* protection." Mohla, 944 F.2d at 533.

Here, the FAC alleges that Defendants filed their counterclaim in an effort to retaliate against Plaintiff for exercising his rights in filing his 42 U.S.C. § 1981 claim. (FAC ¶¶ 57-31.) While this may be sufficient to meet the second, subjective, motivation prong of the sham pleading requirement, it is insufficient to meet the first, objective, prong. While the FAC contains some conclusory allegations that Defendants' counterclaims were "load[ed]" with "slanderous, humiliating, false, malicious statements, rumors and gossip[,]" there are no allegations **[*19]** sufficient to establish that the counterclaim is entirely "objectively baseless." Nor has Plaintiff filed a motion to dismiss the counterclaims as legally meritless or to strike the immaterial and scandalous matters allegedly contained therein.[8]

Thus, as Plaintiff has not met the heightened pleading standard required of Claims that seek to afford liability based on petitioning activity, the Third Claim must be DISMISSED, with leave to amend. Again, we warn Plaintiff that, while we permit him to amend this claim, such amendments must have a reasonable basis in fact, and that alleging facts without an adequate evidentiary basis could result in the imposition of sanctions. *See* *Fed. R. Civ. P. 11(b)(3)*, *(c)*.

C. The Fourth and Fifth Claims for Violations of the Lanham Act

Defendants move to dismiss the Fourth and Fifth Claims for Violations of the Lanham Act, *15 U.S.C. § 1125(a)*, because Plaintiff lacks standing to sue. Plaintiff's Lanham Act claims allege that Defendants have engaged in false commercial advertising that misstates the services provided by Defendants, and that such advertising has the potential to divert customers from Plaintiff's competing mold removal business. Defendants' argument fails to comprehend **[*20]** that the Lanham Act covers more than claims alleging trademark infringement. The Act also prohibits various forms of unfair and deceptive advertising.

"[F]or standing pursuant to the 'false advertising' prong of *§ 43(a)* of the Lanham Act . . . , a plaintiff must show: (1) a commercial injury based upon a misrepresentation about a product; and (2) that the injury is 'competitive,' or harmful to the plaintiff's ability to compete with the defendant." *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1037 (9th Cir. 2005)*. We find Plaintiff's allegations sufficient to meet this standard at the pleading stage. Thus, Defendants' motion to dismiss the Lanham Act claims is **DENIED**.

D. The Sixth Claim for Invasion of Privacy

As we have already stricken the Sixth Claim pursuant to Defendants' anti-SLAPP motion, the motion to dismiss this claim, or to require it to be replead to allege greater particularity is **DENIED** as **MOOT**.

E. The Tenth Claim for Abuse of Process

As we have already stricken the Tenth Claim pursuant to Defendants' anti-SLAPP motion, the motion to dismiss this claim is **DENIED** as **MOOT**.

Plaintiff seeks leave to replead this claim as a claim for malicious prosecution, which is not subject to the litigation immunity addressed above. However, it is clear that a claim **[*21]** for malicious prosecution is not ripe in the current action because such a claim is contingent on favorable termination of the alleged maliciously prosecuted litigation:

> "The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice, establishes the tort, that is, the malicious and unfounded charge . . . against an innocent person . . . ." Because of this requirement, it is obvious that a defendant cannot cross-complain or counterclaim for malicious prosecution in the first or main action since a claim cannot state a cause of action at that stage of the proceedings.

---

[8] Plaintiff has sought to file a summary judgment motion against the counterclaims, which we have denied as premature because discovery in the case has not been completed. *See* *Fed. R. Civ. P. 16(b)(2)*, *(3)* (providing the district court with authority to manage discovery and motion practice through the scheduling order). But a perusal of that motion does not plainly reveal that no "objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome[.]" *Amarel v. Connell, 102 F.3d 1494, 1518 (9th Cir, 1996)* (quoting *Prof?* *Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993))*.

Jenkins v. Pope, 217 Cal. App. 3d 1292, 1298, 266 Cal. Rptr. 557 (1990) (quoting Babb v. Superior Court, 3 Cal. 3d 841, 92 Cal. Rptr. 179, 479 P.2d 379 (1971)).

Thus, leave to amend to allege a malicious prosecution claim is **DENIED** because such amendment would be futile. Moreover, once a defendant has satisfied its burden of showing that a claim arises from activity protected by the anti-SLAPP statute, a plaintiff cannot amend the claim to avoid a pending motion to strike. Simmons v. Allstate Ins. Co., 92 Cal. App. 4th 1068, 1073, 112 Cal. Rptr. 2d 397 (2001).

F. Motion to Stay

Defendant Goodfriend's motion to stay any remaining claims pending against him is **DENIED** as **MOOT** as all such claims have been stricken or dismissed. Inasmuch **[*22]** as we have granted Plaintiff leave to amend certain claims, Goodfriend may renew his stay motion in the event we, after consideration of the amendments, permit any claim to go forward against him.

III. Plaintiff's Motion for Leave to File Motion for Summary Judgment

Plaintiff seeks leave to file a motion for summary judgment. It appears that this request seeks reconsideration of our August 31, 2006 order denying his original motion as premature. The request is **DENIED**.

While Plaintiff takes issue with our original grant of Rule 56(1) relief in our August 31, 2006 order, he fails to recognize the significance of the fact that his motion was filed extremely early in the case. Although it is true that a motion for summary judgment may be filed at any time, when "a summary judgment motion is filed so early in the litigation, before a party has had any realistic opportunity to pursue discovery relating to its theory of the case, district courts should grant any Rule 56(0 motion fairly freely." Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation, 323 F.3d 767, 774 (9th Cir. 2003). "[L]ightning-quick summary judgment motions can impede informed resolution of fact-specific disputes." *Id.* Further, when little or no discovery has taken place, "the party making a Rule 56(f) motion cannot be expected to frame **[*23]** its motion with great specificity as to the kind of discovery likely to turn up useful information, as the ground for such specificity has not yet been laid." *Id.; see also* Metabolife Intl, Inc. v. Wornick, 264 F.3d 832, 846 (9th Cir. 2001) (noting that a district court is required to provide non-moving party with opportunity to conduct discovery of "information that is essential to its opposition").[9] Thus, although Defendants' original Rule 56(f) request was not particularly specific, it was timely made prior to the hearing date for the motion, and it adequately informed the Court of reasons why a summary judgment motion was premature.

Rule 16(b) of the Federal Rules of Criminal Procedure provides us with the authority to enter orders governing scheduling, including orders limiting the time in which the parties can conduct discovery and file dispositive motions. *See* Fed. R. Civ. P. 16(b)(2), (3). In this case, the scheduling conference is presently set for March 26, 2007. However, in light of the fact that we are still at the pleading stages, we **VACATE** the scheduling conference currently set for March 26, 2007, and take it **OFF CALENDAR**. We will re-set the scheduling conference once the pleadings are closed. At that time, we will set cutoff dates for discovery and dispositive motions.

IV. Conclusion

The Special Motion to Strike **[*24]** is **GRANTED**. The Sixth and Tenth claims are **STRICKEN** without leave to amend. Defendants are awarded costs and attorney's fees on these claims as detailed above. The Motion to

[9] We further note that premature consideration of summary judgment motions, particularly those granted prior to the close of discovery, often leads to wasteful re-litigation of issues. *See, e.g.,* Burlington N. Santa Fe, 323 F.3d at 774 (remanding for additional discovery and reconsideration of grant of early motion for summary judgment).

Dismiss / for a More Definite Statement / to Stay is **GRANTED in PART** and **DENIED in PART**. The First Claim as to Defendant Goodfriend, and the Third Claim as to Defendants CRS, Sigmon, and Goodfriend are **DISMISSED**, with leave to amend. The remainder of the Motion is **DENIED** for the reasons stated above. Plaintiff's Motion for Leave to File a Motion for Summary. Judgment prior to the entry of the scheduling order is **DENIED**.

Plaintiff is **ORDERED** to file a Second Amended Complaint within twenty days hereof. Plaintiff's failure to timely file such an amended complaint shall be deemed his waiver of any right to amend as addressed in this order. Defendants are **ORDERED** to answer or otherwise respond to the Second Amended Complaint within ten days of its filing. *See* *Fed. R. Civ. P. 15(a)*.

IT IS SO ORDERED.

Wilson v. General Motors Corp.

Supreme Court of New Jersey

January 29, 2007, Argued ; March 20, 2007, Decided

A-58 September Term 2006

Reporter

190 N.J. 336 *; 921 A.2d 414 **; 2007 N.J. LEXIS 342 ***; 2007-1 Trade Cas. (CCH) P75,638

RICHARD M. WILSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFF-APPELLANT, v. GENERAL MOTORS CORPORATION, GENERAL MOTORS OF CANADA, LTD., FORD MOTOR COMPANY, FORD MOTOR COMPANY OF CANADA, LTD., TOYOTA MOTOR CORPORATION, TOYOTA MOTOR SALES, U.S.A., INC., TOYOTA CANADA, INC., HONDA MOTOR COMPANY, LTD., AMERICAN HONDA MOTOR CO., INC., HONDA CANADA, INC., DAIMLERCHRYSLER AKTIENGESELLSCHAFT, DAIMLERCHRYSLER CANADA, INC., MERCEDES-BENZ CANADA, INC., NISSAN MOTOR COMPANY, LTD., NISSAN NORTH AMERICA, INC., NISSAN CANADA, INC., BMW OF NORTH AMERICA, INC., BMW CANADA, NATIONAL AUTOMOBILE DEALERS ASSOCIATION AND CANADIAN AUTOMOBILE DEALERS ASSOCIATION, DEFENDANTS-RESPONDENTS.

Prior History: [*1]** On appeal from the Superior Court, Appellate Division.

Core Terms

antitrust, dealers, consumers, allegations, complaints, conspiracy, consumer fraud, plaintiffs', indirect

Syllabus

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

Richard M. Wilson v. General Motors Corporation, et al. **(A-58-06)**

Argued January 29, 2007 -- Decided March 20, 2007

PER CURIAM

Four separate complaints, filed as class action lawsuits, were consolidated under the *Wilson v. General Motors* caption. In their complaints, the class-action plaintiffs allege violations of the New Jersey Antitrust Act, *N.J.S.A. 56:9-1 to -19*, and that those acts constituted "unconscionable practices" in violation of the New Jersey Consumer Fraud Act, *N.J.S.A. 56:8-1 to -20*, (CFA).

The foundation of the plaintiffs' claims is that the manufacturing defendants, with the aid and assistance of the dealer association defendants, entered into a series of agreements resulting in actions intended to ensure that New Jersey consumers could not **[***2]** purchase new cars sold to dealers in Canada and, instead could only purchase those same cars in the United States at higher prices. The complaints allege that the defendants sought to restrict the supply of, and the alternative sources for, new vehicles for New Jersey consumers in order to artificially drive up the prices for vehicles purchased in New Jersey. The complaints further allege that by preventing New Jersey consumers from having an alternative supply of cars from Canada, the manufacturing defendants unreasonably increased the costs incurred for their products by New Jersey consumers. Plaintiffs acknowledge that the conduct, the purpose of which was to make sure consumers would pay higher prices for the manufacturing defendants' vehicles, included actions directed at the manufacturing defendants' new vehicle dealers.

In affirming the lower court's dismissal of the complaints, a majority of the Appellate Division reasoned that: 1) the only acts and practices included in the complaint are anti-competitive acts in furtherance of an antitrust conspiracy-each of the acts by defendants were explicitly directed at dealers; 2) there is no act alleged that constitutes a deception **[***3]** or includes any type of misleading behavior directed at the plaintiffs; and 3) all of the acts complained of affect plaintiffs only in their status as indirect consumers. According to the Appellate Division majority, the complaints do not include any facts that constitute an unconscionable commercial practice apart from the antitrust conspiracy and the acts undertaken in furtherance thereof. As such, the majority concluded that the plaintiffs' complaints cannot state a claim for relief under the CFA. The majority noted that to hold otherwise would be to create an "end run" around the plain intention of the Legislature embodied in the Antitrust Act.

One member of the appellate panel dissented, finding that in reading the allegations of the complaints as required for purposes of a motion to dismiss under *Rule 4:6-2(e)*, plaintiffs have alleged the fundamentals of a consumer fraud action, i.e., that independently of the price-fixing conspiracy, defendants have engaged in conduct in violation of the CFA. The dissent noted that it was alleged that the manufacturing defendants, among other things, sought and obtained agreement from their United States dealers to: 1) not honor new car **[***4]** warranties on cars imported from Canada; 2) not install properly calibrated imperial measure speedometers and odometers in cars imported from Canada which had metric speedometers and odometers; and 3) taking measures to enforce the agreements by refusing to provide United States buyers of new Canadian cars with information regarding recalls. The dissent was of the view that these actions suggested the fundamentals of a CFA cause of action independent of the price-fixing, antitrust violation. The dissent also concluded that the CFA claims could be pursued without creating a conflict between the Antitrust Act and the CFA.

Plaintiffs appeal as of right based on the dissent in the Appellate Division.

HELD: The allegations in these class-action complaints essentially assert an anti-competition scheme in violation of the New Jersey Antitrust Act. There are no allegations or communications with, or directed to, consumers "in connection with the sale or advertisement" of vehicles that would entitle plaintiffs to relief under the Consumer Fraud Act.

1. Federal law is followed when interpreting our own antitrust statute. For purposes of this appeal, it is uncontested that indirect **[***5]** purchasers, such as plaintiffs, who did not purchase vehicles directly from defendants, have no standing to assert a private right of action under the New Jersey Antitrust Act. (P. 5)

2. The alleged wrongdoing is essentially directed to the sale of vehicles in Canada and their importation into the United States. There are no allegations of communications with, or directed to, consumers "in connection with the sale or advertisement" of vehicles as required under the CFA. Even if the complaints can be said to allege an "unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact…in connection with the sale or advertisement" of a motor vehicle to a putative plaintiff in violation of the CFA, the Court agrees with the Appellate Division majority that the allegations in the complaints, which basically assert an anti-competition scheme in violation of the Antitrust Act without any allegation of a direct or indirect statement or communication with any plaintiff, are precluded under the federal antitrust case, *Illinois Brick*, (Pp. 6-8)

3. The Court leaves for **[***6]** another day whether a CFA action would be precluded where the allegations of a violation of the Antitrust Act include communications with, or statements to, New Jersey consumers that are clear violations of the CFA. (P. 8)

Judgment of the Appellate Division is **AFFIRMED.**

Counsel: *Donna Siegel Moffa* argued the cause for appellant (*Trujillo Rodriguez & Richards*, attorneys; *Ms. Moffa*, *Lisa J. Rodriguez* and *Nicole M. Acchione*, on the briefs).

William R. Sherman, a member of the District of Columbia bar, argued the cause for respondents *Campbell Campbell Edwards & Conroy*, attorneys for Ford Motor Company and Ford Motor Company of Canada, Ltd., (*Lavin, Coleman, O'Neil, Ricci, Finarelli & Gray*, attorneys for General Motors Corporation and General Motors of Canada, Ltd., *Krovatin & Associates*, attorneys for American Honda Motor Co., Inc., *Cooper, Rose & English*, attorneys for Nissan North America, Inc., *Marshall, Dennehey, Warner, Coleman & Coggin*, attorneys for DaimlerChrysler Canada, Inc. and Mercedes-Benz Canada, Inc. and *Connell Foley*, attorneys for National Automobile Dealers Association; *Bryan D. McElvaine*, *Joseph E. O'Neil*, *Gerald Krovatin*, *Peter M. Burke*, *Kevin M. McKeon* and **[***7]** *Brian G. Steller*, on the brief).

Judges: Justices LaVECCHIA, WALLACE, RIVERA-SOTO, STERN (t/a) and LINTNER (t/a).

Opinion

[*337] **[**415]** PER CURIAM.

Plaintiffs appeal as of right, pursuant to *Rule 2:2-1(a)(2)* following a dissent in the Appellate Division, from a judgment affirming the dismissal of their complaints in the Law Division. [1] Plaintiffs' **[*338]** complaint alleged violations of the New Jersey Antitrust Act, *N.J.S.A. 56:9-1 to -19*, and that those acts constituted "unconscionable practices" in violation of the New Jersey Consumer Fraud Act, *N.J.S.A. 56:8-1 to -20* (CFA). [2] The appeal to the Appellate Division challenged only the dismissal of plaintiffs' claims under the CFA, and, in an unpublished opinion, a majority of the Appellate Division affirmed the judgment dismissing the CFA complaint.

[*8]** In the words of plaintiffs' brief,

> [t]he gravamen of Plaintiffs' complaints was that the Manufacturing Defendants, with the aid and assistance of the dealer association defendants, entered a series of agreements pursuant to which they took various actions intended to ensure that New Jersey (and other United States) consumers could not purchase new cars sold to dealers in Canada and, instead could only purchase those same cars in the United States--at higher prices.

According to plaintiffs,

> [t]he complaints allege that the Manufacturing Defendants, in concert with the automobile dealer association defendants, engaged in a wide-ranging conspiracy to prevent vehicles that they had sold to dealers in Canada from being exported and sold to consumers in New Jersey (and the United States), so that consumers of the Manufacturer-Defendants' vehicles would have to pay higher prices for those vehicles.

---

[1] Four separate complaints, filed as class actions, were consolidated under the *Wilson v. General Motors* caption.

[2] The Wilson and Kaufman complaints do not expressly state "causes of action [in] violation of *N.J.S.A. 56:9-3*," as do the Williams and Tatte complaints. However, the Wilson and Kaufman complaints allege that "[d]efendants have engaged in unfair methods of competition in violation of the standards of conduct established by the New Jersey Antitrust Act, *N.J.S.A. 56:9-1, et seq.* The violation of this [A]ct constitutes unfair and unconscionable practices, which are actionable pursuant to the New Jersey Consumer Fraud Act *56:8-2*." According to the Wilson and Kaufman complaints:

> The contract, combination and conspiracy alleged herein was an unconscionable commercial practice prohibited by the New Jersey Fraud Statute and other state statutes prohibiting price fixing. The unconscionable commercial practice consisted of a continuing agreement, understanding and concert of action among the Defendants and their co-conspirators the substantial terms of which were to eliminate the import of new cars from Canada into the United States and thereby raise, fix, stabilize or maintain prices of new automobiles sold or leased in the State of New Jersey and throughout the United States at artificially high levels.

[*339] "The complaints allege that Defendants sought to restrict the supply of, and the alternative sources for, new vehicles for New Jersey consumers in order to artificially drive up the prices for vehicles purchased in New Jersey." Plaintiffs further allege that **[***9]** "[b]y preventing New Jersey consumers from having the alternative of a supply of cars from Canada, the Manufacturing Defendants unreasonably increased the costs incurred for their products by New Jersey consumers." Thus, plaintiffs **[**416]** acknowledge that "[t]he conduct, the object of which was to ensure that consumers paid higher prices for the Manufacturing Defendant[s'] vehicles, included actions directed at the Manufacturing Defendants new vehicle dealers[.]"

In affirming the dismissal of the complaints the Appellate Division majority concluded:

> Because the only acts and practices included in the complaint are anti-competitive acts in furtherance of an antitrust conspiracy, because there is no act alleged that constitutes a deception or includes any type of misleading behavior directed at these plaintiffs, because all of the acts complained of affect plaintiffs only in their status as indirect consumers, we conclude that their complaint cannot state a claim for relief under the Consumer Fraud Act. To conclude to the contrary, as we found in *Sickles [v. Cabot Corp., 379 N.J. Super. 100, 877 A.2d 267 (App.Div.)*, *certif. denied, 185 N.J. 297, 884 A.2d 1267 (2005)]*, would be **[***10]** to create an "end run" around the plain intention of the Legislature embodied in the Antitrust Act. *See Sickles v. Cabot Corp., supra, 379 N.J. Super. 100 at 117 [877 A.2d 267]* (quoting *Abbott Labs. [Inc. v. Segura, 907 S.W.2d 503, 506, 38 Tex. Sup. Ct. J. 961 (Tex.1995)]*.

As stated in *Sickles v. Cabot Corp., 379 N.J. Super. 100, 107, 877 A.2d 267 (App.Div.)*, *certif. denied, 185 N.J. 297, 884 A.2d 1267 (2005)*, "[w]e follow federal ***antitrust law*** in interpreting our own antitrust statute," *see N.J.S.A. 56:9-18*, and under *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707*, *reh'g denied, 434 U.S. 881, 98 S. Ct. 243, 54 L. Ed. 2d 164 (1977)*, indirect purchasers, such as plaintiffs, who did not purchase vehicles directly from defendants have no standing to assert a private right of action under the New Jersey Antitrust Act. Those propositions are uncontested for purposes of this appeal.

According to the Appellate Division majority:

> Carefully read, the complaint rests only on allegations that are traditional anticompetitive behaviors that plaintiffs argue affect them indirectly. They have **[*340]** identified no acts undertaken by defendants except for those in furtherance of the **[***11]** antitrust conspiracy. Each of the acts by defendants that were explicitly directed at dealers, including conspiracy, refusal to sell to dealers in Canada who might export cars to the United States, instituting chargebacks, requiring agreements not to export and terminating dealerships of uncooperative dealers, are allegations of antitrust activities with an indirect effect on plaintiffs, recovery for which is barred under *Illinois Brick.* Even the few factual allegations that are not directed solely at the dealers, including tracking VIN numbers, causing domestic dealers to refuse to honor warranties or to install imperial measure odometers and speedometers, or refusing to provide recall information to domestic purchasers of Canadian vehicles, are acts in furtherance of the conspiracy and are only acts that affect plaintiffs indirectly. The complaints simply do not include any facts that constitute an unconscionable commercial practice apart from the antitrust conspiracy and the acts undertaken in furtherance thereof.
>
> However expansively we may understand the term "unconscionable commercial practice" as it is used in the Consumer Fraud Act, the heart of plaintiffs' appeal asks **[***12]** us to read that language to effect a repealer of *Illinois Brick.* Plaintiffs suggest that factual allegations that sound only in antitrust violations can support a claim by indirect purchasers through use of the Consumer Fraud Act where the Legislature has specifically rejected such a cause of action under the Antitrust Act itself. In doing so, **[**417]** plaintiffs ask us to accomplish by judicial analysis of the Consumer Fraud Act a result which our Legislature has expressly rejected. We decline to do so.

The dissenting Appellate Division judge concluded that reading the allegations of the complaint as required for purposes of a motion to dismiss under *Rule 4:6-2(e)*, "plaintiffs have alleged the fundamentals of a consumer fraud cause of action, i.e., that independently of the price-fixing conspiracy, defendants have engaged in conduct that violates the [CFA]." The judge believed that allegations that the "Manufacturing Defendants"

> among other things, sought and obtained agreement from their United States dealers to: [(1)] [n]ot honor new car warranties on cars imported from Canada; and [(2)] [n]ot install properly calibrated imperial measure speedometers and odometers **[***13]** in cars imported from Canada which had metric speedometers and odometers[] . . . [as well their taking of] measures to enforce the [] agreements[] [by] [r]efusing to provide U.S. purchasers of new Canadian cars with information regarding recalls . . . suggest[ed] the fundamentals of a CFA cause of action, which is independent of the price-fixing, antitrust violation.

The dissenting judge also concluded that those "CFA claims . . . may be pursued without creating a conflict between the Antitrust Act and the CFA."

[*341] The alleged wrongdoing was essentially directed to the sale of vehicles in Canada and their importation into the United States, and there are no allegations of communications with, or directed to, consumers "in connection with the sale or advertisement" of vehicles, as required by *N.J.S.A. 56:8-2*. *See also* *N.J.S.A. 56:8-1* (definitions). Even if the complaints can be said to allege an "unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact . . . in connection with the sale or advertisement" of a motor vehicle to a putative **[***14]** plaintiff, in violation of *N.J.S.A. 56:8-2*, we agree with the Appellate Division majority that the allegations in the complaints, which essentially assert an anticompetitive scheme in violation of the Antitrust Act without any allegation of a direct or indirect statement or communication with any plaintiff, are precluded under *Illinois Brick* However, we leave for another day whether a CFA action would be precluded when the allegations of a violation of the Antitrust Act include communications with, or statements to, New Jersey consumers that are clear violations of the CFA.

Affirmed.

JUSTICES LaVECCHIA, WALLACE, RIVERA-SOTO, and APPELLATE DIVISION JUDGES STERN and LINTNER, temporarily assigned, join in this opinion. CHIEF JUSTICE ZAZZALI and JUSTICES LONG, ALBIN and HOENS did not participate.

End of Document

In re New Motor Vehicles Canadian Exp. Antitrust Litig.

United States District Court for the District of Maine

March 21, 2007, Decided ; March 21, 2007, Filed

MDL DOCKET NO. 1532

Reporter

241 F.R.D. 77 *; 2007 U.S. Dist. LEXIS 20563 **; 2007-1 Trade Cas. (CCH) P75,648

IN RE NEW MOTOR VEHICLES CANADIAN EXPORT ANTITRUST LITIGATION

Subsequent History: Objection overruled by *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 2007 U.S. Dist. LEXIS 41043 (D. Me., June 5, 2007)*

Vacated by, Remanded by *Brown v. Am. Honda (In re New Motor Vehicles Canadian Exp. Antitrust Litig.), 2008 U.S. App. LEXIS 6483 (1st Cir. Me., Mar. 28, 2008)*

Prior History: *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 235 F.R.D. 127, 2006 U.S. Dist. LEXIS 29371 (D. Me., 2006)*

Core Terms

plaintiffs', class action, prices, antitrust, arbitrage, statewide, ending, certification, discovery, consumer, damages, class certification, consumer protection, federal court, conspiracy, named plaintiff, certify

LexisNexis® Headnotes

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

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

HN1[] **Class Actions, Certification of Classes**

According to the U.S. Supreme Court, if, at the time a class is certified it is clear that the named plaintiffs suffered no injury, they cannot represent the class.

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

HN2[] **Class Actions, Certification of Classes**

A class definition should be precise and that is so, in order that people can determine whether they are class members. But precise or not, the accuracy of the ending date cannot be confidently established at certification in a case where causation and impact may diminish as outside market forces (e.g., exchange rates) fluctuate.

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

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

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

A court has the power to test disputed premises early on if and when a class action would be proper on one premise but not another; a district court must conduct a rigorous analysis of the prerequisites established by *Fed. R. Civ. P. 23* before certifying a class; a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case; and a district court is not limited to the allegations raised in the complaint, and should instead make whatever legal and factual inquiries are necessary to an informed determination of the certification issues. No particular level of factfinding by the district judge is mandated at the certification stage. First, discretion is left to the district judge. Second, what is appropriate for determining whether there is an efficient market in a securities case is quite different from market determinations, market behavior and market definitions for antitrust purposes.

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

Civil Procedure > Special Proceedings > Class Actions > General Overview

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

Mississippi does not provide for class actions in its state courts at all. That is Mississippi's choice to make as a matter of state procedure for its state courts, but not for the federal courts. *Fed. R. Civ. P. 23* sets the procedural criteria for when class actions are permitted in federal court and a federal judge must follow that Rule. A class is properly certifiable under *Rule 23* to enforce Mississippi ***antitrust law***.

Antitrust & Trade Law > Consumer Protection > General Overview

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

HN5[] **Antitrust & Trade Law, Consumer Protection**

Georgia provides that under its consumer protection statute, an injured consumer may bring an action individually, but not in a representative capacity. *O.C.G.A. § 10-1-399*.

Antitrust & Trade Law > Consumer Protection > General Overview

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

HN6[] **Antitrust & Trade Law, Consumer Protection**

In Montana, a consumer can sue for actual damages, or $ 500 if greater, and attorney fees, but only as an individual but not a class action. *Mont. Code Ann. § 30-14-133*.

Antitrust & Trade Law > Consumer Protection > General Overview

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

HN7[ ] **Antitrust & Trade Law, Consumer Protection**

Utah allows actual damages, or $ 2,000 if greater, but not in a class action (unless the transaction violated a specific administrative rule or court decision, and then a class action is available). *Utah Code Ann. § 13-11-19*.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN8[ ] **Preliminary Considerations, Federal & State Interrelationships**

The U.S. Court of Appeals for the First Circuit reads Hanna v. Plumer as stating a principle for resolving a direct conflict between two strictly procedural rules. It rejects the proposition that Hanna commands that the Federal Rules be woodenly applied irrespective of a discoverable substantive, as distinguished from a merely procedural, state purpose.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN9[ ] **Preliminary Considerations, Federal & State Interrelationships**

When the issue is one of state substance and federal procedure, the state substantive rule controls.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

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

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN10[ ] **Deceptive & Unfair Trade Practices, State Regulation**

The state supreme court has held that Alabama's ban on class actions in consumer cases extends to every other state's deceptive practices law if the lawsuit is in Alabama state court and has labeled the bar on class actions as a procedural bar.

Counsel: **[**1]** For WILLIAM H BROWN, Consol Plaintiff: MARC H EDELSON, LEAD ATTORNEY, HOFFMAN & EDELSON, LLC, DOYLESTOWN, PA.

For MICHAEL ROSEN, Consol Plaintiff: ROBERT J. BERG, LEAD ATTORNEY, BERNSTEIN, LIEBHARD & LIFSHITZ, LLP, FORT LEE, NJ.

For JENNIFER MCDONOUGH, ANDREW L POINTER, Consol Plaintiffs: FRED TAYLOR ISQUITH, LEAD ATTORNEY, WOLF HALDENSTEIN ADLER FREEMAN & HERZ, NEW YORK, NY; MARY JANE FAIT, WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLC, CHICAGO, IL.

For MIRIAM SCHVOM, Consol Plaintiff: FRED TAYLOR ISQUITH, LEAD ATTORNEY, WOLF HALDENSTEIN ADLER FREEMAN & HERZ, NEW YORK, NY; LEE ALBERT, LEAD ATTORNEY, MAGER & GOLDSTEIN LLP, PHILADELPHIA, PA.

For NEW WHITE ELECRIC CO INC, Consol Plaintiff: BERNARD PERSKY, LEAD ATTORNEY, LABATON, RUDOFF & SUCHAROW, NEW YORK, NY.

For MADHUSMITA GUPTE, ASHOK NIGAM, ESTELA MAHABIR, LISA SAIZON, Consol Plaintiffs: LEE SQUITIERI, LEAD ATTORNEY, SQUITIERI & FEARON, LLP, NEW YORK, NY; DANIEL R. LAPINSKI, SQUITIERI & FEARON, LLP, NEW YORK, NY.

For ST GEORGE HUNT, Consol Plaintiff: JOSEPH C. KOHN, LEAD ATTORNEY, KOHN, SWIFT & GRAF, PC, PHILADELPHIA, PA; MICHAEL M. BUCHMAN, LEAD ATTORNEY, MILBERG, WEISS, BERSHAD & SCHULMAN, LLP, NEW YORK, **[**2]** NY.

For ROBERT I ELAN, LYNN HORWITZ COE, JEFFREY COE, Consol Plaintiffs: JOSEPH P. GARLAND, LEAD ATTORNEY, KLEIN & SOLOMON, LLP, NEW YORK, NY; KLARI NEUWELT, LEAD ATTORNEY, LAW OFFICE OF KLARI NEUWELT, NEW YORK, NY.

For JATIN BHAIDIS, Consol Plaintiff: CHRISTOPHER A. SEEGER, LEAD ATTORNEY, SEEGER, WEISS, LLP, NEW YORK, NY.

For ZORAIDA LUNA, Consol Plaintiff: RICHARD B. BRUALDI, LEAD ATTORNEY, NEW YORK, NY.

For BRUCE B BELODOFF, Consol Plaintiff: CURTIS V. TRINKO, LEAD ATTORNEY, LAW OFFICE OF CURTIS V. TRINKO, LLP, NEW YORK, NY.

For MARIO C PATANE, Consol Plaintiff: JOSEPH M. PATANE, MARIO N. ALIOTO, LEAD ATTORNEYS, TRUMP, ALIOTO, TRUMP & PRESCOTT, SAN FRANCISCO, CA.

For AAA EGG FARM, Consol Plaintiff: GUIDO SAVERI, LEAD ATTORNEY, SAVERI & SAVERI, SAN FRANCISCO, CA.

For GEORGE C JAYNES, JANE A JAYNES, JILLIAN R WEADER, CATHY-ANN ACCOMANDO, Plaintiffs: JOSEPH J. TABACCO, LEAD ATTORNEY, BERMAN, DEVALERIO, PEASE, TABACCO, BURT & PUCILLO, SAN FRANCISCO, CA.

For B ALISON SHARRETT, Plaintiff: MICHAEL M. BUCHMAN, LEAD ATTORNEY, MILBERG, WEISS, BERSHAD & SCHULMAN, LLP, NEW YORK, NY.

For JASON LEYNER, Plaintiff: ALLYN Z. LITE, LEAD ATTORNEY, LITE, **[**3]** DEPALMA, GREENBERG & RIVAS, LLC, NEWARK, NJ.

For JOSEPH CARROLL, Plaintiff: KRISHNA B. NARINE, LEAD ATTORNEY, SCHIFFRIN & BARROWAY, LLP, RADNOR, PA; MICHAEL M. BUCHMAN, LEAD ATTORNEY, MILBERG, WEISS, BERSHAD & SCHULMAN, LLP, NEW YORK, NY.

For DEBORAH MCCOMB, CARLOS VELEZ, Plaintiffs: BERNARD PERSKY, LEAD ATTORNEY, LABATON, RUDOFF & SUCHAROW, NEW YORK, NY.

For ANDRE RODRIGUEZ, Plaintiff: H. ADAM PRUSSIN, LEAD ATTORNEY, POMERANTZ, HAUDEK, BLOCK, GROSSMAN & GROSS, NEW YORK, NY; MARVIN A. MILLER, LEAD ATTORNEY, MILLER LAW LLC, CHICAGO, IL; PATRICK EDWARD CAFFERTY, LEAD ATTORNEY, MILLER, FAUCHER & CAFFERTY, LLP, ANN ARBOR, MI.

For DANIEL E HERSCHBERG, Plaintiff: H. ADAM PRUSSIN, LEAD ATTORNEY, POMERANTZ, HAUDEK, BLOCK, GROSSMAN & GROSS, NEW YORK, NY.

For JOHN C CROW, Plaintiff: JARED B. STAMELL, LEAD ATTORNEY, STAMELL & SCHAGER, LLP, NEW YORK, NY.

For ROBERT M JAFFE, Plaintiff: ROBERT SCOTT PALMER, LEAD ATTORNEY, BERMAN, DEVALERIO, PEASE, TABACCO, BURT & PUCILLO, WEST PALM BEACH, FL.

For ALL PLAINTIFFS, Plaintiff: BRYAN L CRAWFORD, LEAD ATTORNEY, HEINS MILLS & OLSON PLC, MINNEAPOLIS, MN; CRAIG C. CORBITT, LEAD ATTORNEY, ZELLE, HOFMAN, VOELBEL, MASON & **[**4]** GETTE, LLP, SAN FRANCISCO, CA; DANIEL B. HARRIS, MARIA GRAESSER POTE, MATTHEW D. PEARSON, JOSEPH J. TABACCO, LEAD ATTORNEYS, BERMAN, DEVALERIO, PEASE, TABACCO, BURT & PUCILLO, SAN FRANCISCO, CA; FRANCIS J BALINT, JR, LEAD ATTORNEY, BONNETT, FAIRBOURN, FRIEDMAN &

BALINT, P.C., PHOENIX, AZ; PATRICK BARRETT, LEAD ATTORNEY, BARRETT LAW OFFICE, P.A., NASHVILLE, TN; ROBERT S. FRANK, CHARLES A. HARVEY, JR., LEAD ATTORNEYS, HARVEY & FRANK, PORTLAND, ME; ROBERT SCOTT PALMER, LEAD ATTORNEY, BERMAN, DEVALERIO, PEASE, TABACCO, BURT & PUCILLO, WEST PALM BEACH, FL; TODD A. SEAVER, LEAD ATTORNEY, BERMAN DEVALERIO PEASE TABACCO BURT & PUCILLO, BOSTON, MA; ANN D. WHITE, MAGER WHITE GOLDSTEIN, JENKINTOWN, PA.

For DENNIS AYLWARD, BARRY KUSHNER, PARRY SADOFF, MARTY RESSA, LINDA RESSA, JIMMIE MOORE, ALAN SCHLESINGER, DAVID PHILLIPS, CYDE COZAD, TOM LEWIS, KATHERINE BARRETT RILEY, HENRY KORNEGAY, JOHN COLE, ANDER FIELDS, KENNETH J MARTINEZ, RUBY MCALLISTER, RANDAL PETERSON, JASON SENGEL, CYNTHIA SENGEL, ALLISON ARRINGTON, CYNTHIA D MURPHY, SUSAN LACAVA, CYNTHIA DALE, WILLIAM BAGIN, JACK BERKE, ARLENE BERKE, HILARY ELLIOT, JACKIE HERALD, LARRY KINDBERG, LINDSAY MEDIGOVICH, ROBERT SCHERZER, EDITH THAYER, **[**5]** Plaintiffs: ROBERT S. FRANK, LEAD ATTORNEY, HARVEY & FRANK, PORTLAND, ME.

For I G HOLDINGS INC, Plaintiff: HOLLIS SALZMAN, LEAD ATTORNEY, LABATON, RUDOFF & SUCHAROW, NEW YORK, NY; ROBERT S. FRANK, LEAD ATTORNEY, HARVEY & FRANK, PORTLAND, ME.

For CATHERINE SCHMIDT, Plaintiff:JOHN P. ZUCCARINI, ELWOOD S. SIMON AND ASSOC. P.C., BIRMINGHAM, MI.

For WILLIAM DINKEL, Plaintiff: DANIEL D. OWEN, RICHARD M. PAUL, III, LEAD ATTORNEYS, SHUGHART, THOMSON & KILROY, KANSAS CITY, MO.

For PAUL MELANGAGIO, individually and on behalf of all others similarly situated, Plaintiff: RICHARD M. HAGSTROM, LEAD ATTORNEY, ZELLE, HOFMANN, VOELBEL, MASON & GETTE LLP, WALTHAM, MA; ROXANNE BARTON CONLIN, LEAD ATTORNEY, CONLIN LAW FIRM, DES MOINES, IA; SCOTT H. PETERS, LEAD ATTORNEY, PETERS LAW FIRM, COUNCIL BLUFFS, IA; CRAIG C. CORBITT, LEAD ATTORNEY, ZELLE, HOFMAN, VOELBEL, MASON & GETTE, LLP, SAN FRANCISCO, CA.

For WILLIAM WURGLER, individually and on behalf of all others similarly situated, PAMELA WURGLER, individually and on behalf of all others similarly situated, PAUL ELSOME, individually and on behalf of all others similarly situated, DAN OZAYDIN, individually and on behalf of all **[**6]** others similarly situated, DEANN OZAYDIN, individually and on behalf of all others similarly situated, Plaintiffs: RICHARD M. HAGSTROM, LEAD ATTORNEY, ZELLE, HOFMANN, VOELBEL, MASON & GETTE LLP, WALTHAM, MA; ROXANNE BARTON CONLIN, LEAD ATTORNEY, CONLIN LAW FIRM, DES MOINES, IA; SCOTT H. PETERS, LEAD ATTORNEY, PETERS LAW FIRM, COUNCIL BLUFFS, IA.

For MILBERG WEISS BERSHAD & SCHULMAN LLP, Plaintiff: RICHARD M. HAGSTROM, LEAD ATTORNEY, ZELLE, HOFMANN, VOELBEL, MASON & GETTE LLP, WALTHAM, MA.

For JOHN MILTON MATTER, ANGELA M NEMESH, JOHN NEMESH, RONALD A ACHS, JOHN COOK, DAVID KIOUS, PHILLIP COMORSKI, PETER MCINNESS, KEVIN RUSER, EVELYN AULD, JASON MERCER, DONALD MOHR, RONALD JEWELL, SUSAN GRAY, AUBREY V SPEAR, III, JAMES WEIR, ELIZABETH WEIR, DAVID PERDUE, Plaintiffs: RICHARD M. HAGSTROM, LEAD ATTORNEY, ZELLE, HOFMANN, VOELBEL, MASON & GETTE LLP, WALTHAM, MA; TODD A. SEAVER, LEAD ATTORNEY, BERMAN DEVALERIO PEASE TABACCO BURT & PUCILLO, BOSTON, MA.

For BARRY COHEN, SARAH EPSTEIN, SURI SKORSKI, ELI ELBAZ, SEAN GREGOR AND ASSOCIATES CO LPA, Plaintiffs: MARK SCHLACHET, LEAD ATTORNEY, LAW OFFICES OF MARK SCHLACHET, CLEVELAND, OH.

For GENERAL MOTORS CORPORATION, GENERAL **[**7]** MOTORS OF CANADA, LTD, Defendants:CHRISTA C. COTTRELL, DAVID H. DECELLES, MATTHEW S. BUCKLEY, MATTHEW M. WAWRZYN, RICHARD C. GODFREY, LEAD ATTORNEYS, DAVID J. ZOTT, KIRKLAND & ELLIS, CHICAGO, IL; CLIFFORD RUPRECHT, PIERCE, ATWOOD LLP, PORTLAND, ME; MARGARET M. ZWISLER, HOWRY & SIMON, WASHINGTON, DC.

For FORD MOTOR COMPANY, FORD MOTOR COMPANY OF CANADA, LTD, Defendants: MMARGARET M. ZWISLER, HOWRY & SIMON, WASHINGTON, DC; CLIFFORD RUPRECHT, PIERCE, ATWOOD LLP, PORTLAND, ME; WILLIAM R. SHERMAN, VERNER, LIIPFERT, BERNHARD, MCPHERSON & HAND, WASHINGTON, DC.

For TOYOTA MOTOR CORPORATION, Defendant: MICHAEL R. LAZERWITZ, LEAD ATTORNEY, CLEARY, GOTTLIEB, STEEN & HAMILTON, LLP, WASHINGTON, DC; CLIFFORD RUPRECHT, PIERCE, ATWOOD LLP, PORTLAND, ME; MARGARET M. ZWISLER, HOWRY & SIMON, WASHINGTON, DC.

For TOYOTA MOTOR SALES USA INC, Defendant: MICHAEL R. LAZERWITZ, LEAD ATTORNEY, CLEARY, GOTTLIEB, STEEN & HAMILTON, LLP, WASHINGTON, DC; DYLAN SMITH, JAMES T. KILBRETH, VERRILL & DANA, PORTLAND, ME; CLIFFORD RUPRECHT, PIERCE, ATWOOD LLP, PORTLAND, ME; MARGARET M. ZWISLER, HOWRY & SIMON, WASHINGTON, DC.

For TOYOTA CANADA INC, Defendant: JOHN P PASSARELLI, LEAD ATTORNEY, MCGRATH **[**8]** NORTH LAW FIRM, OMAHA, NE; MICHAEL R. LAZERWITZ, LEAD ATTORNEY, CLEARY, GOTTLIEB, STEEN & HAMILTON, LLP, WASHINGTON, DC;DYLAN SMITH, JAMES T. KILBRETH, VERRILL & DANA, PORTLAND, ME; CLIFFORD RUPRECHT, PIERCE, ATWOOD LLP, PORTLAND, ME; MARGARET M. ZWISLER, HOWRY & SIMON, WASHINGTON, DC.

For HONDA MOTOR COMPANY LTD., Defendant: ROBERT A. VAN NEST, LEAD ATTORNEY, KEKER & VAN NEST, SAN FRANCISCO, CA; CLIFFORD RUPRECHT, PIERCE, ATWOOD LLP, PORTLAND, ME; MARGARET M. ZWISLER, HOWRY & SIMON, WASHINGTON, DC.

For AMERICAN HONDA MOTOR COMPANY INC, Defendant: DAVID SPEARS, LEAD ATTORNEY, RICHARDS, SPEARS, KIBBE & ORBE, LLP, NEW YORK, NY; DOROTHY R MCLAUGHLIN, RACHAEL E MENY, RAGESH K TANGRI, ROBERT A. VAN NEST, LEAD ATTORNEYS, DANIEL PURCELL, KEKER & VAN NEST LLP, SAN FRANCISCO, CA; JOHN H. RICH, III, LEAD ATTORNEY, PERKINS, THOMPSON, HINCKLEY & KEDDY, PORTLAND, ME; JOHN A. SHOPE, LEAD ATTORNEY, FOLEY HOAG LLP, BOSTON, MA; CLIFFORD RUPRECHT, PIERCE, ATWOOD LLP, PORTLAND, ME; MARGARET M. ZWISLER, HOWRY & SIMON, WASHINGTON, DC.

For HONDA CANADA INC, Defendant: DANIEL PURCELL, KEKER & VAN NEST LLP, SAN FRANCISCO, CA; JOHN H. RICH, III, LEAD ATTORNEY, PERKINS, THOMPSON, HINCKLEY & **[**9]** KEDDY, PORTLAND, ME; CLIFFORD RUPRECHT, PIERCE, ATWOOD LLP, PORTLAND, ME; MARGARET M. ZWISLER, HOWRY & SIMON, WASHINGTON, DC; ROBERT A. VAN NEST, LEAD ATTORNEY, KEKER & VAN NEST, SAN FRANCISCO, CA.

For DAIMLERCHRYSLER AKTIENGESELLSCHAFT, Defendant: JAMES C. EGAN, JR, LEAD ATTORNEY, WEIL, GOTSHAL & MANGES, LLP, WASHINGTON, DC; CLIFFORD RUPRECHT, PIERCE, ATWOOD LLP, PORTLAND, ME; MARGARET M. ZWISLER, HOWRY & SIMON, WASHINGTON, DC.

For DAIMLERCHRYSLER CANADA INC, Defendant: CARRIE M. ANDERSON, LEAD ATTORNEY, WEIL, GOTSHAL & MANGES, LLP, WASHINGTON, DC; JAMES C. EGAN, JR LEAD ATTORNEY, WEIL, GOTSHAL & MANGES, LLP, WASHINGTON, DC; MITCHELL WAYNE BERGER, LEAD ATTORNEY, BERGER SINGERMAN, FORT LAUDERDALE, FL; WILLIAM J. KAYATTA, JR., LEAD ATTORNEY, PIERCE, ATWOOD LLP, PORTLAND, ME; CLIFFORD RUPRECHT, PIERCE, ATWOOD LLP, PORTLAND, ME; FERDOSE AL-TAIE,JONATHAN L. SICKLER, WEIL, GOTSHAL & MANGES, LLP, WASHINGTON, DC; MARGARET M. ZWISLER, HOWRY & SIMON, WASHINGTON, DC.

For MERCEDES-BENZ CANADA INC, Defendant: JAMES C. EGAN, JR, LEAD ATTORNEY, WEIL, GOTSHAL & MANGES, LLP, WASHINGTON, DC; KIRSTEN A. LOCKHART, STEVEN A. NEWBORN, JONATHAN L. SICKLER, LEAD ATTORNEYS, WEIL, GOTSHAL **[**10]** & MANGES, LLP, WASHINGTON, DC; MITCHELL WAYNE BERGER, LEAD ATTORNEY, BERGER SINGERMAN, FORT LAUDERDALE, FL; ROBERT D KINSEY, JR, LEAD ATTORNEY, KINSEY ROWE LAW FIRM, LINCOLN, NE; WILLIAM J. KAYATTA, JR., LEAD ATTORNEY, PIERCE, ATWOOD LLP, PORTLAND, ME; CLIFFORD RUPRECHT, PIERCE, ATWOOD LLP, PORTLAND, ME; MARGARET M. ZWISLER, HOWRY & SIMON, WASHINGTON, DC.

For NISSAN MOTOR COMPANY LTD, Defendant: PETER SULLIVAN, LEAD ATTORNEY, GIBSON, DUNN & CRUTCHER, LLP, LOS ANGELES, CA; CLIFFORD RUPRECHT, PIERCE, ATWOOD LLP, PORTLAND, ME; MARGARET M. ZWISLER, HOWRY & SIMON, WASHINGTON, DC.

For NISSAN NORTH AMERICA INC, NISSAN CANADA INC, Defendants: HAROLD J. FRIEDMAN, LEAD ATTORNEY, FRIEDMAN, GAYTHWAITE, WOLF & LEAVITT, PORTLAND, ME;PETER SULLIVAN , LEAD ATTORNEY, GIBSON, DUNN & CRUTCHER, LLP, LOS ANGELES, CA; LAURENCE H. LEAVITT, FRIEDMAN, GAYTHWAITE, WOLF & LEAVITT, PORTLAND, ME; CLIFFORD RUPRECHT, PIERCE, ATWOOD LLP, PORTLAND, ME; MARGARET M. ZWISLER, HOWRY & SIMON, WASHINGTON, DC.

For BMW OF NORTH AMERICA INC, Defendant: DANIEL L. GOLDBERG, LEAD ATTORNEY, BINGHAM MCCUTCHEN LLP, BOSTON, MA; DANIEL S. SAVRIN, BINGHAM MCCUTCHEN LLP, BOSTON, MA; CLIFFORD RUPRECHT, PIERCE, ATWOOD LLP, **[**11]** PORTLAND, ME; MARGARET M. ZWISLER, HOWRY & SIMON, WASHINGTON, DC.

For BMW CANADA, Defendant: DANIEL L. GOLDBERG, LEAD ATTORNEY, BINGHAM MCCUTCHEN LLP, BOSTON, MA; CLIFFORD RUPRECHT, PIERCE, ATWOOD LLP, PORTLAND, ME; MARGARET M. ZWISLER, HOWRY & SIMON, WASHINGTON, DC.

For NATIONAL AUTOMOBILE DEALERS ASSOCIATION, Defendant: BRUCE C. GERRITY, LEAD ATTORNEY, PRETI, FLAHERTY, BELIVEAU, PACHIOS & HALEY, LLP, AUGUSTA, ME; GLENN A. MITCHELL, LEAD ATTORNEY, STEIN, MITCHELL & MEZINES, WASHINGTON, DC; DAVID U. FIERST, STEIN, MITCHELL & MEZINES, WASHINGTON, DC; ROY T. PIERCE, PRETI, FLAHERTY, BELIVEAU, PACHIOS & HALEY, LLP, PORTLAND, ME; CLIFFORD RUPRECHT, PIERCE, ATWOOD LLP, PORTLAND, ME; MARGARET M. ZWISLER, HOWRY & SIMON, WASHINGTON, DC.

For CANADIAN AUTOMOBILE DEALERS ASSOCIATION, Defendant: ANDREW J. FORMAN, DEBORAH A. GARZA, LEAD ATTORNEYS, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, WASHINGTON, DC; CLIFFORD RUPRECHT, PIERCE, ATWOOD LLP, PORTLAND, ME; MARGARET M. ZWISLER, HOWRY & SIMON, WASHINGTON, DC; RICHARD L. O'MEARA, MURRAY, PLUMB & MURRAY, PORTLAND, ME.

For ALL DEFENDANTS, Defendant: DAVID J. ZOTT, KIRKLAND & ELLIS, CHICAGO, IL; CLIFFORD RUPRECHT, PIERCE, ATWOOD **[**12]** LLP, PORTLAND, ME; MARGARET M. ZWISLER, HOWRY & SIMON, WASHINGTON, DC; JONATHAN L. SICKLER, WEIL, GOTSHAL & MANGES, LLP, WASHINGTON, DC; WILLIAM R. SHERMAN, VERNER, LIIPFERT, BERNHARD, MCPHERSON & HAND, WASHINGTON, DC.

For MERCEDES-BENZ USA, LLC, DAIMLERCHRYSLER CORPORATION, DAIMLERCHRYSLER MOTORS CO, INC LLC, Defendants: ALLAN M HUSS, LEAD ATTORNEY, DAIMLERCHRYSLER CORPORATION, AUBURN HILLS, MI; CARRIE M. ANDERSON, DAVID N. SOUTHARD, JAMES C. EGAN, JR, FERDOSE AL-TAIE, JOHN E. SCRIBNER, JONATHAN L. SICKLER, KIRSTEN A. LOCKHART, STEVEN A. NEWBORN, LEAD ATTORNEYS, WEIL, GOTSHAL & MANGES, LLP, WASHINGTON, DC; CLIFFORD RUPRECHT, PIERCE, ATWOOD LLP, PORTLAND, ME; MARGARET M. ZWISLER, HOWRY & SIMON, WASHINGTON, DC.

For SAAB CARS USA INC, SATURN CORPORATION, Defendants: DANIEL P. CHESIRE, LEAD ATTORNEY, LAMSON DUGAN LAW FIRM, OMAHA, NE; DANIEL E. LAYTIN, DAVID J. ZOTT, JEFFREY R MILLER, RICHARD C. GODFREY, LEAD ATTORNEYS, KIRKLAND & ELLIS, CHICAGO, IL.

For VOLVO CARS OF NORTH AMERICA LLC, Defendant: MARGARET M. ZWISLER, HOWRY & SIMON, WASHINGTON, DC; WILLIAM R. SHERMAN, VERNER, LIIPFERT, BERNHARD, MCPHERSON & HAND, WASHINGTON, DC.

For AUDI OF AMERICA INC, Defendant: JERI **[**13]** ROUSE LOONEY, JOHN M HOCHHAUSLER, PATRICIA A. MUSITANO,SUSAN J WELDE, LEAD ATTORNEYS, LORD BISSEL LAW FIRM CALIFORNIA, LOS ANGELES, CA; ROSEMARIE R. HORVATH, LEAD ATTORNEY, CITY OF OMAHA, OMAHA, NE.

For AUDI CANADA, VOLKSWAGEN CANADA INC, Defendants: JERI ROUSE LOONEY, LEAD ATTORNEY, LORD BISSEL LAW FIRM CALIFORNIA, LOS ANGELES, CA; ROSEMARIE R. HORVATH, LEAD ATTORNEY, CITY OF OMAHA, OMAHA, NE.

For VOLVO CARS OF CANADA LTD, Defendant: MARGARET M. ZWISLER, HOWRY & SIMON, WASHINGTON, DC; WILLIAM R. SHERMAN, VERNER, LIIPFERT, BERNHARD, MCPHERSON & HAND, WASHINGTON, DC.

For BASS FINEBERG LEASING INC, Defendant: CHRISTINA M JANICE, LEAD ATTORNEY, ROBERT W HARTMAN, ZASHIN & RICH CO., L.P.A., CLEVELAND, OH.

For GENERAL MOTORS ACCEPTANCE CORP, Defendant: CHRISTA C. COTTRELL, DANIEL E. LAYTIN, DAVID H. DECELLES, DAVID J. ZOTT, MATTHEW S. BUCKLEY, MATTHEW M. WAWRZYN, KIRKLAND & ELLIS, RICHARD C. GODFREY, LEAD ATTORNEYS, KIRKLAND & ELLIS, CHICAGO, IL.

For DAIMLERCHRYSLER FINANCIAL SERVICES AMERICAS LLC, Defendant: ALLAN M HUSS, LEAD ATTORNEY, DAIMLERCHRYSLER CORPORATION, AUBURN HILLS, MI; CARRIE M. ANDERSON, JAMES C. EGAN, JR, FERDOSE AL-TAIE, KIRSTEN A. LOCKHART, WEIL, **[**14]** LEAD ATTORNEYS, GOTSHAL & MANGES, LLP, WASHINGTON, DC.

For CALIFORNIA STATE COURT PLAINTIFFS, Interested Party: ATHENA JIANGXIAO HOU, JUDITH A ZAHID, CRAIG C. CORBITT, LEAD ATTORNEYS, ZELLE, HOFMAN, VOELBEL, MASON & GETTE, LLP, SAN FRANCISCO, CA; PAUL F. MACRI, WILLIAM D. ROBITZEK, LEAD ATTORNEYS, BERMAN & SIMMONS, P.A., LEWISTON, ME.

For NEW MEXICO STATE COURT PLAINTIFFS, Interested Party: H. LADDIE MONTAGUE, JR., LEAD ATTORNEY, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; PAUL F. MACRI, WILLIAM D. ROBITZEK, LEAD ATTORNEYS, BERMAN & SIMMONS, P.A., LEWISTON, ME.

For DESTINE JOHNSON, HELEN J KERNS, C WAYNE BARTLEY, MELONIE C BANKS, Movants: W. GORDON BALL, LEAD ATTORNEY, BALL & SCOTT, KNOXVILLE, TN.

Judges: D. BROCK HORNBY, UNITED STATES DISTRICT JUDGE.

Opinion by: D. BROCK HORNBY

Opinion

[*78]

SUPPLEMENTAL ORDER ON CLASS CERTIFICATION OF STATE DAMAGE CLASSES

This case involves an alleged antitrust conspiracy to elevate or maintain U.S. car prices by preventing lower-priced Canadian cars from entering the American market. Remaining damage claims are based upon various state antitrust and consumer protection statutes. On May 12, 2006, I entered a **[*79]** preliminary order that approved certification **[**15]** of separate *Rule 23(b)(3)* damage classes of retail purchasers in each of five "exemplar" states. Order on Mot. for Class Cert.: Exemplar State Damage Classes ("May 12 Order") (Docket Item 361). Although the defendants had not challenged the plaintiffs' proposed ending date ("the present") for the class, I became concerned about the typicality of certain named plaintiffs' claims. I reserved judgment on the ending date for membership in the five classes and permitted further discovery and briefing. After oral argument on February 21, 2007, I now conclude that the class period should end April 30, 2003. Cross-border arbitrage opportunities may have waxed and waned before that date, but their scope is a proper subject for antitrust impact and damage analysis when the record is complete. I also address the remaining proposed statewide damage classes, and direct the preparation of a certification order. Once it is entered, it will be final for appeal purposes under *Fed. R. Civ. P. 23(f)*.

Ending Date

In my May 12 Order, I did not finally certify the five exemplar classes because under the typicality analysis I was uncertain that the **[**16]** named plaintiffs' claims were "typical of the claims . . . of the class." *Fed. R. Civ. P.*

23(a)(3). **HN1**[] The Supreme Court has said that if, at the time the class is certified it is clear that the named plaintiffs suffered no injury, they cannot represent the class. *Gen. Tel. Co. v. Falcon, 457 U.S. 147, 156, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)* (discussing *East Tex. Motor Freight Sys., Inc., v. Rodriguez, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977))*. [1] Here, comments by the plaintiffs' lawyers led me to conclude that at least one named plaintiff in Kansas had purchased his vehicle at a time when exchange rates made Canadian car prices *higher* than American cars, contrary to the overall theory of the plaintiffs' case. From the exchange, I thought that my concern involved a narrow question of determining actual prices and exchange rates. [2] As a result, I said in my May 12 Order:

> One final issue that comes up under typicality . . . raises concern about the ending date for the proposed classes: that particular named plaintiffs' claims (or the defenses to those claims) may not be typical of those of the class. As I have already noted, the plaintiffs virtually **[**17]** concede that their Kansas plaintiff bought a car at a time, 2005, when the exchange rates were such that Canadian cars were priced higher than American cars; since there was no arbitrage opportunity, the conspiracy could not have increased American prices. This concession calls into question the chronological scope of the damage class: when should the class end? The plaintiffs' reply memorandum suggests that this is a discovery problem; that some defendants used data in their response to the plaintiffs' certification motion that the plaintiffs had not seen previously; that the plaintiffs need to see comparable data for all the defendants; and that therefore I should not deny certification based on a merely "speculative conflict." Essentially, the plaintiffs ask me to certify the class now at its broadest and worry later about its proper scope and whether the named plaintiffs' claims are typical.
>
> I do not believe that is the proper way to proceed. Instead, as to certification of the individual state damage classes, I defer decision until the pertinent discovery problems are resolved and I request Magistrate Judge Kravchuk to hold a prompt conference and set appropriate deadlines. Then **[**18]** I will determine the class definition (and whether the named plaintiffs are representative).

May 12 Order at 25-26 (footnotes omitted).

In retrospect, I believe that I should have confined my expression of concern to the **[*80]** appropriateness of the particular named Kansas plaintiff, rather than raise a question about the class ending date; after all, the antitrust conspiracy to restrict supply is allegedly ongoing. Instead, I have provoked a debate over when the arbitrage **[**19]** window of opportunity closed, or whether it was ever open, or how far open it needed to be, a far broader controversy than I expected and one that would require a complete determination of the plaintiffs' causation and damage case to resolve. [3]

[20]** Specifically, in response to my May 12 Order, the plaintiffs engaged their economic expert, Dr. Robert E. Hall of Stanford University and the Hoover Institution, to perform data analysis. Dr. Hall assessed the profitability of purchasing new cars and light trucks in Canada and re-selling them in the United States. Expert Rpt. of Prof. Robert E. Hall on the Timing of Profitability of Exporting New Vehicles from Canada to the U.S. ("Hall Arbitrage Rpt.") (Docket Item 425). He examined various data and documents produced by the defendants, as well as some publicly

---

[1] A different question is presented if that fact appears after certification. *Gen. Tel. Co., 457 U.S. at 156*.

[2] Indeed, in rejecting then the defendants' challenge to the opening date of the class, I observed merely that the Fourth Amended Complaint "is broad enough to permit proof that the conspiracy had begun earlier [than January 1, 2001] and thus that impact could have started January 2001. Whether that assertion can be proven will await summary judgment or trial." May 12 Order at 25 n.46 (citation omitted).

[3] Both sides urge upon me the make-or-break effect of a class certification ("an intense pressure is brought to bear upon the defendants with no judicial finding that any fact out there is so," Hr'g Tr. p. 66, Feb. 21, 2007 (defendants); "So, you know, there is a flip side to his argument too, and that's why the courts that have considered class certification tend to urge certification, tend to lean in favor of certification because without it--and indeed the public policy surrounding *Rule 23* recognizes that . . . without the device as the first step, the plaintiffs will never really ever be able to get their day in court," Id. pp. 85-86 (plaintiffs)). Certainly those generally recognized effects make me take very seriously the importance of the decision and reinforce my ordinary desire as a trial judge to "get it right," but they cannot lead me in one direction or the other. That would be an unprincipled rule of law.

available data and documents, id. P 3, and information he obtained from importers, id. P 35 n.32. Dr. Hall concluded that for the time period in question, the percentage of Canadian vehicles (weighted by sales) that had price gaps larger than export costs (the arbitrage opportunity that the conspiracy allegedly sought to preempt) declined to less than 10% after April 30, 2003. Hall Arbitrage Rpt. P 46. As a result, the plaintiffs proposed that the class ending date be moved back from their original proposal ("the present") to April 30, 2003. Pls.' Mot. & Mem. of L. for Class Cert. of the Non-Exemplar States ("Pls.' **[**21]** Mot.") at 47 (Docket Item 418). The defendants, in turn, presented the analysis of their expert, Dr. Joseph P. Kalt of Harvard University's John F. Kennedy School of Government. Expert Rpt. of Joseph P. Kalt ("Kalt Rpt.") (Docket Item 461, Ex. 3 part 1). Dr. Kalt found fault with Dr. Hall's computations on a variety of grounds (*e.g.,* inadequate data and improper interpretation of data; improperly treating imported Canadian cars as "new"; failing to consider vertical unilateral restraints; choosing ten percent as the cutoff measure). Kalt Rpt. at 4-5. In response, the plaintiffs defended Dr. Hall's data and analysis and pointed out that without his ten percent calculation, the class period would end January, 2004. [4] Pls.' Reply Mem. of L. Concerning Class Cert. ("Pls.' Reply Mem.") at 6 (Docket Item 475); See also Hr'g Tr., Feb. 21, 2007, pp.15-16. They advanced that date as an alternate closing point for the class. Id.

[22]** The defendants' primary unhappiness with Dr. Hall's analysis flows from their continuing insistence that I determine now whether the alleged horizontal conspiracy actually impacted American car prices. (They insist that it did not.) In my May 12 Order, I explained in detail why individual statewide damage classes are certifiable based upon various states' substantive law and why I would not make a final determination of the existence of antitrust impact at the certification stage. I see no need to reexamine that **[*81]** issue. [5] **[**25]** The only question I address now is narrow: the proper ending point for the various statewide damage classes. In response to my expression of concern, I was expecting only uncontroversial evidence of exchange rates and actual prices so as to exclude a time period when Canadian car prices were higher than American. I was not seeking a precise calculation of the actual arbitrage opportunity from month to month and model to model or a decision now of how many available imports (or the threat of them) it would take to make American prices move (the 10% controversy). Realistically, that will be possible only after all pricing and damage discovery and expert analysis are **[**23]** complete. [6] As I have said, I probably should have left the proposed ending date of the class untouched by my concern over the typicality of the named plaintiffs. But now the plaintiffs have admitted that they cannot prove damages to a class after April 30, 2003. I therefore end the class period at that date. I do not resolve the experts' conflict over the adequacy of the pricing data (the defendants did not provide full discovery in time for Dr. Hall's calculations, as he repeatedly points out, although the plaintiffs' lawyers seem to say that what he had was sufficient), how it is interpreted (issues such as proper interpretation of data entry fields in the Powers Information Network forms, see footnote 8 infra), the volume of threatened imports required to provoke movement in American car prices, etc. An ongoing illegal conspiracy to restrict supply justifies an open ending date for the class at this stage, narrowed only by the plaintiffs' admission. The alternative would be a complete assessment of antitrust causation and damages now, requiring

---

[4] Hall's rebuttal report actually says that without the ten percent calculation, the period of export profitability would have ended in May 2004 (suggesting an alternate class ending date of April 30, 2004 rather than January 2004). Rebuttal Expert Report of Prof. Robert E. Hall on the Timing of Profitability of Exporting New Vehicles from Canada to the United States ("Hall Rebuttal Rpt.") P 12 (Docket Item 475). Since the plaintiffs cite this paragraph of Hall's report as the basis for their January 2004 date, see Pls.' Reply Mem. at 6, I assume the January date is an error; but it is immaterial to my analysis because I accept the plaintiffs proposed ending date of April 30, 2003.

[5] Dr. Hall's analysis is persuasive that price differentials at some level inspire cross-border arbitrage opportunities. Whether an illegal agreement halting Canadian imports (or removing their threat) produced antitrust causation or retail purchase price impact remains to be proven at trial or demonstrated at summary judgment. The question for me at certification, however, is not who will win the merits of that argument, but whether the plaintiffs' proof, adequate or inadequate, meets the tests of commonality, impact and predominance. I concluded in my May 12 Order that it does. As I also observed then, this is not the time to determine what vertical restraints the individual manufacturers maintained, their legality and their effect.

[6] The commentators have said that ***HN2***[] the class definition should be precise, Manual for Complex Litigation (Fourth) § 21.222 (2004), and that is so, in order that people can determine whether they are class members. Id. But precise or not, the accuracy of the ending date cannot be confidently established at certification in a case where causation and impact may diminish as outside market forces (*e.g.,* exchange rates) fluctuate.

completion of fact and expert discovery. This would generate what PolyMedica warned against, an "unwieldy trial on the merits" **[**24]** of causation at the class certification stage. [7] *In re PolyMedica **[*82]** Corp. Sec. Litig., 432 F.3d 1, 17 (1st Cir. 2005)*. If, when we reach the stage of determining causation and damages, a class ending date of April 30, 2003, turns out to be too broad (or too narrow), the ending date can then be altered or amended. See *Fed. R. Civ. P. 23(c)(1)(C)*; May 12 Order at 23 ("the defendants may be able to prove that the arbitrage opportunities in certain years were so limited that there would be no antitrust impact from a horizontal company"). My May 12 concern (over whether certain named plaintiffs could represent the class if they had purchased during a time when the arbitrage opportunity reversed) has been satisfied by substituting plaintiffs who purchased at a different time.

[26]** I reiterate: for certification of the class, I do not finally determine when pricing impact appeared, disappeared or reappeared in response to varying arbitrage opportunities. Once the record is complete, that variation may provoke the creation of future subclasses, alteration of the scope of class certification, or judgment for the defendants in whole or in part. Indeed, the close of discovery and summary judgment practice will soon be upon us. The defendants can then advance their assertions based upon a complete record. [8]

7

PolyMedica held that "[t]he district court was entitled to look beyond the pleadings . . . in its resolution of the class-certification question." *In re PolyMedica Corp. Sec. Litig., 432 F.3d 1, 19 (1st Cir. 2005)*. PolyMedica based that holding upon the statement from Tardiff that ***HN3***[] "a court has the power to test disputed premises early on if and when the class action would be proper on one premise but not another," *Tardiff v. Knox County, 365 F.3d 1, 4-5 (1st Cir. 2004)*; from Smilow that a "district court must conduct a rigorous analysis of the prerequisites established by *Rule 23* before certifying a class," *Smilow v. Southwestern Bell Mobile Sys., 323 F.3d 32, 38 (1st Cir. 2003)*; from Mowbray that "a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case," *In re Waste Mgmt. Holdings, Inc., v. Mowbray, 208 F.3d 288, 298 (1st Cir. 2000)*; and PolyMedica's preference for "the majority view" which it characterized as: "a district court is not limited to the allegations raised in the complaint, and should instead make whatever legal and factual inquiries are necessary to an informed determination of the certification issues." *PolyMedica, 432 F.3d at 5*. I do not read PolyMedica as mandating a particular level of factfinding by the district judge at the certification stage. First, under all the cited cases considerable discretion is left to the district judge. Second, what is appropriate for determining whether there is an efficient market in a securities case is quite different from market determinations, market behavior and market definitions for antitrust purposes. I continue to believe that I followed the teaching of PolyMedica correctly in examining the proof the plaintiffs will use and the defenses the defendants will raise. I have looked "beyond the pleadings," "test[ed] designated premises," "conduct[ed] a rigorous analysis of the [*Rule 23*] prerequisites," tried to predict "how specific issues will play out," and made the inquiries I believe are necessary. See May 12 Order at 16-24. PolyMedica also counsels:

> Exercising its broad discretion, and understanding the correct definition [in PolyMedica, of an efficient market] and the factors relevant to that determination, the district court must evaluate the plaintiff's evidence of [in PolyMedica, an efficient market] critically without allowing the defendant to turn the class-certification proceeding into an *unwieldy* trial on the merits.

432 F. 3d at 17 (emphasis original).

[8] There would also be some procedural unfairness in making an entirely new ruling on the record now. Magistrate Judge Kravchuk made perfectly clear as she arranged for discovery and briefing on the class-ending-date issue that she was not reopening my original May 12 decision. Rpt. of June 1, 2006 Disc. Conf. and Order, at 2 (Docket Item 369) ("[W]hile the court certainly wanted to hear from both sides regarding the economic analysis underlying the proposed 'closing date,' this briefing opportunity was not intended as a relitigation of the motion for class certification."). If I were inclined now to reverse my ruling of May 12, in fairness I would have to allow the plaintiffs fulsome discovery on all the issues that the defendants have posed and give notice that the entire issue of damage class certification was up for reexamination. For the same reason, I do not resolve a computation controversy the specifics of which emerged just days before the hearing, a controversy that continues to develop. (On December 1, 2006, Dr. Kalt said that Dr. Hall wrongly interpreted certain data entries made by the Power Information Network, LLC, which compiles automobile pricing data for certain manufacturers, Kalt Rpt. at 24-25; Dr. Hall responded on December 15, 2006, that he had interpreted the data entries correctly, citing published articles, which I have examined. Hall Rebuttal Rpt. PP 15-16. Nothing further happened on the record until February 16, 2007, five days before the February 21, 2007, oral argument, when the defendants filed an affidavit by a Power employee stating that Dr. Hall had misinterpreted the data entries. Decl. of Mike Murray (Docket Item 519). Clearly the plaintiffs were not in a position to respond to that late-filed

[27] *Additional Damage Class Certifications***

The plaintiffs ask me now to certify damage classes for one more exemplar state, Kansas (I earlier declined to do so because their Kansas plaintiff purchased at a time when the arbitrage opportunity seemed to flow the other direction; now they have a plaintiff who purchased when the arbitrage opportunity was more demonstrable), and for the remaining seventeen states where they have state antitrust and/or consumer protection claims. Initially, I was reluctant, preferring to await any appellate guidance that the defendants might obtain if they persuade the First Circuit to accept their interlocutory appeal. But under *Rule 23(f)* as amended, each class certification is subject to discretionary interlocutory appeal, so it is preferable to make the certification decisions now. I see no reason to repeat my May 12 exercise for each of Kansas and the other 17 states. The briefing on both sides has been excellent, but neither side has presented anything to show that the substantive laws of any of these additional states will fall outside the range of analysis that I performed in my May 12 Order. I conclude that the May 12 analysis, finding **[**28]** statewide damage classes appropriate under *Rule 23(b)(3)* for the substantive law of each of the five states then at issue, would produce the same conclusion for **[*83]** a separate statewide damage class here for each of the remaining 18 states.

There is one new issue. The defendants argue that four of the additional states (Georgia, Mississippi, Montana, Utah) prohibit class actions as a matter of state law and, as a result, that I may not certify a statewide damage class for any of those four states.

I start with Mississippi, where the plaintiffs make a state law antitrust claim. ***HN4***[] Mississippi does not provide for class actions in its state courts at all. That is Mississippi's choice to make as a matter of state procedure for its state courts, but not for the federal courts. The defendants have drawn to my attention no attempt by Mississippi to limit the plaintiffs' *substantive* rights under Mississippi's ***antitrust law*** (unlike consumer protection where Mississippi does have a statutory prohibition of class actions. *Miss. Code Ann. § 75-24-15(4)*). As I stated in my May 12 Order, *Federal Rule of Civil Procedure 23* sets the **[**29]** procedural criteria for when class actions are permitted in federal court and a federal judge must follow that Rule. I conclude that a class is properly certifiable under Federal *Rule 23* to enforce Mississippi ***antitrust law***. See *Hanna v. Plumer, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)*; 7A Charles Alan Wright et. al., Federal Practice and Procedure: Civil 3d, § 1758 at 118 (3d ed. 2005) ("The Hanna decision resolves any doubt as to the availability of a class action in a federal court under *Rule 23* in a diversity action, even in a state that does not recognize the procedure."); Erwin Chemerinsky, Federal Jurisdiction, § 5.3 at 317 (Aspen Law & Business 4th ed. 2003) ("[I]t is now clearly established that the Federal Rules of Civil Procedure . . . are to be applied by the federal court, even if there is a conflicting state requirement and even if the application of the federal Rule might determine the outcome of the case."); Linda S. Mullenix, Should Mississippi Adopt a Class-Action Rule--Balancing the Equities: Ten Considerations that Mississippi Rulemakers Ought to take into Account in Evaluating Whether to Adopt a State Class-Action Rule, *24 Miss. C.L. Rev. 217, 218-19* & nn.8-9 (2005) **[**30]** (citing several cases involving class action practice under Federal *Rule 23* in federal courts based on Mississippi state law claims).

Georgia, Montana and Utah are different. In each of those states, the plaintiffs' claim arises under the consumer protection statute. In creating a consumer substantive right to relief, each respective statute defines the damages a consumer can recover by simultaneously eliminating or severely limiting the consumer's ability to use a class action in the process. ***HN5***[] Georgia provides that under its consumer protection statute, an injured consumer "may bring an action individually, but not in a representative capacity." *Ga. Code Ann. § 10-1-399*. ***HN6***[] In Montana, a consumer can sue for actual damages, or $ 500 if greater, and attorney fees, but only as "an individual but not a class action." *Mont. Code Ann. § 30-14-133*. ***HN7***[] Utah allows actual damages, or $ 2,000 if greater, "but not in a class action" (unless the transaction violated a specific administrative rule or court decision, and then a class action is available). *Utah Code Ann. § 13-11-19*. I conclude that these three states **[**31]** have gone beyond merely procedural rules and have defined the substantive recovery available to an injured consumer (*e.g.,* an individual fixed-damage recovery floor, but no class recovery) or defined the capacity to sue (no representative capacity).

affidavit before the hearing; post-hearing briefing continues to develop the issue. I learned only yesterday from the defendants' reply memorandum that Power maintains different sets of data with different applicable glossaries. I am not in a position to resolve that controversy now.)

HN8[] The First Circuit reads Hanna "as stating a principle for resolving a direct conflict between two strictly procedural rules," *Marshall v. Mulrenin, 508 F.2d 39, 44 (1st Cir. 1974)*; accord *Gil-De-Rebollo v. The Miami Heat Assoc., Inc., 137 F.3d 56 (1st Cir. 1998)*. It rejects the proposition "that *Hanna* commands that the Federal Rules be woodenly applied irrespective of a discoverable substantive, as distinguished from a merely procedural, state purpose." *Marshall, 508 F.2d at 44*. The Seventh Circuit is even more explicit:

> The second class of pretty easy cases is where the state procedural rule, though undeniably "procedural" in the ordinary sense of the term, is limited to a particular substantive area, such as contract law, or tort law. For then the state's intention to influence substantive outcomes is manifest **[*84]** and would be defeated by allowing parties to shift their **[**32]** litigation into federal court unless the state's rule was applied there as well.

S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 310 (7th Cir. 1995) (citations omitted). [9] For Georgia, Montana and Utah the consumer class limitation is substantive. [10] **[**33]** *HN9*[] When the issue is one of state substance and federal procedure, the state substantive rule controls. Therefore, I conclude that a statewide damage class is not certifiable for Georgia, Montana and Utah, but is certifiable for each of 15 additional states. [11]

Trial Manageability

My May 12 Order assumed a separate trial for each statewide damage class. I then learned that both sides had been proceeding on the understanding that there would be a single trial of all remaining states. I directed the plaintiffs to propose a trial management plan for such an approach. See Procedural Order of June 16, 2006 (Docket Item 376). They have done so, and the defendants have criticized it. I choose not to resolve their disagreements over consolidated trial management at this time. My class certification is state-by-state, not some national, regional, or other grouping of states. Any manageability issues under the class action rules, therefore, should be judged on the basis of each single statewide class, and I conclude (as I did in my May 12 Order) that each statewide antitrust or consumer protection class action is separately manageable. When we are closer **[**34]** to trial, and I can determine how many states remain in play, that will be a better time to assess whether it is best to proceed to trial state-by-state, as I had originally assumed, or allow some kind of consolidation under *Fed. R. Civ. P. 42*.

Conclusion

I am prepared now to enter my final order certifying a statewide damage class separately for each of the 20 states. That order is based upon the state substantive law of each of those states and federal procedural (class action) law. By April 11, 2007, the plaintiffs shall file a proposed order that meets all the requirement of *Rule 23(c)(1)(B)* (defining the class, the claims, issues, defenses and re-appointing class counsel). The defendants shall respond within fourteen days thereafter, but need not renew the objections they have raised already. I defer notice issues (discretionary for the *23(b)(2)* injunctive class; mandatory for the 20 separate *23(b)(3)* damages classes; mandatory for the proposed settlement classes for defendants Toyota and CADA [12]; and mandatory for the proposed dismissal

---

[9] *Daigle v. Maine Med. Ctr., Inc., 14 F.3d 684, 689 (1st Cir. 1994)*, is similar: "Since the federal Evidence Rules governing hearsay and impeachment do not seek to displace the Health Act's policy of limiting frivolous malpractice suits, the federal rules [which the court did *not* enforce] and the state statute can peacefully coexist, each operating within its own sphere of influence."

[10] These states appear to be unlike Alabama, where *HN10*[] the state supreme court has held that Alabama's ban on class actions in consumer cases extends to every other state's deceptive practices law if the lawsuit is in Alabama state court and has labeled the bar on class actions as a *procedural* bar. See *O'Keefe v. Mercedes-Benz USA, 214 F.R.D. 266, 285 (E.D. Pa. 2003)* (discussing *Ex Parte Exxon Corp., 725 So. 2d 930 (Al. 1998))*.

[11] The states are: Arizona, Arkansas, Idaho, Kansas, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, North Dakota, South Dakota, West Virginia and Wisconsin.

[12] At oral argument I expressed my concern that a class member would not be able to make an intelligent decision whether to opt out of the proposed settlement classes given the current state of proceedings, as well as my concern over the expense and confusion of several successive notices.

of NADA) until I understand what the First Circuit intends to do and can hear further **[**35]** about notice from counsel.

SO ORDERED.

DATED THIS 21ST DAY OF MARCH, 2007

/s/ D. BROCK HORNBY

UNITED STATES DISTRICT JUDGE

End of Document

Lori Rubinstein Physical Therapy, Inc. v. PTPN, Inc.

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

March 23, 2007, Filed

B187172

Reporter

148 Cal. App. 4th 1130 *; 56 Cal. Rptr. 3d 351 **; 2007 Cal. App. LEXIS 415 ***; 2007 Cal. Daily Op. Service 3077; 2007 Daily Journal DAR 3867; 2007-1 Trade Cas. (CCH) P75,651

LORI RUBINSTEIN PHYSICAL THERAPY, INC., et al., Plaintiffs and Appellants, v. PTPN, INC., et al., Defendants and Respondents.

Subsequent History: Rehearing denied by *Lori Rubenstein Physical Therapy v. PTPN, Inc., 2007 Cal. App. LEXIS 789 (Cal. App. 2d Dist., Apr. 10, 2007)*

Time for Granting or Denying Review Extended *Lori Rubinstein Physical Therapy, Inc. v. PTPN, Inc., 2007 Cal. LEXIS 7136 (Cal., June 22, 2007)*

Review denied by *Lori Rubinstein v. Ptpn, 2007 Cal. LEXIS 7741 (Cal., July 18, 2007)*

Disposition: The court affirmed the trial court's judgment.

Core Terms

providers, preferred provider, insurers, subscribers, antitrust, physical therapy, restrictions, geographic, contracting, rates, anti trust law, negotiate, immunity statute, healthcare, efficient-sized, formation, plans, unfair competition, patients, health care service plan, violates, compete, costs, physical therapist, Cartwright Act, regulations, immunized, forces

LexisNexis® Headnotes

Antitrust & Trade Law > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN1[] **Antitrust & Trade Law**

Antitrust laws rest on the premise that the unrestrained interaction of competitive forces will yield the best allocation of economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of democratic political and social institutions. Antitrust laws place primary reliance on market forces to discipline economic behavior. If a monopoly or a cartel is created, the antitrust laws may be invoked to restore a situation of diffused power, but once that competitive balance is restored, there should be no need for continuing government oversight. The invisible hand of the market provides the discipline, so no regulators or bureaucrats are required once the proper competitive balance is restored. Thus, ordinarily, antitrust laws are invoked to condemn restraints on competition such as market allocations and group boycotts because it is understood that market forces unhampered by these restraints will restore a proper competitive balance and produce the most efficient allocation of resources. Unique aspects of the health care market serve to distort the market forces and make it less likely that market forces alone will produce efficient allocation, high quality, and lower prices.

Healthcare Law > Managed Healthcare > General Overview

HN2[] Healthcare Law, Managed Healthcare

Health & Saf. Code, § 1373.9, requires insurers offering preferred provider organization (PPO) plans to give reasonable consideration to proposals by providers wishing to contract to become preferred providers, unless the providers propose to serve a geographic area that is adequately served by the PPO plans' existing preferred providers.

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN3[] Healthcare Litigation, Antitrust Actions

Ins. Code § 10133, allows an insurer to contract for alternative rates with any provider and offer the benefit of those alternative rates to their insureds. The antitrust laws cannot be applied to forbid that which another statute expressly allows.

Governments > Legislation > Interpretation

HN4[] Legislation, Interpretation

Statutes must be construed with reference to the whole system of law of which they are a part so that all may be harmonized and have effect.

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN5[] Healthcare Litigation, Antitrust Actions

Ins. Code § 10133, allows an insurer to contract with any provider to become a preferred provider, and Health & Saf. Code, § 1373.9, requires the insurer to consider proposals by other providers wishing to become preferred providers only if the existing preferred providers do not adequately serve the geographic area proposed to be served by the other providers. The consumers' interests are protected by the extensive regulatory oversight to ensure that each plan has sufficient preferred providers in the areas in which it operates to adequately serve those subscribers. Cal. Code Regs., tit. 28, §§ 1300.51, 1300.67.2, 1300.67.2.1. Thus, the simple allegation that an insurer has entered into an exclusive contract with a provider group does not describe conduct that violates the antitrust laws. This is not to say there can never be an antitrust violation if one or more providers or provider groups use coercion, threats, or intimidation to convince an insurer to refuse to negotiate with other providers or provider groups.

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN6[] **Healthcare Litigation, Antitrust Actions**

Combinations or groups of providers formed as efficient-sized contracting units are a new product within the health care marketplace and are subject only to those antitrust prohibitions applicable to the conduct of other presumptively legitimate enterprises. *Bus. & Prof. Code, § 16770, subd. (g)*; *Ins. Code § 10133.6*; *Health & Saf. Code, § 1342.6*. In other words, the groups' conduct in forming efficient-sized contracting units is exempt from the antitrust laws, although their conduct in negotiating alternative rates of payment is subject to antitrust enforcement.

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

Constitutional Law > Separation of Powers

HN7[] **Trade Practices & Unfair Competition, State Regulation**

Although the unfair competition law's scope is sweeping, it is not unlimited. Courts may not simply impose their own notions of the day as to what is fair or unfair. Specific legislation may limit the judiciary's power to declare conduct unfair. If the legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination. When specific legislation provides a safe harbor, plaintiffs may not use the general unfair competition law to assault that harbor.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

Plaintiffs, **[***1]** providers of physical therapy services, filed suit against defendants, a corporation that negotiated with health insurers to become a preferred provider group and one of the insurers with whom the corporation negotiated alternative rates of payment. Plaintiffs alleged that defendants violated California's antitrust and unfair competition laws (*Bus. & Prof. Code, §§ 16720*, *17200 et seq.*) by engaging in an improper market allocation through the corporation's geographic restrictions and by engaging in a group boycott through the insurer's exclusive contract with the corporation. The corporation was alleged to be the largest group of physical therapy providers in California. The trial court granted defendants' motions for judgment on the pleadings. (Superior Court of Los Angeles County, No. BC317517, Carl J. West, Judge.)

The Court of Appeal affirmed the judgment. There was no doubt that the contractual relationship between defendants inhibited plaintiffs' ability to compete, at least on a price basis, because of the low out-of-pocket costs to patients who utilized the services of the corporation's members; however, that competitive disadvantage is expressly authorized by *Ins. Code, § 10133*. Moreover, by choosing to subscribe to a preferred provider organization (PPO) plan, the subscribers themselves impaired the nonpreferred providers' ability to compete for their business. To the extent that the subscribers' choice to limit competition among providers might result in higher costs and/or decreased quality, the subscribers were protected by the statutory and regulatory scheme designed to ensure that PPO plan subscribers have adequate access to high quality and cost effective health care. Furthermore, the simple allegation that an insurer has entered into an exclusive contract with a provider group does not describe conduct that violates the antitrust laws. The corporation's imposition of geographic restrictions was expressly immunized by *Bus. & Prof. Code, § 16770, subd. (g)*, *Ins. Code, § 10133.6*, and *Health & Saf. Code, § 1342.6*. (Opinion by Willhite, J., with Epstein, P. J., and Manella, J., concurring.) **[*1131]**

Headnotes

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

Monopolies and Restraints of Trade § 1—Purpose of Antitrust Laws—Health Care Market.

Antitrust laws rest on the premise that the unrestrained interaction of competitive forces will yield the best allocation of economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of democratic political and social institutions. Antitrust laws place primary reliance on market forces to discipline economic behavior. If a monopoly or a cartel is created, the antitrust laws may be invoked to restore a situation of diffused power, but once that competitive balance is restored, there should be no need for continuing government oversight. The invisible hand of the market provides the discipline, so no regulators or bureaucrats are required once the proper competitive balance is restored. Thus, ordinarily, antitrust laws are invoked to condemn restraints on competition such as market allocations and group boycotts because it is understood that market forces unhampered by these restraints will restore a proper competitive balance and produce the most efficient allocation of resources. Unique aspects of the health care market serve to distort the market forces and make it less likely that market forces alone will produce efficient allocation, high quality, and lower prices.

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

Monopolies and Restraints of Trade § 1—Health Care Market—Contracts Conferring Preferred Provider Status—Alternative Rates—Immunity from Antitrust Liability.

A nonpreferred health care provider's ability to compete was inhibited, at least on a price basis, by the contractual relationship between a corporation that negotiated to become a preferred provider group and one of the health insurers with whom the corporation negotiated alternative rates of payment because of the low out-of-pocket costs to patients who utilized the services of the corporation's members. That competitive disadvantage, however, is expressly authorized by statute. *Ins. Code, § 10133*, allows an insurer to contract for alternative rates with any provider and offer the benefit of those alternative rates to its insureds. The antitrust laws cannot be applied to forbid that which another statute expressly allows.

[Simon et al., Matthew Bender Practice Guide: Cal. Unfair Competition and Business Torts (2004) § 5.77; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 593; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 107.]

[*1132] *CA(3)*[] **(3)**

Statutes § 39—Construction—Giving Effect—Harmonizing.

Statutes must be construed with reference to the whole system of law of which they are a part so that all may be harmonized and have effect.

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

Monopolies and Restraints of Trade § 1—Health Care Market—Contracts Conferring Preferred Provider Status—Immunity from Antitrust Liability.

Ins. Code, § 10133, allows an insurer to contract with any provider to become a preferred provider, and *Health & Saf. Code, § 1373.9*, requires the insurer to consider proposals by other providers wishing to become preferred providers only if the existing preferred providers do not adequately serve the geographic area proposed to be served by the other providers. The consumers' interests are protected by the extensive regulatory oversight to ensure that each plan has sufficient preferred providers in the areas in which it operates to adequately serve those subscribers (*Cal. Code Regs., tit. 28, §§ 1300.51*, *1300.67.2*, *1300.67.2.1*). Thus, the simple allegation that an insurer has entered into an exclusive contract with a provider group does not describe conduct that violates the antitrust laws. This is not to say there can never be an antitrust violation if one or more providers or provider groups use coercion, threats, or intimidation to convince an insurer to refuse to negotiate with other providers or provider groups.

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

Monopolies and Restraints of Trade § 1—Health Care Market—Groups of Providers Forming Efficient-sized Contracting Units—Immunity from Antitrust Liability.

Combinations or groups of providers formed as efficient-sized contracting units are a new product within the health care marketplace and are subject only to those antitrust prohibitions applicable to the conduct of other presumptively legitimate enterprises (*Bus. & Prof. Code, § 16770, subd. (g)*; *Ins. Code, § 10133.6*; *Health & Saf. Code, § 1342.6*). In other words, the groups' conduct in forming efficient-sized contracting units is exempt from the antitrust laws, although their conduct in negotiating alternative rates of payment is subject to antitrust enforcement.

CA(6)[] **(6)**

Unfair Competition § 1—Scope—Legislative Limitations on Courts' Ability to Declare Conduct Unfair—Safe Harbor Provisions.

Although the unfair competition law's scope is sweeping, it is not unlimited. Courts may not simply impose their own notions of the day as to what is fair or unfair. Specific legislation may limit the judiciary's power to declare conduct unfair. If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, **[*1133]** courts may not override that determination. When specific legislation provides a safe harbor, plaintiffs may not use the general unfair competition law to assault that harbor.

Counsel: The Foundation for Taxpayer and Consumer Rights, Harvey Rosenfield, Pamela Pressley; Blecher & Collins, Maxwell M. Blecher and James Robert Noblin for Plaintiffs and Appellants.

Hooper, Lundy & Bookman, Blake R. Jones and Jay N. Hartz for Defendant and Respondent PTPN, Inc.

Hogan & Hartson, Gary L. Urwin and Richard L. Stone for Defendant and Respondent Blue Cross of California.

Judges: Willhite, J., with Epstein, P. J., and Manella, J., concurring.

Opinion by: Willhite

Opinion

[352]** **WILLHITE, J.**—In 1982, the California Legislature enacted legislation that paved the way for the proliferation of a new kind of health care service plan, the preferred provider organization (PPO). That year, the Legislature amended *Insurance Code section 10133* to allow private health insurers to contract with hospitals and providers of **[**353]** medical services for alternative rates of payment for those services, thus permitting insurers to create panels of "preferred providers" for the insurers' subscribers. That amendment was followed a few years later by legislation that enables providers to form groups **[***2]** or combinations to more efficiently negotiate with insurers to become preferred providers. In doing so, the Legislature immunized certain conduct from antitrust liability. In this case, we are asked to determine whether the conduct of one such group of providers (which imposed territorial restrictions on its members) and one insurer (which made the members of that group the virtually exclusive preferred providers for physical therapy services) comes within the scope of this immunity. We hold that it does.

BACKGROUND [1]

[*3]** There are two named defendants in this lawsuit. The first is PTPN, Inc., a corporation that was founded by independently owned and licensed physical **[*1134]** therapy practices to negotiate with health insurers to become a preferred provider group. The second is Blue Cross of California, one of the insurers with whom PTPN negotiated alternative rates of payment. PTPN, which is alleged to be the largest group of physical therapy providers in California, limits its membership based in part upon geographic considerations; it does not allow new members whose practices are located within a certain radius of an existing member's practice. For the most part, the members of PTPN are the exclusive preferred providers of physical therapy services for Blue Cross, which is alleged to be the largest provider of PPO coverage in California. [2] PTPN also has contracted with many other insurers, including most managed care organizations in the country, to make PTPN members the preferred providers of physical therapy services for those insurers.

[*4]** Under the Blue Cross PPO plan, a member of PTPN who provides physical therapy services to a Blue Cross subscriber will receive the negotiated rate of payment as a preferred provider directly from Blue Cross. If a Blue Cross subscriber receives treatment from a physical therapist who is not a preferred provider, the subscriber must pay for the treatment and may receive a small portion of that payment as reimbursement from Blue Cross.

Plaintiffs Lori Rubinstein Physical Therapy, Inc., and One on One PT are providers of physical therapy services. They are not, however, members of PTPN, and are not preferred providers for Blue Cross's PPO plan. They filed the instant action on behalf of themselves and all other non-PTPN-affiliated physical therapist providers in California (they estimate there are tens of thousands of such providers). Plaintiffs allege that PTPN and Blue **[**354]** Cross violate California's antitrust and unfair competition laws (*Bus. & Prof. Code, §§ 16720*, *17200 et seq.*) by engaging in an improper market allocation (through PTPN's geographic restrictions) and a group boycott (through Blue Cross's exclusive contract with PTPN). They **[***5]** assert that Blue Cross's exclusive arrangement with PTPN and PTPN's restrictions on membership unlawfully restrain competition for Blue Cross insured patients and have foreclosed actual and potential competitors of PTPN members from competing on the **[*1135]** merits for patients with private health insurance. They assert this restraint on competition has resulted in higher prices to patients, less innovation, less variety in service offerings, and lower quality in physical therapy services. [3] They seek an injunction prohibiting PTPN and Blue Cross from imposing any geographic restrictions on members of PTPN, from imposing a group boycott against non-PTPN members, and from making PTPN the exclusive physical therapy providers for any insurer.

---

[1] Because this appeal comes to us following the granting of motions for judgment on the pleadings, which are equivalent to demurrers (*Smiley v. Citibank (1995) 11 Cal.4th 138, 146 [44 Cal. Rptr. 2d 441, 900 P.2d 690]*), our statement of facts is based upon the allegations of the second amended complaint. "[W]e treat as true all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] However, we disregard allegations that are contrary to law or to facts that may be judicially noticed [citation] or are contradicted by the express terms of an exhibit incorporated into the complaint. [Citation.]" (*Freeman v. San Diego Assn. of Realtors (1999) 77 Cal.App.4th 171, 178, fn. 3 [91 Cal. Rptr. 2d 534]*.)

[2] The complaint alleges there are some physical therapists who are not members of PTPN who are preferred providers for Blue Cross "for idiosyncratic reasons"—e.g., some may have been "grandfathered" into their status as preferred providers, and some are affiliated with physician groups that are preferred providers.

[3] For example, plaintiffs allege that Blue Cross subscribers may not be able to receive the physical therapy they need because some PTPN members have more patients than they can adequately serve and thus limit their appointments to 15 minutes rather than a full hour, or because the PTPN member practicing in the subscriber's location may not be qualified to provide certain specialized treatments.

[*6]** PTPN and Blue Cross moved for judgment on the pleadings. [4] The trial court granted their motions, finding that the conduct at issue was authorized by statute and that plaintiffs failed to allege an antitrust violation under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) or under *Business and Professions Code section 17200*. Plaintiffs appeal from the judgment.

[***7] DISCUSSION

A. *The Legislative Scheme Facilitating PPO Plans*

HN1[] ***CA(1)***[] **(1)** Antitrust laws "rest 'on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.' [Citation.]" (*Marin County Bd. of Realtors, Inc. v. Palsson (1976) 16 Cal.3d 920, 935 [130 Cal. Rptr. 1, 549 P.2d 833]*.) As one treatise explains, "Antitrust laws place primary reliance on market forces to discipline economic behavior. If a monopoly or a cartel is created, the antitrust laws may be invoked to restore a situation of diffused power, but once that competitive balance is restored, there should be **[*1136]** no need for continuing government oversight. The 'invisible hand' of the market provides the discipline, so no regulators or bureaucrats are required once the proper competitive balance is restored." (Sullivan & Grimes, The Law of Antitrust: An Integrated **[**355]** Handbook (2000) § 1.3, pp. 5–6, fn. omitted.) Thus, ordinarily, antitrust laws are **[***8]** invoked to condemn restraints on competition such as market allocations and group boycotts because it is understood that market forces unhampered by these restraints will restore a proper competitive balance and produce the most efficient allocation of resources.

But, as many commentators acknowledge, unique aspects of the health care market serve to distort the market forces and make it less likely that market forces alone will produce efficient allocation, high quality, and lower prices. (See, e.g., Greaney, *Chicago's Procrustean Bed: Applying **Antitrust Law** in Health Care* (2004) 71 Antitrust L.J. 857, 858, 863–866; Sage & Hammer, *Competing on Quality of Care: The Need to Develop a Competition Policy for Health Care Markets* (1999) 32 U. Mich. J.L. Reform 1069, 1072–1073; Sullivan & Grimes, The Law of Antitrust: An Integrated Handbook, *supra*, § 13.4, pp. 670–671.) Indeed, as a result of these distortions, health care costs soared in the absence of government intervention and regulation. (Woo, *Antitrust and California's New Preferred Provider Organization Legislation: A New Alternative in Health Care Cost Containment* (1984) 12 Pepperdine L.Rev. 121, p. 121, fn. 1 **[***9]** (hereafter Woo).)

In 1982, the California Legislature sought to contain those rising costs by enacting legislation designed to encourage the development of PPO plans. (Stats. 1982, ch. 329, § 8, p. 1613.) In a PPO plan, there is a designated panel of preferred providers with whom a third party payor has contracted to provide medical services to insureds at discounted rates. The providers agree to discount their rates in part because they are guaranteed a defined pool of patients who have an economic incentive to use a preferred provider. Although the insureds typically are not precluded from using providers who are not preferred providers, they have to pay significantly more for services from nonpreferred providers. (Woo, *supra*, 12 Pepperdine L.Rev., at pp. 124–125.)

To facilitate the development of PPO plans, the Legislature amended *Insurance Code section 10133* to allow an insurer to "negotiate and enter into contracts for alternative rates of payment with institutional [and, after July 1, 1983, with professional] providers, and offer the benefit of these alternative rates to insureds who select those providers." (*Ins. Code, § 10133, **[***10]** subds. (b)*, *(e)*.) Alternatively, the Legislature permitted insurers to "limit

[4] There were, in fact, several motions for judgment on the pleadings. PTPN and Blue Cross filed two motions, one asserting statutory authorization and the other asserting lack of antitrust injury, directed at the first amended complaint (plaintiffs filed the first amended complaint before serving the original complaint on either defendant). The trial court granted those motions with leave to amend. Plaintiffs filed a second amended complaint containing minor revisions. Noting there was little difference between the first and second amended complaints, the trial court deemed the original motions for judgment on the pleadings to be motions directed to the second amended complaint, and allowed the parties to file supplemental briefs. The parties did so, and the court subsequently granted the motions without leave to amend and entered judgment against plaintiffs.

payments under **[*1137]** a policy to services secured by insureds from institutional [and] professional providers, charging alternative rates pursuant to contract with the insurer." (*Ins. Code, § 10133, subd. (c)*.)

The Legislature subsequently found in 1985, however, that individual providers "have not proven to be efficient-sized bargaining units for these contracts" and that groups or combinations of providers would be more efficient-sized contracting units for PPO plans. (*Bus. & Prof. Code, § 16770, subd. (d)*; *Ins. Code, § 10133.6*; *Health & Saf. Code, § 1342.6*.) But because the formation of these groups required an agreement among competitors, the Legislature recognized that antitrust laws were serving as a disincentive to the formation of such groups due to providers' concerns that they would be "found guilty of committing per se antitrust violations." (*Bus. & Prof. Code, § 16770, subd. (e)*.) To alleviate this problem, the Legislature enacted three virtually identical **[***11]** statutes stating its intent "that the formation of groups and combinations of providers and purchasing groups for the purpose of creating efficient-sized contracting units be recognized as the creation of a new product within the health care marketplace, and be subject, **[**356]** therefore, only to those antitrust prohibitions applicable to the conduct of other presumptively legitimate enterprises." [5] (*Bus. & Prof. Code, § 16770, subd. (g)*; *Health & Saf. Code, § 1342.6*; see *Ins. Code, § 10133.6*.) For ease of reference, we refer to these statutes collectively as the immunity statute.

[*12]** In addition to this portion of the statutory scheme designed to facilitate the development of PPO plans, the Legislature enacted statutes to provide regulatory oversight of the plans and "to promote the delivery and the quality of health and medical care to the people … who enroll in, or subscribe for the services rendered by, a health care service plan." (*Health & Saf. Code,* ***[*1138]*** *§ 1342*.) To that end, the Legislature created the Department of Managed Health Care, which "has charge of the execution of the laws of this state relating to health care service plans and the health care service plan business including, but not limited to, those laws directing the department to ensure that health care service plans provide enrollees with access to quality health care services and protect and promote the interests of enrollees." (*Health & Saf. Code, § 1341, subd. (a)*.) The Legislature also directed the Insurance Commissioner, in consultation with the Department of Managed Health Care, to promulgate regulations "designed to assure accessibility of provider services in a timely manner" to PPO plan subscribers in a cost efficient **[***13]** manner. (*Ins. Code, § 10133.5, subd. (b)*.) [6] **[***14]** The Legislature further directed the Governor to convene a task force on health care service plans to research, among other things, how the changes in health care delivery have affected the health care economy and whether the goals of managed care (such as controlling costs and improving quality and access to care) are being satisfied. (*Health & Saf. Code, § 1342.1*.) Finally, the Legislature enacted ***HN2***[] *Health and Safety Code section 1373.9*, which requires insurers offering PPO plans to give "reasonable consideration" to proposals by providers wishing to contract to become preferred providers, unless

---

[5] The Legislature's reference to the creation of a "new product" is in response to the United States Supreme Court's ruling in *Arizona v. Maricopa County Medical Society (1982) 457 U.S. 332 [73 L. Ed. 2d 48, 102 S. Ct. 2466]*, to which the Legislature cited in *Business and Professions Code section 16770, subdivision (e)*. In *Maricopa*, the Supreme Court held that groups of physicians who agreed to maximum fee schedules for reimbursement by insurance companies committed per se antitrust violations. The Supreme Court rejected the provider groups' reliance on *Broadcast Music, Inc. v. CBS (1979) 441 U.S. 1 [60 L. Ed. 2d 1, 99 S. Ct. 1551]* for the proposition that their fee schedules involved price fixing only in a literal sense and did not constitute illegal price fixing. The court in *Maricopa* explained that in *Broadcast Music*, the blanket license that was offered was an entirely new product that was different from the product an individual composer could offer, whereas the provider groups in *Maricopa* were offering the same product—medical services—but simply were offering them at a fixed price. (*Maricopa, supra, 457 U.S. at pp. 355–357 [73 L. Ed. 2d 48, 102 S. Ct. 2466]*.) By referring in the immunity statute to the provider groups as a "new product," the Legislature emphasized that the formation of those groups to offer services at fixed prices would not constitute illegal price fixing.

[6] Those regulations are found in title 28 of the California Code of Regulations, and include detailed requirements related to patient accessibility to services and geographic accessibility standards. (See, e.g., *Cal. Code Regs., tit. 28, §§ 1300.67.2*, *1300.67.2.1*.)

the providers propose to serve a geographic area that is adequately served by the PPO plans' existing preferred providers. [7]

[357]** It is against the backdrop of all these statutes and regulations that we must analyze plaintiffs' claims.

B. *Plaintiffs' Claims Evaluated Under the Legislative Scheme*

Plaintiffs contend that PTPN's geographic restrictions on membership, coupled with Blue Cross's designation of PTPN members as the exclusive preferred providers of physical therapy services, foreclose non-PTPN physical therapists from competing to provide services **[***15]** to Blue Cross subscribers. They argue that although the immunity statute authorizes the formation of provider networks, it does not allow those networks to violate the antitrust **[*1139]** laws—which prohibit group boycotts and territorial market allocations—while doing so. They also assert that even if the immunity statute immunized all activity in connection with the formation of provider networks, the conduct at issue is not conduct related to the formation of PTPN, but rather it is conduct related to the operation of the PTPN network and PTPN's contractual relationship with Blue Cross.

In examining whether the conduct alleged constitutes an unlawful restraint on competition that is not exempt from antitrust enforcement under the immunity statute, it is important to distinguish between the two markets in which plaintiffs compete with PTPN and/or its members. The first market involves competition to provide physical therapy services to patients, including Blue Cross PPO plan subscribers—a market in which plaintiffs compete with PTPN members. The second market involves the competition to become Blue Cross preferred providers—a market in which plaintiffs compete with PTPN itself **[***16]** (rather than its individual members). We examine each area of competition to determine if the complaint alleges a cognizable unlawful restraint.

1. *Competition to Provide Services to Blue Cross Subscribers*

The complaint alleges that, due to the exclusive contract between Blue Cross and PTPN, plaintiffs and other non-PTPN physical therapists cannot reasonably compete to provide physical therapy services to Blue Cross PPO plan subscribers. The reason: The subscribers are required to pay far more to receive services from a physical therapist who is not a preferred provider.

CA(2)[] **(2)** There is no doubt that the contractual relationship between Blue Cross and PTPN inhibits plaintiffs' ability to compete, at least on a price basis, because of the low out-of-pocket costs to patients who utilize the services of PTPN members. [8] But that competitive disadvantage is expressly authorized by statute. ***HN3***[] *Insurance Code section 10133* allows an insurer to contract for alternative rates with any provider and offer the benefit of those alternative rates to their insureds. The antitrust laws cannot be applied to forbid that **[**358]** which another statute expressly allows. ***CA(3)***[] **(3)** (Cf. *Stafford v. L. A. etc. Retirement Board (1954) 42 Cal.2d 795, 799 [270 P.2d 12]* **[***17]** [***HN4***[] statutes must be " 'construed with reference to the whole system of law of which [they are] a part so that all may be harmonized and have effect' "].)

[*1140]

Moreover, by choosing to subscribe to a PPO plan, the subscribers themselves impair the nonpreferred providers' ability to compete for their business. To the extent that the subscribers' choice to limit competition among providers might result in higher costs and/or decreased quality, the subscribers are protected by the statutory and regulatory scheme designed to ensure that PPO plan subscribers have adequate access to high quality and cost effective

---

[7] The statute defines "reasonable consideration" as "consideration in good faith of the terms of proposals for affiliation prior to the time that contracts for alternative rates of payment are entered into or renewed. A plan may specify the terms and conditions of affiliation to assure cost efficiency, qualification of providers, appropriate utilization of services, accessibility, convenience to persons who would receive the provider's services, and consistency with the plan's basic method of operation, but shall not exclude providers because of their category of license." (*Health & Saf. Code, § 1373.9, subd. (b)(1)*.)

[8] We note that a subscriber might be willing to pay the additional cost to be treated by a non-PTPN member if that physical therapist offered services that were sufficiently better or better suited for the subscriber. Thus, plaintiffs may still compete on the basis of quality or innovation.

health care. (*Bus. & Prof. Code, § 16770*; *Health & Saf. Code, §§ 1341*, **[***18]** *1342*, *1342.6*, *1373.9*; *Ins. Code, §§ 10133.5*, *10133.6*; *Cal. Code Regs., tit. 28, §§ 1300.51*, *1300.67 et seq.*)

2. *Competition to Become Preferred Providers*

CA(4)[] **(4)** The complaint does not allege that Blue Cross or PTPN have engaged in conduct that directly restrains plaintiffs from negotiating with Blue Cross to become preferred providers. Instead, the complaint alleges that plaintiffs are foreclosed from becoming preferred providers because Blue Cross and PTPN have agreed to make PTPN members the exclusive or virtually exclusive preferred providers for Blue Cross's PPO plan. But once again, that conduct is authorized by statute. ***HN5***[] *Insurance Code section 10133* allows an insurer to contract with any provider to become a preferred provider, and *Health and Safety Code section 1373.9* requires the insurer to consider proposals by other providers wishing to become preferred providers *only* if the existing preferred providers do **[***19]** not adequately serve the geographic area proposed to be served by the other providers. And once again, the consumers' interests are protected by the extensive regulatory oversight to ensure that each plan has sufficient preferred providers in the areas in which it operates to adequately serve those subscribers. (See, e.g., *Cal. Code Regs., tit. 28, §§ 1300.51*, *1300.67.2*, *1300.67.2.1*.) Thus, the simple allegation that an insurer has entered into an exclusive contract with a provider group does not describe conduct that violates the antitrust laws.

This is not to say there can never be an antitrust violation if one or more providers or provider groups use coercion, threats, or intimidation to convince an insurer to refuse to negotiate with other providers or provider groups. (*G.H.I.I. v. MTS, Inc. (1983) 147 Cal. App. 3d 256, 268 [195 Cal. Rptr. 211]*.) But as the trial court found in this case, plaintiffs make no such allegation. In fact, it appears from the exhibit attached to the complaint that Blue Cross intended to negotiate with non-PTPN members who served areas in **[***20]** which PTPN did not have an adequate number of members, which prompted PTPN to modify its geographic restrictions to ensure adequate coverage. **[*1141]**

Plaintiffs contend, however, that the exclusive contract between Blue Cross and PTPN unlawfully restrains competition because PTPN places geographic restrictions on its members. Thus, plaintiffs contend that PTPN and Blue Cross engage in a territorial market allocation that violates the Cartwright Act. Plaintiffs' contention fails because PTPN's imposition of geographic restrictions is expressly immunized by the immunity statute.

CA(5)[] **(5)** The immunity statute proclaims that ***HN6***[] combinations or groups of providers formed as "efficient-sized contracting units" are "a new product within the health care marketplace" and are subject **[**359]** "only to those antitrust prohibitions applicable to the conduct of other presumptively legitimate enterprises." (*Bus. & Prof. Code, § 16770, subd. (g)*; *Ins. Code, § 10133.6*; *Health & Saf. Code, § 1342.6*.) In other words, the groups' conduct in forming efficient-sized contracting units is exempt from the antitrust laws, although their conduct **[***21]** in negotiating alternative rates of payment is subject to antitrust enforcement. [9] (See *Cianci v. Superior Court (1985) 40 Cal.3d 903, 923, fn. 7 [221 Cal. Rptr. 575, 710 P.2d 375]*.)

In the present case, PTPN's imposition of geographic restrictions on its members is immunized because it is part of the formation of an efficient-sized contracting unit. The regulations governing PPO plans require Blue Cross (and other insurers) to contract alternative rates of payment with a sufficient number of preferred providers in all geographic areas in which they have subscribers to ensure there will be adequate access to health care services for their subscribers. (See, e.g., *Cal. Code Regs., tit. 28, §§ 1300.51*, *1300.67.2*, **[***22]** *1300.67.2.1*.) To create the most efficient-sized contracting unit, PTPN must include a sufficient number of providers to allow Blue Cross to meet the regulatory requirements (or to exceed those requirements, if Blue Cross so desires). At the same time, PTPN must limit its membership sufficiently to ensure a patient volume for each member that will provide an incentive for the members to reduce their rate of payment. The geographic restrictions PTPN imposes on its members thus must be viewed as conduct related to the formation of an efficient-sized contracting unit, and therefore PTPN is exempt from antitrust enforcement under the immunity statute for the imposition of those restrictions. PTPN's subsequent enforcement of its geographic restrictions and its modification of those restrictions

---

[9] For example, if two or more groups each formed contracting units and agreed that only one group would negotiate with each insurer, that conduct could be subject to antitrust enforcement. There is no such conduct alleged in this case.

in response to Blue Cross's need for additional providers also is excluded from antitrust enforcement **[*1142]** under the immunity statute because it is conduct aimed at maintaining the efficient size of the contracting unit. [10]

[*23]** 3. *Liability Under the Unfair Competition Law*

In addition to alleging that PTPN's and Blue Cross's conduct violates the Cartwright Act, plaintiffs allege that conduct violates the unfair competition law. They argue on appeal that even if their Cartwright Act claim fails, they have stated an unfair competition claim because the conduct they allege violates the policy or spirit of the Cartwright Act and therefore is "unfair" under *Business and Professions Code section 17200*. They are incorrect.

CA(6)[] **(6)** In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163 [83 Cal. Rptr. 2d 548, 973 P.2d 527]*, the Supreme Court discussed **[**360]** the scope of the unfair competition law: ***HN7***[] "Although the unfair competition law's scope is sweeping, it is not unlimited. Courts may not simply impose their own notions of the day as to what is fair or unfair. Specific legislation may limit the judiciary's power to declare conduct unfair. If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination. When specific legislation provides a 'safe harbor,' plaintiffs may not use the general **[***24]** unfair competition law to assault that harbor." (*Id. at p. 182*.)

As we have explained, the Legislature expressly authorized or exempted from antitrust enforcement the conduct alleged in this case. It is from the Legislature or the Department of Managed Health Care that plaintiffs must seek their desired remedy. The courts are not empowered to overrule the Legislature's judgment in these matters. Accordingly, we affirm the trial court's ruling granting PTPN's and Blue Cross's motions for judgment on the pleadings.
[*1143]

DISPOSITION

The judgment is affirmed. PTPN and Blue Cross shall recover their costs on appeal.

Epstein, P. J., and Manella, J., concurred.

A petition for a rehearing was denied April 10, 2007, and appellants' petition for review by the Supreme Court was denied July 18, 2007, S152370.

End of Document

[10] In light of our holding that the immunity statute exempts PTPN's imposition of geographic restrictions on its members from antitrust enforcement, we need not address whether plaintiffs allege *antitrust* injury arising from those restrictions—i.e., whether the alleged territorial market allocation restrains competition in the relevant market, the negotiation to become a Blue Cross preferred provider. (See, e.g., *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. (1977) 429 U.S. 477, 489 [50 L. Ed. 2d 701, 97 S. Ct. 690]* [antitrust plaintiff must establish "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation"].)

Washington v. Haupert

United States Court of Appeals for the Seventh Circuit

September 14, 2006, Argued ; March 27, 2007, Decided

No. 05-4225

Reporter

481 F.3d 543 *; 2007 U.S. App. LEXIS 7129 **

LEON WASHINGTON and CLARA WASHINGTON, Plaintiffs-Appellees, v. JAMES HAUPERT, JOEL SLYGH and FRED ROGERS, Defendants-Appellants.

Subsequent History: Motion granted by, in part, Petition granted by *Washington v. Haupert, 2008 U.S. Dist. LEXIS 73264 (N.D. Ind., Sept. 23, 2008)*

Prior History: [1]** Appeal from the United States District Court Northern District of Indiana, Fort Wayne Division. No. 03 C 96--Theresa L. Springmann, Judge.

Washington v. City of Fort Wayne, 2005 U.S. Dist. LEXIS 45553 (N.D. Ind., Nov. 2, 2005)

Disposition: The court affirmed the district court's order denying the officers' summary judgment motion.

Core Terms

arrest, district court, qualified immunity, chair, summary judgment, photographs, domestic battery, scratched, probable cause, overturned, responded, Hello, summary judgment motion, police officer, downstairs, insolent, angry, juice, touch, jail, neck, rude

LexisNexis® Headnotes

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

Civil Rights Law > ... > Immunity From Liability > Local Officials > Individual Capacity

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

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

The United States Court of Appeals for the Seventh Circuit reviews a district court's denial of summary judgment on qualified immunity grounds de novo.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

HN2[] Entitlement as Matter of Law, Genuine Disputes

Summary judgment should be granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN3[] Summary Judgment, Evidentiary Considerations

In the summary judgment context, the evidence and all inferences that reasonably can be drawn from the evidence are construed in the light most favorable to the non-moving party.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Individual Capacity

HN4[] Local Officials, Individual Capacity

Governmental actors performing discretionary functions are entitled to qualified immunity and are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The United States Supreme Court has defined a test to determine whether a government actor is entitled to qualified immunity. First, the plaintiff must present evidence that, taken in the light most favorable to the plaintiff, would allow a reasonable factfinder to determine that the plaintiff has been deprived of a constitutional right. If the plaintiff meets that burden, the court must determine whether the particular constitutional right was clearly established at the time of the alleged violation. If the right was clearly established, the government actor is not entitled to qualified immunity.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Absence of Essential Element

Civil Rights Law > ... > Scope > Law Enforcement Officials > Arrests

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Probable Cause

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Warrantless Arrests

HN5[] Burdens of Proof, Absence of Essential Element

Where *42 U.S.C.S. § 1983* plaintiffs allege that police officers violated their *Fourth Amendment* rights to be free from unreasonable seizure, in order to survive summary judgment, the plaintiffs first must present evidence which would allow a reasonable factfinder to determine that they were arrested without probable cause. The *Fourth Amendment* permits warrantless arrests only if the arresting officer has probable cause to believe that a crime has been committed. In order to have probable cause for an arrest, law enforcement agents must reasonably believe, in light of the facts and circumstances within their knowledge at the time of the arrest, that the suspect had committed or was committing an offense. Reasonableness turns on what the officers knew, not whether they knew the truth or whether they should have known more.

Criminal Law & Procedure > ... > Domestic Offenses > Domestic Assault > Elements

HN6[] **Domestic Assault, Elements**

Indiana defines domestic battery as a person who knowingly or intentionally touches an individual who--(1) is or was a spouse of the other person; (2) is or was living as a spouse of the other person as provided in subsection (c); or (3) has a child in common with the other person--in a rude, insolent, or angry manner that results in bodily injury to the person described in subdivision (1), (2), or (3) commits domestic battery, a Class A misdemeanor. *Ind. Code § 35-42-2-1.3(a)* (2006).

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Rights Law > ... > Immunity From Liability > Local Officials > Individual Capacity

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

HN7[] **Summary Judgment, Evidentiary Considerations**

In reviewing a denial of summary judgment on the basis of qualified immunity, the United States Court of Appeals for the Seventh Circuit adopts the facts as specified by the district court.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Rights Law > ... > Scope > Law Enforcement Officials > Arrests

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Probable Cause

Civil Rights Law > ... > Immunity From Liability > Local Officials > Individual Capacity

HN8[] **Entitlement as Matter of Law, Legal Entitlement**

Typically, cases in which the United States Court of Appeals for the Seventh Circuit has affirmed the grant of summary judgment on qualified immunity grounds to police officers involve arrests in which a witness, most commonly the putative victim, provides sufficient support to justify the officers' decision. The complaint of a single witness or putative victim alone generally is sufficient to establish probable cause to arrest unless the complaint would lead a reasonable officer to be suspicious, in which case the officer has a further duty to investigate.

Antitrust & Trade Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Governments > Courts > Judicial Precedent

HN9[] **Antitrust & Trade Law**

The United States Supreme Court's holding in Matsushita, regarding the burden of proof for nonmovants in the summary judgment context, is limited to ***antitrust law***.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN10[] **Summary Judgment, Evidentiary Considerations**

A court may not make credibility determinations at the summary judgment stage.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Rights Law > ... > Immunity From Liability > Local Officials > Individual Capacity

HN11[] **Summary Judgment, Evidentiary Considerations**

When qualified immunity turns on a *42 U.S.C.S. § 1983* defendant's actual conduct, a district court should consider not only the plaintiff's allegations, but all the undisputed facts in the record when deciding whether the defendant's conduct violated clearly established legal principles.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

HN12[] **Summary Judgment, Evidentiary Considerations**

When faced with an argument that a district court mistakenly identified clearly established law, a court of appeals can simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason. The appellate court is not required to accept the facts as described by the district court, although in most instances it is appropriate to do so. But, in cases where the appellants are not asking the appeals court to resolve factual disputes or determine whether the evidence is sufficient, it is appropriate for the appeals court to look beyond the factual account of the district court to all undisputed evidence.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Need for Trial

HN13[] **Entitlement as Matter of Law, Appropriateness**

On summary judgment a court may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts; these are jobs for a factfinder. However implausible the non-moving party's account might seem, it is not the court's place to decide who is telling the truth. Where the parties present two vastly different stories, it is almost certain that there are genuine issues of material fact in dispute. Summary judgment is only appropriate when there is no room for a difference of opinion concerning the facts or the reasonable inferences to be drawn from them.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Individual Capacity

HN14[] **Local Officials, Individual Capacity**

For qualified immunity purposes, to be clearly established, the constitutional right in question must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Arrests

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Probable Cause

HN15[] **Law Enforcement Officials, Arrests**

A reasonable officer would understand that what he was doing violated a plaintiff's right to be free from unreasonable seizure, if the officer fabricated a police report in order to justify the plaintiff's arrest. Innumerable decisions have clearly established the right to be free from arrest without probable cause.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN16[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is not appropriate when the facts are disputed.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Need for Trial

Civil Rights Law > ... > Scope > Law Enforcement Officials > Arrests

HN17[] **Entitlement as Matter of Law, Need for Trial**

If the question of probable cause to arrest arises in a damages suit, it is a proper issue for the jury if there is room for a difference of opinion concerning the facts or the reasonable inferences to be drawn from them.

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

HN18[] **Appellate Review, Standards of Review**

In reviewing a summary judgment order, the United States Court of Appeals for the Seventh Circuit is not in a position to resolve swearing contests between litigants.

Counsel: LEON WASHINGTON, Plaintiff - Appellee, Pro se, Fort Wayne, IN.

CLARA WASHINGTON, Plaintiff - Appellee, Pro se, Fort Wayne, IN.

For JAMES HAUPERT, JOEL SLYGH, FRED ROGERS, Defendants - Appellants: Carolyn M. Trier, HUNT SUEDHOFF KALAMAROS, Fort Wayne, IN, USA.

Judges: Before CUDAHY, MANION, and ROVNER, Circuit Judges.

Opinion by: CUDAHY

Opinion

[*544] CUDAHY, *Circuit Judge.* Leon and Clara Washington were arrested for domestic battery by the defendant police officers on January 30, 2001. The plaintiffs claim that they were simply play-fighting when Clara Washington mistakenly called 911. In January 2002, the plaintiffs brought a *42 U.S.C. § 1983* lawsuit against the City of Fort Wayne, Officer James Haupert, Officer Joel Slygh and Sergeant Fred Rogers (collectively, "the officers"). The plaintiffs argue that the officers violated their *Fourth Amendment* right to be free from unreasonable seizure by arresting them without probable cause. Officer Haupert, Officer Slygh and Sergeant Rogers filed a motion for summary judgment on the **[**2]** basis of qualified immunity. The district court denied the officers' motion for summary judgment, and they now appeal. We affirm.

I. Background

On January 30, 2001, Clara and Leon Washington along with other family members returned home to Fort Wayne from Mississippi, where they had attended the funeral of Clara's brother. After arriving home, in an attempt to cheer Clara, Leon threw a few snowballs at Clara. Their two sons joined in, and Clara also threw some snow back at Leon. The family moved some furniture into the house and then went inside. Leon went upstairs to take a shower and rest. In 2001, Leon and Clara were not residing together in the same home; however, Clara offered Leon her room for the evening since she planned on staying downstairs that night.

At some point later in the evening around 9:00, Clara called up to Leon and asked him to come downstairs. She then called out to Leon offering him a glass of juice. Leon put his hands on her back to let her know that he had come downstairs. At that point, the plaintiffs claim that they playfully dashed a small amount of juice and water on each other. Clara then went to pick up a chair that had been knocked over earlier in **[**3]** the day. Leon, then, jokingly grabbed the chair and threatened Clara with it. Clara then said something **[*545]** to the effect of "Put it down or I'll call 911." Leon let go of the chair and went back upstairs to go to bed.

According to Clara, her sister then called from Mississippi. Clara and her sister discussed their brother's death and the possibility that it might have been a murder. Clara then decided to call the Fort Wayne police to discuss her brother's death and dialed 911. She claims that she hung up, though, realizing that she should not have called. The 911 operator called back, and Leon answered the phone. According the Clara, she told the operator that there was no problem. To this, the operator responded that she was going to send a police car out in any event.

The following transcript of the 911 call provides a slightly different account.

Q: 911, what is your emergency?
A: Uh, would you get a car up to 2222 Drexel Avenue, please.
Q: 2222 . . . (beep) Hello . . . (rustling noise) Hello . . . . (beep) Hello (beep, ringing).
Male: Hello.
Q: Hello. Can I speak to the woman that I was just speaking to please . . . hello?
A: Hello.

Q: Ma'am. **[**4]**
A: Yes.
Q: What's the problem on Drexel?
A: Uh, my husband, uh, tryin' to fight me.
Q: Has he hit you?
A: No.
Q: Is he the one that hung up?
A: Uh, no the . . . yeah yeah.

Q: Does he have any weapons?
A: No.
Q: Does he . . . has he been drinking?
A: No.
Q: Alright [sic] we are going to send the police out. If anything happens before they get there call us back.
A: Ok.
Q. Thank you.
A. Bye.

Officers James Haupert and Joel Slygh responded to the call. According to Clara, when the officers arrived, she explained to them that she was depressed about her brother's death. She also told them that she and her husband had been playing around earlier, specifically mentioning that they had dashed juice and water on each other. At that point, one of the officers went upstairs to talk with Leon. According to Leon, he was awakened as Officer Haupert was coming up the stairs. The officer asked him if he had a gun, to which Leon responded no. Officer Haupert then proceeded to question him about the situation and why the 911 call had been placed. Leon told him that there was nothing going on and that he did not know 911 **[**5]** had been called. Officer Haupert then asked him to come downstairs.

According to the plaintiffs, the officers continued to ask them about what had happened. At some point, Clara asked if they were going to jail for calling 911, to which Officer Slygh responded, "No, you ain't going to jail." Officer Haupert added, "But if you ever do something like this again, you will go to jail."

The officers provide a vastly different account of the conversation with the Washingtons leading up to their arrest. According to the officers, Clara Washington said that she and her husband had been arguing and had thrown water and juice on each other during the argument. Clara also told them that Leon had grabbed her shoulders with both hands and pushed her into the kitchen. Clara then told the officers that she had grabbed a chair and **[*546]** tried to hit Leon with it in an attempt to defend herself. Clara then said that Leon had held the leg of the chair across her chest and neck and hurt her with it. She claimed that it was painful when Leon choked her with the chair.

According to Officer Haupert, Leon reported that he had been asleep upstairs when Clara came up to the bedroom and began to argue with him. **[**6]** Both officers report that Leon told them that Clara jumped on Leon and said, "You wanna fight mother f_ _ _ _ _!" Leon also told the officers that Clara had scratched him on the back of his neck. Leon then reported that he had gone downstairs with Clara. He told the officers that he and his wife began wrestling over a chair, and Clara scratched his hand and face. Leon reported that it was painful when Clara scratched him. The police officers took nine photographs of the Washington's home and of Leon Washington's face, neck and hand.

At some point, the officers went outside. They returned some time later with Sergeant Fred Rogers. According to the plaintiffs, Rogers said that they were offering conflicting stories and inquired as to what was going on. According to Clara, she then said, "Officer, I'm telling the truth." To which, Sergeant Rogers responded along the lines of, "How you telling the truth when this guy here is scratched up?" Clara then said something like, "Apparently you have a problem with ladies." At that point, according to the plaintiffs, Sergeant Rogers ordered Officer Haupert to arrest Clara. Leon then asked, "You're not taking her to jail for this, are you?" To **[**7]** which Rogers allegedly responded, "Yeah, and you're going, too." At that point, Leon Washington was also placed under arrest.

According to the defendants, after Sergeant Fred Rogers arrived, Clara told him that she had been scratched. At that point, the decision was made to make a dual arrest for domestic battery.

The Information for Domestic Battery, listing Clara Washington as the defendant, provides that she "did knowingly or intentionally touch Leon Washington . . . [i]n a rude, insolent or angry manner, to wit: by scratching, and/or hitting said Leon Washington." The Information was signed by "J. Haupert 1652F." The Information for Domestic Battery, listing Leon Washington as the defendant, provides that he "did knowingly or intentionally touch Clara G. Washington . . . [i]n a rude, insolent or angry manner, to wit: striking her." This record was signed by "Joel C. Slygh # 1655F." The domestic battery charges were dismissed by the state on October 5, 2001.

On January 29, 2003, Leon Washington and Clara Washington filed the present lawsuit against Officer Haupert, Officer Slygh, Sergeant Rogers and the City of Fort Wayne in state court, alleging a violation of their *Fourth Amendment* **[**8]** right to be free from false arrest pursuant to *42 U.S.C. § 1983*, as well as claims under state tort law. The defendants removed the lawsuit to federal court. On July 15, 2005, the defendants filed a motion for summary judgment, asserting that they were entitled to qualified immunity. The district court granted the motion as to the City of Fort Wayne on the grounds that it did not maintain an unconstitutional policy or custom (*see Strauss v. City of Chicago, 760 F.2d 765, 768 (7th Cir. 1985))* but denied the motion as to the individual defendants. Officer Haupert, Officer Slygh and Sergeant Rogers appeal.

II. Discussion

HN1[] We review a district court's denial of summary judgment on qualified immunity grounds de novo. *Leaf v. Shelnutt, 400 F.3d 1070, 1077* ***[*547]*** *(7th Cir. 2005)*. ***HN2***[] Summary judgment should be granted where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. ***HN3***[] The evidence and all inferences that reasonably **[**9]** can be drawn from the evidence are construed in the light most favorable to the non-moving party, here, the plaintiffs. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

HN4[] Governmental actors performing discretionary functions are entitled to qualified immunity and are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)*. In *Saucier v. Katz, 533 U.S. 194, 200, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)*, the Supreme Court defined a test to determine whether a government actor is entitled to qualified immunity. First, the plaintiff must present evidence that, taken in the light most favorable to the plaintiff, would allow a reasonable fact finder to determine that he has been deprived of a constitutional right. *Id. at 201*. If the plaintiff meets that burden, the court must determine whether the particular constitutional right was clearly established at the time of the alleged violation. *Id.* If the right was clearly established, the government actor is *not* entitled **[**10]** to qualified immunity.

The ***HN5***[] plaintiffs allege that the defendants violated their *Fourth Amendment* rights to be free from unreasonable seizure. In order to survive summary judgment, the plaintiffs first must present evidence which would allow a reasonable fact finder to determine that they were arrested without probable cause. *See Booker v. Ward, 94 F.3d 1052, 1057 (7th Cir. 1996)*. The *Fourth Amendment* permits warrantless arrests only if the arresting officer has probable cause to believe that a crime has been committed. *Thompson v. Wagner, 319 F.3d 931, 934 (7th Cir. 2003)*. "In order to have probable cause for an arrest, law enforcement agents must reasonably believe, in light of the facts and circumstances within their knowledge at the time of the arrest, that the suspect had committed or was committing an offense." *Payne v. Pauley, 337 F.3d 767, 776 (7th Cir. 2003)*; *see also Beck v. Ohio, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964)*. Reasonableness turns on what the officers knew, not whether they knew the truth or whether they should have known more. *Gramenos v. Jewel Companies, 797 F.2d 432, 439 (7th Cir. 1986)*; **[**11]** *see also Thompson, 319 F.3d at 934*.

The Washingtons were arrested for domestic battery, which ***HN6***[] Indiana defines as:

> A person who knowingly or intentionally touches an individual who:
>
> (1) is or was a spouse of the other person;
>
> (2) is or was living as a spouse of the other person as provided in subsection (c); or
>
> (3) has a child in common with the other person; in a rude, insolent, or angry manner that results in bodily injury to the person described in subdivision (1), (2), or (3) commits domestic battery, a Class A misdemeanor.

Ind. Code § 35-42-2-1.3(a) (2006). Here, in order to allege a constitutional violation, the Washingtons must present sufficient evidence that would allow a jury to conclude that the officers unreasonably believed that the Washingtons had knowingly or intentionally touched each other in a **[*548]** rude, insolent or angry manner that resulted in bodily injury.

HN7[] In reviewing a denial of summary judgment on the basis of qualified immunity, we adopt the facts as specified by the district court. Johnson v. Jones, 515 U.S. 304, 317, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995); Leaf, 400 F.3d at 1078; McKinney v. Duplain, 463 F.3d 679, 688 (7th Cir. 2006). **[**12]** The district court assumed the following facts for purposes of determining the defendants' summary judgment motion. "Clara had juice in her hands and playfully dashed it on Leon." Washington v. City of Fort Wayne, No. 1:03-CV-96-TS, 2005 U.S. Dist. LEXIS 45553, slip op. at 4 (N.D. Ind. Nov. 2, 2005). "Leon then playfully picked up a chair to get back at her, but she threatened to call 911." *Id.* "Clara accidentally called 911 and hung up." *Id.* "The operator asked Clara if there was a problem at her home, and Clara responded, 'Uh, my husband, uh, tryin' to fight me.'" *Id.* "Clara told them [Officers Haupert and Slygh] that Leon was asleep, that there was no trouble, and that she and Leon had been playing around." *Id.* "They [Haupert and Slygh] questioned him [Leon] and he confirmed Clara's story." *Id.* In response to Sergeant Rogers' inquiry, "Clara said, 'Officer, I am telling the truth,' to which Sergeant Rogers said, 'How you telling the truth when this guy here is scratched up.'" 2005 U.S. Dist. LEXIS 45553, [WL] at 5. "When Leon asked them, 'You're not taking her to jail for this, are you?' Sergeant Rogers ordered his arrest as well." *Id.*

Based on these facts, a reasonable jury could find it was not reasonable **[**13]** for the officers to believe that Leon and Clara Washington had committed a crime, namely domestic battery. The plaintiffs described their interactions as "playful," in no way implying that they had touched each other in a "rude, insolent, or angry manner." Moreover, besides a passing reference to being scratched, the plaintiffs did not mention any claims of bodily injury to the officers. *Cf.* Simmons v. Pryor, 26 F.3d 650, 654 (7th Cir. 1993) (holding that the defendant police officer had probable cause to arrest the husband for domestic battery where officers witnessed the couple "passing licks with open hand," the wife told the officer about the violence which was corroborated by other witnesses and the officer knew of the wife's previously obtained order of protection).

HN8[] Typically, cases in which we have affirmed the grant of summary judgment on qualified immunity grounds to police officers involve arrests in which a witness, most commonly the putative victim, provides sufficient support to justify the officer's decision. *See* Beauchamp v. City of Noblesville, 320 F.3d 733, 743 (7th Cir. 2003) ("The complaint of a single witness or putative victim **[**14]** alone generally is sufficient to establish probable cause to arrest unless the complaint would lead a reasonable officer to be suspicious, in which case the officer has a further duty to investigate."); *see also* Woods v. City of Chicago, 234 F.3d 979, 987 (7th Cir. 2000); Guzell v. Hiller, 223 F.3d 518, 519-20 (7th Cir. 2000); Tangwall v. Stuckey, 135 F.3d 510, 516 (7th Cir. 1998); Gerald M. v. Conneely, 858 F.2d 378, 381 (7th Cir. 1988); Gramenos, 797 F.2d at 439. But, importantly, in the present case, there are no witnesses offering testimony to support the officers' version of the Washingtons' arrests. Both Clara Washington and Leon Washington deny any physical altercation which would qualify as domestic battery under Indiana law, and they claim that they told the officers they were simply play-fighting.

The defendants attempt to rebut the Washingtons' account of their arrest by couching it in a couple of legal arguments, both of which fail. First, the officers argue that the facts offered by the Washingtons, **[*549]** and relied on by the district court to find that genuine issues of material facts exist, **[**15]** are irrelevant or immaterial, and therefore should not preclude summary judgment. Appellant's Opening Br. at 12. The parties dispute the contents of the conversation leading up to their arrest on the night of January 30, 2001. What was conveyed to the officers goes to the heart of probable cause, and therefore, these facts are relevant and material to this motion. Second, relying on Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), the defendants also contend that the plaintiffs must provide "more persuasive evidence to support their claim" since the "factual context renders the claims asserted by the party opposing summary judgment implausible." *See* Appellant's Opening Br. at 12. Matsushita does not apply to the present case since HN9[] its holding is limited to ***antitrust law***. And, more importantly, whether the Washingtons' story is "implausible" rests on whether they are credible, and we are not in a position to make that assessment. *See* Payne, 337 F.3d at 770-71 (holding that HN10[] a court may not make "credibility determinations" at the summary judgment stage).

The defendants offer an account of the "undisputed facts," which **[**16]** differs from that relied on by the district court in two important ways. [1] **[**17]** The defendants rely on photographs taken by Officer Haupert of the

[1] The "undisputed facts" as described by the defendants are as follows:

Washingtons' kitchen, most notably of an overturned chair, and of Leon Washington's face, hand and neck. The district court did not include a discussion of these photographs in its account of the facts, which it should have. [2] *See* Green v. Carlson, 826 F.2d 647, 651 (7th Cir. 1987) (holding that **HN11**[] when qualified immunity turns on the defendant's actual conduct "the district court should consider not only the plaintiff's allegations, but all the undisputed facts in the record when deciding whether the defendant's conduct violated clearly established **[*550]** legal principles"). Regardless, these photographs do not change the outcome of the decision to deny summary judgment to the defendants, since neither the photograph of the overturned chair nor the photographs of Leon Washington establish probable cause for the Washingtons' arrest.

[18]** As for the overturned chair, according to the Washingtons, the chair was overturned when they were moving their things in from the truck. Even if that explanation was not conveyed to the officers, the overturned chair, in light of the Washingtons' account of their conversation with the officers, does not alter our conclusion that the plaintiffs have alleged sufficient facts to allow a reasonable jury to find that the officers lacked probable cause to arrest them. Although the overturned chair itself may not be in dispute, the facts surrounding it certainly are.

The other "undisputed fact" offered by the defendants is the alleged scratches on Leon Washington, which Officer Haupert photographed. [3] The photographs certainly show abrasions of some kind on Leon Washington's chin and hand; any mark on his neck is more difficult to make out. However, we must credit the plaintiffs' story. *See* Payne, 337 F.3d at 777. The photographs, in light of the Washingtons' account of the night of their arrests, do not alter our conclusion that the plaintiffs have alleged sufficient facts for a reasonable factfinder to conclude that the officers lacked probable cause to arrest them. **[**19]** A jury should consider what weight, if any, should be given to these photographs in determining whether the defendants had probable cause to arrest the Washingtons. *Cf.* Maxwell v. City of Indianapolis, 998 F.2d 431, 435 (7th Cir. 1993) ("To the extent that the presence or absence of probable cause turns on the resemblance of Maxwell to the descriptors and photograph of the fugitive Moore, the question necessarily becomes a factual one for the jury.")

In asking this court to reverse the district court's denial of summary judgment, the officers are asking us to make credibility determinations, which as previously discussed, is an inappropriate request. **HN13**[] "On summary

---

> The undisputed facts show that the police officers were called by Clara Washington to the Appellees' residence because of a domestic problem. The undisputed facts show that there was a chair overturned in the kitchen. Officer Haupert took photographs of the chair. The undisputed facts show that Clara Washington told the police officers that Leon Washington had put his hands on her shoulders and scratched her. She told the police officers that she and Leon Washington had dashed juice on each other. The undisputed facts show that Leon Washington had several scratches on him. Officer Haupert took photographs of the scratches.

Appellant's Opening Br. at 12.

2

Judge Manion, writing separately, argues that this court must accept the facts as set forth by the district court and therefore should not consider the photographs or the 911 transcript. Since the transcript of the 911 call was in fact considered by the district court, we address only the photographs. In Johnson v. Jones, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995), the Supreme Court affirmed this court's decision to dismiss an appeal for lack of jurisdiction because the appellants, police officers appealing the district court's denial of summary judgment on qualified immunity grounds, asked this court to determine a question of sufficiency of the evidence. *Id. at 313*. The Court stated that **HN12**[] "[w]hen faced with an argument that the district court mistakenly identified clearly established law, the court of appeals *can* simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason." *Id. at 319* (emphasis added). The appellate court is not required to accept the facts as described by the district court, although in most instances it is appropriate to do so. But, in cases, such as the present one, where the appellants are not asking the court to resolve factual disputes or determine whether the evidence is sufficient, it is appropriate for this court to look beyond the factual account of the district court to all undisputed evidence.

[3] Incidentally, assuming arguendo that the photographs of the scratches on Leon Washington were sufficient to establish probable cause, the officers only would have had probable cause to arrest Clara Washington, since the photographs only support bodily injury suffered by her husband.

judgment a court may not make credibility determinations, **[**20]** weigh the evidence, or decide which inferences to draw from the facts; these are jobs for a factfinder." *Payne, 337 F.3d at 770* (citing *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))*. However implausible the Washingtons' account might seem, it is not our place to decide who is telling the truth. "Where the parties present two vastly different stories--as they do here--it is almost certain that there are genuine issues of material fact in dispute." *Payne, 337 F.3d at 770*; *see also Qian v. Kautz, 168 F.3d 949, 953 (7th Cir. 1999)* ("[S]ummary judgment is only appropriate when there is no room for a difference of opinion concerning the facts or the reasonable inferences to be drawn from them."). Viewing the facts in the light most favorable to the plaintiffs, the Washingtons have alleged sufficient facts for a jury to find that they suffered a constitutional violation pursuant to *42 U.S.C. § 1983* by being subjected to unreasonable seizure.

We are now required to examine whether the contours of the alleged constitutional violation were clearly established at the time of the incident. **[**21]** *Saucier, 533 U.S. at 201*. If not, the defendants **[*551]** are entitled to qualified immunity. ***HN14***[] "To be 'clearly established,' the right in question must be 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Miller v. Jones, 444 F.3d 929, 934 (7th Cir. 2006)* (quoting *Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987))*. According to the plaintiffs, the police officers fabricated a police report in order to justify their arrests. ***HN15***[] A reasonable officer would have understood that what he was doing violated their right to be free from unreasonable seizure. *See* *Driebel v. City of Milwaukee, 298 F.3d 622, 652 (7th Cir. 2002)* (holding that "innumerable decisions . . . have clearly established the right to be free from arrest without probable cause").

HN16[] Summary judgment is not appropriate when the facts are disputed as they are here. ***HN17***[] "[I]f the question of probable cause arises in a damages suit, it is a proper issue for the jury if there is room for a difference of opinion concerning the facts or the reasonable inferences to be drawn from them." *Maxwell, 998 F.2d at 434*; **[**22]** *see also* *Moore v. Marketplace Rest., Inc., 754 F.2d 1336, 1347 (7th Cir. 1985)*; *Lester v. City of Chicago, 830 F.2d 706, 715 (7th Cir. 1987)*. Since ***HN18***[] we are not in a position to "resolve swearing contests between litigants," we must affirm the district court's denial of summary judgment. *Payne, 337 F.3d at 770*.

III. Conclusion

For the foregoing reasons, we AFFIRM the district court's denial of the defendants' motion for summary judgment.

Concur by: MANION

Concur

MANION, *Circuit Judge,* concurring. I concur. On interlocutory appeal from the denial of qualified immunity, this court must accept the facts as set forth by the district court. *Johnson v. Jones, 515 U.S. 304, 317, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995)*. In this case, the district court stated that under the facts as alleged by the plaintiffs, the plaintiffs "never accused each other of battery or otherwise gave an impression to the officers that they were involved in a domestic dispute." District Court Opinion at 6. This factual finding seemingly conflicts with the content of the 911 tape, as summarized in the district court opinion, as well as the physical evidence presented to the district court **[**23]** in the form of photographs of an overturned chair and scratches on Leon's face. The 911 call indicated that Leon had committed domestic battery and the scratches on Leon indicated that Clara had committed that same offense. And the overturned chair supports the view that a domestic dispute had been under way. Even if the Washingtons disclaimed any dispute once the officers arrived, the officers could still have reasonably disbelieved the Washingtons' story. Thus, it would seem that even accepting the Washingtons' version of the facts, the officers would be entitled to qualified immunity. But the district court read the record differently, stating that the Washingtons never "gave an impression to the officers that they were involved in a domestic dispute." District Court Opinion at 6. On interlocutory appeal, contrary to the court's statement that an "appellate court is not required to accept the facts as described by the district court . . .", *see supra* at 12 n.2, that is precisely what we must do. On appeal from the denial of qualified immunity, this court lacks jurisdiction to review the record to determine whether the district court's summary of the facts is supported by the **[**24]** record evidence. *Johnson, 515 U.S. at 319-20* ("For these reasons, we hold that a defendant entitled to invoke a qualified immunity defense may not appeal a district court's summary judgment **[*552]** order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial."). *See also* *Via v. LaGrand, 469 F.3d 618, 625 (7th Cir. 2006)* ("However, on interlocutory appeal of a denial of qualified immunity, this court generally lacks jurisdiction to review the full record. Instead, we may only consider whether the defendant is entitled to qualified immunity given the factual disputes found by the district court." (footnote omitted)). Therefore, given the district court's recital of the facts, I agree that affirmance is appropriate.

Vitacost.com, Inc. v. Gaia Herbs, Inc.

United States District Court for the Southern District of Florida

March 28, 2007, Decided

CASE NO. 06-81141-CIV-MIDDLEBROOKS/JOHNSON

Reporter

2007 U.S. Dist. LEXIS 22266 *; 2007-1 Trade Cas. (CCH) P75,668

VITACOST.COM, INC., Plaintiff, vs. GAIA HERBS, INC., Defendant,

Prior History: *Vitacost.com, Inc. v. Gaia Herbs, Inc., 2007 U.S. Dist. LEXIS 6393 (S.D. Fla., Jan. 26, 2007)*

Core Terms

antitrust, products, distributor, allegations, resale price, consumer, anti trust law, manufacturer, competitor, prices, amended complaint, retailers, motion to dismiss, enforcer, damages

Counsel: **[*1]** For Vitacost.Com, Inc., Plaintiff: Ira Kerker, LEAD ATTORNEY, Vitacost.com, Boynton Beach, FL.

For Gaia Herbs, Inc., Defendant: David Lee Ross, LEAD ATTORNEY, Greenberg Traurig, Miami, FL; G. Allan Van Fleet, Paul J. Brown, Greenberg Traurig LLP, Houston, TX US.

Judges: DONALD M. MIDDLEBROOKS, UNITED STATES DISTRICT JUDGE.

Opinion by: DONALD M. MIDDLEBROOKS

Opinion

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS, GRANTING FINAL LEAVE TO AMEND

This Cause comes before the Court on Defendant's Motion to Dismiss (DE 16), filed March 8, 2007. The Court has reviewed the record and is fully advised in the premises.

Plaintiff Vitacost.com ("Vitacost") filed this complaint in state court on November 20, 2006, alleging violations of the Florida Antitrust Act, *Fla. Stat. § 542.15 et seq.* Defendant Gaia Herbs, Inc. ("Gaia Herbs") filed a timely notice of removal and now moves to dismiss Plaintiff's amended complaint pursuant to *Fed. R. Civ. P. 12(b)(6)*. Defendant filed a previous motion to dismiss, which I granted on January 29, 2007 (DE 11). In that order I found that Plaintiff had failed to adequately allege that it had standing **[*2]** to bring an antitrust action, and I granted Plaintiff leave to amend its complaint.

I. Plaintiff's Amended Complaint

Defendant Gaia Herbs markets and sells herbal supplements through third-party distributors, including sales in Florida. The Defendant has one hundred thirty seven contracted distributors within 250 miles of Palm Beach County. *See* Pl. Amd. Complaint, P 6.

Plaintiff Vitacost is a retail seller of dietary supplements, and it owns and manufactures its own dietary supplements under the brand name Nutraceuticals Sciences Institute ("NSI"). *Id.* at P 5. Vitacost does not distribute Gaia Herbs products, nor has it ever distributed these products. Prior to the filing of this complaint, Plaintiff and Defendant had discussed entering into a business relationship where Plaintiff would purchase and then sell Defendant's products.

In early 2005 Plaintiff's purchasing manager contacted Defendant's customer service manager about opening an account with Gaia Herbs. *See Id.* at P 7. Plaintiff alleges that Gaia Herbs would only open the account with Plaintiff if Plaintiff agreed not to sell Gaia Herbs products below a certain price, a condition that Plaintiff refused. **[*3]** *See Id.* at P 8.

Vitacost alleges that it is suffering a direct injury to itself by not being allowed to carry Gaia Herbs products. *See Id.* at P 10. Defendant notified Plaintiff in October of 2006 that it was not going to sell its products through e-commerce retailers any longer, as this was no longer consistent with the company's business model. Vitacost alleges, however, that Defendant still markets its products through internet retailers. *See Id.* at P 12-13.

Plaintiff alleges that Defendant's practice of mandating a minimum re-sale for its products represents an antitrust injury to Vitacost, as it cannot compete for business with other retailers who agree to the minimum price and are able to sell Gaia Herbs products. *See Id.* at 22-24.

After the breakdown of these discussions, Plaintiff filed the instant lawsuit, alleging violations of the Florida Antitrust Act, *Fla. Stat. § 542.15 et seq.* Specifically, Plaintiff makes claims of monopolization, conspiracy to monopolize, price-fixing, and unlawful resale price maintenance. *See Id.,* P 17-28. Vitacost is seeking an order requiring Gaia Herbs to allow Plaintiff to re-sell its products, **[*4]** as well as damages for the business it alleges it has lost from not being able to sell Defendant's products. *See Id.*

II. Analysis

A motion to dismiss is appropriate when it is demonstrated "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. For the purpose of the motion to dismiss, the complaint is construed in the light most favorable to the plaintiff, and all facts alleged by the plaintiff are accepted as true. *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)*. Regardless of the alleged facts, however, a court may dismiss a complaint on a dispositive issue of law. *Marshall County Bd. of Educ. v. Marshall County Gas Dist., 992 F.2d 1171, 1174 (11th Cir. 1993)*. "Conclusory allegations in the complaint need not be taken as true and the plaintiff must allege sufficient facts to support his allegations." *Marine Coatings of Alabama, Inc. v. United States, 792 F.2d 1565, 1568 (11th Cir. 1986)*.

In interpreting the Florida Antitrust Act, existing case law holds that a court must rely on the body **[*5]** of federal case law interpreting the Sherman Act. *See* *All Care Nursing Serv. v. High Tech Staffing Servs., 135 F.3d 740, 746 (11th Cir. 1998)* ["Federal and Florida antitrust laws are analyzed under the same rules and case law. *Fla. Stat. § 542.32* ("It is the intent of the Legislature that, in construing this chapter, due consideration and great weight be given to the interpretations of the federal courts relating to comparable federal antitrust statutes."); *see also* *St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc., 457 So. 2d 1028, 1032 (Fla.Dist.Ct.App.1984)* ("The Florida legislature has, in effect, adopted as the law of Florida the body of ***antitrust law*** developed by the federal courts under the Sherman Act."); *Fla. Stat. §§ 542.16* (Florida antitrust laws complement federal antitrust laws), *542.18* (analogous to *§ 1* of the Sherman Act).

Defendant first argues that Plaintiff lacks standing to assert an antitrust injury in this case. The Eleventh Circuit follows a two-part test to determine whether a plaintiff has antitrust standing. *See* *Florida Seed Co. v. Monsanto Co., 105 F.3d 1372, 1374 (11th Cir. 1997),* **[*6]** *citing* *Municipal Utils. Bd. of Albertville v. Alabama Power Co., 934 F.2d 1493, 1499 (11th Cir. 1991)*.

First, the plaintiff must establish that it has suffered "antitrust injury." *Id.* As the Supreme Court has made clear, to have standing antitrust plaintiffs "must prove more than injury casually linked to an illegal presence in the market [i.e., but for causation]. Plaintiffs must prove antitrust injury, which is to say injury of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful." *Id., citing Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*.

Second, the plaintiff must establish that it is an efficient enforcer of the antitrust laws. *See Id.* This determination is predicated on the "target area test," where an antitrust plaintiff must prove that he is within that sector of the economy endangered by a breakdown of competitive conditions in a particular industry, and that he is the target against which anticompetitive activity is directed. *See Id.* Basically, a plaintiff must show that it is a customer or competitor in the relevant antitrust market. **[*7]** *See Id.*

A. Antitrust Injury

Based upon the allegations in the complaint, the Plaintiff has not asserted an antitrust injury. Plaintiff is a distributor of products similar to the Defendant's, and the main injury it asserts is economic damages to itself as a result of not being able to sell Defendant's products. *See* Pl. Amd. Complaint P 25,27,28. Vitacost then asks the Court to order the Defendant to sell its products to Plaintiff. This alleged injury is very similar to that before another court in this circuit, where the judge noted that "Plaintiffs complain of injury largely to themselves, not injury that inures to the public detriment. This is not antitrust injury." *JES Props., Inc. v. United States Equestrian, Inc., 2005 U.S. Dist. LEXIS 43122 (M.D. Fla. 2005)*.

Plaintiff's complaint simply does not allege that Defendant's actions have adversely affected competition in the relevant market, aside from one passing reference stating only that Defendant's actions are "hurting all consumers." *See* Pl. Amd. Complaint P 26. There is no allegation that Gaia Herbs products represent a monopoly for a particular type of supplement, and that consumers **[*8]** are paying inflated prices because there is no other option in the dietary supplement market. Instead, Plaintiff states that it has its own brand of dietary supplements that competes with the very products at issue in this case, and it describes the vitamin supplement industry as "very competitive" in its amended complaint. *See Id.* P 5,25. Given these facts, it is difficult to imagine how competition suffers from Plaintiff being unable to sell Defendant's products.

The Plaintiff is not a consumer paying allegedly inflated prices, nor is it a distributor that has suffered an injury as a result of being unable to sell an artificially high-priced product due to the manufacturer's price fixing. Here the Plaintiff has never sold a Gaia Herbs product.

I find this situation to be very analogous to cases where existing distributors of a product have alleged antitrust injuries after losing their distribution rights through mergers. Relying on *Brunswick,* courts have consistently denied standing to distributors who were terminated, or whose contracts were not renewed, following a merger. *See Florida Seed Co., 105 F.3d at 1375*. In fact, the injury in *Florida Seed* **[*9]** may even be more significant than that alleged here, as the Plaintiff there actually had an existing business relationship and lost the profits therefrom as a result of the merger. Here Vitacost did not even have an existing business relationship with Gaia Herbs, and its alleged damages are entirely speculative. [1] Therefore, Vitacost's claim of antitrust injury fails as a matter of law.

Other courts of appeals have agreed that injuries to distributors generally do not qualify as antitrust injuries. "Competitors and consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs to allege antitrust injury. In contrast, a commercial intermediary, such as a distributor or sales representative, generally lacks standing because its **[*10]** antitrust injury is too remote." *Serpa Corp. v. McWane, Inc., 199 F.3d 6, 10 (1st Cir. 1999)*.

[1] *See JES Props. Inc., 2005 U.S. Dist. LEXIS 43122 at 38* (plaintiff claimed its damages as the profits it would have made on housing developments; court found such damages too remote and speculative to represent an antitrust injury).

B. Efficient Enforcer

While the lack of an antitrust injury alone causes Plaintiff's complaint to fail, I will also address the efficient enforcer prong of the standing test, as Vitacost's complaint fails here as well. As noted above, the Eleventh Circuit has held that to satisfy this prong, a plaintiff needs to be either a consumer or competitor of the Defendant or the Defendant's products. *See* *Florida Seed Co., 105 F.3d at 1374*. Plaintiff has failed to allege sufficient facts in its complaint indicating that it is either a consumer of Defendant's products or a competitor. It is undisputed that Vitacost is not a consumer for purposes of this test, as it is a distributor hoping to sell Defendant's products to consumers. Vitacost does claim in the amended complaint that it is a competitor of Gaia Herbs, but a careful analysis reveals that the competitor allegations are inadequate as a matter of law.

Vitacost is not an actual distributor of Gaia Herbs products, rather it wants to become a distributor. This fact is crucial, because a plaintiff must **[*11]** be a current distributor or a distributor who actually had its prices restrained in order to maintain an action for resale price maintenance. *See* *Serpa Corp. v. McWane, Inc., 14 F. Supp. 2d 147, 151 (D. Mass. 1998)*, *aff'd* *199 F.3d 6*. Here Vitacost was not a distributor that had been selling Defendant's products, then lost the distributorship as a result of an allegedly anticompetitive action.

Additionally, the anticompetitive action alleged in this case is not an example of predatory pricing, where a manufacturer sells its goods at a price below the cost basis in order to drive out competition. Instead, the Defendant has a policy of not allowing retailers to sell its products below a certain price level.

The Supreme Court has stated that, in antitrust actions, a competitor "may not complain of conspiracies that . . . set minimum prices at any level." *Atl. Richfield Co. v. United States Petroleum Co., 495 U.S. 328, 337, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (U.S. 1990)*, *citing* *Matsushita Electric Industrial Corp. v. Zenith Radio Corp., 475 U.S. 574, 585, n. 8, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Minimum resale prices, without more, are not examples of antitrust violations, as they **[*12]** do not inhibit competition. Here, the Plaintiff's own complaint acknowledges that the vitamin supplement market is very competitive, and that there are multiple producers of similar products. It also does not allege a conspiracy on Defendant's part to fix prices. In such a competitive market with various suppliers, the Defendant's unilateral policy of setting a minimum resale price is not anticompetitive.

The Eleventh Circuit has previously held that a product manufacturer may unilaterally announce its resale prices without committing an antitrust violation. "Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *De Long Equipment Co. v. Washington Mills Abrasive Co., 887 F.2d 1499, 1506 (11th Cir. 1989)*, *citing* *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*.

Furthermore, "Under *Colgate,* the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination." *Id.* This is exactly **[*13]** the scenario that appears in the present case. Plaintiff, in two separate complaints, has not alleged facts sufficient to demonstrate any agreement or conspiracy on the part of Defendant and other distributors, as required by *Fla. Stat. § 542.18*. [2]

[2] *Section 542.18* mirrors the Sherman Act, *15 U.S.C. § 1*. As I previously noted, courts must use federal caselaw interpreting the Sherman Act for claims under the Florida Antitrust Act.

The Eleventh Circuit, in interpreting the Sherman Act, has stated that "Section One applies only to agreements between two or more businesses; it does not cover unilateral conduct." *Spanish Broad. Sys. of Fla. v. Clear Channel Communs., 376 F.3d 1065, 1071 (11th Cir. 2004)*.

Furthermore, "Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under *§ 1* in the absence of agreement." *Id., citing* *Fisher v. City of Berkeley, 475 U.S. 260, 266, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986)*.

[*14] Plaintiff alleges only that Defendant's policy of minimum resale prices is a price fixing scheme, and in one sentence of the amended complaint it alleges that another retailer, VitaminShoppe, has agreed to participate in this scheme. *See* Pl. Amd. Complaint P 22. There are no allegations of any specific agreement between Defendant and VitaminShoppe to fix prices, only conclusory allegations. As noted above, mere conclusory allegations need not be taken as true for purposes of a motion to dismiss, and Vitacost must allege sufficient facts to support its allegations. *See* *Marine Coatings of Alabama, Inc., 792 F.2d at 1568*.

III. Conclusion

Vitacost has failed as a matter of law to demonstrate its standing to bring an antitrust action against Gaia Herbs. Plaintiff has not shown either that it has suffered an antitrust injury, or that it is an efficient enforcer of the antitrust laws. The alleged injury is nothing more than damages to Vitacost itself, stemming from its inability to sell the Defendant's products. Its alleged damages of lost profits from these non-existent sales are entirely speculative.

The Plaintiff has also failed to demonstrate that it **[*15]** is an efficient enforcer of the antitrust laws. It is not a consumer of Defendant's products, and it is also not a current distributor. While Vitacost claims that Gaia Herbs is illegally setting minimum resale prices, the Supreme Court has stated that competitors cannot complain about minimum resale prices when competition exists. Finally, this circuit's case law holds that a manufacturer is free to unilaterally set a minimum resale price for its products, and there are no factual allegations in the complaint indicating anything other than a unilateral pricing decision by Gaia Herbs. Under existing Eleventh Circuit case law, Plaintiff's claim fails as a matter of law.

I have already given the Plaintiff an opportunity to amend its complaint to address the standing issue, and Plaintiff has again failed to satisfy the Eleventh Circuit's standing requirement. At this point I am highly skeptical that the Plaintiff can plead sufficient facts to satisfy this test. That said, I will give Plaintiff one final opportunity to meet the standing requirement. In particular, Plaintiff must review this circuit's case law and address whether there is any support in the law for its alleged antitrust **[*16]** injury.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss (DE 16) is GRANTED. Plaintiff must file an amended complaint within seven (7) days of the date of this Order.

DONE AND ORDERED in Chambers at West Palm Beach, FL, this 28th day of March 2007.

DONALD M. MIDDLEBROOKS

UNITED STATES DISTRICT JUDGE

United States v. SBC Communs., Inc.

United States District Court for the District of Columbia

March 29, 2007, Decided ; March 29, 2007, Filed

Civil Action No. 05-2102 (EGS), Civil Action No. 05-2103 (EGS)

Reporter

489 F. Supp. 2d 1 *; 2007 U.S. Dist. LEXIS 22947 **; 2007-1 Trade Cas. (CCH) P75,655

UNITED STATES OF AMERICA, Plaintiff, v. SBC COMMUNICATIONS, INC. and AT&T CORP., Defendants. Civil Action No. 05-2102 (EGS); UNITED STATES OF AMERICA, Plaintiff, v. VERIZON COMMUNICATIONS, INC. and MCI, INC., Defendants. Civil Action No. 05-2103 (EGS)

Subsequent History: Motion denied by *United States v. SBC Communs., 2007 U.S. Dist. LEXIS 45791 (D.D.C., June 26, 2007)*

Core Terms

customers, mergers, Tunney Act, amici, proposed settlement, final judgment, public interest, connections, antitrust, Divestiture, network, factors, parties, carriers, remedies, settlements, complaints, mockery, harms, divested, markets, firms, last-mile, Reply, violations, fiber, district court, merging, judicial power, competitors

LexisNexis® Headnotes

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN1[] **Settlements, Antitrust Procedures & Penalties Act**

The Antitrust Procedures and Penalties Act of 1974, also known as the Tunney Act, requires a court to determine whether proposed final judgments are in the public interest. *15 U.S.C.S. § 16(e)(1)*. The statute does not further define the meaning of "in the public interest," but specifies that in making the public interest determination, the court shall consider: (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of public benefit, if any, to be derived from the determination of the issues at trial. *§ 16(e)(1)*.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN2[] **Settlements, Antitrust Procedures & Penalties Act**

The Antitrust Procedures and Penalties Act of 1974, also known as the Tunney Act, a court is not required to conduct an evidentiary hearing nor is it required to permit anyone to intervene. *15 U.S.C.S. § 16(e)(2)*. Instead, the procedure for making the public interest determination is generally left to the discretion of the court. *§ 16(f)*. The court is permitted to take testimony of government officials or expert witnesses, appoint a special master or expert consultant, authorize participation by other parties as amici or interveners, or take such other action in the public interest as the court may deem appropriate. *§ 16(f)*.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN3[] **Settlements, Antitrust Procedures & Penalties Act**

Under the 2004 amendments to the Antitrust Procedures and Penalties Act of 1974, also known as the Tunney Act, a court must consider all of the enumerated factors, as opposed to just ambiguity of terms, enforcement mechanisms, and third-party harms. *15 U.S.C.S. § 16(e)(1)*

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN4[] **Settlements, Antitrust Procedures & Penalties Act**

Review under the Antitrust Procedures and Penalties Act of 1974, also known as the Tunney Act, is not limited solely to determining whether entry of those consent judgments would make a mockery of the judicial function.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN5[] **Settlements, Antitrust Procedures & Penalties Act**

In the context of review under the Antitrust Procedures and Penalties Act of 1974, also known as the Tunney Act, a district court should not inquire beyond the complaint unless the complaint makes a mockery of judicial power. Apart from that rare case, a district court is not permitted to reach beyond the complaint to evaluate claims that the government did not make and to inquire as to why they were not made.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN6[] **Settlements, Antitrust Procedures & Penalties Act**

In the context of review under the Antitrust Procedures and Penalties Act of 1974, also known as the Tunney Act, it is only if the complaint underlying the consent decree is drafted so narrowly as to make a mockery of judicial power can the district court reject a consent decree due to matters outside the scope of the underlying complaint. In all other cases, a court cannot do so.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN7[] **Settlements, Antitrust Procedures & Penalties Act**

In the context of review under the Antitrust Procedures and Penalties Act of 1974, also known as the Tunney Act, a district court is not permitted to reject proposed remedies merely because the court believes other remedies are preferable. Instead, the question is not whether a proposed remedy is the best one, but only whether it is within the reaches of the public interest.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN8[] **Settlements, Antitrust Procedures & Penalties Act**

In the context of review under the Antitrust Procedures and Penalties Act of 1974, also known as the Tunney Act, district courts should be deferential to the government's predictions as to the effects of the proposed remedies. Accordingly, the relevant inquiry is whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable.

Governments > Legislation > Interpretation

HN9[] **Legislation, Interpretation**

The statement of a lone legislator, unaccompanied by a corresponding change in the statutory language, is insufficient to override a well-established judicial construction of a statute.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN10[] **Settlements, Antitrust Procedures & Penalties Act**

It is improper for a court to require a proposed settlement to perfectly remedy antitrust violations when those violations have not yet been proven at trial, and when the government needs room to negotiate a settlement.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN11[] **Settlements, Antitrust Procedures & Penalties Act**

In the context of review under the Antitrust Procedures and Penalties Act of 1974, also known as the Tunney Act, the United States District Court for the District of Columbia will approve proposed settlements if they are within the reaches of the public interest. The government need not prove that the settlements will perfectly remedy the alleged antitrust harms; it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN12[] **Settlements, Antitrust Procedures & Penalties Act**

In the context of review under the Antitrust Procedures and Penalties Act of 1974, also known as the Tunney Act, a district court should pay attention to a proposed judgment's clarity in order to make implementation of the judgment manageable. In addition, the court should closely examine compliance mechanisms in a proposed settlement. Finally, the court should be concerned with any allegations that the proposed settlement will injure a third party. These factors along with others are explicitly enumerated in the Tunney Act's text, and must all be considered by the court. *15 U.S.C.S. § 16(e)(1)*.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN13[] **Settlements, Antitrust Procedures & Penalties Act**

Under the amended Antitrust Procedures and Penalties Act of 1974, also known as the Tunney Act, a court cannot reject proposed settlements merely because the government failed to address antitrust issues not raised in its complaints. Further, the court must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations because this may only reflect underlying weakness in the government's case or concessions made during negotiation. The Tunney Act only requires that the court consider specific enumerated factors in making its public interested determination. These factors can be loosely separated into two groups. The first group of factors address the competitive impact of the proposed remedies, i.e., how well the settlement remedies the harms alleged in the complaints. *15 U.S.C.S. § 16(e)(1)*. The second group of factors address issues unrelated to the competitive impact of the settlement. *§ 16(e)(1)*.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN14[] Settlements, Antitrust Procedures & Penalties Act

The Antitrust Procedures and Penalties Act of 1974, also known as the Tunney Act, does not require the government to employ any specific type of analysis in evaluating and settling cases. The government need not prove its underlying allegations in a Tunney Act proceeding.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN15[] Settlements, Antitrust Procedures & Penalties Act

15 U.S.C.S. § 16(e)(2) requires consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

Counsel: [1]** For UNITED STATES OF AMERICA, Plaintiff (1:05-cv-02102-EGS): Claude F. Scott, Jr., Jared A. Hughes, Lawrence M. Frankel, LEAD ATTORNEYS, David T. Blonder, James J. Schwartz, Matthew C. Hammond, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For SBC COMMUNICATIONS INC., Defendant: William Randolph Smith, LEAD ATTORNEY, Michael L. Lazarus, CROWELL & MORING, L.L.P., Washington, DC.

For AT&T CORP, Defendant: Wilma A. Lewis, LEAD ATTORNEY, William Randolph Smith, CROWELL & MORNING LLP, Washington, DC.

For VERIZON COMMUNICATIONS INC., Defendant (1:05-cv-02102-EGS): Aaron Martin Panner, Joseph S. Hall, Mark C. Hansen, KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, PLLC, Washington, DC.; David Earl Wheeler, Washington, DC.; John Thorne, Arlington, VA.

For FEDERAL COMMUNICATIONS COMMISSION, Interested Party: James J. Schwartz, LEAD ATTORNEY, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For COMPTEL, Movant: Kevin R. Sullivan, LEAD ATTORNEY, Peter M. Todaro, KING & SPAULDING, Washington, DC.; Mary Catherine Albert, COMPTEL, Washington, DC.

For ALLIANCE FOR COMPETITION IN TELECOMMUNICATIONS, Movant: Gary Leland Reback, LEAD ATTORNEY, CARR & FERRELL, LLP, Palo Alto, CA.

For **[**2]** AMERICAN ANTITRUST INSTITUTE, INC., Movant: Jonathan Laurence Rubin, LEAD ATTORNEY, Patton Boggs LLP, Washington, DC.

For NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE, Movant: Christopher J. White, LEAD ATTORNEY, STATE OF NEW JERSEY, Newark, NJ.

For TIME WARNER TELECOM INC., Movant: Benjamin Wallace Jackson, LEAD ATTORNEY, Washington, DC.; Theodore C. Whitehouse, LEAD ATTORNEY, WILLKIE FARR & GALLAGHER LLP, Washington, DC.

BRENDA SMITH, Movant, Pro se, Virginia Beach, VA.

For LEVEL 3 COMMUNICATIONS, LLC, Movant: Bernard A. Nigro, Jr., LEAD ATTORNEY, WILLKIE FARR & GALLAGHER, Washington, DC.

For NATIONAL ASSOCIATION OF STATE UTILITY ADVOCATES, Amicus: Kathleen F. O'Reilly, LEAD ATTORNEY, Washington, DC.; David C. Bergmann, OFFICE OF THE OHIO CONSUMERS' COUNSEL, Columbus, OH.

For SPRINT NEXTEL CORPORATION, Amicus: Charles Thomas Kimmett, Jr., Timothy J. Simeone, LEAD ATTORNEYS, HARRIS, WILTSHIRE & GRANNIS LLP, Washington, DC.

For ELIOT SPITZER, Attorney General of New York, Amicus: Mary Ellen Burns, LEAD ATTORNEY, Jeremy R. Kasha, Keith Gordon, OFFICE OF NEW YORK ATTORNEY GENERAL, New York, NY.

For UNITED STATES OF AMERICA, United States Department **[**3]** of Justice-Antitrust Division, Plaintiff (1:05-cv-02103 EGS): Claude F. Scott, Jr., Lawrence M. Frankel, LEAD ATTORNEY, David T. Blonder, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For VERIZON COMMUNICATIONS INC., Defendant (1:05-cv-02103 EGS): John Thorne, LEAD ATTORNEY, Arlington, VA.; Mark C. Hansen, LEAD ATTORNEY, Aaron Martin Panner, Evan T. Leo, Joseph S. Hall, KELLOGG HUBER HANSEN TODD & EVANS, PLLC, Washington, DC.; David Earl Wheeler, Washington, DC.

For MCI, INC., Defendant: Aaron Martin Panner, Joseph S. Hall, Mark C. Hansen, KELLOGG HUBER HANSEN TODD & EVANS, PLLC, Washington, DC.; David Earl Wheeler, Washington, DC.; John Thorne, Arlington, VA.

Judges: Emmet G. Sullivan, United States District Judge.

Opinion by: Emmet G. Sullivan

Opinion

[*2]

OPINION

In the span of a couple of weeks in early 2005, four of this nation's largest telecommunications companies announced that they had agreed to merge, leaving only two companies in their place. Mergers of this magnitude have, as can be expected, engendered heated opposition, which has **[*3]** been reflected in the filings of numerous interested parties in this case. Arguments have been put forth regarding the mergers' effects in several **[**4]** major industries, including residential telephone service, cellular telephone service, and internet services. This Court, however, is not tasked with deciding whether these mergers as a whole run afoul of the antitrust laws, nor whether they are altogether in the public interest, nor whether they should be approved by other branches of the federal government. This Court's role is much more limited. The only question facing this Court, under the procedures crafted by Congress, is whether the divestitures agreed upon by the merging parties and the Department of Justice are "in the public interest."

Pending before the Court is plaintiff United States' motion for entry of the proposed final judgments in each of these civil antitrust cases. The procedure governing acceptance of these proposed judgments is specified in Section 2(b) of the Antitrust Procedures and Penalties Act, *15 U.S.C. § 16(b)-(h)*, otherwise known as the Tunney Act. Upon consideration of the motions and supporting memoranda, the filings of several *amici curiae* admitted for this case, the responses and replies thereto, the arguments made by all parties at multiple hearings, the applicable law, **[**5]** and the entire record, the Court determines that entry of the proposed final judgments is in the public interest. Therefore, for the reasons stated herein, plaintiff's motion for entry of final judgments in both cases is **GRANTED.**

BACKGROUND

I. Background of Proposed Final Judgments

A. SBC-AT&T Merger

SBC Communications, Inc. ("SBC"), formerly Southwestern Bell, is a regional bell operating company ("RBOC"), formed as one of the seven regional holding companies to result from the breakup of AT&T's local telephone business in 1984. *United States v. SBC Comm., Inc.,* 05-2102-EGS, Compl. P 7 (hereinafter "SBC Compl."). In 2005, after having acquired two other RBOCs, Pacific Telesis and Ameritech, during the 1990's, SBC served over 50 million switched access lines, both residential and business, in 13 states. *Id.* SBC has fiber optic or copper connections to virtually all of the commercial buildings in its franchised territory. *Id.*

AT&T Corp. ("AT&T") is the nation's largest interexchange carrier ("IXC"), offering traditional long distance telephone service, as well as one of the largest competitive local exchange carriers ("CLEC"), offering local **[**6]** network exchange and access for voice and data services. *Id.* P 8. AT&T serves consumers and businesses across the United States and around the globe, and owns significant local network assets within SEC's 13-state operating territory including direct fiber optic connections to numerous commercial buildings. *Id.* Pursuant to an Agreement and Plan of Merger dated January 30, 2005, SBC agreed to acquire AT&T for approximately $ 16 billion. *Id.* P 9.

B. Verizon-MCI Merger

Verizon Communications, Inc. ("Verizon"), formerly Bell Atlantic Corporation ("Bell Atlantic"), is the nation's largest RBOC. *United States v. Verizon Comm., Inc.,* 05-2103-EGS, Compl. P 7 (hereinafter "Verizon Compl."). Bell Atlantic was another of the seven regional holding companies to result from the AT&T breakup. *Id.* Since that time, Bell Atlantic acquired Nynex, another RBOC, and GTE Corporation, an ILEC that provided local exchange and other services in 28 states, and **[*4]** formed Verizon. *Id.* In 2005, Verizon served over 50 million switched access lines, both residential and business, in 29 states plus the District of Columbia. *Id.* Verizon has fiber optic or copper connections to virtually **[**7]** all of the commercial buildings in its franchised territory. *Id.*

MCI, Inc. ("MCI") is one of the nation's largest IXCs, offering traditional long distance telephone service, as well as one of the largest CLECs, offering local network exchange and access for voice and data services. *Id.* P 8. MCI serves consumers and businesses across the United States and around the globe and owns significant local network assets within Verizon's 29-state operating territory including direct fiber optic connections to numerous commercial buildings. *Id.* Pursuant to an Agreement and Plan of Merger dated February 14, 2005, as amended on March 4, March 29, and May 2, 2005, Verizon agreed to acquire MCI for approximately $ 8.54 billion. *Id.* P 9.

C. Alleged Competitive Harms

Plaintiff, the United States through the Department of Justice ("DOJ"), filed complaints in both of these cases on October 27, 2005. The government sought to enjoin the mergers on the grounds that the mergers would "substantially lessen competition for (a) Local Private Lines that connect hundreds of commercial buildings in [SBC and Verizon]'s franchised territory to a carrier's network or other local destination, **[**8]** and (b) other telecommunications services that rely on Local Private Lines." SBC Compl. P 1; Verizon Compl. P 1. Specifically, the complaints are concerned with hundreds of commercial buildings in metropolitan areas where the two merging parties (either SBC and AT&T, or Verizon and MCI) are the only two firms that own or control a direct wireline connection to the building. SBC Compl. P 3; Verizon Compl. P 3. The government alleged that due to these competitive harms, the mergers violated Section 7 of the Clayton Antitrust Act, *15 U.S.C. § 18*. SBC Compl. P 32; Verizon Compl. P 32.

The complaints address the same type of competitive harm for each merger, and differ only in geographic scope due to the territorial coverage of the RBOCs, SBC and Verizon. The SBC Complaint addresses harms in metropolitan areas in SBC's territory, specifically with regard to buildings where SBC and AT&T are the only two firms that own or control direct wireline connections. SBC Compl. P 3. Analogously, the Verizon Complaint addresses harms in metropolitan areas in Verizon's territory, specifically with regard to buildings where Verizon and MCI are the only two firms that own or control **[**9]** direct wireline connections. Verizon Compl. P 3. Apart from that difference, and the identities of the parties, the complaints are drafted virtually identically.

The government's detailed description of the alleged competitive harm is based on "local loops" and "local private lines," which are components of telecommunications networks operated by the merging parties. Local loops, sometimes referred to as "last-mile" connections, are typically either copper or fiber-optic transmission facilities that connect commercial buildings to a carrier's network. SBC Compl. P 12. These last-mile connections are necessary assets for providing service to business customers located in the building. *Id.*

The government defines a Local Private Line ("LPL") as a dedicated, point-to-point circuit offered over copper and/or fiber-optic transmission facilities that originates and terminates within a single metropolitan area and typically includes at least one local loop. *Id.* P 13. LPLs are sold in both retail markets (to business customers) and wholesale markets (to other **[*5]** carriers). *Id.* LPL circuits are sometimes referred to as "special access." *Id.* Depending on how they are configured, **[**10]** LPLs can be used to carry voice traffic, data, or a combination of the two. *Id.* P 14. LPLs may be purchased as standalone products, but are also an important input to value-added voice and data telecommunications services that are offered to business customers. *Id.*

For the vast majority of commercial buildings in its respective territory, either SBC or Verizon is the only carrier that owns a last-mile connection to the building. SBC Compl. P 15; Verizon Compl. P 15. Thus, in order to provide voice or data telecommunications services to customers in those RBOC-only buildings, competing carriers typically must lease the connection from SBC or Verizon as LPL service, i.e. special access. SBC Compl. P 15; Verizon Compl. P 15.

For a small percentage of commercial buildings (though accounting for a substantial percentage of customer demand and revenue), other competitors (CLECs) have built or acquired their own last-mile fiber-optic connections, separate from the RBOCs, to connect their networks to the buildings. SBC Compl. P 16. [1] Once a CLEC has incurred the high fixed cost to construct a last-mile connection to a building, the CLEC can usually provide service to business customers **[**11]** in the building at a lower cost than it would otherwise be able to do if it had to lease the connection from the RBOC. *Id.* It can also provide alternative access to other CLECs seeking to serve business customers in the building, i.e., LPL service can be resold on the wholesale market. *Id.*

AT&T is among the leading CLECs in SBC's territory in the number of buildings it has connected with its own last-mile fiber facilities, as is MCI in Verizon's territory. SBC Compl. P 17; Verizon Compl. P 17. For hundreds of buildings in SBC's and Verizon's territory, AT&T and MCI respectively are the only CLECs with a last-mile connection into the building. SBC Compl. P 17; Verizon Compl. P 17. In these buildings, the instant mergers would thus reduce **[**12]** the number of carriers with last-mile connections from two to one. SBC Compl. P 18; Verizon Compl. P 18. The parties accordingly refer to these buildings as "2-to-1" buildings.

The government states that the relevant product markets affected by the mergers are the markets for LPLs, and voice and data telecommunications services that rely on LPLs. SBC Compl. P 19. [2] LPLs themselves are a recognized service category among telecommunications carriers and end-user business customers, as customers typically purchase LPLs in standard bandwidth increments. *Id.* P 21. LPLs are distinct from switched local exchange telephone services. *Id.* P 22. Switched local exchange lines route calls through a central office, do not necessarily use a dedicated circuit, and thus do not offer the guaranteed bandwidth, high service levels, and security that LPLs

---

[1] Competitive providers have to date deployed independent connections to approximately 30,000 individual commercial buildings, representing roughly 1% of the 3 million commercial buildings nationwide. Nat'l Ass'n of State Util. Consumer Advocates Resp., Selwyn Decl. at 6.

[2] The government is vague about the relevant geographical areas for these product markets, alleging that they are no broader than each metropolitan area and no more narrow than each individual building. SBC Compl. P 24.

provide. *Id.* Carriers often rely on LPL circuits to connect a business customer's location to their networks, enabling the carrier to supply value-added data networking, Internet access, local voice, and long distance services to **[*6]** the business customer. *Id.* P 23. AT&T and MCI were among the largest competitors to SBC and Verizon respectively **[**13]** in the market for LPLs. SBC Compl. P 20; Verizon Compl. P 20.

Based on this background, the government claims that the mergers would eliminate competition for LPL service to 2-to-1 buildings, resulting in higher prices for both retail and wholesale customers. SBC Compl. P 25; Verizon Compl. P 25. The government also claims that the mergers would tend to lessen the competition for retail voice and data telecommunications services provided over LPL access to 2-to-1 buildings. SBC Compl. P 26; Verizon Compl. P 26.

The government acknowledges that other competitors (CLECs) could build new last-mile connections to buildings in response to the mergers, but that such entry is difficult, time-consuming, and expensive. SBC Compl. P 27. The government identified five factors that affect whether a CLEC **[**14]** would build a new last-mile connection to a particular building: (1) the proximity of the building to the CLEC's existing network interconnection points; (2) the capacity required at the customer's location (and thus the revenue opportunity); (3) the availability of capital; (4) the existence of physical barriers, such as rivers and railbeds, between the CLEC's network and the customer's location; and (5) the ease or difficulty of securing the necessary consent from building owners and municipal officials. *Id.* Because their costs are so substantial, firms typically only build a connection after they have secured a customer contract of sufficient size to justify the anticipated construction costs. *Id.* P 28.

Therefore, the government states that although entry may occur in some 2-to-1 buildings, conditions for entry are unlikely to be met in hundreds of those buildings, and thus entry is unlikely to eliminate the competitive harms that would result from the mergers. SBC Compl. P 29; Verizon Compl. P 29. Accordingly, the government alleged that the mergers would violate *Section 7* of the Clayton Act because they eliminate or substantially lessen competition in the markets for **[**15]** LPLs and voice and data telecommunications services that rely on LPLs, and would correspondingly raise prices for those products. SBC Compl. P 32; Verizon Compl. P 32.

D. Proposed Remedy

The government's proposed remedies for the alleged antitrust harms of the mergers are specified in the proposed final judgments. *See* Pl.'s Mot. for Entry of Final J. at 2-3. Apart from the difference in geographic scope due to the identities of the parties, the proposed final judgments are practically identical and require the same type of divestitures. *See id.,* Proposed SBC-AT&T Final J. at 1-17 & Proposed Verizon-MCI Final J. at 1-16.

The proposed final judgments require defendants, within 120 days after the closing of the mergers, or five days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest the "Divestiture Assets." Proposed SBC-AT&T Final J. at 5. [3] The Divestiture Assets are defined in terms of an indefeasible right of use ("IRU"), a long-term leasehold interest that gives the holder the right to use specified strands of fiber in a telecommunications facility. *Id.* at 4. All of the IRUs must be for a minimum of 10 years, may not **[**16]** include any recurring fee, **[*7]** and cannot limit the right of the acquirer to use the asset as it wishes. *Id.*

The Divestiture Assets consist of IRUs for lateral (or last-mile) connections to hundreds of buildings in the identified metropolitan areas along with transport facilities sufficient to enable the IRUs to be used by the purchaser to provide telecommunications services. *Id.* at 3. The divestitures must be accomplished in such a way as to satisfy the United States that the Divestiture Assets can and will be used by the acquirer as part of a viable, ongoing telecommunications business. *Id.* at 7. All Divestiture Assets in a given metropolitan area must be divested to a single acquirer unless otherwise approved by the United States. *Id.* at 7-8.

---

[3] If defendants do not accomplish the divestiture within the periods prescribed, the proposed final judgments provide that the Court will appoint a trustee selected by the United States to effect the divestitures. *Id.* at 8-11.

To ensure that the acquirer **[**17]** has adequate capacity to serve customers in a given location, the lateral connection to be divested will consist of an IRU for the greater of (1) eight fiber strands or (2) one-half of the currently unused fiber strands in AT&T's or MCI's facilities serving the building. *Id.* at 4. The strands shall connect the point of entry of the building to the splice point with fiber used to serve different buildings. *Id.* The fiber strands may be provided from those controlled by either of the merging parties. *Id.* To ensure that the acquirer can connect the last-mile connections to its network facilities, the divestiture includes IRUs for transport facilities sufficient to connect the divested last-mile connections to locations mutually agreed upon by defendants and the acquirer. *Id.* at 3.

Each proposed final judgment includes a list of specific buildings for which lateral connections must be divested. *Id.* at 18-27. Using information provided by the parties and other CLECs, the government compiled a list of 2-to-1 buildings as described in the complaints. Pl.'s Resp. to Ct.'s Order of July 25, 2006, at 8. The government then applied an algorithm to determine if entry by another **[**18]** competitor was likely for each 2-to-1 building, based on the criteria identified in the complaints. *Id.* The proposed final judgments encompass all 2-to-1 buildings where it was determined that entry by another competitor was unlikely. *Id.* [4]

The proposed final judgments also include additional terms regarding notice of the proposed divestitures, financing, preservation of assets, compliance inspections, and a ban on reacquisitions. Proposed SBC-AT&T Final J. at 11-15. The proposed final judgments are set to expire ten years from the date of their entry. *Id.* at 16. They also specify that this Court retains jurisdiction to enable any party to apply at any time for further orders and directions as may be necessary to carry out or construe the judgments. *Id.* at 15.

II. Procedural History

A. Tunney Act Procedures

The government filed the complaints **[**19]** in both of these cases on October 27, 2005. At the same time, the government filed stipulations and proposed final judgments designed to remedy the alleged anti-competitive harms. Pl.'s Mot. for Entry of Final J. at 2-3. Amended proposed final judgments for both cases were filed on November 28, 2005. *Id.* at 3. In December, the Court consolidated the two cases. Order, Dec. 21, 2005.

In compliance with the procedures mandated by the Tunney Act, the government filed Competitive Impact Statements ("CIS") for both mergers with the Court on November 16, 2005. The government **[*8]** also published the proposed final judgments and CISs in the *Federal Register* on December 15, 2005. *See SBC-AT&T CIS, Proposed Final Judgment, Complaint, Amended Stipulation, 70 Fed. Reg. 74,344 (Dec. 15, 2005)*; *Verizon-MCI CIS, Proposed Final Judgment, Complaint, Stipulation, 70 Fed. Reg. 74,350 (Dec. 15, 2005)* (Verizon-MCI Merger). Finally, the government published separate summaries of the terms of the proposed final judgments in the *Washington Post* for seven days beginning on December 8, 2005 and ending on December 14, 2005. Pl.'s Mot. for Entry of Final J. at 3. Within the **[**20]** 60-day period for public comments, which ended on February 13, 2006, three comments were received. *Id.* These comments were filed by the Alliance for Competition in Telecommunications ("ACTel"), COMPTEL, and the New York Attorney General.

The government filed the public comments and its response to the comments with the Court on March 21, 2006. The comments and response were also published in the *Federal Register* on April 5, 2006. *See Response to Public Comments on the Proposed Final Judgments, 71 Fed. Reg. 17,164 (Apr. 5, 2006)*. On that same day, the government filed with the Court its Certificate of Compliance with the Tunney Act procedures, and its motion for entry of the proposed final judgments.

---

[4] In the final tally, the proposed final judgments cover 383 buildings for the SBC-AT&T merger and 365 buildings for the Verizon-MCI merger.

The SBC-AT&T merger closed on December 18, 2005, and the Verizon-MCI merger closed on January 6, 2006. Pl.'s Resp. to Public Comments at 7 n.10. The government states that this is in keeping with its standard practice that neither the stipulations nor pending proposed final judgments prohibit the closing of the mergers. *Id.* (citing ABA Section of ***Antitrust Law***, ***Antitrust Law*** *Developments* 387 (5th ed. 2002)).

B. Amici Curiae

Over the course of the **[**21]** proceedings, several parties have been granted leave to participate as amici curiae. *See* *15 U.S.C. § 16(f)(3)*. "COMPTEL is an association of competitive local communications providers that are both wholesale customers of and competitors to the merging parties in the Local Private Line service markets that are the subject of the Complaints." COMPTEL's Mot. to Intervene at 5. COMPTEL members include Sprint Nextel, XO Communications, RCN Corporation, Covad Communications, and over 300 other members. *Id.* Defendants AT&T and MCI were members of COMPTEL prior to the mergers. *Id.* The Court permitted COMPTEL to participate as an amicus on May 10, 2006.

ACTel is a group of firms whose "members includes both [CLECs] and [IXCs] that buy Local Private Lines from the merging companies." ACTel's Mot. to Intervene, Ex. 1 at 3 (comments to Proposed Final Judgments). ACTel members combine these purchased LPLs with additional facilities, technology, and services to sell their own value-added telecommunications services, sometimes in competition with the merging parties, to business customers. *Id.* The Court permitted ACTel to participate as an amicus on May 10, 2006.

[22]** The New York Attorney General is charged with enforcing federal and state antitrust and consumer protection laws. N.Y. Att'y Gen. Mot. to Intervene at 2. The New York Attorney General "advocates in federal and state administrative and judicial proceedings on behalf of New York State consumers and small businesses, and the public interest generally." *Id.* The Court permitted the New York Attorney General to participate as an amicus on July 25, 2006.

The National Association of State Utility Consumer Advocates ("NASUCA") is a **[*9]** voluntary, national association of 44 consumer advocates in 41 states and the District of Columbia. NASUCA Mot. to Intervene at 3. "NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts." *Id.* Members operate independently from state utility commissions as advocates primarily for residential ratepayers. *Id.* The Court permitted NASUCA to participate as an amicus on July 25, 2006.

Sprint Nextel Corporation ("Sprint") is corporation that was a significant purchaser of LPL services from the merging parties. Sprint Mot. to Intervene at 3. **[**23]** Sprint relies on those services to provide connectivity to its cellular telephone sites. *See id.* The Court permitted Sprint to participate as an amicus on July 25, 2006.

The New Jersey Division of Rate Counsel ("Rate Counsel"), formerly known as the New Jersey Ratepayer Advocate, "is a division within the Department of the Public Advocate, that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities." N.J. Rate Counsel Mot. to Intervene at 2. The New Jersey Rate Counsel participates actively in relevant federal and state administrative and judicial proceedings. *Id.* The Court permitted the New Jersey Rate Counsel to participate as an amicus on August 8, 2006.

C. Compilation of the Court's Record

In response to the initial materials and motion filed by the government, ACTel and COMPTEL filed oppositions to the motion for entry of the proposed final judgments, and replies were filed thereto. On July 12, 2006, the Court held a hearing involving the government, the merging parties, ACTel, and COMPTEL. *See* Order, July 7, 2006 (setting out instructions to counsel for the hearing). At the hearing, **[**24]** the Court noted that there was no party specifically representing the public in the matter. *See* Hr'g Tr., July 12, 2006, at 5. At the conclusion of the hearing, the Court took the matters under advisement. *Id.* at 223. Following the hearing, the Court also requested the Federal Communication Commission's ("FCC") Memorandum Opinion and Order regarding the mergers. *See* Order, July 14, 2006.

The Court held another hearing on July 25, 2006, to discuss further proceedings for the case. Based on that hearing, the Court permitted three new parties to participate as amici as described above. In addition, the Court found there to be insufficient material in the record, which consisted largely or exclusively of unverified legal pleadings, to allow the Court to adequately discharge its duties under the Tunney Act. Hr'g Tr., July 25, 2006, at 7. Rather than hold an evidentiary hearing, the Court ordered the government to provide further materials that would allow the Court to make the public interest determination required by the Tunney Act. *Id.* at 8, 22. The Court allowed the government to decide exactly what types of materials were appropriate to submit. *Id.* at 10-11, 22. **[**25]** The Court also provided the other parties and amici the opportunity to respond to this supplemental filing. Appropriate protective measures were put in place to allow for the submission of confidential material. *See* Order, July 25, 2006; Order, August 15, 2006.

The government's supplemental submission consisted of a memorandum explaining its submission, the declaration of W. Robert Majure, an economist in the Antitrust Division of the Department of Justice, and various technical materials provided by the merging parties and other telecommunications firms. Pl.'s Submission **[*10]** in Resp. to Order of July 25, 2006 (hereinafter "Gov. Supp."). These technical materials consisted of retail customer statements, network maps and buildings lists of the merging parties and other firms, business plans of other firms, interrogatory responses by other firms, internal business records of the merging parties, and the divestiture assets purchase agreements for three firms that have agreed to purchase Divestiture Assets from AT&T under the proposed final judgments. *Id.,* Decl. of Jared A. Hughes (describing technical materials submitted).

Responses to the government's supplemental submission were **[**26]** filed by all of the admitted amici, as well as Verizon and AT&T. The responses of several amici included declarations by economists or other experts. *See* COMPTEL Resp. (including declaration of economist Joseph Gilliam); N.Y. Att'y Gen. Resp. (including declaration of Nicholas Economides, Ph.D., Economics); NASUCA Resp. (including declaration of Lee L. Selwyn, Ph.D.); Sprint Resp. (including declaration of Keith L. Kassien). The government also submitted a reply to these responses, including a reply declaration of Robert Majure. Pl.'s Reply Submission in Resp. to Order of July 25, 2006 (hereinafter "Gov. Reply").

The Court held a hearing on November 30, 2006, to discuss the supplemental filings. At the hearing, the government represented that six purchasing agreements had been reached for the Divestiture Assets, pending only approval of the proposed final judgments. Hr'g Tr., Nov. 30, 2006, at 24. After hearing from the government, merging parties, and all amici, the Court took the matter under advisement. In addition, the government and amici were permitted to file, and did file, supplemental responses to the specific arguments raised at the hearing.

ANALYSIS

[**27] I. Scope of Review Under the Tunney Act

HN1[] The Antitrust Procedures and Penalties Act of 1974, also known as the Tunney Act, requires the Court to determine whether the proposed final judgments are "in the public interest." *15 U.S.C. § 16(e)(1)*. The statute does not further define the meaning of "in the public interest," but specifies that in making the public interest determination, the Court *shall* consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of public benefit, if any, to be derived from the determination **[**28]** of the issues at trial.

15 U.S.C. § 16(e)(1). ***HN2***[] The Court is not required to conduct an evidentiary hearing nor is it required to permit anyone to intervene. *15 U.S.C. § 16(e)(2)*. Instead, the procedure for making the public interest determination is generally left to the discretion of the Court. *See* *15 U.S.C. § 16(f)*. The Court is permitted to take testimony of government officials or expert witnesses, appoint a special master or expert consultant, authorize participation by other parties as amici or interveners, or "take such other action in the public interest **[*11]** as the court may deem appropriate." *Id.*

The Tunney Act as it stands is the product of amendments recently enacted in the Antitrust Criminal Penalty Enhancement and Reform Act of 2004. A body of law interpreting the Tunney Act's vague language has developed since its inception, but no court has yet examined the impact of the 2004 amendments. While amici argue that the 2004 amendments expanded the Court's scope of review under the Tunney Act, a close reading of the law demonstrates that the 2004 amendments effected minimal changes, and that this **[**29]** Court's scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.

A. 2004 Amendments and Legislative History

The 2004 amendments to the Tunney Act made two relevant changes to the text of the statute: (1) the Court "shall" instead of "may" consider the enumerated factors in making its public interest determination; and (2) there are additional and amended factors to consider in making the determination. *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 221(b)(2) (codified at *15 U.S.C. § 16*). The additional factors are "whether [the proposed final judgment's] terms are ambiguous," and "the impact of entry of such judgment upon competition in the relevant market or markets." *Id.* The catch-all factor was amended from "any other consideration bearing upon the adequacy of such judgment" to "any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest." *Id.*

The amendments also included a set of Congressional findings. Congress stated that **[**30]** the purpose of the Tunney Act "was to ensure that the entry of antitrust consent judgments is in the public interest." *Id. § 221(a)(1)*. Congress further states that "it would misconstrue the meaning and Congressional intent in enacting the Tunney Act to limit the discretion of district courts to review antitrust consent judgments solely to determining whether entry of those consent judgments would make a 'mockery of the judicial function'." *Id.* Finally, Congress stated that the purpose of the amendment was to "effectuate the original Congressional intent in enacting the Tunney Act and to ensure that United States settlements of civil antitrust suits are in the public interest." *Id.*

The legislative history provides further explanation for the amendments. [5] Several legislators spoke of the need to prevent judicial "rubber-stamping" of proposed consent decrees. *See* 150 Cong. Rec. S3613-14, 53619 (Apr. 2, 2004) (Statements of Senators Hatch and Dewine); [6] 150 Cong. Rec. H3659-60 (June 2, 2004) (Statements of Representatives Scott and Conyers). Senator Leahy stated that there was concern that judicial discretion in making the public interest determination resulted in **[**31]** an overly deferential review of prosecutors' judgments. 150 Cong. Rec. at S3615. In his view, the amendments mandate instead that "the court make an independent judgment **[*12]** based on a series of enumerated factors." *Id.*

---

[5] "The court applies the traditional tools of statutory interpretation in determining congressional intent, looking to the text, structure, purpose, and legislative history of a statute." *Me. Pub. Utils. Comm'n v. FERC, 372 U.S. App. D.C. 82, 454 F.3d 278, 282 (D.C. Cir. 2006)*.

[6] Some senators refer to the amendments as Title II of the Standards Development Organization Advancement Act. When passed in its final form, however, Title II of the Act was renamed the Antitrust Criminal Penalty Enhancement and Reform Act.

Senator Kohl, however, was the lone legislator to articulate in depth the rationale for the Tunney Act amendments. *See id.* at S3615-18. Generally, he stated that the purpose of the amendments was to renew the district court's responsibility to independently examine proposed antitrust **[**32]** settlements. *Id.* Senator Kohl traced the history of the Tunney Act, describing Senator Tunney's concerns with the political influence of large companies in these matters, which had been triggered by the ITT antitrust settlement in 1971. *Id.* at 53616. He spoke of the text, legislative history, and early interpretation of the original Tunney Act to demonstrate Congress's intent to prevent judicial "rubber-stamping" of antitrust settlements, and require judicial scrutiny instead. *Id.* [7]

Senator Kohl stated that the D.C. Circuit Court of Appeals had subsequently interpreted the Tunney Act in a manner that made meaningful review of the consent decrees almost impossible. *Id.* at S3617. He specifically pointed to decisions that held that final judgments should only be rejected by courts if they make "a mockery of judicial power." *Id.* (citing **[**33]** and quoting *United States v. Microsoft, 312 U.S. App. D.C. 378, 56 F.3d 1448 (D.C. Cir. 1995)*, and *Mass. School of Law at Andover, Inc. v. United States, 326 U.S. App. D.C. 175, 118 F.3d 776 (D.C. Cir. 1997))*. He stated that to the extent these decisions are contrary to the Congressional findings in the amendments, they are overruled. *Id.* at 53618. In his view, the amendments intend "to assure that courts undertake meaningful review of antitrust consent decrees to assure that they are in the public interest and analytically sound." *Id.* This is in part accomplished by requiring examination of the enumerated factors, which is "intended to preclude a court from engaging in 'rubber stamping' of antitrust consent decrees, but instead to seriously and deliberately consider these factors in the course of determining whether the proposed decree is in the public interest." *Id.*

In order to understand the findings in the 2004 amendments, the Court must therefore closely examine D.C. Circuit precedent regarding Tunney Act review. Moreover, to the extent that this precedent has not been overruled by the 2004 amendments, it is still binding on this Court. As the concept of "mockery of judicial power" **[**34]** is specifically highlighted by both the Congressional findings and legislative history, the Court's inquiry begins there.

B. "Mockery of Judicial Power"

In *United States v. Microsoft, 312 U.S. App. D.C. 378, 56 F.3d 1448 (D.C. Cir. 1995)*, the Circuit court reviewed the district court's rejection of a consent decree under the pre-amended Tunney Act. In analyzing the proper scope of review in a "public interest" inquiry, the Circuit court considered whether district courts should evaluate proposed settlements by examining issues outside the underlying complaint. *See id. at 1458-60*. The Circuit court concluded that in evaluating a proposed settlement, the Tunney Act does not permit the district court to "reach beyond the complaint to evaluate claims that the government did not make and to inquire as to why they were not made." *Id. at 1459*.

It is with regard to this conclusion that the Circuit court invoked the concept of "mockery of judicial power." *Id. at 1462*. The court stated:

> But, when the government is challenged for not bringing as extensive an action **[*13]** as it might, a district judge must be careful not to exceed his or her **[**35]** constitutional role. A decree, even entered as a pretrial settlement, is a judicial act, and therefore the district judge is not obliged to accept one that, on its face and even after government explanation, appears to make a mockery of judicial power. Short of that eventuality, the Tunney Act cannot be interpreted as an authorization for a district judge to assume the role of Attorney General.

Id. In other words, the court held that district courts cannot reach beyond the complaint unless the limited nature of the complaint makes a mockery of judicial power. For example, if an antitrust complaint and proposed settlement in this case only addressed the telephone connections for a single household residence, but none other in the entire country, such an absurd complaint would seem to violate the "mockery" standard.

---

[7] Senator Kohl also noted that the text of the pre-amended Tunney Act contained "no standards governing how a court is to conduct this review." *Id.* at 53616.

This particular understanding of the "mockery" standard, however, may have been altered (or misconstrued) by a subsequent decision. In *Massachusetts School of Law at Andover, Inc. v. United States, 326 U.S. App. D.C. 175, 118 F.3d 776 (D.C. Cir. 1997)*, the court held that in a Tunney Act proceeding, the "district court must examine the decree in light of the violations **[**36]** charged in the complaint and should withhold approval only if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes 'a mockery of judicial power.'" *Id. at 783* (quoting *Microsoft, 56 F.3d at 1462*). This formulation of the "mockery" concept apparently casts it as a standard of review, to be used unless there are other specific problems with the consent decree.

The 2004 amendments to the Tunney Act clearly overruled the Circuit court's holding in *Massachusetts School of Law*. First, ***HN3***[] a court must now consider all of the enumerated factors, as opposed to just ambiguity of terms, enforcement mechanisms, and third-party harms. *See* *15 U.S.C. § 16(e)(1)* (as amended). Second, the Congressional findings in the text of the amendments state that ***HN4***[] Tunney Act review is not limited "solely to determining whether entry of those consent judgments would make a 'mockery of the judicial function'." *Pub. L. No. 108-237, § 221(a)(1)(B)*. This statutory language appears to overrule *Massachusetts School of Law's* use of the "mockery" standard **[**37]** of review.

It is somewhat awkward and unusual for Congress to overrule judicial precedent through a "finding" as opposed to through the operative language of a statute. Nonetheless, this finding was approved by the whole of Congress and the President in the final version of the Act. Therefore, the Court must accept it as a definitive statement of Congressional intent. *See* *Ranbaxy Laboratories Ltd. v. Leavitt, 373 U.S. App. D.C. 377, 469 F.3d 120, 124 (D.C. Cir. 2006)* (holding that courts, like agencies, "must give effect to the unambiguously expressed intent of Congress" (quoting *Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984))*; *see also* *Red Lion Broad. Co. v. FCC, 395 U.S. 367, 380-81, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969)* ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."). Accordingly, the Court cannot use the "mockery of justice" standard as the general standard of review under the Tunney Act.

That being settled, the Court now turns to the two most significant legal questions concerning the public interest determination under the amended Tunney Act: (1) whether this Court has any authority to inquire **[**38]** into matters outside the scope of **[*14]** the complaint as drafted; and (2) how much deference, if any, is accorded to the government's evaluation of the adequacy of the proposed settlements.

C. Review Beyond the Complaints

Some of the amici have argued that, in making its public interest determination, the Court can and should consider matters other than those specifically addressed by the government's complaints. The text of the amended Tunney Act is silent as to whether the Court can probe beyond the scope of the government's complaint in making a public interest determination. The legislative history similarly provides no direct guidance on the question. Therefore, the D.C. Circuit's previous holding remains binding on this Court.

As described above, the D.C. Circuit held in *Microsoft* that ***HN5***[] a district court should not inquire beyond the complaint unless the complaint makes a mockery of judicial power. *56 F.3d at 1462*. Apart from that rare case, a district court is not permitted to "reach beyond the complaint to evaluate claims that the government did *not* make and to inquire as to why they were not made." *Id. at 1459*. The Circuit court derived **[**39]** this limitation from the language of the Tunney Act factors, specifically the factors focusing on the "alleged violations" and "violations set forth in the complaint." *Id.* (citing *15 U.S.C. § 16(e)*). In addition, the Circuit court based its decision on constitutional concerns that overriding prosecutorial discretion to initiate antitrust suits infringes on the proper separation of powers. *Id. at 1458-60*. Finally, the Circuit court took note of the argument that the government could constrain Tunney Act review by drafting a narrow complaint, but explained that this argument has little force because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place." *Id. at 1459-60*.

Nothing in the text or legislative history of the 2004 amendments undermines this reasoning. While the drafters of the 2004 amendments stated that "mockery of judicial power" should not be the general standard of review under the Tunney Act, the *Microsoft* decision did not make it so. Rather, ***HN6***[] it is only if the complaint underlying the consent decree is **[**40]** drafted so narrowly as to make a mockery of judicial power can the district court reject a consent decree due to matters outside the scope of the underlying complaint. *Id. at 1462*. In all other cases, a court cannot do so. *Id. at 1459*.

Some amici, however, maintain that the 2004 amendments do allow the Court to examine matters beyond the scope of the complaint. The textual basis for this assertion is the added factor that the Court must consider, "the impact of entry of such judgment upon competition in the relevant market or markets." *15 U.S.C. § 16(e)(1)*; *see, e.g.,* Sprint Resp. at 17. The plain language, however, does not compel the result amici seek. Rather, the text is ambiguous because "relevant markets" could refer to the markets implicated by the merger as a whole, or only those markets implicated by the government's complaint.

The legislative history favors the latter interpretation. It states that the purpose of that specific added language is to "ensure that the Tunney Act review is properly focused on the likely competitive impact of the judgment, rather than extraneous factors irrelevant to the purposes of antitrust **[**41]** enforcement." 150 Cong. Rec. S3618 (Statement of Senator Kohl). As review is focused on the "judgment," it again appears that the Court cannot go beyond the scope of the complaint. *See* *Microsoft, 56 F.3d at 1459* ("We therefore dismiss the **[*15]** claim that the last line in *section 16(e)(1)*, the catchall clause allowing the district court to entertain 'any other considerations bearing upon the adequacy of such judgment,' authorizes the wide-ranging inquiry the district court wished to conduct in this case."). Therefore, the 2004 amendments have left in place the Circuit's holding that this Court cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.

D. Standard of Review for Proposed Remedies

The remaining core question concerning Tunney Act review is how much deference, if any, is accorded to the government's evaluation of the adequacy of the proposed settlements. The overall standard for the Court is deciding whether entry of the proposed settlements is "in the public interest." *15 U.S.C. § 16(e)(1)*. No explanation of this standard is provided, **[**42]** apart from the aforementioned Congressional finding that it is more stringent than a "mockery of judicial power" standard. The text of the amended Tunney Act specifies factors the Court must consider in making its determination, but is silent as to whether the Court should defer to the government's conclusions regarding those factors. While the legislative history of the original Tunney Act and 2004 amendments make clear that the Court is not to "rubber-stamp" proposed settlements, Congress has not instructed how much scrutiny the Court should apply instead.

In this respect, the 2004 amendments have not altered the conundrum courts face under the Tunney Act. The D.C. Circuit confronted this puzzle in some depth in the *Microsoft* case. The *Microsoft* court was aware that Congress sought to foreclose "judicial rubber-stamping," and require an "independent" determination of whether a proposed settlement is in the public interest. *56 F.3d at 1458*. The great difficulty with the "public interest" standard was that there was "virtually no useful precedent." *Id.* At the very least, no appellate court had ever approved a district court's rejection of a settlement as outside **[**43]** the public interest. *Id.* This assessment appears just as true today as it did in 1995.

The Circuit court nonetheless addressed the question of how to evaluate whether a proposed remedy is adequate to address an alleged antitrust violation. It held that ***HN7***[] a district court is not permitted to reject proposed remedies merely because the court believes other remedies are preferable. *Id. at 1460*. Instead, the question is not whether a proposed remedy is the best one, but only whether it is "within the reaches of the public interest." *Id.* (internal quotation marks and citations omitted). Such a rule is justified because "[r]emedies which appear less than vigorous may well reflect an underlying weakness in the government's case, and for the district judge to assume that the allegations in the complaint have been formally made out is quite unwarranted." *Id. at 1461*. Even though the government has alleged antitrust harms, a court considering a proposed settlement does not have actual findings that defendants engaged in illegal practices, as would exist after a trial. *Id.* Moreover, room must be made for the government to grant concessions in the **[**44]** negotiation process for settlements. *See id.* ("it could also be that this was a concession the government made in bargaining").

For these reasons, the Circuit court also held that ***HN8***[] district courts should be deferential to the government's predictions as to the effects of the proposed remedies. *Id.* Accordingly, the relevant inquiry is whether there is a factual foundation for the **[*16]** government's decisions such that its conclusions regarding the proposed settlements are reasonable. *See id.* (stating that Professor Arrow's opinion that the remedies in question were appropriate provided a sufficient basis for finding the government's remedies reasonable).

The textual changes in the 2004 amendments do not address these holdings and in no way undermine them. The amendments' legislative history also provides little reason to question the Circuit's holdings or reasoning. The legislative record for the most part only contains several general statements that district courts should "carefully review," "undertake meaningful and measured scrutiny of," and "independently review" proposed consent decrees. 150 Cong. Rec. S3616-17. The Circuit, however, already considered the same Congressional **[**45]** sentiments in analyzing the pre-2004 Act. *See* *Microsoft, 56 F.3d at 1458*.

A couple of the statements of Senator Kohl though warrant closer inspection. First, he specifically cited the "reaches of the public interest" language and stated that this holding along with others make it "difficult if not impossible for courts to exercise meaningful scrutiny" of proposed decrees. 150 Cong. Rec. S3617. There is no indication, however, that Congress intended to overrule the holding. Instead, it appears that Congress chose to strengthen review by expanding the list of factors a court must consider. *See id.* at 3618.

Second, Senator Kohl stated that courts should assure that consent decrees are "in the public interest and analytically sound." *Id.* This formulation perhaps indicates that the Court should examine whether the proposed settlement remedies the harms identified in the complaint in an analytically sound manner. This echoes several arguments made by amici that the Court should guarantee that the government has followed sound, established antitrust principles in reaching a settlement. This argument, however, is ultimately without force because the "analytically sound" language **[**46]** was not actually added to the text of the statute. ***HN9***[] The statement of a lone legislator, unaccompanied by a corresponding change in the statutory language, is insufficient to override a well-established judicial construction of the statute. *See* *Ruhe v. Bergland, 683 F.2d 102, 104 (4th Cir. 1982)* (holding that legislative history unaccompanied by a legislative act is insufficient to overrule prior statutory interpretation). [8] Moreover, the Circuit's reasoning in *Microsoft* is still persuasive, as ***HN10***[] it is improper for a court to require a proposed settlement to perfectly remedy antitrust violations when those violations have not yet been proven at trial, and when the government needs room to negotiate a settlement.

[47]** Some amici nevertheless contend that this Court should apply the standard of review for remedies utilized after antitrust violations have been proven at trial. *See, e.g.,* COMPTEL Resp. at 10; ACTel Resp. to Nov. Hr'g at 2-3. In their view, antitrust remedies "must be effective to redress the violations and to restore competition." *See* *Ford Motor Co. v. United States, 405 U.S. 562, 573, 92 S. Ct. 1142, 31 L. Ed. 2d 492 (1972)* (internal quotation **[*17]** marks omitted). These arguments, however, fail to account for the binding precedent in this Circuit, the lack of change effected by the 2004 amendments, and the nature of Tunney Act proceedings that call for limited review. ***HN11***[] This Court instead will approve the proposed settlements if they are "within the reaches of the public interest." *See* *Microsoft, 56 F.3d at 1460*. The government need not prove that the settlements will perfectly remedy the alleged antitrust harms; it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms. *See* *id. at 1460-61*.

[8] In fact, an earlier version of the amendments would have required a "reasonable belief, based on substantial evidence and reasoned analysis, to support the United States' conclusion that the consent judgment is in the public interest." H.R. 1086, § 221 (as reported in Senate out of committee). That this language was removed in the final bill indicates that no change to the standard of review was intended by Congress. This history thus indicates that Senator Kohl's statements better reflect statutory language that was omitted, rather than the Act that was passed.

E. Additional Considerations

Finally, the Circuit court in *Microsoft* mentioned several other factors **[**48]** that courts should consider, though it did not indicate that its analysis was exhaustive. ***HN12***[] A district court should pay attention to a proposed judgment's clarity in order to make implementation of the judgment manageable. *Microsoft, 56 F.3d at 1461-62*. In addition, the court should closely examine compliance mechanisms in a proposed settlement. *Id. at 1462*. Finally, the court should be concerned with any allegations that the proposed settlement will injure a third party. *Id.* The *Massachusetts School of Law* decision held that these were the only specific factors to consider, *118 F.3d at 783*, but the 2004 amendments have clearly overruled that holding. After the 2004 amendments, these factors along with others are explicitly enumerated in the Tunney Act's text, and must all be considered by the Court. *15 U.S.C. § 16(e)(1)*.

F. Summary of Tunney Act Review

In conclusion, ***HN13***[] under the amended Tunney Act, the Court cannot reject the proposed settlements merely because the government failed to address antitrust issues not raised in its complaints. Further, the Court must accord deference to the government's predictions **[**49]** about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations because this may only reflect underlying weakness in the government's case or concessions made during negotiation. The Tunney Act only requires that the Court consider specific enumerated factors in making its public interested determination.

These factors can be loosely separated into two groups. The first group of factors address the competitive impact of the proposed remedies, i.e., how well the settlement remedies the harms alleged in the complaints. *See 15 U.S.C. § 16(e)(1)* (requiring consideration of: "the competitive impact of such judgment, including termination of alleged violations," "duration of relief sought," "the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint," and "any other competitive considerations bearing upon the adequacy of such judgment"). The second group of factors address issues unrelated to the competitive impact of the settlement. *See id.* (requiring consideration of: **[**50]** "provisions for enforcement and modification," "anticipated effects of alternative remedies actually considered," "consideration of the public benefit, if any, to be derived from a determination of the issues at trial," and "whether its terms are ambiguous").

The Court will first consider the competitive impact factors, examining to what degree the proposed settlements remedy the alleged harms. This requires analyzing the government's view of the settlements, as well as amici's arguments regarding the settlements' inadequacies. Finally, the Court will consider the non-competitive **[*18]** factors as they relate to the proposed settlements.

II. Overall Approach of Proposed Settlements

A. Rationale of Proposed Settlements

In the government's view, the proposed settlements perfectly remedy the alleged antitrust violations because the proposed final judgments require asset divestitures at all buildings where harm is alleged - the 2-to-1 buildings where entry is unlikely. Gov. Supp., Mem. at 7. The buyer of the divested lateral (or last-mile) connection for each building is expected to replace the competition lost due to the mergers. *Id.* at 9 As new sales opportunities arise **[**51]** in those buildings, the asset-buyers will be positioned to compete, just as AT&T or MCI would have been. *Id.* Customers seeking access or connectivity to a particular building will thus have the option of two facilities-based provides, just as they did before the mergers. *Id.*

The opinion of economist Robert Majure provides a basis for the government's building-based approach. Majure has analyzed numerous mergers in the telecommunications industry and supervised the economists tasked with analyzing the instant mergers. Gov. Supp., Majure Decl. PP 1-2. In his view, the proposed remedies are straightforward because the asset-buyers "step into the shoes of AT&T or MCI." *Id.* P 16. These asset-buyers can then offer a competitive alternative to customers - either tenants of the buildings or other carriers seeking a building connection in order to provide services to the tenants. *Id.* In other words, the divestitures provide a remedy for both the retail and wholesale markets.

The proposed settlements require that at least eight strands of fiber be divested for each lateral connection. In Majure's view, this amount of fiber is sufficient to serve the likely customer demand in **[**52]** any particular building. *Id.* P 20. He further opines that the settlement's use of IRUs (indefeasible rights of use) instead of divestitures of full ownership of the strands is adequate because IRUs are industry-standard arrangements that carriers routinely employ. *Id.* P 22. The ten-year terms of the IRUs are appropriate in his view because of the dynamic nature of the industry, the fact that customer contracts are typically one to three years, and that DOJ's general policy is to limit settlements to ten years. *Id.* P 23. The divested assets are also effective because they include additional assets necessary to connect the lateral connection with the buyer's transport network. *Id.* P 24.

Finally, one of the keys to this building-based approach is Majure's conclusion that AT&T and MCI did not have any unique qualifications as a competitor in the LPL market. *See id.* P 17. Majure states that he "found no evidence suggesting a unique competitive role for either" AT&T or MCI. *Id.* For this reason, any supplier who buys the divested assets can provide an adequate competitive option for customers. *Id.*

B. Potential Inadequacies of the Government's Approach

[53]** The amici have presented several related arguments that question the government's building-based approach, and thus the adequacy of the proposed settlements. First, they argue that the government's view of the relevant market is simplistic and unrealistic, and that actual customers instead employ a multi-building perspective. Second, they argue that the government's view addresses in part the retail LPL market, but not the wholesale market. Third, they argue that for these two reasons and others, the government has **[*19]** overlooked the uniquely powerful competitive positions of AT&T and MCI before the mergers, and thus has proposed an inadequate remedy. Finally, they argue that the government's position is inconsistent with well-established antitrust analysis, and that the government has not provided sufficient proof of the efficacy of the proposed remedy. The Court will consider each of these arguments in turn, as well as the government's response.

First, amici contend that actual business customers do not purchase LPL services on a single-building basis, but rather seek to purchase from a single provider integrated telecommunications services to connect multiple buildings. *See, e.* **[**54]** *g.,* COMPTEL Resp., Gilliam Decl. at 5-13; N.Y. Att'y Gen. Resp., Economides Decl. at 8-11. Therefore, the competitive position of LPL providers depends not on access to a single building, but access to a network of buildings. Thus, customer pricing data is not available on a single-building basis, but rather consists of contracts for multi-building services. For these reasons, amici argue that the proposed remedies are structurally inadequate because they do not replace the competitive strength of AT&T's and MCI's large networks. *See, e.g.,* COMPTEL Resp., Gilliam Decl. at 10-13.

The government responds that while carriers may seek to combine LPLs for multiple locations into a network for customers, LPLs are distinct inputs that are priced and sold separately. Gov. Reply, Majure Decl. P 9. In effect, the government's rationale is that restoring competition for single-building LPLs will restore competition for multi-building networks. The government acknowledges that a firm's network size can be a competitive advantage if it can cover all of a customer's locations, but argues that AT&T's and MCI's networks were not sufficiently large. *Id.* P 27 n.40 (pointing out that AT&T owned **[**55]** lateral connections for only 4% of the commercial buildings where it provided service and leased LPL access for the other buildings (citing NASUCA Resp., Selwyn Decl. P 13)).

Second, amici contend that the proposed settlements do not remedy harms in the wholesale market for LPL services. The wholesale market involves selling LPL access to buildings to other telecommunication carriers, who in turn sell services to the building tenants. The amici argue that AT&T and MCI acted as major resellers in the wholesale market, in competition with SBC and Verizon, and were able to resell access at especially low rates because they could acquire LPL access at very favorable rates. *See, e.g.,* ACTel Resp. at 25-28; N.Y. Att'y Gen. Resp., Economides Decl. at 21-22. The proposed settlements would thus be inadequate because the buyers of the divested assets could not replace AT&T and MCI's presence in the wholesale market.

The government responds that business records demonstrate that AT&T and MCI did not benefit from favorable rates unavailable to other LPL resellers. Gov. Reply, Majure Decl. P 31. Rather, those rates were available to any carrier spending a minimum of $ 10 million annually. **[**56]** *Id.* Moreover, evidence shows that neither AT&T nor MCI generated a large amount of revenue from its LPL reselling. *Id.* P 31 & n.53. Further, under the proposed final judgments, the government is obligated to ensure that buyers of the Divestiture Assets have the ability to be a viable competitor for wholesale LPL service. *See* Gov. Reply at 17; Proposed SBC-AT&T Final J. at 7-8.

Third, amici argue that AT&T and MCI were especially strong competitors in the relevant markets not only because of their large networks and strength in the wholesale market, but also because of their **[*20]** high name recognition, extensive customer service operations, significant customer base, and dominance in the long-distance telephone service market. *See, e.g.,* COMPTEL Resp. at 30-33, N.Y. Att'y Gen. Resp., Economides Decl. at 13-16, 33; NASUCA Resp., Selwyn Decl. at 18-23. The proposed settlements would thus be inadequate to replace the lost competition because only a fraction of AT&T's and MCI's assets are being divested among multiple, smaller firms.

The government responds that the only relevant attributes of AT&T and MCI are those that directly affect the market for LPLs. Gov. Reply, Majure **[**57]** Decl. P 19. Majure states that the evidence shows that AT&T's LPL services were often priced significantly higher than other carriers. *Id.* P 28. Majure notes that MCI set low prices for LPLs, but only during the period it was in bankruptcy, and raised prices after emerging from bankruptcy. *Id.* P 29.

Finally, amici contend that the government's inadequate view of the market is the result of the failure to follow established antitrust principles, specifically those in DOJ's own Merger Guidelines. *See* DOJ & FTC, *Horizontal Merger Guidelines* (rev. ed. 1997) ("Merger Guidelines"). Specifically, the amici point to the government's failure to properly determine the relevant geographic markets and conduct market concentration analyses using the Hirschman-Herfindahl Index ("HHI"), a commonly used antitrust analysis tool. *See, e.g.,* COMPTEL Resp. at 8-9, 24-28; N.Y. Att'y Gen. Resp. at 6-13; Sprint Resp. at 25-26. In addition, they claim that the government has failed to provide sufficient evidence to support the complaint's allegations as well as the proposed remedy. *See, e.g.,* ACTel Resp. at 28; COMPTEL Resp. at 15.

The government responds that individual buildings **[**58]** are relevant geographical markets under the Merger Guidelines, and that HHI analysis, though useful in other situations, would add little in understanding the situation with 2-to-1 buildings. Gov. Reply, Majure Decl. PP 3-14. The government also notes that the Tunney Act does not require it to prove its underlying case as if this proceeding were a trial on the merits.

C. Sufficiency of Proposed Remedies

As an initial matter, amici's arguments regarding DOJ's method of analyzing the mergers are not substantial. The government has proffered a reasonable explanation of how its analysis conforms to the established policies in the Merger Guidelines. Moreover, ***HN14***[] the Tunney Act does not require the government to employ any specific type of analysis in evaluating and settling cases. *See* Section I.D, *supra.* Finally, the government is correct that it need not prove its underlying allegations in a Tunney Act proceeding. *See id.* To require the government to do so would fatally undermine the practice of settling cases and would violate the intent of the Tunney Act. *See* 15 U.S.C. § 16(e)(2) (specifying that the Act does not require a court to hold an evidentiary **[**59]** hearing).

Notwithstanding the government's counter-arguments, the amici have presented two significant shortcomings of the proposed settlements. First, the government acknowledged that network size matters because carriers are in a better competitive position when they own lateral connections to more locations customers seek to interconnect. *See* Gov. Reply, Majure Decl. P 27 n.40. Therefore, buyers of the Divestiture Assets may not be able to fully replace AT&T or MCI in the competitive landscape because their networks may not be as extensive. In fact, the divestiture agreements already reached encompass **[*21]** multiple buyers, indicating that AT&T and MCI's networks will be split up.

Second, the amici have presented convincing reasons why AT&T and MCI were especially competitive firms in the LPL market, specifically their extensive customer bases, customer support services, and complimentary offerings of other services. Even if AT&T and MCI did not offer LPL services at the lowest price, they may have offered the best options for customers due to other qualities such as superior customer service or existing business relationships. It is quite possible that the buyers of the Divestiture **[**60]** Assets may not be able to offer overall services of the same quality to customers, and thus the proposed settlements would not replace the competition lost to the mergers.

While these shortcomings could reduce the effectiveness of the proposed settlements, they do not completely undermine the settlements. Even accounting for these issues, the government has presented a reasonable basis for concluding that the proposed settlements will replace much of the competition lost to the mergers, if perhaps not all of it. Therefore, the Court finds that the proposed settlements are reasonably adequate, and thus within the reaches of the public interest. *See* *Microsoft, 56 F.3d at 1460*.

III. Accounting for the Likelihood of Entry

The amici argue that the proposed settlements are inadequate because the government overestimated the likelihood of competitor entry, and thus failed to require divestitures in enough buildings. The government contends, however, that it made predictions for entry in a reasonable manner that is as accurate as practically possible.

In both of the complaints, the government recognized that competitors could build new last-mile connections to **[**61]** buildings in response to the mergers. The government identified five factors that affect whether a firm would build a new last-mile connection to a particular building: (1) the proximity of the building to the firm's existing network of interconnection points; (2) the capacity required at the customer's location (and thus the revenue opportunity); (3) the availability of capital; (4) the existence of physical barriers, such as rivers and railbeds, between the firm's network and the customer's location; and (5) the ease or difficulty of securing the necessary consent from building owners and municipal officials. The government also noted that because their costs are so substantial, firms typically only build a connection after they have secured a customer contract of sufficient size to justify the anticipated construction costs.

As is typical in established antitrust analysis, the government had to account for the possibility that the entry of new firms may replace competition lost to the merger. *See* Gov. Reply, Majure Decl. P 15; Merger Guidelines §§ 1.32, 3.0. In order to account for entry, the government created an algorithm to identify 2-to-1 buildings where the competitive **[**62]** harm was not likely to be offset by entry. Gov. Supp., Majure Decl. P 14. The government specifically focused on two of the five identified factors -- proximity to another carrier's network and likely customer demand at the particular building. *Id.* If a building had customer demand over a certain threshold, and a competing carrier had facilities within a certain distance, the government considered entry likely in that building and did not require divestiture. *Id.* P 14 n.17 (describing algorithm in detail).

The amici contend that the government's entry algorithm was unreasonable because the government accounted for only two of **[*22]** the five identified factors that determine whether entry is likely. *See, e.g.,* ACTel Resp. at 14-17; N.Y. Att'y Gen., Economides Decl. at 30-33; Sprint Resp. at 7-8. The amici also argue that the government's algorithm overlooks that fact that firms will not build new connections until they have a committed revenue opportunity. *See, e.g.,* COMPTEL Resp. at 22. The amici further contend that the distance factor in the entry algorithm does not properly take into account the fact new connections with existing networks can only be made at certain points. **[**63]** NASUCA Resp., Selwyn Decl. at 30. Finally, they argue that the entry algorithm should have been under-inclusive rather than over-inclusive. *Id.* at 51.

While the government's entry algorithm does not account for all relevant factors, it is a reasonable, practical prediction of likely entry. Quite reasonably, the algorithm is based on the two most important and easily measured factors -- customer demand, a proxy for potential revenue, and distance, a proxy for overall cost. The other factors, such as physical barriers and licensing hurdles, are far more difficult to measure on a building-by-building basis. *See* Gov. Reply, Majure Decl. P 18. Because the proposed final judgments need not be perfect remedies, the entry algorithm can be a reasonable instead of perfect prediction of entry. Moreover, there is no requirement that the government account for entry in an under-inclusive as opposed to over-inclusive manner. Finally, the algorithm accounts for the need for committed revenue to begin construction because interested firms can bid on customer contracts before constructing a new connection. The competitive bidding by an outside firm can create competition even if the firm has **[**64]** not yet constructed a connection. *See id.* P 16. Because the entry formula is a reasonable, if not perfect, prediction of likely entry, the proposed settlements are within the reaches of the public interest.

IV. Remedies for Additional Buildings or Markets

The amici argue that the proposed settlements are inadequate because they do not require divestitures for other buildings or other markets affected by the mergers. Primarily, the amici argue that if the mergers create competitive harms for 2-to-1 buildings, they must similarly create competitive harms in "3-to-2" or "4-to-3" buildings, i.e., buildings where the mergers reduce the number of carriers with connections to two or three. *See, e.g.,* ACTel Resp. at 29-30; Sprint Resp. at 19-22, 29. In addition, some amici argue that the settlements are inadequate because they fail to remedy competitive harms in markets for other products that indirectly rely on LPL services.

Amici argue that based on standard economic models, a decrease in competitors will result in higher prices for buildings where connected carriers decrease from four to three, or from three to two. *See, e.g.,* N.Y. Att'y Gen., Economides Decl. P **[**65]** 61. The government correctly responds, however, that the underlying complaints in these cases only address 2-to-1 buildings. *See* Gov. Reply at 25 n.82. The complaints are clearly and explicitly limited to 2-to-1 buildings. SBC Compl. PP 3, 18, 25, 29; Verizon Compl. PP 3, 18, 25, 29. Therefore, amici seek to challenge the proposed settlements on grounds beyond the scope of the complaints. That the government chose to address only 2-to-1 buildings does not render the complaints so narrow as to make a mockery of judicial power. *See Microsoft, 56 F.3d at 1462*. Accordingly, the Court cannot find the proposed settlements inadequate for failing to address matters outside the scope of the complaints. *See id. at 1459*.

[*23] Some amici also argue that the proposed settlements are inadequate because they fail to remedy competitive harms in the general LPL market that are not the specific anti-competitive harms identified in the complaints. *See, e.g.,* ACTel Resp. at 9-11; NASUCA Resp., Selwyn Decl. at 11-12. They also argue that the settlements should have addressed the market for LPL-based telecommunications services besides services for the building's tenants. **[**66]** *See* NASUCA Resp., Selwyn Decl. at 38-40 (focusing on markets for residential customers, wireless carriers, and internet service providers); N.J. Rate Counsel Resp. at 3-11, 21-22 (focusing on mass market consumers). Again, however, these areas of concern are outside the scope of the complaints. Therefore, they cannot be grounds for rejecting the proposed settlements. *See Microsoft, 56 F.3d at 1459*.

V. Consideration of Remaining Factors

The first additional factor to consider is "anticipated effects of alternative remedies actually considered." The government states that the only other remedy "actually considered" was seeking to enjoin the entire transactions and proceeding to trial. Gov. Supp., Mem. at 14. Success at trial was surely not assured, so pursuit of that alternative may have resulted in no remedy at all. While a trial may have created an even greater evidentiary record, that benefit may not outweigh the possible loss of the settlement remedies. *See 15 U.S.C. § 16(e)(2)* (***HN15***[] requiring "consideration of the public benefit, if any, to be derived from a determination of the issues at trial").

The government also indicates, **[**67]** however, that it considered certain detailed alternatives in crafting the particular terms of the Divestiture Assets. Gov. Supp., Mem. at 15. First, as some of the amici had proposed, the government considered whether to divest customer contracts along with "live" circuits that serve those customers, instead of currently unused, "dark" fiber. *See* Gov. Supp., Majure Decl. P 18. Some amici contend that this would have been a more effective remedy than the divestiture of dark fiber, which they claim is of little value. *See, e.g.,* COMPTEL Resp., Gilliam Decl. P 24; NASUCA Resp., Selwyn Decl. at 54-60. The government's rationale though was that divesting live circuits would have been disruptive and costly for customers, and that the dark fibers are still of value because the customer contracts are relatively short in duration (typically one to three years) and thus will soon be up for competitive bidding. Gov. Supp., Majure Decl. P 18. The government notes that the selling price of the Divestiture Assets may be low, but explains that buyers often pay lower prices for assets divested under consent decrees. Gov. Reply at 20-21.

The government also considered whether to include wiring **[**68]** or electronics inside the building as part of the Divestiture Assets. *See* Gov. Supp., Majure Decl. P 21. Some amici consider this to be a significant flaw in the proposed settlements because although a carrier may have a connection to a particular building, the connection may not extend to all the floors in the building. *See* ACTel Resp. at 7-8, 12-14. The government's justification, however, is that the additional costs of internal wiring and electronics is too small to prevent connected firms from competing, and divesting those materials would be disruptive to existing customers. Finding these explanations rational, the Court concludes that the government's choices amongst these alternatives were reasonable, and thus that the proposed settlements are within the reaches of the public interest.

[*24] The next factor to consider is the proposed settlements' "provisions for enforcement and modification." The proposed final judgments contain standard provisions that maintain the Court's jurisdiction and enure compliance with the decrees as entered. *See* Proposed SBC-AT&T Final J. at 8-16. The Court retains jurisdiction over the action for further orders necessary to carry out, construe, **[**69]** modify, enforce, or punish violations of the proposed final judgments. To preserve the Divestiture Assets until divested, the proposed final judgments require the preservation of the Divestiture Assets and bar any actions that would interfere with the divestitures. To ensure all necessary actions are being taken to comply with the judgments, the proposed final judgments require the defendants or trustees, if appointed, to make regular submissions of affidavits describing efforts to comply with the judgments. Finally, the government may investigate any potential violations of the judgments, by, among other things, gathering documents, interviewing employees on the record, and requesting written submissions. These are adequate provisions for the enforcement and modification of the final judgments.

The final factor to consider is "whether [the proposed final judgments'] terms are ambiguous." As the government states, the proposed final judgments contain no significant ambiguities -- they are clear and specific regarding the assets to be divested, how the divestitures will occur, to whom the assets may be divested, the circumstances in which modifications may be made, and how the judgments **[**70]** can be enforced. *See* Gov. Supp. at 15-16; Proposed SBC-AT&T Final J. at 3-16. While some terms of the purchase agreements are left to negotiation by the acquirers and defendants in commercial arms-length transactions, this is appropriate for these types of divestitures. Therefore, the Court finds that the terms of the proposed final judgments are not ambiguous.

CONCLUSION

The Court has complied with the procedures mandated by the Tunney Act and conducted a review of the proposed final judgments in accordance with the Act as amended in 2004 and the precedent of this Circuit. By requiring the government to submit supplemental material and admitting several interested parties to act as amici curiae, the Court has availed itself of a record sufficient for the review mandated by the Act. Upon review of the material submitted and arguments raised by all parties, the applicable law, and the entire record, the Court determines that entry of the proposed final judgments is in the public interest. Therefore, plaintiff's motion for entry of final judgments in both cases is **GRANTED.** An appropriate Order accompanies this Opinion.

Signed by: Emmet G. Sullivan

United [71] States District Judge**

March 29, 2007

End of Document

LexisNexis®

Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers

United States District Court for the District of Massachusetts

March 30, 2007, Decided

CIVIL ACTION NO. 04-12536-RGS

Reporter

480 F. Supp. 2d 471 *; 2007 U.S. Dist. LEXIS 23684 **; 2007-1 Trade Cas. (CCH) P75,764

AMERICAN STEEL ERECTORS, INC. et al. v. LOCAL UNION NO. 7, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL & REINFORCING IRON WORKERS

Subsequent History: Affirmed in part and reversed in part by, Remanded by *Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, 2008 U.S. App. LEXIS 16321 (1st Cir. Mass., Aug. 1, 2008)*

Prior History: *Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 2006 U.S. Dist. LEXIS 4348 (D. Mass., Feb. 6, 2006)*

Core Terms

targeting, exemption, projects, anti trust law, antitrust, self-interest, wages, summary judgment, bargaining, Davis-Bacon Act, contractors, conspiracy, violates, subsidy, steel, hire

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Clayton Act

Labor & Employment Law > Collective Bargaining & Labor Relations > Right to Organize

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN1[] **Collectives & Cooperatives, Clayton Act**

Labor unions are excluded from the operation of the antitrust laws by both a statutory and a nonstatutory exemption. The statutory exemption is derived from §§ 6 and 20 of the Clayton Act, *15 U.S.C.S. § 17*, *29 U.S.C.S. § 52*, and from the Norris-LaGuardia Act, *29 U.S.C.S. §§ 101-115*. Section 6 of the Clayton Act declares that the labor of a human being is not a commodity or article of commerce, nor shall labor organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. *15 U.S.C.S. § 17*. Thus, restraints on the sale of an employee's services, however much they curtail competition, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act. Congress reaffirmed the statutory exemption in passing the Norris-LaGuardia Act, which repudiated the U.S. Supreme Court's holding that the Clayton Act's labor antitrust exemption did not immunize unions engaged in "illegal" activity. The exemption was strengthened further by the National Labor Relations Act, *29 U.S.C.S. §§ 151-169*, which guarantees the right of workers to organize unions, to bargain collectively, and to engage in coercive activity, including strikes, as a means of enforcing legitimate union demands.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Clayton Act

Governments > Legislation > Interpretation

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN2[] **Collectives & Cooperatives, Clayton Act**

The U.S. Supreme Court has held that the Sherman Act, § 20 of the Clayton Act, *29 U.S.C.S. § 52*, and the Norris-LaGuardia Act, *29 U.S.C.S. §§ 101-115*, should be read as a harmonizing text defining a comprehensive statutory labor exemption to the antitrust laws. For the statutory labor exemption to apply, a union must act unilaterally in its own self-interest and not in combination with any nonlabor party.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Clayton Act

Labor & Employment Law > Collective Bargaining & Labor Relations > Protected Activities

HN3[] **Collectives & Cooperatives, Clayton Act**

The U.S. Supreme Court has repeatedly held that the preservation of jobs is within the area of proper union concern. Union activity having as its object the preservation of jobs for union members is not violative of the antitrust laws.

Antitrust & Trade Law > Clayton Act > Scope

Labor & Employment Law > Collective Bargaining & Labor Relations > Protected Activities

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN4[] **Antitrust & Trade Law, Clayton Act**

As the U.S. Supreme Court has observed, so long as a union acts in its self-interest and does not combine with nonlabor groups, the licit and the illicit under § 20 of the Clayton Act, *29 U.S.C.S. § 52*, are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN5[] **Monopolies & Monopolization, Conspiracy to Monopolize**

A rimless wheel conspiracy is one in which various defendants enter into separate agreements with a common defendant, but where the defendants have no connection with one another, other than the common defendant's involvement in each transaction. While the imagery of a spoked, but rimless, wheel is quite vivid, the object of the alleged "rimless wheel" conspiracy is no different than that of the horizontal conspiracy, and therefore no more a violation of the antitrust laws, whatever other laws might be implicated.

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Secondary Activities

HN6[] **Union Violations, Secondary Activities**

See *29 U.S.C.S. § 158(b)(4)(ii)*.

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Secondary Activities

HN7[] **Union Violations, Secondary Activities**

A union's holding out a job target fund as an incentive to employers to hire its members is not an improper objective under the Labor Management Relations Act.

Counsel: **[**1]** For Ajax Construction Company, Incorporated, Plaintiff: Michael E. Avakian, LEAD ATTORNEY, Smetana & Avakian, Springfield, VA.

For American Aerial Services, Incorporated, American Steel Erectors, Incorporated, Bedford Ironworks, Incorporated, D.F.M. Industries, Incorporated, Ronald Beauregard, Ajax Construction Company, Incorporated, Plaintiffs: Geoffrey R. Bok, LEAD ATTORNEY, Stoneman, Chandler & Miller, Boston, MA.

For American Aerial Services, Incorporated, American Steel Erectors, Incorporated, Bedford Ironworks, Incorporated, D.F.M. Industries, Incorporated, Ronald Beauregard, American Aerial Services, Incorporated, Plaintiffs: Carol Chandler, LEAD ATTORNEY, Stoneman, Chandler & Miller, Boston, MA.

For American Steel Erectors, Incorporated, Bedford Ironworks, Incorporated, D.F.M. Industries, Incorporated, Ronald Beauregard, Ajax Construction Company, Incorporated, Plaintiff: Paul F. Kelly Segal, LEAD ATTORNEY, Roitman & Coleman, Street Boston, MA.

For Local Union No. 7, Defendant: Paul F. Kelly Segal, LEAD ATTORNEY, Roitman & Coleman, Street Boston, MA.

For Charles Wright, Local Union No. 7, Defendants: Mickey Long Law, Offices of Mickey Long, Boston, MA; **[**2]** Stephanie R. Pratt, LEAD ATTORNEY, Burton E. Rosenthal, LEAD ATTORNEY, Mary T. Sullivan, LEAD ATTORNEY, Indira Talwani LEAD ATTORNEY, Segal, Roitman & Coleman, Boston, MA.

Judges: Richard G. Stearns, UNITED STATES DISTRICT JUDGE.

Opinion by: Richard G. Stearns

Opinion

[*473]

MEMORANDUM AND ORDER ON DEFENDANT LOCAL UNION NO. 7'S MOTION FOR SUMMARY JUDGMENT

March 30, 2007

STEARNS, D.J.

On December 2, 2004, six nonunion steel erector companies - American Steel Erectors, Inc., Ajax Construction Company, Inc., American Aerial Services, Inc., Bedford Ironworks, Inc., D.F.M. Industries, Inc., and Ronald Beauregard d/b/a Independent Welding ("nonunion companies" or "plaintiffs") - brought this antitrust Complaint against Local Union No. 7 of the International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers ("Union" or "Local 7"). [1] Plaintiffs allege that Local 7 conspired with the Building Trades Employers' Association of Boston and Eastern Massachusetts ("BTEA"), and various named and unnamed unionized construction companies, to injure or destroy the business of steel erector companies that do not hire members of Local 7.

[3]** At the heart of the alleged conspiracy is a Job Target Fund ("Fund") supported by dues paid by members of Local 7. Because of the labor-intensive nature of the construction industry, unionized employers are at a competitive disadvantage when bidding against "open shop" contractors on privately-funded projects. In the 1980's, unions representing the building and construction trades initiated a national program of funded job targeting to stanch the loss of jobs to nonunion shops. In the typical job targeting program, a union establishes a fund to which its members are required to contribute. The fund then offers to pay a subsidy to unionized employers bidding on projects "targeted" by the union. The subsidy is intended to make up the difference between a concessionary wage agreed to by the union and regular union scale. If the bid is successful, union workers on the job receive the union-scale wage, while the subsidized employer benefits from lower labor costs. [2] This is the model that Local 7 emulated in establishing the Fund. Plaintiffs recognize that the antitrust laws do not bar unions from offering incentives to employers to hire their members. Plaintiffs allege, however, that **[**4]** Local 7 goes a step further by administering the Fund "in a fashion that is inconsistent with State and Federal law, thereby exposing it[self] to antitrust liability." Plaintiffs' Opposition to Summary Judgment, at 2.

The Complaint alleges that the Union's activities relative to the Fund violate the Sherman Antitrust Act ("Sherman Act"), *15 U.S.C. §§ 1* and *2* (Counts I, II, and III), and the Labor Management and Relations Act ("LMRA"), *29 U.S.C. § 187* (Count IV). [3] On August 1, 2006, the Union **[*474]** filed a motion for summary judgment, arguing that its activities with regard to the Fund are protected by both the statutory and the nonstatutory labor antitrust exemptions. The Union further contends that the claim under the LMRA fails because of plaintiffs' inability **[**5]** to show that the Fund subsidies paid to employers constitute "threat[s], coerc[ion], or restraint[s]" in pursuit of an unlawful objective. The court heard oral argument on the Union's motion on December 14, 2006.

FACTUAL BACKGROUND

The material facts viewed in the light most favorable to plaintiffs are as follows. Local 7 represents iron workers employed by construction companies who are signatories to a master Collective Bargaining Agreement ("CBA")

[1] Plaintiffs had also named as defendants Charles Wright, the Union's former President and current Business Agent and Analyst, and the Steel Erection and Ornamental Iron Industry Advancement Fund. On March 29, 2005, plaintiffs voluntarily dismissed the Fund from the suit. On June 10, 2005, the court allowed Wright's motion to dismiss.

[2] *See* Herbert R. Northrup & Augustus T. White, *Subsidizing Contractors to Gain Employment: Construction Union "Job Targeting", 17 Berkeley J. Emp. & Lab. L. 62, 71 (1996)*.

[3] Plaintiffs also asserted state-law claims for tortious interference with advantageous contractual and economic relations (Counts V and VI), and violations of the Massachusetts Unfair Business Practices Act, *G.L. c. 93A* (Count VII). On February 6, 2006, the court dismissed the state-law claims as preempted by the LMRA.

negotiated between the Union and the BTEA. The plaintiffs are six open shop contractors who compete with BTEA members for steel erection work.

In or around 1990, Local 7 established the Fund to make the hiring of its members more attractive **[**6]** in geographical areas where union-scale wages and benefits undercut the ability of BTEA contractors to compete. In 1992, the members of Local 7 voted to adopt a check-off system under which employers would deduct Fund contributions from their paychecks. On November 1, 1993, Local 7 and the BTEA agreed to incorporate the check-off system into the CBA. [4] Under the CBA, a BTEA employer pays the worker's job targeting contribution directly to the Union, which deposits it into the Fund. [5] The Fund, in turn, distributes wage subsidies on a case-by-case basis to BTEA employers who successfully bid on targeted projects.

The largest Boston area construction **[**7]** projects employing structural steel workers are government-financed public works projects, including the "Big Dig," the Boston Harbor cleanup, and the renovation of the terminals and parking facilities at Logan Airport. Federally-funded construction projects are subject to the Davis-Bacon Act, 40 U.S.C. §§ 276a-276a-5. [6] **[**8]** The Davis-Bacon Act requires contractors working on construction projects financed in whole or in part with federal funds to pay workers no less than the wage that is determined by the Secretary of Labor "to be prevailing for the corresponding classes of laborers and mechanics on projects of a [similar] character." [7] *40 U.S.C. § 3142(b)*. The Act also bars the refunding of any portion of a worker's Davis-Bacon wages as a "kickback" to the employer, "regardless of any contractual relationship." *40 U.S.C. § 3142(c)(1)*. [8] Massachusetts **[*475]** has enacted a "Little Davis-Bacon Act" requiring that the "prevailing wage" be paid on state-subsidized construction projects. *See* *G.L. c. 149, § 26*.

DISCUSSION

The parties agree as to the applicable law. "Labor exemption from antitrust laws stems from both congressional and judicial recognition of the need to ensure that organized labor is able to operate effectively without fear of antitrust liability." [9] ***HN1***[] Labor unions are excluded from the operation of **[**9]** the antitrust laws by both a statutory and a nonstatutory exemption. The statutory labor exemption is derived from §§ 6 and 20 of the Clayton Act, *15 U.S.C. § 17*, *29 U.S.C. § 52*, and from the Norris-LaGuardia Act, *29 U.S.C. §§ 101-115*. *See* *Allied Int'l, Inc. v. Int'l Longshoremen's Ass'n, 640 F.2d 1368, 1379 (1st Cir. 1981)*. The history of the exemption begins in 1914 with the passage of the Clayton Act. *Section 6* of the Act declared that "[t]he labor of a human being is not a commodity or article of commerce . . . nor shall [labor] organizations, or the members thereof, be held or construed to be illegal

---

[4] Section 9 of the CBA states that "[i]t is agreed that the Working Dues Deduction of two percent (2%) of the total package plus .85 for a Market Recovery Program and .03 for the Political Action League will be withheld out of net pay for each and every hour paid."

[5] There is no dispute that the Union has exclusive control over the money deposited into the Fund.

[6] The Act's provisions were recodified in 2002 as *40 U.S.C. §§ 3141-3144*.

[7] The motives that led to the passage of the Davis-Bacon Act in 1931 were not entirely benign. The chief sponsor of the Act, Representative Robert L. Bacon of New York, introduced the antecedent of Davis-Bacon in 1927 with the stated purpose of preventing the loss of local unionized construction jobs to black workers migrating from the South. The Act has been the target of several repeal efforts and has been suspended on at least four occasions by four different Presidents during national emergencies.

[8] Davis-Bacon is supplemented by the Copeland Anti-Kickback Act of 1934, *18 U.S.C. § 874*, which makes it a federal crime for an employer "by force, intimidation, or threat . . . or by any other means whatsoever" to induce any employee into making a kickback.

[9] Michael Scheinkman, *Running Out of Bounds: Over-Extending the Labor Antitrust Exemption in Clarett v. National Football League,* *79 St. John's L. Rev. 733, 741 (2005)*.

combinations or conspiracies in restraint of trade, under the antitrust laws." 15 U.S.C. § 17. [10] Since the enactment of § 6, "it would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act." Apex Hosiery Co. v. Leader, 310 U.S. 469, 503, 60 S. Ct. 982, 84 L. Ed. 1311 (1940). **[**10]** In addition, the Clayton Act provides that no injunction shall issue "prohibit[ing] any person whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do . . . ." 29 U.S.C. § 52.

[11]** In 1932, Congress reaffirmed the statutory exemption in passing the Norris-LaGuardia Act. The Act repudiated the Supreme Court's holding in Duplex Printing Press Co. v. Deering, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349, 18 Ohio L. Rep. 366 (1921), that the Clayton Act's labor antitrust exemption did not immunize unions engaged in "illegal" activity. In 1935, Congress strengthened the exemption further in passing the (Wagner-Connery) National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169. The NLRA was intended to redress the "inequality of bargaining power" between employees and employers that "tends to aggravate recurrent business depressions, by depressing wage rates . . . and by preventing the stabilization of competitive wage rates and working conditions . . . ." *Id.* § 151. The NLRA guarantees the right of workers to organize unions, to bargain collectively, and to engage in coercive activity including strikes as a means of enforcing legitimate union demands. [11]

[*476]

[12]** This succession of labor-friendly statutes led to tension between federal ***antitrust law***, which seeks "to preserve business competition and to proscribe business monopolies," Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 809, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945), and federal labor law, which sanctions the elimination of "competition which is based on differences in labor standards," Apex Hosiery Co., 310 U.S. at 503, in order "to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining." Allen Bradley, 325 U.S. at 806. ***HN2***[] The Supreme Court in United States v. Hutcheson, 312 U.S. 219, 231, 61 S. Ct. 463, 85 L. Ed. 788 (1941), sought to reconcile these competing considerations by holding that the Sherman Act, § 20 of the Clayton Act, and the Norris-LaGuardia Act, should be read as a "harmonizing text" defining a comprehensive statutory labor exemption to the antitrust laws.

For the statutory labor exemption to apply, a union must act unilaterally in its own self-interest and not in combination with any non-labor party. [12] Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622-623, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975). **[**13]** As the First Circuit has explained,

> the Sherman Act does not proscribe concerted union activity "so long as [the] union acts in its self-interest and does not combine with non-labor groups." [Hutcheson, 312 U.S. at 232] . . . . While "the test to determine if a union's actions are in its 'self-interest' has not been precisely formulated," the principle . . . is that activities are in the self-interest of a labor organization "if they bear a reasonable relationship to a legitimate union interest."

---

[10] Congress passed the Clayton Act in response to the Supreme Court's decision in the Danbury Hatters' Case, Loewe v. Lawlor, 208 U.S. 274, 28 S. Ct. 301, 52 L. Ed. 488, 5 Ohio L. Rep. 617 (1908). In *Loewe,* the Court held that the actions of the United Hatters Union in publicizing a secondary boycott constituted an illegal restraint of trade under the Sherman Act. Compounding the injury, the Court held that individual members of the union could be held liable for treble damages under section 7 of the Sherman Act.

[11] In 1947, Congress enacted the Taft-Hartley Act, a package of amendments to the NLRA extending the Wagner-Connery Act prohibitions against unfair labor practices by employers to coercive union tactics such as jurisdictional strikes, secondary boycotts, and "common situs" picketing. The intent of the amendments was to redress a perceived imbalance of bargaining power between unions and employers and to crack down on corrupt practices by some labor leaders.

[12] The nonstatutory labor exemption protects unions from legal restraints that would otherwise inhibit the collective bargaining process. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 237, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996) (collective bargaining agreements almost by definition are "combinations in restraint of trade").

> Adams, Ray & Rosenberg v. William Morris Agency, 411 F. Supp. 403, 410 (C.D. Cal.1976). In particular, the labor exemption has been applied when the union acts to protect the wages, hours of employment, or other working conditions of its member-employees, objectives that are at the heart of national labor policy.

Allied Int'l, 640 F.2d at 1380 (some citations omitted).

[14]** The Union argues forcefully that the Fund's purpose of promoting the hiring of Local 7 members is manifestly in the Union's self-interest. ***HN3***[] "The Supreme Court has repeatedly held that the preservation of jobs is within the area of proper union concern. . . . Union activity having as its object the preservation of jobs for union members is not violative of the anti-trust laws." *Intercont'l Container Transp. Corp. v. New York Shipping Ass'n, 426 F.2d 884, 887 (2d Cir. 1970)*. *See also* *Manno Elec., Inc., 321 NLRB 278, 298 (1996)* (use of a job targeting program to "maintain the union wage scale . . . and obtain work for its members" is a legitimate union interest), *aff'd per curiam mem., 127 F.3d 34 (5th Cir. 1997)* (Table).

Plaintiffs do not contest the proposition that job targeting serves a legitimate interest of the Union. Rather, plaintiffs contend that the check-off system, when it is applied to federally-funded projects, involves **[*477]** the Union in illegal activity. Plaintiffs insist that it cannot be in the Union's self-interest to unlawfully subvert the Davis-Bacon Act and other prevailing wage laws. Plaintiffs' argument is not a new **[**15]** one. It surfaced in 1988 in a petition brought by a contractors' association seeking a ruling from the Administrator of the Department of Labor (DOL) Wage and Hour Division that job targeting programs violate the Copeland Anti-Kickback Act. The Copeland Act argument was rejected, but the Administrator agreed that the deduction of job targeting fund contributions from Davis-Bacon wages violates both the Davis-Bacon Act and the DOL prevailing wage regulations. The dispute percolated its way through the federal courts, culminating in a decision by the D.C. Circuit affirming the Administrator. *See* *Bldg. and Constr. Trades Dep't. v. Reich, 309 U.S. App. D.C. 244, 40 F.3d 1275, 1283 (D.C. Cir. 1994)*. As plaintiffs point out, subsequent court decisions have adhered to the holding in *Reich. See* *Int'l Bhd. of Elec. Workers, Local 357 v. Brock, 68 F.3d 1194, 1198 (9th Cir. 1995)* (holding that the direct and voluntary payment of rebates of Davis-Bacon wages to a targeting fund is not permitted); *Can-Am Plumbing v. NLRB, 355 U.S. App. D.C. 160, 321 F.3d 145, 152 (D.C. Cir. 2003)* (affirming Board precedent holding that the deduction of job targeting fund contributions from Davis-Bacon wages **[**16]** is inimical to public policy).

Although plaintiffs devote a great deal of energy to their Davis-Bacon argument, it misses a fundamental point. Even assuming that plaintiffs have standing to object to a violation by the Union of the Davis-Bacon Act, [13] no cause of action under the Act is plead in the Complaint. Moreover, even if the check-off system violates Davis-Bacon (which given the holding in *Reich* would appear to be the case), the Union's allegedly illegal conduct is irrelevant to an antitrust analysis. ***HN4***[] As the Supreme Court observed in *Hutcheson,* "[s]o long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under *§ 20* [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." *312 U.S. at 232* (footnote omitted). In other words, the issue is not whether the Union's requirement that all members contribute to the Fund violates some law, but whether it violates the antitrust laws, which it does not.

[17]** With respect to the second prong of the statutory labor exemption, plaintiffs concede that the Fund was established by the unilateral action of the Union and not in combination with the BTEA. Plaintiffs argue, however, that because BTEA members are required by the master CBA to deduct contributions from workers' wages

[13] Plaintiffs rely on *McDaniel v. Univ. of Chicago, 548 F.2d 689, 695 (7th Cir. 1977)*, for the proposition that the Davis-Bacon Act creates a private right of action. The Union, relying on *United States v. Binghamton Constr. Co., 347 U.S. 171, 176-177, 74 S. Ct. 438, 98 L. Ed. 594 (1954)*, insists that only the Secretary of Labor can enforce the wage provisions of the Act, and in the specific instance of the Union's job targeting program, has declined to do so. Given the court's decision to allow summary judgment for the Union, this is not a matter that need be resolved, although I would be inclined to think that if there is a Davis-Bacon private right of action, only an aggrieved union member would have standing to bring suit. *Cf.* *NLRB v. Int'l Bhd. of Elec. Workers, Local 48 (Kingston Constr.), 345 F.3d 1049 (9th Cir. 2003)*. *See also* *64 Am. Jur. 2d Public Works and Contracts, § 222* (2007) (warning practitioners that the Davis-Bacon Act does not as a rule confer a private right of action).

irrespective of their source, they are for all **[*478]** practical purposes the agents of the Union in a horizontal conspiracy to violate the Davis-Bacon Act. Assuming that this is true, and assuming that such a conspiracy would in fact violate the antitrust laws, a BTEA employer's ministerial act of deducting and mailing a worker's job targeting contribution to the Union is simply too slender a reed on which to rest the nullification of a century of congressional policy exempting unions from the sanctions of the antitrust laws. [14] **[**18]** Because the court agrees that the Union's job targeting program is protected by the statutory labor exemption, the court will enter summary judgment in favor of the Union on Counts I, II, and III of the Complaint. [15]

Plaintiffs also allege that the **[**19]** Union's use of the Fund violates the LMRA, which prohibits a union from engaging in conduct designed to:

> ***HN6***[] threaten, coerce, or restrain any person engaged in commerce . . . where . . . [the] object thereof is --
> (A) forcing or requiring any employer . . . to join any labor or employer organization . . . .
> (B) forcing or requiring any person to . . . cease doing business with any other person . . . .

29 U.S.C. § 158(b)(4)(ii).

The Union argues that the decision taken through the Fund to grant or deny an employer subsidy does not constitute coercive conduct in the pursuit of an unlawful objective, as the LMRA requires. The court in *Grinnell Corp. v. Road Sprinkler Fitters Local Union No. 669, 1997 U.S. Dist. LEXIS 7897, 1997 WL 311498, at *14 (D. Md. June 3, 1997)*, *aff'd, 133 F.3d 914 (4th Cir. 1998)* (Table), held in an analogous case that:

> the withdrawal of targeting did not constitute coercion but was a lawful bargaining strategy employed by the Union. Grinnell had been a principal user of targeting during the period of time when it had been permitted by the Union to participate in the program. The Union hoped that, **[**20]** by exercising its right to deny targeting to Grinnell, it could persuade this employer to accede to other **[*479]** demands which the Union was making during the bargaining sessions. Indeed, at one point during its negotiations with Grinnell, the Union even offered to reinstate targeting if Grinnell in turn would agree to certain of its other demands. When Grinnell decided not to accept these proposals, it remained excluded from targeting. In the absence of proof of coercion or threats, defendants' conduct did not constitute an unfair labor practice.

The same is true here. There is nothing in the record to support plaintiffs' assertion that the Union resorted to coercive restraints or tactics. ***HN7***[] The Union did no more than hold out the Fund as an incentive to employers

---

[14] As an alternative theory, plaintiffs allege that the Union is the instigator of a "rimless wheel conspiracy" with individual BTEA members. As plaintiffs envision it, the Union stands at the hub of a conspiratorial wheel with spokes radiating to the BTEA contractors on its perimeter. ***HN5***[] "A rimless wheel conspiracy is one in which various defendants enter into separate agreements with a common defendant, but where the defendants have no connection with one another, other than the common defendant's involvement in each transaction." *Dickson v. Microsoft Corp., 309 F.3d 193, 203 (4th Cir. 2002)*, citing *Kotteakos v. United States, 328 U.S. 750, 755, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)*. While the imagery of a spoked but rimless wheel is quite vivid, the object of the alleged "rimless wheel" conspiracy is no different than that of the horizontal conspiracy, and therefore no more a violation of the antitrust laws, whatever other laws might be implicated.

[15] The Union argues that even if its conduct is not shielded by the statutory labor exemption, it falls within the nonstatutory exemption, which protects conduct conducive to the lawful functioning of the collective bargaining process. *Brown, 518 U.S. at 236*. The Union correctly points out that the plaintiffs' argument in opposition, which relies on *Mathiowetz Constr. Co. v. Minn. Dep't of Transp., 2002 U.S. Dist. LEXIS 3389, 2002 WL 334394 (D. Minn. Feb. 27, 2002)*, is somewhat shaky as *Machiowetz* relied on *Mackey v. Nat'l Football League, 543 F.2d 606 (8th Cir. 1976)*, the holding of which the Supreme Court substantially undercut in *Brown. See, e.g., Clarett v. Nat'l Football League, 369 F.3d 124, 133-134 & n.14 (2d Cir. 2004)*. Because the court agrees that the Union's activities with respect to the Fund are insulated from the antitrust laws by the statutory labor exemption, there is no need to decide definitively whether the nonstatutory exemption also applies (although the Union makes a persuasive case that it does).

to hire its members. [16] This is not an improper objective under the LMRA. *Manno Elec., Inc., 321 NLRB at 298*. Consequently, the Union's motion for summary judgment on Count IV will also be allowed.

[21]** *ORDER*

For the foregoing reasons, Local 7's motion for summary judgment is *ALLOWED* as to all remaining counts of the Complaint. The Clerk will enter judgment for the Union and the case will be closed.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE

End of Document

[16] The court does not read the Complaint, despite its prolixity, to allege an alternative "cease doing business" violation of the LMRA.

Fox Hollow of Turlock Owners' Ass'n v. Sinclair

United States District Court for the Eastern District of California

March 30, 2007, Decided ; March 30, 2007, Filed

1:03-CV-05439 OWW DLB

Reporter
2007 U.S. Dist. LEXIS 27762 *; 2007 WL 987873

FOX HOLLOW OF TURLOCK OWNERS' ASSOCIATION, et al., Plaintiff, v. RICHARD SINCLAIR, et al., Defendants; AND OTHER CONSOLIDATED ACTIONS.

Subsequent History: Motion to strike granted by, Motion denied by *Fox Hollow of Turlock Owners' Ass'n v. Sinclair, 2007 U.S. Dist. LEXIS 44148 (E.D. Cal., June 4, 2007)*

Costs and fees proceeding at *Sinclair v. Katakis, 2013 Cal. App. Unpub. LEXIS 502 (Cal. App. 5th Dist., Jan. 23, 2013)*

Related proceeding at *Katakis v. Sinclair (In re Sinclair), 2015 Bankr. LEXIS 1957 (Bankr. E.D. Cal., June 15, 2015)*

Related proceeding at *Flake v. Neumiller & Beardslee, 9 Cal. App. 5th 223, 215 Cal. Rptr. 3d 277, 2017 Cal. App. LEXIS 182 (Jan. 31, 2017)*

Core Terms

cause of action, trust deed, alleges, Lenders, definite statement, Garage, second amended complaint, mutual mistake, deposits, lease, rents, motion to strike, grounds, unfair, racketeering activity, reformation, subdivision, fraudulent, unfair competition, constitutes, refinancing, accounting, collateral, enterprise, parties, amend, deeds

Counsel: [*1] Richard - Sinclair, Plaintiff, Pro se, Oakdale, CA.

Brandon Sinclair, Plaintiff, Pro se, Oakdale, CA.

Gregory Mauchley, Plaintiff, Pro se, Oakdale, CA.

Mauctrst LLC, Plaintiff, Pro se.

For California Equity Management Group Inc., Andrew Katakis, Fox Hollow of Turlock Owner's Association, Plaintiffs: Timothy Matthew Ryan, Ryan Firm, Anaheim, CA.

For Fox Hollow of Turlock Owners Association, a California Nonprofit Mutual Benefit Corporation, Defendant: Timothy Matthew Ryan, Ryan Firm, Anaheim, CA.

For Deborah Sinclair, Defendant: Richard C. Sinclair, LEAD ATTORNEY, Law Office of Richard C. Sinclair, Oakdale, CA.

For Richard - Sinclair, Defendant: Lisa Blanco Jimenez, Stockton, CA.

Stanley M. Flake, Trustee of the Capstone Trust, Plaintiff, Pro se, Oakdale, CA.

Lairtrust, LLC, Plaintiff, Pro se.

Capstone LLC, Pro se.

Judges: Oliver W. Wanger, UNITED STATES DISTRICT JUDGE.

Opinion by: Oliver W. Wanger

Opinion

ORDER (1) DENYING DEFENDANTS' MOTION TO STRIKE (247); (2) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR MORE DEFINITE STATEMENT (251); AND (3) REFERRING PENDING SANCTIONS MOTION TO MAGISTRATE JUDGE BECK (258).

I. INTRODUCTION

[*2] Defendants Mauctrst LLC, Capstone LLC, LairTrust LLC, Stanley Flake, as Trustee of Capstone Trust, Gregory Mauchley, Brandon Sinclair, and Richard Sinclair (collectively, "the Defendants") move to strike the Second Amended Complaint, filed by Plaintiff California Equity Management Group, Inc. ("CEMG") on August 26, 2005, for failure to comply with *Federal Rule of Civil Procedure Rule 15(a)*. The Defendants also move, under *Federal Rule of Civil Procedure 12(e)*, to require Plaintiff to more definitely state the First, Second, Third, Tenth, Thirteenth, Fifteenth, Nineteenth, Twentieth, Twenty-First, Twenty-Second, and Twenty-Third Causes of Action in the Second Amended Complaint.

II. MOTION TO STRIKE

A. Background.

On April 7, 2005, CEMG moved for permission to file a second amended complaint to allege new causes of action, and to support with new theories, causes of action already alleged. A May 24, 2005, order authorized amendment. (Doc. 147.) Counsel of record for both CEMG and Plaintiff Fox Hollow of Turlock Owners' Association ("the Association") filed a Second Amended Complaint **[*3]** the following day. (Doc. 149.) The caption inadvertently identified the Association as the filing party, not CEMG, as contemplated by the order of May 24.

The Defendants filed a Motion to Strike the Second Amended Complaint, on the grounds that the Association had not obtained leave to file it. The attorneys subsequently stipulated to correct the erroneous caption, and agreed that CEMG would file a Second Amended Complaint. An August 3, 2005, order gave CEMG until August 24, 2005, to file. (Doc. 244.)

CEMG, however, did not file its Second Amended Complaint until August 26, 2005. CEMG's counsel states that he was on vacation on August 24, and had left to his staff the task of filing the Second Amended Complaint, which they did not accomplish.

B. Legal Standard for Motion to Strike.

Federal Rule of Civil Procedure 15(a) reads, in relevant part:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any **[*4]** time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

(emphasis added).

Defendants argue that the district court's grant to CEMG of leave to amend expired with the expiration of the 15-day period allowed in its order, so that the late amendment was without leave and is without legal effect.

A pleading cannot be amended without leave of court or consent of the opposition, and where (as here) such leave or consent is required and not obtained, the amendment is a nullity. *See, e.g., United States ex rel. Mathews v. HealthSouth Corp., 332 F.3d 293, 296 (5th Cir. 2003)*; Wright, Miller & Kane, *Federal Practice and Procedure* § 1484. However, CEMG's Opposition to the Motion to Strike may fairly be considered a motion for the enlargement of the period within which to file the Second Amended Complaint.

In the Ninth Circuit, there is no rigid rule against allowing a late filing attributable to attorney negligence, particularly where no prejudice results. *Pincay v. Andrews, 389 F.3d 853, 860 (9th Cir. 2004)* **[*5]** (citing *Pioneer Inv. Serv. v. Brunswick Assoc. Ltd P'ship, 507 U.S. 380, 395 n. 14, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993))*. Rather, a district court entrusted with discretion to weigh the equitable factors enunciated by the Supreme Court in *Pioneer*. These include, "[1] the danger of prejudice to the [opposing party], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, [4] and whether the movant acted in good faith. *507 U.S. at 395*. Here, where there was no showing of any prejudice or bad faith and the delay was negligible(only three days), striking the complaint is not warranted.

The motion to strike is **DENIED.**

III. MOTION FOR A MORE DEFINITE STATEMENT

A. Summary of the Motion.

The Second Amended Complaint alleges twenty-three separate causes of action. The Defendants request more definite statement of eleven of these.

CEMG's First, Second, and Third Causes of Action request equitable reformation of certain deeds of trust. The First Cause of Action alleges mutual mistake as the grounds for the request; the Second, unilateral **[*6]** mistake; and the Third, fraud. The Defendants claim that CEMG fails to plead fraud and mistake with particularity.

California Business and Professional Code § 17200 ("Unfair competition; prohibited activities") forms the basis for CEMG's Tenth, Thirteenth, and Fifteenth Causes of Action. The Defendants seek more definite statements of these claims on the grounds that in their present form the allegations do not specify whether the acts by which the Defendants allegedly violated a statute were unlawful, unfair, or fraudulent.

The Defendants argue that the Nineteenth Cause of Action, which alleges violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1961, et seq.*, does not plead racketeering activity with requisite particularity.

The Twentieth Cause of Action seeks an accounting of deposits and rents received. Defendants argue that the Plaintiff should be required to state the period for which it seeks an accounting.

Finally, Defendants claim that Causes of Action Twenty-One, Twenty-Two, and Twenty-Three -- for breach of contract, money had and received, and bad faith retention of security **[*7]** deposit, respectively -- fail to allege whether the contract is written or oral, and move the court upon this basis to require the Plaintiff to make them more definite.

B. Motion for a More Definite Statement as to the First, Second, and Third Causes of Action.

1. Overview of the First, Second, and Third Causes of Action.

CEMG alleges that, in the course of developing the Fox Hollow subdivision ("Fox Hollow," or "the subdivision"), the Defendants sought refinancing for certain loan obligations which were secured by deeds of trust on each lot of the subdivision. (Second Amended Complaint ("SAC") P 42.) The lots were appraised as part of the refinancing process, and the values assigned were based in large measure on the assumption that each unit would have access or legal right to at least one garage appurtenant to the lot on which the unit was located. (SAC P 43.) Most of Fox Hollow's twenty lots featured a garage for each housing unit. For Lots 2, 6, 7, 8, 9, 10, and 18, there was also one garage sited on a second lot. (SAC P 36.) The Defendants secured refinancing on the lots, and deeds of trust were drafted. The "Garage Lots," identified as Lots 2A, **[*8]** 6A, etc., however, were not mentioned in the trust deeds, despite the fact that their corresponding housing-unit lots' appraisal values depended on access to the garages.

The Defendants later defaulted on their loans, and the lenders foreclosed upon the Fox Hollow lots, including Lots 2, 6, 7, 8, 9, 10, and 18. (SAC P 50.) After purchasing the lenders' rights to the lots at a foreclosure sale, CEMG discovered that the deeds of trust did not encumber the Garage Lots, which were not collateral for the new loan. (SAC P 53.)

CEMG seeks equitable reformation of the trust deeds, as well as the deeds of conveyance, to include the Garage Lots. (SAC P 55.) CEMG advances three alternative legal theories in support the requested relief.

In its First Cause of Action, CEMG seeks reformation of the trust deeds on the grounds of mutual mistake. (SAC P 48.) Specifically, CEMG alleges that the lenders and the Defendants agreed and intended that the trust deeds should include the Garage Lots among the collateral for the prospective refinancing, that these lots were included in the original grant deeds for later individual lots after the subdivision was established, but that the title company **[*9]** to which they left the task of drafting the relevant conveyance and security documents omitted the Garage Lots from the legal description through error. (SAC PP 45-49.) Due to this clerical scrivener's error, the instruments do not reflect the true understanding of the parties. (SAC P 51.) In addition, CEMG alleges that "sometime after the Lenders' Deeds of Trust were executed and delivered to the Lenders, the Defendants. . .became aware of the mutual mistake regarding the legal description in such deeds of trust," and nonetheless "failed to notify the Lenders of the mutual mistake or to take any action to correct the error." (SAC P 54.) Finally, CEMG argues that the Defendants should be estopped from claiming that the trustee deeds and deeds of trust did not incorporate the Garage Lots into the collateral, on the grounds that the Defendants benefitted from the real property appraisals which included the Garage Lots, which facilitated refinancing. (SAC P 56.)

In its Second Cause of Action, CEMG seeks reformation of the trust deeds on the grounds of unilateral mistake with knowledge. (SAC PP 61-62.) CEMG alleges that the lenders drafted the deeds of trust, and each failed to include **[*10]** the Garage Lot or Lots as part of the collateral. (SAC P 61.) CEMG further alleges that the Defendants, "and each of them," knew of the lenders' mistake when the deeds of trust were executed, but failed to raise the issue. (SAC P 62.)

In its Third Cause of Action, CEMG seeks reformation of the trust deeds on the grounds of fraud, alleging that the Defendants actively misled the lenders into believing that the collateral for the trust deeds, as drafted, included the Garage Lots. (SAC P 65.)

2. Analysis of the First, Second and Third Causes of Action.

Federal Rule of Civil Procedure Rule 9(b) demands that, when allegations of fraud or mistake are made, the circumstances constituting the alleged fraud must be stated with "particularity." The allegations must be specific enough to give Defendants notice of what they are alleged to have done, so that they may defend against the accusations. *Concha v. London, 62 F.3d 1493, 1502 (9th Cir. 1995)*. [1]

[1] The Defendants point out that CEMG states these causes of action on information and belief only. Though it is true that CEMG avers its first three causes of action only on "information and belief," *see, e.g.,* SAC, PP 43, 47, this alone is not fatal to the complaint:

> Allegations of the circumstances of a fraud based on information and belief, which are commonplace and often a necessity in many litigation contexts, usually do not satisfy the particularity requirement of *Rule 9(b)*, unless accompanied by a statement of the facts upon which the pleader's belief is founded, but the application of the rule may be relaxed as to

[*11] Actions for the reformation of a contract is governed by *California Civil Code Section 3399*, which provides:

> When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value.

See also *Shupe v. Nelson, 254 Cal. App. 2d 693, 62 Cal. Rptr. 352 (1967)* (in action based on mistake, "aggrieved party" under *§ 3399* need not be an original party to transaction).

With respect to the First Cause of Action, which alleges mutual mistake on the part of the lenders, the Defendants, and a scrivener's error by the title company, the SAC does not allege that the responsibility for the scrivener's error lies with the Defendants or the lenders. [2] A mutual mistake occurs where both parties share the same factual misconception. *Sutter Youth Org., v. Borsen, 214 Cal. App. 2d 676, 680, 29 Cal. Rptr. 628 (1963)*. The claim for mutual mistake **[*12]** is sufficiently definite to enable the Defendants to frame a response. The motion for a more definite statement is **DENIED** as to the First Cause of Action.

The Second Cause of Action is for unilateral mistake, which requires that the plaintiff be mistaken and the other (non-mistaken) party to the instrument suspected or had knowledge of the mistake at the time the instrument was drawn up. *See* *Cal. Civ. Code § 3399*; *see* *Pac. State Bank v. Greene, 110 Cal. App. 4th 375, 389, 1 Cal. Rptr. 3d 739 (2003)*. At oral argument, the court erroneously observed that the second amended complaint fails to allege that the non-mistaken party to the original instrument had knowledge of the mistake. However, Paragraph 62 does allege that Defendants **[*13]** knew of the mistake at the time the deeds were executed. The motion for a more definite statement is **DENIED** as to the Second Cause of Action.

The Third Cause of Action is for reformation on the ground that the deed was executed as a result of fraud. Averments of fraud must be accompanied by the "who, what, when, where, and how" of the misconduct charged. A plaintiff must set forth more than the neutral facts necessary to identify the transaction. The plaintiff must set forth what is false or misleading about a statement, and why it is false. *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)* (citations and internal quotation marks omitted). Here, Plaintiffs allege that the "failure of the Lender Deeds of trust to contain a legal description of the Garage Lots resulted from the false representations of Defendants . . . to the Lenders that the Lender Deeds of Trust secured the Lenders against all of the property constituting the Lot or Lots on which they were securing loans, and the intentional omission of Defendants . . . to inform the Lenders that the Lenders Deeds of Trust were not secured against the Garage Lots." (SAC P 65.) This plainly describes **[*14]** the nature of the allegedly fraudulent representations and omissions, putting Defendants on notice of "what is false or misleading" and "why it is false." Plaintiffs further allege that the false representations and omissions were knowingly and intentionally made by Defendants "in that Defendants were the original owners of the Fox Hollow Subdivision." (*Id.* at P 66.) This sufficiently describes who made was involved in the alleged fraud. The motion for a more definite statement as to the Third Cause of Action is **DENIED.**

C. <u>Motion For a More Definite Statement as to the Tenth, Thirteenth, and Fifteenth Causes of Action.</u>

1. Summary of the Tenth, Thirteenth, and Fifteenth Causes of Action.

> matters peculiarly within the opposing party's knowledge that the pleader is not privy to at the time the document is being drafted.

5A Wright & Miller, Federal Practice and Procedure: Civil 3d § 1298.

[2] This necessarily implicates that title company, which is not a party to this lawsuit. The title company, potentially responsible party, is not identified. It is hard to understand how the Plaintiff has not ascertained the identity of the title company.

CEMB alleges that it acquired fee simple title to lots 11 and 18 of the subdivision from the GMAC Mortgage Corporation ("GMAC"). (*See* SAC P 25.) These lots (the "GMAC Lots") "were subject to valid and enforceable written residential lease agreements (the 'GMAC Leases')." (SAC P 82.)

CEMG alleges that the Defendants intentionally interfered with CEMG's rights under these leases by (a) representing to the tenants of the GMAC Lots that Defendants "were the owners **[*15]** of such lots and were entitled to the deposits and rents under the GMAC Leases," and (b) collected rents from the tenants under the GMAC Leases after the date on which title was transferred to Plaintiff and continuing through the present time. (SAC P 84, Eighth Cause of Action.) CEMG claims that the Defendants' collection of deposits and rents also constitutes conversion. (SAC P 87, Ninth Cause of Action.)

The Tenth Cause of Action alleges that the false representations and conversion of deposits and rents constitute an "unfair trade practice" under *Business and Professions Code Section 17200*. (SAC P 91.)

In the Eleventh and Twelfth Causes of Action, which are not challenged here, CEMG alleges that the Defendants intentionally interfered in a similar manner with its lot 7 lease (SAC PP 92-99), and converted to their own use the rents due to it thereunder (SAC PP 100-102), respectively. The Thirteenth Cause of Action alleges that this intentional interference with contract and conversion constitutes an unfair trade practice under *§ 17200*. (SAC PP 103-104.) The Fourteenth Cause of Action, which is not challenged here, alleges that the Defendants slandered title to certain Fox Hollow **[*16]** subdivision lots. (SAC PP 105-110.) The Fifteenth Cause of Action alleges that this slander constitutes an unfair trade practice under *§ 17200*. (SAC PP 111-112.)

2. Analysis of the Motion for a More Definite Statement as to the Tenth, Thirteenth, and Fifteenth Causes of Action.

California's unfair competition law ("UCL"), *Cal. Bus. & Prof. Code § 17200, et seq.*, prohibits "unfair competition" which is defined to "include any unlawful, unfair[,] or fraudulent business act or practice. . . ." "Because the statute is framed in the disjunctive, a business practice need only meet one of the three criteria to be considered unfair competition." *McKell v. Washington Mut. Inc., 142 Cal. App. 4th 1457, 1471, 49 Cal. Rptr. 3d 227 (2006)*.

The purpose of the UCL "is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." *Kasky v. Nike, Inc., 27 Cal. 4th 939, 949, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002)*. The scope of the statute is broad, including "anything that can properly be called a business practice and that at the same time is forbidden by law." *Perfect 10, Inc. v. CCBill, LLC, 340 F. Supp. 2d 1077, 1108 (C.D. Cal. 2004).* **[*17]**

"Although the unfair competition law's scope is sweeping, it is not unlimited." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 182, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. Its purpose is to permit courts to enjoin on-going wrongful business conduct to enable courts to "deal with innumerable new schemes which the fertility of man's invention would contrive." *Cel-Tech Communications, 20 Cal. 4th at 181 (1999)*(emphasizing the fact that *§ 17200* is an equitable remedy). With this in mind, the California Supreme Court has narrowed the definition of the term "unfair" to mean "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id. at 187*. However, *Cel-Tech* did not narrow the term "unlawful," *see* *Kearney v. Salomon Smith Barney, Inc., 39 Cal. 4th 95, 131, 45 Cal. Rptr. 3d 730, 137 P.3d 914 (2006)*. "Unlawful" acts or practices include any which are "forbidden by law, be it civil or criminal, federal, state or municipal, statutory, regulatory, or court-made. **[*18]** " *Saunders v. Superior Court, 27 Cal. App. 4th 832, 838-39, 33 Cal. Rptr. 2d 438 (1994)*. Nor did *Cel-Tech* address or narrow the term "fraudulent." *See* *Cel-Tech, 20 Cal. 4th at 187 n.12* (acknowledging that the holding does not apply to allegations of fraudulent or unlawful business practices). However, the second amended complaint does not explain whether Plaintiffs are alleging an "unfair" business act or practice, [3] an "unlawful" one or a "fraudulent" one.

Remedies under the UCL are limited injunctive relief or restitution. *Valdez v. Himmelfarb, 144 Cal. App. 4th 1261, 1267, 51 Cal. Rptr. 3d 195 (2006)*. The complaint is also unclear as to the remedies sought by these claims.

The motion for a more definite statement as to the Tenth, Thirteenth and Fifteenth Claims is **GRANTED,** but Plaintiffs are reminded that *Federal Rule of Civil Procedure 11* **[*19]** requires good-faith bases for these claims to be re-alleged.

D. <u>The Nineteenth Cause of Action.</u>

CEMG has conceded that its Nineteenth Cause of Action, which alleges a civil RICO claim, needs to be stated more definitely. Defendants' motion is **GRANTED** as to this cause of action.

In re-pleading this cause of action, CEMG must meet RICO's civil action requirements. A RICO civil complaint must at least allege: (1) that a 'person' within the scope of the statute (2) has utilized a 'pattern of racketeering activity' or the proceeds thereof (3) to infiltrate an interstate 'enterprise' (4) by (a) investing the income derived from the pattern of racketeering activity in the enterprise; (b) acquiring or maintaining an interest in the enterprise through the pattern of racketeering activity; (c) conducting the affairs of the enterprise through the pattern of racketeering activity; or (d) conspiring to commit any of the above acts. *18 U.S.C. § 1962*. A plaintiff in a private, civil RICO action must also allege that he was injured in his business or property 'by reason of one of the foregoing. *18 U.S.C. § 1964[c]*. The racketeering **[*20]** enterprise must be separate from the racketeering acts or activity. *Chang v. Chen, 80 F.3d 1293, 1298-99 (9th Cir. 1996)*.

Section 1961 enumerates acts which are each considered to be acts of "racketeering activity" and which, in RICO parlance, are often called the "predicate acts." The most important predicate acts for RICO violation are: (1) "any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in *Section 102 of the Controlled Substances Act*), which is chargeable under State Law and punishable by imprisonment for more than one year;" (2) any of more than twenty types of conduct indictable under enumerated provisions of the United States Code, ranging from mail fraud and wire fraud, through robbery and extortion, to white slave trade; or (3) any offense involving fraud "connected with" a bankruptcy case, "fraud in the sale of securities," or any act related to a controlled substance or listed chemical "punishable" under federal law. *18 U.S.C. § 1961*; *see generally* *Wagh v. Metris Direct, Inc., 363 F.3d 821 (9th Cir. 2003).* **[*21]** No such predicate acts are alleged in the complaint.

The motion for a more definite statement as to the Nineteenth Cause of Action is **GRANTED.**

E. <u>The Twentieth Cause of Action.</u>

The Twentieth Cause of Action seeks an accounting of deposits and rents paid. However, CEMG specifies neither the period for which it seeks the accounting, nor if it seeks an accounting of any sums more than deposits taken and the amount of rents paid under leases. Defendants are entitled to be apprised of what must be accounted for and for what period. The motion for a more definite statement is **GRANTED** with regard to the Twentieth Cause of Action.

F. <u>The Twenty-First, Twenty-Second, and Twenty-Third Causes of Action.</u>

The Twenty-First, Twenty-Second, and Twenty-Third Causes of Action are for breach of contract, money had and received, and bad faith retention of tenants' security deposits. Defendants seek more definite statements of these

---

[3] A single act of misconduct may form the basis of a UCL suit. *Madrid v. Perot Systems Corp., 130 Cal. App. 4th 440, 464, 30 Cal. Rptr. 3d 210 (2005)*.

causes of action on the grounds that CEMG fails to allege whether the contracts upon which the causes of action are based are oral or written.

CEMG responds by referring the court to the Eighth, Tenth, and Eleventh Causes of Action, **[*22]** which, according to CEMG, "each allege written residential lease agreements." Mem. in Opp. at 9. The lots described in those claims are not the same as those alleged in the Twenty-First through Twenty-Third causes of action.

The Defendants' motion with regard to these causes of action is **GRANTED.** Plaintiffs shall re-plead the Twenty-First, Twenty-Second, and Twenty-Third causes of action in a manner that indicates the nature of the contract at issue.

VI. CONCLUSION

For the reasons set forth above:

(1) Defendants' motion to strike is **DENIED.**

(2) Defendants' motion for a more definite statement is **GRANTED IN PART AND DENIED IN PART.** The motion is **DENIED** as to the First, Second, and Third Causes of Action, and **GRANTED** as to the Tenth, Thirteenth, Fifteenth, Nineteenth, Twentieth, Twenty-First, Twenty-Second, and Twenty-Third Causes of Action.

(3) As indicated during oral argument, the still-pending motion to amend/correct a prior sanctions order (Doc. 258) is referred back to Magistrate Judge Dennis L. Beck, who issued the original sanctions order. If the parties are mutually satisfied that there is no further need for this motion **[*23]** to be heard, they are instructed to file a stipulation taking the motion off calendar.

IT IS SO ORDERED.

Dated: March 30, 2007

/s/ **Oliver W. Wanger**

UNITED STATES DISTRICT JUDGE

Jim Hood ex rel. Miss. v. Microsoft Corp.

Chancery Court of Mississippi, Hinds County

March 30, 2007, Decided; March 30, 2007, Filed

CIVIL ACTION NO. G2004-1542 O/3

Reporter
2007 Miss. Trial Order LEXIS 1 *

JIM HOOD, ATTORNEY GENERAL ex rel. STATE OF MISSISSIPPI, PLAINTIFF v. MICROSOFT CORPORATION, DEFENDANT

Core Terms

pleadings, summary judgment, unfair, parens patriae, Antitrust, antitrust claim, damages, standing to bring, trade practice

Judges: **[*1]** CHANCELLOR DENISE OWENS.

Opinion by: DENISE OWENS

Opinion

ORDER

THIS MATTER is before the Court on the Motion for Judgment on the Pleadings or, in the alternative, Motion for Summary Judgment filed by Defendant Microsoft Corporation. Having heard arguments on the matter and all premises considered, this Court finds that Defendant's Motion for Summary Judgment is partially well taken and the certain relief requested shall be GRANTED. Any and all other relief requested shall be DENIED. The Court further finds as follows:

Statement of Facts

This action involves a Complaint filed by Jim Hood, Attorney General for the State of Mississippi (hereinafter "Plaintiff"), against Defendant Microsoft Corporation (hereinafter "Defendant"). The Attorney General brings this action on behalf of the State of Mississippi and also as *parens patriae* for citizens of the State of Mississippi who have purchased Defendant's products. Plaintiff seeks relief under the Mississippi Antitrust Act, *Miss. Code Ann. § 75-21-1* and *75-21-3* and the Mississippi Consumer Protection Act, *Miss. Code Ann. § 75-24-1 et seq.* Microsoft sought to remove this action to the United States District Court for the Southern District of Mississippi, but the action was remanded back to this Court.

Defendant Microsoft is a supplier **[*2]** of computer software for personal computers. The Complaint basically alleges that Microsoft, through a series of illegally anti-competitive actions, all of which rook place outside the State of Mississippi, has sold personal computer software within the State of Mississippi at inflated, monopolistic prices. Defendant Microsoft has filed a Motion for Judgments on the Pleadings pursuant to *Rule 12 (c) of the Mississippi Rules of Civil Procedure* alleging that all of Plaintiffs claims as pled fail as a matter of law. Defendant also moves for

Summary Judgment pursuant to *Rule 56 (c)* alleging the Plaintiff's claims are barred by the doctrine of unclean hands.

Legal Analysis

Rule 12(c) states that "after the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If . . . matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in *Rule 56*, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion by *Rule 56* . . ." *M.R.C.P. 12(c)*. *Rule 56(c) of the Mississippi Rules of Civil Procedure* provides that summary judgment shall be granted by a court if "the pleadings, depositions, answers to interrogatories and admissions on file, together with **[*3]** affidavits, if any, show that there is no genuine issue as to any material fact. . . ." *M.R.C.P. 56(c)*. "[w]hen looking at the grant or denial of summary judgment, this Court, as well as the trial court, considers *all* evidentiary matters before it--admissions in pleadings, answers to interrogatories, depositions, affidavits, etc." *Rein v. Benchmark Const. Co., 865 So.2d 1134, 1142 (Miss. 2004)*. In *Rein v. Benchmark Const. Co.*, the Court held that because the trial court made its decision after reviewing the complaint, answer and motion to dismiss, the response to the motion to dismiss and the accompanying exhibits, its decision is properly labeled a summary judgment. *Id.* The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If in this view the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise the motion should be denied. *Martin v. Simmons, 571 So. 2d 254, 258 (Miss. 1990)*.

State Antitrust Claims

Defendant Microsoft asserts that Plaintiff's antitrust claim must fail because at the time of the enactment of the Mississippi Antitrust Act in 1900, rulings of the United States Supreme Court had held that states could only regulate intrastate commerce and not interstate commerce. Pursuant **[*4]** to these rulings, the Mississippi Supreme Court in *Standard Oil of Kentucky, ex rel. Attorney General, 65 So.2d 468 (Miss. 1914)* held that to be regulated under Mississippi's antitrust laws, there had to be intrastate acts taken by the alleged monopolist. *Standard Oil of Kentucky* also held that wrongful acts wholly taking place out of Mississippi would not support jurisdiction of Mississippi to prosecute under its own ***antitrust law*** where the only contacts with the state were monopolistic sales within the state. Defendant argues that *Mississippi State Tax Commission v. Brown, 193 So. 794 (Miss.1940)*, requires that under Mississippi law a statute has to be construed in accordance with the legislature's constitutional powers at the time the statute was enacted.

The Court does not find Defendant's argument on this point to be well taken. While enacting the Mississippi Antitrust Act, the legislature specifically provided that "this chapter shall be liberally construed in all courts to the end that trusts and combines may be suppressed, and the benefits arising from competition and business preserved to the people of this state." *Miss. Code Ann. § 75-21-39*. This Court concludes that it was the intent of the legislature at the time of the enactment of the Mississippi Antitrust Act that the Act be construed as broadly as possible, consistent, of course, with **[*5]** constitutional restrictions. As those constitutional restrictions have been liberalized through the ensuing 100 years, the scope of the act is to be liberally construed to reach the limits of constitutionality. Defendant's Motion for Judgment on the Pleadings on this point is denied.

Defendant also asserts that the Attorney General has no *parens patriae* standing to bring the antitrust claims pled in the Complaint on behalf of the individual citizens of the State of Mississippi. The *parens patriae* doctrine allows a state to bring an action on behalf of its citizens. This doctrine is limited; however, a state cannot attempt to pursue the interest of a private party only for the sake of the interest of the private party. To assert *parens patriae* standing, the state must articulate a quasi-sovereign interest, "that is, some set of interests that the state has in the well-being of its citizens which is sufficiently concrete to create an actual controversy between the state and the defendant. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 601-602 (1982)*.

The only antitrust claim that this Court discerns in the Complaint is that the State of Mississippi seeks damages "for the injury suffered by the citizens of the State of Mississippi who purchased the **[*6]** Defendant's products at inflated prices." The Court believes this to be simply an attempt by the state to pursue the interest of private parties, which will not support *parens patriae* standing. *Id. at 602*. The State of Mississippi, of course, is entitled to pursue its own proprietary claims for damages it claims to have suffered as a result of the Defendant's alleged monopolistic practices, but as the Complaint now reads, the State has no standing to pursue state antitrust claims on behalf of Mississippi citizens who purchased Microsoft's products.

Consumer Protection Act

This Court finds that the Complaint does not state a claim under the unfair methods of competition and unfair and deceptive trade practices enumerated in *Miss. Code Ann. § 75-24-5 (2)*. The Court finds no such allegations in the Complaint.

The Court finds that the Attorney General does have statutory standing to bring an action under *Miss. Code Ann. § 75-24-5 (1)* for unfair methods of competition affecting commerce and unfair trade practices affecting commerce against the Defendant. An action may only be brought under *§ 75-24-5 (1)* and/or *§ 75-24-5 (9)* which specifically authorizes the Attorney General to bring an action in the name of the State for injunctive relief to restrain practices prohibited under *§ 75-24-5*.

The **[*7]** Court construes the additional relief authorized by *Miss. Code Ann. § 75-24-11* to be supplementary to *§ 75-24-9*. *Miss. Code Ann. § 75-24-11* authorizes the Court to make "such" additional orders or judgments, including restitution, as may be necessary to restore to any person in interest any monies or property, real or personal, which may be acquired by means of any practice prohibited by this chapter . . . ." The authorization of the Court to "make such additional orders or judgments" in *§ 75-24-11* comes immediately after the provision for injunctive relief and makes sense only in connection with the provision authorizing injunctive relief. The section for private actions for damages is entirely separate. *Miss. Code Ann. § 75-24-15*. The Court, therefore, finds that the Attorney General has statutory authority under *§ 75-24-9* to seek injunctive relief for violations of *§ 75-24-5 (1)* and seek restitution for any person who lost money or property by means of any practice prohibited by *§ 75-24-5 (1)*.

The Court further finds that the Attorney General is authorized to seek civil penalties for violations based on clear and convincing evidence of *§ 75-24-5 (1)*. *Miss. Code Ann. § 75-24-19 (b)* provides in pertinent part,

> In any action brought under *Section 75-24-9*, if the court finds from clear and convincing evidence, that a person knowingly and willfully used any unfair or deceptive **[*8]** trade practice, method or act prohibited by *Section 75-24-5*, the Attorney General, upon petition to the court, may recover on behalf of the state a civil penalty in a sum not to exceed Ten Thousand Dollars ($ 10,000.00) per violation.

As set forth in *§ 75-24-19 (b)*, a civil penalty is available, if established by sufficient proof, for each violation.

Defendant's Other Contentions

The Court finds that Plaintiff has no *parens patriae standing* to bring a common law action for restitution/unjust enrichment as set forth in Count I of the Complaint. Any damages claimed by the State in its proprietary capacity could be recoverable, if proven but would not, in the Court's opinion, constitute restitution or enrichment damages.

Defendant asserts that the Attorney General is prevented from prosecuting this litigation because of the equitable doctrine of "unclean hands." The Attorney General's Office of Consumer Protection served for a brief period as mediator between Defendant and individual claimants represented by one of the lawyers now representing the Attorney General. There is a significant question in the Court's mind as to what extent the doctrine of unclean hands would apply to the State. If it does apply, the Court **[*9]** feels it would take an extreme situation, which does not exist here. The Court finds no "willful inequity" committed by the State or by the Attorney General. *O'Neill v. O'Neill, 551 So.2d 228, 233 (Miss. 1989)*. Defendant has shown no injury as a result of the alleged misconduct on the part of the Attorney General. *Rodeway Inns International. Inc. v. Amman Enterprises, Inc., 742 F.Supp 365 (Miss. 1990)*.

The Attorney General is charged with enforcing the laws of the State of Mississippi. The Attorney General's Office also supplies informal dispute settlement in consumer protection claims.

With respect to Defendant's Motion to Dismiss Plaintiff's count for civil conspiracy, the Court notes that Mississippi is a notice pleading state. Notice of the claim has properly been given. The Court is not going to dismiss the claim on the pleadings.

The Court also denies Defendant's statute of limitations claims. Under Mississippi law, the statute of limitations does not run against the State of Mississippi in accordance with *Miss. Code Ann. §15-1-51*.

Conclusion

The Court finds that the Plaintiff does have standing to bring claims for unfair methods and unfair trade practices pursuant to *Miss. Code Ann.§ 75-24-5 (1)* and *§ 75-24-9*. The Plaintiff is also authorized to pursue claims for additional relief pursuant to *Miss. Code Ann.§ 75-24-11* and § 7524-19. The Plaintiff may also assert claims for civil conspiracy as outlined in the **[*10]** Complaint. The Court further finds that the Plaintiff has no *parens patriae* standing to bring private parties' antitrust claims for damages and penalties as pled in its Complaint; therefore, Plaintiffs claims for damages and penalties pursuant to the Mississippi Antitrust Act are hereby dismissed. The Court also dismisses Plaintiff's claims asserting unfair methods of competition and deceptive trade practices pursuant to *Miss. Code Ann. § 75-24-5 (2)*.

Based on the foregoing reasons, the Court hereby finds that the Motion for Judgment on the Pleadings or in the alternative, Motion for Summary Judgment is partially well taken and certain relief requested shall be GRANTED. Any and all other relief requested shall be DENIED.

SO ORDERED and ADJUDGED this 30th day March, 2007.

/s/ Denise Owens

CHANCELLOR DENISE OWENS

End of Document

Stolfa v. Arnold Sales Co.

United States District Court for the Eastern District of New York

March 30, 2007, Decided; March 30, 2007, Filed

06-CV-2085 (JS)(WDW)

Reporter

2007 U.S. Dist. LEXIS 114969 *

PHILIP STOLFA, BRUCE MILLIGAN, JOHN ARTINO, THOMAS MASCOLA, JOHN AMENDOLARE, THOMAS ROCHE, and WILLIAM G. GANNON, Plaintiffs, - against - ARNOLD SALES COMPANY, INC., Defendant.

Core Terms

Distributor's, terminated, state-court, state court, cause of action, abstention, products, pricing, Clayton Act, breached, federal court, discriminatory, antitrust, covenant, factors, distribution agreement, chain store, proceedings, complains, Handheld, Shop, baked goods, Robinson-Patman Act, competitors, customers, injuries, dismissal with prejudice, motion to dismiss, punitive damages, good faith

Counsel: **[*1]** For Plaintiffs: David H. Besso, Esq., Long, Tuminello, Besso, Seligman & Werner, LLP, Bayshore, NY.

For Defendant: James J. Stricker, Esq., Kasowitz, Benson, Torres & Friedman LLP, New York, NY.

Judges: Joanna Seybert, United States District Judge.

Opinion by: Joanna Seybert

Opinion

MEMORANDUM AND ORDER

SEYBERT, District Judge,

INTRODUCTION

On May 4, 2006, Plaintiffs Philip Stolfa ("Stolfa"), Bruce Milligan ("Milligan"), John Artino ("Artino"), Thomas Mascola ("Mascola"), John Amendolare ("Amendolare"), Thomas Roche ("Roche"), and William G. Gannon ("Gannon") (collectively, "Plaintiffs") commenced this action against Arnold Sales Company, Inc. ("Defendant" or "Arnold"). The Complaint alleges thirty-two counts encompassing eight separate causes of action. Plaintiffs allege that Defendant (1) violated *Section 2* of the Clayton Antitrust Act, *15 U.S.C. § 15* ("Clayton Act"), as amended by the Robinson-Patman Price Discrimination Act, *15 U.S.C. §§ 13*, *13a* ("Robinson-Patman Act") (collectively, the "Acts"), through practices of discriminatory pricing; (2) violated *Section 2* of the Clayton Act through discriminatory offers of advertising discounts; (3) wrongfully terminated each of Stolfa's, Milligan's, Artino's, and Gannon's Distributor's Agreements; (4) unlawfully breached **[*2]** by failure to supply each of Stolfa's, Milligan's, Artino's, and Gannon's Distributor's Agreements; (5) breached the implied covenant of good faith and fair dealing with each of the seven

Plaintiffs; (6) terminated each of Plaintiff's distribution agreements on purely pretextual grounds; (7) tortiously interfered with each of Plaintiff's business relations; and (8) harmed, through its tortious actions, Plaintiffs and the general public to the extent that punitive damages should be awarded.

Presently pending before the Court is Defendant's motion to dismiss all but three of the thirty-two counts pursuant to *Federal Rules of Civil Procedure 12(b)(1)*, for lack of subject matter jurisdiction, and 12(b)(6), for failure to state a claim upon which relief may be granted. Defendant is not arguing at this time to dismiss the individualized breach of contract claims made by Stolfa, Milligan, and Artino (counts 3-5). For the reasons set forth herein, Defendant's motion to dismiss all but three of the thirty-two claims is GRANTED in part and DENIED in part. The request to dismiss Gannon's wrongful termination claim (sixth cause of action) is DENIED; the remaining claims Defendant sought to dismiss (causes of action 1, 2 and 7-32) are **[*3]** DISMISSED with prejudice.

BACKGROUND

Plaintiffs are independent distributors of Defendant's manufactured baked goods. (Compl. ¶ 15.) Each had independently entered into Distributor's Agreements with former wholesalers of Defendant, who was assigned the interest in the agreements, whereby each Plaintiff was assigned an exclusive territory in which he could sell and distribute Defendant's food items. (Id. ¶¶ 15-29.) Plaintiffs allege that Defendant's pricing and advertising policies violate federal ***antitrust law*** and further allege that Defendant unlawfully breached Plaintiffs' Distributor's Agreements in varied ways when it terminated each of their agreements.

The Distribution Process

Each Plaintiff delivered Defendant's baked goods along an exclusive route. (Id. ¶ 15.) These routes generally consist of two types of retail stores: "cash stores," which are smaller shops such as delicatessens and convenience stores, and "chain stores," which are businesses (usually supermarkets) having multiple locations throughout New York. (Id. ¶ 35.)

Plaintiffs (the distributors) obtained the Arnold products from the wholesaler on consignment, for which Plaintiffs were billed at a predetermined price. Plaintiffs, **[*4]** in turn, sold the products to the retail stores at a higher price, with the difference in price comprising Plaintiffs' compensation. (Id. ¶ 31.) While the cash stores would pay Plaintiffs upon delivery of the products, the chain stores paid the wholesalers directly. (Id. ¶ 35.) Any products not ultimately sold to the customers of the retail stores prior to the products' "sell by" date, would be taken back to the wholesaler by Plaintiffs. Both the retail stores and Plaintiffs would receive a credit for the price initially paid for the "stale" products. (Id. ¶ 32.)

Implementation Of Computerized System

Originally, each Plaintiff would document all sales made, prices charged, and all "stale" products removed on multi-paged, carbonized forms, of which copies would be given to Defendant and the retail stores, and Plaintiffs. (Id. ¶ 34.) Defendant would then use the information received to, among other things, settle the accounts of Plaintiffs and calculate their compensation. (Id. ¶ 33.)

In April 2000, Defendant decided to replace the carbonized, manual forms with handheld computers only with respect to distributions to chain stores. Defendant gave notice to its wholesalers, who in turn gave **[*5]** notice to Plaintiffs, that all distributors of Defendant's baked goods would be required to purchase or lease from Defendant a handheld computer system by June 9, 2000 for use with all chain store customers on Plaintiffs' routes. (Id. ¶¶ 37-38.) The computer had an initial purchase price of $6,000. (Id. ¶ 37.) Distributors were informed that failure to comply would be seen as an inability to fulfill their obligation to distribute Defendant's baked goods and would be deemed a breach of their Distributor's Agreements. (Id. ¶ 38.)

Plaintiffs were extremely displeased by this new requirement. Under the new system, prices of Defendant's goods would change daily and Plaintiffs, who had paid full price for the product, would be forced to sell that same product at a sale price set by the computer on any given day. (Id. ¶ 41.) According to Plaintiffs, under the previous billing system, Defendant credited the retail stores directly for any adjustment to the sales price and absorbed the lost profit; distributors were not affected. (Id. ¶ 42.) In addition, under the new system Plaintiffs would be required to submit documentation for credits based on mid-week sales. (Id. ¶ 42.) As a result, Plaintiffs **[*6]** allege that the handheld computer system would make it more difficult for them to earn profits and recapture credits owed to them by Defendant. (Id. ¶¶ 40-43.) Finally, they argue that the purchase itself was a financial hardship due to the high cost, which represented a significant percentage of their annual income. (Id. ¶ 40.)

Plaintiffs' State Court Actions

Plaintiffs determined, due to the negative impact that it would have upon their businesses, that the requirement to obtain a handheld computer was in violation of their Distributor's Agreements. (Id. ¶ 44.) Thereafter, Plaintiffs filed four separate actions in the Supreme Court of New York, County of Suffolk, in order to prevent Defendant from terminating their Distributor's Agreements due to an unwillingness to obtain the computer. (Id. ¶ 45.) These suits were consolidated and are collectively referred to as the "Handheld Litigation," which is still pending in state court.[1] Plaintiffs in the Handheld Litigation requested, and were granted, a preliminary injunction restraining Defendant from terminating their Distributor's Agreements. (Id. ¶ 45.)

Almost three years later, on February 9, 2004, the preliminary injunction was clarified; Defendant was still restricted from terminating the Distributor's Agreements based on a failure to obtain the computer but was allowed to terminate the agreements for other "for cause" reasons, as permitted by the Distributor's Agreements. (Id. ¶ 46.) Thereafter, Defendant began terminating each of Plaintiff's distribution agreements for reasons that Defendant contends were "for cause." (Id. ¶ 47.) Plaintiffs allege, however, that the reasons stated for the terminations were merely pretextual and used solely to avoid violating the narrow preliminary injunction. (Id. ¶ 47.) They therefore allege that these terminations were unlawful breaches of their Distributor's Agreements. (See id.)

Although Plaintiffs do not state it in their Complaint, it is important to note at the outset that Defendant contends that, in 2004, Plaintiffs Mascola, Amendolare, and Roche also filed additional individual lawsuits in New York Supreme Court, Suffolk County.[2] (Def.'s Mem. of Law 3-5.) These suits involve multiple causes of actions alleging that Defendant **[*8]** breached the Distributor's Agreements by terminating them. (Id.) The individual lawsuits are ongoing and should not be confused with the Handheld Litigation. Thereafter, in May 2006, the current Complaint was filed to recover damages related in various ways to Defendant's termination of each of the Plaintiff's Distributor's Agreements.

DISCUSSION

Defendant moves to dismiss all but three of the thirty-two counts. Although Defendant moves to dismiss pursuant to *Rules 12(b)(1)* and *12(b)(6)*, most of its arguments relate to Plaintiffs' failure to state a claim under which relief may

[1] The lawsuits, which were consolidated, were Cola v. Arnold Foods Company, Inc., Index No. 01-596; Baker v. H.J.S. Distributor's, Inc., Index No. 01-595; Roche v. Nature's **[*7]** Best Group, Inc., Index No. 01-483; Peligrini v. Nature's Best Group, Inc., Index No. 01-484. (Compl. ¶ 45 n.1.) Plaintiffs Roche, Mascola, Amendolare, Artino, Gannon, and Stolfa (among others) came together in Roche, Index No. 01-483, and Plaintiff Milligan is a plaintiff in Baker, Index No. 01-595. (Def.'s Mem. of Law 3-4.)

[2] Mascola v. Arnold Sales Company, Inc., Index No. 04-24003 (Sup. Ct., Suffolk County, N.Y.); Amendolare v. Arnold Sales Company, Inc., Index No. 04-21891 (Sup. Ct., Suffolk County, N.Y.); Roche v. Arnold Sales Company, Inc., Index No. 04-28898 (Sup. Ct., Suffolk County, N.Y.). (Def.'s Mem. of Law 4-5.)

be granted. The Court first sets forth the standards of review to be used and then analyzes each of the substantive issues involved.

I. Standard Of Review On Motion To Dismiss

A. *Rule 12(b)(1)*

In considering a motion to dismiss for lack of subject matter jurisdiction pursuant to *Rule 12(b)(1)*, the Court may consider affidavits and other materials beyond the pleadings to resolve jurisdictional questions. See *Robinson v. Gov't of Malaysia, 269 F.3d 133, 140 n.6 (2d Cir. 2001)*. Under *Rule 12(b)(1)*, the Court will deem true the factual allegations contained in the complaint. See *Jaghory v. New York State Dep't of Educ., 131 F.3d 326, 329 (2d Cir. 1997)*. When, however, there is a question involving federal **[*9]** jurisdiction, such jurisdiction must be shown affirmatively. See *Shipping Fin. Servs. Corp. v. Drakos, 140 F.3d 129, 131 (2d Cir. 1998)* (citing *Norton v. Larney, 266 U.S. 511, 515, 45 S. Ct. 145, 69 L. Ed. 413 (1925))*. Accordingly, the court will not draw references favorable to the party asserting jurisdiction. See id.

B. *Rule 12(b)(6)*

In reviewing a motion to dismiss under *Rule 12(b)(6)*, each fact alleged by the Plaintiff must be taken as true and all possible inferences should be viewed in favor of the pleader. See *Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir. 1993)*; see also *G-I Holdings, Inc. v. Baron & Budd, 238 F. Supp. 2d 521, 534 (S.D.N.Y. 2002)*. Further, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 746, 96 S. Ct. 1848, 48 L. Ed. 2d 338, (1976)*(quoting *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*. Additionally, Plaintiffs are not required to state specifics such as underlying legal theory or facts when they plead their initial claims. *Fed. R. Civ. P. 8(a)*; see also *Phillips v. Girdich, 408 F.3d 124, 130 (2d Cir. 2005)*.

The pleader is only required to demonstrate that she is entitled to relief and to give the opposing party "fair notice . . . of what the claim is and on what grounds it stands." *Twombly v. Bell Atl. Corp., 425 F.3d 99, 108 (2d Cir. 2005)*(internal quotations omitted). Finally, although there has been much debate, the Second Circuit recently reiterated that there are no heightened or more specific pleading standards demanded of pleaders in cases of antitrust violations. See id.

II. The Clayton Act Claims

It is with these **[*10]** lenient pleading standards squarely in mind that the Court first examines the Clayton Act claims presented by Plaintiffs. Plaintiffs allege that Defendants violated *Section 2* of the Clayton Anti-Trust Act, as amended by the Robinson-Patman Act. Although Plaintiffs do not specifically identify the provisions of the Robinson-Patman Act Defendant allegedly violated, it appears they are claiming violations of *Section 13* of the Robinson-Patman Act for discriminatory pricing and *Section 13(a)* of the Robinson-Patman Act for discriminatory offers of advertising discounts.

Defendant argues that Plaintiffs fail to state a claim upon which relief can be granted under the Acts because (1) Plaintiffs lack standing under the Acts, (2) Plaintiffs have failed to allege an anti-trust injury, (3) Plaintiffs have failed to allege that sales were made in interstate commerce, (4) the facts alleged are not specific as to any individual Plaintiff, and (5) Plaintiffs have failed to allege a prima facie case under *Section 13(a)* of the Robinson-Patman Act. Because the Court finds that Plaintiffs lack standing under the Acts, the Court will not analyze Defendant's remaining arguments with respect to the Acts.

A. Standing Requirements For Antitrust Actions **[*11]**

To determine who has standing to bring a private cause of action under the Robinson-Patman Act, the Court must look to *Section 4* of the Clayton Act. See *15 U.S.C. § 15*. When reading *Section 4* of the Clayton Act, it appears that even those indirectly injured by antitrust violations would have the standing necessary to file suit. Id.; see also

Schwimmer v. Sony Corp. of America, 637 F.2d 41, 46 (2d Cir. 1980). Courts have found, however, that the wide net cast by the Clayton Act is too broad and must therefore be limited in order to prevent speculative claims of antitrust injuries from being brought by remote participants. See *Schwimmer, 637 F.2d at 46*. As a result, only certain classes of individuals are given standing to claim injuries suffered due to antitrust violations.

As Plaintiff correctly points out, the Robinson-Patman Act allows remedies to be sought for three categories of "competitive injury." See *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, , 126 S. Ct. 860, 870, 163 L. Ed. 2d 663 (2006)*. The first category is primary-line injuries, which occur where predatory pricing decreases "competition at the level of the discriminating seller and its direct competitors." Id. The next category, secondary-line injuries, are injuries that negatively impact competition as among the discriminating seller's customers (i.e., favored and disfavored purchasers of the discriminatorily priced goods). Id. **[*12]** The last category, tertiary-line injuries, involve injuries to competition among customers of the favored and disfavored purchasers. See id. To put it simply, to fall within these classes, it is necessary that a plaintiff be the one "targeted" by the antitrust violations and, in turn, be within the target group intended by the statute to obtain relief.[3] *Schwimmer, 637 F.2d at 46-47*. This limitation on standing means that, on occasion, there will be injuries suffered due to antitrust violations that will not be redressed by the Acts.

B. Application Of The Standing Requirements

Although Plaintiffs set forth the three categories of injury to demonstrate the supposed "broad" nature of the Clayton Act, they fail to indicate into which class of potential litigants they fall. Thus, it is left to the Court to determine into which of the three classes, if any, Plaintiffs fall. When reviewing the pleadings, accepting all facts as true and drawing all inferences in a light most favorable to Plaintiffs, the Court finds that Plaintiffs do not have standing to go forth with their antitrust claims.

Plaintiffs stress that they must only plead a set of facts that may show a possibility of harming competition, and that a motion for dismissal should not be granted merely because it does not appear that Plaintiffs have a significant chance of winning. On this matter of law, they are correct. See *Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996)*. They must, however, allege facts to support their standing to bring federal antitrust claims.

1. Discriminatory Pricing Claims

Plaintiffs maintain that they are within the class of persons who should be protected by the Robinson-Patman Act because Defendant set prices for its goods to be purchased by Stop & Shop (and, in turn, to be sold to **[*14]** Stop & Shop's customers) substantially below those prices set for Stop & Shop's competitors (i.e., the cash stores), thereby creating a class of favored and disfavored purchasers. (Pls.' Opp'n 7-8.) Plaintiffs contend that this discriminatory pricing not only injured competition among Stop & Shop and its competitors, but it also harmed competition among the distributors of bakery products by diminishing profits realized on goods sold to Stop & Shop and its customers. (Id. at 7.) Defendant contends that because Plaintiffs are neither competitors of Arnold, competitors of Stop & Shop, nor customers of the favored or disfavored purchasers, they lack standing under the Acts. (Def.'s Mem. of Law in Supp. 6; Def.'s Reply 2.)

Plaintiffs clearly do not fall within the "primary-line injury" class because Plaintiffs are not direct competitors of Defendant. The correct party to file suit for a primary-line injury in this case would be manufacturers competing with

---

[3] The Court in Schwimmer went on to further illuminate the rationale behind creating standing "boundaries":

> Thus, it is recognized that treble damage actions, effective and attractive as they are in deterring violations of the federal antitrust laws, must have some boundaries. Consequently, the standing requirement is designed, in essence, to limit access to treble recovery to a target of the anticompetitive conduct. Thus, the standing rules exclude a non-target whose damages are more difficult to prove and, in all likelihood, highly speculative. Where, as here, the substantive law provides few 'bright lines' separating permissible from impermissible conduct, it is especially important to have clear standing rules in order to avoid abuses of the Clayton Act's private enforcement remedy. **[*13]**

Schwimmer, 637 F.2d at 46-47.

Defendant to place their own baked goods in as many stores as possible. Similarly, Plaintiffs do not come within the "tertiary-line injury" class, as that category includes injuries sustained by customers of the favored and unfavored purchasers. **[*15]** In the present case, the proper party to file suit claiming a "tertiary-line injury" would be the customers of the local delicatessen, who had to pay higher prices for Defendant's goods because the delicatessen was charged higher prices by Defendant.[4]

Plaintiffs also do not fall within the "secondary-line injury" class, as Plaintiffs are not the competitors of the purchasers receiving the favored pricing (i.e., Stop & Shop). Here, the correct party to claim a secondary-line injury would be competitors of the chain stores, such as local delicatessens, alleging that competition was injured due to discriminatory pricing that favored the chain stores.

The closest Plaintiffs come to clarifying into which group they fall, albeit not well, is when they state that "[b]y reason of this discriminatory pricing scheme, competition . . . between the distributors of bakery products to Stop & Shop and its competitors, is substantially lessened." (Pls.' Opp'n 7.) The only further explanation offered is that the discriminatory pricing caused the distributors to earn less profit on certain sales and that certain distributors realized diminished profits because they happened to have more Stop & Shop chain **[*16]** stores on their routes than other distributors.[5]

Although not exactly clear, the Court assumes that Plaintiffs are attempting to claim that they have viable antitrust claims due to an injury to competition among the Plaintiffs themselves. This argument, however, does not bring them within the "secondary-line injury" category. Plaintiffs have predetermined exclusive routes based on geographical area for delivering Defendant's baked goods. Regardless of how many chain stores or cash stores each Plaintiff has on his route, they are not competing with one another. In addition, it does not appear that they are in a position to compete for routes, as Defendant is not permitted to terminate a Distributor's Agreement simply to give it to a different distributor. Being that Plaintiffs have the exclusive right to deliver Defendant's products to the retail stores along their routes, competition among Plaintiffs cannot be viewed as being injured under any set of facts presented by Plaintiffs. They are not competing with each other.

Ultimately, this Court finds that Plaintiffs, under any interpretation of the facts presented, do not fall within any of the three categories. Thus, because **[*17]** Plaintiffs do not fit within any of the three classes carved out to be protected by the Acts, Plaintiffs lack standing to bring their discriminatory pricing claim, and such claim is DISMISSED with prejudice.

2. Discriminatory Promotional Allowances

Plaintiffs allege that Defendant violated ***antitrust law*** by making it more difficult for cash stores to receive discounts through the use of advertising displays. (Compl. ¶¶ 64-69.) Defendant offers retailers of their bread products what amounts to a 5% discount if they set up within their stores a display focused on Defendant's goods. (Compl. ¶ 65). Plaintiffs allege that because chain stores, but not cash stores, pay Defendant directly for Defendant's bread products, the chain stores are given the advertising discounts automatically, and without confirming the display.[6]

---

[4] As set forth above, Defendant's bread products are given to Plaintiffs on a consignment basis, meaning that there is no middleman in terms of ownership. (Compl. ¶ 31). In other words, Plaintiffs pick up the bread products and deliver it that day; they do not take ownership and do not incur added costs. Thus, in this case, since there is no true middleman, the customers of the cash stores, for example, would be able to sue if they were trying to compete in some form.

[5] Although not vital to deciding the antitrust issues in this case, it is worth noting that the purpose of our body of ***antitrust law***, from the Sherman Act and onward, is to protect competition itself, and in turn, consumers. The goal has never been to prevent a competitor from earning less profits in the face of furious competition, and it is also not concerned with any one, specific competitor thriving or not. It is competition itself that the law seeks to insulate. See, e.g. *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)* (relating that ***antitrust law*** is in place for "the protection of competition, not competitors").

[6] Like with the discriminatory pricing claim, it may be that the cash stores actually did suffer an antitrust injury. That issue, however, is not for this Court to decide.

(Compl. ¶¶ 66-68). There is no mechanism in place, however, under which cash stores are credited with the advertising discount.

The issue at hand is whether Plaintiffs, independent distributors of Defendant's baked goods, have the required standing to recover under the Clayton Act based on these potential violations. For the reasons discussed in Section II.A.1., supra, Plaintiffs **[*18]** lack standing to bring this claim. Once again, it appears that Plaintiffs seek to fit themselves within the "secondary-line injury" class, but the parties with standing in this category would be the owners of the cash stores, not Plaintiffs. Although Plaintiffs may have been indirectly injured by these alleged violations, it does not mean that they are automatically allowed to bring suit under the Clayton Act. Thus, because Plaintiffs lack standing, this Court DISMISSES Plaintiffs' Clayton Act claims (causes of action one and two) with prejudice.

III. Applying The Rooker-Feldman Doctrine To Gannon

Defendant next requests that all five individual claims[7] brought by Plaintiff William M. Gannon be dismissed under *Federal Rule of Civil Procedure 12(b)(1)* for lack of subject matter jurisdiction under the Rooker-Feldman doctrine. This doctrine has been understood as preventing the losing party in a state court action from turning around and filing the same suit in federal court. See, e.g., *Bridgewater Operating Corp. v. Feldstein, 346 F.3d 27, 29-30 (2d Cir. 2003)*. The Rooker-Feldman doctrine exists in order to protect the constitutional concept that only the United States Supreme Court, and not any federal court, has appellate jurisdiction to review final state-court decisions. See id.

Recently, the Supreme **[*19]** Court revisited the Rooker-Feldman doctrine in *Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005)*. In Exxon Mobil, the Supreme Court limited what it viewed to be a growing, unnecessary expansion of the applicability of the doctrine, stating: "The Rooker-Feldman doctrine . . . is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id. at 284*. This formulation effectively means the losing party is attempting to have the district court overturn a state-court decision. In these cases, the Rooker-Feldman doctrine applies and the federal court will dismiss for lack of subject matter jurisdiction. This rule applies even if the constitutional claims brought in federal court are not identical to, but are "inextricably intertwined" with, the claims that were originally rejected in state court. See *id. at 287 n.1* (quoting *District of Columbia Ct. of Appeals v. Feldman, 460 U.S. 462, 482 n.16, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983))*.

Plaintiffs argue that Rooker-Feldman is inapplicable because Gannon does not seek review of the constitutionality of the state court decision. Rather, Gannon seeks to assert distinct claims that accrued eight months **[*20]** after the state court decision was rendered. Defendant contends, however, that Rooker-Feldman bars Gannon's claims because Gannon essentially asks this Court to review the state court judgment dismissing Gannon's claims with prejudice. In fact, Defendant argues, Gannon seeks to hold Defendant liable for doing that which the state court determined Defendant had a right to do - terminate the Distributor's Agreement. (Def.'s Reply 5-6.)

This Court finds much guidance in the Second Circuit's decisions in McKithen v. Brown, No. 03-PR-0168, *2007 U.S. App. LEXIS 5763 (2d Cir. March 13, 2007)*, and *Hoblock v. Albany County Bd. of Elections, 422 F.3d 77 (2d Cir. 2005)*, both of which applied the Rooker-Felman doctrine as announced in Exxon Mobil. In Hoblock, the Second Circuit advised that, pursuant to Exxon Mobil, to determine whether Rooker-Feldman applies, there are four requirements that must be satisfied:

> First, the federal-court plaintiff must have lost in state court. Second, the plaintiff must complain of injuries caused by [a] state-court judgment. Third, the plaintiff must invit[e] district court review and rejection of [that] judgment[]. Fourth, the state-court judgment must have been rendered before the district court proceedings commenced . . . . The first and fourth of these requirements may be loosely **[*21]** termed procedural; the second and third may be termed substantive.

---

[7] These counts are for breach of contract due to wrongful termination, breach of contract, breach of the covenant of good faith and fair dealing, termination of distributorship on purely pretextual grounds, and tortious interference with business relations.

Hoblock, 422 F.3d at 85 (internal quotation marks and citation omitted and alteration in original).

In the present case, on January 11, 2005, Gannon's state-court claims were dismissed in their entirety "upon the application of the defendant, and upon consent of the plaintiff." (Aulivola Affirm. Ex. J.) Although Gannon does not raise the argument, the Court questions whether Gannon may be properly classified as a "state-court loser" where his claims were dismissed upon consent. Nevertheless, the federal action was commenced in May 2006; therefore, the fourth prong is clearly satisfied.

Assuming that the procedural requirements are satisfied, "the application of the Rooker-Feldman doctrine turns on whether the second and third 'substantive' requirements are met. McKithen, 2007 U.S. App. LEXIS 5763, at *18-19. The substantive requirements, "the Hoblock panel explained, can be reduced to the following statement: 'federal plaintiffs are not subject to the Rooker-Feldman bar unless they complain of an injury caused by a state judgment.'" (Id. at *19 (quoting Hoblock, 422 F.3d at 87) (emphasis in original).) The Second Circuit further explained that "[a] federal suit complains of injury from a state-court judgment, even if it **[*22]** appears to complain only of a third party's actions, when the third party's actions are produced by a state-court judgment and not simply ratified, acquiesced in, or left unpunished by it." Hoblock, 422 F.3d at 88. It follows, therefore, that when a plaintiff brings the same or similar claims in federal court seeking a result different from the one he received from state court, such plaintiff "does not, for that reason alone, run afoul of Rooker-Feldman." Id. at 87. Rather, "applicability of the Rooker-Feldman doctrine turns not on the similarity between a party's state-court and federal-court claims (which is, generally speaking, the focus of ordinary preclusion law), but rather on the causal relationship between the state-court judgment and the injury of which the party complains in federal court." McKithen, 2007 U.S. App. LEXIS 5763, at *20 (emphasis in original).

The McKithen court went on to hold Rooker-Feldman inapplicable to that case because McKithen sought redress for an injury that existed, in its exact form, prior to the state-court judgment. Therefore, the Second Circuit advised, "a party is not complaining of an injury 'caused by' a state-court judgment when the exact injury of which the party complains in federal court existed prior in time to **[*23]** the state-court proceedings, and so could not have been 'caused by' those proceedings. Id. at *21-22.

Gannon filed suit in state court as one of the plaintiffs in the Handheld Litigation seeking (1) a declaratory judgment interpreting both his and Defendant's legal rights as per the Distributor's Agreement, (2) a permanent injunction prohibiting Defendant from terminating his Distributor's Agreement and from asserting any rights under the Distributor's Agreement to Gannon's detriment, and (3) a declaratory judgment finding that Defendant was not entitled to require Gannon to acquire the computer. (See Aulivola Affirm. Ex. I at 26-27.) As noted above, Gannon's state-law claims were dismissed with prejudice on January 11, 2005. On or about July 28, 2005, Defendant terminated Gannon's Distributor's Agreement. (Compl. ¶ 92.)

It is not clear to the Court, however, that the injury of which Gannon complains - termination of the Distributor's Agreement - was caused by the state-court decision. First, while Defendant argues that the state-court decision permitted Defendant to terminate Gannon's Distributor's Agreement, it appears that dismissal of Gannon's state-court claims was with Gannon's consent, and **[*24]** the order does not discuss the merits of the underlying claims. (Def.'s Reply 6; Aulivola Affirm. Ex. J.) As such, this Court cannot comfortably conclude that the state court authorized the termination of Gannon's Distributor's Agreement. Second, the Handheld Litigation, other than Gannon's claims, remains pending and, yet, Defendant terminated each of the other Plaintiff's Distributor's Agreements as well. It seems, therefore, that the state court order did not necessarily cause the injury of which Gannon complains.

Accordingly, the Court DENIES Defendant's motion to dismiss Gannon's individual claims for lack of subject matter jurisdiction based on the Rooker-Feldman doctrine.

IV. Applying The Abstention Doctrine To Amedolare, Mascola, & Roche

Defendant next requests that this Court abstain from exercising jurisdiction regarding the litany of individual breach of contract claims brought by Plaintiffs Amedolare, Mascola, and Roche because these Plaintiffs already have substantially similar claims pending in state court. Defendant brings its request pursuant to the abstention doctrine enunciated in *Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)*. As all the parties agree, abstaining from exercising jurisdiction when it is properly **[*25]** before the Court is rarely practiced. "The doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89, 79 S. Ct. 1060, 3 L. Ed. 2d 1163 (1959)*.

Under Colorado River, a court may abstain from exercising its subject matter jurisdiction to "conserve federal judicial resources . . . where the resolution of existing concurrent statecourt litigation could result in comprehensive disposition of litigation." *Woodford v. Cmty. Action Agency of Greene County, Inc., 239 F.3d 517, 522 (2d Cir. 2001)* (internal quotations omitted). However, the Court in Colorado River also made clear that abstention is the "exception, not the rule" and is only proper in "exceptional circumstances." *Colorado River, 424 U.S. at 813*.

The Colorado River Court set forth a test for federal courts to employ when determining whether abstention is proper in light of a concurrent state-court action. This test involves balancing the following six factors: (1) assumption of jurisdiction over res; (2) inconvenience of the federal forum; (3) avoidance of piecemeal litigation; (4) order in which the actions were filed and whether proceedings are more advanced in one of the fora; (5) the law that provides the rule of decision; and (6) protection of the federal plaintiff's rights. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 15-16, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)*; *Colorado River, 424 U.S. at 818-19*; *Woodford, 239 F.3d at 522*; *De Cisneros v. Younger, 871 F.2d 305, 307 (2d Cir. 1989)*.

A. **[*26]** Parallel Proceedings

Defendant requests that the Court abstain from making any determination in this case and, instead, allow the issues to be resolved by the state court. Plaintiffs argue that the actions are not parallel and that abstention is inappropriate.

The Second Circuit has defined parallel proceedings with regard to abstention as proceedings where the parties' issues and relief sought are substantially the same. *Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Karp, 108 F.3d 17, 22 (2d Cir. 1997)*. Here, although Plaintiffs proclaim otherwise, the issues being pursued are essentially the same in both the state court and federal court actions. Although there are variations as to the damages sought and some claims are for allegedly unique breaches, upon closer analysis, the complaints are substantially the same.

In the individual state court actions, for example, each of Amedolare, Mascola, and Roche is suing for damages related to termination of his underlying Distributor's Agreements. (Stricker Aff. Exs. L, N, and O.) These Plaintiffs are seeking injunctive or, in the alternative, monetary relief in the state-court proceedings. (Id.) In this action, they are suing for damages related to the underlying termination of the Distributor's Agreements. In the state-court **[*27]** action, they allege a breach for failure to provide baked goods to Plaintiffs once the agreements were terminated. (Id.) In the instant action, they again speak of Defendant's failure to supply baked goods, but here Plaintiffs couch the claim in terms of "wrongful breach" and "breach of covenant of good faith and fair dealing." The amount of damages sought may be different, but that is not as telling as the fact that both the state and federal claims revolve around the same issue: whether Defendant properly terminated Plaintiffs' distribution agreements as and when it did. As such, the Court finds that this action and the pending state actions are parallel proceedings for the purposes of abstention.

B. Application Of The Colorado River Factors

Having determined that there are parallel state and federal actions, the Court will apply the Colorado River factors to determine whether or not abstention is appropriate in this case. In order for a court to abstain from the exercise of jurisdiction, all the factors do not have to be met and no one factor is determinative. Considerations include "both the obligation to exercise jurisdiction and the combination of factors counseling [sic] against **[*28]** that exercise." *Colorado River, 424 U.S. at 818-19*; see also *Moses H. Cone, 460 U.S. at 15-16* (holding that the Court "declined to prescribe a hard and fast rule for dismissals of this type . . . the decision whether to dismiss . . . does not rest on a mechanical checklist, but on a careful balancing of the important factors . . . ."); *Woodford, 239 F.3d at 522* (noting that "'[n]o one factor is necessarily determinative . . . [and] [o]nly the clearest of justifications will warrant dismissal'" (internal quotations and emphasis omitted)); De Cisneros, 871 F.2d at 307 (noting that "the Supreme Court admonishes that no single factor is necessarily decisive"). The analysis should be employed with caution as it is "heavily weighted in favor of the exercise of jurisdiction." Moses H. Cone, 460 U.S. at 16. As a result, when the Court examines each factor, a determination that the facts as they pertain to a particular factor are neutral, or do not favor abstention, shall weigh in favor of retention of jurisdiction. See, e.g., Woodford, 239 F.3d at 522 (citing Village of Westfield v. Welch's, 170 F.3d 116, 122 (2d Cir. 1999)("[W]ith respect to the first Colorado River factor, 'the absence of a res points toward exercise of federal jurisdiction.'").

All parties agree that both the first and second Colorado River factors are not relevant here. The first factor deals with res, which is not applicable here, and the second factor **[*29]** as well is not applicable because the federal venue is not less convenient for the parties.

The third factor, whether there is a risk of piecemeal litigation, very much concerns the Court in this case and weighs heavily in favor of abstention. As noted, both the state and federal claims revolve around the same issues: whether Defendant wrongfully terminated and breached the Distributor's Agreements. As such, the risk of piecemeal litigation and inconsistent judgments are great. If this court were to rule for Plaintiffs, hypothetically speaking, that would necessarily involve a determination that Defendant wrongfully terminated and breached the distribution agreements. If the state court rules in favor of Plaintiffs in the pending actions, it also would have to conclude that Defendant wrongfully terminated and breached the agreements. Therefore, the risk of incongruent and potentially contradictory rulings weighs on this Court in favor of abstention.

The fourth factor looks at which suit was filed first and the current stage of each proceeding. These issues have been argued in state court since Fall 2004. Defendant argues, and Plaintiffs do not dispute, that, since that time, there has **[*30]** been extensive discovery and motion practice. (Def.'s Mem. 16.) In fact, the individual state action brought by Mascola was scheduled for trial for September 2006. (Stricker Aff. Ex. M.) In contrast, the instant federal action was filed in May 2006. The action before this Court is in its infancy; discovery has not yet commenced and this motion is the first and only motion to be filed. The state court has been handling the individual actions for significantly longer than this Court and is much more familiar with the intricacies involved. There has been much discovery conducted, costs incurred, and time spent regarding the state-court actions. Therefore, the fourth factor also weighs in favor of abstention.

The fifth factor asks whether federal law or state law will provide the rule of decision on the merits. As Defendant points out, all the claims in the federal action, apart from the Clayton Act claims which have already been dismissed for lack of standing, are New York common law claims. Accordingly, New York law will govern the claims, regardless of the claim being brought in federal court. Therefore, the fifth factor also weighs in favor of abstention.

Finally, the sixth factor looks **[*31]** to allow Plaintiffs to bring their action in federal court if there is a fear that Plaintiffs' rights will not be adequately protected by the state court. In the present case, there is absolutely no fear of Plaintiffs' rights going unprotected. Plaintiffs are all New York residents and business owners and state law governs; surely the state court is capable of protecting their rights. Plaintiffs argue that because they are asserting different claims in this action, the rights they want protected via the present claims will not be protected by the state-court actions. As discussed in Section IV.A., supra, because the federal and state claims are in fact parallel, as they involve substantially the same issues and damages, this argument is unavailing. If the state court finds that Defendant wrongfully terminated the distribution agreements, Plaintiffs will recover what they are rightfully owed pursuant to the state-court decision. Therefore, the sixth factor as well weighs in favor of abstention.

Although two of the six Colorado River factors are not at issue, and, therefore, arguably point toward the exercise of jurisdiction, four of the six factors weigh heavily in favor of abstention. The risk of piecemeal **[*32]** litigation and inconsistent judgment, combined with the chronology and posture of the state-court actions, the fact that state law will be applied regardless of the forum, and that Plaintiffs' rights are well protected by the state court, coalesce to urge this Court to abstain from exercising its subject matter jurisdiction.

A similar scenario was seen in Telesco v. Telesco Fuel and Masons' Materials, Inc., 765 F.2d 356 (2d Cir. 1985). In Telesco, where the actions were "essentially the same," the cases had been in state court for a significant period of time already, with much in the way of hearings and discovery having taken place, and the federal court had not moved beyond the pleadings stage, the Court dismissed the federal action. See *id. at 362-63*. So too here, the Court finds that, although the abstention doctrine teaches that abstaining from exercising jurisdiction is the exception and not the rule, the factors here present a set of "exceptional circumstances" that warrant federal abstention. See *Colorado River, 424 U.S. at 819-20*. This conclusion is warranted based on consideration of all the Colorado River factors, but especially in light of the significant risk of piecemeal litigation and inconsistent judgments should both actions go forth. Thus, the Court exercises its discretion to abstain from **[*33]** exercising jurisdiction over these claims. The individual claims brought by Plaintiffs Mascola, Amedolare, and Roche (causes of action 14-16 and 21-23) are DISMISSED with prejudice.

V. Duplicative State Claims

Although Defendant does not seek to dismiss Plaintiffs' primary contract claims,[8] which are allegations of breach of contract due to wrongful termination, it does move for dismissal of the numerous other state law claims brought by Plaintiffs. In sum, Defendant argues that all the other contract claims are merely duplicative and derivative of the initial wrongful termination causes of action (causes of action 3-6). Plaintiffs argue that, pursuant to *Federal Rules of Civil Procedure 8* and *18(a)*, they have sufficiently pleaded additional claims in the alternative. The Court holds that Plaintiffs have not correctly utilized the right to plead in the alternative and, therefore, their additional claims, which are merely duplicative of their wrongful termination claims, must be dismissed for failure to state a claim upon which relief may be granted.

1. Breach Of Contract - Failure To Supply

The first questionable causes of action are phrased as breach of contract due to a failure to supply Plaintiffs with Defendant's **[*34]** bread products every day since the distribution agreements were terminated (causes of action 7-10). Defendant argues that the failure to supply claims should be dismissed because, if Defendant is found to have wrongfully terminated Plaintiffs' distribution agreements, then Defendant would be liable for all damages incurred due to the wrongful termination, which necessarily includes a failure to supply Plaintiffs with bread products. If, on the other hand, Defendant is found to have rightfully terminated the distribution agreements, then it would no longer have any responsibility to supply Plaintiffs with bread products after such termination. Therefore, the failure to supply claims are not claims pleaded in the alternative because they are based on the same event, underlying facts, and repercussions that are the focus of the primary wrongful termination contract claims. See, e.g., *O'Hearn v. Bodyonics, Ltd., 22 F. Supp. 2d 7, 11-12 (E.D.N.Y. 1998)* (dismissing a secondary contract claim because it was duplicative of the primary breach of contract claim).

Plaintiffs, after citing to the Federal Rules of Civil Procedure, cite to *Aiena v. Olsen, 69 F. Supp. 2d 521 (S.D.N.Y. 1999)*, to demonstrate how each of their alternative pleadings was appropriate and lawful. Aiena, however, is easily distinguishable **[*35]** from the current situation. In Aiena, alternative pleadings were allowed, but only because the Plaintiff was unsure of several things, such as whether the plan at issue was governed by ERISA. Given the uncertainties in Aiena concerning (a) whether certain arrangements constituted an ERISA plan and (b) the scope of ERISA preemption, the Court held that "it would be foolish to put all of one's eggs in either . . . basket." *Id. at 532*.

Unlike Aiena, there are no "uncertainties" in the present case. Plaintiffs know exactly what type of case it is — breach of contract — and they know exactly how the events unfolded. The only question is whether the breach was lawful. There is no risk here, like in Aiena, that the Plaintiffs are "put[ting] all of [their] eggs in [one] basket" if they would have only filed the primary wrongful termination claim. Therefore, the case cited by Plaintiffs for support actually reiterates why they did not properly plead in the alternative. This reasoning similarly applies to each of the other related contract claims. Accordingly, Plaintiffs' failure to supply claims are DISMISSED with prejudice.

2. Breach Of Covenant Of Good Faith And Fair Dealing

---

[8] As discussed in Section III, supra, Defendant does move to dismiss Gannon's wrongful termination claim on the basis of the Rooker-Feldman doctrine; however, that motion is DENIED.

Defendant requests that the **[*36]** causes of action for breach of the covenant of good faith and fair dealing be dismissed as well (causes of action 11-15, 17).[9] In New York, there is an implied covenant of good faith and fair dealing underlying every express contract. See, e.g., *Fasolino Foods Co., Inc. v. Banca Nazionale del Lavoro, 961 F.2d 1052, 1056 (2d Cir. 1992)*. It is well established, however, that breaching the implied covenant is not a separate breach in and of itself, but is simply a breach of the contract itself. See id. ("Under New York law, parties to an express contract are bound by an implied duty of good faith, but breach of that duty is merely a breach of the underlying contract.") (internal quotation marks and citations omitted); see also *Village on Canon v. Bankers Trust Co., 920 F. Supp. 520, 534 (S.D.N.Y. 1996)* (holding that the implied covenant does not "provide an independent basis for recovery").

This conceptualization of the meaning of the implied covenant is quite apparent when one looks at the Complaint. The breach of the covenant of good faith and fair dealing claims are explained in exactly the same terms as the primary contract cause of action: Defendant terminated the distribution agreements and then breached the covenant by failing to provide the bread products. (See, e.g., Compl. ¶ 108.) This formulation is not pleading in the alternative, but pleading **[*37]** in the repetitive. For these reason, Stolfa's, Milligan's, Artino's, Mascola's, Amendolare's, and Gannon's claims for breach of the covenant of good faith and fair dealing are DISMISSED with prejudice.

3. Termination Based On Purely Pretextual Grounds

Defendant moves to dismiss Plaintiffs' causes of action for termination based on purely pretextual grounds. The same reasoning also applies here. These causes of action are only a restatement of their fundamental contract claims — that the distribution agreements were wrongfully terminated. Once again, Plaintiffs are attempting to plead the same claims, not an alternative one.

Moreover, a party's reason for terminating a contract is not important. Once a party establishes an appropriate reason for terminating an agreement, whatever underlying motivation the party may have had for the termination is "legally irrelevant." *Refinement Int'l Co. v. Eastbourne N.V., 815 F. Supp. 738, 742 (S.D.N.Y. 1993)*; see also *ESPN, Inc. v. Office of the Comm'r of Baseball, 76 F. Supp. 2d 383, 409 (S.D.N.Y. 1999)* (finding that "motive is irrelevant" to the issue of whether a party properly terminated a contract where the party had an independent right to terminate). Provided that Defendant did not wrongfully terminate the Distributor's Agreements, it is irrelevant that Defendant may have had other reasons for wanting to **[*38]** terminate the agreements, for instance, because Plaintiffs would not purchase the handheld computers. Once good cause is established, that is all that matters.[10] Accordingly, if this Court finds under the original wrongful termination claims that the reasons given by Defendant for the termination were valid, it will not matter whether Defendant had ulterior motives as well. The Court holds, therefore, that each redundant claim related to the original wrongful termination claims must be DISMISSED with prejudice.

4. Tortious Interference With Prospective Business Relations

The final cause of action supposedly made in the alternative similarly fails to stand up as an actual alternative pleading. It is well settled that a contract claim may not be pleaded as a tort unless a plaintiff shows a violation of a legal duty independent of the contract itself. See *United States ex rel. Evergreen Pipeline Constr. Co. v. Merritt Meridian Constr. Corp., 95 F.3d 153, 162 (2d Cir. 1996)*; see also *Liberty Mut. Ins. Co. v. York Hunter, Inc., 945 F.*

---

[9] Cause of action 16 is a claim for breach of the covenant of good faith and fair dealing brought by Roche. Since Roche did not also bring a wrongful termination claim, Defendants did not seek to dismiss his implied covenant claim as duplicative; however, as held in Section IV, supra, Roche's sixteenth cause of action is dismissed pursuant to the abstention doctrine.

[10] Plaintiffs, in their opposition papers, contend that the causes of action based on pretextual termination should stand because Defendant did not explain what valid reasons it had for terminating the agreements. The Court does not see the rationale of this statement. Whether a party lists the reasons for the termination is irrelevant in the context of these duplicative claims. Just as with the other redundant claims, the reasons for termination will be argued via the primary wrongful termination claims, with the ultimate decision resting on whether the breach was lawful because it was "for cause," or whether the reasons offered by Defendant for the terminations were, in fact, pretextual and nothing more.

Supp. 742, 749 (S.D.N.Y. 1996) (citing Clark-Fitzpatrick, Inc. v. Long Island R.R. Co., 70 N.Y.2d 382, 389, 516 N.E.2d 190, 521 N.Y.S.2d 653 (1987)). "This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract." Evergreen Pipeline Constr. Co., 95 F.3d at 162. Here, Defendant had no legal duty to Plaintiffs apart from an obligation to supply Plaintiffs with bread products until the agreements were **[*39]** terminated. If the Court determines that the agreements were terminated by Defendant without cause, then it will lead to the ruling that Defendant breached the contract — not that Defendant committed some separate tort. For this reason, the claim of tortious interference cannot be described as anything but a breach of the underlying contract.

Moreover, Plaintiffs failed to allege any facts that could be interpreted to meet the elements necessary for a tortious interference claim. One element of a tortious interference claim is that the Defendant must have actively interfered with the Plaintiffs' business dealings by contacting or otherwise influencing a third party with whom the Plaintiffs do business. See Lombard v. Booz-Allen & Hamilton, Inc., 280 F.3d 209, 214 (2d Cir. 2002). Here, there are no allegations of Defendant doing anything other than terminating Plaintiffs' Distributor's Agreements and failing to supply bread thereunder.[11] Accordingly, this Court fails to see, while assuming as true all facts presented by Plaintiffs, how there could have potentially been a tortious interference with Plaintiffs' prospective business dealings. For the foregoing reasons, the Court DISMISSES with prejudice Plaintiffs' claims of tortious interference.

VI. Plaintiffs' **[*40]** Request For Punitive Damages

As their final cause of action, Plaintiffs request punitive damages in the amount of $10,000,000.00. They seek this punitive award based on Defendant's allegedly "egregious tortious conduct" towards the Plaintiffs and the general public. (Compl. ¶ 253.) There is no separate cause of action in New York for punitive damages. See Martin v. Dickson, 100 F. App'x 14, 16 (2d Cir. 2004) (citing Paisley v. Coin Devise Corp., 5 A.D.3d 748, 749-50, 773 N.Y.S.2d 582, 583 (2d Dep't 2004). In addition, the punitive damages cannot be allowed to stand as related to Plaintiffs' tortious interference claim, as this Court has dismissed those causes of action.

Punitive damages may be recovered, however, for a breach of contract claim where the general public has been harmed in some way. See, e.g., Evergreen Pipeline Constr. Co., 95 F.3d at 160-62. This Court strains to see even potential harm to the general public in this case, let alone actual harm. Plaintiffs allege harm to competition, which may in turn harm the public, but they do not have standing to bring those Clayton Act claims and, therefore, should not be able to seek punitive damages related to them. The only claims remaining in this action are four counts of breach of contract for wrongful termination. The thrust of Plaintiffs' arguments with respect to such claims relate to how Plaintiffs were harmed **[*41]** as distributors of Defendant's products. They do not allege harm to the general public as a result of the breach of contract claims. Accordingly, Defendant's motion to dismiss Plaintiffs' claim of punitive damages is hereby GRANTED and such claim is DISMISSED with prejudice.

CONCLUSION

For the reasons stated herein, the Defendant's motion to dismiss 29 of Plaintiffs' 32 claims is GRANTED in part and DENIED in part. Defendants' motion to dismiss Plaintiff's anti-trust claims and duplicative contract claims is GRANTED, and Defendant's motion to dismiss Gannon's wrongful termination claim (cause of action six) is DENIED. In sum, four of the thirty-two counts are permitted to go forward: Stolfa's, Milligan's, Artino's, and Gannon's claims of breach of contract due to wrongful termination of the Distributor's Agreements (causes of action 3-6).

SO ORDERED

/s/ JOANNA SEYBERT

---

[11] As Defendant points out, the only "interference" that Plaintiffs mention is that by terminating their agreements, Defendant interfered with Plaintiffs' ability to sell and deliver Defendant's bread products to their customers. This fact does not constitute tortious interference, but merely termination of the agreement.

Joanna Seybert, U.S.D.J.

Dated: Central Islip, New York

March 30, 2007

[In re Bulk Extruded Graphite Prods. Antitrust Litig.]

United States District Court for the District of New Jersey

April 4, 2007, Decided

Civ. No. 02-6030 (WHW)

Reporter

2007 U.S. Dist. LEXIS 25070 *; 2007-1 Trade Cas. (CCH) P75,660

In re: BULK EXTRUDED GRAPHITE PRODUCTS ANTITRUST LITIGATION

Notice: [*1] NOT FOR PUBLICATION

Subsequent History: Motion granted by, Motion denied by *In re Bulk [Extruded] Graphite Prods. Antitrust Litig., 2007 U.S. Dist. LEXIS 54906 (D.N.J., July 30, 2007)*

Prior History: *In re Bulk [Extruded] Graphite Prods. Antitrust Litig., 2006 U.S. Dist. LEXIS 45762 (D.N.J., Apr. 24, 2006)*

Core Terms

graphite, pricing, price fixing, extruded, bulk, diligence, investigations, products, fraudulent concealment, concealment, defendants', notice, summary judgment motion, suspicions, customers, genuine, summary judgment, cause of action, settlements, deposition, non-moving, antitrust, tolled

Counsel: For In re: BULK [EXTRUDED] GRAPHITE PRODUCTS ANTITRUST LITIGATION this document relates to" ("ALLL ACTIONS" or specify by tittle and case number the individual application cases if the docu, In Re: LISA J. RODRIGUEZ, LEAD ATTORNEY, TRUJILLO, RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ.

For INDUSTRIAL GRAPHITE PRODUCTS, INC., Plaintiff: LISA J. RODRIGUEZ, LEAD ATTORNEY, TRUJILLO, RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ; SAMUEL D. HEINS, LEAD ATTORNEY, HEINS MILLS & OLSON P.L.C., MINNEAPOLIS, MN.

For CERADYNE, INC., Consol Plaintiff: DANIEL R. KARON, LEAD ATTORNEY, WEINSTEIN KITCHENOFF SCARLATO & GOLDMAN LTD., CLEVELAND, OH; LISA J. RODRIGUEZ, LEAD ATTORNEY, TRUJILLO, RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ; SAMUEL D. HEINS, LEAD ATTORNEY, HEINS MILLS & OLSON P.L.C., MINNEAPOLIS, MN.

For SGL CARBON A.G., SGL CARBON, L.L.C., SGL CARBON GmbH, Defendants: ADAM NELSON SUBERVI, BRIAN J. MCMAHON, JENNIFER A. HRADIL, GIBBONS, PC, NEWARK, NJ.

For ROBERT J. KOHLER, Defendant: BRIAN J. MCMAHON, LEAD ATTORNEY, ADAM NELSON SUBERVI, GIBBONS, PC, NEWARK, NJ.

Judges: William H. Walls, United States Senior District Judge.

Opinion by: William H. Walls

Opinion

OPINION

[*2] ***Walls, Senior District Judge***

Before the Court is defendants' motion for summary judgment. Pursuant to *Fed. R. Civ. P. 78*, the motion is decided without oral arguments. The motion is denied.

FACT AND PROCEDURAL HISTORY

Defendants SGL Carbon, LLC ("SGL US"), SGL Carbon AG ("SGL AG"), and SGL Carbon GmbH ("SGL GmbH") are sellers of bulk extruded graphite products. [1] Defendant Robert J. Koehler ("Koehler") is Chairman of the Board of Management of SGL AG. Defendants are alleged to have engaged in a world-wide conspiracy to fix, raise, stabilize and maintain at artificially high levels the prices charged for bulk extruded graphite products in the United States and elsewhere.

In December 2002, certain purchasers of bulk extruded graphite, **[*3]** Industrial Graphite, Inc., Graphite Machining, Inc., Midwest Graphite Co., and Semco Carbon, filed a complaint, which alleged that defendants engaged in price fixing from as early as 1993. In April 2006, the Court certified the class of bulk extruded graphite purchasers represented by named plaintiffs. [2]

In May 2004, defendants moved to dismiss the action, arguing that it was time-barred under Section 4B of the Clayton Act. This section bars any private antitrust action not "commenced within four years after the cause of action accrued." *15 U.S.C. § 15b*. Though the present action **[*4]** had been brought more than four years after the plaintiffs' alleged initial injury, plaintiffs claimed that the statute of limitations was tolled because defendants fraudulently concealed their wrongdoing. In its October 28, 2004 opinion, this Court rejected defendants' argument that plaintiffs had insufficiently pled fraudulent concealment and denied their motion to dismiss. In its decision, the Court stated that once the factual record evolved, the issue of fraudulent concealment might better be determined.

Since that time, the parties have engaged in considerable discovery. In their motion for summary judgment, defendants once again bring the issue of fraudulent concealment before the court. They argue that plaintiffs' action must be dismissed because the action is time barred under *15 U.S.C. § 15(b)*.

LEGAL STANDARD

A. Summary Judgment

Summary judgment is appropriate when the moving party establishes that "there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. Only a genuine and material factual dispute between the parties will defeat a motion for summary **[*5]** judgment. *See* *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A factual dispute is genuine if a reasonable jury could find for the non-moving party on that issue. It is material if, under the substantive law, that issue would affect the outcome of the suit. *See* *id. at 248*.

[1] An additional company, UCAR Carbon Company ("UCAR"), which is now known as GrafTech, was also named as a defendant in the Consolidated Amended Class Action Complaint ("Amended Complaint"). On March 8, 2004, this Court approved the settlement with UCAR.

[2] The Court certified the following class: "All persons (excluding federal government entities, defendants, and their respective parents, subsidiaries, and affiliates) who purchased Bulk Extruded Graphite Products in the United States, directly from the defendants, their affiliates or subsidiaries, during the period January 1, 1993 through December 31, 1998." Class Certification Order, No. 02-6030, April 4, 2006.

A court must enter summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record]" that show that there is no genuine material issue of fact as to the non-existence of that element. *Id. at 323*. When the burden of proof for a particular factual element falls on the non-moving party, the moving party must initially demonstrate that the non-moving party cannot meet its burden with the evidentiary material of record admissible at trial. *See id. at 322-23.* **[*6]**

Once the moving party has carried its burden under *Rule 56*, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts in question." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. To survive a motion for summary judgment, a nonmovant must present more than a mere scintilla of evidence in his favor. *Woloszyn v. County of Lawrence, 396 F.3d 314, 319 (3d Cir. 2005)*. The opposing party must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings. *Shields v. Zuccarini, 254 F.3d 476, 481 (3d Cir. 2001)*.

At the summary judgment stage the court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *See Anderson, 477 U.S. at 249*. In so doing, the court must construe the facts and inferences in the light most favorable to the non-moving party. *Curley v. Klem, 298 F.3d 271, 276-77 (3d Cir. 2002)*.

B. Fraudulent Concealment

The burden of establishing fraudulent concealment **[*7]** falls on the plaintiff who invokes that doctrine to toll the statute of limitations. *Forbes v. Eagleson, 228 F.3d 471, 487 (3d. Cir. 1993)*. The plaintiff must show "(1) an affirmative act of concealment; (2) which misleads or relaxes the plaintiff's inquiry, who (3) exercised due diligence in investigating his cause of action." *In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1178* -1179 (3d. Cir. 1993).

The defendant must affirmatively act to conceal the plaintiff's claim. The affirmative acts of concealment may be separate from the underlying price-fixing conspiracy or, if the conspiracy is self-concealing, the acts of concealment may be performed as part of the conspiracy itself. *See In re Mercedes-Benz Antitrust Litig., 157 F.Supp.2d 355, 369 (D.N.J. 2001)*; *Pennsylvania v. Milk Indus. Management Corp., 812 F. Supp. 500 (E.D. Pa. 1992)*. The statute of limitations is tolled "'until the plaintiff knows, or should reasonably be expected to know, the concealed facts supporting the cause of action . . . .'" *Forbes v. Eagleson, 228 F.3d 471, 487 (3d Cir. 2000)* (quoting *Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1392 (3d Cir. 1994)).* **[*8]**

Courts should not toll the statute of limitation if the "antitrust causes of action 'were nonetheless discovered or could with reasonable diligence have been discovered notwithstanding such a concealment and well within the appropriate time for commencing such actions.'" *Lower Lake Erie Iron Ore Antitrust Litig., 998 F. 2d at 1179* (quoting *Pinney Dock and Transport Co. v. Penn Cent. Corp., 838 F.2d at 1483 (6th Cir. 1988))*. The plaintiff must exercise due diligence in investigating his cause of action. He may demonstrate this by either proving that he did in fact exercise reasonable diligence or by proving that a reasonably diligent plaintiff would not have had notice of his potential claim. *Forbes, 228 F.3d at 487*; *In re Mercedes, 157 F.Supp.2d at 373*.

DISCUSSION

Defendants argue that the statute of limitations should not be tolled for fraudulent concealment because plaintiffs had "reason to know of a possible claim more than four years before the complaint was filed." (Def.'s Memo. at 21.)

They maintain plaintiffs "cannot prove they 'exercised due diligence in attempting to discover their claim.'" (Id. **[*9]** at 22.) [3]

To support their claim that the plaintiffs had reason to know of their claim before December 1998, defendants make the following assertions: (1) plaintiffs could and did perceive that SGL Carbon, LLC and UCAR had the same prices for bulk extruded graphite from 1993 to 1996; (2) defendants' customers and certain plaintiffs made statements which demonstrated that before 1998 they had harbored suspicions that SGL Carbon, LLC and UCAR had worked together **[*10]** to set prices of bulk extruded graphite; (3) plaintiffs had access to public information regarding government investigations and settlements relating to price fixing in the graphite industry by the defendants and other corporations.

A. Similarity of Defendants' Prices

According to defendants, a review of the 1993-1996 price announcements in evidence demonstrates that SGL Carbon LLC and UCAR increased their prices for bulk extruded graphite products by similar amounts during that time. They also offer deposition testimony of officers of the plaintiff corporations that these officers believed that different suppliers of bulk extruded graphite products sold comparable products at identical or similar prices.

Plaintiffs point out that parallel pricing does not, as a matter of ***antitrust law***, establish price fixing. *Petruzzi's IGA Supermarkets, Inc. v. Darling Delaware Co., 998 F.2d 1224, 1232 (3d Cir. 1993)*. Courts have held that knowledge of "apparent parallel price increases" is not sufficient to demonstrate that plaintiffs should have known that they had an antitrust cause of action. *United Nat'l Records, Inc. v. MCA, Inc., 609 F.Supp. 33, 37 (N.D. Ill., 1984)*. **[*11]** *See King & King Enterprises v. Champlin Petroleum Co., 657 F.2d 1147, 1156 (10th Cir.1981)*. The Third Circuit recognizes that it is common for similar products to be similarly priced in a competitive market. *See In re Flat Glass Antitrust Litigation, 385 F. 3d 350, 359 (3d. Cir. 2004)*. In his deposition, a former UCAR executive, Robert Hart, expressed a similar view that parallel pricing is not necessarily a sign of price fixing.

B. Customer Suspicions of Price Fixing

Defendants also present evidence that numerous class members had expressed suspicions that the leading producers of bulk extruded graphite had colluded to fix prices. In 1996, the accounting firm KPMG Peat Marwick LLP ("KPMG") conducted a survey of 32 SGL US bulk extruded graphite customers; seven of these customers expressed to KPMG interviewers some suspicion that the Defendants were fixing prices. Frank Schoch, now the president and co-owner of one the named plaintiffs, Graphite Machining, Inc. ("GMI"), testified in a deposition that he has long been suspicious of pricing practices in the extruded graphite industry. During the 1980s, Mr. Shoch sent several **[*12]** letters to the United States Department of Justice, which requested that they investigate price fixing in the graphite industry. Matthew Shane, the General Manager of GMI, also testified in a deposition that he had noticed similarities in pricing between competing extruded graphite sellers, and considered it to be suspicious behavior.

As Plaintiffs point out, the customer statements (and KPMG's paraphrases of customer statements) defendants quote from KPMG's survey are unverifiable hearsay. Such hearsay statements would not be admissible at trial, and so are inadmissible to support motions for summary judgment. Indeed, subsequent statements of the interviewees cast the reliability of the survey evidence into doubt. Declarations of two of the seven quoted interviewees indicate

---

[3] Defendants also argue that the action is time barred because the plaintiffs filed suit more than four years after any alleged act of concealment occurred. However, the statute of limitations begins to run when "the plaintiff knows, or should reasonably be expected to know, the concealed facts supporting the cause of action," *Forbes, 228 F.3d at 487*, *not* when the last act of concealment occurred. Defendants do not dispute that there exists a material issue of fact as to alleged acts of concealment before June 1997. (Def. Reply at 5.)

that they had no basis for believing that the defendants were engaged in price fixing, and that representatives of SGL Carbon LLC justified increased prices by referring to their own increased costs.

Mr. Schoch's deposition testimony is also of limited value in proving that plaintiffs had notice of the defendants' alleged price fixing. The fact that Mr. Schoch, throughout the 1980s and 1990s, and Mr. Shane, **[*13]** in 1996 or 1997, suspected that sellers of graphite products were engaging in price fixing is hardly dispositive of the issue of whether plaintiffs had notice before 1998. [4] Mr. Schoch's and Mr. Shane's pre-1998 suspicions of price fixing could lead a reasonable factfinder to determine that a diligent plaintiff would have been noticed before 1998. But that factfinder could also decide that their suspicions do not prove that a reasonably diligent plaintiff would have been on notice of his claim.

[*14] C. Government Investigations and Settlements

Defendants also demonstrate that from 1997 to 1999 public information was available about government investigations of price fixing in the graphite industry and about related settlements into which members of that industry, including certain defendants, entered. Defendants point to numerous industry and government press releases, wire service stories, and newspaper articles that discuss an ongoing Department of Justice investigation into pricing practices in the graphite industry and litigation brought by the government and private parties against corporations in that industry (including certain of the defendants). These documents date from 1997 to 1999. According to defendants, they prove that a reasonably diligent plaintiff would have been aware of a potential cause of action for price fixing in the bulk extruded graphite market before 1998.

The vast majority of the public information relating to antitrust investigations and settlements in the graphite industry concerns graphite electrode pricing or refers to investigations of price fixing by producers of generic "graphite products." All of the settlements related to graphite **[*15]** electrode pricing. [5] Only one wire service story and two SEC filings state that UCAR had been served subpoenas for documents relating to both graphite electrodes and "bulk graphite." The relevant story and the filings each contain only one sentence that mentions subpoenas relating to bulk graphite.

D. Conclusion

The sum of defendants' evidence is not nearly enough to compel a reasonable jury to find that a diligent plaintiff would have had notice of his claim before December 1998. Defendants have not shown that plaintiffs will be unable to meet their burden for proving fraudulent concealment at trial. A material issue of fact exists, and the Court will not grant summary judgment.

It is on this 4th day of April, 2007,

ORDERED that defendants' motion for summary judgment be DENIED.

s/ William H. Walls

United States Senior District Judge **[*16]**

---

[4] Plaintiffs state, without direct evidentiary support, that Mr. Schoch only acquired a controlling stake in plaintiff corporation GMI in 2000. The record demonstrates that Mr. Schoch started a graphite machining company in 1978, which he sold to SGL Carbon LLC in 1997. As of 1998, Mr. Schoch owned a company named Mercury Machine and Tool, for which Mr. Shane also worked. The Court is not satisfied that defendants have established that Mr. Shoch and Mr. Shane worked for GMI before 2000. It would be unfair for this Court to impute Mr. Schoch's and Mr. Shane's pre-1997 suspicions, much less notice, of price fixing to GMI.

[5] The plaintiffs in the private graphite electrode civil actions were steelmakers because graphite electrodes are used for certain types of steel production.

End of Document

[Rhino Sports v. Sport Court, Inc.](#)

United States District Court for the District of Arizona

April 4, 2007, Decided ; April 5, 2007, Filed

CV-02-1815-PHX-JAT (Lead), CV-06-3066-PHX-JAT (Cons)

Reporter
2007 U.S. Dist. LEXIS 25687 *; 2007-1 Trade Cas. (CCH) P75,686

Rhino Sports, Inc., an Arizona corporation; and John E. Shaffer, individually, Plaintiffs/Counterdefendants, v. Sport Court, Inc., a Delaware corporation, Defendant/Counterclaimant. Connor Sport Court International, Inc., a California corporation, Plaintiff, vs. Rhino Sports, Inc., an Arizona Corporation, John E. Shaffer, individually, Defendants.

Subsequent History: Sanctions disallowed by, Motion denied by *Rhino Sports, Inc. v. Sport Court, Inc., 2007 U.S. Dist. LEXIS 32970 (D. Ariz., May 2, 2007)*

Core Terms

counterclaim, amend, antitrust, argues, propose an amendment, settlement agreement, motion to amend, futile, affirmative defense, pleadings

LexisNexis® Headnotes

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN1[ ] **Pleadings, Counterclaims**

Leave to file a counterclaim is governed by *Fed. R. Civ. P. 13(f)*. Leave to file an amended answer is governed by *Fed. R. Civ. P. 15(a)*. Although technically different, the standards for granting each are similar.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN2[ ] **Amendment of Pleadings, Leave of Court**

See *Fed. R. Civ. P. 15(a)*.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN3[] **Judges, Discretionary Powers**

While the decision to grant or deny a motion to amend is within the discretion of the district court, *Fed. R. Civ. P. 15(a)* declares that leave to amend shall be freely given when justice so requires; this mandate is to be heeded. This liberality is not dependent on whether the amendment will add causes of action or parties. The extremely liberal policy in favor of amendments, however, is subject to some limitations. The United States Supreme Court has established that motions to amend should be granted unless the district court determines that there has been a showing of: (1) undue delay; (2) bad faith or dilatory motives on the part of the movant; (3) repeated failure to cure deficiencies by previous amendments; (4) undue prejudice to the opposing party; or (5) futility of the proposed amendment. Generally, this determination should be performed with all inferences in favor of granting the motion. Significantly, the party opposing amendment bears the burden of showing prejudice, futility, or one of the other permissible reasons for denying a motion to amend.

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

HN4[] **Pleadings, Counterclaims**

A motion to amend a pleading to assert a counterclaim is governed by *Fed. R. Civ. P. 13(f)*. Under *Rule 13(f)*, when a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment. Like *Fed. R. Civ. P. 15(a)*, *Fed. R. Civ. P. 13(f)* is interpreted liberally to settle all claims in one action. However, leave to file a counterclaim may be denied if the counterclaim is totally lacking in merit.

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

HN5[] **Market Definition, Relevant Market**

Under United States Court of Appeals for the Ninth Circuit case law, a plaintiff must identify a relevant product market when asserting an antitrust claim. As the Tanaka court explained, a relevant product market encompasses notions of geography as well as product use, quality, and description. The geographic market extends to the area of effective competition where buyers can turn for alternative sources of supply. The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand. The failure to identify a relevant market is a proper ground for dismissing an antitrust claim.

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

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

HN6[] **Market Definition, Relevant Market**

In Todd, the United States Court of Appeals for the Second Circuit stated that because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market. The Todd court explained that to survive a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, an alleged product market must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes--analysis of the interchangeability of use or the cross-elasticity of demand--and it must be plausible. The Todd court further explained that cases in which dismissal on the pleadings is appropriate frequently involve either (1) failed attempts to limit a product market to a single brand, franchise, institution, or comparable entity that competes with potential substitutes or (2) failure even to attempt a plausible explanation as to why a market should be limited in a particular way.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

HN7[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

The Noerr-Pennington doctrine provides that the Sherman Act does not prohibit persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.

Counsel: **[*1]** For Rhino Sports Inc, an Arizona corporation, John E Shaffer, Plaintiffs: Christopher Thomas Micheletti, Daniel S Mason, LEAD ATTORNEYS, Zelle Hofmann Voelbel Mason & Gette LLP, San Francisco, CA.; Daniel Paul Beeks, David W Dow, LEAD ATTORNEYS, Mohr Hackett Pederson Blakley & Randolph PC, Phoenix, AZ.; George Hamilton King, LEAD ATTORNEY, Chandler, AZ.; John D Everroad, LEAD ATTORNEY, Jamie A Brown, Ray Kendall Harris, Fennemore Craig PC, Phoenix, AZ.

For Connor Sport Court International, Inc., a California corporation, Plaintiff: Gordon K Hill, Peter M deJonge, LEAD ATTORNEYS, Thorpe North & Western LLP, Sandy, UT.; Mark M Bettilyon, Samuel C Straight, LEAD ATTORNEYS, Ray Quinney & Nebeker PC, Salt Lake City, UT.

For Sport Court Inc, a Delaware corporation, Defendant: Arthur B Berger, Mark M Bettilyon, LEAD ATTORNEYS, Ray Quinney & Nebeker PC, Salt Lake City, UT.; David L Stott, Peter M deJonge, LEAD ATTORNEYS, Thorpe North & Western LLP, Sandy, UT.; P Douglas Barr, LEAD ATTORNEY, Stoll Keenon & Park LLP, Lexington, KY.; Robert M Wolesensky, LEAD ATTORNEY, Sport Court Inc, Leander, TX.; Douglas F Behm, Jennings Strouss & Salmon PLC, Phoenix, AZ.

For Sport Court Inc, **[*2]** Counter Claimant: Arthur B Berger, LEAD ATTORNEY, Ray Quinney & Nebeker PC, Salt Lake City, UT.; Douglas F Behm, Jennings Strouss & Salmon PLC, Phoenix, AZ.; P Douglas Barr, Stoll Keenon & Park LLP, Lexington, KY.

For Rhino Sports Inc, John E Shaffer, Counter Defendants: Christopher Thomas Micheletti, Daniel S Mason, LEAD ATTORNEYS, Zelle Hofmann Voelbel Mason & Gette LLP, San Francisco, CA.; George Hamilton King, LEAD ATTORNEY, Chandler, AZ.; John D Everroad, LEAD ATTORNEY, Jamie A Brown, Ray Kendall Harris, Fennemore Craig PC, Phoenix, AZ.

Judges: James A. Teilborg, United States District Judge.

Opinion by: James A. Teilborg

Opinion

ORDER

Pending before the Court is Defendant Rhino Sports, Inc.'s Motion to Amend (Doc. # 122). [1] Rhino Sports, Inc. and John E. Shaffer (collectively referred to as "Rhino") seek to amend their answer to Connor Sport Court International,

---

[1] The introductory paragraph recites that only "Rhino Sports, Inc. moves to amend its answer." However, considering that the attorneys for Rhino Sports, Inc. also represent John E. Shaffer and that the subsequent reply was filed on behalf of both defendants, the Court assumes Mr. Shaffer joins in the motion to amend.

Inc.'s Complaint by asserting additional affirmative defenses and counterclaims for violations of the Sherman Act and the Arizona ***Antitrust Law***, and for unfair competition.

[*3] II. Legal Standards

Rhino seeks leave to amend pursuant to *Rules 13(f)* and *15(a) of the Federal Rules of Civil Procedure*. ***HN1***[] Leave to file a counterclaim is governed by *Rule 13(f)*. Leave to file an amended answer is governed by *Rule 15(a)*. Although technically different, "the standards for granting each are similar and thus will be considered simultaneously." *Unispec Development Corp. v. Harwood K. Smith & Partners, 124 F.R.D. 211, 213 (D.Ariz. 1988)*.

A motion to amend a pleading is governed by *Federal Rule of Civil Procedure 15(a)*, which provides:

> ***HN2***[] A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Fed. R. Civ. P. 15(a) **[*4]** . ***HN3***[] While the decision to grant or deny a motion to amend is within the discretion of the district court, "*Rule 15(a)* declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded." *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*; *see, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*; *United States v. SmithKline Beecham, Inc., 245 F.3d 1048, 1052 (9th Cir. 2001)* ("A district court's discretion to deny leave to amend . . . is not absolute.") (citing *Foman*); *Cal. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d. 1466, 1472 (9th Cir. 1987)*. "In exercising its discretion[,] . . . 'a court must be guided by the underlying purpose of *Rule 15*--to facilitate decision on the merits rather than on the pleadings or technicalities. . . . Thus, '*Rule 15*'s policy of favoring amendments to pleadings should be applied with extreme liberality.'" *Eldridge v. Block, 832 F.2d 1132, 1135 (9th Cir. 1987)* (citations omitted); *Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990)* (stating **[*5]** that leave to amend is generally allowed with "extraordinary liberality"). "This liberality . . . is not dependent on whether the amendment will add causes of action or parties." *DCD Programs, LTD. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987)*.

The extremely liberal policy in favor of amendments, however, is subject to some limitations. The United States Supreme Court has established that motions to amend should be granted unless the district court determines that there has been a showing of: (1) undue delay; (2) bad faith or dilatory motives on the part of the movant; (3) repeated failure to cure deficiencies by previous amendments; (4) undue prejudice to the opposing party; or (5) futility of the proposed amendment. *Foman, 371 U.S. at 182*; *see SmithKline Beecham, 245 F.3d at 1052*; *Texaco, Inc. v. Ponsoldt, 939 F.2d 794, 798 (9th Cir. 1991)*; *W. Shoshone Nat'l Council v. Molini, 951 F.2d 200, 204 (9th Cir. 1991)*; *Cal. Architectural Bldg. Prods., 818 F.2d. at 1472*; *Poling v. Morgan, 829 F.2d 882, 886 (9th Cir. 1987)*. "Generally, this determination should be performed **[*6]** with all inferences in favor of granting the motion." *Griggs v. Pace Am. Group, Inc., 170 F.3d 877, 880 (9th Cir. 1999)* (citing *DCD Programs, 833 F.2d at 186*). Significantly, "[t]he party opposing amendment bears the burden of showing prejudice," futility, or one of the other permissible reasons for denying a motion to amend. *DCD Programs, 833 F.2d at 187*; *see Richardson v. United States, 841 F.2d 993, 999 (9th Cir. 1988)* (stating that leave to amend should be freely given unless opposing party makes "an affirmative showing of either prejudice or bad faith").

HN4[] A motion to amend a pleading to assert a counterclaim is governed by *Federal Rule of Civil Procedure 13(f)*. Under *Rule 13(f)*, "[w]hen a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment." Like *Rule 15(a)*, *Rule 13(f)* is interpreted liberally to settle all claims in one action. *Unispec Development Corp., 124 F.R.D. at 213* (citing *2001, Inc. v. Novaglas Corp., 60 F.R.D. 649 (E.D.N.Y. 1973)).* **[*7]**

However, leave to file a counterclaim may be denied if the counterclaim "is totally lacking in merit." *Id.* (citing United Brick & Clay Workers v. Hydraulic Press Brick Co., 371 F.Supp. 818 (S.D.Mo. 1974).

Like the court in *Unispec Development Corp.,* this Court "will consider whether the proposed amendment and counterclaim are meritorious, *i.e.,* survive the 'futility' test and whether . . . [the] motion constitutes bad faith, dilatory action or would cause undue delay or prejudice." Id. at 214.

II. Discussion

In opposition to Rhino's motion to amend, Connor Sport Court International, Inc. ("Sport Court") first argues that the proposed amendment is futile because Rhino released the affirmative defenses and counterclaims in whole or in part pursuant to the parties' prior settlement agreement dated March 9, 2004. The settlement agreement provides, in part, that the parties:

> completely release, acquit, and forever discharge one another … from and against any and all claims, demands, rights, obligations, debts, expenses, liabilities, defenses, or causes of action, whether or not alleged, recited, described, or currently asserted, **[*8]** whether known or unknown, suspected or unsuspected, fixed or contingent, which they have, may have, or could assert against the other.

Sport Court notes that Rhino's proposed amendment seeks redress for anti-competitive acts within the past four years and that the settlement agreement was entered into three years ago. According to Sport Court, this shows that Rhino is improperly seeking to assert claims and defenses for alleged conduct that occurred prior to the settlement agreement and which conduct was subject to release under the terms of the agreement. In contrast, Rhino argues that, at most, the settlement agreement bars claims that may have existed before March 9, 2004, and that it is entitled to assert claims against Sport Court based on conduct occurring thereafter. Rhino further avers that the affirmative defenses and counterclaims rely only on conduct occurring after March 9, 2004. At this stage of the proceedings, and considering Rhino's representations concerning the timing of the conduct made subject of the proposed affirmative defenses and counterclaims, the Court is unable to conclude, as Sport Court requests, that the proposed amendment is futile because of the **[*9]** March 9, 2004, settlement agreement.

Second, Sport Court argues that the proposed amendment is untimely because Rhino was aware of the facts underlying its present antitrust counterclaims as evidenced by Rhino's answer, filed in December 2002, to Sport Court's counterclaim. In contrast, Rhino argues that the proposed amendment is timely because Sport Court's complaint was filed on December 21, 2006, and Rhino filed its original answer on February 7, 2007, less than two months ago. Rhino further argues that the proposed amendment is timely because the affirmative defenses and counterclaims rely only on conduct occurring after March 9, 2004, which conduct was not the subject of the prior proceedings between the parties. The Court agrees with Rhino, finding that the proposed amendment, which Rhino represents relates to conduct occurring after the March 9, 2004, settlement agreement, is not untimely.

Third, Sport Court argues that the proposed antitrust counterclaim fails to allege and define a proper antitrust "product market" as a matter of law. ***HN5***[] Under Ninth Circuit case law, Plaintiff must identify a relevant product market when asserting an antitrust claim. *Tanaka v. University of Southern California, 252 F.3d 1059, 1063 (9th Cir. 2001).* **[*10]** As the *Tanaka* court explained, a relevant product market:

> encompasses notions of geography as well as product use, quality, and description. The geographic market extends to the "'area of effective competition' … where buyers can turn for alternative sources of supply." The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand.

Id. (quoting Oltz v. St. Peter's Community Hospital, 861 F.2d 1440, 1446 (9th Cir. 1988)). The failure "to identify a relevant market is a proper ground for dismissing" an antitrust claim. *Id.* (citing Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1105 (9th Cir. 1999)).

Sport Court contends that Rhino has failed to reference or analyze the rule of "reasonable interchangeability" or explain why substitute products, such as concrete, wood, rubber, vinyl or painted acrylic, are not included in the narrow product market of recreational flooring. Sport Court further contends that there is "no allegation concerning cross-elasticity of demand or other consumer considerations." Thus, Sport Court concludes that "Rhino's **[*11]** relevant product market allegation fails to satisfy the required pleading standards as a matter of law."

Countering, Rhino quotes *Twombly v. Bell Atlantic Corp., 425 F.3d 99, 108 (2nd Cir. 2005)*, which rejected the argument "that antitrust complaints merit a more rigorous pleading standard, whether because of their typical complexity and sometime amorphous nature, or because of the related extraordinary burdens that litigation beyond the pleading stage may place on defendants and the courts." Further, Rhino quotes *Todd v. Exxon Corp., 275 F.3d 191, 199-200 (2nd Cir. 2001)*, ***HN6***[] which stated that "[b]ecause market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market." As the *Todd* court explained: "To survive a *Rule 12(b)(6)* motion to dismiss, an alleged product market must bear a 'rational relation to the methodology courts prescribe to define a market for antitrust purposes - analysis of the interchangeability of use or the cross-elasticity of demand . . . and it must be 'plausible.'" *Todd, 275 F.3d at 200* (citations omitted). The *Todd* court **[*12]** further explained:

> Cases in which dismissal on the pleadings is appropriate frequently involve either (1) failed attempts to limit a product market to a single brand, franchise, institution, or comparable entity that competes with potential substitutes or (2) failure even to attempt a plausible explanation as to why a market should be limited in a particular way.

Id. (citations omitted).

Based on the foregoing case law, and the federal notice pleading standards, Rhino argues that it has adequately alleged a relevant product market, that being "indoor and outdoor modular recreational flooring." Rhino also argues that Sport Court's position, that the product definition could include other alternative recreational substitutes such as concrete, wood, rubber, vinyl or painted acrylic, involves questions of fact and is inconsistent with the admissions of Sport Court's former president in these proceedings. In other words, Rhino argues that the relevant product market allegation is the same market that Sport Court's former president described and that it is "disingenuous" for Sport Court to now complain that the relevant product market is inadequately pleaded. The Court **[*13]** agrees with Rhino and finds that the relevant product market allegation in the proposed amendment is adequately pleaded. [2]

Finally, Sport Court argues that the proposed antitrust counterclaim violates ***HN7***[] the *Noerr-Pennington* doctrine, which provides that "the Sherman Act does not prohibit … persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Professional Real Estate Investors, Inc. v. Columbia, 508 U.S. 49, 56, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* (quoting *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)).* **[*14]** Rhino counters that its antitrust counterclaim is not about efforts to influence government action; instead the Rhino states that the counterclaim concerns abusive contractual relations, improper economic interference, improper harassment of dealers and distributors, industrial espionage, and other alleged unlawful activities perpetrated with the intent to maintain a monopoly. The Court agrees, finding that the proposed antitrust counterclaim is not based on the *Noerr-Pennington* doctrine.

For the foregoing reasons, the Court finds that Sport Court has failed to show that the proposed amended answer and counterclaim will cause undue delay, is being made in bad faith or with a dilatory motive, will cause undue prejudice to Sport Court, or is futile.

Accordingly,

---

[2] In addition, Sport Court's argument that Rhino's antitrust claim faces a high hurdle and is rarely successful, which Sport Court argues highlights the importance of requiring precise and accurate allegations, is insufficient to allow a finding that the antitrust claim cannot proceed as a matter of law at this stage of the proceedings.

IT IS ORDERED that Defendant Rhino Sports, Inc.'s Motion to Amend (Doc. # 122) is GRANTED;

IT IS FURTHER ORDERED that the Clerk of Court shall file the lodged amended answer and counterclaim (Doc. # 123) as of the date of this Order.

DATED this 4th day of April, 2007.

James A. Teilborg

United States District Judge

Bartholomew v. Bail Bonds Unlimited, Inc.

United States District Court for the Eastern District of Louisiana

April 5, 2007, Decided ; April 5, 2007, Filed

CIVIL ACTION NO. 05-4165 SECTION K(2)

Reporter

2007 U.S. Dist. LEXIS 25506 *; 2007-1 Trade Cas. (CCH) P75,663

DENISE BARTHOLOMEW VERSUS BAIL BONDS UNLIMITED, INC., ET AL

Subsequent History: Motion granted by, in part, Motion denied by, in part, Dismissed by *Bartholemew v. Bail Bonds Unlimited, Inc., 2008 U.S. Dist. LEXIS 70918 (E.D. La., Sept. 17, 2008)*

Prior History: *Bartholomew v. Bail Bonds Unlimited, Inc., 2007 U.S. Dist. LEXIS 22980 (E.D. La., Mar. 28, 2007)*

Core Terms

antitrust, sham exception, Sherman Act, conspiracy, Bail, cause of action, anti trust law, anticompetitive, shields

LexisNexis® Headnotes

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN1[] **Motions to Dismiss, Failure to State Claim**

In considering a motion to dismiss for failure to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)*, a complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in the original complaint must be taken as true. A district court may not dismiss a complaint under *Rule 12(b)(6)* unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The question therefore is whether in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

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

HN2[] **Sherman Act, Defenses**

Section 1 of the Sherman Act prohibits every contract, combination or conspiracy that unreasonably restrains interstate for foreign trade. *15 U.S.C.S. § 1*. The Noerr-Pennington doctrine instructs that the federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from the government. That doctrine instructs that the Sherman and Clayton Acts do not reach political activities, no matter how nefarious those activities may be. The Noerr-Pennington applies to private parties seeking government action. The Sherman Act cannot be predicated upon attempts to influence the passage of enforcement of laws. The United States Supreme Court has held that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or executive to take particular action with respect to a law that would produce a restraint or monopoly. The Court has extended Noerr, stating that, Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purposes.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN3[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The United States Supreme Court has definitively stated that a "conspiracy exception" to the Noerr-Pennington doctrine must be rejected. Overall, Noerr-Pennington stands for the proposition that any type of conspiracy exception would have nothing to do with the policies of the antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN4[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

As a general rule, lobbying and other efforts to obtain legislative, executive, judicial and quasi-judicial actions do not violate the antitrust laws. The Noerr-Pennington doctrine shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN5[] **Noerr-Pennington Doctrine, Sham Exception**

The Noerr-Pennington doctrine does have one exception: it does not shield petitioning activity that is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. Under this sham exception, if the petitioner seeks to use the governmental process-as opposed to the outcome of that process-as an anticompetitive weapon, the petitioning activity will not be protected from antitrust liability. The sham exception governs situations in which the petitioner's "activities are not genuinely aimed at procuring favorable governmental action. The absence of a genuine desire for governmental action may be evidenced by a pattern of baseless, repetitive claims indicating that the administrative and judicial processes have been abused.

Counsel: **[*1]** For Denise Bartholomew doing business as A+ Bail Bond of Louisiana, Plaintiff: Samuel S. Dalton, LEAD ATTORNEY, Samuel S. Dalton, Attorney at Law, Jefferson, LA; Raylyn R. Beevers, Steven Michael Mauterer, Wiley J. Beevers, Beevers & Beevers, LLP, Gretna, LA.

For Bail Bonds Unlimited, Inc. also known as BBU, Louis M Marcotte, III, Lori M Marcotte, Marcotte, Inc., Defendants: Richard W. Westling, LEAD ATTORNEY, Law Office of Richard W. Westling, LLC, New Orleans, LA.

Lt. Guy Crosby, individually and in his official capacity, Defendant, Pro se, Belle Chasse, LA.

Capt. William Giangrosso, individually and in his official capacity, Defendant, Pro se, Fort Worth, TX.

For Sheriff Harry Lee, individually and in his official capacities, Defendant: Daniel Rault Martiny, LEAD ATTORNEY, Martiny & Associates, Metairie, LA; Franz L. Zibilich, Martiny & Associates, LLC, Metairie, LA.

For Bankers Insurance Company, erroneously sued as Bankers Insurance Company of Florida, Defendant: Michael Hudson Ellis, LEAD ATTORNEY, Michael H. Ellis, Attorney at Law, Metairie, LA; Preston Lee Hayes, Chehardy, Sherman, Ellis, Breslin, Murray, Recile & Griffith, Metairie, LA.

Judges: STANWOOD **[*2]** R. DUVAL, JR., UNITED STATES DISTRICT JUDGE.

Opinion by: STANWOOD R. DUVAL, JR.

Opinion

The defendant, Bail Bonds Unlimited, Inc., Marcotte Inc., Louis M. Marcotte, III, and Lori Marcotte ("the Marcotte Defendants"), filed a Motion to Dismiss the Antitrust Claims Pursuant to *Rule 12(b)(1)* and *(6) of the Federal Rules of Civil Procedure* (Rec. Doc. 56), which came before the Court for hearing on February 21, 2007. Oral argument was waived by the parties and the matter was taken under submission on the briefs only. The Court, having considered the record, the evidence submitted, the law and applicable jurisprudence, is fully advised in the premises and ready to rule.

ORDER AND REASONS

I. BACKGROUND

This suit arises out of a cause of action filed by plaintiff, who alleges civil rights violations, civil RICO claims, Sherman Anti-Trust violations, and pendent state law causes of action centering around the activities of the defendants Louis and Lori Marcotte, and their bail bonding company, Bail Bonds Unlimited ("BBU"). On December 6, 2006, the Marcotte Defendants filed a motion seeking dismissal of the Civil Rights Act and state law claims based on the Court's August 30, 2006 ruling **[*3]** that these claims had prescribed as to another defendant. The present motion seeks dismissal of Plaintiff's antitrust claims.

The Plaintiff claims that the Marcotte Defendants violated federal ***antitrust law***, particularly *Section 1* and *2* of the Sherman Antitrust Act, in that all defendants engaged in a conspiracy to monopolize the commercial bail bond business in Jefferson Parish, Louisiana. (Rec. Doc. 49, Complaint, P 1 & 10-17). Specifically, the complaint alleges that "the 'roll out' scheme was created by the Racketeering Enterprise, Marcotte III, BBU and Bankers participation therein, for the sole purposes of maximizing BBU's profits, hindering oppressing and suppressing BBU's competition, including but not limited to the competition from Plaintiff, in the Bail Bond Business within Jefferson Parish, Louisiana…" (Rec. Doc. 56). These violations involved a conspiracy with a variety of government actors, including Sheriff's Deputies and Judges, who were unlawfully influenced, including through bribery, to treat the Marcotte Defendants' bail bond business favorably and to the detriment of the plaintiff (Rec. Doc. 49). The Complaint alleges that "the Racketeering Enterprise then ordered **[*4]** the authoritative staff of the Jefferson Parish Jail at Gretna, Louisiana, which it controlled through bribes, gifts and favors . . . to allow the Racketerring Enterprise and BBU to take custody of all the arresters whose bonds had been set at $ 2500 or less, each morning (Rec. Doc. 56).

The Marcotte Defendants, however, seek dismissal of the antitrust causes of action based on the rules of the *Noerr-Pennington* doctrine, which provides immunity from the antitrust laws. This doctrine shields the actions of private individuals seeking anticompetitive action from the government. In Plaintiff's opposition to Defendant's Motion to Dismiss, plaintiff claims that the defendant's activities alleged in the Complaint are not protected by the Noerr-Pennington Doctrine, rather they fall within the "sham exception" to that Doctrine.

II. LAW AND ANALYSIS OF THE COURT

A. Motion to Dismiss for Failure to State a Claim

HN1[] In considering a motion to dismiss for failure to state a claim pursuant to *Rule 12(b)(6)*, the complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in the original complaint must be taken as true. *Campbell v. Wells Fargo Bank, 781 F.2d 440, 442 (5th Cir. 1980).* **[*5]** A district court may not dismiss a complaint under *FRCP 12(b)(6)* "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957)*; *Blackburn v. Marshall, 42 F.3d 925, 931 (5th Cir. 1995)*. The Fifth Circuit defines this strict standard as, "The question therefore is whether in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Lowrey v. Texas A&M University System, 117 F.3d 242 (5th Cir. 1997)*, citing 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 1357, at 601 (1969).

Plaintiff asserts that the Marcotte Defendants, and their Co-Defendants violated federal antitrust and laws by when they acted as a Criminal RICO enterprise for the sole purpose of maintaining a monopoly within the Parish of Jefferson (Rec. Doc. 56). Plaintiff claims they were prevented from having access to the Louisiana Judiciary by the actions of the Defendants in **[*6]** concert with Official Public Custodians. The Marcotte Defendants contend that the *Noerr-Pennington* doctrine shields them from liability for the alleged violations of the Sherman Act and the antitrust causes of action in the complaint.

B. Noerr-Pennington Doctrine

HN2[] *Section 1* of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy" that unreasonably restrains interstate for foreign trade. *See 15 U.S.C. § 1 (West 2000)*. The *Noerr-Pennington* doctrine instructs that the federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from the government. *Astoria Entertainment, Inc. v. Edwards, 159 F.Supp.2d 303, 320 (E.D. La. 2001)* (citing *City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 379-380, 111 S.Ct. at 1345-54 (1991)*. That doctrine, distilled from two Supreme Court cases, and based upon political and constitutional concerns, instructs that the Sherman and Clayton Acts do not reach political activities, no matter how nefarious those activities may be. *Id.* The *Noerr-Pennington* applies to private parties seeking government **[*7]** action. *Id.* In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961)*, the Supreme Court relied upon basic statutory construction and constitutional theory to find that the Sherman Act cannot be predicated upon attempts to influence the passage of enforcement of laws. *Id.* (citing *Eastern, 365 U.S. at 136, 81 S.Ct. at 528*). The Court held that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or executive to take particular action with respect to a law that would produce a restraint or monopoly." *Id.* In *United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965)*, a case involving attempts to influence the Secretary of Labor to set a higher minimum wage, the Court extended *Noerr,* stating that, "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purposes." *Id.* (citing *Pennington, 381 U.S. at 670, 85 S.Ct. 1585, 85 S.Ct. at 1593*.) *Pennington*'s significance lies in the fact **[*8]** that it entailed more than the general lobbying activity seen in *Noerr,* but immunized lobbying directly to executive officials with commercial functions. *Id. at 321*.

Noerr-Pennington's reach was magnified by the Court in *City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382*,, *499 U.S. 365, 111 S.Ct. 1344, 113 L. Ed. 2d 382 (1991)*, in that the Court held no conspiracy exception existed for *Noerr-Pennington,* even one limited to situations involving "some element of unlawfulness." *Id.* (citing *Omni* at *499 U.S. at 383, 111 S.Ct. at 1356*.) By stating that there is no conspiracy exception to the *Noerr-Pennington* doctrine, the Supreme Court overruled those prior cases, such as *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988)*, which stated that corrupt practices in connection with lobbying activities stripped an actor's immunity. *Id.* Indeed, ***HN3***[] the Court definitively stated that "[g]iving full consideration to this matter for the first time, we conclude that a "conspiracy exception" to *Noerr* must be rejected." *Id.* Overall, Noerr-Pennington stands for the proposition that any type **[*9]** of conspiracy exception would have nothing to do with the policies of the antitrust laws." *Id.*

The result of these cases is that, ***HN4***[] as a general rule, lobbying and other efforts to obtain legislative, executive, judicial and quasi-judicial actions do not violate the antitrust laws. *Id. (See Acoustic Systems v. Wenger Corp., 207 F.3d 287 (5th Cir.2000); See also Bayou Fleet, Inc. v. Alexander, 234 F.3d 852, 862 (5th Cir.2000)* (citations omitted)). *Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Id.* (citing *Omni, 499 U.S. at 380, 111 S.Ct. at 1354*).

However, ***HN5***[] the *Noerr-Pennington* doctrine does have one exception: it does not shield petitioning activity that is "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Livingston Downs Racing Ass'n v. Jefferson Downs, Corp., 192 F.Supp.2d 519, 530 (M.D. La.2001)* (citing *Noerr, 365 U.S. at 144*). Under this sham exception, if the petitioner seeks "to use the governmental process-as opposed **[*10]** to the outcome of that process-as an anticompetitive weapon," the petitioning activity will not be protected from antitrust liability. *Id.;* see also *Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*. The sham exception governs situations in which the petitioner's "activities are not genuinely aimed at procuring favorable governmental action." See *Allied Tube & Conduit Corp., 486 U.S. 492, 500 n.4, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)*. The absence of a genuine desire for governmental action may be evidenced by "a pattern of baseless, repetitive claims" indicating that "the administrative and judicial processes have been abused." *Livingston, 192 F.Supp.2d at 530* (citing *California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972))*.

In her opposition, Plaintiff only mentions the "sham exception," but fails to apply it to the facts of this case (Rec. Doc. 56). Plaintiff defines defendant's activities and states that once those factual allegations are taken as true, "it becomes clear" the sham exception applies. However, the Plaintiff fails show how defendant's activities were not genuinely aimed at procuring favorable **[*11]** governmental action. The Plaintiff asserts the Marcotte Defendants controlled the staff of the Jefferson Parish Jail through "bribes, gifts and favors," and they did this in order to allow them to take custody of all the arresters whose bonds had been set at $ 2500 or less, each morning. Clearly, the Defendants' actions represent a good-faith effort to petition the Government for favorable action. The author of the memorandum even states that he "is not sure that the sham exception applies to the foregoing activities" (Rec. Doc. 56).

The sham exception will apply if the petition seeks to use the governmental process, as opposed to the outcome, as an anticompetitive weapon. See *Livingston, 192 F.Supp.2d at 530*. Here, the Plaintiff claims that the "roll out" scheme was created "for the sole purposes of maximizing BBU's profits, hindering, oppressing and suppressing BBU's competition…" Therefore, the Marcotte Defendants clearly sought to use the outcome of maximizing their profits and hindering competition, as an anticompetitive weapon. They were not merely using the governmental process as a method which, in itself, would injure plaintiff. This Court finds that the **[*12]** *Noerr-Pennington* Doctrine applies to the facts of this case, and the Marcotte Defendants are immune from Sherman Act liability. Therefore, the antitrust causes of action in the complaint should be dismissed.

For the foregoing reasons,

IT IS ORDERED that the Defendant's Motion to Dismiss the Antitrust Claims is hereby **GRANTED.**

New Orleans, Louisiana, this 5th day of April, 2007

STANWOOD R. DUVAL, JR.

UNITED STATES DISTRICT JUDGE

[In re Ins. Brokerage Antitrust Litig.]

United States District Court for the District of New Jersey

April 5, 2007, Decided

MDL Docket No. 1663, Civ. No. 04-5184 (GEB), Civ. No. 05-1079 (GEB)

Reporter

2007 U.S. Dist. LEXIS 25633 *

IN RE INSURANCE BROKERAGE ANTITRUST LITIGATION; IN RE EMPLOYEE-BENEFIT INSURANCE BROKERAGE ANTITRUST LITIGATION; This Document Relates To: ALL ACTIONS

Notice: **[*1]** NOT FOR PUBLICATION

Subsequent History: Appeal filed, 03/19/2007

Application granted by, Costs and fees proceeding at *[In re Ins. Brokerage Antitrust Litig., 2007 U.S. Dist. LEXIS 40729 (D.N.J., June 5, 2007)]*

Prior History: *[In re Ins. Brokerage Antitrust Litig., 2007 U.S. Dist. LEXIS 25632 (D.N.J., Apr. 5, 2007)]*

Disposition: Defendants' motion to dismiss granted, with final opportunity for Plaintiffs to amend.

Core Terms

conspiracy, brokers, insurers, contingent, Particularized, plaintiff's claim, allegations, Plaintiffs', Antitrust, horizontal, customers, broker-centered, global, carriers, alleged conspiracy, anticompetitive, Sherman Act, Consolidated, allocate, commissions, markets, conspirators, commission agreement, motion to dismiss, per se violation, Defendants', renewals, bid, partner, bid-rigging

Counsel: For EAGLE PRODUCTS, INC., Movant: HOWARD J. SEDRAN, LEVIN, FISHBEIN, SEDRAN & BERMAN, PHILADELPHIA, PA.

For STEPHEN LEWIS, Plaintiff: ADAM J LEVITT, FRED TAYLOR ISQUITH, WOLF HALDENSTEIN ADLER FREEMAN & HERTZ LLP, CHICAGO, IL; JAYNE ARNOLD GOLDSTEIN, MAGER & GOLDSTEIN LLP, CORAL SPRINGS, FL; KENNETH I. TRUJILLO, PHILADELPHIA, PA; MARK C. RIFKIN, WOLF, HALDENSTEIN, ADLER, FREEMAN & HERZ, LLP, NEW YORK, NY; ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US.

For DIANE PRUESS, Plaintiff: ADAM J LEVITT, FRED TAYLOR ISQUITH, MARY JANE EDELSTEIN FAIT, WOLF HALDENSTEIN ADLER FREEMAN & HERTZ LLP, CHICAGO, IL; JAYNE ARNOLD GOLDSTEIN, MAGER & GOLDSTEIN LLP, CORAL SPRINGS, FL; KENNETH I. TRUJILLO, PHILADELPHIA, PA; MARK C. RIFKIN, WOLF, HALDENSTEIN, ADLER, FREEMAN & HERZ, LLP, NEW YORK, NY; ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US.

For OPTICARE HEALTH SYSTEMS INC, (CIVIL 05-1168), Plaintiff: EDITH M. KALLAS, MILBERG, WEISS, BERSHAD & SCHULMAN, LLP, NEW YORK, NY; JOE R. WHATLEY, CHARLENE P. FORD, OTHNI J. LATHRAM, RICHARD P. ROUCO, WHATLEY, DRAKE, LLC, BIRMINGHAM, AL; JOHN J. STOIA, MARY LYNNE CALKINS, **[*2]** [*2] RACHEL LYNN JENSEN, THEODORE JOSEPH PINTAR, LERACH, COUGHLIN, STOIA, GELLER, RUDMAN & ROBBINS, LLP, SAN DIEGO, CA; JOSEPH P. GUGLIELMO, LILI R. SABO, WHATLEY

DRAKE & KALLAS, NEW YORK, NY; KENNETH I. TRUJILLO, PHILADELPHIA, PA; ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US; BONNY ELAINE SWEENEY, JAMES DANIEL MCNAMARA, LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS, SAN DIEGO, CA; PETER S. PEARLMAN, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, SADDLE BROOK, NJ.

For MARYANN WAXMAN, (CIVIL 05-1079), Plaintiff: KENNETH I. TRUJILLO, PHILADELPHIA, PA; ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US; LILI R. SABO, WHATLEY DRAKE & KALLAS, NEW YORK, NY; PETER S. PEARLMAN, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, SADDLE BROOK, NJ.

For SUNBURST HOSPITALITY CORPORATION, (CIVIL 04-5742), Plaintiff: ELLEN MERIWETHER, MELODY FORRESTER, MICHAEL STEVEN TARRINGER, TIMOTHY FRASER, BRYAN L. CLOBES, MILLER, FAUCHER & CAFFERTY, LLP, PHILADELPHIA, PA; KENNETH I. TRUJILLO, PHILADELPHIA, PA; ROBERT ANDREW SANTILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US.

For GOLDEN GATE BRIDGE, HIGHWAY AND TRANSPORTATION DISTRICT, **[*3]** [*3] REDWOOD OIL CO, Plaintiffs: FREDERICK P. FURTH, MICHAEL P. LEHMANN, THOMAS P. DOVE, JON T. KING, THE FURTH FIRM LLP, SAN FRANCISCO, CA; KENNETH I. TRUJILLO, PHILADELPHIA, PA; ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US; JULIO J. RAMOS, THE FURTH FIRM LLP, SAN FRANCISCO, NJ.

For SHELL VACATIONS LLC, Plaintiff: DOUGLAS A. MILLEN, STEVEN A. KANNER, WILLIAM HENRY LONDON, MUCH, SHELIST, FREED, DENENBERG, AMENT & RUBENSTEIN, PC, CHICAGO, IL; FREDERICK P. FURTH, MICHAEL P. LEHMANN, THOMAS P. DOVE, JON T. KING, THE FURTH FIRM LLP, SAN FRANCISCO, CA; KENNETH I. TRUJILLO, PHILADELPHIA, PA; ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US; JULIO J. RAMOS, THE FURTH FIRM LLP, SAN FRANCISCO, NJ.

For BAYOU STEEL CORP, (CIVIL NO. 05-1800), Plaintiff: AUSTIN B COHEN, HOWARD J. SEDRAN, LEVIN, FISHBEIN, SEDRAN & BERMAN, PHILADELPHIA, PA; KENNETH I. TRUJILLO, PHILADELPHIA, PA; ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US.

For REDWOOD OIL COMPANY, (CIVIL NO. 05-1798), Plaintiff: JAMES S. SHEDDEN, LAWRENCE WILEY SCHAD, MICHAEL S HILICKI, TONY KIM, BEELER, SCHAD & DIAMOND, PC, CHICAGO, IL; KENNETH **[*4]** I. [*4] TRUJILLO, PHILADELPHIA, PA; ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US; W. TIMOTHY NEEDHAM, JANSSEN MALLOY NEEDHAM MORRISON REINHOLTSEN & CROWLEY, EUREKA, CA.

For CLEAR LAM PACKAGING INC, (CIVIL 05-1797), Plaintiff: KATHLEEN CURRIE CHAVEZ, CHAVEZ LAW FIRM, GENEVA, IL; KENNETH I. TRUJILLO, PHILADELPHIA, PA; ROBERT M. FOOTE, FOOTE, MEYERS, MIELKE & FLOWERS, GENEVA, IL; ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US.

For DR ROBERT H KIMBALL, (CIVIL 05-2374), Plaintiff: JAMES L REED, TRAVIS SCOTT CRABTREE, LOOPER REED & MCGRAW, HOUSTON, TX; ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US.

For DAVID BOROS, (CIVIL NO. 05-1793), Plaintiff: CADIO ZIRPOLI, GEOFFREY C. RUSHING, SAVERI & SAVERI, SAN FRANCISCO, CA; GUIDO SAVERI, RICHARD ALEXANDER SAVERI, SAVERI & SAVERI, INC., SAN FRANCISCO, CA; KENNETH I. TRUJILLO, PHILADELPHIA, PA; ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US.

For SHELDON LANGENDORF, (CIVIL 05-3284), ESTELLE LANGENDORF, (CIVIL 05-3284), Plaintiffs: KENNETH I. TRUJILLO, PHILADELPHIA, PA; LARRY R. DRURY, CHICAGO, IL; ROBERT ANDREW **[*5]** SANTILLO, [*5] TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US.

For Cellect, LLC, City of Stamford, Gateway Club Apartments, Ltd., Michigan Multi-King Corp., GLENN SINGER, The Enclave, LLC, The Omni Group of Companies, Plaintiffs: KENNETH I. TRUJILLO, PHILADELPHIA, PA; ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US.

For COMCAR INDUSTRIES, INC., Plaintiff: KENNETH I. TRUJILLO, PHILADELPHIA, PA; ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US; JOSEPH PRESTON STROM, STROM LAW FIRM LLC, COLUMBIA, SC US; MARIO ANTHONY PACELLA, STROM LAW FIRM LLP, COLUMBIA, SC US.

For ROBERT MULCAHY, Plaintiff: ELLEN MERIWETHER, MELODY FORRESTER, MICHAEL STEVEN TARRINGER, MILLER, FAUCHER & CAFFERTY, LLP, PHILADELPHIA, PA; ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US.

For SIGNUM LLC, (CIVIL NO. 05-4047), Plaintiff: ARTHUR CAMDEN LEWIS, LEWIS, BABCOCK & HAWKINS, LLP, COLUMBIA, SC; JAMES M. GRIFFIN, JAMES M. GRIFFIN LAW OFFICE, COLUMBIA, SC; KENNETH I. TRUJILLO, PHILADELPHIA, PA; RICHARD A HARPOOTLIAN, COLUMBIA, SC; ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US.

For **[*6]** KLLM INC, (CIVIL [*6] NO. 05-4046), Plaintiff: ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US; ROY H. LIDDELL, THOMAS M. LOUIS, JULIE C. SKIPPER, WELLS, MARBLE & HURST, PLLC, JACKSON, MS.

For FORTUNE BRANDS INC, (CIVIL NO. 05-4137), Plaintiff: ERNEST SUMMERS, III, LISA COLLEEN SULLIVAN, HOWREY, SIMON, ARNOLD & WHITE, LLP, CHICAGO, IL US; KENNETH I. TRUJILLO, PHILADELPHIA, PA; ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US; THOMAS LOUIS RUFFNER, HOWREY LLP, CHICAGO, IL US.

For SLAY INDUSTRIES, (CIVIL NUMBER 05-5698), Plaintiff: JEFFREY J. LOWE, ST. LOUIS, MO; KENNETH I. TRUJILLO, PHILADELPHIA, PA; MICHAEL J. FLANNERY, CAREY & DANIS, ST. LOUIS, MO; ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US.

For SLAY TRANSPORTATION CO INC, (CIVIL NUMBER 05-5698), Plaintiff: JEFFREY J. LOWE, ST. LOUIS, MO; KENNETH I. TRUJILLO, PHILADELPHIA, PA; ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US.

For PALM TREE COMPUTERS SYSTEMS INC, (CIVIL NO. 05-5238), DELTA RESEARCH INSTITUTE INC, (CIVIL NO. 05-5238), Plaintiffs: DAVID HUGHES HARRIS, GOLDSTEIN, BUCKLEY, CECHMAN, RICE **[*7]** & PURTZ, PA, FORT MYERS, [*7] FL; KENNETH G. GILMAN, GILMAN & PASTOR, LLP, BOSTON, MA; KENNETH I. TRUJILLO, PHILADELPHIA, PA; ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US.

For EMERSON ELECTRIC CO., (CIVIL NO. 05-5697), Plaintiff: DOROTHY L. WHITE-COLEMAN, WHITE, COLEMAN & ASOCIATES, LLC, ST. LOUIS, MO US; KENNETH I. TRUJILLO, PHILADELPHIA, PA; ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US.

For DELTA PRIDE CATFISH INC, (CIVIL NO. 05-5290), Plaintiff: JULIE C. SKIPPER, ROY H. LIDDELL, WELLS, MARBLE & HURST, PLLC, JACKSON, MS; KENNETH I. TRUJILLO, PHILADELPHIA, PA; ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US.

For CAMERON OFFSHORE BOATS INC, (CIVIL NO. 05-5696), Plaintiff: H. ALAN MCCALL, STOCKWELL SIEVERT, LAKE CHARLES, LA US; JOSEPH N. KRAVEC, SPECTER & SPECTER, PITTSBURG, PA US; ROBERT ANDREW SANTILLO, TRUJILLO, RODRIGUEZ & RICHARDS, PHILADELPHIA, PA US.

For Tri-State Container Corp., Plaintiff: NATALIE FINKELMAN BENNETT, SHEPHERD, FINKELMAN, MILLER & SHAH, LLC, COLLINGSWOOD, NJ.

Connecticut Spring & Stamp Co., Plaintiff, Pro se.

For BELMONT HOLDINGS CORP., PLAINTIFF **[*8]** IN CIV. 05-5533, Plaintiff: [*8] CHRISTINA DONATO SALER, KOHN SWIFT & GRAF, PHILADELPHIA, PA US.

For AMERICAN STANDARD, INC., PLAINTIFF FROM DOCKET 05-4573, AMERICAN STANDARD COMPANIES, INC., PLAINTIFF IN DOCKET 05-4573, Plaintiffs: BARBARA T. SICALIDES, PEPPER, HAMILTON, PHILADELPHIA, PA; JOANNA J. CLINE, PEPPER HAMILTON LLP, CHERRY HILL, NJ.

For SINCLAIR OIL CORP, Plaintiff in 06-3844, Plaintiff: GEORGE M. HALEY, J. ANDREW SJOBLOM, E. BLAINE RAWSON, HOLME ROBERTS & OWEN, SALT LAKE CITY, UT US.

AIR LIQUIDE AMERICA L.P., Plaintiff, Pro se.

AIR LIQUIDE LARGE INDUSTRIES U.S. LP, Plaintiff, Pro se.

AIR LIQUIDE USA LLC, Plaintiff, Pro se.

AL America Holdings, LLC, Plaintiff, Pro se.

American Air Liquide Holdings, Inc., Plaintiff, Pro se.

American Air Liquide, Inc., Plaintiff, Pro se.

American Plumbing and Mechanical, Inc., Plaintiff, Pro se.

Huntsman Advance Materials LLC, Plaintiff, Pro se.

HUNTSMAN CORPORATION, Plaintiff, Pro se.

Huntsman Holdings, LLC, Plaintiff, Pro se.

HUNTSMAN LLC, Plaintiff, Pro se.

International Risk Insurance Company, Plaintiff, Pro se.

John Baird, Plaintiff, Pro se. [*9].

PLAINT **[*9]** CORPORATION, Plaintiff, Pro se.

For MARK TOBEY, KIM VAN WINKLE, Intervenor Plaintiffs: GREGG ABBOTT, AUSTIN, TX US.

For MARSH & MCLENNAN COMPANIES, INC., Defendant: ANDREW T. BERRY, GARY N. WILCOX, MCCARTER & ENGLISH, LLP, NEWARK, NJ; C. LARRY CORBO, III, CAROLE ELAINE HOWARD, JACKSON WALKER LLP, HOUSTON, TX; CHRISTOPHER J. ST. JEANOS, JOHN ROBERT OLLER, MITCHELL JAY AUSLANDER, WILLKIE FARR & GALLAGHER, NEW YORK, NY US; DANIEL P. JORDAN, P. RYAN BECKETT, BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC, JACKSON, MS US; FREDERICK BARTLETT WULFF, SR, JACKSON WALKER LLP, DALLAS, TX; GREGORY K. CONWAY, WILLKIE, FARR & GALLAGHER, WASHINGTON, DC US; KEVIN F HORMUTH, KEVIN F. O'MALLEY, GREENSFELDER & HEMKER, ST LOUIS, MO US; PHILIP RITCHEY SIMS, WILLIAM F. GRACE, CHAFFE MCCALL, NEW ORLEANS, LA US.

For MARSH INC., Defendant: ANDREW T. BERRY, GARY N. WILCOX, MCCARTER & ENGLISH, LLP, NEWARK, NJ; CAROLE ELAINE HOWARD, JACKSON WALKER LLP, HOUSTON, TX; CHRISTOPHER J. ST. JEANOS, JOHN ROBERT OLLER, MITCHELL JAY AUSLANDER, WILLKIE FARR & GALLAGHER, NEW YORK, NY US; DANIEL P. JORDAN, P. RYAN BECKETT, BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC, JACKSON, MS US; DAVID C [*10] GUSTMAN, **[*10]** JILL CHRISTINE ANDERSON, FREEBORN & PETERS, CHICAGO, IL US; FREDERICK BARTLETT WULFF, SR, JACKSON WALKER LLP, DALLAS, TX; KEVIN F HORMUTH, KEVIN F. O'MALLEY, GREENSFELDER & HEMKER, ST LOUIS, MO US.

For MARSH USA INC., Defendant: ANDREW T. BERRY, GARY N. WILCOX, MCCARTER & ENGLISH, LLP, NEWARK, NJ; C. LARRY CORBO, III, CAROLE ELAINE HOWARD, JACKSON WALKER LLP, HOUSTON, TX; CHRISTOPHER J. ST. JEANOS, JOHN ROBERT OLLER, MITCHELL JAY AUSLANDER, WILLKIE FARR & GALLAGHER, NEW YORK, NY US; DANIEL P. JORDAN, P. RYAN BECKETT, BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC, JACKSON, MS US; FREDERICK BARTLETT WULFF, SR, JACKSON WALKER LLP, DALLAS, TX; GREGORY K. CONWAY, WILLKIE, FARR & GALLAGHER, WASHINGTON, DC US; KEVIN F HORMUTH, KEVIN F. O'MALLEY, GREENSFELDER & HEMKER, ST LOUIS, MO US; PHILIP RITCHEY SIMS, WILLIAM F. GRACE, CHAFFE MCCALL, NEW ORLEANS, LA US; CHRISTOPHER J. ST. JEANOS, WILLKIE FARR & GALLAGHER, NEW YORK, NY US; DANIEL P. JORDAN, BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC, JACKSON, MS US; DAVID C GUSTMAN, FREEBORN & PETERS, CHICAGO, IL US; GREGORY K. CONWAY, WILLKIE, FARR & GALLAGHER, WASHINGTON, DC US; JILL CHRISTINE ANDERSON, FREEBORN & PETERS, CHICAGO, IL [*11] **[*11]** US; JOHN ROBERT OLLER, MITCHELL JAY

AUSLANDER, WILLKIE FARR & GALLAGHER, NEW YORK, NY US; KEVIN F HORMUTH, KEVIN F. O'MALLEY, GREENSFELDER & HEMKER, ST LOUIS, MO US; P. RYAN BECKETT, BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC, JACKSON, MS US; PHILIP RITCHEY SIMS, WILLIAM F. GRACE, CHAFFE MCCALL, NEW ORLEANS, LA US.

For SEABURY & SMITH, INC., DOING BUSINESS AS MARSH ASVANTAGE AMERICA, Defendant: MITCHELL JAY AUSLANDER, WILLKIE FARR & GALLAGHER, NEW YORK, NY US.

For B&T CORPORATION, (CIVIL 05-1168), BB&T INSURANCE SERVICES, INC., (CIVIL 05-1168), Defendants: ALAN L. BRIGGS, JAMES PAUL WEHNER, JR., AMY LYNN BROWN, HOLLY BROOKE JAMES, SQUIRE, SAMDERS & DEMPSEY, LLP, WASHINGTON, DC US; HOWARD J.C. NICOLS, SQUIRE, SANDERS & DEMPSEY, LLP, NEW YORK, NY; JACK LOUIS WUERKER, SQUIRE SANDERS & DEMPSEY, VIENNA, VA US.

For BRANCH BANKING & TRUST COMPANY, (CIVIL 05-1168), Defendant: ALAN L. BRIGGS, JAMES PAUL WEHNER, JR., AMY LYNN BROWN, SQUIRE, SAMDERS & DEMPSEY, LLP, WASHINGTON, DC US; HOWARD J.C. NICOLS, SQUIRE, SANDERS & DEMPSEY, LLP, NEW YORK, NY.

For UNUMPROVIDENT CORPORATION, Defendant: DEBORAH E HYRB, PATRICK SHEA, PAUL HASTINGS, JANOFSKY & WALKER, LLP, STAMFORD, CT **[*12]** [*12] US; JENNIFER BATES MCINTYRE, ROSEANN OLIVER, PERKINS COIE LLC, CHICAGO, IL; RACHEL ROSS KRAUSE, OGDEN & SULLIVAN, PA, TAMPA, FL US; STEVEN PAUL DEL MAURO, RANDI F. KNEPPER, MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP, MORRISTOWN, NJ; TIMON V SULLIVAN, OGDEN & SULLIVAN, PA, TAMPA, FL US.

For ACE INA HOLDINGS, (CIVIL 05-1800, PUR. TO ORDER DATED 3/11/2005), Defendant: JEREMY J BRANDON, JOHNNY W. CARTER, SUSMAN GODFREY, LLP, DALLAS, TX US; LIZA M. WALSH, MARC D. HAEFNER, CONNELL FOLEY, LLP, ROSELAND, NJ; M. DUNCAN GRANT, PEPPER HAMILTON LLP, PHILADELPHIA, PA; DANIEL J. LEFFELL, NEW YORK, NY.

For ACE LIMITED, (PUR. TO ORDER DATED 3/11/2005, Defendant: ALAN N. SALPETER, CHICAGO, IL; H. LEE GODFREY, JEFFREY R. SEELY, JOHNNY W. CARTER, MICHAEL P. GEISER, NEAL S. MANNE, VINEET BHATIA, SUSMAN GODFREY, LLP, HOUSTON, TX; JEREMY J BRANDON, SUSMAN GODFREY, LLP, DALLAS, TX US; ROBERT J KRISS, MAYER, BROWN, ROWE & MAW, LLP, CHICAGO, IL; DANIEL J. LEFFELL, NEW YORK, NY; MARC D. HAEFNER, CONNELL FOLEY, LLP, ROSELAND, NJ.

For ACE USA, (PUR. TO ORDER DATED 3/11/2005), Defendant: ALAN N. SALPETER, CHICAGO, IL; FREDERIC STANLEY, JR, STANLEY, DEHLINGER & RASCHER, ALTAMONTE SPRINGS, **[*13]** FL US; [*13] GRETHCHEN S. SWEEN, JEREMY J BRANDON, JOHNNY W. CARTER, SUSMAN GODFREY, LLP, DALLAS, TX US; H. LEE GODFREY, JEFFREY R. SEELY, L. JANE RAY, MICHAEL P. GEISER, NEAL S. MANNE, VINEET BHATIA, SUSMAN GODFREY, LLP, HOUSTON, TX; LIZA M. WALSH, CONNELL FOLEY, LLP, ROSELAND, NJ; M. DUNCAN GRANT, PEPPER HAMILTON LLP, PHILADELPHIA, PA; ROBERT J KRISS, MAYER, BROWN, ROWE & MAW, LLP, CHICAGO, IL; DANIEL J. LEFFELL, NEW YORK, NY; MARC D. HAEFNER, CONNELL FOLEY, LLP, ROSELAND, NJ.

For WILLIS GROUP HOLDINGS LIMITED, (CIVIL 05-1168), WILLIS GROUP LIMITED, (CIVIL 05-1168), WILLIS NORTH AMERICA INC., Defendants: ANASTASIA ANGELOVA, RICHARD C. PEPPERMAN, II, SULLIVAN & CROMWELL, LLP, NEW YORK, NY.

For AMERICAN INTERNATIONAL GROUP, INC., Defendant: CARL H POCDTKE, DLA PIPER RUDNICK GARY CARY US LLP, CHICAGO, IL; DANIEL J. LEFFELL, LAYALIZA KLEIN SOLOVEICHIK, MARTIN FLUMENBAUM, REBECCA CAREN SHORE, ROBERTA A. KAPLAN, PAUL WEISS RIFKIND, WHARTON & GARRISON LLP, NEW YORK, NY; KENNETH A. GALLO, PAUL WEISS RIFKIND, WHARTON & GARRISON LLP, WASHINGTON, DC; MARK A. ARONCHICK, HANGLEY ARONCHICK SEGAL & PUDLIN, PHILADELPHIA, PA; SAMUEL BAYARD ISAACSON, STEPHEN W SCHWAB, DLA PUPER RUDICK **[*14]** GRAY CARY US LLP, [*14] CHICAGO, IL.

For THE ST. PAUL TRAVELERS COMPANIES, INC., Defendant: DANIEL J. LEFFELL, NEW YORK, NY; MICHAEL J. GARVEY, SIMPSON THACHER & BARTLETT LLP, NEW YORK, NY.

For BROWN & BROWN, INC., Defendant: BARRY G. SHER, KEVIN C. LOGUE, SARAH EMILY HAGANS, VICTORIA ASHWORTH, PAUL HASTINGS JANOFSKY & WALKER, LLP, NEW YORK, NY US; THEODORE ALLAN KITTILA, PAUL, HASTINGS, HANOFSKY & WALKER, LLP, NEW YORK, NY.

For ACORDIA INC, WELLS FARGO, (CIVIL 05-1168), Defendants: ALAN L. KILDOW, DLA PIPER RUDNICK GRAY CARY US LLP, MINNEAPOLIS, MN; CARLOS F. ORTIZ, DLA, PIPER, RUDNICK, GRAY & CARY, LLP, NEW YORK, NY; SONYA RAE BRAUNSCHWEIG, DLA, PIPER, RUDNICK, GRAY, CARY & US, LLP, MINNEAPOLIS, MN.

For NATIONAL FINANCIAL PARTNERS CORP., Defendant: WILLIAM F. CLARKE, JR., SKADDEN ARPS, SLATE, MEAGHER & FLOM. LLP, NEW YORK, NJ.

For PRUDENTIAL FINANCIAL, INC., (CIVIL 05-1064), Defendant: CHRISTOPHER C. GILBERT, MARTIN B. UNGER, UNGER LAW GROUP, PL, ORLANDO, FL US; DOUGLAS SCOTT EAKELEY, JOHN R. MIDDLETON, LOWENSTEIN SANDLER PC, ROSELAND, NJ.

For THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, INC., (CIVIL 05-1064), Defendant: JOHN R. MIDDLETON, LOWENSTEIN **[*15]** SANDLER [*15] PC, ROSELAND, NJ.

For U.S.I. HOLDINGS CORPORATION, Defendant: RACHEL L. GERSTEIN, ROBERT HARDY PEES, AKIN, GUMP, STRAUSS, HAUER & FELD, LLP, NEW YORK, NY; RICHARD B. ZABEL, AKIN, GUMP, STRAUSS, HAVER & FELD, LLP, NEW YORK, NY.

For ACE INA, Defendant: FREDERIC STANLEY, JR, STANLEY, DEHLINGER & RASCHER, ALTAMONTE SPRINGS, FL US; GRETHCHEN S. SWEEN, JEREMY J BRANDON, SUSMAN GODFREY, LLP, DALLAS, TX US; H. LEE GODFREY, JEFFREY R. SEELY, JOHNNY W. CARTER, L. JANE RAY, NEAL S. MANNE, SUSMAN GODFREY, LLP, HOUSTON, TX; MARC D. HAEFNER, CONNELL FOLEY, LLP, ROSELAND, NJ.

For ACE INA HOLDINGS INC, Defendant: ALAN N. SALPETER, CHICAGO, IL; H. LEE GODFREY, JEFFREY R. SEELY, MICHAEL P. GEISER, NEAL S. MANNE, VINEET BHATIA, SUSMAN GODFREY, LLP, HOUSTON, TX; JOHNNY W. CARTER, SUSMAN GODFREY, LLP, DALLAS, TX US; M. DUNCAN GRANT, PEPPER HAMILTON LLP, PHILADELPHIA, PA; ROBERT J KRISS, MAYER, BROWN, ROWE & MAW, LLP, CHICAGO, IL; MARC D. HAEFNER, CONNELL FOLEY, LLP, ROSELAND, NJ.

For ACE LTD, (CIVIL 05-1167), Defendant: M. DUNCAN GRANT, PEPPER HAMILTON LLP, PHILADELPHIA, PA; MARC D. HAEFNER, CONNELL FOLEY, LLP, ROSELAND, NJ.

For AON CORPORATION, Defendant: AMY D **[*16]** HARMON, MARGUERITE [*16] S. WILLIS, RUSSELL THOMAS BURKE, NEXSEN, PRUET, JACOBS & POLLARD, COLUMBIA, SC; BENJAMIN R. OSTAPUK, KIRKLAND & ELLIS LLP, SAN FRANCISCO, CA; DANIEL EDWARD LAYTIN, ELIZABETH A. LARSEN, KIRKPATRICK & LOCKHART, NICHOLSON, GRAHAM, LLP, CHICAGO, IL; DONALD A. ROBINSON, LEDA DUNN WETTRE, ROBINSON & LIVELLI, ESQS., NEWARK, NJ; JILL M. STEINBERG, BAKER DONELSON BEARMAN, CALDWELL & BERKOWITZ, MEMPHIS, TN; JOHN ARMANDO BOUDET, GREENBERG TRAURIG, PA, ORLANDO, FL US; LESLIE M. SMITH, RENEE WICKLUND, RICHARD C GODFREY, KIRKLAND & ELLIS LLP, CHICAGO, IL.

For AON CORP, (CIVIL 05-1801), Defendant: DONALD A. ROBINSON, LEDA DUNN WETTRE, ROBINSON & LIVELLI, ESQS., NEWARK, NJ.

For AON SERVICES GROUP, (CIVIL 05-1167), Defendant: LESLIE M. SMITH, KIRKLAND & ELLIS LLP, CHICAGO, IL; DONALD A. ROBINSON, LEDA DUNN WETTRE, ROBINSON & LIVELLI, ESQS., NEWARK, NJ.

For MARSH USA INC., (CONNECTICUT) (CIVIL 05-1168), Defendant: ANDREW T. BERRY, MCCARTER & ENGLISH, LLP, NEWARK, NJ; MITCHELL JAY AUSLANDER, WILLKIE FARR & GALLAGHER, NEW YORK, NY US.

For HILB, ROGAL & HOBBS, (CIVIL 05-1168) FORMERLY KNOWN AS HILB, ROGAL, & HAMILTON COMPANY, Defendant: MICHAEL R. GRIFFINGER, **[*17]** WILLIAM P. DENI, JR., GIBBONS, [*17] DEL DEO, DOLAN, GRIFFINGER & VECCHIONE, PC, NEWARK, NJ; SHAWN PATRICK REGAN, HUNTON & WILLIAMS, LLP, NEW

YORK, NY; JONATHAN MICHAEL WILAN, NEIL KEITH GILMAN, HUNTON & WILLIAMS LLP, WASHINGTON, DC.

For ARTHUR J GALLAGHER & CO, Defendant: ANDREW KENNETH LEVINE, BROAD AND CASSEL, TALLAHASSEE, FL US; DANIELLE A. R. COFFMAN, WINSTON & STRAWN, LLP, CHICAGO, IL; DAVID EMILIO MOLLON, EDWIN MICHAEL LARKIN, LINA M. VIVIANO, WINSTON & STRAWN LLP, NEW YORK, NY; JAMES S. RICHTER, WINSTON & STRAWN LLP, NEWARK, NJ; KATHERINE E BORDEN, STEPHEN CHARLES SCHULTE, TERRY M. GRIMM, CHICAGO, IL.

For LEXINGTON INSURANCE COMPANY, Birmingham Fire Insurance Co. of PA, NEW HAMPSHIRE INSURANCE CO., Defendants: DANIEL J. LEFFELL, NEW YORK, NY; KENNETH A. GALLO, PAUL WEISS RIFKIND, WHARTON & GARRISON LLP, WASHINGTON, DC.

For U.S.I HOLDINGS CORP, Defendant: PATRICK CHARLES SCHMITTER, ROBERT HARDY PEES, RICHARD B. ZABEL, AKIN, GUMP, STRAUSS, HAUER & FELD, LLP, NEW YORK, NY.

For HARTFORD FINANCIAL SERVICES GROUP INC, Defendant: ANDREA ROBINSON, WILMER CUTLER PICKERING, HALE & DORR LLP, BOSTON, MA; GREGORY M. REISER, WILMER, CUTLER, PICKERING, HALE & DORR, LLP, **[*18]** PRINCETON, NJ; JAMES E. FOSTER, VIRGINIA [*18] B. TOWNES, AKERMAN SENTERFITT, ORLANDO, FL US; MARCI A EISENSTEIN, WILLIAM M HANNAY, SCHIFF HARDIN, LLP, CHICAGO, IL; PAUL ADAM ENGELMAYER, WILMER, BUTLER & PICKERING, ESQS., NEW YORK, NY; ROBERT W. TRENCHARD, ROBIN L. ALPERSTEIN , WILMER, CUTLER, PICKERING, HALE & DORR, LLP, NEW YORK, NY; DANIEL J. LEFFELL, NEW YORK, NY;MARY SUSAN HENIFIN, BUVHANAN INGERSOLL, PC, PRINCETON, NJ.

For HARTFORD FIRE INSURANCE COMPANY, Defendant: ANDREA ROBINSON, WILMER CUTLER PICKERING, HALE & DORR LLP, BOSTON, MA; JAMES E. FOSTER, VIRGINIA B. TOWNES, AKERMAN SENTERFITT, ORLANDO, FL US; ROBERT W. TRENCHARD, WILMER, CUTLER, PICKERING, HALE & DORR, LLP, NEW YORK, NY; DANIEL J. LEFFELL, NEW YORK, NY; MARY SUSAN HENIFIN, BUVHANAN INGERSOLL, PC, PRINCETON, NJ.

For PROPERTY & CASUALTY INSURANCE COMPANY OF HARTFORD, Defendant: MARCI A EISENSTEIN, WILLIAM M HANNAY, SCHIFF HARDIN, LLP, CHICAGO, IL; MARY SUSAN HENIFIN, BUVHANAN INGERSOLL, PC, PRINCETON, NJ.

For TWIN CITY FIRE INSURANCE COMPANY, Nutmeg Life Insurance Co., The Hartford Fidelity & Bonding, Defendants: DANIEL J. LEFFELL, NEW YORK, NY; MARY SUSAN HENIFIN, BUVHANAN INGERSOLL, PC, PRINCETON, **[*19]** NJ.

For AON GROUP INC, (CIVIL NO. 05-1801), [*19] Defendant: BENJAMIN R. OSTAPUK, KIRKLAND & ELLIS LLP, SAN FRANCISCO, CA; DANIEL EDWARD LAYTIN, KIRKPATRICK & LOCKHART, NICHOLSON, GRAHAM, LLP, CHICAGO, IL; JILL M. STEINBERG, BAKER DONELSON BEARMAN, CALDWELL & BERKOWITZ, MEMPHIS, TN; JOHN ARMANDO BOUDET, GREENBERG TRAURIG, PA, ORLANDO, FL US; LESLIE M. SMITH, RICHARD C GODFREY, KIRKLAND & ELLIS LLP, CHICAGO, IL; DONALD A. ROBINSON, ROBINSON & LIVELLI, ESQS., NEWARK, NJ.

For AON DIRECT GROUP INC, (CIVIL NO. 05-1801), Defendant: DANIEL EDWARD LAYTIN, KIRKPATRICK & LOCKHART, NICHOLSON, GRAHAM, LLP, CHICAGO, IL; JILL M. STEINBERG, BAKER DONELSON BEARMAN, CALDWELL & BERKOWITZ, MEMPHIS, TN; LESLIE M. SMITH, RICHARD C GODFREY, KIRKLAND & ELLIS LLP, CHICAGO, IL; DONALD A. ROBINSON, ROBINSON & LIVELLI, ESQS., NEWARK, NJ.

For AFFINITY INSURANCE SERVICES INC, (CIVIL NO. 05-1801), Defendant: DANIEL EDWARD LAYTIN, KIRKPATRICK & LOCKHART, NICHOLSON, GRAHAM, LLP, CHICAGO, IL; JILL M. STEINBERG, BAKER DONELSON BEARMAN, CALDWELL & BERKOWITZ, MEMPHIS, TN; LESLIE M. SMITH, RICHARD C GODFREY, KIRKLAND & ELLIS LLP, CHICAGO, IL; DONALD A. ROBINSON, ROBINSON & LIVELLI, ESQS., NEWARK, NJ.

[*20] For HEALTHCARE PROVIDERS SERVICE ORGANIZATION, (CIVIL [*20] NO. 05-1801), Defendant: DANIEL EDWARD LAYTIN, KIRKPATRICK & LOCKHART, NICHOLSON, GRAHAM, LLP, CHICAGO, IL; JILL M. STEINBERG, BAKER DONELSON BEARMAN, CALDWELL & BERKOWITZ, MEMPHIS, TN; LESLIE M. SMITH, RICHARD C GODFREY, KIRKLAND & ELLIS LLP, CHICAGO, IL.

For AMERICAN RE CORPORATION, Defendant: DAVID GRAIS, DEWEY BALLANTINE, LLP, NEW YORK, NY; DANIEL J. LEFFELL, NEW YORK, NY; MOLLY LEHR, DEWEY BALLANTINE, LLP, NEW YORK, NY.

For AMERICAN RE-INSURANCE COMPANY, Defendant: DAVID GRAIS, JOHN F. COLLINS, MOLLY LEHR, DEWEY BALLANTINE, LLP, NEW YORK, NY; EAMON O'KELLY, DEWEY BALLANTINE, NEW YORK, NY US; HOUSTON S. PARK, III, STEPHENS, LYNN, KLEIN, LA CAVA, HOFFMAN, WEST PALM BEACH, FL US; KRISTIN ANN MEISTER, DEWEY BALLANTINE, LLP, NEW YORK CITY, NY US; DANIEL J. LEFFELL, NEW YORK, NY.

For MUNICH-AMERICAN RISK PARTNERS INC, Defendant: DAVID GRAIS, JEFFREY S. RUGG, MOLLY LEHR, DEWEY BALLANTINE, LLP, NEW YORK, NY; EAMON O'KELLY, DEWEY BALLANTINE, NEW YORK, NY US; DANIEL J. LEFFELL, NEW YORK, NY.

For AON RISK SERVICES COMPANIES INC, Defendant: BENJAMIN R. OSTAPUK, KIRKLAND & ELLIS LLP, SAN FRANCISCO, CA; DANIEL **[*21]** EDWARD LAYTIN, KIRKPATRICK & LOCKHART, NICHOLSON, GRAHAM, LLP, [*21] CHICAGO, IL; JOHN ARMANDO BOUDET, GREENBERG TRAURIG, PA, ORLANDO, FL US; LESLIE M. SMITH, KIRKLAND & ELLIS LLP, CHICAGO, IL; DONALD A. ROBINSON, ROBINSON & LIVELLI, ESQS., NEWARK, NJ.

For AON RISK SERVICES INC U.S., Defendant: BENJAMIN R. OSTAPUK, KIRKLAND & ELLIS LLP, SAN FRANCISCO, CA; DANIEL EDWARD LAYTIN, KIRKPATRICK & LOCKHART, NICHOLSON, GRAHAM, LLP, CHICAGO, IL; LESLIE M. SMITH, KIRKLAND & ELLIS LLP, CHICAGO, IL; DONALD A. ROBINSON, ROBINSON & LIVELLI, ESQS., NEWARK, NJ.

For AON SERVICES GROUP INC, Defendant: BENJAMIN R. OSTAPUK, KIRKLAND & ELLIS LLP, SAN FRANCISCO, CA; DANIEL EDWARD LAYTIN, KIRKPATRICK & LOCKHART, NICHOLSON, GRAHAM, LLP, CHICAGO, IL; JOHN ARMANDO BOUDET, GREENBERG TRAURIG, PA, ORLANDO, FL US; LESLIE M. SMITH, KIRKLAND & ELLIS LLP, CHICAGO, IL; DONALD A. ROBINSON, ROBINSON & LIVELLI, ESQS., NEWARK, NJ.

For UNIVERSAL LIFE RESOURCES, DOING BUSINESS AS ULR, Defendant: DAVID A. GABIANELLI, HANCOCK ROTHERT & BUNSHOFT LLP, SAN FRANCISCO, CA; ERIC NEAL MACEY, STEPHEN J SIEGAL, NOVACK & MACEY, LLP, CHICAGO, IL; SCOTT L. METZGER, DUCKOR, SPRADLING, METZGER & WYNNE, SAN DIEGO, CA US; **[*22]** STEPHEN P. YOUNGER, PATTERSON, BELKNAP, WEBB & TYLER, NEW YORK, NY.

For [*22] UNIVERSAL LIFE RESOURCES INC, DOING BUSINESS AS ULR INSURANCE SERVICES INC, Defendant: ERIC NEAL MACEY, NOVACK & MACEY, LLP, CHICAGO, IL; NED GELHAAR, HANCOCK, ROTHERT & BUNSHOFT, LLP, LOS ANGELES, CA US; SCOTT L. METZGER, DUCKOR, SPRADLING, METZGER & WYNNE, SAN DIEGO, CA US; STEPHEN P. YOUNGER, PATTERSON, BELKNAP, WEBB & TYLER, NEW YORK, NY.

For WILLIS GROUP HOLDINGS LTD., Defendant: ANASTASIA ANGELOVA, RICHARD C. PEPPERMAN, II,, SULLIVAN & CROMWELL, LLP, NEW YORK, NY; FREDRICK H. MCCLURE, TAMPA, FL US; JOHN L. WARDEN, SULLIVAN & CROMWELL, NEW YORK, NY US; RICHARD C. PEPPERMAN, II,, SULLIVAN & CROMWELL, LLP, NEW YORK, NY.

For WILLIS GROUP LTD., WILLIS NORTH AMERICAN INC, Defendants: ANASTASIA ANGELOVA, RICHARD C. PEPPERMAN, II,, SULLIVAN & CROMWELL, LLP, NEW YORK, NY; FREDRICK H. MCCLURE, TAMPA, FL US; JOHN L. WARDEN, SULLIVAN & CROMWELL, NEW YORK, NY US.

For BENEFITS COMMERCE, Defendant: ERIC NEAL MACEY, NOVACK & MACEY, LLP, CHICAGO, IL; SCOTT L. METZGER, DUCKOR, SPRADLING, METZGER & WYNNE, SAN DIEGO, CA US; STEPHEN P. YOUNGER, PATTERSON, BELKNAP, WEBB & TYLER, NEW YORK, NY.

For **[*23]** DOUGLAS P. COX, Defendant: ERIC NEAL MACEY, NOVACK & MACEY, LLP, CHICAGO, IL; SCOTT L. [*23] METZGER, DUCKOR, SPRADLING, METZGER & WYNNE, SAN DIEGO, CA US; STEPHEN P. YOUNGER, PATTERSON, BELKNAP, WEBB & TYLER, NEW YORK, NY.

For METLIFE INC, Defendant: CHRISTOPHER C. GILBERT, MARTIN B. UNGER, UNGER LAW GROUP, PL, ORLANDO, FL US; JAMES W. CARBIN, DUANNE MORRIS, LLP; EDWARD G. BIESTER, COUNSEL NOT ADMITTED TO USDC-NJ BAR, DUANE MORRIS, LLP, PHILADELPHIA, PA; PAUL JEFFREY RIEHLE, SEDGWICK DETERT MORAN & ARNOLD, SAN FRANCISCO, CA; MARGARET MARY O'ROURKE, WOLFF SAMSON, PC, WEST ORANGE, NJ.

For ST PAUL TRAVELERS COS INC, Defendant: PAUL C. CURNIN, SIMPSON THACHER & BARTLETT, NEW YORK, NY.

For ZURICH AMERICAN INSURANCE CO., DOING BUSINESS AS ZURICH NORTH AMERICA, Defendant: ANN M. ASHTON, DAVID S. TURETSKY, GEORGE E. ANHANG, RALPH C. FERRARA, LEBOEUF, LAMB, GREENE & MACRAE, LLP, WASHINGTON, DC; GIL M. SOFFER, MATTHEW J. CANNON, KATTEN MUCHIN ZAVIS ROSENMAN, CHICAGO, IL; JONATHAN E. RICHMAN, LEBOEUF, LAMB, GREENE & MACRAE, LLP, NEW YORK.

For NATIONAL FINANCIAL PARTNERS CORPORATION, Defendant: DONNA L. MCDEVITT, TIMOTHY ALAN NELSEN, SKADDEN ARPS SLATE, MEAGHER & FLOM & LLP, CHICAGO, IL.

For AMERICA RE-INSURANCE CO, Athena Assurance Co., Gulf Insurance Co. **[*24]** , Indemnity Insurance Co. North America, ST. PAUL FIRE & MARINE INSURANCE CO., ST. PAUL MERCURY [*24] INSURANCE CO., Westchester Surplus Lines Insurance Co., AMER REINSURANCE CO, Illinois Union Insurance Co., THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, HARTFORD STEAM BOILER INSPECTION & INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG PA, Defendants: DANIEL J. LEFFELL, NEW YORK, NY.

For WELLS FARGO & CO, Defendant: CARLOS F. ORTIZ, DLA, PIPER, RUDNICK, GRAY & CARY, LLP, NEW YORK, NY; SONYA RAE BRAUNSCHWEIG, DLA, PIPER, RUDNICK, GRAY, CARY & US, LLP, MINNEAPOLIS, MN.

For HILB ROGAL & HAMILTON CO, Defendant: JONATHAN MICHAEL WILAN, NEIL KEITH GILMAN, HUNTON & WILLIAMS LLP, WASHINGTON, DC.

For BB&T CORP, Defendant: ALAN L. BRIGGS, JAMES PAUL WEHNER, JR., SQUIRE, SAMDERS & DEMPSEY, LLP, WASHINGTON, DC US; JACK LOUIS WUERKER, SQUIRE SANDERS & DEMPSEY, VIENNA, VA US.

For BRANCH BANKING & TRUST CO, Defendant: ALAN L. BRIGGS, JAMES PAUL WEHNER, JR., HOLLY BROOKE JAMES, SQUIRE, SAMDERS & DEMPSEY, LLP, WASHINGTON, DC US.

For HUB INTERNATIONAL LTD, Defendant: ALAN SETH RABINOWITZ, NEW YORK, NY.

For AMERICAN RE CORP, Defendant: EAMON **[*25]** O'KELLY, JEFFREY S. RUGG, DEWEY BALLANTINE, NEW YORK, NY US; DANIEL J. LEFFELL, NEW YORK, NY.

For [*25] MARSH USA INC., (ILLINOIS), MARSHA USA INC, MARSH & MCLENNAN INCORPORATED, Defendants: ANDREW T. BERRY, MCCARTER & ENGLISH, LLP, NEWARK, NJ.

For AMERICAN RE-INSURANCE COMPANY, Defendant: MOLLY LEHR, DEWEY BALLANTINE, LLP, NEW YORK, NY; DANIEL J. LEFFELL, NEW YORK, NY.

For AON BROKERS SERVICES INC, Defendant: BENJAMIN R. OSTAPUK, KIRKLAND & ELLIS LLP, SAN FRANCISCO, CA; JOHN ARMANDO BOUDET, GREENBERG TRAURIG, PA, ORLANDO, FL US; LESLIE M. SMITH, KIRKLAND & ELLIS LLP, CHICAGO, IL; DONALD A. ROBINSON, LEDA DUNN WETTRE, ROBINSON & LIVELLI, ESQS., NEWARK, NJ.

For AON GROUP INT, Defendant: DONALD A. ROBINSON, ROBINSON & LIVELLI, ESQS., NEWARK, NJ.

For AMERICAN RE INSURANCE CO, Defendant: JEFFREY S. RUGG, DEWEY BALLANTINE, LLP, NEW YORK, NY; DANIEL J. LEFFELL, NEW YORK, NY.

For MERCER HUMAN RESOURCE CONSULTING INC, Defendant: CAROLE ELAINE HOWARD, JACKSON WALKER LLP, HOUSTON, TX; FREDERICK BARTLETT WULFF, SR, JACKSON WALKER LLP, DALLAS, TX.

For MERCER HUMAN RESOURCE CONSULTING OF TEXAS INC, Defendant: CAROLE ELAINE HOWARD, JACKSON WALKER LLP, HOUSTON, **[*26]** TX; FREDERICK BARTLETT WULFF, SR, JACKSON WALKER LLP, DALLAS, TX; MITCHELL JAY AUSLANDER, NEW YORK, NY.

For [*26] ACE American Insurance Co., Defendant: DANIEL J. LEFFELL, NEW YORK, NY; MARC D. HAEFNER, CONNELL FOLEY, LLP, ROSELAND, NJ.

For AIU Insurance Co., National Union Fire Insurance Co. of Louisiana, Defendants: DANIEL J. LEFFELL, NEW YORK, NY; KENNETH A. GALLO, PAUL WEISS RIFKIND, WHARTON & GARRISON LLP, WASHINGTON, DC.

For American Alternative Insurance Co. Corp., Defendant: DAVID GRAIS, EAMON O'KELLY, DEWEY BALLANTINE, LLP, NEW YORK, NY.

For American Casualty Co. of Reading, CNA FINANCIAL CORP., Continental Casualty Co., Defendants: MICHAEL R. BLANKSHAIN, MICHAEL LEE MCCLUGGAGE, BETH L. FANCSALI, WILDMAN, HARROLD, ALLEN & DIXON, LLP, CHICAGO, IL US; DANIEL J. LEFFELL, NEW YORK, NY; JOHN MICHAEL AGNELLO, CARELLA BYRNE BAIN, GILFILLAN CECCHI STEWART & OLSTEIN, PC, ROSELAND, NJ; MATTHEW JOSEPH CACCAMO, WILDMAN, HARROLD, ALLEN & DIXON, CHICAGO, IL US; MELISSA E. FLAX, CARELLA, BYRNE, BAIN, GILFILLAN, ROSELAND, NJ.

For AMERICAN HOME ASSURANCE CO., AMERICAN INTERNATIONAL INSURANCE CO., Commerce and Industry Insurance Co., Defendants: DANIEL J. LEFFELL, **[*27]** NEW YORK, NY; KENNETH A. GALLO, PAUL WEISS RIFKIND, WHARTON & GARRISON LLP, WASHINGTON, DC.

For AON GROUP, INC., AON [*27] RE, INC., AON SERVICES GROUP, INC., Defendants: DONALD A. ROBINSON, ROBINSON & LIVELLI, ESQS., NEWARK, NJ.

For AON RISK SERVICES INC US, Defendant: JOHN ARMANDO BOUDET, GREENBERG TRAURIG, PA, ORLANDO, FL US; DONALD A. ROBINSON, ROBINSON & LIVELLI, ESQS., NEWARK, NJ.

For Arthur J. Gallagher Risk Management Service, Defendant: JAMES S. RICHTER, WINSTON & STRAWN LLP, NEWARK, NJ.

For AXIS REINSURANCE CO., AXIS Specialty Insurance Co., AXIS Surplus Insurance Co., Defendants: WILLIAM F. CLARKE, JR., SKADDEN ARPS, SLATE, MEAGHER & FLOM. LLP, NEW YORK, NJ; DANIEL J. LEFFELL, NEW YORK, NY.

For Berkshire Hathaway, Inc., Defendant: CATHERINE FLORENCE AUGUST JOHNSON, MUNGER, TOLLES & OLSON, LLP; LOS ANGELES, CA US; CHRISTOPHER P. ANTON, BUDD LARNER PC, SHORT HILLS, NJ; DANIEL J. LEFFELL, NEW YORK, NY; JOSEPH J. SCHIAVONE, BUDD LARNER, PC, SHORT HILLS, NJ.

For Chicago Insurance Co., National Surety Corp., Defendants: STEVEN P. HANDLER, AMY GRAHAM DOEHRING, GEOFFREY A. VANCE, LAZAR P. RAYNAL, MCDERMOTT, WILL & EMERY, LLP, CHICAGO, IL US; DANIEL **[*28]** J. LEFFELL, NEW YORK, NY.

For Crum & Forster Holdings Corp, United States Fire Insurance Co., Defendants: LOUIS G. CORSI, LANDMAN, [*28] CORSI, BALLAINE & FORD, NEW YORK, NY US; CHRISTOPHER G. FRETEL, STEPHEN JACOBS, LANDMAN, CORSI, BALLAINE & FORD, NEW YORK, NY US; DANIEL J. LEFFELL, NEW YORK, NY; JOHN HERBERT NOORLANDER, LANDMAN, CORSI, BAILAINE & FORD, NEWARK, NJ.

For EXECUTIVE RISK INDEMNITY INC., FEDERAL INSURANCE CO., The Chubb Corp., VIGILANT INSURANCE CO., Defendants: PETER RICHARD BISIO, HOGAN & HARTSON, LLP, WASHINGTON, DC; DANIEL J. LEFFELL, NEW YORK, NY.

For FIREMAN'S FUND INSURANCE CO., Defendant: STEVEN P. HANDLER, AMY GRAHAM DOEHRING, GEOFFREY A. VANCE, LAZAR P. RAYNAL, MCDERMOTT, WILL & EMERY, LLP, CHICAGO, IL US.

For General Re Corporation, General Reinsurance Corp., Defendants: CHRISTOPHER P. ANTON, BUDD LARNER PC, SHORT HILLS, NJ; DANIEL J. LEFFELL, NEW YORK, NY; JOSEPH J. SCHIAVONE, BUDD LARNER, PC, SHORT HILLS, NJ.

For GREENWICH INSURANCE CO., Indian Harbor Insurance Co., Defendants: AMY E. BARABAS, ROBERT A. ALESSI, TAMMY L. ROY, CAHILL, GORDON & REINDELL, LLP, NEW YORK, NY US; DANIEL J. LEFFELL, NEW YORK, NY; JOHN L. THURMAN, FARRELL **[*29]** & THURMAN, PC, SKILLMAN, NJ.

For HARTFORD STEAM BOILER INSPECTION AND INSURANCE CO., National Union Fire Insurance Co. of Pittsburg, PA, [*29] Defendants: DANIEL J. LEFFELL, NEW YORK, NY; KENNETH A. GALLO, PAUL WEISS RIFKIND, WHARTON & GARRISON LLP, WASHINGTON, DC; MITCHELL JAY AUSLANDER, WILLKIE FARR & GALLAGHER, NEW YORK, NY US.

For Liberty Mutual Fire Insurance Co., Liberty Mutual Holding Co., LIBERTY MUTUAL INSURANCE CO., WAUSAU UNDERWRITERS INSURANCE COMPANY, Defendants: BRIAN E. ROBISON, VINSON & ELKINS, DALLAS, TX; DANIEL J. LEFFELL, NEW YORK, NY; KATHRINE MARLENE MORTENSEN, KORNSTEIN, VEISZ, WEXLER & POLLARD, NEW YORK, NY US.

For Mt. Hawley Insurance Co., RLI CORP, Defendants: AUGUSTA MORGAN RIDLEY, BRIAN ROBERT MEINERS, GRACIELA RODRIGUEZ, KEVIN RICHARD SULLIVAN, KING & SPALDING, LLP, WASHINGTON, DC; DANIEL J. LEFFELL, NEW YORK, NY.

For Pacific Insurance Co., Ltd, Defendant: MARY SUSAN HENIFIN, BUVHANAN INGERSOLL, PC, PRINCETON, NJ.

For RLI Insurance Corp, Defendant: AUGUSTA MORGAN RIDLEY, BRIAN ROBERT MEINERS, GRACIELA RODRIGUEZ, KEVIN RICHARD SULLIVAN, KING & SPALDING, LLP, WASHINGTON, DC.

For Summit Global Partners of Florida, Inc., USI Insurance **[*30]** Services of Florida, Inc., Defendants: ROBERT HARDY PEES, AKIN, GUMP, STRAUSS, HAUER & FELD, LLP, NEW YORK, NY.

For The Continental Insurance [*30] Group, Defendant: MICHAEL R. BLANKSHAIN, MICHAEL LEE MCCLUGGAGE, BETH L. FANCSALI, WILDMAN, HARROLD, ALLEN & DIXON, LLP, CHICAGO, IL US; MATTHEW JOSEPH CACCAMO, WILDMAN, HARROLD, ALLEN & DIXON, CHICAGO, IL US.

For TRAVELERS INDEMNITY COMPANY, RLI INSURANCE COMPANY, Defendants: MITCHELL JAY AUSLANDER, WILLKIE FARR & GALLAGHER, NEW YORK, NY US; DANIEL J. LEFFELL, NEW YORK, NY.

For UNITED STATES FIRE INSURANCE COMPANY, Defendant: LOUIS G. CORSI, LANDMAN, CORSI, BALLAINE & FORD, NEW YORK, NY US; CHRISTOPHER G. FRETEL, STEPHEN JACOBS, LANDMAN, CORSI, BALLAINE & FORD, NEW YORK, NY US; JOHN HERBERT NOORLANDER, LANDMAN, CORSI, BAILAINE & FORD, NEWARK, NJ.

For XL Capital Ltd, Defendant: DANIEL J. LEFFELL, NEW YORK, NY; JOHN L. THURMAN, FARRELL & THURMAN, PC, SKILLMAN, NJ.

For AON RISK SERVICES OF THE CAROLINAS INC, Defendant: AMY D HARMON, MARGUERITE S. WILLIS, RUSSELL THOMAS BURKE, NEXSEN, PRUET, JACOBS & POLLARD, COLUMBIA, SC; DONALD A. ROBINSON, ROBINSON & LIVELLI, ESQS., NEWARK, NJ.

For INSURANCE CO OF THE STATE **[*31]** OF PENNSYLVANIA, (CIVIL NO. 05-4046), Defendant: KENNETH A. GALLO, PAUL WEISS RIFKIND, WHARTON & GARRISON LLP, WASHINGTON, DC; DANIEL J. LEFFELL, NEW YORK, [*31] NY.

For MARSH & MCLENNAN INC, Defendant: ANDREW T. BERRY, MCCARTER & ENGLISH, LLP, NEWARK, NJ; DANIEL P. JORDAN, P. RYAN BECKETT, BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC, JACKSON, MS US.

For C. V. Starr & Co., Defendant: ROBERT A. MAGNANINI, BOIES, SCHILLER & FLEXNER, LLP, SHORT HILLS, NJ.

For FIRST MARKET INTERNATIONAL INC, Defendant: MAYANNE DOWNS, KIMBERLY DUNKEL HEALY, KING, BLACKWELL, DOWNS & ZEHNDER, PA, ORLANDO, FL.

For AMERICAN ALTERNATIVE INSURANCE CORPORATION, Defendant: JEFFREY S. RUGG, MOLLY LEHR, DEWEY BALLANTINE, LLP, NEW YORK, NY; DANIEL J. LEFFELL, NEW YORK, NY.

For Discover Re Managers, Inc., UNITED STATES FIDELITY AND GUARANTY SPECIALITY INSURANCE COMPANY, Defendants: EDWARD F. MALUF, MIRIAM THERESA DOWD, PHILIP L. BLUM, BINGHAM MCCUTCHEN, LLP, NEW YORK, NY.

For DISCOVER REINSURANCE COMPANY, DISCOVERY MANAGERS LTD, UNITED STATES FIDELITY & GUARANTY COMPANY, Defendants: BARRY HASSELL, COPELAND, COOK, TAYLOR & BUSH, RIDGELAND, MS; CHARLES GREG COPELAND, MICHAEL W. BAXTER, **[*32]** COPELAND, COOK, TAYLOR & BUSH, RIDGELAND, MS; EDWARD F. MALUF, MIRIAM THERESA DOWD, PHILIP L. BLUM, BINGHAM MCCUTCHEN, LLP, NEW YORK, NY.

For MARK A SMITH, [*32] (CIVIL NUMBER 05-5698), Defendant: KEVIN F HORMUTH, KEVIN F. O'MALLEY, GREENSFELDER & HEMKER, ST LOUIS, MO US.

For AMERICAN INTERNATIONAL GROUP, Defendant: CHRIS S. COUTROULIS, CARLTON FIELDS, PA, TAMPA, FL US; JAMES E. FOSTER, VIRGINIA B. TOWNES, AKERMAN SENTERFITT, ORLANDO, FL US; STEVEN J BRODIE, CARLTON FIELDS, PA, MIAMI, FL US; DANIEL J. LEFFELL, NEW YORK, NY.

For CHUBB CORPORATION, THE, Defendant: DUSTIN E DEESE, MARVIN E. BARKIN, TRENAM, KEMKER, SCHRARF, BARKIN, FRYE, O'NEILL & MULLIS, TAMPA, FL US; DANIEL J. LEFFELL, NEW YORK, NY.

For HARTFORD INSURANCE CO OF THE SOUTHEAST, HARTFORD UNDERWRITER INS. CO., Defendant: ANDREA ROBINSON, WILMER CUTLER PICKERING, HALE & DORR LLP, BOSTON, MA; JAMES E. FOSTER, VIRGINIA B. TOWNES, AKERMAN SENTERFITT, ORLANDO, FL US; ROBERT W. TRENCHARD, WILMER, CUTLER, PICKERING, HALE & DORR, LLP, NEW YORK, NY.

For USI HOLDINGS INC, Defendant: DENIS L. DURKIN, BAKER & HOSTETLER, LLP, ORLANDO, FL; PATRICK CHARLES SCHMITTER, RACHEL L. GERSTEIN, RICHARD B. ZABEL, ROBERT **[*33]** HARDY PEES, AKIN, GUMP, STRAUSS, HAUER & FELD, LLP, NEW YORK, NY.

For JOSEPH E LAMPEN, Defendant: KEVIN F HORMUTH, KEVIN F. O'MALLEY, GREENSFELDER & HEMKER, ST LOUIS, [*33] MO US.

For MARSH USA INC OF LOUISIANA, Defendant: DANIEL P. JORDAN, P. RYAN BECKETT, BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC, JACKSON, MS US.

For NAVIGATORS INSURANCE COMPANY, Defendant: ELLIOTT ABRUTYN, MORGAN, MELHUISH & ABRUTYN, LIVINGSTON, NJ.

For NAVIGATORS INSURANCE SERVICES OF TEXAS INC, Defendant: ELLIOTT ABRUTYN, MORGAN, MELHUISH & ABRUTYN, LIVINGSTON, NJ; ELTON F DUNCAN, JESSICA G ROUX, KELLEY SEVIN, THOMAS A. FRENCH, DUNCAN, COURINGTON & RYDBERG, NEW ORLEANS, LA US.

For THE CONTINENTAL INSURANCE COMPANY, Defendant: DANIEL J. LEFFELL, NEW YORK, NY; JOHN MICHAEL AGNELLO, CARELLA BYRNE BAIN, GILFILLAN CECCHI STEWART & OLSTEIN, PC, ROSELAND, NJ; MATTHEW JOSEPH CACCAMO, CHICAGO, IL US; MELISSA E. FLAX, CARELLA, BYRNE, BAIN, GILFILLAN, ROSELAND, NJ.

For UNITED STATES OF AMERICA, Defendant: SUSAN J. STEELE, UNITED STATES ATTORNEY'S OFFICE, NEWARK, NJ.

For Guy Carpenter & Company, Inc., MARSH & MCLENNAN COMPANIES, INC., Marsh Advantage America, Marsh Global Broking, **[*34]** Inc. (Missouri), Marsh Global Broking, Inc. (New Jersey), Marsh Global Placement, MARSH INC., MARSH USA INC. (Connecticut), MARSH USA INC., Seabury & Smith Inc., MARSH & MCLENNAN COMPANIES, [*34] INC., Marsh Advantage America, MARSH INC., Defendants: CHRISTOPHER J. ST. JEANOS, WILLKIE FARR & GALLAGHER, NEW YORK, NY US.

For MARSH & MCLENNEN, DEFENDANT IN 06-3844, Defendant: DARREN K NELSON, PARR WADDOUPS BROWN GEE & LOVELESS, SALT LAKE CITY, UT US.

For MARSH, DEFENDANT IN 06-3844, Defendant: DARREN K NELSON, PARR WADDOUPS BROWN GEE & LOVELESS, SALT LAKE CITY, UT.

For AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE CO., Consol Defendant: DANIEL J. LEFFELL, NEW YORK, NY; KENNETH A. GALLO, PATRICIA C. CROWLEY, PAUL WEISS RIFKIND, WHARTON & GARRISON LLP, WASHINGTON, DC.

For LEXINGTON INSURANCE CO., Consol Defendant: DANIEL J. LEFFELL, NEW YORK, NY; PATRICIA C. CROWLEY, PAUL WEISS RIFKIND, WHARTON & GARRISON LLP, WASHINGTON, DC.

For National Association of Professional Insurance Agents, National Association of Professional Insurance Agents, Amicus: WILLIAM F. MEGNA, MORRIS, MANNING & MARTIN, LLP, PRINCETON, NJ.

For Independent Insurance Agents & Brokers of **[*35]** America, Inc., Amicus: SHAFFIN ABDUL DATOO, VENABLE LLP, NEW YORK, NY US.

Judges: GARRETT E. BROWN, JR., U.S.D.J.

Opinion by: GARRETT E. BROWN, JR.

Opinion

MEMORANDUM OPINION

BROWN, Chief Judge

TABLE OF CONTENTS

INTRODUCTION

This matter comes before the Court upon the renewed **[*36]** motion of Defendants [1] to dismiss, pursuant to *Federal Rule of Procedure 12(b)(6)*, Plaintiffs' claims under *§ 1* of the Sherman Act, as set forth in Plaintiffs' First Consolidated Commercial Class Action Amended Complaint and First Consolidated Employee Benefits Class Action Amended Complaint (collectively, "Complaints"). Oral argument was held on March 1, 2007. The Court, having considered the parties' written submissions and oral argument, and for the reasons discussed herein, grants the Renewed Motions to Dismiss without prejudice.

[*37] BACKGROUND

This action involves numerous class actions filed against various insurance brokers and insurers. The class actions allege violations of federal and state antitrust laws, the Racketeer Influenced and Corrupt Organizations Act ("RICO") and common law. These class actions have been consolidated into the present action.

Plaintiffs filed an amended complaint on or about August 1, 2005 and a corrected amended complaint on or about August 15, 2005. Plaintiffs make claims on behalf of a proposed class of insureds who purchased or renewed insurance policies with the Defendant Insurers through the Defendant Brokers. Plaintiffs allege that the Defendants "engaged in a combination and conspiracy to suppress and eliminate competition in the sale of insurance by coordinating and rigging bids for insurance policies, allocating insurance markets and customers and raising, or maintaining or stabilizing premium prices above competitive levels." Corrected First Consolidated Amended Commercial Class Action Compl., P 1. The Complaints asserted six causes of action: (1) RICO violations; (2) violations of *Section 1* of the Sherman Act; (3) violations of the antitrust laws of forty-eight **[*38]** states and the District of Columbia; (4) breaches of statutory and common-law-based fiduciary duties; (5) aiding and abetting breach of fiduciary duty; and (6) unjust enrichment.

After these causes of action were aligned and severed into two types of matters (one involving commercial property and casualty insurance coverages ("Commercial Case") and the other involving employee benefits insurance plans ("Employee-Benefits Case")), the Court consolidated all actions into two accordingly aligned dockets. See *In re Ins. Brokerage Antitrust Litig., 04-5184 (FSH), Docket Entry No. 118, 2005 U.S. Dist. LEXIS 44904 (D.N..J. May 25, 2005)*; *In re Employee-Benefits Brokerage Antitrust Litig., 05-1079 (FSH), Docket Entry No. 20, 2005 U.S. Dist. LEXIS 44909 (D.N.J. Aug. 8, 2005)*. Consequently, Plaintiffs filed one consolidated amended complaint per each

[1] AIG Defendants (Commercial Defendants); Chubb Defendants (Chubb Corp., Federal Ins. Co., Executive Risk Indem., Vigilant Ins. Co.); Fireman's Fund Defendants (Fireman's Fund Ins. Co., Chicago Ins. Co., National Surety Corp.); XL Defendants (Greenwich Ins. Co., Indian Harbor Ins. Co., XL Capital Ltd.); Mid-Size Brokers (Brown & Brown Inc., Brown & Brown Ins. Benefits, Inc., et. al); Berkshire Defendants (Berkshire Hathaway, Inc., General Re Corp., General Reinsurance Corp.); CNA Defendants (CNA Financial Corp., Continental Ins. Corp., American Cas. Co. Of Reading, PA, Continental Cas. Co.); Defendants Axis, Berkshire, Crum & Forster and RLI (Axis Reinsurance Co., Axis Speciality Ins. Co., Axis Surplus Ins. Co., Berkshire Hathaway, Inc., General Re Corp., General Reinsurance Corp., Crum & Forster Holdings Corp., U.S. Fire Ins. Co., RLI Corp., RLI Ins. Co., Mt. Hawley Ins. Co.); BB&T Defendants(BB&T Corp., Branch Banking & Trust Co., BB&T Ins. Services, Inc.).

respective docket, and then altered these two submissions by filing two corrected amended complaints. See *In re Ins. Brokerage Antitrust Litig., 04-5184 (FSH), Docket Entry No. 201, 2005 U.S. Dist. LEXIS 44904 (D.N.J. May 25, 2005)*; *In re Employee-Benefits Ins. Brokerage Antitrust Litig., 05-1079 (FSH), Docket Entry No. 2, 2005 U.S. Dist. LEXIS 44909 (D.N.J. Aug. 8, 2005)*.

The extensive facts and procedural history in this case have been set **[*39]** forth previously by the Court and are repeated only where relevant to the instant motion.

In the October 3, 2006 Opinion, the Court concluded that the allegations set forth in Plaintiffs' First Consolidated Amended Complaints "have insufficient particularity to demonstrate 'concerted action' by all of the Defendants under the Sherman Act." *In re Ins. Brokerage Antitrust Litig, 04-5184, (FSH), 2006 U.S. Dist. LEXIS 73054, Docket Entry No. 720, at 26 (D.N.J. Oct. 3, 2006)*. The Court further stated that in lieu of filing an amended complaint, Plaintiffs were permitted to file a Supplemental Statement of Particularity which "shall set forth, with the degree of particularity required under 9(b), the identity of the conspirators and the role of each Defendant in the alleged conspiracies. Id. at 29. The Court further required Plaintiffs to "aver sufficient facts to inform each Defendant of its alleged participation in the conspiracies." Id. The Court also concluded that Plaintiffs did not allege sufficient facts to show that an "implied or express agreement existed between the alleged conspirators." *Id. 2006 U.S. Dist. LEXIS 73054 at 26*. Pursuant to the two orders of the Court and accompanying opinion, see *In re Ins. Brokerage Antitrust Litig, 04-5184 (FSH), 2006 U.S. Dist. LEXIS 73054* **[*40]** Docket Entries Nos. 123,720-21 (D.N.J. May 25, 2005 and Oct. 3, 2006), Plaintiffs filed their RICO Case Statement and Plaintiffs' Statements of Particularity supplementing the Complaints. See, e.g., In re Ins. Brokerage Antitrust Litig., 04-5184, Docket Entries Nos. 843, 844, 845.

The Court stated that Defendants, upon receipt of the Particularized Statements, could file either a subsequent motion to dismiss, a motion for judgment on the pleadings or a motion for summary judgment (after the completion of fact discovery). In re Ins. Brokerage Antitrust Litig., 04-5184, Docket Entry No. 720, at 29-30. Defendants filed the current motions to dismiss on December 21, 2006.

DISCUSSION

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

A motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)* may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief. *Oran v. Stafford, 226 F.3d 275, 279 (3d Cir. 2000)*; **[*41]** *Langford v. City of Atlantic City, 235 F.3d 845, 850 (3d Cir. 2000)*; *Bartholomew v. Fischl, 782 F.2d 1148, 1152 (3d Cir. 1986)*. The Court may not dismiss a complaint unless plaintiff can prove no set of facts that would entitle him to relief. *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*; *Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir.)*, cert. denied, *474 U.S. 935, 106 S. Ct. 267, 88 L. Ed. 2d 274 (1985)*. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*.

Under *Rule 12(b)(6)*, the Court must "accept the allegations in the complaint as true, and draw all reasonable factual inferences in favor of the plaintiff. [The motion can be granted] only if no relief could be granted under any set of facts that could be proved." *Turbe v. Government of the Virgin Islands, 938 F.2d 427, 428 (3d Cir. 1991)*(citing *Unger v. Nat'l Residents Matching Program, 928 F.2d 1392, 1394-95 (3d Cir. 1991))*; see also *Langford, 235 F.3d at 850*; **[*42]** *Dykes v. Southeastern Pa. Transp. Auth., 68 F.3d 1564, 1565 n.1 (3d Cir. 1995)*, cert. denied, *517 U.S. 1142, 116 S. Ct. 1434, 134 L. Ed. 2d 556 (1996)*; *Piecknick v. Commonwealth of Pennsylvania, 36 F.3d 1250, 1255 (3d Cir. 1994)*; *Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994)*. A complaint may be dismissed for failure to state a claim where it appears beyond any doubt "that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)*(citation omitted).

A complaint should not be dismissed unless it appears beyond doubt that "the facts alleged in the complaint, even if true, fail to support the . . . claim . . ." *Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)*. Legal conclusions made in the guise of factual allegations, however, are given no presumption of truthfulness. *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)*(citation omitted); see also *Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997)*(stating that "a court need not credit a complaint's **[*43]** 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss.")(citations omitted).

Courts are reluctant to grant motions to dismiss antitrust claims. See, e.g., *Lum v. Bank of America, 361 F.3d 217, 223 (3d Cir. 2004)* ("In considering a motion to dismiss, a court must accept as true all of the factual allegations in the complaint and draw all reasonable inferences from those facts in favor of the plaintiffs. (citations omitted). A court may dismiss the complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."); *Todd v. Exxon Corp., 275 F.3d 191, 197-98 (2d Cir. 2001)* ("On a motion to dismiss for failure to state a claim, we construe the complaint in the light most favorable to the plaintiff, accepting the complaint's allegations as true. A complaint should not be dismissed for failure to state a claim 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' Thus, '[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer **[*44]** evidence to support the claims.'") (citations omitted).

II. Sherman Act

A. Plaintiffs' Particularized Statements

According to Plaintiffs, the issue before the Court is whether the Particularized Statements allege sufficient facts "to show that an implied or express agreement existed between the alleged conspirators" and "to inform each defendant of its alleged participation in the conspiracies." See In re Ins. Brokerage Antitrust Litig., 04-5184, Docket Entry No. 720. Plaintiffs claim that the Particularized Statements satisfy the requirements set forth in the Court's Opinion. According to Plaintiffs, the Statements describe the seven broker-centered conspiracies in the commercial case and the three broker-centered conspiracies in the employee benefits case. Plaintiffs contend that these conspiracies operate as classic "hub and spoke" (plaintiffs describing the "hub" as being the broker and the "spokes" as the strategic partner insurance carriers), and that these participants conspired to allocate customers and reduce competition. Plaintiffs also contend that the Particularized Statements allege facts from which it may be inferred that an industry-wide **[*45]** global conspiracy arose out of the operation of the broker-centered conspiracies. Defendants, however, claim that the facts Plaintiffs allege do not support a global conspiracy or any broker-centered conspiracies, and fall short of the pleading requirements set forth in the Court's October Opinion as well as *Rule 9(b)*.

Plaintiffs' Brief sets forth several categories of facts alleged in the Particularized Statements relating to the conspiracies, including: the formation of the conspiracies; the interdependent operation of the spokes of each broker defendant hub; the brokers' anticompetitive and exclusionary practices with their alleged insurance carrier partners; bid-rigging and other direct evidence of the existence of a conspiracy; other evidence of the conspiracies, including circumstantial evidence, plus factors and facilitating devices; actions against interest and facts relating to a plausible global conspiracy.

According to Plaintiffs, the alleged conspiracies began in the early to mid-1990's, when each Broker Defendant, beginning with Marsh, decided to "consolidate their markets." See Plaintiffs' Opposition, In re Ins. Brokerage Antitrust Litig., 04-5184, Docket Entry **[*46]** No. 849, at 4. Plaintiffs claim that "consolidating markets" means to "funnel the bulk of their business to a select number of preferred insurers." Id. Plaintiffs allege that insurers were invited to be among a select few to whom a broker's business was directed upon entering contingent commission agreements with brokers. Id. at 4-5. Plaintiffs submit in the Particularized Statements that the brokers' decision to consolidate their markets was a "dramatic change in their method of doing business," and that the brokers changed their practices to steer the bulk of their business to their preferred customers. Commercial Statement ("Comm. St."), PP 13, 17, 18, 20. According to Plaintiffs' Commercial Statement, the "dramatic consolidation of carrier markets began to be undertaken by most of the Broker Defendants at approximately the same time period . . . ." Comm. St., P 17. Plaintiffs cite to several specific facts to support these allegations. See, e.g., Comm. St., P 17 (an internal document stating that between 1993 and 2001 there has been "[t]remendous consolidation in [the top ten brokers] marketplace. The way they do business is fundamentally different than in years **[*47]** past . . . ."); Comm. St., P 18 ("brokers, including USI, Wells Fargo/Acordia, Aon, all consciously trying to limit their preferred carriers in order to leverage bonus programs); Comm. St., P 18, n.4; P 28. Plaintiffs further contend that "every broker embarked on the same or similar consolidation program" and that "[n]ot one deviated." Plaintiffs' Opposition, In re Ins. Brokerage Antitrust Litig., 04-5184, Docket Entry No. 849, at 6.

Plaintiffs also allege that the Broker Defendants communicated their strategy of consolidating the markets to prospective insurance partner carriers and to each other. Id. at 6. More specifically, Plaintiffs contend that the partner carriers were aware of "(1) who the other partner carriers were; (2) all 'tiers' or levels of preferred status, and who was on them; and (3) what level of contingent commission payments was necessary to achieve preferred status or entry to a specific tier." Id. at 6-7; see also Employee Benefits Statement ("EB St."), PP 261, 71; Comm. St., PP 71, 141. Further, Plaintiffs claim that the insurers had such details regarding specific arrangements between other insurers and partner brokers including the amount **[*48]** of contingent commissions paid by competitors. Id. at 6; see also Comm. St. PP 63, 31, 223, 448, 109, 112, 115-16, 117, 119, 120-21, 126, 114. Plaintiffs contend that the details regarding these arrangements were disclosed despite the fact that the agreements contained confidentiality provisions which prohibited the disclosure of their terms. Id. at 8; see also Comm. St., P 84.

Plaintiffs submit that the Broker Defendants disclosed information to insurers relating to the premium volume they delivered to other insurers, citing to examples such as Aon disclosing to CIGNA the premium volume it delivered to Met Life, Unum, Aetna and Prudential. Id., EB St., P 261; see, e.g. Comm. St., P 513 (regarding Wells Fargo disclosing information with Hartford); Comm. St. P 591 (regarding disclosures made by HRH to Hartford); Comm. St., P 513 (regarding Wells Fargo's disclosures to Chubb). Plaintiffs claim that evidence exists regarding the exchange of information relating to broker agreements directly between insurer partners and that brokers distributed information collectively to a group of insurers. Id. at 9; EB St., P 118; Comm. St., PP 151, 61, 480-81. Plaintiffs **[*49]** allege that "in each broker-centered conspiracy, the brokers facilitated the exchange of information relating to the identity of the market partners, their level of participation in the brokers' book, and the details of their specific contingent commission arrangements." Id. at 10.

Plaintiffs claim that the agreements at issue were motivated by anticompetitive and exclusionary conduct and were not procompetitive. See Plaintiffs' Opposition, In re Ins. Brokerage Antitrust Litig., 04-5184, Docket Entry No. 849, at 11 (stating that, for example, brokers agreed with insurers to "shift" or "roll" entire blocks of business to preferred insurers without the benefit of any competitive bidding); see also Comm. St., PP 157, 488, 44; EB St., P 88. Plaintiffs also allege that brokers shielded insurer partners from competition by agreeing not to bid renewals competitively or limited the circumstances of renewals. Id.; see, e.g., Comm. St., P 44 (BB&T instructed producers not to move renewals from Travelers); P 170 (Chubb and Marsh discuss strategy to retain renewals without marketing them). Plaintiffs allege that the insurers paid for and expected unfair competitive advantage **[*50]** and protection from competition as a result of their agreements with broker partners. Id. at 12; see also Comm. St., PP 164-65; 166; 168; 225; EB St., P 243.

Plaintiffs claim that in the Particularized Statements they have put forth direct evidence of a conspiratorial arrangement. Id. at 13. Plaintiffs submit that they have pled particularized facts describing the involvement of Marsh and Insurer Defendants ACE, AIG, Munich/Am Re, Liberty Mutual, St. Paul/Zurich and XL to cooperate in order to protect the business of the designated insurer. Id.; see, e.g., Comm. St., P 190 (AIG submitted a predetermined losing bid in order to protect Zurich); P 192 (Munich/Am Re submitted a predetermined losing bid to protect AIG). Moreover, Plaintiffs contend that Marsh employee Kathryn Winters, in her plea agreement with regulators, "admitted that a primary goal of the scheme was to maximize contingent commissions and 'protect the incumbent insurance carrier when their business was up for renewal.'" Id.; Comm. St., P 189. Plaintiffs also claim, for example, that HRH promised to move existing books of business to certain carriers in return for contingent commission payments. **[*51]** Id. at 15. Plaintiffs cite to internal memos from Travelers and Hartford to support this assertion. Comm. St., PP 570-72.

According to Plaintiffs, the Particularized Statements also include plus factors or circumstantial evidence, which they claim, if proven, are probative of the existence of the broker-centered and global conspiracies. Plaintiffs' Opposition, In re Ins. Brokerage Antitrust Litig., 04-5184, Docket Entry No. 849, at 16. Plaintiffs allege that there was an economic motivation to collude for both insurers and brokers. Id.; see also Comm. St., PP 11-14. For example, Plaintiffs claim that the collusive agreement increased the broker's contingent commission revenue by limiting bidding to a smaller number of insurers. Id.; Comm. St., PP 12-13, 15. Plaintiffs allege that the insurers would have a motive to collude so long as the cost of paying contingent commissions to the brokers was offset by the advantages in paying them. Id.; Comm. St., P 14. Plaintiffs also claim that information exchanges and organizational structures within the industry provided mechanisms to facilitate the alleged conspiracy and monitor compliance. Comm. St., PP 602-609. Consequently, **[*52]** Plaintiffs contend that the primary mechanism for monitoring the conspiracy was the exchange of information about the terms of the contingent commission agreements. Id. at 18; Comm. St., PP 603-605. Plaintiffs also cite to industry mechanisms that provided an opportunity for Defendants to exchange information, for example, a "National Study Group" and participation in LIMRA, which Plaintiff contends conducted surveys on issues relating to broker compensation and Rule 5500 disclosure practices. Comm. St., P 607; EB St., PP 318-21. Plaintiffs claim that the CIAB and the Council of Employee Benefits Executives also provided forums to discuss partnering relationships, broker compensation and contingent commission disclosures. Comm. St., PP 610-21; EB St., P 325.

In the Particularized Statements, Plaintiffs allege that there were methods in place to discipline participants who failed to comply with the conspiracy. Plaintiffs' Opposition, In re Ins. Brokerage Antitrust Litig., 04-5184, Docket Entry No. 849, at 19. For example, Plaintiffs claim that brokers stopped placing premium with particular insurers or discontinued their practice of protecting renewal business when insurers **[*53]** did not pay certain contingent commissions. Id.; see, e.g., Comm. St., P 73 (XL business plan stating "PSAs are a prerequisite for doing business with Marsh Global Broking, and identify preferred markets for Aon . . . [w]e know [Marsh and Aon] will move even more business away from XL unless we provide them some incentive to continue."); Comm. St., P 179 ("Liberty Mutual lost a renewal account despite having met the terms specified by Marsh because there was 'no PSA.'"); Comm. St., P 174 ("Chubb - we are now being heavily penalized by Marsh for not having new contingent commission agreements signed so that we are being systematically excluded from . . . placements that we would otherwise like the chance to write."). Plaintiffs allege that Defendants' non-disclosure policies also facilitated the agreement, claiming that "the documents reveal that brokers were concerned that if disclosure of contingent commissions were made, the door would be open for a non-conspiring broker to come in and steal the business." Plaintiffs' Opposition, In re Ins. Brokerage Antitrust Litig., 04-5184, Docket Entry No. 849, at 20; see also Comm. St., PP 76-102; EB St., P 176.

Plaintiffs set **[*54]** forth facts in the Particularized Statements which they claim demonstrate "actions against interest." Comm. St., PP 14, 15. Some of the statements include allegations that it would be irrational in a non-conspiratorial market "for a broker to cut off his own supply outlets *i.e.* restrict its business to those paying the largest contingent commissions, unless the other major brokers went along with the arrangement;" "for insurers to pay contingent commissions for access to a broker's business unless its other major rivals did so as well;" "for a broker to protect an insurer partner (*i.e.,* by not bidding renewals or permitting it to raise a bid), at the expense of a client;" "for the insurers to refuse to bid on business or to submit a falsely inflated bid, in order to protect the business of a rival insurer;" "for insurers to allow their proprietary information to be disseminated to other insurers by the brokers;" and "for insurers to fail to make Form 5500 disclosures at the behest of a broker." See Plaintiffs' Opposition, In re Ins. Brokerage Antitrust Litig., 04-5184, Docket Entry No. 849, at 21.

Finally, Plaintiffs claim that all of the above-mentioned facts and **[*55]** categories of facts support the existence of the broker-centered and global conspiracies. Id. 23. Plaintiffs claim that "[b]ecause each broker had relationships with multiple insurers and each insurer had relationships with multiple brokers, and because detailed information about the contingent commission arrangements, and what they bought, were freely available among all, a global conspiracy may be inferred." Id. at 24. Further, Plaintiffs explain that "[r]ather than operating as an amorphous conspiracy with 50 unconnected members, the global conspiracy operated through the interdependence of more organized and controlled subparts - *i.e.* the broker-centered wheels." Id. While Plaintiffs claim that this parallel adoption of anticompetitive business practices by the broker-centered conspiracies may, on its own, support an inference of collusion, Plaintiffs contend that they have put forth facts that demonstrate the participation of many insurers in the conspiracies and mechanisms through which participants shared information and enabled participants to monitor the actions of their coconspirators. Id. at 25.

B. Sherman Act, Section 1

Section 1 of the **[*56]** Sherman Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared illegal." *15 U.S.C. § 1*. To properly plead a violation of *Section 1*, a plaintiff must allege "(1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted action was illegal; and (4) that the plaintiff was injured as a proximate result of the concerted action." *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 442 (3d Cir. 1997)*.

The first element, concerted action, constitutes the "very essence of a section 1 claim." *Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 998 (3d Cir. 1994)* (noting that "unilateral action, no matter what its motivation, cannot violate [section] 1") (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 110 (3d Cir. 1980))*. The Third Circuit has stated that "[a] general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient of itself to constitute **[*57]** a cause of action." *Com. of Pa. ex rel. Zimmerman v. PepsiCo, Inc., 836 F.2d 173, 182 (3d Cir. 1988)*. Only "allegations of conspiracy which are particularized . . . will be deemed sufficient." *Id. at 181* (quoting *Garshman v. Universal Resources Holding, Inc., 641 F.Supp. 1359, 1370 (D.N.J. 1986)*; *id. at 182* (stating that, on a motion to dismiss, plaintiffs must "present evidence 'that tends to exclude the possibility that the alleged conspirators acted independently.'") (citations omitted). To adequately allege concerted activity, Plaintiffs are not required, at this stage of the proceedings, to provide all the details of the alleged conspiracies. Id. (quoting *Black & Yates, Inc. v. Mahogany Asso., 129 F.2d 227, 231-32 (3d Cir. 1941))*, but they must, at a minimum, "plead the facts constituting the conspiracy, its object and accomplishment," such as "the date of the alleged conspiracy," or "its attendant circumstances." Id.; see also *Mowrer v. Armour Pharmaceutical Co., Civ. No. 92-6905, 1993 U.S. Dist. LEXIS 18367, at * 8 (E.D. Pa. Dec. 30, 1993)* (holding that plaintiffs must plead "the general composition **[*58]** of the conspiracy, some or all of its broad objectives, and [each defendant's] general role in that conspiracy.").

The requirement that conspiracy allegations be pled with adequate specificity is not a mere technicality, but rather, is grounded in considerations of judicial economy and fairness to the defendants. *Zimmerman, 836 F.2d at 182* ("It is simply not fair to the defendants, and it would be an onerous imposition on the judicial process, to permit litigation to go forward on the basis of [] conclusory and speculative allegations."); see also Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 1409, at 55 (2003) ("Conspiracy allegations frequently name one or two specific persons or firms and also sweep in other unnamed conspirators. The openness of the charge invites confusion where only a few of the possible conspirators have engaged in readily proved collaborative conduct."); see finally *In re Tower Air, Inc., 416 F.3d 229, 237 (3d Cir. 2005)* ("[e]ven at the pleading stage, a defendant deserves fair notice of the general factual background for the plaintiff's claims.').

This requirement is also particularly important where, as **[*59]** here, Plaintiffs' conspiracy claims are predicated on fraud, as previously determined by the Court, and thus are subject to *Fed. R. Civ. P. 9(b)*. [2] In Lum v. Bank of America, the Third Circuit held that antitrust and RICO claims based on theories of fraud are subject, like explicit fraud claims, to the heightened pleading requirement of *Rule 9(b)*. *361 F.3d at 228-29*. The Court noted that "generally, the pleading standard for Section 1 claims is the short and concise statement standard of *Rule 8(a)*," but

[2] *Rule 9(b)* provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

stated that "[b]ecause plaintiffs allege that the defendants accomplished the goal of their conspiracy through fraud, the Amended Complaint is subject to Rule 9(b)." Id. at 228 (emphasizing that under Rule 9(b), "*all* averments of fraud . . . shall be stated with particularity.") (emphasis in original). In the Court's October 3rd Opinion, Plaintiffs were required to submit Statements of Particularity which conformed to the heightened pleading requirements of Rule 9(b).

[*60] C. Per Se Analysis

In assessing liability under Section 1, courts generally evaluate agreements pursuant to one of three approaches. Continental Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 508-509 (4th Cir. 2002) ("[T]he Supreme Court has authorized three methods of analysis: (1) per se analysis, for obviously anticompetitive restraints, (2) quick-look analysis, for those with some procompetitive justification, and (3) the full 'rule of reason,' for restraints whose net impact on competition is particularly difficult to determine."). "Generally, conduct alleged to violate the Sherman Act is scrutinized under the rule of reason rather than the per se rule, and 'departure from the rule-of-reason standard must be based upon demonstrable economic effect.'" Mid-West Underground Storage, Inc. v. Porter, 717 F.2d 493, 496 (10th Cir. 1983) (quoting Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)). "It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act." United States v. Topco Assoc., Inc., 405 U.S. 596, 607-608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972). **[*61]** "Per se rules of illegality are judicial constructs," FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 432-33, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990), "and are based in large part on economic predictions that certain types of activity will more often than not unreasonably restrain competition." United States v. Brown Univ., 5 F.3d 658, 670 (3d Cir. 1993) (citing Arizona v. Maricopa Cty. Medical Society, 457 U.S. 332, 344, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)) ("Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable."); Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985) ("[The] per se approach permits categorical judgments with respect to certain business practices that have proved to be predominantly anticompetitive.").

Plaintiffs claim that the alleged horizontal conspiracies to allocate business in this case should be treated as a *per se* violation of the Sherman Act. Defendants, however, submit that Plaintiffs have not alleged conduct that is *per se* unlawful. **[*62]** Defendants insist that Plaintiffs have admitted that there are procompetitive reasons for brokers to seek to consolidate their business with a smaller number of insurers. During oral argument, however, Plaintiffs claimed that they admit nothing of the sort. Rather, Plaintiffs contend that while procompetitive justifications for the partnership agreements and contingent commission agreements could exist, none are present here. Plaintiffs claim that while they do not challenge contingent commission payments or partnership agreements, they do challenge the use of these devices to allocate business, restrict competition and exclude outsiders. Plaintiffs also argue that no procompetitive justification exists for acts such as protecting incumbency and giving first and last looks. Plaintiffs claim this conduct is anticompetitive, exclusionary and used as a means to minimize competition and deter efficiency. Plaintiffs claim that just because it is possible that in a different situation an incentive agreement could be used for procompetitive reasons, that does not make the agreements at issue legitimate. In the Particularized Statements, Plaintiffs allege that "the Broker Defendants and Insurer **[*63]** Defendants engaged in a *per se* unlawful scheme to allocate customers and markets through explicit and tacit agreements whereby the brokers would direct the bulk of their business to a limited number of "partner" insurers in exchange for kickbacks paid by the insurers to the brokers, nominally referred to as "contingent commissions." Comm. St., P 1.

Defendants devote a significant portion of their argument in favor of dismissal to the absence of a *per se* violation. Defendants claim that *per se* violations involve conduct so inherently anticompetitive that it is *per se* illegal and so there is no need for a factual inquiry into the anticompetitive effects. Defendants maintain that it is in the unilateral, independent interest of brokers to maximize revenue and thus a horizontal conspiracy cannot be inferred by this conduct.

The *per se* approach "permits categorical judgments with respect to certain business practices that have proved to be predominantly anticompetitive. Courts can thereby avoid the 'significant costs' in 'business certainty and litigation efficiency' that a full-fledged rule-of-reason inquiry entails." *Northwest Wholesale Stationers, 472 U.S. at 289* **[*64]** (quoting *Maricopa Cty. Medical Society, 457 U.S. at 343-44*). "Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." *Id. at 290* (quoting *National Collegiate Athletic Ass'n v. Board of Regents of Univ. Of Oklahoma, 468 U.S. 85, 103-104, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984))*. Defendants claim that the conduct Plaintiffs challenge, the alleged steering by brokers of the bulk of their business to preferred insurers in exchange for contingent commissions, is not *per se* unlawful. Defendants contend that the "strategic partnerships" are a type of preferred provider agreement, and are commonplace throughout the economy and have consistently held not to be *per se* illegal. Defendants' Brief, In re Ins. Brokerage Antitrust Litig., 04-5184, Docket Entries Nos. 823, 846, at 18; citing *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 62 (1st Cir. 2004)*; *Quality Auto Body, Inc. v. Allstate Ins. Co., 660 F.2d 1195, 1202-1203 (7th Cir. 1981)*. Defendants claim that preferred provider agreements **[*65]** may have procompetitive effects and so courts do not treat them as *per se* unlawful.

A classic example of a *per se* violation of *Section 1* is "an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition . . . This Court has reiterated time and time again that 'horizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.' Such limitations are per se violations of the Sherman Act." *Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 49, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)* (citations omitted). "The essence of a market allocation violation, however, is that competitors apportion the market among themselves and cease competing in another's territory or for another's customers." *Mid-West Underground Storage, 717 F.2d at 497*.

Because Plaintiffs have alleged the Section 1 claim as a *per se* violation, even at the pleading stage Plaintiffs must set forth sufficient facts evidencing a horizontal conspiracy involving market or customer allocation in order for their claim to survive a motion to dismiss. The Court will examine Plaintiffs' particularized facts **[*66]** to determine whether the global conspiracy and/or the broker-centered conspiracies adequately allege Section 1 claims in light of the Court's previous order and the limitations of a *per se* violation. See *Garot Anderson Agencies, Inc. v. Blue Cross & Blue Shield United, 1993 U.S. Dist. LEXIS 3446, 1993-1 Trade Cas. (CCH) P 70, 235, at 70, 161 (N.D. Ill. 1993)* ("Characterization of an agreement as horizontal or vertical is important because certain horizontal agreements have been declared *per se* illegal while vertical agreements covering the same subject matter have not.").

D. Global and Broker-Centered Conspiracies

In the October 3rd Opinion, the Court concluded that the allegations regarding the "global conspiracy" lacked sufficient particularity to demonstrate "concerted action" by all of the Defendants under the Sherman Act. The Court stated that "[w]hile the conduct of bid-rigging has been stated with particularity, the pleadings must identify the purported subset of conspirators in this conduct and the nature and scope of each alleged conspirator's role." In re Ins. Brokerage Antitrust Litig, 04-5184, Docket Entry No. 720, at 26. Further, the Court determined that Plaintiffs **[*67]** failed to "explain how such a large and diverse group of Defendants acted, combined or conspired as part of a single conspiracy." Id. The Court stated that even at the dismissal stage, Plaintiffs must aver sufficient facts to make the existence of the pleaded conspiracy among so great a number of alleged co-conspirators plausible.

The Complaints also allege the existence of a series of "separate but parallel" conspiracies, "each involving a Defendant Broker and the insurance companies with which each had Contingent Commission Agreements." Comm. Compl., P 429; EB Compl., P 338. The Court concluded that Plaintiffs did not specifically identify the entities which allegedly conspired with each Broker Defendant, rather referred to "the insurance companies with whom [the Broker Defendant] had Contingent Commission Agreements." The Court also concluded that the Plaintiffs did not adequately allege the role of each Defendant in the conspiracy. According to the Court, Plaintiffs did not challenge the legality of contingent commissions, and did not put forth evidence to show that these contingent commissions were more than business relationships. The Court determined that the Plaintiffs did **[*68]** not plead sufficient facts to adequately allege a Section 1 contract, combination or conspiracy.

1. *Express or Implied Agreements*

Defendants contend that Plaintiffs have still not alleged facts that show an express or implied agreement existed among the conspirators, and thus have failed to show how the alleged conspiracy among so many Defendants is plausible. Defendants claim that the Complaint and the Particularized Statements consist of allegations "about individual brokers communicating with individual insurers about contingent commission agreements, their purposes, and their effects." Defendants' Brief, In re Ins. Brokerage Antitrust Litig., 04-5184, Docket Entries Nos. 823, 846, at 7. Defendants also submit that Plaintiffs have failed to establish concerted action, and that Plaintiffs do not allege that any broker agreed with another broker or that any insurer agreed with another insurer to distribute policyholders or placements in any identifiable way. Id. at 8. Defendants claim that Plaintiffs' allegations are devoid of a method for the market allocation, and only allege a few isolated examples of bid-rigging in individual placements. Defendants contend **[*69]** that it is implausible that insurers would agree and pay for an uncertain scheme and that unilateral "steering" by brokers does not constitute a customer or market allocation. Id. at 9.

Plaintiffs rely on Petruzzi's IGA Supermarkets, Inc. v. Darlington-Delaware Co. and In re Flat Glass Antitrust Litigation in support of their position that the facts they have alleged, if proven, support an inference of a horizontal conspiracy. *998 F.2d 1224 (3d Cir. 1993)*; *385 F.3d 350, 356-61 (3d Cir. 2004)*. Plaintiffs claim that the facts alleged cannot be viewed in a compartmentalized manner, but rather must be viewed in their totality. Further, Plaintiffs contend that Defendants cannot simply defeat their claims by proffering a plausible rationale for their conduct. Plaintiffs claim that the Particularized Statements allege sufficient facts to show that each of the Defendants in each of the broker-centered conspiracies was "aware that its contract was not an isolated transaction but part of a larger arrangement" the "necessary consequence of which . . . is restraint of interstate commerce." *United States v. Masonite Corp., 316 U.S. 265, 275, 62 S. Ct. 1070, 86 L. Ed. 1461, 1942 Dec. Comm'r Pat. 777 (1942).*

[*70] 2. *Communication Among Members of the Conspiracy*

Defendants also claim that Plaintiffs have not alleged any communications between brokers or between insurers that show a collusive agreement to allocate customers or markets. Defendants' Brief, In re Ins. Brokerage Antitrust Litig., 04-5184, Docket Entry Nos. 823, 846, at 7. Defendants claim that Plaintiffs have not alleged any method for the market allocation (by specific line of insurance, customer, geographic area), and have not alleged that any broker agreed with other brokers or insurers agreed with other insurers to competitive constraints. Plaintiffs maintain that proof of direct communication among the "spokes of the wheel" is not necessary to establish the existence of a "hub and spoke" conspiracy. Plaintiffs' Opposition, In re Ins. Brokerage Antitrust Litig., 04-5184, Docket Entry No. 849, at 29. Plaintiffs rely on Masonite, which states "[i]t is not clear what precise point of time each appellee became aware of the fact that its contract was not an isolated transaction, but part of a larger arrangement. But it is clear that as the arrangement continued, each became familiar with its purpose and **[*71]** scope." *Masonite, 316 U.S. at 274-75*. Plaintiffs also note the Supreme Court's decision in Interstate Circuit, which found that "[i]t is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators . . . [a]cceptance by competitors without previous agreement of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." Id. (citing *Interstate Circuit v. United States, 306 U.S. 208, 227, 59 S. Ct. 467, 83 L. Ed. 610 (1939))*.

Plaintiffs point to *Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000)* for guidance regarding the inferences that can be made when establishing a horizontal conspiracy. "[T]he critical question here is whether substantial evidence supported the Commission's finding that there was a horizontal agreement . . . It acknowledges that such an agreement may be proved by either direct or circumstantial evidence." *Id. at 935*. Plaintiffs claim that they have put forth sufficient evidence **[*72]** to conclude that each broker was the "ringmaster" of a horizontal arrangement to allocate premium and reduce competition among members of each broker-centered conspiracy and that the members of each broker-centered conspiracy had a connection with one another and were aware of each others involvement. Plaintiffs also contend that they have supplied sufficient facts to describe the facilitation of communications among the participants and that the formation of "strategic partnerships" entailed a dramatic departure from past business practices. Plaintiffs claim that there is direct evidence in the Marsh and Willis broker-centered conspiracies of collusive arrangements such as submission of bids to protect the business of one another. See Plaintiffs' Opposition, In re Ins. Brokerage Antitrust Litig., 04-5184, Docket Entry No. 849, at 33.

3. *Global Conspiracy*

Plaintiffs claim that they have set forth adequate evidence to support an inference of a global conspiracy. Plaintiffs claim that the alleged broker-centered conspiracies operated in a parallel fashion. Plaintiffs' Opposition, In re Ins. Brokerage Antitrust Litig., 04-5184, Docket Entry No. 849, at 34-35. Plaintiffs **[*73]** also claim that "the partnership arrangements were created out of a motive by the broker to increase its contingent commission revenue at the expense of the interests of its clients" and that "the brokers sacrificed their clients' interests in the best product at the best price, for the interests of their co-conspirators, in order to increase their short-term profits." Plaintiffs' Opposition, In re Ins. Brokerage Antitrust Litig., 04-5184, Docket Entry No. 849, at 37. Defendants contend that "strategic partnerships" are a type of preferred provider agreement. Plaintiffs, however, maintain that "while it may be true that some preferred provider agreements have procompetitive effects, these agreements, as detailed in the Statements did not." Id. at 39. Plaintiffs cite to several cases which they claim support their theory that lawful acts may be utilized for an unlawful purpose. See, e.g., *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)* ("Acts which are themselves legal lose that character when they become constituent elements of an unlawful scheme.").

Plaintiffs claim that it was not in the economic self-interest of the insurers **[*74]** to pay for access to a broker's book of business in the absence of an understanding that their major rivals were making similar payments. Plaintiffs' Opposition, In re Ins. Brokerage Antitrust Litig., 04-5184, Docket Entry No. 849, at 38. Plaintiffs claim that while it is "possible that an insurer would provide economic incentives to a broker so as to encourage the delivery of certain types of quality of business in order to meet its strategic objectives, that is not what is alleged here. Here, the Statements allege that insurers made those payments because they were *required to do so* in order to access a broker's book of business." Id. (emphasis in original). Plaintiffs claim that "the evidence shows that insurers were reluctant to pay contingent commissions, at least at the level demanded, and if they could have secured premium volume without making the payment, they would have done so." Id. (citing *In re Brand Name Prescription Drugs Antitrust Litigation, 123 F.3d 599, 615 (7th Cir. 1997)* ("reluctant accomplices" are not less liable for that fact).

4. *Mid-Sized Brokers and Other Defendants' Separate Arguments*

While certain Defendants **[*75]** [3] join the Commercial Defendants' Omnibus Motion to Dismiss, they also write separately regarding particular reasons why Plaintiffs' claims should be dismissed against them. The Chubb and Fireman's Fund Defendants claim that the Complaint and the Particularized Statements are devoid of allegations that constitute bid-rigging against them. XL claims that there are only a few allegations against them contained in Plaintiffs' pleadings, and these allegations fail due to a lack of specificity as to any fraudulent conduct by XL. XL also contends that Plaintiffs lack standing since Plaintiffs fail to allege that any one of the named Plaintiffs was defrauded by them and the action is "merely a *proposed* class action." XL's Brief, In re Ins. Brokerage Antitrust Litig., 04-5184, Docket Entry No. 814, at 3 (emphasis in original). The Midsized Brokers claim that Plaintiffs have again failed to sufficiently plead claims against them regarding the global and broker-centered conspiracies, and that Plaintiffs lack standing to assert allegations against them since there are no allegations that any of the named Plaintiffs were their customers. The Berkshire Defendants contend that there is no factual **[*76]** basis for their liability as their direct activities with brokers were not unlawful and they are not liable for their subsidiaries' actions. CNA Defendants submit that the allegations against them do not constitute bid-rigging claims or implicate CNA in the customer or market allocation scheme or the Willis-centered conspiracy. Defendants AXIS, Berkshire, Crum & Forster and RLI argue that Plaintiffs have expressly made no claim of bid-rigging against them and there are no

[3] Chubb Defendants, Fireman's Fund Defendants, XL Defendants, Mid-Sized Broker Defendants, Berkshire Defendants, CNA Defendants, AXIS, Berkshire, Crum & Forster and RLI Defendants and BB&T Defendants.

facts to suggest any horizontal coordination aside from the alleged bid-rigging. They contend that the allegations against them are based solely on the steering of business to certain of the insurers, which is not unlawful, and that there are no allegations that they declined to compete. BB&T Defendants contend that there are no bid-rigging claims against them, and that the steering of business is the only activity plead to implicate them in the alleged conspiracies. BB&T Defendants also contend that if the federal claims are dismissed against them, that the state claims should follow due to a lack of standing.

[*77] Plaintiffs claim that despite these certain brokers' supplemental briefs which assert that no facts are alleged to tie them to the global conspiracy, each of the mid-sized brokers is "alleged to have participated in broker-centered arrangements that operated in a similar manner to the described broker-centered conspiracies, even if a specific broker-centered conspiracy has not been alleged." Plaintiffs' Opposition, In re Ins. Brokerage Antitrust Litig., 04-5184, Docket Entry No. 849, at 46. Plaintiffs also address the arguments submitted on behalf of AXIS, Berkshire, Crum & Forster and RLI, in which Defendants claim there is no evidence of horizontal coordination among any insurers. Plaintiffs claim that each of these Defendants is alleged to have entered into strategic partnerships with one or more of the Broker Defendants to receive guaranteed access to business and protection from competition. [4] Id. at 47. Plaintiffs claim that the "slight evidence rule" applies here with regard to these Defendants. Plaintiffs cite to *United States v. Consolidated Packaging Corp., 575 F.2d 117, 126 (7th Cir. 1978)*, which states "[o]nce the conspiracy has been established, **[*78]** slight evidence is needed to connect a particular participant . . . Even a single act may be sufficient to draw a defendant within the ambit of a conspiracy where the act is such that one may infer from it an intent to participate in the unlawful enterprise." Plaintiffs also claim that the Statements allege that the midsized brokers engaged in the same conduct with respect to their strategic partners as the other members of the conspiracy, and that an inference that they joined the conspiracy is warranted. Id. at 48.

Regarding the standing arguments set forth by certain Defendants, Plaintiffs claim that they allege that all of the Defendants **[*79]** participated in the global conspiracy that harmed all of the Plaintiffs and the members of the proposed class, regardless of whether they had direct dealings with each of the Defendants. Plaintiffs recognize that the "Defendants' standing arguments are relevant only if the Court concludes that the Statements do not adequately allege a horizontal conspiracy." Plaintiffs address HRH's contention that the Court should not consider the HRH-centered conspiracy because there are no allegations that any of the named plaintiffs retained HRH. Id. at 49. Plaintiffs, however, contend that the "allegations concerning the HRH broker-centered conspiracy are properly considered in connection with the global conspiracy that HRH is alleged to have participated in, regardless of whether any of the plaintiffs dealt directly with HRH." Id. Plaintiffs also contend that they have sufficiently alleged that Berkshire is responsible for its participation in the Marsh-centered conspiracy as a preferred carrier. Additionally, Plaintiffs claim that Berkshire may be held indirectly liable under an agency theory for the conduct of its subsidiaries.

E. Plaintiffs' Particularized Statements Do Not [*80] Sufficiently Allege the Necessary Facts to Support a Horizontal Conspiracy to Allocate the Market or Customers

While courts are reluctant to dismiss antitrust claims, Plaintiffs are still required to make a sufficient showing that the behavior alleged falls within the purview of prohibited behavior under the Sherman Act. *In re K-Dur Antitrust Litig., 338 F.Supp. 2d 517, 529 (D.N.J. 2004)* ("While courts should be reluctant to grant dismissals in antitrust cases, it is axiomatic that a plaintiff asserting an antitrust claim must plead a quantum of facts sufficient to survive a *Rule 12(b)(6)* motion to dismiss."). Courts have held that because "[t]he existence of an agreement is 'the very essence of a section 1 claim,'" a plaintiff is required to prove "'some form of concerted action.'" *In re Flat Glass, 385 F.3d at 356-57* (quoting *Alvord-Polk, 37 F.3d at 999*). "In other words, there must be a 'unity of purpose or a common design and understanding or a meeting of minds' or a 'conscious commitment to a common scheme.'" Id. (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*.

---

[4] Plaintiffs claim that RLI and Berkshire are alleged to be participants in the Marsh broker-centered conspiracy and that Crum & Forster participated in four conspiracies (Aon, Gallagher Marsh and Willis) and Axis in three conspiracies (Aon, Marsh and Willis). Plaintiffs' Opposition, In re Ins. Brokerage Antitrust Litig., 04-5184, Docket Entry No. 849, at 47, n. 52.

1. [*81] *Horizontal Conspiracy*

The first question confronted by this Court is whether the challenged conduct involves a "horizontal" restraint among competitors. The Court is satisfied, at this stage in the proceedings, with the level of specificity contained in the Particularized Statements which identify the majority of the conspirators and their roles in the conspiracy. *In re Elec. Carbon Prods. Antitrust Litig., 333 F.Supp. 2d 303, 311-12 (D.N.J. 2004)* ("if 'inferences can be fairly drawn from the behavior of the alleged conspirators' which indicate that they participated in the conspiracy, the Court should construe the Complaint 'liberally in the plaintiffs' favor' at the motion to dismiss stage and allow the case to proceed. Indeed, 'in the antitrust context, where the proof is largely in the hands of the alleged conspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.'"(quoting *Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)))*.

Plaintiffs have roughly identified time periods of the alleged conspiracies, the participants and some of the behavior which Plaintiffs **[*82]** claim show a concerted agreement to collude. As noted in Interstate Circuit, if the "spokes" of the conspiracy have communicated and agreed with one another or accepted the alleged practices based on the participation of others in the scheme, a common conspiracy may be inferred. *306 U.S. at 222-23*; see also *Monsanto Co., 465 U.S. at 764* ("[T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the [defendant] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective."); *American Tobacco Co. v. United States, 328 U.S. 781, 810, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)* (evidence must show "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.").

In this case, Plaintiffs have alleged that in the 1990's, brokers decided to consolidate their markets, which they contend was a radical change in the way they previously did business. Plaintiffs allege that the Broker Defendants communicated this strategy to prospective insurance partner carriers and to each other. Plaintiffs claim that the partner carriers knew who the other carriers **[*83]** were, the tiers or levels of preferred status and who was on them and what level of contingent commission payments were necessary to reach that status. Plaintiffs claim the insurers had such details regarding these arrangements between insurers and brokers such as the amount of contingent commissions paid. Plaintiffs also allege these arrangements were disclosed despite confidentiality provisions and that brokers disclosed information to the insurers regarding premium volume they delivered to the other insurers. Plaintiffs submit that they have put forth facts regarding the exchange of information regarding broker agreements directly between the insurer partners and collective information distribution from the brokers to a group of insurers. Plaintiffs assert that the insurers knew the identity of the market partners, the level of participation and the details of the arrangements. Plaintiffs allege some instances of bid rigging among the insurers. Plaintiffs put forth facts that they claim demonstrate mechanisms to facilitate the conspiracy, including organizational structures, contingent commission agreements, a national study group and surveys. Plaintiffs also assert that there were **[*84]** methods to discipline members of the conspiracy such as brokers stopping placements or ceasing to protect renewal business. Plaintiffs assert actions against interest, including that it was not in the insurers interest to pay contingent commissions for access to a broker's business unless other insurers were participating as well.

Based on the Complaint and Particularized Statements, viewing all of the allegations as true, Plaintiffs have established facts which could show, if proven, that a horizontal collusion among the insurers was plausible in the broker-centered conspiracies. Plaintiffs are not required, at this stage, to allege *all* facts supporting a horizontal conspiracy, however, there is a threshold showing that must be satisfied in order for Plaintiffs to move forward. "The question of whether a combination in restraint of trade is illegal per se or subject to the 'rule of reason' is influenced by whether the restraints are horizontal or vertical, that is, whether they stem from an agreement among competitors or are the result of an agreement between parties at different levels of the distribution system." *Shulton, Inc. v. Optel Corp., 1986 U.S. Dist. LEXIS 19775, *69-70 (D.N.J. 1986)*. **[*85]** The Court's prior order required Plaintiffs to set forth facts that show the alleged horizontal conspiracy was plausible. At this stage, it appears that the communications among the competitor insurers and the mechanisms in place to exchange information and police the alleged conspiracy, could have made this relationship plausible when viewing the facts as true. However, while it might have been plausible that the Defendants agreed to engage in some sort of behavior, it cannot survive as a horizontal conspiracy unless what the competitors agreed to do was "unlawful." *Monsanto Co., 465 U.S. at*

764; American Tobacco Co., 328 U.S. at 810. While the allegations are sufficient at this stage to infer that the Insurer Defendants agreed to participate in the contingent commission agreements with the Broker Defendants and exchanged information regarding those agreements, the allegations regarding the common, unlawful scheme is unclear. There are not sufficient allegations that it was the Insurer Defendants, at the same level of competition, who participated in the division of the market or customers or agreed to such an unlawful scheme **[*86]** as initiated by the Broker Defendants. While there was an exchange of information about these contingent commission agreements, which Plaintiffs allege were a method by which the market or customers were allocated among the insurers, Plaintiffs have not shown that the insurers colluded to allocate business.

2. *Per Se Violation - Market or Customer Allocation*

While Plaintiffs have set forth particularized facts that support the possible existence of a horizontal relationship among the Defendant Insurers, the Court must assess whether the alleged restraint is anticompetitive. Northwest Wholesale Stationers, 472 U.S. at 298 ("A plaintiff seeking application of the per se rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects."). The allegations supporting the horizontal market or customer allocation scheme are lacking. The Court is not persuaded that the showing of a *per se* violation, *i.e.* a horizontal conspiracy to allocate the market or customers, has been set forth in the pleadings or the Particularized Statements. Due to the nature of their allegations, and **[*87]** the fact that Plaintiffs forgo a rule of reason analysis, they must allege activity which has been designated *per se* illegal. In the Complaint and Particularized Statements there is an absence of a common plan or scheme to divide the market among the alleged conspirators in some unlawful manner. Plaintiffs claim that Defendants utilized legitimate practices, such as contingent commission agreements, to facilitate an anticompetitive and exclusionary scheme. However, the scheme that Plaintiffs allege is not apparent. In this case, it appears that there were, in some instances, "tiers" of defendants who received benefits for providing certain contingent payments to brokers. The allegations, however, are devoid of how the markets were divided or customers allocated to further this scheme, and that the Insurer Defendants agreed to participate or further this particular allocation of the brokers' business. While Plaintiffs will not, at this stage or perhaps ever, possess all of the details of how this alleged operation was executed, it would appear that there should be some sort of method of allocation of the customers or market of which insurers were aware to make the alleged broker-centered **[*88]** conspiracies plausible.

Without some sort of anticompetitive conduct, this claim cannot survive, regardless of how Plaintiffs characterize the relationship between the brokers and the insurers. Facts have been alleged to indicate a contingent commission program being conducted by the brokers who received certain amounts of commissions from a fixed number of insurers who allegedly paid higher commissions to receive more of the brokers' business. That alone is not a horizontal conspiracy to allocate the market. Horizontal conspiracies allocating territories or dividing up customers have been held to be *per se* illegal. See, e.g., *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 734, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*; *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*; *Topco Assoc., Inc., 405 U.S. at 608*. Here, Plaintiffs have alleged that the participants in each broker-centered conspiracy "agreed and understood that members of the conspiracy purchased a flow of premium and protection from competition in return for contingent commission payments." Plaintiffs' Opposition, In re Ins. Brokerage Antitrust Litig., 04-5184, Docket **[*89]** Entry No. 849, at 2. But the Plaintiffs have failed to allege that what was purchased constitutes a market or customer allocation scheme.

Plaintiffs allege that the brokers funneled the bulk of their business to a select number of preferred insurers, and insurers were invited to be among a select few to whom a broker's business was directed once they entered into contingent commission agreements and agreed to make the payments in exchange for the business. Id. at 4-5. Plaintiffs claim that the aim of the conspiracy was "the allocation of premium volume to preferred insurers and the protection of insurers from competition." Id. at 13. Plaintiffs have set forth an alleged instance of a "customer allocation scheme" among "Broker Defendant HRH and Insurer Defendants CNA, St. Paul/Travelers and The Hartford to divide HRH's portfolio of 'select commercial' accounts among its three partner insurers." Id. at 15 (referring to Comm St., P 568). Plaintiffs claim that documents exist which describe these insurers' understanding of the amount of business to be divided among these three carriers as well as the arrangements each carrier made with the broker. Id. (referring to Comm. **[*90]** St., PP 570-572). Specifically, Plaintiffs cite to the Assurance of

Discontinuance entered into by St. Paul/Travelers with the State of New York, which states that "in return for hidden contingent commissions to HRH, the Big Three carriers would split among themselves more than 80% of HRH's select commercial accounts nationwide . . . [the insurers] understood . . . that HRH offered available books of business to only one Big Three Carrier at a time. Only if the chosen carrier chose not to take a large enough share of the book would the business be offered to another Big Three carrier. Travelers knew who the other members of the Big Three were and all agreed not to compete for available books of business on the basis of commission paid to HRH." Id. at 15-16 (citing St. Paul AOD at 19). Defendants respond to Plaintiffs reliance on these facts as improper, as they contend "[t]he Assurance contains no facts that support an inference of any Sherman Act violation, *i.e.,* any horizontal agreement among Travelers, CNA and/or The Hartford to refrain from competing with each other for policyholders." Defendants' Reply, In re Ins. Brokerage Antitrust Litig., 04-5184, Docket **[*91]** Entry No. 875, at 5, n. 3. Defendants maintain that Plaintiffs have not alleged facts to establish that the "strategic partnerships" with individual brokers constituted an agreement to "allocate policyholders or placements in any identifiable way, to exclude any insurer or broker from the market, to refrain from competing with one another for any business, or to adopt any other competitive restraints." Id. at 5. The Court is not satisfied that Plaintiffs have set forth sufficient allegations that the conduct alleged, *i.e.* the consolidation of the insurance markets and the steering of certain customers based on contingent commission payments, constitutes a *per se* illegal horizontal customer or market allocation scheme. While the Court will not assess the merits of Plaintiffs' allegations at this juncture, it is necessary for Plaintiffs to adequately allege conduct which constitutes market or customer allocation and not just the steering of business to preferred partners.

3. *Leave to Amend the Complaint and/or Revise the Particularized Statements*

While Plaintiffs claim it is clear that the brokers were the "ringmasters" of the alleged conspiracies, it is not **[*92]** clear whether the insurers themselves were collaborating or agreeing in some way to further this *per se* illegal market or customer allocation scheme. Instances of bid-rigging may show that there was collusion among the insurers, however, these allegations are limited to the Marsh and Willis broker-centered conspiracies. In terms of a global conspiracy, the Court is permitted to make an inference as to its existence if Plaintiffs show that the conspiracy is plausible. To allege such a conspiracy, Plaintiffs may set forth allegations of parallel anticompetitive behavior which was the "product of collusion rather than coincidence, and may also set forth "plus factors" at the summary judgment stage to strengthen the plausibility of the conspiracy pleading. *Twombly v. Bell Atl. Corp., 425 F.3d 99, 114 (2d Cir. 2005)* (citing *In re Pressure Sensitive Labelstock Antitrust Litig., 356 F.Supp. 2d 484, 492 (M.D. Pa. 2005)* (noting that "a plaintiff need not allege the existence of . . . plus factors in order to plead an antitrust cause of action")(quoting *Lum, 361 F.3d 230*)).

The Plaintiffs must allege that the behavior of Defendants is anticompetitive **[*93]** and indicative of a *per se* violation of the Sherman Act to establish the broker-centered conspiracies. If and when Plaintiffs are able to amend their Complaints and/or revise their statements to set forth the alleged anticompetitive market or customer allocation scheme, the Court will assess the plausibility of a global conspiracy. See, e.g., *In re Elec. Carbon Prods. Antitrust Litig., 333 F.Supp. 2d at 312* ("Simply using the 'global term 'defendants' to apply to numerous parties without any specific allegations' that would tie each particular defendant to the conspiracy is not sufficient. However, it is also true that, if '[i]nferences can be fairly drawn from the behavior of the alleged conspirators' which indicate that they participated in the conspiracy, the Court should construe the Complaint 'liberally in the plaintiffs' favor at the motion to dismiss stage and allow the case to proceed.") (citations omitted).

Because so much time has been invested in this case by all parties, and because courts should construe Plaintiffs' allegations liberally at this stage of the proceedings, this Court grants Plaintiffs leave to amend their Section 1 claims and further **[*94]** revise the Particularized Statements setting forth the alleged market or customer allocation scheme and Defendants' agreement to engage in such a scheme in order to comply with the pleading requirements as set forth above. The Court recognizes that many of the Mid-Size Broker Defendants and others wrote separately regarding bid-rigging allegations and standing. Many of these arguments are dependent upon the revised Particularized Statements and the Court's determination of whether a global conspiracy may be inferred. Thus, Plaintiffs are also permitted to set forth additional facts or allegations regarding the aforementioned Defendants and their roles in the alleged scheme. Defendants may file a subsequent motion to dismiss, motion on the pleadings or motion for summary judgment (after the completion of fact discovery).

CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss are granted. Plaintiffs' claims alleging violations of *15 U.S.C. § 1* are dismissed without prejudice. The Court will permit Plaintiffs one final opportunity to amend these claims and/or revise the Particularized Statements within thirty days of the entry of this Opinion. **[*95]** An appropriate form of Order accompanies this Opinion.

Dated: April 5, 2007

s/ Garrett E. Brown, JR., U.S.D.J.

Gibson v. Office of the AG of Cal.

United States District Court for the Central District of California

April 10, 2007, Decided; April 10, 2007, Filed

CV 07-00838 FMC (JCx)

Reporter

2007 U.S. Dist. LEXIS 105205 *

PAULA LAUREN GIBSON, ESQ., and ANNETTE D. GOODE-PARKER, Plaintiffs, vs. OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; BILL LOCKYER; RICHARD M. FRANK; JAMES THOMAS GREENE; KATHLEEN FOOTE; LOUIS MAURO; JACOB APPLESMITH; BARBARA MOTZ; and DOES 1-10, Defendants.

Prior History: *Gibson v. Office of the AG of Cal., 2007 U.S. Dist. LEXIS 105204 (C.D. Cal., Feb. 28, 2007)*

Core Terms

allegations, permission, damages, rights, cause of action, amended complaint, motion to dismiss, grievance, amend, reasonable accommodation, public concern, first cause, Whistleblower, violations, adverse employment action, limitations, employees, overtime, lawsuit

Counsel: **[*1]** Paula Lauren Gibson, Plaintiff, Pro se, Los Angeles, CA USA.

For Paula Lauren Gibson, Annette D Goode-Parker, Plaintiffs: Mark A McBride, LEAD ATTORNEY, Law Offices of Mark McBride PC, Beverly Hills, CA USA.

Annette D Goode-Parker, Plaintiff, Pro se, Los Angeles, CA USA.

For Office of The Attorney General State of California, Bill Lockyer, Richard M Frank, James Thomas Greene, Kathleen Foote, Louis Mauro, Jacob Applesmith, Barbara Motz, Defendants: Stephanie L Quinn, LEAD ATTORNEY, Murphy Campbell Alliston and Quinn, Sacramento, CA USA; Thomas Allen Cregger, LEAD ATTORNEY, Cregger and Chalfant, Sacramento, CA USA.

Judges: FLORENCE-MARIE COOPER, UNITED STATES DISTRICT JUDGE.

Opinion by: FLORENCE-MARIE COOPER

Opinion

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT AND DENYING MOTION TO STRIKE

This matter is before the Court on Defendants' Motion to Dismiss and Motion to Strike Plaintiffs' First Amended Complaint (docket no. 32), filed on March 23, 2007. The Court has read and considered the moving, opposition, and reply documents submitted in connection with the motion. The Court deems this matter appropriate for decision without oral argument. *See* *Fed. R. Civ. P. 78*; *Local Rule 7-15*. Accordingly, the hearing set for April **[*2]** 16, 2007, is removed from the Court's calendar. For the reasons and in the manner set forth below, the Court hereby GRANTS Defendants' Motion to Dismiss and DENIES the Motion to Strike as moot.

FACTUAL BACKGROUND[1]

Plaintiff Paula Lauren Gibson ("Gibson") has been employed as a Deputy Attorney General ("DAG") for the State of California since 1984. (FAC ¶ 1.) In or about 2001, she was transferred to the ***Antitrust Law*** Section from the Health, Education and Welfare Section, pursuant to an agreement entered into between herself and Defendant Office of the Attorney General ("OAG") to resolve complaints of disability discrimination and denial of reasonable accommodations she had made to the State Personnel Board and Department of Fair Employment and Housing. (*Id.* at ¶¶ 110, 112, Ex. 14.) Gibson is the sole African-American DAG in the ***Antitrust Law*** Section. (*Id.* at ¶ 5.)

Co-Plaintiff Annette Goode-Parker ("Goode-Parker") is a Senior Legal Analyst (paralegal) in the statewide ***Antitrust Law*** Section and provides many of the "reasonable accommodation" services required by Gibson. (*Id.* at ¶¶ 2, 6, 118, Ex. 14.) She is also the only African-American in her position in the Antitrust Section. (*Id.* at **[*3]** ¶ 6.) At some unspecified point in time, she resided in the same household as Gibson. (*Id.* at ¶¶ 68, 85(5).)

On June 25, 2003, Gibson filed a private legal malpractice action in the Los Angeles Superior Court, on behalf of Goode-Parker and against California attorney Harold Greenberg ("Greenberg"). (*Id.* at ¶ 44.) Although the OAG has a policy of requiring attorneys within its employ to receive advance permission to engage in the private practice of law, Gibson did not seek such permission in connection with her representation of Goode-Parker until April 21, 2004. (*Id.* at ¶¶ 33-35, 51)[2] Gibson's request was ultimately denied by Defendant Kathleen Foote ("Foote"), Senior Assistant Attorney General for the Antitrust Section, on the grounds that the existence of a separate and pending claim filed by Greenberg against Gibson with the State Board of Control created a "conflict of interest." (*Id.* at ¶ 53.) Foote was apparently notified of the pending Board claim by defendant Jacob Applesmith ("Applesmith"), Senior Assistant Attorney General for the Employment, Regulation and Administrative Law Section. (*Id.*)

In June of 2004, Gibson filed a grievance concerning the denial of her request **[*4]** to represent Goode-Parker, arguing, *inter alia*, that the OAG's policy of requiring advance permission for engaging in the private practice of law violated the *First Amendment*. (*Id.* at ¶ 57, Ex. 5.) Around the same time, Greenberg filed a lawsuit against the State of California and Gibson individually, which was dismissed as to Gibson by means of an Anti-SLAPP motion in October of 2004. (*Id.* at ¶ 58.)

On November 19, 2004, Gibson was advised that she would be terminated from her employ with the OAG if she did not withdraw from representing Goode-Parker in the malpractice action, notwithstanding the fact that there had not yet been any formal action regarding her grievance. (*Id.* at ¶ 59.) Although Gibson protested to Defendant Foote, she ultimately withdrew as requested on December 9, 2004. (*Id.* at ¶¶ 60, 63.) However, Defendant James Thomas Greene ("Greene"), the Chief Assistant Attorney General for the Public Rights Division, agreed, via separate email, to consider review of Gibson's June 2004 grievance. (*Id.* at ¶ 62, Ex. 7.)

On December 30, 2004, Greene, acting on the designation of the Attorney General, denied the grievance. (*Id.* at ¶ 64, Ex. 5.) Greene noted that "it is the Department's view that **[*5]** given the breadth of law dealt with by this Office, it is extremely difficult for a [DAG] to engage in the private practice of law and not come into conflict with the Department's interests or those of a client." (Ex. 5 at 104-05.) He further noted that the prior approval process is essential to be "an effective deterrent against conflicts between a public employee's official duties and his or her outside activities," and is not an unconstitutional "prior restraint." (*Id.* at 105-06.)

Gibson appealed the denial of her grievance to "the next level." (FAC ¶ 64.) On February 25, 2005, Defendant Richard Frank, Chief Deputy Attorney General, rendered a determination upholding the denial. (*Id.* at ¶ 65, Ex. 10.) Specifically, Frank noted that he agreed "with CAAG Greene's conclusions that the Department's pre-approval

[1] All facts are taken from the allegations set forth in Plaintiffs' First Amended Complaint ("FAC"), and the Exhibits attached thereto, as indicated herein.

[2] As discussed in the Court's prior order, the OAG's policy is embodied in paragraph 9 of a comprehensive "Incompatible Activities Statement," adopted pursuant to *Cal. Gov't. Code § 19990*. (*See id.* at ¶ 35, Ex. 2.)

requirement is not an unconstitutional prior restraint and that [Gibson's] involvement in the malpractice lawsuit created a conflict of interest." (Ex. 10 at 119.) Plaintiff appealed Frank's decision to the Department of Personnel Administration; that appeal was subsequently denied. (FAC ¶ 67.)

In the interim, Gibson requested and received permission to represent herself in connection with **[*6]** two additional legal matters related to the underlying Greenberg malpractice suit. First, on January 21, 2005, she was granted permission to appeal a sanctions order that had been issued against her in that lawsuit, subject to certain limitations. (*Id.* at ¶ 69, Ex. 11 at 135.) Those limitations included, *inter alia*, that (1) the representation be confined to specific issues; (2) OAG resources not be used and/or that Gibson's affiliation with the OAG not be invoked; and (3) any criticisms of Gibson's performance by the court be promptly communicated to Greene. (Ex. 11 at 137.) Second, on December 1, 2005, Gibson was granted permission to file a malicious prosecution action against Greenberg in response to Greenberg's litigation against her. (*Id.* at ¶ 72; Ex. 11 at 121-22.) That permission was also conditioned upon Gibson's compliance with certain conditions, including but not limited to (1) that she not "disparage the Office of the Attorney General or its policies, including the incompatibility policy"; (2) that OAG resources not be utilized; and (3) that any criticisms expressed by the court be reported. (Ex. 11 at 121-22.)

Gibson appealed the imposition of the limitations in connection **[*7]** with the grant of permission to pursue the sanctions litigation, but her appeal was denied by Defendant Frank. (*Id.* at ¶ 70.) Plaintiff requested an appeal of the limitations imposed in connection with the malicious prosecution action on or about December 14, 2005, but no action has been taken on that request. (*Id.* at ¶ 73.) However, the malicious prosecution case was dismissed in its entirety in when the court sustained Greenberg's demurrer on an "unclean hands" defense. (*Id.* at ¶ 80.)

Separate and apart from her requests for permission to engage in the outside practice of law, Gibson requested certain "reasonable accommodations" from her employer for herself and Goode-Parker, in or about October 2004. Specifically, Gibson requested (1) a flexible work schedule; and (2) modification of Goode-Parker's additional duties in order to maximize the time she would be available to assist Gibson. (*Id.* at ¶ 100.) That request was denied on November 19, 2004. (*Id.* at ¶ 103.) Subsequent to that time, Gibson and Goode-Parker were purportedly subjected to additional, adverse employment actions, including but not limited to the denial of challenging assignments/reassignment of cases, denial of overtime **[*8]** compensation, and negative performance evaluations. (*See id.* at ¶¶ 88, 104, 118.)

PROCEDURAL HISTORY

On December 11, 2006, Plaintiffs filed a Complaint in the Superior Court of the State of California, County of Los Angeles, alleging various violations of their Constitutional rights, as well as claims for breach of contract, interference with contract and contractual advantage, and violations of California's "Whistleblower Protection Acts," *Cal. Gov't. Code §§ 8547-8547.12*. Defendants removed the action to this Court on February 5, 2007. On February 9, 2007, they filed a Motion to Dismiss and Motion to Strike.

On February 28, 2007, the Court issued a written order granting the Motion to Dismiss. The Court dismissed the first cause of action (under *42 U.S.C. § 1983*) with prejudice against Defendant OAG and Defendants Lockyer, Frank, Applesmith and Mauro in their official capacities. All other causes of action against all other Defendants were dismissed without prejudice to Plaintiffs' filing of an amended complaint to address the specific defects identified by the Court.

Plaintiffs filed the FAC on March 13, 2007. By means of the present motion, Defendants once again seek dismissal of all claims against them. In the alternative, **[*9]** they move to strike paragraphs 138 and 140 of the FAC, along with Plaintiffs' prayer for punitive damages, pursuant to *Fed. R. Civ. P. 12(f)*.

DISCUSSION

I. Motion to Dismiss

A. Legal Standard

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a defendant to seek dismissal of a complaint that "fail[s] to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. The Court will not dismiss claims for relief unless the plaintiff cannot prove any set of facts in support of the claims that would entitle him to relief. *Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002)*; *see also* *Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295 (9th Cir. 1998)*. All material factual allegations in the complaint are assumed to be true and construed in the light most favorable to the plaintiff. *Nursing Home Pension Fund, Local 144 v. Oracle Corp., 380 F.3d 1226, 1229 (9th Cir. 2004)* ("The general rule for *12(b)(6)* motions is that allegations of material fact made in the complaint should be taken as true and construed in the light most favorable to the plaintiff.") (citing *Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000))*. However, the Court "is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network, 18 F.3d 752, 755 (9th Cir. 1994)* (internal citations omitted).

If the Court dismisses the complaint, it must decide whether to grant leave to amend. Denial of leave to amend is "improper unless it is clear that the complaint could not be saved by any amendment." *Livid Holdings Ltd. v. Salomon Smith Barney, Inc., 416 F.3d 940, 946 (9th Cir. 2005)*. However, **[*10]** the district court's discretion to deny leave to amend is decidedly broader where the plaintiff has previously filed an amended complaint. *Miller v. Yokohama Tire Corp., 358 F.3d 616, 622 (9th Cir. 2004)* ("Where the plaintiff has previously filed an amended complaint, as Miller has done here, the district court's discretion to deny leave to amend is 'particularly broad.'").

B. Plaintiffs' Claims for Relief

1. First Cause of Action—Violation of Rights under *42 U.S.C. §§ 1981*, *1983*

a. *First Amendment* Claims

The first cause of action in the FAC is entitled "Violation of Plaintiff's [sic] *First Amendment* Right to Assembly and Petition for Redress," pursuant to *42 U.S.C. §§ 1981*, *1983*, against Defendants Lockyer, Frank, Greene, Foote, Metz, Applesmith, and Mauro, in their individual capacities. Although the Court admonished Plaintiffs, via its prior dismissal order, to "clarify the specific unlawful actions at issue and the nature of the Constitutional violations (Federal and State) alleged," Plaintiffs have in instead added additional, disjointed allegations (divided into three "counts"), as well as substantial paragraphs of legal argument. However, the Court understands that the gravamen of Plaintiffs' first cause of action continues to be that Defendants' actions in denying Gibson permission to represent Goode-Parker, and/or **[*11]** in imposing certain restrictions on Gibson's ability to otherwise engage in private legal practice, deprived Plaintiffs of their *First Amendment* rights to speech and petition for grievances. As in their original complaint, Plaintiffs allege that the OAG's policy of requiring that attorneys within its employ obtain permission prior to engaging in the private practice of law constitutes an unlawful "prior restraint" and has served to chill them from engaging in "further petitioning activities." (FAC ¶¶ 36, 87-88.) Plaintiffs also allege that the petitioning activities they did engage in resulted in their employer's undertaking the specific acts of retribution enumerated above. (*Id.* at ¶¶ 90-91.)

In their motion, Defendants raise numerous objections to the sufficiency of Plaintiffs' allegations. Most prominently, Defendants argue that they are entitled to qualified immunity because Plaintiffs have failed to allege that they have engaged in any protected *First Amendment* activity. The Court agrees.[3]

It is well established in this judicial circuit that "a public employee's litigation must involve a matter of public concern in order to be protected by either the Petition Clause or the Speech Clause of the *First Amendment*." *Rendish v. City of Tacoma, 123 F.3d 1216, 1220 (9th Cir. 1997)*; *see also Settlegoode, 371 F.3d at 513* ("Where plaintiff is a government **[*12]** employee claiming violations of his *First Amendment* rights, he must show that two things were clearly established: (1) that his speech involved a matter of public concern, and (2) that the interests served by allowing him to express himself outweighed the state's interest in promoting work-place efficiency and avoiding workplace disruption.") (citing *Pickering v. Bd. of Educ., 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968))* (additional citation omitted). Whether a public employee's speech addresses a matter of public concern is a determination of law, not fact, which must be "made in light of 'the content, form, and context' of the expressive conduct 'as revealed by the whole record.'" *Alpha Energy Savers, Inc. v. Hansen, 381 F.3d 917, 924 (9th Cir. 2004)* (quoting *Connick v. Myers, 461 U.S. 138, 147-48, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983))*.[4] As a general matter, "[s]peech that concerns issues about which information is needed or appropriate to enable the members of society to make informed decisions about the operation of their government merits the highest degree of *first amendment* protection," while "speech that deals with individual personnel disputes and grievances and that would be of no relevance to the public's evaluation of the performance of government agencies, is generally not of public concern." *Id.* (internal quotations and citations omitted).

Here, the pleadings definitively establish that none of Plaintiffs' **[*13]** speech and "petitioning" activities in any way involved a matter of public concern. Goode-Parker, through Gibson, filed a private lawsuit for money damages against an attorney she had apparently retained to represent her in a personal, "domestic dispute." (FAC ¶ 44, 48.) Plaintiffs have cited no authority (nor has the Court found any) which stands for the proposition that a lawsuit of such an intimately private nature somehow implicates the public's evaluation of the performance of government agencies. *Compare, e.g., Ulrich v. City & County of San Francisco, 308 F.3d 968, 978-979 (9th Cir. 2002)* (collecting cases where speech held to be protected involved (1) the allocation of school funds, (2) the failure to grant pay raises that might affect the hiring and retention of police officers, (3) a city's preparedness to respond to fires due to budget cuts and firefighter layoffs, and (4) inappropriate standards affecting patient care at a public hospital).

Plaintiffs' additional "petitioning" activities—appealing the sanctions order against Gibson and filing the malicious prosecution action against Greenberg—likewise involved quintessentially "private" matters. Accordingly, Defendants are entitled to qualified immunity from suit under *§ 1983* vis a vis Plaintiffs' *First Amendment* claims, **[*14]** such that dismissal, with prejudice, is appropriate at this time. *See, e.g., Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)* ("If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity.").[5] Because dismissal with prejudice is appropriate on qualified immunity grounds, the Court need not consider Defendants'

---

[3] "Public officials are immune from liability for *section 1983* damages 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" ***Settlegoode v. Portland Pub. Schs., 371 F.3d 503, 512-513 (9th Cir. 2004)*** (quoting *Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982))*.

[4] Because it involves a threshold question of pure law, it is appropriate to consider Defendants' qualified immunity defense in this case in the context of a motion to dismiss. *See, e.g., Weisbuch v. County of Los Angeles, 119 F.3d 778, 783 n.1 (9th Cir. 1997)* ("It is illogical to say that something is a question of law, and that it is reviewed de novo, yet that it can never be decided on the pleadings.")

[5] It is clear to the Court that Plaintiffs cannot, by means of an additional opportunity for amendment, plead any facts concerning any speech and petitioning activities that would involve a matter of public concern. As both the original complaint and FAC make clear, Plaintiffs' "petitioning" activities were limited to the filing of the Greenberg malpractice action and various satellite matters.

additional arguments regarding the statute of limitations, the sufficiency of allegations against individual Defendants and/or Goode-Parker's standing.

b. Other Constitutional Claims

To the extent that the FAC purports to state additional claims for violations of *42 U.S.C. §§ 1981* and/or *1983* based on racial discrimination in violation of the *Fourteenth Amendment* or other Constitutional provisions, the allegations are so vague and unclear that the Court cannot make a determination as to their basic nature, much less their sufficiency. However, the Court will afford Plaintiffs one final opportunity to amend their complaint to clearly identify, in concise and plain terms, (1) the nature of the Constitutional rights involved; and (2) the specific actions taken (within the relevant limitations period) by the individual Defendants in violation of those rights.

2. Second Cause [*15] of Action—Retaliation Under the *First Amendment* Pursuant to *42 U.S.C. § 1983*

Plaintiffs' second cause of action appears to be duplicative of the first cause of action, in that it alleges that Plaintiffs suffered various adverse employment actions as a result of their "petitioning activities" vis a vis the Greenberg litigation. (FAC ¶¶ 107-08.) As set forth above, Plaintiffs cannot state a claim for relief based on any retaliation taken on account of those activities because they did not involve matters of "public concern." However, Plaintiffs also make vague allegations concerning retaliation allegedly taken in response to a complaint made by Gibson against Defendant Applesmith, their making of requests for reasonable accommodations, and/or their expressing of concerns about racial hostility in the workplace. Given the ambiguous and virtually unintelligible nature of the allegations, the Court will, as with the first cause of action, afford Plaintiffs one additional opportunity to amend their complaint and clearly identify: (1) the protected activity at issue (engaged in during the relevant limitations period); and (2) the adverse employment actions taken. *See, e.g., Coszalter v. City of Salem, 320 F.3d 968, 973 (9th Cir. 2003)* ("In order to state a claim against a government **[*16]** employer for violation of the *First Amendment*, an employee must show (1) that he or she engaged in protected speech; (2) that the employer took 'adverse employment action'; and (3) that his or her speech was a 'substantial or motivating' factor for the adverse employment action.").

3. Third Cause of Action—Breach of Contract

As in the original Complaint, Plaintiffs' Cause of Action for "breach of contract" is brought against Defendant OAG only. Once again, Plaintiffs allege that the OAG has "breached" the terms of the 2001 transfer agreement with Gibson, as well as a similar "oral" agreement made with respect to Goode-Parker. (FAC ¶ 110-112, 118.) Plaintiffs allege that the various "breaches" consisted of (1) denial of overtime and reasonable accommodation assistance (for Gibson) and overtime compensation (for Goode-Parker), on an "emergency" or "informal" basis; (2) failure to make Goode-Parker's reasonable accommodation assistance a priority over her other work; (3) "micro-management" of Plaintiffs' work; and (4) failure to be assigned challenging work. (*Id.* at ¶ 118(1)-(4)). Plaintiffs also now allege that Defendants breached the terms of a "memorandum of understanding" ("MOU") between the OAG and **[*17]** their respective unions by denying them flexible work hours and "docking" Goode-Parker's time using "the pretext" of her "being on an alternative work schedule." (*Id.* at ¶ 119.)

The Court agrees with Defendants that Plaintiffs have failed to allege conduct which is inconsistent with the terms of the transfer agreement. The alleged denials of unlimited assistance to Gibson in the form of overtime paralegal support from Goode-Parker and failure to prioritize that assistance over Goode-Parker's other work are not denials of any accommodations specifically contemplated therein. Rather, the agreement explicitly provides that approval for overtime "for the paralegal designated to assist Gibson" (i.e., Goode-Parker) is "subject to supervisory oversight as may be necessary from time to time." (Ex. 14 at 155.) Gibson's "ability to give assignments to the paralegal designated" is likewise "subject to supervisory oversight and approval as may be necessary from time to time." (*Id.*). Plaintiffs' remaining allegations of "breach of contract" (including the MOU) concern the imposition of undesired conditions of employment which, as the Court noted in its prior order of dismissal, cannot form the basis **[*18]** for a breach of contract claim by civil service employees under California law. *See, e.g., Kim v. Regents of University of California, 80 Cal. App. 4th 160, 164, 95 Cal. Rptr. 2d 10 (2000)* ("[O]ur Supreme Court has made it clear that civil service employees cannot state a cause of action for breach of contract or breach of the implied covenant of good faith and fair dealing.") (citing *Shoemaker v. Myers, 52 Cal. 3d 1, 23-24, 276 Cal. Rptr. 303, 801 P.2d 1054 (1990))*; *see also Miller v. State, 18 Cal. 3d 808, 814, 135 Cal. Rptr. 386, 557 P.2d 970 (1977)* ("Nor is any vested contractual right conferred on the public employee because he occupies a civil service position since it is equally well settled that the terms and conditions of civil service employment are fixed by statute and not by contract.") (internal quotations omitted).

Even if Plaintiffs had sufficiently alleged "breach" of a particular contractual agreement between themselves and the OAG, the Court agrees with Defendants that they have failed to allege any foreseeable contract damages. *See Erlich v. Menezes, 21 Cal. 4th 543, 558, 87 Cal. Rptr. 2d 886, 981 P.2d 978 (1999)* ("Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at the time; consequential damages beyond the expectations of the parties are not recoverable."). Plaintiffs' allegations regarding damages (purportedly in the amount of $20,000,000.00) are limited to damages in the nature **[*19]** of "severe emotional and physical distress," including depression, lost sleep, anxiety, rashes and skin problems, and aggravation of Gibson's arthritis. (FAC ¶ 129.) Plaintiffs cannot recover such damages in connection with standard employment contract(s). *See, e.g., Applied Equipment Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 516, 28 Cal. Rptr. 2d 475, 869 P.2d 454 (1994)* ("[D]amages for mental suffering and emotional distress are generally not compensable in contract actions.") (citation omitted); *Rodriguez v. IBM, 960 F. Supp. 227, 232 (N.D. Cal. 1997)* ("[T]he emotional distress and punitive damages claimed by Plaintiff are not recoverable on a breach of contract claim."). Indeed, the mere fact that they are endeavoring to do so further evinces their attempt, as Defendants point out, to circumvent the bar to relief in the nature of contract by California civil service employees who are dissatisfied with the conditions of their work environment. *See, e.g., Shoemaker, 52 Cal.3d at 25*. For this reason as well as the others set forth above, Plaintiffs' breach of contract claim is subject to dismissal, with prejudice.

4. Fourth Cause of Action—Violation of Whistleblower Protection Act

Plaintiffs' fourth cause of action purports to state a claim for violation of *Cal. Gov't. Code §§ 9149.20-9149.23*, known as the "Whistleblower Protection Act," against Defendant OAG. However, these provisions only impose **[*20]** liability for a public employee's "use or attempt to use the official authority or influence of the employee for the purpose of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person for the purpose of interfering with *the right of that person to disclose to a legislative committee improper governmental activities*." *See Cal. Gov't. Code § 9149.23(a)* (emphasis added). Here, Plaintiffs do not allege that Defendant OAG has interfered with their rights to disclose improper conduct to a legislative committee, or even that they have attempted to make such a disclosure. Rather, their allegations (cryptic though they may be) are limited to their making of internal complaints about particular supervisors (i.e, Applesmith) and suffering retaliation as a result.

Moreover, the Whistleblower Protection Act only permits actions against individual *employees*, not employers. *See Cal. Gov't. Code § 9149.23(b)* ("Any employee who violates *subdivision (a)* may be liable in an action for civil damages brought against the employee by the offended party."); *see also Konig v. State Bar of Cal., 2004 U.S. Dist. LEXIS 19498 *26 (N.D. Cal. 2004)* ("Government Code *section 9149.23* only applies to employees. . . ."). As set forth above, Plaintiffs are not bringing their claim against any of the individual Defendant **[*21]** supervisors, but rather against the OAG alone. Accordingly, Plaintiffs have failed to state a claim for violation of the Whistleblower Protection Act, *Cal. Gov't. Code §§ 9149.20-9149.23*. Leave to amend is also inappropriate, as this is Plaintiffs' second attempt to plead a "whistleblower" cause of action.

II. Motion to Strike

Because Defendants' motion to dismiss is granted in its entirety, their alternative motion to strike is moot.

CONCLUSION

Based on the foregoing, Defendants' Motion to Dismiss (docket no. 32) is GRANTED. Plaintiffs' third and fourth causes of action are hereby DISMISSED WITH PREJUDICE. With respect to their first and second (*§§ 1981* and *1983*) causes of action, Plaintiffs may file a second amended complaint within twenty (20) days from the date of this order. Said amended complaint shall not assert claims for violation of Plaintiffs' *First Amendment* rights arising out of their "petitioning" activities in connection with the Greenberg litigation or for breach of contract and shall comply with the mandate of *Fed. R. Civ. P. 8* to plead "a short and plain" statement of the claims alleged.

Defendants' Motion to Strike is DENIED as MOOT.

IT IS SO ORDERED.

April 10, 2007

/s/ Florence-Marie Cooper

FLORENCE-MARIE COOPER, JUDGE

UNITED STATES DISTRICT **[*22]** COURT

End of Document

Reilly v. Medianews Group, Inc.

United States District Court for the Northern District of California

April 10, 2007, Decided ; April 10, 2007, Filed

No. C 06-04332 SI

Reporter

2007 U.S. Dist. LEXIS 29419 *

CLINTON REILLY, Plaintiff, v. MEDIANEWS GROUP, INC, et al., Defendants.

Prior History: Reilly v. Medianews Group Inc., 2007 U.S. Dist. LEXIS 8139 (N.D. Cal., Jan. 24, 2007)

Core Terms

newspaper, antitrust, consumer, Clayton Act, summary judgment, defendants', anti trust law, competitors, purchaser, genuine, prices

Counsel: **[*1]** For Clinton Reilly, Plaintiff: Joseph M. Alioto, Joseph Michelangelo Alioto, Jr., Thomas P. Pier, LEAD ATTORNEYS, Alioto Law Firm, San Francisco, CA, US.; Daniel R. Shulman, Gray, Plant, Mooty, Mooty & Bennett, P.A., Minneapolis, MN.

For Medianews Group, Inc., California Newspapers Partnership, Defendants: Gary L. Hailing, LEAD ATTORNEY, Michael W. Scarborough, Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.; Alan L Marx, Steven C. Douse, King & Ballow, Nashville, TN.

For The Hearst Corporation, Defendant: Daniel M. Wall, LEAD ATTORNEY, Sadik Harry Huseny, Latham & Watkins LLP, San Francisco, CA, U.S.A.

For Stephens Group, Inc., Gannett Co., Inc., Defendants: Gordon L. Lang, LEAD ATTORNEY, Nixon Peabody LLP, Washington, DC.; John H. Riddle, LEAD ATTORNEY, Paul Joseph Byrne, Esq., Nixon Peabody LLP, San Francisco, CA.

For The McClatchy Company, Intervenor: Michael A. Berta, Wilson Sonsini Goodrich & Rosati, Palo Alto, CA.

For The McClatchy Company, Intervenor: Charles E. Biggio Wilson Sonsini Goodrich & Rosati, New York, NY, US.

For Media Alliance and San Francisco Bay Guardian, Intervenor: James Russell Wheaton, LEAD ATTORNEY, **[*2]** The First Amendment Project, Oakland, CA.

Judges: SUSAN ILLSTON, United States District Judge.

Opinion by: SUSAN ILLSTON

Opinion

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON PLAINTIFF'S LACK OF STANDING

Plaintiff Clinton Reilly brought this antitrust case to block and undo a series of transactions through which, he claims, the past and present owners of the major San Francisco Bay Area newspapers have begun to consolidate ownership of those newspapers, to divide up geographic markets, and ultimately to forego competing with each other. [1] Pursuant to an expedited case management schedule stipulated to by the parties, trial is currently set, for April 30, 2007.

On April 6, 2007, the Court heard argument on defendants' motion for summary judgment based on plaintiff's lack of standing. Defendants argue that because plaintiff is not threatened with any "antitrust injury," he does not have standing **[*3]** to bring this suit. Having considered the arguments of the parties and the papers submitted, and for good cause shown, the Court DENIES defendants' motion.

LEGAL STANDARD

Summary adjudication is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. In a motion for summary judgment, "[if] the moving party for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issues of material fact, the burden of production then shifts so that the non-moving party must set forth, by affidavit or as otherwise provided in *Rule 56*, specific facts showing that there is a genuine issue for trial." *T.W. Elec. Service, Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987)* (citing *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986))*.

In judging evidence at the summary judgment **[*4]** stage, the Court does not make credibility determinations or weigh conflicting evidence, and draws all inferences in the light most favorable to the non-moving party. *See T.W. Electric, 809 F.2d at 630-31* (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986))*; *Ting v. United States, 927 F.2d 1504, 1509 (9th Cir. 1991)*. The evidence presented by the parties must be admissible. *Fed. R. Civ. P. 56(e)*. Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Thornhill Publ'g Co., Inc. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979)*.

DISCUSSION

Defendants argue that plaintiff lacks standing to bring this suit because the actions of which he complains do not threaten him with any antitrust injury. Plaintiff responds that, as a subscriber to the *San Francisco Chronicle* and frequent purchaser of other Bay Area newspapers, he is threatened with antitrust injury because defendants' actions are likely to result in price increases and diminished diversity of **[*5]** content. [2]

I. Chief Judge Walker's standing analysis in *Reilly I*

The issue, of plaintiff's standing arose in prior case before Chief Judge Walker, *Reilly v. The Hearst Corp., 107 F. Supp. 2d 1192 (N.D. Cal. 2000)* (*"Reilly I"*). Chief Judge Walker's standing analysis in *Reilly I* supports a finding of standing in this case. In *Reilly I* plaintiff alleged that Hearst's acquisition of the *San Francisco Chronicle* violated *sections 1* and *2* of the Sherman Act. As in this case, plaintiff brought his claims under *section 16* of the Clayton Act. *Id. at 1194*. At the time, Hearst published the *San Francisco Examiner,* which was a major daily and an active competitor to the Chronicle. *Id. at 1193-94*.

[1] The order issued on November 28, 2006 contains a more detailed summary of the relevant facts of this case.

[2] Plaintiff also argues in a footnote that he has standing as an advertiser. As discussed below, this argument, fails.

Before proceeding to the merits, Chief Judge Walker analyzed whether plaintiff had standing to bring his claims "as a subscriber **[*6]** to the Chronicle and single-copy purchaser of the Examiner . . . ." *Id. at 1194*. He concluded that Reilly did have standing, stating:

> Plaintiff claims that the challenged transactions would eliminate one of only two providers of daily newspaper news, features and opinion in what plaintiff contends is the relevant market. . . . These claims, while novel, would appear to state a cognizable injury to plaintiff as a consumer of newspaper news, features and opinion and to competition in that market; if proved, such a claim would entitle plaintiff to injunctive relief under section 16 of the Clayton Act, *15 U.S.C. § 26*.

Id. at 1195. In reaching this conclusion, Chief Judge Walker relied heavily on the congressional intent regarding newspaper markets reflected in the Newspaper Preservation Act ("NPA"), *15 U.S.C. §§ 1801-1804*. He stated:

> Standing analysis in this case is informed, in part, by the [NPA]. The NPA provides an antitrust exemption for an otherwise unlawful combination or merger of two newspapers' business operations if the market for newspaper circulation **[*7]** and advertising does not provide sufficient revenue to support independent publication of the newspapers. In that situation, the NPA permits two newspaper firms to combine their business operations as long as they continue to produce separate newspapers.
>
> Although the NPA does not confer affirmative rights on newspaper readers or advertisers or competing newspaper firms, the Sherman Act and Clayton Act should be read bearing in mind the legislative purposes that prompted enactment of the NPA; namely, encouragement of multiple sources of newspaper news, features and opinion. The NPA thus imports distinctly non-economic considerations into the antitrust statutes, which otherwise exclusively confine their scope to matters of economic consequence. Under this statutory framework, the elimination of a newspaper represents a cognizable injury to interests protected by the antitrust laws, and this injury supplies a ground for standing under Article III.

Id.

Defendants here argue that Chief Judge Walker's finding of standing is inapplicable because this case does not involve the NPA. In *Reilly I,* defendants argue, the NPA was at issue because as part of the challenged acquisition, **[*8]** the *Chronicle* and the *Examiner* would be terminating a joint operating agreement ("JOA") that was permitted under the NPA. According to defendants, in *Reilly I* plaintiff "sued to prevent termination of the San Francisco JOA and to ensure the continued existence of the *Examiner."* Reply at 3:1-2. This Court agrees with plaintiff that defendants' argument misinterprets both the nature of *Reilly I,* and Chief Judge Walker's use of the NPA in the *Reilly I* standing analysis.

Plaintiff in *Reilly I* sued to maintain the existence of two viable, editorially independent newspaper competitors in the San Francisco market. Whether the competitors existed pursuant to the JOA, or as fully independent papers, was not plaintiff's concern. Moreover, Chief Judge Walker ultimately treated the proposed merger of the JOA competitors as a court would treat the proposed merger of any competitors. He stated: "a transaction terminating a JOA is subject to ordinary antitrust scrutiny." *Id. at 1203*. "The court concludes that in an antitrust challenge to a proposed merger of JOA newspapers, the defendants may avoid liability by proving the traditional failing company **[*9]** defense . . . ." *Id.* The existence of the JOA was thus critical to understanding and analyzing the facts of the case, but it did not alter the Court's analytical antitrust framework. *Reilly I* was not an "NPA case" or a "JOA case"; it was an antitrust case, like this one, dealing, with consolidation in a local newspaper market.

Similarly, the standing analysis did not depend on the involvement of the NPA in the facts of *Reilly I,* as defendants here suggest. Chief Judge Walker simply noted that the NPA reflects a congressional concern with "encouragement of multiple sources of newspaper news, features and opinion," and "the Sherman Act and Clayton Act should be read bearing in mind [these] legislative purposes." *Id. at 1195*. There is no reason to think that Congress was only concerned with newspaper diversity in situations where the NPA is involved.

This Court agrees with the analysis of standing made in *Reilly I.* The NPA evidences that Congress values the existence of separate sources of newspaper content in a community, and that loss of separate sources injures consumers. The existence of the NPA thus strongly suggests that loss of diversity of **[*10]** content is a "threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 113, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*. This conclusion is consistent with the Supreme Court's broad interpretation of the Clayton Act, which "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Blue Shield of Virginia v. McCready, 457 U.S. 465, 472, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*.

II. General antitrust standing

Even under the traditional antitrust analysis, independent of the newspaper context, plaintiff has standing as a consumer. Plaintiff brings this case under section 16 of the Clayton Act, *15 U.S.C. § 26*, which provides in pertinent part: "[any] person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss, or damage by a violation of the antitrust laws. . . ." *15 U.S.C. § 26* **[*11]** . [I] order to seek injunctive relief under *§ 16*, a private plaintiff must allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill, 479 U.S. at 113 (1986)*; *see also* *Glen Holly Entm't Inc. v. Tektronix Inc., 352 F.3d 367, 371 (9th Cir. 2003)* ("Only those who meet the requirements for 'antitrust standing' may pursue a claim under. the Clayton Act; and to acquire antitrust standing,' a plaintiff must adequately allege and eventually prove 'antitrust injury.").

In the context of a claim under *section 4* of the Clayton Act, which, unlike *section 16*, provides for monetary damages, the Ninth Circuit summarized the antitrust injury requirement as follows:

> Antitrust injury is made up of four elements: "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent."
>
> In addition, we impose a fifth requirement, that "the injured party be a participant in the same market as the alleged malefactors." "In other words, **[*12]** the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market." In fact, and as the district court recognized, *"Consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs' to allege antitrust injury."*

Glen Holly, 352 F.3d at 372 (citations omitted) (emphasis added).

"To maintain an antitrust divestiture suit [(*section 16*)], a private plaintiff must generally meet all the requirements that apply to the damages. [(*section 4*)] plaintiff, except that the injury itself need only be threatened, damage need not be quantified, and occasionally a party too remote for damages might be granted an injunction." *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1234 (9th Cir. 1998)*; *see also* *Cargill, 479 U.S. at 111* ("It is plain that *§ 16* and *§ 4* do differ in various ways. For example, *§ 4* requires a plaintiff to show actual injury, but *§ 16* requires a showing only of 'threatened' loss or damage; similarly, *§ 4* requires a showing of injury to 'business **[*13]** or property,' while *§ 16* contains no such limitation.") (citations omitted). "[U]nder both *§ 16* and *§ 4* the plaintiff must still allege an injury of the type the antitrust laws were designed to prevent." *Cargill, 479 U.S. at 111*

"The central purpose of the antitrust laws, state and federal, is to preserve competition. It is competition . . . that these statutes recognize as vital to the public interest." *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 988 (9th Cir. 2000)*. "Every precedent in the field makes clear that the interaction of competitive forces . . . is what will benefit consumers." *Id.* The Sherman Act:

> was enacted in the era of "trusts" and of "combinations" of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic

> tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods **[*14]** and services, all of which had come to be regarded as a special form of public injury.

Apex Hosiery Co. v. Leader, 310 U.S. 469,493-94, 60 S. Ct. 982, 84 L. Ed. 1311 (1940).

> A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the, provision of desired goods and services to consumers at a price approximating the marginal cost of providing them.

FTC v. Indiana Federation of Dentists, 476 U.S. 447, 459, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986); *see also* *Glen Holly, 352 F.3d at 377* ("***Antitrust law*** addresses distribution restraints in order to protect consumers from the higher prices or diminished choices that can sometimes result from limiting intrabrand competition.") (citation omitted).

In *Lucas Automotive, 140 F.3d 1229*, the Ninth Circuit "decide[d] whether a distributor and downstream purchaser of vintage automobile tires has standing to bring an antitrust action under the Clayton Act against a competitor and supplier for damages and divestiture." *Id. at 1230.* **[*15]** The district court had dismissed the plaintiffs claims on summary judgment because the plaintiff "has not produced any evidence to show that [defendant] has in fact raised these prices on brand name vintage tires. Therefore, it has not suffered any actual injury." *Id. at 1235* (quoting case). The Ninth Circuit reversed the district court, stating:

> We conclude that [plaintiff], . . . as a customer in a market controlled by a monopolist, has standing to assert a *§ 7* claim for equitable relief, including divestiture, under *§ 16* [of the Clayton Act]. It established a *prima facie* case, both that it was an active participant in the vintage tire market and that [defendant's] conduct in that market violated *§ 7*. This showing was thus sufficient to avoid summary judgment on [plaintiff's] Clayton Act *§ 7* claim for equitable relief.

Id. at 1237. In *Lucas,* therefore, it was sufficient that plaintiff was an active consumer in a market in which there was anti-competitive activity; the Ninth Circuit did not require the plaintiff to present evidence of a prior or imminent raise in prices. Similarly here, plaintiff is an active **[*16]** consumer in the Bay Area newspaper market, in which he alleges there is anti-competitive activity.

Defendants suggest that *Lucas* is distinct because here there is no evidence that "a price increase is virtually inevitable, as was the case in *Lucas Automotive* . . . ." Reply at 8:25. Nowhere in *Lucas,* however, did the Ninth Circuit find or suggest that a price increase was "virtually inevitable." The Ninth Circuit only found that plaintiff had shown "*prima facie,* that [defendant]'s conduct threatens substantially to lessen competition' and 'tends to create a monopoly' . . . ." *140 F.3d at 1236*. Here, whether defendants' actions threaten to lessen competition, create a monopoly, or raise prices, is the issue the Court must decide after trial. Plaintiff alleges anti-competitive acts in the Bay Area newspaper market, and provides evidence that he is an active consumer in that market, *see* Reilly Depo. (Scarborough Decl., Ex. 1) at 47-48, 52-53. This is sufficient under *Lucas* to defeat summary judgment. *See* *140 F.3d at 1237*.

CONCLUSION

In sum, *Lucas* and *Reilly I,* supported by the purposes underlying the antitrust statutes, **[*17]** compel this Court to find that plaintiff has raised a genuine issue as to whether he has valid antitrust injury in this case. "Consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs to allege antitrust injury." *Glen Holly, 352 F.3d at 372*. Plaintiff here presents evidence that he is "an active participant in the [newspaper] market and" alleges that defendants' "conduct in that market violate[s]" the Sherman Act. [3] *Lucas, 140 F.3d at 1237*. This is "sufficient to avoid summary judgment on [plaintiff's] Clayton Act . . . claim for equitable relief." *Id.* For the foregoing reasons and for good cause shown, the Court concludes that plaintiff has standing to assert his Clayton Act claims, and DENIES defendants' motion for summary judgment.

[*18] IT IS SO ORDERED.

Dated: April 10, 2007

SUSAN ILLSTON

United States District Judge

End of Document

[3] Plaintiff is not, however, an "active participant" in the Bay Area newspaper advertising market. Apart from a handful of advertisements placed in the *Chronicle* by two limited liability companies in which plaintiff is a shareholder, plaintiff has not engaged in any advertising in Bay Area newspapers. A shareholder has no standing to assert a claim based on an injury to a corporation. *See* *Shell Petroleum, N.V. v. Graves, 709 F.2d 593, 595 (9th Cir. 1983)*. Furthermore, in deposition plaintiff offered no more than a vague plan "in my head" to do some future advertising in Bay Area newspapers. *See generally* Scarborough Decl., Ex. A (Reilly Dep.) at 180-183. Plaintiff therefore does not have standing as a consumer of newspaper advertising space.

Trollinger v. Tyson Foods, Inc.

United States District Court for the Eastern District of Tennessee

April 10, 2007, Filed

No. 4:02-CV-23

Reporter
2007 U.S. Dist. LEXIS 26611 *

BIRDA TROLLINGER, VIRGINIA BRAVO, KELLY KESSINGER, IDOYNIA MCCOY, REGINA LEE, PATRICIA MIMS, LORI WINDHAM and ALEXANDER HOWLETT, individually and on behalf of all others similarly situated, Plaintiffs, v. TYSON FOODS, INC., JOHN TYSON, ARCHIBALD SCHAFFER III, RICHARD, BOND, KENNETH KIMBRO, GREG LEE, KAREN PERCIVAL, AHRAZUE WILT and TIM MCCOY, Defendants.

Subsequent History: Motion denied by *Trollinger v. Tyson Foods, Inc., 2007 U.S. Dist. LEXIS 38882 (E.D. Tenn., May 29, 2007)*

Prior History: *Trollinger v. Tyson Foods, Inc., 2007 U.S. Dist. LEXIS 23329 (E.D. Tenn., Mar. 28, 2007)*

Core Terms

affirmative defense, estoppel, summary judgment motion, antitrust, statute of limitations, individual defendant, entitled to summary judgment, scope of employment, amended complaint, Clayton Act, employees, estoppel defense, summary judgment, nonmoving party, no evidence, Memorandum

Counsel: **[*1]** For Birda Trollinger, Robert Martinez, Tabetha Eddings, Doris Jewell, Plaintiffs: Howard W Foster, LEAD ATTORNEY, Johnson & Bell, Ltd., Chicago, IL; William G Colvin, LEAD ATTORNEY, Horton, Maddox & Anderson, PLLC, Chattanooga, TN; Thomas Clifton Greenholtz, Chambliss, Bahner & Stophel, P.C., Chattanooga, TN.

For Virginia Bravo, Kelly Kessinger, Idoynia McCoy, Regina Lee, Patricia Mims, Lori Windham, Alexander Howlett, individually and on behalf of all others similarly situated, Plaintiffs: Howard W Foster, Johnson & Bell, Ltd., Chicago, IL.

For Tyson Foods, Inc., Defendant: Christopher H Steger, LEAD ATTORNEY, Roger W Dickson, LEAD ATTORNEY, Travis R McDonough, Miller & Martin, Chattanooga, TN; Colleen M Lauerman, LEAD ATTORNEY, Frank R Volpe, LEAD ATTORNEY, Mark D Hopson, LEAD ATTORNEY, Thomas C Green, LEAD ATTORNEY, Sidley, Austin, Brown & Wood, Washington, DC.

For John Tyson, Archibald Schaffer, III, Richard Bond, Kenneth Kimbro, Greg Lee, Karen Percival, Ahrazue Wilt, Tim McCoy, Defendants: Colleen M Lauerman, LEAD ATTORNEY, Frank R Volpe, LEAD ATTORNEY, Sidley, Austin, Brown & Wood, Washington, DC; Travis R McDonough, Miller & Martin, Chattanooga, TN.

Judges: CURTIS **[*2]** L. COLLIER, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: CURTIS L. COLLIER

Opinion

MEMORANDUM

Before the Court are the following motions for summary judgment filed by Plaintiffs Birda Trollinger, Virginia Bravo, Kelly Kessinger, Idoynia McCoy, Regina Lee, Patricia Mims, Lori Windham and Alexander Howlett (collectively "Plaintiffs"):

1. Plaintiffs' Motion for Summary Judgment as to all Defendants' First Affirmative Defense to the Second Amended Complaint (estoppel) (Court File No. 186).
2. Plaintiffs' Motion for Summary Judgment as to all Defendants' First Affirmative Defense to the Second Amended Complaint (statute of limitation) (Court File No. 188) [1].
3. Plaintiffs' Motion for Summary Judgment as to all Defendants' First Affirmative Defense to the Second Amended Complaint (scope of employment) (Court File No. 190).

[*3] Plaintiffs filed memorandums in support of their motions (Court File Nos. 187, 189, 191). Defendants Tyson Foods, Inc., John Tyson, Archibald Schaffer III, Richard Bond, Kenneth Kimbro, Greg Lee, Karen Percival, Ahrazue Wilt, and Tim McCoy (collectively, "Defendants" or " Tyson") filed a consolidated memorandum in opposition to the motions (Court File No. 201). [2]

After carefully considering the arguments of counsel and the applicable law, the Court will **GRANT** Plaintiffs' motions for summary judgment on Defendants' estoppel and statute of limitations affirmative defenses (Court File Nos. 186 and 188) and **GRANT IN PART AND DENY IN PART** Plaintiffs' motion for summary judgment on Defendants' scope **[*4]** of employment affirmative defense (Court File No. 190).

I. PROCEDURAL BACKGROUND

This case commenced with Plaintiffs' complaint filed on April 2, 2002 (Court File No. 1). Subsequently, Plaintiffs filed amended complaints with the latest filed on June 24, 2005 [3] (Court File No. 3, Plaintiffs' First Amended Complaint; Court File No. 115, Plaintiffs' Second Amended Complaint). On August 11, 2005, Defendants filed their answers to the Amended Complaint ("Answer") (Court File Nos. 117, 128-135).

In their answers, Defendants assert three affirmative defenses: (1) Plaintiffs' claims are barred by the doctrine of estoppel; (2) Plaintiffs' claims are barred by the statute of limitations; and (3) to the extent any wrongdoing or violation of the law was committed by individuals, such wrongdoing or violations of the law were committed by employees acting outside the scope of their employment and was inconsistent with Tyson's corporate **[*5]** policy.

In their summary judgment motions, Plaintiffs argue they are entitled to summary judgment as to the estoppel affirmative defense because this defense is not available in cases brought pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. §§ 1961 et seq.*, and Defendants have produced no evidence to support that defense. As to the statute of limitations affirmative defense, Plaintiffs claim summary judgment is proper because the "separate accrual rule" precludes application of the statute of limitations. Finally, Plaintiffs argue they are entitled to summary judgment on Defendants' scope of employment affirmative defense because

---

[1] Defendants concede that summary judgment is appropriate as to the statute of limitations affirmative defense. "In light of Judge Edgar's prior ruling on defendants' motion for summary judgment as to two of the named plaintiffs under a statute of limitations theory, . . . defendants do not dispute that this affirmative defense is unavailable as to those plaintiffs who were employed by Tyson during the class period." (Court File No. 201, Defendants' Consolidated Memorandum in Opposition to Plaintiffs' Motions For Summary Judgment ("Def.'s Memo"), at 1, n.1).

[2] Discovery in this case is ongoing. The Court recently held a Management Conference in the case and set discovery deadlines. Even though discovery is not yet complete, no party has asked the Court to delay ruling on these motions pursuant to *Fed. R. Civ. P. 56(f)*.

[3] The Court will simply refer to the latest filed complaint as "Complaint."

Defendants have produced no evidence to support that defense, and even if there is some evidence to support such a defense, the individual defendants are not entitled to summary judgment because they are liable for their own individual actions.

Because Defendants do not dispute the second affirmative defense is inapplicable, the Court need not discuss the defense at any length.

II. STANDARD OF REVIEW

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, **[*6]** and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. Initially, the burden is on the moving party to conclusively show no genuine issues of material fact exist, *Leary v. Daeschner, 349 F.3d 888, 897 (6th Cir. 2003)*, and the Court must view the evidence and draw all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S. Ct. 1348, 89 L. Ed. 2d 538, (1986)*. However, the nonmoving party is not entitled to a trial merely on the basis of allegations, but must come forward with some significant probative evidence to support its claim. *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to summary judgment. *Id. at 323*.

The Court determines whether sufficient evidence has been presented **[*7]** to make the issue of fact a proper jury question, but does not weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *Weaver v. Shadoan, 340 F.3d 398, 405 (6th Cir. 2003)*. The standard for summary judgment mirrors the standard for directed verdict. *Anderson, 477 U.S. at 250*. The Court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id. at 251-52*. There must be some probative evidence from which the jury could reasonably find for the nonmoving party. If the Court concludes a fair-minded jury could not return a verdict in favor of the nonmoving party based on the evidence presented, it may enter a summary judgment. *Id.; Lansing Dairy, Inc. v. Espy, 39 F.3d 1339, 1347 (6th Cir. 1994)*.

II. ANALYSIS

A. Estoppel Affirmative Defense

Plaintiffs argue they are entitled to summary judgment as to Defendants' estoppel affirmative defense because estoppel "is not **[*8]** available in cases brought pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO")," *18 U.S.C. §§ 1961 et seq.* (Court File No. 187, Plaintiff's Memorandum ("Pl.'s Memo"), at 1-2). Plaintiffs further argue even if the defense were available, Defendants have produced no evidence to support that defense. For the first proposition they rely upon federal Anti-Trust law and *South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767, 784 (6th Cir. 1970)*.

Defendants argue (1) Judge Edgar already ruled the estoppel defense is proper, which constitutes the law of the case; and (2) there are genuine issues of material fact in dispute with regard to each element of the estoppel defense. Defendants rely upon the following facts to support their assertion of this affirmative defense: Tyson has a corporate Code of Conduct that mandates compliance with all federal laws; all employees are required to report any known or suspected violations to Tyson; none of the Plaintiffs ever reported any illegal alien employees to Tyson; and Tyson was justified in relying upon Plaintiffs failure to report illegal alien hiring to conclude its workforce **[*9]** was legal.

The Court finds it necessary to determine at the outset whether Defendant's contention the law of the case has already been established on this issue is accurate. After carefully reviewing Judge Edgar's opinion, the Court does not agree Judge Edgar ruled that estoppel is a valid defense in RICO actions. Judge Edgar merely addressed whether the defense was pleaded in compliance with *Fed. R. Civ. P. 8(c)*. *See* Court File No. 84, Memorandum and Order, at pp. 4-6. Judge Edgar did not consider or discuss the legal issues involved nor did he discuss the factual basis for such a defense. *Id.* In fact, he specifically stated his "decision d[id] not preclude the parties from filing motions for summary judgment under *Fed. R. Civ. P. 56* concerning the estoppel defense once there has been discovery." *Id.* at 6. Because this issue has not been decided by Judge Edgar or by this Court, the Court is not bound by any earlier ruling and will proceed to address the issue.

There is not much case law addressing the availability of estoppel as an affirmative defense in RICO actions. In fact, the Court **[*10]** only found one case where a Plaintiff contended the defense was not available in RICO actions. *See* *United Power Ass'n., Inc. v. L.K. Comstock & Co., No. 3-89 CIV 766, 1992 U.S. Dist. LEXIS 18874, 1992 WL 402906, *7 (D. Minn. October 27, 1992)* ("Plaintiffs argue that these equitable defenses [waiver, laches and estoppel] are not available in an antitrust /RICO action"). [4] However, there is ample case law agreeing with Plaintiffs' position that estoppel is not available as a defense in private ***antitrust law*** suits. *Telectronics Proprietary, Ltd. v. Medtronic, Inc., 687 F. Supp. 832, 841 (S.D.N.Y. 1988)* ("'[I]t is highly unlikely that estoppel can be readily allowed to defeat antitrust claims.'") (quoting *Bernstein v. Universal Pictures, Inc., 517 F.2d 976, 981 (2d Cir. 1975))*; *Am. Motor Inns, Inc. v. Holiday Inns, Inc., 365 F. Supp. 1073, 1098 (D. N.J. 1973)* ("The common law defenses of laches, waiver and estoppel have no application in a federal antitrust action."), *rev'd in part on other grounds by,* *521 F.2d 1230 (3rd Cir. 1975)*; *South-East Coal Co., 434 F.2d at 784* (noting the estoppel defense might be proper **[*11]** in certain negligence and contract cases but there is no evidence Congress intended it to be a defense in antitrust cases); *Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elec. Corp., 296 F.Supp. 920, 926 (D. Haw. 1969)* ("The doctrines of estoppel and waiver do not in general apply in transactions that are forbidden by statute or that are contrary to public policy.") (quoting *Am. Sur. Co. of New York v. Gold, 375 F.2d 523, 528 (10th Cir. 1966))*.

Likewise, there is sufficient case law supporting Plaintiffs' contention Congress closely patterned RICO after the Clayton and Sherman antitrust acts. *See* *Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 150, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987)* **[*12]** (noting "[e]ven a cursory comparison of the two statutes reveals that the civil action provision of RICO was patterned after the Clayton Act."); *Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 612 (6th Cir. 2004)* (recognizing Congress modeled RICO's civil-suit provision on similar language in the antitrust laws (§ 4 of the Clayton Act and § 7 of the Sherman Act)).

Since RICO was closely modeled after the Clayton Act and the Sherman Act, it logically follows the estoppel defense should be precluded from RICO actions, just as it is precluded from antitrust actions. *Compare* *Agency Holding Corp., 483 U.S. at 152* (holding the 4-year statute of limitations for a Clayton Act action is the most appropriate limitations period for RICO actions due to the similarities in purpose and structure between RICO and the Clayton Act and the clear legislative intent to pattern RICO's civil enforcement provision on the Clayton Act); *Trollinger, 370 F.3d at 612* (holding because Congress modeled RICO's civil suit provision after antitrust laws and antitrust laws require a private plaintiff show proximate cause in order to have standing to sue, RICO civil **[*13]** claims also require proximate cause). Accordingly, the Court will **GRANT** Plaintiffs' motion for summary judgment as to Defendants' first affirmative defense (estoppel) (Court File No. 186). [5]

B. Statute of Limitation Affirmative Defense

---

[4] The Court notes the court in *United Power Association, Inc.* rejected Plaintiff's argument; however, it did not do so on the merits of the plaintiff's argument. Rather, it was because the equitable defenses were so closely intertwined with other issues the court did not feel summary judgment was appropriate.

[5] Since the Court finds estoppel is not available as an affirmative defense in RICO actions, there is no need to address whether a genuine issue of material fact exists in this case with respect to such a defense.

Because Defendants concede the statute of limitations affirmative defense is not applicable, the Court will **GRANT** Plaintiffs' motion for summary judgment on this issue (Court File No. 188).

C. Scope of Employment Affirmative Defense

Plaintiffs allege they are entitled to summary judgment as to the scope of employment affirmative defense because Defendants have produced no evidence to support that defense, and even if there is some evidence to support such a defense, the individual defendants are not entitled to summary judgment because **[*14]** they are liable for their own individual actions. Defendants point to evidence they suggest shows any "wrongdoing was committed by individuals who were acting pursuant to their *own* agendas and for their *own* benefit, and were not acting pursuant to any socalled "Willful Blindness Policy." Def.'s Memo at 6. They also argue to the extent there may have been violations of the law these violations were committed without the knowledge of the corporation and in violation of the corporation's specific instructions to its employee.

Generally, a corporation may be held liable for the criminal acts of its employees and agents done within the scope of their employment with the intent to benefit the corporation. *United States v. Peterson, Nos. 97-4469, 97-4470, 1999 U.S. App. LEXIS 20336, 1999 WL 685917, at *12 (6th Cir. Aug. 23, 1999)*; *United States v. Carter, 311 F.2d 934, 941-42 (6th Cir. 1963)*; *Cont'l Baking Co. v. United States, 281 F.2d 137, 149 (6th Cir. 1960)*. This general rule applies to RICO actions. *See* *Davis v. Mutual Life Ins. Co. of New York, 6 F.3d 367, 379 (6th Cir. 1993)* (noting vicarious liability under RICO may be imposed on corporate **[*15]** "persons" on account of the acts of their agents, particularly where the corporation benefitted by those acts).

Based upon the arguments advanced by the parties, the Court is not willing to conclude summary judgment is appropriate as to Tyson's scope of employment affirmative defense. It seems to the Court the issue of whether the employees' actions benefitted Tyson is fact determinative. At this stage of the litigation the Court must assume all the facts stated by Defendants are true. If all the facts as Defendants have stated them are true, it may be that certain acts committed by Tyson employees and agents were outside the scope of their employment. Accordingly, the Court will **DENY** Plaintiffs' motion for summary judgment as to Tyson on this issue.

Of course, the Court's action on this affirmative defense as to Tyson has no application to any individual defendant's liability or responsibility for their own personal conduct. Defendants appear to argue the individual defendants should not be held liable for the actions of others merely because of their status as officers, employees or agents of Tyson. Defendants' argument is misplaced, however, since Plaintiffs accuse the individual **[*16]** defendants of violating RICO by conspiring to violate RICO and execute the "Illegal Immigrant Hiring Scheme." Complaint at P57. Thus, it is clear Plaintiffs are not attempting to hold the individual defendants liable for the acts of others. Rather, Plaintiffs are alleging the individuals defendants themselves committed the violations. Since individual defendants are liable for their own actions regardless of whether they were acting in the scope of employment, Defendants' third affirmative defense is inapplicable to the individual defendants. *See* *United States v. Wise, 370 U.S. 405, 416, 82 S. Ct. 1354, 8 L. Ed. 2d 590 (1962)* (holding "a corporate officer is subject to prosecution under § 1 of the Sherman Act whenever he knowingly participates in [the] . . . conspiracy-be he one who authorizes, orders, or helps perpetrate the crime-regardless of whether he is acting in a representative capacity."); *A & M Records, Inc. v. M.V.C. Distrib. Corp., 574 F.2d 312, 315 (6th Cir. 1978)* ("[A] corporate officer or agent is personally liable for torts committed by him even though he was acting for the benefit of the corporation."). Thus, the Court will **GRANT** Plaintiffs' motion for **[*17]** summary judgment as to Defendants' third affirmative defense with respect to the individual defendants (Court File No. 190). [6]

---

[6] The Court notes in responding to Plaintiff's motion, Defendants made reference to the fact Judge Edgar had already held the scope of employment defense was available, and as such, the law of the case had been established on this issue. While it is true Judge Edgar had stated Tyson had a right to defend itself in such a manner, he never stated the individual defendants had such a right. *See* Court File No. 84, Memorandum and Order, at 13. Therefore, there had been no prior determination as to the availability of the defense to the individual defendants, and accordingly, no "law of the case" on this issue.

III. CONCLUSION

For the reasons stated above, the Court will **GRANT** Plaintiffs' motions for summary judgment as to Defendants first and second affirmative defenses (Court File Nos. 186 & 188). However, the Court will **GRANT IN PART AND DENY IN PART** Plaintiffs' **[*18]** motion for summary judgment as to Defendants' third affirmative defense (Court File No. 190).

An Order shall enter.

CURTIS L. COLLIER

CHIEF UNITED STATES DISTRICT JUDGE

FTC v. Foster

United States District Court for the District of New Mexico

April 13, 2007, Decided

No. CIV 07-352 JB

Reporter

2007 U.S. Dist. LEXIS 34203 *; 2007-1 Trade Cas. (CCH) P75,670

FEDERAL TRADE COMMISSION, Plaintiff, vs. PAUL L. FOSTER, WESTERN REFINING, INC., and GIANT INDUSTRIES, INC., Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part *FTC v. Foster, 2007 U.S. Dist. LEXIS 55163 (D.N.M., Apr. 26, 2007)*

Motion granted by, in part, Motion denied by, in part *Ftc v. Foster, 2007 U.S. Dist. LEXIS 110914 (D.N.M., May 10, 2007)*

Core Terms

merger, prices, temporary restraining order, petroleum product, anti-competitive, competitors, injunction, northern, acquisition, believes, refinery, merits, public interest, markets, lessen

LexisNexis® Headnotes

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

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

Mergers & Acquisitions Law > Merger Guidelines

HN1[] **Remedies, Injunctions**

Section 13(b) (*15 U.S.C.S. § 53(b)*) of the Fair Trade Commission (FTC) Act, provides for the grant of a preliminary injunction where such action would be in the public interest -- as determined by a weighing of the equities and a consideration of the Commission's likelihood of success on the merits. This standard departs from the traditional equity standard, which requires plaintiff to demonstrate: (i) irreparable damage, (ii) probability of success on the merits and (iii) a balance of equities favoring the plaintiff. The traditional standard is not appropriate for an independent regulatory agency's implementation of a federal statute where the standards of the public interest measure the propriety and the need for injunctive relief. Agencies acting to enforce a federal statute are not held to the high thresholds applicable where private parties seek interim restraining orders. The Fair Trade Commission is not required to establish that the proposed transaction would in fact violate § 7 (*15 U.S.C.S. § 18*) of the Clayton Act.

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

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

Mergers & Acquisitions Law > Merger Guidelines

HN2[] Remedies, Injunctions

To determine the likelihood of success on the merits, courts measure the probability that, after an administrative hearing on the merits, the Fair Trade Commission (FTC) will succeed in proving that the effect of the proposed transaction may be substantially to lessen competition, or to tend to create a monopoly, in violation of § 7 (*15 U.S.C.S. § 18*) of the Clayton Act. The FTC satisfies its burden of showing the likelihood of success on the merits if it raises questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by a court of appeals. When the FTC demonstrates a likelihood of ultimate success, a counter-showing of private equities alone does not suffice to justify the denial of a preliminary injunction barring a merger.

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Mergers & Acquisitions Law > Merger Guidelines

HN3[] Remedies, Injunctions

While the showing by the Fair Trade Commission (FTC) of likelihood of success creates a presumption in favor of preliminary injunctive relief, courts must still weigh the equities in order to decide whether enjoining the merger would be in the public interest. The principal public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the ***antitrust law***--a public equity consideration in the mind of Congress when it enacted § 13(b) (*15 U.S.C.S. § 53(b)*). Section 13(b) is intended to preserve the status quo until the FTC can perform its statutory responsibility: determining whether, in fact, the effect of the transaction at issue may be substantially to lessen competition.

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

Mergers & Acquisitions Law > Merger Guidelines

HN4[] Antitrust Statutes, Clayton Act

Section 7 (*15 U.S.C.S. § 18*) of the Clayton Act prohibits any transaction where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. Section 7 seeks to forestall anticompetitive mergers in their incipiency before their effects occur; § 7 thus requires a prediction about the merger's impact on future competition. Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable is called for. With respect to anticompetitive effect, the fact that prices might be lower than current prices after a merger does not mean that the merger will not have an anticompetitive effect; consumers would still be hurt if prices after the merger did not fall as far as they would have absent the merger.

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

Mergers & Acquisitions Law > Merger Guidelines

HN5[] **Antitrust Statutes, Clayton Act**

In determining whether a transaction is likely to impair competition, courts analyze: (i) the line of commerce or product market in which to assess the transaction; (ii) the section of the country or geographic market in which to assess the transaction; and (iii) the transaction's probable effect on competition in the product and geographic markets.

Counsel: [*1] For Plaintiff: Thomas J Lang, Federal Trade Commission, Washington, D.C.

For Western Refining, Inc., Plaintiff: Andrew G. Schultz, Henry M. Bohnhoff, Patrick Shay, Thomas A. Outler, Rodey, Dickason, Sloan, Akin, & Robb, P.A., Albuquerque, New Mexico; Marc G. Schildkraut, Michael P.A. Cohen, Heller Erhman LLP, Washington, D.C.

For Giant Industries, Inc., Plaintiff: Andrew G. Schultz, Henry M. Bohnhoff, Patrick Shay, Thomas A. Outler, Rodey, Dickason, Sloan, Akin, & Robb, P.A., Albuquerque, New Mexico; Tom D. Smith, Jones Day, Washington, D.C.; Hugh R. Whiting, Jones Day, Houston, Texas.

Judges: James O. Browning, UNITED STATES DISTRICT JUDGE.

Opinion by: James O. Browning

Opinion

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the Plaintiff's Motion for Temporary Restraining Order, filed April 12, 2007 (Doc. 9). The Court held a hearing on the motion on April 13, 2007. The primary issue is whether Plaintiff Federal Trade Commission ("FTC") has demonstrated that the standards for a temporary restraining order are met here. Consistent with the Court's ruling at the hearing on this application, for the reasons given at the time of the hearing, and because **[*2]** the FTC has satisfied the standard required for a temporary restraining order to issue, the Court will grant the application for a temporary restraining order.

FACTUAL BACKGROUND

Western Refining, Inc. is a publicly traded company headquartered in El Paso, Texas. Western owns and operates a single refinery in El Paso. From its refinery, Western provides petroleum products to El Paso, west Texas, Albuquerque, Tucson, Phoenix, and Juarez, Mexico. Western's parent entity is Paul L. Foster, who also serves on Western's Board of Directors, and is its President and Chief Executive Officer. Western supplies the northern New Mexico market through historic shipping rights on the Plains pipeline.

Giant Industries, Inc., is a publicly traded company headquartered in Scottsdale, Arizona. Giant is an independent refiner and marketer of petroleum products with one refinery in Yorktown, Virginia, and two refineries in the Four Corners region of New Mexico.

On August 26, 2006, Giant, Western, and a wholly-owned subsidiary of Western entered into an Agreement and Plan of Merger by which Western agreed to acquire all of the voting securities of Giant in exchange for approximately $ 83 **[*3]** per share, plus $ 275 million in assumed liabilities.

LAW REGARDING TEMPORARY RESTRAINING ORDERS

HN1[] Section 13(b) of the FTC Act, *15 U.S.C. § 53(b)* "provides for the grant of a preliminary injunction where such action would be in the public interest -- as determined by a weighing of the equities and a consideration of the Commission's likelihood of success on the merits." *FTC v. H.J. Heinz Co., 345 U.S. App. D.C. 364, 246 F.3d 708, 714 (D.C. Cir. 2001)*. Congress intended this standard to depart from what it regarded as the traditional equity standard, which it characterized as requiring the plaintiff to demonstrate: "[i] irreparable damage, [ii] probability of success on the merits and [iii] a balance of equities favoring the plaintiff." *Id.* (citing H.R. Rep. No. 93-624, at 31 (1971)). Congress determined that the traditional standard was not appropriate for an independent regulatory agency's implementation of a Federal statute where the standards of the public interest measure the propriety and the need for injunctive relief. *See id.* (citing H.R. Rep. No. 93-624, at 31). Agencies acting to enforce a federal statute are not held to the high thresholds **[*4]** applicable where private parties seek interim restraining orders. *FTC v. Weyerhaeuser Co., 214 U.S. App. D.C. 254, 665 F.2d 1072, 1082 (D.C. Cir. 1981)*. The FTC is not required to establish that the proposed transaction would in fact violation of *Section 7* of the Clayton Act. *See FTC v. H.J. Heinz Co., 246 F.3d at 714*; *FTC v. Food Town Stores, Inc., 539 F.2d 1339, 1342 (4th Cir. 1976)*("The district court is not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance.").

HN2[] To determine the likelihood of success on the merits, courts measure the probability that, after an administrative hearing on the merits, the FTC will succeed in proving that the effect of the proposed transaction "may be substantially to lessen competition, or to tend to create a monopoly," in violation of *Section 7* of the Clayton Act. *FTC v. H.J. Heinz Co., 246 F.3d at 714*. The FTC satisfies its burden of showing the likelihood of success on the merits if it "raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair **[*5]** ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *FTC v. Beatrice Foods Co., 190 U.S. App. D.C. 328, 587 F.2d 1225, 1229 (D.C. Cir. 1978)*. When the FTC demonstrates a likelihood of ultimate success, a counter-showing of private equities alone does not suffice to justify the denial of a preliminary injunction barring a merger. *See FTC v. Weyerhaeuser Co., 214 U.S. App. D.C. 254, 665 F.2d 1072, 1083 (D.C. Cir. 1981)*.

HN3[] While the FTC's showing of likelihood of success creates a presumption in favor of preliminary injunctive relief, courts must still weigh the equities in order to decide whether enjoining the merger would be in the public interest. *FTC v. H.J. Heinz Co., 246 F.3d at 726*. The principal public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the antitrust laws. *FTC v. University Health, Inc., 938 F.2d 1206, 1225 (11th Cir. 1991)*. The Congress specifically had this public equity consideration in mind when it enacted *section 13(b)* *See* *FTC v. Food Town Stores, Inc., 539 F.2d at 1345-46.* **[*6]** Congress enacted *Section 13(b)* to preserve the status quo until the FTC can perform its statutory responsibility: determining whether, in fact, the effect of the transaction at issue "may be substantially to lessen competition." *See id.*

LAW REGARDING ANTI-COMPETITIVE MERGERS

Section 7 ***HN4***[] of the Clayton Act, *15 U.S.C. § 18*, prohibits any transaction "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." *15 U.S.C. § 18*. *Section 7* seeks to forestall anti-competitive mergers "in their incipiency" before their effects occur; *Section 7* thus requires a prediction about the merger's impact on future competition. *See United States v. Phila. Nat'l Bank, 374 U.S. 321, 362, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)*.

> *Section 7* does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future. A predictive judgment, necessarily probabilistic and judgmental **[*7]** rather than demonstrable is called for.

Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1389 (7th Cir. 1986). With respect to anti-competitive effect, "the fact that prices might be lower than current prices after [a] merger does not mean that the merger will not have an anticompetitive effect[;] [c]onsumers would still be hurt if prices after the merger did not fall as far as they would have absent the merger." *FTC v. Staples, Inc., 970 F. Supp. 1066(D.D.C. 1997)*.

HN5[] In determining whether a transaction is likely to impair competition, courts analyze: "[i] the "line of commerce" or product market in which to assess the transaction; [ii] the "section of the country" or geographic market in which to assess the transaction; and [iii] the transaction's probable effect on competition in the product and geographic markets." *FTC v. Swedish Match N. Am., Inc., 131 F. Supp. 2d 151, 156 (D.D.C. 2000)*(citing *United States v. Marine Bancorp., 418 U.S. 602, 618-23, 94 S. Ct. 2856, 41 L. Ed. 2d 978 (1974))*.

ANALYSIS

The Court emphasizes that this hearing involves a request for a temporary restraining order, and is not a preliminary injunction **[*8]** hearing. To a considerable degree, the Court has to rely upon representations of what the evidence will be rather than on actual evidence. The Court has heard no expert testimony, and because of the late filing, the Court has not been able to thoughtfully review the submitted affidavits.

The Court has concerns whether the FTC is defining the market and region accurately, and whether it is including all the competitors that should be considered. While the Court is concerned that the evidence may not ultimately support a finding of anti-competitive results from the merger, there is some evidence that the merger will be anti-competitive. At this stage, the Court is not in a position to weigh the evidence. At the end of the day, the Court believes that there is a serious question, on the record before it, whether the effect of Western's proposed acquisition of Giant "may be substantially to lessen competition" for the bulk supply of gasoline and light petroleum products to northern New Mexico in violation of *Section 7* of the Clayton Act and *Section 5* of the FTC Act. *15 U.S.C. § 18*.

The Court believes that the FTC's strongest argument is that Western competes with **[*9]** Giant by providing bulk supplies of light petroleum products to northern New Mexico at Albuquerque prices via the Plains pipeline. While the Court has not had time to fully digest the FTC's recent Aloha Petroleum, Inc. case, the Court is tentatively persuaded that Western is a participant in the Albuquerque market, even though it does not own a terminal in Albuquerque. By acquiring Giant, Western would increase, perhaps significantly, its share of the bulk supply of light petroleum products to northern New Mexico and reduce the number of competitors that could respond to an output decrease or price increase in the market. In the bulk gasoline market, Western's acquisition of Giant would reduce the number of such competitors. An acquisition that increases the degree of market concentration in a concentrated market suggests that the acquisition will harm competition.

The FTC's Exhibit 5 is styled "New Mexico Crude Oil Pipeline Fact Sheet" and indicates that Giant prepared the document. The document indicates that Giant believes additional product marketed to Albuquerque and Santa Fe will spur price competition. The fact sheet states: "Price Competition. Additional production of petroleum **[*10]** products will help spur price competition in northern New Mexico markets, including Albuquerque and Santa Fe." Exhibit 5. With the addition of the 400 mile Jal pipeline to Giant's assets, there is the possibility that Giant may bring its refinery near Gallup to capacity and then supply more petroleum products to the Albuquerque area.

The Court believes this evidence, when considered with Exhibit 6, gets the FTC to where it needs to be to secure a temporary restraining order. While the Defendants vigorously dispute that the Court can even consider Exhibit 6, someone at Giant generated this document to show Giant's incremental supply marketing after the potential mid-2007 utilization increase. The document reflects that the prices in the Albuquerque/Santa Fe area could drop in the six to eight percent range, which would translate to a savings of about $ 7 million dollars to those consumers. While the Court has many questions about this document, including its admissibility against Giant, it is some evidence that, if the merger does not proceed, prices in the Albuquerque/Santa Fe could decline merely from greater utilization of the Giant refinery.

The FTC has also presented argument **[*11]** and charts that indicate that the other competitors in the market do not have the ability to increase their volume of product to the Albuquerque/Santa Fe market. The conclusion from this representation is that an increase in price by the Giant/Western merger could put the enlarged competitor in a position of decreasing product for the region and thus increasing cost, because competitors could not increase their supply in the area. While the Court is reluctant to say, on the record before it, that the merger would create a combined firm able to in any way dominate northern New Mexico, the Court does think this evidence shows that the merger has the possibility of lessening competition.

The FTC has demonstrated that, as a result of the merger, Giant, which would otherwise likely increase its potential and actual supply of light petroleum products to the northern New Mexico market, may end up re-directing supply away from that market, because a combined Western/Giant firm would be susceptible to the economic incentives and mechanisms that presently lead Western to direct its supply elsewhere. The FTC has also shown, based on historical market trends, that the remaining competitors in **[*12]** the market are unlikely to expand output to counter any supply reduction the Western/Giant merger may create. The FTC has further demonstrated that, even if the merger leads to an actual increase in the supply of light petroleum products to the market, the resulting increase would not equal the supply that Giant would likely provide if it did not merge. "[T]he fact that prices might be lower than current prices after the merger does not mean that the merger will not have an anti-competitive effect. Consumers would still be hurt if prices after the merger did not fall as far as they would have absent the merger." *FTC v. Staples, Inc., 970 F. Supp. at 1092*.

The Defendants have brought a number of arguments, some with considerable force, before the Court that the merger will not reduce competition in the Albuquerque and surrounding areas. The problem for the Defendants is that the standard for receiving a temporary restraining order is not that great. The Court believes that, today, it must find whether there is a serious question and, if so, set the matter for a hearing on the request for a preliminary injunction.

The Court does not believe that the equities override **[*13]** the FTC's showing of possible anticompetitive effects from the merger. The equities point in different and conflicting directions. In the end, the Court believes that it is in the public's interest to consider more thoroughly the possible anticompetitive effects of the merger and maintain the status quo until that can be done.

IT IS ORDERED that the Plaintiff's Motion for a Temporary Restraining Order is granted. Defendants Paul L. Foster and Western Refining, Inc., including its domestic and foreign agents, divisions, subsidiaries, affiliates, partnerships, and joint ventures, are enjoined from acquiring any stock, assets, or other interest, directly or indirectly, from Defendant Giant Industries, Inc.

04/13/07

James O. Browning

UNITED STATES DISTRICT JUDGE

End of Document

[Capital City Cab Serv. v. Susquehanna Area Reg'l Airport Auth.]

United States District Court for the Middle District of Pennsylvania

April 18, 2007, Decided ; April 18, 2007, Filed

Civil Action No. 1:06-CV-671

Reporter

2007 U.S. Dist. LEXIS 28527 *; 2007-1 Trade Cas. (CCH) P75,677

CAPITAL CITY CAB SERVICE, INC., and AYAL SALAME, Plaintiffs v. SUSQUEHANNA AREA REGIONAL AIRPORT AUTHORITY, et al., Defendants

Subsequent History: Sanctions allowed by, Motion denied by *Capital City Cab Serv. v. Susquehanna Area Reg'l Airport Auth., 2008 U.S. Dist. LEXIS 89707 (M.D. Pa., Nov. 5, 2008)*

Prior History: *Capital City Cab Serv. v. Susquehanna Area Reg'l Airport Auth., 470 F. Supp. 2d 462, 2006 U.S. Dist. LEXIS 85555 (M.D. Pa., 2006)*

Core Terms

second amended complaint, motion for leave, antitrust, Airport, amend, equal protection claim, allegations

Counsel: **[*1]** For Capital City Cab Service, Inc., Ayal Salame, Plaintiffs: Joseph T. Sucec, LEAD ATTORNEY, Gardners, PA.

For Susquehanna Regional Airport Authority, Alfred Testa, Defendants: Dean F. Piermattei, Rhoads & Sinon, Harrisburg, PA; Stephanie E. DiVittore, Rhoads & Sinon LLP, Harrisburg, PA.

For Salgals, Inc., Randy Hicks, Defendants: Dean F. Piermattei, Rhoads & Sinon, Harrisburg, PA.

Judges: Yvette Kane, Chief Judge.

Opinion by: Yvette Kane

Opinion

MEMORANDUM

Before the Court is Plaintiffs' motion for leave to file a second amended complaint. (Doc. No. 28.) The parties have briefed the motion, and it is ripe for disposition. For the following reasons, the motion will be granted in part and denied in part.

I. BACKGROUND

A. Procedural Background

On November 27, 2006, this Court granted Defendants' motion to dismiss Plaintiffs' amended complaint (Doc. No. 11) pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. (Doc. No. 26.) In the order, the Court allowed Plaintiffs ten (10) days to file a motion for leave to amend pursuant to *Federal Rule of Civil Procedure 15(a)*. (Doc. No. 26.) **[*2]** On December 5, 2006, Plaintiffs filed a motion for leave to file a second amended complaint (Doc. No. 28) and filed a brief in support of the motion on December 19, 2006 (Doc. No. 29). Plaintiffs' proposed second amended complaint includes two counts: a federal antitrust claim and an equal protection claim. Plaintiffs' complaint seeks injunctive as well as monetary relief. Defendants filed a brief in opposition on January 3, 2007 (Doc. No. 32), and Plaintiffs replied on January 12, 2007 (Doc. No. 33).

B. Factual Background

Most of the pertinent factual allegations in this case are addressed in the Court's November 27, 2006, order. (Doc. No. 26.) Because Plaintiffs proposed second amended complaint includes several new allegations that require elaboration, a brief summary is necessary.

Capital City Cab Services, Inc. ("Capital City"), is a taxicab company located in Harrisburg, Pennsylvania, and owned by Plaintiff Ayal Salame. Salame is an Israeli-born United States citizen. In 2004, Defendants Susquehanna Area Regional Airport Authority ("SARAA") and American Taxi, a competitor of Capital City, entered into an exclusive operating agreement at Harrisburg International Airport **[*3]** ("HIA") after a competitive-bidding process. That agreement, according to Plaintiffs, substantially limits Capital City's ability to compete for outbound fares from the airport because American Taxi has exclusive access to the garage facilities as well as the queue. In the second amended complaint, Plaintiffs additionally allege that American Taxi and Alfred Testa, who served as the Director of Aviation at SARAA during the time relevant to this case, worked in concert to ensure that American Taxi would win the contract by manipulating insurance requirements throughout the bidding process.

Salame and many of Capital City's taxicab drivers are Muslim. Many of the drivers speak Arabic as their primary language, but are United States citizens or legal residents. Plaintiffs allege that Testa refused to allow Capital City's drivers to conduct prayer rituals at HIA. [1] Plaintiffs also claim that Testa, on multiple occasions, stated that "he wanted 'no Arabs at his airport' and for Capital City to send 'only American cab drivers down here (to HIA for fares).'" (Proposed Second Am. Compl. P 45.)

[*4] Plaintiffs also assert that American Taxi was the only white-owned taxicab company in the metropolitan market. Defendant American Taxi is owned and managed by Josie and James Salinger. Non-parties United Cab and Keystone Cab are owned by Maher Saber, an Egyptian national. Penn Central Taxi is owned by Manuel Cardona, who is Puerto Rican.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 15(a) allows a party to amend its pleading after a responsive pleading has been filed "by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Courts have discretion to deny a motion for leave to amend, *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*, but "[l]eave to amend must generally be granted unless equitable considerations render it otherwise unjust," *Arthur v. Maersk, Inc., 434 F.3d 196, 204 (3d Cir. 2006)*. Such equitable considerations include "undue delay, bad faith, dilatory motive, prejudice, and futility." *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997)*.

[1] In their reply brief, Plaintiffs indicate that they are not asserting *First Amendment* claims against SARAA. (Doc. No. 33, at 10.) Rather, it is Plaintiffs' position that denying Capital City's drivers the right to pray at HIA supports Plaintiffs' claims of intentional discrimination under the *Equal Protection Clause*.

When evaluating the last consideration, **[*5]** futility, the court must apply "the same standard of legal sufficiency as applies under *Rule 12(b)(6)*." *Id.* Dismissal under *Rule 12(b)(6)* is proper when, taking all factual allegations and inferences as true, the moving party is entitled to judgment as a matter of law. *Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990)*. Thus, if "under any reasonable reading of the complaint, the plaintiff may be entitled to relief," *Hill v. Borough of Kutztown, 455 F.3d 225, 233 (3d Cir. 2006)*, the Court should permit a party to amend a pleading.

III. DISCUSSION

A. Sherman Act claims

Section 1 of the Sherman Act provides, in relevant part, that: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." *15 U.S.C. § 1*. Plaintiffs allege that Defendants' exclusive operating agreement violates the Sherman Act because it reduces access to the garage facility at HIA and limits taxicabs' ability to acquire outgoing fares. (Proposed Second Am. Compl. P 22.) Plaintiffs further allege that Defendants colluded **[*6]** to restrict Plaintiffs' access to outgoing fares. (*Id.*)

Throughout the briefs, Plaintiffs' arguments focus on whether Pennsylvania state law allows SARAA to enter into the exclusive contract. [2] Whether the Municipal Authorities Act, *53 Pa. Cons. St. §§ 5601-5622*, authorized SARAA to enter in the contract at issue has already been decided by this Court. It does. (Doc. No. 26, at 12) ("[T]he Court finds no basis for a determination that SARAA exceeded the broad discretion afforded it under the [Municipal Authorities Act] by entering into an exclusive contract."). Plaintiffs' argument that the Pennsylvania Public Utility Commission has sole jurisdiction over a common carrier's coverage area is equally unpersuasive in deciding whether federal ***antitrust law*** prohibits the exclusive operating arrangement at issue before the Court.

[*7] In order to state an claim that an exclusive operating agreement violated federal ***antitrust law***, a plaintiff has the burden to define the relevant product and geographic markets in which the allegedly anticompetitive conduct occurred. *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327-30, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*; *Queen City Pizza v. Domino's Pizza, 124 F.3d 430, 436 (3d Cir. 1997)*. In their brief in opposition, Defendants cite to *Double D Spotting Service, Inc. v. Supervalu, Inc., 136 F.3d 554 (8th Cir. 1998)*, for the same proposition. In response, Plaintiffs declare that "Paragraph 22 [of the proposed second amended complaint] identified Harrisburg International Airport as the 'relevant market' *Double D Spotting* apparently requires." (Doc. No. 33, at 6.) Yet Plaintiffs "definition" is legally insufficient even under the liberal notice-pleading requirements under *Federal Rule of Civil Procedure 8(a)*. *Electronics Communs. Corp. v. Toshiba Am. Consumer Prods., 129 F.3d 240, 245 (2d Cir. 1997)* ("Without any allegation as to how market-wide competition will be affected, the complaint fails **[*8]** to allege a claim on which relief may be granted."). Indeed, in *Queen City,* the Third Circuit expressly held that a district court may dismiss a complaint "[w]here the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor. . ." *124 F.3d at 436*.

Simply put, Plaintiffs' definition of the relevant market as "Harrisburg International Airport" fails to meet the minimum antitrust requirements. Even if HIA constituted a cognizable relevant geographic market, the Court notes that "[e]xclusive dealing contracts are analyzed under the rule of reason," *Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp., 208 F.3d 655, 660 (8th Cir. 2000)*, and Plaintiffs have not alleged that the anticompetitive agreement

---

[2] The first two of Plaintiffs' three questions presented are (1) "Does the [Municipal Authorities Act] deny Defendant SARAA the explicit power to issue an exclusive contract?" and (2) "Does the regulatory power of the Pennsylvania Public Utility Commission preempt the power of Defendant SARAA to regulate taxicab service at Harrisburg International Airport?" The third (and last) question relates to Plaintiffs' Equal Protection claim.

between SARAA and American Taxi was unreasonable. Thus, Plaintiffs' antitrust claims are insufficient as a matter of law, and amendment would be futile on Count I.

B. Equal Protection [*9] claims

The *Fourteenth Amendment of the United States Constitution* provides, in relevant part, that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const. amend. XIV*. In the proposed second amended complaint, Plaintiffs allege that Defendants, acting under color of state law, entered into the complained-of contract with the intent to discriminate against Plaintiffs on the basis of ethnicity. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265-66, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)*; *cf.* *Shelley v. Kraemer, 334 U.S. 1, 20-21, 68 S. Ct. 836, 92 L. Ed. 1161 (1948)* (*Fourteenth Amendment* prohibits judicial enforcement of racially restrictive covenants). Unlike Plaintiffs' previous complaint, which did not specify any different treatment of Plaintiffs, the proposed second amended complaint includes clear allegations of purposeful discrimination proscribed by the *Fourteenth Amendment*. Thus, the Court will grant Plaintiffs' motion for leave to amend with respect to their Equal Protection claims.

C. Punitive Damages and Qualified Immunity

Defendants also argue that Plaintiffs' motion for leave to amend should be denied in part because **[*10]** Plaintiffs cannot recover punitive damages against SARAA, Testa, or Randy Hicks (an officer of SARAA). The Court agrees that Plaintiffs cannot pursue a claim of punitive damages against SARAA itself, *see* *Moore v. Susquehanna Area Reg'l Airport Auth., No. 02-0535, 2005 U.S. Dist. LEXIS 45023, 2005 WL 2430790, at *8 (M.D. Pa. Sept. 30, 2005)*, but may maintain such claims against the individual defendants, *id.*

Defendants also argue that the individual defendants enjoy qualified immunity. However, the Third Circuit has held that "a civil rights complaint filed under *§ 1983* against a government official need only satisfy the notice pleading standard of *Rule 8(a)*, regardless of the availability of a qualified immunity defense." *Thomas v. Independence Twp., 463 F.3d 285, 295 (3d Cir. 2006)*. In this case, it is clear that Plaintiffs can state an Equal Protection claim, and therefore amendment will not be futile. Accordingly, the Court will permit Plaintiffs to amend the pleadings to include their Equal Protection claims.

IV. CONCLUSION

For the foregoing reasons, the Court will grant in part Plaintiffs' motion to file a second amended complaint. An appropriate order follows.

ORDER

AND [*11] NOW, on this 18th day of April, 2007, upon consideration of the parties' arguments in the briefs and for the reasons set forth in the accompanying memorandum, **IT IS HEREBY ORDERED THAT** Plaintiffs' motion for leave to file a second amended complaint is **GRANTED** in part and **DENIED** in part as follows:

(1) Plaintiffs' proposed amendments in Count II (equal protection) will be allowed.

(2) Plaintiffs' proposed amendments to Count I (antitrust) will be stricken.

(3) Plaintiffs' claims for punitive damages against SARAA will be stricken.

/s/ Yvette Kane, Chief Judge

United States District Court

Middle District of Pennsylvania

In re K-Dur Antitrust Litig.

United States District Court for the District of New Jersey

April 19, 2007, Decided; April 19, 2007, Filed

Civil Action No. 01-1652 (JAG) (Consolidated Cases); MDL Docket No. 1419

Reporter
2007 U.S. Dist. LEXIS 97508 *; 2007 WL 5309212

IN RE K-DUR ANTITRUST LITIGATION; This Document Relates To: All Actions

Subsequent History: Magistrate's recommendation at, Summary judgment granted, in part, summary judgment denied, in part by *In re K-Dur Antitrust Litig., 2007 U.S. Dist. LEXIS 97509 (D.N.J., Sept. 25, 2007)*

Prior History: *In re K-Dur Antitrust Litig., 2007 U.S. Dist. LEXIS 102182 (D.N.J., Mar. 12, 2007)*

Core Terms

documents, summary judgment, generic, discovery, purchases, Defendants', summary judgment motion, reimbursed, responses, branded, records, undisputed, Requests, reflecting, genuine issue of material fact, class action, no evidence, Interrogatories, antitrust, incapable, discovery request, Pharmaceuticals, non-moving, argues, unjust enrichment, material fact, amend, consolidated actions, discovery response, essential element

Counsel: **[*1]** For STEPHEN M. ORLOFSKY, Special Master: STEPHEN M. ORLOFSKY, LEAD ATTORNEY, BLANK, ROME, LLP, PRINCETON, NJ.

For HIP HEALTH PLAN OF FLORIDA, INC., on behalf of itself and all others similarly situated, Plaintiff: DANIEL BERGER, LEAD ATTORNEY, BERGER & MONTAGUE, PC, PHILADEPHIA, PA; LISA J. RODRIGUEZ, LEAD ATTORNEY, TRUJILLO, RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ.

For Indirect Purchaser Plaintiffs, Plaintiff: SHELLY L. FRIEDLAND, COHEN, MILSTEIN, HUSFLD & TOLL, P.L.L.C., NEW YORK, NY; THEODORE M. LIEVERMAN, SPECTOR, ROSEMAN & KODROFF, PC, PHILADELPHIA, PA; ALLYN ZISSEL LITE, LITE, DEPALMA, GREENBERG & RIVAS, LLC, NEWARK, NJ.

For Direct Purchaser Plaintiffs, Plaintiff: BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY, ARONCHICK, SEGAL & PUDLIN, PHILADELPHIA, PA.

For AMY REICHERT, on behalf of herself and all others similarly situated, GREAT LAKES HEALTH PLAN, INC., on behalf of itself and all others similarly situated, JOSEPH J. MORGAN, on behalf of himself and all others similarly situated, CARL M. WALLACE, NORMA SEABROOK, ISRAEL REXACH, ELIAS HUSAMUDEEN, WILLIAM WASNICKI, GUY ANDERSON, ROBERT SEABROOK, STEVEN ROBINSON, On behalf of Correction officers benevolent association security benefits **[*2]** fund, on behalf of themselves and all other similarly situated, Consol Plaintiffs: LISA J. RODRIGUEZ, LEAD ATTORNEY, TRUJILLO, RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ.

For JACQUELINE CUNDIFF, Consol Plaintiff: DAVID K. LIETZ, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, COALE, COOLEY, LIETZ & MCINERNY, ESQS., WASHINGTON, DC; FREDERICK P. FURTH, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, THE FURTH FIRM LLP, SAN FRANCISCO, CA.

For ESTELLE TRAVERS, on Behalf of Herself and all Others Similarly Situated, Consol Plaintiff: GUIDO SAVERI, RICHARD ALEXANDER SAVERI, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, SAVERI & SAVERI, INC., SAN FRANCISCO, CA.

For MECHANICAL CONTRACTORS-UA LOCAL 119 WELFARE PLAN, by and through its Trustees, Danny Price, William Morrison, Phillip Holloway, J. Bradley Donaghey, Glen Reed Jr. and Stanley Small, IBEW-NECA LOCAL 505 HEALTH & WELFARE PLAN, by and through its Trustees, Donnie Adams, Terry N. Adams, Fred J. Moore, Charles S. Belk, Charles Freeman and Larry Smith, A.F. OF L.-A.G.C. BUILDING TRADES WELFARE PLAN, by and through its Trustees, Larry Fincher, Gordon Parmer, Charles Loftin, Gene Stokely, Jack Terry and Andy Joiner, Consol **[*3]** Plaintiffs: JOSEPH J. DEPALMA, LEAD ATTORNEY, LITE, DEPALMA, GREENBERG & RIVAS, LLC, NEWARK, NJ.

For ESTATE OF STANLEY NEMSER, Consol Plaintiff: ALLYN ZISSEL LITE, LEAD ATTORNEY, LITE, DEPALMA, GREENBERG & RIVAS, LLC, NEWARK, NJ; ANN D. WHITE, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, ANN D. WHITE LAW OFFICES, P.C., JENKINTOWN, PA.

For CONSUMERS FOR AFFORDABLE HEALTHCARE COALITION, Consol Plaintiff: STEVEN J. PFEFFERLE, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, TERHAAR ARCHIBALD PFEFFERLE & GRIEBEL, MINNEAPOLIS, MN.

For WALGREEN CO., Consol Plaintiff: DEBORAH S. CORBISHLEY, LEAD ATTORNEY, KENNY, NACHWALTER, SEYMOUR, ARNOLD, CRITCHLOW & SPECTOR, PA, MIAMI, FL; STACEY K. SUTTON, LEAD ATTORNEY, KENNY NACHWALTER, PA, MIAMI, FL.

For ECKARD CORPORATION, THE KROGER CO., ALBERTSON'S INC., SAFEWAY, INC., HY-VEE, INC., Consol Plaintiffs: STACEY K. SUTTON, LEAD ATTORNEY, KENNY NACHWALTER, PA, MIAMI, FL.

For NATALIE SUTIN, on behalf of herself and all others similarly situated, Consol Plaintiff: LIONEL Z GLANCY, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, Los Angeles, CA.

For ROSE LIPSCOMB, NEW YORK STATE-WIDE SENIOR ACTION COUNCIL, INC., MASSACHUSETTS SENIOR ACTION COUNCIL, **[*4]** on behalf of themselves and all others similarly situated, Consol Plaintiffs: ALLYN ZISSEL LITE, LEAD ATTORNEY, LITE, DEPALMA, GREENBERG & RIVAS, LLC, NEWARK, NJ.

For GEORGE BURNS, Individually and on behalf of all others similarly situated, Consol Plaintiff: ANDREW ROBERT JACOBS, LEAD ATTORNEY, RAMSEY BERMAN, PC, MORRISTOWN, NJ.

For MILDRED GROSSMAN, on her own behalf and on behalf of all others similarly situated, Consol Plaintiff: C. OLIVER BURT, III, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, BURT & PUCILLO, PC, WEST PALM BEACH, FL.

For LOUISIANA WHOLESALE DRUG CO. INC, on behalf of itself and all others similarly situated, Consol Plaintiff: PETER S. PEARLMAN, LEAD ATTORNEY, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, SADDLE BROOK, NJ; REBEKAH R. CONROY, WALDER HAYDEN & BROGAN, ROSELAND, NJ.

For UNITED FOOD AND COMMERCIAL WORKERS LOCAL 56 HEALTH & WELFARE DEPARTMENT, on behalf of itself and all others similarly situated, PATRICK J. LYNCH, Consol Plaintiffs: LISA J. RODRIGUEZ, LEAD ATTORNEY, TRUJILLO, RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ; THEODORE M. LIEVERMAN, SPECTOR, ROSEMAN & KODROFF, PC, PHILADELPHIA, PA.

For FRANCES IRENE STEADMAN, Consol Plaintiff: FREDERICK **[*5]** T. KUYKENDALL, III, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, GARDNER, MIDDLEBROOKS, FLEMING, GIBBONS & KITTRELL, PC, BIRMINGHAM, AL; JAMES H MCFERRIN, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, SOUTHEASTERN LEGAL GROUP, BIRMINGHAM, AL; S C MIDDLEBROOKS, III, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, GARDNER, MIDDLEBROOKS, FLEMING & GIBBONS, PC, MOBILE, AL.

For DAWN MAFFEI, Consol Plaintiff: MICHAEL G. NAST, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, RODA & NAST, PC, LANCASTER, PA.

For LEONARD BROWN, Consol Plaintiff: JENNIFER SHARON ABRAMS, JOSEPH J. TABACCO, JR., LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, BERMAN, DEVALERIO, PEASE & TABACCO, PC, SAN FRANCISCO, CA.

For ARKANSAS CARPENTERS HEALTH & WELFARE FUND, On its own behalf & on behalf of all others similarly situated, Consol Plaintiff: GREG THOMPSON, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, PROVOST & UMPHREY, BEAUMONT, TX.

For MARY MARGARET PIETSCH, individually and on behalf of a class of persons similarly situated, Consol Plaintiff: BRITT L. TINGLUM, LYNN L. SARKO, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, KELLER & ROHRBACK, LLP, SEATTLE, WA; RON KILGARD, LEAD **[*6]** ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, DALTON, GOTTO, SAMSON & KILGARD, PLC, PHOENIX, AZ.

For DONALD W. HANNU, on behalf of himself and all others similarly situated, Consol Plaintiff: NEIL A. MCEWEN, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, INVER GROVE HEIGHTS, MN.

For BETTY SAAD, Consol Plaintiff: DIANE A. NYGAARD, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, LEAWOOD, KS.

For EVELYN BARCZAK, ANTHONY DEBELLA, on behalf of himiself and others similiarly situated, Consol Plaintiffs: MICHAEL J. FLANNERY, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, CAREY & DANIS, ST. LOUIS, MO.

For AGATHA AGATHA "NIKKI&quo MCCUTCHON, Consol Plaintiff: THOMAS M. SOBOL, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, HAGENS BERMAN SOBOL SHAPIRO LLP, CAMBRIDGE, MA.

For RITE AID CORPORATION, Consol Plaintiff: BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY, ARONCHICK, SEGAL & PUDLIN, PHILADELPHIA, PA; JERRY L. TANENBAUM, LEAD ATTORNEY, SCHNADER HARRISON SEGAL & LEWIS LLP, CHERRY HILL, NJ; STEVE D. SHADOWEN, COUNSEL NOT ADMITTED TO USDC-NJ BAR, HANGLEY ARONCHICK SEGAL & PUDLIN, HARRISBURG, PA.

For COBALT CORP., Consol Plaintiff: CHARLES J. BARNHILL, JR., WILLIAM P. DIXON, LEAD ATTORNEYS, **[*7]** COUNSEL NOT ADMITTED TO USDC-NJ BAR, MINER, BARNHILL & GALLAND, ESQS., MADISON, WI; MARY C. NASH, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, COBALT CORPORATION, MILWAUKEE, WI; RICHARD W. COHEN, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, LOWEY, DANNENBERG, BEMPORAD & SELINGER, ESQS., WHITE PLAINS, NJ.

For CVS MERIDIAN, INC., Consol Plaintiff: BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY, ARONCHICK, SEGAL & PUDLIN, PHILADELPHIA, PA; STEVE D. SHADOWEN, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, HANGLEY ARONCHICK SEGAL & PUDLIN, HARRISBURG, PA.

For ROBERT MITCHELL, Consol Plaintiff: DAVID J. SHEA, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, MANTESE, MILLER & SHEA, PLLC, TROY, MI; KENNETH J. MCINTYRE, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, DICKINSON WRIGHT, ESQS., DETROIT, MI; ROBERT L. MICHELS, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, WINSTON & STRAWN LLP, CHICAGO, IL.

Judges: STEPHEN M. ORLOFSKY, SPECIAL MASTER.

Opinion by: STEPHEN M. ORLOFSKY

Opinion

SPECIAL MASTER'S REPORT AND RECOMMENDATION ON THE MOTION OF DEFENDANTS, SCHERING-PLOUGH CORPORATION, KEY PHARMACEUTICALS, INC., UPSHER-SMITH LABORATORIES, INC., WYETH

AND ESI LEDERLE FOR SUMMARY JUDGMENT AGAINST INDIRECT [*8] PURCHASER PLAINTIFF ARKANSAS CARPENTERS HEALTH AND WELFARE FUND

ORLOFSKY, SPECIAL MASTER

INTRODUCTION

This consolidated antitrust action has been transferred to the District of New Jersey by the Judicial Panel on Multidistrict Litigation pursuant to *28 U.S.C. § 1407*. Pursuant to *Rule 53 of the Federal Rules of Civil Procedure* [1] and by consent of all parties in the above-captioned action, I have been appointed by order of this Court, dated April 12, 2006, to preside as a Special Master to review and decide all currently pending and future motions directed to Judge Joseph A. Greenaway, Jr. and Magistrate Judge Madeline Cox Arleo including, but not limited to discovery disputes, class certification and summary judgment (the "Appointment Order") (Docket No. 316). The Appointment Order provides that the decision of the Special Master on any matter before the Special Master will conclusively resolve that matter unless an appropriate objection is filed pursuant to *Fed. R. Civ. P. 53(g)*.

This Report and Recommendation will decide Defendants', Schering-Plough Corporation, Key Pharmaceuticals, Inc., Upsher-Smith Laboratories, Inc., Wyeth and ESI Lederle, Motion for Summary Judgment Against Indirect Purchaser Plaintiff Arkansas Carpenters Health and Welfare Fund (the "Motion"). This Report and Recommendations is based upon the parties' written submissions in support of and in opposition to the Motion and the oral argument presented by the parties at a March 26, 2007 telephonic hearing before me.

BACKGROUND

The factual background of this consolidated action and the underlying motions have been set forth in detail in Judge Greenaway's decision in this case, *see* *In re K-Dur Antitrust Litig., 338 F.Supp.2d 517 (D.N.J. 2004)*, and my Report and Recommendation on: (1) Defendants Schering-Plough Corporation, Key Pharmaceuticals, Inc. and Upsher-Smith Laboratories, Inc.'s Motion for Sanctions against Plaintiff Commonwealth of Pennsylvania; (2) Plaintiff Commonwealth of Pennsylvania's Cross-Motion to Dismiss; and (3) Motion of James Morgan to Intervene as Class Representative (Docket No. 328). **[*10]** Familiarity with that factual background is presumed and will not be repeated in this Report and Recommendation except where necessary to resolve this motion.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AGAINST INDIRECT PURCHASER PLAINTIFF ARKANSAS CARPENTERS HEALTH AND WELFARE FUND

Pending before me is the motion of Defendants, Schering-Plough Corporation ("Schering"), Key Pharmaceuticals, Inc. ("Key"), Upsher-Smith Laboratories, Inc. ("Upsher"), Wyeth and ESI Lederle ("ESI") (collectively, "Defendants"), for summary judgment on the class action complaint of Indirect Purchaser Arkansas Carpenters Health and Welfare Fund (the "Motion"). The relief sought from the Court is a determination that there no evidence to support each element of the claims brought in the Arkansas Carpenters Health and Welfare Fund ("Arkansas Carpenters") class

---

[1] **(a) Appointment.**

(1) Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

* * *

(C) address pretrial and post-trial matters that cannot be addressed **[*9]** effectively and timely by an available district judge or magistrate judge of the district.

action complaint (the "Complaint"), that there are no genuine issues of material fact that are in dispute and that, therefore, the Defendants are entitled to judgment as a matter of law.

History of the Dispute

On May 22, 2006, Schering filed separate letter motions to compel certain discovery responses from Arkansas Carpenters and Great Lakes Health Plan (Docket **[*11]** No. 318). Following the completion of briefing on the respective letter motions, I issued the Special Master's Report and Recommendation on Schering-Plough Corporation's May 22, 2006 Letter Motions to Compel Discovery from Indirect Purchaser Class Representatives Arkansas Carpenters Health and Welfare Fund and Great Lakes Health Plan (Docket No. 336) (the "Report").

In that Report, I found, pursuant to a July 14, 2006 e-mail from counsel to Arkansas Carpenters, that Arkansas Carpenters intended to remain in the case, that it had begun the process of responding to Schering's discovery requests and would be providing deposition dates to Schering. (Report, at 8.) In addition, I found that, to that point, Arkansas Carpenters' response to the discovery that Schering had served upon it was, "by any measure, unsatisfactory." (*Id.*) However, relying upon counsel's representation, I also found that Arkansas Carpenters was attempting to comply with its discovery obligations. As a consequence, I granted Schering's motion and ordered Arkansas Carpenters to provide "complete answers" to Schering's discovery requests within thirty (30) days. (Report, at 8.) This ruling was memorialized in an order **[*12]** of the same date (the "Order") (Docket No. 337). Finally, the Report admonished Arkansas Carpenters to "be mindful of the fact that any further failure on its part to comply with discovery, including the attached Order, shall be dealt with appropriately, including the possible imposition of sanctions, up to and including its dismissal." (Report, at 8-9.)

I. LEGAL STANDARD GOVERNING MOTIONS FOR SUMMARY JUDGMENT

Pursuant to *Rule 56(c) of the Federal Rules of Civil Procedure*, a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. "In deciding whether there is a disputed issue of material fact, the court must view the evidence in favor of the non-moving party by extending any reasonable favorable inference to that party; in other words, 'the non-moving party's evidence is to be believed and all justifiable inferences are to be drawn in [that party's favor].'" *Brown v. City of Camden, 2006 U.S. Dist. LEXIS 56215, 2006 WL 2177320, at *3 (D.N.J. July 27, 2006)* **[*13]** (quoting *Hunt v. Cromartie, 526 U.S. 541, 552, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999))*. "A dispute is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the non-moving party.'" *Dasrath v. Continental Airlines, Inc., 467 F.Supp.2d 431, 443 (D.N.J. 2006)* (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))*. "A fact is 'material' only if it might affect the outcome of the suit under the applicable rule of law." *Id.* Therefore, "[d]isputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *Id.*

II. DISCUSSION

A. Defendants' Motion for Summary Judgment on the Arkansas Carpenters' Class Action Complaint

On January 17, 2007, Defendants moved for an order granting summary judgment against the Arkansas Carpenters' Complaint pursuant to *Rule 56(c) of the Federal Rules of Civil Procedure* (the "Motion") (Docket No. 398). In support of their motion, Defendants filed a memorandum of law ("Defendants' Memo. of Law"). In Defendants' Memo. of Law, Defendants argue that they are entitled to summary judgment on the Complaint because there is no evidence supporting the key elements of each claim for relief brought by Arkansas Carpenters. In particular, Defendants **[*14]** claim that there is no evidence showing: (1) that Arkansas Carpenters paid for K-Dur; (2) the price of such payments, if any; and (3) that such payments would have been lower with earlier generic entry. (Defs.' Memo. of Law, at 1.) [2] Thus, Defendants argue that Arkansas Carpenters cannot demonstrate a compensable injury.

In support of their position, Defendants rely upon a number of "undisputed facts" that are material to Arkansas Carpenters' claims. These "undisputed facts" include, but are not limited to the following: (1) Schering served its First Set of Interrogatories and Document Requests on July 1, 2004; (2) Arkansas Carpenters did not provide responses to this discovery in the intervening twenty-two (22) months; (3) on May 22, 2006, Schering filed a motion to compel discovery against Arkansas Carpenters; (4) the motion to compel was granted on July 21, 2006; (5) Arkansas Carpenters **[*15]** produced only two documents in response to Schering's discovery requests and neither document demonstrated that Arkansas Carpenters had made any payments for K-Dur or its AB-rated generics; (6) Arkansas Carpenters did not produce any other documents in response to the discovery requests; (7) in response to the Defendants' First Set of Requests for Admission, Arkansas Carpenters admitted that it did not have any documents: (a) reflecting payments for K-Dur or generic versions of the drug; (b) from which the average price paid for K-Dur or generics could be calculated; (c) from which to compare the per pill payments for K-Dur versus generics; and (d) showing the average co-payment for K-Dur versus generics; and (8) Arkansas Carpenters did not provide any interrogatory responses from which such information could be determined. (Defs.' Memo. of Law, at 2-3.) [3]

Relying upon the **[*16]** foregoing "undisputed facts," Defendants argue that Arkansas Carpenters is incapable of demonstrating an injury with respect to each of its claims and, therefore, is incapable of substantiating its claims for relief. Conversely, Defendants argue that they have satisfied their burden on summary judgment by demonstrating the abject lack of evidence in support of the essential elements of the respective claims. (*Id.* at 3-4.) Defendants argue that without such evidence, their alleged conduct cannot constitute actionable claims for relief and that, as a result, Defendants are entitled to judgment as a matter of law. (*Id.* at 5.)

B. Arkansas Carpenters' Opposition to the Motion for Summary Judgment

In response to the Motion, Arkansas Carpenters submitted a Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment against Arkansas Carpenters Fund ("Arkansas Carpenters' Memo. of Law"). In their Memo. of Law, Arkansas Carpenters argues that the only fact that is relevant for purposes of the Motion is whether Arkansas Carpenters paid for, or reimbursed plan members for purchases of K-Dur, or its generic equivalent. (ACHWF Memo. of Law, at 1.) [4] Indeed, Arkansas Carpenters argues **[*17]** that it did, in fact, make payments or reimbursements for purchases of K-Dur and that this fact and contention is supported by the Declaration of James Rosemergy (the "Rosemergy Declaration") which was submitted in support of the IP Plf's. Memo. of Law.

Similarly, Arkansas Carpenters argues that Defendants' Motion must be denied because the only fact upon which Defendants rely -- i.e., whether Arkansas Carpenters purchased or reimbursed for purchases of K-Dur -- is disputed by Arkansas Carpenters. Arkansas Carpenters notes that the Declaration attaches partial records which detail the purchases of K-Dur made by Arkansas Carpenters. (*Id.*) While Arkansas Carpenters admits that an antitrust plaintiff must show injury or "impact" as an element of an antitrust claim which is separate from damages, it notes that that the payment records it has produced clearly reflect that Arkansas Carpenters made some payments for K-Dur, thereby creating a disputed issue of material fact which **[*18]** precludes the entry of summary judgment. (*Id.* at 2.) Arkansas Carpenters also argues that in response to Schering's Requests for Admission, it noted that it was not

---

[2] References to Defendants' Schering-Plough Corporation, Upsher-Smith Laboratories, Inc., Wyeth and ESI Lederle, Memorandum of Law in Support of Their Motion for Summary Judgment Against Indirect Purchaser Plaintiff Arkansas Carpenters Health and Welfare Fund shall be cited as "Defs.' Memo. of Law at __."

[3] In addition to the undisputed facts specifically identified in the Memo. of Law, the Defendants submitted a broader Statement of Undisputed Facts in Support of their Motion for Summary Judgment Against Indirect Purchaser Plaintiff Arkansas Carpenters Health and Welfare Fund (the "Defs.' Statement") (Docket No. 398).

[4] References to Arkansas Carpenters Health and Welfare Fund Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment Against Arkansas Carpenters Fund shall be cited as "ACHWF Memo. of Law, at __."

capable of producing specific data related to purchases or reimbursements of K-Dur because this information was in the hands of its pharmaceutical benefits manager/plan administrator (the "Administrator"). Further, Arkansas Carpenters argues that it specifically denied the request that it had no documents in its possession that its plan members purchased K-Dur. (*Id.*)

Arkansas Carpenters adds that the alleged absence of impact is the *only* issue challenged by Defendants' Motion. Arkansas Carpenters notes, however, that Defendants have not challenged the sufficiency of its responses to the discovery requests or whether it is an adequate class representative. Thus, Arkansas Carpenters contends that with respect to the single, narrow legal question presented by Defendants' Motion, the documents submitted in opposition to the Motion conclusively preclude summary judgment. (ACHWF Memo. of Law, at 2-3.)

Alternatively, Arkansas Carpenters originally argued that the Motion should be denied because it was entitled, pursuant to *Rule 56(f) of the Federal Rules of Civil Procedure*, **[*19]** to a brief period of time within which to review the documents produced by the Arkansas Carpenters' Administrator. (*Id.* at 3.) Arkansas Carpenters argued that *Rule 56(f)* requests are usually granted provided that the non-movant demonstrates why it cannot presently respond to the allegations and identifies what additional investigation needs to occur. To this end, Arkansas Carpenters noted that the Declaration reflects the difficulties that Arkansas Carpenters has experienced in trying to obtain documents from both former and current benefit administrators. Further, Arkansas Carpenters explained that in order to make the purchase records available, counsel for Arkansas Carpenters would need to conduct a page-by-page review of the documents produced and then redact any confidential personal information as required by HIPAA. Arkansas Carpenters contended that it would take significant time to conduct this review. However, once this review had been completed, Arkansas Carpenters contended that it would prove difficult to demonstrate that Arkansas Carpenters reimbursed some plan participants for purchases of K-Dur and, as a result, sustained an antitrust injury. (*Id.* at 3-4.)

Therefore, **[*20]** Arkansas Carpenters contends that Defendants' Motion should be dismissed. Alternatively, Arkansas Carpenters asked the Court to defer the Motion for thirty (30) days to permit the continued review of the Administrators' documents. (*Id.* at 5.) [5]

C. <u>Defendants' Reply in Support of Motion for Summary Judgment on the Arkansas Carpenters Class Action Complaint</u>

In further support of its Motion, on March 14, 2007, Defendants submitted their Reply in Further Support of their Motion for Summary Judgment Against Indirect Purchaser Plaintiff Arkansas Carpenters Health and Welfare Fund ("Defendants' Reply Memo.") (Docket No. 425). In their Reply, Defendants contend that in Defs.' Memo. of Law, they established the following: (1) that Arkansas Carpenters admitted it has no evidence reflecting that it would **[*21]** have benefited from earlier entry of generic K-Dur; (2) that Arkansas Carpenters admitted that it has no evidence reflecting that it would have bought generic K-Dur given earlier generic entry; and that (3) Arkansas Carpenters has admitted it has no evidence demonstrating that generic K-Dur would have been cheaper then branded K-Dur. (Defs.' Reply Memo. at 1.) [6]

Importantly, Defendants note that Arkansas Carpenters has proffered only one fact -- i.e., that it had plan members which bought K-Dur. However, Defendants argue that without evidence that Arkansas Carpenters would have paid

---

[5] Arkansas Carpenters' request for relief under *Rule 56(f)* is now moot. Pursuant to a March 23, 2007 letter from Theodore Lieverman, Esq. to me (Docket No. 427), Arkansas Carpenters withdrew its request for this relief. In addition, during the March 26, 2007 telephonic hearing before me, Mr. Lieverman reiterated that Arkansas Carpenters was not seeking this relief under *Rule 56(f)*. Hrg. Tr. at 13.

[6] References to Defendants' Schering-Plough Corporation, Upsher-Smith Laboratories, Inc., Wyeth and ESI Lederle, Reply Memorandum of Law in Support of Their Motion for Summary Judgment Against Indirect Purchaser Plaintiff Arkansas Carpenters Health and Welfare Fund shall be cited as "Defs.' Reply Memo. at __."

a cheaper price for generic K-Dur given earlier generic entry, Arkansas Carpenters singular fact is insufficient to establish that it suffered a compensable injury. Further, Defendants reemphasize that Arkansas Carpenters has had sufficient time to collect and produce discovery in support of its claims, **[*22]** but has failed to produce adequate admissible evidence. (*Id.*)

Defendants note that not only does Arkansas Carpenters not dispute that it bears the burden of proving each element of its claims, but also argue that Arkansas Carpenters must show that it actually paid for K-Dur and that the payments for K-Dur were higher than they would have been had generic entry occurred earlier. (*Id.* at 2.) To this end, Defendants argue that Arkansas Carpenters has presented no evidence that it paid for K-Dur. Specifically, Defendants note that the Rosemergy Declaration submitted by Arkansas Carpenters simply attaches random pharmacy records of unidentified individuals, which do not, in any respect, identify their relationship to Arkansas Carpenters and, further, that there is no evidence in the records themselves which demonstrate that Arkansas Carpenters paid any money in connection with the purported purchases. Furthermore, Defendants note that the records do not contain a single entry reflecting payments for generic K-Dur or reflect the amount of such payments. Thus, Defendants argue that because Arkansas Carpenters cannot demonstrate that it would have bought generic K-Dur at a cheaper price had **[*23]** generic entry occurred earlier, Arkansas Carpenters simply cannot prove that it suffered an injury. (Defs.' Reply Memo. at 2.)

In addition, Defendants argue that the documents submitted by Arkansas Carpenters should be stricken. First, Defendants contend that Arkansas Carpenters cannot rely upon documents which contradict Arkansas Carpenters' earlier admission that it had no documents reflecting that it had made payments for branded or generic K-Dur. In addition, Defendants argue that Arkansas Carpenters cannot escape an earlier binding admission by submitting an affidavit in response to the summary judgment motion that contradicts that very admission. (*Id.* at 3.)

Second, Defendants emphasize that *Rule 56(e)* requires an affidavit submitted in response to a motion for summary judgment to, *inter alia,* be made based on "personal knowledge" and "show affirmatively" that the affiant is competent to testify about the matter contained in the affidavit. In this regard, Defendants contend that the records submitted by Arkansas Carpenters should be stricken because Mr. Rosemergy, as counsel to the Indirect Purchasers, does not have personal knowledge of the accuracy of the documents provided by **[*24]** the Administrator. Moreover, Defendants note that several courts have found that affidavits submitted, on summary judgment, by counsel who lack personal knowledge, fail to create a genuine issue of material fact. (Defs.' Reply Memo. at 3-4.)

Third, Defendants argue that Arkansas Carpenters should not now be permitted to rely upon documents that were not produced in response to the Court's July 21, 2006 Order. Defendants note that they specifically sought documents related to Arkansas Carpenters' purchases of K-Dur as early as July 2004. (Defs.' Reply Memo. at 4.) Nonetheless, Arkansas Carpenters never produced the instant records despite the fact that the Declaration reflects that these documents had been gathered as early as April 2001. In contrast, Defendants note that Arkansas Carpenters produced only two documents, neither of which pertained to Arkansas Carpenters' payments for branded or generic K-Dur. Thus, Defendants argue that because Arkansas Carpenters failed to produce the instant records in response to the Court's Order, these records should be stricken by the Court. (*Id.*)

Finally, Defendants contend that Arkansas Carpenters' argument that it may wait until trial to present **[*25]** the evidence in support of its claims is simply wrong as a matter of law. Instead, Defendants argue that any party opposing summary judgment cannot withhold its evidence until trial, but instead must present whatever evidence it has in opposition to the motion. (*Id.* at 6.) [7]

In light of the foregoing arguments, Defendants contend that the Motion should be granted. (*Id.* at 8.)

---

[7] The Defendants also presented an argument in opposition to Arkansas Carpenters' request for additional time, pursuant to *Rule 56(f)*, to review certain documents produced by its Administrator. As discussed in note 5, supra, this request has since been withdrawn by Arkansas Carpenters. Therefore, because this issue is now moot, it is unnecessary to address the Defendants' response in opposition to this alternate relief.

D. Analysis

1. Standard of Review

Defendants have moved for summary judgment on the Arkansas Carpenters' class action complaint (the "Complaint"). Motions for summary judgment are specifically governed by *Rule 56(c) of the Federal Rules of Civil Procedure*. Although only the Defendants attempted to articulate a standard of review on a *Rule 56* motion, it is well-settled that the standard of review articulated **[*26]** on pages 4 and 5 of this Report is the appropriate standard for adjudicating a motion brought under *Rule 56(c)* and it is this standard that will govern my resolution of this Motion.

2. Local Rule 56.1

The Local Rules of the District Court for the District of New Jersey also govern motions brought pursuant to *Rule 56 of the Federal Rules of Civil Procedure*. Under *Rule 56.1 of the Local Rules of the United States District Court for the District of New Jersey*, "[o]n motions for summary judgment, each side shall furnish a statement which sets forth material facts as to which there exists or does not exist a genuine issue." *D.N.J. L. Civ. R. 56.1*.

Consistent with *Local Rule 56.1*, Defendants submitted a Statement of Undisputed Facts in Support of their Motion for Summary Judgment Against Indirect Purchaser Plaintiff Arkansas Carpenters Health and Welfare Fund (the "Statement") (Docket No. 398). Defendants also provided a "Summary of Undisputed Facts" in Defendants' Memo. of Law. (Defs.' Memo. of Law, at 1-3.) In response, Arkansas Carpenters provided a "Counterstatement of Facts" in its Memo. of Law. (ACHWF Memo. of Law, at 1.) Specifically, Arkansas Carpenters claims that the *only* fact in **[*27]** dispute that is relevant to the instant motion is whether Arkansas Carpenters either paid for, or reimbursed payments for branded or generic K-Dur. To this end, Arkansas Carpenters claims that it did make such payments and that this fact is reflected in the Declaration filed contemporaneously with its Memo. of Law. (*Id.*) I shall, therefore, treat the issue of Arkansas Carpenters' payment of branded and generic K-Dur as a genuine issue of material fact that is in dispute.

Arkansas Carpenters does not, however, appear to challenge any of the other "undisputed facts" contained in Defendants' Statement or summary. Accordingly, I find the remaining "undisputed facts" to have been admitted by Arkansas Carpenters. *See* *SEC v. Chester Holdings, Ltd., 41 F.Supp.2d 505, 516 n.7 (D.N.J. 1999)* (holding that where non-movant failed to specifically challenge certain material facts identified in movant's Rule 56.1 statement, those undisputed facts would be deemed admitted); *see also* *Hutchinson v. Bennigan's/Metromedia Restaurant, Inc., 2006 U.S. Dist. LEXIS 10489, *4 (D.N.J. Feb. 28, 2006)* ("A number of courts in this district have held that when a party has failed to submit a statement of facts, as is required by *Local Civ. R. 56.1*, **[*28]** those facts that are not disputed are deemed admitted"); *Longoria v. New Jersey, 168 F.Supp.2d 308, 312 n.1 (D.N.J. 2001)* (same).

3. The Claims for Relief

Although the issue of whether Arkansas Carpenters, in fact, made payments for branded and generic K-Dur raises a genuine issue of material fact that is disputed, the existence of this single disputed fact does not carry the day in opposition to Defendants' Motion.

a. The burden of proof

In its Complaint, Arkansas Carpenters seeks two distinct forms of relief against the Defendants. Specifically, Arkansas Carpenters seeks injunctive relief under federal ***antitrust law*** and also seeks damages on the grounds of unjust enrichment. In order for these respective claims to survive summary judgment, Arkansas Carpenters must, at this juncture, provide concrete evidence in support of each element underlying those claims, notwithstanding

Arkansas Carpenters' belief to the contrary. (*See* ACHWF Memo. of Law, at 2-3.) [8] In *Celotex Corp. v. Catrett,* the United States Supreme Court held that:

> [T]he plain language of *Rule 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a **[*29]** showing sufficient to establish the existence of *an element* essential to that party's case, and on which that party will bear the burden at trial. In such a situation, there can be no 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

477 U.S. 317, 322-323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (emphasis added). The plain language of *Celotex* requires that, after adequate time for discovery has been allowed, if a non-moving party is incapable of proving any element essential to their case or claim, summary judgment is appropriate. *See* *Heffron v. Adamar of New Jersey, 270 F.Supp.2d 562, 575 (D.N.J. 2003)* (noting that in order to defeat a properly supported motion for summary judgment "plaintiff 'must point to concrete evidence in the record which supports each essential element' of a claim on which he will bear the burden of proof at trial") (quoting *Herbert v. Newton Memorial Hosp., 933 F.Supp. 1222, 1229 (D.N.J. 1996)*; *Commodity Futures Trading Comm'n v. Equity Fin. Group, 2006 U.S. Dist. LEXIS 91534, 2006 WL 3752547, at *1* (same, citing *Heffron); Tozzi v. Union R.R. Co., 722 F.Supp. 1236, 1239 (W.D. Pa. 1989)* **[*30]** (in order to withstand a motion for summary judgment, "[p]laintiff must point to concrete evidence in the record which supports each essential element of his case"). Therefore, the burden placed on Arkansas Carpenters under *Rule 56* with respect to each of its claims is plain.

b. The elements of proof

On summary judgment, therefore, Arkansas Carpenters must make a showing sufficient to establish the existence of each element essential to their antitrust and unjust enrichment claims. In the case of a claim brought under Section 1 of the Sherman Act, *15 U.S.C. § 1*, Arkansas Carpenters must demonstrate evidence sufficient to support each of the following elements:

> (1) that the defendants contracted, combined, or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within the relevant product and geographic markets; (3) that the **[*31]** objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy."

Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991). Conversely, "to survive [defendants'] motion for summary judgment [on a Section 1 claim], [plaintiff] must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused [plaintiff] to suffer a cognizable injury." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (emphasis added). [9] For a claim brought under Section 2 of the Sherman Act, *15 U.S.C. § 2*, Arkansas Carpenters must demonstrate evidence sufficient to support each of the following elements: "(1) the possession of monopoly power in the market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Harrison Aire, Inc. v. Aerostar Int'l, Inc., 423 F.3d 374, 380 (3d Cir. 2005)*. Thus, "to survive a summary judgment motion on [a] Sherman Act *§ 2*…claim, [plaintiff has] **[*32]** to show that (1) [defendants] possessed monopoly power in the relevant market, and that (2) [defendants] willfully acquired and maintained monopoly power and did not acquire its

---

[8] "Although Defendants argue that it is not their burden to subpoena third parties to find evidence supporting a plaintiff's claim, see Def. Mem. at 5 n.6, it is not plaintiff's burden either *at this time.* Clearly, Indirect Purchasers will need, at the time of trial, to meet its burden of persuasion and proof…."

[9] See also *Intervest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 159 (3d Cir. 2003)* (noting that under the "rule of reason" standard, in order for an antitrust plaintiff to survive summary judgment, they must show "concerted action, antitrust injury, evidence that the conspiracy produced 'adverse, anti-competitive effects within the relevant product and geographic markets,' and evidence 'that the objects of and the conduct pursuant' to that conspiracy were illegal").

monopoly share due to 'growth or development as a consequence of a superior product, business acumen, or historical accident.'" *Ideal Dairy Farms v. John Labatt, Ltd., 90 F.3d 737, 749 (3d Cir. 1996)* (citation omitted).

Further, in order to state a claim for unjust enrichment, Arkansas Carpenters must demonstrate that: "(1) at plaintiff's expense (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to retain benefit without paying for it." *In re K-Dur Antitrust Litig., 338 F. Supp. 2d 517, 544 (D.N.J. 2004)*; *see* **[*33]** *also* *Osio v. DeMane, 2006 U.S. Dist. LEXIS 40880, 2006 WL 2129460, at *18 (D.N.J. June 19, 2006)* ("To succeed on an action for unjust enrichment, a plaintiff must establish that a defendant received a benefit, and that the defendant's retention of that benefit would be unjust") (quoting *Stearns & Foster Bedding Co. v. Franklin Holding Corp., 947 F.Supp. 790, 812 (D.N.J. 1996))*. Therefore, in order to survive summary judgment on an unjust enrichment claim, a plaintiff has to present evidence that: "(1) at plaintiff's expense (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to retain benefit without paying for it." *In re K-Dur Antitrust Litig., at 544*.

Consequently, in order to withstand summary judgment, Arkansas Carpenters must provide record evidence in support of each element of its claims. Moreover, Arkansas Carpenters, in effect, concedes that it bears the burden for proving each element of these claims. (*See* ACHWF Memo. of Law at 2-3.) [10]

c. The facts of record

In *Celotex,* the Supreme Court clearly stated that only **[*34]** after "adequate time for discovery" has been allowed may the entry of summary judgment be appropriate. *See* *Celotex, at 477 U.S. at 322*. In this case, I find that more than "adequate time for discovery" has been allowed. The undisputed procedural history underlying the Motion reflects that Arkansas Carpenters has had adequate opportunity both to acquire and serve responsive discovery in support of the claims asserted in its Complaint.

The undisputed factual record on the Motion [11] reflects that: (1) Arkansas Carpenters filed a class action complaint against Schering, Upsher and Wyeth on May 24, 2001; (2) on July 1, 2004, Schering served its First Set of Interrogatories (the "Interrogatories") and First Set of Document Requests (the "Document Requests") upon the Indirect Purchasers, including Arkansas Carpenters; (3) over the next twenty-two (22) months, Arkansas Carpenters did not provide a response to that discovery; (4) on May 22, 2006, Schering filed a motion to compel responses from Arkansas Carpenters; (5) on July 21, 2006, I ordered Arkansas Carpenters to provide "full and complete answers" to Schering's discovery within thirty (30) days; [12] (6) on August 21, 2006, Arkansas Carpenters **[*35]** served Arkansas Carpenters' Health & Welfare Fund's Consolidated Objections and Responses to Schering-Plough Corporation's First Set of Interrogatories and Requests for Production of Documents (the "Consolidated Objections and Responses"); (7) Arkansas Carpenters produced two documents in response to the Document Requests: (a) the Trust Agreement of the Oklahoma/Arkansas Carpenters Health and Welfare Fund (ACHWF 1-41); and (b) the Plan Document for the Oklahoma/Arkansas Carpenters Health and Welfare Fund (ACHWF 42-97); (8) neither document produced by Arkansas Carpenters reflected payments for or reimbursement of payments for branded or generic K-Dur; (9) Arkansas Carpenters did not produce any other documents in response to the Document Requests; (10) on November 6, 2006, Schering served its First Set of Requests for Admission (the "Requests") on Arkansas Carpenters; (11) on December 6, 2006, Arkansas Carpenters served its responses to Schering's Requests for Admission; (12) Arkansas Carpenters' responses to the Requests revealed, *inter alia,* that Arkansas Carpenters had no documents: (a) showing any payments for branded or generic K-Dur; and (b) from

[10] Arkansas Carpenters dispute, however, the procedural juncture at which it must satisfy its burdens in this regard. (*See* ACHWF Memo. of Law, at 2-3.)

[11] This determination is based upon Arkansas Carpenters' Memo. of Law in which it submitted a "Counterstatement of Facts" with respect to only one factual issue. (ACHWF Memo. of Law, at 1.)

[12] See Special Master's Report and Recommendation on Schering-Plough Corporation's May 22, 2006 Letter Motions to Compel Discovery from Indirect Purchaser Class Representatives Arkansas Carpenters Health and Welfare Fund and Great Lakes Health Plan (Docket No. 336) (the "Report"), at 8; see also Order, at 1 (Docket No. 337).

which payments or reimbursements **[*36]** for branded or generic K-Dur could be calculated; and (13) Arkansas Carpenters' Interrogatory responses did not provide any facts from which any of the foregoing information could be determined. (Defs.' Memo. of Law, at 2-3; Defs.' Statement, at 1-4.)

Arkansas Carpenters did not appeal my Report and Order of July 21, 2006. Accordingly, Arkansas Carpenters was required to provide "full and complete answers" to Schering's discovery within thirty (30) days of the date of the Order. (Report, at 8.) Importantly, in its response to four of the individual document requests, Arkansas Carpenters admitted that "upon information and belief, additional documents regarding potassium chloride **[*37]** products for which reimbursements have been made may be in the possession of the third-party administrator responsible for handling the plan, OBA Midwest, to the extent they exist." (*See* Plaintiff Arkansas Carpenters Health & Welfare Fund's Consolidated Objections and Responses, at 4-9.)

Notwithstanding Arkansas Carpenters' "information and belief" in this regard and my express Order requiring "full and complete answers" to Schering's discovery requests, Arkansas Carpenters did not acquire any such documents from its third-party administrator and serve copies of such documents upon Schering within thirty (30) days of the entry of the Order. In addition, at no time prior to Defendants' filing of the Motion -- on January 17, 2007 -- did Arkansas Carpenters supplement the record in this regard. In fact, despite Arkansas Carpenters' "information and belief" about the documents in the possession of OBA Midwest, counsel for Arkansas Carpenters made no effort to subpoena the records of OBA Midwest until February 9, 2007 (*See* Rosemergy Declaration, at 3, P 13.) However, because Arkansas had a legitimate belief that OBA Midwest may have had responsive documents in its possession that were responsive **[*38]** to Schering's discovery requests at the time it filed its responses thereto, it arguably had an affirmative obligation to attempt to acquire that documentation and serve the same upon Schering within thirty (30) days of the issue of the Order. [13] Alternatively, if it were not possible to obtain these documents within the allotted thirty (30) day period, then Arkansas Carpenters should have, at least, made a concerted effort to rapidly acquire and serve any responsive documents pursuant to its obligation to "seasonably amend" responses to discovery under *Rule 26(e)(2) of the Federal Rules of Civil Procedure*. Instead, it was not until over four months later that Arkansas Carpenters, through counsel, actually confirmed that any such documents were even in the possession of OBA Midwest. (Rosemergy Declaration, at 2, P 10.) Further, it may have taken as long as an additional month before those documents were subpoenaed by Arkansas Carpenters. (*Id.* at P 13.)

Under *Rule 37(c)(1) of the Federal Rules of Civil Procedure*, "[a] party that without substantial justification fails to disclose information required by *Rule 26(a)* or *26(e)(1)*, or to amend a prior response to discovery as required by *Rule 26(e)(2)*, is not, unless such failure is harmless, permitted to use at trial, at a hearing, or on a motion any…information not so disclosed." *Fed. R. Civ. P. 37(c)(1)*. In this case, Arkansas Carpenters has failed to provide any "substantial justification" for its failure to "seasonably amend" its responses to Schering's discovery. Arkansas Carpenters' failure to "seasonably amend" is even more inexplicable given that its discovery responses were preceded by a motion to compel, and the filing of the Report which clearly placed **[*40]** Arkansas Carpenters on notice that its failure to "fully and completely answer" discovery could result in "the possible imposition of sanctions, up to and including…dismissal." (Report, at 8-9.) Further, contemporaneous with filing its discovery responses, Arkansas Carpenters was aware (or, certainly had reason to believe) that responsive information was in the hands of its third-party administrator. Thus, at a minimum, I conclude that Arkansas Carpenters' acts or omissions in this regard are not a "harmless" failure. Indeed, given Arkansas Carpenters' dilatoriness prior to the filing of the motion to compel, its failure to reasonably amend demonstrates a conscious indifference to the express language of the Report and accompanying Order.

---

[13] See *Nobles v. Jacobs IMC, 2003 U.S. Dist. LEXIS 24083, 2003 WL 23198817, at *2 (D.V.I. July 7, 2003)* ("A party must produce all discoverable information or things responsive to a request that are in the party's possession, custody or control. Documents are deemed **[*39]** to be within the possession, custody or control of a party if the party has actual possession, custody, or control, or the legal right to obtain the documents…."); see also *Bhagwandass v. Hovensa, L.L.C., 2002 U.S. Dist. LEXIS 27059, 2002 WL 32349814, *2 (D.V.I. Oct. 29, 2002)* (same); *Frieman v. USAir Group, Inc., 1994 U.S. Dist. LEXIS 16994, 1994 WL 675221, at *4 (E.D. Pa. Nov. 23, 1994)* (same); *Camden Iron and Metal, Inc. v. Marubeni Am. Corp., 138 F.R.D. 438, 441 (D.N.J. 1991)* (same).

Therefore, I conclude, consistent with *Rule 37(c)(1)*, that the imposition of a sanction is appropriate. Accordingly, I shall exclude the Rosemergy Declaration from the summary judgment record in deciding the Motion. This sanction is consistent with the express language of the Rule and appropriate given the tortured history underlying Defendants' attempts to obtain discovery from Arkansas Carpenters. Therefore, the summary judgment record on which I **[*41]** shall rely for purposes of deciding this Motion are the discovery responses submitted by Arkansas Carpenters on August 21 and December 6, 2006, respectively, and the "undisputed facts" submitted by the parties to the Motion. I shall exclude the Rosemergy Declaration from the summary judgment record.

d. The evidence of record

In Arkansas Carpenters' Memo. of Law, Arkansas Carpenters argues that the only disputed fact relevant to the Motion is whether Arkansas Carpenters paid for or reimbursed payments for purchases of branded or generic K-Dur. (ACHWF Memo. of Law, at 1.) Arkansas Carpenters further argues that certain documents reflect that it did, and rely upon the Rosemergy Declaration in support of this claim. (*Id.*) While it is debatable whether the Rosemergy Declaration and the documents appended thereto actually reflect that Arkansas Carpenters paid for or reimbursed payments for K-Dur or its generic equivalent, [14] Arkansas Carpenters' reliance on the Rosemergy Declaration is to no avail, because, for the reasons stated above, I have excluded the Rosemergy Declaration from the summary judgment record in this case.

Had Arkansas Carpenters made some effort to "seasonably amend" or otherwise supplement its responses to Schering's Interrogatories and Document Requests in advance of the filing of the Motion, it might have been appropriate to consider the Rosemergy Declaration. However, Arkansas Carpenters had over two years to produce documents in support of its respective claims and it simply failed to do so. Admittedly, counsel for Arkansas Carpenters was aware of the existence of documents comprising Exhibit "1" of the Rosemergy Declaration three years prior to the service of Defendants' discovery. [15] Arkansas Carpenters patent inability to square this fact with the two-year delay in responding to discovery, and the actual content of the discovery responses submitted on August 21, and December 6, 2006, respectively, **[*43]** is fatal to Arkansas Carpenters' attempts to rely upon the Rosemergy Declaration [16] and the documents appended thereto to establish the existence of a genuine issue of material fact.

---

[14] Indeed, as Defendants argue in Defs. Reply Memo. (see Defs.' Reply **[*42]** Memo. at 2), the documents submitted as Exhibit "1" to the Rosemergy Declaration, purportedly pharmacy records, do not reflect who, in fact, paid for the prescriptions identified in the records and, apparently, do not reflect payment for or reimbursement of payments for generic K-Dur. Thus, it is unclear what, if any, conclusions or "reasonable inferences" can be drawn from these documents.

[15] "On or about July 11, 2006 and again on August 21, 2006 (to attempt to address legibility issues with the original transmission), Mr. Youngdahl forwarded to me copies of these documents, including a cover memo dated April 11, 2001, near the outset of the litigation, which indicates, 'I am enclosing copies of the K-Dur claims reimbursed by the Arkansas Carpenters Health and Welfare Fund.' True and accurate copies of those documents are attached hereto as Exhibit 1, redacted to safeguard protected health information." (Rosemergy Declaration, at 2, P 6).

[16] THE SPECIAL MASTER: "Wasn't Arkansas Carpenters, though, subject to an Order I entered a couple of weeks ago or whenever it was?" MR. LIEVERMAN: "I believe it was last July about providing their documents. That's correct your Honor. And they did provide everything in their possession. Unfortunately, they did not have any of the records showing reimbursement or payments for the drugs. Those were in the hands of the third party payers [sic]. They just could **[*44]** not get cooperation from them. We finally subpoenaed them as -- co-leads subpoenaed them as a last effort to represent the interests of the named plaintiffs. I think as your Honor understands -- I think as all of us understand in an MDL you don't get to choose necessarily everyone on your side as co-leads. We have an obligation to act on behalf of all of the named plaintiffs. But when there is something that then harms the interests of the class, we have to try to resolve that. And we spoke with counsel for Arkansas Carpenters and he's agreed that in the interests of the class as a whole, it is better for them to withdraw their claim. So yes, there was an Order, and I believe they obeyed that Order, with the possible exception of the few pages demonstrating reimbursement that, as Mr. Rosemergy said, he believed, erroneous as it turned out, those had been provided. That was simply a mistake on our part and we apologize. But with that exception, what they had was turned over. What they didn't have was in the hands of the third-party payers [sic]. We subpoenaed it. Now having seen it, there is just nothing that makes this goes [sic]

In the absence of the Rosemergy Declaration, any support for Arkansas Carpenters' lone "disputed" fact -- i.e., that it "paid for or reimbursed plan participants for purchases of K-Dur or generic equivalents" (ACHWF Memo. of Law, at 1) -- is simply lacking, leaving Arkansas Carpenters incapable of proving each element of their respective claims for relief. Under these circumstances, there are no genuine issues of material fact in dispute and, as such, Defendants would be entitled to judgment as a matter of law.

Alternatively, Defendants are entitled to summary judgment because Arkansas Carpenters is incapable of proving the element of "injury" or loss for its respective claims. In its Memo. of Law and its Reply Memo., Defendants argue that Arkansas Carpenters' claims are subject to dismissal because it is incapable of proving that it suffered the element of "injury" inherent in each claim. (*See* Defs.' Memo. of Law, at 4-5; Defs.' Reply Memo, at 2.) For its part, Arkansas Carpenters concedes that "an antitrust plaintiff must show injury, or 'impact,' as an element of its claim, **[*46]** which is separate from damages." (ACHWF Memo. of Law, at 2.) *See* *Pennsylvania v. Milk Indus. Mgmt. Corp., 812 F.Supp. 500, 507 (E.D. Pa. 1992)* ("[I]t has been said that to establish liability under the various provisions of the Sherman and Clayton Acts, proof must be provided that the Defendants' conduct violated the Sherman Act and that the plaintiffs suffered an actual anti-trust injury as a result…."); *Prima v. Darden Restaurants, Inc., 78 F.Supp.2d 337, 355 (D.N.J. 2000)* (quoting *Eli Lilly and Co. v. Roussel Corp., 23 F.Supp.2d 460, 496 (D.N.J. 1998)* ("[T]he tort of unjust enrichment rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at *the expense of another*") (emphasis added). Even if the Rosemergy Declaration were part of the record in this case, the fact of payment or reimbursement by Arkansas Carpenters alone is insufficient to demonstrate "injury," loss or "impact." In order to satisfy its burden in this regard, at a minimum, Arkansas Carpenters must be able to demonstrate, for example, that it paid *more* for branded, than generic K-Dur, or that an artificially inflated price for branded K-Dur had a detrimental "impact" on Arkansas **[*47]** Carpenters. Presenting record evidence in support of this element of Arkansas Carpenters' claims is clearly part of Arkansas Carpenters' burden on summary judgment. *See* *Heffron, 270 F.Supp.2d at 575* (noting that in order to defeat a properly supported motion for summary judgment, "plaintiff 'must point to concrete evidence in the record which supports each essential element' of a claim on which he will bear the burden of proof at trial"). However, this is a burden that Arkansas Carpenters cannot satisfy because record evidence in support of this element of each claim is simply lacking.

Moreover, even if Arkansas Carpenters had an opportunity to supplement the record in this regard, it is questionable whether it could even provide adequate evidence of "injury" or "impact." Indeed, counsel for Arkansas Carpenters virtually conceded that, even with the benefit of additional time, Arkansas Carpenters will be incapable of filing a proof claim if and when the case settles or is otherwise resolved in the Plaintiffs' favor. (*See* Hrg. Tr. at 12-13.) [17] [18] Uncertainty, however, in the face of a motion for summary judgment is simply not good enough. *See*

---

forward as a practical matter. I don't want to turn **[*45]** over confidential health information in violation of HIPA [sic] to the defendants, frankly." (Hrg. Tr. at 14-15.)

[17] THE SPECIAL MASTER: "First of all, you're saying they're still a named plaintiff in their own case?" MR. LIEVERMAN: "They are, but they want to withdraw that as well. It goes back to the documents." THE SPECIAL MASTER: "Well, maybe I'm not understanding this. They want to withdraw entirely from the case?" MR. LIEVERMAN: "Yes." THE SPECIAL MASTER: "Do they want to remain a member of the class?" MR. **[*49]** LIEVERMAN: "They'd like to remain a member of the class although, frankly, it will be difficult for them to file a proof of claim when the case is settled because of the way in which they now keep their documents. As I tried to describe in my letter -- and I think you got a flavor of it in the exhibit to Mr. Rosemergy's declaration. There is no rhyme or reason to these records. There are 68 boxes of medical receipts from doctors, from pharmacies, from hospitals and they got stamps on them that show they've been reimbursed, although I don't think the stamps says that. And they're stuck in boxes randomly. To produce those to Mr. -- to defendants right now, the boxes we've looked through, would require a page-by-page review by our lawyers and a redaction of the protected health information as required by HIPA [sic], federal regulations. That is a monumental undertaking and one that doesn't advance anyone's interests, including Arkansas Carpenters at this point. On that basis alone there is really no reason to have their case go forward at all. That is why, now that we've had the chance to look at the documents, I wrote the letter and said we don't need the extra time. We've looked through **[*50]** it and we know that really -- out of fairness to all the parties as well as to the class, the claims of Arkansas Carpenters are actually going to impede the claims of the class." (Hrg. Tr. at 12-14.)

*e.g., Borough of Olyphant, Pennsylvania v. PP&L, Inc., 2004 U.S. Dist. LEXIS 8958, 2004 WL 1091037, at *11 (E.D. Pa. May 14, 2004)* **[*48]** (noting that on summary judgment, "failure to produce sufficient evidence to allow a reasonable jury to find in plaintiff's favor on any one facet of [a]…Sherman Act claim is fatal to the entire claim"). Arkansas Carpenters has an affirmative obligation to present whatever evidence it has to support each and every element of its claims in this case. *See e.g., Celotex Corp., 477 U.S. at 322-323*. If Arkansas Carpenters' own counsel is not confident that, upon settlement or judgment in Plaintiffs' favor, Arkansas Carpenters would have sufficient records to file a "competent proof of claim," (*see* note 18, *infra*), then not only is summary judgment appropriate for the claims brought by Arkansas Carpenters, but they arguably lack standing to even be a plaintiff in the consolidated class action.

Therefore, since I conclude that Arkansas Carpenters has not, **[*51]** and is incapable of providing adequate evidence in support of each element of its claims for relief, as is its obligation in opposing a motion for summary judgment, I conclude that there are no genuine issues of material fact material sufficient to withstand summary judgment. Accordingly, I find that summary judgment is appropriate as to each claim asserted in Arkansas Carpenters' Complaint.

III. CONCLUSION

For the reasons set forth above, I conclude that the Motion of Defendants, Schering-Plough Corporation, Key Pharmaceuticals, Inc., Upsher-Smith Laboratories, Inc., Wyeth and ESI Lederle, for summary judgment on the Indirect Purchaser Plaintiff Arkansas Carpenters Health and Welfare Fund's class action complaint should be granted. Further, Arkansas Carpenters Health and Welfare Fund shall be dismissed as a party from the consolidated action and shall not be permitted to participate as a member of the class of Indirect Purchaser Plaintiffs in the consolidated action should that class be certified.

As provided in the Order entered by Magistrate Judge Arleo in this matter, the Special Master's decision on any motion can be appealed to Judge Greenaway in the manner, and subject to the standards [*52] of review set forth in *Rule 53 of the Federal Rules of Civil Procedure* and applicable Local Rules.

ENTERED this 19th day of April, 2007

/s/ Stephen M. Orlofsky

STEPHEN M. ORLOFSKY

SPECIAL MASTER

ORDER

The Special Master having considered the Motion of Defendants, Schering-Plough Corporation, Key Pharmaceuticals, Inc., Upsher-Smith Laboratories, Inc., Wyeth and ESI Lederle, for Summary Judgment against Indirect Purchaser Plaintiff Arkansas Carpenters Health and Welfare Fund, the briefs filed by all parties in support of

---

[18] THE SPECIAL MASTER: "Let me ask you a question?" MR. LIEVERMAN: "Yes." THE SPECIAL MASTER: "Let's assume I would allow them to remain in the class. Where does this problem get solved? What you're telling me is that their records are virtually impossible to put together; that it requires, you know, a page-by-page analysis. Even if the class were to be certified -- MR. LIEVERMAN: "Correct." THE SPECIAL MASTER: -- you, yourself, have conceded that they would have difficulty preparing and filing a proof of claim." MR. LIEVERMAN: "From what I've seen, that's correct. Now, they may find -- that they may have records, depending on the class period. They may have certain records that are good enough that they can file a competent proof of claim and get some money back. I don't think so, frankly, from what I've seen. But I'm just a little loathe to, you know, foreclose them from filing any proof of claim later on." (Hrg. Tr. at 16.)

and in opposition to the Motion, as well as the oral argument of counsel, for the reasons set forth in the foregoing Report and Recommendation;

IT IS HEREBY ORDERED, this 19th day of April, 2007, that:

(1) the Defendants' motion for summary judgment is hereby **GRANTED;** and

(2) Arkansas Carpenters Health and Welfare Fund shall be dismissed as a party from the consolidated action and shall not be permitted to participate as a member of the class of Indirect Purchaser Plaintiffs in the consolidated action should such a class be certified.

ENTERED this 19th day of April, 2007

/s/ Stephen M. Orlofsky

STEPHEN M. ORLOFSKY

SPECIAL MASTER

S&M Brands, Inc. v. Summers

United States Court of Appeals for the Sixth Circuit

April 19, 2007, Filed

File Name: 07a0283n.06

No. 06-5148

Reporter

228 Fed. Appx. 560 *; 2007 U.S. App. LEXIS 9218 **; 2007 FED App. 0283N (6th Cir.); 2007-1 Trade Cas. (CCH) P75,673

S&M BRANDS, INC., and INTERNATIONAL TOBACCO PARTNERS, LTD., Plaintiffs-Appellants, v. PAUL G. SUMMERS, in his official capacity as Attorney General of the State of Tennessee, Defendant-Appellee.

Notice: **[**1]** CONSULT 6TH CIR. R. 32.1 FOR CITATION OF UNPUBLISHED OPINIONS AND DECISIONS.

Prior History: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE.

S&M Brands, Inc. v. Summers, 393 F. Supp. 2d 604, 2005 U.S. Dist. LEXIS 23216 (M.D. Tenn., 2005)

Core Terms

Tobacco, antitrust, district court, Sherman Act, dormant, manufacturers, preempted

LexisNexis® Headnotes

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

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

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

An appellate court reviews de novo a dismissal for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*. To survive a motion to dismiss, a complaint must allege facts which, if proved, would entitle them to relief. A court construes the complaint in the light most favorable to the plaintiff, accept the plaintiff's factual allegations as true, and determines whether the plaintiff can prove no set of facts in support of its claims that would entitle the plaintiff to relief.

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

HN2[] **Sherman Act, Scope**

Section 1 of the Sherman Act provides in part that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. 15 U.S.C.S. § 1. State statutes that authorize or compel private parties to act anticompetitively can violate § 1 of the Sherman Act; however, not all state statutes that restrain competition violate the Act. To bring a valid claim, a plaintiff must show, among other things, that the Sherman Act preempts the state statute in question.

Civil Procedure > Appeals > En Banc Determinations

Governments > Courts > Judicial Precedent

HN3[] Appeals, En Banc Determinations

In the Sixth Circuit, a panel of a United States Court of Appeals for the Sixth Circuit cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or the Sixth Circuit sitting en banc overrules the prior decision. 6th Cir. R. 206(c) states that reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel.

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

HN4[] Reviewability of Lower Court Decisions, Preservation for Review

Issues which were raised in the district court, yet not raised on appeal, are considered abandoned and not reviewable on appeal.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

HN5[] Appeals, Reviewability of Lower Court Decisions

An appellate court will not consider arguments raised for the first time on appeal unless our failure to consider the issue will result in a plain miscarriage of justice.

Counsel: For S & M BRANDS, INC., INTERNATIONAL TOBACCO PARTNERS, LTD., Plaintiffs - Appellants: Jennifer S. Ghanem, Lassiter, Tidwell & Hildebrand, Nashville, TN; David F. Dobbins, Patterson, Belknap, Webb & Tyler, New York, NY.

For PAUL G. SUMMERS, in his official capacity as Attorney General of the State of Tennessee, Defendant - Appellee: Russell T. Perkins, Asst. Atty. General, Daniel W. Champney, John H. Sinclair, Jr., Asst. Atty. General, Office of the Attorney General, Nashville, TN.

Judges: BEFORE: KENNEDY, MOORE, and McKEAGUE, Circuit Judges.

Opinion by: McKEAGUE

Opinion

[*561] McKEAGUE, Circuit Judge. S&M Brands, Inc. and International Tobacco Partners, Ltd. ("ITP") sued Paul G. Summers in his official capacity as the Attorney General of the State of Tennessee. [1] They claim **[**2]** that the State of Tennessee has violated federal ***antitrust law*** and the U.S. Constitution in its implementation and application of the Master Settlement Agreement ("MSA") between various states and major tobacco manufacturers. The district court dismissed all but one of their claims under *Federal Rule of Civil Procedure 12(b)(6)*. [2] As explained below, we affirm the district court's dismissal in favor of the Attorney General.

[3] I**

The Appellants' claims arose in connection with the MSA executed in November 1998 by and among forty-six states (including Tennessee) and six territories as well as the four largest domestic cigarette manufacturers (Philip Morris USA, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Company, and Lorillard Tobacco Company). S&M Brands is a tobacco product manufacturer and ITP is an importer of tobacco products. Neither company has joined the MSA.

In their complaint, the Appellants challenge the validity of certain statutes enacted by Tennessee pursuant to the terms of the MSA, including the Tennessee Tobacco Manufacturers' Escrow Fund Act of 1999, *Tenn. Code Ann. § 47-31-101 et seq.* ("Escrow Act") (as amended), and the tax laws passed to aid in the enforcement of the Escrow Act, *Tenn. Code Ann. § 67-4-2601 et seq.* (collectively, the "Tobacco Statutes"). Specifically, the Appellants claim that the enactment and enforcement of the Tobacco Statutes have had the effect of implementing an illegal combination or "output cartel" created by the settling states and the participating manufacturers in the **[**4]** MSA, and that this implementation constitutes a *per se* restraint of trade in violation of Section 1 of the Sherman Act, *15 U.S.C. § 1*. They further contend that the enforcement of the Tobacco Statutes violates their rights under the *Equal Protection Clause of the Fourteenth Amendment* as well as their *First Amendment* **[*562]** rights of freedom of speech and freedom to petition. Finally, in their response to the Attorney General's motion to dismiss, the Appellants assert that the Tobacco Statutes violate their rights to substantive and procedural due process under the *Fourteenth Amendment*. [3]

On the Attorney General's motion, the district court dismissed the claims. The district court held that Tennessee's Tobacco Statutes were not preempted by the Sherman Act. *S&M Brands, Inc. v. Summers, 393 F. Supp. 2d 604, 629-30 (M.D. Tenn. 2005)*. On the constitutional claims, the district court concluded that **[**5]** the Appellants failed to state any valid claim for relief. *Id. at 630-38*.

The Appellants timely appealed.

II

A. Standard of Review

HN1[] We review *de novo* a dismissal for failure to state a claim under *Rule 12(b)(6)*. *Se. Tex. Inns. Inc. v. Prime Hospitality Corp., 462 F.3d 666, 671 (6th Cir. 2006)*. To survive a motion to dismiss, the Appellants' complaint must allege facts which, if proved, would entitle them to relief. *Id.* We construe the complaint in the light most favorable to

[1] On November 1, 2006, Robert E. Cooper, Jr., was sworn in as the Attorney General for the State of Tennessee.

[2] On the Appellants' remaining claim--Tennessee's enforcement of a recent amendment to its tobacco legislation had an impermissible retroactive effect--the district court granted partial summary judgment to both parties. *S&M Brands, Inc. v. Summers, 420 F. Supp. 2d 840 (M.D. Tenn. 2006)*; *S&M Brands, Inc. v. Summers, No. 05-171, 2005 U.S. Dist. LEXIS 31138, 2005 WL 3160869 (M.D. Tenn. Nov. 28, 2005)*. They have sought review of the ruling in a separate set of appeals. *S&M Brands v. Summers,* Nos. 06-5828/5829. Accordingly, the Appellants' retroactivity claim is not before us today in this appeal.

[3] These claims are separate from the retroactivity claim. *See supra* note 2.

the Appellants, accept their factual allegations as true, and determine whether they can prove no set of facts in support of their claims that would entitle them to relief. *Id.*

B. Antitrust Claims

HN2[] Section 1 of the Sherman Act provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. State statutes that authorize or compel private parties to act anticompetitively can violate Section 1 of the Sherman Act; however, not all state statutes that restrain **[**6]** competition violate the Act. To bring a valid claim, a plaintiff must show, among other things, that the Sherman Act preempts the state statute in question. *Rice v. Norman Williams Co., 458 U.S. 654, 659, 102 S. Ct. 3294, 73 L. Ed. 2d 1042 (1982)*; *McNeilus Truck & Mfg. Co. v. Ohio, 226 F.3d 429, 440 (6th Cir. 2000)*.

After the parties filed their briefs, another panel of this court issued a published decision in a case similar to the present one. In *Tritent International Corp. v. Kentucky, 467 F.3d 547 (6th Cir. 2006)*, the court considered whether the State of Kentucky violated the federal antitrust laws in connection with its implementation and application of the MSA. The court held that Kentucky's tobacco legislation was not preempted by the Sherman Act because the legislation did not "mandate[] or authorize[] conduct that necessarily constitutes a violation of the antitrust laws in all cases, or . . . place[] irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." *Id. at 554* (quoting *Rice, 458 U.S. at 661*). The manufacturers' failure to establish that the Sherman Act preempted **[**7]** Kentucky's tobacco legislation was fatal to their antitrust claims. *Id. at 558-59*.

Because Tennessee's Tobacco Statutes are identical in all material respects to the Kentucky legislation at issue in *Tritent,* we asked the parties to submit supplemental briefs on the impact of that decision on the present appeal. The Appellants concede in their supplemental brief that "the antitrust issues raised on that appeal [*Tritent*] . . . are the same as those involved here." Plaintiffs-Appellants Supp. Br. at 1. Our own review confirms that *Tritent* is directly on-point to the antitrust claims in this appeal.

[*563] ***HN3***[] " A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting *en banc* overrules the prior decision." *Salmi v. Sec'y of Health & Human Servs., 774 F.2d 685, 689 (6th Cir. 1985)* (citing *Timmreck v. United States, 577 F.2d 372, 376 n.15 (6th Cir. 1978)*, *rev'd on other grounds, 441 U.S. 780, 99 S. Ct. 2085, 60 L. Ed. 2d 634*, *on remand, 600 F.2d 1228 (6th Cir. 1979))*; **[**8]** *see also* 6th Cir. R. 206(c) ("Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel."). Under the reasoning of *Tritent,* we hold that the Sherman Act does not preempt Tennessee's Tobacco Statutes; therefore, we affirm the dismissal of the Appellants' antitrust claims.

C. Constitutional Claims Raised Before the District Court

The Appellants have not raised any issues in this appeal involving their Equal Protection, Due Process, or First Amendment claims. ***HN4***[] "Issues which were raised in the district court, yet not raised on appeal, are considered abandoned and not reviewable on appeal." *Renkel v. United States, 456 F.3d 640, 642 n.1 (6th Cir. 2006)* (quoting *Robinson v. Jones, 142 F.3d 905, 906 (6th Cir. 1998))*. Accordingly, we will not address those claims on appeal.

D. Dormant *Commerce Clause*

Finally, in their supplemental brief, the Appellants argue that a claim under the dormant Commerce Clause survives *Tritent.* They are correct that *Tritent* did not involve a claim brought under the dormant Commerce Clause. U.S. Const. art. 1, § 8, cl. 3 **[**9]** . Yet, the Appellants did not assert a dormant Commerce Clause claim in their complaint. Nor does it appear that they otherwise brought such a claim to the attention of the district court. *See,* *e.g.,* Plaintiffs-Appellants Final Br. at 56 n.21 ("In the event of a reversal [of the district court], plaintiffs will amend their complaint to plead this dormant *Commerce Clause* violation.").

"It is well-settled that this ***HN5***[] court will not consider arguments raised for the first time on appeal unless our failure to consider the issue will result in a plain miscarriage of justice." *Overstreet v. Lexington-Fayette Urban County Gov't, 305 F.3d 566, 578 (6th Cir. 2002)* (quoting *Bailey v. Floyd County Bd. of Educ., 106 F.3d 135, 143 (6th Cir. 1997))*; *see also* *Renkel, 456 F.3d at 642 n.1* (same). As the Appellants have not shown that failure to consider their dormant *Commerce Clause* argument will result in a plain miscarriage of justice, we will not consider it for the first time on appeal.

III

Accordingly, we AFFIRM.

Olde Monmouth Stock Transfer Co. v. Depository Trust & Clearing Corp.

United States District Court for the Southern District of New York

April 23, 2007, Decided ; April 23, 2007, Filed

07 Civ. 990 (CSH)

Reporter
485 F. Supp. 2d 387 *; 2007 U.S. Dist. LEXIS 29938 **; 2007-2 Trade Cas. (CCH) P75,948

OLDE MONMOUTH STOCK TRANSFER CO., INC., Plaintiff, -against- DEPOSITORY TRUST & CLEARING CORPORATION and DEPOSITORY TRUST COMPANY, Defendants.

Core Terms

allegations, transfer agent, stock transfer, compete, stock, monopolization, relevant market, motion to dismiss, cause of action, Sherman Act, competitor, antitrust, preliminary injunction, airline, depository, plaintiff's claim, monopoly, communications, certificates, customers, terminated, ski, anticompetitive, transactions, issuers, malice, tortious interference, monopoly power, defendants', probability

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Injunctions, Preliminary & Temporary Injunctions**

When a plaintiff moves for preliminary injunctive relief, it does so on the basis and in aid of its previously filed complaint. The objective of a plaintiff moving for a preliminary injunction is to obtain relief pendente lite with respect to the claims plaintiff pleads in its complaint.

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

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

In deciding a motion to dismiss a complaint, a court looks only to the well-pleaded allegations in the complaint.

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

HN3[] **Motions to Dismiss, Failure to State Claim**

On a motion to dismiss a complaint under *Fed. R. Civ. P. 12(b)(6)*, a district court's function is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof. In reviewing a motion to dismiss, a court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor. While the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice.

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

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN4[] **Regulated Practices, Private Actions**

A complaint must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory. An antitrust plaintiff cannot create a cause of action by pleading conclusory allegations which merely recite the litany of antitrust. Rather, a plaintiff's complaint must adequately allege facts establishing the required elements of an antitrust violation.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN5[] **Regulated Practices, Monopolies & Monopolization**

The U.S. Supreme Court has explained that the offense of monopoly under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power. To state an attempted monopolization claim, a plaintiff must allege (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power in the relevant market.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN6[] **Regulated Practices, Monopolies & Monopolization**

The U.S. Court of Appeals for the Second Circuit has explained that it is axiomatic that a firm cannot monopolize a market in which it does not compete and that there can be no "dangerous probability" of monopolization--a necessary element of an attempted monopoly claim--where defendants do not even compete in that the relevant market and there is no indication that they ever sought to do so.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Pleading & Practice > Motion Practice > Opposing Memoranda

HN7[] **Pleadings, Amendment of Pleadings**

It is long-standing precedent in the U.S. Court of Appeals for the Second Circuit that parties cannot amend their pleadings through issues raised solely in their briefs.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN8[] **Regulated Practices, Monopolies & Monopolization**

A claim of monopoly leveraging requires that a defendant (1) possessed monopoly power in one market; (2) used that power to create a dangerous probability of monopolizing another market; and (3) caused injury by such anticompetitive conduct.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN9[] **Regulated Practices, Monopolies & Monopolization**

The "dangerous probability" of monopolization factor is usually assessed by a defendant's current market share--not by the possibility that the defendant might enter the market.

Antitrust & Trade Law > Sherman Act > Claims

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

HN10[] **Sherman Act, Claims**

The elements of an essential facility claim under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, are: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. The essential facility doctrine is intended to prevent a competitor from obtaining an unfair advantage in a market by denying to its actual or potential competitors access to a facility essential for use of that market.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Interpretation

HN11[] **Public Enforcement, State Civil Actions**

Courts have recognized that the New Jersey state antitrust statutes shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes and that New Jersey looks to federal jurisprudence to guide its interpretation of the New Jersey Antitrust Act, *N.J. Stat. Ann. § 56:9-1 to 19*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN12[] **Regulated Practices, Price Fixing & Restraints of Trade**

Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies that unreasonably restrain trade in the relevant market. *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN13[] **Regulated Practices, Price Fixing & Restraints of Trade**

Absent an actual agreement, a plaintiff's claim under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, must fail. there can be no liability under *§ 1* of the Sherman Act in the absence of agreement between separate entities.

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

HN14[] **Intentional Interference, Elements**

Under New Jersey law, a claim for tortious interference with prospective economic advantage requires: (1) a reasonable expectation of economic advantage to plaintiff, (2) interference done intentionally and with "malice," (3) causal connection between the interference and the loss of prospective gain, and (4) actual damages.

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

HN15[] **Intentional Interference, Elements**

The New Jersey Supreme Court has explained that in a claim for tortious interference with prospective economic advantage, malice is not used in its literal sense to mean "ill will"; rather, it means that harm was inflicted intentionally and without justification or excuse.

Counsel: **[**1]** For Olde Monmouth Stock Transfer Co., Inc., Plaintiff: Edward Roland Gallion, LEAD ATTORNEY, Gallion & Spielvogel(New York), New York, NY, Steven Spielvogel, LEAD ATTORNEY, Gallion & Spielvogel, Garden City, NY.

For Depository Trust & Clearing Corporation, Depository Trust Company, Defendants: Gregg M. Mashberg, LEAD ATTORNEY, Proskauer Rose LLP (New York), New York, NY, Karen Deborah Coombs, LEAD ATTORNEY, Proskauer Rose LLP (New York), New York, NY.

Judges: CHARLES S. HAIGHT, JR., Senior District Judge.

Opinion by: CHARLES S. HAIGHT, JR.

Opinion

[*388]

MEMORANDUM OPINION AND ORDER

HAIGHT, Senior District Judge:

In this action, plaintiff Olde Monmouth Stock Transfer Co., Inc. ("Olde Monmouth") alleges that defendants Depository Trust & Clearing Corporation ("DTCC") and Depository Trust Company ("DTC") violated federal and state antitrust laws by unreasonably excluding Olde Monmouth from DTC's Fast Automated Securities Transfer ("FAST") Program. Plaintiff also alleges that DTC tortiously interfered with Olde Monmouth's economic relationships with existing and potential future customers by contacting some of plaintiff's clients and undermining Olde Monmouth's business relationships. Furthermore, **[**2]** plaintiff suggests that DTC may have publicized Olde Monmouth's exclusion from the FAST Program to the stock issuing community.

Plaintiff moved for a preliminary injunction, requesting that this Court affirmatively order DTC immediately to approve Olde Monmouth's application for participation **[*389]** in the FAST Program. [1] Defendants filed a cross-motion to dismiss the complaint pursuant to *Rule 12(b)(6), Fed. R. Civ. P.*, for failure to state an actionable claim for relief.

I. BACKGROUND

A. [3] Factual Summary**

Defendant DTC is a clearing agency, registered with the United States Securities and Exchange Commission ("SEC") under *Section 17A* of the Securities Exchange Act of 1934, which provides central securities depository services for the nation's securities industry. [2] DTC acts as a depository for trillions of dollars worth of physical securities certificates, which are maintained in a central location; and it operates an automated, centralized system for book-entry transfers of securities among its participants, the beneficial owners of securities deposited at DTC. It describes itself as a "utility" for the securities industry that facilitates prompt and accurate settlement of securities transactions, and aims to increase the efficiency of such transactions by reducing the need for actual physical transfer of individual stock certificates. DTC charges its participants fees for services, but operates on a cost basis; revenues in excess of operating costs and reserves are refunded to participants. Olde Monmouth asserts that DTC enjoys a monopoly over the entire securities depository industry, as demonstrated by the fact that DTC is the stock custodian for some 2.5 million **[**4]** issuers, valued at more than $28 trillion.

Plaintiff Olde Monmouth is a stock transfer agent duly and properly registered with the SEC, pursuant to *Section 17A(c)* of the Securities Exchange Act of 1934. [3] As a transfer agent, Olde Monmouth performs various services for its clients, which are companies that issue publicly-traded shares of stock. For example, transfer agents issue new stock certificates in withdrawal by transfer transactions when an owner seeks to obtain a physical certificate for his or her shares. In addition, transfer agents process deposits of physical securities and maintain books and records on the securities issued by their clients. Olde Monmouth keeps track of the constantly shifting ownership rolls of its clients' stocks and acts as an intermediary between its clients and DTC. As a stock **[**5]** transfer agent, Olde Monmouth is paid transaction fees by its clients, as well as by DTC.

Under DTC's FAST Program, some transfer agents can be appointed to act as DTC's agents. The purpose of the program is to eliminate the movement of physical securities by allowing transfer agents to hold one balance certificate for each issuing company--and to adjust the balance on that certificate--rather than issuing multiple stock certificates. The program is intended to reduce the cost of creating, transporting, and storing stock certificates. Transfer agents appointed as **[*390]** FAST agents enter into a contractual relationship with DTC governing the treatment of stock ownership records for their FAST stock issues. A transfer agent may become a FAST agent by submitting an application and obtaining approval from DTC.

---

[1] Initially, Olde Monmouth also sought a preliminary injunction restraining DTC from its allegedly tortious communications with Olde Monmouth's clients. After defendants agreed not to initiate any further unsolicited communications with clients about Olde Monmouth's fees, plaintiff withdrew this request for preliminary injunctive relief. In consequence, Olde Monmouth's present motion for a preliminary injunction depends entirely upon the viability of its antitrust claims.

[2] Defendant DTC is a wholly-owned subsidiary of defendant DTCC. Both defendants are incorporated under the laws of the state of New York with their principal place of business located in New York City.

[3] Olde Monmouth is incorporated under the laws of New Jersey with its principal place of business located in New Jersey.

The present dispute arises out of Olde Monmouth's efforts to become a FAST agent in order **[**6]** to participate in DTC's Direct Registration System ("DRS"). Under DRS, individual investors have the ability to establish a direct book entry position with the issuer, either through the issuer's transfer agent or the investor's broker, without having to hold a physical certificate. The major stock exchanges in the United States--including the New York Stock Exchange, the American Stock Exchange, and the NASDAQ--have made or will soon make DRS participation a listing requirement for their exchanges. To be eligible for DRS, the issuing company must have a transfer agent that has been approved for the FAST Program.

Olde Monmouth believes that participation in the FAST Program is of critical importance for retaining its existing clients and attracting new ones. Accordingly, Olde Monmouth has made vigorous efforts to join the FAST program. In March 2006, Olde Monmouth began inquiring with DTC about participating in the FAST program. After obtaining the necessary application materials, Olde Monmouth submitted an application to become a FAST agent on May 19, 2006. On June 22, 2006, DTC advised Olde Monmouth that it had determined not to use Olde Monmouth's services as a FAST agent, noting **[**7]** that Olde Monmouth had been cited for certain operational deficiencies in SEC reviews. After this rejection notice, Olde Monmouth made numerous written and telephone inquiries to DTC about its application, and attempted to show that it had cured the deficiencies cited by the SEC and that it was otherwise in complete compliance with all of the FAST Program's requirements, as well as DTC's *proposed*--and not yet enacted--criteria for eligibility. However, despite these efforts, DTC did not approve Olde Monmouth's application for the FAST Program.

Beginning in July 2006, Olde Monmouth also decided to raise the fees that it charged DTC in an effort to pressure DTC to process and approve Olde Monmouth's FAST application. Olde Monmouth instituted a series of steep fee increases, such that by October 8, 2006, the charge for a single withdrawal by transfer--originally $35--was now $700. Olde Monmouth represented that it would revert to the original fee schedule if DTC approved its FAST application. DTC estimates that, as of the time of the present litigation, it had paid Olde Monmouth approximately $1.1 million in excessive fees.

After the fee increases, DTC contacted several of Olde **[**8]** Monmouth's clients, complained about the fees Olde Monmouth was charging DTC, intimated that it might stop processing physical transactions for Olde Monmouth's clients, [4] and suggested that the clients should consider using a different stock transfer agent. Olde Monmouth claims that these communications were malicious attempts to injure Olde Monmouth by disrupting its business relationships. DTC contends that, in light of the exorbitant transaction fees charged by Olde Monmouth (which were passed on to participants), it was reasonable for DTC to notify participants of the fee increases and to advise those issuers that DTC was considering "chilling" the issues for companies using Olde Monmouth as their transfer agent.

[*391] Finally, Olde Monmouth suggests that DTC has publicized Olde Monmouth's exclusion from the FAST Program to the stock issuing community at large, and thus hindered Olde Monmouth's ability to attract new clients.

[**9] B. Plaintiff's Claims

Plaintiff's Verified Complaint asserts seven causes of action: claims for actual and attempted monopolization pursuant to *Section 2* of the Sherman Act (plaintiff's First and Second Causes of Action), attempted monopolization pursuant to *Section 1* of the Sherman Act (Third Cause of Action), companion claims pursuant to New Jersey antitrust statutes (Fourth, Fifth, and Sixth Causes of Action), and a common law claim for tortious interference with prospective economic advantage (Seventh Cause of Action). Plaintiff seeks compensatory, punitive, exemplary, and treble damages, as well as injunctive relief requiring DTC to enroll Olde Monmouth in the FAST Program.

Based on these claims, Olde Monmouth moves for a preliminary injunction which if granted would compel DTC to approve Olde Monmouth's application to the FAST Program. [5] DTC opposes that motion and cross-moves to dismiss Olde Monmouth's complaint.

---

[4] A stop on physical processing is known in the industry as "chilling" the issue.

[10] II. DISCUSSION**

A. Procedural Analysis

While DTC's cross-motion to dismiss Olde Monmouth's complaint was filed after Olde Monmouth moved for a preliminary injunction, I will consider it first, for the following reasons.

Every federal civil case begins with the filing of a complaint. ***HN1***[] When a plaintiff moves for preliminary injunctive relief, it does so on the basis and in aid of its previously filed complaint. The objective of a plaintiff moving for a preliminary injunction is to obtain relief *pendente lite* with respect to the claims plaintiff pleads in its complaint.

Given these procedural realities, the Court properly considers DTC's motion to dismiss Olde Monmouth's complaint before considering plaintiff's motion for a preliminary injunction. DTC moves to dismiss the complaint under *Rule 12(b)(6)* on the ground that it fails to state a claim upon which relief--*any* form of relief--can be granted. If DTC's motion is well founded, Olde Mountain's complaint falls and its motion for a preliminary injunction necessarily falls with it.

Moreover, ***HN2***[] in deciding DTC's motion to dismiss the complaint, the Court looks only to the well-pleaded allegations in the complaint. **[**11]** Olde Monmouth, in support of its motion for a preliminary injunction, has submitted affidavits and briefs. Their contents fall outside the four corners of the complaint and I do not consider them in deciding DTC's motion to dismiss the complaint. *See* the cases cited in Part II.C., *infra*.

B. Standard of Review on a Motion to Dismiss

HN3[] On a motion to dismiss a complaint under *Rule 12(b)(6)*, the district court's function "is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980)*. In reviewing **[*392]** a motion to dismiss, "the court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor." *Hernandez v. Coughlin, 18 F.3d 133, 136 (2d Cir. 1994)*. But "[w]hile the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice." *Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996)*.

HN4[] "[T]he complaint must contain allegations concerning each of the material elements necessary to sustain recovery **[**12]** under a viable legal theory." *Yurman Design Inc. v. Chaindom Enters., Inc., 2000 U.S. Dist. LEXIS 9243, 2000 WL 897141, at *4 (S.D.N.Y. July 5, 2000)*. Thus, "[a]n antitrust plaintiff cannot create a cause of action by pleading conclusory allegations which merely recite the litany of antitrust." *Doron Precision Sys., Inc. v. FAAC, Inc., 423 F. Supp. 2d 173, 179 (S.D.N.Y. 2006)* (quotations and citation omitted). Rather, the plaintiff's complaint must adequately allege facts establishing the required elements of an antitrust violation. *Id.*

C. Plaintiff's Claims Under *Section 2* of the Sherman Act

HN5[] The Supreme Court has explained that "[t]he offense of monopoly under *§ 2* of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power . . . ." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. To state an attempted monopolization claim, a plaintiff must allege "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly **[**13]** power" in the relevant market. *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. In the case at bar, Olde Monmouth asserts that "[t]he relevant market in each antitrust claim . . . is the market for stock transfer agent services." Compl. P 43.

---

[5] As noted above, Olde Monmouth initially also moved for a preliminary injunction to restrain DTC from further allegedly tortious communications with Olde Monmouth's clients and potential clients, but plaintiff withdrew this request after an agreement was reached between the parties.

The complaint alleges that DTC "enjoys a monopoly over the entire securities depository industry." Compl. P 42. But this industry is distinct from the stock transfer agent industry, in which Olde Monmouth competes, and the complaint fails to allege that DTC actually competes in the relevant market. [6] *See* Compl. P 42 (alleging that DTC competes in the securities depository market and that it exerts influence on "the very closely related stock transfer agency industry"). Because DTC does not compete in the relevant market--the market for stock transfer agents in which Olde Monmouth competes--plaintiff cannot, as a matter of law, state a claim for monopolization or attempted monopolization of that market by DTC. ***HN6***[] The Second Circuit has explained that "it is axiomatic that a firm cannot monopolize a market in which it does not compete" and that there can be no "dangerous probability" of monopolization--a **[**14]** necessary element of an attempted monopoly claim--where the defendants "do not even compete in that [the relevant] market and there is no indication that they ever sought to do so." *Discon, Inv. v. NYNEX Corp., 93 F.3d 1055, 1062 (2d Cir. 1996)*, *rev'd on other grounds*, *525 U.S. 128, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*.

Plaintiff argues that DTC's "influence" over the transfer agent industry, which it exerts from its monopoly position in the closely related securities **[*393]** depository industry, "is precisely the type of market power the antitrust laws were enacted to protect the consuming public [from]." Pl.'s Br. at 12. But Olde Monmouth offers no legal authority for the proposition that market power under *Section 2* of the Sherman Act encompasses "influence" **[**15]** by a non-competitor over the relevant market. In fact, the Second Circuit rejected a similar theory in the context of the antitrust provisions in *Section 5* of the Federal Trade Commission Act in *Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980)*. The petitioner in *Official Airline Guides* published an airline guide that provided detailed information on flight connections and fares. At the time, the guide was considered the "bible" of the industry, and was the "standard reference for airline ticket officers, travel agents, businesses, and the public generally." *Id. at 921-22*. The publisher's arbitrary failure to list the connecting flight schedules of commuter airlines (as it did for certified airlines) hindered the commuter airlines' ability to compete with certified airlines. Although the guide injured competition among air carriers, the Court of Appeals emphasized that the defendant, "though possibly a monopolist in the airline schedule publishing industry, admittedly had no anticompetitive motive or intent with respect to the airline industry and is engaged in a different line of commerce from that of the air carriers." *Id. at 926*. **[**16]** Thus, the court held that the publisher had no duty "not to discriminate unjustifiably between certified air carriers and commuter airlines so as to place the latter at a significant competitive disadvantage." *Id. at 921*. [7]

Thus, plaintiff's legal theories for monopolization and attempted monopolization are fundamentally flawed because the complaint fails to allege that DTC competes in the **[**17]** relevant market. Plaintiff attempts to remedy this defect by raising new factual allegations in its briefing papers. But ***HN7***[] "[i]t is long-standing precedent in this circuit that parties cannot amend their pleadings through issues raised solely in their briefs." *Fadem v. Ford Motor Co., 352 F. Supp. 2d 501, 516 (S.D.N.Y. 2005)*. *See also* *Lazaro v. Good Samaritan Hosp., 54 F. Supp. 2d 180, 184 (S.D.N.Y. 1999)* ("it is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss" (quoting *O'Brien v. Nat'l Prop. Analysts Partners, 719 F. Supp. 222, 229 (S.D.N.Y. 1989))*; *Jacobson v. Peat, Marwick, Mitchell & Co., 445 F. Supp. 518, 526 (S.D.N.Y. 1977)* ("a party is not entitled to amend his pleading through statements in his brief").

Even if I were to consider these new factual allegations, they fail to demonstrate a viable monopoly claim against DTC. First, plaintiff suggests that DTC *might* be planning to enter the stock transfer agency market. John Troster, President of Olde Monmouth, states: "Notwithstanding the fact that I have no personal knowledge suggesting that

---

[6] In addition, stock transfer agents must be registered with the SEC pursuant to *15 U.S.C. § 78q-1(c)*. Olde Monmouth has not alleged that DTC is registered, or has sought to register, as a transfer agent with the SEC.

[7] In *Official Airline Guides*, the Second Circuit also rejected the FTC's suggestion that "if the only supermarket in town decides to stock Birdseye vegetables but not Green Giant vegetables, the FTC would be able to require it to stock Green Giant vegetables if it were to find Green Giant competitively disadvantaged." *Id. at 927*. Rather, it concluded that "even a monopolist" had the right to exercise its discretion as to the parties with whom it would deal, so long as it "had no purpose to restrain competition or to enhance or expand [its] monopoly." *Id. at 927-28*.

Defendants actively **[**18]** or overtly participate or engage in the stock transfer agency industry, it is abundantly clear that Defendants could at any time, and quite conceivably might be preparing to, participate or so engage." Troster Decl. P 36. This assertion is purely speculative, and does not adequately allege that DTC competes in the relevant market. Second, plaintiff contends that **[*394]** "many DTCC Board members are employed by companies that are transfer agents or affiliated with companies that are FAST-approved transfer agents," Troster Decl. P 36, and that some of DTC's participants (the shareholder/owners of DTCC and DTC) "own outright or otherwise control stock transfer agency affiliates that vie with and compete directly against Olde Monmouth to provide stock transfer agent services to securities issuers," Pl.'s Reply Br. at 2. But plaintiff cites no legal authority that could impute competitor status in the relevant market to DTC merely on the basis that some members of its Board of Directors and some of its shareholders are involved in the transfer agent industry. [8] Thus, these allegations fail to show that DTC is a competitor in the relevant market. Third, plaintiff notes an "irrefutable and unmistakable **[**19]** trend toward complete ownership of all issuers' outstanding shares in the name of Defendants' nominee, Cede & Co." and that "the shares go in but they never come out." Pl.'s Reply Br. at 10-11. But DTC's nominal ownership of shares merely facilitates book-entry settlement of security transactions; the participants remain the beneficial owners of the stock. DTC's nominal ownership of shares is not relevant to whether it competes in the transfer agent market. Fourth, plaintiff notes that over the past thirty years the number of FAST-eligible stock issues has increased by a much greater magnitude than the number of FAST-approved stock transfer agents, and that "[i]n recent years, the number of small stock transfer agents has decreased at a much higher rate than the rate at which the number of stock transfer agents has decreased overall." Pl.'s Reply Br. at 3. These trends within the transfer agent market are not relevant to whether DTC actually competes in that market. [9]

[20]** Because DTC is not a competitor in the relevant market, Olde Monmouth's alternative theories for monopolization--based on monopoly leveraging, the essential facility doctrine, and the Supreme Court's *Aspen Skiing* decision--also fail as a [10] matter of law.

HN8[] **[*395]** A claim of monopoly leveraging requires that "defendant (1) possessed monopoly power in one market; (2) used that power to create a dangerous probability of monopolizing another market; and (3) caused injury by such anticompetitive conduct." *A.I.B. Express, Inc. v. FedEx Corp., 358 F. Supp. 2d 239, 246-47 (S.D.N.Y. 2004)* (citing *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004))*. As described above, the complaint fails to allege that DTC even competes or seeks to compete in the "another market" of transfer agent services--much less that there is a dangerous **[**21]** probability of DTC monopolizing that market. [11] *Cf. A.I.B. Express, 358 F. Supp. 2d at 250-51* (refusing to dismiss monopoly

[8] For example, plaintiff has not attempted to formally pierce the corporate veil of DTC.

[9] Plaintiff's reply papers contain additional allegations based on the historical development of the DRS program. Specifically, Dr. Susanne Trimbath, a former DTC employee now employed as the Chief Executive Manager and Chief Economist of STP Advisory Services, LLC, submits an affidavit on behalf of Olde Monmouth which discusses a proposal presented by the transfer agent industry fifteen years ago that would have expanded their business into the market for securities intermediaries (the market for providing direct services to consumers for the purchase and sale of stock), and argues that DTC developed the DRS program to compete with the transfer agents' proposal. *See* Trimbath Decl. I do not consider Dr. Trimbath's allegations because they involve completely new facts and legal theories from those asserted in the complaint. First, the complaint challenges Olde Monmouth's exclusion from the FAST program--not DTC's original development of the DRS program. (Thus, the relief sought by Olde Monmouth is admission to the FAST program, not the dismantling of DRS.) Second, the historical background discussed by Dr. Trimbath is not relevant to the current market for transfer agent services. The proposal advanced by the transfer agent industry fifteen years ago was not adopted. There is no indication in the complaint that the transfer agent industry presently involves direct services to consumers for purchase and sale of stock, or that Olde Monmouth engages in such services. *See* Compl. P 13 (describing how plaintiff acts as an intermediary between its clients and DTC and maintains records of the ownership of its customers' shares of stock). Thus, the historical background presented in plaintiff's reply papers does not speak to whether DTC competes in the relevant market identified in the complaint.

[10] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*.

leveraging claim where AIB sufficiently alleged dangerous probability that FedEx would monopolize "facilitation market," in which both FedEx and AIB competed).

[22]** ***HN10***[] The elements of an essential facility claim under *Section 2* of the Sherman Act are: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." *New York Mercantile Exch., Inc. v. Intercontinental Exch., Inc., 323 F. Supp. 2d 559, 568 (S.D.N.Y. 2004)* (quoting *Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 569 (2d Cir. 1990))*. Here, Olde Monmouth alleges that DTC controls stock depository mechanisms that are "essential" to the stock transfer industry, and that DTC has been denying Olde Monmouth access to the FAST Program. But the essential facility doctrine is intended to prevent a *competitor* from obtaining an unfair advantage in a market by denying to its actual or potential *competitors* access to a facility essential for use of that market. *See* Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* (2d ed. 2002) § 772 ("the primary use of the so-called essential facility **[**23]** doctrine has been in cases where a monopolist refuses to share some important input with actual or potential competitors"). The doctrine is inapplicable here because DTC is not a competitor of Olde Monmouth in the transfer agent industry. *See* *Interface Group, Inc. v. Massachusetts Port. Auth., 816 F.2d 9, 12 (1st Cir. 1987)* ("The [essential facility] doctrine aims to prevent a firm with monopoly power from extending that power from one stage of production into another and from one market to another . . . . But it is difficult to see how denying a facility to one who, like [plaintiff], is not an actual or potential competitor [of the defendant] could enhance or reinforce the monopolist's market power.") (dismissing essential facility claim brought by charter airline operator against Port Authority for denying access to a particular airport terminal). Put another way, DTC's denial of Olde Monmouth's FAST **[*396]** application does not enhance or reinforce DTC's monopoly power in the securities depository industry--because Olde Monmouth does not compete in that market.

Finally, plaintiff contends that under the Supreme Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*, **[**24]** a willingness to forgo short-term profits in favor of achieving a long-term anticompetitive result and a refusal to continue a profitable prior course of dealing reveal anticompetitive conduct. In *Aspen Skiing*, the Supreme Court found actionable an improper "refusal to deal" where the defendant ski resort operator suddenly departed from a long-standing profitable arrangement with its competitor pursuant to which they had joined together to sell multi-area ski lift tickets that gave customers the flexibility to patronize any of the area's ski resort facilities at a discounted price. But this decision does nothing to diminish the fundamental requirement that DTC compete in the relevant market against Olde Monmouth. And although plaintiff claims that there are "striking similarities between the underlying factual predicate" in *Aspen Skiing* and the case at bar, Pl.'s Br. at 19, the cases are plainly distinguishable-because the parties in *Aspen Skiing* were competitors in the same market for ski resort operations.

In sum, the gravamen of plaintiff's complaint is that DTC unfairly and unreasonably denied Olde Monmouth's application to the FAST Program. Although plaintiff strains **[**25]** to connect this allegation to legal theories of monopolization, these theories are fundamentally flawed because DTC does not compete with Olde Monmouth in the relevant market for transfer agent services. Thus, plaintiff's claims under *Section 2* of the Sherman Act and the equivalent New Jersey antitrust statute (plaintiff's First, Second, Fourth, and Fifth Causes of Action) fail as a matter of law and must be dismissed. [12] Allegations that DTC has been arbitrary and capricious in excluding Olde

---

[11] Troster's speculation that DTC might enter the relevant market is completely insufficient to show a "dangerous probability" of monopolization. ***HN9***[] That factor is usually assessed by the defendant's current market share--not by the possibility that the defendant might enter the market. *See, e.g., H.L. Hayden Co. v. Siemens Med. Sys., Inc., 879 F.2d 1005, 1017 (2d Cir. 1989)* (40 market share between two alleged conspirators, in the context of a widely diversified and competitive market, insufficient to demonstrate "dangerous probability of success"). *Cf. A.I.B. Express, 358 F. Supp. 2d at 251* (allegation in complaint that defendant "will simply take over" the other market sufficient to withstand motion to dismiss plaintiff's claim based on monopoly leveraging). Olde Monmouth's complaint nowhere alleges that DTC has plans to enter the other market of transfer agency services, let alone that it will "take over" that market.

Monmouth from the FAST Program are properly addressed to the SEC, which oversees DTC's activities as a registered clearing agency.

[26] D. Plaintiff's Claims Under *Section 1* of the Sherman Act**

HN12[] *Section 1* of the Sherman Act prohibits contracts, combinations, or conspiracies that unreasonably restrain trade in the relevant market. *See* *15 U.S.C. § 2*; *Texaco Inc. v. Dagher, 547 U.S. 1, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*.

Plaintiff's Third Cause of Action alleges "attempted monopolization" in violation of *Section 1* of the Sherman Act. But *Section 1* does not address "attempt" claims. *Compare* *15 U.S.C. § 1* (prohibiting contracts, combinations, or conspiracies in restraint of trade) *with* *15 U.S.C. § 2* (prohibiting monopolization or *attempted* monopolization). Plaintiff must allege an actual agreement to restrain trade, and it has not done so.

Plaintiff claims that "DTC coerced and/or attempted to coerce such third parties [actual New Jersey and potential customers of Olde Monmouth] into forming a combination, contract, or conspiracy with DTC for the purpose of furthering DTC's anticompetitive scheme to restrain trade in the **[*397]** relevant market." Compl. P 57. But the apparent factual bases in the complaint for this claim are allegations that DTC contacted **[**27]** several of Olde Monmouth's clients, complained about the fees Olde Monmouth was charging DTC, intimated that it might stop processing physical transactions for Olde Monmouth's clients, and suggested that the clients should consider using a different stock transfer agent. Compl. PP 34-38. Nothing in these allegations indicates that any third party actually agreed to form a combination, contract, or conspiracy with DTC. ***HN13***[] Absent an actual agreement, plaintiff's *Section 1* claim must fail. *See* *Fisher v. Berkeley, 475 U.S. 260, 266, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986)* ("there can be no liability under *§ 1* [of the Sherman Act] in the absence of agreement" between separate entities). [13] **[**28]** Thus, plaintiff's claims for "attempted monopolization" under *Section 1* of the Sherman Act and the equivalent New Jersey antitrust statute (plaintiff's Third and Sixth Causes of Action) fail as a matter of law and must be dismissed. [14]

E. Plaintiff's Claim for Tortious Interference

HN14[] Under New Jersey law, a claim for tortious interference with prospective economic advantage requires: "(1) a reasonable expectation of economic advantage to plaintiff, (2) interference done intentionally and with 'malice,' (3) causal connection between the interference and the loss of prospective gain, and (4) actual damages." *Varrallo v. Hammond, Inc., 94 F.3d 842, 848 (3d Cir. 1996)* (citing *Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 563 A.2d 31, 37 (N.J. 1989))*.

---

[12] ***HN11***[] courts have recognized that the New Jersey state antitrust statutes "shall be construed in harmony with ruling judicial interpretations of comparable Federal antitrust statutes" and that New Jersey "look[s] to federal jurisprudence to guide our interpretation of the [New Jersey Antitrust] Act." *Patel v. Soriano, 369 N.J. Super. 192, 848 A.2d 803, 826 (N.J. App. Div. 2004)* (citations omitted). Thus, Olde Monmouth's New Jersey monopolization claims fail for the same reasons the federal claims fail.

[13] In its reply brief, plaintiff suggests that "it hardly strains credulity to suspect that Defendants' own shareholder/owner Participants with DRS-approved transfer agency facilities might well have conspired with Defendants improperly to apportion unto themselves an ever increasing share of the market for transfer agency services . . . ." Pl.'s Reply Br. at 18. I do not consider this speculated conspiracy--between DTC and major transfer agents--because it is completely different from the conspiracy theory alleged in the complaint--between DTC and Olde Monmouth's clients. And as explained above, "the Complaint cannot be amended by the briefs in opposition to a motion to dismiss." *Lazaro v. Good Samaritan Hosp., 54 F. Supp. 2d 180, 184 (S.D.N.Y. 1999)* (citation omitted).

[14] As described *supra* n.12, the New Jersey antitrust statutes are construed in accordance with the comparable federal antitrust statutes. Thus, Olde Monmouth's New Jersey claim fails for the same reason the federal claim under *Section 1* fails.

Olde Monmouth alleges that DTC tortiously interfered with Olde Monmouth's economic relationships with existing and potential future customers in two ways. First, plaintiff alleges that DTC contacted several of Olde Monmouth's clients, complained about the fees Olde Monmouth was **[**29]** charging DTC, intimated that it might "chill" the issues for Olde Monmouth's clients, and suggested that the clients should consider using a different stock transfer agent. Second, Olde Monmouth suggests that DTC has publicized Olde Monmouth's exclusion from the FAST Program to clients and the stock issuing community, and thus hindered Olde Monmouth's ability to attract new clients. Defendants argue that these allegations are deficient because they do not sufficiently allege "malice" or that actual damages were caused by DTC's communications.

HN15[] The New Jersey Supreme Court has explained: "Malice is not used here in its literal sense to mean 'ill will;' rather, it means that harm was inflicted intentionally and without justification or excuse." *Lamorte Burns & Co. v. Walters, 167 N.J. 285, **[*398]** 770 A.2d 1158, 1170 (N.J. 2001)*; *see also* Printing Mart, 563 A.2d at 37 (defining "malice" in this context as "the intentional doing of a wrongful act without justification or excuse"). Plaintiff's complaint acknowledges that Olde Monmouth implemented fee increases on DTC, Compl. P 31, but alleges that DTC's communications with plaintiff's customers were undertaken **[**30]** "solely to injure Olde Monmouth," Compl. P 82. Construing the complaint liberally and accepting its factual allegations as true for the purposes of a motion to dismiss, I conclude that Olde Monmouth has sufficiently alleged that DTC acted with malice when it contacted Olde Monmouth's clients and allegedly pressured them to use a different transfer agent. [15] However, to the extent that plaintiff's tortious interference claim is based on DTC's general publication of lists of institutions that have been approved as DRS-eligible, plaintiff has not adequately alleged malice. There are plain business justifications for the general publication of such lists, and plaintiff cannot plausibly contend that these publications were made solely to injure Olde Monmouth.

[31]** DTC argues that plaintiff has failed to allege any specific business relationships that were terminated as a result of defendants' communications. And it is true that plaintiff's specific allegations of DTC's communications with Olde Monmouth's customers--PAID, Inc. and ERF Wireless Company--do not allege that either of those customers actually terminated their relationships with plaintiff as a result of DTC's communications. Compl. PP 34-37. However, the complaint later asserts that: "As a proximate result of the conduct alleged herein [DTC's allegedly tortious communications with plaintiff's actual and potential customers], these actual and potential customers terminated or are contemplating the termination of their prospective economic relationships with Olde Monmouth and did not do further business with Olde Def Monmouth." Compl. P 81. The mere contemplation of terminating a business relationship would not suffice to show actual damages, but actual termination would. Once again construing the complaint liberally and accepting its factual allegations as true for the purposes of a motion to dismiss, I conclude that Olde Monmouth has sufficiently alleged that DTC's communications **[**32]** caused actual damages. Therefore I deny defendants' motion to dismiss plaintiff's Seventh Cause of Action.

Whether plaintiff can prove all the elements of a tortious interference claim is, of course, a different question, which will no doubt be explored in discovery.

F. Plaintiff's Motion for a Preliminary Injunction

As noted *supra*, plaintiff's present motion for a preliminary injunction depends entirely upon its antitrust claims. Since those claims will be dismissed, it necessarily follows that plaintiff's motion for a preliminary injunction must be denied.

III. CONCLUSION

---

[15] endants' submissions assert that Olde Monmouth instituted exorbitant fee increases--such that the charge for a single withdrawal by transfer increased from $35 to $700--and that DTC's communications with Olde Monmouth's customers were entirely reasonable under these circumstances. Defs.' Opp'n Br. at 9-10. Although plaintiff does not appear to dispute the magnitude of the fee increases, I do not presently address the justifications asserted by DTC because a motion to dismiss deals only with the sufficiency of the complaint.

For the foregoing reasons, defendants' motion to dismiss plantinff's First through Sixth Causes of Action in the complaint **[*399]** under *Federal Rule of Civil Procedure 12(b)(6)* is granted.

Plaintiff's motion for a preliminary injunction is denied.

Defendants' motion to dismiss plaintiff's Seventh Cause of Action is denied. With respect to that cause of action only, counsel for the parties are directed to meet and draft a proposed discovery plan pursuant to *Rule 26(f)*. Counsel are further directed to file that with the Court not later than May 23, 2007.

[33]** The foregoing is SO ORDERED.

Dated: New York, New York

April 23, 2007

CHARLES S. HAIGHT, JR.

SENIOR UNITED STATES DISTRICT JUDGE

Roberson v. Medtronic, Inc.

United States District Court for the Western District of Tennessee, Western Division

April 23, 2007, Decided; April 23, 2007, Filed

Case No. 04-2183 D/P

Reporter

494 F. Supp. 2d 864 *; 2007 U.S. Dist. LEXIS 50779 **

TIMOTHY ROBERSON AND GWENDOLYN A. ROBERSON, for themselves and as representatives of a class, Plaintiffs, MEDTRONIC, INC.; MEDTRONIC SOFAMOR DANEK USA, INC.; MICHAEL F. DEMANE; TODD N. SHELDON; GREG SELLERS; JEFF MOORE; MIKE HARRAH; LAURENCE FAIREY; RON PICARD; TED BIRD; HANK PELLEGRIN; LISA BUCKLER; DAVID MILLER; ROBERT A. COMPTOM; KEVIN FOLEY; CLAUDIO FELER; MAURICE M. SMITH; and SEMMES-MURPHEY CLINIC, a Professional Corporation, Defendants.

Core Terms

Defendants', motion to dismiss, antitrust, conspiracy, cognizable, injuries, statute of limitations, antitrust violation, anti trust law, notice, consumer protection, alleged violation, antitrust claim, predicate act, time barred, anticompetitive, allegations, grounds, repose

LexisNexis® Headnotes

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

HN1[] Motions to Dismiss, Failure to State Claim

Fed. R. Civ. P. 12(b)(6) enables a defendant to file a motion to dismiss for a plaintiff's failure to state a claim upon which relief can be granted. Motions to dismiss under Fed. R. Civ. P. 12(b)(6) are designed to test whether a cognizable claim has been pleaded in the complaint. Dismissal under Fed. R. Civ. P. 12(b)(6) is appropriate when no set of facts exists which would entitle the plaintiff to recover. Essentially, it allows the court to dismiss meritless cases which would otherwise waste judicial resources and result in unnecessary discovery.

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

HN2[] Motions to Dismiss, Failure to State Claim

In reviewing a defendant's Fed. R. Civ. P. 12(b)(6) motion to dismiss, a district court should construe the complaint in the light most favorable to the plaintiff and determine whether the plaintiff undoubtedly can prove no set of facts in support of her claims that would entitle her to relief. If an allegation is capable of more than one inference, it must be construed in the plaintiff's favor.

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

HN3[] **Motions to Dismiss, Failure to State Claim**

A district court may not grant a defendant's *Fed. R. Civ. P. 12(b)(6)* motion to dismiss based on its disbelief of the plaintiff's factual allegations. It is not the court's function to weigh evidence or evaluate the credibility of witnesses. A court will not consider any disputed questions of fact at this stage. Rather, the court should accept all well-pleaded facts as true and not consider matters outside the pleadings.

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

HN4[] **Motions to Dismiss, Failure to State Claim**

The United States Supreme Court has held that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Thus, the standard to be applied when evaluating a motion to dismiss for failure to state a claim is very liberal in favor of the party opposing the motion. Even if the plaintiff's chances of success are remote or unlikely, a motion to dismiss should be denied.

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

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN5[] **State Regulation, Claims**

See *Tenn. Code Ann. § 47-18-109(a)(1)*.

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

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN6[] **Trade Practices & Unfair Competition, State Regulation**

Physicians are not immune from claims under the Tennessee Consumer Protection Act (TCPA), *Tenn. Code Ann. § 47-18-101 et seq.*, and allegations of unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of the entrepreneurial, commercial, or business aspect of a physician's practice may properly be brought under the TCPA.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

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

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

HN7[] **Standing, Requirements**

To be cognizable, an antitrust claim must assert injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. According to the United States Supreme Court, merely alleging violations of the antitrust laws is not enough to sustain a private antitrust claim. A plaintiff must also establish antitrust injury. The Supreme Court has explained that the antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior.

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > General Overview

Governments > Legislation > Statutory Remedies & Rights

HN8[] **Bribery, Commercial Bribery**

The Anti-Kickback Act, *42 U.S.C.S. § 1320a-7b*, provides only criminal penalties for its violation and provides no private right of action.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN9[] **Racketeer Influenced & Corrupt Organizations, Claims**

Damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§ 1961-1968*, are generally measured by the harm resulting from the predicate acts of the offenders. Recovery for physical injury or mental suffering is not allowed under RICO because it is not an injury to business or property.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN10[] **Racketeer Influenced & Corrupt Organizations, Claims**

Antitrust violations are not predicate acts under the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. §§ 1961-1968*.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

Governments > Legislation > Statute of Repose

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN11[] **Trade Practices & Unfair Competition, State Regulation**

See *Tenn. Code Ann. § 47-18-110*.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

Governments > Legislation > Statute of Repose

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN12[] Trade Practices & Unfair Competition, State Regulation

The Tennessee Supreme Court has interpreted statutes of repose like *Tenn. Code Ann. § 47-18-110*'s five-year limit as absolute time limits within which action must be brought. The statute of repose in the Tennessee Consumer Protection Act, *Tenn. Code Ann. § 47-18-101 et seq.*, runs from the date of the relevant consumer transaction.

Antitrust & Trade Law > Clayton Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

HN13[] Clayton Act, Defenses

The Clayton Act provides in part that any action to enforce any federal antitrust cause of action shall be forever barred unless commenced within four years after the cause of action accrued, *15 U.S.C.S. § 15b*, plus any additional number of years during which the statute of limitations was tolled. Generally, a cause of action under federal antitrust laws accrues when the defendant commits an act which injures the plaintiff's business. In the context of an ongoing conspiracy to violate the antitrust laws, the cause of action accrues anew each time the plaintiff is injured.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN14[] Racketeer Influenced & Corrupt Organizations, Claims

While the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§ 1961-1968*, does not provide an express statute of limitations for actions brought under its civil enforcement provision, the United States Supreme Court has concluded that the appropriate statute of limitations to be applied in RICO actions is the four-year statute of limitations applicable to Clayton Act civil enforcement actions. A civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern.

Counsel: [1]** For Timothy Roberson, Gwendolyn A. Roberson, for themselves and as representatives of a class, Plaintiffs: Duncan E. Ragsdale, Jr., LEAD ATTORNEY, LAW OFFICE OF DUNCAN E. RAGSDALE, Memphis, TN.

For Medtronic, Inc., Medtronic Sofamor Danek USA,Inc., Michael F. Demane, Todd N. Sheldon, Greg Sellers, Jeff Moore, Mike Harrah, Laurence Fairey, Ron Picard, Ted Bird, Hank Pellegrin, Lisa Buckler, David Miller, Robert A. Compton, Defendants: Corey W Roush, Mitchell E. Zamoff, LEAD ATTORNEYS, HOGAN & HARTSON LLP, Washington, DC; Douglas F. Halijan, Nathan A. Bicks, LEAD ATTORNEYS, BURCH PORTER & JOHNSON, Memphis, TN; Mary Alison Hale, LEAD ATTORNEY, BURCH PORTER & JOHNSON PLLC, Memphis, TN.

For Dr Kevin T Foley, Claudio Feler, Maurice M. Smith, Semmes-Murphey Clinic, a Professional Corporation, Defendants: Buckner Wellford, Jennifer A. Sink, BAKER DONELSON BEARMAN CALDWELL & BERKOWITZ, Memphis, TN.

Judges: Bernice B. Donald, UNITED STATES DISTRICT JUDGE.

Opinion by: Bernice B. Donald

Opinion

[*866]

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Before the Court are Defendants' motions (D.E. ## 6, 10) to dismiss the above-captioned case, pursuant to *Fed. R. Civ. P. 12(b)(6)*. Plaintiffs assert that Defendants entered into a nationwide **[**2]** conspiracy "for the purpose of monopolizing the sale [] and controlling the prices" of medical equipment, in violation of the Tennessee Consumer Protection Act, *Tenn. Code Ann. § 47-25-101*; the Federal Anti-Kickback Act, *42 U.S.C. 1320a-7b*; the Sherman Antitrust Act, *15 U.S.C. §§ 1-7*; and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1961-68*. [1] This Court has jurisdiction pursuant to *28 U.S.C. §§ 1331* and *1367*. For the following reasons, the Court grants Defendants' motions to dismiss.

I. STANDARD OF REVIEW

HN1[] *Federal Rule of Civil Procedure 12(b)(6)* enables a defendant to file a motion to dismiss for a plaintiff's failure to state a claim upon which relief can be granted. Motions to dismiss under *Fed. R. Civ. P. 12(b)(6)* are designed to test "whether a cognizable claim has been pleaded in the complaint." *Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988)*. Dismissal under *Fed. R. Civ. P. 12(b)(6)* is appropriate when no set of facts exists which would entitle the plaintiff to recover. *Hammond v. Baldwin, 866 F.2d 172, 175 (6th Cir. 1989)*. Essentially, it allows the court to dismiss meritless cases which would otherwise waste judicial resources and result in unnecessary discovery. See, e.g., *Neitzke v. Williams, 490 U.S. 319, 326-27, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989)*.

HN2[] In reviewing a defendant's *Rule 12(b)(6)* motion to dismiss, a district court should construe the complaint in the light most favorable to the plaintiff and determine whether the plaintiff undoubtedly can prove no set of facts in support of her claims that would entitle her to relief. *Meador v. Cabinet for Human Res., 902 F.2d 474, 475 (6th Cir. 1990)*, cert. denied, *498 U.S. 867, 111 S. Ct. 182, 112 L. Ed. 2d 145 (1990)*. **[**4]** If an allegation is capable of more than one inference, it must be construed in the plaintiff's favor. *Sinay v. Lamson & Sessions Co., 948 F.2d 1037, 1039-40 (6th Cir. 1991)*.

HN3[] A district court may not grant a defendant's *Fed. R. Civ. P. 12(b)(6)* motion to dismiss based on its disbelief of the plaintiff's factual allegations. *In re Sofamor Danek Group, Inc., 123 F.3d 394 (6th Cir. 1997)*, cert. denied, *Murphy v. Sofamor Danek Group, Inc., 523 U.S. 1106, 118 S. Ct. 1675, 140 L. Ed. 2d 813 (1998)*. It is not the court's function to weigh evidence or evaluate the credibility of witnesses. *Miller v. Currie, 50 F.3d 373, 377 (6th Cir. 1995)*. A court will not consider any disputed questions of fact at this stage. *Barnes v. Winchell, 105 F.3d 1111, 1114 (6th Cir. 1997)*. Rather, the court should accept all well-pleaded facts as true and not consider matters outside the pleadings. *Hammond, 866 F.2d at 175*.

HN4[] The United States Supreme Court has held that "a complaint should not be dismissed **[*867]** for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*; see also *Neitzke, 490 U.S. at 326-27*; *Lewis, 135 F.3d at 405 (6th Cir. 1997)*. **[**5]** Thus, the standard to be applied when evaluating a motion to dismiss for failure to state a claim is very liberal in favor of the party opposing the motion. *Westlake v. Lucas, 537 F.2d 857, 858 (6th Cir. 1976)*. Even if the plaintiff's chances of success are remote or

[1] Claims of conspiracy in violation of the above referenced federal and state statutes are all contained in Count I of the complaint. Counts II and III of the complaint are vaguely worded accusations of "misrepresentation," and do not set forth any clearly discernible causes of action. While *Fed. R. Civ. P. 8* requires only a "short and plain statement of the claim" and "simple, concise, and direct" allegations, Counts II and III fail to satisfy even these minimal requirements and do not provide Defendants with fair notice of their alleged misconduct in order to prepare an appropriate responsive pleading. Accordingly, the Court will not consider Counts II and III in its ruling **[**3]** on the instant motions to dismiss.

unlikely, a motion to dismiss should be denied. *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*.

II. FACTUAL BACKGROUND [2]

On July 7, 2000, Defendant Kevin T. Foley, M.D., an employee of the Semmes-Murphey Clinic, advised Plaintiff Timothy Roberson that he had a ruptured disc. (Compl. P 31.) Dr. Foley recommended that Mr. Roberson allow Dr. Foley to purchase for him the TSRH Spinal System, manufactured by Defendants Medtronic, Inc. and/or Medtronic Sofamor Danek USA, Inc. (collectively "Medtronic"), to fuse his back. Id. PP 30, 34. Mr. Roberson contends that Dr. Foley's diagnosis of a ruptured disc was false. Id. P 31. Mr. Roberson further contends **[**6]** that the use of the Medtronic device was not needed and did not meet the FDA and Medtronic criteria for its use. Id. P 30.

Plaintiffs allege that Dr. Foley's misrepresentations were part of a conspiracy created by Medtronic to monopolize the sale of medical devices and to control the prices thereof by inducing physicians, in Tennessee and nationwide, to exclusively purchase, order for, or recommend to their patients, Medtronic devices, including the TSRH Spinal System. (Compl. PP 26-29.) The alleged conspiracy involved overt acts by Medtronic, which included paying for travel, resort/hotel accommodations, recreation activities, and car rentals for physicians and their families, and paying physicians for unearned commissions, royalties and consulting contracts. Id. P 26.

III. PROCEDURAL BACKGROUND

On November 13, 2006, Plaintiffs filed the instant complaint in Shelby County Circuit Court, on behalf of themselves and as representatives of a class of persons injured as a result of the alleged conspiracy, against Medtronic, Inc., Medtronic Sofamor Danek USA, and their employees Michael DeMane, Todd Sheldon, Greg Sellers, Jeff Moore, Mike Harrah, Laurence Fairey, Ron Picard, Ted Bird, Hank **[**7]** Pellegrin, Lisa Buckler, David Miller, and Robert Compton (collectively, "the Medtronic Defendants"); and Semmes-Murphey Clinic and its employees Kevin Foley, M.D., Claudio Feler, M.D., and Maurice Smith, M.D. (collectively, "the Semmes-Murphey Defendants"). On December 22, 2006, Defendants removed the case to federal court on federal question and Class Action Fairness Act grounds.

On December 28, 2006, Plaintiff filed a notice of voluntary dismissal pursuant to *Fed. R. Civ. P. 41*, attempting to excise from the complaint all federal and class action issues. On January 3, 2007, Defendants filed objections to Plaintiffs' notice of voluntary dismissal on grounds that "*Rule 41(a)* provides for the dismissal of 'actions,' not individual allegations or claims." (Def.'s Resp. Pl.'s Notice Voluntary Dismissal 1.)

[*868] Also on January 3, 2007, the Medtronic Defendants filed their answer to Plaintiffs' complaint and moved to dismiss the complaint pursuant to *Rule 12(b)(6)*. On January 4, 2007, the Semmes-Murphey Defendants filed their own answer and motion to dismiss. In their motion to dismiss, the Semmes-Murphey Defendants adopted and incorporated the arguments of the Medtronic Defendants' motion to **[**8]** dismiss. They also argued that any medical malpractice claims by Plaintiffs are barred by the statute of repose provided under Tennessee medical malpractice law. [3]

On January 10, 2007, Plaintiffs, in apparent response to the aforementioned objections raised by Defendants and prior to any ruling by the Court on their first notice, filed a second notice of voluntary dismissal without prejudice as to the entire complaint. Defendants objected on grounds that Plaintiffs had failed to seek or obtain Defendants' consent to the dismissal as required after a defendant has answered under *Fed. R. Civ. P. 41(a)*.

[2] The complaint's "Statement of Fact" consists chiefly of legal citations and conclusions of law and very little in the way of factual detail. The few factual allegations provided by Plaintiffs are summarized herein and are presumed to be true for purposes of the instant motion only.

[3] The Court finds that Plaintiff has not stated a discernible medical malpractice claim. Consequently, the Court will not discuss this argument by the Semmes-Murphey Defendants.

In a status conference held on February 1, 2007, this Court affirmed Defendants' reading of *Rule 41*, finding Plaintiffs' second notice of dismissal improper and declaring its intention to rule on the merits of Defendants' *12(b)(6)* motion to dismiss. [4]

IV. ANALYSIS

A. Injury

Defendants argue that all of Plaintiffs' claims should be dismissed because personal injury is not cognizable under any of the statutes relied upon in Plaintiffs' complaint. (Mem. Supp. Medtronic Defs.' Mot. Dismiss 4.) Defendants support this argument with the assertion that the "only injury alleged here is the bodily physical injury that Roberson purportedly suffered as a result of surgery," citing paragraphs 33 and 34 of the complaint. Id.

The Court has reviewed the cited paragraphs and finds Defendants' assertion as to the nature of Plaintiffs' injury unsubstantiated. In fact, the complaint offers little clue as to the type of injury Plaintiffs are claiming. Paragraph 33 of the complaint states that "[a]s a direct, proximate, factual, and legal result [of Dr. Foley's misrepresentation regarding the need for Medtronic's medical device], Mr. Roberson was injured." Similarly, paragraph 34 states that "[a]s a result of Mr. Roberson's reliance upon the truth of [Dr. Foley's] representation, Mr. Roberson was injured." Other than placing a $ 10 million dollar value **[**10]** on the "injuries and damages suffered by Timothy J. Roberson", (Compl. 12), there is no information in the complaint as to the nature or extent of Mr. Roberson's alleged injuries or how they occurred. [5] Since bodily harm, pain and suffering, medical expenses, and lost earnings are all types of injury that might conceivably result from the wrongdoing Plaintiffs allege, Defendants' general conclusion that Plaintiffs have suffered only "personal, non-economic" harm, (Mem. Supp. Medtronic Defs.' Mot. Dismiss 5), is **[*869]** premature and unsupported by the language of the complaint.

1. Tennessee Consumer Protection Act (TCPA)

Plaintiffs allege violation of the Tennessee Consumer Protection Act, *Tenn. Code Ann. § 47-18-101, et seq.* (Compl. P 32.) Defendants counter that the TCPA does not provide a private right of action for the type of injury claimed by Plaintiffs. (Mem. Supp. Medtronic Defs.' Mot. Dismiss 8-9.)

Tenn. Code. Ann. § 47-18-109(a)(1) provides that

> ***HN5***[] Any person who suffers an ascertainable **[**11]** loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually to recover actual damages.

As noted supra, Plaintiffs have not specified whether their injuries are bodily, psychological, or pecuniary, or a combination thereof. Since an action for pecuniary damage, i.e., "an ascertainable loss of money," is available under *§ 47-18-109*, dismissal on grounds that the TCPA does not cover the type of injury claimed is inappropriate.

Defendants further assert that Plaintiffs' claim is invalid because medical malpractice claims cannot be brought under the TCPA. (Mem. Supp. Medtronic Defs.' Mot. Dismiss 9.) Defendants cite *Constant v. Wyeth, 352 F. Supp.*

---

[4] Given that the motions to dismiss of the Medtronic and Semmes-Murphey Defendants are virtually identical, the Court will treat the two motions as one for the purposes **[**9]** of this order and will hereinafter refer to the two groups of defendants collectively as "Defendants."

[5] The complaint also seeks $ 2 million for Plaintiff Gwendolyn Roberson's injuries, although the complaint contains no additional mention of Ms. Roberson, her involvement in the case, or the nature of her injury.

2d 847 (M.D. Tenn. 2003), for the proposition that "medical malpractice claims may not be recast as consumer protection act claims." Id. However, the Constant court made clear that **HN6**[] physicians are not immune from TCPA claims and that "allegations of unfair, unconscionable, or deceptive methods, acts, or practices in the **[**12]** conduct of the entrepreneurial, commercial, or business aspect of a physician's practice" may properly be brought under the TCPA. *Constant, 352 F. Supp. 2d at 854 n.10* (citation omitted).

Applying this concept to the case at hand, the Court concludes that Plaintiffs' allegations against Dr. Foley, and his alleged co-conspirators, implicates Dr. Foley's business practices rather than his medical services, specifically his inducement of Mr. Roberson to buy a medical device he did not need. Accordingly, the Court finds dismissal of Plaintiffs' TCPA claim on this ground to also be inappropriate.

Finally, Defendants argue that Plaintiffs' TCPA claim should be dismissed because the claim is based on allegations of antitrust violations which do not fall within the scope of the TCPA. (Mem. Supp. Medtronic Defs.' Mot. Dismiss 9.) Defendants base their argument on a Tennessee Court of Appeals decision, *Sherwood v. Microsoft Corp., No. M20000-01850-COA-R9-CV, 2003 Tenn. App. LEXIS 539, 2003 WL 21780975, at *33 (Tenn. Ct. App. July 31, 2003)*, holding that "claims based upon anticompetitive conduct are not cognizable under the TCPA."

While Plaintiffs do allege a "conspiracy to attempt to monopolize the sale of medical devices **[**13]** and to control the prices thereof," (Compl. P 26), the alleged deception by Dr. Foley, which is at the heart of Plaintiffs' complaint, is quite independent of any anticompetitive effect resulting from the alleged conspiracy. Consequently, the Court disagrees with Defendants' basic premise that Plaintiffs' TCPA claim is "based upon" anticompetitive conduct. Accordingly, the Court finds Defendants' argument unavailing and the case law cited by Defendants to be inapplicable to the claim at issue. Thus, the Court rejects **[*870]** dismissal of Plaintiffs' TCPA claim on "anticompetitive injury" grounds.

2. Antitrust Violations

Plaintiffs allege violation of the Tennessee Antitrust Act, *Tenn. Code Ann. § 47-25-101*, and the Sherman Antitrust Act, *15 U.S.C. §§ 1-7*. (Compl. P 32.) Defendants counter that to bring an antitrust suit Plaintiffs must not only allege antitrust violations, but also must assert an injury to the Plaintiffs' business or property flowing from the alleged antitrust violations. (Mem. Supp. Medtronic Defs.' Mot. Dismiss 5.) Defendants maintain that since Plaintiffs only allege "personal bodily harm," they lack standing to bring federal or state ***antitrust law*** claims. Id. The Court has **[**14]** rejected supra Defendants' premise that Plaintiffs have alleged only bodily harm. Consequently, the Court finds that dismissal on such basis is unwarranted.

Defendants further argue that dismissal is appropriate because Plaintiffs' alleged injuries do not flow from the alleged anticompetitive behavior. (Mem. Supp. Medtronic Defs.' Mot. Dismiss 6.) Citing Supreme Court precedent, Defendants assert that, **HN7**[] to be cognizable, an antitrust claim must assert injury "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Id. (quoting *Brunswick Corp. v. Pueblo Bowl-O-Matic, 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*.

According to the Supreme Court, merely alleging violations of the antitrust laws is not enough to sustain a private antitrust claim. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 529, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. Plaintiff must also establish antitrust injury. *Id.* The Court has explained that the "antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a *competition-reducing* aspect or effect of the defendant's behavior." *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* **[**15]** (emphasis added).

Plaintiffs allege that Dr. Foley, induced by the favors extended by Medtronic to participating doctors, misdiagnosed Plaintiff and persuaded him to authorize the purchase of medical equipment which was not needed. Again, the Court is confronted with the ambiguity as to the nature of Plaintiffs' injury. If the injury is solely bodily in nature, then the Court would have to conclude that such injury is unrelated to "competition-reducing aspects" of the alleged conspiracy. On the other hand, if Plaintiffs' injury is pecuniary, and such pecuniary loss stems from Medtronic's inducement of Dr. Foley to favor its products over those of its competitors, then such loss would arguably fall within the ambit of the antitrust statutes.

At this juncture the Court lacks the necessary information to determine whether Plaintiffs have a viable antitrust claim. Accordingly, the Court finds that dismissal on the basis of lack of "antitrust injury" is inappropriate at this time.

3. Federal Anti-Kickback Act

Plaintiffs allege violation of the Federal Anti-Kickback Act, *42 U.S.C. § 1320a-7b*. (Compl. P 32.) Defendants argue that the anti-kickback statute is a criminal statute, and provides no **[**16]** private right of action. (Mem. Supp. Medtronic Defs.' Mot. Dismiss 10.)

The language of the statute and relevant case law support Defendants' position that ***HN8***[] the Anti-Kickback Act provides only criminal penalties for its violation and provides no private right of action. See *West Allis Memorial Hosp., Inc. v. Bowen, 852 F.2d 251, 255 (7th Cir.1988)*; *United States ex* ***[*871]*** *rel. Barrett v. Columbia/HCA Health Care Corp., 251 F.Supp.2d 28, 37 (D.D.C. 2003)*; *Donovan v. Rothman, 106 F.Supp.2d 513, 516 (S.D.N.Y.2000)*. Accordingly, the Court grants Defendants motion to dismiss Plaintiffs' Anti-Kickback Act claims for failure to state a claim upon which relief can be granted.

4. Racketeer Influenced and Corrupt Organizations Act (RICO)

Plaintiffs allege violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. §§ 1961-68*. (Compl. P 32.) Defendants respond with its now familiar argument that Plaintiffs lack standing to seek remedy under RICO because they have alleged only personal injuries. (Mem. Supp. Medtronic Defs.' Mot. Dismiss 7.)

HN9[] Damages under RICO are generally measured by the harm resulting from the predicate acts of the offenders. *Fleischauer v. Feltner, 879 F.2d 1290, 1299 (6th Cir. 2002)*. **[**17]** Recovery for physical injury or mental suffering is not allowed under RICO because it is not an injury to business or property. *Id. at 1300*. However, as the Court has noted, it is unsettled whether Plaintiffs allege property damage as well as bodily harm. Consequently, dismissal on this basis of this argument is inappropriate.

Defendants further argue that Plaintiffs' RICO claims fail because they contain no allegation of a cognizable predicate act under RICO. (Mem. Supp. Medtronic Defs.' Mot. Dismiss 8.) Defendants note that the only predicate act alleged in the complaint is "Defendants' violation of the Sherman Antitrust Act." (Mem. Supp. Medtronic Defs.' Mot. Dismiss 8.) (quoting Compl. P 21). Because a violation of ***antitrust law*** is not a predicate act under RICO, Defendants argue, Plaintiffs' claim must fail.

The language of the *RICO* statute and relevant case law support Defendants' position that ***HN10***[] antitrust violations are not RICO predicate acts. See *Jennings v. Emry, 910 F.2d 1434, 1438 (7th Cir. 1990)*; *Prince Heaton Enterprises, Inc. v. Buffalo's Franchise Concepts, Inc., 117 F. Supp. 2d 1357, 1363 (N.D. Ga. 2000)*. Accordingly, the Court grants Defendants' motion to dismiss Plaintiffs' **[**18]** RICO claims.

B. Statutes of Limitation and Repose

In addition to the foregoing arguments as to why Plaintiffs' claims are not cognizable, Defendants further argue that the claims are time barred because they were filed more than six years after Plaintiffs' alleged injuries. (Mem. Supp.

Medtronic Defs.' Mot. Dismiss 11.) Plaintiffs do not address the issue of statutes of limitations or repose in the complaint, nor have they filed a response to Defendants' assertions. [6]

1. Tennessee Consumer Protection Act (TCPA)

Tenn. Code Ann. § 47-18-110 provides that

> ***HN11***[] Any action commenced pursuant to *§ 47-18-109* [7] shall be brought within one (1) year from a person's discovery of the unlawful act or practice, but in no event shall an action under *§ 47-18-109* be brought more than five (5) years **[*872]** after the date of the consumer transaction giving rise to the claim for relief.

HN12[] The Tennessee Supreme Court has interpreted statutes of repose **[**19]** like *§ 47-18-110*'s five-year limit as "absolute time limit[s] within which action must be brought." *Penley v. Honda Motor Co., Ltd., 31 S.W.3d 181, 184 (Tenn. 2000)*.

The statute of repose in the TCPA runs from the date of the relevant consumer transaction. See *Bolden v. Aames Funding Corp., No. 03-2827, 2005 U.S. Dist. LEXIS 44091, 2005 WL 948592, *4 (W.D. Tenn. Feb. 25, 2005)*. Because Plaintiffs filed their complaint well over five years from the July 7, 2000 and August 16, 2000 transaction dates cited by Plaintiffs, the Court must conclude that Plaintiffs' TCPA claims are time barred. Accordingly, the Court grants Defendants' motion to dismiss Plaintiffs' TCPA claims.

2. Antitrust Violations

HN13[] The Clayton Act provides in pertinent part that "[a]ny action to enforce any [federal antitrust] cause of action [] shall be forever barred unless commenced within four years after the cause of action accrued," *15 U.S.C. § 15b (2000)*, "plus any additional number **[**20]** of years during which the statute of limitations was tolled." *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*. Generally, a cause of action under federal antitrust laws accrues when the defendant commits an act which injures the plaintiff's business. Id. In the context of an ongoing conspiracy to violate the antitrust laws, the cause of action accrues anew each time the plaintiff is injured. Id.

Plaintiffs set forth two dates on which injury is alleged to have occurred: July 7, 2000 and August 16, 2000. Both of these dates fall outside the statutory period. Since the complaint was filed well beyond the statutory deadline and Plaintiffs have presented no argument as to why the limitation period should commence on a different date or why the statute of limitations should be tolled, the Court finds Plaintiffs' federal antitrust claims time barred. Accordingly, Defendants' motion to dismiss Plaintiffs' federal antitrust claims is granted.

3. Racketeer Influenced and Corrupt Organizations Act (RICO)

HN14[] While RICO does not provide an express statute of limitations for actions brought under its civil enforcement provision, the Supreme Court has concluded that the appropriate **[**21]** statute of limitations to be applied in RICO actions is the four-year statute of limitations applicable to Clayton Act civil enforcement actions. *Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 147, 107 S. Ct. 2759, 97 L. Ed. 2d 121*

---

[6] In the February 1, 2007 status conference, Plaintiffs' counsel stipulated that its presentation in that hearing was to serve as response to Defendants' motion to dismiss. Plaintiffs' counsel did not respond to Defendants' statute of limitations/repose assertions in that hearing.

[7] *Tenn. Code Ann. § 47-18-109* is the provision of the TCPA providing for a private cause of action for unfair or deceptive acts or practices. Although not specifically mentioned in the complaint, it is the provision under which Plaintiff presumably makes her TCPA claim.

(1987). "[A] civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern." *Agristor Financial Corp. v. Van Sickle, 967 F.2d 233, 241 (6th Cir.1992)*.

Plaintiffs' complaint does not raise the issue of when their injuries were discovered, nor have they filed a response to Defendants' statute of limitations argument. As the Court has previously noted, the complaint was filed well beyond the statutory deadline and Plaintiffs have presented no argument as to why the statutory period should commence on a different date or why the statute of limitations should be tolled. Consequently, in addition to its conclusion that Plaintiffs have not made a cognizable RICO claim, the Court further concludes that Plaintiffs' federal RICO claims are time barred.

V. CONCLUSION

For the reasons stated herein, the Court concludes that Plaintiffs' claims **[**22]** against **[*873]** Defendants are either invalid or time barred. Accordingly, the Court **GRANTS** Defendants' motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*.

IT IS SO ORDERED this 23rd day of April, 2007.

s/ Bernice B. Donald

UNITED STATES DISTRICT JUDGE

[Southwire Co. v. J.P. Morgan Chase & Co.]

United States District Court for the Western District of Wisconsin

April 24, 2007, Decided

MDL Docket No. 1303, 02-C-707-C, 03-C-314-C, 03-C-316-C, 03-C-317-C, 03-C-318-C, 03-C-368-C, 06-C-169-C

Reporter

528 F. Supp. 2d 908 *; 2007 U.S. Dist. LEXIS 30294 **; 2007-1 Trade Cas. (CCH) P75,708

SOUTHWIRE COMPANY, GASTON COPPER RECYCLING CORPORATION, ASARCO INC., n/k/a ASARCO LLC, KENNECOTT UTAH COPPER CORP., LEVITON MANUFACTURING CO., INC., AMERICAN INSULATED WIRE CORPORATION, ESSEX ELECTRIC, INC., n/k/a EXEON INC., MUELLER COPPER TUBE CO., INC., MUELLER COPPER TUBE PRODUCTS, INC., SUPERIOR TELECOM, INC., n/k/a SUPERIOR ESSEX INC., AETNA INSULATED WIRE; CERRO E.M.S. LIMITED, CERRO FABRICATED PRODUCTS, INC., CERRO FLOW PRODUCTS, INC., CERRO METAL PRODUCTS COMPANY, CERRO WIRE & CABLE CO., INC., COMTRAN CORPORATION, HENDRIX WIRE & CABLE, INC., THE KERITE COMPANY, ROCKBESTOS-SURPRENANT CABLE CORP. and OWL WIRE AND CABLE INC., Plaintiffs, v. J.P. MORGAN CHASE & CO., as successor to J.P. MORGAN & CO., INC. and MORGAN GUARANTY TRUST COMPANY OF NEW YORK, Defendants.

Prior History: Southwire Co. v. J.P. Morgan Chase & Co., 2004 U.S. Dist. LEXIS 7418 (W.D. Wis., Apr. 23, 2004)

Core Terms

copper, defendants', purchases, producers, transactions, integrated, manipulation, plaintiffs', trading, Metal, cathode, calculating, antitrust, merchants, damages, documents, conspiracy, Wire, prices, Products, vendor, tons, Commodities, positions, equation, hedging, options, variable, parties, records

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Sherman Act > Claims

HN1[] Clayton Act, Claims

Section 4 of the Sherman Act, 15 U.S.C.S. § 1, makes illegal every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations and subjects persons found guilty of such conspiracies to criminal penalties. Section 1 of the Clayton Act, 15 U.S.C.S. § 15, gives persons injured by anything forbidden in the antitrust laws the right to sue for relief in federal court. To prove the elements of a claim under § 4 of the Sherman Act of knowing participation in a conspiracy, a plaintiff must come forward with evidence showing that the defendant had a conscious commitment to a common scheme to achieve an unlawful objective.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN2[] **Antitrust & Trade Law, Sherman Act**

Ordinarily, when a court decides a motion for summary judgment, it must view the facts in the light most favorable to the party opposing the motion. But ***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *15 U.S.C.S. § 1* case. To defeat a motion for summary judgment in an antitrust case, the opponent of the motion must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN3[] **Private Actions, Remedies**

To bring suit for an antitrust violation, a plaintiff must have antitrust standing (as distinguished from Article III standing), a component of which is antitrust injury. To qualify as an antitrust injury, an injury must be proximately caused by the direct purchase of a product whose price has been affected by anti-competitive behavior.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses > Helpfulness

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN4[] **Expert Witnesses, Daubert Standard**

See *Fed. R. Evid. 702*.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN5[] **Testimony, Expert Witnesses**

Fed. R. Evid. 702 imposes a special obligation upon a trial judge to ensure that any and all scientific testimony is not only relevant, but reliable. The trial judge's gate keeping obligation applies not only to testimony based on scientific knowledge, but also to testimony based on technical and other specialized knowledge.

Evidence > Admissibility > Expert Witnesses

HN6[] **Admissibility, Expert Witnesses**

When determining whether expert testimony is admissible, district courts employ a two-step inquiry. First, the court examines the expert's testimony to determine whether it is reliable, that is, whether it is grounded in scientific evidence or in subjective belief or unsupported speculation. Second, the court must determine whether the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses

HN7[] Expert Witnesses, Daubert Standard

When an expert proposes to give testimony that is scientific (whether derived from the natural or social sciences), courts engage in a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. A number of factors bear on the scientific validity of the expert's testimony, including whether the theory or technique can be and has been tested; whether the theory or technique has been subjected to peer review or scientific scrutiny within the scholarly community; and the reliability of the technique, including the potential rate of error and the general acceptance it enjoys. The evidentiary inquiry is meant to be flexible and fact specific, and a court should use, adapt, or reject Daubert factors as the particular case demands. There is no single requirement for admissibility as long as the proffer indicates that the expert evidence is reliable and relevant.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN8[] Expert Witnesses, Daubert Standard

In deciding whether an expert's opinion is admissible under Daubert, a district court must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist. The supposed uniqueness of a market does not justify substituting a guess for careful analysis. Essentially, an expert must adhere to the same standards of intellectual rigor that are demanded in their professional work. The expert's work must be reasoned and founded on data, and the expert must explain his conclusions.

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Expert Witnesses > Credibility of Witnesses > General Overview

HN9[] Admissibility, Expert Witnesses

In serving its gatekeeping function, the court must be careful not to cross over into the role of factfinder. It is not the job of the court to insure that the evidence heard by the jury is error-free, but to insure that it is not wholly unreliable. Whether the expert is credible or whether his or her theories are correct given the circumstances of a particular case is a factual one that is left for the jury to determine after opposing counsel has been provided the opportunity to cross-examine the expert.

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Documentary Evidence > Writings > General Overview

HN10[] Admissibility, Expert Witnesses

A statistical study that fails to correct for salient explanatory variables, or even to make the most elementary comparisons, has no value as causal explanation and is therefore inadmissible in a federal court.

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Documentary Evidence > Writings > General Overview

HN11[] **Admissibility, Expert Witnesses**

Although some regression analyses may be so incomplete as to be inadmissible, in most cases, failure to include variables will affect the analysis' probativeness, not its admissibility. A statistical study is not inadmissible merely because it is unable to exclude all possible causal factors other than the one of interest.

Evidence > Types of Evidence > Documentary Evidence > Summaries

HN12[] **Documentary Evidence, Summaries**

Although *Fed. R. Evid. 1006* permits a party to introduce in the form of a chart, summary, or calculation the contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court, such evidence remains subject to all evidentiary objections.

Evidence > Admissibility > Expert Witnesses

Evidence > Types of Evidence > Documentary Evidence > Summaries

HN13[] **Admissibility, Expert Witnesses**

Fed. R. Civ. P. 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed this assistance may be needed. *Fed. R. Civ. P. 26(a)(2)(B)*. Although an expert report should be written in a manner that reflects the testimony to be given by the witness and must be signed by the witness, it need not be drafted by him.

Evidence > Admissibility > Expert Witnesses

HN14[] **Admissibility, Expert Witnesses**

Under *Fed. R. Evid. 703*, the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.

Evidence > Admissibility > Expert Witnesses

HN15[] **Admissibility, Expert Witnesses**

Experts may rely on data and other information supplied by third parties. Analyzing data assembled by others is neither illicit nor unusual, even if the data were prepared for litigation by an interested party. Unless the expert's opinion is too speculative, it should not be rejected as unreliable merely because the expert relied on the reports of others.

Evidence > Admissibility > Expert Witnesses

HN16[] **Admissibility, Expert Witnesses**

As a general rule, questions relating to the bases and sources of an expert's opinion affect only the weight to be assigned that opinion rather than its admissibility.

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Expert Witnesses > Credibility of Witnesses > General Overview

HN17[] **Admissibility, Expert Witnesses**

Mistakes and miscalculations are not grounds for excluding evidence. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN18[] **Private Actions, Standing**

In an antitrust action, the stakes are too high to permit plaintiffs to recover damages that may duplicate damages awarded to other plaintiffs. Therefore, the best-situated plaintiff is the plaintiff closest to the antitrust injury.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN19[] **Private Actions, Standing**

When Party A, the antitrust violator, sells to Party B, and then Party C, a down-stream purchaser from B, seeks to recover the implicit overcharges that B passed on to C, C has no standing to bring an antitrust claim. Party B does.

Counsel: **[**1]** For IN RE: KENNECOTT UTAH COPPER CORPORATION, SOUTHWIRE COMPANY (02-C-707), KENNECOTT UTAH COPPER CORPORATION (03-C-316-C), LEVITON MANUFACTURING CO., INC. (03-C-316-C), AMERICAN INSULATED WIRE CORPORATION (03-C-316-C), ESSEX ELECTRIC INC. (03-C-317-C), MUELLER COPPER TUBE COMPANY INC. (03-C-318-C), MUELLER COPPER TUBE PRODUCTS INC. (03-C-318-C), SUPERIOR TELECOM INC. (03-C-368-C), ASARCO INCORPORATED (03-C-314-C), GASTON COPPER RECYCLING CORPORATION (02-C-707), CERRO FLOW PRODUCTS, INC. (06-C-169-C), CERRO METAL PRODUCTS COMPANY (06-C-169-C), CERRO WIRE & CABLE, INC. (06-C-169-C), COMTRAN CORPORATION (06-C-169-C), THE KERITE COMPANY (06-C-169-C), ROCKBESTOS-SURPRENANT CABLE CORP. (06-C-169-C), OWL WIRE AND CABLE, INC. (06-C-169-C), Plaintiffs: WILLIAM R. STEINMETZ, REINHART, BOERNER, VAN DEUREN, MILWAUKEE, WI; JAMES H. BRATTON, JR., SMITH GAMBRELL & RUSSELL, LLP, ATLANTA, GA; BRYAN NOWICKI, REINHART BOERNER VAN DEUREN, MADISON, WI; DANIEL W. HILDEBRAND, DEWITT, ROSS & STEVENS, MADISON, WI; ALLEN D. BLACK, FINE, KAPLAN & BLACK RPC, PHILADELPHIA, PA; JOSEPH GOLDBERG, FREEDMAN, BOYD, DANIELS & HOLLANDER, ALBUQUERQUE, NM; MARK A. GLICK, PARSONS, BEHLE & LATIMER, SALT LAKE CITY, UT; SARA **[**2]** K. BERGER, SMALL BUSINESS LAW CENTER, LLC, ALBUQUERQUE, NM; STANLEY M. GROSSMAN, POMERANTZ HAUDEK BLOCK GROSSMAN & GROSS, NEW YORK, NY; DAVID H. WEINSTEIN, WEINSTEIN KITCHENOFF & ASHER LLC,

PHILADELPHIA, PA; MICHAEL J. GUZMAN, KELLOGG, HUBER, HANSEN, ET AL., WASHINGTON, DC; REBECCA A. BEYNON, KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C., WASHINGTON, DC.

For COPPER ANTITRUST LITIGATION, J.P. MORGAN & COMPANY, MORGAN GUARANTY TRUST CO. OF NEW YORK, Defendants: JAMES H.R. WINDELS, DAVIS, POLK & WARD WELL, NEW YORK, NY; MICHAEL D. LEFFEL, FOLEY & LARDNER LLP, MADISON, WI.

Judges: BARBARA B. CRABB, District Judge.

Opinion by: BARBARA B. CRABB

Opinion

[*910] OPINION AND ORDER

This civil antitrust action for money damages is before the court on the motion of defendants J.P. Morgan Chase & Co. and Morgan Guaranty Trust Company of New York for summary judgment on the claims of plaintiffs Southwire Co., Gaston Copper Recycling Corp., ASARCO LLC, Kennecott Utah Copper Corporation, American Insulated Wire Corporation, Leviton Manufacturing Co., Inc., Exeon Inc., Mueller Copper Tube Co., Inc., Mueller Copper Products, Inc., Superior Essex, Inc., Cerro Flow Products, Inc., Cerro Metal Products Company, **[**3]** Cerro Wire & Cable Co, Inc., Comtran Corporation, The Kerite Company, Rockbestos-Surprenant Cable Corp and Owl Wire and Cable Inc. (Plaintiffs Aetna Insulated Wire, Cerro E.M.S. Limited, Cerro Fabricated Products, Inc., and Hendrix Wire & Cable, Inc., have stipulated that they did not purchase copper cathode or copper rod during the years 1993-1996 and for that reason are not claiming damages in this action. They will be dismissed as parties.)

Plaintiffs contend that defendants violated section 1 of the Clayton Act, *15 U.S.C. § 15*, and section 4 of the Sherman Act, *15 U.S.C. § 1*, by conspiring with Sumitomo Corporation's chief copper trader, Yasuo Hamanaka to "squeeze" the copper market and raise prices for Sumitomo's copper holdings. (A "squeeze" is a "market situation in which the lack of supplies tends to force shorts to cover their positions by offset at higher prices." CFTC Glossary: A Guide to the Language of the Futures Industry, available at *http://www.cftc.gov/opa/glossary/opaglossary_s.htm* **[*911]** (last visited Apr. 23, 2007). Plaintiffs' theory is that defendants were aware that Sumitomo was manipulating copper futures **[**4]** prices and that they provided services and loans to finance and hide Sumitomo's illegal activity. Plaintiffs allege that defendants' deals were structured as individual option and forward transactions but that they were in fact financing arrangements supporting Hamanaka's market manipulations.

Although trial in the case is scheduled to begin on May 29, 2007, defendants believe that trial will not be necessary because plaintiffs lack sufficient evidence from which a jury could find that defendants knowingly agreed with Hamanaka to take actions that would result in a manipulation of the copper market. In addition, defendants argue that plaintiffs cannot establish that they have suffered an antitrust injury because their own damages expert has acknowledged that the econometric model he employed does not attempt to discern whether defendants' allegedly manipulative transactions had any actual effect on the price of copper traded on the New York and London metal exchanges. Defendants maintain that without this information plaintiffs cannot show a connection between the transaction and the price of physical copper. Further, defendants argue, even if plaintiffs can prove a conspiracy between **[**5]** defendants and Hamanaka that affected the price of exchange-traded copper, they lack standing to sue for nearly half the purchases they claim were affected by the conspiracy. Finally, defendants have moved in limine to exclude the reports of plaintiffs' expert witnesses, Christopher Gilbert, Roy Henry and Marianne DeMario.

I conclude that the evidence is sufficiently disputed to allow a jury to find reasonably that defendants "knew that Sumitomo intended to restrain trade, intended that trade be restrained, and materially contributed to that restraint," *Loeb Industries, Inc. v. Sumitomo Corp., 306 F.3d 469, 497 (7th Cir. 2002)*, that the econometric model that plaintiffs' expert has employed is not obviously inadequate to identify the effect of the allegedly manipulative transactions on the price of exchange-traded copper and that although plaintiffs have established their antitrust standing to bring suit, the question of what damages they may receive at trial is not one that can be decided on the present record. Therefore, defendants' motion for summary judgment will be denied in its entirety. In addition, because the expert testimony of Christopher Gilbert, Roy Henry **[**6]** and Marianne DeMario qualifies as expert under *Fed. R. Evid. 702* and *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, defendants' motions in limine to exclude the testimony of these experts will be denied.

From the parties' proposed findings of fact, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

A. The Cast of Characters

Plaintiffs are either integrated producers of copper or manufacturers of copper wire or copper tubing. With the exception of plaintiffs Aetna Insulated Wire, Cerro E.M.S. Limited, Cerro Fabricated Products, Inc., and Hendrix Wire & Cable, Inc., all of them purchased copper cathode, rod or ingot during the period 1993-1996. Defendant J.P. Morgan Chase & Co. is a leading global financial services firm and one of the largest banking institutions in the United States. Defendant Morgan Guaranty Trust Company of New York is a wholly owned subsidiary of defendant J.P. Morgan Chase & Co. (For the purposes of litigation, defendants have been **[*912]** treating themselves as one entity and I will do the same.) J.P. Morgan Securities Ltd. is a securities dealer incorporated in England **[**7]** and Wales and a member of the London Metal Exchange.

Sumitomo Corporation is one of Japan's oldest trading houses, with interests that include banking, computer manufacturing, chemicals, mining and machinery. It is a major metals trader in Japan and in other parts of the world. In the early 1990s, it handled approximately 500,000 metric tons of copper a year, or about 5% of the world's total annual copper production.

Yasuo Hamanaka began working for Sumitomo Corporation in Japan in 1970. In 1985, when he was working as a copper trader in the non-ferrous metal department, he lost $ 6.5 billion yen on Sumitomo's copper transactions. Not wanting to disclose the losses, he began taking steps to cover them up by engaging in a variety of financial transactions, including derivative transactions in the copper future markets that continued into 1996.

Hamanaka was authorized to deal in derivatives and other kinds of financial transactions, but he ignored Sumitomo's internal regulations in the way he carried out the transactions and the purposes for which he pursued them. To give his actions verisimilitude, he counterfeited documents and forged signatures.

In 1993, Keith Murphy was head **[**8]** of defendants' base metal activities, which had their headquarters in London. From 1993 until 1996, he was responsible for direct marketing to existing and prospective global clients with the goal of generating revenue and market share for defendants.

B. Physical Copper

Copper producers extract ore from a mine and crush or mill it into a gravel-like substance known as concentrate. Smelters separate out the nonferrous metals in the concentrate, producing one-meter square plates of anode, which are approximately 90% copper. That anode is refined electrolytically to create sheets of cathode, which are fed into a furnace at a mill and melted into rod or wire. *Loeb Industries, Inc. v. Sumitomo Corp., 306 F. 3d at 475*. Refined copper can also be made from copper scrap, which is recycled and reintroduced into the refining process.

Participants in the physical copper market include integrated producers, smelters, semi-fabricators, merchants and traders, manufacturers, retailers and scrap dealers, all of whom buy and sell copper at each state of the production process. Integrated producers are mining companies engaged in the extraction and refining of copper. They both **[**9]** buy and sell refined and pre-refined products. In the event of a production shortfall, an integrated producer might purchase cathode or rod from a third party, rather than refining copper itself. A consumer cannot tell the specific origin of a particular sheet of cathode from looking at it or at the documentation accompanying delivery.

C. Copper Transactions in General

Copper transactions take place in three markets: the physical copper market, the futures market and the over-the-counter derivatives market. In the physical copper market, customers buy copper in its physical form for further refining, for use in a product or for resale. From October 1993 to December 1996, plaintiffs purchased copper cathode or rod from numerous integrated producers and from merchants. (Although purchases of rod pay a premium over and above that paid for cathode, the court of appeals held that the additional premium does not render the purchaser's injury direct. The premium is small and ends to increase as the Comex price increases. *Loeb Industries, 306 F.3d at 495*.

In the futures market, copper is traded on commodities exchanges through warrants **[*913]** and futures contracts traded on **[**10]** either the London Metal Exchange (LME) or the New York Mercantile Exchange (known as Comex) on a principal-to-principal basis. The London Metal Exchange contracts assume an eventual delivery of physical copper on a prompt date. In reality, such deliveries rarely do not occur because the majority of the LME business is carried out for trade hedging, that is, for minimizing the risks of price fluctuations in the market at the time of delivery.

On the over-the-counter market, copper derivative transactions are negotiated privately between dealers and end-users.

D. Defendants' Copper Transactions with Sumitomo

In 1992 and early 1993, defendants began to focus on their base metals trading business. To that end, Kevin Murphy and another employee of defendants, Brian Harmon de Clare, approached Yasuo Hamanaka in August 1993, to discuss setting up a copper trading relationship with Sumitomo.

Defendants engaged in a number of transactions with Sumitomo between 1993 and 1996, five of which are of particular significance in the parties' eyes importance to the suit. In September 1993, Sumitomo, through Hamanaka, proposed a large copper derivatives transaction to Murphy. Although the proposal **[**11]** raised concerns among defendants' managers, who declined the transaction as proposed, they approved it after Sumitomo changed its timing. As proposed originally, Sumitomo was to sell defendants over-the-counter put options for 600,000 metric tons at a strike price of $ 2000 per metric ton, along with three financially settled forward transactions under which defendants would buy 585,000 metric tons of copper at prices between $ 1740 and $ 1750 per metric ton, with both transactions to be settled in cash. The premium for the options was $ 145.8 million. After amendment, to allay defendants' concerns about Sumitomo's use of the transaction to beef up its midyear earnings, the metric tons of copper were increased to 1 million.

In the process of considering Sumitomo's proposals, defendants asked Kazutaka Suzuki, one of defendants' senior credit officers in Tokyo, to discuss the proposed transaction with Sumitomo senior management. In a memorandum, Suzuki reported that he had called Takehiko Yonezu, a member of Sumitomo's executive committee and a senior managing director. Suzuki wrote that he described the proposed deal to Yonezu as one involving a sale of copper put options covering **[**12]** as much as 1 million metric tons for a premium payment to Sumitomo's Hong Kong subsidiary of $ 280 million to $ 300 million. According to Suzuki, Yonezu confirmed the company's awareness of the transaction and told Suzuki that the transaction was related to one of Sumitomo's clients located near Hong Kong.

In March 1994, Hamanaka approached defendants about entering into a copper option transaction involving put and call options and forward contracts. Defendants' Tokyo Management Committee met on March 29 to discuss the Sumitomo proposal, which was to close before March 31 and would involve 1.8 million metric tons of copper and a premium payment to defendants of $ 253.8 million. The deal was to provide funding at an effective price of 570 bp (basis points) over libor (the London InterBank Offered Rate), within a copper price range of $ 1900 to $ 2000 per metric ton on maturity. Defendants were aware that Sumitomo had access to ten year funds at 10 bp below libor. The committee was concerned that such a large deal so close to Sumitomo's fiscal year end might be used to manipulate reported earnings, particularly in light of the company's effort to obtain a similar deal two days before **[**13]** its **[*914]** September 1993 interim period end. The committee was worried about "the substantial market risk involved in obtaining funding in this manner." Handley Decl., dkt. # 776, exhs. ## 121-28, 130. Seeking further clarification of the company's motivation for the deal, the committee learned from Price Waterhouse that

Japan's Generally Accepted Accounting Procedures would not allow Sumitomo to take the premium on the deal as income or use the deal in any other way to manipulate earnings. Japan's procedures required capitalization until expiration of premiums on commodity options. Sumitomo told the committee that its motivation was to obtain funding without drawing down other credit lines and that the substantial market risk of obtaining funding in this way was not a concern because it had offsetting options purchased from a client. The committee concluded that it had no reason to withhold approval for the transaction. Although it would have preferred to do the deal after Sumitomo's fiscal year end, it did not insist on this condition. The deal went ahead on March 30, 1994.

On April 4, 1994, Hamanaka transferred defendants' entire premium payment back to defendants, where the deposit **[**14]** earned overnight interest rates, pending further instructions from Sumitomo. Defendants did not consider the deposit unusual; clients left funds with defendants on occasion.

On August 24, 1994, Murphy arranged a meeting with Sumitomo's senior management. One of the purposes of the meeting was "to glean understanding as to the extent that Immamura [sic] is aware and briefed on the business completed and the relationship, etc." Duncan Decl., dkt. # 767, exh. # 93.

In October 1994, when David Pryde was defendants' Global Head of Commodities. he met briefly with Akio Imamura, General Manager of Sumitomo's Non-Ferrous Metals Division and Hamanaka's superior, and discussed the copper derivatives transactions between defendants and Sumitomo. Imamura told Pryde, "[Y]ou are not seeing the whole deal. There are a couple of legs to this and you are only seeing part of the deal." Polland Decl., dkt. # 679, Vol. I, exh. # 23.

Four days later, Pryde traveled with Murphy to China, where they met with the president of CNIEC, a major state run copper producer, who told Pryde that he had entered into a large transaction with a large copper trader in the region. This led Pryde to believe that **[**15]** CNIEC was Sumitomo's customer.

In a faxed letter dated November 14, 1994, Murphy wrote Hamanaka to tell him that defendants were executing some "forward producer" selling around the $ 2745 level. He added, "If you have an interest, we must borrow this material 3's to the average of 95." Id., exh. # 162. On November 15, Hamanaka thanked Murphy for his useful information and comments, "which were greatly valuable." Duncan Decl., dkt. # 767, # 153. On November 16, 1994, Sumitomo Hong Kong paid defendants $ 421,308,500.00 to settle transactions dated November 19, 1993 and March 30, 1994.

In December 1994, Murphy wrote Hamanaka to propose a potential action in the cash copper market and three-month trading strategies. On December 21, 1994, defendants paid Sumitomo $ 31.92 million for put options on 240,000 tons of copper and an additional forward position of 153,600 tons. The positions were to expire in the fourth quarter of 1995.

Defendants executed additional large cash and copper futures trades on Sumitomo's behalf throughout 1995. Sumitomo purchased more than 1 million tons of copper and sold an additional 858,000 tons in trades executed by defendants. These **[*915]** volumes exceeded **[**16]** Sumitomo's 500,000-ton requirements for physical copper. Its total volume of copper transactions on the exchanges for the year was 2.4 to 2.5 million tons and its total volume of copper-related transactions may have been as much as 50 million tons.

On March 28, 1995, Sumitomo and defendants entered into another large financing transaction immediately before the March 31 end of Sumitomo's fiscal year. Defendants purchased call options and went short a forward, making a premium payment to Sumitomo of $ 90 million. (A forward contract is a "cash transaction common in many industries, including commodity merchandising, in which a commercial buyer and seller agree upon delivery of a specified quality and quantity of goods at a specified future date." CFTC Glossary, available at *http://cftc.gov/opa/glossary/opaglossary_f.htm* (last visited Apr. 23. 2007).

On September 29, 1995, defendants entered into a copper derivatives transaction with Sumitomo. Their next large transaction took place in March 1996 and involved put and call options, forwards and a total premium payment to Sumitomo of approximately $ 49.5 million. Although defendants' management had concerns about market manipulation, **[**17]** it found no reason not to engage in the Sumitomo transaction. It believed that the "deal in no way involves Sumitomo trying to squeeze the price as per the allegations. In fact it is delta neutral." Polland Decl., dkt. # 679, Vol. 1, exh. # 59. ("Delta" is "the expected change in an option's price given a one-unit change in the price of the underlying futures contract or physical commodity. For example, an option with a delta of 1.5 would change $ .50 when the underlying commodity moves $ 1.00." "Delta neutral" "[r]efers to a position involving options that is designed to have an overall delta of zero." CFTC Glossary, available at *http://www.cftc.gov/opa/glossary/opaglossary_d.htm* (last visited Apr. 23, 2007). The transaction earned defendants the approximate revenue of $ 20.5 million on a $ 49,596 million transaction.

Between November 1993 and June 1996, defendants executed 149 trades on the London Metal Exchange trading copper on Sumitomo's behalf.

In its copper trading business, defendants' role was that of a dealer. As a financial institution, it was required to, and did run a delta neutral copper book, otherwise known as keeping a "square book." As a general rule, defendants **[**18]** kept their option book "delta neutral" on a portfolio basis, although not necessarily on intraday trading

E. Audits

At the beginning of 1995, defendants' audit department became concerned about the base metals trading in the London office. The department undertook a review of defendants' base metals business, including its copper trading operations and the copper derivations transactions between defendants and Sumitomo. In a report issued December 21, 1995, the auditors identified a number of control and procedural problems within the base metals business, but found no evidence of fraud.

In the fall of 1995, defendants engaged Arthur Andersen to undertake an independent confirmation of all transactions in base metals in London. In response to the auditors' report, defendants made changes in the London office, after which they were confident that they had taken appropriate action and that they had found no evidence of fraud.

F. The Unraveling of Hamanaka's Schemes

On April 11 and 12, 1996, Hamanaka was deposed by the Commodities Futures **[*916]** Trading Commission. On May 20, he was removed by Sumitomo from day-to-day trading. On June 5, 1996, he disclosed his unauthorized trading **[**19]** to Sumitomo, precipitating his dismissal and accelerating the sharp decline in the copper market, which fell from highs of around $ 2,800 a ton to below $ 2,000 a ton.

On June 14, Hamanaka issued a statement taking responsibility for the disgrace he had caused Sumitomo and explaining the methods he had used to carry out his scheme, which included his insistence on receiving trade confirmations directly so that Sumitomo did not find about them. The same day, Sumitomo announced that it had suffered a loss of $ 1.8 billion as a result of allegedly unauthorized copper trading by Hamanaka over a ten-year period and that it was terminating Hamanaka's employment. In September 1996, Sumitomo revised its losses upward to $ 2.6 billion. Hamanaka admitted he was guilty of fraud and forgery, was sentenced to eight years in prison and served a little more than seven years' incarceration.

When word circulated of the confession, defendants' audit/risk management department expressed concern that Murphy might flee the country or even commit suicide. Traders in the London office did not share those concerns. Defendants reassigned Murphy to the New York office and demoted him to a marketing role.

[20]** G. Investigations of Market Manipulation

After Sumitomo disclosed Hamanaka's activities, a number of regulatory investigations of Sumitomo and its trading partners were instigated; others had begun before the disclosure was made. For example, on November 8, 1995, the London Metal Exchange wrote to all members, including J.P. Morgan Securities, Ltd., requesting information on their clients' large copper positions, including "futures, options and their delta equivalent and off-Exchange products, where any such position exceeds 300 lots (7500 metric tonnes)." On November 17, 1995, Kieran Sykes, Vice President, Global Brokerage, for J.P. Morgan Securities, wrote the exchange to say that its only copper-related activity was limited to clearing exchange contracts for one client, defendant Morgan Guaranty Trust. Attached to the letter was a chart showing client contracts beneficially owned by Morgan Guaranty Trust for its own account. These included futures, puts and calls. Duncan Decl., dkt. # 768, exh. # 240.

On November 24, the exchange thanked J.P. Morgan Securities for its November 17 letter, but reiterated that "client" means "the ultimate position holder." Id., exh. # 233. **[**21]** The exchange asked the company again to go through its house accounts, brokers and parent company omnibus accounts to determine the ultimate client, his positions, the dates thereof and the tonnages involved. Sykes responded on November 28, saying that J.P. Morgan Securities had previously informed the exchange that its client was Morgan Guaranty Trust and that the trust company did not act as a broker or keep a parent company omnibus account at J.P. Morgan Securities.

The exchange tried again to elicit information from J.P. Morgan Securities on December 6, when it wrote Sykes to say that one of the purposes of its inquiry was "to identify the beneficial owners of OTC or off-Exchange contracts, which have the effect of creating an on-Exchange hedge of exactly the type you have described in your letter." Duncan Decl., dkt. # 768, # 243. Alan Wethered, Managing Director and Chief Executive of J.P. Morgan Securities, wrote the exchange on December 8, to say that Morgan Guaranty Trust was a client of J.P. Morgan Securities, that it maintained an account with J.P. Morgan **[*917]** Securities for the purpose of clearing London Metal Exchange contracts, that the account was strictly an arm's length **[**22]** account and that Morgan Guaranty Trust was the "ultimate position holder." Wethered stated his belief that J.P. Morgan Securities had been entirely forthcoming in reporting the positions of Morgan Guaranty Trust to the exchange. Id., exh. # 244. At some point, because defendants had concerns about the confidentiality of the London Metal Exchange, they suggested that it ask the Securities and Investment Board in London to make requests for information.

On January 18, 1996, the Securities and Investment Board began an investigation of J.P. Morgan Securities, Ltd. and its activities in the copper market. On January 31, J.P. Morgan Securities provided the board with the information it had requested. It gave the board the details of its positions in "any form of contract or holdings of warrants based on copper as of 11 December 1995" and "details of all JPSML's positions in any form of contract or holdings of warrants based on copper as of 12 January 1996." Id., exh. # 245. It added that defendant Morgan Guaranty Trust was "the ultimate position holder in respect of all positions identified in the attachments [to the letter]." Id. The board requested details from defendant **[**23]** Morgan Guaranty Trust of all of its open positions in London Metal Exchange contracts; defendant provided the details immediately, including details of all positions with Sumitomo. Id., exh. # 247.

Starting in the summer of 1996, the Federal Reserve Board and the New York State Banking Department reviewed defendants' copper trading activities. During this review, the two agencies maintained offices at defendants' headquarters in New York City, where they had access to defendants' employees and records. More than twenty of defendants' employees spoke with representatives of the board or the banking department or both.

The Federal Reserve confirmed that Hamanaka enjoyed a close personal relationship with Murphy and that during the 1993-1996 period, Sumitomo had accounted for 75-80% of the revenue earned by defendants' commodities business. Defendants reviewed with the Federal Reserve its 1995 audit and analysis of the London base metal trading. In its investigative findings, the Federal Reserve expressed "serious concerns about the general level and content of management oversight of the Global Base Metals Business" and about Murphy's "business practices and conduct." Duncan Decl. **[**24]** , dkt. # 767, exh. # 129. It found that although management was aware of Murphy's conduct, "no steps were taken to limit his authority or provide him with additional management oversight" and that "within the context of [defendants'] relationship with Sumitomo, there were a large number of warning signs that all was not well. . . . Along the same lines, we have also noted a troubling lack of forthrightness in the context of [defendants'] dealings with regulatory authorities." Id. These included Murphy's testimony to the Federal Reserve that he had dealt with several traders at Sumitomo, which was not true, and his testimony to the Securities and Investment Board that Sumitomo had never asked defendants to facilitate trading by a third party through Sumitomo's account with defendants. In fact Hamanaka had made such a request and Murphy had sent a power of attorney to Hamanaka to facilitate the third party trading. Id.

On December 11, 1996, the Federal Reserve and the New York State Banking Department entered into a Memorandum of Understanding with defendants. The memorandum addressed improvements in defendants' control structure but made no **[*918]** reference to Sumitomo, to market **[**25]** manipulation or fraud. However, the parties did agree that defendants would "address and consider" "the effectiveness of the due diligence process, including: (A) policies and procedures for determining that the business purposes of transactions executed with customers are reasonably transparent to both parties, that transaction structures are appropriate for the business purpose intended, that potential legal, market and reputational risks have been identified, and that documentation and legal risks have received appropriate legal review." Duncan Decl., dkt. # 767, exh. # 128.

Sumitomo and Merrill Lynch were investigated by the Commodities Futures Trading Commission in connection with an alleged manipulation of the copper markets. On May 11, 1998, the commission issued an order against Sumitomo and made several findings. The commission found that Sumitomo had established a dominant position on the London Metal Exchange, acting through various agents, and that it had done so for the purpose of manipulating the price of copper and copper futures upwards. In a separate proceeding, it found that Merrill Lynch had aided and abetted the Sumitomo conspiracy. It concluded that "the manipulators' **[**26]** warrant-taking operation was not motivated by any genuine commercial need" and this knowledge and intent supported the finding of aiding and abetting. Polland Decl., dkt. # 679, Vol. I, exh. # 69, at 4. The commission found that Merrill Lynch had "realized profits from the increased backwardation in spreads created by the manipulators' activities." Id. Sumitomo paid $ 150 million and Merrill Lynch paid $ 15 million to settle the matter.

In the summer of 1996, the Commodities Futures Trading Commission began an investigation of defendants. Defendants produced documents to the commission and their employees testified before the commission. (Some of these same employees or others testified before other regulatory agencies.). The commission never brought any charges or sought any sanction against defendants related to their copper trading relationship with Sumitomo. The Financial Services Authority advised defendants on April 16, 1998 and August 14, 1998, that it would not "seek to have its investigators make further inquiries." Id., exhs. ## 71 & 72.

H. Murphy's Status

In February 1997, defendants ended market making activity in base metals and closed the doors on its copper **[**27]** trading business. In January 1997, Murphy left defendant's employ. He received no bonus and forfeited his options.

In April 1997, Murphy wrote defendants' managing director, asking for renegotiation of his severance agreement that would include his 1996 bonus and his stock options. In July 1997, Murphy talked with Barbara Hack, an employee of defendants, and told her he believed his option forfeiture was not fair after what he had contributed to revenue for 1996. He added that he had been the "good corp. citizen" and had taken calls from the press and The Wall Street Journal, baiting him for information and had called defendants immediately. Duncan Decl., dkt. # 771, exh. # 300. Defendants declined Murphy's request to reinstate his stock options.

On November 23, 1998, Murphy entered into a settlement agreement and general release in which he agreed that he would not "directly or indirectly, use or disclose, or permit or aid the use by or disclosure . . . of any privileged, confidential or proprietary business information relating to" defendants' business. Id. exh. # 302. Murphy agreed to give defendants notice of any subpoenas and the opportunity to resist them. Under the **[**28]** agreement, Murphy received a "special payment of **[*919]** $ 225,000 and the reinstatement of approximately $ 700,000 in stock options forfeited on his termination." Id.

I. Damages

Throughout the period of the alleged conspiracy, plaintiffs were parties to contracts under which they were obligated to sell cathode or rod to various purchasers. When they were unable to produce enough cathode or rod to fill their contractual obligations, they purchased cathode or rod from other sources, including other integrated producers and merchants. The integrated producers from whom plaintiffs purchased cathode and rod did not themselves produce all the cathode and rod they sold. The parties dispute the percentage of cathode and rod sold for the first time by each producer.

From 1993-1996, plaintiffs American Insulated Wire, Leviton Manufacturing Company and Superior Telecom purchased cathode and rod exclusively from integrated producers. During the same period, plaintiffs Kennecott, Asarco, Essex Group, Mueller Copper Tube Company, Mueller Copper Tube Products and Southwire purchased cathode through merchants when they were unable to obtain the product from integrated producers. These merchants **[**29]** included AICO Corp., BAL Metals International, Inc., Billiton Metals Inc., Brandeis Ltd., Cerro Sales Corp., Conversion Resources, Inc., Essex, Gerald Metals, Glencore Ltd., Heisei Minerals Corp., International Metals, J. Aron & Co., Kataman Metals, Inc., Kobe Copper Products, Kojemi Corp., Manitoba Corp., Metal Commodities, MG Metal and Commodity Co., Miles Metal Company, Minemet Inc., Minorco, Mitsubishi Materials America Corp., Mitsui & Co., Outokumpu, Pechiney World Trade Inc., PMX Industries, Inc., Samsung America, Inc. and Southwire Company. (In making this finding, I have disregarded the statements of plaintiffs' employees to the extent they conflicted with the sworn statements of the merchants themselves about their sales of cathode or copper rod when plaintiffs' employees did not explain how they would have had personal knowledge of the sources of the products sold, when they did not make it clear that the purchases were made within the relevant time period or when plaintiffs' own admissions of those of its experts classified the source as a merchant rather than a producer.) The parties dispute the terms and conditions under which these sales were made, whether the merchants **[**30]** ever took possession of the copper and when and how payments were exchanged among plaintiffs, the merchants and the integrated producers.

OPINION

A. Evidence of Defendants' Knowing Participation in Conspiracy

HN1[] Section 4 of the Sherman Act, *15 U.S.C. § 1*, makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations" and subjects persons found guilty of such conspiracies to criminal penalties. Section 1 of the Clayton Act, *15 U.S.C. § 15*, gives persons injured "by anything forbidden in the antitrust laws" the right to sue for relief in federal court. To prove the elements of a claim under *§ 4 of the Sherman Act* of knowing participation in a conspiracy, a plaintiff must come forward with evidence showing that the defendant "'had a conscious commitment to a common scheme to achieve an unlawful objective.'" *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*(quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980))*. In this case, plaintiffs **[**31]** must prove that defendants "knew that Sumitomo **[*920]** intended to restrain trade, intended that trade be restrained, and materially contributed to that restraint." *Loeb Industries, Inc. v. Sumitomo Corp., 306 F.3d 469, 497 (7th Cir. 2002)*(citing Phillip E. Areeda, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application, P 1474a (1986)).

HN2[] Ordinarily, when a court decides a motion for summary judgment, it must view the facts in the light most favorable to the party opposing the motion. *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. "But ***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Id. at 588*. To defeat a motion for summary judgment in an antitrust case, the opponent of the motion "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." Id. (quoting *Monsanto Co., 465 U.S. at 764*).

Eleven years after the public first learned of Yasuo Hamanaka's misconceived schemes to recoup his copper trading losses, it remains unproven whether defendants conspired with **[**32]** Hamanaka or Sumitomo or both to manipulate the copper market. Defendants contend that this is because they were never part of any conspiracy with Hamanaka. In their view, plaintiffs have failed to adduce any evidence that is not as consistent with legitimate transactions on defendants' part as it is with conspiratorial actions, that is, they have not come forward with evidence that excludes the possibility that defendants' dealings with Sumitomo and Hamanaka were entirely proper.

Plaintiffs contend that their evidence is more than sufficient to exclude any possibility that defendants' dealings were proper, asserting to the contrary that the evidence establishes that defendants knew of Sumitomo's intent to restrain trade, that defendants had the same intent and that they materially contributed to the restraint.

1. Defendants' knowledge of Sumitomo's intent to manipulate the market

Plaintiffs have adduced evidence that it was public knowledge in August and September 1993 that Sumitomo was involved in market manipulation. Articles had appeared describing a copper squeeze, naming Sumitomo and reporting that the London Metal Exchange had issued several regulatory warnings concerning **[**33]** copper manipulation to its members, including J.P. Morgan Securities. In addition, plaintiffs cite defendants' assessment of the September 30, 1993 transaction proposed by Sumitomo. Plaintiffs acknowledge that defendants declined Sumitomo's first proposal, but assert that the deal's significance lies in the fact that it would have alerted defendants to Sumitomo's willingness to engage in improper financing transactions.

Plaintiffs claim additional support from a series of internal memoranda defendants prepared, discussing the possibility of defendants' internal copper hedge positions having an effect on the liquidity of the physical copper market. These memoranda did not relate to defendants' over the counter transactions with Sumitomo, but to defendants' attempts to predict the effect of the transactions on defendants' risks. The authors noted that if defendants were forced to enter into separate hedging transactions in the future, those transactions might affect the price of copper. However, plaintiffs cite the memoranda as showing defendants' awareness of the possibility that the size of their transaction with Sumitomo might have an adverse effect on the market's liquidity at some **[**34]** time. Finally, plaintiffs note that when The Wall **[*921]** Street Journal published an article in 1995 concerning squeeze rumors, Murphy sent it to Hamanaka.

2. Defendants' intent to manipulate the market

On the necessary element of defendants' intent, plaintiffs have a considerable amount of circumstantial evidence. Most of it is ambiguous, such as evidence of the confidentiality that defendants promised Sumitomo in their dealings. (It is as plausible to believe that confidentiality is a critical criterion for winning clients in the competitive world of metals trading as it is to believe that confidentiality means concealment of improper activities.)

Plaintiffs cite evidence showing that defendants allowed Hamanaka to handle his own confirmations and allowed Murphy to handle all confirmations and payments on defendants' end. Defendants have produced evidence that although they sent trade confirmations directly to Hamanaka, they did so because they had what they thought was authorization from Sumitomo for doing so. Defendants' evidence shows, moreover, that they took steps to talk with Hamanaka's superiors to insure that the company knew of the nature and scope of Hamanaka's **[**35]** transactions. As for Murphy's handling of confirmations, the evidence shows that defendants did not sign off on the handling of confirmations and payments but allowed Murphy to mail those on to Sumitomo (in care of Hamanaka) after the back office had reviewed and approved them.

Plaintiffs assert that defendants kept Sumitomo's management in the dark about the conspiracy. They cite Murphy's discouragement of any contact between defendants' Tokyo office and Sumitomo, Hamanaka's "beating up" of Murphy when any representative of defendants approached Sumitomo's management and Murphy's promise to Hamanaka that no one from the Tokyo office would "bother" Sumitomo. According to plaintiffs, this led to a remark from an exasperated Toyko employee that he was not allowed to conduct due diligence on the Sumitomo transactions.

Plaintiffs ignore the contradictory evidence that defendants adduced of their efforts to ascertain from Sumitomo officials both that the officials knew of Hamanaka's trading and that the trades were for a legitimate hedging purpose. Defendants dispatched a Toyko employee to check with a Sumitomo employee on the good faith basis of the proposed September 1993 transaction **[**36]** and David Pryde met personally with Imamura to talk with him about Sumitomo's copper trading. Defendants set up at least two luncheon meetings with top Sumitomo officials during this period to discuss the copper trading, among other topics, and they obtained information from a large Chinese corporation that it was engaged in large scale business with a prominent Asian trader. If the Chinese were dealing with Sumitomo, it would explain Sumitomo's need for the derivatives transactions it sought with defendants.

On the question of concealing information from regulators, the undisputed facts seem to show that the alleged "stonewalling" consisted merely of J.P. Securities' refusal to turn over to the London Metal Exchange records about the clients of defendant Morgan Guaranty Trust. Plaintiffs have not established what J.P. Securities' legal obligations were in this regard, that is, whether it had a legal obligation to defendant Morgan Guaranty Trust and its clients not to turn over this information or conversely, whether it had a legal obligation to turn over the information to the exchange. Moreover, it is significant that even now, after plaintiffs have gained access to all the information **[**37]** that could bear on the alleged conspiracy, neither they nor **[*922]** any regulatory body has identified any incriminating information that defendants did not provide to the regulators. Plaintiffs have not shown that there is any evidence in defendants' possession that would have prevented any additional market manipulation if it had been turned over earlier.

It is hard to imagine that a jury would place much weight on defendants' special payment to Murphy and reinstatement of his stock options in 1998. Plaintiffs try to put a spin on the actions by linking them to the "looming copper litigation." This effort would be more successful if defendants had made the payment and reinstatement in connection with Murphy's termination in July 1996. Instead defendants released him without any severance pay and held his stock options forfeited. Between then and November 23, 1998, when the payments were made, Murphy had talked to a number of regulators and had had ample opportunity (and potential motivation arising from defendants' treatment of him) to disclose information that would be harmful to defendants. Of course, he had his own reasons to refuse to disclose information harmful to him personally, **[**38]** but these were independent of any payments or lack of payments from defendants.

Nothing about the agreement that Murphy entered into is out of the ordinary for companies dealing with departing employees who have had access to confidential business information. In suggesting that the payment was made because Murphy had told defendants he had been the "good corp. citizen" and remained silent rather than disclose relevant evidence to regulators, plaintiffs misstate Murphy's actual statement. He told defendants that he had been a good corporate citizen by refusing to talk to the press. He did not say, and the evidence does not show, that he ever refused to talk to regulators or failed to respond to a subpoena issued in any lawsuit.

Plaintiffs argue that the intimate and conspiratorial relationship between Murphy and Hamanaka is evidence of defendants' knowledge of the entire conspiracy and defendants' part in it. Setting aside the tautological error in saying that the conspiratorial relationship is evidence of the conspiracy, plaintiffs have produced no evidence that would require a jury to find that Murphy was conspiring with Hamanaka on behalf of defendants. Brokers and traders speak **[**39]** on the telephone frequently and use the telephone to discuss specific matters; such activity is as consistent with innocent behavior as it is with conspiracy. The same is true of Murphy's close personal relationship with his biggest client, including sending Hamanaka articles about the price of copper and giving him advance notice of a proprietary commodities index that defendants were developing.

Plaintiffs look for support from Murphy's November 14, 1994 message to Hamanaka about defendants' copper-producer clients taking a bearish position on the London Market Exchange. It is difficult to tell from the message whether Murphy was simply talking to Hamanaka about buying "forward producers selling around the 2745 level," passing on confidential information about defendants' clients or acting to give Hamanaka a chance to take more copper off the market.

Finally, plaintiffs point to defendants' concern about Murphy's possible reaction to the news of the market collapse and the realization that his friend and client might be going to prison. As the evidence shows, although defendants were sufficiently concerned to place Murphy under surveillance to insure against self-harm or flight, **[**40]** their concerns were misplaced. Their concern is not evidence of their guilt or Murphy's; it was not unreasonable for **[*923]** them to be concerned about the effect on Murphy when he learned of Hamanaka's firing and the resulting effect on the copper market.

If this were all the evidence that plaintiffs had, Matsuishita Electric might compel the conclusion that defendants were entitled to summary judgment. Much of plaintiffs' evidence is ambiguous and subject to two meanings, one of which favors defendants' position that no conspiracy existed.

There is, however, additional evidence in the form of the transactions themselves. It is possible that these transactions should be viewed as entirely innocent, as defendants maintain they are. It is also the case that the transactions could be seen reasonably as part of a conspiracy. Before a jury could find that defendants' acts have an innocent explanation, it must sort out a plethora of disputed issues of fact. Both sides have retained highly qualified experts to analyze the nature of the transactions. The experts have expressed radically different opinions about whether these transactions should be characterized as having rational economic purposes **[**41]** and therefore are presumptively legitimate, or whether they are deals that neither defendants nor Sumitomo would have entered into but for the knowing purpose of providing financing to Sumitomo to manipulate the market at great profit to defendants.

From defendants' perspective, the major transactions were typical transactions for market makers and dealers in derivatives such as defendants during this period. The transactions were purchases of over the counter put and call options on copper, combined in some instances with the purchase or sale of forward contracts that reduced the risk of the transactions to defendants "by creating a initial delta hedge of the net option position," Polland Decl., dkt. # 679, vol. III, exh. # 84, MacKay Expert Report, at 5, and priced in accordance with [defendants'] internal pricing policies and recommended dealer practices at the time. Id. According to defendants' expert, Robert MacKay, defendants managed the market risks of the positions by "dynamically delta hedging almost of the directional copper price risk in their overall copper portfolio with forward contracts on the London Metal Exchange and by partially hedging other option related **[**42]** risks, such as volatility risk, with offsetting put and call options traded either on the exchange on over the counter. Id. Because defendants hedged the directional price risk in their copper portfolio, "[they] would not have profited from nor would [they] have expected to profit from an attempted price manipulation by Sumitomo designed to increase or decrease copper prices. In fact, it can be shown for certain [of defendants'] transactions with Sumitomo that any profit to [defendants] attributable to rising prices was largely offset by specifically identified hedges while dynamic hedging at the portfolio level would have offset much, if not all, of the remaining profit from rising prices." Id. at 6.

Three of MacKay's conclusions raise interesting questions for trial. First, he says that "[t]he profitability of any particular transactions cannot be determined on a stand-alone basis. Profitability must be adjusted for offsetting gains or losses on hedges." Id. at 5. Second, he asserts that it is error to infer defendants' knowing participation in the conspiracy from merely looking at a transaction "without considering the fact that [defendants] hedged the transaction **[**43]** with other forwards and options." Id. at 6. Such an analysis "results in a large overstatement of [defendants'] potential profits. In other words, argue defendants, it is necessary to look at the profits that defendants expected to earn at the outset of the transaction, not what **[*924]** defendants did earn by subsequent hedging and market movement. Only then can a factfinder have any sense of how defendants would have assessed the transaction and thus determine whether the transaction would have alerted any reasonable dealer to the probability if not the certainty that it was a bogus transaction, intended only for financing. Third, MacKay challenges plaintiffs' expert's assertion that defendants' profits on the Sumitomo transactions were excessive because the experts do not provide any "supporting empirical analysis based on comparisons to appropriate benchmarks." Id.

Defendants contend that the evidence shows that because it ran a "square book" on copper, it had no reason to conspire with Sumitomo to manipulate the price of copper upward; doing so would have run counter to its business strategy. As MacKay has indicated, in a squeezed market, defendants would have lost money on **[**44]** many of their hedging transactions because they would have had to buy copper at a higher price than it could have obtained for the copper it had to sell. Defendants ask why, if their goal was to manipulate the price of copper upward, they would have declined to enter into the September 1993 scheme that Sumitomo proposed and documented their awareness of the possibility that the transaction was designed to help Sumitomo squeeze the market?

On the other hand, plaintiffs are adamant in their position that the transactions with Sumitomo were so unusual in their nature that any reasonable dealer, let alone entities as sophisticated as defendants, would recognize the transactions as having no purpose other than providing Sumitomo financing for its conspiracy. Plaintiffs cite the high profits that the transactions promised defendants, which should have raised a red flag, given Sumitomo's high credit rating and the competition for its business. Why would Sumitomo need to make the deal so profitable to defendants when it could borrow on more advantageous terms and when other dealers were competing with defendants to do business with Sumitomo?

Moreover, plaintiffs ask, why would defendants **[**45]** think it normal to be offered transactions that not only raised no downside price risk to them but provided a large profit they could book immediately and the prospect of higher profits if copper prices rose. If this were not enough, they say, the size of the deals should have been a warning to defendants; they and Sumitomo were dealing in quantities far in excess of the amounts traded on the London Metal Exchange.

Plaintiffs rely on the report of Anthony Saunders, one of their expert witnesses. According to Saunders, defendants had no risk of losing money in the March 1994 transaction; Sumitomo could not have realized a gain that would have offset any potential loss it might incur as a result of an underlying risk; and defendants' expected and realized profit from the transaction was "extraordinary." Duncan Decl., dkt. # 766, exh. # 68, at 37, P 58. In addition, defendants entered into a transaction that would allow Sumitomo to transfer back to defendants funds obtained from defendants a week earlier and leave them on deposit for several months at below-market interest.

Finally, plaintiffs argue that it is suspicious that defendants carried out significant copper trading above and **[**46]** beyond the large financing deals, including manipulative trades executed on the London Metal Exchange during a known market squeeze, and that the trading often followed suspicious communications between Murphy and Hamanaka.

[*925] 3. Defendants' contribution to the market manipulation

On the issue of defendants' contribution to the conspiracy, there is little to discuss. If plaintiffs can prove that defendants' transactions with Sumitomo were made knowingly for the purpose of financing Sumitomo's market manipulation, they will have proved defendants' contribution to the illegal restraint of trade.

I conclude that if the jury were to find plaintiffs' experts more believable than defendants', if it were to find that defendants knew the Sumitomo transactions were so commercially irrational as to be obvious disguises for financing manipulative conduct, and if it were to disbelieve defendants' evidence of the steps they took to confirm Sumitomo's awareness of the scope and volume of Hamanaka's dealings, it could find reasonably for plaintiffs on the question of defendants' involvement in Sumitomo's scheme to manipulate the market. As the Court of Appeals for the Seventh Circuit remarked **[**47]** in *In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651, 661 (7th Cir. 2002)*, in discussing the evidence in that case of an actionable conspiracy to fix prices: "The evidence is not conclusive by any means -- there are alternative interpretations of every bit of it -- but it is highly suggestive of the existence of an explicit though of course covert agreement to fix prices." So too in this case. The evidence is suggestive of an agreement between defendants and Sumitomo to "fix" the copper market. Therefore, defendants' motion for summary judgment will be denied with respect to plaintiffs' claim that defendants conspired with Sumitomo to manipulate the price of copper.

B. Antitrust Standing

HN3[] To bring suit for an antitrust violation, a plaintiff must have "antitrust standing" (as distinguished from Article III standing), a component of which is antitrust injury. To qualify as an antitrust injury, an injury must be proximately caused by the direct purchase of a product whose price has been affected by anti-competitive behavior. *Loeb Industries, Inc. v. Sumitomo Corp., 306 F.3d 469, 481 (7th Cir. 2002)*. In Loeb Industries, the court **[**48]** of appeals held that in the context of this litigation, plaintiffs may demonstrate their antitrust standing by proving that (1) they were the first purchasers of copper from integrated producers and (2) the price of their first-purchased copper was inflated artificially by the alleged conspiracy between defendants and Sumitomo.

Defendants contend that even if plaintiffs are able to prove that defendants conspired with Sumitomo, plaintiffs have failed to adduce reliable evidence from which it may be inferred that they made purchases that qualify as compensable antitrust injuries. Defendants' attack on the adequacy of plaintiff's evidence takes two forms: their motion for summary judgment and their motions in limine, dkt. ## 793 & 795. In both motions, defendants contend that the testimony of expert witnesses Christopher Gilbert, Marianne DeMario and Roy Henry is inadmissible. According to defendant, Gilbert's econometric model fails to draw a causal connection between plaintiffs' alleged injury (in the form of inflated copper prices) and the defendants' alleged wrongdoing. Moreover, defendants contend, the methods employed by DeMario and Henry in calculating the amount of plaintiffs' **[**49]** alleged damages is so flawed that it should be excluded, a result that would leave plaintiffs with no proof of the antitrust injuries they have allegedly sustained.

1. Testimony of Christopher Gilbert

Each plaintiff relies on the testimony of Christopher Gilbert to establish a connection between the alleged conspiracy and **[*926]** the allegedly inflated prices it paid for copper during the period of the conspiracy. Therefore, I begin with the question whether Gilbert's testimony is admissible.

a. Summary of the relevant testimony

Christopher Gilbert is Professor of Economics at the University of Trento, Italy, where he is the academic director of the doctoral program in economics and management. Gilbert has created an econometric model to forecast the price of copper "but for" the alleged manipulation. (Econometrics is the "application of statistical and mathematical techniques in solving problems as well as in testing and demonstrating theories." Random House Webster's Unabridged Dict. (2d ed. 2001).

In creating his model, Gilbert determined that certain accounts between defendants and Sumitomo had been established for wholly "non-commercial and manipulative reasons." These **[**50]** accounts included the RADR transactions, the GMMC transactions and the Merrill Lynch B Account transactions. Gilbert included all transactions from these accounts in his "non-commercial position" variable, which is the "single most important variable" for determining whether the price of copper was influenced by defendants' alleged manipulation. Gilbert used a multiple regression model to determine whether a relationship existed between the price of copper and a number of variables, including the non-commercial position and various competitive forces in the market.

In constructing the model, Gilbert chose to employ a two-step technique known as the Engle-Granger model. The first step of the model is called the equilibrium equation; the second step of the model is the adjustment equation. Used together, these equations are designed to test whether a relationship exists between non-commercial positions and the price of copper and, if so, the degree to which the non-commercial positions affected the price. Gilbert estimated that the alleged conspiracy raised the price of copper by 12-16 cents a pound during the period of the alleged conspiracy.

The equilibrium equation in Gilbert's **[**51]** model exhibits serial correlation. Defendants' expert, Duncan Cameron, asserts that if the equilibrium equation is adjusted to correct for serial correlation, the model shows that the alleged conspiracy had no effect on the price of copper. However, Gilbert asserts that one would expect to see serial correlation in the equilibrium equation and that the adjustment equation corrects for any errors in his model. Gilbert maintains that no further adjustment for serial correlation is necessary.

Unlike Cameron's model, Gilbert's model does not use the price of aluminum as a variable that may have affected the price of copper during the period of the alleged conspiracy.

b. Admissibility of the testimony

In both their motion in limine and motion for summary judgment, defendants contend that Gilbert's testimony is inadmissible under *Fed. R. Evid. 702* and *Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, because the foundation for his testimony is unreliable.

Rule 702 of the Federal Rules of Evidence provides:

> ***HN4***[] If scientific, technical, or other specialized knowledge will assist the **[**52]** trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) that testimony is the product of reliable **[*927]** principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In *Daubert, 509 U.S. at 583*, the Supreme Court held that ***HN5***[] *Rule 702* imposes a special obligation upon a trial judge to "ensure that any and all scientific testimony . . . is not only relevant, but reliable." The trial judge's gate keeping obligation "applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge" such as the economic testimony Gilbert has proffered in this case. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

HN6[] When determining whether expert testimony is admissible, district courts employ a two-step inquiry. E.g., United States v. Hall, 165 F.3d 1095, 1101-02 (7th Cir. 1999); Ancho v. Pentek, 157 F.3d 512, 515 (7th Cir. 1998). **[**53]** First, the court examines the expert's testimony to determine whether it is reliable, that is, whether it is grounded in scientific evidence or in subjective belief or unsupported speculation. Porter v. Whitehall Laboratories, Inc., 9 F.3d 607, 614 (7th Cir. 1993). Second, the court must determine whether the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue. Id. at 616.

Defendants contend that Gilbert's econometric model fails the first prong of the Daubert inquiry because it contains methodological flaws so pervasive they render the model wholly unreliable. According to defendants, the econometric model upon which Gilbert's testimony rests suffers from three key defects: (1) the model includes *all* transactions from designated "non-commercial" accounts, instead of only transactions that can be characterized as non-commercial; (2) the first stage of the model (the equilibrium equation) exhibits serial correlation; and (3) the price of aluminum is not included as a variable that may have affected the price of copper.

Before turning to defendants' specific critiques of Gilbert's work, several "meta-points" **[**54]** bear mentioning. HN7[] When an expert proposes to give testimony that is scientific (whether derived from the natural or social sciences), courts engage in "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Daubert, 509 U.S. at 592-93. A number of factors bear on the scientific validity of the expert's testimony, including whether the theory or technique can be and has been tested; whether the theory or technique has been subjected to peer review or scientific scrutiny within the scholarly community; and the reliability of the technique, including the potential rate of error and the general acceptance it enjoys. Id. at 593-94. The evidentiary inquiry is meant to be flexible and fact specific, and a court should use, adapt, or reject Daubert factors as the particular case demands. Kumho Tire Co, 526 U.S. at 141-42. There is no single requirement for admissibility as long as the proffer indicates that the expert evidence is reliable and relevant. Unrein v. Timesavers, Inc., 394 F.3d 1008, 1011 (8th Cir. 2005).

Significantly, **[**55]** defendants do not question Gilbert's credentials or the model upon which he based his expert opinions. They do not suggest that the Engel-Granger model is not accepted among economists. Therefore, it does not appear that they take issue with the scientific model that forms the foundation of Gilbert's opinion. Rather, they question Gilbert's decision to include and exclude specific factors from his model and the effect of those **[*928]** choices on the reliability of his ultimate conclusions.

i) inclusion of all transactions from designated non-commercial accounts

Defendants assert first that in calculating the non-commercial position variable, Gilbert erred in deeming whole accounts of individual trades either manipulative or legitimate without considering whether the individual trades were manipulative. By doing so, defendants contend, Gilbert's calculations are overinclusive, unreliable and not on a par with the standards demanded in his professional work.

HN8[] In deciding whether an expert's opinion is admissible under Daubert, a district court "must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist." **[**56]** Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 318 (7th Cir. 1996); see also Zenith Electronics Corp. v. WH-TV Broadcasting Corp., 395 F.3d 416, 419 (7th Cir. 2005)("The supposed 'uniqueness' of a market does not justify substituting a guess for careful analysis."). Essentially, an expert must "adhere to the same standards of intellectual rigor that are demanded in their professional work." Id. The expert's work must be reasoned and founded on data, Lang v. Kohl's Food Stores, Inc., 217 F.3d 919, 924 (7th Cir. 2000), and the expert must explain his conclusions, Zenith, 395 F.3d at 419.

Plaintiffs argue that after investigating and analyzing the market, Professor Gilbert used his professional judgment to make a conservative determination whether certain accounts were manipulative. As plaintiffs note, Gilbert devoted several pages of his report to explaining his rationale for deeming certain accounts non-commercial or manipulative. In his deposition, Gilbert stated that although he could have analyzed the accounts on a transaction-by-transaction basis (as he has done in other prior work), it would have been impossible to **[**57]** determine the individual intent behind the large number of daily transactions in this case. Further, he explained that although certain transactions in manipulative accounts may appear to have legitimate commercial purposes, he proceeded on the assumption that the overall account was set up for a non-commercial (or manipulative) purpose, and any transaction undertaken within it was in furtherance of the manipulation. Gilbert's methods are well articulated and do not rest on mere speculation.

HN9[] In serving its gatekeeping function, the court must be careful not to cross over into the role of factfinder. It is not the job of the court to insure that the evidence heard by the jury is error-free, but to insure that it is not wholly unreliable. *Smith v. Ford Motor Company, 215 F.3d 713, 719 (7th Cir. 2000)*("[W]hether the expert is credible or whether his or her theories are correct given the circumstances of a particular case is a factual one that is left for the jury to determine after opposing counsel has been provided the opportunity to cross-examine the expert. . ."). Gilbert's decision to include all transactions within the accounts that he conservatively estimated **[**58]** to be non-commercial was an exercise of professional judgment subject to cross-examination. It is not a ground for excluding his testimony altogether.

ii) serial correlation

Defendants' second contention is their most adamant: they argue that because Gilbert concedes that the equilibrium equation in his model exhibits serial correlation (the cumulative effect of unexplained price variations over time), he cannot show that the alleged conspiracy caused inflated prices within the physical market for copper during the relevant period. Defendants contend that if Gilbert had used the correction technique employed by their expert, **[*929]** Dr. Cameron, his model would have revealed that defendants' alleged misconduct had no discernible effect on copper prices.

At his deposition (and in his report), Gilbert conceded that the equilibrium equation he used exhibits serial correlation. However, despite defendants' assertions to the contrary, that is not the end of the story. Gilbert used the Engel-Granger error correction form of a multiple regression model. The Engel-Granger form uses two equations to estimate the effect of various factors on the price of copper: the equilibrium equation and the adjustment **[**59]** equation. According to Gilbert, serial correlation is always present in the residuals of the equilibrium equations; this is expected and accounted for in the adjustment equations. Given that Gilbert accounted for the existence of serial correlation and the need to correct for it, his method is not so inherently flawed as to preclude him from establishing whether defendants' alleged wrongdoing had any effect on the price of copper. Defendants will have ample opportunity to cross-examine Gilbert at trial and present competing expert evidence on whether defendants' alleged misconduct had any discernible effects on the price of copper in the physical market. In the end, however, whether Gilbert erred in applying his model and whether he failed to properly correct for serial correlation are jury questions not amenable to resolution on summary judgment.

iii) aluminum variable

Finally, defendants contend that Gilbert's model is unreliable because it does not include aluminum as a variable affecting the price of copper. Defendants argue that aluminum is comparable to copper and can serve as a proxy for otherwise omitted variables in measuring the impact of defendants' alleged wrongdoing **[**60]** on the price of copper futures. In support of their argument, defendants point to the report of their expert, Dr. Cameron, who found that the effects of the alleged misconduct diminished significantly when the price of aluminum was included as an explanatory variable. Defendants argue that Gilbert's failure to capture this salient explanatory variable makes his opinion unreliable. See, e.g., People Who Care v. Rockford Board of Education, School District *No. 205, 111 F.3d 528, 537-38 (7th Cir. 1997)*(***HN10***[] "A statistical study that fails to correct for salient explanatory variables, or even to make the most elementary comparisons, has no value as causal explanation and is therefore inadmissible in a federal court.").

In his revised affirmation, Gilbert states that he used a multiple regression model to estimate the overcharge and considered several factors that may have affected the price of copper. Dkt. # 802, exh. C at 31-35, PP 65-73 and 41. Gilbert explained in the supplement to his report that he rejected the inclusion of aluminum as a proxy for a number of reasons: 1) aluminum and copper are produced under different conditions and have different cost structures; 2) **[**61]** the aluminum market was flooded with exports in 1991-1993, skewing the normal relationship between copper and aluminum; and 3) the comparison is not valid given the type of informational manipulation that occurred because demand for aluminum may also have been affected by the alleged misconduct. Id. at 65-66, P 3.

HN11[] Although some regression analyses may be so incomplete as to be inadmissible, in most cases, "failure to include variables will affect the analysis' probativeness, not its admissibility." *Bazemore v. Friday, 478 U.S. 385, 400, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986)*; see also *Cullen v. Indiana University Board of Trustees, 338 F.3d 693, 702 n. 4 (7th Cir. 2003)*(citing **[*930]** *Bazemore, 478 U.S. at 400*). A "statistical study is not inadmissible merely because it is unable to exclude all possible causal factors other than the one of interest." *People Who Care, 111 F.3d at 537-38*. Because Gilbert considered and rejected the use of aluminum as a proxy and factored in other explanatory variables, his method is not so incomplete or lacking in foundation as to be unreliable. Although Gilbert's judgment may not be correct, his errors are fodder for **[**62]** cross-examination, not summary judgment. Consequently, I will deny defendants' motion in limine to exclude Gilbert's testimony and deny their motion for summary judgment with respect to defendants' claim that Gilbert's testimony is insufficient to establish a causal link between the alleged conspiracy and the price of copper in the physical market.

2. Testimony of Roy Henry and Marianne DeMario

Plaintiffs have employed three damage experts in this lawsuit: Roy Henry (for the Marmon plaintiffs), Marianne DeMario (for the Asarco plaintiffs) and David Hoffman (for the Southwire plaintiffs). Defendants do not challenge the admissibility of Hoffman's testimony; however, they contend that Henry and DeMario's testimony is inadmissible on several grounds.

Before assessing whether Henry's and DeMario's testimony meets the requirements of *Fed. R. Evid. 702*, I note as an initial matter, plaintiffs' contention that Henry's and DeMario's tabulations of copper purchases are admissible under *Fed. R. Evid. 1006*. ***HN12***[] Although *Rule 1006* permits a party to introduce in the form of a chart, summary, or calculation "[t]he contents **[**63]** of voluminous writings, recordings, or photographs which cannot conveniently be examined in court," such evidence remains subject to all evidentiary objections. *United States v. Milkiewicz, 470 F.3d 390, 396 (1st Cir. 2006)*("Evidence admitted under *Rule 1006* must be otherwise admissible and remains subject to the usual objections under the rules of evidence and the Constitution.") In this case, defendants are challenging the foundation for Henry's and DeMario's decision to include the records they did in their summary. Therefore, it is not the summaries themselves, so much as the conclusions being drawn from them, that are the subject of defendants' attack. Because Henry and DeMario are qualified to draw those conclusions only by virtue of their specialized training and experience, defendants' challenge to their testimony falls under *Rule 702*, not *Rule 1006*.

a. Summary of relevant testimony

i) Henry

Roy Henry has an undergraduate degree in accounting and a masters degree in business administration. After several years of working in finance and as a president-general manager for metal fabricating businesses, Henry joined Marmon in 1993 as corporate controller. **[**64]** In 2000, Henry became the Vice President of Finance for Cerro Wire & Cable and Vice President of Finance and Controller for Marmon Wire and Cable Companies. As a result of his tenure with Marmon, Henry is generally familiar with the copper purchasing and use patterns, document management systems and document retention policies of all of the Marmon plaintiffs. From his work in the industry, Henry possesses an understanding of how integrated producers operate and how copper is priced.

The Marmon plaintiffs (plaintiffs Cerro Wire & Cable, Inc., Cerro Flow Products, Inc., Cerro Metal Products Company, Comtran Corporation, The Kerite Company, Owl Wire and Cable, Inc. and Rockbestos-Suprenant Cable

Corp.) asked Henry to calculate the amount of copper cathode, rod, ingot and billet that they purchased **[*931]** between 1993 and 1996 from integrated producers. Henry supervised the collection and review of all documents relating to the Marmon plaintiffs' purchases during the relevant period. He provided guidance to the Marmon employees on what qualified as a purchase according to the guidelines set by plaintiffs' counsel and oversaw the record gathering process and insured that the purchase documents **[**65]** were relevant.

Invoices and other documents reflecting purchases of copper were separated from other documents, and duplicate invoices were removed. In addition, non-invoice documents, including contracts and purchase summaries, were reviewed to insure that the best available documentation was used to determine the pounds purchased by the Marmon plaintiffs. Copper purchases were assigned to the month best representing the month in which the copper was priced, based on the pricing month as noted on the invoice, the shipment date, the date the shipment was received, the invoice date or other available dates. The results were tabulated to create several spreadsheets. Henry verified personally more than 10% (400-500 documents) of the roughly 3600 documents used to calculate the total purchase volumes contained in the tabulations attached to his declarations.

Although Henry stated in his deposition that he identified which vendors were integrated producers in reliance on information from Marmon employees and his own knowledge of the vendor's operations, in some instances he relied on plaintiffs' discussions with Bill Rickher for this information. Henry explained that Rickher is an expert **[**66]** in the copper buying field, who was helpful in determining the relevancy of more unique copper purchases made by a number of companies that no longer had a management team in place.

Henry concluded that the Marmon plaintiffs purchased 1.16 billion pounds of copper from integrated producers during the period of the conspiracy; defendants' damage expert, Paul Wazzan, concluded that the Marmon plaintiffs had purchased 1.04 billion pounds during the relevant period.

Although Henry's short declarations were drafted by plaintiffs' counsel, he reviewed the documents before signing them and believes they express his findings accurately.

ii) DeMario

Marianne DeMario is a certified public accountant with more than fifteen years of substantial experience in complex forensic accounting investigation. She is the managing director of Spectrum Consulting Partners LLC, a financial and economic consulting firm. Her assignment was twofold: to compile an accounting of the Asarco plaintiffs' copper purchases and to determine, on behalf of all plaintiffs, the percentage of cathode and rod sales from integrated producers that were first-time sales of those products.

DeMario calculated copper cathode **[**67]** purchases made by the following Asarco plaintiffs between September 1, 1993 and May 31, 1996: American Insulated Wire Corporation; ASARCO Incorporated; Kennecott Utah Copper Corporation; Leviton Manufacturing Company, Inc.; Mueller Copper Tube Products, Inc.; Mueller Copper Tube Company; Superior TeleCom, Inc. and Essex Electric, Inc. This work was a continuation and completion of work initiated by Grant Thornton LLP, a large, well-known public accounting firm.

DeMario and her staff obtained 130,000 pages of invoices, vendor statements and other business records from the Asarco plaintiffs, which they reviewed and analyzed. In addition, she and her staff reviewed vendor statements and other business **[*932]** records to find relevant and sufficient information regarding the purchases by the Asarco plaintiffs and extracted the relevant information regarding the number of pounds of copper purchased, the month the purchases were made and from whom the copper was purchased. DeMario independently verified 88% of the data entries performed by her staff.

In calculating the percentage of sales from integrated producers that could be considered first time sales of cathode and rod (a number the parties **[**68]** call the "integrated producer percentage"), DeMario identified seven integrated producers for whom she was able to calculate an integrated production percentage: Asarco, Codelco, Cyprus, Kennecott, Phelps Dodge, Cominco, Inco and Magma/BHP. To calculate an average integrated producer percentage for remaining integrated producers for whom no records were available (Mexicana de Cananea, Minera Mexico, Noranda, Minera Escondida, Compania Minera Quebrada Blanca, Cox Creek Refining and Empresa

Minera de Mantos Blancos), DeMario calculated an average integrated production percentage by taking the simple average of the other producers, excluding Kennecott, because she thought that its unusual production problems during the Damages Period . . . increased its reliance on third party purchases" and made it an "outlier."

Defendants' expert relied on much of the same data as DeMario did in calculating his version of the integrated producer percentage. Although Wazzan (1) used a weighted average rather than a straight average to calculate the average percentage; (2) did not exclude data from Kennecott when calculating the average integrated producer percentage; and (3) did not calculate an integrated **[**69]** production percentage for Cominco because he could not identify any invoices for it, he agreed with DeMario that Asarco, Codelco, Cyprus, Inco, Kennecott, Magma and Phelps Dodge are each integrated producers who produced more than half of the copper they provided to plaintiffs.

b. Admissibility of the testimony

When assessing the admissibility of Henry's and DeMario's testimony, it is important to remember the purpose of the experts' reports. Neither purports to be a legal specialist. Although Henry attempted to distinguish between integrated producers and other vendors in his calculation of purchases made by the Marmon plaintiffs, DeMario made no similar distinction when tabulating the purchases made by the Asarco plaintiffs. DeMario and Henry have offered their testimony for the limited purpose of (1) quantifying how much copper cathode and rod the Asarco and Marmon plaintiffs purchased from 1993-1996 and (2) determining from whom they purchased it. In addition, DeMario has provided an opinion regarding the percentage of sales from each producer from whom plaintiffs purchased copper that can be labeled a first-time sale of cathode or rod. Because the experts are offering their **[**70]** testimony for no purpose other than the accuracy of those calculations, it is with respect to those matters only that the testimony's admissibility must be assessed.

Defendants raise several Daubert challenges to the admissibility of Henry's and DeMario's testimony. First, they contend that Henry's report should be excluded because he relied too heavily on plaintiffs' counsel. Second, they contend that both Henry's and DeMario's testimony should be excluded because the experts relied on others to assist them in collecting and analyzing data and because the reports are "riddled with errors." (In addition, defendants raise several other challenges to the data included in the reports that are relevant to determining how much plaintiffs **[*933]** may recover in damages but not to the admissibility of the reports. I will address those matters separately in section C, below.)

i) reliance on others

First, defendants contend that Henry relied improperly on plaintiffs' counsel in forming his opinions and preparing his expert reports. Defendants assert that Henry relied on counsel to draft his reports and to define the parameters of his inquiry into plaintiffs' purchases during the relevant time **[**71]** period, resulting in a work product that is effectively not his own.

Despite defendants' assertions to the contrary, the fact that plaintiffs' counsel drafted Henry's initial and revised declarations is not a ground for excluding his report and testimony. As plaintiffs note, ***HN13***[] "*Rule 26(a)(2)(B)* does not preclude counsel from providing assistance to experts in preparing the reports, and indeed . . . this assistance may be needed." *Fed. R. Civ. P. 26(a)(2)(B)* advisory committee's note (1993). Although an expert report "should be written in a manner that reflects the testimony to be given by the witness and . . . must be signed by the witness," it need not be drafted by him.

Henry's revised declaration is quite short, describing the process used to collect the purchase information. Apart from incorporating by reference several summary tables of copper purchases, the report does not express opinions or conclusions. Instead, the conclusions are contained in the summary data, which were prepared under Henry's direct supervision. Moreover, Henry testified in his deposition that he reviewed both declarations before signing them. Henry did not merely **[**72]** parrot the arguments of counsel; he reached his own conclusions after a lengthy process of collecting and reviewing purchase documents. *Indiana Insurance v. Hussey Seating Co., 176 F.R.D. 291, 293 (S.D. Ind. 1997)*(expert report not excluded where expert had prepared the attachments, consisting of the expert's opinions and work papers). Consequently, his report will not be excluded as the work of anyone other than himself.

Defendants assert that both Henry and DeMario deferred too much to plaintiffs' counsel by allowing counsel to set the parameters for their reports by specifying the relevant date range, product type and vendor classification for the purchases to be calculated. ***HN14***[] Under *Fed. R. Evid. 703*, the "facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing." See also *Dura Automotive Systems of Indiana, Inc. v. CTS Corp., 285 F.3d 609, 613 (7th Cir. 2002)*(citing *Fed. R. Evid. 703*); *Tuf Racing Products, Inc. v. American Suzuki Motor Corp., 223 F.3d 585, 591 (7th Cir. 2000)* **[**73]** (expert relied on financial information supplied by plaintiff and assumptions given by counsel). With respect to both Henry and DeMario, plaintiffs' counsel provided information to limit the scope of the experts' analysis; however, the lawyers did not formulate the experts' ultimate opinions. DeMario and Henry both supervised the collection of data they themselves determined were relevant to calculating the amount of copper plaintiffs purchased from 1993-1996. They verified a portion of the data that were collected and concluded that the end product was a reliable compilation of the data they were asked to assess. Although defendants remain free to argue that counsel set improper parameters, there was nothing improper about Henry's and DeMario's decision to perform the work they were asked to do in the manner they were asked to do it.

Next, defendants contend that in constructing their expert testimony, Henry and DeMario relied on the ad hoc judgments **[*934]** of others to determine the relevancy of purchase documents, without setting any objective guidelines. Specifically, defendants assert that Henry farmed out all of his work to Marmon employees, who determined on a document-by-document **[**74]** basis which transactions to include and then relied on plaintiffs' counsel to tabulate the data and to determine for him which vendors should be classified as integrated producers. Defendants contend that DeMario relied solely on data collected by another accounting firm and documents determined relevant and provided by plaintiffs. Plaintiffs argue that the opinions of Henry and DeMario are based on reliable methods and their reliance on others in preparing their reports is permissible.

HN15[] As explained above, experts may rely on data and other information supplied by third parties. *Dura Automotive Systems, 285 F.3d at 609* ("An expert witness is permitted to use assistants in formulating his expert opinion, and normally they need not themselves testify."); *NutraSweet Company v. X-L Engineering Company, 227 F.3d 776, 789-90 (7th Cir. 2000)*; *Tuf Racing, 223 F.3d at 591*. Analyzing data assembled by others is neither illicit nor unusual, even if the data were prepared for litigation by an interested party. *Loeffel, 372 F. Supp. 2d at 1119*. Unless the expert's opinion is too speculative, it should not be rejected as unreliable **[**75]** merely because the expert relied on the reports of others. *Walker v. Soo Line Railroad Co., 208 F.3d 581, 588 (7th Cir. 2000)*. Defendants argue that "[a]nalysis becomes more complicated if the assistants aren't merely gofers or data gatherers but exercise professional judgment that is beyond the expert's ken." *Dura Automotive Systems, 285 F.3d at 613*. Here, however, both experts were positioned to supervise and independently evaluate the data collection being done by others who assisted them.

Henry had extensive experience working in the industry, including personal knowledge of many copper vendors. He personally coordinated the collection of documents by asking his financial staff members to gather relevant purchase documents and provided guidance on what qualified as a purchase according to the guidelines set by plaintiffs' counsel. In light of his continued oversight and experience, the fact that Henry relied in part on plaintiffs' counsel and another consultant to identify certain integrated producers does not render his report inadmissible. Given his expertise in the copper industry, it was permissible for him to assess the information provided **[**76]** to him by others in formulating his opinion. *NutraSweet, 227 F.3d at 789-90*; *Walker, 208 F.3d at 588-89*.

Once again, defendants remain free to question the weight that should be given to Henry's testimony. They have not shown, however, that the testimony is inherently unreliable. *Loeffel Steel Products, Inc. v. Delta Brands, Inc., 372 F. Supp. 2d 1104, 1119-20 (N.D. Ill. 2005)*(citation omitted)(***HN16***[] "As a general rule, questions relating to the bases and sources of an expert's opinion affect only the weight to be assigned that opinion rather than its admissibility.").

With respect to DeMario, the Asarco plaintiffs provided her with business records detailing their copper cathode, rod and ingot purchases, including accounting records, purchase contracts, invoices and vendor statements. Although the accounting firm of Grant Thornton LLP was initially responsible for the data collection, DeMario continued and completed its work. She and her staff tested Grant Thornton's initial compilations for accuracy by comparing them with the supporting documentation. DeMario stated in her deposition that she reviewed the method **[*935]** used by Grant Thornton and **[**77]** reached her own conclusion, asserting that she would have gone back and changed what Grant Thornton had done if she had disagreed with its approach. For those purchases not yet calculated by Grant Thornton, DeMario reviewed the business records to determine which records contained relevant and sufficient information; noted the number of pounds, month and vendor for each purchase; and verified the existence, accuracy and completeness of the records by comparing them to other records or summary schedules provided by plaintiffs.

Defendants have not shown that the opinions of Henry and DeMario are based on unreliable methods or amount to unsupported speculation. *Hall, 165 F.3d at 1101-02*; *Ancho, 157 F.3d at 515*. Henry and DeMario explained the methods that they used to collect and summarize the documents. Although these methods may not be the most rigorous, they are not obviously flawed either. Whether the experts employed competent assistants, properly instructed them or ultimately relied on faulty judgments of others goes to the weight and not the admissibility of their opinions. Therefore, I decline to grant defendants' motion in limine with respect to their **[**78]** assertion that in forming their expert opinions Henry and DeMario relied impermissibly on the opinions and assistance of others.

ii) compilation errors

In a final attempt to exclude the testimony of Henry and DeMario, defendants point to numerous alleged miscalculations and errors in the work of both experts to show that their resulting opinions are unreliable. Defendants assert that Henry's report includes purchases by non-Marmon entities, double-counts purchases by using the provisional and final invoice for the same purchase and improperly includes unrefined copper purchases and non-purchase transactions in his calculations (such as tolling arrangements to turn copper into wire, wire purchases, shipping costs, amounts listed in credit memos, and swap transactions). According to defendants, DeMario includes in her calculation copper purchases from non-integrated producers and includes duplicate purchases totaling millions of pounds.

Certainly, the alleged errors and inconsistencies are grounds for impeaching the credibility of the experts and the reliability of their ultimate findings; however, ***HN17***[] mistakes and miscalculations are not grounds for excluding evidence. E.g., *Daubert, 509 U.S. at 596* **[**79]** ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."). Defendants do not challenge the methods employed by plaintiffs' experts. Instead, they allege that mistakes were made in implementing the experts' chosen methods. Whether certain types of transactions should have been included as purchases or how well the experts checked their work and the work of others can be explored fairly through cross-examination.

As I will discuss in more detail below, it is true that plaintiffs may not recover damages for any purchases that were not first time purchases of copper from an integrated producer. That point should have been clear to plaintiffs from the time the court of appeals issued its decision in *Loeb Industries, 306 F.3d 469*. Given that fact, it is difficult to understand why plaintiffs chose to have their experts go through the fruitless task of tabulating many purchases for which they will not be able to recover damages and failed to take more care in separating out qualifying purchases from nonqualified ones (more on that later). **[**80]** However, the fact that *some* of the purchases itemized by plaintiffs' Henry and **[*936]** DeMario cannot be recovered does not mean that *all* of the purchase information itemized in the reports is useless or inadmissible.

Both Henry and DeMario utilized well-recognized methods for tabulating the quantities of copper plaintiffs purchased from 1993-1996. Assuming the jury finds them to be credible witnesses, their calculations will assist the jury in determining how much damages, if any, to award plaintiffs for their alleged antitrust injuries. Because I find that Henry's and DeMario's testimony meets the basic requirements of *Fed. R. Evid. 702*, defendants' motion in limine to exclude their testimony will be denied.

3. Evidence of antitrust injury

In their motion for summary judgment, defendants suggest that without the testimony of Gilbert, Henry and DeMario, plaintiffs would be unable to show that they were harmed by defendants' alleged conspiracy. Because I have found that the expert testimony is admissible, the next question is whether the experts' testimony, if believed, would permit a jury to find that plaintiffs suffered any antitrust injury **[**81]** for which they could recover damages under ***antitrust law***.

Although the parties' proposed facts are less than clear on this point, defendants do not appear to contend that any one plaintiff failed to make at least one first-time purchase of cathode or rod from an integrated producer. Therefore, even if it is true that plaintiffs will be unable to recover damages for many of the purchases their experts have tabulated because those purchases do not qualify as first-time purchases under Loeb Industries, each plaintiff has demonstrated that it has antitrust standing to bring suit against defendants. Consequently, defendants' motion for summary judgment will be denied with respect to defendants' contention that plaintiffs lack antitrust standing to pursue their claims.

C. Damages

Having established that the reports and calculations of plaintiffs' damage experts are admissible and that those reports, if believed, are sufficient to establish plaintiffs standing to bring suit, I turn to several remaining questions. Although the answers to these questions do not affect the disposition of defendants' pending motions, they will affect the duration and organization of the trial and therefore **[**82]** must be addressed at this time.

In their motion for summary judgment, defendants identify three problems with plaintiffs' experts' reports. First, each of plaintiffs' experts failed to distinguish clearly between purchases made from integrated producers and from other vendors, complicating the assessment of potential damages. Second, although plaintiffs are barred as a matter of law from recovering for any purchases they made through copper merchants, they have nevertheless included such purchases in their damage assessment. Finally, plaintiffs' experts failed to apply a reduction to purchases of cathode and rod from integrated producers to account for the portion of those purchases that were not first-time sales. In response to these objections, plaintiffs assert that it is the jury's job to determine which purchases are first purchases, whether purchases made through merchants are recoverable and what percentage reduction should be applied to plaintiffs' purchases from integrated producers. I am not persuaded that plaintiffs' laissez faire approach to damages is fair to defendants, the court or the jury.

1. Identity of integrated producers

From the parties' proposed findings **[**83]** of fact and the reports of their damages experts, **[*937]** it appears the parties agree that Asarco, Codelco, Cyprus, Kennecott, Phelps Dodge, Inco, Magma/BHP, Cominco, Empresa Minera de Mantos Blancos, Minera Mexico Internacional, Noranda, Mexicana de Cananea SA Minera Escondida Limitada, Compania Minerva Quebrada Blanca S.A. and Cox Creek Refining are each integrated producers of copper that refined at least a portion of the cathode and rod they sold to plaintiffs between 1993 and 1996. It is entirely unclear whether there are additional integrated producers from whom plaintiffs purchased cathode or rod during the relevant period.

Having studied the parties' proposed findings, briefs and expert reports, I remain uncertain whether the parties have identified all integrated producers. It is difficult to imagine that the lay jury will not find itself confused as well. Rather than wait until trial to sort out the identity of integrated producers, I will hold a hearing on May 16 to address this and other matters. The parties to produce a list of the vendors who qualify as integrated producers and, at the hearing, plaintiff should be prepared to make a proffer of proof with respect to any vendor **[**84]** whose status as integrated producer is disputed.

2. Role of merchants

In *Loeb Industries, 306 F.3d 469*, the court of appeals made it explicit that plaintiffs could recover damages only for first-time purchases of cathode and rod from integrated producers. The reason behind this rule is simple: ***HN18***[]

in an antitrust action, the stakes are too high to permit plaintiffs to recover damages that may duplicate damages awarded to other plaintiffs. Therefore, the best-situated plaintiff is the plaintiff closest to the antitrust injury. *Id. at 481* (citing *Illinois Brick Co. v. Illinois, 431 U.S. 720, 729, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*("[T]he direct purchaser from the alleged antitrust violator(s) is the one with the right of action; those further removed from the illegal arrangement may not (under the federal antitrust laws, at least) bring their own actions.").

In *Loeb Industries, 306 F.3d at 490*, the court held that in this case the proper plaintiffs are those who first-purchased cathode or rod at an inflated price as a result of defendants' alleged conspiracy. Implicit in the decision was the finding that all purchases of non-scrap copper **[**85]** could be classified either as (1) purchases of an original product manufactured by an integrated producer for direct sale or (2) purchases of a product previously sold by an integrated producer or reseller to a buyer "downstream" from the original vendor. Under that framework, only initial sales are properly compensable as antitrust injuries; money expended on the purchase of previously sold copper cannot be recouped in damages.

Now, however, plaintiffs have identified a third category of sales not mentioned in the court of appeals' decision: sales arranged through vendors known as merchants. According to plaintiffs, merchants are neither producers nor resellers. Instead, they are service providers who arrange for the order and delivery of products from an original producer directly to plaintiffs. Plaintiffs contend that they should be permitted to recover treble damages for all copper they purchased through merchants. (The merchants identified by the parties include AICO Corp., BAL Metals International, Inc., Billiton Metals Inc., Brandeis Ltd., Cerro Sales Corp., Conversion Resources, Inc., Exeon, Gerald Metals, Glencore Ltd., Heisei Minerals Corp., International Metals, J. Aron **[**86]** & Co., Kataman Metals, Inc., Kobe Copper Products, Kojemi Corp., Manitoba Corp., Metal Commodities, MG Metal and Commodity Co., Miles Metal Company, Minemet Inc., Minorco, Mitsubishi Materials America Corp., Mitsui & Co., Outokumpu, Pechiney **[*938]** World Trade Inc., PMX Industries, Inc., Samsung America, Inc. and Southwire Company.)

As explanation why they should be permitted to recover damages for purchases made through vendors, plaintiffs have invoked the "control/agency" and "cost-plus" exceptions to the direct purchaser rule established in Illinois Brick and reiterated in Loeb Industries. Even if the exceptions on which plaintiffs rely were viable in this circuit (and there is serious reason to doubt that they are, see, e.g., *State of Illinois, ex rel. Burris v. Panhandle Eastern Pipe Line Co., 935 F.2d 1469, 1478 (7th Cir. 1991)*(noting "questions about the viability of the cost-plus exception in *any* context")(citing Calkins, The October 1989 Supreme Court Term and Antitrust: Power, Access, and Legitimacy, 59 Antitrust L.J. 339, 363 n. 135 (1991)) plaintiffs' reliance on those theories is misguided.

As the court of appeals explained in **[**87]** *Loeb Industries, 306 F.3d at 482*, ***HN19***[] when "Party A, the antitrust violator, sells to Party B, and then Party C, a down-stream purchaser from B, seeks to recover the implicit overcharges that B passed on to C," C has no standing to bring an antitrust claim. Party B does. In this case, if the merchants stood in the place of Party B, they would have standing to bring their own claim and plaintiffs would be barred under the antitrust laws from recovering damages for cathode purchased from the merchants.

At its root, then, the question before the court is a simple one: Did the merchants *purchase* the cathode they passed along to plaintiffs? If so, it is they who have standing to recover for those purchases, not plaintiffs. However, if the arrangement between the merchants and plaintiffs was nothing more than a service contract in which the merchants merely placed orders on plaintiffs' behalf and arranged for delivery while plaintiffs paid the bill, then plaintiffs are the first purchasers and may recover for the cathode purchases they made from the integrated producers with the assistance of the merchants.

Unfortunately, the facts the parties have proposed do little to **[**88]** assist the court in determining the answer to this dispositive question. The facts proposed by plaintiffs are disputed by defendants and relate only to the generalities of how merchant purchases "typically" and "often" work. Once again, I am concerned that the jury not be presented with unnecessarily complicated information regarding the peripheral question whether the merchants or plaintiffs were the actual first purchasers of the cathode and rod in question. Therefore, I will take up this matter in advance of trial, together with the question of identification of the integrated producers. At the May 16 hearing, plaintiff should be prepared to make a detailed proffer of proof with respect to the role played by each merchant with respect to each purchase for which plaintiffs are seeking damages.

3. "Integrated Producer Percentage" reduction

In *Loeb Industries, 306 F.3d 469*, the court of appeals reversed this court's finding that the complexity of apportioning damages in this case counseled against finding that plaintiffs had standing to bring suit under the antitrust laws. In doing so, the court explained that

> tracking every pound of cathode refined **[**89]** or purchased by [plaintiffs'] suppliers, and locating every cathode contract Viacom entered into over a six-year span will not be easy. But complex litigation is hardly new for the federal courts, whether it is in the field of antitrust, environmental clean-ups, pension law, or accounting frauds. . . . [O]ne need only determine through available records what percentage of cathode bought by **[*939]** [plaintiffs] represents first purchases. This is not speculative or complex, only time-consuming, and we are confident that the parties and their counsel are up to the task.

Id. The court reinstated plaintiffs' claims and reiterated its holding that plaintiffs would "have the burden of ascertaining what percentage of the cathode sold by these [integrated] producers was refined by them and not purchased from third parties," *id. at 495*, in order to prove their damages.

Plaintiffs do not deny that their damages are subject to reduction by the "integrated producer percentage" referred to in the court of appeals' decision. In fact, as mentioned in Section B, above, DeMario calculated an integrated producer percentage for each integrated producer identified to her **[**90]** by plaintiffs. Wazzan, defendants' damage expert, has done the same. Nevertheless, for reasons that are not entirely clear, defendants object strenuously to the failure of plaintiffs' experts to apply their integrated producer percentage reduction to the final tally of the damages they are seeking.

In their defense, plaintiffs point out that DeMario and Wazzan calculated the integrated provider percentage in slightly different ways. (DeMario used a straight average and Wazzan used a weighted average; DeMario excluded Kennecott's percentages when calulating the "average"percentage; Wazzan did not.) Recognizing that the dispute regarding percentages needs to be resolved before any final damages estimate can be reliable, plaintiffs' experts have provided their underlying damages figures without applying the integrated producer percentage reduction. Plaintiffs assert that once the jury has determined which purchases qualify as first purchases and which percentage reductions are more reliable, the court or the parties need only engage in a "simple arithmetic calculation" to determine the ultimate damages due them. I agree.

At trial, the jury will undoubtedly hear testimony from DeMario **[**91]** and Wazzan regarding their reasons for calculating the initial producer percentage in the manner they did. The jury will have to weigh the credibility of the experts and determine which approach is the more reasonable one. Once it has chosen a set of figures on which to rely (DeMario's or Wazzan's, or some amalgamation of the two), applying the percentage reductions to the qualifying purchases will be a simple matter.

ORDER

IT IS ORDERED that

1. The motion for summary judgment of defendants J.P. Morgan Chase & Company and Morgan Guaranty Trust Company of New York is DENIED;

2. Defendants' motion in limine to exclude the reports and testimony of Roy Henry and Marianne DeMario is DENIED.

3. Defendants' motion in limine to exclude the report and testimony of Christopher Gilbert is DENIED.

FURTHER, IT IS ORDERED that

4. Plaintiffs Aetna Insulated Wire, Cerro E.M.S. Limited, Cerro Fabricated Products, Inc. and Hendrix Wire & Cable, Inc. are DISMISSED from this lawsuit.

5. A hearing will be held on Wednesday, May 16, 2007, at 7:30 a.m. At that time, plaintiff should be prepared to make a detailed proffer of proof with respect to (1) any vendor whose status as integrated producer **[**92]** is disputed; and (2) the role played by each merchant with respect to **[*940]** each purchase for which plaintiffs are seeking damages.

Entered this 24th day of April, 2007.

BY THE COURT:

BARBARA B. CRABB

District Judge

Freightliner of Knoxville, Inc. v. DaimlerChrysler Vans, LLC

United States Court of Appeals for the Sixth Circuit

April 19, 2007, Submitted ; April 26, 2007, Decided ; April 26, 2007, Filed

File Name: 07a0147p.06

No. 06-6054

Reporter

484 F.3d 865 *; 2007 U.S. App. LEXIS 9452 **; 2007 FED App. 0147P (6th Cir.) ***; 2007-1 Trade Cas. (CCH) P75,676

FREIGHTLINER OF KNOXVILLE, INC.; CARROLL PROPERTIES, L.P.; and BUDDIE E. CARROLL, Plaintiffs-Appellants, v. DAIMLERCHRYSLER VANS, LLC, Defendant-Appellee, FREIGHTLINER, LLC, Defendant.

Prior History: [1]** Appeal from the United States District Court for the Eastern District of Tennessee at Knoxville. No. 05-00339--Thomas Varlan, District Judge.

Freightliner of Knoxville, Inc. v. DaimlerChrysler Vans, LLC, 438 F. Supp. 2d 869, 2006 U.S. Dist. LEXIS 51610 (E.D. Tenn., 2006)

Core Terms

Vans, dealers, retail, customer, alleges, brand, dealerships, terminated, amended complaint, terms, distributes, circumstances, trucks, district court, advertising, facilities, offering, resale, seller, motor vehicle, heavy-duty, processing, purchasers, discovery, package, selling, sales

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

When reviewing a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss a court must accept the plaintiff's allegations as true even if the defendant vehemently denies such allegations.

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

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

HN2[] **Standards of Review, De Novo Review**

An appellate court reviews de novo a district court's decision to dismiss under *Fed. R. Civ. P. 12(b)(6)*. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. An appellate court must accept all facts in the complaint as true and construe the complaint liberally in favor of the plaintiff.

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

HN3[] **Trade Practices & Unfair Competition, State Regulation**

The Tennessee Trade Practices Act, *Tenn. Code Ann. § 47-25-1301 et seq.*, states that no supplier may terminate, cancel, fail to renew or substantially change the competitive circumstances of a retail agreement without good cause. *Tenn. Code Ann. § 47-25-1302*.

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

HN4[] **Trade Practices & Unfair Competition, State Regulation**

The Tennessee Trade Practices Act, *Tenn. Code Ann. § 47-25-1301 et seq.*, defines a "retailer" as a person, firm or corporation engaged in the business of selling and retailing farm implements and machinery, construction, utility and industrial equipment, outdoor power equipment, attachments or repair parts and shall not include retailers of petroleum products. *Tenn. Code Ann. § 47-25-1301*.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

HN5[] **Contract Interpretation, Parol Evidence**

The parol evidence rule does not permit contracting parties to use extraneous evidence to alter, vary, or qualify the plain meaning of an unambiguous written contract. Furthermore, to allow a party to a contract to admit that the party signed the contract but to deny that the terms of the contract express the party's agreement would destroy the value of contracts.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN6[] **Robinson-Patman Act, Coverage**

The Robinson-Patman Price Discrimination Act (RPA) amends portions of the Clayton Antitrust Act and is codified at *15 U.S.C.S. § 13(a)*, *(d)*, and *(e)*. *Section 13(d)* and *(e)* of the RPA deal with discrimination in the field of promotional services made available to purchasers who buy for resale.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN7[] **Robinson-Patman Act, Coverage**

The language of *15 U.S.C.S. § 13* provides as follows: (d) Payment for services or facilities for processing or sale. It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities. (e) Furnishing services or facilities for processing, handling, etc. It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN8[] **Robinson-Patman Act, Coverage**

Under the Robinson-Patman Act, if the seller pays the retailer to perform the promotional service, *15 U.S.C.S. § 13(d)* applies. Whereas if the seller itself provides the promotional service to the retailer, *15 U.S.C.S. § 13(e)* applies. This is often a fine distinction and thus the two sections tend to be considered together as a "harmonious whole." At bottom, the aim of both sections is to eliminate devices by which preferred buyers obtain discriminatory preferences under the guise of promotional allowances.

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

HN9[] **Reviewability of Lower Court Decisions, Preservation for Review**

There is no duty on the part of the trial court or the appellate court to create a claim which an appellant has not spelled out in his pleading.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN10[] **Robinson-Patman Act, Coverage**

The "services or facilities" envisioned by the Robinson-Patman Act are not explicitly defined within the text of the Act, but they have been construed to include any kind of advertising, catalogs, demonstrators, display and storage cabinets, display materials, hand bills, special packaging or package sizes, warehouse facilities, accepting returns for credit, prizes or merchandise for conducting promotional contests, and "monetary awards" paid by the seller to clerks, salesmen, and other employees of the customer for special sales or promotional efforts.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN11[] **Robinson-Patman Act, Coverage**

Section 2(d) of the Robinson-Patman Act, *15 U.S.C.S. § 13(d)*, has been applied to a broad range of promotional payments, including cooperative advertising programs, rebates that a retailer must pass to consumers, payments for customer mailings, payments for preferred shelf space, payments for institutional advertising (i.e., advertising the buyer's business generally), and unjustified off-invoice deductions for promotional allowances. "Services" and "facilities" covered by § 2(e) of the Robinson-Patman Act, *15 U.S.C.S. § 13(e)*, have been held to include handbills, demonstrators, catalogues, cabinets, display racks, prizes or merchandise for conducting promotional contests, point-of-sale materials, advertising services, providing personnel whose salaries are paid in whole or in part by the seller, background music with periodic advertisements, letters announcing a new distributor but not mentioning competing distributors, special packaging or package sizes, and marketing support. The list is not exhaustive, however, for many incentives have been held not to be within the prohibitions of *§ 13(d)* and *(e)*, such as a supplier's offering favorable credit terms or authorizing the extension of credit to select customers.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN12[] **Robinson-Patman Act, Coverage**

With regard to the Robinson-Patman Act, the extension of credit is a practice incident to the original sale rather than to the subsequent resale of the product, and, therefore, outside the coverage of § 2(d) and (e) of the Robinson-Patman Act, *15 U.S.C.S. § 13(d)* and *(e)*.

Counsel: ON BRIEF: Robert S. Stone, Jr., Katherine M. Hamilton, YOUNG, WILLIAMS, KIRK & STONE, Knoxville, Tennessee, for Appellants.

George W. Mykulak, Boston, Massachusetts, for Appellee.

Judges: Before: MERRITT and MARTIN, Circuit Judges; FORESTER, District Judge. *

Opinion by: BOYCE F. MARTIN, JR.

Opinion

[*867]

[*1]** BOYCE F. MARTIN, JR., Circuit Judge. Plaintiffs appeal from the district court's dismissal of their claims under *Fed. R. Civ. P. 12(b)(6)*. For the reasons outlined below, we **AFFIRM** in part and **REVERSE** in part.

[*2]** I

Plaintiff-Appellant Freightliner of Knoxville, Inc. ("FOK") is a Tennessee corporation authorized to sell and service the Freightliner brand of medium- and heavy-duty trucks. Plaintiff-Appellant Carroll Properties, L.P. is a Tennessee partnership that built and leased the FOK facility to Plaintiff-Appellant Buddie E. Carroll. Carroll, a Tennessee **[**2]** resident who is the sole shareholder of FOK and its president, then leased the facility to FOK.

Defendant-Appellee DaimlerChrysler Vans, LLC ("DC Vans") is a Delaware company wholly owned by DaimlerChrysler, AG. DC Vans distributes a line of commercial vans known as the "Sprinter." Defendant Freightliner, LLC ("FLLC") is a Delaware company also wholly owned by the parent DaimlerChrysler, AG. FLLC manufactures vehicles marketed under the Freightliner brand.

FOK alleges that in February 2000, the president of FLLC presented it and a select group of Freightliner dealers with the opportunity to sell what was to be called the "Freightliner Sprinter," a medium-size commercial van which could also be customized for passengers. Although it was to be marketed in the United States under the Freightliner brand, the Sprinter was virtually identical to a van that had been sold in Europe for many years, with tremendous success, under the Mercedes-Benz brand. FOK believed that if it became a Freightliner Sprinter franchisee, "it would be able to sell a great deal of product for a long time."

The catch, according to FOK, was that a dealer would only be selected to sell the Sprinter if it were to **[**3]** upgrade its facility in a variety of ways, including (among other things): creation of a separate showroom for Sprinter vans, so as to "segregate potential Sprinter corporate customers from heavy-duty truck customers who frequent every Freightliner dealership for sales and service." FOK took the bait and accordingly changed the design plans for

* The Honorable Karl S. Forester, United States District Judge for the Eastern District of Kentucky, sitting by designation.

its planned Knoxville facility by adding designated space for the Sprinter vans. FOK estimates that it paid $ 800,000 in "additional construction costs" in order to build the new space. FOK was rewarded for its efforts: sometime after May 2001 FLLC notified FOK that it had been approved for a Sprinter retail sales and service agreement. At the same time, FLLC told FOK that DC Vans, and not FLLC, would be the distributor of the Sprinter vans. This appears to have been a mere hiccup in the negotiations, however, as on September 26, 2001, FOK entered into a dealer agreement with DC Vans for the sale of Sprinters.

FOK alleges that regardless of who its distributor was (FLLC or DC Vans), it had always operated under the unwritten assumption that the Sprinter vans would be distributed exclusively to *Freightliner* **[*868]** dealers (such as FOK), and sold **[**4]** exclusively under the *Freightliner* brand. As FOK states in its amended complaint, "DC Vans stepped seamlessly into the shoes of FLLC. It parroted and confirmed the distinct impression of exclusivity fostered by FLLC's representations." This assumption proved mistaken, however: sometime in 2002, FOK was informed that the Sprinter van would also be sold through *Dodge* dealers under the *Dodge* brand, i.e., as a " *Dodge* Sprinter." [1] To add insult to injury, on July 19, 2002, FOK was informed that not only would the Sprinter be concomitantly sold as a Dodge product, but also that Freightliner dealers would only be permitted to sell Sprinter vans until 2005, at which point the vans would be sold exclusively as a Dodge product. DC Vans has since pulled back from this hard-line stance, and has in fact amended the record to note that it will not terminate its Sprinter agreements with Freightliner dealers, and that the Sprinter van will simply be "dual branded" for the foreseeable future. Indeed, despite the instant litigation, FOK and DC Vans continue to do business in Freightliner Sprinter vans pursuant to their **[***3]** dealer agreement, an agreement which has now been extended **[**5]** through the 2007 model of Freightliner Sprinter. D. Ct. Op. at 4.

DC Vans' concession notwithstanding, FOK claims that the damage was done by the mere fact of having the rug pulled out from what it thought was an exclusive dealership agreement. Essentially, FOK claims that it would never have entered into the dealer agreement in the first place, nor invested $ 800,000 in its facility, had it known that DC Vans intended to distribute the Sprinter under both the Dodge and Freightliner brands. [2] Furthermore, FOK maintains that DC Vans has engaged in discriminatory pricing by offering Dodge dealers "special incentives with respect to sales of the Sprinter product." Due to these incentives and "discounts," Dodge dealers were allegedly "able to offer the vans to the public at a significantly lower price than FOK was able to offer and still make a profit."

[6]** FOK filed suit in federal court against FLLC and DC Vans on October 11, 2005, bringing a total of eleven claims, some against both defendants and some only against DC Vans. Jurisdiction was proper on the basis of diversity; additionally, because one of the claims arose under federal ***antitrust law***, federal question jurisdiction was properly invoked. All eleven claims were dismissed on the pleadings by the district court. FOK now only requests that we review the following two aspects of its original claims, both of which are directed solely at DC Vans, not at FLLC: (1) whether it was proper for the district court to dismiss FOK's claims under the Tennessee Trade Practices Act, *Tenn. Code Ann. §§ 47-25-1301 to 1314*; and (2) whether it was proper for the district court to dismiss FOK's claims under the federal Robinson-Patman Act, *15 U.S.C. §§ 13 (d)* and *(e)*.

II

HN2[] We review *de novo* a district court's decision to dismiss under *Fed. R. Civ. P. 12(b)(6)*. *Adika v. Smith, 466 F.3d 503, 505 [*869] (6th Cir. 2006)*. "[A] complaint should not be dismissed for failure to state a claim unless **[**7]** it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Kottmyer v. Maas, 436 F.3d 684, 688 (6th Cir. 2006)* (quoting *Conley v. Gibson, 355 U.S. 41,*

---

[1] Dodge is yet another subsidiary of DaimlerChrysler, AG.

[2] DC Vans strenuously maintains that it does not distribute, nor has it ever distributed, the *Dodge* Sprinter van. Appellee's Br. at 3 ("The only motor vehicle that DC Vans has ever distributed is the *Freightliner* Sprinter van.") (emphasis added). ***HN1***[] When reviewing a *12(b)(6)* motion to dismiss, however, we must accept the plaintiff's allegations as true even if the defendant vehemently denies such allegations. Here, FOK alleges that DC Vans distributed not just the Freightliner Sprinter, but also the Dodge Sprinter. *See* Amended Compl. PP 53, 114-21.

45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). This Court "must accept all facts in the complaint as true and construe the complaint liberally in favor of the plaintiff." Adika, 466 F.3d at 505.

A. Claims under the Tennessee Trade Practices Act

HN3[] The Tennessee Trade Practices Act ("TTPA") states that "[n]o supplier . . . may terminate, cancel, fail to renew or substantially change the competitive circumstances of a retail agreement without good cause." Tenn. Code Ann. § 47-25-1302. FOK's claims under the TTPA are twofold. First, it alleges that by dual-branding the Sprinter van and by selling the van through Dodge dealerships, DC Vans has effected a "substantial[] change in the competitive circumstances of a retail agreement." Second, it claims that DC Vans constructively terminated the retail agreement, both by stating its intent to withdraw the van from Freightliner dealers and by providing **[**8]** competing Dodge dealers with the same Sprinter product on better terms than those offered to FOK.

In dismissing FOK's claims, the district court ruled that the TTPA does not apply to motor vehicles. **HN4**[] The TTPA defines a "retailer" as a "person, firm or corporation engaged in the business **[***4]** of selling and retailing farm implements and machinery, construction, utility and industrial equipment, outdoor power equipment, attachments or repair parts and shall not include retailers of petroleum products." T.C.A. § 47-25-1301. FOK continues to assert that the Sprinter van qualifies as "industrial equipment" under the TTPA, as it is designed ostensibly for industrial use. DC Vans vigorously counters that the Sprinter is quite simply a motor vehicle, distinguishable from the common understanding of "industrial equipment," and that the presence of another Tennessee statutory scheme which provides for the licensing and regulation of motor vehicle sales, T.C.A. § 55-17-101 et seq., suggests that the state legislature did not intend to include motor vehicles within the ambit of the TTPA. There are apparently no Tennessee authorities **[**9]** that definitively address whether "industrial equipment" includes motor vehicles used for industrial purposes under the TTPA.

We frankly find the language of the TTPA to be rather vague and unhelpful, and are disinclined to endorse the district court's sweeping interpretation of this statute without more guidance from the Tennessee legislature or courts. We find it unnecessary to resolve this dispute, however, because even assuming that the TTPA governs the distribution and sale of the Sprinter van, FOK has failed to allege facts that would amount to a violation of the statute.

First, FOK's claim that DC Vans has "substantially change[d] . . . the competitive circumstances of [the] retail agreement," is undercut by the plain terms of the retail agreement itself, which FOK quoted in relevant part in the Amended Complaint. In the retail agreement, DC Vans "retains all rights and discretion with respect to the manufacture, distribution, sales and service of motor vehicles, . . . including the rights (a) to sell and service Contract Goods in the Primary Market Area . . . (b) *to appoint other dealers in the Primary Market Area on terms and conditions deemed appropriate* . . . . **[**10]** " Amended Compl. P 36 (emphasis added). This provision explicitly contemplates the sale of Sprinter vans through other dealers. Consequently, DC Vans's decision to **[*870]** sell the vans through Dodge dealers was actually provided for in the retail agreement. Neither the Amended Complaint nor FOK's brief identifies any portion of the retail agreement that precludes DC Vans from dual-branding the Sprinter van or from specifically selling it through Dodge. Nor does any portion of the amended complaint indicate that the retail agreement speaks to how the terms of the agreement between DC Vans and FOK should compare to the terms offered to any other dealers. [3] A straightforward reading of the agreement belies FOK's argument that DC Vans's business relationship with Dodge amounted to a change in the competitive circumstances of the retail agreement under the TTPA, as this relationship is explicitly anticipated in the agreement itself.

---

[3] This is not to say that other forms of relief that are based on differences between the terms offered to respective dealers and that find their source outside the contract, such as FOK's Robinson-Patman Act claim, are necessarily precluded by the retail agreement. Unlike other such forms of statutory relief, however, the TTPA incorporates the retail agreement by reference, and by so doing would appear to render unavailable a claim based on changed competitive circumstances to the agreement where the agreement itself provides such rights to the supplier.

[11]** FOK makes a number of factual allegations pertaining to representations made by DC Vans prior to the execution of the retail agreement. The Amended Complaint alleges that based on these representations FOK was led to believe that Freightliner would be the exclusive dealer of the Sprinter van. *See* Amended Compl. P 18. Even taken as true, the allegations of such representation are not enough for FOK's claim of changed competitive circumstances to survive, as they stand in stark contrast to the terms that were eventually included in the retail agreement. *See* *Staubach Retail Services-Southeast, LLC v. H. G. Hill Realty Co., 160 S.W.3d 521, 525 (Tenn. 2005)* (***HN5***[] "The parol evidence rule does not permit contracting parties to 'use extraneous evidence to alter, vary, or qualify the plain meaning of an unambiguous written contract.' Furthermore, to allow a party to a contract to admit that the party signed the contract but to deny that the terms of the contract express the party's agreement would destroy the value of contracts." (internal citations omitted)). Moreover, **[***5]** DC Vans cannot be said to have somehow pulled a fast one on FOK by memorializing different terms **[**12]** than the parties discussed, as it had FOK sign a Release that discharged any prior obligations owed to FOK by DC Vans, including claims based upon any prior "agreement" or "representation." The retail agreement itself also stated that it "constitute[s] the Parties' entire agreement relating to selling and servicing Contract Goods," and "supercedes all prior negotiations, understandings and agreements, written or oral, relating to its subject matter." If FOK had any doubts about whether it maintained an exclusive right to sell the Sprinter van based on prior discussions between the parties, despite the contrary language in the retail agreement, the explicit provisions of the release and the retail agreement should have cleared them up. Any such representations were clearly and intentionally excluded from the retail agreement, and FOK cannot now rely on them to support its claim that DC Vans changed the agreement's competitive circumstances.

FOK also fails to allege facts to support its claim that DC Vans terminated the retail agreement. Although the complaint alleges that DC Vans constructively terminated the agreement by dual-branding the Sprinter vans and distributing them through **[**13]** Dodge, such distribution **[*871]** was specifically contemplated in the agreement. We would be hard-pressed to read FOK's factual allegations to include a claim of constructive termination of the agreement based on actions taken by DC Vans that were provided for by the very terms of the agreement itself.

Additionally, FOK contends that DC Vans terminated the agreement by advising FOK that it would stop distributing Sprinter vans under the Freightliner brand after 2005. This allegation could be read to present a claim for anticipatory breach, presenting us with the potentially interesting legal question of whether anticipatory breach amounts to "termination" under the TTPA. Yet FOK now concedes that DC Vans has decided not to withdraw the Freightliner Sprinter from the market and to offer an extension of the dealer agreement, effectively terminating its termination claim. This concession forces FOK to put all its eggs in the "changed competitive circumstances" basket based on the dual-branding of the vans, an argument which we reject under the terms of the contract as discussed above.

For these reasons, we affirm, albeit on different grounds, the district court's dismissal of FOK's claims under **[**14]** the TTPA.

B. Claims under the Robinson-Patman Act

HN6[] The Robinson-Patman Price Discrimination Act ("RPA") amends portions of the Clayton Antitrust Act and is codified at *15 U.S.C. §§ 13(a)*, *(d)*, and *(e)*. FOK's amended complaint, however, alleges violations of *§§ 13(d)* and *(e)* only. [4] These two sections of the RPA "deal with discrimination in the field of promotional services made

---

[4] Nowhere in FOK's original or amended complaint is *§ 13(a)* even mentioned, and Count XI--which outlines the RPA claims--refers exclusively to *§§ 13(d)* and *(e)*. Thus, to the extent that FOK now argues that its complaint should be construed so as to encompass alleged *§ 13(a)* violations as well, Appellant's Br. at 21-23, this argument comes too late. *See* *Clark v. National Travelers Life Ins. Co., 518 F.2d 1167, 1169 (6th Cir. 1975)* (***HN9***[] "[T]here is no duty on the part of the trial court or the appellate court to create a claim which appellant has not spelled out in his pleading.") (internal quotation marks and parentheses omitted).

available to purchasers who buy for resale." *Lewis v. Philip Morris Inc., 355 F.3d 515, 521-22 (6th Cir. 2004)*. ***HN7***[] The language of the sections provides as follows:

> (d) *Payment for* services or facilities for processing or sale
>
> It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the **[***6]** course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally **[**15]** equal terms to all other customers competing in the distribution of such products or commodities.
>
> (e) *Furnishing* services or facilities for processing, handling, etc.
> It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

[*872] *15 U.S.C. § 13* (emphasis added). As this Court has said, ***HN8***[] if the seller (here, DC Vans) *pays* the retailer (here, Dodge dealerships) to perform the promotional service, *§ 13(d)* applies. *Lewis, 355 F.3d at 522*. Whereas if the seller itself *provides* the promotional service to the retailer, *§ 13(e)* applies. *Id* . This is often a fine distinction and thus the two sections "tend to be considered together" as a "harmonious whole." *Id* . At bottom, "[t]he aim of both sections is to eliminate devices by **[**16]** which preferred buyers obtain discriminatory preferences under the guise of promotional allowances." *Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319, 1327 (6th Cir. 1983)* (citing *Federal Trade Comm. v. Fred Meyer, Inc., 390 U.S. 341, 349-50, 88 S. Ct. 904, 19 L. Ed. 2d 1222 (1968))*.

HN10[] The "services or facilities" envisioned by the RPA are not explicitly **[**17]** defined within the text of the Act, but they have been construed to include "any kind of advertising, catalogs, demonstrators, display and storage cabinets, display materials, hand bills, special packaging or package sizes, warehouse facilities, accepting returns for credit, prizes or merchandise for conducting promotional contests, and 'monetary awards' paid by the seller to clerks, salesmen, and other employees of the customer for special sales or promotional efforts." *Lewis, 355 F.3d at 522* (quoting *Cecil Corley Motor Co. v. General Motors Corp., 380 F. Supp. 819, 851 (M.D. Tenn. 1974))*; *see also* Barbara O. Bruckman, *Discounts, Discrimination, and Exclusive Dealing: Issues under the Robinson-Patman Act*, 68 ANTITRUST L.J. 253, 278 (2000) (***HN11***[] "*Section 2(d)* has been applied to a broad range of promotional payments, including cooperative advertising programs, rebates that a retailer must pass to consumers, payments for customer mailings, payments for preferred shelf space, payments for institutional advertising (i.e., advertising the buyer's business generally), and unjustified off-invoice deductions for promotional allowances. 'Services' **[**18]** and 'facilities' covered by *Section 2(e)* have been held to include handbills, demonstrators, catalogues, cabinets, display racks, prizes or merchandise for conducting promotional contests, point-of-sale materials, advertising services, providing personnel whose salaries are paid in whole or in part by the seller, background music with periodic advertisements, letters announcing a new distributor but not mentioning competing distributors, special packaging or package sizes, and marketing support.") (citations omitted). The list is not exhaustive, however, for many incentives have been held not to be within the prohibitions of *§§ 13(d)* and *(e)*, such as "a supplier's offering favorable credit terms or authorizing the extension of credit to select customers." *Cecil Corley Motor Co., 380 F. Supp. at 851* (internal citations omitted).

In its amended complaint, FOK states that because the Sprinter vans distributed by DC Vans to FOK and Dodge dealers were "of like grade and quality," and because the relevant consumer markets of the FOK and Dodge dealerships were geographically equivalent, DC Vans violated *§§ 13(d)* and *(e)* of the RPA by offering "incentives" to the Dodge dealers **[**19]** that it did not make available to FOK. Amended Compl. at PP 111-18. Specifically, FOK alleges that "DC Vans offers, **[***7]** or has offered while FOK is a retailer of Freightliner Sprinter vans, the

Dodge Sprinter van to Dodge dealerships in FOK's area of responsibility or market area with incentives that grant to Dodge dealerships the right to receive greater allocation of high demand Dodge brand heavy duty trucks." *Id*. at P 118. Paragraph 53 of the amended complaint, which is incorporated by reference into the RPA count via paragraph 111, further states:

> FOK has suffered the effects of unfair competition from Dodge dealers with incentive **[*873]** packages not offered to FOK. Upon information and belief, DC Vans commenced selling the Sprinter vans through the Dodge Business Link program providing direct customer benefits such as first service bay priority and first service technician priority. These sales benefits were not available to Freightliner Sprinter customers. These benefits are valuable sales incentives and make a substantial difference as to where or from whom a potential customer will purchase a Sprinter product.

The "incentives" that FOK alleges were offered **[**20]** to Dodge dealers--and not to FOK--are thus twofold: (1) the right to receive more Dodge heavy-duty trucks, and (2) incorporation of Dodge Sprinters into the Dodge "Business Link" program, a service which apparently would give end users of a Dodge Sprinter some form of priority when having their van serviced at Dodge dealerships.

As to the first alleged incentive, it is unclear how close a nexus exists between DC Vans and the Dodge heavy-duty trucks -- for while FOK alleges that DC Vans distributes the Dodge Sprinter, it does not allege that DC Vans distributes Dodge vehicles generally. Thus it is unclear how DC Vans would even have the power to provide those Dodge dealers that elected to market the Sprinter van with a "greater allocation of high demand Dodge brand heavy duty trucks." Appellee's Br. at 25. Furthermore, the alleged allocation of Dodge heavy-duty trucks would not appear to be a discriminatory practice under *§§ 13(d)* or *(e)*. Even if true, it is a practice incident to the *original sale* of the Sprinter (i.e., the sale of the Sprinter from DC Vans to Dodge dealers) rather than incident to its subsequent *resale* (i.e., the resale of the Sprinter from a Dodge dealer **[**21]** to an end user). *See* *Bouldis, 711 F.2d at 1328* (noting that ***HN12***[] "the extension of credit is a practice incident to the original sale rather than to the subsequent resale of the product, and, therefore, outside the coverage of *§§ 2(d)* & *2(e)*"). While *Bouldis* dealt with a seller's extension of credit to various dealers, we see no reason why the same principles should not also apply to the seller's extension, as here, of a greater allocation of vehicles totally unrelated to the Sprinter.

As to the second alleged incentive, however, we cannot affirm the district court's decision, because our standard of review of a *12(b)(6)* motion to dismiss requires that we "construe the complaint liberally in favor of the plaintiff." *Adika, 466 F.3d at 505*. In fact, the district court seems to have entirely passed over FOK's allegation that DC Vans violated the RPA by participating with its Sprinter vans in the Dodge "Business Link" program. While DC Vans likely did not create the Dodge "Business Link" program, a program which presumably predates by some time the introduction of the Sprinter van to Dodge dealerships, we cannot exclude the possibility that DC Vans somehow **[**22]** tied the distribution of the Sprinter van to this alleged incentive. And unlike the greater-allocation-of-heavy-duty-trucks incentive, the Business Link incentive may well be incident to *resale* of the Sprinter vans. *See* *Bouldis, 711 F.2d at 1328*. If end users who buy a Sprinter van from a Dodge dealer are, for example, given priority at that dealership in getting their van serviced (which is what "first service bay priority" and "first service technician priority" would seem to indicate), this is a promotional service provided directly to the consumer.

The critical question is likely to be whether DC Vans *payed* for these extra services with Dodge dealers and yet did not offer the same payments or equivalent incentives to FOK, or whether Dodge dealers already had the "Business Link" program in place and simply offered, of their **[*874]** own **[***8]** accord, to provide these incentives to customers who purchased the Sprinter van. Without the benefit of discovery, however, it would seem virtually impossible for FOK to answer this question; for without discovery, we have no way of knowing exactly what the incentive structure was between DC Vans and its Dodge dealers, or if in fact **[**23]** such an incentive structure existed at all. *See also* Appellant's Br. at 20 ("Count XI should not have been dismissed without an opportunity for FOK to conduct discovery into the scope and manner in which the Dodge Business Link program benefits were provided to the Dodge Sprinter dealers."). FOK's claims under the RPA may well be highly speculative, and discovery may well reveal that they are futile, but we cannot--nor can the district court-make such a determination based on the pleadings alone. [5]

[24]** III

Based on the above discussion, the judgment of the district court is **AFFIRMED** in full, except as to FOK's claims under the Robinson-Patman Act, which we **REVERSE and REMAND** for further proceedings. Specifically, FOK's allegation that DC Vans violated *§ 13(d)* and *(e)* of the RPA should be allowed to proceed to discovery with respect to the theory asserted in Paragraph 53 of its amended complaint.

[5] We note that this Court's *Bouldis* decision, on which both the district court and DC Vans so heavily rely in rejecting FOK's claims under the RPA, was decided at the summary judgment stage, not the *12(b)(6)* stage. There, a determination of which practices were "incident to the original sale" versus "incident to the subsequent resale" of a product was only made after the parties had "engaged in extensive discovery, including interrogatories, requests for documents and depositions." *711 F.2d at 1323*. Only *after* discovery was the district court in *Bouldis* able to discern the true relationship between distributor, retailer, and consumer, and thus only *after* discovery was the court able to state with confidence that the plaintiff's *§§ 13(d)* and *(e)* claims were meritless. *Id. at 1328-29*.

Catch Curve, Inc. v. Venali, Inc.

United States District Court for the Central District of California

April 30, 2007, Decided; May 3, 2007, Filed, Entered

Case No. CV 05-04820 DDP (AJWx)

Reporter

519 F. Supp. 2d 1028 *; 2007 U.S. Dist. LEXIS 84389 **; 2008-1 Trade Cas. (CCH) P76,097

CATCH CURVE, INC., Plaintiff, v. VENALI, INC., Defendants.

Subsequent History: Patent interpreted by *Catch Curve, Inc. v. Venali, Inc., 2007 U.S. Dist. LEXIS 93667 (C.D. Cal., May 11, 2007)*

Prior History: *Catch Curve, Inc. v. Venali, Inc., 2006 U.S. Dist. LEXIS 96379 (C.D. Cal., Feb. 27, 2006)*

Core Terms

alleges, patents, monopolization, motion to dismiss, sham, antitrust, tortious interference, baseless, Counts, counterclaim, competitors, lawsuits, infringement, anti-competitive, third party, failure to state a claim, anticompetitive conduct, business relationship, third party complaint, patents-in-suit, patent infringement, tied product, probability, predatory, immunity

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

Dismissal under *Fed. R. Civ. P. 12(b)(6)* is appropriate when it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations set forth in the complaint. A court must view all allegations in the complaint in the light most favorable to the non-movant and must accept all material allegations--as well as any reasonable inferences to be drawn from them--as true.

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

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

Motions to dismiss for failure to state a claim are disfavored, and *Fed. R. Civ. P. 12(b)(6)* dismissals are proper only in "extraordinary" cases. In dismissing for failure to state a claim, a district court should grant leave to amend even if no request to amend the pleadings was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN3[] Regulated Practices, Monopolies & Monopolization

Section 2 of the Sherman Act, 15 U.S.C.S. § 2, states that every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any part of the trade or commerce shall be deemed guilty of a felony.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

HN4[] Attempts to Monopolize, Elements

To state a claim for attempted monopolization, a plaintiff must allege: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct to accomplish the monopolization; (3) dangerous probability of success; and (4) causal antitrust injury.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

HN5[] Attempts to Monopolize, Elements

Anticompetitive conduct alone can satisfy the specific intent requirement if the conduct forms the basis for a substantial claim of restraint of trade, or is clearly threatening to competition or clearly exclusionary. Unfair tactics can suffice to prove intent to monopolize.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN6[] Regulated Practices, Monopolies & Monopolization

Neither monopoly power nor a dangerous probability of achieving monopoly power can exist absent evidence of barriers to new entry or expansion.

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

HN7[] Private Actions, Remedies

In order to demonstrate that it suffered an antitrust injury, a plaintiff must show that its injury was caused by anticompetitive or predatory aspects of the defendants' conduct, not by competition.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

HN8[] Attempts to Monopolize, Elements

In order to state a claim for attempted monopolization, a plaintiff must allege that the defendants have engaged in predatory or anticompetitive conduct to accomplish the monopolization. The question of whether a particular course of conduct is predatory of anticompetitive (also referred to as exclusionary) cannot be answered by simply considering its effect on the plaintiff.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

HN9[] **Attempts to Monopolize, Elements**

With regard to a claim of attempted monopolization, it is relevant to consider the impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. If a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory. The word "exclusionary" comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN10[] **Antitrust & Trade Law, Exemptions & Immunities**

The Noerr-Pennington doctrine does protect parties from antitrust liability predicated on acts of petitioning the government. However, these activities are not protected if the petitioning act is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. In analyzing whether the conduct of bringing a lawsuit is protected, the United States Supreme Court holds that litigation cannot be deprived of immunity as a sham unless the litigation is objectively baseless. The Supreme Court has created a two-part test for determining when a suit is "objectively baseless": First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of the definition a court should focus on whether the baseless suit conceals an attempt to interfere directly with a competitor's business relationships through the use of the governmental process--as opposed to the outcome of that process--as an anticompetitive weapon. The United States Court of Appeals for the Federal Circuit has adopted this framework and applies it in determining whether patent litigation is a sham.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN11[] **Noerr-Pennington Doctrine, Sham Exception**

With regard to the Noerr-Pennington doctrine, the United States Court of Appeals for the Ninth Circuit holds that whether something is a genuine effort to influence governmental action, or a mere sham, is a question of fact.

Antitrust & Trade Law > General Overview

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

HN12[] **Antitrust & Trade Law**

The United States Court of Appeals for the Ninth Circuit holds that there is a policy disfavoring the pre-trial dismissal of antitrust actions because the proof lies largely in the hands of the defendants.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Patent Law > Infringement Actions > Defenses > General Overview

HN13[] **Noerr-Pennington Doctrine, Sham Exception**

The United States Court of Appeals for the Federal Circuit has indicated that district courts should employ Federal Circuit law to determine whether a patent case is sham litigation eviscerating the protection of the Noerr-Pennington doctrine.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

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

HN14[] **Noerr-Pennington Doctrine, Sham Exception**

With regard to a motion to dismiss, when dealing with a series of lawsuits, the question is not whether any one of them has merit--some may turn out to, just as a matter of chance--but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN15[] **Tying Arrangements, Sherman Act Violations**

In order to show that a tying arrangement violates § 1 of the Sherman Act, a plaintiff must establish: (1) two distinct products or services; (2) a sale or agreement to sell the tying product conditioned upon the purchase of the tied product; (3) market power in the relevant market for the tying product; and (4) the tied product involves a "not insubstantial" amount of interstate commerce. The United States Court of Appeals for the Ninth Circuit also requires that the defendant have an economic interest in the tied product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN16[] **Price Fixing & Restraints of Trade, Tying Arrangements**

To state a claim for tying a plaintiff must allege two distinct products and two distinct markets.

Torts > ... > Business Relationships > Intentional Interference > Elements

HN17[] **Intentional Interference, Elements**

To state a claim for tortious interference with existing business relationships a plaintiff must plead facts that if true, would establish: (1) a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of the contract, (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship, (4) actual breach of the contractual relationship, and (5) resulting damage.

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

HN18[] **Intentional Interference, Elements**

To state a claim for tortious interference with prospective business relationships a plaintiff must plead: (1) an economic relationship between it and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.

Counsel: [1]** For Catch Curve Inc, Plaintiff: John C Carey, LEAD ATTORNEY, Carey Rodriguez Greenberg and Paul, Miami, FL; Matthew S Warren, Robert A Sacks, LEAD ATTORNEYS, Sullivan and Cromwell, Los Angeles, CA.

For Venali Inc, Defendant: John C Carey, LEAD ATTORNEY, Carey Rodriguez Greenberg and Paul, Miami, FL; Robert A Sacks, LEAD ATTORNEY, Sullivan and Cromwell, Los Angeles, CA; Steven M Goldsobel, LEAD ATTORNEY, Steven M Goldsobel Law Offices, Los Angeles, CA.

For Venali Inc, Counter Claimant: Steven M Goldsobel, LEAD ATTORNEY, Steven M Goldsobel Law Offices, Los Angeles, CA; John C Carey, LEAD ATTORNEY, Carey Rodriguez Greenberg and Paul, Miami, FL.

For Catch Curve Inc, Counter Defendant: Robert A Sacks, LEAD ATTORNEYS, Sullivan and Cromwell, Los Angeles, CA.

For Venali Inc, ThirdParty Plaintiff: John C Carey, LEAD ATTORNEY, Carey Rodriguez Greenberg and Paul, Miami, FL.

Judges: DEAN D. PREGERSON, United States District Judge.

Opinion by: DEAN D. PREGERSON

Opinion

[*1032] ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF AND COUNTERCLAIM-DEFENDANT'S MOTION TO DISMISS

[Motion filed on February 16, 2007]

This matter is before the Court on plaintiff Catch Curve, Inc. and third party defendant j2 Global Communications, Inc.'s motion to **[**2]** dismiss counts two through six and count eight of defendant Venali, Inc.'s amended counterclaim and third party complaint. After reviewing the parties' arguments, the Court grants in part and denies in part the motion to dismiss and adopts the following order.

I. BACKGROUND

A. *The Infringement Suite*

On July 1, 2005, Plaintiff Catch Curve, Inc. ("Catch Curve"), brought this suit against Defendant Venali, Inc. ("Venali"), alleging patent infringement. Catch Curve is the owner by assignment of the following patents: U.S. Patent No. 6,785,021 (the "'021 Patent"), U.S. Patent No. 6,643,034 (the "'034 Patent"), U.S. Patent No. 5,459,584 (the "'584 Patent"), U.S. Patent No. 5,291,302 (the "'302 Patent"), U.S. Patent No. 4,994,926 (the "'926 Patent"). (Compl. PP 31-54.) These patents are all entitled "Facsimile Telecommunications System and Method". (*Id.* PP 5,7,9,11,13.) Venali provides a fax-to-email service that Catch Curve argues infringes these patents under *35*

U.S.C. § 271. (*Id.* PP 18, 31-54.) Catch Curve also requests injunctive relief, an award of reasonable attorneys fees under *35 U.S.C. § 285*, and costs and interest. (*Id.* at 9.)

On December 5, 2005, Venali filed an answer to the complaint **[**3]** and a counterclaim against Catch Curve. On December 27, 2006, Venali filed an answer, amended counterclaim, and third-party complaint against j2 (Catch Curve's parent company). On January 8, 2007, Venali filed a corrected answer to the complaint, amended counterclaim and third party complaint.

In its answer, Venali contends that it is not infringing, and will not infringe, directly or indirectly, any claim of the '021, '034, '584, '302, or '926 patents ("patents-in-suit"). (Countercl. and Third Party Compl. PP 56, 58, 60, 62, 64.) Venali also asserts a number of affirmative defenses: (1) The patents-in-suit are invalid for failure to comply with the requirements of *35 U.S.C. § 101, et seq.* (*Id.* PP 57, 59, 61, 63, **[*1033]** 65.) (2) Claims under the patents-in-suit are barred, in whole or in part, by the doctrines of laches, waiver and estoppel. (*Id.* PP 66-75.) (3) Catch Curve has failed to state a claim upon which relief can be granted pursuant to *Fed. R. Civ. P. 12(b)(6)*. (*Id.* P 76.) (4) Catch Curve's claims for injunctive relief are barred by the existences of an adequate remedy at law. (*Id.* P 77.) (5) Catch Curve is precluded by the doctrine of prosecution history estoppel and/or prior art **[**4]** from asserting any construction of the claims in the patents-in-suit that would cover Venali's accused products and/or services. (*Id.* P 78.) (6) Catch Curve is precluded from enforcing the patents-in-suit due to patent misuse. (*Id.* P 79.) (7) Catch Curve's conduct related to the patents-in-suit constitutes unclean hands and renders the patents unenforceable. (*Id.* P 80.)

B. *The Counterclaim and Third Party Complaint*

In its amended counterclaim and third party complaint, Venali alleges that j2 and Catch Curve have engaged in an illegal scheme to unfairly compete with Venali and other competitors in the consumer/small office/home office ("SOHO") Internet facsimile services industry in violation of the Sherman and Clayton Acts, the Lanham Act and California Unfair Competition Law. (*Id.* P 82.) Venali alleges that the following conduct by Catch Curve and j2 supports its claims: (1) harassment of competitors generally, and Venali in particular, by bringing baseless patent infringement suits, (2) tortious interference with Venali's business relations based on a campaign of threats of patent infringement lawsuits targeting Venali's customers, (3) willful infringement of competitors' trademarks, **[**5]** (4) dissemination of false information about the validity and applicability of the Audio Fax patent portfolio, and (5) other unfair, anti-competitive, and illegal actions.

Venali also alleges that j2 was instrumental in the creation of Catch Curve, that Catch Curve is a wholly owned subsidiary of j2 and at all relevant times has been the alter ego of j2. (*Id.* PP 90, 102.) Venali asserts that in furtherance of its anti-competitive scheme j2 has sought to conceal its relationship with Catch Curve. (*Id.* PP 93, 99, 100, 101.)

Counts Two through Six and Eight are the subject of the instant motion to dismiss. Counts Two, Three, and Four each allege that j2 and Catch Curve have engaged in conduct that may qualify as anti-competitive to form the basis of a claim of monopolization under Section Two of the Sherman Act. Count Two addresses j2 and Catch Curve's conduct in the instant litigation, characterizing the litigation as a sham. Count Three addresses j2 and Catch Curve's license pooling practices, characterizing these practices as tying. Count Four addresses j2 and Catch Curve's institution of numerous patent suits against j2 competitors - characterizing this conduct as a pattern of baseless **[**6]** litigation intended to stifle competition in the relevant market.

Counts Five and Six allege that Catch Curve and j2 engaged in tortious interference with existing and prospective business relationships in violation California common law. Count Eight alleges that Catch Curve and j2 have violated the California Unfair Competition Law, *Cal. Bus. & Prof. Code §§ 17200 et seq.*, on the basis of the same conduct that allegedly supports Counts Two through Six.

C. *Motion to Dismiss*

On February 16, 2007, Catch Curve and j2 filed a motion to dismiss Counts Two through Six and Count Eight of Venali's counterclaim under *Rule 12(b)(6)*. Catch **[*1034]** Curve and j2 first argue that the attempted monopolization claims in Counts Two and Four should be dismissed under the *Noerr Pennington* doctrine, which protects parties from antitrust liability for litigation brought to enforce their legal rights. Contending that the *Noerr Pennington* doctrine also bars tortious interference claims predicated on protected conduct related to litigation, j2 and Catch Curve suggest that Counts Five and Six also fail to state a claim.

Next, j2 and Catch Curve argue that the Court should strike the tortious interference claims in Counts **[**7]** Five and Six under California's Anti-SLAPP Statute, *Cal. Civ. Proc. Code § 425.16*, which requires early-dismissal of lawsuits aimed at chilling *First Amendment* activity. Catch Curve and j2 also argue that the cease-and-desist letters that form the basis of the tortious interference claims are protected under California's litigation privilege codified in *Cal Civ. Code § 47(b)*. Catch Curve and j2 finally contend that the tortious interference claims also fail because they were not pled with particularity.

Catch Curve and j2 also argue that Count Three, the tying claim, fails in light of a recent Federal Circuit holding that vindicates the practice of patent pooling as not anti-competitive. Finally, they argue that Count Eight, the *§ 17200* claim, should be dismissed because it is based on the conduct underlying the other causes of action. They assert that if the other counts are dismissed, *§ 17200 of the California Business and Professions Code* should not allow Venali to circumvent the rationale that defeats the other causes of action.

II. DISCUSSION

A. *Legal Standard For 12(b)(6)*

HN1[] Dismissal under *Rule 12(b)(6)* is appropriate when it is clear that no relief could be granted under any set of **[**8]** facts that could be proven consistent with the allegations set forth in the complaint. *Newman v. Universal Pictures, 813 F.2d 1519, 1521-22 (9th Cir. 1987)*. The Court must view all allegations in the complaint in the light most favorable to the non-movant and must accept all material allegations -- as well as any reasonable inferences to be drawn from them -- as true. *North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983)*.

HN2[] Motions to dismiss for failure to state a claim are disfavored, *see Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997)*, and *12(b)(6)* dismissals are proper only in "extraordinary" cases. *United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981)*. In dismissing for failure to state a claim, "a district court should grant leave to amend even if no request to amend the pleadings was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995)*

B. *Sherman Act § 2*

HN3[] *Section 2* of the Sherman Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any **[**9]** part of the trade or commerce . . . shall be deemed guilty of a felony . . . ." *15 U.S.C. § 2*.

Venali's counterclaim seems to allege attempted monopolization by j2 and Catch Curve, invoking the "dangerous probability" language. ***HN4***[] To state a claim for attempted monopolization, a plaintiff must allege: "(1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct to accomplish the monopolization; (3) dangerous probability of success; and (4) causal antitrust **[*1035]** injury." *SmileCare Dental Group v. Delta Dental Plan, 88 F.3d 780, 783 (9th Cir. 1996)*, *cert. denied, 519 U.S. 1028, 117 S. Ct. 583, 136 L. Ed. 2d 513 (1996)*(quoting *Pacific Express. Inc. v. United Airlines, Inc., 959 F.2d 814, 817 (9th Cir. 1992)*).

1. *Market Definition*

Venali alleges that the relevant product market is the "consumer/small office/home office ('SOHO') internet facsimile services market in the United States". (Countercl. and Third Party Compl. P 112.) Without adopting Venali's market definition, the Court evaluates the allegations of attempted monopolization in relation to this alleged market.

2. *Specific Intent*

Venali alleges j2 and Catch Curve intended to gain monopoly power for j2 by engaging in the potentially **[**10]** anticompetitive conduct that is the basis for the claim. (*Id.* PP 121, 130.) At the pleading stage, facts to support allegations about j2 and Catch Curve's intent are likely in the possession of j2 and Catch Curve and may be discovered by Venali at a later stage in the litigation. Furthermore, ***HN5***[] anticompetitive conduct alone can satisfy the specific intent requirement if the conduct "form[s] the basis for a substantial claim of restraint of trade" or is "clearly threatening to competition or clearly exclusionary." *Twin City Sportservice. Inc. v. Charles O. Finley & Co., Inc., 676 F.2d 1291, 1309 (9th Cir.1982)*; *see* *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)* (stating that unfair tactics can suffice to prove intent to monopolize). Therefore, Venali's allegations of specific intent are sufficiently stated to survive a motion to dismiss.

3. *Dangerous Probability of Success*

Venali also alleges that j2 and Catch Curve control more than 80% of the relevant product market. (*Id.* P 115.) The Ninth Circuit has held that a 44% market share was sufficient as a matter of law to support a finding of market power for attempted monopolization. *See* *Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1438 (9th Cir. 1995)*. **[**11]** However***HN6***[] , "neither monopoly power nor a dangerous probability of achieving monopoly power can exist absent evidence of barriers to new entry or expansion." *Am. Prof'l Testing Serv. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 108 F.3d 1147, 1154 (9th Cir. 1997)*. Venali has alleged that "there are substantial barriers to entry into the relevant product market" including without limitation those created by the allegedly anticompetitive conduct. (Countercl. and Third Party Compl. P 113.) Venali has alleged that j2 and Catch Curve's litigation and licensing strategy creates additional capital costs for new entrants into the market. (*Id.* PP 106, 131, 133) Viewed in the light most favorable to Venali, it has pled facts to support the conclusion that Catch Curve and j2 have a dangerous probability of creating a j2 monopoly.

4. *Antitrust Injury*

Venali has alleged that as a result of the violations of ***antitrust law***, it has been damaged in its business or property. (*Id.* PP 128, 134.) ***HN7***[] In order to demonstrate that it suffered an antitrust injury, Venali must show that its injury was caused by anticompetitive or predatory aspects of Catch Curve and j2's conduct, not by competition. *Pacific Express, 959 F.2d at 818*(noting **[**12]** that the purpose of the antitrust laws is "the protection of competition, not competitors." (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*). Venali has alleged that j2 and Catch Curve's conduct has "rendered competitors less competitive" and has a dangerous probability of **[*1036]** "stifl[ing] innovation" in the market. (Countercl. and Third Party Compl. PP 132, 133.) Viewed in the light most favorable to Venali, these allegations support the conclusion that Venali has suffered causal antitrust injury.

5. *Anticompetitive Conduct*

HN8[] In order to state a claim for attempted monopolization, Venali must allege that Catch Curve and j2 have engaged in "predatory or anticompetitive conduct to accomplish the monopolization." *SmileCare Dental Group, 88 F.3d at 783*. The question of whether a particular course of conduct is predatory of anticompetitive (also referred to as exclusionary) "cannot be answered by simply considering its effect on" Venali. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (U.S. 1985)*.

> In addition, ***HN9***[] it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. If a firm has been 'attempting **[**13]** to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory . . . [The word] 'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.

Id. (citing 3 P. Areeda & D. Turner, ***Antitrust Law*** 78 (1978); R. Bork, The Antitrust Paradox 138 (1978)).

i. *Noerr Pennington and Sham Litigation*

Catch Curve and j2 have moved to dismiss Venali's antitrust claims, arguing that *Noerr Pennington* immunity bars a claim of antitrust liability based on conduct petitioning the government. Venali has alleged that the instant litigation is a sham, therefore, it does not deserve the protection of the *Noerr Pennington* doctrine.

HN10[] The *Noerr-Pennington* doctrine does protect parties from antitrust liability predicated on acts of petitioning the government. *See Noerr Motor Freight, Inc., 365 U.S. 127, 135, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *United Mine Workers v. Pennington, 381 U.S. 657, 670, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*. However, these activities are not protected if the petitioning act is "a mere sham to cover what is actually nothing more than an attempt to **[**14]** interfere directly with the business relationships of a competitor." *Noerr, 365 U.S. at 144*. In analyzing whether the conduct of bringing a lawsuit is protected, the Supreme Court has held: "litigation cannot be deprived of immunity as a sham unless the litigation is objectively baseless." *Professional Real Estate Investors v. Columbia Pictures Indus., 508 U.S. 49, 51, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*. The Court created a two-part test for determining when a suit is "objectively baseless":

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of the definition a court should focus on whether the baseless suit conceals an attempt to interfere directly with a competitor's business relationships through the use [of] the governmental process -- as opposed to the outcome of that process -- as an anticompetitive weapon.

Id. (citations omitted). The Federal Circuit has adopted this framework and applies it in determining whether patent litigation is a sham. *See Nobelpharma, 141 F.3d at 1072*.

[*1037] ii. *Venali's* ***[**15]*** *Allegations*

In its counterclaim, Venali alleges that j2 and Catch Curve have engaged in a course of conduct aimed at damaging competition in the relevant product market. Venali alleges that this course of conduct includes: (1) a pattern of acquiring competitors, (2) a pattern of vexatious litigation brought by j2 and Catch Curve aimed at injuring j2's market rivals (including this patent infringement suit), (3) a pattern of using the litigation to coerce competitors to pay for "unnecessary" licenses as a means of extracting money from competitors to stifle competition, (4) sending cease and desist letters in bad faith to Venali's customers threatening to sue these entities for patent infringement, (5) offering licenses to relevant patents in a pool (a tying claim), (6) disseminating false information to the industry regarding the validity and applicability of their patents to the relevant product market. (Venali's Counterclaim and Third Party Complaint PP 82, 91, 92, 121, 126, 131.)

Catch Curve and j2 argue that the attempted monopolization actions fail to state a claim because Venali argues for antitrust liability based on patent litigation and litigation-related activity, all of which **[**16]** j2 and Catch Curve contend is protected by the *Noerr Pennington* doctrine. Venali contends that the litigation at issue is a sham, piercing the protection of *Noerr Pennington.* Venali's central argument is that Catch Curve relies on an objectively unreasonable construction of the claims in the Audio Fax patents to support its infringement case against Venali. Venali asserts that Catch Curve's advocated claim construction exceeds the scope of the right granted under the AudioFax patents, ignores the prosecution history that bars it from arguing this construction, and is objectively baseless, meaning no reasonable litigant could realistically expect success on these arguments on the merits.

HN11[] The Ninth Circuit has stated that "[w]hether something is a genuine effort to influence governmental action, or a mere sham, is a question of fact." *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1253 (9th Cir. 1982)*. At present, the Court cannot rule out the possibility that the claim construction arguments advocated by Catch Curve are objectively unreasonable. *See Hoffman La Roche Inc. v. Genpharm Inc., 50 F. Supp. 2d 367, 380 (D.N.J. 1999)* (declining to find *Noerr* ***[**17]*** *Pennington* immunity on a motion to dismiss because "reasonableness is a question of fact, and the Court cannot make such factual determinations on a factual controversy roiled by a motion to dismiss.") The claim construction hearing in this case is scheduled for May 11, 2007, so these construction arguments will be directly before the Court in a matter of weeks. After that hearing, the Court will be better situated to evaluate the objective reasonableness of the arguments to decide the applicability of *Noerr Pennington* immunity.

iii. *Venali's Allegations Satisfy the Pleading Standard*

HN12[] The Ninth Circuit has noted that "there is a policy disfavoring the pre-trial dismissal of antitrust actions because the proof lies largely in the hands of the defendants." *Ernest W. Hahn, Inc. v. Codding, 615 F.2d 830, 835 (9th. Cir 1980)* (citing *Poller v. Columbia Broadcasting, 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*); *see also Hydranautics v. FilmTec Corp., 70 F.3d 533, 537 (9th Cir. 1995)*(determining whether particular litigation was a sham "could not properly be resolved against Hydranautics on the basis of the pleadings. The outcome [would] depend on evidence.")

[*1038] Venali alleges that the instant litigation is "objectively **[**18]** baseless in that no reasonable litigant could realistically expect success on the merits". (Venali's Counterclaim and Third Party Complaint P 131.) This contention is predicated on the allegation that there is no support in the patents or the law for Catch Curve's claim construction argument. Venali also alleges that the suit was brought in bad faith with the intention of interfering with Venali's ability to service existing customers and compete for new ones. (*Id.* PP 121, 132.) Because Venali has sufficiently pled the requisite elements of sham litigation to defeat *Noerr Pennington* protection, the Court cannot conclude that Venali has failed to state an antitrust claim on this basis.

In detailing the pattern of litigation, Venali alleges that j2 and Catch Curve have brought numerous cases similar to this one that are objectively baseless and that serve their bad faith purpose of injuring competition in the relevant market. (*Id.* PP 106, 107, 130-132.) Venali cites lawsuits brought by Catch Curve against Call Wave, EasyTel Communications, Protus IP Solutions, and Mijanda as examples of this pattern. (*Id.* P 107.) To support the allegation that these suits were brought in bad faith, Venali **[**19]** notes that three of the lawsuits were filed within weeks of the defendants' objecting to j2's efforts to trademark the term "efax". (*Id.*) Venali has pled enough of a basis to overcome dismissal on its attempted monopolization claim. Catch Curve will, of course, be entitled to raise its arguments again on summary judgment. Resolution of these claims at this juncture, however, is premature.

iv. *Applicable Law*

The parties have devoted substantial portions of their briefs to arguing about how the Court should analyze the pattern of allegedly baseless lawsuits brought with anticompetitive intent. These arguments address an unresolved conflict between the Ninth Circuit cases that place greater importance on the subjective intent of the actor in analyzing whether the institution of a series of lawsuits operates as a restraint on trade [1] and the objectively baseless standard discussed above. ***HN13***[] The Federal Circuit has indicated that district courts should employ Federal Circuit law to determine whether a patent case is sham litigation eviscerating the protection of *Noerr Pennington*. *Nobelpharma Ab v. Implant Innovations, 141 F.3d 1059, 1067 (Fed. Cir. 1998)*. However, the Federal Circuit has not **[**20]** yet addressed a situation where a district court is presented with a pattern of patent lawsuits that may be deemed an illegal restraint on trade under that circuit's law, even without a showing that each individual suit is objectively baseless. Without deciding whether the Court will require Venali to prove that each litigation in the alleged pattern is baseless, the Court is satisfied that Venali has sufficiently stated a claim of sham litigation in the instant case to overcome the motion to dismiss.

D. *Tying*

HN15[] In order to show that a tying arrangement violates *Section 1* of the Sherman Act, Venali must establish: 1) two distinct products or services; 2) a sale or agreement to sell the tying product conditioned upon the purchase of the tied product; **[*1039]** 3) market power in the relevant **[**21]** market for the tying product; and 4) the tied product involves a "not insubstantial" amount of interstate commerce. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12-18, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*. *See also Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 464, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*; *County of Tuolumne v. Sonora Cmty. Hosp.,*

---

[1] *See USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, 31 F.3d 800, 811 (9th Cir. 1994)* ("***HN14***[] When dealing with a series of lawsuits, the question is not whether any one of them has merit - some may turn out to, just as a matter of chance - but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival").

236 F.3d 1148, 1157 (9th Cir. 2001). The Ninth Circuit also requires that the defendant have an economic interest in the tied product. *See County of Tuolumne, 236 F.3d at 1158*.

HN16[] To state a claim for tying Venali must allege two distinct products and two distinct markets. Venali's complaint fails to define two distinct markets mentioning a "Relevant Innovation Market" only one time and providing no details to support this market definition. (Complaint P 126). Although one might conclude that Venali contends that the AudioFax patents are the tying product and that some "unwanted j2 patents" are the tied product, this essential allegation is not obvious from the claims. Furthermore, Venali has failed to allege that the tied product involves a "not insubstantial" amount of interstate commerce, or to plead facts which if true support the conclusion that Catch Curve or j2 have an economic **[**22]** interest in the "unwanted j2 patents." As a result, the Court dismisses the tying cause of action for failure to state a claim, with leave to amend.

E. *Tortious Interference*

i. *Failure to State a Claim*

Venali alleges that j2 and Catch Curve have committed the torts of interference with existing and prospective business relationships under California common law.

HN17[] To state a claim for tortious interference with existing business relationships Venali must plead facts that if true, would establish: (1) a valid contract between Venali and a third party, (2) j2 and Catch Curve's knowledge of the contract, (3) j2 and Catch Curve's intentional acts designed to induce a breach or disruption of the contractual relationship, (4) actual breach of the contractual relationship, and (5) resulting damage. *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist., 106 Cal.App.4th 1219, 1239, 132 Cal. Rptr. 2d 57 (2003)*. In the complaint, Venali did not identify the particular contract(s) with which Catch Curve allegedly interfered. However, as Venali noted at oral argument, at the time it filed its complaint, it was still determining which contracts definitely fell within this claim. Through discovery and the parties' **[**23]** supplemental responses, Venali has now identified these contracts. As the notice pleading standard under the Federal Rules of Civil Procedure is liberal, the Court finds that Catch Curve will not be prejudiced if the tortious interference claim is permitted to remain. *See Fed. R. Civ. P. 8*.

HN18[] To state a claim for tortious interference with prospective business relationships Venali must plead: (1) an economic relationship between it and some third party, with the probability of future economic benefit to Venali; (2) j2 and Catch Curve's knowledge of the relationship; (3) intentional acts on the part of the j2 and Catch Curve designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to Venali proximately caused by the acts of j2 and Catch Curve. *See Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 1153, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*; *Buckaloo v. Johnson, 14 Cal.3d 815, 827, 122 Cal. Rptr. 745, 537 P.2d 865 (1975)*. For the same reason identified above, the **[*1040]** Court permits this claim to stand. Thus, the motion to dismiss the tortious interference claims is denied.

ii. *Anti-SLAPP and Litigation Privilege*

The Court notes that it has not ruled out the possibility that the infringement lawsuit is a **[**24]** sham. If the Court is persuaded, after the claim construction hearing, that the infringement action meets the requirements for sham litigation, the related conduct of sending cease-and-desist letters to Venali's customers will not be protected as an act in furtherance of the Catch Curve's right of petition or free speech under the United States or California Constitution. Accordingly, an Anti-SLAPP motion to strike the tortious interference claims will fail. At this time, however, the Court declines to rule on this argument.

F. *California Business and Professions Code § 17200*

Catch Curve argues that the Court should dismiss Venali's *§ 17200* claim because this type of claim is derivative of Venali's other claims and should fail if the others fail. Because Venali has adequately alleged an attempted monopolization claim, however, the Court does not dismiss the "tag along" *§ 17200* claim.

III. CONCLUSION

For the reasons stated herein, the Court GRANTS in part and DENIES in part, as follows:

(1) Catch Curve and j2's motion to dismiss the Second, Fourth, and Eighth Counts on the basis of Noerr-Pennington immunity is DENIED. The extent to which the infringement litigation may constitute a sham **[**25]** based on objectively unreasonable claim construction arguments is more properly decided after the claim construction hearing.

(2) Catch Curve and j2's motion to dismiss the Third Count of tying, for failure to state a claim is GRANTED with leave to amend.

(3) Catch Curve and j2's motion to dismiss the Fifth and Sixth Counts of tortious interference for failure to state a claim is DENIED.

IT IS SO ORDERED.

Dated: 4-30-07

/s/ Dean D. Pregerson

DEAN D. PREGERSON

United States District Judge

Midland Glass Co. v. Aluma Spec, Inc.

Court of Appeals of Minnesota

May 1, 2007, Filed

A06-765

Reporter
2007 Minn. App. Unpub. LEXIS 397 *

Midland Glass Co., Inc., Appellant, vs. Aluma Spec, Inc., Respondent, EFCO Corporation, Respondent, Minneapolis Public Schools, Special School District No. 1, Respondent, C. L. Paulson & Associates, Inc., Respondent, Rozeboom Miller Architects, Inc., Defendant.

Notice: **[*1]** THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

Subsequent History: Review denied by *Midland Glass Co. v. Aluma Spec, Inc., 2007 Minn. LEXIS 406 (Minn., July 17, 2007)*

Prior History: Hennepin County District Court File No. 27-CV-04-016555. Hon. Isabel Gomez.

Disposition: Affirmed.

Core Terms

products, summary judgment, conspiracy, contractor, allegations, antitrust, promissory estoppel, bid, restrained, conspired

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Need for Trial

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

HN1[] **Entitlement as Matter of Law, Need for Trial**

When appealing from summary judgment, appellate courts ask whether there are any genuine issues of material fact and whether the lower courts erred in their application of the law. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN2[] **Burdens of Proof, Nonmovant Persuasion & Proof**

The party resisting summary judgment must do more than rest on mere averments.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

HN3[] **Entitlement as Matter of Law, Legal Entitlement**

Summary judgment is mandatory against a party who fails to establish an essential element of its claim.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

HN4[] **Trade Practices & Unfair Competition, State Regulation**

Courts construe Minnesota ***antitrust law*** consistently with the federal court's interpretation of analogous federal antitrust provisions.

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN5[] **State Regulation, Claims**

Although inferences on summary judgment must be viewed in the light most favorable to the nonmoving party, ***antitrust law*** limits the range of permissible inferences from ambiguous evidence. To survive a motion for summary judgment a plaintiff must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. Conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN6[] **Regulated Practices, Price Fixing & Restraints of Trade**

See *Minn. Stat. § 325D.51* (2006).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN7[] **Horizontal Refusals to Deal, Boycotts**

See *Minn. Stat. § 325D.53, subd. 1* (2006).

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

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN8[] **State Regulation, Claims**

Because a single entity cannot contract, combine, or conspire with itself, to withstand summary judgment on a restraint of trade action, an appellant must provide evidence that respondents acted together.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

HN9[] **Horizontal Refusals to Deal, Boycotts**

A private business generally has a right to deal, or refuse to deal, with whomever it chooses, as long as it does so independently.

Public Contracts Law > Bids & Formation > Competitive Proposals

HN10[] **Bids & Formation, Competitive Proposals**

An antitrust violation occurs when a contract, combination, or conspiracy in the letting of any public contract restrains competition. *Minn. Stat. § 325D.53, subd. 1(2)(c)*.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN11[] **Burdens of Proof, Nonmovant Persuasion & Proof**

Allegations alone are not sufficient to withstand summary judgment.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

HN12[] **Consideration, Promissory Estoppel**

The elements of promissory estoppel are: (1) a clear and definite promise; (2) that the promissor intended to induce reliance and did induce reliance; and (3) enforcement of the promise is necessary to prevent injustice.

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

HN13[] **Intentional Interference, Elements**

To establish a prima facie case for intentional interference with contractual relations, a plaintiff must show: (1) the existence of a contract, (2) knowledge of the contract by the alleged wrongdoer, (3) intentional procurement of the contract's breach, (4) absence of justification, and (5) damages caused by the breach.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN14[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

A business may deal or refuse to deal with any party as long as it does so independently.

Counsel: For Appellant: Floyd E. Siefferman, Jr., Boris Parker, Saliterman & Siefferman, P.C., Minneapolis, MN.

For Hon. Isabel Gomez, Respondent: Philip J. Young, Moss & Barnett, P.A., Minneapolis, MN.

For EFCO Corporation, Respondent: Kevin R. Coan, Parsinen Kaplan Rosberg & Gotlieb, P.A., Minneapolis, MN.

For Minneapolis Public Schools, Special School District No. 1, Respondent: Alan I. Silver, David A. Turner, Jeffery S. Brockmann, Bassford Remele, P.A., Minneapolis, MN.

For Respondent: C. L. Paulson & Associates, Inc., St. Michael, MN.

Judges: Considered and decided by Halbrooks, Presiding Judge; Kalitowski, Judge; and Collins, Judge. *

Opinion by: KALITOWSKI

Opinion

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Midland Glass Co., Inc. challenges the district court's grant of summary judgment on its antitrust, promissory **[*2]** estoppel, and intentional interference with contractual relations claims against respondents Aluma Spec, Inc., EFCO Corp., C.L. Paulson & Associates, and Minneapolis Public Schools, Special School District No. 1. We affirm.

FACTS

Appellant Midland Glass Co., Inc. (Midland) is a glazing contractor. Appellant was awarded a subcontract to replace windows for a project of Minneapolis Public School District, Special District No. 1 (MPSD), but was subsequently removed from the project after appellant was unable to obtain products that met MPSD's specifications. Appellant was unable to obtain these materials because respondents Aluma Spec, Inc., (Aluma Spec), EFCO Corporation (EFCO), and C.L. Paulson (Paulson) refused to sell the specified products to appellant.

After reviewing several window products, MPSD specified two manufacturers of the specified products for use in the project: EFCO and Duracraft. Aluma Spec is EFCO's exclusive distributor in Minnesota. Duracraft is exclusively distributed through Paulson.

Appellant did not obtain a price quote for either the EFCO or Duracraft products before submitting its bid, but intended to use the EFCO products for the project. Instead **[*3]** of obtaining a price quote for the products from Aluma Spec, appellant estimated the cost of the specified EFCO products based on the cost of other EFCO products. Appellant was awarded the subcontract based on this bid.

In mid-February 2003, after appellant learned it was the winning bidder, appellant called a representative of Aluma Spec to inquire about the purchase of EFCO products for the project. The representative informed appellant that Aluma Spec would not sell the specified EFCO products to appellant because appellant had not requested a quote before the bid deadline. The representative stated that he considered it unethical to sell the products to appellant because the other glazing contractors

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

> were competing for the Project based on *real* product costs for EFCO products whereas [appellant] competed based on product costs which might have been completely wrong. As many of the glazing contractors which had requested a quote from Aluma Spec before the bid deadline were significant customers of Aluma Spec, I was concerned that those contractors would think it improper for Aluma Spec to sell to a contractor which had not . . . obtained actual product cost information **[*4]** before submitting a bid. I felt that selling to [appellant] under these circumstances could affect my future sales with these larger customers.

Appellant then sought to purchase the other specified product, Duracraft, from respondent Paulson. Paulson informed appellant that it would not sell the Duracraft product to appellant for the same reason cited by Aluma Spec. On approximately March 17, 2003, appellant contacted EFCO and requested EFCO to force Aluma Spec to sell to appellant. EFCO declined appellant's requests.

Appellant attempted to use a substitute product, but failed to follow the required procedure for getting approval and the attempt failed. After failing to obtain the specified products, appellant submitted shop drawings to the project architect using products from another supplier not specified in the project manual. When appellant was unable to obtain either of the specified products, the general contractor terminated appellant's subcontract.

Appellant brought suit against all respondents. Respondents EFCO and MPSD filed motions for summary judgment and Aluma Spec filed a memorandum in support of summary judgment in favor of respondents.

DECISION

Appellant **[*5]** alleges that (1) Aluma Spec, EFCO, and Paulson conspired unlawfully in their refusal to sell the specified products to appellant under *Minn. Stat. § 325D.53, subd. 1(3)* (2006); (2) MPSD conspired with Aluma Spec and Paulson to specify EFCO and Duracraft products in the project manual, knowing that Duracraft was not a commercially available product and therefore restrained competition in the letting of a public contract under *Minn. Stat. § 325D.53, subd. 1(2)(c)* (2006); (3) Aluma Spec, EFCO, and Paulson were estopped from declining to sell to appellant under appellant's theory of promissory estoppel; and (4) Aluma Spec, EFCO, MPSD, and Paulson intentionally and unjustifiably interfered with appellant's contractual relationship with the general contractor.

HN1[] "When appealing from summary judgment, we ask whether there are any genuine issues of material fact and whether the lower courts erred in their application of the law." *Howard v. Minn. Timberwolves Basketball Ltd. P'ship, 636 N.W.2d 551, 555 (Minn. App. 2001)*, *review denied* (Minn. Feb. 19, 2002). "Where the record taken as a whole could not lead a rational **[*6]** trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id. at 556* (quotation omitted). ***HN2***[] "[T]he party resisting summary judgment must do more than rest on mere averments." *Id*. ***HN3***[] Summary judgment is "mandatory against a party who fails to establish an essential element" of its claim. *Lloyd v. In Home Health, Inc., 523 N.W.2d 2, 3 (Minn. App. 1994)*.

HN4[] We construe Minnesota ***antitrust law*** consistently with the federal court's interpretation of analogous federal antitrust provisions. *Keating v. Philip Morris, Inc., 417 N.W.2d 132, 136 (Minn. App. 1987)*. The United States Supreme Court addressed the standards governing motions for summary judgment in the antitrust context in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., Ltd., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. The court instructed that ***HN5***[] although inferences on summary judgment must be viewed in the light most favorable to the nonmoving party, "***antitrust law*** limits the range of permissible inferences from ambiguous evidence." *Id. at 588, 106 S. Ct. 1356*. "To survive a motion for summary judgment . . . a plaintiff . . **[*7]** . must present evidence that tends to exclude the possibility that the alleged conspirators acted independently." *Id.* (quotation marks omitted). The court further noted that "conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." *Id. at 597, 106 S. Ct. at 1361 n.21*.

Pursuant to Minnesota's antitrust statute, ***HN6***[] "[a] contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade or commerce is unlawful." *Minn. Stat. § 325D.51* (2006). The definition of "unreasonable restraint" and "unlawful combination or conspiracy" is clarified in *Minn. Stat. § 325D.53, subd. 1* (2006), which states:

> ***HN7***[] [T]he following shall be deemed to restrain trade or commerce unreasonably and are unlawful:
> . . . .
> (2) A contract, combination, or conspiracy between two or more persons whereby, in the letting of any public contract, (a) the price quotation of any bid is fixed or controlled . . . or (c) competition is in any other manner restrained.
>
> (3) A contract, combination, or conspiracy **[*8]** between two or more persons refusing to deal with another person.

HN8[] Because a single entity cannot contract, combine, or conspire with itself, to withstand summary judgment appellant must provide evidence that respondents acted together. *See Howard, 636 N.W.2d at 559* (affirming summary judgment when nonmoving party failed to establish that the actors to an alleged conspiracy were economically independent entities and failed to establish collusion or conspiracy with any other entity). Here, the district court correctly determined that appellant failed to introduce any evidence showing that any combination of respondents acted in concert.

I. Refusal to Deal

HN9[] A private business generally has a right to deal, or refuse to deal, with whomever it chooses, as long as it does so independently. *See United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 468, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*; *see also Steele v. City of Bemidji, 114 F. Supp. 2d 838, 849 (D. Minn. 2000)* (under Minnesota law, "[i]t is the right . . . of a trader engaged in an entirely private business, 'freely to exercise his own independent discretion as to the parties with **[*9]** whom he will deal'"), *aff'd in part, rev'd in part on other grounds*, *257 F.3d 902 (8th Cir. 2001)*.

Appellant relies on its owner's inference that an MPSD employee seemed surprised that appellant was awarded the contract as evidence of a conspiracy whereby MPSD communicated to Paulson, Aluma Spec, and EFCO not to sell the specified products to appellant. But representatives of MPSD, Aluma Spec, and Paulson testified that they never communicated with one another regarding the sale of the specified products to appellant. And appellant's owner testified that he did not have any evidence that anyone instructed Aluma Spec not to sell the product to appellant.

Moreover, the record indicates that EFCO did not know that appellant was the subcontractor on the project until appellant sought to purchase the specified products directly from EFCO, after Aluma Spec and Paulson refused to supply the specified products. The record contains no evidence of any communication between EFCO and either MPSD or Paulson. Although the record indicates that EFCO supported Aluma Spec's decision not to sell to appellant, it was not EFCO's usual business practice to sell directly to subcontractors. **[*10]** Because EFCO's decision to support its distributor is at least as consistent with permissible competition as with an impermissible conspiracy, appellant has failed to produce evidence sufficient to warrant an inference of conspiracy and avoid summary judgment.

Appellant also claims that MPSD's specification of Duracraft products, which according to appellant failed to meet project specifications, is evidence of MPSD's involvement in the alleged conspiracy. But even if MPSD should have specified different products or allowed substitutions, appellant has the burden of producing evidence from which an inference can be made that the respondents acted in concert. Appellant has failed to meet this burden.

Absent evidence of collusion, or even communication, among the respondents, appellant has failed to show that a genuine issue of material fact exists. *See Minn. Stat. § 325D.53, subd. 1(3)* (requiring collusion); *Howard, 636 N.W.2d at 559*. We conclude that summary judgment for respondents is appropriate on this claim.

II. Restraint of Competition in a Public Contract

HN10[] An antitrust violation occurs when a contract, combination, **[*11]** or conspiracy in the letting of any public contract restrains competition. *Minn. Stat. § 325D.53, subd. 1(2)(c)*. Appellant alleges that MPSD, EFCO, Paulson, and Aluma Spec conspired to ensure that EFCO products were the only specified products available and thereby ensured that only EFCO products would be used in the project, restraining competition. The basis for this argument is appellant's allegation that Duracraft, the other specified products of choice, were not commercially available and did not meet the project specifications. But appellant has failed to produce any evidence in support of these allegations, and *HN11*[] allegations alone are not sufficient to withstand summary judgment. *See Howard, 636 N.W.2d at 556*. We conclude that the district court did not err in granting respondents summary judgment on this claim.

III. Promissory Estoppel

Appellant argues that Aluma Spec is promissorily estopped from refusing to sell the specified EFCO products. We disagree.

HN12[] The elements of promissory estoppel are: (1) a clear and definite promise; (2) that the promissor intended to induce reliance and did induce reliance; and (3) enforcement **[*12]** of the promise is necessary to prevent injustice. *Hous. & Redev. Auth. of Chisholm v. Norman, 696 N.W.2d 329, 336 (Minn. 2005)*.

Appellant's promissory estoppel claims rests upon three allegations: (1) "Aluma Spec's interactions with [MPSD] in fixing and limiting the allowed manufacturer constituted a clear promise . . . that Aluma Spec would sell the EFCO products to the successful bidder"; (2) Aluma Spec "put itself in a position, by its dealings with [MPSD], to be the only possible product supplier"; and (3) Aluma Spec intended that the successful bidder of the project would rely on its promise to supply EFCO products.

Assuming, but not deciding, that these allegations would support a claim of promissory estoppel, appellant has failed to produce any evidence supporting any of the allegations and may not withstand summary judgment by resting on "mere averments." *Howard, 636 N.W.2d at 556*. We affirm the district court's grant of summary judgment on this claim.

IV. Intentional Interference with Contractual Relations

Appellant argues that MPSD, Aluma Spec, and EFCO intentionally interfered with appellant's contract with the general **[*13]** contractor. We disagree.

HN13[] To establish a prima facie case for intentional interference with contractual relations, a plaintiff must show: (1) the existence of a contract, (2) knowledge of the contract by the alleged wrongdoer, (3) intentional procurement of the contract's breach, (4) absence of justification, and (5) damages caused by the breach. *Kjesbo v. Ricks, 517 N.W.2d 585, 588 (Minn. 1994)*.

Appellant alleges that because each respondent acted deliberately in refusing to sell, respondents intentionally procured the contract's breach. But *HN14*[] a business may deal or refuse to deal with any party as long as it does so independently. *Steele, 114 F. Supp. 2d at 849*. Here, Aluma Spec, EFCO, and Paulson were each entitled to refuse to sell to appellant absent an illegal agreement. Appellant has not produced any evidence that the respondents' refusals to sell were unjustified or were intended to procure the breach of appellant's contract with the general contractor. Therefore appellant has failed to produce evidence sufficient to withstand summary judgment on this claim.

We affirm the district court's grant of summary judgment with respect to all of appellant's **[*14]** claims.

Affirmed.

End of Document

Flying J Inc. v. TA Operating Corp.

United States District Court for the District of Utah

May 2, 2007, Decided ; May 2, 2007, Filed

Case No: 1:06-CV-30 TC

Reporter
2007 U.S. Dist. LEXIS 32518 *; 2007 WL 1302756

FLYING J INC., et al., Plaintiffs, vs. TA OPERATING CORPORATION, et al., Defendants.

Subsequent History: Motion granted by Flying J Inc. v. TA Operating Corp., 2007 U.S. Dist. LEXIS 55567 (D. Utah, July 30, 2007)

Core Terms

Interrogatories, responses, discovery, damages, boycott, response to interrogatory, motion to compel, antitrust, market power, supplemental, calculated, horizontal, objected, temporal, asserts, definition of the term, court concludes, requests, answers, economic relations, allegations, contends, vague

Counsel: **[*1]** For Flying J Inc, a Utah corporation, TCH, a Utah limited liability company, Transportation Alliance Bank, a Utah corporation, TON Services, a Utah corporation, Plaintiffs: Gregory J. Kerwin, LEAD ATTORNEY, GIBSON DUNN & CRUTCHER (CO), DENVER, CO; Jonathan A. Dibble, LEAD ATTORNEY, RAY QUINNEY & NEBEKER (SLC), SALT LAKE CITY, UT; Katrina Casey Lewis, LEAD ATTORNEY, GIBSON DUNN & CRUTCHER (CO), DENVER, CO; Justin T. Toth, RAY QUINNEY & NEBEKER (SLC), SALT LAKE CITY, UT; Keith A. Kelly, RAY QUINNEY & NEBEKER (SLC), SALT LAKE CITY, UT; T. Michael Crimmins, GIBSON DUNN & CRUTCHER (DC), WASHINGTON, DC; Taggart Hansen, GIBSON DUNN & CRUTCHER (CO), DENVER, CO.

For TA Operating, a Delaware corporation doing business as TravelCenters of America, Defendant: Jane E. Willis, LEAD ATTORNEY, ROPES & GRAY (BOSTON), BOSTON, MA; Michael D. Zimmerman, LEAD ATTORNEY, SNELL & WILMER (UT), SALT LAKE CITY, UT; Amy B. Auth, ROPES & GRAY (BOSTON), BOSTON, MA; Todd M. Shaughnessy, SNELL & WILMER (UT), SALT LAKE CITY, UT; Troy L. Booher, SNELL & WILMER (UT), SALT LAKE CITY, UT.

For Pilot Travel Centers, a Delaware limited liability company, Defendant: Alan M. Grimaldi, LEAD ATTORNEY, HOWREY SIMON ARNOLD **[*2]** & WHITE, WASHINGTON, DC; Gary F. Bendinger, LEAD ATTORNEY, HOWREY LLP (UT), SALT LAKE CITY, UT; Charles A. Stormont, HOWREY LLP (UT), SALT LAKE CITY, UT; John H. Bogart, HOWREY LLP (UT), SALT LAKE CITY, UT; Scott D. McCoy, HOWREY LLP (UT), SALT LAKE CITY, UT; Zachary J. Weyher, HOWREY LLP (UT), SALT LAKE CITY, UT.

For Pilot, a Tennessee corporation, Defendant: Alan M. Grimaldi, LEAD ATTORNEY, HOWREY SIMON ARNOLD & WHITE, WASHINGTON, DC; Gary F. Bendinger, LEAD ATTORNEY, HOWREY LLP (UT), SALT LAKE CITY, UT; Charles A. Stormont, HOWREY LLP (UT), SALT LAKE CITY, UT; John H. Bogart, HOWREY LLP (UT), SALT LAKE CITY, UT; Scott D. McCoy, HOWREY LLP (UT), SALT LAKE CITY, UT; Zachary J. Weyher, HOWREY LLP (UT), SALT LAKE CITY, UT.

Judges: Tena Campbell, District Judge, David Nuffer, Magistrate Judge.

Opinion by: David Nuffer

Opinion

MEMORANDUM DECISION AND ORDER GRANTING IN PART & DENYING IN PART MOTION TO COMPEL

Defendant Pilot Travel Centers LLC ("Pilot Travel") has filed a motion to compel supplemental responses to its First Set of Interrogatories. [1] On August 29, 2006, Pilot Travel served its First Set of Interrogatories on Plaintiffs. **[*3]** On October 30, 2006, plaintiffs served their responses and objections on Pilot Travel. [2] On December 1, 2006, counsel for Pilot Travel sent a letter to Plaintiffs' counsel noting what they considered to be numerous deficiencies in Plaintiffs' responses. [3] Thereafter, the parties exchanged correspondence and held a telephone conference, but were unable to come to an agreement on the disputed discovery requests. [4] For the reasons discussed below, the court grants the motion to compel in part, and denies it in part. The court will discuss each disputed request in turn.

[*4] DISCUSSION

A. Interrogatories 1, 2, & 3.

Interrogatory no. 1 asks plaintiffs to describe in detail the basis for the allegation in paragraph 48 of the complaint that there is a continuing horizontal group boycott. [5] Plaintiffs responded to this interrogatory in part by stating that the factual basis for the allegation is set forth in paragraphs 1-60 of the complaint. [6]

Interrogatory no. 2 asks Plaintiffs to describe in detail the basis for the contention that Pilot Travel has participated in the alleged boycott. [7] Interrogatory no. 3 asks the same question with regard to Pilot Corp. [8] In response to Interrogatory no. 2, Plaintiffs incorporated by reference their response to Interrogatory no. 1. In addition, they stated:

> [T]here is direct evidence of Pilot Travel's participation in the group boycott with TA through the conversations between Mike Hinderliter (of TA) and Mark Hazelwood (of Pilot) **[*5]** documented in the email attached as Exhibit 5 to the Complaint, as well as Pilot's actions with respect to Irving Oil in furtherance of the boycott after those conversations. [9]

---

[1] Motion to Compel, docket no. 82, filed February 8, 2007.

[2] Memorandum in Support of Motion to Compel ("Supporting Memorandum") at iii, docket no. 83, filed February 8, 2007. Copies of Pilot Travel's First Set of Interrogatories and plaintiffs' responses are attached to the Supporting Memorandum as Exhibits 1 and 2, respectively.

[3] Supporting Memorandum at iv; Letter from John Bogart to Jonathon Dibble and Gregory Kerwin, dated December 1, 2006, attached to Supporting Memorandum as Exhibit 3.

[4] Supporting Memorandum at iv; Letters attached to Supporting Memorandum as Exhibits 4 & 5; Plaintiffs' Response to Pilot Travel Center's Motion to Compel ("Plaintiffs' Response") at 1, 2 n.1, docket no. 90, filed February 23, 2007; Letters attached to Plaintiffs' Response as Exhibits A & B.

[5] Ex. 1 to Supporting Memorandum at 6.

[6] Ex. 2 to Supporting Memorandum at 7.

[7] Ex. 1 to Supporting Memorandum at 7.

[8] Ex. 1 to Supporting Memorandum at 7.

[9] Exhibit 2 to Supporting Memorandum at 8.

In response to Interrogatory no. 3, Plaintiffs incorporated by reference their response to Interrogatory no. 2. The response further stated: "As detailed in Plaintiffs' briefing and exhibits in response to Pilot's motion to dismiss in this case, public records confirm that Mark Hazelwood has served as an executive for both Pilot Travel and Pilot Corp. during the time period relevant to Plaintiff's claims, as have other Pilot employees." [10]

Defendants contend that these responses are **[*6]** inadequate and that Plaintiffs should be required to provide a more detailed factual statement. In response to the motion to compel, Plaintiffs state that they have not withheld any information, and in fact, have provided all currently known information in support of the identified contentions. Plaintiffs state: "Having provided all known information in response to the contention interrogatories, Plaintiffs cannot do any more." [11]

The court concludes that Plaintiffs should provide a more detailed statement of the facts supporting the allegations in the complaint. "An interrogatory may properly inquire into a party's contentions in the case and the factual basis therefor." [12] A defendant "must be allowed to require the accusing party to set forth, with particularity, what he is accused of doing, not doing, or both." [13] Although it is true, as one court has observed, that the allegations in the complaint shed some light on the role defendants apparently played, a general reference **[*7]** to the allegations in the complaint is not a proper response to an interrogatory. [14] Similarly, vague references to conversations between Mr. Hinderliter and Mr. Hazelwood and to Pilot's actions with respect to Irving Oil are not appropriate responses to the interrogatories. If Plaintiffs do not have the "necessary information to make a full, fair and specific answer to an interrogatory, [they] should so state under oath." [15] Accordingly, Plaintiffs are directed to supplement their responses to Interrogatories 1, 2, and 3.

[*8] B. Interrogatories 6 & 7.

Interrogatories 6 and 7 ask the basis for the contention in Paragraph 69 of the complaint that Pilot Travel and Pilot Corp., respectively, possess market power. [16] In response to Interrogatories 6 and 7, Plaintiffs repeated allegations in the complaint relating to the market shares of the so-called "boycotting firms," and their exclusive access to the Trendar POS System. [17] They further stated that "Plaintiffs believe the combined market share of these two companies and possibly others, in the circumstances and context alleged in the Complaint, gives these boycotting firms 'market power' as defined in applicable ***antitrust law*** for purposes of their horizontal group boycott." [18]

Pilot Travel contends that this answer is insufficient. It states that Interrogatories 6 and 7 "asked whether Pilot Travel or Pilot Corp. possesses market power, not whether some other **[*9]** persons or group possesses market power." [19] Pilot Travel states that in the meet and confer process, Plaintiffs admitted that they do not contend that

---

[10] Exhibit 2 to Supporting Memorandum at 9.

[11] Plaintiffs' Response at 2.

[12] *Cont'l Ill. Nat'l Bank & Trust Co. of Chicago v. Caton, 136 F.R.D. 682, 684 (D. Colo. 1991)*.

[13] *Id. at 689*.

[14] *Id. at 688* (stating that "all references in plaintiff's Interrogatory Responses to the *allegations* in the Complaint amount to nothing more than *claims* or *allegations* that the *allegations* are true.").

[15] *Id. at 684* (quoting *Miller v. Doctor's Gen. Hosp., 76 F.R.D. 136, 140 (W .D. Okla. 1977)*.

[16] Ex. 1 to Supporting Memorandum at 7.

[17] Ex. 2 to Supporting Memorandum at 10-12.

[18] *Id.* at 12.

Pilot Travel and Pilot Corp. have market power, but they refused to provide supplemental responses indicating their position. [20]

In response to the motion to compel, Plaintiffs explain that "Paragraph 69 contends that the boycotting firms possess market power *collectively,* not that each individual boycotting firm possesses market power by itself." [21] The court concludes that Plaintiffs' answers to Interrogatories 6 and 7 are sufficient to apprise Pilot Travel of Plaintiffs' contentions with regard to the issue of "market power."

[*10] C. Interrogatories 8 & 9.

Interrogatories 8 and 9 ask Plaintiffs to describe the basis for their contention in Paragraph 84 of the complaint that Pilot Travel and Pilot Corp. have interfered with Plaintiffs' economic relations other than through the alleged horizontal boycott. [22] In answer to these interrogatories, Plaintiffs pointed out that the allegations in Paragraph 84 of their complaint refer to Defendant TA, not the Pilot defendants. They state, however, that they believe that "evidence developed through discovery in this case will reveal instances in which Pilot has engaged in other acts intended to interfere with Plaintiffs' economic relations, besides the actions described in Paragraph 83 of the complaint, but they have not yet alleged such actions by Pilot." [23]

Pilot Travel asserts that Plaintiffs' responses to these interrogatories say both "yes and no, the paradigm of **[*11]** evasion." [24] Pilot Travel asserts that it is entitled to know whether Plaintiffs contend that either Pilot Travel or Pilot Corp. interfered with Plaintiffs' economic relations, and if so, the factual basis for such contentions. [25]

In response to the motion to compel, Plaintiffs state that they "made clear in their responses that they have not alleged that Pilot has engaged in such 'other acts.'" [26] However, they then repeat their response to the interrogatories that they believe evidence developed through discovery will reveal instances in which Pilot engaged in such "other acts," but they have not yet alleged such actions by Pilot. Plaintiffs contend that this response is clear and direct. [27]

The court concludes that Plaintiffs should **[*12]** supplement their answers to Interrogatories 8 and 9 to state whether they contend that Pilot Travel or Pilot Corp. has interfered with their economic relations other than through the alleged horizontal boycott. If so, Plaintiffs should provide detailed factual statements supporting the contention. If Plaintiffs have no facts supporting this contention, they should so state under oath. [28]

D. Interrogatories 10, 11, & 12.

---

[19] Pilot Travel's Reply Memorandum in Support of Motion to Compel Supplemental Answers to Interrogatories ("Reply") at 4, docket no. 98, filed March 8, 2007.

[20] Supporting Memorandum at viii.

[21] Plaintiffs' Response at 3; see Ex. 4 to Supporting Memorandum at 6-7.

[22] Supporting Memorandum at 4, Ex. 1 to Supporting Memorandum at 7-8.

[23] Ex. 2 to Supporting Memorandum at 13.

[24] Reply at 4.

[25] Supporting Memorandum at 4.

[26] Plaintiffs' Response at 4.

[27] *Id.*

[28] See *Cont'l Ill. Nat'l Bank & Trust Co. of Chicago, 136 F.R.D. at 684*.

Interrogatories 10, 11, and 12 ask whether Plaintiffs contend that Plaintiffs TON Services, Inc. ("TON"), Transportation Alliance Bank, Inc. ("TAB"), or Flying J, Inc. are direct participants in the trucker fuel card market, and if so, the basis for each such contention. [29] Plaintiffs objected that the interrogatories are "vague as to the term 'direct participant.'" [30] Subject to the objection, Plaintiffs provided a brief description, as alleged in their complaint, of the general nature **[*13]** of the businesses engaged in by TON, TAB, and Flying J. [31]

Pilot Travel contends that the objection is unfounded for three reasons. First, Pilot Travel asserts that Plaintiffs' failure to explain how the term is vague or how they understood the term constitutes a waiver of the objection. Second, Pilot Travel contends that there is nothing vague about the term. Pilot Travel notes that direct participation in the relevant market is a factor to be considered in determining standing. It further points out that Plaintiffs have long involvement in antitrust cases, and are represented by experienced antitrust counsel, who may be presumed to understand the standing requirements for antitrust claims. Finally, it states that during the meet and confer process, Plaintiffs conceded that they understood the term. [32]

[*14] In response to the motion to compel, Plaintiffs state that while objecting to their responses, counsel for Pilot Travel "declined to provide a definition of the term 'direct participant' as used in the interrogatories but clarified their belief that the term is 'well-defined in the law of the Tenth Circuit.'" [33] In subsequent communications, they have "refused to provide a definition of the term or to identify the 'Tenth Circuit case law' purportedly supplying the definition." [34] Plaintiffs contend that this refusal "is evidence of the fact that the term is susceptible of many interpretations and nuances and that [Pilot Travel's] insistence upon a response using the undefined term can be viewed as an effort to catch Plaintiffs in a legalistic trap." [35]

The court believes that Pilot Travel **[*15]** should provide a definition of the term or identify the case law supplying the definition. If it does so, Plaintiffs will be required to supplement their responses to the interrogatories.

E. Interrogatory 13.

Interrogatory 13 asks Plaintiffs to describe their alleged damages in detail. [36] Plaintiffs declined to provide a response to this interrogatory. Instead, they stated that they have not yet analyzed or calculated their damages. They further stated that they will retain an expert to identify and quantify each category of damages. Since initial expert reports are not due until May 30, 2008, Plaintiffs asserted that it is premature for them to disclose any analysis or computation of damages. [37]

In opposition to the motion to compel, Plaintiffs state that antitrust damages must be proven by a complex economic analysis which requires an expert. They state that any opinion about damages that could be offered **[*16]** at this time by their non-expert representatives would be unsupported by expert analysis and calculation and might even be misleading as it might be inconsistent with the ultimate opinions offered by their antitrust expert. Plaintiffs state

---

[29] Ex. 1 to Supporting Memorandum at 8.

[30] Ex 2. to Supporting memorandum at 13-15.

[31] *Id.*

[32] Supporting Memorandum at ix, 5-6.

[33] Plaintiffs' Response at 5 (quoting Letter, dated Dec. 1, 2006, from John Bogart to Jonathon Dibble & Gregory Kerwin at 4, attached as Ex. 3 to Supporting Memorandum.

[34] Plaintiffs' Response at 6.

[35] *Id.*

[36] Ex. 1 to Supporting Memorandum at 8.

[37] Ex. 2 to Supporting Memorandum at 15-16.

that they have already agreed to produce the financial data and other information that their expert will use to conduct the analysis. In Plaintiffs' view, Pilot Travel will have ample opportunity during expert discovery to evaluate the basis for their damages calculation and to attempt to refute those calculations with their own expert analysis. [38]

In response, Pilot Travel states that much of the information it now seeks should have been provided in initial disclosures. Pilot Travel points out that Plaintiffs' expert report will not be served until long after the close of fact discovery. Pilot Travel states:

> Until then, according to Plaintiffs, Pilot Travel should rely on its own guesses about what Plaintiffs might claim as damages, **[*17]** and hope for the best in framing discovery requests. This is not the process contemplated by the Rules of Civil Procedure, and it is [a]n invitation to wasteful and contentious document and deposition discovery. [39]

Pilot Travel also note notes that "Plaintiffs have already ***twice*** calculated damages they think attributable to an alleged boycott of the TCH card" in litigation in other cases. [40] Pilot Travel asserts that "[w]ith two expert reports already in their files, they should be in a position to say something substantive about their damage claims." [41]

The court agrees that Plaintiffs should provide a description of their damages so that Pilot Travel may frame its discovery requests in an efficient manner. Accordingly, Plaintiffs will be required to answer this interrogatory.

F. Interrogatory 14.

Interrogatory 14 is as follows: "State whether you contend that point-of-sale systems comprise a relevant antitrust market **[*18]** in this case, and if so, describe in detail the claims you assert in that market." [42] Plaintiffs objected to this interrogatory as "vague as to the term 'relevant antitrust market in this case.'" [43] Subject to the objection, Plaintiffs answered the interrogatory as follows: "Yes, as Plaintiffs understand the term 'relevant antitrust market in this case.'" [44] In addition, Plaintiffs provided an explanation of the basis for this contention as outlined in the complaint. [45] However, Plaintiffs did not describe any claims they assert in that market.

Pilot Travel argues that "Defendants are entitled to know what claim, if any, is asserted for that market. If no claim is being asserted, Defendants are entitled to know that now so that further discovery and argument are not wasted on diversions." [46] In their response to the motion to compel, Plaintiffs state in a footnote that "the Complaint **[*19]** does not assert 'claims in that market.'" [47]

As discussed, Plaintiffs have indicated in their response to Interrogatory 14 that they contend that point-of-sale systems constitute a relevant antitrust market. Also, it seems clear from Plaintiffs' memorandum that they do not

---

[38] Plaintiffs' Response at 8-9.

[39] Reply at 6.

[40] *Id.* at 7.

[41] *Id.*

[42] Ex. 1 to Supporting Memorandum at 8.

[43] Ex. 2 to Supporting Memorandum at 16.

[44] *Id.*

[45] *Id.*

[46] Reply at 8.

[47] Plaintiffs' Response at 6 n.3.

assert any claims in that market. However, the answer to the interrogatory does not make this clear. The court thus concludes that Plaintiffs should supplemental their response to Interrogatory 14 to state unequivocally whether they assert any claims in that market, and if so, to describe them in detail.

G. Failure to Differentiate Between Pilot Travel and Pilot Corp.

Pilot Travel complains that Plaintiffs "generically refer to 'Pilot' without distinguishing between Pilot Travel and Pilot Corp." [48] For example, Interrogatories 4 and 5 ask whether Plaintiffs contend that Pilot Travel and Pilot Corp., respectively, discuss and share information with horizontal competitors. **[*20]** Plaintiffs responded by referring only to "Pilot" making it impossible for Pilot Travel to determine whether the response was directed at Pilot Travel, Pilot Corp. or both. [49] During the meet and confer process, Plaintiffs explained that their answers described actions by individuals, and Plaintiffs did not know whether those actions were taken on behalf of Pilot Travel, Pilot Corp., or someone else. However, Plaintiffs refused to supplement their responses to provide this clarification even though the interrogatories related to specific companies. [50] Plaintiffs have not addressed this issue in their response to the motion to compel.

The court concludes that Plaintiffs should supplement their responses to distinguish between the two entities as requested by the interrogatories. Where the answer concerns actions by an individual, and Plaintiffs are not sure on which company's behalf **[*21]** the individual was acting, they should so state in their response.

H. Plaintiffs' Objections to the Instructions and Definitions

Pilot Travel asserts that Plaintiffs improperly objected to virtually every definition and instruction in its First Set of Interrogatories. In particular, they complain about Plaintiffs' objections to (1) the term "describe in detail," (2) the temporal scope of the interrogatories, and (3) the definition of "you," "your," and "plaintiff." [51]

1. Describe in Detail

Pilot Travel asserts that Plaintiffs' objection to this instruction is meritless because a party is required to describe in reasonable detail the factual basis for any contention when asked to do so in an interrogatory. [52] **[*22]** Pilot Travel requests that the court order Plaintiffs to state the definition of "describe in detail" that they used in their interrogatory responses. [53]

In response, Plaintiffs state that "they did attempt to honor a common sense view of that phrase by providing reasonable detail to explain the facts supporting their contentions." [54] The court takes Plaintiffs at their word that they attempted to provide reasonable detail to explain the facts, as they are required to do, [55] and declines to enter an order requiring Plaintiffs to state a definition of the term at this time.

---

[48] Supporting Memorandum at 8.

[49] *Id.;* see Ex. 2 to Supporting Memorandum at 9-10.

[50] Supporting Memorandum at 8.

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

[52] *Id.* at 9 (citing *Cont'l Ill., 136 F.R.D. at 684*).

[53] See Pilot Travel's Proposed Order G ranting Motion to Compel, attached to its Motion to Compel.

[54] Plaintiffs' Response at 9.

[55] *See Cont'l Ill., 136 F.R.D. at 684*.

2. Temporal Scope of Responses

The instructions for Pilot Travel's First Set of Interrogatories requested Plaintiffs to provide information beginning in 1996. [56] Plaintiffs objected to the date "as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. **[*23]** " [57] Pilot Travel asserts that this objection is "both surprising and bizarre," since Plaintiffs' complaint refers to events occurring as early as 1985, and appears to allege that the boycott began in 1996. [58] Pilot Travel contends that Plaintiffs' objection should be overruled, and to the extent it is not overruled, Plaintiffs should be required to state the temporal scope of their answers. [59]

In response, Plaintiffs state that all parties in this case have sought at least some information dating back to 1996, and all parties including Pilot Travel have objected to this temporal scope. Plaintiffs also describe their efforts in trying to resolve this issue. [60] Plaintiffs concede that temporal scope "remains an important issue that will need to be clarified in the context of document requests." [61] They assert, however, that temporal scope is not relevant to their **[*24]** interrogatory responses because they "provided information on their contentions concerning certain subjects rather than an account of particular events occurring at certain dates in the past." [62]

Plaintiffs' interrogatory responses do not deal with events occurring on specific dates. Since Plaintiffs' interrogatory responses are the only discovery requests presently before the court, the court concludes that it is not necessary at this time to enter an order setting the temporal scope of discovery. The court encourages the parties to reach an agreement on this issue.

3. Definition of "you," "your," and "plaintiff."

In their response to Pilot Travel's First Set of Interrogatories, Plaintiffs objected to Pilot Travel's definition of "you," "your," and "plaintiff" in that it required Plaintiffs "to review and provide information from their 'parent, subsidiaries, directors, officers, employees, agents and attorneys. . . .'" [63] Subsequently, **[*25]** in a December 11, 2006 letter, Plaintiffs stated that they would adopt the definition used by Pilot Travel in its discovery responses. Under this definition, Plaintiffs interpreted the terms as "the named Plaintiffs and their agents and employees acting within the scope of their employment or agency." [64]

In support of its motion to compel, Pilot Travel states that any claim that plaintiffs have adopted a definition based on Pilot Travel's definition of a similar term is disingenuous because Pilot Travel served its responses more than a month after Plaintiffs served their responses. [65] In response, Plaintiffs reaffirm that they already have adopted the definition suggested by Pilot Travel, and confirmed that the definition does not change their answers to Pilot

---

[56] Ex. 1 to Supporting Memorandum at 5.

[57] Ex. 2 to Supporting Memorandum at 5.

[58] Supporting Memorandum at 9.

[59] *Id.* at 10.

[60] Plaintiffs' Response at 9-10.

[61] *Id.* at 10.

[62] *Id.*

[63] Ex. 2 to Supporting Memorandum at 3.

[64] Letter dated December 11, 2006 from M ichael Crimmins to John Bogart at 3, attached as Exhibit 4 to Supporting Memorandum.

[65] Supporting Memorandum at xi.

Travel's interrogatories. [66] The court concludes that Plaintiffs have made their **[*26]** definition of the terms sufficiently clear.

ORDER

IT IS HEREBY ORDERED that Pilot Travel's Motion to compel [67] is GRANTED IN PART as follows:

Plaintiffs shall provide supplemental responses to Pilot Travel's Interrogatory Nos. 1, 2, and 3 that include detailed statements of facts supporting the allegations of the Complaint that (a) there is a continuing horizontal boycott by TA, Pilot, and Petro Stopping Centers, LP of Flying J, the Trucker Fuel Card of Flying J's subsidiary TCH, and any other Trucker Fuel Card processed by TCH; (b) that Pilot Travel has participated in or taken steps in furtherance of any alleged boycott of TCH; and (c) that Pilot Corporation has participated in or taken **[*27]** steps in furtherance of any alleged boycott of TCH.

Plaintiffs shall provide supplemental responses to Pilot Travel's Interrogatory Nos. 8 and 9 that state whether Plaintiffs contend that either Pilot Travel or Pilot Corporation have intentionally interfered with Plaintiffs' economic relations other than through the alleged horizontal boycott, that include detailed statements of facts supporting such contentions;

Plaintiffs shall provide a supplemental response to Pilot Travel's Interrogatory No. 13 that includes a detailed statement of any and all theories of damages, the elements of such damages, the amount of damages for each such element, and the method of calculation of such damages;

Plaintiffs' response to Interrogatory 14 indicates that they contend that point-of-sale systems constitute a relevant antitrust market. Plaintiffs shall supplement their response to Interrogatory 14 to state whether they assert any claims in that antitrust market, and if so, to describe them in detail.

For all supplemental responses, including Interrogatories 4 and 5, Plaintiffs shall separately state answers with respect to Pilot Travel and Pilot Corporation, and to the extent Plaintiffs are **[*28]** unable to do so, Plaintiffs shall so state and provide a detailed explanation of why they are unable to do so.

The motion to compel is DENIED IN PART. Specifically, the court denies the motion as to Interrogatory Nos. 6 and 7, and with regard to the instructions and definitions discussed in Section H of this order. Plaintiffs are not required to provide a supplemental response to Interrogatory Nos. 10, 11, and 12 at this time. If Pilot Travel provides a definition of the term "direct participant," Plaintiffs will be required to supplement their responses.

This Order in no way relieves Plaintiffs of their duty to supplement their answers to discovery materials pursuant to *Federal Rule of Civil Procedure 26(e)*.

May 2, 2007.

BY THE COURT:

s/ David Nuffer

U.S. Magistrate Judge

[66] Plaintiffs' Response at 9; Exhibit 4 at 3.

[67] Motion to Compel, docket no. 82, filed February 8, 2007.

Static Control Components, Inc. v. Lexmark Int'l, Inc.

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

May 2, 2007, Decided ; May 2, 2007, Filed

CONSOLIDATED CIVIL ACTION NOS. 5:02-571 AND 5:04-84

Reporter

487 F. Supp. 2d 861 *; 2007 U.S. Dist. LEXIS 32489 **; 2007-2 Trade Cas. (CCH) P75,773

STATIC CONTROL COMPONENTS, INC., Plaintiff/Counterclaim Defendant, v. LEXMARK INTERNATIONAL, INC., Defendant/Counterclaim Plaintiff, v. NER DATA PRODUCTS, INC., ET AL., Counterclaim Defendants.

Subsequent History: As Amended May 3, 2007.

Partial summary judgment denied by *Static Control Components, Inc. v. Lexmark Int'l, Inc., 487 F. Supp. 2d 891, 2007 U.S. Dist. LEXIS 34224 (E.D. Ky., 2007)*

Prior History: *Static Control Components, Inc. v. Lexmark Int'l, Inc., 487 F. Supp. 2d 830, 2007 U.S. Dist. LEXIS 31445 (E.D. Ky., 2007)*

Core Terms

cartridges, Remanufacturers, Prebate, market power, summary judgment, antitrust, recycling, customers, patent, anticompetitive, Sherman Act, Lanham Act, deceptive, printer, toner, monopoly power, environmental, single-use, Repair, argues, label, attach, prices, restraint of trade, manufacturer, literally, rule of reason, consumers, antitrust violation, monopolization

LexisNexis® Headnotes

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

HN1[] **Summary Judgment, Entitlement as Matter of Law**

Fed. R. Civ. P. 56(c) provides that judgment for the moving party is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. While all inferences are drawn in favor of the non-moving party, that party still must present some affirmative evidence supporting its position to defeat an otherwise appropriate motion for summary judgment. Stated alternatively, the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN2[] Burdens of Proof, Movant Persuasion & Proof

There is no special burden placed on an antitrust plaintiff at the summary judgment stage. In the context of antitrust, just as in all cases, the non-movant's version of any issue of fact is presumed correct.

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

HN3[] Sherman Act, Scope

Section 1 of the Sherman Act provides, in pertinent part: every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN4[] Scope, Monopolization Offenses

Section 2 of the Sherman Act makes it unlawful to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations. *15 U.S.C.S. § 2*.

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

HN5[] Sherman Act, Scope

See *15 U.S.C.S. § 14*.

Antitrust & Trade Law > General Overview

Patent Law > General Overview

HN6[] Antitrust & Trade Law

Asserted tensions between the antitrust and patent laws have been the subject of extensive commentary. In the case of patent antitrust cases, it is possible for manufacturers to draft specific patent license terms so as to insure the cooperation of licensees in effecting anticompetitive ends.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN7[] Per Se Rule Tests, Manifestly Anticompetitive Effects

Market power is the power to force a purchaser to do something that he would not do in a competitive market, and it entails the ability of one seller to restrict output or raise prices. In order for a Sherman Act claim to lie against a defendant, there must be a finding of market power. Determining market power is critical to the court's inquiry.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN8[] **Per Se Rule & Rule of Reason, Sherman Act**

In order for a plaintiff to succeed on a Kodak-type theory--that a lack of market power in the equipment market does not necessarily preclude market power sufficient for a *15 U.S.C.S. § 1* claim--there must be some evidence that the defendant has changed its policy after locking-in customers and that the defendant has not been otherwise forthcoming about its pricing structure and service policies.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN9[] **Per Se Rule & Rule of Reason, Sherman Act**

There are two standards for determining whether actions violate *15 U.S.C.S. § 1*: (1) per se violations and (2) violations subject to the rule of reason. Per se violations do not require a finding that the defendant's actions were anticompetitive, but they do require the plaintiff to show that the defendant possesses market power or unique access to a business element necessary for effective competition. If the facts do not sustain a finding of a per se violation, the court will apply the rule of reason approach. There is an automatic presumption in favor of the rule of reason standard. A rule of reason analysis involves, inter alia, a study of consequences of the conduct on the affected market before imposition of antitrust sanctions. While the rule of reason and per se analysis have merged over time, courts still tend to separate the two.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN10[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Typically, per se violations are seen within the context of a boycott of supplies or customers. The per se rule should be applied only in clear cut cases of trade restraints that are so unreasonably anticompetitive that they present straightforward questions for reviewing courts. A refusal to deal may qualify as a per se restraint, by the mere allegation of a concerted refusal to deal does not suffice because not all concerted refusals to deal are predominantly anticompetitive.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

HN11[] **Tying Arrangements, Per Se Rule**

A per se tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. In a tying claim, a party is able to exclude competitors from a market because of its power or leverage in another market. at 6. In order to present a per se tying claim, a seller must possess substantial market power in the tying product market. If there is appreciable power in the tying market, then a court must determine whether the defendant's conduct is procompetitive or anticompetitive. Determining whether a party's actions have an anticompetitive effect requires use of the Sixth Circuit's three step analysis: (1) the seller must have power in the tying product market; (2) there must be a substantial threat that the tying seller will acquire market power in the tied-product market; and (3) there must be a coherent economic basis for treating the tying and tied products as distinct.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN12[] **Price Fixing & Restraints of Trade, Vertical Restraints**

When looking to whether a contract in restraint of trade is anticompetitive under *15 U.S.C.S. § 1*, the key issue is whether that contract addresses a horizontal or vertical market. Horizontal conspiracies are agreements among competitors at the same level of market structure to stifle trade, such as agreements among manufacturers or among distributors to fix prices for a given product. Vertical conspiracies are agreements among actors at different levels of market structure to restrain trade, such as agreements between a manufacturer and its distributors to exclude another distributor from a given product and geographic market. While horizontal restrains of trade fall under per se analysis, a vertical restrain will be analyzed pursuant to the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN13[] **Per Se Rule & Rule of Reason, Sherman Act**

When applying the rule of reason, an agreement limiting consumer choice by impeding the ordinary give and take of the market place cannot be sustained. The general test for whether there is an antitrust violation under the rule of reason is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN14[] **Actual Monopolization, Monopoly Power**

In order to prevail on a *15 U.S.C.S. § 2* claim, defendant must demonstrate (1) the possession of monopoly power in a relevant market; and (2) the willful acquisition, maintenance, or use of that power by anti-competitive means as opposed to growth or development resulting from a superior product, business acumen, or historical. accident. *Section 2* claims are examined under a fact specific analysis, and in proving its claim, a plaintiff must first define the relevant product and geographic markets in which it competes with the alleged monopolizer, and with respect to the monopolization claim, to show that the defendant, in fact, possesses monopoly power. To establish the offense of monopolization a plaintiff must demonstrate that a defendant either unfairly attained or maintained monopoly power. To have monopoly power, a defendant must have the power to control prices or exclude competition. When a competitor, with a dangerous probability of success, engages in anti-competitive practices the specific design of which are, to build a monopoly or exclude or destroy competition, there is an attempted monopolization. *Section 2* monopoly power requires something greater than market power under *§ 1*. the standard for monopoly power is, in fact, very high, and is typically defined by the market share.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN15[] **Actual Monopolization, Monopoly Power**

While market share might, in many instances, lead to an inference of monopoly power, it is not, in and of itself, the only factor to consider. Within the context of an aftermarket monopolization, there are special factors to consider. When there is an allegation of aftermarket monopolization, the analysis is more complex, because market share data standing alone is not necessarily a reliable proxy for monopoly power. It is to be expected that a company will supply a large percentage of its aftermarket parts and services. It is only when there are significant information and switching costs, that the link between the primary market-and the aftermarket is severed for monopolization purposes. In sum, only a careful factual analysis of the market in question will reveal whether monopoly power, in fact, exists.

Antitrust & Trade Law > Clayton Act > Scope

HN16[] **Antitrust & Trade Law, Clayton Act**

The Clayton Act addresses the legality of exclusive dealing contracts. An exclusive dealing contract is formed when a good is sold on the condition that the buyer not deal with competitors of the seller. *15 U.S.C.S. § 14*. In order to be an illegal exclusive dealing contract, a court must engage in a three-part inquiry. First, a court must determine line of commerce, i.e. the type of goods that are involved. Second, the court must determine that there is a relationship between the anti-competitive actions and the market. Third, the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market. Under the Clayton Act, the relevant market is the prime factor in relation to which the ultimate question, whether the contract forecloses competition in a substantial share of the line of commerce involved, must be decided. Clayton Act claims are generally analyzed in conjunction with a Sherman Act *§1*, *15 U.S.C.S. § 1*, discussion, and the same facts are relevant to a market power determination under both statutes.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN17[] **Summary Judgment, Evidentiary Considerations**

The court, in determining whether an issue may properly be considered at the summary judgment stage, must rely on actual evidence. *Fed. R. Civ. P. 56*. Arguments requiring a court's speculation, and going well beyond the submitted evidence, are insufficient means for granting summary judgment.

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion > False Designation of Origin

HN18[] **Likelihood of Confusion, False Designation of Origin**

See *15 U.S.C.S. § 1125(a)*.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

Evidence > Burdens of Proof > Initial Burden of Persuasion

HN19[] **False Advertising, Lanham Act**

In order to prove liability for false advertising under the Lanham Act, a plaintiff must satisfy the follow five-element test: 1) the defendant has made false or misleading statements of fact concerning his own product or another's; 2) the statement actually deceives or tends to deceive a substantial portion of the intended audience; 3) the statement is material in that it will likely influence a deceived consumers' purchasing decisions; 4) the advertisements were introduced into interstate commerce; 5) there is some causal link between the challenged statements and harm to the plaintiff. A plaintiff seeking monetary damages must either show that a statement is literally false or that it is true yet misleading or confusing. For literally false statements, no evidence that consumers were mislead is necessary for recovery, i.e., there is a presumption of actual deception. The initial determination concerning whether a statement is ambiguous is a matter of law, while the determination as to whether facts exist so as to justify the statement is a question of fact.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

HN20[] **False Advertising, Lanham Act**

Where statements are literally true, yet deceptive, or too ambiguous to support a finding of literal falsity, a violation can only be established by proof of actual deception. For deceptive statements, a plaintiff cannot obtain monetary relief by arguing how consumers would react; it must show how consumers actually do react. If seeking monetary relief, there must be evidence from which a jury could determine that a substantial portion of the audience was deceived in order to support a determination that the statement has a tendency to deceive. Concern or confusion of the audience does not amount to deception. While common sense and personal experience serve as useful aids for the deception determination, they are not substitutes for other, harder evidence, such as consumer surveys.

Civil Procedure > Remedies > General Overview

HN21[] **Civil Procedure, Remedies**

A court cannot require disgorgement unless there is some proof that plaintiff lost sales or profits, or that defendant gained them, the principles of equity do not warrant an award of defendant's profits.

Counsel: **[**1]** For Lexmark International, Inc. (5:02-cv-00571-GFVT), Plaintiff: Binal J. Patel, LEAD ATTORNEY, Christopher J. Renk, LEAD ATTORNEY, Jason S. Shull, LEAD ATTORNEY, Timothy C. Meece, LEAD ATTORNEY, Banner & Witcoff, Ltd. - IL, Chicago, IL; Charles E. Shivel, Jr., LEAD ATTORNEY, Hanly A. Ingram, LEAD ATTORNEY, Steven Brian Loy, LEAD ATTORNEY, Stoll Keenon Ogden, PLLC - Lexington, Lexington, KY; David A. Shirlen, LEAD ATTORNEY, John F. Morrow, Jr., LEAD ATTORNEY, Mark N. Poovey, LEAD ATTORNEY, Womble, Carlyle, Sandridge & Rice PLLC - NC, Winston-Salem, NC; Joseph M. Potenza, LEAD ATTORNEY, Banner & Witcoff, LTD - DC, Washington, DC US; William L. Montague, Jr., LEAD ATTORNEY, Dinsmore & Shohl LLP - Lexington, Lexington, KY.

For Static Control Components, Inc. (5:02-cv-00571-GFVT), Defendant: Ann M. Brose, LEAD ATTORNEY, John R. Fuisz, LEAD ATTORNEY, Melise R. Blakeslee, LEAD ATTORNEY, Stefan M. Meisner, LEAD ATTORNEY, William H. Barrett, LEAD ATTORNEY, McDermott, Will & Emery - Washington, Washington, DC; Matthew F. Weil, LEAD ATTORNEY, McDermott, Will & Emery, Irvine, CA; Mickey T. Webster, LEAD ATTORNEY, Steven L. Snyder, LEAD ATTORNEY, W. Craig Robertson, III, LEAD ATTORNEY, William **[**2]** H. Hollander, LEAD ATTORNEY, Wyatt, Tarrant & Combs LLP - Lexington, Lexington, KY; Seth D. Greenstein, LEAD ATTORNEY, Constantine Cannon, PC, Washington, DC US.

Bernt W. von Grabe (5:02-cv-00571-GFVT), Amicus, Pro se, Fort Orange, FL.

Computer & Communications Industry Association (5:02-cv-00571-GFVT), Amicus, Pro se, Washington, DC.

International Imaging Technology Council (5:02-cv-00571-GFVT), Amicus, Pro se, Las Vegas, NV.

Amici Law Professors (5:02-cv-00571-GFVT), Amicus, Pro se, Washington, DC.

For Automotive Parts Rebuilders Association (5:02-cv-00571-GFVT), Amicus: Michael J. Conlon, LEAD ATTORNEY, Conlon, Frantz, Phelan, Pires LLP, Washington, DC.

Grassroots Recycling Network (5:02-cv-00571-GFVT), Amicus, Pro se, Madison, WI.

Silicon Valley Toxics Coalition (5:02-cv-00571-GFVT), Amicus, Pro se, San Jose, CA.

Basel Action Network (5:02-cv-00571-GFVT), Amicus, Pro se, Seattle, WA.

For Automotive Aftermarket Industry Association (5:02-cv-00571-GFVT), Amicus: George W. Keeley, LEAD ATTORNEY, Keeley, Kuenn & Reid, Automotive Aftermarket Industry, Chicago, IL.

For Static Control Components, Inc. (5:02-cv-00571-GFVT), Counter Claimant, **[**3]** Counter Defendant: Mickey T. Webster, LEAD ATTORNEY, Wyatt, Tarrant & Combs LLP - Lexington, Lexington, KY.

For Lexmark International, Inc. (5:02-cv-00571-GFVT), Counter Defendant: David A. Shirlen, LEAD ATTORNEY, John F. Morrow, Jr., LEAD ATTORNEY, Mark N. Poovey, LEAD ATTORNEY, Womble, Carlyle, Sandridge & Rice PLLC - NC, Winston-Salem, NC; Charles E. Shivel, Jr., Stoll Keenon Ogden, PLLC - Lexington, Lexington, KY.

For Lexmark International, Inc. (5:02-cv-00571-GFVT), Counter Claimant: David A. Shirlen, LEAD ATTORNEY, John F. Morrow, Jr., LEAD ATTORNEY, Mark N. Poovey, LEAD ATTORNEY, Womble, Carlyle, Sandridge & Rice PLLC - NC, Winston-Salem, NC; Hanly A. Ingram, Stoll Keenon Ogden, PLLC - Lexington, Lexington, KY.

For Pendl Companies, Inc. (5:02-cv-00571-GFVT), Counter Defendant: Daniel E. Danford, LEAD ATTORNEY, Elizabeth L. Thompson, LEAD ATTORNEY, Jack A. Wheat, LEAD ATTORNEY, Joel T. Beres, LEAD ATTORNEY, Stites & Harbison, PLLC - Lexington, Lexington, KY.

For Wazana Brothers International, Inc., d/b/a Micro Solutions Enterprises (5:02-cv-00571-GFVT), Counter Defendant: A. Steven Dotan, LEAD ATTORNEY, Darren S. Enenstein, LEAD ATTORNEY, Richardson & Patel **[**4]** LLP, Los Angeles, CA US; Andrew D. DeSimone, LEAD ATTORNEY, Douglas L. McSwain, LEAD ATTORNEY, Sturgill, Turner, Barker & Moloney PLLC, Lexington, KY; Ira M. Siegel, LEAD ATTORNEY, Blakely, Sokoloff, Taylor & Zafman, Los Angeles, CA; James M. Gilbert, LEAD ATTORNEY, Jeffrey R. Glassman, LEAD ATTORNEY, Kimberly D. Lewis, LEAD ATTORNEY, Steven E. Moyer, LEAD ATTORNEY, Moldo Davidson Fraioli Seror & Sestanovich, LLP - LA, Los Angeles, CA.

For Static Control Components, Inc. (5:04-cv-00084-GFVT), Plaintiff: Allison W. Freedman, LEAD ATTORNEY, Christopher D. Landgraff, LEAD ATTORNEY, James B. Heaton, III, LEAD ATTORNEY, Bartlit Beck Herman Palenchar & Scott, LLP - Chicago, Chicago, IL; Jennifer E. Heisinger, LEAD ATTORNEY, John M. Hughes, LEAD ATTORNEY, Joseph C. Smith, Jr., LEAD ATTORNEY, Bartlit Beck Herman Palenchar & Scott, LLP - Denver, Denver, CO; John J. Dabney, LEAD ATTORNEY, Melise R. Blakeslee, LEAD ATTORNEY, Paul E. Poirot, LEAD ATTORNEY, Stefan M. Meisner, LEAD ATTORNEY, William H. Barrett, LEAD ATTORNEY, McDermott, Will & Emery - Washington, Washington, DC; Kevin M. Bolan, LEAD ATTORNEY, McDermott, Will & Emery - Boston, Boston, MA; Mickey T. Webster, LEAD ATTORNEY, W. **[**5]** Craig Robertson, III, LEAD ATTORNEY, Sharon L. Gold, Wyatt, Tarrant & Combs LLP -Lexington, Lexington, KY; Seth D. Greenstein, LEAD ATTORNEY, Constantine Cannon, PC, Washington, DC US; Stanley L. Amberg, LEAD ATTORNEY, Chappaqua, NY; William L. London, III, LEAD ATTORNEY, Static Control Components, Sanford, NC.

For Lexmark International, Inc. (5:04-cv-00084-GFVT), Defendant: Allen E. Hoover, LEAD ATTORNEY, Bradley Rademaker, LEAD ATTORNEY, Mark T. Banner, LEAD ATTORNEY, Matthew P. Becker, LEAD ATTORNEY, Michael L. Krashin, LEAD ATTORNEY, Robert H. Resis, LEAD ATTORNEY, Binal J. Patel, Christopher J. Renk, Jason S. Shull, Timothy C. Meece, Banner & Witcoff, Ltd. - IL, Chicago, IL; Christopher B. Roth, LEAD ATTORNEY, Frederic M. Meeker, LEAD ATTORNEY, Robert F. Altherr, LEAD ATTORNEY, Joseph M. Potenza, Banner & Witcoff, LTD - DC, Washington, DC US; Hada V. Haulsee, LEAD ATTORNEY, Jason C. Hicks, LEAD ATTORNEY, Mark N. Poovey, LEAD ATTORNEY, W. Andrew Copenhaver, LEAD ATTORNEY, Womble, Carlyle, Sandridge & Rice, PLLC - NC, Winston-Salem, NC; Adrian M. Mendiondo, Charles E. Shivel, Jr., Hanly A. Ingram, Steven Brian Loy, Stoll Keenon Ogden, PLLC - Lexington, Lexington, KY.

For **[**6]** Quality Manufacturing Company, Inc. (5:04-cv-00084-GFVT), Respondent: John H. Rompf, LEAD ATTORNEY, Nanci Marian House, LEAD ATTORNEY, White, McCann & Stewart, Winchester, KY.

For NER Data Products, Inc. (5:04-cv-00084-GFVT), Cross Claimant, Counter Claimant: Jay Edward Ingle, LEAD ATTORNEY, Jackson & Kelly PLLC - LEXINGTON, Lexington, KY; Martin J. O'Donnell, LEAD ATTORNEY, Michael R. Reinemann, LEAD ATTORNEY, Thomas C. O'Konski, LEAD ATTORNEY, Cesari & McKenna, LLP, Boston, MA.

For American Family Mutual Insurance Company (5:04-cv-00084-GFVT), Intervenor: Amy E. Wochos, LEAD ATTORNEY, Terry J. Booth, LEAD ATTORNEY, Piper & Schmidt, Milwaukee, WI US.

For Lexmark International, Inc. (5:04-cv-00084-GFVT), Counter Claimant: Adrian M. Mendiondo, LEAD ATTORNEY, Charles E. Shivel, Jr., LEAD ATTORNEY, Hanly A. Ingram, LEAD ATTORNEY, Steven Brian Loy, LEAD ATTORNEY, Stoll Keenon Ogden, PLLC - Lexington, Lexington, KY; Allen E. Hoover, LEAD ATTORNEY, Binal J. Patel, LEAD ATTORNEY, Bradley Rademaker, LEAD ATTORNEY, Christopher J. Renk, LEAD ATTORNEY, Jason S. Shull, LEAD ATTORNEY, Mark T. Banner, LEAD ATTORNEY, Matthew P. Becker, LEAD ATTORNEY, Michael L. Krashin, LEAD ATTORNEY, **[**7]** Robert H. Resis, LEAD ATTORNEY, Timothy C. Meece, LEAD ATTORNEY, Banner & Witcoff, Ltd. - IL, Chicago, IL; Christopher B. Roth, LEAD ATTORNEY, Frederic M. Meeker, LEAD ATTORNEY, Joseph M. Potenza, LEAD ATTORNEY, Robert F. Altherr, LEAD ATTORNEY, Banner & Witcoff, LTD - DC, Washington, DC US; Hada V. Haulsee, LEAD ATTORNEY, Jason C. Hicks, LEAD ATTORNEY, W. Andrew Copenhaver, LEAD ATTORNEY, Womble, Carlyle, Sandridge & Rice, PLLC - NC, Winston-Salem, NC.

For NER Data Products, Inc. (5:04-cv-00084-GFVT), Counter Defendant: Andrew C. Oatway, LEAD ATTORNEY, Morisi & Oatway, Quincy, MA; Jay Edward Ingle, LEAD ATTORNEY, Jackson & Kelly PLLC - LEXINGTON, Lexington, KY; Martin J. O'Donnell, LEAD ATTORNEY, Michael R. Reinemann, LEAD ATTORNEY, Thomas C. O'Konski, LEAD ATTORNEY, Cesari & McKenna, LLP, Boston, MA.

For Static Control Components, Inc. (5:04-cv-00084-GFVT), Counter Defendant: Alison G. Wheeler, LEAD ATTORNEY, Bartlit Beck Herman Palenchar & Scott, LLP, Denver, CO US; Allison W. Freedman, LEAD ATTORNEY, Christopher D. Landgraff, LEAD ATTORNEY, James B. Heaton, III, LEAD ATTORNEY, Bartlit Beck Herman Palenchar & Scott, LLP - Chicago, Chicago, IL; Jennifer E. Heisinger, LEAD **[**8]** ATTORNEY, John M. Hughes, LEAD ATTORNEY, Joseph C. Smith, Jr., LEAD ATTORNEY, Bartlit Beck Herman Palenchar & Scott, LLP - Denver, Denver, CO; John J. Dabney, LEAD ATTORNEY, Paul E. Poirot, LEAD ATTORNEY, Stefan M. Meisner, William H. Barrett, McDermott, Will & Emery - Washington, Washington, DC; Kevin M. Bolan, LEAD ATTORNEY, McDermott, Will & Emery - Boston, Boston, MA; Mickey T. Webster, LEAD ATTORNEY, Sharon L. Gold, LEAD ATTORNEY, W. Craig Robertson, III, Wyatt, Tarrant & Combs LLP - Lexington, Lexington, KY; Stanley L. Amberg, LEAD ATTORNEY, Chappaqua, NY; William L. London, III, Static Control Components, Sanford, NC; Seth D. Greenstein, Constantine Cannon, PC, Washington, DC US.

For Lexmark International, Inc. (5:04-cv-00084-GFVT), Counter Claimant, Counter Defendant: Adrian M. Mendiondo, LEAD ATTORNEY, Charles E. Shivel, Jr., Hanly A. Ingram, Steven Brian Loy, Stoll Keenon Ogden, PLLC - Lexington, Lexington, KY; Allen E. Hoover, LEAD ATTORNEY, Bradley Rademaker, LEAD ATTORNEY, Mark T. Banner, LEAD ATTORNEY, Matthew P. Becker, LEAD ATTORNEY, Michael L. Krashin, LEAD ATTORNEY, Robert H. Resis, LEAD ATTORNEY, Binal J. Patel, Christopher J. Renk, Jason S. Shull, Timothy C. **[**9]** Meece, Banner & Witcoff, Ltd. - IL, Chicago, IL; Christopher B. Roth, LEAD ATTORNEY, Frederic M. Meeker, LEAD ATTORNEY, Robert F. Altherr, LEAD ATTORNEY, Joseph M. Potenza, Banner & Witcoff, LTD - DC, Washington, DC US; Hada V. Haulsee, LEAD ATTORNEY, Jason C. Hicks, LEAD ATTORNEY, W. Andrew Copenhaver, LEAD ATTORNEY, Womble, Carlyle, Sandridge & Rice, PLLC - NC, Winston-Salem, NC.

For Static Control Components, Inc. (5:04-cv-00084-GFVT), Counter Defendant, Cross Defendant: Alison G. Wheeler, LEAD ATTORNEY, Bartlit Beck Herman Palenchar & Scott, LLP, Denver, CO US; Allison W. Freedman, LEAD ATTORNEY, Christopher D. Landgraff, LEAD ATTORNEY, James B. Heaton, III, LEAD ATTORNEY, Bartlit Beck Herman Palenchar & Scott, LLP - Chicago, Chicago, IL; Jennifer E. Heisinger, LEAD ATTORNEY, John M. Hughes, LEAD ATTORNEY, Joseph C. Smith, Jr., LEAD ATTORNEY, Bartlit Beck Herman Palenchar & Scott, LLP - Denver, Denver, CO; John J. Dabney, LEAD ATTORNEY, Paul E. Poirot, LEAD ATTORNEY, Stefan M. Meisner, William H. Barrett, McDermott, Will & Emery - Washington, Washington, DC; Kevin M. Bolan, LEAD ATTORNEY, McDermott, Will & Emery - Boston, Boston, MA; Sharon L. Gold, LEAD ATTORNEY, Mickey T. **[**10]** Webster, W. Craig Robertson, III, Wyatt, Tarrant & Combs LLP - Lexington, Lexington, KY; Stanley L. Amberg, LEAD ATTORNEY, Chappaqua, NY; Seth D. Greenstein, Constantine Cannon, PC, Washington, DC US; William L. London, III, Static Control Components, Sanford, NC.

For Pendl Companies, Inc. (5:04-cv-00084-GFVT), Counter Defendant: Alexandra MacKay, LEAD ATTORNEY, James R. Michels, LEAD ATTORNEY, Stites & Harbison, PLLC - Nashville, Nashville, TN US; Carol Dan Browning, LEAD ATTORNEY, Daniel E. Danford, LEAD ATTORNEY, Elizabeth L. Thompson, LEAD ATTORNEY, John M. Famularo, LEAD ATTORNEY, Stites & Harbison PLLC - Lexington, Lexington, KY; David H. Weber, LEAD ATTORNEY, Liebman, Conway, Olejniczak & Jerry, S.C., Green Bay, WI US; Jack A. Wheat, LEAD ATTORNEY, Jeffrey A. Haeberlin, LEAD ATTORNEY, Jennifer L. Kovalcik, LEAD ATTORNEY, Joel T. Beres, LEAD ATTORNEY, John A. Jeziorski, LEAD ATTORNEY, John William Scruton, LEAD ATTORNEY, Julie Marie McDonnell, LEAD ATTORNEY, Matthew A. Gillies, LEAD ATTORNEY, William Charles Ferrell, Jr., LEAD ATTORNEY, Stites & Harbison, PLLC - Louisville, Louisville, KY; Michael Peter Foley, LEAD ATTORNEY, Rendigs, Fry, Kiely & Dennis, LLP, Cincinnati, **[**11]** OH.

For Wazana Brothers International, Inc., doing business as Micro Solutions Enterprises (5:04-cv-00084-GFVT), Counter Defendant: A. Steven Dotan, LEAD ATTORNEY, Darren S. Enenstein, LEAD ATTORNEY, Geronimo Perez, Jr., LEAD ATTORNEY, Ned Gelhaar, LEAD ATTORNEY, O. Andrew Wheaton, LEAD ATTORNEY, Richardson & Patel LLP, Los Angeles, CA US; Andrew D. DeSimone, LEAD ATTORNEY, Douglas L. McSwain, LEAD ATTORNEY, Sturgill, Turner, Barker & Moloney, PLLC, Lexington, KY; Elizabeth L. Swanson, LEAD ATTORNEY, Swanson & Associates, Beverly Hills, CA US.

For Wazana Brothers International, Inc. (5:04-cv-00084-GFVT), Counter Claimant: A. Steven Dotan, LEAD ATTORNEY, Geronimo Perez, Jr., LEAD ATTORNEY, Ned Gelhaar, LEAD ATTORNEY, O. Andrew Wheaton, LEAD ATTORNEY, Darren S. Enenstein, LEAD ATTORNEY, Richardson & Patel LLP, Los Angeles, CA US; Elizabeth L. Swanson, LEAD ATTORNEY, Swanson & Associates, Beverly Hills, CA US.

For Pendl Companies, Inc. (5:04-cv-00084-GFVT), Counter Claimant: Alexandra MacKay, LEAD ATTORNEY, James R. Michels, LEAD ATTORNEY, Stites & Harbison, PLLC - Nashville, Nashville, TN US; Carol Dan Browning, LEAD ATTORNEY, John M. Famularo, LEAD ATTORNEY, Stites & **[**12]** Harbison PLLC - Lexington, Lexington, KY; David H. Weber, LEAD ATTORNEY, Liebman, Conway, Olejniczak & Jerry, S.C., Green Bay, WI US; Jeffrey A. Haeberlin, LEAD ATTORNEY, John A. Jeziorski, LEAD ATTORNEY, John William Scruton, LEAD ATTORNEY, Julie Marie McDonnell, LEAD ATTORNEY, Matthew A. Gillies, LEAD ATTORNEY, William Charles Ferrell, Jr., LEAD ATTORNEY, Joel T. Beres, Stites & Harbison, PLLC -Louisville, Louisville, KY; Michael Peter Foley, LEAD ATTORNEY, Rendigs, Fry, Kiely & Dennis, LLP, Cincinnati, OH.

For Lexmark International, Inc. (5:04-cv-00084-GFVT), Counter Defendant: Adrian M. Mendiondo, LEAD ATTORNEY, Charles E. Shivel, Jr., Hanly A. Ingram, Steven Brian Loy, Stoll Keenon Ogden, PLLC - Lexington, Lexington, KY; Allen E. Hoover, LEAD ATTORNEY, Bradley Rademaker, LEAD ATTORNEY, Mark T. Banner, LEAD ATTORNEY, Matthew P. Becker, LEAD ATTORNEY, Michael L. Krashin, LEAD ATTORNEY, Robert H. Resis, LEAD ATTORNEY, Binal J. Patel, Christopher J. Renk, Jason S. Shull, Timothy C. Meece, Banner & Witcoff, Ltd. - IL, Chicago, IL; Christopher B. Roth, LEAD ATTORNEY, Frederic M. Meeker, LEAD ATTORNEY, Robert F. Altherr, LEAD ATTORNEY, Joseph M. Potenza, Banner & Witcoff, LTD - **[**13]** DC, Washington, DC US; Hada V. Haulsee, LEAD ATTORNEY, Jason C. Hicks, LEAD ATTORNEY, W. Andrew Copenhaver, LEAD ATTORNEY, Mark N. Poovey, Womble, Carlyle, Sandridge & Rice, PLLC - NC, Winston-Salem, NC.

Judges: Gregory F. Van Tatenhove, United States District Judge.

Opinion by: Gregory F. Van Tatenhove

Opinion

[*869] AMENDED MEMORANDUM OPINION AND ORDER

This matter is before the Court on Lexmark International, Inc.'s Motion for Summary Judgment on the Remanufacturers' Claims of affirmative antitrust and Lanham Act violations. [R. 529]. Also before the Court is Wazana Brothers International, Inc.'s Motion for Summary Judgment on three of its Lanham Act claims. [R. 534].

Lexmark's Motion must be largely denied. It is granted only to the extent that the Remanufacturers have failed to produce sufficient evidence from which a reasonable jury could find that certain distribution contracts at issue are horizontal, *per se* restraints on trade and on the issue of the *per se* tying claim. Wazana's Motion is granted only to the extent that the Court holds that, as a matter of law, the allegedly false or deceptive statements at issue are not ambiguous. The remainder of Wazana's Motion must be denied since **[**14]** Lexmark has presented sufficient facts from which a reasonable jury could find that the statements were not false or deceptive.

I.

BACKGROUND

A. FACTS

Defendant, Lexmark International, Inc. ("Lexmark"), is a manufacturer of laser printers. [R. 531 at 1]. It controls approximately 10%-15% of the national and international laser printer market, whereas its largest competitor, Hewlett-Packard ("HP") controls between 50%-75% of the national and international markets. [*Id.*]. In addition to being in the laser printer business, Lexmark also manufactures and sells the toner cartridges for its printers. Sometimes these toner cartridges are sold under Lexmark labels. [*Id.*]. Other times, Lexmark sells its cartridges to resellers, and the cartridges are sold under those companies' labels. [R. 540, attach. A; R. 680 at 14 n.21; R. 678, attachs. 22-27]. One of these resale agreements is with IBM, under which IBM and Lexmark entered into "a multinational procurement relationship under which Lead Buyer[, IBM,] and its Affiliates may purchase or license from Lead Supplier[, Lexmark]." [R. 540, attach. A at 3]. The procurement contract was not limited **[**15]** simply to the cartridges, but also includes equipment. [*Id.*]. Under the IBM-Lexmark contract, if IBM, while selling Lexmark products, sold compatible cartridges or re-fill cartridge kits, IBM would face contractual penalties. [R. 540, attach. A, *(First) Amendment 003 To the Statement of Work under Transaction Attachment # 4997S23861* at P 4.3; **[*870]** *Id.* at *Amendment 006 To the Statement of Work under Transaction Attachment # 4997S23861* at P 4.2].

Lexmark is not only engaged in the sale, either directly or through resellers, of Lexmark equipment and toner cartridges, but Lexmark also sells remanufactured toner cartridges. [R. 531 at 1-2]. Lexmark's only competition for the sale of printer cartridges is in this remanufacturing market. [R. 628 at 2-3]. An industry has been built up around this remanufacturing process in which remanufacturers purchase parts from a supplier, take used toner cartridges, repair them, refill the toner, and resell the cartridges to end-user consumers. [*Id.*]. The Plaintiff, Static Control Components, Inc. ("SCC"), is "a leading supplier to toner cartridge remanufacturers." [R. 172 at 16, Case No. 5:02-571]. The Counterclaim Defendants, **[**16]** Pendl Companies, Inc. ("Pendl"), and Wazana Brothers International, Inc. ("Wazana"), are toner cartridge remanufacturers (collectively "Remanufacturers"). [R. 628 at 2-3].

Lexmark runs what it at one time called the "Prebate Program" and what now is referred to as the "Lexmark Return Program." [R. 594 at 3 n.4]. The program began with the new 1997 printer models [R. 593 at 1-2], and in that program, Lexmark's customers buy printer cartridges at an up-front discount in exchange for the customer agreeing to use the cartridge only once and then returning the empty cartridge only to Lexmark. [R. 594 at 3 n.4]. According to Lexmark, Lexmark offers "'[r]egular' toner cartridge[s] for those customers who do not choose the Prebate/Cartridge Return Program toner cartridge[s] with [their] terms." [R. 2 at 8]. Therefore, "Prebate" is temporally the reverse of a rebate. Roughly 90% of Lexmark's new cartridges are "Prebate cartridges" and 10% are non-prebate or "Regular cartridges." [R. 520 at 7].

When Lexmark sells a cartridge subject to Prebate, it labels the package as follows: [1]

RETURN EMPTY CARTRIDGE TO LEXMARK FOR REMANUFACTURING AND RECYCLING

---

[1] Lexmark has not always used this exact wording but has used a close estimation of it. [*See,* R. 573 at 3].

> Please read before **[**17]** opening. Opening this package or using the patented cartridge inside confirms your acceptance of the following license agreement: This patented Return Program cartridge is sold at a special price subject to a restriction that it may be used only once. Following this initial use, you agree to return the empty cartridge only to Lexmark for remanufacturing and recycling. If you don't accept these terms, return the unopened package to your point of purchase. A regular price cartridge without these terms is available.

[R. 531 at 2]. According to Lexmark, the Prebate program is further explained in the cartridge's packaging materials, and "if the customer does not agree to these terms, a regular price cartridge with no restrictions is available." [*Id.*]. However, there is evidence that Lexmark does not make regularly priced cartridges available for at least five of its cartridge models. [R. 534 at 9-10]. Because of the Prebate program, Lexmark has been able to achieve a 90% loyalty among toner cartridge customers, i.e. 90% of customers purchase Lexmark manufactured or remanufactured cartridges. [R. 628 at 4]. Prior to Prebate, Lexmark only had a 60% loyalty among cartridge **[**18]** purchasers. [*Id.*]. Lexmark's remanufactured cartridges, **[*871]** which sell for $ 41.00, are $ 10 more than the Defendants' remanufactured cartridges, which sell for $ 31.00. [*Id.* at 10]. The Remanufacturers contend that the Prebate program has resulted in an increase in the remanufactured toner cartridge price. [*Id.*]. This increase is due to the share of the market that Lexmark has been able to take from the Remanufacturers. [*Id.*]. This increase allegedly represents approximately 7% of the Lexmark toner cartridge market. [*Id.*].

Under the Prebate program, customers have three options for their empty cartridges: keep them, throw them in the trash, or return them to Lexmark. According to the Remanufacturers, though contested by Lexmark, in order to ensure that customers do not resell the cartridges, Lexmark has installed a "lock-out" microchip on its cartridges. [R. 628 at 4]. **[**19]** The alleged "lock-out" microchip prevents the toner from properly putting toner on the paper. [*See R.* 831]. The Remanufacturers present evidence that Lexmark included this microchip on both its Prebate and Non-Prebate labels, and the true purpose of installing the microchip on *all* of the printers was to "reduce manufacturing." [R. 628 at 4]. The microchips are not sold separately from the cartridges, and thus remanufacturing of used cartridges containing a lock-out microchip is theoretically foreclosed. [*Id.*]. SCC, however, has been able to create a microchip that enables the Remanufacturers to continue to remanufacture the cartridges. [*Id.* at 12].

As a result of the Prebate program, Lexmark, over time, accumulated a large number of empty cartridges. [*Id.* at 6]. Lexmark does not remanufacture all of these cartridges [*id.*], and due to cost concerns, when it does remanufacture the cartridges, it does not remanufacture all of the parts. [R. 534 at 9]. Hundreds of thousands of cartridges have been and continue to be incinerated, [R. 628 at 6], and the ash from these cartridges goes to a landfill. [R. 534 at 7]. Incineration is sometimes called **[**20]** "thermally recycling." [R. 628 at 6]. Lexmark's prebate cartridge boxes contain the following label concerning Lexmark's "Environmental Program": "We manage resources today to ensure a beautiful tomorrow. Small steps can have big rewards. Thank you for your ongoing support, together we have recycled millions of toner cartridges, one cartridge at a time. See details inside about how you can continue to participate in this important environmental initiative." [R. 534 at 4].

Consumers who look to Lexmark's website for information concerning the prebate or environmental programs are informed that "Return Prebate cartridges are a great choice for the environment." [*Id.* at 2]. They can also read that "Lexmark Return Prebate Program Cartridges are sold at a discount in exchange for the customer's agreement to use the cartridge only once and return it only to Lexmark for remanufacturing or recycling" and that "Lexmark recycles Return Program Cartridges, keeping them out of the waste stream." [*Id.* at. 5]. A question and answer section on Lexmark's website gives the following exchange: "Q. What happens to the empties I return? A. Lexmark remanufacturers and/or recycles the cartridges. **[**21]** " [*Id.*].

Lexmark's market research examined the effects of this label language. [R. 622, attach. B]. Lexmark's survey included "managers who are involved in making the laser printer purchase decision," and "[p]articipants responsible for 20+ printers in the organization." [*Id.* at 7]. These participants were not only the people responsible for the purchase of the printers, but were also, primarily, the people responsible for physically replacing used cartridges with new or repaired cartridges. [*Id.* at 17-18]. When asked about the **[*872]** "environmentally friendly message" of the prebate program, the responses included the following:

> The manufacturer may not dispose of the cartridge, but do something with it to have recycling.
> I think you want to know that things are disposed of in an environmentally friendly way.

> …
>
> It makes everybody look good because they are recycling. The green environmental label gives you a better conscience.
>
> …
>
> You want it to be green. You don't want this stuff out in the street. You want it to be recycled; you want it to be treated properly.

[*Id.* at 15]. When asked about their concerns regarding the prebate label, **[**22]** one participant replied: "It's not readily apparent that this box is to return the cartridge. The label is missing the whole point that the program is a simple/convenient way to use the box to recycle." [*Id.* at 21]. When the focus groups were pushed to create their own names for the prebate program, the names suggested included "HP's Recycle Program," [2] "Save the Toner Tree," "Responsible Use of Resources," "Environmental Express (so that people get the impression that it speeds up the process)," "Different Users for the Sake of the Environment," "Envirosave," "Save $ and the Environment," and "Stewardship of Resources." [*Id.* at 25].

B. RELEVANT PROCEDURAL HISTORY

The lead case in this action was brought by SCC. [R. 1]. SCC seeks declaratory relief against Lexmark on various **[**23]** issues related to the toner cartridges. [*Id.*]. Lexmark filed its current Second Amended Counterclaim on November 8, 2004, in which it asserted counterclaims against the Remanufacturers. [R. 67]. Lexmark makes allegations of patent violations, which are predicated on the Prebate Program. [*Id.; see also* R. 1008 (explaining in detail the patent and prebate claims)]. Lexmark's counterclaims also accuse the counterclaim-defendants, SCC and the Remanufacturers, of interfering with Lexmark's business and contractual relations and conspiring to do the same, presumably by causing end users of Lexmark's cartridges to breach the Prebate agreement by sending spent cartridges to entities other than Lexmark. [R. 67]. Since filing its counterclaim, these state law claims have been dismissed. [R. 1020 (granting Lexmark's Motion to Dismiss its state law claims)].

Wazana asserted several of its own counterclaims against Lexmark, including violations of *section 1* of the Sherman Act, which it states is "a [c]ontract, [c]ombination or [c]onspiracy in [r]estraint of [t]rade," [R. 175 at 54]; violation of *section 2* of the Sherman Act, which is described as an "[a]ttempted **[**24]** [m]onopolization and [m]onopolization," [*id.* at 55]; violation of *section 3 of the Clayton Act*, which is an exclusive dealing contract lessening competition, [*id.* at 57]; and, violations of *section 43(a) of the Lanham Act*, which Wazana label's as "[f]alse [a]dvertising, [p]roduct [l]ibel, and [u]nfair [c]ompetition," [*id.* at 58]. Pendl has asserted the same counterclaims under the Sherman Act, *sections 1* and *2*, [R. 144 at 19, 22], and the Clayton Act, *section 3* [*id.* at 23], but it has not asserted the Lanham Act claims.

[*873] II.

DISCUSSION

A. STANDARD OF REVIEW

HN1[] *Federal Rule of Civil Procedure 56(c)* provides that judgment for the moving party is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See also* *Browning v. Dep't of Army, 436 F.3d 692, 695 (6th Cir. 2006)*. While all inferences are drawn in favor

---

[2] The focus group was never told which printer cartridge company sponsored the focus group. Many of them assumed that HP was sponsoring the group, and they were never informed otherwise. [R. 622, attach. B at 6].

of the non-moving party, that party still must **[**25]** present some affirmative evidence supporting its position to defeat an otherwise appropriate motion for summary judgment. *See id.; see also* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (non-movant must "do more than simply show there is some metaphysical doubt as to the material facts") (citations omitted); *Celotex Corp. v. Catrett, 477 U.S. 317, 324-325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Stated alternatively, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

HN2[] There is no special burden placed on an antitrust plaintiff at the summary judgment stage. *PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811, 814 (6th Cir. 1997)*. In the context of antitrust, just as in all cases, the non-movant's "version of any issue of fact … is presumed correct …." *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 456, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*.

B. ANTITRUST CLAIMS

1. Relevant *Antitrust* [26] *Law***

Wazana and Pendl have asserted three separate, statutory antitrust claims against Lexmark. The first of these, ***HN3***[] Sherman Act *section 1*, provides, in pertinent part: "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*.

The second claim asserted is a violation of ***HN4***[] Sherman Act *section 2*, which makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations …." *15 U.S.C. § 2*.

Finally, Pendl and Wazana argue that Lexmark has violated *section 3* of the Clayton Act:

> ***HN5***[] It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession **[**27]** or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen **[*874]** competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14.

In addition to meeting the various tests for recovery under these three statutory schemes, an antitrust plaintiff must also prove antitrust injury. *Valley Prods. Co. v. Landmark, a Div. of Hospitality Franchise Sys., Inc., 128 F.3d 398, 402 (6th Cir. 1997)*. Proving antitrust injury simply requires a plaintiff to prove that the defendant's conduct causes the type of market-based injury that antitrust laws are designed to prevent. *Id.*

2. Specific Claims Asserted

Lexmark makes three arguments supporting summary judgment on the claims made **[**28]** under the Sherman Act and the Clayton Act. First, Lexmark argues that its patents render prebate valid as a matter of law, and even if not valid, any misuse was in good faith and precludes a finding of anticompetitive behavior. [*See R.* 531]. It next argues that, in light of little evidence of market imperfections and information costs, the lack of a "lock-in," low switching costs, an inability to exploit ignorant customers, and an inability to charge supracompetitive prices, there is insufficient evidence for finding that Lexmark possesses market power. [*Id.*]. Finally, Lexmark argues that the alleged antitrust violation cannot be traced to an antitrust injury. [*Id.*].

The Court, taking these arguments in turn, will first turn to what effect, if any, Lexmark's patent rights have on the antitrust claims. Second, the Court must determine whether there has been a sufficient showing of market power under each of the antitrust statutes. Third, the Court will examine whether, assuming that there is an antitrust violation, there are sufficient facts from which a jury could conclude that there is an antitrust injury.

In addressing these arguments, the Court notes that the **[**29]** Remanufacturers have taken the position that Lexmark's Motion addresses only Sherman Act *section 2* claims. [R. 628 at 16 n.29]. The Court disagrees. Market power and antitrust injury are critical to all of the Remanufacturers' antitrust claims, and this issue was extensively briefed by Lexmark. Furthermore, the Court notes that the Remanufacturers stated that they would seek leave to file an additional response if it was clear in Lexmark's Reply that Lexmark was seeking summary judgment on all antitrust claims. It was clear, [R. 680 at 13 ("IV. The Remanufacturers Do Not State Any *Section 1* Claims.")], and Pendl did not move to file an additional response.

Lexmark's Motion, therefore, will be construed to encompass exactly what the Court has understood it to include--any and all antitrust allegations. To the extent that there may be discrete points relevant to a *Section 1* inquiry and those points were briefed by Lexmark, those arguments are refined within the applicable section.

3. Effect of Patent Validity on Antitrust Claims

HN6[] "Asserted 'tensions' between the antitrust and patent laws have been the subject of extensive commentary." *Mallinckrodt, Inc. v. Medipart, Inc., 976 F.2d 700, 706 n. 5 (Fed. Cir. 1992)* **[**30]** (citations omitted). In the case of patent antitrust cases, "it is possible for manufacturers to draft specific patent license terms so as to insure the cooperation of licensees in effecting anticompetitive ends." *Moraine Prods. v. ICI Am., Inc., 538 F.2d 134, 144 (7th Cir. 1976)*. *Cf.Lexmark Int'l v. Static Control Components, Inc., 387 F.3d 522, 551 (6th Cir. 2004)* (Merritt, J., concurring) ("We should make clear that in the future companies like Lexmark cannot use the DMCA in conjunction with copyright law to create **[*875]** monopolies of manufactured goods for themselves just by tweaking the facts of this case ….").

Lexmark argues that the Remanufacturers' antitrust claims fall within the line of case law explaining and ruling on this very tension. [3] Specifically, Lexmark maintains that *35 U.S.C. § 271(d)* protects it from antitrust liability. [R. 531 at 13-14 (citing, among others, *Axis v. Micafil, Inc., 870 F.2d 1105, 1111 (6th Cir. 1989)]*, for the proposition that "a lawfully acquired patent creates a monopoly that does not violate the antitrust laws," and *Mallinckrodt, Inc., 976 F.2d 700* **[**31]** for the holding that a post-sale "single-use" restriction on reuse of a patented medical device to be lawful under patent law). To the extent that Lexmark argues that it cannot be held liable for any antitrust liability because it refuses to license its otherwise valid patents, its argument must fail. Holding valid patents might make it more difficult to act in an anticompetitive manner, but it does not, conversely, necessarily preclude an antitrust violation or prevent a finding of anticompetitive behavior. *Moraine Prods., 538 F.2d at 144*. Lexmark cannot, therefore, rely on any potential finding of patent validity when defending the antitrust claims. [4]

[32] 4. The Relevant Market, Market Power, and Other Factors: Sherman Act *Section 1***

i. Market Power

[3] The Court notes that it has already addressed the related issue of patent validity. [R. 1008].

[4] The Court notes, however, that the issue of holding patents will come up again in this Opinion, at which point it becomes a valid reason for granting summary judgment on the discrete issue of a *per se* tying agreement. In order to avoid confusion, the Court has not delved into that discussion at this point.

HN7[] "'Market power is the power to force a purchaser to do something that he would not do in a competitive market,'" and it entails the ability of one seller to restrict output or raise prices. PSI Repair Servs., Inc., 104 F.3d at 817 (quoting Eastman Kodak Co., 504 U.S. at 464). In order for a Sherman Act claim to lie against a defendant, there must be a finding of market power. Hand v. Cent. Transp., Inc., 779 F.2d 8, 11 (6th Cir. 1985). Determining market power is, thus, critical to this Court's inquiry. A toner cartridge is nothing more than a part which is purchased in order to make a machine function. As such, this Court must begin its market power examination with the line of case law examining market power in the context of a machine repair market.

The line of on-point cases traces back to *Eastman Kodak.* In *Eastman Kodak,* the Supreme Court looked to whether Kodak affected an illegal tying agreement when it entered into a contract with its copy machine parts suppliers. 504 U.S. at 458. The contract **[**33]** was formed after Kodak sold the original copiers, and it prevented the parts suppliers from selling replacement parts to copy machine repairmen. *Id.* This prohibition essentially allowed Kodak to corner the repair market through its control of the parts markets. *Id.* The issue in *Eastman Kodak* was whether the service market could be tied to the parts market, not whether the service or parts markets were tied to the equipment market. Id. at 459. The Court distinguished between two possible markets within an aftermarket, one for service and the other for parts, id. at 461, and it left to the jury the issue of whether these two aftermarkets were separate. Id. at 463. Ultimately, the Court held that a company need not have market power in the primary, i.e., copier, market **[*876]** in order to have market power in the tying, i.e., copy machine parts, market. [5] Id. at 477.

[34]** Out of this broad holding grew a Sixth Circuit case, which at first seems analogous to the current action. In *PSI Repair Service, Inc.,* the issue was whether Honeywell, an industrial control equipment manufacturer, should be allowed to prevent customers from seeking outside service repair by requiring that customers purchase a repair part, a circuit board, from Honeywell. 104 F.3d at 813-14. Only a small percentage of the parts on the circuit board were made exclusively by Honeywell, and the rest of the board was made for Honeywell by outside contractors. *Id.* In effect, Honeywell's policy devastated the third party repair industry by cutting off the supply of replacement parts. *Id.*

The Sixth Circuit took a two step approach to determine if Honeywell possessed market power sufficient to support Sherman Act claims. First, the court decided that the primary equipment market was the relevant market for an antitrust analysis. Id. at 821 ("Since PSI has not alleged or shown that Honeywell has market power in *the relevant market--the primary equipment market*--summary judgment is appropriate in favor of Honeywell on PSI's § 1 claim." (emphasis **[**35]** added)). Second, the court decided that Honeywell could not, as a matter of law, have sufficient power within the primary market to support Sherman Act claims. *Id.*.

In distinguishing the holding in *Eastman Kodak* from that of *PSI Repair Services,* the Sixth Circuit set out the following language, which is instructive to this Court's query:

> We likewise agree that the change in policy in *Kodak* was the crucial factor in the Court's decision. By changing its policy after its customers were "locked in," Kodak took advantage of the fact that its customers lacked the information to anticipate this change. Therefore, it was Kodak's own actions that increased its customers' information costs. In our view, this was the evil condemned by the Court ....
>
> ... [W]e thus hold that an antitrust plaintiff cannot succeed on a *Kodak*-type theory when the defendant has not changed its policy after locking-in some of its customers, and the defendant has been otherwise forthcoming about its pricing structure and service policies....

---

[5] The Court notes that in *Kodak,* the parts market was a tying market whereas the service market was a tied market. To clarify the terms, in the patent context, a tying product is the patented product, and the secondarily purchased product is a tied product. *See* Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 1284, 164 L. Ed. 2d 26 (2006) ("This presumption of market power, applicable in the antitrust context when a seller conditions its sale of a patented product (the "tying" product) on the purchase of a second product (the "tied" product), has its foundation in the judicially created patent misuse doctrine." (citing United States v. Loew's Inc., 371 U.S. 38, 83 S. Ct. 97, 9 L. Ed. 2d 11, (1962))).

> …. If there were any evidence in the record that Honeywell took advantage of its customers' imperfect information in order to reap supracompetitive **[**36]** profits in the aftermarkets for its equipment, we would not hesitate to allow a *Kodak*-type theory to be submitted to the jury.

Id. at 820.

The factual underpinnings of *PSI Repair Services* elucidate the Sixth Circuit's reasoning. There were "no allegations that Honeywell changed its parts-restrictive policy," and the seller's policy was generally known. *Id.* Prior to sale, there were lengthy negotiations, during which various service plans were offered and estimates **[*877]** of service costs and parts' failure rates were provided upon request. *Id.* The evidence of information availability, specifically information provided and limited by the manufacturer as opposed to the general information costs imposed by a functioning marketplace, was the crucial distinction from *Kodak* which lead the court to ultimately determine that there was insufficient market power as a matter of law. *Id. at 820-21*. Under this Sixth Circuit precedent, ***HN8***[] in order for a plaintiff to succeed on a *Kodak*-type theory--that a lack of market power in the equipment market does not necessarily preclude market power sufficient for a *section 1* claim--there must be some **[**37]** evidence that the defendant has changed its policy after locking-in customers and that the defendant has not "been otherwise forthcoming about its pricing structure and service policies." *Id.*

Though the Motion before the Court involves a myriad of alleged anticompetitive behavior going well beyond the scope of the *PSI Repair Service* and *Kodak* holdings (i.e., tying), these cases remain relevant to the determination of market power. First, the Court notes that implicit in both parties' discussions of the instant motion was the assumption that the cartridge and printer markets are separate. However, even if the parties' were to contest this issue, their dispute would leave a question of fact. *See PSI Repair Servs., Inc., 104 F.3d at 817*. Second, it is clear under both *Eastman Kodak* and *PSI Repair Services* that the printer market is, at least initially, the relevant market for the determination of market power. *See PSI Repair Servs., Inc., 104 F.3d at 821*.

The seminal question, then, is whether Lexmark possesses sufficient market power when applying the rule of *PSI Repair Services.* It is undisputed that Lexmark does not hold a **[**38]** sufficient grasp on the printer market such that an inference of market power can be drawn. *See id. at 818* (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 26-29, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)* ("A thirty-percent share of the market, standing alone, provides an insufficient basis from which to infer market power."), *abrogated on other grounds by Ill. Tool Works, Inc., 126 S. Ct. at 1291* (holding patent grant does not lead to automatic presumption of market power)). Thus, the issue becomes whether the Remanufacturers have submitted sufficient evidence of a change in Lexmark's policy such that market power may still be present. *See PSI Repair Servs., 104 F.3d at 820-821*.

The Remanufacturers have presented several pieces of evidence in favor of a finding of market power. [R. 628 at 13-15]. Especially important to the disposition of this Motion are the following facts: (1) imperfect ability to determine life-time, or life-cycle, costs for printers, [*id.*]; (2) Lexmark was able to increase the price of remanufactured cartridges, [*id.* at 10]; and (3) Lexmark did not actually always provide non-prebate cartridges, [R. **[**39]** 534 at 21-22]. To the extent that Lexmark argues that these facts are incorrect, there is a disputed issue of fact that, for the purposes of summary judgment, must be resolved in favor of the Remanufacturers. When the Remanufacturers' facts are taken as true, they are sufficient under the *Kodak*-theory, as developed by *PSI Repair Services,* to create a genuine issue of fact best left for the jury. Stated alternatively, a reasonable jury could find that the Remanufacturers have presented more than a mere scintilla of evidence that Lexmark misled customers into believing that non-prebate cartridges would be available; lifetime costs were impossible to calculate; and that Lexmark caused an increase in the overall price of available cartridges. To wit, the Remanufacturers' have presented evidence which falls squarely within **[*878]** the factors outlined and decried by *Kodak* and *PSI Repair Services. See PSI Repair Servs., Inc., 104 F.3d at 820* (holding that a change in policy or otherwise not being forthcoming in a policy can allow a party to succeed on a *Kodak*-type theory). If a jury finds that Lexmark did, in fact, not provide non-prebate cartridges when it claimed **[**40]** that those cartridges were available, the jury could also find that Lexmark used market power to take advantage of its customers' imperfect knowledge in order to corner the remanufactured cartridge market. In sum, this Court cannot determine, at this stage, that Lexmark does not possess market power. Summary judgment on Sherman Act *section 1* cannot be granted based on an absence of market power.

The Court should caution, however, that situations such as this, wherein market power does not automatically flow from market share, are difficult to prove. The Supreme Court's cautionary language is instructive:

> [i]n the end, of course, [the defendant]'s … argument[] may prove to be correct. It may be … that the equipment market does discipline the aftermarkets so that [both] are priced competitively overall, or that any anti-competitive effects of [the defendant]'s behavior are outweighed by its competitive effects. But [this Court] cannot reach these conclusions as a matter of law on [this] record ….

Eastman Kodak Co., 504 U.S. at 486. The disputed issues of fact must first go to the jury.

ii. Remaining *Section 1* Factors

[41]** While the Court has concluded its analysis under the market share argument made by Lexmark, it has by no means addressed all the arguments raised by Lexmark. Lexmark makes specific arguments under both a *per se* and a *rule-of-reason* approach. For the purposes of analysis under those approaches, the Court assumes that there is sufficient market power.

Several additional reasons supporting summary judgment were woven into Lexmark's argument on market power. Specifically, Lexmark argues that there is insufficient evidence for finding anticompetitive behavior under any of the Sherman Act *section 1* standards. ***HN9***[] There are two standards for determining whether actions violate *section 1* of the Sherman Act: (1) *per se* violations and (2) violations subject to the *rule of reason. Per se* violations do not require a finding that the defendant's actions were anticompetitive, but they do require the plaintiff to show that the defendant "possesses market power or unique access to a business element necessary for effective competition." *Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing, 472 U.S. 284, 298, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)*.

If the facts do not sustain a finding of a **[**42]** *per se* violation, then the Court will apply the *rule-of-reason* approach. *Mallinckrodt, Inc. v. Medipart, Inc., 976 F.2d 700, 708 (Fed. Cir. 1992)*. ("Anticompetitive effects that are not *per se* violations of law are reviewed in accordance with the *rule of reason.").* "There is an automatic presumption in favor of the rule of reason standard." *Care Heating & Cooling, Inc. v. Am. Standard, Inc., 427 F.3d 1008, 1012 (6th Cir. 2005)*. A *rule-of-reason* "analysis involves, inter alia, a study of consequences of the conduct on the affected market before imposition of antitrust sanctions." *Moraine Prods., 538 F.2d at 144*; *PSI Repair Servs., Inc., 104 F.3d at 815 n. 2* ("Under *rule-of-reason* analysis, the antitrust plaintiff must show, inter alia, an adverse effect on competition."). While the *rule of reason* and *per se* analyses have merged together over time, *PSI Repair Servs., Inc., 104 F.3d at* ***[*879]*** *815 n.2*, courts still tend to separate the two. *See, e.g., Care Heating & Cooling, 427 F.3d at 1013-14* (separating discussion of *per se* and *rule of reason* analysis). **[**43]**

(a) *Per Se* Violations

HN10[] Typically, *per se* violations are seen within the context of a boycott of supplies or customers. *See generally, Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1012 (6th Cir. 1999)* (explaining that the Supreme Court's precedent seems to suggest that a boycott of supplies or customers is often present in *per se* antitrust violations but is not present in a *rule-of-reason* case). "[T]he *per se* rule should be applied only in 'clear cut cases' of trade restraints that are so unreasonably anticompetitive that they present straightforward questions for reviewing courts." *Care Heating & Cooling, Inc., 427 F.3d at 1012*. A refusal to deal may qualify as a *per se* restraint, but "[t]he mere allegation of a concerted refusal to deal does not suffice because not all concerted refusals to deal are predominantly anticompetitive." *Nw. Wholesale Stationers, Inc., 472 U.S. at 298*; *see also Windsurfing Int'l, Inc. v. AMF, Inc., 782 F.2d 995, 1001-02 (Fed. Cir. 1986)* ("To sustain a misuse defense involving a licensing arrangement not held to have been *per se* anticompetitive **[**44]** by the Supreme Court, a factual determination must reveal that the overall effect of the license tends to restrain competition unlawfully in an appropriately defined relevant market.").

(1) Tying

HN11[] A per se tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. In a tying claim, a party is able to exclude competitors from a market because of its "power or leverage in another market." *Id. at 6*. In order to present a *per se* tying claim, a "seller must possess substantial market power in the tying product market." *PSI Repair Servs., Inc., 104 F.3d at 815 n.2*. If there is appreciable power in the tying market, then a court must determine whether the defendant's conduct is procompetitive or anticompetitive. *Id.* Determining whether a party's actions have an anticompetitive effect requires use of the Sixth Circuit's three step analysis: "(1) the seller must have power in the tying product **[**45]** market; (2) there must be a substantial threat that the tying seller will acquire market power in the tied-product market; and (3) there must be a coherent economic basis for treating the tying and tied products as distinct." *Hand, 779 F.2d at 11*.

As to the first prong, the Supreme Court reexamined the market power of patent holders within the context of a tying claim. *Ill. Tool Works, Inc., 126 S. Ct. at 1284-93*. The issue before the Court was whether there was an automatic presumption of market power with patented goods. *126 S. Ct. at 1289-91*. The Supreme Court rejected a *per se* approach to patented good tying claims and held that patented products should be examined under a case-by-case, market based approach. *Id. at 1291*.

Lexmark is seeking summary judgment on the issue of whether the Remanufacturers can prove that there is impermissible tying between Lexmark's printers and its printer cartridges. [R. 680 at 14]. Regardless of any *Kodak-PSI* theory that might ultimately lead to a finding of market power, the *per se* approach is no longer an appropriate means by which a patented good can be found to be **[**46]** an illegal tying agreement. *Ill. Tool Works, Inc., 126 S. Ct. at 1291*. The means **[*880]** available to the Remanufacturers is through applying the *rule of reason.* To the extent that Lexmark seeks summary judgment on the issue of a *per se* tying arrangement, this Court will grant the Motion.

(2) Contracts

The next issue before the Court is whether Lexmark's distribution contracts are *per se* restraints of trade. ***HN12***[] When looking to whether a contract in restraint of trade is anticompetitive under *section 1* of the Sherman Act, the key issue is whether that contract addresses a horizontal or vertical market. *Care Heating & Cooling, Inc., 427 F.3d at 1013* (citing *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 805 (6th Cir. 1988)*). Horizontal conspiracies are "agreements among competitors at the same level of market structure to stifle trade, such as agreements among manufacturers or among distributors to fix prices for a given product … *Care Heating & Cooling, Inc., 427 F.3d at 1013* (citations omitted). Vertical conspiracies are "agreements among actors at different levels of market structure **[**47]** to restrain trade, 'such as agreements between a manufacturer and its distributors to exclude another distributor from a given product and geographic market.'" *Id.* (quoting *Crane & Shovel Sales Corp., 854 F.2d at 805*). While horizontal restraints of trade fall under *per se* analysis, a vertical restraint will be analyzed pursuant to the *rule of reason. Id.*

The Remanufacturers state that Lexmark's contracts with certain resellers, specifically Dell and IBM, are horizontal restraints of trade, which are *per se* anticompetitive. [R. 628 at 18 n.30]. The Remanufacturers do not, however, cite to any evidence submitted in support of this position. [*Id.*]. In contrast, Lexmark has submitted examples of six separate resale agreements, none of which are with Dell or IBM, [R. 680 at 14 n.21; R. 678, attachs. 22-27], and has referred the Court to a copy of the IBM agreement, which was submitted by SCC. [R. 540, attach. A]. Though this Court must presume that the Remanufacturers' version of the facts are correct, *see Eastman Kodak Co., 504 U.S. at 456*, they must still present some affirmative evidence to support their position. *See* **[**48]** *Browning, 436 F.3d at 695*; *see also Matsushita Elec. Indus. Co., 475 U.S. at 586-587* (non-movant must "do more than simply show there is some metaphysical doubt as to the material facts") (citations omitted); *Celotex Corp., 477 U.S. at 324-325*. Because the Remanufacturers have not presented any evidence in support of their allegation of a horizontal restraint of trade, Lexmark's evidence must be taken as true.

A review of the contracts provided by Lexmark reveals that these are not horizontal restraints of trade. They go well beyond "'naked restraints of trade with no purpose except stifling competition,'" *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 132 (2d. Cir. 1978)* (quoting *White Motor Co. v. United States, 372 U.S. 253, 263, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963))*, and move into the realm of agreements that are "combinations of persons at different levels of the market structure, such as manufacturers and distributors." *Oreck Corp., 579 F.2d at 132* (citing *United States v. Topco Assocs., 405 U.S. 596, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*); *see also* *Crane & Shovel Sales Corp., 854 F.2d at 805* (quoting **[**49]** *Oreck).* The contracts are specifically designated as "resale" agreements that provide for sale of goods under the purchaser's label. [R. 678, attachs. 22-27]. The IBM contract is "for a multinational procurement relationship." [R. 540, attach A at 3]. Lexmark's agreements, therefore, "involve agreements among actors at different levels of market structure **[*881]** to restrain trade." *Care Heating & Cooling, Inc., 427 F.3d at 1013*. To the extent that Lexmark seeks summary judgment that the agreements between it and IBM, Dell, and any other reseller are not horizontal restraints of trade which are *per se* anticompetitive, summary judgment is appropriate. As vertical trade agreements, they are subject to the *rule of reason.* *Care Heating & Cooling, Inc., 427 F.3d at 1013*.

(b) The *Rule of Reason*

HN13[] When applying the *rule of reason,* "'an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place' cannot be sustained.'" *Re/Max Int'l, Inc., 173 F.3d at 1014 (quoting FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986))*. The general test for whether there is an antitrust **[**50]** violation under the *rule of reason* "'is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.'" *Ind. Fed'n of Dentists, 476 U.S. at 458* (quoting *Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918))*.

The parties do not clearly distinguish between the *rule of reason* and the *per se* arguments within Lexmark's Motion. Because Lexmark is clearly seeking summary judgment on the tying and contract claims, regardless of whether Lexmark is clear in its *rule-of-reason* argument, this Court will address both of those issues.

(1) Tying

As already addressed, whether a patented good has created an illegal tying agreement under *section 1* of the Sherman Act is a question to be analyzed under a case-by-case, *rule-of-reason* analysis. Here, the issue of market power cannot be decided on summary judgment because there remain disputed issues of fact. *See, supra,* § (11)(B)(4)(I). Because Lexmark relies only on market power, [R. 680 at 14], and the issue of market power cannot be decided at this stage of the litigation, **[**51]** Lexmark's Motion must be denied insofar as it relates to the Remanufacturers' tying claim under the *rule-of-reason,* case-by-case, analysis articulated by the Supreme Court in *Illinois Tool Works, Inc.*

(2) Contract

The IBM contract cited by Lexmark contains the following clause:

> In addition, if Buyer promotes or sells non-Supplier business printer cartridges or re-fill kits that function in Eligible Printers, Buyer will notify Supplier, in which case Supplier will not be required to pay any Consideration for the annual period in which the non-Supplier inkjet cartridge or re-fill kits were promoted or sold by Buyer.

[R. 540, attach. A, *(First) Amendment 003 To the Statement of Work under Transaction Attachment # 4997S23861* at P 4.3]. The contract later adds the following at the end of that clause: "and Supplier shall have the right to immediately terminate this Appendix G." [*Id. Amendment 006 To the Statement of Work under Transaction Attachment # 4997523861* at P 4.2].

This record is very limited, but it is the only evidence that the Court has before it. This contract prohibits the reseller from also selling or promoting non-Lexmark cartridges, **[**52]** albeit inkjet cartridges, and its enforcement tool is the threat of lost consideration. On this very limited record, this prohibition might ultimately be found to be a device through which trade was suppressed. That is to say, it is not clear that the Lexmark-IBM contract simply dictates the methods whereby trade will be effectuated. Therefore, the Court cannot hold as a matter of law that Lexmark did not unreasonably destroy competition **[*882]** through unreasonable, contractual market restraints.

5. The Relevant Market and Monopoly Power: Sherman Act *Section 2*

HN14[] In order to prevail on a *Section 2* claim, the Remanufacturers must demonstrate "(1) the possession of monopoly power in a relevant market; and (2) the willful acquisition, maintenance, or use of that power by anti-competitive means as opposed to 'growth or development resulting from a superior product, business acumen, or historical. accident.'" *Conwood, Co. v. U.S. Tobacco Co., 290 F.3d 768, 782 (6th Cir. 2002)* (quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 595-96, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*; *United States v. Grinnell Corp., 384 U.S. 563 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. *Section 2* claims **[**53]** are examined under a fact specific analysis, and in proving its claim, a plaintiff must first "define the relevant product and geographic markets in which it competes with the alleged monopolizer, and with respect to the monopolization claim, to show that the defendant, in fact, possesses monopoly power." *Conwood Co., 290 F.3d at 782*.

"To establish the offense of monopolization a plaintiff must demonstrate that a defendant either unfairly attained or maintained monopoly power." *Potters Med. Ctr. v. City Hosp. Ass'n, 800 F.2d 568, 574 (6th Cir. 1986)*. To have monopoly power, a defendant must have "the power to control prices or exclude competition." *Grinnell, 384 U.S. at 571*. "[W]hen a competitor, with a dangerous probability of success, engages in anti-competitive practices the specific design of which are, to build a monopoly or exclude or destroy competition," there is an attempted monopolization. *Smith v. N. Mich. Hosps., Inc., 703 F.2d 942, 954 (6th Cir. 1983)*. *Section 2* monopoly power "requires … something greater than market power under *§ 1*." *Eastman Kodak Co., 504 U.S. at 481*.

The standard **[**54]** for monopoly power is, in fact, very high, and is typically defined by the market share. *See Grinnell, 384 U.S. at 570*. For example, in *Eastman Kodak,* the Supreme Court held that there was a triable issue of fact as to whether Kodak held monopoly power when Kodak controlled 80% to 95% of the service market and 100% of the parts market. *Eastman Kodak Co., 504 U.S. at 481*. In *Grinnell,* the Court held that 87% of market power could constitute monopoly power, *see Grinnell Corp., 384 U.S. at 571* (determining that 87% of market constitutes a monopoly), and in *American Tobacco Co. v. United States, 328 U.S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*, the Court determined that control of over two-thirds of the market could amount to monopoly power. *See id. at 797*.

HN15[] While market share might, in many instances, lead to an inference of monopoly power, it is not, in and of itself, the only factor to consider. *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 185 F.3d 606, 623 (6th Cir.1999)* ("[M]arket share is only a starting point for determining whether monopoly power **[**55]** exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share."). Within the context of an aftermarket monopolization, there are special factors to consider.

When there is an allegation of aftermarket monopolization, the analysis is more complex, "because market share data standing alone is not necessarily a reliable proxy for monopoly power." *Harrison Aire, Inc. v. Aerostar Int'l, Inc., 423 F.3d 374, 381 (3d Cir. 2005)* (citing *SMS Sys. Maintenance Servs. v. Digital Equip. Corp., 188 F.3d 11, 16 (1st Cir.1999)*). It is to be **[*883]** expected that a company will supply a large percentage of its aftermarket parts and services. *Harrison Aire, Inc., 423 F.3d at 381*. It is only when there are "significant information and switching costs," *Eastman Kodak Co., 504 U.S. at 473*, that the "link between the primary market-and the aftermarket" is severed for monopolization purposes. *Harrison Aire, Inc., 423 F.3d at 382*. In sum, "[o]nly a careful factual analysis of the market in question will reveal whether monopoly power, in fact, exists." *Byars, 609 F.2d at 851.* **[**56]**

The Remanufacturers have presented a triable issue of fact as to whether Lexmark enjoyed monopoly power. Summary judgment in *Eastman Kodak* was inappropriate because questions of fact remained regarding supracompetitive pricing, indeterminate lifecycle costs, and high switching costs. *Eastman Kodak Co., 504 U.S. at 469-75, 477, 480*. The Remanufacturers have submitted evidence that would satisfy three of these factors: that

Lexmark controlled, at a minimum, 75% of the market for remanufactured sales and 80% of the overall market for Lexmark-compatible toner cartridges, [R. 628 at 8, 10]; that Lexmark was able to charge a higher price for its remanufactured cartridges than the remanufacturers charged, [R. 628 at 10]; and that determining a life-cycle cost for a printer is nearly impossible. [R. 628 at 14]. As a result, this Court cannot, at this stage of litigation, hold that the market reality was such that Lexmark was not able to gain monopoly power.

Lexmark appears to have rested its entire *section 2* argument on the issue of monopoly power. [R. 680]. Since Lexmark does not argue whether the Remanufacturers have presented sufficient evidence that it willfully **[**57]** acquired, maintained, or used potential monopoly power through the use of anti-competitive means, this Court need not address this issue. Even if addressed, there is evidence that Lexmark engaged in the Prebate program in order to achieve total control over the remanufactured cartridge market. [R. 628 at 3]. Suffice it to say, neither prong one or prong two under a Sherman Act *§ 2* analysis is sufficient to grant summary judgment for Lexmark.

6. The Relevant Market and Market Power: Clayton Act

HN16[] The Clayton Act addresses the legality of exclusive dealing contracts. An exclusive dealing contract is formed when a good is sold on the condition that the buyer not deal with competitors of the seller. *See 15 U.S.C. § 14*. In order to be an illegal exclusive dealing contract, a court must engage in a three-part inquiry. First, a court must determine "line of commerce, i.e. the type of goods ..." that are involved. *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*. Second, the court must determine that there is a relationship between the anti-competitive actions and the market. *Id.* ("[T]he area of effective competition **[**58]** in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies."). Third, "the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market." *Id. at 328*.

Under the Clayton Act, "the relevant market is the prime factor in relation to which the ultimate question, whether the contract forecloses competition in a substantial share of the line of commerce involved, must be decided." *Id. at 329*. Clayton Act claims are generally analyzed in conjunction with a Sherman Act *section 1* discussion, *see Ill. Took* ***[*884]*** *Works, Inc., 126 S. Ct. at 1286*, and the same facts are relevant to a market power determination under both statutes. *See U.S. v. Dairymen, Inc., 758 F.2d 654 (6th Cir. 1985)* (per curiam). As the Court has previously discussed, *see supra* § (II)(B)(4)(i), the Remanufacturers have presented sufficient evidence to proceed on the question of whether Lexmark has used its power in the market to foreclose a significant amount of competition. Summary judgment is **[**59]** inappropriate on this issue.

7. Antitrust Injury

Lexmark's final argument in favor of summary judgment is that the Remanufacturers have failed to prove an injury predicated on an antitrust violation. This discussion assumes that there is an antitrust violation. In other words, it poses the following question: Assuming that there is an antitrust violation, may the Remanufacturers recover for that violation? In order to recover, the Remanufacturers "must prove *antitrust* injury, which is to say injury of the type antitrust laws were intended to prevent and that flows from that which makes [Lexmark's] acts unlawful." *Valley Prods. Co., 128 F.3d 398, 402 (6th Cir. 1997)*. Whether there is an antitrust injury rests on whether the Remanufacturers can satisfy the "necessary predicate" test. This test requires the Remanufacturers to demonstrate "facts showing that [Lexmark's] alleged anticompetitive conduct was a 'necessary predicate' to their antitrust injury; i.e., that [summary judgment] is required unless [the Remanufacturers prove] facts showing that the alleged antitrust injury could not possibly have occurred absent [Lexmark's] alleged anticompetitive **[**60]** conduct?" *In re Cardizem CD Antitrust Litig., 332 F.3d 896, 900 (6th Cir. 2003)*.

Because Lexmark does not attempt to summarize its antitrust injury argument, [*see R.* 531], this Court attempts to concisely state Lexmark's position as follows: No antitrust injury can flow from the Prebate Program, since in the absence of that program, Lexmark would continue to attempt to obtain empty cartridges. [*Id.*]. Lexmark's argument fails for three reasons: (1) it compares analytically distinct situations; (2) it requires reliance on speculation; and (3) it ignores the Remanufacturers' Sherman Act *section 1* and Clayton Act claims, i.e., whether Lexmark's resale contracts unreasonably restrain trade.

Lexmark's argument compares analytically distinct injuries. It states that the injury alleged by the Remanufacturers--cutting off the stream of cartridges via a prebate program (the "prebate-based injury")--is the same injury as would result if there were no prebate program--where there would be a market-based competition which in turn would lesson the supply of cartridges (the "market-based hypothetical"). The former, prebate-based injury results from an alleged antitrust **[**61]** violation, whereas the later, market-based hypothetical is an injury outside of any antitrust violation. Additionally, the alleged injury based on prebate falls within the type of harm for which antitrust statutes seek to remedy. Specifically, it forecloses competition and increases prices. The market-based hypothetical is based on the opposite type of injury; it is injury resulting from open competition. Because two situations are not analogous, Lexmark's argument must fail.

Second, there are evidentiary concerns with Lexmark's argument. ***HN17***[] This Court, in determining whether an issue may properly be considered at the summary judgment stage, must rely on actual evidence. *Fed. R. Civ. Pro. 56*. Arguments requiring a court's speculation, and going well beyond the submitted evidence, are insufficient means for granting summary judgment. *See* *Matsushita Elec. Indus. Co.,* ***[*885]*** *475 U.S. at 586-587* (non-movant must "do more than simply show there is some metaphysical doubt as to the material facts"); *see also* *Browning, 436 F.3d at 695* (requiring that some evidence be submitted to avoid summary judgment). Lexmark's argument is **[**62]** based on its speculation that it is more efficient than its competitors. The Court will not rely on such speculation.

Finally, Lexmark's argument ignores whether there is an antitrust injury as a result of its contracts with the Resellers. The injury argument, cannot, therefore, be grounds for granting summary judgment on the Sherman Act *section 1* or Clayton Act claim.

For these three reasons, the Court must deny summary judgment on the issue of whether there is an antitrust injury.

C. LANHAM ACT CLAIMS

At issue is whether Lexmark violated *section 43(a)* of the Lanham Act:

> ***HN18***[] [a]ny person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) **[**63]** in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a).

1. Wazana's Motion

Wazana is only seeking summary judgment on three of its Lanham Act allegations: (1) that Lexmark is falsely assuring customers that all prebate cartridges will be remanufactured or recycled; (2) that Lexmark falsely represents that the cartridges will be disposed of in a manner different from regular household waste; and (3) that Lexmark has falsely represented that regularly priced cartridges, or non-prebate cartridges, are available for purchase. [R. 534]. Wazana's Motion for Summary Judgment argues that all three of these statements are literally false. [*Id.*].

HN19[] In order to prove liability for false advertising under the Lanham Act, a plaintiff must satisfy the follow five-element test:

> 1) the defendant has made false or misleading statements of fact concerning his own product **[**64]** or another's; 2) the statement actually deceives or tends to deceive a substantial portion of the intended audience; 3) the statement is material in that it will likely influence a deceived consumers' purchasing decisions; 4) the advertisements were introduced into interstate commerce; 5) there is some causal link between the challenged statements and harm to the plaintiff.

Am. Council of Certified Podiatric Physicians & Surgeons, Inc., 185 F.3d at 613; *Balance Dynamics Corp. v. Schmitt Indus., 204 F.3d at 689*. A plaintiff seeking monetary damages must either show that a statement "is literally false or that it is true yet misleading or confusing." *Am. Council of Certified Podiatric Physicians **[*886]** & Surgeons, 185 F.3d at 614*. For literally false statements, no evidence that consumers were mislead is necessary for recovery, i.e., there is a presumption of actual deception. *Id.* "[T]he initial determination concerning whether a statement is ambiguous is a matter of law, while the determination as to whether facts exist so as to justify the statement is a question of fact." *Id. at 615 n.2*.

Lexmark contests Wazana's **[**65]** position that the statements at issue are clear and false, i.e., Lexmark argues that these statements are subject to multiple meanings and that it possessed sufficient factual underpinnings to support its statements. Therefore, as to each of the three statements presented by Wazana, this Court must first determine if the statements are ambiguous. *Am. Council of Certified Podiatric Physicians & Surgeons, 185 F.3d at 615 n. 2*. If unambiguous, then a jury could find that the statements are either literally false or true but deceptive. In order to proceed to the jury, there must be sufficient facts to justify Lexmark's statement as true or as not deceptive. If those disputed issues of fact exist, then the Court cannot make a determination as to falsity or deception, but must present this issue to a jury. *Id.*

i. Ambiguity of Statement

The first representation at issue states: "Following this initial use, you agree to return the empty cartridge only to Lexmark for remanufacturing and recycling." [R. 531 at 2]. Lexmark argues that this statement does not mean that it will recycle or remanufacture 100% of each returned cartridge. [R. 613 at 18-19]. This **[**66]** argument goes to whether the facts support the statement, not to whether the statement is clear. To state the representation alternatively, Lexmark is simply letting customers know that they are agreeing to return the empty cartridge to Lexmark so that the cartridges can be recycled or remanufactured. In sum, this statement is unambiguous.

The second statement at issue states, "Lexmark recycles Return Program Cartridges, keeping them out of the waste stream." [R. 534 at 5]. Lexmark seems to argue that this statement has never been explicitly made but could be inferred by other statements. [R. 613 at 21]. The Court is not quite clear as to exactly what Lexmark means when it states that the statement is "implicit," and can only assume that Lexmark is contesting whether the statement ever appeared on its website. Lexmark has not submitted any evidence supporting this claim, and therefore the Court need not consider Lexmark's blanket denial in light of Wazana's evidence that the statement appeared, explicitly, on Lexmark's website. [R. 534 at 5. *See* *Browning, 436 F.3d at 695* (noting that while all inferences are drawn in favor of the non-moving party, that party **[**67]** still must present some affirmative evidence supporting its position to defeat an otherwise appropriate motion for summary judgment); *see also* *Matsushita Elec. Indus. Co., 475 U.S. at 586-587* (non-movant must "do more than simply show there is some metaphysical doubt as to the material facts")]. Therefore, in the absence of any disputed, material facts, the Court holds that this statement was, in fact, made and is unambiguous. As to its meaning, the statement simply represents that Lexmark is recycling the returned prebated cartridge and that this recycling is keeping the returned cartridge out of the waste stream.

Finally, Lexmark argues that its statement regarding the validity of the prebate agreement is susceptible to different meanings. Lexmark is wrong. The statement at issue reads, "Regular cartridges without this license/agreement sold at regular prices are available." [R. 534 at 21]. In its Response, Lexmark stated that **[*887]** certain "kits," [6] consisting of a cartridge and parts, contained the statement at issue. [R. 613]. Wazana did not counter Lexmark's assertion that this statement was contained on a kit containing more than just a prebate cartridge. The **[**68]** statement means that if a customer does not want to accept the prebate terms placed on the kit, it may choose to buy a non-prebate cartridge (not kit), which Lexmark has available. Like the others, this statement is unambiguous.

ii. Facts Supporting Statement

Having determined that the three statements at issue in Wazana's Motion are unambiguous, the next step is to determine if there are disputed issues of facts as to the falsity or deceptiveness of those statements. If so, the issue of whether the statements are false or are true yet deceptive must go to a jury.

(a) Waste Stream, Recycling, [69] and Remanufacturing**

As set out by Lexmark in its Response [R. 613], there are significant disputed facts as to whether the products were recycled, remanufactured, or placed in the waste stream. Specifically, the dispute seems to involve Lexmark's incineration of the cartridges, or as identified by Lexmark, its "thermal recycling." There appears to be significant factual disputes as to whether technically or effectively incineration would support a claim that Lexmark recycles its returned cartridges. [*Compare* R. 531, *with* R. 534]. There is also a dispute as to whether the facts support Lexmark's claim that it is recycling or reusing the cartridges when only part of the returned cartridges are reused or recycled. [R. 613 at 20]. The resolution of these disputed issues of fact must be reserved for the trial phase and left to the province of the jury. Wazana's Motion must, therefore, be denied as to the statement that Lexmark is recycling or remanufacturing the used cartridges and as to whether these cartridges are placed in the waste stream.

(b) Availability of Regularly-Priced Cartridges

The Court notes that when determining whether Wazana should receive summary **[**70]** judgment on this issue, it must construe all disputed issues in favor of Lexmark and must take as true all proper evidence submitted by Lexmark. Lexmark submits several pieces of evidence that it made regularly priced cartridges available to customers who did not want to purchase the cartridge kits. [R. 613]. Therefore, summary judgment cannot be granted on this issue.

iii. Injury and Damages

Having determined that there is conflicting evidence regarding the falsity of the statements at issue, the Court need not reach the issue of whether Wazana has met its burden for proving any injury or damages.

2. Lexmark's Motion

Due to a dispute between the parties, the Court must first determine the scope of Lexmark's Motion for Summary Judgment with regard to the Lanham Act claims. Lexmark states that

> [Wazana] asserts two distinct Lanham Act claims against Lexmark, based on two different types of allegedly false advertising. First, [Wazana] contends **[*888]** that Lexmark falsely advertised that Prebate-labeled cartridges are sold subject to a valid single-use patent license ….Second, [Wazana] contends that Lexmark

[6] The Court notes that Lexmark identifies these kits as *labels.* In order to avoid confusing the general cartridge packaging from the cartridge itself from the cartridge packaged within a kit, the use of word *label* will be used when referring to the actual packaging of all cartridges and the word *cartridge kit* will be used when referring to the sale of cartridges in conjunction with various other parts.

> falsely advertised that Prebate cartridges **[**71]** are more environmentally friendly than non-Prebate cartridges and that Lexmark remanufactures or recycles Prebate cartridges ....

[R. 531 at 30 (citations omitted)]. Lexmark, in its Memorandum, seeks summary judgment as to all Lanham Act claims but it only argues for summary judgment as to three Lanham Act issues: (1) the Prebate statement; (2) the Environmental claims; and (3) the measure of damages available. [*Id.*]. Wazana noted, in its Response, that there are more than three statements at issue under the Lanham Act in this litigation, and it sets out all of the statements that it purports to assert. [R. 638 at 11-14]. Lexmark, in turn, attempts in its Reply to address each of these additional Lanham Act claims. [R. 679 at 10-15]. Local Rule 7.1 requires parties to state precisely the relief requested and allows a court to rest its denial of a motion on the failure to submit an accompanying memorandum. It seems clear that, based on the Motion and Memorandum, Lexmark is only seeking summary judgment on the three statements originally mentioned. [*See* R. 531]. To the extent that Lexmark failed, when submitting its Motion, to specifically address any additional **[**72]** Lanham Act claims, its effort to address them in its Reply will be disregarded. After all, what purpose does a Motion and its Memorandum serve but to inform the Court and the other parties of relief requested therein? Therefore, to the extent that Lexmark seeks summary judgment on specific Lanham Act claims via its Reply, as opposed to its actual Motion, it must be denied.

Only three claims are before the Court pursuant to Lexmark's Motion. First, whether the prebate label correctly stated the single-use restriction. [*Id.*]. Second, whether the environmental claims were false or misleading. [*Id.*]. Finally, whether Wazana can prove, under the applicable standard, an amount for which it is entitled. [*Id.*].

i. Valid Single-Use Restriction

Wazana has asserted a Lanham Act claim regarding Lexmark's statement that all prebate cartridges are sold subject to a valid, single-use restriction. The Court need not go into the details of the single-use restriction in this Order, since there is a lengthy discussion of the single-use restriction elsewhere in the record. [*See R.* 1008]. Lexmark argues that there are three reasons why the single-use restriction representation **[**73]** cannot support a Lanham Act claim: (1) the cartridges were subject to a single-use restriction; (2) there is no evidence of damages to Wazana; and (3) Wazana's response that the statement is merely deceptive, not false, is a new theory not properly considered on summary judgment. [R. 679 at 10].

The first and third arguments are quickly disposed of. As to the first argument, the Court did not hold that *all* prebate cartridges were, in fact, sold subject to a valid, single-use restriction. [See R. 1008 at 38]. Therefore, Lexmark cannot place reliance on this proposition. As to the third argument, this Court need not address whether the statement is deceptive since given the Court's earlier holding regarding the single-use restrictions [*id.*], facts exist that could lead a reasonable jury to conclude that the statement is literally false. [*See generally* R. 531 at 34 (Lexmark's memorandum states, "Assuming that the Prebate single-use license is not valid and enforceable, and therefore the representations are literally false....")]. [7]

[74] [*889]** The second argument is slightly more complex. As cited, Lexmark's Motion states the argument as follows: "Assuming that the Prebate single-use license is not valid and enforceable, and therefore the representations are literally false, [Wazana] must nevertheless come forward with evidence that the representations about the enforceability of Prebate caused Lexmark to gain sales at the expense of MSE." [R. 531 at 41]. In its Response, Wazana asserts that its expert "opined that [Wazana] lost approximately $ 2,200,000 - 2,400,00 as a result of Lexmark's prebate program." [R. 622 at 30]. Lexmark's Reply simply argues that this evidence from Wazana "fails because [Wazana] has produced no evidence of materiality, i.e. customers purchased remanufactured cartridges <u>because</u> they are sold subject to the single use restriction ...." [R. 679 at 10].

As to Lexmark's first argument, Wazana has met the burden. It has submitted expert evidence that Lexmark gained sales through prebate while Wazana lost sales. [R. 622 at 30]. Specifically, once one assumes that not all Prebate was valid, [See R. 1008 at 38 (explaining that cartridges that were originally sold unrestricted in **[**75]** the United

---

[7] The Court notes that both parties seem to imply that their positions rest on the single-use restriction being only within the context of a patent license.

States but to which Prebate later attached were not actually subject to Prebate)], it is easy to see how Lexmark could, allegedly, gain sales at Wazana's expense through its requiring, under the guise of Prebate, those cartridges to which Prebate did not validly attach.

Wazana has also met its burden on Lexmark's second argument: that customers purchased the cartridges because of the single-use restriction. While Wazana did not submit direct evidence that customers purchased the cartridges because they were sold subject to a valid, single-use restriction, it would seem reasonable to infer that the single-use restriction was, in fact, valuable to the customer. Without that restriction, the price of the cartridge could be significantly higher. Therefore, none of the arguments put forth by Lexmark are sufficient grounds for granting summary judgment in favor of Lexmark on this issue.

ii. Environmental Benefit of Prebate and Cartridge Disposal

As defined by Lexmark, the "environmental benefits" Lanham claim includes both the environmental benefits of the Prebate program and whether the returned cartridges were recycled or remanufactured upon return to Lexmark. **[**76]** These two arguments have already been discussed in the context of literal falsity. *See supra* §§ II(C)(1)(i)-(ii). As explained in the previous section, there are significant disputed material facts making these statements improper for granting summary judgment. Even if this Court were to construe all facts in favor of Wazana, which would be required on a Motion by Lexmark, summary judgment remains inappropriate as to whether these statements are literally false. Wazana has presented evidence that incineration is not considered, or defined as, recycling and that the clear language of Lexmark's label states that the purpose of returning cartridges is so that they may be recycled or remanufactured. [R. 622]. These are sufficient facts from which a jury could conclude that Lexmark stated it was recycling or reusing the cartridges and that incineration does not qualify as either of those two end results.

A remaining issue in Lexmark's motion is whether, assuming that the statements are literally true but deceptive, Wazana has presented evidence that they are actually deceptive.***HN20***[] "Where statements are literally true, yet deceptive, or **[*890]** too ambiguous to support a finding of literal falsity, **[**77]** a violation can only be established by proof of actual deception . . . ." *Am. Council of Certified Podiatric Physicians & Surgeons, 185 F.3d at 614*. For deceptive statements, a plaintiff "cannot obtain [monetary] relief by arguing how consumers could react; it must show how consumers actually do react." *Sandoz Pharm. Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 229 (3d Cir. 1990)*. Wazana is seeking both monetary and injunctive relief for the alleged Lanham violations. [R. 175 at 59].

If seeking monetary relief, there must be evidence from which a jury could determine that a substantial portion of the audience was deceived in order to support a determination that the statement has a "tendency to deceive." *Am. Council of Certified Podiatric Physicians & Surgeons, 185 F.3d at 616*. The deceived audience must be the intended audience for the statement. *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 922 (3d. Cir. 1990)*. Concern or confusion of the audience does not amount to deception. *See Am. Council of Certified Podiatric Physicians & Surgeons, 185 F.3d at 617*. While **[**78]** common sense and personal experience serve as useful aids for the deception determination, they are not substitutes for other, harder evidence, such as consumer surveys. *Id. at 617-18*.

Wazana relies on Lexmark's own survey for support of its deception claim. [R. 622 attach. B]. Lexmark's survey included those people who were involved in the cartridge purchase decisions and those people responsible for replacing used cartridges with new or repaired cartridges. [*Id.* at 7, 17-18]. When asked about the "environmentally friendly message" of the Prebate program, the survey participants touted the benefits of helping the environment and recycling and also noted the importance of conveying that message on the cartridge label. [*Id.* at 15, 21]. The participants even went so far as to suggest names for the program that necessarily conveyed the importance of the environmental effects of Prebate. [*Id.* at 25]. This evidence is sufficient to send the issue of actual deception to the jury. To the extent that the methods of this survey are attacked, that is within Lexmark's province to present on cross. To conclude, for the purposes of summary judgment and with **[**79]** all conflicting facts resolved in favor of Wazana, the evidence presented by Wazana is enough that a reasonable jury could find in favor of Wazana. Thus, as to whether monetary damages might be recovered on the two environmental statements at issue, Lexmark's Motion must be denied.

The standard for receiving injunctive relief is lower than that for monetary relief. Because the claims for monetary relief must be submitted to a jury, so too must the claims for injunctive relief. *See* Max Daetwyler Corp. v. Input Graphics, Inc., 608 F. Supp. 1549, 1551 (E.D. Penn. 1985) (stating that in contrast with money damages, if injunctive relief is sought, a plaintiff need only show that "the defendant's representations about its product have a tendency to deceive consumers ...."); *see also* Am. Council of Certified Podiatric Physicians & Surgeons, 185 F.3d at 618. ("Although plaintiff need not present consumer surveys or testimony demonstrating actual deception, it must present evidence of some sort demonstrating that consumers were misled."). The aforementioned facts would also satisfy this lower standard.

In sum, Wazana has met its burden under both the injunctive **[**80]** and monetary relief standards. Thus, this Court must deny Lexmark's Motion for Summary **[*891]** Judgment regarding the Lanham Act claims.

iii. Profit Disgorgement

The final issue for which Lexmark seeks summary judgment regards the measure of damages, specifically whether profit discouragement is an appropriate remedy. Profit disgorgement is an equitable remedy available under the Lanham Act, and it cannot be used as a penalty. *Balance Dynamics Corp., 204 F.3d at 695*.**HN21**[] A court cannot require disgorgement "unless there is some proof that plaintiff lost sales or profits, or that defendant gained them, the principles of equity do not warrant an award of defendant's profits." *Id.* Thus, assuming that Wazana is successful on its Lanham Act claims, the question is whether there is sufficient evidence to support a claim that Lexmark unfairly profited from its statements. Given the number of Lanham Act statements that will be decided at trial but which were not briefed in Lexmark's original Memorandum, and the amount of disputed expert evidence [*Compare* R. 622 at 30-32, *with* 679 at 3-5], this Court declines to make a decision which will become either moot or **[**81]** clearer after trial. Therefore, Lexmark's Motion, as it relates to profit disgorgement, is denied.

III.

CONCLUSION

Accordingly, for the foregoing reasons and being sufficiently advised, it is hereby **ORDERED** as follows:

1. that Defendant's Motion for Summary Judgment [R. 529] is **DENIED in part** and **GRANTED in part;**

2. that Counterclaim-Defendant's Motion for Summary Judgment [R. 534] is **DENIED in part** and **GRANTED in part;**

3. that Counterclaim-Defendant's Motion for Hearing [R. 564] on its Motion for Summary Judgment is **DENIED as moot;** and

4. this Memorandum Opinion and Order is entered as an erratum to, replace Docket Entry 1035, and it contains no substantive changes from the previously entered order. The clerk of court is directed to strike Docket Entry Number 1035 from the docket.

This 3nd day of May, 2007.

Signed By:

Gregory F. Van Tatenhove

United States District Judge

[Recetas Por Menos, Inc. v. Five Dev. Corp.]

United States District Court for the District of Puerto Rico

May 3, 2007, Decided; May 3, 2007, Filed

Civil No. 02-1935(SEC)

Reporter

2007 U.S. Dist. LEXIS 57974 *

RECETAS POR MENOS, INC., et al. Plaintiffs v. FIVE DEVELOPMENT CORP., et al. Defendants

Core Terms

geographic, shopping center, lease, relevant market, antitrust, anti trust law, Defendants', nonmovant, summary judgment, pharmacy, renew, sites, summary judgment motion, material fact, genuine, vendor, instant case, Sherman Act, competitors, injunctive, space, food, mall

Counsel: **[*1]** For Recetas Por Menos, Inc., Plaintiff: Edward M. Borges, LEAD ATTORNEY, Borges Law Center, San Juan, PR; Jane A. Becker-Whitaker, LEAD ATTORNEY, Jane Becker Whitaker, PSC, San Juan, PR.

For Five Development Corp., Rafael Perez-Diez, Defendants: Jose A. Bague-Soto, Rivera Tulla & Ferrer, Hato Rey, PR.

For Farmacias El Amal, Farmacias El Amal, Inc., Defendant: Enrique G. Figueroa-Llinas, LEAD ATTORNEY, Guillermo J. Bobonis, LEAD ATTORNEY, Bobonis, Bobonis & Rodriguez Poventud, San Juan, PR.

For Ymas Inventory Management Corp., PMC Marketing Corp., Defendants: Guillermo J. Bobonis LEAD ATTORNEY, Bobonis, Bobonis & Rodriguez Poventud, San Juan, PR.

Judges: SALVADOR E. CASELLAS, United States District Judge.

Opinion by: SALVADOR E. CASELLAS

Opinion

AMENDED OPINION AND ORDER

Pending before the Court is Defendants' motion for summary judgment (Docket # 108). Plaintiffs opposed said motion (Docket # 115) and Defendants replied [1] (Docket # 136). After carefully reviewing the parties' filings and the applicable law, for the reasons set herein, Defendants' motion for summary judgment will be **GRANTED.**

---

[1] Plaintiffs also moved to strike Defendants' reply for being in violation of Local Rule 7.1(c) and this Court's order of November **[*2]** 8, 2004 (Docket # 153). Defendants opposed Plaintiffs' request (Docket # 164). The Court will not strike Defendants' reply which is ten pages in length (Docket # 136). However, the Court will strike Defendants' supplemental reply which is forty-seven pages long (Docket # 136 - Attachment # 1). Defendants also moved to strike several declarations under perjury and expert reports submitted by Plaintiffs (Dockets ## 137, 138 & 145). Because our ruling on these motions does not alter our disposition of the case, we will **DENY** Defendants' various motions to strike. However, this does not mean that these documents will automatically be given the weight that Plaintiffs intended. There are some defects in these documents that are worth noting.

Procedural and Factual Background

Plaintiff Recetas Por Menos, Inc. ("RPM") filed the instant action against Defendants Five Development Corp. ("Five Development"); Farmacias El Amal, Inc. ("El Amal"); Rafael Perez Diez, [2] administrator of Five Development; Saleh Yassin, [3] administrator of El Amal; and several unnamed defendants (collectively referred **[*4]** to as "Defendants") on June 18, 2002 seeking damages (trebled in accordance with the Antitrust Laws), interests, costs, and attorneys' fees, as well as specific performance and injunctive relief (Docket # 1). Plaintiff amended the complaint several times. The last version, the Third Amended Verified Complaint, was filed on March 26, 2004 (Docket # 79). In its last complaint, Plaintiff adds as Defendants PMC Marketing Corp. ("PMC") and YMAS Inventory Management ("YMAS"). [4] Co-plaintiff Puerto Rico Pharmaceutical, Inc. ("PRPI"), Co-plaintiff RPM's supplier, also appears as plaintiff (collectively hereinafter "Plaintiffs"). [5]

Per the Third Amended Verified Complaint, Plaintiffs claim violations to *Sections 1* and *2* of the Sherman Antitrust Act, *15 U.S.C. §§ 1-2*, and *Sections 4* and *16* of the Clayton Act, *15 U.S.C. §§ 15(a)*, *26*, as well as violations to Puerto Rico's Anti-Monopoly Law, *10 L.P.R.A. §§ 257-276*. Plaintiffs also request specific performance and damages under Article 1802 of the Puerto Rico Civil Code, *31 L.P.R.A. § 5141* (Docket # 79).

Plaintiffs' claims arise out Five Development's nonrenewal of Plaintiffs' commercial lease at the Villa Fontana Shopping Center. Plaintiffs allege that Five Development did not renew the lease agreement because it entered into a contract with El Amal Group which requires that no other pharmacy be allowed to operate at the same shopping center (Docket # 79, PP 18, 35-36). Plaintiffs argue that El Amal Group "exercises monopolistic and/or oligopolistic power in the relevant market in which RPM and El Amal Group are located and compete" and that "El Amal Group and FIVE have colluded with the express purpose of putting RPM out of business and eliminating competition in the relevant market." (Docket **[*6]** # 79, PP 49-50). Furthermore, Plaintiffs allege that "El Amal Group's abuse of its monopolistic power constitutes an unreasonable attempt to monopolize" and that "[t]he efforts of El Amal Group and FIVE constitute a combination of entrepreneurs to harass and deter their competitors from having 'free and unlimited access' to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group as ways of building up El Amal Group's empire and strangling competition by bringing baseless suits to evict plaintiff." (Docket # 79, PP 52 & 57).

Subsequent to filing its action, on June 18, 2002, Co-plaintiff RPM requested a preliminary injunction (Docket # 2). Co-plaintiff renewed its request on January 31, 2003 (Docket # 27). RPM requested that the Court stay a local

---

First, "[a]n expert's opinion that lacks any credible support does not create an issue of fact." *Am. Key Corp. v. Cole Nat'l Corp., 762 F. 2d 1569, 1580 (11th Cir. 1985)* (citing ***Merit Motors, Inc. v. Chrysler Corp., 187 U.S. App. D.C. 11, 569 F.2d 666, 673 n. 27 (D.C. Cir. 1977))***. Moreover, with respect to Mr. Mukamal's statement under penalty of perjury, we note that "[c]onstruction of a relevant economic market or a showing of monopoly power in that market cannot, however, **[*3]** be based upon lay opinion testimony." Id. (citing *Forro Precision, Inc. v. Internat'l Bus. Machs. Corp., 673 F.2d 1045, 1059 (9th Cir. 1982))*. Therefore, to the extent that Mr. Mukamal's contentions are based on his lay opinion, they are insufficient to raise a genuine issue of material fact precluding the entry of summary judgment. Finally, Mr. Mukamal's second declaration, which is signed, is subscribed to as "Joseph J. Maximal." Furthermore, Appendixes I and II to Plaintiffs' expert's reply report (Docket # 153) are in Spanish. Therefore, the Court cannot consider them. Local Rule 10(b). In addition, the Court notes that, contrary to Plaintiffs' assertion, the expert's report was never amended to include her signature, or, at least, the Court has not been able to locate said alleged correction within Plaintiffs' submitted compiled exhibits.

[2] Plaintiff also sues his wife and their conjugal partnership.

[3] Plaintiff also sues his wife and their conjugal partnership.

[4] El Amal, however, does not appear listed as defendant in this last complaint. Instead, Plaintiffs refer to PMC and YMAS collectively as El Amal or El Amal Group because that is how the entity has been identified to the Puerto Rico Department of State (Docket # 79, P 10). Per the information provided by Defendants, PMC owns a chain of pharmacies known as El Amal and Mr. Saleh Yassin is its Chief Executive Officer (Docket # 108 n. 4).

[5] Joseph J. **[*5]** Mukamal is the sole shareholder of both RPM and PRPI (Docket # 79, PP 4-5).

injunction proceeding instituted against it by Five Development. RPM's preliminary injunctive request was denied on March 24, 2003. The Court found that Co-plaintiff RPM had failed to show irreparable harm (Docket # 34). Thereafter, on April 3, 2003, the Court of First Instance of the Commonwealth of Puerto Rico in Carolina rendered a judgment of eviction against RPM. As a result, Co-plaintiff **[*7]** RPM relocated and opened for business on June 15, 2004 (Docket # 91). The new location, Sanchez-Osorio Ave., 5-BB-9 Villa Fontana Park, is 482.28 meters from the Villa Fontana Shopping Center (Docket # 109, SUF # 21).

In reaching its judgment of eviction, the Court of First Instance expressly determined that: (1) the lease agreement between Five Development and RPM did not contain an automatic right to renew the lease; (2) Five Development, as the lessor, conserved its right to accept or reject RPM's offer to renew the lease and/or terminate the lease upon the expiration of the contract; (3) RPM did not have the unilateral right to renew the contract without the consent of Five Development; (4) Five Development did not breach its obligations under the lease agreement nor rejected Plaintiff's offers to renew the lease in bad faith; and (5) RPM continued to illegally occupy the premises notwithstanding the expiration of the lease. The Court then ordered the eviction of RPM from the premises and ordered RPM to pay Five Development three times the monthly rent payment for the period RPM illegally occupied the leased space in the Villa Fontana Shopping Center ($ 46,200.00, plus a per diem **[*8]** of $ 140.00 until it vacated the premises), attorneys' fees in the amount of $ 3,000.00, and an annual interest rate of 5.25% for obstinacy calculated from June 1, 2002 until RPM satisfied the judgment (Docket # 109, SUF # 35; Docket ## 142, Exhibits # 12). RPM appealed and said appeal was dismissed for lack of jurisdiction (Docket # 171, Exhibit # 14). RPM then sought certiorari and the Court of Appeals denied RPM's request. (Docket # 171, Exhibit # 13).

Standard of Review

Fed. R. Civ. P. 56(b) provides that: "A party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part [of the claims asserted against him/her]." The Court may grant the movant's motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed.R.Civ.P. 56(c)*; See also *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202(1986)*; *NASCO, Inc. v. Pub. Storage, Inc., 29 F.3d 28 (1st Cir. 1994)*. **[*9]** "The principal judicial inquiry required by *Rule 56* is whether a genuine issue of material fact exists." Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2725, p.401.

In this regard, the First Circuit Court of Appeals has noted that for a dispute to be "genuine," there must be sufficient evidence to permit a reasonable trier of fact to resolve the issue in favor of the non-moving party. *U.S. v. One Parcel of Real Prop., 960 F.2d 200, 204 (1st Cir. 1992)*; see also *Boston Athletic Ass'n v. Sullivan, 867 F.2d 22, 24 (1st Cir. 1989)*; *Medina-Munoz v. R.J. Reynolds Tobacco, 896 F.2d 5, 8 (1st Cir. 1990)* ("[a] 'genuine' issue is one that must be decided at trial because the evidence, viewed in the light most favorable to the nonmovant, would permit a rational factfinder to resolve the issue in favor of either party.") (citations omitted).

By like token, "material" means that the fact is one that might affect the outcome of the suit under the governing law. *Morris v. Gov't Dev. Bank of P.R., 27 F.3d 746, 748 (1st Cir. 1994)*. "A fact is material if it tends to resolve any of the issues that have been properly raised by the parties." Wright, Miller & Kane, supra, § 2725 at p. **[*10]** 419. "Not every genuine factual conflict necessitates a trial. It is only when a disputed fact has the potential to change the outcome of the suit under the governing law if found favorably to the nonmovant that the materiality hurdle is cleared." *Martinez v. Colon, 54 F.3d 980, 983-84 (1st Cir. 1995)*.

In addition, when determining whether to grant summary judgment, the Court may not weigh the evidence. *Casas Office Machs., Inc. v. Mita Copystar Am., Inc., 42 F.3d 668 (1st Cir. 1994)*. Summary judgment "admits of no room for credibility determinations, no room for the measured weighing of conflicting evidence such as the trial process entails." Id. (citing *Greenburg v. P.R. Mar. Shipping Auth., 835 F.2d 932, 936 (1st Cir. 1987))*. Accordingly, if the facts permit more than one reasonable inference, the court on summary judgment may not adopt the inference least favorable to the non-moving party. *Casas Office Machs., 42 F.3d at 684*.

While the moving party has the burden of initially establishing that there is "an absence of evidence to support the nonmoving party's case," *Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1984)*; the nonmovant has a "corresponding obligation **[*11]** to offer the court more than steamy rhetoric and bare conclusions." *Lawton v. State Mut. Life Assurance Co. of Am., 101 F.3d 218, 223 (1st Cir. 1996)*. Furthermore, "the nonmovant must 'produce specific facts, in suitable evidentiary form' sufficient to limn a trialworthy issue. . . . Failure to do so allows the summary judgment engine to operate at full throttle." Id.; see also *Kelly v. United States, 924 F.2d 355, 358 (1st Cir. 1991)* (warning that "the decision to sit idly by and allow the summary judgment proponent to configure the record is likely to prove fraught with consequence."); *Medina-Munoz, 896 F.2d at 8*, (quoting *Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 181 (1st Cir. 1989))* (holding that "[t]he evidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve.").

Local Rule 56(b), [6] moreover, requires the moving party to file annexed to the motion "a separate, short, and concise statement of material facts, set forth in numbered paragraphs, as to which the moving party contends there is no genuine issue of material fact to be tried." **[*12]** Unless the non-moving party controverts this statement, all the material facts set forth therein "shall be deemed to be admitted." Id.; *Cosme-Rosado v. Serrano-Rodriguez, 360 F.3d 42 (1st Cir. 2004)*. This is the so-called "anti-ferret rule." See, e.g., *Orbi, S.A. v. Calvesbert & Brown, 20 F. Supp. 2d 289, 291 (D.P.R. 1998)*. While failure to comply with this rule does not automatically warrant the granting of summary judgment, "it launches the nonmovant's case down the road toward an early dismissal." *Tavarez v. Champion Prods., Inc., 903 F. Supp. 268, 270 (D.P.R. 1995)*.

Finally, antitrust cases are not shielded from summary judgment. See e.g., *In Re Mun. Bond Reporting Antitrust Litig., 672 F.2d 436, 440 (5th Cir. 1982)*. "[I]f the facts 'do not at least outline or adumbrate' a violation of the Sherman Act, the plaintiffs 'will get nowhere merely by dressing them up in the language of antitrust.'" *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984)*(quoting *Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984))*.

Applicable Law and Analysis

Defendants assert various grounds in support of their motion for summary judgment. **[*13]** Namely, (1) that Plaintiffs cannot establish the essential elements of their claims; (2) that the relevant geographic market for the pharmacy business is far broader than the Villa Fontana Shopping Center given the availability of alternate sites for competition; (3) that Plaintiffs cannot prove harm to competition because the Puerto Rico Department of Health already found that competition is served since both El Amal and RPM are competing in the same market; (4) *res judicata;* (5) lack of monopoly power; and (6) failure to establish a conspiracy claim pursuant to ***antitrust law*** (Docket # 108). [7] Plaintiffs, on the other hand, have countered averring that material facts exist as to Defendants'

---

[6] Formerly codified at Local Rule 311(12).

[7] Defendants also filed a motion to dismiss (Docket # 105), which Plaintiffs opposed (Docket # 114). Given the fact that the parties have already engaged in discovery and that Plaintiffs sought to convert the motion to dismiss to one for summary judgment, we only consider in this Opinion Defendants' **[*14]** motion for summary judgement. Furthermore, since we are granting said motion, Defendants' motion to dismiss (Docket # 105) and all related pending motions (Dockets ## 113 & 153A) are hereby deemed as MOOT. In addition, Plaintiffs' motion to compel discovery (Docket # 90), to change the discovery schedule (Docket # 91), and Plaintiffs' motion submitting sworn statement in support of both motions (Docket # 125), as well as Defendants' motion to strike the reply to its opposition (Docket # 100) and Defendants' motion to strike the motion submitting sworn statement (Docket # 128) and its opposition (Docket # 133) are also deemed as **MOOT.** We note that the discovery requested in Plaintiffs' motion to compel, to wit, financial data for El Amal, even if granted, would not affect our decision as set forth in this Opinion.

violations of *Sections 1* and *2* of the Sherman Act (Docket # 115). Because we find it to be dispositive of the case, we will only address Defendants' arguments with respect to the relevant geographic market.

For purposes of this Opinion, we will assume *arguendo* that there is in fact an exclusive dealing agreement between Five and PMC. [8] As described by the First Circuit, an exclusive dealing contract is "[a] common arrangement that involves an agreement not to deal but is far from unlawful per se." *E. Food Servs. v. Pontifical Catholic Univ. Servs. Ass'n, 357 F.3d 1, 4 (2004)*. **[*15]** Faced with such an agreement in this case, upon review, we find that the rule of reason governs our analysis. Plaintiffs have admitted as much. See Docket # 115 at p. 7. The alleged combination restraining trade in the instant case is vertical since the alleged agreement is between entities at different market levels. See *United States v. Topco Assocs., Inc., 405 U.S. 596, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*. Vertical restraints are not illegal *per se* unless they include some agreement as to pricing levels. *Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 735-36, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*. No such condition has been alleged, nor is there any evidence submitted on that point. Finally, courts have consistently held that restrictive covenants in shopping center leases are not *per se* violations of the antitrust laws. See e.g., *Harold Friedman, Inc. v. Thorofare Markets, 587 F.2d 127 (3d Cir.1978)*; *Dunafon v. Del. McDonald's Corp., 691 F. Supp. 1232 (W.D. Mo.1988)*; *Child World, Inc. v. S. Towne Ctr., Ltd., 634 F. Supp. 1121 (S.D. Ohio 1986)*; *Optivision, Inc. v. Syracuse Shopping Ctr. Assn., 472 F. Supp. 665 (N.D.N.Y.1979)*; *Borman's, Inc. v. Great Scott Supermarkets, Inc., 433 F. Supp. 343, 348-50 (E.D. Mich. 1975)*; *Dalmo Sales Co. v. Tysons's Corner Reg'l Shopping Ctr., 308 F. Supp. 988, 994 (D. D.C. 1970)*, **[*16]** *aff'd, 139 U.S. App. D.C. 22, 429 F.2d 206 (D.C. Cir. 1970)*.

Since the rule of reason governs our analysis, in order to establish an antitrust violation in the instant case Plaintiffs have to show that the alleged arrangement among Defendants has anti-competitive effects outweighing the legitimate economic advantages that it might provide. *E. Food Servs., 357 F. 3d at 5* (citing *U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 595 (1st Cir. 1993))*. **[*17]** Typically, under the rule of reason, this requires that "the arrangement in question create or enhance market power - meaning the power to control prices or exclude competition" since "absent market power there is ordinarily no detriment and no reason to engage in any weighing." Id. (citing IIA Areeda & Hovenkamp, ***Antitrust Law***, P 501 (2d ed. 2002); *Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 709 (4th Cir. 1991))*. Thus, it stems from this discussion that the identification of market power be our first step. See e.g., *U.S. v. Visa, U.S.A., Inc., 344 F.3d 229, 238 (2d Cir. 2003)*; *Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 666 (7th Cir. 1987)*.

In order to assess market power, we must first identify the economic market in which said power can be measured. The plaintiff carries the burden of defining the relevant market. *Double D Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554 (8th Cir. 1998)*. Moreover, the relevant market is divided into two components: the product market and the geographic market. *Bathke v. Casey's Gen. Stores, Inc., 64 F.3d 340, 345 (8th Cir. 1995)*("Antitrust claims often rise or fall on the definition of the relevant market."). See VII Areeda, **[*18]** ***Antitrust Law*** P 1503b, at 376 (1986)("virtually all courts applying the rule of reason require the plaintiff to define the product and geographic market in which competition is allegedly restrained"). The disagreement in the instant case is circumscribed to the geographic market. [9]

---

[8] Defendants reject the existence of an exclusive dealing agreement. To that effect, they have submitted the lease agreement circumscribed by PMC (El Amal) and Five Development. (Docket # 109, Exhibit 11). Upon review, we find that there is no exclusivity clause regarding the operation of a single pharmacy at the Villa Fontana Shopping Center. Instead, the agreement precludes PMC from opening additional El Amal pharmacies within a one mile radius from the mall. Moreover, the agreement states that "all of the agreements made are written in this contract, that no other additional agreements exist, and that any changes should be realized in writing and signed by both parties." Nonetheless, we do not reach the ultimate conclusion proposed by Plaintiffs nor do we find that we need to.

[9] At this point, we have to address Plaintiffs' contention that it is for the jury to determine what area comprises the relevant geographic market in any particular case. Having reviewed the relevant precedents, we differ from Plaintiffs' understanding. For example, in *Double D Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554 (8th Cir. 1998)*, the Eight Circuit affirmed the district court's grant of the defendants' motion to dismiss, finding that, *as a matter of law,* the plaintiffs' alleged geographic market was too narrow to support an antitrust claim. Noticeably, in said case, the plaintiffs averred that the relevant geographic market was

"The geographic market is defined by considering the commercial realities faced by consumers. It includes the geographic area in which consumers can practically seek alternative sources of the product, and it can be defined as 'the market area in which the seller operates.'" *Double D. Spotting Serv., Inc., 136 F.3d at 560* (citations omitted) (quoting *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580* ("The area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practically turn for supplies.)).

Plaintiffs contend that the relevant geographic market is the Villa Fontana Shopping Center because it is their understanding that, where pharmacies are concerned, parking is critical (Docket # 115, pp. 10-16). They have submitted their expert's (Heidie Calero) **[*20]** report to that effect as well their expert's reply to Defendants' expert's report [10] (Docket # 118, Exhibit 3; Docket # 153, Exhibit 4). The Calero report tracks the relationship between the number of prescriptions sold and the number of parking spaces at selected El Amal stores. The analysis yields a positive relationship of .69 (Docket # 118, Exhibit 3, p. 10). However, as pointed out by Defendants and their expert in his report, said analysis fails to consider other relevant variables, such as the flow of traffic in the particular shopping center (Docket # 136, Exhibit # 22). Although we concede that the availability of multiple parking spaces makes a location convenient, the lack thereof does not impede prescription drug clientele from seeking and reaching alternative locations.

The Fifth Circuit has recently considered and rejected the convenience argument. *Apani S.W., Inc. v. Coca-Cola Enters., Inc., 300 F.3d 620 (5th Cir. 2002)*. In said case, the city had granted the defendant **[*21]** marketer exclusive rights to sell bottled water on facilities owned or operated by the city, which totaled twenty-seven (27). The plaintiff, a manufacturer of purified bottled water, sued alleging illegal combination or conspiracy between the city and the defendant marketer. The plaintiff suggested that the twenty-seven city owned facilities were the relevant geographic market. He defended this definition with the premise that a patron attending an event at a City-owned facility would not likely cross the street to purchase a beverage at a convenience store where competing products may be displayed.

The plaintiff's geographic market definition was found to be legally insufficient as a matter of law. The Fifth Circuit held that:

> Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient . . . .

Id. at 628. In reaching this conclusion, the Fifth Circuit pointed to the district **[*22]** court's finding that the plaintiff could do business in other locations and in fact had done so. The Fifth Circuit also upheld the district court's conclusion that the injury to competition was not sufficiently significant to rise to the level of an antitrust violation.

In a more extreme case, *Elliott v. United Ctr., 126 F.3d 1003 (7th Cir. 1997)*, a licensed peanut vendor who formerly sold peanuts outside the United Center, an entertainment complex, sued the United Center on the grounds that its policy of prohibiting patrons from bringing food into the complex violated the Sherman Act. According to the vendor, the relevant geographic market was comprised by the "market for food concessions within and around the United Center itself." The district court dismissed the vendor's antitrust claim finding that the vendor failed to adequately identify a relevant geographic market. In affirming the district court's ruling, the Seventh Circuit stated that:

---

the Supervalu warehouse in Urbandale, Iowa. The plaintiffs in Double D Spotting Service, Inc. challenged a contract between the owner of one particular warehouse within the Des Moines metropolitan area and one unloading service provider. The contract gave the unloading **[*19]** service provider all of the unloading services at that particular warehouse. The Eighth Circuit found that "the market for unloading services would seem to be more properly defined as including all warehouses within, at least, the entire Des Moines, Iowa, metropolitan area, if not an even larger area." *Id. at 560-61*.

[10] Ironically, Plaintiffs' expert also concluded that the Department of Health's criteria of a one mile radius was *too narrow* to analyze real competition in the market (Docket # 153, Exhibit 4, pp. 199-200).

> The logic of Elliott's argument would mean that exclusive restaurants could no longer require customers to purchase their wines only at the establishment, because the restaurant would be 'monopolizing' the sale of wine within its interior. **[*23]** Movie theaters, which traditionally (and notoriously) earn a substantial portion of their revenue from the sales of candies, popcorn, and soda, would be required by the antitrust laws to allow patrons to bring their own food.

Id. at 1005.

The First Circuit has similarly rejected narrow market definitions as the one proposed in the instant case. In Eastern Food Services, Inc., the First Circuit affirmed the district court's rejection of the plaintiff's proposed market as "extremely narrow" and not "large enough so as to constitute an economically significant area of commerce." *357 F.3d at 3*. The plaintiff, who provided food services, sued the university and a vendor after the vendor and the university entered into an exclusive dealing arrangement for vending machines on campus. The First Circuit noted that "[f]rom the outset, Eastern's description of what happened raises warning flags for anyone familiar with ***antitrust law***. The university, like most landlords, controls who may set up shop on its premises." *Id. at 4*. Nonetheless, the First Circuit continued and found that foreclosure in the campus segment of the market did not prevent the plaintiff from distributing its products at other **[*24]** outlets. Thus, the First Circuit highlighted, "except in special circumstances, a contract restricting a small percentage of a larger available market will have no anti-competitive effect on that market." *Id. at 7*.

Ignoring this precedent, Plaintiffs look to an unpublished opinion to support their arguments, namely, *Pay Less Drug Stores Northwest, Inc. v. City Products Corp., 1975 U.S. Dist. LEXIS 11847, 1975 WL 906 (D. Oregon 1975)*. However, in said case, the district court did not make a determination as to the relevant geographic market. In invalidating the exclusivity clause, the district court nonetheless found that "[b]ecause of the physical characteristics of the area, the dynamics of the market and *the unavailability of alternate sites in the vicinity,* a site within the Oregon City shopping center is the only place from which the plaintiff can compete effectively in the market serviced by the center." *Id.1975 U.S. Dist. LEXIS 11847, at *6, [WL] at *2* (emphasis added). This case is clearly distinguishable from the instant case, since RPM has already set up shop at a new location. As noted later by the Northern District of New York:

> It is significant that in the only case in which an exclusivity clause in a shopping center lease was invalidated *Pay Less Drug Stores Northwest, Inc. v. City Products Corp., supra* **[*25]** the court found that alternate sites in the area were unavailable, and that a site within the shopping center in question was the only place from which the plaintiff could effectively compete in the market. This is not the case here.

Optivision, Inc. v. Syracuse Shopping Ctr. Assocs., 472 F. Supp. 665, 677 (N.D.N.Y. 1979). After being denied renewal of the lease, RPM was able to open a pharmacy 482.28 meters from the Villa Fontana Shopping Center. In approving RPM's request to transfer its Certificate of Necessity and Convenience ("CNC"), the Puerto Rico Department of Health recognized that there are five other pharmacies - Farmacia Amiga, Farmacia Walgreens, Farmacia Monserrate, Farmacia Puerto de Carolina, and super Farmacia Carolina - within a one mile radius from RPM's location. [11] (Docket # 142, Exhibit # 6). Although this location may not be as ideal as Plaintiffs' original spot at the Villa Fontana Shopping Center, this is not enough to establish antitrust injury. See *Double D Spotting Serv., Inc., 136 F.3d at 561* ("Disappointment at not receiving one unloading contract at one particular warehouse is insufficient as a matter of law to rise to the level of an antitrust violation **[*26]** within a relevant market.").

Plaintiffs also rely on *Harold Friedman, Inc. v. Thorofare Markets, Inc., 587 F.2d 127 (3d Cir. 1978)*. Yet, in said case, there is no analysis of the relevant geographic market. Thus, it has no bearing on our discussion. Noticeably, as cited by Plaintiffs in their opposition to Defendants' instant motion, the Third Circuit recognized that "[a] final conclusion regarding the reasonableness of the restraint in this case must also await some evaluation of the relevant geographic market." *Id. at 144*.

---

[11] The P.R. Department of Health's studies are limited to a one mile radius.

Finally, Plaintiffs rely on *Morales-Villalobos v. Garcia-Llorens, 316 F.3d 51 (1st Cir. 2003)*. However, they misinterpret the case, representing that the First Circuit recognized that, under appropriate circumstances, a relevant geographic market can be as small as the two hospitals in Arecibo. The plaintiff in said case was foreclosed from providing services in the entire town of Arecibo as a result of the exclusive dealing agreement since there were only two hospitals in the entire municipality. [12] The First Circuit reversed the district court's dismissal for failure to plead a relevant **[*27]** market finding that the matter could not be resolved on the face of the complaint. The First Circuit stressed the plaintiff's allegation that she was foreclosed from the outlets reasonably available to her and that, as an anesthesiologist, the primary outlets for her services ordinarily are hospitals and clinics. That is clearly not the situation here. [13] Plaintiffs have had an opportunity to conduct discovery as to the geographic market and have submitted their proof to that effect. Moreover, Plaintiffs have not been foreclosed from other outlets; they were able to open a new pharmacy at a different location within the same general area, although not in a shopping center. [14]

We are not treading uncharted waters. Numerous courts have addressed exclusivity clauses in shopping centers. [15] In addressing the specific issue of shopping centers, the Eleventh Circuit has asserted that "[a] precise definition of the geographic market is required, not space within regional shopping centers." *Am. Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1579 n.7 (11th Cir. 1985)* (citing *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580(1961))*. Additionally, for example, in *Dunafon v. Delaware McDonald's Corporation, 691 F. Supp. 1232 (W.D. Mo. 1988)*, **[*29]** McDonald's had entered into an exclusive lease agreement with the owner of the mall. The plaintiff, restaurant owner, wanted to lease space in the mall and open a Taco Bell within the shopping center. The court found that the record did not establish that the restriction had any substantial anti-competitive effect. In addressing the specific issue of the relevant geographic market, the court concluded that it included the geographic area within which consumers were able to turn for other food-service and that this area included locations outside the mall in question. The court also found that the plaintiff was free to purchase or lease other parcels of land at other locations and that "[t]he fact that plaintiff cannot place a Taco Bell restaurant at his ideal selection site does not establish that there is a restriction of sites available to competitors generally and thus an exclusion from the relevant market." *Id. at 1242*.

In sum, the Villa Fontana Shopping Center does not contain an "appreciable segment of the product market." Earl W. Kintner, Federal ***Antitrust Law***: Volume IV, Mergers & Markets § 38.2 (1984). The relevant market is the "area of effective competition" in which competitors generally are willing to compete for the consumer potential, and not

---

[12] The First Circuit also pointed out that the plaintiff would not be able to provide her services at a neighboring municipality since the doctors she serviced did not have any privileges there.

[13] Perhaps if Plaintiffs wanted to track the First Circuit's case and insist on the importance of parking spaces, they should have alleged a wider market, such as all the shopping centers in Carolina, if applicable.

[14] Plaintiffs limited their search for new venues to a 500 meters radius in order to avoid having to obtain a **[*28]** new CNC (Docket # 118, SUF # 30). Per Defendants' statement of uncontested facts, there are nine (9) shopping strip malls in addition to other commercial leaseable space in the area between 65th Infantry Ave., Sanchez Osorio Ave. and Monserrate Ave. in Carolina, approximately one mile radius from the Villa Fontana Shopping Mall (Docket # 109, SUF # 5). Plaintiffs have countered asserting that of those nine (9) centers, two have El Amal pharmacies (Docket # 118, PP 3- 4). However, this does not mean that Plaintiffs are foreclosed from obtaining a location, as evidenced by the fact that Plaintiffs have moved to a new location which contains five (5) parking spaces (Docket # 118, Exhibit 3, p. 5).

[15] See, e.g., *Deauville Corp. v. Federated Dep't Stores, Inc., 756 F.2d 1183 (5th Cir. 1985)* (finding that the plaintiff had failed to show that the exclusive lease agreement with the anchor tenant adversely affected competition since it failed to show that competition **[*30]** from alternative mall sites was precluded); *Child World, Inc. v. S. Towne Ctr., Ltd., 634 F. Supp. 1121 (S.D. Ohio 1986)*(upholding restrictive covenant in shopping center); *Optivision, Inc. v. Syracuse Shopping Ctr. Assocs., 472 F. Supp. 665 (N.D.N.Y. 1979)* ("The availability of such market alternatives is an important factor that supports a determination that the exclusivity clause here does not unreasonably restrain competition."); *Goodman v. Acme Markets, Inc., 1989 U.S. Dist. LEXIS 4260, 1989 WL 42484 (E.D. Pa. 1989)*("A restrictive covenant which excludes the sale of grocery items within one-half mile of the Acme does not substantially affect the market for grocery items.").

the market area of a single company. Am. Key Corp., 762 F.2d at 1581 (citing Tampa Elec. Co., 365 U.S. at 327-29). Counting only with one pharmacy, the Villa Fontana Shopping Center is not economically **[*31]** significant. See Brown Shoe Co. v. United States, 370 U.S. 294, 336-37, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)("The geographic market selected must, therefore, both 'correspond to the commercial realities' of the industry and be economically significant."); Apani Southwest, Inc., 300 F.3d at 627. Plaintiffs' suit is geared at gaining access to an ideal location. However, "antitrust claims are concerned not with wrongs directed against the private interest of an individual business but with conduct that stifles competition. E. Food Servs., 357 F.3d at 4 (citing Brown Shoe Co., 370 U.S. at 344). "It is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors.'" Bathke, 64 F.3d at 344 (quoting Brooke Group, Ltd. v. Brown & Williamson Tobacco, 509 U.S. 209, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)). Moreover, "harm does not mean a simple loss of business or even the demise of a competitor but an impairment of the competitive structure of the market." Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57 (1st Cir. 2004)(citing Brown Shoe Co. 370 U.S. at 344).

Because we find that Plaintiffs have not met their burden of establishing a viable geographic market, we need not go further in our **[*32]** analysis. Nevertheless, we note El Amal's position of "anchor tenant" at the Villa Fontana Shopping Center [16] and that the relevant jurisprudence has recognized the importance of anchor tenants in regional shopping centers. See Deauville Corp. v. Federated Dep't Stores, Inc., 756 F.2d 1183 (5th Cir. 1985)("Successful regional shopping malls require 'anchor tenants.'"). Moreover, "antitrust laws do not compel a company to do business with anyone or to adjust the mix of mall tenants." Am. Key Corp., 762 F.2d at 1578 (citing United States v. Colgate & Co., 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)).

The inquiry into the relevant geographic market is essential to both Plaintiffs' Section 1 and Section 2 claims under the Sherman Act. Double D Spotting Serv., Inc., 136 F. 3d at 560. See Stop & Shop Supermarket Co. 373 F.3d at 66 (finding it "critical to any attack on the exclusive dealing arrangement--and almost any other non-per-se claim one could imagine--that plaintiffs establish a relevant market and harm within it"). Because we have found that Plaintiffs' proposed market is too narrow, **[*33]** we necessarily **GRANT** Defendants' motion for summary judgment on Plaintiffs' Sherman Act claims. Finally, because we are dismissing Plaintiffs' antitrust claims, Plaintiffs' request for injunctive relief is **MOOT.**

Supplemental Claims

Having dismissed all of Plaintiffs' federal claims, we will similarly dismiss Plaintiffs' Commonwealth law claims. See Newman v. Burgin, 930 F.2d 955, 963 (1st Cir. 1991)("[t]he power of a federal court to hear and to determine state-law claims in non-diversity cases depends upon the presence of at least one 'substantial' federal claim in the law suit."). Accordingly, Plaintiffs' supplemental law claims are hereby **DISMISSED WITHOUT PREJUDICE.**

Conclusion

For the reasons set herein, Defendants' motion for summary judgment is **GRANTED.** Thus, Plaintiffs' federal law claims are **DISMISSED WITH PREJUDICE,** and Plaintiffs' supplemental law claims are **DISMISSED WITHOUT PREJUDICE.** Judgment shall be entered accordingly.

SO ORDERED.

In San Juan, Puerto Rico, this 3rd day of May, 2005.

S/ Salvador E. Casellas

---

[16] El Amal leases at Villa Fontana Shopping Center over five times the amount of space which RPM leased (Docket # 118, SUF # 37).

United States District Judge

Moore v. State Farm Mut. Auto. Ins. Co.

United States District Court for the Eastern District of Louisiana

May 4, 2007, Decided ; May 4, 2007, Filed

CIVIL ACTION NUMBER 03-2390 REF: ALL CASES SECTION "L" (5)

Reporter

520 F. Supp. 2d 815 *; 2007 U.S. Dist. LEXIS 33315 **

JAMES HAROLD MOORE, JR., ET AL. VERSUS STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ET AL.

Subsequent History: Partial summary judgment denied by, Summary judgment denied by, Motion denied by *Moore v. State Farm Mut. Auto. Ins. Co., 2007 U.S. Dist. LEXIS 63574 (E.D. La., Aug. 24, 2007)*

Reconsideration denied by *Moore v. State Farm Mut. Auto. Ins. Co., 2007 U.S. Dist. LEXIS 63576 (E.D. La., Aug. 24, 2007)*

Prior History: *Moore v. State Farm Mut. Auto. Ins. Co., 2006 U.S. Dist. LEXIS 75439 (E.D. La., Oct. 6, 2006)*

Core Terms

termination, insureds, injunctive relief, coverage, counterclaim, damages, summary judgment, staff, allegations, appointment, reasons, parties, summary judgment motion, insurance agency, policies, insurance policy, antitrust, insurance company, health insurance, Cross-Motion, injunction, licensed, motions, affirmative defense, seek damages, anticompetitive, restraining, secrets, Vacate

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > General Overview

Civil Procedure > Judgments > Entry of Judgments > Nonparties Affected by Judgment

HN1[] **Remedies, Injunctions**

Although a district court can grant injunctive relief to non-parties, it may only do so if necessary to give the named plaintiffs the continuing relief to which they are entitled.

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

HN2[] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment will be granted only if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56*.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN3[] **Entitlement as Matter of Law, Appropriateness**

When considering a motion for summary judgment, a court must review the facts drawing all inferences most favorable to the party opposing the motion.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN4[] **Burdens of Proof, Movant Persuasion & Proof**

If the party moving for summary judgment demonstrates the absence of a genuine issue of material fact, the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN5[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The per se rule has not been applied to collective refusals to deal where exclusionary or coercive conduct is not present. The United States Supreme Court has made it clear that departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than upon formalistic line drawing. In applying the rule of reason analysis, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. In general, any potential anticompetitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the alleged restraint, and the reasons why it was imposed. However, in an antitrust case summary judgment is still appropriate where the plaintiff does not produce significant probative evidence demonstrating that a genuine issue of (material) fact exists.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN6[] **Practices Governed by Per Se Rule, Boycotts**

The United States Supreme Court has stated that with respect to group boycott, the boycotters and the ultimate target need not be in a competitive relationship with each other. Indeed, the Supreme Court has also found the Sherman Act to be applicable to concerted refusals to deal in cases where the target is a customer of some or all of the conspirators who is being denied access to desired goods or services because of a refusal to accede to particular terms set by some or all of the sellers. In these circumstances, however, an antitrust injury must reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN7[] **Price Fixing & Restraints of Trade, Vertical Restraints**

The United States Court of Appeals for the Fifth Circuit has held that as a matter of law, the termination of a dealer by a supplier lacking market power cannot have an adverse effect on competition.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Question of Law

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

HN8[] **Federal & State Interrelationships, Erie Doctrine**

The interpretation of an insurance contract is typically a question of law that can be properly resolved in a motion for summary judgment.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Insurance Law > ... > Policy Interpretation > Ambiguous Terms > Construction Against Insurers

Insurance Law > ... > Policy Interpretation > Ambiguous Terms > Coverage Favored

Insurance Law > ... > Policy Interpretation > Ambiguous Terms > Unambiguous Terms

HN9[] **Contract Interpretation, Ambiguities & Contra Proferentem**

Under Louisiana law, an insurance policy is an agreement between the parties and is interpreted using ordinary contract principles. Therefore, when the words of the policy are clear, unambiguously express the intent of the parties, and lead to no absurd consequences, the contract must be enforced as written. If, however, the words of the policy are ambiguous, the ambiguous provision is to be construed against the drafter and in favor of the insured.

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > Determination

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Indemnification

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Civil Procedure > Remedies > Injunctions > General Overview

HN10[] Amount in Controversy, Determination

In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation.

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > General Overview

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

HN11[] Measurement of Damages, Foreseeable Damages

La. Civ. Code Ann. art. 1997 provides that an obligor who acts in bad faith is liable for all damages, foreseeable or not, that are a direct consequence of his failure to perform. *La. Civ. Code. Ann. art. 1997*.

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Damages

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Indemnification

HN12[] Commercial General Liability Insurance, Damages

For purposes of an insurer's obligation to pay "damages," such word has an accepted technical meaning in law.

Counsel: [1]** For James Harold Moore, Jr, Jim Moore Insurance Agency, Inc., Plaintiffs: Tommy Wood Thornhill, LEAD ATTORNEY, Chadwick William Collings, Thornhill & Collings, LC, Slidell, LA.

For James Harold Moore, Jr, CA 06-3515, Jim Moore Insurance Agency, Inc., CA 06-3515, Blanche A. Moore, CA 06-3515, Consol Plaintiffs: Tommy Wood Thornhill, LEAD ATTORNEY, Chadwick William Collings, Mitchell A. Palmer, Thornhill & Collings, LC, Slidell, LA.

For State Farm Mutual Automobile Insurance Company, State Farm Life Insurance Company, Defendants: Mark N. Mallery, LEAD ATTORNEY, Kiesewetter Wise Kaplan Prather, PLC, New Orleans, LA; Christine M. White, Christopher E. Moore, Coats / Rose, New Orleans, LA; Thomas Landers Watson, II, McGlinchey Stafford, PLLC, New Orleans, LA.

For State Farm General Insurance Company, State Farm Fire and Casualty Company, Defendants: Christine M. White, Christopher E. Moore, Coats / Rose, New Orleans, LA.

For State Farm Mutual Fire & Casualty Company, erroneously sued as State Farm Fire & Casualty Company, State Farm Mutual General Insurance Company, erroneously sued as State Farm General Insurance Company, Defendants: Mark N. Mallery, LEAD ATTORNEY, Kiesewetter **[**2]** Wise Kaplan Prather, PLC, New Orleans, LA; Christine M. White, Christopher E. Moore, Coats / Rose, New Orleans, LA.

For Mary Bitzer, Vice President of State Farm in her individual capacity, Defendant: Mark N. Mallery, LEAD ATTORNEY, Kiesewetter Wise Kaplan Prather, PLC, New Orleans, LA; Christopher E. Moore, Coats / Rose, New Orleans, LA.

For Fortis Insurance Company, Defendant: Harry Rosenberg, LEAD ATTORNEY, Christopher Michael Capitelli, Christopher K. Ralston, Phelps Dunbar, LLP, New Orleans, LA.

For American Home Assurance Company, CA 06-3515, Consol Defendant: Robert J. David, Jr., LEAD ATTORNEY, Sue Nations, Juneau Law Firm, Lafayette, LA.

For State Farm Fire & Casualty Company, CA 06-3515, Consol Defendant: Thomas Glenn Buck, LEAD ATTORNEY, Brett Wayne Tweedel, John Covington Henry, Blue Williams, L.L.P., Metairie, LA; Thomas Landers Watson, II, McGlinchey Stafford, PLLC, New Orleans, LA.

For State Farm Mutual Automobile Insurance Company, State Farm Life Insurance Company, State Farm Fire and Casualty Company, State Farm General Insurance Company, Counter Claimants: Mark N. Mallery, LEAD ATTORNEY, Kiesewetter Wise Kaplan Prather, PLC, New Orleans, **[**3]** LA; Christopher E. Moore, Coats / Rose, New Orleans, LA; Thomas Landers Watson, II, McGlinchey Stafford, PLLC, New Orleans, LA.

For Blanche Moore, Moore Insurance Agency, James Harold Moore, Jr, Jim Moore Insurance Agency, Inc., Counter Defendants: Tommy Wood Thornhill, LEAD ATTORNEY, Chadwick William Collings, Thornhill & Collings, LC, Slidell, LA.

For State Farm Mutual Fire & Casualty Company, erroneously sued as State Farm Fire & Casualty Company, State Farm Mutual General Insurance Company, erroneously sued as State Farm General Insurance Company, Counter Claimants: Mark N. Mallery, LEAD ATTORNEY, Kiesewetter Wise Kaplan Prather, PLC, New Orleans, LA; Christopher E. Moore, Coats / Rose, New Orleans, LA.

For Blanche A. Moore, CA 06-3515, Counter Defendant: Tommy Wood Thornhill, Thornhill & Collings, LC, Slidell, LA.

Judges: Eldon E. Fallon, UNITED STATES DISTRICT JUDGE.

Opinion by: Eldon E. Fallon

Opinion

[*817] **ORDER & REASONS**

James Harold Moore, Jr. was a State Farm insurance agent for approximately twenty-five years. But Mr. Moore's relationship with State Farm began to sour several years ago, and has since sprawled into a number of lawsuits in courts around the country. **[**4]** The continuing addition of parties to the instant litigation has caused the cases in this District to travel between no fewer than four Sections in the past four years. Having been recently assigned to preside over the dispute, the Court now enters an omnibus order resolving a number of outstanding motions.

I. BACKGROUND

A. Factual History

In 1982, Mr. Moore entered into an individual agent's agreement with State Farm, allowing him to solicit insurance business **[*818]** on behalf of the company. In 1989, the parties agreed to shift the form of the relationship to one of corporate agency. Accordingly, on March 1, 1989, Mr. Moore and his corporation, Jim Moore Insurance Agency, Inc. (collectively, "Moore"), entered into a corporate agency agreement (known as the "AA4 (Inc.)" agreement) with State Farm, thereby terminating the individual agency agreement. [1]

[5]** For more than a decade, Moore's licensed staff members could do everything except bind coverage in their own name and pay claims. In 1995, however, State Farm implemented Clerical Employee ("CE") Agreements for its

[1] The Court has previously held that by virtue of the shift to corporate agency, Mr. Moore cannot assert any rights under the 1982 individual agency agreement. *See* *Moore v. State Farm Mut. Auto. Ins. Co., No. 03-2390, 2006 U.S. Dist. LEXIS 75439, 2006 WL 2925445 (E.D. La. Oct. 10, 2006)*.

agents' staff. The CE agreements authorized agents' staff to bind coverage in their own name and pay claims. Moore and his staff took advantage of this arrangement.

In 1999, State Farm attempted to implement a more restrictive program with the "Licensed Staff Agreement" ("LSA"). The LSA is a three-party contract between State Farm, its agents, and the agents' employees who are licensed to sell insurance. Moore alleges that the LSA improperly gives State Farm certain control over his employees, including the contractual power to terminate them at will. The LSA also imposes on agents and their staff an obligation to protect State Farm's trade secrets and includes a one-year restriction on former staff members' ability to have any contact with State Farm policyholders upon their separation of employment from the agent. [2]

[6]** The LSA arrangement was purportedly voluntary. However, any licensed staff who failed to sign an LSA by April 1, 2001 would no longer be considered "appointed" by State Farm to transact business. In 2000, Mr. Moore and one of his staff members, Bettye Candies, signed the LSA but reserved their rights pursuant to the AA4 Inc. agency contract. The reservation of rights was rejected by State Farm. Moreover, on February 26, 2001, State Farm terminated the CE agreement of Bettye Candies, and she subsequently resigned, leaving Moore with only one licensed staff member, Cathleen Zuppardo. On August 23, 2002, State Farm placed Moore on "non-submission only" status because Ms. Zuppardo was continuing to provide quotes and assist with applications, activities which are, according to State Farm, reserved for LSA staff only. This has prevented Moore from accepting new business from both existing and new clients. State Farm formally terminated the AA4 Inc. agency agreement with Moore on April 4, 2005.

In addition, in July 2000, State Farm began to market and sell individual health insurance policies underwritten by Fortis Insurance Company. Moore was appointed to sell such policies, but allegedly **[**7]** without his knowledge or consent. In 2003, following the above disputes with State Farm, Fortis terminated Moore's appointment **[*819]** to sell its products as well. Moore has asserted various claims against both State Farm and Fortis with respect this separate appointment and termination.

B. Procedural History

On August 22, 2003, Moore filed suit in this Court against State Farm Mutual Automobile Insurance Company, State Farm Life Insurance Company, State Farm Mutual Fire & Casualty Company, and State Farm Mutual General Insurance Company (collectively, the "State Farm" defendants). In general, Moore alleges that State Farm has improperly interfered with his insurance business, causing significant economic and noneconomic losses. Specifically, Moore seeks damages for breach of contract, intentional infliction of emotional distress, intentional interference with employment and contractual relationships, antitrust injuries, negligence, and various other state law violations. In January 2004, the bulk of Moore's claims survived State Farm's *Rule 12(b)(6)* motion to dismiss. *See Moore v. State Farm Mut. Auto. Ins. Co., No. 03-2390, 2004 U.S. Dist. LEXIS 815, 2004 WL 137853 (E.D. La. Jan. 21, 2004)*. **[**8]** [3]

On December 10, 2004, Moore filed a motion for leave to file a Second Amended Complaint, which, according to State Farm, disclosed confidential and propriety information and trade secrets. On December 20, 2004, State Farm's request for a temporary restraining order ("TRO") was granted, sealing Moore's motion for leave to file and requiring that all related filings be sealed as well. The TRO remained in effect until February 14, 2005, when Judge Livaudais (1) dissolved the TRO with respect to all filings except Exhibits C and D to the Second Amended

[2] The issue of whether State Farm breached its AA4 Inc. agency contract with Moore by implementing the LSA program appears to have been fully and finally litigated in California state court. *See Patricia Adkins Ins. Agency, Inc. v. State Farm Mut. Auto. Ins. Co., 146 Cal. App. 4th 526, 52 Cal. Rptr. 3d 882 (Cal. Ct. App. 2007)* (finding that the LSA program breached the AA4 agreement), *petition for review denied, 2007 Cal. LEXIS 4071 (Cal. Apr. 18, 2007)*. However, until the preclusive effect, if any, of the *Adkins* case on the claims in the instant litigation can be determined, the Court will defer consideration of several outstanding motions that address issues of liability filed by parties that were litigants in the *Adkins* case.

[3] However, Moore's claim for intentional infliction of emotional distress upon the corporate agency was dismissed.

Complaint, and (2) issued a preliminary injunction sealing Exhibits C and D and prohibiting Moore from disclosing certain proprietary information. *See* Moore v. State Farm Mut. Auto. Ins. Co., No. 03-2390, 2005 U.S. Dist. LEXIS 2444, 2005 WL 399395 (E.D. La. Feb. 14, 2005). The Second Amended Complaint has now been dismissed in its entirety. *See* Minute Entry **[**9]** dated June 22, 2005 (Rec. Doc. 122); Minute Entry dated April 12, 2006 (Rec. Doc. 250).

On June 22, 2005, Judge Livaudais granted in part Moore's request for injunctive relief (Rec. Doc. 57), enjoining State Farm from interfering with his right to conduct insurance agency business in Louisiana. *See* Rec. Doc. 122. The next day, the Court also found that the names, addresses, and general policy information of State Farm's insureds are not trade secrets, but did not specifically address Moore's request that State Farm be enjoined from restraining individual insureds from using such information. *See* Moore v. State Farm Mut. Auto. Ins. Co., No. 03-2390, 2005 U.S. Dist. LEXIS 13409 , 2005 WL 1573938 (E.D. La. June 23, 2005). State Farm took an interlocutory appeal and the United States Court of Appeals for the Fifth Circuit vacated part of the June 23, 2005 Order and Reasons and has remanded for consideration of whether Moore has standing to seek injunctive relief on behalf of State Farm's insureds. *See* Moore v. State Farm Mut. Auto. Ins. Co., 205 F. App'x 218 (5th Cir. 2006). The Fifth Circuit declined to address Judge Livaudais' finding that the policyholder information is not **[**10]** a trade secret.

On June 22, 2005, Moore was also granted leave to file a Third Amended Complaint, which added twenty-eight new factual allegations in support of eight new **[*820]** counts against State Farm and several new defendants, including Mary Bitzer, a State Farm corporate officer, and Fortis Insurance Company. [4] On June 7, 2006, the Court granted in part State Farm's motion to dismiss certain allegations in the Third Amended Complaint. *See* Moore v. State Farm Mut. Auto. Ins. Co., 439 F. Supp. 2d 615 (E.D. La. 2006), *reconsideration denied,* 2006 U.S. Dist. LEXIS 54560, 2006 WL 2067714 (E.D. La. July 19, 2006).

In response, State Farm has asserted a counterclaim against Mr. Moore, his corporation, and his wife Blanche Moore (collectively, now, "Plaintiffs"). In the counterclaim, State Farm alleges that the Plaintiffs intentionally converted **[**11]** insurance policies written and serviced by State Farm and sold their interest in such policies to an independent insurance agency owned and operated by Mrs. Moore. State Farm further alleges that the Plaintiffs printed and improperly removed copies of thousands of pages of policyholder information to their home. State Farm seeks several declarations that the Plaintiffs breached their contractual obligations by virtue of these activities and requests associated injunctive relief.

Lastly, the Plaintiffs filed a separate action in this District on July 7, 2006, seeking a declaration that they are entitled to indemnity and defense coverage from their insurers American Home Assurance Company and State Farm Fire & Casualty Company for the claims made against them by the other State Farm entities in the underlying consolidated litigation. The Plaintiffs' requests for coverage have repeatedly been denied by both insurers, forcing the Plaintiffs to finance this litigation themselves.

II. LAW & ANALYSIS

There are multiple outstanding motions in this litigation. As noted, the Court will defer consideration of several motions on questions of liability, as the parties are currently **[**12]** briefing the issue of whether the related California state-court litigation has any preclusive effect on the instant cases. [5] However, a number of motions can be resolved at this time. The Court will address these motions separately and issue its respective orders at the end of each subsection. The Court will conclude by summarizing all of its orders in one location.

---

[4] However, the Court struck that portion of the first paragraph of the Third Amended Complaint which sought to add as party defendants unspecified State Farm subsidiaries.

[5] Specifically, the Court defers ruling on the following motions: Rec. Doc. 338, Rec. Doc. 345, Rec. Doc. 359, Rec. Doc. 382, Rec. Doc. 396, Rec. Doc. 413, Rec. Doc. 431, Rec. Doc. 459, and Rec. Doc. 490.

A. Remand of June 23, 2005 Order and Reasons

The Fifth Circuit has remanded Judge Livaudais' Order and Reasons dated June 23, 2005 (Rec. Doc. 123), which discusses, among other things, Moore's Motion for Injunctive Relief (Rec. Doc. 57) and State Farm's Motion to Strike Motion for Injunctive Relief (Rec. Doc. 72). In addition, State Farm has filed two motions with respect to these issues: (1) a Motion to Vacate (Rec. Doc. 433) the preliminary **[**13]** injunction granting the relief requested in Paragraph A of Moore's motion and (2) a Motion to Set Oral Argument (Rec. Doc. 435) concerning Paragraph C of Moore's motion (Rec. Doc. 435). [6]

[*821] ***1. Paragraph A***

At the original hearing on Moore's motion, Judge Livaudais granted the relief requested in Paragraph A, prohibiting "any interference by State Farm in the right of Moore and/or the Moore Agency to conduct insurance agency business as licensed insurance agents in the state of Louisiana." With respect to Paragraph A, the Fifth Circuit has held that State Farm failed to preserve its objection to the granting of this relief. *See* *Moore v. State Farm Mut. Auto. Ins. Co., 205 F. App'x 218, 219 (5th Cir. 2006)*. Accordingly, this Court will not revisit Paragraph A of Moore's **[**14]** motion, and instead will allow the preliminary injunction to stay in place pending a final resolution of this case on the merits. Therefore, IT IS ORDERED that State Farm's Motion to Vacate (Rec. Doc. 433) is DENIED.

2. Paragraph C

In Paragraph C, Moore sought to enjoin State Farm from restraining "the use by individual customers of their name, address or policy information which State Farm contends is 'trade secrets' that have been released to third parties, released to Moore for use in the NFIP Insurance Program and are therefore no longer subject to any claim of trade secrecy." Judge Livaudais discussed this request, but found that "the names, addresses and general policy information of State Farms' insureds belong to the insureds. Each insured may disclose that information at will, and to anyone for any purpose." *See* *Moore v. State Farm Mut. Auto. Ins. Co., No. 03-2390, 2005 U.S. Dist. LEXIS 13409, 2005 WL 1573938, at *2 (E.D. La. June 23, 2005)*. Thus, Judge Livaudais "granted in part" Paragraph C of Moore's motion. However, the Fifth Circuit has vacated this ruling and remanded for clarification. *See* *Moore v. State Farm Mut. Auto. Ins. Co., 205 F. App'x 218, 220-21 (5th Cir. 2006)*. **[**15]** [7]

As the Fifth Circuit noted, "the only relief Moore sought under paragraph C was to prohibit State Farm from restraining the use by individual customers of their own policy information." *See* *Moore v. State Farm Mut. Auto. Ins. Co., 205 F. App'x 218, 220 (5th Cir. 2006)*. ***HN1***[] Although a district court "can grant injunctive relief to non-parties," it may only do so "if necessary to give the named plaintiffs the continuing relief to which they are entitled." *Great W. Directories, Inc. v. Sw. Bell Tel. Co., 63 F.3d 1378, 1391 (5th Cir. 1995)*. This Court agrees with Judge Livaudais' conclusion that Moore would not have been entitled to injunctive relief even if he had sought to enjoin "State Farm from enforcing the contractual provisions that prohibit *plaintiffs* from using **[**16]** [customer information] to solicit business from State Farm's insureds." *2005 U.S. Dist. LEXIS 13409, 2005 WL 1573938, at *2* (emphasis added). *A fortiori,* Moore cannot obtain such relief for non-parties. Accordingly, IT IS ORDERED that Moore's Motion for Injunctive Relief (Rec. Doc. 57) is DENIED IN PART with respect to Paragraph C, and that State Farm's Motion to Strike (Rec. Doc. 72) is GRANTED IN PART with respect to Paragraph C. IT IS FURTHER ORDERED that State Farm's Motion to Set Oral Argument (Rec. Doc. 435) is DENIED AS MOOT.

[6] To be consistent, the Court will continue to refer to the relief requested in Moore's motion alphabetically by paragraph. To be precise, Moore requests relief in various subparagraphs of section XXVII of his motion.

[7] Judge Livaudais denied Moore's remaining requests for relief in Paragraphs B, D, E, F, and G of his motion by granting State Farm's motion to strike. These rulings have not been challenged and remain in place.

B. Fortis Appointment and Termination

As noted above, in July 2000 State Farm began to market and sell individual health **[*822]** insurance policies underwritten by Fortis Insurance Company. Moore was appointed to sell such policies, but allegedly without his knowledge or consent. In 2003, following the above disputes with State Farm, Fortis terminated Moore's appointment to sell its products as well. Moore has asserted various claims against both State Farm and Fortis with respect this separate appointment and termination. Fortis now moves for summary judgment on all of Moore's claims against it.

HN2[] Summary judgment will be granted only if the pleadings, depositions, **[**17]** answers to interrogatories, and admissions, together with affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56*. ***HN3***[] When considering a motion for summary judgment, the Court must "review the facts drawing all inferences most favorable to the party opposing the motion." *Gen. Universal Sys., Inc. v. Lee, 379 F.3d 131, 137 (5th Cir. 2004)*. ***HN4***[] If the party moving for summary judgment demonstrates the absence of a genuine issue of material fact "the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Willis v. Roche Biomedical Lab., 61 F.3d 313, 315 (5th Cir. 1995)*.

In Count 11 of Moore's Amended and Restated Complaint, he alleges that State Farm and Fortis violated both federal and state ***antitrust law***:

> State Farm and Fortis Insurance Company committed an act of boycott when it conspired to restrain trade by terminating Moore's agency appointment with Fortis. This termination resulted in an unreasonable restraint of Moore's agency's health **[**18]** insurance sales. Since the termination of Moore's agency's appointment with Fortis, its clients have been denied access to health insurance which has resulted in damage to competition in the health insurance market. Moore's agency can no longer provide health insurance to its clients or prospective clients in his geographical market area.

(Am. & Restated Compl. P EEE.) [8] The only other allegation against Fortis appears in Count 16 of the Third Amended Complaint, which seeks "damages from both State Farm and Fortis for their actions terminating the authority of Moore and/or the Moore Agency to sell health insurance at the direction of State Farm for reasons that are totally unrelated to the contracts comprising the law between the parties." The Court previously found that, taking the allegations in Moore's four complaints together, "his claims against Fortis pass *Rule 8(a)* muster." *See* Order and Reasons dated March 15, 2006, at 6 (Rec. Doc. 222).

[19]** Moore contends that pursuant to *Fashion Originators' Guild of America v. Federal Trade Commission, 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949, 32 F.T.C. 1856 (1941)*, a *per se* rule of illegality should apply to the allegations of group boycott in this case, presumably because he views the alleged restraint as a horizontal combination, rendering proof of anticompetitive effects unnecessary. However, for the most part, Moore relies on populist era case law that is no longer controlling. Regardless, the Court finds that this case "contains no horizontal aspect, but involves only a vertical action undertaken by suppliers, the insurance company defendants, against **[*823]** their agent." *Blackburn v. Crum & Forster, 611 F.2d 102, 104 (5th Cir. 1980)*.

Moreover, ***HN5***[] "the *per se* rule has not been applied to collective refusals to deal" where "exclusionary or coercive conduct" is not present. *E.A. McQuade Tours, Inc. v. Consol. Air Tour Manual Comm., 467 F.2d 178, 187 (5th Cir. 1972)*; *see also* *Rothery Storage & Van Co. v. Atlas Van Lines, 253 U.S. App. D.C. 142, 792 F.2d 210, 215-16 (D.C. Cir. 1986)* (collecting authorities). The United States Supreme Court has made it clear that "departure from the **[**20]** rule-of-reason standard must be based upon demonstrable economic effect rather than as in

[8] Despite these allegations, Moore did not name Fortis as a defendant in the Amended and Restated Complaint. However, Fortis was named in the Third Amended Complaint, which incorporated all prior allegations by reference. Accordingly, the Court addresses Moore's claims against Fortis in Count 11 on their merits.

Schwinn upon formalistic line drawing." Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977). Accordingly, the Court finds that Moore's antitrust claims in this case are subject to a rule-of-reason analysis. *See, e.g.,* Hood v. Tenneco Texas Life Ins. Co., 739 F.2d 1012, 1017-19 (5th Cir. 1984).

In applying the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Sylvania, 433 U.S. at 49. In general, any potential anticompetitive effect "can only be evaluated by analyzing the facts peculiar to the business, the history of the [alleged] restraint, and the reasons why it was imposed." Nat'l Soc'y of Prof'l Engineers v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978). However, "[i]n an antitrust case . . . summary judgment is still appropriate where the plaintiff does not produce significant probative evidence demonstrating that a genuine issue of (material) fact exists." Carlson Mach. Tools, Inc. v. Am. Tool, Inc., 678 F.2d 1253, 1258 (5th Cir. 1982) **[**21]** (citations omitted).

HN6[] The Supreme Court has stated that with respect to group boycott, "the boycotters and the ultimate target need not be in a competitive relationship with each other." St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 543, 98 S. Ct. 2923, 57 L. Ed. 2d 932 (1978). Indeed, the Supreme Court has also found the Sherman Act to be applicable to "concerted refusals to deal in cases where the target is a customer of some or all of the conspirators who is being denied access to desired goods or services because of a refusal to accede to particular terms set by some or all of the sellers." *Id.* In these circumstances, however, an antitrust injury must "reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977).

Here, it is undisputed that Fortis' share of the individual health insurance market in Louisiana was less than five percent during the years 2001 through 2005. (Berquist Aff. Oct. 27, 2006.) ***HN7***[] The Fifth Circuit has held that as a matter of law, "the termination of a dealer by a supplier lacking market power cannot have an adverse **[**22]** effect on competition." Hood, 739 F.2d at 1018. Moore makes no attempt to redefine the relevant market. In these circumstances, it is "simply not an antitrust violation" for Fortis to terminate its relationship with Moore, "even if the effect of the [termination] is to seriously damage" Moore's business. Burdett Sound, Inc. v. Altec Corp., 515 F.2d 1245, 1249 (5th Cir. 1975).

Accordingly, the Court finds that Moore has "failed to provide adequate evidence of anticompetitive effect to raise a material fact issue and to preclude summary judgment under the rule of reason." Hood, 739 F.2d at 1019. For the same **[*824]** reasons, Moore's antitrust claims also fail under Louisiana state law. *See* Gulf States Land & Dev., Inc. v. Premier Bank N.A., 956 F.2d 502, 508 (5th Cir. 1992). Lastly, Moore's Rule 56(f) request for further discovery also lacks merit, as he has not identified any factual information that might dictate a different result. [9]

[23]** Thus, IT IS ORDERED that Fortis Insurance Company's Motion for Summary Judgment (Rec. Doc. 373) is GRANTED and that all of Moore's claims against Fortis, in both Counts 11 and 16, are hereby DISMISSED WITH PREJUDICE.

C. Coverage Issues

As noted above, the Plaintiffs filed a second lawsuit in July 2006 against American Home Assurance Company ("American Home") and State Farm Fire and Casualty Company ("State Farm F&C"). The Plaintiffs seek a declaration that they are entitled to insurance coverage for the defense and indemnity of the claims asserted by the other State Farm defendants in the underlying consolidated litigation. [10] Specifically, the Plaintiffs seek (1)

---

[9] In denying Fortis' earlier motion to dismiss, the Court did not specifically address the breach of contract allegations in Count 16, focusing instead on Moore's antitrust allegations. *See* Order and Reasons dated March 15, 2006, at 6 (Rec. Doc. 222). However, because Moore has never alleged the existence of a contract with Fortis (indeed the original Fortis appointment is alleged to have been made without Moore's knowledge or consent), the Court finds that the breach of contract claim against Fortis in Count 16 also fails as a matter of law.

attorneys' fees and expenses incurred with regard to State Farm's Motion for Injunctive Relief, filed on December 20, 2004 (Rec. Doc. 31), and associated injunction proceedings, and (2) defense and indemnity with regard to the State Farm counterclaim (Rec. Doc. 158) and amended counterclaim (Rec. Doc. 351). The insurers contend that the respective policies do not provide coverage in this case.

[24]** The Court has already discussed the applicable standards for granting summary judgment. *See supra* Part II.B. ***HN8***[] The interpretation of an insurance contract is typically a question of law that can be properly resolved in a motion for summary judgment. *See Independent Fire Ins. Co. v. Sunbeam Corp., 99-2182 & 99-2257 (La. 2/29/00), 755 So. 2d 226, 230*. ***HN9***[] Under Louisiana law, an insurance policy is an agreement between the parties and is interpreted using ordinary contract principles. *See Reynolds v. Select Props., Ltd., 93-1480 (La. 4/11/94), 634 So. 2d 1180, 1183*. Therefore, when the words of the policy are clear, unambiguously express the intent of the parties, and lead to no absurd consequences, the contract must be enforced as written. *See Cent. La. Elec. Co. v. Westinghouse Elec. Corp., 579 So. 2d 981, 985 (La. 1991)*. If, however, the words of the policy are ambiguous, the ambiguous provision is to be construed against the drafter and in favor of the insured. *See Louisiana Ins. Guar. Ass'n Guar. Ass'n v. Interstate Fire & Casualty Co., 93-911 (La. 1/14/94), 630 So. 2d 759, 763-64*.

1. American Home Assurance Company Policy

The **[**25]** parties have filed cross-motions for summary judgment on the issue of coverage under the American Home policy. During the relevant time periods, American Home issued a professional liability "errors & omissions" insurance policy to Jim Moore Insurance Agency, Inc., bearing Policy No. 18-22-1744, which provides in the insuring agreement that American Home will "pay on behalf of the Insured **[*825]** all sums which the Insured shall become legally obligated to pay as damages because of any claim . . . arising out of . . . [a]ny negligent act, error or omission in rendering or failing to render professional services for others in the Insured's capacity as an Insurance Agent." (Ex. A to American Home's Motion.)

American Home argues that there is no coverage because the claims made by State Farm against the Plaintiffs in its motion for injunctive relief and in its counterclaim will not require the Plaintiffs to pay damages, as required by the policy. In addition, American Home argues that State Farm does not allege negligence by the Plaintiffs in the rendering of professional services for others. The Plaintiffs respond that State Farm seeks damages under article 1997 of the *Louisiana Civil Code* **[**26]** and that State Farm's allegations are sufficient to trigger coverage.

The Court finds, however, that State Farm does not seek damages in this litigation, but only injunctive and declaratory relief. It is undisputed that State Farm did not seek damages by virtue of its Motion for Injunctive Relief, filed on December 20, 2004 (Rec. Doc. 31). Similarly, State Farm does not seek damages in either its counterclaim or amended counterclaim. *See* Counterclaim PP 18, 29; Amended Counterclaim PP 29, 40. The only mention of damages appears in the jurisdictional statement for the joinder of additional counter-defendants, in which State Farm notes that "the amount in controversy, including the value of injunctive relief," exceeds $ 75,000. *See* Counterclaim P 22; Amended Counterclaim P 33. ***HN10***[] "In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 347, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)*. State Farm's attempt to value the injunctive relief sought does not transform its counterclaim into one for damages.

Lastly, the Plaintiffs point to State **[**27]** Farm's answer, which asserts as its twenty-seventh defense that "[p]ursuant to *La. Civ. Code art. 1997*, Defendants are entitled to offset against Plaintiffs' claimed damages any foreseeable or unforeseeable damages that ought to be awarded for Plaintiffs' bad-faith breach of contact." *See* Answer and Affirmative Defenses at 14 (Rec. Doc. 23); First Amended Answer and Affirmative Defenses at 14

---

[10] The Plaintiffs make an ancillary claim for damages as well, seeking reimbursement of past and future expenses associated with the defense of such claims.

(Rec. Doc. 248). ***HN11***[] Article 1997 provides that "an obligor [who acts] in bad faith is liable for all . . . damages, foreseeable or not, that are a direct consequence of his failure to perform." *La. Civ. Code. Ann. art. 1997*.

The Court finds, however, that the Plaintiffs cannot "become legally obligated to pay" damages by virtue of State Farm's set-off affirmative defense, and therefore that this affirmative defense does not trigger coverage under the policy. By pleading article 1997 as an affirmative defense in its answer, and by abandoning any claims under article 1997 in its counterclaim, State Farm has limited its relief under this article to a reduction of the Plaintiffs' damages. At most, State Farm may be entitled to a set-off up to, but not exceeding, the amount of the Plaintiffs' **[**28]** claims. *See* *Myers v. Hurley Motor Co., 273 U.S. 18, 27, 47 S. Ct. 277, 71 L. Ed. 515 (1927)* ("The defense, in effect, is that the plaintiff was guilty of tortious conduct to the injury of the defendant in the transaction out of which his own cause of action arose. In such case it is well settled that the relief is by way of recoupment--that is, that the amount of defendant's damage can be allowed only in abatement or diminution of plaintiff's claim--and that defendant **[*826]** cannot, at least in that action, recover any excess.").

Because the plain language of the American Home policy provides coverage only for "sums which the Insured shall become legally obligated to pay as damages," the Court finds that the Plaintiffs are neither entitled to reimbursement of fees and costs associated with the injunction proceedings nor to indemnity or defense related to State Farm's counterclaim. *See* *Aetna Cas. & Sur. Co. v. Hanna, 224 F.2d 499, 503 (5th Cir. 1955)* (***HN12***[] "The obligation of the insurer to pay is limited to 'damages,' a word which has an accepted technical meaning in law."). [11] Accordingly, IT IS ORDERED that American Home's Motion for Summary Judgment (Rec. Doc. 408) is GRANTED and that **[**29]** the Plaintiffs' Cross-Motion for Summary Judgment (Rec. Doc. 418) is DENIED.

2. State Farm Fire and Casualty Company Policies

The parties have also filed cross-motions for summary judgment on the issue of coverage under the State Farm F&C policies. During the relevant time periods, State Farm F&C provided (1) a business office insurance policy to Jim Moore, bearing Policy Number 98-14-6305-2, (2) a commercial liability umbrella policy to Jim Moore Insurance Agency, Inc., bearing Policy Number 98-CW-7308-6F, (3) a business office insurance policy to Blanche Moore d/ba Moore Insurance Agency, bearing Policy Number 98-CW-0906-8, and (4) a commercial liability umbrella policy to Blanche Moore d/ba Moore Insurance Agency, bearing Policy Number 98-CW-7024-3F. These policies contain the same language as the American Home policy discussed above, providing coverage only for "those sums **[**30]** that the insured becomes legally obligated to pay as damages." *See* Ex. 1-3 to State Farm F& C's Answer (Rec. Doc. 314).

For the reasons discussed above with respect to the American Home policy, the Court also finds that there is no coverage under the State Farm F&C policies. Accordingly, IT IS ORDERED that State Farm Fire and Casualty Company's Motion for Summary Judgment (Rec. Doc. 427) is GRANTED, and that the Plaintiffs' Cross-Motion for Summary Judgment (Rec. Doc. 436) is DENIED.

D. Plaintiffs' Motion to Strike Testimony

The Plaintiffs move the Court to strike the testimony elicited from Grant Gravois, a State Farm employee who oversaw Moore's geographical region, by State Farm's counsel after stopping Gravois' deposition to allegedly coach the witness. The Plaintiffs argue that this violated *Rule 30(d)(1) of the Federal Rules of Civil Procedure*, and that pages 207:12 through 209:5 of Mr. Gravois' deposition testimony should be stricken. However, the Court finds that whether or not the witness was coached is a matter to be explored on cross-examination and ultimately weighed by the finder of fact. Accordingly, IT IS ORDERED that the Plaintiffs' Motion to Strike **[**31]** Testimony (Rec. Doc. 354) is DENIED.

---

[11] Thus, the Court need not address whether or not State Farm's allegations relate to the provision of professional services.

III. CONCLUSION

To summarize, the Court issues the following orders for the foregoing reasons:

(1) IT IS ORDERED that State Farm's Motion to Vacate (Rec. Doc. 433) is DENIED.

[*827] (2) IT IS ORDERED that Moore's Motion for Injunctive Relief (Rec. Doc. 57) is DENIED IN PART with respect to Paragraph C, and that State Farm's Motion to Strike (Rec. Doc. 72) is GRANTED IN PART with respect to Paragraph C. IT IS FURTHER ORDERED that State Farm's Motion to Set Oral Argument (Rec. Doc. 435) is DENIED AS MOOT.

(3) IT IS ORDERED that Fortis Insurance Company's Motion for Summary Judgment (Rec. Doc. 373) is GRANTED and that all of Moore's claims against Fortis, in both Counts 11 and 16, are hereby DISMISSED WITH PREJUDICE.

(4) IT IS ORDERED that American Home's Motion for Summary Judgment (Rec. Doc. 408) is GRANTED and that the Plaintiffs' Cross-Motion for Summary Judgment (Rec. Doc. 418) is DENIED.

(5) IT IS ORDERED that State Farm Fire and Casualty Company's Motion for Summary Judgment (Rec. Doc. 427) is GRANTED, and that the Plaintiffs' Cross-Motion for Summary Judgment (Rec. Doc. 436) is DENIED.

(6) IT IS ORDERED **[**32]** that the Plaintiffs' Motion to Strike Testimony (Rec. Doc. 354) is DENIED.

New Orleans, Louisiana, this 4th day of May, 2007.

Eldon E. Fallon

UNITED STATES DISTRICT JUDGE

Teague v. Bayer AG

North Carolina Superior Court, Buncombe County

May 7, 2007, Decided

05 CVS 90

Reporter

2007 NCBC 12 *; 2007 NCBC LEXIS 14 **

MITCHELL TEAGUE, on behalf of himself and all others similarly situated, Plaintiff, v. BAYER AG; BAYER POLYMERS, LLC, n/k/a BAYER MATERIALSCIENCE, LLC; BAYER CORPORATION; CROMPTON CORPORATION; UNIROYAL CHEMICAL COMPANY, INC., n/k/a CROMPTON MANUFACTURING COMPANY, INC.; THE DOW CHEMICAL COMPANY; E.I. DUPONT DE NEMOURS & COMPANY; DUPONT DOW ELASTOMERS, L.L.C.; DSM COPOLYMER, INC.; DSM ELASTOMERS EUROPE, B.V.; EXXON MOBIL CHEMICAL, a division or subsidiary of EXXON MOBIL CORP., Defendants.

Subsequent History: Reversed by, Remanded by *Teague v. Bayer AG, 2009 N.C. App. LEXIS 58 (N.C. Ct. App., Jan. 20, 2009)*

Core Terms

purchaser, indirect, settlement, products, manufacturer, cy pres, consumers, distributions, cases, motion to dismiss, chain, factors, courts, Chemical, damages, funds, class member, class action, amended complaint, anti trust law, public policy, Defendants', speculative, rubber, liner, pond, nationwide, retailers, parties, prices

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

When ruling on a motion to dismiss under N.C. R. Civ. P. 12(b)(6), the court must determine whether, as a matter of law, the allegations of the complaint are sufficient to state a claim upon which relief may be granted. In making its decision, the court must treat the allegations in the complaint as true. The court must construe the complaint liberally and must not dismiss the complaint unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. When considering a motion under Rule 12(b)(6), the court is not required to accept as true any conclusions of law or unwarranted deductions of fact in the complaint. When the complaint fails to allege the substantive elements of some legally cognizable claim, or where it alleges facts which defeat any claim, the complaint should be dismissed under Rule 12(b)(6).

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

Civil Procedure > ... > Justiciability > Standing > General Overview

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

A motion to dismiss a party's claim for lack of standing is tantamount to a motion to dismiss for failure to state a claim upon which relief can be granted according to N.C. R. Civ. P. 12(b)(6).

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN3[] **Standing, Injury in Fact**

The doctrine of standing is usually considered in the context of federal jurisdiction under U.S. Const. art. III. State of North Carolina courts use the term standing to refer generally to a party's right to have a court decide the merits of a dispute. A court may not properly exercise subject matter jurisdiction over the parties to an action unless the standing requirements are satisfied. The requirements are as follows: (1) injury in fact, an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN4[] **Purchasers, Indirect Purchasers**

The United States Supreme Court holds that states may allow indirect purchaser standing if they so choose in antitrust actions.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

HN5[] **Purchasers, Indirect Purchasers**

See *N.C. Gen. Stat. § 75-16* (2005).

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN6[] **Purchasers, Indirect Purchasers**

Factors to recognize indirect purchaser standing in antitrust actions include: 1. Whether the plaintiff is a consumer or competitor in the allegedly restrained market. That inquiry focuses on the market the alleged restraint was designed to impact and the intent of the actor in engaging in the restraint. One key question is whether the plaintiff claims injury in a market collateral to the market in which the alleged restraint took place. 2. The directness of the impact on the plaintiff. Being an indirect purchaser does not preclude standing. The causal connection between the act and the claimed injury cannot be too remote. 3. Whether there exist other indirect purchasers in the distribution chain who are more directly impacted by the alleged violation. 4. The speculative nature of the damage claims. 5.

The risk of duplicative recovery and danger of complex apportionment of damages. The application of those factors is a fact-intensive exercise. The relative importance of any single factor may vary considerably from case to case.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

HN7[] **Purchasers, Indirect Purchasers**

Recognizing that the antitrust laws are designed to see that customers in the relevant market get the benefit of price competition, the first step is to identify the relevant market.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN8[] **Purchasers, Indirect Purchasers**

A test to determine the scope of indirect purchaser standing has been established that recognizes that there is a boundary beyond which claims are too remote in antitrust suits. That is similar to the concept of proximate cause in the law of torts. The analysis centers on the length and complexity of the distribution chain. The nature of the item can influence the directness of the impact on the price of the end product at retail. The smaller the component, the less likely there will be impact on the final price.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN9[] **Purchasers, Indirect Purchasers**

Examination of the factor of whether other direct purchasers are more directly impacted in an antitrust suit is a factor meant to avoid a double recovery. State courts should focus that inquiry on whether or not the existence of other indirect purchasers in the chain of distribution gives rise to other claims against the fund representing the amount by which the price of the retail item has been artificially inflated. The potential for long distribution chains makes that inquiry easier. In long distribution chains, there are likely to be distributors and retailers who may have a claim that they absorbed some or all of the price increase, rather than passing it along to a plaintiff.

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN10[] **Special Proceedings, Class Actions**

See *N.C. Gen. Stat. § 1-267.10(a)*(2005).

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN11[] **Special Proceedings, Class Actions**

N.C. Gen. Stat. § 1-267.10(a)(2005) requires the parties to report to the court the total amount actually paid to class members. After receiving that report, the court shall direct the defendant to pay the sum of the unpaid residue, to be divided and credited equally, to the Indigent Person's Attorney Fund and to the North Carolina State Bar for the provision of civil legal services for indigents. § 1-267.10(b). Although the statute does not directly address cy pres distributions in which there are no payments made to class members, a trial court believes the public policy regarding unpaid residuals is also applicable to cy pres distributions which have no relationship with the class victimized by the violations. When cy pres distributions are approved by judges sitting in distant jurisdictions, there is an acute danger that the settlement funds will not further the purposes of the underlying causes of action or promote justice for all citizens of the State of North Carolina. § 1-267.10(a).

Business & Corporate Compliance > ... > Trusts > Trust Administration > Construction & Interpretation of Trusts

HN12[] **Trust Administration, Construction & Interpretation of Trusts**

In trust law, cy pres is a rule of construction which courts employ to carry out the spirit of a trust's terms when literal application of such terms is not feasible.

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN13[] **Special Proceedings, Class Actions**

In the context of class actions, courts have utilized cy pres distributions where class members are difficult to identify, or where they change constantly, or where there are unclaimed funds. In these cases, the court, guided by the parties' original purpose, directs that the unclaimed funds be distributed for the indirect prospective benefit of the class.

Counsel: [1]** Wimer & Jobe by Michael G. Wimer; Forman Rossabi Black, P.A. byAmiel J. Rossabi; Law Offices of Isaac L. Diel by Issac L. Diel; Weinstein, Kitchenoff Scarlato, Karon & Goldman, Ltd. by Daniel R. Karon; Law Office of Krishna B. Narine by Krishna B. Narine; Schriffrin & Barroway, LLP by Stephen E. Connolly; Gunderson, Sharp & Walke, P.C. by Rex Sharp for Plaintiff Mitchell Teague.

Mayer, Brown, Rowe & Maw LLP by Mary K. Mandeville, W.C. Turner Herbert, Gary A. Winters, Andrew S. Marovitz, and Britt M. Miller for Defendants DSM Copolymer, Inc. and DSM Elastomers Europe, B.V.

Nelson, Mullins, Riley & Scarborough, LLP by Joseph W. Eason and Christopher J. Blake; O'Melveny & Myers LLP by Ian Simmons and Benjamin G. Bradshaw for Defendants Chemtura (f/k/a Crompton) Corporation and Uniroyal Chemical Company, Inc.

Pinto, Coates, Kyre & Brown, PLLC by Richard L. Pinto; Weil, Gotschal & Manges, LLP by James W. Quinn, Steven Alan Reiss, and Christopher V. Roberts for Defendant ExxonMobil Chemical Company.

Judges: Tennille, Judge.

Opinion by: Tennille

Opinion

ORDER ON MOTION TO DISMISS SECOND AMENDED COMPLAINT AND FOR APPROVAL OF DISMISSAL OF CLASS ACTION CLAIMS

[*1] This case arises **[**2]** out of Plaintiff's suit for damages under *sections 75-1* and *75-1.1 of the General Statutes of North Carolina*. This matter comes before the Court on certain Defendants' Motion to Dismiss Second Amended Complaint Under Rule 12(b)(6) and Plaintiff's motions to dismiss his North Carolina class action allegations against some defendants as a result of a multistate settlement agreement presided over by the courts of the State of Tennessee.

[*2] After considering the briefs and oral arguments, the Court GRANTS Defendants' Motion to Dismiss on the grounds that Plaintiff lacks standing to pursue the action. With grave reservations and the firm belief that the class representative and his counsel have done little for the citizens of North Carolina, the Court GRANTS Plaintiff's motions to dismiss his class action allegations against the Bayer, Dow, and DuPont Defendants.

Tennille, Judge.

I.

DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT UNDER RULE 12(b)(6)

A.

FACTUAL AND PROCEDURAL BACKGROUND

1.

THE PARTIES

[*3] This case involves alleged price fixing of a synthetic rubber known as ethylene propylene diene monomer, or "EPDM." Defendants are all involved in the manufacture, **[**3]** distribution, marketing, or sale of EPDM.

[*4] Plaintiff Mitchell Teague is a citizen and resident of the State of North Carolina. Plaintiff purchased EPDM roofing material and pond liner manufactured, marketed, distributed, or sold by one or more of the Defendants. Plaintiff also purchased at least one vehicle with EPDM components during the relevant time. He brings this claim individually and on behalf of all other North Carolinians who purchased products containing EPDM from 1994 until 2002. He has held himself out to be a person suitable to represent the interests of his fellow citizens. His counsel have likewise held themselves out to be suitable advocates for the interests of the North Carolina class members.

[*5] Defendant Bayer AG is a corporation organized and existing under the laws of the Federal Republic of Germany, with its principal place of business located in Leverkusen, Germany. Bayer AG is a management holding company that oversees operations for some 350 companies worldwide. The global enterprise operates in the fields of health care, nutrition, and high technology materials.

[*6] Defendant Bayer Polymers, LLC (n/k/a Bayer MaterialScience, LLC) **[**4]** is a limited liability company organized and existing under the laws of the State of Delaware, with its principal place of business located in Pittsburgh, Pennsylvania. Bayer MaterialScience, LLC is a subsidiary of Bayer AG.

[*7] Defendant Bayer Corporation is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal place of business located in Pittsburgh, Pennsylvania. Bayer Corporation is a wholly owned subsidiary of Bayer AG.

[*8] Defendant Crompton Corporation merged with Great Lakes Chemical Corporation in 2005 to form Chemtura Corporation. Chemtura is a global enterprise that manufactures and markets specialty chemicals for a variety of uses. The company is headquartered in Middlebury, Connecticut.

[*9] Defendant Uniroyal Chemical Company, Inc. merged with Crompton & Knowles Corporation in 1996, became part of Crompton Corporation in 1999, and is now part of Chemtura.

[*10] Defendant Dow Chemical Company is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Midland, Michigan.

[*11] Defendant E.I. DuPont De Nemours & Company ("DuPont") **[**5]** is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Wilmington, Delaware.

[*12] Defendant DuPont Dow Elastomers, LLC was a joint venture of Defendants DuPont and Dow at times relevant to this action. Dow withdrew from the partnership in 2005. DuPont operates the remaining businesses under the name DuPont Performance Elastomers.

[*13] Defendant DSM Elastomers Europe, B.V. is part of a global operation headquartered in the Netherlands.

[*14] Defendant DSM Copolymer, Inc. is part of the DSM global operation, with its principal place of business in Baton Rouge, Louisiana. [1]

[6]** **[*15]** Defendant ExxonMobil Chemical Company is an entity organized and existing under the laws of the State of New Jersey with its principal place of business in Irving, Texas. ExxonMobil Chemical is a division or subsidiary of ExxonMobil Corporation.

2.

PROCEDURAL BACKGROUND

[*16] Plaintiff filed the Complaint in this action in Buncombe County Superior Court on April 2, 2004. Plaintiff filed the First Amended Complaint on December 23, 2004. The case was designated complex business and assigned to the undersigned Special Superior Court Judge for Complex Business Cases by order of the Chief Justice of the Supreme Court of North Carolina dated March 15, 2005.

[*17] Defendants filed motions to dismiss the original and first amended complaints in the summer of 2004 and winter of 2005. The Court heard oral arguments on the motions on November 21, 2005. Following the hearing, the Court entered an order giving Plaintiff an opportunity to plead facts with more precision. (Order, Nov. 22, 2005.) Plaintiff filed the Second Amended Complaint on December 8, 2005. In January of 2006, Defendants renewed their motions to dismiss.

[*18] This order addresses the Motion to **[**7]** Dismiss the Second Amended Complaint under Rule 12(b)(6) of Defendants DSM Copolymer, Inc., Chemtura Corporation (successor by merger to Crompton Corporation and Uniroyal Chemical Company, Inc.), and ExxonMobil Chemical Company. This order also addresses the Motion of Defendant DSN Elastomers Europe B.V. to Dismiss Second Amended Complaint under Rules 12(b)(2) and 12(b)(6).

3.

PLAINTIFF'S ALLEGATIONS

[*19] Plaintiff alleges the following facts in his Second Amended Complaint:

[*20] As noted above, Defendants are involved in the manufacture, distribution, marketing, or sale of EPDM. (2d Am. Compl. PP 1, 25.) EPDM is a synthetic rubber with many and varied applications. (*Id.* PP 21, 23.) It is a "commodity product that is fungible among grades." (*Id.* P 24.) EPDM itself is not a consumer product. Rather, it is a component found in many consumer products. The amount of EPDM in a given product varies depending on the nature of the product. For example, "[t]he EPDM roofing material purchased by Plaintiff and other Class Members is believed to contain at least 90% EPDM" and "[t]he tires, window molding, hoses, and other rubber products purchased by Plaintiff and other **[**8]** Class members is [sic] believed to include 1% or more EPDM." (*Id.* P 36.)

---

[1] DSM Elastomers Holding Company, Inc., DSM Elastomers, Inc. and DSM Elastomers Americas were originally parties to this action. By stipulation filed May 20, 2004, Plaintiff dismissed these three entities and substituted DSM Copolymer, Inc. (Notice of Dismissal Without Prejudice and Stipulation Re: Tolling and Acceptance of Service 1-2.) DSM Copolymer, Inc. and DSM Elastomers Europe, B.V. are the only DSM-related parties currently involved as defendants in this action.

The crux of Plaintiff's allegations is that the Defendants "engaged in a combination, conspiracy and scheme to suppress and eliminate competition by fixing the price of EPDM sold in the United States and elsewhere." (*Id.* P 27.) The conspiracy "consisted of a continuing agreement, understanding and concerted action among Defendants and co-conspirators." (*Id.* P 28.) The Defendants allegedly colluded to issue price announcements, allocate markets and customers among themselves, and actively conceal their uncompetitive actions from consumers in North Carolina. (*Id.* P 30.) These alleged actions are under investigation by antitrust authorities in the United States, Canada, and Europe. (*Id.* PP 32, 34.)

[*21] As a result of Defendants' conduct, Plaintiff and other consumers "have been forced to pay higher and supracompetitive prices for EPDM and were deceived and treated unfairly and unethically in their purchases of EPDM." (*Id.* P 44.) Plaintiff paid these "supracompetitive prices" when he "purchased EPDM roofing material and pond liner manufactured, distributed, and/or sold by one or more **[**9]** of the Defendants." (*Id.* P 35.) Plaintiff also purchased "at least one vehicle, components of which contain Defendants' EPDM." (*Id.*) Plaintiff claims that he and other North Carolina class members absorbed all of the supracompetitive portion of the price because "middlemen passed on 100% or more of the overcharge from the Defendants." (*Id.* P 37.)

[*22] In sum, Plaintiff claims that "Defendants were parties to an illegal cartel, agreement, contract, combination, scheme and/or conspiracy designed to fix, raise, stabilize and maintain the price for EPDM" and conceal their conduct from consumers. (*Id.* P 49.) "Defendants' contract, combination, scheme and/or conspiracy restrained trade or commerce in the State of North Carolina and affected commerce in North Carolina." (*Id.*) Plaintiff seeks "actual damages, treble damages, plus costs, pre- and post-judgment interest and attorneys' fees" under *sections 75-1* and *75-1.1 of the General Statutes of North Carolina*. (*Id.* PP 48, 55.) These provisions make combinations in restraint of trade and unfair methods of competition illegal. *N.C. Gen. Stat. §§ 75-1*, *75-1.1* (2005).

B.

MOTION TO DISMISS

1.

LEGAL STANDARD

[10]** **[*23]** The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the pleading against which the motion is directed. *Sutton v. Duke, 277 N.C. 94, 99, 176 S.E.2d 161, 163 (1970)*. In *Branch Banking & Trust Co. v. Lighthouse Financial Corp., 2005 NCBC 3 (N.C. Super. Ct. July 13, 2005)*, *http://www.ncbusinesscourt.net/opinions/2005%20NCBC%203.htm*, this Court summarized the 12(b)(6) standard as follows:

> ***HN1***[] When ruling on a motion to dismiss under Rule 12(b)(6), the court must determine "whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted." In making its decision, the court must treat the allegations in the complaint as true. The court must construe the complaint liberally and must not dismiss the complaint unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. When considering a motion under Rule 12(b)(6), the court is not required to accept as true any conclusions of law or unwarranted deductions of fact in the complaint. When the complaint fails **[**11]** to allege the substantive elements of some legally cognizable claim, or where it alleges facts which defeat any claim, the complaint should be dismissed under Rule 12(b)(6).

Branch Banking & Trust Co., 2005 NCBC 3 P8 (citations omitted). In this case, it is also relevant that "[***HN2***[] a] motion to dismiss a party's claim for lack of standing is tantamount to a motion to dismiss for failure to state a claim upon which relief can be granted according to Rule 12(b)(6)." *Slaughter v. Swicegood, 162 N.C. App. 457, 464, 591 S.E.2d 577, 582 (2004)*.

2.

STANDING

[*24] ***HN3***[] The doctrine of standing is usually considered in the context of federal jurisdiction under Article III of the United States Constitution. North Carolina state courts use the term "standing" to "refer generally to a party's right to have a court decide the merits of a dispute." *Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002)*. A court may not properly exercise subject matter jurisdiction over the parties to an action unless the standing requirements are satisfied. *Aubin v. Susi, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002).* **[**12]** The requirements are as follows:

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

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). With its concern over conjectural injuries and speculative damage awards, standing is frequently an issue in indirect purchaser cases such as this one. [2] The goal of the detailed analytical framework described below is to determine if indirect purchaser plaintiffs meet the broad standing requirements.

[13]** 3.

INDIRECT PURCHASER CASES IN FEDERAL COURT

[*25] In *Hanover Shoe Co. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*, and *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, the United States Supreme Court addressed the issue of standing for indirect purchasers under federal ***antitrust law***. *Hanover Shoe* was a suit by a shoe manufacturer against a manufacturer of shoe machinery. *392 U.S. at 483*. In defending the treble damage suit, United argued that Hanover suffered no injury because it simply passed the illegal overcharges on to its customers. *Id. at 487-88*. The Supreme Court rejected this "passing-on" defense, and held that a direct purchaser was entitled to damages regardless of the actual injury. *Id. at 488*.

[*26] In *Illinois Brick,* the State of Illinois brought suit as an indirect purchaser against a manufacturer and distributor of concrete block. *431 U.S. at 726*. The issue was whether the "pass on" theory "may be used offensively by an indirect purchaser plaintiff against an alleged violator." *Id.* Justice White, writing for the Court as he did in *Hanover* **[**14]** *Shoe,* declined to construe the federal antitrust laws to allow for indirect purchaser suits. *Id. at 736*. With these two cases, the federal judiciary has decided "that the direct purchaser suit is on balance a more effective instrument for enforcement of the antitrust rule prohibiting price fixing than the indirect purchaser suit." *Crouch v. Crompton Corp., 2004 NCBC 7 P30 (N.C. Super. Ct. Oct. 26, 2004)*, *http://www.ncbusinesscourt.net/OtherRefdocs/2004%20NCBC%207.htm; see also* William Landes & Richard Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. Chi. L. Rev. 602, 634-35 (1979).

4.

INDIRECT PURCHASER CASES IN STATE COURTS

[*27] Dissatisfied with the federal policy, some states enacted new statutes or interpreted existing statutes to allow indirect purchasers to recover under state antitrust laws. *See* *Crouch, 2004 NCBC 7 P31*. These state policies favoring indirect purchaser recovery were challenged, but in *California v. ARC America Corp., 490 U.S. 93, 109 S.*

---

[2] Indirect purchaser causes of action are generally based upon claims that the defendants conspired to fix prices in violation of the antitrust laws. They are indirect in the sense that the plaintiff did not purchase the price-fixed product directly from a defendant but rather purchased the product further down in the distribution chain or purchased a product in which the price-fixed product was either used as a component or consumed in the manufacturing process.

Ct. 1661, 104 L. Ed. 2d 86 (1989), **HN4**[] the Supreme Court held that states **[**15]** may allow indirect purchaser standing if they so choose. Id. at 105-06. As this Court has previously discussed, the differences in the federal and state policies regarding indirect purchasers create a number of problems. *See* Adams v. Aventis, S.A., 2003 NCBC 7 P23 (N.C. Super. Ct. Aug. 26, 2003), http://www.ncbusinesscourt.net/opinions/2003%20NCBC%207.htm. Despite these problems, this system of dual enforcement is the law today, and the Court must work within it.

5.

INDIRECT PURCHASER CASES IN NORTH CAROLINA

[*28] The section of North Carolina's General Statutes that gives rise to a number of indirect purchaser cases is 75-16, which states as follows:

> **HN5**[] If any person shall be injured or the business of any person, firm, or corporation shall be broken up, destroyed, or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm, or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the **[**16]** amount fixed by the verdict.

N.C. Gen. Stat. § 75-16 (2005). In Hyde v. Abbott Lab., 123 N.C. App. 572, 473 S.E.2d 680 (1996), the North Carolina Court of Appeals interpreted section 75-16 to allow indirect purchasers to sue manufacturers for antitrust violations. Id. at 584, 473 S.E.2d at 688. *Hyde* was a class action against manufacturers of infant formula alleging violations of state antitrust laws. Id. at 573, 473 S.E.2d at 681. Plaintiffs were consumers who purchased the formula from retailers and distributors. Id. at 574, 473 S.E.2d at 681-82. The trial court granted defendants' motion to dismiss for lack of standing, but the Court of Appeals reversed. Id. at 584, 473 S.E.2d at 688. Although *Hyde* established indirect purchaser standing in North Carolina, it did not delineate the scope and breadth of standing under the statute. In *Crouch v. Crompton Corp.,* this Court noted several important developments since *Hyde* and set certain boundaries for indirect purchaser standing. The most important of these developments was a 1996 amendment to the North Carolina antitrust **[**17]** statutes revising those provisions to be "internally consistent and consistent with federal antitrust laws." Act of June 3, 1996, ch. 550, 1995 N.C. Sess. Laws 550. This legislative signal required the Court to reconcile the indirect purchaser standing statute with federal standing requirements. Crouch, 2004 NCBC 7 P49.

[*29] The leading federal case on standing in cases such as this is Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983) *(AGC).* In *AGC,* the United States Supreme Court adopted a five factor standing test. In *Crouch,* this Court modified the *AGC* **HN6**[] factors to recognize indirect purchaser standing. *See* Crouch, 2004 NCBC 7 PP66-74. Those factors were described in *Crouch* as follows:

> 1. Whether the plaintiff is a consumer or competitor in the allegedly restrained market. This inquiry focuses on the market the alleged restraint was designed to impact and the intent of the actor in engaging in the restraint. One key question is whether the plaintiff claims injury in a market collateral to the market in which the alleged restraint **[**18]** took place. This factor recognizes that the antitrust laws are designed to see that customers in the relevant market get the benefit of price competition. This factor would have supported standing in *Hyde.*
>
> 2. The directness of the impact on the plaintiff. This factor is modified to eliminate the restriction of *Illinois Brick* against indirect purchaser standing. Being an indirect purchaser does not preclude standing. However, the causal connection between the act and the claimed injury cannot be too remote. Purchasers in the direct chain of distribution are more likely to be able to show sufficiently direct injury than those outside the chain of distribution. Purchasers who buy the product which is the subject of the restraint are more likely to be able to show sufficiently direct injury than those who purchase a product with a component which is the subject of the restraint. Purchasers of products whose manufacture was impacted by the restraint face significant hurdles showing sufficiently direct impact. Within the chain of distribution, the relative positions of the purchaser and the actor can be significant, depending on the length and complexity of the distribution **[**19]** chain. Even

though a purchaser is removed from the direct restraint, he or she may still show direct injury. *See Blue Shield of Va. v. McCready, 457 U.S. 465, 478-81, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*. This factor would have supported standing in *Hyde.*

3. Whether there exist other indirect purchasers in the distribution chain who are more directly impacted by the alleged violation. The nature of the market is significant here. Courts must look at the nature of the product and the market for the product as well as the chain of distribution to determine the likelihood of direct pass through of the cost of the restraint or inflated price. The nature of the restraint must also be considered. Double recovery among indirect purchasers should be avoided. This factor would have supported standing in *Hyde* where the distribution chain was short.

4. The speculative nature of the damage claims. As damage claims move from direct to indirect and the distribution chain becomes more complex, the possibility of factors intervening to affect causation and price multiplies, and claims become more speculative. It is appropriate for purposes of determining indirect purchaser standing "to consider **[**20]** whether a claim rests at bottom on some abstract conception or speculative measure of harm." *McCready, 457 U.S. at 475 n.11*. In *McCready* the Court noted that the courts were required to be cautious when dealing with speculative, abstract and impractical damage theories. *Id.* This factor would not have prevented standing in *Hyde.* This factor focuses on sound economic analysis. Important factors would include reliable demand and supply curve studies and sufficient regression analysis to eliminate other factors in pricing.

5. The risk of duplicative recovery and danger of complex apportionment of damages. While these factors are limited by the General Assembly's creation of indirect purchaser standing, they should not be totally eliminated when considering the state claims. The courts still have the same interest in keeping the scope of a complex antitrust trial within judicially manageable limits. *AGC, 459 U.S. at 543*. The factors are simply taken down a level and the *Hanover Shoe/Illinois Brick* restrictions eliminated. State cases may present apportionment issues which are simply too complex and for which there exists no measure **[**21]** of recovery which is not speculative. It is clear that the General Assembly did not intend that every purchaser in the distribution chain have a right of recovery or that there be duplicative recovery among indirect purchasers. Such an interpretation would be contrary to the clear guidance to follow federal precedent and harmonize state ***antitrust law*** with federal law. Rather, it should be clear that the General Assembly intended that those who can show with some degree of certainty that they were directly impacted by the alleged acts in restraint of trade should be able to recover even though they are indirect purchasers. The courts must be cognizant that the problems between direct and indirect purchaser cases replicate themselves in state indirect purchaser cases where there are multiple levels in the distribution chain and multiple distribution chains. There should only be one fund constituting the amount of the alleged overcharge to North Carolina residents, and the courts must guard against multiple liability for the fund and prejudice to absent victims or non-class members. The complexity of the distribution chain and the variety of consumers in *Bruggers* [*Bruggers v. Eastman Kodak Co., 2000 NCBC 3 (N.C. Super. Ct. Mar. 17, 2000)*, **[**22]** *http://www.ncbusinesscourt.net/opinions/2000%20NCBC%203.htm*.] highlight the issues this factor would implicate. As the Supreme Court noted in *AGC* and *Illinois Brick,* massive and complex damages litigation undermines the effectiveness of treble damage suits. The poor results obtained in settlement in the North Carolina cases confirms this view.

Id. P73(1)-(5). The application of these factors is a fact-intensive exercise. The relative importance of any single factor may vary considerably from case to case. This Court's decision in *Crouch* was not appealed and no appellate court has addressed the standing question.

6.

ANALYSIS

[*30] The Court now turns to the facts of the case at bar. Before applying the *AGC* factors, the Court notes that this case presents the same problems encountered in *Crouch. Crouch* involved price fixing of rubber processing chemicals used in the manufacture of automobile tires. Crouch, 2004 NCBC 7 P15. In *Crouch,* the Court faced several problems:

> First, the price-fixed item is a product consumed or altered in the manufacturing process. Accordingly **[**23]** its use will vary with the type of . . . product being made. It may also vary with the nature of the product . . . being used and how it is used in the manufacturing process. Different direct purchasers . . . might use the various [products] in various ways in differing products.

Id. at P78. The EPDM at issue here is similar to the rubber processing chemicals in *Crouch.* As noted previously, EPDM is a component of many consumer products. The use of EPDM varies with the type of product being made. Some products, such as roofing material or pond liners, contain a high percentage of EPDM. Others, such as automobiles, have only a small amount of EPDM. As such, the role of EPDM varies with the nature of product being used.

[*31] However, this case differs from *Crouch* in the number of consumer products at issue. The only products at issue in *Crouch* were tires, and the Court was able to determine at the motion to dismiss stage that "the recovery per tire sold in North Carolina will be in the range of $ 0.01 to $ 0.11." *Id. P79*. The Court concluded that this "would not represent a meaningful recovery for consumers" and that "the **[**24]** costs associated with litigation and administration of any settlement would far outweigh the benefits to consumers." *Id.* Here, there are multiple consumer products at issue. Plaintiff alleges he purchased EPDM roofing material, pond liner, and at least one vehicle containing EPDM. (2d Am. Compl. P 35.) The EPDM components in an automobile include "tires, window molding, hoses, and other rubber products." (*Id.* P 36.) It is clear to the Court that EPDM may well be present in hundreds of consumer products, resulting in an enormous class of plaintiffs and many subclasses. Plaintiff does not seek to limit his claims to pond liners or products which might have a substantial component of EPDM. Perhaps the market and damages would be too small to make the case attractive. The Second Amended Complaint seeks to recover for *every* product which was made using EPDM. The Court's ruling is based upon the Second Amended Complaint before it. The costs of litigation and administration of such a settlement far outweigh the benefits to consumers. Indeed, the settlements reached with the Bayer, Dow, and DuPont defendants in this matter demonstrate that recovery on behalf of individual **[**25]** consumers of EPDM would be miniscule and distribution administratively impossible. The funds from these settlements are destined to end up in the hands of the lawyers, a handful of named plaintiffs, and a small number of charities selected by the approving court pursuant to the cy pres doctrine. In no way do these settlement funds compensate North Carolina consumers who purchased products that contained overpriced EPDM. *See infra* Part II.C. As a preliminary matter, the Court thus notes that the challenges here appear to be even greater than those in *Crouch.*

[*32] Preliminary considerations aside, the Court must determine whether Plaintiff has standing to pursue this action, and therefore turns to the *AGC* factors as harmonized with North Carolina law in *Crouch.*

a.

THE RELEVANT MARKET

[*33] Here the Court must consider "whether the plaintiff claims injury in a market collateral to the market in which the alleged restraint took place." *Crouch, 2004 NCBC 7 P73*. ***HN7***[] Recognizing that "[t]he antitrust laws are designed to see that customers in the relevant market get the benefit of price competition," the first step is to identify the "relevant **[**26]** market." In this case, as in *Crouch,* there are two relevant markets. The first is the market for EPDM itself. In this first market, the sellers are EPDM manufacturers and the buyers are manufacturers of products that contain EPDM. For example, an automobile manufacturer may purchase EPDM for use in its cars. Plaintiff is not part of this first market. Rather, Plaintiff is a buyer in a second, collateral market. In this second market, the sellers are manufacturers, distributors, or retailers of products that contain EPDM and the buyers are consumers who purchase these items. In the case of automobile parts or other small component parts of larger products, the consumer is even further removed from the primary sale. As a purchaser at retail of a product that contains EPDM, Plaintiff is in a market at least secondarily affected by the restraint in the original EPDM-only market. The antitrust laws primarily seek to protect buyers in the first market, who are most directly affected by artificially high prices for EPDM. Plaintiff purchased products the price of which may or may not have been influenced by the illegal restraint. Thus, this factor weighs against standing as to most products.

[27]** **[*34]** The situation here is similar to that in *Crouch,* where the plaintiff purchased products that contained the price-fixed rubber additive, rather than the rubber additive itself. The Court found that this weighed slightly against standing in *Crouch.* Both *Crouch* and the case at bar are distinguishable from *Hyde,* in which the plaintiff was a participant in the market for baby formula. *See Hyde, 123 N.C. App. at 574, 473 S.E.2d at 681-82*. Although the *Hyde* plaintiffs did not purchase baby formula directly from the manufacturer, they purchased baby formula, not a product comprised of baby formula and a number of other ingredients. For this reason, this factor would have supported standing in *Hyde.* If the product at issue in *Hyde* was an ingredient in baby formula, rather than the formula itself, this first factor would not have supported standing. Since Plaintiff in this case is a participant in a collateral market--the market for products that contain EPDM rather than the market for EPDM itself--this factor works against standing.

b.

DIRECTNESS OF IMPACT

[*35] As the Court of Appeals made clear in *Hyde,* being an indirect **[**28]** purchaser in North Carolina does not preclude standing. *See id. at 584, 473 S.E.2d at 688*. In *Crouch,* this Court fashioned ***HN8***[] a test to determine the scope of indirect purchaser standing and recognized that there is a boundary beyond which claims are too remote. *See Crouch, 2004 NCBC 7 P96*. This is similar to the concept of proximate cause in the law of torts. *See Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928)*. The analysis centers on the length and complexity of the distribution chain. *See Crouch, 2004 NCBC 7 P73*. Furthermore, "[t]he nature of the item can influence the directness of the impact on the price of the end product at retail . . . . The smaller the component, the less likely there will be impact on the final price." *Id. P85*. In *Crouch,* however, the Court knew that "the chemicals only comprise 1% of the value of a tire, reducing the likelihood that total final price was significantly affected." *Id.*

[*36] The Court does not have the benefit of such knowledge here. Plaintiff is not claiming damage based on one product. Rather, Plaintiff claims damage based on his **[**29]** purchase of roofing material, pond liner, and "at least one vehicle." (2d Am. Compl. P 35.) The list of products at issue may grow even longer, for "[d]iscovery may reveal that Plaintiff purchased other goods containing Defendants' EPDM, but which are not known to him at this time." (*Id.* P 36.) The fact that there are multiple products at issue makes analysis of the directness of impact rather difficult. Some products, such as roofing material or pond liner, contain a high percentage of EPDM. The price paid for these items is more likely to have been affected by price fixing because EPDM is a significant component. But other products, such as the vehicle, may contain little EPDM, and their final prices are not as likely to have been influenced by price fixing in the EPDM market.

[*37] The presence of multiple end products also presents the Court with distribution chains of varying length and complexity. Some products may have relatively short distribution chains. For example, a chain might run from an EPDM manufacturer to a pond liner manufacturer to the customer. There is also the potential for long distribution chains. A longer chain might run from an EPDM **[**30]** manufacturer to a rubber hose manufacturer to a hose distributor to an automobile manufacturer to a retailer, and finally to the customer.

[*38] Given the great number of products, the varying amount of EPDM in those products, and the varying length and complexity of the distribution chains, the Court cannot determine the directness of impact on these facts. This factor is inconclusive and weighs neither for nor against standing. But as the Court will discuss later, the complexity inherent in multiple distribution chains weighs against standing. *See infra* Part I.B.6.d & e.

c.

OTHER DIRECT PURCHASERS MORE DIRECTLY IMPACTED

[*39] ***HN9***[] Examination of this factor is meant to avoid a double recovery. "State courts should focus this inquiry on whether or not the existence of other indirect purchasers in the chain of distribution gives rise to other claims against the fund representing the amount by which the price of the retail item has been artificially inflated." Crouch, 2004 NCBC 7 P85. The potential for long distribution chains makes this inquiry easier. In long distribution chains, there are likely to be distributors and retailers who may have a claim that **[**31]** they absorbed some or all of the price increase, rather than passing it along to Plaintiff. For example, a retailer who sold pond liners containing EPDM would also be an indirect purchaser (since it did not purchase raw EPDM), but would have a more direct claim than Plaintiff by virtue of its higher position on the distribution chain. The antitrust laws favor recovery on behalf of these purchasers, and their existence increases the likelihood of double recovery if Plaintiff is allowed to recover. Even though no claims have currently been filed on behalf of these distributors and retailers, this factor nevertheless weighs against standing. The Court reached the same conclusion in Crouch on similar facts. *See* id. P 85.

d & e.

SPECULATIVE NATURE OF DAMAGE CLAIMS AND COMPLEXITY

[*40] Earlier, the Court noted that analysis of the modified *AGC* factors is a fact-intensive exercise and that "different factors might be important in different cases." Id. P 74. In this case, the fourth and fifth factors are extremely important and weigh heavily against standing. These factors are interrelated and share an overarching concern for practicality and **[**32]** wise use of judicial resources.

[*41] Calculation of damages in this case would be a daunting task. First, Plaintiff would have to establish prices for products containing EPDM both before and after the alleged conspiracy period. However, this process is complicated by the fact that EPDM is only a component in these products. Thus, "a regression analysis would be required to disaggregate any effect of other changes in the manufacturing process for each manufacturer for each product category." Id. P 80. It would not be enough to simply establish that cars, roofing material, pond liner, and other products cost more after the alleged conspiracy than before. There are many factors which could cause a price increase in these products--inflation, prices of other inputs, transport costs, product demand, and market conditions just to name a few. Such an analysis would have to be carried out at each link in the distribution chain in order to determine whether the allegedly illegal price increase was borne in whole or in part by consumers such as Plaintiff. Economists would require huge amounts of information before they could embark on such an analysis. Nonparties will **[**33]** almost certainly consider some of this information to be confidential or subject to trade secret protection, resulting in a protracted and contentious discovery process that would burden the Court. Even if the information were readily available, "the demand and supply curves must then be calculated for this myriad of products and suppliers and the prices determined by the intersections of those curves tested against rigorous regression analysis to insure that no external factors affected the pricing and pass through at the manufacturer level." Id. P 81. This rigorous economic analysis is necessary to determine whether increased prices were the result of the alleged price fixing, or were the result of some other factor. If, at the end of this process, it is determined that none of the increased price was passed on to the Plaintiff, then there are no damages and there can be no recovery. [3]

[34]** **[*42]** The potentially large number of products containing EPDM adds to the complexity. The analysis described above would have to be carried out for each product in order to accurately calculate damages. In *Crouch,* the Court found that carrying out this type of analysis for a single product, tires, "would be a Herculean task and one which the Court believes would not be free from speculation given the enormous number of disaggregating factors to be considered in the process." Crouch, 2004 NCBC 7 P80. The present case, with its multiple products, manufacturers, markets, externalities, and disaggregating factors, would cause even Hercules to question his legendary abilities. Given these variables, the issues surrounding allocation of the alleged price fixing in this case would be enormously complex and would render the results of any economic analysis speculative.

---

[3] This is similar to the "loss causation" requirement found in the federal securities laws, which itself is rooted in the common law of torts. *See, e.g.,* Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 346, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (noting "Congress' intent to permit private securities fraud actions for recovery where, but only where, plaintiffs adequately allege and prove the traditional elements of causation and loss").

[*43] The Court notes again that each case must be analyzed separately. It is not difficult to imagine "other examples where a component, such as a computer chip, is price fixed, and its costs passed through directly to purchasers of the product in which it is incorporated." *Crouch, 2004 NCBC 7 P84.* **[**35]** In the example, the required economic analysis would be relatively straightforward. But here, it is clear from the pleadings that the analysis would be unmanageably difficult and unreliable. Thus, it is to the benefit of all parties for the Court to rule on standing early in the litigation process, before substantial resources are expended gathering information for an economic analysis that would prove unreliable in the end.

[*44] Considering all factors, Plaintiff lacks standing to pursue indirect purchaser claims. Due to this lack of standing, the law will not grant him relief. Accordingly, Plaintiff's claims against the moving Defendants are subject to dismissal under Rule 12(b)(6).

II.

PLAINTIFF'S MOTIONS FOR LEAVE TO DISMISS CERTAIN DEFENDANTS

[*45] Plaintiff moves for leave to voluntarily dismiss the Bayer, Dow, and DuPont defendants under Rule 41(a). These defendants are parties to EPDM antitrust lawsuits in other states and have entered into a multistate settlement agreement which Plaintiff contends includes resolution of all claims asserted in the litigation before this Court. Settlements as to both the Bayer and the Dow and DuPont Defendants were approved by **[**36]** the Honorable John McAfee, Circuit Court Judge for Claiborne County, Tennessee.

A.

PLAINTIFF'S MOTION FOR LEAVE TO DISMISS WITH PREJUDICE DEFENDANTS BAYER CORPORATION, BAYER MATERIALSCIENCE, LLC, AND BAYER AG

[*46] Plaintiff moves to dismiss Defendants Bayer Corporation, Bayer MaterialScience, LLC, and Bayer AG (collectively "Bayer defendants") pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure, subject to Rule 23(c), which requires court approval of the dismissal or compromise of a class action. Claims against the Bayer defendants have been compromised and settled for $ 2,250,000 as part of a multistate settlement agreement. Plaintiffs and Bayer AG submitted the multistate settlement, along with three others, to the Honorable John McAfee, Circuit Judge of Claiborne County, Tennessee. On March 3, 2006, Judge McAfee approved the settlement, which "provides for a fluid recovery or cy pres distribution in lieu of a claims-made process." (Order P 11, Mar. 3, 2006.) The following amounts were deducted from the gross settlement amount:

$ 818,500 -- Attorney fees and expenses for Plaintiffs' counsel
$ 55,303 -- Notice costs

$ 14,500 -- Incentive **[**37]** payments to named plaintiffs

This left $ 1,361,696.30 plus interest available for cy pres distribution.

[*47] On May 15, 2006, Judge McAfee entered a Corrected Supplemental Order consolidating the settlement funds from the four settlements and approving the following cy pres awards:

$ 700,000 -- East Tennessee Children's Hospital of Knoxville, Tennessee
$ 700,000 -- Special Operations Warrior Foundation of Tampa, Florida
$ 250,000 -- Baker Cancer Center of Harrogate, Tennessee
$ 1,400,000 -- St. Jude Children's Research Hospital of Memphis, Tennessee

These payments were to be made from the consolidated settlement funds, which included the $ 2,250,000 Bayer settlement.

B.

PLAINTIFF'S MOTION TO DISMISS DEFENDANTS DOW CHEMICAL COMPANY, E.I DUPONT DE NEMOURS & COMPANY and DUPONT DOW ELASTOMERS, LLC

[*48] Plaintiff also moves to dismiss Defendants Dow Chemical Company, E.I. DuPont de Nemours & Company, and DuPont Dow Elastomers, LLC (collectively "Dow/DuPont Defendants") under Rule 41(a) and subject to Rule 23(c). These claims have been settled for $ 2,000,000 as part of a multistate settlement agreement. On June 21, 2005, Judge McAfee **[**38]** approved the settlement. The following amounts were deducted from the gross settlement amount:

$ 746,771.26 -- Attorney fees and expenses for Plaintiffs' counsel

$ 101,000.00 -- Notice Costs

$ 6,000.00 -- Incentive payments for named plaintiffs

This left $ 1,156,982.15 available for cy pres distribution. On July 1, 2005, Judge McAfee entered a Supplemental Order approving the following cy pres awards:

$ 800,000.00 - Special Operations Warrior Foundation of Tampa, Florida

$ 356,982.15 - East Tennessee Children's Hospital of Knoxville, Tennessee

C.

ANALYSIS

[*49] In considering these motions, the Court is mindful of the clear public policy of this state regarding unpaid residuals in class action litigation. The General Assembly codified this policy in section 1-267.10 of the General Statutes, which states as follows:

> **HN10**[] It is the intent of the General Assembly to ensure that the unpaid residuals in class action litigation are distributed, to the extent possible, in a manner designed either to further the purposes of the underlying causes of action or to promote justice for all citizens of this State. The General Assembly finds that **[**39]** the use of funds collected by the State courts pursuant to this section for these purposes is in the public interest, is a proper use of the funds, and is consistent with essential public and governmental purposes.

N.C. Gen. Stat. § 1-267.10(a)(2005). The statute goes on to **HN11**[] require the parties to report to the court the total amount actually paid to class members. After receiving this report, the court "shall direct the defendant to pay the sum of the unpaid residue, to be divided and credited equally, to the Indigent Person's Attorney Fund and to the North Carolina State Bar for the provision of civil legal services for indigents." *Id.* § 1-267.10(b). Although the statute does not directly address cy pres distributions in which there are no payments made to class members, the Court believes the public policy regarding unpaid residuals is also applicable to cy pres distributions which have no relationship with the class victimized by the violations. Indeed, the citizens of North Carolina are at even greater risk of injustice in nationwide cy pres settlements than they are when there is money left over after class members have been paid. When cy pres distributions are approved **[**40]** by judges sitting in distant jurisdictions, there is an acute danger that the settlement funds will not "further the purposes of the underlying causes of action or . . . promote justice for all citizens" of North Carolina. *See id.* § 1-267.10(a).

[*50] The term "cy pres" is most commonly associated with trust law. It "appears to derive from the Norman-French term *'cy pres comme possible,'* meaning 'as near as possible.'" Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrist Actions Brought by State Attorneys General,* 68 Fordham L. Rev. 361, 406 n.212 (1999). **HN12**[] In trust law, "[c]y pres is a rule of construction which courts employ to carry out the spirit of a trust's terms when literal application of such terms is not feasible." *Id.* An example of the proper application of the cy pres concept in North Carolina can be found in Board of Trustees v. Heirs of Prince, 311 N.C. 644, 319 S.E.2d 239 (1984). In that case, the testatrix bequeathed her residuary estate in trust to the University of North Carolina at Chapel Hill for the purpose of building a theatre. Id. at 649, 319 S.E.2d at 243. **[**41]** When the University eventually built a new theater, it used funds from the General Assembly instead of the trust funds. Id. at 654, 319 S.E.2d at 246. The Supreme Court affirmed an order of the trial court amending the trust to provide for "activities that enhance the production, development, maintenance, and student participation in theatrical productions" at the University, reasoning that this amendment carried out Mrs. Prince's general charitable intent to promote dramatic art. Id. at 656, 319 S.E.2d at 247.

[*51] *HN13*[] In the context of class actions, "[c]ourts have utilized cy pres distributions where class members are difficult to identify, or where they change constantly, or where there are unclaimed funds. In these cases, the court, guided by the parties' original purpose, directs that the unclaimed funds be distributed for the indirect prospective benefit of the class." 3 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 10:16, at 513 n.1 (4th ed. 2002).

[*52] The cy pres distributions here are all going to respectable medical or charitable organizations. However, the injured class in this case consists of consumers who **[**42]** were overcharged for a variety of products as the result of an alleged conspiracy between manufacturers of synthetic rubber. The funds distributed are in no way "for the indirect prospective benefit of the class." Such distributions are contrary to the very definition of "cy pres." The National Association of Consumer Advocates suggests that "[c]lass counsel should recommend cy pres remedies which will provide indirect benefit to absent members of the class or which will further the purposes of the underlying litigation." Nat'l Ass'n of Consumer Advocates, *Standards and Guidelines for Litigating and Settling Consumer Class Actions* § 7.C., at 32 (rev. 2006), *available at http://www.naca.net/_assets/media/RevisedGuidelines.pdf*. The purpose of this litigation was to protect consumers from collusion among manufacturers. The organizations receiving funds from these settlements engage in many praiseworthy activities for the benefit of the sick and injured, but they do not work to protect consumers. The distribution of these settlement funds is clearly not "as near as possible" to the purposes of the litigation or the benefit of class members.

[*53] In this case, the settlements **[**43]** approved by Judge McAfee are prima facie evidence of the fact that there can be no administratively economical distribution to the class and that the cy pres distribution will result in less than fifty percent of the settlement being distributed to anyone in need. Of that amount, there is no demonstrable showing that any citizen of North Carolina will benefit and a clear indication that citizens of states which do not have indirect purchaser statutes (a majority) will benefit as much as, if not more than, citizens of states that recognize such causes of action. Approximately $ 150,000 will be spent on "notices" to tell class members who probably will never recognize that they are class members that they will receive nothing from the settlement.

[*54] The indirect purchaser cases present a real contradiction. Usually the defendants have been charged with or pleaded guilty to a federal antitrust violation. They are not entitled to any sympathy. The nature of the cases makes proof and defense practically or economically impossible. The Court is not aware of any indirect purchaser case ever being tried in North Carolina, or nationally for that matter. Settlement is virtually certain. **[**44]** Because the individual class members' damages are usually so small that administration of distribution of a fund is impossible or impractical, a cy pres settlement is the norm. This case is a classic example. Since the states with indirect purchaser standing are limited, defendants want them all settled at once. Plaintiffs' counsel are happy to agree as the settlement fund from which they claim a fee is larger. Simultaneous settlement ensures that multistate distributions to individuals are practically impossible. That leads to forum shopping to get a nationwide class action settlement approved. The parties have a common interest in making the selected judge happy.

[*55] These motions present the flip side of the coin if there is no standing requirement for indirect purchaser cases in North Carolina. In the event there is no standing requirement, most cases will involve individual clams for which it would be impossible to economically distribute small sums to consumers. These cases will result in cy pres distributions such as those proposed in this case. The economics of litigation dictate that defendants resolve all the individual state litigation at one time. Hence, there has **[**45]** developed the practice of counsel for plaintiffs and defendants choosing a state where they can get court approval of a nationwide settlement that encompasses claims from all states which recognize indirect purchaser status. Such distributions have the salutary benefit of not permitting the guilty price fixer to escape from paying state law claims in addition to the direct claims for which they are liable under federal law. The question raised in light of the realities of this kind of litigation is what responsibilities lawyers for the North Carolina class and North Carolina judges have to see that these "nationwide" settlements are fair to North Carolinians.

[*56] Here the parties chose Tennessee. [4] The reason for that selection is not obvious from the facts of the case. It is obvious that local institutions in Tennessee will benefit disproportionately to other states. It is arguable that some North Carolina residents may go to St. Jude's Children's Hospital for treatment and that some North Carolina residents may receive scholarships from the Special Operations Warrior Fund. All the recipients are worthy charities, and the Court is sure Judge McAfee was conscientious in his **[**46]** selection.

[*57] The Court has reached two conclusions based upon its experience with these cases. First, if a nationwide settlement is approved in another state, it is unlikely that North Carolina residents will benefit in any significant way and the public policy embodied in *section 1-267.10* will be ignored. Local judges selected by the lawyers get to decide where the cy pres money goes.

[*58] Second, no money goes to people who have allegedly been injured. The lawyers benefit directly, and the fees and expenses often consume fifty percent of the settlement funds. Indirect purchaser cases have become a means of generating legal fees without any corresponding value to the persons allegedly **[**47]** injured. If we are to punish those who are guilty of antitrust violations, it seems appropriate that the funds generated by such suits be distributed to victims, a fund they have a connection to, or at least in a manner consistent with the established public policy set by the Legislature. This settlement distributes funds in a manner totally unrelated to the alleged victims and without regard to North Carolina public policy.

[*59] This area of the law is in serious need of attention. The appellate courts may find that there is no standing requirement. If so, some guidance to trial judges about their obligations to protect the public from settlements that only benefit the lawyers and the citizens of other states would be useful. This Court has attempted to discern the public policy indicated by the Legislature in *section 1-267.10* in a manner to make the settlement of North Carolina claims comport with North Carolina public policy. The Legislature itself could clarify the situation by amending the statute to make clear that if injured persons do not receive any distribution, cy pres funds, whether generated by state or nationwide settlement, should be dispersed to a fund with some **[**48]** beneficial relationship to the victims or as a default as directed in the statute. Judges should not be making those decisions. As the *Financial Times* noted in an article critical of cy pres class action settlements, "[g]overnments, Legislatures and elected representatives should look after society as a whole; courts and lawyers should stick to the task of compensating victims." Patti Waldmeir, *Charitable Giveaway That Cheats Justice: Microsoft's Offer to Settle a Legal Case by Giving Computers to Poor Children Illustrates a Disturbing Tendency for US Courts to Assume the Role of Social Policy Arbiters,* Fin. Times, Nov. 29, 2001, at 19.

[*60] The dangers inherent in and problems created when the parties join in selection of one state forum for settlement of nationwide claims underlie the rationale for the federal Class Action Fairness Act. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.); *see also* Anna Andreeva, Comment, *Class Action Fairness Act of 2005: The Eight-Year Saga Is Finally Over, 59 U. Miami L. Rev. 385, 393-94 (2005)* (describing congressional concern with forum shopping **[**49]** in class action litigation). One need only look at the outcome for North Carolina residents of *Moody v. Sears, Roebuck & Co., 2007 NCBC 13 (N.C. Super. Ct. May 7, 2007)*, to see the impact locally. *Moody* involved a nationwide class action settlement administered in Illinois in which North Carolina citizens received a total of $ 66 in cash and coupons and the entire nationwide class received cash and coupons totaling only $ 2,402, while the lawyers got close to a million dollars in cash. *Id. P 2*. North Carolina courts should not abdicate to judges in foreign jurisdictions the determination of cy pres distributions of settlement funds which belong in part to North Carolina residents and should ensure that North Carolina public policy is followed. The even more difficult question is whether the North Carolina courts should permit dismissal of North Carolina class actions where, as here, no allocation of damages has been made among the states having indirect purchase standing. It can be done. *See Thai Holding of Charlotte, Inc. v. Archer Daniels Midland Co., 2007 NCBC 11 (N.C. Super. Ct. May 7, 2007)*.

---

[4] In another case pending before this Court the parties selected New Mexico. *See Thai Holding of Charlotte, Inc. v. Archer Daniels Midland Co.,* No. 03 CVS 15096 (N.C. Super. Ct. Sept. 3, 2003). The use of nationwide class action settlements presided over by state judges can be troublesome. *See infra P 60*.

[*61] The message from this decision should **[**50]** be clear. If North Carolina lawyers and class representatives undertake the representation of North Carolina citizens, they must ensure that the state's interests and the interests of its injured citizens come first. North Carolina courts will and should be reluctant to approve dismissal of any purported North Carolina class action where the North Carolina share of the settlement proceeds is not disbursed to its injured citizens or for their benefit in a cy pres fund related to North Carolina victims or in conformity with the public policy established in *section 1-267.10*. That is especially true where North Carolina is in the minority of states which recognize indirect purchaser standing.

[*62] Class representatives and class counsel should see that (1) a fair share of damages is allocated to North Carolina, (2) victims receive damages if possible, (3) cy pres funds bear some relation to the class of victims, or (4) the North Carolina funds are distributed in accordance with *section 1-267.10*. At least in the fallback position, the statute promotes access to the court system by North Carolina citizens.

[*63] This Court reluctantly approves the dismissal of this action. It **[**51]** does so because it has held that there is no standing and therefore no reason not to approve the payment of funds by the other defendants. Neither Mr. Teague nor his counsel have adequately represented the class in this action. Had they secured a settlement that distributed funds to North Carolina victims of the alleged violation or secured a cy pres distribution in conformity with the interests of the North Carolina class or North Carolina public policy as embodied in *section 1-267.10* they would have fulfilled their obligation even if it was in the context of a multistate settlement.

[*64] The Court hopes that in the future class counsel will become more attuned to the interests of the class members and that either the appellate courts or the Legislature will bring some rationality to a flawed process.

III.

CONCLUSION

[*65] Based upon the foregoing, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. Defendants' motion to dismiss is GRANTED. Plaintiff's complaint against Defendants Crompton Corporation, Uniroyal Chemical Company, DSM Copolymer, Inc., DSM Elastomers Europe, B.V., and ExxonMobil Chemical Company is hereby dismissed.

2. Plaintiff's Motion **[**52]** for Leave to Dismiss with Prejudice Defendants Bayer Corporation, Bayer MaterialScience, LLC, and Bayer AG is GRANTED.

3. Plaintiff's Motion to Dismiss Defendants Dow Chemical Company, E.I. DuPont De Nemours & Company and DuPont Dow Elastomers, LLC is GRANTED.

4. Within sixty days from the date of entry of this Order, Plaintiff's counsel shall file with the Court an affidavit showing publication on two successive Sundays of a legal notice in the *Citizen-Times* of Asheville and *The News & Observer* of Raleigh. The notice published in these newspapers shall be four columns wide and printed in ten-point font. The notice shall detail the following:

   a. The total amount of the settlement.
   b. The recipients of the settlement distribution.
   c. The benefit to North Carolina class members.
   d. The amount of fees and expenses paid to counsel representing the North Carolina class.
   e. The total amount of fees paid to class counsel.
   f. The costs of notice and other administrative expenses.

IT IS SO ORDERED, this the 7th day of May, 2007.

In re Rubber Chems. Antitrust Litig.

United States District Court for the Northern District of California

May 9, 2007, Decided ; May 9, 2007, Filed

No. C04-1648 MJJ (BZ) (Lead Case)

Reporter

486 F. Supp. 2d 1078 *; 2007 U.S. Dist. LEXIS 35589 **; 2007-1 Trade Cas. (CCH) P75,721

IN RE: RUBBER CHEMICALS ANTITRUST LITIGATION, This document relates to: C07-1057 MJJ (BZ)

Subsequent History: Dismissed by, in part *In re Rubber Chems. Antitrust Litig., 2007 U.S. Dist. LEXIS 62734 (N.D. Cal., Aug. 13, 2007)*

Prior History: *In re Rubber Chems. Antitrust Litig., 232 F.R.D. 346, 2005 U.S. Dist. LEXIS 39808 (N.D. Cal., 2005)*

Core Terms

documents, comity, discovery, investigations, conspiracy, antitrust, sovereign, Leniency

LexisNexis® Headnotes

Civil Procedure > Discovery & Disclosure > General Overview

Governments > Courts > Judicial Comity

International Law > ... > Comity Doctrine > Comity Doctrine Procedures > Discretion Regarding Procedures

HN1[] **Civil Procedure, Discovery & Disclosure**

The Federal Rules of Civil Procedure authorize party-initiated discovery of any evidence that is relevant to any party's claims or defenses. *Fed. R. Civ. P. 26(b)(1)*. However, *Rule 26* grants the court discretion to limit discovery on several grounds, including international comity. American courts, in supervising pretrial proceedings, should exercise special vigilance to demonstrate due respect for any sovereign interest expressed by a foreign state.

Governments > Courts > Judicial Comity

International Law > Dispute Resolution > Comity Doctrine > General Overview

HN2[] **Courts, Judicial Comity**

Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. It is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

International Law > Dispute Resolution > Comity Doctrine > General Overview

International Law > Dispute Resolution > Tribunals

HN3[] **Dispute Resolution, Comity Doctrine**

The European Commission is the executive and administrative organ of the European communities. The Commission exercises responsibility over the wide range of subject areas covered by the European Union Treaty; those areas include the treaty provisions, and regulations thereunder, governing competition. While the U.S. Supreme Court has not expressly held that the European Union is a sovereign who should be accorded comity, the analysis it has conducted in concluding that the European Commission is a tribunal within the meaning of *28 U.S.C.S. § 1782(a)* is in significant part a comity analysis. Nothing in the Supreme Court's opinion suggests that the European Union should not be treated as a sovereign.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

International Law > Dispute Resolution > General Overview

HN4[] **International Aspects, International Application of US Law**

The Directorate-General for Competition, operating under the European Commission's aegis, is the European Union's primary ***antitrust law*** enforcer.

Governments > Courts > Judicial Comity

International Law > ... > Comity Doctrine > Comity Doctrine Procedures > Discretion Regarding Procedures

HN5[] **Courts, Judicial Comity**

In undertaking a comity analysis, a court must balance five competing factors: (1) the importance to the litigation of the documents or other information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

Governments > Courts > Judicial Comity

International Law > ... > Comity Doctrine > Comity Doctrine Procedures > Discretion Regarding Procedures

HN6[] **Courts, Judicial Comity**

Courts are less inclined to ignore a foreign state's concerns where the outcome of litigation does not stand or fall on a discovery order, or where the evidence sought is cumulative of existing evidence.

Civil Procedure > ... > Discovery > Methods of Discovery > Foreign Discovery

Governments > Courts > Judicial Comity

International Law > ... > Comity Doctrine > Comity Doctrine Procedures > Discretion Regarding Procedures

International Law > Dispute Resolution > Evidence > General Overview

HN7[] **Methods of Discovery, Foreign Discovery**

As to the specificity of a discovery request and its relation to international comity, generalized searches for information whose disclosure is prohibited under foreign law are discouraged.

Governments > Courts > Judicial Comity

International Law > ... > Comity Doctrine > Comity Doctrine Procedures > Discretion Regarding Procedures

International Law > Dispute Resolution > Evidence > General Overview

HN8[] **Courts, Judicial Comity**

The fourth factor in the international comity analysis is whether the information sought can be obtained through alternative means. If the information sought can easily be obtained elsewhere, there is little or no reason to offend foreign law.

Civil Procedure > ... > Discovery > Methods of Discovery > Foreign Discovery

Governments > Courts > Judicial Comity

International Law > ... > Comity Doctrine > Comity Doctrine Procedures > Discretion Regarding Procedures

HN9[] **Methods of Discovery, Foreign Discovery**

A court must determine the extent to which noncompliance with a request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located. This requires a balancing of comity with the underlying policies of the Federal Rules of Civil Procedure.

Counsel: [1]** For Rubber Engineering & Development Company, Plaintiff: Joseph M. Barton, Paul F. Bennett, LEAD ATTORNEYS, C. Andrew Dirksen, Steven O. Sidener, Gold Bennett Cera & Sidener LLP, San Francisco, CA; Richard Alexander Saveri, LEAD ATTORNEY, Saveri & Saveri Inc., San Francisco, CA; Yvonne M. Flaherty, LEAD ATTORNEY, W. Joseph Bruckner, Lockridge Grindal Nauen PLLP, Minneapolis, MN; Karen Dixon Fineran, Wilson Sonsini Goodrich & Rosati, Palo Alto, CA; Linda Phyllis Nussbaum, Kaplan Fox & Kilsheimer, LLP, New York, NY; Michael D. Hausfeld, Cohen Milstein Hausfeld & Toll, Washington, DC; Richard Adam Koffman, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Washington, DC.

For Percision Associates, Inc., Plaintiff: Guido Saveri, Richard Alexander Saveri, LEAD ATTORNEYS, Lisa Saveri, Saveri & Saveri Inc., San Francisco, CA; Yvonne M. Flaherty, LEAD ATTORNEY, W. Joseph Bruckner, Lockridge Grindal Nauen PLLP, Minneapolis, MN.

For Monmouth Rubber & Plastics Corp., Plaintiff: Richard Alexander Saveri, LEAD ATTORNEY, Saveri & Saveri Inc., San Francisco, CA; H. Laddie Montague, Jr., Ruthanne Gordon, Berger & Montague PC, Philadelphia, PA.

For Polymerics Inc., Plaintiff: Richard Alexander **[**2]** Saveri, LEAD ATTORNEY, Saveri & Saveri Inc., San Francisco, CA; Yvonne M. Flaherty, LEAD ATTORNEY, W. Joseph Bruckner, Lockridge Grindal Nauen PLLP, Minneapolis, MN; Michael Paul Lehmann, Furth Lehmann & Grant LLP, San Francisco, CA.

For RBX Industries, Inc., Plaintiff: Dianne M. Nast, LEAD ATTORNEY, Roda & Nast PC, Lancaster, PA; Michael G. Nast, Roda & Nast, Lancaster, PA; Michael L. Roberts, Roberts Law Firm, Little Rock, AR.

For Goodyear Tire & Rubber Company, The, Plaintiff: Jack Morrison, Jr., LEAD ATTORNEY, Thomas R. Houlihan, Amer Cunningham, Akron, OH; Michael R. Rickman, LEAD ATTORNEY, The Goodyear Tire & Rubber Company, Akron, OH; Richard A. Arnold, Kenny Nachwalter, Miami, FL; William J. Blechman, Kenny Nachwalter PA, Miami, FL.

For Industrial Rubber Products, L.L.C., Plaintiff: Susan Gilah Kupfer, LEAD ATTORNEY, Glancy & Binkow LLP, San Francisco, CA.

For Parker Hannifin Corporation, PolyOne Corporation, Plaintiffs: Edmund Wilson Searby, LEAD ATTORNEY, Walter W. Noss, Scott & Scott LLC, Chagrin Falls, OH.

For Globe Manufacturing Co., Inc., North American Rubber Thread Co., Inc., Plaintiffs: Joseph M. Barton, Gold Bennett Cera & Sidener LLP, San **[**3]** Francisco, CA.

For Caterpillar Inc., Plaintiff: Daniel Simon Mason, Attorney at Law, San Francisco, CA.

For Chemtura Corporation, Plaintiff: Mark A. Racanelli, O'Melveny & Meyers LLP, New York, NY US.

For Bridgestone Americas Holding Inc, Bridgestone Firestone North American Tire, LLC, Pirelli Tire LLC, Plaintiffs: A. Scott Ross, LEAD ATTORNEY, Neal & Harwell, Nashville, TN US; Alexandre De Gramont, LEAD ATTORNEY, Crowell & Moring, Washington, DC; Aubrey B. Harwell, Jr., LEAD ATTORNEY, Neal & Harwell, , Nashville, TN; Daniel Allen Sasse, LEAD ATTORNEY, Crowell & Moring LLP, Irvine, CA; Kent A. Gardiner, LEAD ATTORNEY, Crowell & Moring LLP, Washington, DC; Roger Scott Feldmann, LEAD ATTORNEY, Crowell & Moring LLP, Irvine, CA usa.

For Bandag Incorporated, Plaintiff: A. Scott Ross, LEAD ATTORNEY, Neal & Harwell, Nashville, TN US; Alexandre De Gramont, LEAD ATTORNEY, Crowell & Moring, Washington, DC; Aubrey B. Harwell, Jr., LEAD ATTORNEY, Neal & Harwell, Nashville, TN; Daniel Allen Sasse, LEAD ATTORNEY, Van-Dzung Vu Nguyen, Crowell & Moring LLP, Irvine, CA; Kent A. Gardiner, LEAD ATTORNEY, Crowell & Moring LLP, Washington, DC; Roger Scott Feldmann, LEAD ATTORNEY, Crowell **[**4]** & Moring LLP, Irvine, CA usa.

For Akzo Nobel N.V., Defendant: Michael A. Sitzman, LEAD ATTORNEY, Gibson Dunn & Crutcher LLP, San Francisco, CA.

For Akzo Nobel Inc., Defendant: Michael A. Sitzman, LEAD ATTORNEY, Gibson Dunn & Crutcher LLP, San Francisco, CA; Adam Joseph Di Vincenzo, Gibson, Dunn & Crutcher, Washington, DC.

For Flexsys N.V., Defendant: Michael A. Sitzman, LEAD ATTORNEY, Gibson Dunn & Crutcher LLP, San Francisco, CA; Adam Joseph Di Vincenzo, Gibson, Dunn & Crutcher, Washington, DC; Andrew Zachary Edelstein, Gibson, Dunn & Crutcher LLP, Los Angeles, CA.

For Flexsys America L.P., Defendant: Michael A. Sitzman, LEAD ATTORNEY, Gibson Dunn & Crutcher LLP, San Francisco, CA; Adam Joseph Di Vincenzo, Gibson, Dunn & Crutcher, Washington, DC; Andrew Zachary Edelstein, Gibson, Dunn & Crutcher LLP, Los Angeles, CA; D. Jarrett Arp, Gibson Dunn & Crutcher, Washington, DC.

For Solutia, Inc., Defendant: John Guyler White, Richard Allen Jones, Covington & Burling, San Francisco, CA.

For Bayer A.G., Defendant: Julie E. McEvoy, Jones Day, Washington, DC US; Kerry C. White, Jones Day, Los Angeles, CA; Matthew P. Vandall, Kauff McClain & McGuire, San Francisco, **[**5]** CA; Susan Q Haines, Jones Day, San Francisco, CA.

For Bayer Corporation, Defendant: Julie E. McEvoy, Jones Day, Washington, DC US; Matthew P. Vandall, Kauff McClain & McGuire, San Francisco, CA; Susan Q Haines, Jones Day, San Francisco, CA.

For Rhein Chemie Corporation, Defendant: Caroline N. Mitchell, Susan Q Haines, Thomas A. Rector, Jones Day, San Francisco, CA; Matthew P. Vandall, Kauff McClain & McGuire, San Francisco, CA.

For Crompton Corporation, Uniroyal Chemical Company, Inc., Defendants: Michael F. Tubach, O'Melveny & Myers LLP, San Francisco, CA.

For Bayer Corp., Defendant: Amy K. Pohl, LEAD ATTORNEY, Jones Day, Pittsburgh, PA; Susan Q Haines, Jones Day, San Francisco, CA.

For Bayer AG, Bayer Corporation, Rhein Chemie Corporation, Defendants: Susan Q Haines, LEAD ATTORNEY, Jones Day, San Francisco, CA.

For Azko Nobel Chemicals, Inc., Defendant: Robert Anthony Klein, LEAD ATTORNEY, Conrad O'Brien Gellman & Rohn, Philadelphia, PA; Andrew Zachary Edelstein, Gibson, Dunn & Crutcher LLP, Los Angeles, CA.

For Flexsys N.V., Defendant: Robert Anthony Klein, LEAD ATTORNEY, Conrad O'Brien Gellman & Rohn, Philadelphia, PA.

For Crompton Corporation, **[**6]** Uniroyal Chemical Company, Inc., Defendants: Debra H. Dermody, LEAD ATTORNEY, Reed Smith, Pittsburgh, PA.

For Bayer A.G., Defendant: Melissa J. Nandi, LEAD ATTORNEY, Jones Day, Cleveland, OH; Susan Q Haines, Jones Day, San Francisco, CA.

For Rhein Chemie Corporation, Defendant: Melissa J. Nandi, LEAD ATTORNEY, Jones Day, Cleveland, OH; Susan Q Haines, Jones Day, San Francisco, CA.

For Uniroyal Chemical Co., Inc., Crompton Corporation, Defendants: Thomas M. Parker, LEAD ATTORNEY, Parker Leiby Hanna & Rasnick, Akron, OH; Benjamin G. Bradshaw, Charles E. Borden, Ian T Simmons, Richard G. Parker, O'Melveny & Myers LLP, Washington, DC.

For Bayer AG, Bayer Corporation, Rhein Chemie Corporation, Defendants: Caroline N. Mitchell, Jones Day, San Francisco, CA.

For Rhein Chemie Rheinau GmbH, Rhein Chemie GMBH, Defendants: Caroline N. Mitchell, Susan Q Haines, Jones Day, San Francisco, CA.

For Bay MaterialScience LLC, Defendant: Susan Q Haines, Jones Day, San Francisco, CA.

For Crompton Corporation, Defendant: Steven Ellis Conigliaro, O'Melveny & Myers, San Francisco, CA.

For Chemtura Corporation, Defendant: Ian T Simmons, LEAD ATTORNEY, O'Melveny & Myers **[**7]** LLP, Washington, DC.

For Joseph B. Eisenberg, Defendant: Jason M. Koral, William J. Schwartz, Cooley Godward Kronish LLP, New York, NY.

For Michael J. Duchesne, Defendant: Rachel J Nash, LEAD ATTORNEY, Jason Brown, Ropes & Gray, New York, NY.

For Peter D. Welch, Defendant: Barry A. Bohrer, E. Scott Schirick, LEAD ATTORNEYS, Morvillo Abramowitz Grand Iason Anello & Bohrer PC, New York, NY US.

For Akzo Nobel Chemicals International B.V., Defendant: Andrew Zachary Edelstein, Gibson, Dunn & Crutcher LLP, Los Angeles, CA.

For Rhein Chemie Corporation, 3rd party defendant: Caroline N. Mitchell, LEAD ATTORNEY, Jones Day, San Francisco, CA.

For Rhein Chemie Rheinau GBMH, 3rd party defendant: Caroline N. Mitchell, LEAD ATTORNEY, Jones Day, San Francisco, CA; Susan Q Haines, Jones Day, San Francisco, CA.

For Chemtura Corporation, Uniroyal Chemical Company, Inc., 3rd party defendants: Steven Ellis Conigliaro, LEAD ATTORNEY, O'Melveny & Myers, San Francisco, CA.

Judges: Bernard Zimmerman, United States Magistrate Judge.

Opinion by: Bernard Zimmerman

Opinion

[*1080]

ORDER DENYING PLAINTIFF'S MOTION TO COMPEL DISCOVERY

May plaintiff discover communications between a defendant's **[**8]** affiliate and the European Commission that were made pursuant to the Commission's Leniency Program? Based on the particular facts of this case, I conclude it may not and **DENY** plaintiff's motion to compel.

In 2002, attorneys representing defendant Flexsys N.V. met with officials of the European Commission. Flexsys N.V. disclosed the existence of anti-competitive practices in the rubber chemicals industry and solicited immunity from fines for Flexsys N.V. pursuant to the Commission's Leniency Program. [1] Decision of the European Commission dated December 21, 2005 attached as Exhibit D to the Forman Supplemental Declaration filed February 12, 2007 (hereafter "Decision") P 46. Over the next three years the Commission, through its Directorate-General for Competition ("DG-Competition") carried out an extensive investigation during which there were communications between the Commission and its counsel and Flexsys N.V. and its counsel. At the conclusion of its investigation, the Commission issued its 106-page Decision containing highly detailed findings of fact based on specific evidence, including evidence that was submitted by Flexsys N.V.

[9]** In 2006, Plaintiff Korea Kumho Petrochemical Co., Ltd. ("Kumho"), filed this complaint against defendant Flexsys America L.P. ("Flexsys"), its affiliate Flexsys N.V., and others, alleging that defendants engaged in unlawful conduct to exclude Kumho from the U.S. rubber chemicals market. Kumho then served Flexsys, but not Flexsys N.V., with requests for documents related to investigations of suspected antitrust violations in the rubber chemicals industry that were conducted by the governments of the United States, Canada, and the European Union.

Flexsys objected to the requests on various grounds. Over the ensuing months, the parties resolved many of the objections. Flexsys produced documents with **[*1081]** respect to the U.S. and Canadian investigations and produced all the business documents that had been produced in Europe. Flexsys refuses to produce the communications between the Commission and Flexsys N.V. which were generated under the Leniency Program (hereafter collectively referred to as the EC documents). Flexsys objects on the principal ground that production would conflict with the policies of a foreign sovereign, which is entitled to comity. Flexsys has submitted a letter from **[**10]** the Commission opposing discovery of the EC documents. [2]

---

[1] "The European Commission's 'Leniency Program' allows 'cartel participants [to] confess their wrongdoing' in return for prosecutorial leniency." *Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 266 n.18, 124 S. Ct. 2466, 159 L. Ed. 2d 355 (2004)*.

[2] The Commission feels so strongly about this issue that it has filed briefs amicus curiae in two other cases in which similar issues have arisen. In *In re Methionine Antitrust Litig., MDL No. 00-1311 CRB, 2002 U.S. Dist. LEXIS 27122 (N.D. Cal. July 17, 2002)*, Judge Breyer affirmed a special master's report which denied plaintiff's motion to compel. The special master, a retired former judge of this court, had conducted a comity analysis and concluded that "the balance tips strongly in favor of" respecting the Commission's interests, largely because, as here, the documents at issue were not seen as that important and alternative sources for the information existed. Order on Plaintiff's Motion to Compel at 13. In *In re Vitamin Antitrust Litig., 2002 U.S. Dist. LEXIS 26490 (D.D.C. Jan. 23, 2002)* and 25815 (Dec. 18, 2002), the court adopted a special master's report which recommended that the documents be produced after the master conducted a comity analysis. While the master's report was sealed, in balancing the comity factors the court concluded that the information there sought did not all originate outside the U.S. and could not be obtained from other sources. The court also doubted that production of the documents would undermine

[11]** ***HN1***[] The Federal Rules of Civil Procedure authorize party-initiated discovery of any evidence that is relevant to any party's claims or defenses. *Fed. R. Civ. P. 26(b)(1)*. However, *Rule 26* grants the court discretion to limit discovery on several grounds, including international comity. See *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist., 482 U.S. 522, 544, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987)*. American courts, in supervising pretrial proceedings, should exercise special vigilance to demonstrate due respect for any sovereign interest expressed by a foreign state. *Aerospatiale, 482 U.S. at 546*.

HN2[] "Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Aerospatiale, 482 U.S. at 544* (citing *Hilton v. Guyot, 159 U.S. 113, 163-64, 16 S. Ct. 139, 40 L. Ed. 95 (1895))*. It is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who **[**12]** are under the protection of its laws." Id.

As a threshold matter, Kumho doubts the position the Commission has taken in this case is even entitled to comity. It first questions whether the European Union is a sovereign entity. As the Supreme Court recognized in *Intel v. Advanced Micro Devices, Inc., 542 U.S. 241, 124 S. Ct. 2466, 159 L. Ed. 2d 355 (2004)*, ***HN3***[] "'The European Commission is the executive and administrative organ of the European communities' . . . The Commission exercises responsibility over the wide range of subject areas covered by the European Union Treaty; those areas include the treaty provisions, and regulations thereunder, governing competition." *Id. at 250*. While the Supreme Court did not expressly hold that the European Union is a sovereign who should be accorded comity, the analysis it conducted in **[*1082]** concluding that the European Commission is a tribunal within the meaning of *28 U.S.C. § 1782(a)* is in significant part a comity analysis. *Id. at 261-62*. Nothing in the Supreme Court's opinion suggests that the European Union should not be treated as a sovereign. Kumho has cited no authority in support of its position and the **[**13]** only authority of which I am aware accords the European Union comity. [3]

Kumho next questions whether the letter directed to the court and signed by Kirtikumar Mehta, Director of DG-Competition, accurately states the views of the Commission. Once again, the Supreme Court has recognized that ***HN4***[] "DG-Competition, operating under the Commission's aegis, is the European Union's primary ***antitrust law*** enforcer." *Intel Corp. v. Advanced Microdevices, Inc., 542 U.S. at 250*. Far from being a mere "bureaucrat," as Kumho has characterized him, Mr. Mehta seems analogous to the head of the Justice Department's Antitrust Division. His letter states that it "reflects the views of D.G. Competition" **[**14]** and that the Commission will seek leave to act as amicus curiae if desired. Moreover, he has attached to his letter a position paper filed by the Commission with the United States Antitrust Modernization Commission which amplifies the Commission's views. Under these circumstances I conclude that the views expressed in Mr. Mehta's letter and its attachment are the views of the Commission.

HN5[] In undertaking a comity analysis, a court must balance five competing factors:

> "(1) the importance to the … litigation of the documents or other information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located."

Aerospatiale, 482 U.S. at 544 (citing Restatement (Third) of the Foreign Relations Law of the U.S. § 442 (1987)). Applying this analysis, I conclude that **[**15]** principles of comity outweigh the need for production of the EC documents.

---

important interests of the Commission based in part on expert testimony not offered in this case. *2002 U.S. Dist. LEXIS 26490 at *127-28*.

[3] See *Empagaran S.A. v. Hoffman-LaRoche Ltd., 453 F. Supp. 2d 1 (D.D.C. 2006)*. See also *Methionine, MDL No. 00-1311 CRB, 2002 U.S. Dist. LEXIS 27122 (N.D. Cal. July 17, 2002)*, and *Vitamins, 2002 U.S. Dist. LEXIS 25815 at *33* ("the concerns of the EC should be addressed out of respect for the EC as a foreign Sovereign").

First, ***HN6***[] courts are less inclined to ignore a foreign state's concerns where the outcome of litigation "does not stand or fall on the present discovery order," or where the evidence sought is cumulative of existing evidence. See *Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1475 (9th Cir. 1992)*. Here, plaintiff has failed to persuade me of the importance of the EC documents. Plaintiff asserts that they are "highly relevant" to its claim, in that Flexsys N.V. admitted its participation in one or more conspiracies to restrain trade. (See Memorandum in Support of Motion to Compel at 5). However, the Commission was investigating whether Flexsys N.V. had entered into a conspiracy to restrain trade and monopolize in Europe. It is not clear how relevant or important any admissions Flexsys N.V. made while seeking leniency from the Commission would be in this case in which plaintiff claims that Flexsys engaged in a conspiracy to exclude plaintiff from the U.S. rubber chemicals market. It is even less clear **[*1083]** for documents generated by the Commission.

Flexsys has already produced all **[**16]** the business records Flexsys N.V. turned over to the Commission. It also produced documents relating to the investigation by the U.S. Department of Justice ("DOJ"), including all documents relating to any actual or proposed amnesty, agreement, or plea. Thus, I fail to see the importance or relevance of the EC documents to this litigation in which plaintiff claims that Flexsys sought to exclude it from the U.S. market, not the European market, and plaintiff already has the documents relating to the DOJ investigation of a conspiracy in the U.S. [4] This factor weighs against production.

HN7[] As to the specificity of the request, generalized searches for information whose disclosure is prohibited under foreign law are discouraged. *Richmark Corp., 959 F.2d at 1475.* **[**17]** Flexsys has not objected on these grounds, and the request for the EC documents seems sufficiently specific. This factor favors production.

As to the third factor, the EC documents did not originate in the United States. According to Flexsys, they were prepared by European counsel for Flexsys N.V. and by officials of the Commission, which sits in Belgium. In its letter the Commission states that the documents requested by Kumho include confidential Commission documents that were provided to the parties to allow them to exercise their rights of defense in the Commission's proceedings. (See Mehta Letter dated April 17, 2007, at 2). The fact that Flexsys has access to these documents in the U.S. is not dispositive. The documents were created, transmitted, and used only in Europe and in conjunction with the European enforcement proceedings. This factor weighs against production.

HN8[] The fourth factor in the comity analysis is whether the information sought can be obtained through alternative means. See *Aerospatiale, 482 U.S. at 544*. If the information sought can easily be obtained elsewhere, there is little or no reason to offend foreign law. Here, Flexsys has produced **[**18]** the documents exchanged with the DOJ in the course of its investigation, including any amnesty or plea agreement. This information is likely to be more relevant to Kumho that the EC documents, since Kumho asserts that Flexsys conspired to keep it out of the U.S. market and any admission made to DOJ likely involves an admission of wrongdoing within the U.S.

In addition, Kumho admits that the Commission issued a lengthy Decision detailing the entire alleged price-fixing conspiracy "communication-by-communication"; an opinion that, according to Kumho, "recites the entire file which was provided to Flexsys"; an opinion to which Kumho has access and has submitted to this Court. (Memorandum in Support of Motion to Compel at 8-9). Since Kumho's request is, in large part, cumulative of information it already has, I find that the available alternative means of obtaining the information Kumho needs weighs against production. [5]

[19]** Finally, ***HN9***[] a court must determine the extent to which noncompliance with the request would undermine important interests **[*1084]** of the United States, or compliance with the request would undermine important interests of the state where the information is located. *Aerospatiale, 482 U.S. at 544*. This requires a balancing of comity with the underlying policies of the Federal Rules of Civil Procedure.

---

[4] In an abundance of caution, I reviewed the EC documents *in camera.* My review confirmed their lack of importance to this litigation. Specifically, I found no reference to Kumho or to any conduct aimed at excluding anyone from the U.S. market.

[5] Disavowal by Flexsys N.V. in this litigation of the admissions it made in Europe might alter the analysis of this factor.

The Commission states that given the crucial investigative and evidentiary value of corporate statements and voluntary submissions, the protection of these documents is "indispensable to ensure the viability and efficacy of the Leniency Programme," which the Commission has described as the E.U.'s most effective tool in combating illegal cartels. (See Mehta Letter dated April 17, 2007, at 2). The Commission also states that "any response to a discovery request covering [the information sought by Kumho] would conflict with Flexsys' obligations under E.C. law." Id. Although this investigation is completed, the Commission argues that production of the EC documents would undermine its ability to initiate and prosecute future investigations by creating disincentives to cooperate **[**20]** with the Commission and would prejudice future investigations.

Taken as a whole, the Commission's letter is a strong objection to the production of the statements sought by Kumho, and raises some concerns that discovery of the EC documents could impact U.S. - E.U. cooperation in the enforcement of the antitrust laws. It seems that any marginal benefit that the plaintiff would gain from disclosure is outweighed by the impact that disclosure will have on the Commission's interests in the effective enforcement of its competition laws and its cooperation with the U.S. to enforce those laws internationally, especially considering that the other factors substantially disfavor production.

In this case, a foreign entity has taken a clear position and articulated reasons why it believes production of the requested documents would harm its interests. Comity is a sensitive balance, but having balanced the conflicting interests of comity and discovery, I find that in this case the principles of comity outweigh the policies underlying discovery. It is therefore **ORDERED** that the Motion to Compel is **DENIED.**

Dated: May 9, 2007

Bernard Zimmerman

United States Magistrate Judge

End of Document

Jones v. City of McMinnville

United States Court of Appeals for the Ninth Circuit

March 8, 2007, Argued and Submitted, Portland, Oregon ; May 9, 2007, Filed

No. 05-35523

Reporter

244 Fed. Appx. 755 *; 2007 U.S. App. LEXIS 11235 **; 2007-1 Trade Cas. (CCH) P75,693

DON JONES; VJ-2 DEVELOPMENT, INC., an Oregon corporation, Plaintiffs - Appellants, v. CITY OF MCMINNVILLE, OREGON, an Oregon municipal corporation, Defendant - Appellee.

Notice: [1]** PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: US Supreme Court certiorari denied by *Jones v. City of McMinnville, 552 U.S. 890, 128 S. Ct. 311, 169 L. Ed. 2d 152, 2007 U.S. LEXIS 10718 (Oct. 1, 2007)*

Prior History: Appeal from the United States District Court for the District of Oregon. D.C. No. CV-04-00047-ALA. Ann L. Aiken, District Judge, Presiding.

Jones v. City of McMinnville, 2005 U.S. Dist. LEXIS 60560 (D. Or., Apr. 25, 2005)

Core Terms

Appellants', district court, state law, ripe, equal protection claim, properly dismiss, annexation, municipal, regulations, antitrust, substantive due process claim, statute of limitations, antitrust claim, immunity, prong, procedural due process claim, due process claim, anti trust law, state court, time barred, decisions, urban

LexisNexis® Headnotes

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

Civil Procedure > ... > Removal > Postremoval Remands > Motions for Remand

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

The appellate court reviews de novo a district court's denial of a motion to remand.

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

Civil Procedure > ... > Justiciability > Ripeness > General Overview

HN2[] **Standards of Review, De Novo Review**

The appellate court subjects ripeness issues to de novo review.

Civil Procedure > ... > Justiciability > Ripeness > Tests for Ripeness

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Constitutional Law > The Judiciary > Case or Controversy > Ripeness

HN3[] **Ripeness, Tests for Ripeness**

Under Williamson, an as-applied takings claim is ripe only if the plaintiff can establish that (1) the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue, and (2) the claimant has sought compensation through the procedures the state has provided for doing so.

Civil Procedure > ... > Justiciability > Ripeness > Tests for Ripeness

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Real Property Law > Inverse Condemnation > Procedures

Constitutional Law > The Judiciary > Case or Controversy > Ripeness

HN4[] **Ripeness, Tests for Ripeness**

Under Oregon law, a state law takings claim is an action for inverse condemnation. Williamson's second prong does not mandate that available state law remedies be pursued in state court.

Civil Procedure > ... > Justiciability > Ripeness > Tests for Ripeness

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Constitutional Law > The Judiciary > Case or Controversy > Ripeness

Constitutional Law > Substantive Due Process > General Overview

Constitutional Law > Equal Protection > General Overview

HN5[] **Ripeness, Tests for Ripeness**

The United States Court of Appeals for the Ninth Circuit has held that the final decision requirement of Williamson's first prong is applicable to substantive due process and equal protection claims brought to challenge the application of land use regulations, and is most likely applicable to related procedural due process claims. However, the Ninth Circuit has limited Williamson's second prong to takings claims and their equivalents.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Annexation

Governments > Local Governments > Boundaries

HN6[ ] Zoning, Annexation

The Oregon Court of Appeals has held that the decision by a city or other governing body that proposes an annexation is an act of planning that must comply with the land use laws; however, the subsequent acts that are necessary to finally adopt or reject the proposal, generally a popular vote under the Or. Rev. Stat. ch. 222 procedures, are not controlled by or subject to the land use laws.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN7[ ] Exemptions & Immunities, Parker State Action Doctrine

Although the Oregon courts have not expressly resolved the issue, it is doubtful that the state courts would veer from federal ***antitrust law*** and adopt a "conspiracy exception" to municipal immunity from state law antitrust claims. The United States Supreme Court firmly rejected such an exception to federal ***antitrust law*** in Omni Outdoor Advertising. The United States Court of Appeals for the Ninth Circuit has previously noted that the Oregon antitrust statutes under *Or. Rev. Stat. §§ 646.725*, *646.730* are almost identical to the federal antitrust statutes under *15 U.S.C.S. §§ 1*, *2*. In fact, Oregon courts look to federal antitrust decisions for "persuasive" guidance in interpreting the state antitrust laws. *Or. Rev. Stat. § 646.715(2)*. Indeed, Oregon has adopted by statute the same test for municipal immunity applied by the federal courts. *Or. Rev. Stat. § 646.740*. Also, the Oregon state courts have not mentioned the potential exception despite finding municipal immunity in a number of antitrust cases since City of Columbia.

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

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

HN8[ ] Standards of Review, Abuse of Discretion

The appellate court reviews for an abuse of discretion a district court's grant of a motion to strike.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

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

HN9[ ] Entitlement as Matter of Law, Appropriateness

The appellate court reviews de novo a district court's order granting summary judgment to determine whether, viewing the evidence in the light most favorable to the non-moving party, any genuine issue of material fact exists and whether the court correctly applied the relevant substantive law.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN10[ ] Exemptions & Immunities, Parker State Action Doctrine

A municipality is immune from federal antitrust liability where its actions restricting competition are authorized by state policy. The court applies a two-part test to determine whether a clearly articulated state policy has authorized a municipality's anticompetitive actions. First, a court must determine whether the legislature authorized the challenged actions of the city. Second, the court must determine whether the legislature intended to displace competition with regulation.

Governments > Local Governments > Duties & Powers

Real Property Law > Zoning > General Overview

HN11[] **Local Governments, Duties & Powers**

Or. Rev. Stat. chs. 195-197 and 222 grant municipalities broad authority to engage in comprehensive land use planning, zoning, and annexation. Further, Oregon requires municipalities to make land use decisions in compliance with a state-acknowledged plan. *Or. Rev. Stat. § 197.175(2)*.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

HN12[] **Fundamental Rights, Eminent Domain & Takings**

Or. Const. art. I, § 18 provides that private property shall not be taken for public use without just compensation. The Oregon Court of Appeals has held that a regulation may constitute a taking under the state constitution if it is a step in a plan to acquire the property for public use and denies the owner an economic use of the property pending its eventual acquisition.

Civil Rights Law > Protection of Rights > Procedural Matters > Statute of Limitations

HN13[] **Procedural Matters, Statute of Limitations**

Because the statute of limitations for federal constitutional claims under *42 U.S.C.S. § 1983* is determined by the forum state's statute of limitations for personal injury actions, a federal equal protection claim in Oregon is subject to a two-year statute of limitations. Oregon's two-year statute of limitations for personal injury actions, *Or. Rev. Stat. § 12.110(1)*, applies to actions under *42 U.S.C.S. § 1983*. An Oregon state law equal protection claim is also subject to a two-year statute of limitations.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Evidence > Burdens of Proof > General Overview

HN14[] **Equal Protection, Nature & Scope of Protection**

The United States Court of Appeals for the Ninth Circuit has held that, although a successful equal protection claim may be brought by a class of one, the plaintiff still bears the burden of proving that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.

Civil Procedure > Judgments > Summary Judgment > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Constitutional Law > Substantive Due Process > Scope

HN15[] **Judgments, Summary Judgment**

Federal substantive due process claims are barred where the claimant could seek equivalent relief under constitutional provisions that provide more specific guarantees. A more general substantive due process claim cannot be brought if the claim is based on governmental conduct which implicates an enumerated constitutional right. The United States Court of Appeals for the Ninth Circuit has broadly applied Armendariz in actions involving takings, holding that a plaintiff is precluded from asserting a substantive due process claim instead of, or in addition to, a takings claim. Also, the Ninth Circuit has clarified that these substantive due process claims should be dismissed with prejudice.

Counsel: For DON JONES, VJ-2 DEVELOPMENT, INC., an Oregon corporation, Plaintiffs - Appellants: John W. Shonkwiler, Esq., LAW OFFICES, Tigard, OR.

For CITY OF MCMINNVILLE, OREGON, an Oregon municipal corporation, Defendant - Appellee: James P. Martin, Esq., Marjorie A. Speirs, Esq., Kari A. Furnanz, Esq., HOFFMAN HART & WAGNER, LLP, Portland, OR.

Judges: Before: GOULD, PAEZ, and RAWLINSON, Circuit Judges. Rawlinson, Circuit Judge, concurring.

Opinion

MEMORANDUM *

Before: GOULD, PAEZ, and RAWLINSON, Circuit Judges.

[*756] Don Jones and VJ-2 Development, Inc. ("Appellants") appeal the district court's **[*757]** denial of their motion to remand and grant of summary judgment **[**2]** to the City of McMinnville ("City"). We have jurisdiction pursuant to *28 U.S.C. § 1291*, and we affirm. Because the parties are familiar with the background of this case, we do not recite it here.

1. Motion to Remand

Appellants argue that their federal claims were unripe, and, therefore, that the district court should have dismissed these claims without prejudice, declined to exercise supplemental jurisdiction over the remaining state claims, and remanded the case to Oregon state court.

HN1[] We review de novo a district court's denial of a motion to remand. *Harris v. Bankers Life & Cas. Co., 425 F.3d 689, 692 (9th Cir. 2005)*. *HN2*[] We also "subject ripeness issues to de novo review." *Traweek v. City and County of San Francisco, 920 F.2d 589, 593 (9th Cir. 1990)*. We conclude that the district court properly denied Appellants' motion to remand. Because five of Appellants' claims arose under federal law, the City properly removed the case to federal court. Further, because at least three of these federal claims were ripe, the district court properly declined to dismiss those claims and retained supplemental jurisdiction over Appellants' **[**3]** state law claims, which were also ripe.

Under the two-prong test set forth by the Supreme Court in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985)*, Appellants' federal takings claim was not ripe:

---

* This disposition is not appropriate for publication and is not precedent except as provided by *Ninth Cir. R. 36-3*.

> *HN3*[] Under *Williamson,* an as-applied takings claim is ripe only if the plaintiff can establish that (1) "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," and (2) the claimant has sought "compensation through the procedures the State has provided for doing so."

Carson Harbor Vill., Ltd. v. City of Carson, 353 F.3d 824, 826 (9th Cir. 2004) (quoting *Williamson, 473 U.S. at 194*).

The parties agree that the City issued numerous final decisions, such that Appellants' claims satisfy *Williamson's* first prong, but Appellants concede that they have not sought just compensation for the alleged taking through available state procedures under Oregon law, which allows for inverse condemnation actions. *See Dodd v. Hood River County, 59 F.3d 852, 859-61 (9th Cir. 1995).* **[**4]** Thus, their federal takings claim was not ripe under *Williamson's* second prong, and the district court properly dismissed it without prejudice.

However, as the district court properly concluded, Appellants' state law takings claim was ripe. *HN4*[] Under Oregon law, Appellants' state law takings claim is an action for inverse condemnation. *See Vokoun v. City of Lake Oswego, 335 Ore. 19, 56 P.3d 396, 400-01 (Or. 2002)*. Thus, Appellants sought compensation through the available state procedure for obtaining relief, exactly as *Williamson* requires. Contrary to Appellants' argument, *Williamson's* second prong does not mandate that available state law remedies be pursued in state court. *Cf. Macri v. King County, 126 F.3d 1125, 1129-30 (9th Cir. 1997)* (holding that the district court properly remanded appellants' state law inverse condemnation claim, not because it was unripe, but because the court did not abuse its discretion in declining to exercise supplemental jurisdiction after dismissing all of appellants' federal claims); *Sinclair **[*758]** Oil Corp. v. County of Santa Barbara, 96 F.3d 401, 408 (9th Cir. 1996)* (holding that the district court properly **[**5]** dismissed appellant's state law inverse condemnation claim as unripe because it was barred under *Williamson's first* prong).

Appellants' federal and state equal protection and procedural due process claims, and state law substantive due process claim, were also ripe. *HN5*[] We have held that "the final decision requirement [of *Williamson's* first prong] is applicable to substantive due process and equal protection claims brought to challenge the application of land use regulations, and is most likely applicable to related procedural due process claims." *Hoehne v. County of San Benito, 870 F.2d 529, 532 (9th Cir. 1989)* (citations omitted). However, we have limited *Williamson's* second prong to takings claims and their equivalents. *See Sinclair, 96 F.3d at 405*.

Here, Appellants' equal protection claims, alleging that the City "intentionally treated [them] differently from others similarly situated" by "exten[ding] public facilities" to similar parcels of land, are not mere reformulations of their federal takings claim. Likewise, to the extent Appellants set forth cognizable procedural due process claims, and a cognizable state law substantive **[**6]** due process claim, they are distinct from their federal takings claim.

Lastly, as explained below, it is immaterial whether Appellants' federal substantive due process claim was ripe or not, because the claim was barred under *Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996)*. In sum, the district court properly declined to remand Appellants' case to state court. Although Appellants' federal takings claim was not ripe, their federal procedural due process, equal protection, and antitrust claims were ripe, and, hence, the district court properly declined to dismiss those claims and exercised its discretion to maintain supplemental jurisdiction over Appellants' state law claims, which were also ripe.

2. Abstention

Because we can resolve Appellants' remaining claims without addressing doubtful issues of state law, the district court did not abuse its discretion in declining to exercise *Pullman* abstention. *See Smelt v. County of Orange, 447 F.3d 673, 681-82 (9th Cir. 2006)*.

First, contrary to Appellants' argument, there is no unresolved issue of state law regarding the alleged conflict between the City's Charter Amendment, which allows **[**7]** the City's voters to veto proposed annexations, and Oregon's land use statutes, which require the City to comply with certain land use goals in making land use decisions. As the Oregon Court of Appeals has held:

> ***HN6***[] The decision by a city or other governing body that *proposes* an annexation is an act of planning that must comply with the land use laws; however, the subsequent acts that are necessary to *finally adopt or reject* the proposal, generally a popular vote under the ORS chapter 222 procedures, are not controlled by or subject to the land use laws.

Bear Creek Valley Sanitary Auth. v. City of Medford, 130 Ore. App. 24, 880 P.2d 486, 489 (Or. App. 1994) (emphases in original).

Second, ***HN7***[] although the Oregon courts have not expressly resolved the issue, it is doubtful that the state courts would veer from federal ***antitrust law*** and adopt a "conspiracy exception" to municipal immunity from state law antitrust claims. The Supreme Court firmly rejected such an exception to federal ***antitrust law*** in *City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 374-79, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*, and, as we have previously noted:

> **[*759]** The Oregon antitrust statutes are **[**8]** almost identical to the federal antitrust statutes. *Compare 15 U.S.C. §§ 1*, *2* *with Or. Rev. Stat. §§ 646.725*, *646.730*. In fact, Oregon courts look to federal antitrust decisions for "persuasive" guidance in interpreting the state antitrust laws. *See Willamette Dental Group, P.C. v. Oregon Dental Serv. Corp., 130 Or. App. 487, 882 P.2d 637, 640 (1994)* (citing *Or. Rev. Stat. § 646.715(2)*).

Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957, 963 n.4 (9th Cir. 1999). Indeed, Oregon has adopted by statute the same test for municipal immunity applied by the federal courts. *See Pre-Hosp. Med. Servs., Inc. v. Malheur County, 134 Ore. App. 481, 896 P.2d 585, 592 (Or. App. 1995)* (citing *Or. Rev. Stat. § 646.740*). Also, the Oregon state courts have not mentioned the potential exception despite finding municipal immunity in a number of antitrust cases since *City of Columbia. See, e.g., id.*

3. Motion to Strike

Appellants also argue that the district court erred by granting the **[**9]** City's motion to strike, in part, an affidavit from Appellant Jones. ***HN8***[] We review for an abuse of discretion a district court's grant of a motion to strike. *Hambleton Bros. Lumber Co. v. Balkin Enters., Inc., 397 F.3d 1217, 1224 n.4 (9th Cir. 2005)*.

Because Jones' affidavit contradicted his deposition testimony and made conclusory allegations without establishing personal knowledge, the district court did not abuse its discretion in granting the City's motion to strike portions of the affidavit.

4. Summary Judgment

HN9[] We review de novo a district court's order granting summary judgment to determine whether, viewing the evidence in the light most favorable to the non-moving party, any genuine issue of material fact exists and whether the court correctly applied the relevant substantive law. *F.T.C. v. Gill, 265 F.3d 944, 954 (9th Cir. 2001)*.

a. Antitrust Claims

The district court properly dismissed Appellants' antitrust claims. ***HN10***[] A municipality is immune from federal antitrust liability where its actions restricting competition are authorized by state policy. *See City of Columbia, 499 U.S. at 370*. We apply a two-part test **[**10]** "to determine whether a 'clearly articulated' state policy has authorized a municipality's anticompetitive actions." *Traweek, 920 F.2d at 591*. "First, a court must determine whether the legislature authorized the challenged actions of the city. Second, the court must determine whether the legislature intended to displace competition with regulation." *Id. at 591-92*. Here, the district court properly reviewed the relevant state statutes and correctly determined that ***HN11***[] they grant municipalities broad authority to engage in comprehensive land use planning, zoning, and annexation. *See* *Or. Rev. Stat. §§ 195-197*, *222*. Further, Oregon requires municipalities to make land use decisions in compliance with a state-acknowledged plan. *See id.* *§ 197.175(2)*. The State has acknowledged the City's Land Use Plan, which expressly prohibits urban development of land not annexed to the City and precludes the City from extending urban services to such unincorporated land.

In light of these state policies, the City was entitled to immunity from Appellants' federal antitrust claim: the State authorized the City to make annexation decisions and limit urban development **[**11]** and services to annexed land, and anti-competitive conduct is a foreseeable result of this broad grant of land use planning authority. *See* *Traweek, 920 F.2d at 593*.

For the same reasons, the district court properly dismissed Appellants' state law **[*760]** antitrust claims. As noted, Oregon's antitrust statutes are identical to the federal antitrust statutes, Oregon's test for municipal immunity is the same as the federal test, and Oregon's courts look to federal ***antitrust law*** for persuasive guidance in interpreting state ***antitrust law***. [1]

[12]** b. State Law Takings Claim

The district court also properly dismissed the City's state law takings claim. ***HN12***[] *Article I, section 18* of Oregon's constitution provides that "Private property shall not be taken for public use . . . without just compensation." On facts very similar to the instant case, the Oregon Court of Appeals held that a regulation may constitute a taking under the State constitution if it "is a step in a plan to acquire the property for public use and denies the owner an economic use of the property pending its eventual acquisition." *Schoonover v. Klamath County, 105 Ore. App. 611, 806 P.2d 156, 158 (Or. App. 1991)*.

Here, there is no evidence that the City's regulations are "a step in a plan to acquire [Appellants'] property for public use." *See id.* ("Nothing in the record suggests, even remotely, that Klamath County imposed the contested condition as a step in a plan to acquire the property for public use. It merely regulated the private use of land by requiring annexation into a fire district as a condition to the development of the property as a subdivision."). *Cf.* *Suess Builders Co. v. City of Beaverton, 294 Ore. 254, 656 P.2d 306, 310 (Or. 1982)* ("The **[**13]** issue in this case, however, arises from a governmental plan to acquire private land for public ownership.").

c. Equal Protection Claims

We agree with the district court that Appellants' equal protection claims are largely time barred, and that the City did not intentionally discriminate against Appellants by denying their request to extend urban services to their unannexed property.

HN13[] Because the statute of limitations for federal constitutional claims under *42 U.S.C. § 1983* is determined by the forum state's statute of limitations for personal injury actions, Appellants' federal equal protection claim is subject to a two-year statute of limitations. *See* *Sain v. City of Bend, 309 F.3d 1134, 1139 (9th Cir. 2002)* ("Oregon's two-year statute of limitations for personal injury actions applies to actions under *42 U.S.C. § 1983*.") (citing *Or. Rev. Stat. § 12.110(1)*). Appellants' state law equal protection claim is also subject to a two-year statute of limitations. *See* *Medo-Bel Creamery, Inc. v. State By and Through Kunzman, 65 Ore. App. 614, 673 P.2d 537, 542-43 (Or. App. 1983)*. Thus, the district **[**14]** court correctly determined that Appellants' equal protection claims are time barred to the extent they are based on the City's denials of their annexation proposals from 1995 to 2001, but

[1] Appellants also argue that the "sham exception," which the Supreme Court has recognized in certain antitrust cases, precludes immunity. However, the Court has not recognized this exception in the context of state or municipal immunity, known as "*Parker*" immunity; it has only recognized the exception in the context of "*Noerr-Pennington*" immunity, which applies to private parties and is based on distinct, *First Amendment* considerations. *See* *City of Columbia, 499 U.S. at 380*.

are not time barred insofar as they allege injury from the City's denial of their request to extend urban services in 2003.

Appellants' timely claims, however, are without merit. The parties agree that the analysis of Appellants' equal protection claims is the same under state and federal law. Appellants argue that they are members of a "class of one." ***HN14***[] We have held that, although a "successful equal protection **[*761]** claim may be brought by a class of one, the plaintiff still bears the burden of proving that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Thornton v. City of St. Helens, 425 F.3d 1158, 1167 (9th Cir. 2005)* (internal quotation marks omitted).

Appellants provide no evidence that the City intentionally discriminated against them in refusing to extend services to their unannexed property. Appellants allege that the City "approved extraterritorial extension of public facilities **[**15]** and services to property owned by [another private developer] and the McMinnville School District." Viewed in the light most favorable to Appellants, however, the record demonstrates only that the City considered extending services outside of city limits in order to support property already annexed to the City. Therefore, even assuming the City decided to extend services to these other property owners, Appellants were not similarly situated. In any event, the City had a rational basis for treating Appellants differently: the City's voters rejected each of Appellants' annexation proposals that the City Council had approved.

d. Due Process Claims

To the extent Appellants set forth a cognizable procedural due process claim, it is based exclusively on the City's and the voters' denials of Appellants' annexation proposals; Appellants do not allege that the City denied them procedural due process in rejecting their request to extend services in 2003. Because the statute of limitations analysis for Appellants' due process claims is the same as for their equal protections claims, Appellants' procedural due process claim is time barred. *See Medo-Bel Creamery, 673 P.2d at 542-43* **[**16]**

Further, ***HN15***[] federal substantive due process claims are barred where the claimant could seek equivalent relief under constitutional provisions that provide more specific guarantees. *See Armendariz, 75 F.3d at 1318-20*; *see also Macri, 126 F.3d at 1130* ("[A] more general substantive due process claim cannot be brought if the claim is based on governmental conduct which implicates an enumerated constitutional right."). We have broadly applied *Armendariz* in actions involving takings. *See, e.g., Buckles v. King County, 191 F.3d 1127, 1137 (9th Cir. 1999)* ("[A] plaintiff is precluded from asserting a substantive due process claim instead of, or in addition to, a takings claim."). Also, we have clarified that these substantive due process claims should be dismissed with prejudice. *See Sinclair, 96 F.3d at 407* ("[T]he district court should amend its order to reflect that this count is dismissed with prejudice."). Because Appellants' federal substantive due process claim merely restates their takings and equal protections claims, the district court properly dismissed the claim with prejudice.

Finally, to the extent **[**17]** it is not time barred, the district court properly dismissed Appellants' state law substantive due process claim, for the same reasons it dismissed Appellants' equal protection claims.

e. Civil Rights Claims

Appellants argue that they are entitled to relief for alleged civil rights violations claims only if they prevail on their other claims. In light of our disposition of Appellants' other claims, we also conclude that the district court properly dismissed their civil rights claims.

AFFIRMED.

Concur by: Rawlinson

Concur

[*762] Rawlinson, Circuit Judge, concurring:

I concur in the result.

In re Ditropan XL Antitrust Litig.

United States District Court for the Northern District of California

May 11, 2007, Decided ; May 11, 2007, Filed

CASE NO. M:06-CV-01761-JSW, MDL No. 1761

Reporter

529 F. Supp. 2d 1098 *; 2007 U.S. Dist. LEXIS 38068 **; 2007-1 Trade Cas. (CCH) P75,737

IN RE: DITROPAN XL ANTITRUST LITIGATION; This Order Relates to: ALL CASES

Subsequent History: Complaint dismissed at *In re Ditropan Xl Antitrust Litig., 2007 U.S. Dist. LEXIS 78423 (N.D. Cal., Oct. 11, 2007)*

Core Terms

Purchaser, Indirect, restitution, motion to dismiss, Plaintiffs', profits, disgorgement, antitrust claim, funds, ownership interest, class action, antitrust, damages, unfair, generic, cases, unfair competition, Donnelly Act, misrepresentations, competitor, fraudulent, patent, unfair business practice, unjust enrichment, named plaintiff, state law, unilateral, premised, argues, prong

LexisNexis® Headnotes

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

HN1[] **Trade Practices & Unfair Competition, State Regulation**

Non-California resident plaintiffs may bring a *Cal. Bus. & Prof. Code § 17200* claim based on misconduct that occurs within California.

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

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

Damages cannot be recovered pursuant to a *Cal. Bus. & Prof. Code § 17200* unfair competition law claim. A plaintiff bringing such a claim is limited to injunctive relief and restitution.

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

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

HN3[] **Trade Practices & Unfair Competition, State Regulation**

An order for "restitution" is defined as one "compelling a *Cal. Bus. & Prof. Code § 17200* unfair competition law (UCL) defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property or those claiming through that person. "Disgorgement" is a broader remedy. Disgorgement may include a restitutionary element, but it is not so limited. An order for "disgorgement" is defined as: (1) compelling a defendant to surrender all money obtained through an unfair business practice even though not all is to be restored to the person from whom it was obtained or those claiming under those persons, or (2) compelling a UCL defendant to surrender all profits earned as a result of an unfair business practice regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice. Disgorgement of profits is allowed in UCL claims only to the extent it constitutes restitution, i.e., profits unfairly obtained to the extent they represent money in which the plaintiff has an ownership interest.

Contracts Law > Remedies > Restitution

HN4[] **Remedies, Restitution**

The object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest.

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

Contracts Law > Remedies > Restitution

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

HN5[] **State Regulation, Claims**

"Direct victims" of unfair competition may obtain restitution.

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

HN6[] **State Regulation, Claims**

Restitution under *Cal. Bus. & Prof. Code § 17200* must be of a measurable amount to restore to the plaintiff what has been acquired by violations of the statutes, and that measurable amount must be supported by evidence.

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

HN7[] **Trade Practices & Unfair Competition, State Regulation**

Pursuant *Cal. Bus. & Prof. Code § 17200*, there are three varieties of unfair competition: practices which are unlawful, unfair or fraudulent. To state an unfair competition law (UCL) claim, a plaintiff must establish that the practice is either unlawful (i.e., is forbidden by law), unfair (i.e., harm to victim outweighs any benefit) or fraudulent (i.e., is likely to deceive members of the public).

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

HN8[] State Regulation, Claims

Proposition 64, which was approved by California voters on November 2, 2004, amended the unfair competition law (UCL), *Cal. Bus. & Prof. Code § 17200*, to limit the standing of private plaintiffs to bring UCL claims to those who "suffered injury in fact and has lost money as a result of such unfair competition. *Cal. Bus. & Prof. Code § 17204*. The UCL, as amended by Proposition 64, thus requires a person seeking to represent claims on behalf of others to show (1) she has suffered actual injury in fact, and (2) such injury occurred as a result of the defendant's alleged unfair competition or false advertising. Thus, a showing of causation is required as to each representative plaintiff.

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

HN9[] State Regulation, Claims

It is logical to require reliance on misrepresentations when an unfair competition law, *Cal. Bus. & Prof. Code § 17200*, claim is premised on allegations that the defendants engaged in fraudulent business practices.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN10[] Standing, Burdens of Proof

To demonstrate standing named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Moreover, at least one named plaintiff must have standing with respect to each claim the class representatives seek to bring. A claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

HN11[] Class Actions, Certification of Classes

Ortiz v. Fibreboard Corp., does not require courts to consider class certification before standing.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

HN12[] Standing, Burdens of Proof

Plaintiffs bear the burden of demonstrating standing.

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

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN13[] **Regulated Practices, Private Actions**

New York law firmly disallows a Donnelly, *N.Y. Gen. Bus. Law § 340*, class action by private plaintiffs.

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

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN14[] **Regulated Practices, Private Actions**

N.Y. C.P.L.R. § 901 sets forth the prerequisites to class action suits, provides in part that unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action. *N.Y. C.P.L.R. § 901(b)*. The Donnelly Act, *N.Y. Gen. Bus. Law § 340*, in turn provides in part: any person who shall sustain damages by reason of any violation of this section, shall recover three-fold the actual damages sustained thereby. *N.Y. Gen. Bus. Law § 340(5)*. The statute is silent as to class actions. Cases applying New York law have construed the Donnelly Act in light of *N.Y. C.P.L.R. § 901* and hold that class actions cannot be maintained under the Donnelly Act.

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

HN15[] **Regulated Practices, Private Actions**

The Tennessee Trade Practices Act, *Tenn. Code Ann. § 47-25-101 et seq.*, prohibits all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article. *Tenn. Code Ann. § 47-25-101*.

Counsel: **[**1]** For City of Fargo Health Trust Fund, Plaintiff: Anne K. Mandt, Charfoos & Christensen, P.C., Detroit, MI US; Gregory P. Sautter, Zimmerman Reed, Minneapolis, MN; Jason John Thompson, J. Thompson & Associates PLC, Southfield, MI; Mike Miller, Solberg Stewart Miller Johnson & Tjon, Fargo, ND; Timothy J. Becker, Zimmerman Reed PLLP, Minneapolis, MN.

For United Food and Commercial Workers Unions and Employers Midwest Health Benefits Fund, Plaintiff: Mark J. Tamblyn, LEAD ATTORNEY, Wexler Toriseva Wallace, LLP, Sacramento, CA; Andrae P Reneau, The Wexler Firm LLP, Chicago, IL US; Curtis Brooks Cutter, Kershaw Cutter & Ratinoff LLP, Sacramento, CA; Edward A. Wallace, Kenneth A. Wexler, The Wexler Firm LLP, Chicago, IL; William Alter Kershaw, Kershaw, Cutter & Ratinoff, Sacramento, CA.

For Teamsters Local No. 35 Health Plans, Plaintiff: Elaine T. Byszewski, LEAD ATTORNEY, Hagens Berman LLP, Los Angeles, CA; Jay S. Cohen, Jeffrey L. Kodroff, Patrick Howard, Theodore M. Lieverman, LEAD ATTORNEYS, Spector, Roseman & Kodroff, P.C., Philadelphia, PA; Steve C. Richman, Markowitz & Richman, Philadelphia, PA.

For Local 28 Sheet Metal Workers, on behalf of itself and all others similarly **[**2]** situated, Plaintiff: Ann K. Mandt, Charfoos & Charistensen, P.C., Detroit, MI; Gregory P. Sautter, Zimmerman Reed, Minneapolis, MN; Jason John Thompson, J. Thompson & Associates PLC, Southfield, MI; Timothy J. Becker, Zimmerman Reed PLLP, Minneapolis, MN.

For Jabo's Pharmacy, Inc., on behalf of itself and all others similarly situated in the States of TN, AL, AR, FL, HI, IA, KS, ME, MA, MI, MN, MS, NB, NV, NM, NY, NC, ND, SC, SD, VT, WV, WI and the District of Columbia, Plaintiff: Gordon Ball, LEAD ATTORNEY, Ball & Scott, Knoxville, TN.

For American Sales Co., Inc., SAJ Distributers, Inc., Stephen L LaFrance, Plaintiffs: Elaine T. Byszewski, Hagens Berman LLP, Los Angeles, CA; Lee M. Gordon, Hagens Berman Sobol Shapiro LLP, Los Angeles, CA.

For Alza Corporation a California corporation, Defendant: Taggart Hansen, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, Denver, CO US; Aileen Y. Mo, San Francisco, CA; Joshua Lipton, M. Sean Royall, Washington, DC US; Michael A. Sitzman, Gibson Dunn & Crutcher LLP, San Francisco, CA.

For Johnson & Johnson, Defendant: Melinda Meador, LEAD ATTORNEY, Bass, Berry and Sims, Knoxville, TN US; Michael A. Sitzman, Gibson Dunn & Crutcher **[**3]** LLP, San Francisco, CA.

For Ortho-McNeil Pharmaceuticals, Inc., Defendant: Melinda Meador, LEAD ATTORNEY, Bass, Berry and Sims, Knoxville, TN US.

For Stephen L. LaFrance, Holiday, Inc., 3rd party defendant: Lee M. Gordon, Hagens Berman Sobol Shapiro LLP, Los Angeles, CA.

For Plumbers and Pipefitters Local 572 Health and Welfare Fund, Interested Party: Mark J. Tamblyn, LEAD ATTORNEY, Wexler Toriseva Wallace, LLP, Sacramento, CA.

Judges: JEFFREY S. WHITE, UNITED STATES DISTRICT JUDGE.

Opinion by: JEFFREY S. WHITE

Opinion

[*1099] ORDER (1) GRANTING DEFENDANTS' MOTION TO DISMISS DIRECT PURCHASER'S COMPLAINT AND (2) GRANTING IN PART AND DENYING IN PART ALZA'S MOTION TO DISMISS INDIRECT PURCHASERS' COMPLAINT

Now before the Court are Defendants' motions to dismiss the two consolidated class action complaints filed by plaintiff American Sales Company ("ASC" or "Direct Purchaser Plaintiff") [1] and by City of **[*1100]** Fargo Health Trust Fund, Local 28 Sheet Metal Workers Fund, United Food & Commercial Workers Union & Employers Midwest Health Fund, Plumbers & Pipefitters Local 572 Health & Welfare Fund, and Teamsters Local No. 35 Health Plans (collectively, "Indirect Purchaser Plaintiffs"). Defendants **[**4]** Alza Corporation ("Alza") and Johnson & Johnson (collectively, "Defendants") move jointly to dismiss the Direct Purchaser Plaintiff's action. Alza is the only named defendant in the Indirect Purchaser Plaintiffs' action, and thus, only Alza moves to dismiss their complaint. Having considered the parties' arguments, relevant legal authority, and having had the benefit of oral argument, the Court hereby grants the motion to dismiss the Direct Purchaser Plaintiff's complaint and grants in part and denies in part the motion to dismiss the Indirect Purchaser Plaintiffs' complaint.

BACKGROUND

This is an antitrust action. In essence, the Direct and Indirect Purchaser Plaintiffs allege that Defendants filed a baseless complaint to preclude a competitor from producing a **[**5]** generic version of the drug Ditropan XL, as well as other anti-competitive conduct. They further allege that through such anti-competitive conduct, Alza was able to maintain a monopoly and charge supra-competitive prices Ditropan XL. According to the Direct and Indirect Purchaser Plaintiffs, Defendants' conduct in delaying or preventing the sale of a generic version of the drug caused them to pay more than they otherwise would have paid for the drug.

[1] Although the Direct Purchaser Plaintiff class action complaint was filed by Stephen L. LaFrance Holdings ("LaFrance") and SAJ Distributors ("SAJ") as well, LaFrance and SAJ recently submitted a notice of voluntary dismissal. (Docket No. 60.)

Direct Purchaser Plaintiff brings the following two claims: (1) a claim premised on *Section 2* of the Sherman Act and (2) a claim for restitution, disgorgement and constructive trust. Indirect Purchaser Plaintiffs assert the following three claims: (1) a claim under the California Cartwright Act; (2) a claim for violation of *California Business and Professions Code section 17200*; and (3) a claim for violation of the antitrust statutes of twenty-eight different states - Alabama, Alaska, Arizona, California, District of Columbia, Florida, Hawaii, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North **[**6]** Dakota, South Dakota, Tennessee, Vermont, West Virginia, and Wisconsin.

The Court will address additional specific facts as required in the analysis.

ANALYSIS

A. Direct Purchaser Plaintiff's Complaint.

1. Antitrust Claim.

Admittedly, Direct Purchaser Plaintiff did not purchase Ditropan XL from Alza or Johnson & Johnson. Rather, Direct Purchaser Plaintiff's claims are premised on Cardinal Health, Incorporated's ("Cardinal") purchases of Ditropan XL from Ortho-McNeil Pharmaceutical, Incorporated ("Ortho-McNeil"), a wholly owned subsidiary of Johnson & Johnson. Direct Purchaser Plaintiff asserts that Cardinal purportedly assigned its antitrust claims to it. (Declaration of Michael A. Sitzman ("Sitzman Decl."), Ex. 1.) It is undisputed that Direct Purchaser Plaintiff did not directly purchase Ditropan XL from Defendants and that its ability, if any, to maintain a direct purchaser action against Defendants, arises out of its purported assignment from Cardinal. However, Direct Purchaser Plaintiff's complaint fails to allege the existence of the assignment from Cardinal. Without such allegations, any antitrust claims by Direct Purchaser Plaintiff are insufficient. **[**7]** Accordingly, the Court dismisses the Direct **[*1101]** Purchaser Plaintiff's antitrust claim with leave to amend. [2]

[8] 2. Unjust Enrichment.**

At the hearing on Defendants' motion to dismiss, Direct Purchaser Plaintiff clarified that its unjust enrichment claim is based on state law, but it has not plead under which state or states laws it is based. In fact, Direct Purchaser Plaintiff admitted it is not yet aware of which state or states' laws it is moving under. Its ability to plead a claim for unjust enrichment may vary from state to state, and unless and until Direct Purchaser Plaintiff clarifies under what state law it is moving, neither Defendants nor the Court can address whether the claim or claims have been adequately plead. Accordingly, the Court dismisses the unjust enrichment claim without prejudice.

---

[2] The Court notes that Direct Purchaser Plaintiff's complaint may suffer from another defect. Direct Purchaser Plaintiff does not dispute that neither Alza nor Johnson & Johnson sold Ditropan XL during the class period. Rather, its antitrust claim against these defendants is premised on the sales by Ortho-McNeil. In response to the Court's concern regarding the validity of a direct purchaser action that fails to name the direct seller, Direct Purchaser Plaintiff cited to *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, *Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323, 326 (9th Cir. 1980)* (holding that "*Illinois Brick* does not bar an indirect purchaser's suit where the direct purchaser is a division or subsidiary of a co-conspirator"), and *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Ligit., 497 F. Supp. 218, 227 (C.D. Cal. 1990)* (concluding "that an indirect purchaser that purchases from an entity owned or controlled by the wrongdoer may sue to recover passed-on overcharges and is excepted from the general rule of *Illinois Brick.* …[T]he plaintiffs will be allowed to seek recovery only as to direct purchases from a defendant, a co-conspirator, sellers with whom the plaintiffs had pre-existing, fixed-quantity, cost-plus contracts, or an entity controlled by a conspirator.") If Direct Purchaser Plaintiff intends to pursue this action, it should be careful to plead facts that demonstrate a basis to maintain a direct purchaser action against *both* Johnson & Johnson *and* Alza based on sales by Ortho-McNeil.

B. Indirect Purchaser Plaintiffs' Complaint.

Indirect Purchaser Plaintiffs concede they are not bringing an antitrust claim under New Jersey law. (Indirect Purchasers' Opp. at 13.) Accordingly, the Court grants Alza's motion as to the New Jersey antitrust claim.

1. Unfair Competition Law Claim.

Alza moves to dismiss Indirect Purchaser Plaintiffs' unfair competition law claim under *California Business and Professions Code § 17200* ("UCL") **[**9]** on the following grounds: (1) the remedy Indirect Purchaser Plaintiffs seek is precluded under the UCL and (2) Indirect Purchaser Plaintiffs failed to allege reliance. [3]

[*1102] [10] i. The Remedy is not Precluded.**

HN2[] Damages cannot be recovered pursuant to a UCL claim. *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1144, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*. A plaintiff bringing such a claim is limited to injunctive relief and restitution. *Id.* Indirect Purchaser Plaintiffs do not dispute that they cannot obtain damages for their UCL claim. Instead, they argue that the relief they are seeking is restitutionary. Alza, on the other hand, contends that Indirect Purchaser Plaintiffs do not and cannot state a UCL claim because any money lost by them was not taken *directly* by Alza, and thus, does not qualify as restitution.

In support of its argument, Alza relies primarily on language from the California Supreme Court opinion in *Korea Supply.* In *Korea Supply,* the court addressed when disgorgement of a defendant's profits qualifies as restitution and, thus, is recoverable under UCL claims. *Korea Supply, 29 Cal. 4th at 1140*. The court explained the meaning of the terms "restitution" and "disgorgement." ***HN3***[] An order for "restitution" is defined as one "compelling a UCL defendant to return money obtained through an unfair business practice **[**11]** to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property or those claiming through that person." *Id. at 1144-45* (quoting *Kraus v. Trinity Management Services, Inc., 23 Cal. 4th 116, 126-27, 96 Cal. Rptr. 2d 485, 999 P.2d 718 (2000))*. "Disgorgement" is a broader remedy. "Disgorgement 'may include a restitutionary element, but it is not so limited.'" *Id. at 1145* (quoting *Kraus, 23 Cal. 4th at 127*). An order for "disgorgement" is defined as: (1) "compel[ling] a defendant to surrender all money obtained through an unfair business practice even though not all is to be restored to the person from whom it was obtained or those claiming under those persons," or (2) compelling a UCL defendant "to surrender … all profits earned as a result of an unfair business practice regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice." *Id. at 1145* (quoting *Kraus, 23 Cal. 4th at 127*). Thus, the court clarified that disgorgement of profits is allowed in UCL claims only to the extent it constitutes restitution, *i.e.,* profits **[**12]** unfairly obtained to the extent they represent money in which the plaintiff has an ownership interest. *Id. at 1145, 1148*; *see also* *Colgan v. Leatherman Tool Group, Inc., 135 Cal. App. 4th 663, 699, 38 Cal. Rptr. 3d 36 (2006)* (a plaintiff can seek money or property as restitution where such "money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession") (citation omitted).

[3] Even though Alza did not move to dismiss Indirect Purchaser Plaintiffs' UCL claim on the grounds of lack of standing, the Court questioned Alza at the hearing on its motion as to whether its standing argument would apply to this claim as well. In response, Alza argued it would. However, ***HN1***[] non-California resident plaintiffs may bring a UCL claim based on misconduct that occurs within the California. *Northwest Mortgage, Inc. v. Superior Court, 72 Cal. App. 4th 214, 222, 224-25, 85 Cal. Rptr. 2d 18 (1999)* (citing *Diamond Multimedia Syst., Inc. v. Superior Court, 19 Cal. 4th 1036, 1063-64, 80 Cal. Rptr. 2d 828, 968 P.2d 539 (1999))*. Because Alza's principal place of business is in California, it is reasonable to infer the alleged misconduct occurred within California. At this procedural stage, the Court will not dismiss Indirect Purchaser Plaintiffs' UCL claim for lack of standing. However, this ruling is without prejudice to Alza raising this argument again if it appears that Indirect Purchaser Plaintiffs do not have any evidence that demonstrates that the alleged misconduct actually occurred in California.

In *Korea Supply,* a plaintiff who alleged a lost business opportunity due to the unfair practices of a competitor sought to obtain disgorgement of the competitor's profits. *Korea Supply, 29 Cal. 4th at 1140*. The plaintiff alleged that the defendant's unfair business practices caused a company the plaintiff represented to lose a contract with the Republic of Korea. When the Republic of Korea awarded the contract to the defendant, the plaintiff lost the opportunity to obtain a commission it would have earned if the Republic of Korea had awarded the contract to the plaintiff's client. *Id.* The plaintiff then sought to obtain the profits the defendant gained from the contract with the Republic **[**13]** of Korea. The Court held that the plaintiff was not **[*1103]** entitled to disgorgement of the defendant's profits under the UCL because the profits were neither money taken from the plaintiff nor funds in which the plaintiff had an ownership interest. Thus, the plaintiff's requested remedy was nonrestitutionary. *Id. at 1140, 1149*.

The court reasoned that ***HN4***[] "[t]he object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." *Id at 1149*. The court noted that "it [was] clear that plaintiff [was] not seeking the return of money or property that was once in its possession. [The plaintiff had] not given any money to [the defendant]; instead it was from the Republic of Korea that [the defendant] received its profits." *Id.* In light of these facts, the court found that "[a]ny award that plaintiff would recover from defendants would not be restitutionary as it would not replace any money or property that defendants took directly from plaintiff." *Id.*

Alza places great weight on the word "directly" in the preceding sentence, and argues argues that because Plaintiffs, as indirect **[**14]** purchasers, did not pay any money *directly* to Alza, Plaintiffs cannot recover restitution under the UCL. However, as noted above, it was clear in *Korea Supply* that the plaintiff did not pay *any* money, even indirectly, to the defendant. In *Korea Supply,* the defendant's conduct merely caused the plaintiff to lose an opportunity to obtain a commission it would have received if a third party had awarded a contract to its client. Although the court mentions that ***HN5***[] "direct victims" of unfair competition may obtain restitution, *id. at 1152*, the issue of whether someone who pays money to a defendant through an intermediary would be precluded from seeking restitution was not before the court in *Korea Supply.* Therefore, this Court will not read such a limitation into the holding of *Korea Supply.*

Nor do the other cases relied on by Alza convince the Court that Indirect Purchaser Plaintiffs are precluded from recovering restitution as a matter of law. *See Madrid v. Perot Systems Corp., 130 Cal. App. 4th 440, 30 Cal. Rptr. 3d 210 (2005)*; *National Rural Telecommunications Cooperative v. DIRECTV, Inc., 319 F. Supp. 2d 1059 (C.D. Cal. 2003)*. In these **[**15]** cases the issue of whether indirect purchasers could recover restitution was not before the court. As in *Korea Supply,* it was clear that the plaintiffs were seeking to recover funds that they never paid to defendants or in which they ever had an ownership interest. *Madrid, 130 Cal. App. 4th at 456* (affirming summary judgment where "even assuming [the defendant] sold confidential information, plaintiff fail[ed] to show that such profit, received from third parties, would qualify as money taken from plaintiff or money in which plaintiff had a vested ownership interest, so as to be recoverable as restitution in this UCL action"); *National Rural Telecommunications, 319 F. Supp. 2d at 1079* (granting summary judgment on UCL claim finding "Plaintiffs [were] not seeking the return of money that was once in their possession").

Alza's reliance on *In re First Alliance Mortgage Co., 471 F.3d 977 (9th Cir. 2006)*, a case it brought to the Court's attention as recent authority, similarly is misplaced. [4] This case involved a complicated financial scheme in which any funds paid by the plaintiffs were not traceable to those eventually funds **[**16]** paid to the defendant. The plaintiffs were borrowers of First Alliance Mortgage Company ("First Alliance") who sought to impose liability on the defendant for aiding and abetting a fraudulent **[*1104]** scheme engaged in by First Alliance. *Id. at 983*. Pursuant to the scheme, First Alliance persuaded borrowers to assume loans with high interest rates and hidden "junk" fees. *Id. at 985*. First Alliance used a credit line provided by the defendant to fund and secure the loans. The defendant profited by earning interest from the credit line and fees for underwriting the securitizations. *Id. at 986*. The court affirmed summary judgment on the plaintiffs' UCL claim because it determined the relief the plaintiffs were seeking under this claim was more akin to "nonrestitutionary disgorgement" prohibited by *Korea Supply*. *Id. at 997*. The plaintiffs were seeking to disgorge *all* of the defendant's profits earned by the unfair business practice, "regardless

[4] The Court grants Alza's request for leave to submit this decision.

of whether those profits represent money taken directly from persons who were victims of the unfair practice." *Id.* The court found that:

> [T]he [plaintiffs] in this case **[**17]** cast their claim under *section 17200* as one for equitable relief by asking the court to disgorge [the defendant's] "ill-gotten gains," asserting that [the defendant] unlawfully acquired money and property directly and indirectly from the [plaintiffs] and has been unjustly enriched at their expense. They do not, however, specify the amount of these "ill-gotten gains" to which they have an actual ownership interest.

Id. at 997. Significantly, the plaintiffs "did not actually claim an ownership interest in funds in [the defendant's] possession, nor explain the basis of their purported ownership interest in those funds." *Id. at 997 n. 7*. Therefore, the court found that their equitable claim under the UCL would be left largely to the court's speculation and thus, affirmed summary judgment against the plaintiffs. *Id. at 997-98*. In contrast, Indirect Purchaser Plaintiffs here do allege an ownership interest in funds received by Alza, namely, the profits Alza obtained by allegedly inflating the price of Ditropan XL.

[18]** Although the parties did not cite to, and the Court did not find, any authority applying California law that squarely addresses whether *indirect* purchaser plaintiffs may recover restitution under the UCL, [5] the Court notes that one district court refused to dismiss a UCL claim in a factually analogous situation. *See Trew v. Marx, 2006 U.S. Dist. LEXIS 4890, 2006 WL 306904, *2-3 (E.D. Cal. Feb. 8, 2006)*. In *Trew,* Volvo moved to strike the plaintiffs' claim for disgorgement under the UCL because, it argued, plaintiffs' damages could not be traced to funds acquired by it. *Trew, 2006 U.S. Dist. LEXIS 4890, 2006 WL 306904, at *2*. The plaintiffs were owners of Volvo cars. They alleged that Volvo installed defective electronic throttle modules ("ETMs") in their **[*1105]** cars. Volvo asserted that the "plaintiffs paid dealerships or independent mechanics to service their ETMs and that these monies did not go to Volvo." *Id.* The plaintiffs responded that Volvo, as the producer of the ETMs, profited from the sale of ETMs to car owners who had to have them replaced. *2006 U.S. Dist. LEXIS 4890, [WL] at *3*. The court denied the motion to strike the claim for disgorgement because the plaintiffs could recover as restitution Volvo's profits **[**19]** from owners who replaced defective ETMs. *Id.*

[20]** In light of the reasoning of *Korea Supply,* as well as that of *Trew,* the Court concludes that as long as Indirect Purchaser Plaintiffs are ultimately able to prove traceability, California law authorizes this Court to award them restitution under the UCL. Indirect Purchaser Plaintiffs are seeking to recover funds that *they* overpaid to Alza. [6] That Indirect Purchaser Plaintiffs allege such funds were paid to Alza through an intermediary does not change the fact that Indirect Purchaser Plaintiffs are seeking funds in which they have an ownership interest. If Indirect Purchaser Plaintiffs can demonstrate that the amount they overpaid for Ditropan XL was the amount that Alza overcharged, and that any intermediaries merely passed on the overcharge from Alza to the Indirect Purchaser Plaintiffs as end-paying customers, they may recover such funds as restitution under the UCL.

---

[5] Both parties assert that *Colgan, 135 Cal. App. 4th 663, 38 Cal. Rptr. 3d 36* supports their position. However, the Court finds it does not assist either. In *Colgan,* the court struck down a restitution award to indirect purchaser plaintiffs who brought an antitrust action. *Id. at 700*. The court noted that the *Korea Supply* "made clear that the 'object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest.'" *Colgan, 135 Cal. App. 4th at 697* (citing *Korea Supply, 29 Cal. 4th at 1149*). Restitution ***HN6***[] under *§ 17200* "must be of a measurable amount to restore to the plaintiff what has been acquired by violations of the statutes, and that measurable amount must be supported by evidence." *Id at 698*. The court struck down the restitution award, not because the court was not authorized to award restitution to the customers, but because there was "*no* evidence concerning the amount of restitution necessary to restore purchasers to the *status quo ante." Id. at 700* (emphasis in original). Because there was insufficient evidence to support the award, the court did not address the issue of whether restitution could be awarded to indirect purchasers.

[6] The Court notes that Defendants contend Ortho-McNeil, not Alza, sold Ditropan XL during the class period. If true, Plaintiffs may be precluded from seeking any restitution because the money they are seeking to recover was not actually paid to Alza. Indirect Purchaser Plaintiffs may need to proffer the existence of facts and authority demonstrating that the money paid to Ortho-McNeil may be attributed to Alza for purposes of the UCL claim and that Ortho-McNeil should not be considered a separate entity. However, because Alza did not raise this point in its motion, and because the facts upon which the Court could decide this issue are not yet before it, the Court declines to dismiss Indirect Purchaser Plaintiffs' UCL claim at this stage.

[21] ii. Plaintiffs Need Not Allege Reliance.**

Alza also argues that Indirect Purchaser Plaintiff's UCL claim should be dismissed because they have not alleged reliance on any misrepresentations. ***HN7***[] Pursuant *Section 17200*, "there are three varieties of unfair competition: practices which are unlawful, unfair or fraudulent." *See Daugherty v. American Honda Motor Co., Inc., 144 Cal. App. 4th 824, 837, 51 Cal. Rptr. 3d 118 (2006)*; *see also Albillo v. Intermodal Container Services, Inc., 114 Cal. App. 4th 190, 206, 8 Cal. Rptr. 3d 350 (2003)* (to state a UCL claim, a "plaintiff must establish that the practice is either unlawful unlawful (i.e., is forbidden by law), unfair (i.e., harm to victim outweighs any benefit) or fraudulent (i.e., is likely to deceive members of the public)"). Alza has not proffered any authority that demonstrates reliance on misrepresentations, as opposed to *causation* more generally, is required for UCL claims which fall under the unfair or unlawful prongs.

HN8[] Proposition 64, which was approved by California voters on November 2, 2004, amended the UCL to limit the standing of private plaintiffs to bring UCL claims to those who "suffered injury in fact and has lost money **[**22]** as a result of such unfair competition." *Laster v. T-Mobile USA, Inc., 407 F. Supp. 2d 1181, 1193 (S.D. Cal. 2005)* (quoting *Cal. Bus. & Prof. Code § 17204*). The UCL, as amended by Proposition 64, thus requires a person seeking to represent claims on behalf of others to show "(1) she has suffered actual injury in fact, and (2) such injury occurred as a result of the defendant's alleged unfair competition or false advertising." *Id. at 1194*. Thus, "a showing of causation is *required* as to each **[*1106]** representative plaintiff." *Id.,* (emphasis in original); *see also Doe v. Texaco, 2006 U.S. Dist. LEXIS 53930, 2006 WL 2053504 (N.D. Cal. July 21, 2006)* (dismissing UCL claim for failure to sufficiently allege causation).

In *Laster,* the plaintiffs' UCL claim was brought under the fraudulent prong of *Section 17200* and was premised on alleged false advertising by a phone company. According to the plaintiffs, the phone company falsely advertised that cell phones were free or substantially discounted but charged customers sales tax based on the phones' full retail value. *Id. at 1194*. However, the plaintiffs failed to allege that they **[**23]** actually relied on any false or misleading advertising in entering into the transactions and, thus, failed to adequately allege causation. *Id.*

Similarly, in *Texaco,* the plaintiffs' UCL claim was based on alleged misrepresentations. *Texaco, 2006 U.S. Dist. LEXIS 53930, 2006 WL 2053504 at *1-3*. The plaintiffs alleged that pollution by Texpet raised the average risk of cancer. Texpet then merged with Chrevron. The plaintiffs brought a UCL claim against Chevron based on misrepresentations denying that Texpet's conduct was responsible for environmental and health problems in the region. *Texaco, 2006 U.S. Dist. LEXIS 53930, 2006 WL 2053504 at *1*. The court noted that "[f]or plaintiffs to prevail, they would have to claim that their cancer or increased risk of cancer caused them to lose money or property and that the false statements caused the cancer or increased risk thereof. Such a contention would be patently absurd and appears no where in the complaint." *2006 U.S. Dist. LEXIS 53930, [WL] at *3*.

It***HN9***[] is logical to require reliance on misrepresentations when a UCL claim is premised on allegations that the defendants engaged in fraudulent business practices. However, where, as here, plaintiffs allege that they were harmed by **[**24]** other types of misconduct actionable under the UCL the Court finds no basis for requiring reliance on misrepresentations.

In essence, Indirect Purchaser Plaintiffs allege that Alza filed a baseless complaint to preclude a competitor from producing a generic version of Ditropan XL, as well as other anti-competitive conduct. (Indirect Purchaser Compl., PP 92-98.) They further allege that through such anti-competitive conduct, Alza was able to maintain a monopoly and charge supra-competitive prices. (*Id.,* P 246.) According to Indirect Purchaser Plaintiffs, Alza's conduct in delaying or preventing the sale of a generic version caused them to pay more than they otherwise would have for the drug. (*Id.,* P 251.) Thus, at the very least, they allege a UCL claim premised on the unfair prong. Because Indirect Purchaser Plaintiffs have alleged facts sufficient to state a claim under the unfair prong, the Court need not determine on a motion to dismiss whether they have also alleged sufficient facts to maintain their UCL claim under the fraudulent prong.

3. Standing To Bring Various Antitrust State Law Claims

Except for the antitrust claims based on Tennessee, New York, North Dakota, **[**25]** and New Jersey law, Alza moves to dismiss all of Indirect Purchaser Plaintiffs' state law antitrust claims brought under their third cause of action on the grounds of lack of standing. Under their third cause of action, in addition to the antitrust claims based on Tennessee, New York, North Dakota, and New Jersey law, Indirect Purchaser Plaintiffs allege that Alza's conduct violates the antitrust laws of the following twenty-four states: Alabama, Alaska, Arizona, California, District of Columbia, Florida, Hawaii, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, North Carolina, South Dakota, Vermont, **[*1107]** West Virginia, and Wisconsin. (Indirect Purchaser Compl., P 280.) Alza argues that Indirect Purchaser Plaintiffs' lack standing because none of the named plaintiffs reside in or are alleged to have personally purchased Ditropan XL in any of these twenty-four states.

HN10[] To demonstrate standing "named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. **[**26]** " *Lewis v. Casey, 518 U.S. 343, 347, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)* (internal quotes omitted). Moreover, at least one named plaintiff must have standing with respect to each claim the class representatives seek to bring. *Griffin v. Dugger, 823 F.2d 1476, 1483 (11th Cir. 1987)* ("a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim."); *see also In re Salomon Analyst Level 3 Litig., 350 F. Supp. 2d 477, 496 (S.D.N.Y. 2004)*; *In re Terazosin Hydrocholoride Antitrust Litig., 160 F. Supp. 2d 1365, 1370-71 (S.D. Fla. 2001)* (dismissing based for lack of standing the state law antitrust claims in which none of the named plaintiffs resided or purchased the drug at issue).

Indirect Purchaser Plaintiffs do not assert there is basis to confer standing on them to bring claims based on the state law of states in which they do not reside, but rather, argue that the determination of standing is premature prior to class certification. (Indirect Purchasers' Opp. at 11-12 (citing *Ortiz v. Fibreboard Corp., 527 U.S. 815, 831, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)*.) However, the Ninth Circuit has rejected **[**27]** this exact argument. *See Easter v. American West Financial, 381 F.3d 948, 962 (9th Cir. 2004)*. The Ninth Circuit reasoned that "[a]though the court in *Fibreboard* examined class issues before the question of Article III standing, it did so in the very specific situation of a mandatory global settlement class. ***HN11***[] *Fibreboard* does not require courts to consider class certification before standing." *Id.* Thus, the court held that the "district court correctly addressed the issue of standing before it addressed the issue of class certification." *Id.*

HN12[] Plaintiffs bear the burden of demonstrating standing. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. They have not done so here. Accordingly, the Court dismisses for lack of standing the claims based on the ***antitrust law*** of the following twenty-four states: Alabama, Alaska, Arizona, California, [7] District of Columbia, Florida, Hawaii, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan Minnesota, Mississippi, Nebraska, Nevada, New Mexico, North Carolina, South Dakota, Vermont, West Virginia, and Wisconsin without prejudice.

[28] 4. Donnelly Act.**

Alza moves to dismiss Indirect Purchaser Plaintiffs' claim under *New York General Business Law § 340*, known as the "Donnelly Act," which is New York's antitrust statute. *See Leider v. Ralfe, 387 F. Supp. 2d 283, 287 **[*1108]** (2005)*. Alza argues that the Court should dismiss this claim because New York law does not permit private class actions under the Donnelly Act. *See id.* ("***HN13***[] New York law firmly disallows a Donnelly class action by private plaintiffs."). This Court agrees.

---

[7] The Court notes that Indirect Purchaser Plaintiffs allege a claim under California's ***antitrust law***, the Cartwright Act, under both their second and third causes of action. Although Alza only raised its standing argument with respect to Plaintiffs' Cartwright Act claim under the third cause of action, the Court's finding that Plaintiffs failed to demonstrate standing as to this claim necessarily applies to the same claim pled under the second cause of action. Accordingly, the Court need not address the parties' arguments as to whether Indirect Purchaser Plaintiffs sufficiently alleged coercive conduct actionable under the Cartwright Act.

HN14[] New York Civil Practice Law and Rules *§ 901* ("*CPLR 901*"), which sets forth the prerequisites to class action suits, provides in pertinent part that "[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action." *N.Y. C.P.L.R. § 901(b)*. The Donnelly Act in turn provides in pertinent part: "any person who shall sustain damages by reason of any violation of this section, *shall recover three-fold* **[**29]** *the actual damages* sustained thereby. …" *N.Y. Gen. Bus. Law § 340(5)* (emphasis added). The statute is silent as to class actions. Cases applying New York law have construed the Donnelly Act in light of *CPLR 901* and, thus, have held that class actions cannot be maintained under the Donnelly Act. *See* *Leider, 387 F. Supp. 2d at 287-88*; *see also* *Asher v. Abbott Laboratories, 290 A.D.2d 208, 737 N.Y.S.2d 4, 4-5 (2002)*.

In opposition to the motion to dismiss, Indirect Purchaser Plaintiffs argue that Alza "ignores the New York Supreme Court's Appellate Division holding entitling a plaintiff to bring a class action for antitrust activities pursuant to *N.Y. Gen. Bus. Law § 349* if the plaintiff foregoes any demand for punitive damages." (Indirect Purchasers' Opp. at 15.) In support of their argument, they cite to *Cox v. Microsoft Corp., 8 A.D.3d 39, 778 N.Y.S.2d 147, 149 (2002)*, which allows a class action to go forward under *New York General Business Law § 349* ("*Section 349*"). Indirect Purchaser Plaintiff's reliance on *Section 349*, and the case law interpreting this statute, is misplaced **[**30]** because *section 349* is part of a different statute. "General Business Law article 22-A, of which *section 349* is a part, is entitled 'Consumer Protection from Deceptive Acts and Practices.'" *Feinberg v. Federated Dept. Stores, Inc., 15 Misc. 3d 299, 832 N.Y.S.2d 760, 764 (2007)*. Significantly, *Section 349* provides in pertinent part that "any person who has been injured by reason of any violation of the section may bring an action … to recover his actual damages or fifty dollars, whichever is greater." *N.Y. Gen. Bus. Law § 349(h)*. In *Cox,* the court found *CPLR 901* was inapplicable because the plaintiffs expressly sought only their actual damages in their complaint. *Cox, 778 N.Y.S.2d at 149*. Accordingly, the Court dismisses Indirect Purchaser Plaintiffs' Donnelly Act claim. To the extent Indirect Purchaser Plaintiffs seek to allege a claim under a different law, this ruling is without prejudice to their seeking leave to amend to add a new claim.

5. Tennessee Law.

Indirect Purchaser Plaintiffs plead an antitrust claim under Tennessee Trade Practices Act, *Tenn. Code Ann. § 47-25-101 et seq.* "(TTPA"). **[**31]** Alza moves to dismiss this claim on the basis that Indirect Purchaser Plaintiff's complaint only pleads unilateral conduct, which is not covered by the TTPA. **HN15**[] The TTPA prohibits "all arrangements, contracts, agreements, trusts, or combinations *between persons or corporations* designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article." *See* *Tenn. Code Ann. § 47-25-101* (emphasis added).

The only authority cited by the parties analyzing the language of the TTPA and whether it applies to unilateral conduct is *In re Relafen Antitrust Litig., 221 F.R.D. 260, 284* **[*1109]** *(D. Mass. 2004)*. *In re Relafen* is factually analogous to the Indirect Purchasers Plaintiffs' action before this Court. In that case, the defendant received a patent for a drug. When other companies sought approval from the Food and Drug Administration ("FDA") to market a generic version of the drug, the defendant filed lawsuits to enforce its patent and to preclude approval of the generic drugs. The courts in the underlying patent litigation found that the patent was unenforceable based on prior **[**32]** art and inequitable conduct. *Id. at 264*. In the antitrust action, the plaintiffs argued that the defendant wrongfully filed patent lawsuits to preclude its competitors from selling generic versions of the drug. *Id.* The court found that the plaintiffs alleged unilateral, not concerted, action. *Id. at 282-83*. The court then analyzed the plain language of the Tennessee statute, emphasizing the terms *"between persons or corporations"* in the TTPA, and concluded that it only applied to unilateral conduct. *Id. at 284*.

In their brief in opposition to the motion to dismiss and at the hearing, Indirect Purchaser Plaintiffs rely on the plain language of the TTPA to argue that the statute encompasses Alza's conduct as alleged in their complaint. At the hearing, they argued that the language "all arrangements" is broad. However, they ignore the modifying language "between persons or corporations." The cases cited to by Indirect Purchaser Plaintiffs at the hearing do not assist them because those cases did not address whether a defendant's unilateral activity to exclude competitors from the market would be prohibited by the TTPA. *See* **[**33]** *In re Cardizem CD Antitrust Litig., 105 F.Supp.2d 618, 667 (E.D. Mich. 2000)* (addressing whether TTPA is limited to transactions that are wholly or predominantly within the state); *Duke v. Browning-Ferris Indus. of Tenn., Inc., 2006-1 Trade Cases P 75-323, 2006 Tenn. App. LEXIS 355, *20-21 (Tenn. App. Ct. 2006)* (affirming denial of TTPA claim for monopolization or attempted monopolization where there were no barriers to entry into the market); *Sherwood v. Microsoft Corp., 2003-1 Trade Cases P 74,109, 2003 Tenn. App. LEXIS 539, 2003 WL 21780975, at *1 (Tenn Ct. App. 2003)* (determining whether indirect purchasers could bring an action for damages under the TTPA and whether the TTPA applies to activity with substantial effects on commerce within the state).

Upon review of the plain language of the Tennessee statute, and in the absence of any authority demonstrating that Tennessee courts would construe this language to apply to the conduct alleged in this action, the Court finds that the TTPA does not encompass the conduct the Indirect Purchaser Plaintiffs have alleged. Accordingly, the Court grants Alza's motion to dismiss as to Plaintiff's antitrust claim under **[**34]** Tennessee law. This ruling is without prejudice to Indirect Purchaser Plaintiffs' seeking leave to amend if they are aware of additional facts they could allege which would be sufficient to demonstrate covered conduct *between persons or corporations.*

CONCLUSION

For the foregoing reasons, the Court ORDERS as follows:

(1) Defendants' motion to dismiss Direct Purchaser Plaintiff's complaint is GRANTED;

(2) Alza's motion to dismiss Indirect Purchaser Plaintiffs' complaint is GRANTED as to their claims under the antitrust laws of New Jersey, New York, Tennessee, Alabama, Alaska, Arizona, California, District of Columbia, Florida, Hawaii, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan Minnesota, Mississippi, Nebraska, Nevada, New Mexico, North Carolina, South Dakota, Vermont, West Virginia, and Wisconsin; and

(3) Alza's motion to dismiss Indirect Purchaser **[*1110]** Plaintiffs' complaint is DENIED as to their UCL claim.

This ruling is without prejudice to Direct and Indirect Purchaser Plaintiffs filing amended complaints in compliance with this Order. Direct and Indirect Purchaser Plaintiffs shall file any amended complaints within twenty-one days of **[**35]** the date of this Order. If Direct Purchaser Plaintiffs do not file an amended complaint within twenty-one days, its action shall be dismissed. If necessary, Defendants shall file their answers or move to dismiss within twenty days of service of any amended complaint or the deadline to amend has expired, whichever is earlier.

IT IS SO ORDERED

Dated: May 11, 2007

JEFFREY S. WHITE

UNITED STATES DISTRICT JUDGE

Bradburn Parent Teacher Store, Inc. v. 3M

United States District Court for the Eastern District of Pennsylvania

May 14, 2007, Decided ; May 15, 2007, Filed; May 16, 2007, Entered

CIVIL ACTION NO. 02-7676

Reporter

513 F. Supp. 2d 322 *; 2007 U.S. Dist. LEXIS 35899 **; 2007-1 Trade Cas. (CCH) P75,722

BRADBURN PARENT TEACHER STORE, INC., on behalf of itself and all others similarly situated v. 3M (MINNESOTA MINING AND MANUFACTURING COMPANY)

Prior History: *Bradburn Parent Teacher Store, Inc. v. 3M, 2005 U.S. Dist. LEXIS 15815 (E.D. Pa., July 29, 2005)*

Core Terms

Settlement, class member, Notice, tape, settlement agreement, attorney's fees, final approval, expenses, parties, settlement fund, transparent, class action, damages, approve, invisible, factors, incentive award, cases, risks, district court, calculated, antitrust, label, proposed settlement, common fund, multiplier, Estoppel, lodestar, reimbursement, subsidiaries

LexisNexis® Headnotes

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

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN1[] **Class Actions, Compromise & Settlement**

The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court. While the law generally favors settlement in complex or class action cases for its conservation of judicial resources, the court has an obligation to ensure that any settlement reached protects the interests of the class members. Consequently, prior to approving a settlement, the court must determine whether the notice provided to class members was adequate. The court must also scrutinize the terms of the settlement to ensure that it is fair, adequate and reasonable.

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

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

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

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN2[] Class Actions, Compromise & Settlement

The due process demands of the *Fifth Amendment* and the Federal Rules of Civil Procedure require adequate notice to class members of a proposed settlement. In the class action context, the district court obtains personal jurisdiction over the absentee class members by providing proper notice of the impending class action and providing the absentees with the opportunity to be heard or the opportunity to exclude themselves from the class. The due process requirements of the *Fifth Amendment* are satisfied by the combination of reasonable notice, the opportunity to be heard and the opportunity to withdraw from the class. The notice must be reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

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

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

HN3[] Class Actions, Compromise & Settlement

In a settlement class maintained under *Fed. R. Civ. P. 23(b)(3)*, class notice must meet the requirements of both *Fed. R. Civ. P. 23(c)(2)* and *23(e)*. *Rule 23(c)(2)* provides that class members must receive the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. *Fed. R. Civ. P. 23(c)(2)(B)*. *Rule 23(c)(2)* also requires that the notice indicate an opportunity to opt out, that the judgment will bind all class members who do not opt out and that any member who does not opt out may appear through counsel.

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

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

HN4[] Class Actions, Compromise & Settlement

In addition to the requirements of *Fed. R. Civ. P. 23(c)(2)*, *Fed. R. Civ. P. 23(e)* requires that notice of a proposed settlement must inform class members: (1) of the nature of the pending litigation; (2) of the settlement's general terms; (3) that complete information is available from the court files; and (4) that any class member may appear and be heard at the Fairness Hearing. The court should consider both the mode of dissemination and its content to assess whether notice was sufficient. Although the notice need not be unduly specific the notice document must describe, in detail, the nature of the proposed settlement, the circumstances justifying it, and the consequences of accepting and opting out of it.

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

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

HN5[] Class Actions, Notice of Class Action

In the usual situation first-class mail and publication in press fully satisfy the notice requirements of both *Fed. R. Civ. P. 23* and the due process clause.

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

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN6[] **Class Actions, Compromise & Settlement**

Fed. R. Civ. P. 23(e) requires that the court must approve any settlement of a class action and states that the court may only approve a settlement after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate. *Fed. R. Civ. P. 23(e)(1)*. The United States Court of Appeals for the Third Circuit has determined that a court should accord a presumption of fairness to a settlement if the court finds that: (1) the negotiations occurred at arms length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.

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

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN7[] **Class Actions, Compromise & Settlement**

The United States Court of Appeals for the Third Circuit developed a nine factor test in Girsh, which provides the analytic structure for determining whether a class action settlement is fair, reasonable, and adequate under *Fed. R. Civ. P. 23(e)*. The nine factors are: (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund in light of all the attendant risks of litigation.

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

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN8[] **Class Actions, Compromise & Settlement**

The first Girsh factor, the complexity, expense, and likely duration of the litigation, captures the probable costs, in both time and money, of continued litigation. An antitrust class action is arguably the most complex action to prosecute as the legal and factual issues involved are always numerous and uncertain in outcome.

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

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN9[] **Class Actions, Compromise & Settlement**

The second Girsh factor, the reaction of the class, attempts to gauge whether members of the class support the settlement.

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

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN10[] **Class Actions, Compromise & Settlement**

The utter absence of objections from a class itself militates strongly in favor of approval of settlement.

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

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN11[] **Class Actions, Compromise & Settlement**

The third Girsh factor, the stage of the proceedings and the amount of discovery completed, enables the court to determine whether counsel had an adequate appreciation of the merits of the case before negotiating.

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

Civil Procedure > Settlements > Settlement Agreements > General Overview

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

The fourth Girsh factor, the risks of establishing liability, enables the court to examine what the potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them. When considering this factor, the court should avoid conducting a mini-trial. Rather the court may give credence to the estimation of the probability of success proffered by class counsel, who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action. Antitrust actions are among the most high risk, complex cases to litigate.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN13[] **Regulated Practices, Monopolies & Monopolization**

In order to succeed on its claim that defendant violated § 2 of the Sherman Act, 15 U.S.C.S. § 2, a plaintiff must establish that defendant possessed monopoly power in the relevant market and that it willfully acquired or maintained that power as distinguished from achieving growth or development as a consequence of a superior product, business acumen, or historic accident.

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

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN14[] **Class Actions, Compromise & Settlement**

The fifth Girsh factor, the risks of establishing damages, attempts to measure the expected value of litigating the action rather than settling it at the current time. In conducting this inquiry, courts consider the potential damage award if the case were taken to trial against the benefits of immediate settlement.

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

Civil Procedure > ... > Class Actions > Certification of Classes > Decertification

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN15[] **Class Actions, Compromise & Settlement**

The sixth Girsh factor, the risks of maintaining the class action through the trial, allows the court to weigh the possibility that, if a class were certified for trial in this case, it would be decertified prior to trial. *Fed. R. Civ. P. 23(a)* provides that a district court may decertify or modify a class at any time during the litigation if it proves to be unmanageable, and proceeding to trial would always entail the risk, even if slight, of decertification. There will always be a risk or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement.

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

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN16[] **Class Actions, Compromise & Settlement**

The seventh Girsh factor, the ability of the defendants to withstand a greater judgment, is concerned with whether the defendants could withstand a judgment for an amount significantly greater than the settlement.

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

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN17[] **Class Actions, Compromise & Settlement**

The eighth and ninth Girsh factors, the range of reasonableness of the settlement fund in light of the best possible recovery and the range of reasonableness of the settlement fund in light of all the attendant risks of litigation, ask whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial. In making this assessment, courts compare the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing with the amount of the proposed settlement. The damages estimates should generate a range of reasonableness (based on size of the proposed award and the uncertainty inherent in these estimates) within which a district court approving (or rejecting) a settlement will not be set aside. The primary touchstone of this inquiry is the economic valuation of the proposed settlement. In making this assessment, the evaluating court must recognize that settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and guard against demanding too large a settlement based on the court's own view of the merits of the litigation.

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

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN18[] **Class Actions, Compromise & Settlement**

Approval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate. Courts generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable.

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

HN19[] Class Attorneys, Fees

Attorneys who create a common fund for the benefit of a class are entitled to reimbursement of reasonable litigation expenses from the fund.

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

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN20[] Class Attorneys, Fees

District courts approving class action settlements must thoroughly review fee petitions for fairness. Although the ultimate decision as to the proper amount of attorneys' fees rests in the sound discretion of the court, the court must set forth its reasoning clearly. Thorough review of fee arrangements is critical in the context of a class action settlement because of the danger that the lawyers might urge a class settlement at a low figure or on a less-than optimal basis in exchange for red-carpet treatment for fees, and because the parties to the action might lack sufficient incentive to object to the arrangement.

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

HN21[] Class Attorneys, Fees

Courts typically use one of two methods for assessing attorneys' fees, either the percentage of recovery method or the lodestar method. The percentage of recovery method is generally favored in common fund cases because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure. The United States Court of Appeals for the Third Circuit recommends that courts use the lodestar method to cross-check the percentage fee award, in order to verify that the fee award is not excessive.

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

HN22[] Class Attorneys, Fees

In reviewing an attorneys' fees award in a class action settlement, when a district court uses the percentage of recovery method, it first calculates the percentage of the total recovery that the proposal would allocate to attorneys fees by dividing the amount of the requested fee by the total amount paid out by the defendant; it then inquires whether that percentage is appropriate based on the circumstances of the case. The percentage will be based on the net settlement fund after deducting the costs of litigation.

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

HN23[] **Class Attorneys, Fees**

In reviewing an attorneys' fees award in a class action settlement, the United States Court of Appeals for the Third Circuit directed district courts to consider the following seven factors when determining whether a percentage of recovery fee award is reasonable: (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or the fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases. Since this is a flexible and fact-driven determination, district courts are not limited to the Gunter factors in their analysis of the fee request's reasonableness.

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

HN24[] **Class Attorneys, Fees**

In reviewing an attorneys' fees award in a class action settlement, the list of Gunter factors is not intended to be exhaustive. Three other factors that may be relevant and important to consider: (1) the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations; (2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and (3) any innovative terms of the settlement. In reviewing an attorneys' fees award in a class action settlement, a district court should consider the Gunter factors, the Prudential factors, and any other factors that are useful and relevant with respect to the particular facts of the case. While the district courts should engage in robust assessments of the fee award reasonableness factors when evaluating a fee request, these factors need not be applied in a formulaic way because each case is different, and in certain cases, one factor may outweigh the rest.

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

HN25[] **Class Attorneys, Fees**

In reviewing an attorneys' fees award in a class action settlement, the skill and efficiency of Class Counsel are measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel.

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

HN26[] **Class Attorneys, Fees**

In reviewing an attorneys' fees award in a class action settlement, the awards in similar cases factor requires the court to compare the percentage of recovery requested as a fee in this case against the percentage of recovery awarded as a fee in other common fund cases in which the percentage of recovery method, rather than the lodestar method, was used.

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

HN27[] **Class Attorneys, Fees**

In reviewing an attorneys' fees award in a class action settlement, the first Prudential factor is intended to measure whether the entire value of the benefits accruing to class members is properly attributable to the efforts of class counsel, or if some of those benefits are more properly attributed to the efforts of other groups, such as government agencies conducting investigations.

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

HN28[] Class Attorneys, Fees

The United States Court of Appeals for the Third Circuit has suggested that, in addition to reviewing the fee award reasonableness factors, it is sensible for district courts to cross-check the percentage fee award against the lodestar method. The lodestar is calculated by multiplying the number of hours worked by the normal hourly rates of counsel. The court may then multiply the lodestar calculation to reflect the risks of nonrecovery, to reward an extraordinary result, or to encourage counsel to undertake socially useful litigation. The lodestar cross-check serves the purpose of alerting the trial judge that when the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award. The cross-check, however, does not trump the primary reliance on the percentage of common fund method. Moreover, the lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records. The resulting multiplier need not fall within any pre-defined range, provided that the district court's analysis justifies the award. It is appropriate for the court to consider the multipliers utilized in comparable cases.

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

HN29[] Class Attorneys, Fees

The United States Court of Appeals for the Third Circuit has recognized that multipliers ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied. A multiplier of 2.5 is within this range of normal awards.

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN30[] Special Proceedings, Class Actions

Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation. It is particularly appropriate to compensate named representative plaintiffs with incentive awards when they have actively assisted plaintiffs' counsel in their prosecution of the litigation for the benefit of the class.

Counsel: [1]** For BRADBURN PARENT/TEACHER STORE, INC., ON BEHALF OF ITSELF AND OTHERS SIMILARLY SITUATED, Plaintiff: CHARLES M. JONES, LEAD ATTORNEY, JONES OSTEEN JONES & ARNOLD, HINESVILLE, GA; GREGORY BARUCH, LEAD ATTORNEY, J. DANIEL LEFTWICH, ROBERT STEPHEN BERRY, BERRY & LEFTWICH, WASHINGTON, DC;

For PUBLIX SUPER MARKETS, INC., Plaintiff: ANTHONY J. BOLOGNESE, BOLOGNESE & ASSOCIATES, LLC, PHILADELPHIA, PA; PAUL E SLATER, CHICAGO, IL.

For 3M (MINNESOTA MINING AND MANUFACTURING COMPANY), Defendant: BRENT N. RUSHFORTH, LEAD ATTORNEY, KIT A. PIERSON, LEAD ATTORNEY, MARTINA M. STEWART, LEAD ATTORNEY, PAUL ALEXANDER, LEAD ATTORNEY, HELLER EHRMAN LLP, WASHINGTON, DC; DAVID W. ENGSTROM, LEAD

ATTORNEY, ELEANOR MORRIS ILLOWAY, LEAD ATTORNEY, JOHN G. HARKINS, JR., LEAD ATTORNEY, HARKINS CUNNINGHAM LLP, PHILADELPHIA, PA; DEAN RINGEL, LEAD ATTORNEY, CAHILL, GORDON & REINDEL, NEW YORK, NY; ERIC R. OLSON, LEAD ATTORNEY, BARTLIT BECK HERMAN PALENCHAR & SCOTT LLP, DENVER, CO; JAIDEEP VENKATESAN, LEAD ATTORNEY, HELLER EHRMAN LLP, MENLO PARK, CA; MARK S. OUWELEEN, LEAD ATTORNEY, PAUL J. SKIERMONT, LEAD ATTORNEY, BARTLIT BECK HERMAN PALENCHAR & SCOTT LLP, CHICAGO, IL.

For HENKEL CORPORATION, Movant: **[**2]** ELIZABETH S. CAMPBELL, LEAD ATTORNEY, JOANNA J. CLINE, LEAD ATTORNEY, MURRAY S. LEVIN, LEAD ATTORNEY, PEPPER HAMILTON LLP, PHILADELPHIA, PA.

For MEIJER DISTRIBUTION, INC., MEIJER, INC., Movants: BRENT W. LANDAU, LEAD ATTORNEY, COHEN, MILSTEIN, HAUSFELD & TOLL, PLLC, PHILADELPHIA, PA; DANIEL A. SMALL, LEAD ATTORNEY, COHEN, MILSTEIN, HAUSFELD AND TOLL, WASHINGTON, DC; IRA NEIL RICHARDS, LEAD ATTORNEY, TRUJILLO RODRIGUEZ & RICHARDS LLC, PHILADELPHIA, PA.

For HENKEL CONSUMERS ADHESIVES, INC., Movant: JOANNA J. CLINE, LEAD ATTORNEY, MURRAY S. LEVIN, LEAD ATTORNEY, PEPPER HAMILTON LLP, PHILADELPHIA, PA.

Judges: Hon. John R. Padova, United States District Judge.

Opinion by: John R. Padova

Opinion

[*324] **MEMORANDUM**

Padova, J.

May 14, 2007

Plaintiff Bradburn Parent Teacher Store, Inc. ("Bradburn") has brought this class action antitrust lawsuit against Defendant 3M for damages arising out of 3M's allegedly anti-competitive conduct. Plaintiffs have reached a settlement with 3M, which we preliminarily approved on October 24, 2006. Presently before the Court are Plaintiff's Motion for Final Approval of Settlement (Docket No. 350) and Class Counsel's "Application for Attorneys' Fee, Expenses, and **[**3]** Class Representative Incentive Award" (Docket No. 355). After a Final Approval Hearing held on April 18, 2007, and for the reasons that follow, we grant the Motion for Final Approval and the "Application for Attorneys' Fee, Expenses, and Class Representative Incentive Award" as described in our Final Approval Order and Judgment below.

I. BACKGROUND

Bradburn brings this action against 3M on behalf of itself and other members of a class, which was approved on August 18, 2004 and includes persons who purchased invisible or transparent tape from 3M at any time from October 2, 1998 to the present, who have not purchased for resale under the class member's own label, any "private label" invisible or transparent tape from 3M or any of 3M's competitors from October 2, 1988 to the present. Bradburn alleges one count of monopolization in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*, claiming that 3M unlawfully maintained monopoly power in the invisible and transparent tape markets in the United States. (Compl. PP 29-33.)

[*325] A. Litigation History

The conduct of 3M that forms the basis of this class action lawsuit was the subject of a prior lawsuit **[**4]** before the Court, LePage's Inc. v. 3M, Civ. A. No. 97-3983 (E.D. Pa.). In that suit, LePage's, a competing supplier of transparent tape, sued 3M alleging, *inter alia*, unlawful maintenance of monopoly power in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*. The jury found in favor of LePage's on its claim, and we denied 3M's Motion for Judgment as a Matter of Law. See *LePage's Inc. v. 3M, Civ. A. No. 97-3983, 2000 U.S. Dist. LEXIS 3087, 2000 WL 280350 (E.D. Pa. Mar. 14, 2000)*, aff'd, *324 F.3d 141 (3d Cir. 2003)* (en banc), cert. denied, *542 U.S. 953, 124 S. Ct. 2932, 159 L. Ed. 2d 835 (2004)*.

On March 1, 2004, we denied Bradburn's initial motion for class certification on the grounds that the inclusion of direct purchasers of transparent tape who had also purchased private label tape (from 3M or elsewhere) could create conflicts in damage theories with class members, such as Bradburn, who had not purchased private label tape, because the private label tape purchasers might benefit from pursuing a "lost profit" rather than an overcharge theory of damages. *Bradburn Parent/Teacher Store, Inc. v. 3M, 2004 U.S. Dist. LEXIS 3347, 2004 WL 414047 (E.D. Pa. Mar. 1, 2004)*.

Bradburn **[**5]** then sought certification of the following modified class:

> All persons who directly purchased invisible or transparent tape from 3M Company between October 2, 1998 and the present, who have not purchased, for resale under the class member's own label, any "private label" invisible or transparent tape from 3M Company or any of 3M Company's competitors at any time from October 2, 1988 to the present.

We granted certification of Bradburn's modified class on August 18, 2004. *Bradburn Parent/Teacher Store v. 3M, 2004 U.S. Dist. LEXIS 16193, 2004 WL 1842987 (E.D. Pa. Aug. 18, 2004)*. In the same order we appointed the following individuals to serve as Class Counsel: R. Steven Berry, J. Daniel Leftwich, Gregory Baruch, and Charles M. Jones.

Following certification, Bradburn sought to apply estoppel to many of the liability findings of the LePage's jury, with some success. In our Order of March 30, 2005, we granted collateral estoppel to Bradburn on several issues (the "Estoppel Order"). *Bradburn Parent Teacher Store, Inc. v. 3M, 2005 U.S. Dist. LEXIS 5315, 2005 WL 736629 (E.D. Pa. Mar. 30, 2005)*. Following a Motion for Reconsideration by 3M pertaining to the Estoppel Order, which we granted **[**6]** in part and denied in part, we deemed the following issues to be established for the purposes of this action: (1) for the time period from June 11, 1993 to October 13, 1999, the relevant market in this matter is the market for invisible and transparent tape for home and office use in the United States; and (2) for some time period from June 11, 1993 to October 13, 1999, 3M possessed monopoly power in the relevant market, including the power to control prices and exclude competition in the relevant market, 3M willfully maintained such monopoly power by predatory or exclusionary conduct, and 3M's predatory or exclusionary conduct harmed competition (the "Amended Estoppel Order"). *Bradburn Parent Teacher Store, Inc. v. 3M., 2005 U.S. Dist. LEXIS 11375, 2005 WL 1388929 (E.D. Pa. June 9, 2005)*. 3M then sought leave to file an interlocutory appeal of the Amended Estoppel Order. We certified the issue for interlocutory appeal. *Bradburn Parent Teacher Store, Inc. v. 3M, 2005 U.S. Dist. LEXIS 15815, 2005 WL 1819969 (E.D. Pa. Aug. 2, 2005)*. However, the Third Circuit denied 3M's petition to allow an interlocutory appeal on September 27, 2005.

Following the class and estoppel proceedings, the parties proceeded to full fact **[*326]** and **[**7]** expert discovery, including dozens of depositions and production and review of more than 1 million pages of documents from 3M and third parties. (Pl. Corr. Mem. in Support at 4-5.) The parties participated in mediation with Jonathan Marks on November 8-9, 2005, but were unable to reach agreement. (Id. at 5.) As trial was scheduled to begin on May 30, 2006, the parties filed pretrial memorandum, witness lists, exhibit lists, deposition designation, and motions in limine; and conducted the last round of depositions of experts on the opinions set forth in their supplemental reports. (Id. However, on May 5, 2006, they reached a settlement agreement after another mediation session with Mr. Marks. (Id.

On September 8, 2006, Bradburn filed a Motion for Preliminary Approval of Settlement. We preliminarily approved the Settlement on October 24, 2006. This Order also authorized the dissemination of Notice of Proposed

Settlement, scheduled a Final Approval Hearing for April 18, 2007, and set February 7, 2007 as the deadline for objections to the Settlement.

On January 18, 2007, Bradburn filed the instant Motion for Final Approval of the Settlement and Class Counsel's "Application **[**8]** for Attorneys' Fee, Expenses, and Class Representative Incentive Award." The Motion and Application were supported by the following: Declaration of Charles G. Hunter ("Hunter Declaration"); Declaration of Richard Bithell ("Bithell Declaration"); Declaration of Gregory Baruch ("Baruch Declaration"); and Declaration of Geoffrey C. Hazard ("Hazard Declaration"). Bradburn subsequently filed a Corrected Memorandum in Support of Motion for Final Approval of Settlement ("Pl. Corr. Mem. in Support"); Class Counsel's Corrected Application for Attorneys' Fee, Expenses, and Class Representative Award ("Corr. Application"); Memorandum in Further Support of the Motion and Application ("Pl. Mem. in Further Support"); Second Declaration of Gregory Baruch ("Second Baruch Decl."); Second Declaration of Bithell ("Second Bithell Decl."); and Third Declaration of Bithell ("Third Bithell Decl.").

B. The Settlement Agreement

1. The Class Definition

The Class certified by the Court, and clarified in the Preliminary Approval Order as to the time period for the Class is defined as follows:

> all persons who directly purchased invisible or transparent tape from 3M Company between October 2, 1998 and **[**9]** February 10, 2006, who have not purchased, for resale under the Class Member's own label, any "private label" invisible or transparent tape from 3M Company or any of 3M Company's competitors at any time from October 2, 1988 to February 10, 2006; but excluding the following: (i) 3M Company, its subsidiaries, affiliates, officers, directors, and employees; (ii) those Persons that timely and validly requested exclusion from the Class in response to the Notice of Pendency of Class Action dated November 29, 2004, provided pursuant to the Court's November 12, 2004 Order; and (iii) any other Person that may be excluded by order of the Court.

2. Terms of the Settlement Agreement

The Settlement Agreement provides for payment into a common fund of $39,750,000.00 in cash (the "Settlement Consideration"). Following payment of the attorneys' fees, expenses, and any class representative incentive award from the Settlement Consideration, all of the remaining funds are to be distributed to the Class. The Settlement Agreement does not require class members to file **[*327]** proof of claim forms. Therefore, all class members that can be located will receive a distribution from the common fund. The Settlement **[**10]** Consideration equals between 41 and 48 percent of the damages calculated by Plaintiff's expert Dr. Morton Kamien. (Pl. Corr. Mem. in Support at 7.) The Settlement Consideration results in an award of more than 18.5 percent of the Class's transparent tape purchases during the more than seven year damage period. (Id.) In return for the Settlement Consideration, the parties agree to dismiss the case with prejudice and the Class members agree to release and discharge 3M from any and all claims asserted, or which could have been asserted, in the litigation. The release includes all claims and potential claims concerning any 3M discount, rebate, offer, promotion or other sales program or practice (including, without limitation, programs claimed to involve the bundling of products or volume growth rebates) relating in any way to the sale, promotion, or distribution of invisible or transparent tape for home or office use in effect from January 1, 1993 to the Settlement Agreement Date, September 5, 2006.

C. Final Approval Hearing

On April 18, 2006, we held a Final Approval Hearing to address the Motion for Final Approval and the Application for Fees, Expenses, and Class Representative **[**11]** Incentive Award. At the Final Approval Hearing, Class Counsel reported that no objections or requests for entry of appearance through separate counsel have been filed, and no correspondence has been received that would indicate a Class Member's interest in raising an objection in response to the Notices mailed before or after the original objections deadline. The parties agreed to an extension until May 3, 2007 to allow time for 71 Class Members, whose addresses had only recently been identified and who were sent a Notice of the proposed Class Settlement on or before April 9, 2007, to file any objections. Class

Counsel subsequently reported to the Court on May 3, 2007, that no objections have been filed by these 71 remaining Class Members.

II. MOTION FOR FINAL APPROVAL OF SETTLEMENT

HN1[] "The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court." *Girsh v. Jepson, 521 F.2d 153, 156 (3d Cir. 1975)*. "While the law generally favors settlement in complex or class action cases for its conservation of judicial resources, the court has an obligation to ensure that any settlement reached protects **[**12]** the interests of the class members." *In re Aetna Inc. Sec. Litig., MDL No. 1219, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *4 (E.D. Pa. Jan. 4, 2001)* (citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 784 (3d Cir. 1995))*. Consequently, prior to approving a settlement, the Court must determine whether the notice provided to class members was adequate. Id. (citations omitted). The Court must also "scrutinize the terms of the settlement to ensure that it is 'fair, adequate and reasonable.'" Id. (quoting *In re General Motors, 55 F.3d at 785*).

A. Adequacy of Notice

HN2[] The due process demands of the *Fifth Amendment* and the Federal Rules of Civil Procedure require adequate notice to class members of a proposed settlement. *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *5*. "In the class action context, the district court obtains personal jurisdiction over the absentee class members by providing proper notice of the impending class action and providing the absentees with the opportunity to be heard or the opportunity to exclude themselves from the class." *In re Prudential **[*328]** Ins. Co. of Am. Sales Practice Litig., 148 F.3d 283, 306 (3d Cir. 1998)* **[**13]** (citing *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985))*. The due process requirements of the *Fifth Amendment* are satisfied by the "combination of reasonable notice, the opportunity to be heard and the opportunity to withdraw from the class." Id. The notice must be "'reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Lachance v. Harrington, 965 F. Supp. 630, 636 (E.D. Pa. 1997)* (quoting *Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950))*.

Moreover, *HN3*[] "in a settlement class maintained under *Rule 23(b)(3)*, class notice must meet the requirements of both *Federal Rules of Civil Procedure 23(c)(2)* and *23(e)*." *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig., 226 F.R.D. 498, 517 (E.D. Pa. 2005)* (citing *Carlough v. Amchem Prods., Inc., 158 F.R.D. 314, 324-25 (E.D. Pa. 1993))*. *Rule 23(c)(2)* provides that class members must receive the "best notice practicable under the circumstances, including **[**14]** individual notice to all members who can be identified through reasonable effort." *Fed. R. Civ. P. 23(c)(2)(B)*. *Rule 23(c)(2)* also requires that "the notice indicate an opportunity to opt out, that the judgment will bind all class members who do not opt out and that any member who does not opt out may appear through counsel." *In re Diet Drugs, 226 F.R.D. at 517* (citing *Fed. R. Civ. P. 23(c)(2))*.

HN4[] In addition to the requirements of *Rule 23(c)(2)*, *Rule 23(e)* "requires that notice of a proposed settlement must inform class members: (1) of the nature of the pending litigation; (2) of the settlement's general terms; (3) that complete information is available from the court files; and (4) that any class member may appear and be heard at the Fairness Hearing." *Id. at 517-18* (citation omitted). The court should consider both "the mode of dissemination and its content to assess whether notice was sufficient." Id. Although the "notice need not be unduly specific . . . the notice document must describe, in detail, the nature of the proposed settlement, the circumstances justifying it, and the consequences of accepting and opting out of it." *Id. at 518* **[**15]** (citing *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig., 369 F.3d 293, 308-10 (3d Cir. 2004))*.

We find that the Notice provided in this case satisfies the requirements of due process and the Federal Rules of Civil Procedure. Pursuant to the Settlement Agreement and the Court's Preliminary Approval Order, Poorman-Douglas Corp. ("PDC") was authorized and appointed to serve as Settlement Administrator in this matter, and was responsible for assisting with the administration of the Settlement by, among other things, mailing the Class Notice to Class Members, and identifying Class Members whose initial Notices were returned as undeliverable. (Bithell Decl. P 4.) The Settlement Class consists of 3,574 Class Members identified in the 3M data provided to Plaintiff and

PDC. (Second Bithell Decl. P 5.) PDC mailed the Notice of the Proposed Class Settlement to each Class Member on the Class Member list on January 8, 2007. (Bithell Decl. P 6.) Included in the notice was a special insert sheet that calculated each class member's approximate percentage share of the Net Settlement Amount. (Id.) For undeliverable Notices, PDC performed a database **[**16]** search for a new address for the Class Members using an address search database owned and operated by Lexis/Nexis. (Second Bithell Decl. P 6.) New addresses **[*329]** were found for 952 Class Members, and a Notice was re-mailed to them on or before January 18, 2007. (Bithell Decl. P 7.) PDC performed additional searches using the Internet and telephone contacts for those Class Members whose Notices were undeliverable and who had award amounts of $1,000 or more. (Second Bithell Decl. P 7.) Ninety-three Class Members met this criteria. (Id. PDC located a new address for 48 of them and mailed Notices to them on or before March 30, 2007. (Id. Finally, PDC performed additional searches using the Internet and telephone contact for those Class Members whose Notices were undeliverable and who had award amounts of $100 or more. (Third Bithell Decl. P 4.) One hundred and sixty-four Class Members met this criteria. (Id. PDC located a new address for 71 of them and mailed Notices to them on or before April 9, 2007. (Id. PDC also hosted a website, *www.bradburntapesettlement.com*, as well as a dedicated toll free telephone line for claimant access. As a result of PDC's efforts to locate valid **[**17]** addresses for the Class Members, the total number of Class Members for whom Notice was undeliverable is just 257 out of the 3,574 Class Members identified in 3M's sales data. (Id. P 8). The percentage of tape sales during the damage period (and the percentage of proposed settlement funds) represented by these undeliverable Notices in 2.86 percent. (Id. We find that these efforts to disseminate notice were the best practicable. See *Zimmer Paper Prods., Inc. v. Berger & Montague, 758 F.2d 86, 90 (3d Cir. 1985)* (noting that ***HN5***[] "in the usual situation first-class mail and publication in press fully satisfy the notice requirements of both *Fed. R. Civ. P. 23* and the *due process clause*").

We also find the content of the Notice to be adequate under the *due process clause* and *Rule 23*. The Notice describes the nature and background of this action and defines the Class, Class claims, and consequences of Class Membership. (Pl. Corr. Mem. in Support, Ex. B.) It summarizes the terms of the Settlement, including information relating to the size of the Settlement Fund; the release provisions of the Settlement; and the attorneys' fees, expenses, and incentive award for which **[**18]** Bradburn may apply. (Id. The Notice also describes the proposed Distribution Plan. (Id. The Notice informs Class Members of the time and date of the Final Approval Hearing, and advises them of the nature and purpose of the Hearing, of their rights to object to the Settlement and appear at the Hearing, and of the procedure for asserting those rights. (Id. The Notice includes the contact information of the relevant attorneys and of the Settlement Administrator, and also directs Class Members to the dedicated website where additional information pertaining to the case maybe found. (Id. After reviewing the Notice, we conclude that the substance, like the method of dissemination, is sufficient to satisfy the concerns of due process and *Rule 23*. See *In re Prudential, 148 F.3d at 328*; *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *5* (citing In re Ikon Office Solutions, Inc. Sec. Litig., *194 F.R.D. 166, 175 (E.D. Pa. 2000))*.

B. Presumption of Fairness

HN6[] *Rule 23(e) of the Federal Rules of Civil Procedure* requires that the Court must approve any settlement of a class action and states that the Court may only approve a settlement "after **[**19]** a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate." *Fed. R. Civ. P. 23(e)(1)*. The Third Circuit has determined that a court should accord a presumption of fairness to a settlement if the court finds that: "(1) the negotiations occurred at arms length; (2) there was sufficient **[*330]** discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re Cendant Corp. Litig., 264 F.3d 201, 232 n.18 (3d Cir. 2001)* (citing *In re General Motors, 55 F.3d at 785*).

The Settlement in this case is entitled to a presumption of fairness. The Settlement resulted from arm's-length negotiations that occurred both during the Court-suggested mediation and in the months following mediation. (Pl. Corr. Mem in Support at 8.) This case was settled only after all discovery, lasting more than one year, was completed. (Hazard Decl. P 11.) Class Counsel has extensive experience litigating complex actions such as the one at hand. (Baruch Decl. P 3.) Lastly, no Class Members filed objections to the Settlement. Accordingly, we will apply a presumption **[**20]** of fairness in analyzing the Settlement.

C. The *Girsh* Factors

HN7[] The Third Circuit developed a nine factor test in Girsh, "which provides the analytic structure for determining whether a class action settlement is fair, reasonable, and adequate under Rule 23(e)." In re Cendant, 264 F.3d at 231 (citation omitted). The nine factors are:

> (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund in light of all the attendant risks of litigation.

Id. at 232 (citing Girsh, 521 F.2d at 157). Upon consideration of these factors, we find that the proposed Settlement is fair, reasonable, and adequate.

1. Complexity, expense, **[**21]** and likely duration of the litigation

HN8[] "This factor captures 'the probable costs, in both time and money, of continued litigation.'" Id. at 233 (quoting In re General Motors, 55 F.3d at 812). An antitrust class action, such as this one, is "arguably the most complex action to prosecute" as "[t]he legal and factual issues involved are always numerous and uncertain in outcome." In re Linerboard Antitrust Litig., 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003) (citations and internal quotation marks omitted).

The parties to this action have spent nearly four years litigating these claims. This litigation has included two class certifications, several hearings on the court's estoppel rulings, more than a full year of discovery, and virtually complete trial preparation. Whatever the disposition of the case on the merits, litigation likely would have continued for some time thereafter through post-trial motions and appeal. See *In re Ikon, 194 F.R.D. 166, 179 (E.D. Pa. 2000)* ("[T]he extremely large sums of money at issue almost guarantee that any outcome, whether by summary judgment or trial, would be appealed."). The time **[**22]** and resources saved by the avoidance of these costs benefit all parties. See In re Warfarin, 391 F.3d at 536 ("[I]t was inevitable that post-trial motions and appeals would not only further prolong the litigation but also reduce the value of recovery to the class."); In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *6 (noting that "[t]he risk of delay could have deleterious effects on any future recovery due to the time value of **[*331]** money"). Thus we find that the complexity, expense, and likely duration of the litigation favor settlement. See In re Prudential, 148 F.3d at 318 ("[T]he trial of this class action would be a long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court. The prospect of such a massive undertaking clearly counsels in favor of settlement.").

2. The reaction of the class

HN9[] This factor "attempts to gauge whether members of the class support the settlement." Id. As stated above, Notice of this Settlement was disseminated thoroughly by means of publication and first-class mail, and informed potential Class Members of their rights to object to the Settlement and to request **[**23]** exclusion from the Class. The deadline for filing objections and requesting exclusion was originally February 7, 2007. As of the Final Approval Hearing on April 18, 2007, no objections had been filed. (Pl. Mem. in Further Support at 7.) At the Final Approval Hearing, the parties suggested and we agreed to extend the deadline for the filing of objections until May 3, 2007 for the additional 71 Class Members who had recently been sent their Notices of Settlement. As of May 6, 2007, Class Counsel reported to the Court that no objections have been filed.

This total absence of objections argues in favor of the proposed Settlement. See Sala v. Nat'l R.R. Passenger Corp., 721 F. Supp. 80, 83 (E.D. Pa. 1989) ("HN10[] The utter absence of objections from the class itself militates strongly in favor of approval of the settlement."). The lack of objections is also particularly notable in this case as "these are sophisticated businesses with, in some cases, large potential claims, and they could be expected to object to a settlement they perceived as unfair or inadequate." In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 254-55 (D. Del. 2002), aff'd, 391 F.3d 516 (3d Cir. 2004). **[**24]** Accordingly, we find that the reaction of the Class in this case strongly favors approval of the Settlement.

3. Stage of proceedings and amount of discovery completed

HN11[] This factor enables the Court to "'determine whether counsel had an adequate appreciation of the merits of the case before negotiating.'" *In re Cendant, 264 F.3d at 235* (quoting *In re General Motors, 55 F.3d at 813*). This case was on the eve of trial, with all discovery having been completed, when settlement was reached through arm's-length negotiations with the assistance of a mediator. (Pl. Corr. Mem. in Support at 11.) All of the pertinent liability and damages issues had been analyzed by Plaintiff's counsel and experts. (Id. Prior to agreeing to a settlement, the parties had taken 42 depositions, completed expert reports, and conducted extensive partial summary judgment motion practice. (Id. 3M had also produced more than one million pages of documents for review and copying; produced large amounts of computer date on tape sales, rebates, and margins covering at least a seven year period, all of which was analyzed an used to support the expert reports submitted by Bradburn's **[**25]** testifying expert; and responded to several sets of Bradburn's interrogatories. (Id.) Third party discovery in this matter took more than one year due to motions to compel and for protective orders filed in several other district courts by third parties and 3M. (Id. In total, more than 60,000 pages of documents were produced by third parties, and 3M and Bradburn took 10 depositions of third party witnesses. (Id. Moreover, prior to reaching the Settlement, the parties had engaged in several face-to-face settlement negotiations, during which each side's potential strengths and weaknesses **[*332]** were presented and evaluated. (Id. We conclude, therefore, that the parties had "an adequate appreciation of the merits" of this case at the time they negotiated the Settlement. *In re Cendant, 264 F.3d at 235* (citation omitted).

4. Risks of establishing liability

HN12[] This factor enables the Court to examine "'what the potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them.'" *In re Cendant, 264 F.3d at 237* (quoting *In re General Motors, 55 F.3d at 814*). "When **[**26]** considering this factor, the court should avoid conducting a mini-trial. Rather the court may 'give credence to the estimation of the probability of success proffered by class counsel, who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action.'" *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *9* (quoting *In re Ikon, 194 F.R.D. at 181*).

Antitrust actions are among the most high risk, complex cases to litigate. *Stop & Shop Supermarket Co. v. Smithkline Beecham Corp., Civ. A. No. 03-4578, 2005 U.S. Dist. LEXIS 9705, 2005 WL 1213926, at *11 (E.D. Pa. May 19, 2005)*; *In re Linerboard Antitrust Litig., 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003)*; *In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 465, 475 n.10 (S.D.N.Y. 1998)* ("Recurrently, when some of the largest members of the antitrust classes have opted out of the class to try to do better than the class, they have failed to establish impact or other elements of liability, and have lost their cases at trial."). *HN13*[] In order to succeed on its claim that 3M violated *§ 2* of the Sherman Act, Bradburn "must establish that [3M] possessed monopoly **[**27]** power in the [relevant] market and that it willfully acquired or maintained that power as distinguished from achieving growth or development as a consequence of a superior product, business acumen, or historic accident." *In re Warfarin, 391 F.3d at 529 n.11* (citing *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*.

Bradburn's risks of establishing liability in this case are diminished by the LePage's verdict and the Amended Estoppel Order. However, the Amended Estoppel Order left many issues unresolved and Bradburn, therefore, still faced numerous challenges in establishing 3M's liability in this case. For example, the Amended Estoppel Order left intact Bradburn's obligation to prove injury and damages. Even if 3M had monopolized the market and harmed competition for some period between 1993 and 1999, 3M could still argue that this did not affect purchases of transparent and invisible tape. Additionally, the market definition rulings extended only into 1999. Therefore, the market definition could be re-litigated for the period from October 13, 1999 to the present, and 3M had argued that the market had substantially **[**28]** changed since the time of the LePage's trial, and had become international. (Pl. Corr. Mem in Support at 13-14.) Thus, while the Amended Estoppel Order provided some potential efficiencies at trial, substantial trial risk remained for the Bradburn class. We concluded that, given these challenges, this factor favors settlement.

5. Risks of establishing damages

"Like the fourth factor, *HN14*[] 'this inquiry attempts to measure the expected value of litigating the action rather than settling it at the current time.'" *In re Cendant, 264 F.3d at 238-39* (quoting *In re General Motors, 55 F.3d at 816*). In conducting this inquiry, we consider the "potential damage award if the case were taken to trial against the benefits of immediate settlement." *In re Warfarin, 212 F.R.D. at* **[*333]** *256* (citing *In re Prudential, 148 F.3d at 319*). Plaintiff's damage expert, Dr. Kamien, calculated overcharge damages to be in the range of $82,693,181 to $96,449,176. (Pl. Corr. Mem. in Support at 15.) 3M's experts, however, contended that, contrary to Class Plaintiff's overcharge damage theory, prices were declining or stable in real terms, and also **[**29]** challenged other aspects of Class Plaintiff's damage methodology. (Id. at 16.) Particularly in complex antitrust actions, the parties' efforts to dispute damages at trial undoubtedly would result in a "'battle of the experts,' with each side presenting its figures to the jury and with no guarantee whom the jury would believe." *In re Cendant, 264 F.3d at 239*. For these reasons, we conclude that the risks of establishing damages weigh in favor of settlement in this case.

6. Risks of maintaining class action status through trial

HN15[] This factor allows the Court to weigh the possibility that, if a class were certified for trial in this case, it would be decertified prior to trial. *Federal Rule of Civil Procedure 23(a)* provides that "a district court may decertify or modify a class at any time during the litigation if it proves to be unmanageable, and proceeding to trial would always entail the risk, even if slight, of decertification." *In re Cendant, 264 F.3d at 239* (citation and internal quotations omitted). In this action, class certification was denied initially. See *Bradburn Parent/Teacher Store, Inc. v. 3M, 2004 U.S. Dist. LEXIS 3347, 2004 WL 414047, at *1.* **[**30]** The class was certified only after a second motion for class certification. See *Bradburn Parent/Teacher Store, Inc. v. 3M, 2004 U.S. Dist. LEXIS 16193, 2004 WL 1842987, at *1*. "There will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement." *In re Prudential, 148 F.3d at 321*. Consequently, we find that this factor weighs in favor of approving the Settlement.

7. Ability of defendants to withstand greater judgment

HN16[] This factor "is concerned with whether the defendants could withstand a judgment for an amount significantly greater than the Settlement." *In re Cendant, 264 F.3d at 240*. As we noted in the Meijer case, "3M, with 2005 annual net sales of $21.2 billion (3M 2005 Annual Report), likely can withstand a judgment significantly greater than the Settlement Amount [of approximately $28 million]. Even so, this determination in itself does not carry much weight in evaluating the fairness of the Settlement." *Meijer, Inc. v. 3M, Civ. A. No. 04-5871, 2006 U.S. Dist. LEXIS 56744, 2006 WL 2382718, *16 (E.D. Pa. Aug. 14, 2006)* (citing *Perry v. FleetBoston Fin. Corp., 229 F.R.D. 105, 116 (E.D. Pa. 2005)* **[**31]** ("Fleet could certainly withstand a much larger judgment as it has considerable assets. While that factor weighs against approving the settlement, this factor's importance is lessened by the obstacles the class would face in establishing liability and damages.")). Accordingly, we find that this factor disfavors settlement, albeit very slightly.

8 & 9. Range of reasonableness (in light of best possible recovery and risks of litigation)

HN17[] The eighth and ninth *Girsh* factors "ask whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial." *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *11* (citing *In re Prudential, 148 F.3d at 322*). In making this assessment, we compare "'the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing'" with "'the amount of the proposed settlement.'" *In* **[*334]** *re General Motors, 55 F.3d at 806* (quoting Manual for Complex Litigation 2d § 30.44). The damages estimates should "generate a range of reasonableness (based on size of the proposed award and the uncertainty **[**32]** inherent in these estimates) within which a district court approving (or rejecting) a settlement will not be set aside." Id. (citation omitted). "The primary touchstone of this inquiry is the economic valuation of the proposed settlement." Id. "In making this assessment, the evaluating court must recognize that settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and guard against demanding too large a settlement based on the court's own view of the merits of the litigation." *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *11* (citing *In re General Motors, 55 F.3d at 806*).

Pursuant to the Settlement Agreement, Class Members will receive immediate monetary relief in accordance with their relevant purchases of 3M tape, without undertaking the risks, costs, and delays of further litigation. The proposed Settlement provides between approximately 41 and 48 percent of the damages calculated by Plaintiff's expert economist. (Pl. Corr. Mem. in Support at 19.) This result is significantly above the typical antitrust settlement, and courts routinely grant approval to settlements that involve **[**33]** recoveries that represent a much lower percentage of the actual damages. See *Stop & Shop Supermarket Co., 2005 U.S. Dist. LEXIS 9705, 2005 WL 1213926, *9* (holding that a recovery of 11.4 percent of actual damages "compares favorably with the settlements reached in other complex class action lawsuits"); *Nichols v. SmithKline Beecham Corp., Civ. A. No. 00-6222, 2005 U.S. Dist. LEXIS 7061, 2005 WL 950616, *16 (E.D. Pa. Apr. 22, 2005)* (approving settlement for between 9.3 and 13.9 percent of actual damages); *In re Ravisent Techs., Inc. Sec. Litig., 2005 U.S. Dist. LEXIS 6680, 2005 WL 906361, *9 (E.D. Pa. Apr. 18, 2005)* (finding that 6 to 12 percent of potential recovery generally reasonable); *Lazy Oil Co. v. Witco Corp., 95 F. Supp. 2d 290, 339 (W.D. Pa. 1997)* (noting cases approving settlements for 0.2 to 16 percent of potential recovery).

The Settlement Consideration also represents more than 18.5 percent of 3M sales to Class Members. (Pl. Corr. Mem. in Support at 19.) This is also far above settlements approved in other cases. See *Meijer Inc. v. 3M, Civ. A. No. 04-5871, 2006 U.S. Dist. LEXIS 56744, 2006 WL 2382718, *20 (E.D. Pa. Aug. 14, 2006)* (approving settlement where the settlement fund represented **[**34]** 2% of the sales to class members, and which the Court observed "compares favorably with other class action antitrust settlements"); *In re Auto. Refinishing Paint Antitrust Litig., 2004 U.S. Dist. LEXIS 29161, 2004 WL 1068807 at *2* (settlement approved for 2% of sales). Moreover, there is no indication that this Settlement Amount has been reached inappropriately, or should otherwise be considered suspect; both parties have demonstrated willingness and ability to litigate this action, have engaged in mediation, and have reached an agreement that provides Class Members with monetary relief that is immediate, significant, and in line with or better than other comparable settlements. See *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *11* ("Additionally, the hallmarks of a questionable settlement are absent. Plaintiffs will receive a significant monetary settlement, and there is no suggestion of collusion between Defendants and Plaintiffs' counsel.") (internal quotation marks omitted). Accordingly, we find that the Settlement represents a reasonable compromise in light of both the best possible recovery and the risks of litigation.

Thus, of the nine *Girsh* factors, we find that only factor seven (the **[**35]** ability of 3M to withstand greater judgment) weighs against approving the Settlement. This **[*335]** one factor is outweighed by the other Girsh factors favoring the Settlement. We, therefore, conclude that the Settlement Agreement is fair, adequate, and reasonable.

D. Fairness of the Distribution Plan

In addition to analyzing the terms of the Settlement Agreement, the Court must also examine the fairness of the proposed Distribution Plan. ***HN18***[] "'Approval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate.'" *In re Ikon, 194 F.R.D. at 184* (quoting *In re Computron Software Inc., 6 F. Supp. 2d 313, 321 (D.N.J. 1998))*. "Courts generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable." *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *12* (citing *In re Ikon, 194 F.R.D. at 184*).

The proposed Distribution Plan allocates the Settlement Fund among Class Members based upon their pro rata share of the Class's **[**36]** total transparent tape purchases from 3M during the damage period, net of invoice adjustments and rebates paid as of the date of the settlement. (Hunter Decl. PP 8-10.) The Distribution Plan provides a straightforward method for determining each Class Member's pro rata share of the net Settlement Fund. The calculations and distribution methodology were overseen by the Leaf Group, consulting experts on computer data and damages issues throughout this litigation, as well as Class Counsel and PDC. (Hunter Decl. P 2, Bithell Decl. P 6.) We find that the proposed distribution methodology is fair, reasonable, and adequate. See *In re Remeron Direct Purchaser Antitrust Litig., Civ. A. No. 03-0085, 2005 U.S. Dist. LEXIS 27013, 2005 WL 3008808,*

11 (D.N.J. Nov. 9, 2005)* ("Plaintiffs propose to allocate the Settlement funds, net of Court approved attorneys' fees, incentive award, and expenses . . . in proportion to the overcharge damages incurred by each Class member due to Defendants' alleged conduct in restraint of trade. Such a method of allocating the Net Settlement Fund is inherently reasonable."); see also *In re Corel Corp. Inc. Securities Litig., 293 F. Supp. 2d 484, 493 (E.D. Pa. Jan. 4. 2001)* **[37]** (noting that courts "generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable.").

In sum, we find that the content and dissemination of Notice in this case satisfies the requirements of due process and the Federal Rules of Civil Procedure, and we also find that the Settlement Agreement is fair, adequate and reasonable in light of all relevant considerations. We therefore grant final approval to the Settlement. We further find that the proposed Distribution Plan is fair, reasonable and adequate, and approve the Plan.

III. APPLICATION FOR ATTORNEYS' FEES, EXPENSES, AND INCENTIVE AWARD

Class Counsel request that the Court grant the following, to be distributed from the common fund established by the Settlement: (1) a class representative incentive award of $75,000 to Bradburn/Teacher Store; (2) an award of attorneys' fees of $13,912,500, or 35% of the Settlement common fund; and (3) an award of costs and expenses of $1,011,375 for reimbursement of expenses incurred by counsel on behalf of the class.

A. Expenses

HN19[] "Attorneys who create a common fund for the benefit of a class are **[**38]** entitled **[*336]** to reimbursement of reasonable litigation expenses from the fund." *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *13* (citing *In re Ikon, 194 F.R.D. at 192*). Class Counsel request reimbursement for expenses in the amount of $ 1,011,375. This consists of $ 983,463 for expenses that have been incurred since the beginning of this litigation in 2002, and includes costs incurred in connection with the prosecution and settlement of the litigation for items such as: expert fees; travel; document production; depositions and transcripts; settlement administration; mediation; document storage; on-line legal research; and class notice. (Baruch Decl. P 6). The remainder of the requested expenses, i.e. $27,912, represents estimated future expenses. (Baruch Decl. PP 6-8, Second Baruch Decl. PP 2-3.) The estimated future expenses consist of $23,662 for claims administration, $3,500 in travel expenses for the April 18, 2007 Hearing, and $750 in off-site document storage through June 2007. (Baruch Decl. P 8.) As Class Counsel notified Class Members that they would seek reimbursement of up to $1,400,000 in litigation and settlement expenses, (Pl. Corr. Mem. in Support, Ex. **[**39]** B at 3.), the total amount of expenses for which they now seek reimbursement is within that amount. Moreover, no objections have been filed in response to this request for reimbursement. Accordingly, we find that the litigation expenses enumerated by Class Counsel are reasonable and we grant Class Counsel's request for reimbursement. See *In re Remeron End-Payor Antitrust Litig., Civ. A. No. 02-2007, 2005 U.S. Dist. LEXIS 27011, at *92 (D.N.J. Sept. 13, 2005)* (approving reimbursement of expenses which "reflect costs expended for purposes of prosecuting this litigation, including substantial fees for experts; substantial costs associated with creating and maintaining an electronic document database; travel and lodging expenses; copying costs; and the costs of deposition transcripts").

B. Attorneys' Fees

HN20[] "District courts approving class action settlements must thoroughly review fee petitions for fairness. Although the ultimate decision as to the proper amount of attorneys' fees rests in the sound discretion of the court, the court must set forth its reasoning clearly." *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *13* (citations omitted). Thorough review of fee **[**40]** arrangements is critical in the context of a class action settlement because of "'the danger . . . that the lawyers might urge a class settlement at a low figure or on a less-than optimal basis in exchange for red-carpet treatment for fees,'" *In re General Motors, 55 F.3d at 820* (quoting *Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991))*, and because the parties to the action might lack sufficient incentive to object to the arrangement. *In re AT&T Corp. Sec. Litig., 455 F.3d 160, 168 (3d Cir. 2006)*.

HN21[] Courts typically use one of two methods for assessing attorneys' fees, either the percentage of recovery method or the lodestar method. *In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 300 (3d Cir. 2005)*. We utilize the percentage of recovery method in this case as it is "generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'" Id. (quoting *In re Prudential, 148 F.3d at 333*). As the Third Circuit recommends, however, we use the lodestar method "to 'cross-check' the **[**41]** percentage fee award," in order to verify that the fee award is not excessive. *Id. at 305* (citing *In re Prudential, 148 F.3d at 333*).

Class Counsel have requested attorneys' fees of $ 13,912,500, or 35% of the Settlement **[*337]** Fund. *HN22*[] When a district court uses the percentage of recovery method, it "first calculates the percentage of the total recovery that the proposal would allocate to attorneys fees by dividing the amount of the requested fee by the total amount paid out by the defendant; it then inquires whether that percentage is appropriate based on the circumstances of the case." *In re Cendant, 264 F.3d at 256*. "The percentage will be based on the net settlement fund after deducting the costs of litigation." *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *14* (citing *In re Ikon*, *194 F.R.D. at 193*); see also *Meijer, Inc., 2006 U.S. Dist. LEXIS 56744, 2006 WL 2382718, at *19* (calculating the percentage recovery based on the net settlement fund). In this case, Class Counsel appear to have erroneously calculated the requested award based on the *gross* settlement amount, rather then the *net* settlement amount. Because Class Counsel **[**42]** argue in their Corrected Application for Attorneys' Fee, Expenses, and Class Representative Award that 35% of the settlement amount is reasonable under the percentage of recovery method of assessing attorneys' fees, we will consider whether the requested attorney award of 35% of the net settlement amount (i.e. $ 13,558,518) is reasonable.

In *Gunter v. Ridgewood Energy Corp., 223 F.3d 190 (3d Cir. 2000)*, *HN23*[] the Third Circuit directed district courts to consider the following seven factors when determining whether a percentage of recovery fee award is reasonable:

> (1) the size of the fund created and the number of persons benefitted;
>
> (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or the fees requested by counsel;
>
> (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment;
>
> (6) the amount of time devoted to the case by plaintiffs' counsel; and
>
> (7) the awards in similar cases.

Id. at 195 n.1; see also *In re Rite Aid, 396 F.3d at 301*. "Since this is a flexible and fact-driven determination, **[**43]** " *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *14*, district courts are not limited to the Gunter factors in their analysis of the fee request's reasonableness. As the Third Circuit recently noted:

> *HN24*[] This list [of Gunter factors] was not intended to be exhaustive. . . . In Prudential, we noted three other factors that may be relevant and important to consider: (1) the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations; (2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and (3) any 'innovative' terms of the settlement. . . . In reviewing an attorneys' fees award in a class action settlement, a district court should consider the Gunter factors, the Prudential factors, and any other factors that are useful and relevant with respect to the particular facts of the case.

*In re AT&T Corp. Secs. Litig., 455 F.3d 160, 2006 WL 2021033, at *4* (citing *In re Prudential, 148 F.3d at 338-340*). While the district courts should "engage in **[**44]** robust assessments of the fee award reasonableness factors when evaluating a fee request," *In re Rite Aid, 396 F.3d at 302*, these factors "'need not be applied in a formulaic way' because each case is different, 'and in certain cases, one factor may outweigh the rest.'" *In re AT&T, 455 F.3d 160, 2006 WL 2021033, at *4* (quoting *In re Rite Aid, 396 F.3d at 301*); see also *In re Cendant Corp. PRIDES Litig.,* *243 F.3d 722, 736 (3d Cir. 2001)* ("[A] district court may not rely on a formulaic application of the appropriate **[*338]** range in awarding fees but must consider the relevant circumstances of the particular case.").

1. Size of fund created and number of persons benefitted

Class Counsel have obtained for the class a common fund of $39,750,000 in cash, less expenses, attorneys' fees, and incentive award, benefitting more than 3000 Class Members. As discussed above, the Settlement Consideration represents 18.5 percent of what Class Members paid to 3M for invisible and transparent tape during the damage period, and amounts to 41 to 48 percent of the total single damages claimed by the class. As the Settlement does not require Class Members **[**45]** to file proof of claim forms, all Class Members that can be located will receive a distribution from the common fund. Therefore, this factor weighs in favor of finding that the percentage of the settlement fund requested is appropriate.

2. Presence or absence of substantial objections by members of the class

There have been no objections either to the Settlement Agreement or to the requested attorneys' fees. The absence of objections to the requested attorneys' fees in this case is particularly notable given the sophisticated nature of the absent Class Members. See *In re Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013, 2005 WL 3008808, at *13 n.1* ("When a class is comprised of sophisticated business entities that can be expected to oppose any request for attorney fees they find unreasonable, the lack of objections 'indicates the appropriateness of the [fee] request.'" (alteration in original) (quoting *Cimarron Pipeline Constr., Inc. v. National Council on Compensation Ins., Civ. A. Nos. 89-822, 89-1186, 1993 U.S. Dist. LEXIS 19969, 1993 WL 355466, at *1-2 (W.D. Ok. June 8, 1993)))*; *Stop & Shop Supermarket Co., 2005 U.S. Dist. LEXIS 9705, 2005 WL 1213926, at *10* (finding that this factor weighs in **[**46]** favor of approval because, "[a]lthough the Settlement Class in this case is relatively small and consists of sophisticated businesses, not one member of the Settlement Class objected to the requested fee"). We find that the total absence of objections to the requested fees weighs in favor of finding that the percentage of the settlement fund requested is appropriate. See *In re Linerboard Antitrust Litig., MDL No. 1261, 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *5 (E.D. Pa. June 2, 2004)* ("The absence of objections supports approval of the Fee Petition."); *In re Rent-Way Secs. Litig., 305 F. Supp. 2d 491, 515 (W.D. Pa. 2003)* ("[T]he absence of substantial objections by other class members to the fee application supports the reasonableness of Lead Counsels' request."); *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *15* ("[T]he Class members' view of the attorneys' performance, inferred from the lack of objections to the fee petition, supports the fee award.").

3. Skill and efficiency of the attorneys involved

HN25[] The skill and efficiency of Class Counsel are "measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, **[**47]** the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." *In re Ikon, 194 F.R.D. at 194* (citation omitted). Class Counsel are experienced in complex class action litigation (Baruch Decl. P 3), and have obtained a significant settlement for the Class despite the complexity and challenges of this case. Accordingly, this factor favors finding that the percentage of the settlement fund requested is appropriate.

4. Complexity and duration of the litigation

As mentioned above, courts have stated that antitrust class action are perhaps the **[*339]** most complex cases to litigate. *Stop & Shop Supermarket Co., 2005 U.S. Dist. LEXIS 9705, 2005 WL 1213926, *11*; *In re Linerboard Antitrust Litig., 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003)*. This action was filed more than four years ago, and involved litigation over class certification and collateral estoppel, expert testimony on both class certification and the merits, and numerous depositions. At the time of settlement, the parties had submitted pretrial memoranda, completed expert depositions, and were ready **[**48]** for trial. Though Plaintiff benefitted from our estoppel ruling, there remained complex challenges in establishing liability and damages in this case, as discussed above. Accordingly, this factor weighs in favor of finding that the percentage of the settlement fund requested is appropriate.

5. Risk of nonpayment

Class Counsel's compensation for their services in this case was wholly contingent on the success of the litigation. (Hazard Decl. P 25.) Given the risks of establishing liability and damages discussed above, the possibility of non-payment has been present throughout this litigation. Accordingly, this factor weighs in favor of finding that the percentage of the settlement fund requested is appropriate.

6. Amount of time devoted to the case by Plaintiffs' counsel

Class Counsel spent more than four years, more than 9,000 hours in attorney time, and approximately 2,000 hours in paralegal time working on this case. (Baruch Decl. P 2.) Due to the significant number of hours devoted to this litigation and the duration of this litigation, this factor weighs in favor of finding that the percentage of the settlement fund requested is appropriate.

7. Awards in similar **[**49]** cases

HN26[] This factor requires the Court to compare the percentage of recovery requested as a fee in this case against the percentage of recovery awarded as a fee in other common fund cases in which the percentage of recovery method, rather than the lodestar method, was used. *In re Cendant Corp. PRIDES Litig., 243 F.3d at 737*. Class Counsel request attorneys' fees that produce a percentage of recovery of 35%. This percentage of recovery is slightly above the typical range of common fund attorneys' award in securities and antitrust litigation. See 4 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 14:6 (4th ed. 2006) ("In the normal range of common fund recoveries in securities and antitrust suits, common fee awards fall in the 20 to 33 per cent range."). In In re Rite Aid, the Third Circuit noted three studies which found that fee awards ranging between 25-33% of the common fund were not unusual. *In re Rite Aid, 396 F.3d at 303* ("[O]ne study of securities class action settlements over $10 million . . . found an average percentage fee recovery of 31%; a second study by the Federal Judicial Center of all class actions resolved **[**50]** or settled over a four-year period . . . found a median percentage recovery range of 27-30%; and a third study of class action settlements between $100 million and $200 million . . . found recoveries in the 25-30% range were 'fairly standard.'") (citations omitted). Several decisions have awarded one-third of the fund as a fee though the settlements in those cases were substantially less successful than here. See *Ravisent Technologies, Civ. A. No. 001014, 2005 U.S. Dist. LEXIS 6680, 2005 WL 906361, *9, *10-*12 (E.D. Pa. Apr. 18, 2005)* (granting one-third of the settlement fund in attorneys' fees where the settlement fund totaled 12.2% of the maximum possible damages); *In re Gen. Instrument Sec. Litig., 209 F. Supp. 2d 423, 431, 433-34* ***[*340]*** *(E.D. Pa. 2001)* (granting one-third of settlement fund in attorneys' fees where settlement fund totaled 11% of damages). Because the requested fee percentage is only slightly higher than the percentages awarded in those cases and the settlement in this case provides a common fund that represents a much higher percentage share of the Class Members' damages than did the common funds in those cases, this factor supports a finding that the **[**51]** percentage of the settlement fund requested is appropriate.

We conclude that each of the seven *Gunter* factors favors the requested award of attorneys' fees in this case. Accordingly, we find that, under the Gunter analysis, the percentage of recovery requested as attorneys' fees in this case is reasonable.

8. The Prudential factors

Our assessment of Class Counsel's request for attorneys' fees in light of the three *Prudential* factors is consistent with our finding of reasonableness under the *Gunter* factors. ***HN27***[] The first Prudential factor is intended to measure whether "the entire value of the benefits accruing to class members is properly attributable to the efforts of class counsel," *In re AT&T, 455 F.3d 160, 2006 WL 2021033, at *11*, or if some of those benefits are more properly attributed "to the efforts of other groups, such as government agencies conducting investigations." *455 F.3d 160, [WL] at *4* (citing *In re Prudential, 148 F.3d at 338*). While Class Counsel were not aided in their prosecution of this case by a government investigation, Class Counsel did have the benefit of prior litigation which assigned liability to 3M for the same sort of **[**52]** anti-competitive conduct that has been alleged here. Compare *Stop & Shop Supermarket Co., 2005 U.S. Dist. LEXIS 9705, 2005 WL 1213926, at *12* ("[T]his action was riskier than many other antitrust class actions because there was no prior government investigation, or prior finding of civil or criminal liability based on antitrust violations, in this case."). However, in comparison to the Meijer litigation, which similarly benefitted from the prior litigation and settled for an amount equaling 2 percent of the class members purchases, the proposed Settlement Consideration in this action represents 18.5 percent of the Class Members purchases. Consequently, we find that this factor supports the conclusion that the percentage of recovery requested by Class Counsel for attorneys' fees in this case is reasonable.

As for the second *Prudential* factor, we find that a percentage of recovery of 35 percent is comparable to the likely "percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained." *In re AT&T, 455 F.3d 160, 2006 WL 2021033, at *4* (citing *In re Prudential, 148 F.3d at 340*). See **[**53]** *In re Remeron, 2005 U.S. Dist. LEXIS 27013, 2005 WL 3008808, *16* ("Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation."); see also *In re Ikon, 194 F.R.D. at 194* ("[I]n private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery.").

With respect to the third *Prudential* factor, the Settlement Agreement here contains no particularly "innovative" terms to argue in favor of the requested award of attorneys' fees. *In re AT&T, 455 F.3d 160, 2006 WL 2021033, at *4* (citing *In re Prudential, 148 F.3d at 339*).

In sum, we find that both the Prudential factors and the Gunter factors support our conclusion that the percentage of recovery requested by Class Counsel for attorneys' fees in this case is reasonable.

[*341] 9. Lodestar cross-check

HN28[] The Third Circuit has suggested that, in addition to reviewing the fee award reasonableness factors, "it is 'sensible' for district courts to 'cross-check' the percentage fee award against the 'lodestar' method." *In re Rite Aid, 396 F.3d at 305* **[**54]** (citing *In re Prudential, 148 F.3d at 333*). The lodestar is calculated by "multiplying the number of hours worked by the normal hourly rates of counsel. The court may then multiply the lodestar calculation to reflect the risks of nonrecovery, to reward an extraordinary result, or to encourage counsel to undertake socially useful litigation." *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *15* (citing *In re Ikon, 194 F.R.D. at 195*). "The lodestar cross-check serves the purpose of alerting the trial judge that when the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award." *In re Rite Aid, 396 F.3d at 306*. The cross-check, however, "does not trump the primary reliance on the percentage of common fund method." *Id. at 307*. Moreover, "[t]he lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records. . . . [T]he resulting multiplier need not fall within any pre-defined range, provided **[**55]** that the District Court's analysis justifies the award." *Id. at 306-07* (footnotes and citations omitted). It is appropriate for the court to consider the multipliers utilized in comparable cases. *Id. at 307 n.17*.

The total lodestar amount submitted to the Court by Class Counsel in this case is $5,476,800 for 10,957.5 hours of attorney and paralegal time. (Baruch Decl. P 2.) The lodestar amount covers work done from the inception of the claims in this action through January 18, 2007 and is calculated at current rates. (Id. The hours worked were recorded contemporaneously in the books and records that the firms maintained in the ordinary course of business. (Id. P 5.) The lodestar amount, taken against the requested fee award, results in a lodestar multiplier of approximately 2.5.

HN29[] The Third Circuit has recognized that multipliers "'ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.'" *In re Cendant PRIDES, 243 F.3d at 742* (quoting *In re Prudential, 148 F.3d at 341*). A multiplier of 2.5 is within this range of normal awards. See *In re Linerboard, 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *16* **[**56]** (noting that "during 2001-2003, the average multiplier approved in common fund class actions was 4.35"). Moreover, the lack of objections by this Class of sophisticated parties to Class Counsel's request for fees supports the resulting multiplier. See *Stop & Shop Supermarket Co., 2005 U.S. Dist. LEXIS 9705, 2005 WL 1213926, at *18* (noting that "the high lodestar multiplier (15.6) which results from the Court's award of attorneys' fees in this case is neutralized . . . by the extraordinary support Plaintiffs have shown for counsels' request for fees. Not one member of the Settlement Class, which is made up of approximately 90 sophisticated businesses, objected."). Accordingly, we find that, given the facts of this case, the requested lodestar multiplier of approximately 2.5 is acceptable and does not call for a reduction in Class Counsel's requested attorneys' fees award.

Having thoroughly reviewed Class Counsel's request for attorneys' fees, we conclude that the percentage of recovery requested by Class Counsel is reasonable, and that the lodestar cross-check is consistent with a finding of reasonableness. Accordingly, we approve Class Counsel's request, and award Class Counsel **[*342]** $ 13,558,518 **[**57]** in attorneys' fees to be paid from the Settlement Fund.

C. Incentive Award to Representative Plaintiffs

Bradburn has asked the Court to approve an incentive award in the amount of $75,000 to be paid from the Settlement Fund, because Bradburn has spent a significant amount of its own time litigating this case for the absent members of the Settlement Class. ***HN30***[] "'Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.'" *Cullen v. Whitman Med. Corp., 197 F.R.D. 136, 145 (E.D. Pa. 2000)* (quoting *In re S. Ohio Corr. Facility, 175 F.R.D. 270, 272 (S.D. Ohio 1997))*. It is particularly appropriate to compensate named representative plaintiffs with incentive awards when they have actively assisted plaintiffs' counsel in their prosecution of the litigation for the benefit of the class. See *Tenuto v. Transworld Sys., Civ. A. No. 99-4228, 2002 U.S. Dist. LEXIS 1764, 2002 WL 188569, at *5 (E.D. Pa. Jan. 31, 2002)*; see also *In re Linerboard, 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *18* ("Like the attorneys in this case, the class representatives **[**58]** have conferred benefits on all other class members and they deserve to be compensated accordingly.") (citing In re Plastic Tableware Antitrust Litig., Civ. A. No. 94-3564, 2002 WL 188569 (E.D. Pa. Dec. 4, 1998)).

Bradburn has worked closely with Class Counsel throughout the four years of investigation, prosecution and settlement of the claims in this litigation. (Corr. Application at 6.) Although it is a small business, Bradburn's representatives underwent nine depositions, in addition to providing testimony at the class certification hearing, and at the time of settlement, Bradburn's representatives were preparing to attend and give testimony at the trial. (Id. In opposing class certification, 3M interrogated Bradburn at length on internal family quarrels and allegations of misconduct, and claimed that these allegations disqualified Bradburn from being an adequate representative. (Id. Furthermore, the Notice advised Class Members that Bradburn would apply for an incentive award up to this amount and there were no objections to the award. See *In re Remeron, 2005 U.S. Dist. LEXIS 27013, 2005 WL 3008808, at *18*. Accordingly, we approve the requested incentive award.

[59] IV. CONCLUSION**

For the foregoing reasons, we conclude that the Settlement Agreement and Distribution Plan are fair, adequate and reasonable, and we approve them. The Court further concludes that Class Counsel's requested reimbursement of expenses in the amount of $1,011,375 and requested award of attorneys' fees representing 35 % of the Settlement Fund (or $13,558,518) are fair and reasonable, and we approve them. Lastly, the Court approves Bradburn's request to be paid an incentive award in the amount of $75,000.

An appropriate Order follows.

FINAL APPROVAL ORDER AND JUDGMENT

WHEREAS Plaintiff Bradburn Parent Teacher Store, Inc. ("Bradburn"), on behalf of itself and each Class Member, as defined herein, by and through its counsel of record in the Litigation, has asserted claims for damages and injunctive relief against 3M Company ("3M"), alleging violations of federal ***antitrust law***;

WHEREAS, the Court entered an order on August 18, 2004 certifying a class of Plaintiffs comprising "all persons who directly purchased invisible or transparent tape from 3M Company between October 2, 1998 and the present, who have not **[*343]** purchased, for resale under the class member's own label, **[**60]** any 'private label' invisible or transparent tape from 3M Company or any of 3M Company's competitors at any time from October 2, 1988 to the present"; and

WHEREAS, the Court has appointed R. Stephen Berry, J. Daniel Leftwich and Gregory Baruch, of the law firm of Berry & Leftwich, and Charles M. Jones, of the law firm of Jones, Osteen, Jones & Arnold, to serve as Class Counsel; and

WHEREAS, the Court directed on November 12, 2004 that potential class members be given notice of the class certification and afforded an opportunity to exclude themselves from the class; and

WHEREAS, Class Counsel certified on December 7, 2004 that such notice had been provided; and

WHEREAS the Plaintiff and 3M, desiring to resolve any and all disputes in this action, executed a Settlement Agreement dated as of September 5, 2006, which was filed with the Court on September 8, 2006; and

WHEREAS the Settlement Agreement does not constitute, and shall not be construed as or deemed to be evidence of, an admission of any fault, wrongdoing or liability by 3M or by any other person or entity; and

WHEREAS Plaintiff and 3M have agreed to entry of this Final Approval Order and

Judgment (hereinafter, the "Order"); **[**61]** and

WHEREAS Plaintiff, on behalf of itself and each Class Member, has agreed to the release of claims specified in the Settlement Agreement; and

WHEREAS, on October 24, 2006, this Court confirmed and updated the class certification granted in its Order dated August 18, 2004, granted preliminary approval to the Settlement Agreement and directed that Notice be given to the Class as defined in the Court's Order dated August 18, 2004 and updated in the Preliminary Approval Order; and

WHEREAS, pursuant to the Preliminary Approval Order, Notice of the Settlement was given to Class Members, in accordance with *Federal Rules of Civil Procedure 23(c)(2)* and *23(e)* and the requirements of due process (which Notice is incorporated herein by reference); and

WHEREAS an opportunity to be heard was given to all persons requesting to be heard in accordance with this Court's Orders; the Court has reviewed and considered the terms of the Settlement Agreement, and the submissions of the parties in support thereof; and after holding a hearing on April 18, 2007 at which all interested parties were given an opportunity to be heard; and

WHEREAS there is no just reason for delay;

NOW, THEREFORE, before **[**62]** the taking of any testimony, without trial or adjudication of any issue of fact or law herein, without any admission of liability or wrongdoing by 3M Company, and upon the consent of the Settling Parties,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

I.

JURISDICTION

1.1. The Court has jurisdiction over the subject matter of this action and the parties hereto. Plaintiff brought this action asserting an claim under *Section 2* of the Sherman Act, *15 U.S.C. § 2*. Jurisdiction lies in this Court pursuant to *28 U.S.C. §§ 1331* and *1337*. Venue is proper in the Eastern District of Pennsylvania.

[*344] II.

DEFINITIONS

As used in this Final Approval Order and Judgment, the following definitions shall apply:

2.1. "3M" or "Defendant" means 3M Company and all of its predecessors, successors and past and present affiliates, subsidiaries, directors, officers, employees and agents.

2.2. "Class" means all Persons who directly purchased invisible or transparent tape from 3M Company between October 2, 1998 and February 10, 2006, who have not purchased, for resale under the Class Member's own label, any "private label" invisible **[**63]** or transparent tape from 3M Company or any of 3M Company's competitors at any time from October 2, 1988 to February 10, 2006; but excluding the following: (i) 3M Company, its subsidiaries, affiliates, officers, directors, and employees; (ii) those Persons that timely and validly requested exclusion from the Class in response to the Notice of Pendency of Class Action dated November 29, 2004, provided pursuant to the Court's November 12, 2004 Order; and (iii) any other Person that may be excluded by order of the Court.

2.3. "Class Counsel" means R. Stephen Berry, J. Daniel Leftwich, and Gregory Baruch of the law firm of Berry & Leftwich, and Charles M. Jones, of the law firm of Jones, Osteen, Jones & Arnold.

2.4. "Class Member" means any Person, including but not limited to the individual representative Plaintiff, that satisfies all of the requirements for inclusion in the Class as set forth in paragraph 2.2 herein, and that has not validly requested exclusion therefrom.

2.5. "Distribution Plan" means the plan that sets forth the process for the allocation and distribution of the Net Settlement Fund, which was submitted to the Court simultaneously with the Final Approval Motion.

[64]** 2.6. "Effective Date" means the first date by which all of the events and conditions specified in paragraph 7.1 of the Settlement Agreement have been met and have occurred.

2.7. "Invisible or transparent tape" means invisible or transparent tape sold within the United States for home and office use, including such products as Scotch (R) Magic TM tape, Scotch (R) transparent tape, Highland TM tapes and other invisible or transparent tapes for home and office use, but not including such products as packaging tapes, sealing tapes or masking tapes.

2.8. "Judgment" refers to this Final Approval Order and Judgment.

2.9. "Litigation" means the action pending in the United States District Court for the Eastern District of Pennsylvania titled Bradburn Parent Teacher Store, Inc. v. 3M (Minnesota, Mining and Manufacturing Company), Civil Action No. 02-7676 (JP).

2.10. "Notice of Proposed Settlement" means, collectively, the communications by which the Class was notified of the existence and terms of the Settlement.

2.11. "Notice Plan" means the plan approved in the Preliminary Approval Order for notifying the Class of the Settlement.

2.12. "Plaintiff" means Bradburn Parent Teacher **[**65]** Store, Inc. and each of its parents, subsidiaries, affiliates, assignees, predecessors, successors, officers, directors, employees, agents, and attorneys.

2.13. "Released Claims" means the release and discharge of 3M and each of its parents, subsidiaries, divisions, affiliates, assignors, assignees, predecessors, successors, **[*345]** officers, directors, employees, agents and attorneys, from any and all claims asserted, or which could have been asserted, in the Litigation and any and all claims and potential claims, demands, rights, liabilities and causes of action which have arisen or could arise hereafter, whether known or unknown, whether asserted or that could have been or could hereafter be asserted by any Class Member or any parent, affiliate or subsidiary of any of such Class Member against 3M and any of its subsidiaries, affiliates, directors, officers, employees and/or agents, concerning or relating in any way to or arising in any way from any 3M discount, rebate, offer, promotion or other sales program or practice (including without limitation, programs claimed to involve the bundling of products or volume or growth rebates) concerning, including or relating in any way to the sale, **[**66]** promotion or distribution of invisible or transparent tape for home or office use in effect from January 1, 1993 to September 5, 2006, including without limitation claims arising under any federal and/or state antitrust laws, unfair competition laws, consumer protection laws or deceptive trade practices acts or any similar statutory or common law provisions, but excluding from this release claims relating to any alleged product defect, personal injury or breach of contract. With the exception of claims relating to any alleged product defect, personal injury or breach of contract, this release is a "general release" as that term is used in *Section 1542* of the Civil Code of the State of California and all Class Members that have not opted out will expressly waive any rights under that statute or any similar law of any state or territory of the United States or any principle of common law that is similar, comparable, or equivalent to *Section 1542 of the California Civil Code*.

2.14. "Settlement" means the settlement contemplated by the terms, conditions and provisions set forth in the Settlement Agreement.

2.15. "Settlement Agreement" means the Settlement Agreement dated as of September 5, 2006 by **[**67]** and between Plaintiff Bradburn Parent Teacher Store, Inc., on behalf of itself and each Class Member, and Defendant 3M Company, including all exhibits thereto.

2.16. "Settlement Agreement Date" means September 5, 2006, the date as of which the Settling Parties entered into the Settlement Agreement.

2.17. "Settlement Consideration" means the amount that will be paid by 3M to or on behalf of the Class in exchange for the settlement and release of all Released Claims, as defined in paragraph 2.13 herein.

2.18. "Settling Parties" means, collectively, the Plaintiff, on behalf of itself and each Class Member, and 3M.

III.

FINAL APPROVAL OF SETTLEMENT

3.1. In its Order dated August 18, 2004, as confirmed and updated in the Preliminary Approval Order dated October 24, 2006, the Court certified the following Class which it now reconfirms:

> all persons who directly purchased invisible or transparent tape from 3M Company between October 2, 1998 and February 10, 2006, who have not purchased, for resale under the Class Member's own label, any "private label" invisible or transparent tape from 3M Company or any of 3M Company's competitors at any time from October 2, 1988 to **[**68]** February 10, 2006.

3.2 Attached hereto as Exhibit 1 is the list of Persons that have timely excluded themselves from the Class, in response to **[*346]** the Notice of Pendency of Class Action dated November 29, 2004, which was provided pursuant to the Court's Order dated November 12, 2004, and for which this Final Approval Order and Judgment has no force or effect.

3.3 The Court finds that the Notice and the Notice Plan were reasonably calculated to apprise the Class of all material elements of the proposed settlement, constituted the best notice practicable under the circumstances, and constituted due and sufficient notice. The Court finds that all Class Members were afforded the opportunity to object to or comment on the Settlement, and to appear at the Final Approval Hearing. Accordingly, the Court determines that all Class Members that have not excluded themselves from this Litigation are bound by this Final Approval Order and Judgment.

3.4 The terms of the Settlement Agreement are hereby approved. The Court finds that the Settlement is fair, reasonable and adequate and in the best interests of Plaintiff and the Class as a whole. The Settlement is the product of arm's-length, serious **[**69]** and informed negotiations among experienced and knowledgeable counsel. The Settlement Agreement has the full force and effect of an order of this Court, and the Settling Parties are directed to implement the Settlement Agreement in accordance with its terms and conditions.

3.5. The Distribution Plan is adjudged to be fair, reasonable and adequate and is hereby approved. Class Counsel are directed to proceed with the implementation of the Distribution Plan.

3.6 No objections have been filed with respect to the Settlement and/or the Distribution Plan.

3.7. No part of the Settlement Consideration to be provided by 3M pursuant to the Settlement Agreement shall constitute, nor shall it be construed or treated as constituting, a payment in lieu of treble damages, fines, penalties, forfeitures or punitive recoveries under any state or federal laws, rules or regulations, or any other applicable statute or provision.

IV.

DISMISSAL OF ACTION AND RELEASES OF CLAIMS

4.1. This action is dismissed with prejudice and, except as provided in paragraph 5.1 of this Order, without costs.

4.2. The Court hereby finds that the Released Claims which Plaintiff and the Class Members, on behalf **[**70]** of themselves and, with respect to individuals or individually owned businesses, on behalf of each of their heirs, predecessors, successors, representatives or assigns, and, with respect to corporate entities, on behalf of each of their parents, subsidiaries, affiliates, assignees, predecessors, successors, officers, directors, employees and agents, shall fully and forever release, relinquish and discharge, by operation of this Final Approval Order and Judgment are as defined in paragraph 2.13 of this Order, i.e.,

> the release and discharge of 3M and each of its parents, subsidiaries, divisions, affiliates, assignors, assignees, predecessors, successors, officers, directors, employees, agents and attorneys from any and all claims asserted, or which could have been asserted, in the Litigation and any and all claims and potential claims, demands, rights, liabilities and causes of action which have arisen or could arise hereafter, whether known or unknown, whether asserted or that could have been or could hereafter be asserted by any Class Member or any parent, affiliate or subsidiary of any of such Class Member against 3M and any of its subsidiaries, affiliates, directors, officers, **[**71]** employees and/or **[*347]** agents, concerning or relating in any way to or arising in any way from any 3M discount, rebate, offer, promotion or other sales program or practice (including without limitation, programs claimed to involve the bundling of products or volume or growth rebates) concerning, including or relating in any way to the sale, promotion or distribution of invisible or transparent tape for home or office use in effect from January 1, 1993 to September 5, 2006, including without limitation claims arising under any federal and/or state antitrust laws, unfair competition laws, consumer protection laws or deceptive trade practices acts or any similar statutory or common law provisions, but excluding from this release claims relating to any alleged product defect, personal injury or breach of contract. With the exception of claims relating to any alleged product defect, personal injury or breach of contract, this release is a "general release" as that term is used in *Section 1542* of the Civil Code of the State of California

and all Class Members that have not opted out will expressly waive any rights under that statute or any similar law of any state or territory of the United States **[**72]** or any principle of common law that is similar, comparable, or equivalent to *Section 1542 of the California Civil Code*.

4.3. Upon the Effective Date, each Class Member, on behalf of itself and, with respect to individuals or individually owned businesses, on behalf of each of their heirs, predecessors, successors, representatives or assigns, and, with respect to corporate entities, on behalf of each of their parents, subsidiaries, affiliates, assignees, predecessors, successors, officers, directors, employees and agents, shall have, shall be deemed to have and by operation of this Judgment shall have fully, finally and forever released, relinquished and discharged 3M and its attorneys from any and all Released Claims and shall be deemed to have covenanted and agreed not to sue 3M or its attorneys with respect to the Released Claims.

4.4. Upon the Effective Date, 3M shall be deemed to have, and by operation of the Final Judgment shall have fully, finally and forever released, relinquished and discharged each and all of the Plaintiff and Class Counsel from all claims arising out of, relating to, or in connection with the institution, prosecution, assertion, settlement or resolution **[**73]** of the Litigation, other than claims for breach of the Settlement Agreement.

V.

FEES AND EXPENSES AND PLAINTIFF INCENTIVE AWARD

5.1 The Court approves the award of $13,558,518 to pay Class Counsel's fees plus $1,011,375 to reimburse Class Counsel for payment of costs and expenses reasonably incurred in prosecuting and settling this action.

5.2 The Court approves the award of $75,000 as an incentive award for Plaintiff Bradburn Parent Teacher Store, Inc.

5.3 No objections have been filed with respect to attorneys' fees and/or costs and expenses or with respect to Plaintiff's incentive award.

5.4 The fee award represents a multiplier of approximately 2.5 of Class Counsel's lodestar of $5,476,800, which multiplier is reasonable under the circumstances.

VI.

FINALITY OF JUDGMENT

6.1 The Court finds that this Final Approval Order and Judgment adjudicates all the claims, rights and liabilities of the parties to the Settlement Agreement and is **[*348]** final and shall be immediately appealable. Neither this Order nor the Settlement Agreement shall constitute any evidence or admission of liability by 3M, nor shall either document or any other document relating to the **[**74]** Settlement be offered in evidence or used for any other purpose in this or any other matter or proceeding except as may be necessary to consummate or enforce the Settlement Agreement or the terms of this Order or if offered by 3M in responding to any action purporting to assert Released Claims.

VII.

RETENTION OF JURISDICTION

7.1. Without affecting the finality of this Order, the Court retains jurisdiction for the purposes of enforcing the terms of the Settlement Agreement, to supervise the Settlement and to bar class members that have not opted out from instituting, maintaining or otherwise pursuing claims encompassed within the Released Claims. The Court also retains jurisdiction to allow any of the Settling Parties to apply to this Court at any time for such further orders and directions as may be necessary and appropriate for the construction or carrying out of the Settlement Agreement and this Final Approval Order and Judgment, for the modification of any of the provisions of this Final Approval Order and Judgment, and for the enforcement of compliance herewith.

7.2. If this Settlement is terminated or reversed or overturned on appeal (except as to attorneys' fees, **[**75]** expenses, or incentive awards), then: (a) this Final Approval Order and Judgment will have no force or effect, and all negotiations, proceedings, and statements made in connection with the Settlement Agreement will be without prejudice to the right of any persons or entities, and shall not be deemed admissions as to any issue; (b) the Settling Parties expressly reserve all of their rights and preserve all applicable defenses; and (c) the Settling Parties shall be restored to their respective positions in this Litigation as of May 5, 2006, and proceed as if the Settlement Agreement, and all other related orders and papers, had not been executed.

7.3. Under *Rule 54 of the Federal Rules of Civil Procedure*, the Court, in the interests of justice, there being no just reason for delay, expressly directs the Clerk of the Court to enter this Final Approval Order and Judgment, and hereby decrees that upon entry, it be deemed a final judgment and appealable with respect to all claims by Class Members, in accordance with the terms of the Settlement Agreement.

7.4. The Court directs the Clerk of the Court to maintain for a period of five (5) years the record of those members of the Class listed **[**76]** on Exhibit 1 that timely excluded themselves from the Class.

So Ordered.

Dated this 14th day of May, 2007.

s/ John R. Padova

United States District Judge

EXHIBIT 1

LIST OF PERSONS THAT HAVE TIMELY EXCLUDED THEMSELVES FROM THE CLASS

Advantage Office Prods, 8930 Western Way, Jacksonville FL 32256

All Printing Resources, 140 W Lake Dr, Glendale Hts IL 60139

Benjamin Office Supply, 5022 Cook Rd, Beltsville MD 20705

Bobels Office Plus, 1953 C Coopr Fostr, Amherst OH 44001

Borden Office Equipment, 141 N 5th St, Steubenville OH 43952

Bowmans Stationers Inc., 322 Parker St, Vacaville CA 95688

Brotherton Ofc Products, 130 S College Ave, Fort Collins CO 80524

[*349] Campbell Sply Co, PO Box 1464, Sioux Falls SD 57101

Crown Products Company, PO Box 696, 450 Nepperhan Avenue, Yonkers NY 10701

Data Essentials Inc, 3150 Mercier St, Kansas City MO 64111

Evans Drug Co, 102 W Randolph Ave, Enid OK 73701

F & L Country Store, 55883 Cnty Rd 43, Middlebury IN 46540

Foleys Inc, PO Box 2768, 1116 Foust Ave., High Point NC 27260

Frameware Inc, 25 Sherwood Ln, Fairfield NJ 07004

Fraternal Enterprises, 4100 Baldwin Rd, Holly MI 48442

Hearn Paper Co Inc, 556 N Meridian **[**77]** Rd, Youngstown OH 44509

J R Freeman Co Inc, 123 S D St Ste A, San Bernardino CA 92401

Johnson Wholesale Co., Inc., 2226 Mustang Way, Madison WI 53718

Joshen Paper Packaging, 5808 Grant Ave., Cuyahoga Heights, OH 44105

Kelly Paper Co., 288 Brea Canyon Rd, City Industry CA 91789

Latschs Inc, 200 Oakcreek Dr, Lincoln NE 68528

Markus Inc, 3646 Werk Rd, Cincinnati OH 45248

Marshfield Book & Stationery Inc, M111 W McMillan St, Marshfield WI 54449

Maurer Industrial Supply, Inc, 3940 Lexington Pk, Elkhart IN 46514

Maxi Aids, 42 Executive Blvd, Farmingdale NY 11735

Meyers Sply Co, 191 Sheridan Dr, Naugatuck CT 06770

Motive Parts & Supply, Po Box 708, Rapid City SD 57709

Nashville Office Interiors, Inc., PO Box 330399, 1621 Church St., Nashville TN 37203

Office Church School Spl, 780 S. Pike W., Sumter SC 29150

Office Supply Services, 2139 Supply Ct NW, Concord NC 28027

Peters Office Supply, 338 NW 9th Ave, Portland OR 97209

Publix Super Markets Inc., 2600 County Line, Lakeland FL 33811

Ray Engel Packaging Supp, 12060 Lackland Rd, St Louis MO 63146

Roanoke Moulding Design, 1715 Granby Street, Roanoke VA 24012

Rogards Office Prods, 214 S Walnut St, Champaign IL 61820

Schwarz, **[**78]** 8338 Austin Avenue, Morton Grove IL 60053

Schwegmans Office Supply, 502 W Broadway St, PO Box 616, West Plains MO 65775

Ship-Pac, Inc., 3000 Covington Rd, Kalamazoo MI 49001

Signcraft Screenprint, 100 A J Harle Dr, Galena IL 61036

Southwestern Bus Systems (now Southwestern Office Plus), 1007 N 8th St, Garden City KS 67846

Stephens Office Supply, 1201 West Loop N, Houston TX 77055

Stinson Stationers, 1108 Baker Street, PO Box 3399, Bakersfield CA 93305

Student Book Store, 421 E. Grand River Ave., East Lansing MI 48823

Sundry Distributors, Inc., 110 E Washington St., PO Box 1166, Athens AL 35611

Swartz & Watson (dba Accurate Office Equipment & Stebbins Office Systems), 1248 Lincoln Way East, Massillon OH 44646

[*350] Technical Library Service Inc., dba Talas, 20 W. 20th Street, New York NY 10011

Tharco, 10900 Painter Avenue, Santa Fe Springs CA 90670

TSRC, Inc. (T/a The Supply Room Companies), 14140 N. Washington Hwy., PO Box 1810, Ashland VA 23005

Total Office Products, 9452 Philips Hwy, Ste. 7, Jacksonville FL 32256

Unique Novelties, 61741 Campground, Washington MI 48094

Variety Distributors, PO Box 728, Harlan IA 51537

Wuzburg Inc., 710 S. Fourth St., PO Box 710, Memphis **[**79]** TN 38101

Borough of Lansdale v. PP&L, Inc.

United States District Court for the Eastern District of Pennsylvania

May 16, 2007, Filed

CIVIL ACTION NO. 02-8012

Reporter

503 F. Supp. 2d 730 *; 2007 U.S. Dist. LEXIS 35867 **; 2007-1 Trade Cas. (CCH) P75,718

BOROUGH OF LANSDALE, BOROUGH OF BLAKELY, BOROUGH OF CATAWISSA, BOROUGH OF DUNCANNON, BOROUGH OF HATFIELD, BOROUGH OF KUTZTOWN, BOROUGH OF LEHIGHTON, BOROUGH OF MIFFLINBURG, BOROUGH OF OLYPHANT, BOROUGH OF QUAKERTOWN, BOROUGH OF SCHUYLKILL HAVEN, BOROUGH OF ST. CLAIR, BOROUGH OF WATSONTOWN, BOROUGH OF WEATHERLY, PENNSYLVANIA, Plaintiffs, v. PP&L, INC., PPL ELECTRIC UTILITIES CORP., PPL ENERGY PLUS, L.L.C., and PPL GENERATION, L.L.C., Defendants.

Subsequent History: Summary judgment granted by, Judgment entered by *Borough of Lansdale v. PP&L, Inc., 2007 U.S. Dist. LEXIS 65371 (E.D. Pa., Sept. 4, 2007)*

Prior History: *Borough of Lansdale v. PP&L, Inc., 426 F. Supp. 2d 264, 2006 U.S. Dist. LEXIS 29469 (E.D. Pa., 2006)*

Core Terms

squeeze, rates, filed rate doctrine, wholesale, plaintiffs', anticompetitive, electricity, antitrust, summary judgment, retail rate, interaction, reconsideration motion, regulated, Sherman Act, Reconsideration, damages, retail, regulatory agency, anti trust law, customers, tariffs, defendants', immunity, district court, manifest, non-rate, effects, alternative grounds, Counterclaim, monopolize

LexisNexis® Headnotes

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

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Newly Discovered Evidence

HN1[] **Relief From Judgments, Altering & Amending Judgments**

Reconsideration is proper where the moving party demonstrates one of three grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.

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

HN2[] Relief From Judgments, Altering & Amending Judgments

A district court may properly refuse to consider evidence presented in a motion for reconsideration when the evidence was available prior to summary judgment.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

HN3[] Scope, Monopolization Offenses

Section 2 of the Sherman Act, 15 U.S.C.S. § 2, sanctions those who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations. Conduct that constitutes a "price squeeze" may violate the Sherman Act § 2. It is generally accepted that a price squeeze involves a defendant who as a monopolist supplies the plaintiff at one level (e.g., wholesale), competes at another (e.g., retail), and seeks to destroy the plaintiff by holding up the wholesale price to the plaintiff while depressing the retail price to common customers.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

HN4[] Filed Rate Doctrine, Public Utilities & Telecommunications Carriers

The filed rate doctrine bars antitrust suits based on rates that have been filed and approved by federal agencies and state agencies. Under the filed rate doctrine, a plaintiff may not sue the supplier of electricity based on rates that, though alleged to be the result of anticompetitive conduct, were filed with the federal agency responsible for overseeing such rates. The doctrine operates as a defense to both federal and state law actions based on the regulated rates. The form or details of the filed rate are not relevant to the application of the doctrine; the rate need only be filed with an agency responsible for overseeing such rates.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Energy & Utilities Law > Electric Power Industry > General Overview

HN5[] Antitrust & Trade Law, Exemptions & Immunities

There can be no doubt about the proposition that the federal antitrust laws are applicable to electrical utilities, and past precedent cautions that the courts should be reluctant to imply antitrust immunity.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

HN6[] **Antitrust & Trade Law, Exemptions & Immunities**

The United States Supreme Court has held that an implied exemption from the antitrust laws by regulatory legislation would be found only if the exemption is necessary in order to make the regulatory act work and even then only to the minimum extent necessary. Thus the filed rate doctrine may only apply as an exemption to the antitrust laws to the minimum extent necessary for the Federal Energy Regulatory Commission and the state Public Utility Commission to fulfill their functions.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > General Overview

HN7[] **Antitrust & Trade Law, Exemptions & Immunities**

The United States Supreme Court has found that electric utilities that are regulated by the Federal Energy Regulatory Commission are not immune from the antitrust laws, largely on the grounds that the regulation is not sufficiently "pervasive."

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

HN8[] **Antitrust & Trade Law, Exemptions & Immunities**

A court's determination that a defendant is immune from the antitrust laws is an assertion of jurisdiction that is separate from the calculation of damages, at which point the court has already determined that it has jurisdiction. An award of damages in an antitrust suit based on a court's estimate of what a hypothetical rate would have been if there had been no anticompetitive behavior does not prevent the Federal Energy Regulatory Commission or the Pennsylvania Public Utility Commission from performing its regulatory duties of approving or proscribing rates that a regulated entity may charge. Additionally, such a justification for the filed rate doctrine is offset by the specifics raised by a price squeeze claim where the alternative is to have no regulatory agency with the power to affect an anticompetitive rate differential. Nothing indicates that a court should not fill in the gap created in such a situation.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Retail Rates

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Wholesale Rates

HN9[] **Anticompetitive & Predatory Practices, Predatory Hiring & Price Squeezes**

Wholesale electricity rates are controlled by the Federal Energy Regulatory Commission (FERC); the retail rates are controlled by the state Public Utility Commission (PUC). Neither FERC nor the PUC has jurisdiction over the interaction between wholesale and retail rates; each agency has authority over only one end of the alleged price squeeze. Though FERC can take the possibility of a price squeeze into account when reviewing the reasonableness of a rate, it can do nothing to force a state commission to change the retail electricity rates. The same truth exists for the PUC. Plus, the federal and state regulatory systems do not work in perfect harmony, so it is possible for a utility to time or manipulate its rate filings in a way that causes a price squeeze. Even though FERC and the PUC might review rates for the possibility of a price squeeze, because simultaneous approval of retail and wholesale rates by the agencies is not required and rates can change with a later filing, it is very difficult for the agencies to predict a price squeeze.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > General Overview

HN10[] **Anticompetitive & Predatory Practices, Predatory Hiring & Price Squeezes**

There is no indication that district court antitrust review of rates, at least with regard to price squeeze allegations involving the interaction of state and federally approved rates, is repugnant to any regulatory scheme. Though the Federal Energy Regulatory Commission may lower wholesale rates and the the Pennsylvania Public Utility Commission may raise retail rates to compensate for a price squeeze, neither entity has the power to adjust both rates at the same time. Nor does the court have the power to revise agency-approved rates. Applying antitrust review to the interaction between these two rates is not inconsistent with the federal and state regulatory regimes because the resulting interaction falls outside the regulatory scheme.

Counsel: [1]** For BOROUGH OF LANSDALE, PENNSYLVANIA, BOROUGH OF BLAKELY, PENNSYLVANIA, BOROUGH OF CATAWISSA, PENNSYLVANIA, BOROUGH OF DUNCANNON, PENNSYLVANIA, BOROUGH OF HATFIELD, PENNSYLVANIA, BOROUGH OF KUTZTOWN, PENNSYLVANIA, BOROUGH OF LEHIGHTON, PENNSYLVANIA, BOROUGH OF MIFFLINBURG, PENNSYLVANIA, BOROUGH OF OLYPHANT, PENNSYLVANIA, BOROUGH OF QUAKERTOWN, PENNSYLVANIA, BOROUGH OF SCHUYLKILL HAVEN, PENNSYLVANIA, BOROUGH OF ST. CLAIR, PENNSYLVANIA, BOROUGH OF WATSONTOWN, PENNSYLVANIA, BOROUGH OF WEATHERLY, PENNSYLVANIA, Plaintiffs: C. J. MUSTACCHIO, LEAD ATTORNEY, SCRANTON, PA; CHARLES F. WHEATLEY, JR., JOHN F. WOODS, LEAD ATTORNEYS, WHEATLEY & RANQUIST P.A., ANNAPOLIS, MD; JONATHAN B. YOUNG, LEAD ATTORNEY, DISCHELL BARTLE YANOFF & DOOLEY, LANSDALE, PA.

For PP&L, INC., PPL CORPORATION, PPL ENERGY PLUS, L.L.C., PPL CORPORATION 1, PPL GERNERATION, Defendants: CHRISTOPHER D. OATWAY, EDWARD H. RIPPEY, JAMES R. ATWOOD, LEAD ATTORNEYS, COVINGTON & BURLING, WASHINGTON, DC; JOHN G. HARKINS, JR., STEVEN A. REED, LEAD ATTORNEYS, HARKINS CUNNINGHAM, PHILADELPHIA, PA; KARIN E. DAVIS, LEAD ATTORNEY, HARKINS CUNNINGHAM LLP, PHILA, PA; CHARLES F. WHEATLEY, JR., WHEATLEY & RANQUIST P.A., ANNAPOLIS, MD.

Judges: William **[**2]** H. Yohn Jr., Judge.

Opinion by: William H. Yohn Jr.

Opinion

[*732]

MEMORANDUM and ORDER

YOHN, J.

The Boroughs of Lansdale, Blakely, Catawissa, Duncannon, Hatfield, Kutztown, Leighton, Mifflinburg, Olyphant, Quakertown, Schuylkill Haven, St. Clair, Watsontown, and Weatherly, Pennsylvania ("the Boroughs") bring this action against PP&L, Inc., PPL Electric Utilities Corp., PPL Energy Plus, L.L.C., and PPL Generation, L.L.C. (collectively, "PPL") alleging various antitrust violations and asserting a claim for breach of contracts approved by **[*733]** the Federal Energy Regulatory Commission ("FERC"). (Compl. PP 14-19, 20-22.) Defendants asserted counterclaims for breach of contract as to all plaintiffs, (Countercl. PP 19-24), and tortious interference with existing and ongoing contractual relations as to Olyphant, (Countercl. PP 25-36). On March 30, 2006, I granted defendants summary judgment as to liability only on defendants' breach of contract counterclaims as to each plaintiff, except the Borough of Olyphant. *See Borough of Lansdale v. PP&L, Inc., 2006 U.S. Dist. LEXIS 14972 (E.D. Pa. Mar. 30, 2006)*. On April 5, 2006, I granted defendants summary judgment on many of plaintiffs' **[**3]** claims. *See Borough of Lansdale v. PP&L, Inc., 426 F. Supp. 2d 264 (E.D. Pa. 2006)*.

Now before me are the Boroughs' motions for reconsideration of both orders, defendants' responses, and the Boroughs' replies. The Boroughs contend that there were clear errors of law in the decisions and that reconsideration is necessary to prevent manifest injustice. For the reasons stated herein, the Boroughs' motions for reconsideration will be granted in part and denied in part.

STANDARD OF REVIEW

"The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985)*. ***HN1***[] Reconsideration is proper where the moving party demonstrates one of three grounds: "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999)* (citing *N. River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995))*; **[**4]** *see also* *Local Rule 7.1(g)*.

DISCUSSION

Plaintiffs argue pursuant to the third ground for reconsideration that this court overlooked certain law and facts and that these deficiencies resulted in manifest errors of law and fact. Plaintiffs ask this court to grant their motions for reconsideration and to vacate the March 31 and April 5, 2006 orders. [1]

I. March 31, 2006 Order - Summary Judgment on Defendants' Counterclaim

Plaintiffs argue that the court did not take into consideration evidence on record that indicated the existence of genuine issues of material fact regarding whether or not they breached the dispute resolution clause of the power supply contracts. (Pl. Mot. Reconsideration Mar. 31 Order 2.) However, they fail to demonstrate grounds under which the court may **[**5]** properly grant reconsideration.

First, without arguing any intervening change in the controlling law, plaintiffs provide new evidence with their motion for reconsideration. Plaintiffs' evidence consists of a letter PPL produced in discovery, which was also the subject of

---

[1] For the purposes of this opinion, the court will assume a familiarity with the facts underlying this case. *See Lansdale, 426 F. Supp. 2d at 269-74* (laying out the factual background behind the case).

deposition testimony. (Pl. Mem. Supp. Reconsideration Mar. 31 Order 7 n.4; Pl. Ex. 1.) Plaintiffs also present a fax sent by PPL to the Boroughs on October 17, 2002. (Pl. Ex. 2.) Though these exhibits **[*734]** were available to plaintiffs at the time the court granted summary judgment, the Boroughs did not provide these documents as part of the record. As such, these exhibits do not constitute "newly discovered evidence" and the court will not consider them. *See* *Bailey v. United Airlines, 279 F.3d 194, 201 (3d Cir. 2002)* ***HN2***[] ("A district court may properly refuse to consider evidence presented in a motion for reconsideration when the evidence was available prior to summary judgment.").

Second, plaintiffs' contention that the prior order contains manifest errors of law or fact is unpersuasive. The remainder of plaintiffs' motion for reconsideration presents nothing convincing to controvert this court's grant of **[**6]** summary judgment and merely seeks to rehash the same issues by citing different case law. The court already considered these arguments in the motion for summary judgment and will not revisit them again here. Accordingly, plaintiffs' motion for reconsideration of this court's order of March 30, 2006 will be denied.

II. April 5, 2006 Order - Summary Judgment on Plaintiffs' Claims

Plaintiffs request that this court reconsider its order of April 5, 2006, granting in part and denying in part defendants' motion for summary judgment on plaintiffs' claims. *See* *Borough of Lansdale v. PP&L, Inc., 426 F. Supp. 2d 264 (E.D. Pa. 2006)*.

A. Plaintiffs' Price Squeeze Claim under Sherman Act *§ 2*

Plaintiffs alleged two claims under Sherman Act *§ 2* in their complaint: 1) that defendants "monopolized the sale of electric power in the wholesale power market available to the Boroughs . . . resulting in increases in the cost of power to the Boroughs," and 2) that defendants created a "price squeeze" by requiring plaintiffs "to pay wholesale prices for electric power substantially higher than the retail prices Defendants charge for comparable service to its commercial **[**7]** and industrial customers, based on the charge demanded of Plaintiffs by Defendants." (Compl. PP 14, 15, 18.)

In the April 5, 2006 memorandum and order, I found that defendants were immune under the filed rate doctrine from antitrust liability on plaintiffs' Sherman Act *§ 2* claims. *Lansdale, 426 F. Supp. 2d at 283-89*. I explained that plaintiffs' price squeeze claim was barred by the filed rate doctrine because both the wholesale rate and retail rates were filed with and approved by the federal and state government agencies. *Id. at 283-84*. Therefore, I found that a claim based on the interaction between the two rates was barred. *Id.* With regard to plaintiffs' second, more general monopolization claim, I also found that the claim was barred by the filed rate doctrine because PPL's alleged monopolistic behavior took place in the FERC and PJM-approved ICAP market. *Id. at 284*.

Plaintiffs contend that the court erred in finding that their price squeeze claim is barred by the filed rate doctrine. First, plaintiffs claim that the court erred in not recognizing that their price squeeze claim falls within an exception to the filed rate **[**8]** doctrine for non-rate activities. Second, plaintiffs argue that the court was incorrect to rely on *Utilimax.com, Inc. v. PPL Energy Plus, LLC, 273 F. Supp. 2d 573 (E.D. Pa. 2003)*, *aff'd*, *378 F.3d 303 (3d Cir. 2004)*, because the plaintiff in that case did not assert a price squeeze claim.

In response, defendants maintain that the court's April 5, 2006 ruling is consistent with applicable authority, and that "the filed rate doctrine precludes a court from entertaining damage claims that are predicated on challenges to the level of rates filed with and subject to the jurisdiction **[*735]** of federal and state regulatory agencies." (Def. Opp'n Reconsideration Apr. 5 Order 3 (citing *Utilimax.com, 378 F.3d 303*).) Defendants argue that because FERC and the Pennsylvania Public Utility Commission ("PUC") may consider the interaction of the wholesale and retail rates in deciding upon a reasonable rate, the filed rate doctrine should apply to the price squeeze claim. (Def. Opp'n Reconsideration Apr. 5 Order 3.) Defendants also argue that plaintiffs' price squeeze claim falls within the heart of the filed rate doctrine because plaintiffs seek antitrust **[**9]** damages in the form of a trebling of the alleged overcharges stemming from the FERC-approved rates, rather than profits on retail sales lost due to the alleged price squeeze. (*Id.* at 4.) Finally defendants claim that even if the filed rate doctrine does not apply, their "summary-judgment papers demonstrated a multitude of alternative grounds for dismissal of plaintiffs' *§ 2* claims." (*Id.* at 5.)

1. *Application of the Filed Rate Doctrine to Price Squeeze Claims*

HN3[] *Section 2* of the Sherman Act sanctions those "who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations." *15 U.S.C. § 2*. Conduct that constitutes a "price squeeze" may violate the Sherman Act *§ 2*. *United States v. Aluminum Co. of Am., 148 F.2d 416, 437-38 (2d Cir. 1945)*. It is generally accepted that a "price squeeze involves a defendant who as a monopolist supplies the plaintiff at one level (e.g., wholesale), competes at another (e.g., retail), and seeks to destroy the plaintiff by holding up the wholesale price to the plaintiff **[**10]** while depressing the retail price to common customers." *Utilimax.com, 273 F. Supp. 2d at 582* (quoting *Town of Norwood v. New England Power Co., 202 F.3d 408, 418 (1st Cir. 2000))*.

HN4[] The filed rate doctrine "bars antitrust suits based on rates that have been filed and approved by federal agencies" and state agencies. *Utilimax.com, 378 F.3d at 306* (citations omitted); *see also Keogh v. Chicago & N. R. Co., 260 U.S. 156, 43 S. Ct. 47, 67 L. Ed. 183 (1922)*. "Under the filed rate doctrine, a plaintiff may not sue the supplier of electricity based on rates that, though alleged to be the result of anticompetitive conduct, were filed with the federal agency responsible for overseeing such rates." *Utilimax.com, 378 F.3d at 306* (citing *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251-52, 71 S. Ct. 692, 95 L. Ed. 912 (1951))*. The doctrine operates as a defense to both federal and state law actions based on the regulated rates. *See Ark. La. Gas Co. v. Hall, 453 U.S. 571, 578, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981)* (finding that under the filed rate doctrine, "courts lack authority to impose a different rate than the one approved by the Commission"). The **[**11]** purpose of the filed rate doctrine is to preserve the regulatory agency's authority to determine the reasonableness of rates and to insure that the regulated entities charge only those rates that the agency has approved. *Id. at 577-78*. The form or details of the filed rate are not relevant to the application of the doctrine; the rate need only be filed with an agency responsible for overseeing such rates. *See AT&T v. Central Office Tel., 524 U.S. 214, 222, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998)* (stating the doctrine applies even if it results in the application of the filed rate when a defendant intentionally misrepresented the promised rate).

Plaintiffs' price squeeze claim rests on the combined effect of two different tariffs: the retail rates PPL was required to **[*736]** charge provider of last resort ("POLR") customers and the wholesale rates offered to the Boroughs pursuant to the Power Supply Agreements. Plaintiffs allege that PPL purposely increased the price of wholesale electricity to the Boroughs in the last two years of the Power Supply Agreements, while the retail rates PPL charged its POLR customers were locked in under the Joint Petition. FERC approved the wholesale **[**12]** rates charged by PPL when it approved the Power Supply Agreements between the Boroughs and PPL. *Lansdale, 426 F. Supp. 2d at 273*. The PUC approved PPL's POLR retail rates. *Id.*

Plaintiffs argue that the filed rate doctrine does not bar their price squeeze claim because the claim is based on non-rate activity, which is unrelated to the rates filed with FERC and the PUC. *See In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1159 (3d Cir. 1993)* (stating that the filed rate doctrine "does not preclude liability based on non-rate anticompetitive activity"). Plaintiffs claim that because neither FERC nor the PUC has "jurisdiction over the *interaction* of the wholesale and retail rates as manipulated by the defendants, the interaction between the rates that creates the price squeeze cannot properly be said to be a rate-making activity." (Pl. Mem. Supp. Reconsideration Apr. 5 Order 6.)

However, as this court stated in its April 5, 2006 opinion, the non-rate anticompetitive activity exception does not apply to plaintiffs' price squeeze claim because the claim is based specifically on the interaction of the retail and wholesale rates. [2] **[**13]** *Lansdale, 426 F. Supp. 2d at 288-89*. As the Third Circuit explained in *Utilimax.com,* the

---

[2] Plaintiffs incorrectly claim that the court required them to calculate actual damages to avoid summary judgment. In the April 5 decision, this court reviewed plaintiffs' damage request as evidence as to whether their price squeeze claim was an example of

non-rate anticompetitive activity exception applies when a defendant's activities are "wholly separate from rates," rather than activities that are closely tied to the rates themselves, such as a defendant positioning "itself in the wholesale capacity market to be able to charge exorbitant rates for capacity." *378 F.3d at 308*. The interaction between the FERC-approved and PUC-approved rates is intrinsically tied to the rates themselves and thus cannot be said to be anticompetitive activity that is wholly separate from rate-based activity.

[14]** Though the non-rate anticompetitive activity exception does not apply the Seventh and Eighth circuits, as described below, have developed a separate, limited exception to the filed rate doctrine in situations where no regulatory agency can afford full relief. These courts have found that price squeeze claims are not barred by the filed rate doctrine where the challenge falls "within a lacuna of state and federal regulation." IA Areeda, Hovenkamp, & Elhauge, ***Antitrust Law*** P 244e (2d ed. 2004). However, the First Circuit has rejected the exception created by the Seventh and Eight Circuits and has been reluctant to recognize price squeeze antitrust violations. The Third Circuit has yet to address whether an antitrust claim asserting that the interaction of two properly filed and approved rates resulted in an anticompetitive price squeeze is barred by the filed rate doctrine.

In *City of Mishawaka v. Indiana & Michigan Electric Co. (Mishawaka I), 560 F.2d 1314 (7th Cir. 1977)*, *cert. denied, 436 U.S. 922,* ***[*737]*** *98 S. Ct. 2274, 56 L. Ed. 2d 765 (1978)*, on facts involving a virtually identical dual rate structure creating a price squeeze between the wholesale and retail sale of electric power, **[**15]** the Seventh Circuit concluded that antitrust immunity against the plaintiff's price squeeze claim was not necessary to the functioning of the regulatory process because the Federal Power Commission ("FPC"), the predecessor of FERC, did not control both ends of the alleged discriminatory conduct. *Id. at 1321*. Though the FPC controlled the wholesale rates, only the state energy commissions had jurisdiction over the retail rates. *Id.* The opinion never mentions the filed rate doctrine; however, the reasoning behind the Seventh Circuit's decision takes into account the considerations underlying the doctrine. The court found that if the plaintiff proved it was entitled to relief on the price squeeze claim, the FPC's "regulatory process would not be disturbed by the court's awarding damages for past anti-competitive conduct or by enjoining future anti-competitive conduct by [the] defendant in making and promoting its rate applications. Thus relief could be granted without the district court's actually becoming involved in the process of setting rates." *Id.*

In *City of Kirkwood v. Union Electric Co., 671 F.2d 1173 (8th Cir. 1982)*, the Eighth Circuit **[**16]** followed the Seventh Circuit's analysis in *Mishawaka I* and was the first to adopt a dual rate interaction exception to the filed rate doctrine for price squeeze claims. *Id. at 1178-79*. In *Kirkwood,* the plaintiff brought a price squeeze claim under Sherman Act *§ 2*, asserting that the FERC-approved wholesale rate the plaintiff paid to the defendant exceeded the state-approved retail rate paid by the defendant's large retail customers. *Id. at 1176*. The court noted that "the Supreme Court has announced that 'since our decision in *Otter Tail Power Co. v. United States, [410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*,] ***HN5***[] there can be no doubt about the proposition that the federal antitrust laws are applicable to electrical utilities,'" *Kirkwood, 671 F.2d at 1177*, and recognized that "past precedent cautions that the courts should be reluctant to imply antitrust immunity," *id. at 1178* (citing *Cantor v. Detroit Edison Co., 428 U.S. 579, 596 n.35, 96 S. Ct. 3110, 49 L. Ed. 2d 1141 (1976))*. The Eighth Circuit held that the filed rate doctrine did not preclude the City of Kirkwood's price squeeze claim because

> Kirkwood does not quarrel **[**17]** with the reasonableness determinations of the FERC and PSC as to any individual wholesale or retail rate. Instead, Kirkwood complains of anti-competitive effects resulting from the interaction of rates which, taken separately, may be reasonable. As discussed above, neither the FERC nor the [state administrative agency] has plenary authority over the interaction of wholesale and retail rates, because each commission can affect only one category of those rates. Thus, neither an award of antitrust damages nor the granting of properly conditioned injunctive relief for the price squeeze would interfere with either commission's regulatory authority.

---

non-rate anticompetitive behavior and thus the filed rate doctrine applied. *Lansdale, 426 F. Supp. 2d at 288 n.18*. Review of plaintiffs' alleged damages only reinforced the court's view that plaintiffs' price squeeze claim was rate-related. *Id.*

Kirkwood, 671 F.2d at 1179. Therefore, the Eighth Circuit concluded that the plaintiff's price squeeze claim was not barred "because the question is not whether the rates themselves are anti-competitive, but whether the defendant utility acted illegally in proposing a certain anti-competitive combination of rates." *Id.* [3]

[18]** **[*738]** The First Circuit has taken the opposite approach to the Seventh and Eighth Circuits and has invoked the filed rate doctrine to bar a price squeeze claim against an electric utility. *Norwood, 202 F.3d at 420*. In *Norwood,* the local municipality's price squeeze claim rested on the combined effect of two different tariffs, both of which were approved by FERC. *Id. at 418*. The First Circuit found that the filed rate doctrine barred the price squeeze claim. *Id. at 420*. The court found the Town of Norwood's situation was distinguishable from *Kirkwood* and *Mishawaka I* because FERC actively regulated both of the tariffs in question, thus there was no concern that a regulatory agency could not afford full relief. *Id. at 418*. However the court said that the filed rate doctrine applied even though one of the tariffs filed with FERC was a market-based rate, reasoning that, "[i]t is the filing of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine." *Id. at 419*. The court also held that the filed rate doctrine applied to both equitable relief **[**19]** and damages claims because

> any meaningful relief as to the price squeeze would require the alteration of tariffs--and not merely tariffs subject to regulation but tariffs actually scrutinized repeatedly by FERC in the companion-case proceedings. In part, the rationale for the filed rate doctrine is to protect the exclusive authority of the agency to accept or challenge such tariffs.

Id. at 420 (citing *Ark. La. Gas Co., 453 U.S. at 577-78*). Though the First Circuit found the law "extremely creaky," the court affirmed the district court's dismissal of the price squeeze claim under the filed rate doctrine. *Norwood, 202 F.3d at 420*.

Two district courts in this circuit, in cases with virtually identical facts to *Kirkwood,* came to opposite conclusions about the application of the filed rate doctrine to a price squeeze created by properly filed and approved state and federal electricity rates. In *Ellwood City v. Pennsylvania Power Co., 462 F. Supp. 1343, 1348 (W.D. Pa. 1979)*, the Western District of Pennsylvania came to the same conclusion as the Eighth Circuit in *Kirkwood;* however, the court did **[**20]** not explicitly base its decision on the filed rate doctrine. The court concluded that

> [b]ecause, however, no regulatory agency has jurisdiction over the complete rate structure complained of by plaintiffs, it is improper to accord antitrust immunity to the rate related complaints raised here . . . . There is no mechanism which accords overall review of ratemaking and its potential anticompetitive effect. There is no indication that overall district court antitrust review of rates (at least with regard to price squeeze **[*739]** allegations) is in any way repugnant to any regulatory scheme.

Id. at 1350.

Four days later, the District Court of Delaware came to the opposite conclusion and applied the filed rate doctrine to bar a price squeeze claim. *City of Newark v. Delmarva Power & Light Co., 467 F. Supp. 763, 771 (D. Del. 1979)*. In *Newark,* the plaintiffs raised the same argument as in *Kirkwood,* claiming that antitrust relief for their price squeeze claim must be available to fill the gap where "neither the FPC nor the [state energy commission] has full authority over the relationship between a utility's retail and wholesale rates. **[**21]** " *Id. at 768*. In concluding that antitrust

---

[3] Plaintiffs also argue that the Second Circuit's decision in *City of Groton v. Connecticut Light & Power Co., 662 F.2d 921 (2d Cir. 1981)* supports their claim that the filed rate doctrine does not bar a price squeeze claim based on the interaction of FERC and state approved rates. However, there is no indication that the retail rates at issue in *Groton* were ever approved by a state energy commission. *Id.* Additionally, the Second Circuit did not base its decision on the absence of FERC's ability to relieve the price squeeze. Rather, the court found that the filed rate doctrine did not bar plaintiff's price squeeze claims because the filed rates were later disapproved by FERC, thus the rates at issue were not "filed and approved," as required by the doctrine. *Id. at 931*. The court also found the competitor exception to the filed rate doctrine applied because the litigants were competitors under the definition adopted by the Second Circuit. *Id. at 929*. As noted in the April 5, 2006 memorandum, under Third Circuit precedent, the competitor exception does not apply in the instant case. *Lansdale, 426 F. Supp. 2d at 286 n.15* (citing *Utilimax.com, 378 F.3d at 308*).

damages were not available to the plaintiffs, the court focused on whether such an award might undermine Congressional intent with respect to the work of the FPC and the work of the state regulatory agencies. Id. at 769. The court noted that this inquiry was distinguishable from *Mishawaka I,* where the court had focused on the unprovided-for gap in regulatory authority. Newark, 467 F. Supp. at 769. The *Newark* court determined that imposition of damages in a situation where the plaintiffs had alleged a price squeeze resulting from rates set by two regulatory agencies "would constitute no less of an interference with the [state] regulatory program . . . than it would in a suit where [the plaintiffs] had attacked only the state regulated rate." *Id.* Similarly, Congress could not have intended a federal court to impose liability on a public utility for charging wholesale rates authorized by the FPC because, "[a]t the heart of the [Federal Power Act] is the concept that no one has a right to pay or to receive any price other than a price fixed or accepted by the FPC." Id. at 770. **[**22]** The court found that a wholesale customer in a price squeeze situation still has the remedy of intervening "when a rate is proposed" and the customer may "seek to have it become effective subject to a refund after the Commission has had the opportunity to pass upon the price squeeze allegations." Id. at 771. Accordingly, the court held "that an award of antitrust damages measured by the difference between the filed rate and whatever rate this Court might determine would have prevailed but for a defendant's anticompetitive conduct is foreclosed." [4] *Id.* However, the court found that other possible forms of damage relief may be available to plaintiffs. *Id.*

[23]** Though the law on the filed rate doctrine has not been settled by Third Circuit, I am now persuaded that plaintiffs' price squeeze claim is not barred by the filed rate doctrine. Overall district court review of the interaction between FERC-approved and PUC-approved rates, at least with regard to allegations of price squeezes in violation of the antitrust laws, may not be repugnant to the regulatory scheme. ***HN6***[] The Supreme Court has held that an implied exemption from the antitrust laws by regulatory legislation would be found only if the "exemption was necessary in order to make the regulatory Act work 'and even then only to the minimum extent necessary.'" Cantor, 428 U.S. at 597 (quoting Otter Tail, 410 U.S. at 389). Thus the filed rate doctrine may only apply as an exemption **[*740]** to the antitrust laws to the minimum extent necessary for FERC and the PUC to fulfill their functions.

HN7[] The Supreme Court has found that electric utilities that are regulated by FERC are not immune from the antitrust laws, largely on the grounds that the regulation was not sufficiently "pervasive." Otter Tail, 410 U.S. at 374. If regulation of the electricity industry **[**24]** was not sufficiently pervasive when *Otter Tail* was decided in 1973, it has become even less so today, creating more opportunities for anticompetitive behavior to occur. Since 1978, Congress and FERC have taken numerous steps toward deregulating the electricity industry. *See* Public Utility Regulatory Policy Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified as amended at scattered sections of title 16 of the United States Code) (permitting new, non-regulated parties to enter the electric generation market); Energy Policy Act of 1992, *Pub. L. No. 102-486, 106 Stat. 2776 (1992)* (codified in scattered sections of 15 U.S.C. and 16 U.S.C.) (allowing FERC to force regulated electric utilities to grant other parties access to their transmission systems); FERC Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996) (codified at 18 C.F.R. pt. 35-385) (acting upon the Energy Policy Act's mandate to promote wholesale competition through open access non-discriminatory transmission services). Effective January 1, 1997, Pennsylvania adopted the Electric Generation Customer Choice and Competition Act, which effectively deregulated the business of generating electricity **[**25]** in the state. *See* 66 Pa. Cons. Stat. Ann. § 2802 (declaring the policy behind the act). With the advent of deregulation in the electricity industry, the antitrust laws play a larger role in dealing with anticompetitive pressures that arise.

One justification for the filed rate doctrine is that to establish injury plaintiffs must prove that hypothetically lower wholesale rates or higher retail rates would have prevailed but for the anticompetitive behavior. Keogh, 260 U.S. at 163-64. The question of predicting administrative approval of public utility rates is a question best left to the agency itself, rather than the courts. Utilimax.com, 273 F. Supp. 2d at 580 (citing Keogh, 260 U.S. at 162-64.) A court's lack

[4] The court did find that injunctive relief could be granted in this case without interfering with the state and federal regulatory scheme because plaintiffs did not "seek injunctive relief against [the defendant]'s charging the filed rate, but rather against multifaceted anticompetitive activities of [the defendant] which are unrelated to its conduct at the time of sale." Newark, 467 F. Supp. at 768. However, as discussed in the April 5, 2006 opinion, the Boroughs' basis for injunctive relief is now moot and their only available relief is in the form of money damages. Lansdale, 426 F. Supp. 2d at 285 n.14.

of institutional expertise in determining electricity rates may interject an element of speculation into a plaintiff's damage calculation, but it is difficult to see how this threatens FERC's authority. ***HN8***[] A court's determination that a defendant is immune from the antitrust laws is an assertion of jurisdiction that is separate from the calculation of damages, at which point the court has already **[**26]** determined that it has jurisdiction. *See* Steven E. Bunnell, *The Use of Hypothetical Rates in Antitrust Damages Calculations: Reforming the Keogh Doctrine,* *38 Stan. L. Rev. 1141, 1147-48 (1986)*. An award of damages in an antitrust suit based on a court's estimate of what a hypothetical rate would have been if there had been no anticompetitive behavior does not prevent FERC or the PUC from performing its regulatory duties of approving or proscribing rates that a regulated entity may charge. Additionally, such a justification for the filed rate doctrine is offset by the specifics raised by a price squeeze claim where the alternative is to have no regulatory agency with the power to affect an anticompetitive rate differential. Nothing indicates that a court should not fill in the gap created in such a situation.

As described above, in *Kirkwood,* the Eighth Circuit stated that an exception to the filed rate doctrine is necessary where no regulatory mechanism accords overall review of rate making and its potential anticompetitive effects. ***HN9***[] Wholesale electricity rates are controlled by FERC; the **[*741]** retail rates are controlled by the PUC. Neither FERC nor the PUC has jurisdiction **[**27]** over the interaction between wholesale and retail rates; each agency has authority over only one end of the alleged price squeeze. Though FERC can take the possibility of a price squeeze into account when reviewing the reasonableness of a rate, it can do nothing to force a state commission to change the retail electricity rates. [5] **[**29]** *See* *FPC v. Conway, 426 U.S. 271, 96 S. Ct. 1999, 48 L. Ed. 2d 626 (1976)*; *18 C.F.R. § 2.17* (dealing with the anti-competitive effects of price squeezes). The same truth exists for the PUC. Plus, the federal and state regulatory systems do not work in perfect harmony, so it is possible for a utility to time or manipulate its rate filings in a way that causes a price squeeze. [6] Even though FERC and the

---

[5] PPL argues that since FERC may consider an alleged price squeeze in the setting of wholesale rates, and the PUC is sensitive to maintaining competitive retail rates, the interaction between the two rates is monitored by the agencies. (Def. Opp'n Reconsideration Apr. 5 Order 3-4.) PPL bases part of its argument upon *FPC v. Conway Corp., 426 U.S. 271, 96 S. Ct. 1999, 48 L. Ed. 2d 626 (1976)*. In *Conway,* the Supreme Court held that the FPC had a duty to consider price squeeze allegations when deciding whether a proposed wholesale rate was just, reasonable, and nondiscriminatory. *Id. at 279*. Though the FPC could not order an increase in the state-supervised retail rate when a price squeeze was found to exist, the FPC could afford relief by fixing the wholesale rate in "the lower range of the zone of reasonableness" and directing a refund of the charges previously collected subject to refund. *Id.* On March 21, 1977, FERC issued regulations to comply with the *Conway* decision. *See* *18 C.F.R. § 2.17* (dealing with the anti-competitive effects of price squeezes).

Conway does not bar a district court's review of a plaintiff's price squeeze claim. "[T]he mere fact that FERC may consider arguments based on antitrust concepts does not preclude later antitrust review," because "[t]here is no certainty that use of the limited powers of [] FERC can fully remedy an antitrust violation." *Ellwood City, 462 F. Supp. at 1349-1350*. "[T]he only remedy [] FERC can grant is to reduce the wholesale price . . . which, depending on where the retail price is set, may or may not be enough to eliminate a price squeeze." *Kirkwood, 671 F.2d at 1178*. FERC does not provide a mechanism equivalent to the antitrust laws "to safeguard a strong public interest in free and open competition." *Ellwood City, 462 F. Supp. at 1349* (citing *Gordon v. N. Y. Stock Exch., Inc., 422 U.S. 659, 692, 95 S. Ct. 2598, 45 L. Ed. 2d 463 (1975))*. District court review is necessary to preserve the more extensive remedies a court can provide, including equitable relief and awarding damages. *Id. at 1350*.

With regard to state regulation of the rate interaction, though the PUC considers questions that arise regarding the effect of retail rates on competition, this does not prevent this court from also reviewing such claims. Therefore, this court cannot conclude that the PUC and FERC's ability to review the interaction between the retail and wholesale rates was an intended substitute for the antitrust laws in a situation involving the alleged monopolizing effect of a dual price structure.

[6] The facts in this case counsel against application of the filed rate doctrine. FERC approved the wholesale rate structure in the Settlement Agreement (which resulted in the five-year Power Supply Agreements) on May 29, 1998. *Lansdale, 426 F. Supp. 2d at 273*. The Joint Petition, which specified PPL's POLR retail rates, was approved by the PUC on August 27, 1998. *Id.* Thus, because the Settlement Agreement was approved before PPL's POLR retail rates were approved, FERC could not have considered the potential of a price squeeze with the rates that later became effective. Also, because the Settlement Agreement and Power Supply Agreements provided for wholesale rate changes from February 1, 2002 to January 31, 2004 and the Joint Petition provided a variable fixed retail rate range as of 2002, it would be impossible for the agencies to predict the movement of the energy markets and the possibility of a price squeeze situation arising.

PUC might review rates for the possibility of a price squeeze, because simultaneous approval of retail and wholesale rates by the agencies is not required and rates can change with a later filing, it is very difficult for the agencies to predict a price **[*742]** squeeze. This court's ruling is thus not inconsistent with the reasoning of the court in *Norwood* because, unlike the price squeeze claim asserted by plaintiffs in this case, the claim in *Norwood* **[**28]** was based on the interaction of two rates, both of which were approved by FERC, thus the full mechanism of the price squeeze was under federal control. *202 F.3d at 418*. Here only the wholesale rate is approved by FERC; the retail rate is controlled by the PUC. Therefore neither regulatory agency could afford full relief. [7]

[30]** As such, the court believes that the concerns addressed by the filed rate doctrine, involving the possibility of incompatibility between the antitrust laws and a statutory scheme charging regulatory agencies with fixing reasonable rates, are not implicated here. Though there is no question that PPL is subject to regulation by both FERC and the PUC, because neither agency has "jurisdiction over the complete rate structure complained of by plaintiffs, it is improper to accord antitrust immunity" to the price squeeze claim raised here. *Ellwood City, 462 F. Supp. at 1350*. If the filed rate doctrine applied, there would be no mechanism to review overall ratemaking and its potential anticompetitive effects. ***HN10***[] There is no indication that district court antitrust review of rates, at least with regard to price squeeze allegations involving the interaction of state and federally approved rates, is repugnant to any regulatory scheme. Though FERC may lower wholesale rates and the PUC may raise retail rates to compensate for a price squeeze, neither entity has the power to adjust both rates at the same time. Nor does the court have the power to revise agency-approved rates. However, **[**31]** this court could award damages if the relationship between the wholesale and retail rates, rather than the unreasonableness of either the wholesale or the retail rates standing alone, was found to result in an antitrust violation. Applying antitrust review to the interaction between these two rates is not inconsistent with the federal and state regulatory regimes because the resulting interaction falls outside the regulatory scheme. For these reasons, the court now concludes that plaintiffs' price squeeze claim is not barred by the filed rate doctrine.

2. *Alternative grounds for summary judgment*

Although the court has determined that plaintiffs' price squeeze claim under the Sherman Act *§ 2* is not barred by the filed rate doctrine, defendants have asserted several alternative grounds for granting summary judgment against plaintiffs on that claim. (*See* Def. Opp'n Reconsideration Apr. 5 Order 5.) Because those alternative grounds were not briefed fully, the court will give the parties the opportunity to brief them at this juncture. The briefs may be by page reference to previous briefs filed in this action or, if necessary, by filing a new brief.

B. All Other Claims [32] in April 5, 2006 Opinion**

Plaintiffs request that the court reconsider its decision with regard to their **[*743]** Sherman Act *§ 1*, Clayton Act *§ 2*, and breach of contract claims. However, the Boroughs' motion for reconsideration does not meet the standard required by our Court of Appeals. There has been no intervening change of controlling law since April 5, 2006. Also, no new evidence is available that could not easily have been previously provided to the court.

Plaintiffs' contention that the prior order contains manifest errors of law or fact is unpersuasive. Plaintiffs' Sherman Act *§ 1* claims are barred by the Noerr-Pennington doctrine and, even if they were not, the evidence provided by plaintiffs does not show the existence of a contract to fix prices or allocate markets. Sales between PPL's two subsidiaries may not form the basis of a Clayton Act *§ 2* claim. With regard to the breach of contract claims, the

---

[7] Though the court finds that plaintiffs' price squeeze claim is not barred by the filed rate doctrine, plaintiffs' second Sherman Act *§ 2* claim, that PPL monopolized the ICAP market, is still barred by the doctrine. The filed rate doctrine bars antitrust claims "based on rates that have been filed and approved by federal agencies," thus the monopolization of the ICAP market itself may not be the basis for a Sherman Act *§ 2* claim because FERC had power to oversee the rates. *See Utilimax.com, 378 F.3d at 306*. The problems that arise where a plaintiff asserts a price squeeze based on the interaction of a federally-approved wholesale rate and state-approved retail rate are not an issue where a single administrative agency is charged with oversight.

Boroughs, other than Catawissa, failed to provide evidence that created a genuine issue of material fact. Accordingly, the plaintiffs' motion for reconsideration of the remainder of this Court's order of April 5, 2006 will be denied.

CONCLUSION

For the foregoing reasons, **[**33]** the motions for reconsideration are granted in part and denied in part. An appropriate order follows.

ORDER

AND NOW, this __ day of May, 2007, upon consideration of plaintiffs' Motion for Reconsideration of Summary Judgment in favor of Defendants on Defendants' Breach of Contract Counterclaim and Motion for Reconsideration of the Courts' Granting in Part and Denying in Part Summary Judgment on Plaintiffs' Claims, defendants' responses, and plaintiffs' replies, IT IS HEREBY ORDERED that:

1. Plaintiffs' motion for reconsideration of summary judgment in favor of defendants on defendants' breach of contract counterclaim (Doc. No. 105) is DENIED.

2. Plaintiffs motion for reconsideration of the court's granting in part and denying in part summary judgment on plaintiffs' claims (Doc. No. 106) is GRANTED to the extent that the plaintiffs' price squeeze claim under the Sherman Act *§ 2* is not barred by the filed rate doctrine. The balance of the motion is denied.

3. Defendants shall file a brief within 20 days of the date hereof with reference to their alternative grounds for seeking summary judgment on plaintiffs' Sherman Act *§ 2* claims. Plaintiffs shall file **[**34]** a response within 20 days thereafter. Both briefs may be submitted by page references to prior briefs only or, if necessary, they may be briefed in full.

s/ William H. Yohn Jr., Judge

[Silicon Image, Inc. v. Analogix Semiconductor, Inc.](#)

United States District Court for the Northern District of California

May 16, 2007, Decided ; May 16, 2007, Filed

No. C-07-0635 JCS

Reporter

2007 U.S. Dist. LEXIS 39599 *; 2007 WL 1455903

SILICON IMAGE, INC., Plaintiff, v. ANALOGIX SEMICONDUCTOR, INC., Defendant.

Subsequent History: Injunction denied by *Silicon Image, Inc. v. Analogix Semiconductor, Inc., 2007 U.S. Dist. LEXIS 96073 (N.D. Cal., Dec. 20, 2007)*

Core Terms

software, allegations, preempted, Copyright Act, trade secret, customers, chips, false advertising, contractual relationship, tortious interference, unfair competition, intentional interference, license agreement, semiconductor, advertising, misappropriation, asserts, unfair, misleading, business practice, theory of liability, configuration, competitor, violations, notice, copyright infringement, misrepresentation, disseminate, threatens, designs

Counsel: **[*1]** For Silicon Image, Inc., a Delaware corporation, Plaintiff: David Douglas Schumann, Jedediah Wakefield, LEAD ATTORNEYS, Fenwick & West LLP, San Francisco, CA.; J. David Hadden, Saina Sason Shamilov, LEAD ATTORNEYS, Fenwick & West LLP, Mountain View, CA.

For Analogix Semiconductor, Inc., a Delaware corporation, Defendant: Ryan James Padden, LEAD ATTORNEY, Luann Loraine Simmons, O'Melveny & Myers LLP, San Francisco, CA.

Judges: JOSEPH C. SPERO, United States Magistrate Judge.

Opinion by: JOSEPH C. SPERO

Opinion

ORDER GRANTING IN PART AND DENYING IN PART ANALOGIX'S MOTION TO DISMISS SILICON IMAGE'S UNFAIR COMPETITION CLAIM AND DISMISSING UNFAIR COMPETITION CLAIM WITH LEAVE TO AMEND [Docket No. 9]

I. INTRODUCTION

On January 31, 2007, Plaintiff Silicon Image, Inc. ("Silicon Image") filed this action against Analogix Semiconductor ("Analogix"), asserting claims for copyright infringement, trade secret misappropriation and unfair competition. Analogix brings a Motion to Dismiss Silicon Image's Unfair Competition Claim ("the Motion"), which came on for hearing on Friday, May 11, 2007. For the reasons stated below, the Motion is GRANTED IN PART and DENIED IN PART. Plaintiff's Unfair **[*2]** Competition Claim is dismissed with leave to amend.

II. BACKGROUND

A. The Complaint

Silicon Image is a "leading provider of semiconductor solutions for the secure storage, distribution and presentation of high-definition content in the consumer electronics and personal computing markets." Complaint at 2. Analogix also provides semiconductor solutions for HDTV products and is a competitor of Silicon Image. *Id* at 4. Silicon Image alleges that it enjoys a competitive advantage in the marketplace, in part, as a result of its semiconductor layout designs, which it has developed "[a]t great expense and effort" and which account for the "high performance" of Silicon Image's semiconductor chips. *Id.* at 3. These layout designs include "register maps that identify locations of registers within its chip designs." *Id.* The layout designs and register maps are trade secrets. *Id.* Silicon Image further alleges that "[a]long with its chips, Silicon Image has developed at substantial expense its configuration software that interoperates with its semiconductor chips." *Id.* This software is subject to copyright protection. *Id.* According to the Complaint, Analogix, **[*3]** without authorization, copied and used Silicon Image's register maps and configuration software in order to create semiconductor chips that mirror those that are made by Silicon Images. *Id.* Allegedly, Analogix markets these chips as "drop-in replaceable" with Silicon Image's chips, even though use of Analogix's chips with Silicon Image's configuration software violates the terms of Silicon Image's Software License Agreement. *Id.* According to Silicon Image, the Software License Agreement "specifies that Silicon Image's configuration software can only be used with Silicon Image chips and no other products." *Id* at 3. Silicon Image alleges that "[s]uch a restriction is common in the industry." *Id.* Silicon Image also alleges that it contacted Analogix and "placed it on notice of Silicon Image's intellectual property rights [but that] Analogix has continued its unlawful activities." *Id.* at 4.

Based on these allegations, Silicon Image asserts three claims: 1) Copyright Infringement in violation of the Copyright Act (17 §§ U.S.C. 101 *et seq.*); 2) Trade Secret Misappropriation in violation of California's Uniform Trade Secrets Act (*California Civil Code §§ 3426 et seq.*); **[*4]** and 3) Unfair Competition in violation of *California's Business and Professions Code §§ 17200 et seq.* ("the UCL Claim"). The UCL Claim incorporates by reference all of Silicon Image's factual allegations. *Id.* at 7. In addition, Silicon Image specifically alleges in the UCL Claim that:

> Analogix's actions described herein constitute an (sic) unlawful, unfair and fraudulent business acts and practices in violation of *Cal. Bus. & Prof. Code §§ 17200 et seq.* The unlawful business acts include, without limitation, violations of the Copyright Act, including, but not limited to, inducing customers to infringe Silicon Image's intellectual property rights by encouraging use of Silicon Image configuration software with Analogix chips, and theft of trade secrets.

Id.

B. The Motion

In the Motion, Analogix asserts that Silicon Image's UCL Claim is preempted by the federal Copyright Act and the California Uniform Trade Secrets Act. In support of this position, Analogix points to the fact that Silicon Image expressly alleges in its UCL Claim that that claim is based on violations of the **[*5]** Copyright Act and theft of trade secrets.

In its Opposition brief, Silicon Image does not dispute that the UCL Claim is preempted to the extent it is based on alleged violation of the Copyright Act and theft of trade secrets. [1] Instead, it argues that its UCL Claim should not be dismissed because it is based on unlawful and unfair conduct that is independent from and extends beyond the

---

[1] At oral argument, Silicon Image stipulated that the UCL Claim is preempted to the extent it is based on alleged violations of the Copyright Act and theft of trade secrets.

alleged violation of the Copyright Act and theft of trade secrets. In particular, it asserts that its UCL Claim is based on Analogix's intentional interference with contractual relations and misleading advertising, both of which are unlawful business practices under the UCL. Silicon Image further asserts that Analogix's alleged conduct threatens competition, which is an unfair business practice under the UCL. Finally, Silicon Image asserts that it should be given the opportunity to amend the claim if the Court finds that it is defective.

[*6] In its Reply brief, Analogix argues that Silicon Image has not adequately pleaded intentional interference with contractual relations or misleading advertising, and that even if it had, the UCL Claim would still be preempted because this alleged unlawful conduct is based on the same nucleus of facts as the Copyright violation and the trade secret theft. Analogix further asserts that Silicon Image does not sufficiently allege unfair business practices under the UCL because "Silicon Image has not tied [its] allegations to any alleged violation of an ***antitrust law*** or policy or any alleged Analogix conduct that 'threatens an incipient violation of an ***antitrust law***.'" *Id.* at 9.

III. ANALYSIS

A. Legal Standard Applicable to *Rule 12(b)(6)* Motions

A claim should not be dismissed pursuant to *Fed. R. Civ. P. 12(b)(6)* unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995)*. Dismissal can be based on the lack of cognizable legal theory or the absence of sufficient **[*7]** facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. On a motion to dismiss, the court accepts the facts alleged in the complaint as true. *Id.* Where a court dismisses for failure to state a claim pursuant to *Rule 12(b)(6)*, it "should grant leave to amend . . . unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss & Liehe v. N. Cal. Collection Serv., 911 F.2d 242, 247 (9th Cir.1990)*.

B. Sufficiency of Allegations

California's Unfair Competition Law, *Cal. Bus. & Prof. Code §§ 17200 et seq.*, defines unfair competition as any "unlawful, unfair or fraudulent business practice." Silicon Image asserts that it has alleged violations of the UCL based on two unlawful business practices, namely, intentional interference with contractual relations and misleading advertising. In addition, Silicon Image asserts that it has alleged that Analogix has engaged in unfair business practices by threatening competition. Silicon Image argues that none of these three theories is adequately pleaded. The **[*8]** Court finds that while the allegations in the Complaint as a whole are sufficient to support all three of these theories of liability under the UCL, the UCL Claim is nonetheless deficient to the extent that it fails to articulate any of these theories.

1. UCL Claim Based on Intentional Interference With Contractual Relations

In a recent decision addressing the types of conduct that are prohibited under the UCL, the Ninth Circuit noted that "[t]he California Supreme Court has given the word 'unlawful' a straightforward and broad interpretation:

> The UCL covers a wide range of conduct. It embraces anything that can properly be called a business practice and that at the same time is forbidden by law. . . . *Section 17200* "borrows" violations from other laws by making them independently actionable as unfair competitive practices."

CRST Van Expedited, Inc. v. Werner Enters., Inc., 479 F.3d 1099, 1107 (9th Cir. 2007) (quoting *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 1143, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003))*. Here, the alleged interference by Analogix with the Software License Agreement between Silicon Image and its customers is a business **[*9]** practice. *See CRST, 479 F.3d at 1107* (holding that alleged interference by corporate competitor with plaintiff's employment contracts was a business practice). Moreover, "intentional interference with contract is a tortious violation of duties imposed by law." *Id.* Therefore, so long as the underlying claim for interference with contractual relations is adequately pleaded, so is the UCL Claim to the extent that it is based on the tortious interference claim.

While the elements of the UCL Claim derive from state substantive law, the degree of specificity required is governed by the Federal Rules of Civil Procedure. *See* *Taylor v. U.S., 821 F.2d 1428, 1432 (9th Cir. 1987)*. Under *Rule 8(a)*, a plaintiff is required to provide only a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)*. The Supreme Court has admonished that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim." *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. Rather, the allegations are sufficient so long as **[*10]** they provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* The UCL Claim fails to expressly allege that it is based on tortious interference with contract and therefore fails to meet the "fair notice" requirement under *Rule 8(a)*. On the other hand, the factual allegations in the Complaint would be sufficient to support allegations of tortious interference, were they to be articulated in the UCL Claim, as discussed below.

To state a claim for intentional interference with contractual relations, a plaintiff must allege the following elements: (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. *Pac. Gas & Elec. Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 1126, 270 Cal. Rptr. 1, 791 P.2d 587 (1990)*. Analogix argues that Silicon Image's interference with contract claim is deficient because the Complaint fails to allege adequately the first three elements of such a claim. Drawing all reasonable inferences in favor **[*11]** of Silicon Image, as the Court is required to do at this stage of the proceeding the Court concludes that the allegations are sufficient to support a claim for intentional interference with contract.

First, Silicon Image has adequately alleged the existence of a contract between itself and a third party by alleging that its customers are required to enter into a Software License Agreement which provides that Silicon Image's configuration software can only be used with Silicon Image chips. While Silicon Image does not identify the customers by name, its allegations are sufficiently specific to place Analogix on notice of the contractual relationship at issue.

The decisions cited by Analogix do not support a contrary result because in those cases, the allegations regarding the existence of a contract with a third party were so vague that they failed indicate even the *nature* of the contract at issue, in contrast to the allegations here. *See* *Accuimage Diagnostics Corp. v. Terarecon, Inc., 260 F. Supp. 2d 941 (N.D. Cal. 2003)* (holding that allegation that "valid contracts" existed between the plaintiff and an unspecified third party were insufficient because the plaintiff **[*12]** failed to give the defendants notice of "some facts surrounding the type or nature of the contracts their conduct allegedly interfered with"); *Brown v. Allstate Ins. Co., 17 F. Supp. 2d 1134 (S.D. Cal. 1998)* (allegation regarding existence of valid contract with third party found insufficient where allegation was conclusory and contained no description of the nature of the existing relationship); *Bradley v. Google, 2006 U.S. Dist. LEXIS 94455, 2006 WL 3798134 (N.D. Cal. Dec. 22, 2006)* (same). The Court also finds that Silicon Image's allegations are sufficient to allege knowledge of the Software License Agreement on the part of Analogix. In particular, Silicon Image alleges that Analogix is a competitor and that such licensing agreements are common in the industry. Based on these allegations, one could reasonably infer that Analogix knew that sale of its product to Silicon Image customers violated the Software License Agreement. In contrast, the allegations in *Beverly v. Network Solutions, Inc., 1998 U.S. Dist. LEXIS 20453, 1998 WL 917526 (N.D. Cal. Dec. 30, 1998)*, on which Analogix relies, did not support a similar inference. In that case, the plaintiff asserted a claim for tortious interference **[*13]** with contract against Network Solutions, Inc. ("NSI"), the entity that registers top level internet domain names; alleging that by enforcing its dispute resolution policy against the plaintiff -- which resulted in a hold being placed on the plaintiff's domain name registration -- NSI interfered with the plaintiff's existing economic relationship with a "Mr. Ross." *1998 U.S. Dist. LEXIS 20453, [WL] at *1, 3*. The plaintiff did not allege that NSI knew or should have known of the plaintiff's economic relationship with Mr. Ross and there were no facts alleged that would have supported such an inference. To the contrary, the court noted that the domain name registration process was entirely automated and therefore, there would have been no reason NSI would have been aware of the Plaintiff's relationship with Mr. Ross. *1998 U.S. Dist. LEXIS 20453, [WL] at *10*.

Summit Mach. Tool, Mfg. Corp. v. Victor CNC Sys., Inc., 7 F.3d 1434, (9th Cir. 1993), another case cited by Analogix, is also inapposite. In that case, the court dismissed the plaintiff's claim for intentional interference with contractual relations following a bench trial during which the plaintiff admitted there was no evidence showing that the defendant knew about **[*14]** the contractual relationship with which it had allegedly interfered. *7 F.3d at 1436, 1442*.

Finally, by alleging that Analogix markets its product as "drop-in replaceable" with Silicon Image's product, Silicon Image has adequately alleged that Analogix has engaged in intentional acts designed to induce a breach of contract. *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortgage Corp., 461 F. Supp. 2d 1188, 1193 (C.D. Cal. 2006)*, cited by Analogix, has no bearing on this question because it was decided on summary judgment on the basis that there was no *evidence* that the defendant intended to induce a breach of contract.

Therefore, the Court concludes that Plaintiff's UCL Claim is deficient as to the tortious interference theory of liability only to the extent that the Claim fails to expressly allege that it is based on such a theory.

2. False or Misleading Advertising

California's false advertising law provides as follows:

> It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, **[*15]** or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised.

Cal. Bus. & Prof. Code § 17500 **[*16]** . This provision has been "interpreted broadly to embrace not only advertising which is false, but also advertising which although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." *Leoni v. State Bar, 39 Cal. 3d 609, 626, 217 Cal. Rptr. 423, 704 P.2d 183 (1985)*. Whether the public actually has been or will be misled for purposes of a claim under the false advertising law is a factual question that cannot be resolved on a motion to dismiss. *Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013, 1037 (C.D. Cal. 1998)*. It is established that a violation of the false advertising law is also a violation of the UCL. *Comm. on Children's Television, Inc. v. Gen. Foods Corp., 35 Cal.3d 197, 210, 197 Cal. Rptr. 783, 673 P.2d 660 (1983)*.

Here again, Silicon Image's Complaint is deficient to the extent that the UCL Claim fails to provide Analogix "fair notice" that the UCL Claim is based on a false advertising theory. On the other hand, the allegations in the Complaint would be sufficient to support such a theory if it were expressly alleged in the UCL Claim. In particular, Silicon Image has alleged that Analogix has told customers of Silicon Image **[*17]** that they can replace their Silicon Image chips with those of Analogix. Drawing all reasonable inferences in favor of Silicon Image, one could reasonably infer based on this allegation that the statements were likely to mislead the public to the extent they suggested that use of the Analogix chip with Silicon Image software was permissible under the Software License

Agreement. Therefore, this theory of liability is adequately pleaded except insofar as Silicon Image has failed to identify the theory in its UCL Claim.

3. Unfair Business Practices

As noted above, the UCL defines unfair competition as any "unlawful, unfair or fraudulent business practice." *Cal. Bus. & Prof. §§ 17200 et seq.* In *Cel-Tech Communications v. Los Angeles Cellular Telephone Co.,* the California Supreme Court clarified the test for determining what business practices fall under the "unfair prong" in the context of suits by competitors:

> to guide courts and the business community adequately and to promote consumer protection, we must require that any finding of unfairness to competitors under *section 17200* be tethered to some legislatively declared policy or proof of some actual or threatened **[*18]** impact on competition. We thus adopt the following test: When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes *section 17200*, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999).

Here, Silicon Image asserts that Analogix's promotion of "drop-in replaceability" is unfair because, as alleged in the Complaint, its development of both its semiconductor layout designs and the configuration software used with its chips has involved "substantial expense." *See* Complaint at 3. Further, the layout designs are, allegedly, the source of Silicon Image's competitive advantage in the marketplace. Drawing all reasonable inferences in Silicon Image's favor, these allegations could support the inference that Analogix conduct, which creates a disincentive for semiconductor manufacturers to invest in the development of semiconductor chips and related **[*19]** software, threatens to harm competition. Silicon Image must, however, provide adequate notice in the UCL Claim itself that it is proceeding on such a theory.

While Analogix is correct that Silicon Image will be required to establish that Analogix's conduct harms *competition* as a whole and not just Silicon Image, Analogix has not cited any case that persuades the Court that dismissal of the claim is appropriate at the pleading stage. Indeed, neither of the cases on which Analogix relies were decided on the pleadings. *See* *RLH Industries, Inc. v. SBC Communications, Inc., 133 Cal. App. 4th 1277, 1286, 35 Cal. Rptr. 3d 469 (2005)* (holding that there was no evidence of harm to competition and on that basis granting summary judgment); *Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d 1099 (C.D. Cal. 2001)* (holding that evidence of harm to competition was not sufficient to survive summary judgment). Accordingly, the Court concludes that Silicon Image's allegations of unfair business practices under the UCL are sufficient except to the extent that the UCL Claim does not identify this theory of liability.

C. Preemption

Analogix asserts that even if Silicon Image **[*20]** has adequately alleged tortious interference and false advertising, its UCL Claim is, nonetheless, preempted to the extent it is based on this alleged unlawful conduct, both by the Copyright Act and the California Uniform Trade Secret Act. [2] The Court concludes that although Silicon Image will be required to amend its Complaint to identify these theories of liability, the UCL Claim based on tortious interference and false advertising is not preempted.

---

[2] Analogix stipulated at oral argument that it does *not* challenge the "unfair" business practices 28 alleged by Silicon Image on the basis of preemption.

1. Preemption Under the Copyright Act

The Copyright Act preempts a state law cause of action when two requirements are met. First, the rights asserted under state law must be "'rights that are equivalent' to those protected by the Copyright Act." *Kodadek v. MTV Networks, Inc., 152 F.3d 1209, 1212 (9th Cir. 1998)* (quoting 1 *Nimmer, § 1.01[B]* at 1-11). **[*21]** "Second, the work involved must fall within the 'subject matter' of the Copyright Act as set forth in *17 U.S.C. §§ 102* and *103*." *Id.* Here, the Court concludes that the first prong is not met either as to the intentional interference claim or the false advertising claim. Silicon Image's UCL Claim, to the extent it is based on these theories of liability, is not preempted by the Copyright Act.

The determination of whether state law rights are "equivalent" to those protected by the Copyright Act "involves determining whether the state law claim contains an element not shared by the federal law." *Summit Mach. Tool Mfg. Corp. v. Victor CNC Sys., 7 F.3d 1434, 1440 (9th Cir. 1993)*. The Copyright Act provides copyright owners with the exclusive rights of reproduction, distribution, performance, display and preparation of derivative works. *17 U.S.C § 106*. "If a state law claim includes an 'extra element' that makes the right asserted qualitatively different from those protected under the Copyright Act, the state law is not preempted by the Copyright Act." *Altera Corp. v. Clear Logic, 424 F.3d 1079, 1089 (9th Cir. 2005)* **[*22]** (internal citation omitted). Here, both the false advertising allegation and the tortious interference allegation include the required extra element necessary to avoid preemption by the Copyright Act.

a. False Advertising

The false advertising allegation requires that Silicon Image establish that Analogix has made representations that are false or misleading. A number of courts have held that claims that involve the element of misrepresentation or deception -- including false advertising -- are not equivalent to any exclusive right protected by the Copyright Act, and therefore are not preempted. *See, e.g., Baekert Progressive Composites v. Wave Cyber Ltd., 2007 U.S. Dist. LEXIS 25817, 2007 WL 1110736 (S.D. Cal. April 5, 2007)* (holding that California state law claim for false advertising was not preempted by Copyright Act because claim included element of misrepresentation) (citing *Valente-Kritzer Video v. Pinckney, 881 F.2d 772 (9th Cir. 1989)* (holding that fraud claim was not substantially equivalent to any right protected under Copyright Act because it required proof of misrepresentation)); *Tracy v. Skate Key, Inc., 697 F. Supp. 748, 750-51 (S.D.N.Y. 1988)* **[*23]** (holding that claim for trademark dilution was not preempted because it involved the "additional element" of misrepresentation or deception); *Brignoli v. Balch, Hardy & Scheinman, Inc., 645 F. Supp. 1201, 1205 (S.D.N.Y. 1986)* (holding that fraud claim was not preempted by the Copyright Act because it contained the "extra element" of misrepresentation). The Court finds these cases persuasive and therefore concludes that the UCL Claim is not preempted to the extent it is based on false advertising.

The Court concludes that *Motown Record Corp. v. George A. Hormel & Co., 657 F. Supp. 1236 (C.D. Cal. 1987)*, cited by Analogix, is distinguishable. In that case, the defendant was alleged to have produced and aired a television advertisement for its product, Dinty Moore Stew, in which a modified version of the Supremes song "Baby Love" was performed by three women who were made to look like the members of the Supremes. *Id. at 1237*. The plaintiff alleged that the advertisement constituted unfair competition in violation of California's UCL because the advertisement falsely implied that the image of the Supremes was used with the permission **[*24]** of the plaintiff, who owned the copyright to the song. *Id. at 1239*. The court held that the Copyright Act preempted the UCL claim because "the essence of the plaintiff's claim derived from defendants' unauthorized use of a copyrighted work." *Id. at 1240*. In contrast, the alleged misrepresentation here is independent of the alleged copyright violation: Silicon Image does not allege that Analogix has created the false impression that its reproduction of the Silicon Image software is authorized -- which would amount to copyright infringement claim -- but rather, that Silicon Image customers may use the Silicon Image software in combination with the Analogix chip without violating the Silicon Image Software License Agreement. Because of this additional element that is not present in *Motown Records,* the holding in that case does not apply here.

b. Intentional Interference with Contractual Relations

The Court concludes that the tortious interference allegation is based on rights not protected by the Copyright Act and therefore, that the claim is qualitatively different from a copyright infringement claim. In reaching this conclusion, the Court **[*25]** finds persuasive the reasoning in *Altera Corp. v. Clear Logic, 424 F.3d 1079, 1089 (9th Cir. 2005)*.

In *Altera,* plaintiff Altera and defendant Clear Logic were competitors in the semiconductor industry. *Id. at 1081*. Altera manufactured chips called "programmable logic devices" ("PLDs"), which customers tailored to their specific needs using a software program that was also developed and sold by Altera. *Id.* Clear Logic manufactured a different kind of chip called an Application-Specific Integrated Circuit ("ASIC"). ASIC chips usually use less power than PLDs and are often cheaper than PLD's. *Id.* Traditionally, customers who wanted to replace PLDs with ASICs had to go through a lengthy and difficult process to develop an ASIC that worked. *Id. at 1082*. However, Clear Logic developed a technique that was much faster and more dependable to create ASIC chips to replace Altera PLDs: Clear Logic would have Altera customers send it the "bitstream" file that was generated during the programming of the PLD. *Id.* Using that bitstream, Clear Logic could create a compatible ASIC chip in just a few weeks. *Id.*

Altera asserted that **[*26]** Clear Logic, in having Altera customers send it the bitstreams, was intentionally interfering with Altera's contractual relations with its customers because the software license agreement which all Altera's customers must accept prohibits use of the Altera software for any purpose other than development of PLDs by Altera. *Id. at 1082*. Clear Logic, on the other hand, argued that this claim was preempted by the Copyright Act because the alleged conduct really amounted to reproduction of Altera's software in violation of the copyright infringement. *Id. at 1090*. The Ninth Circuit held that the claim was not preempted, explaining its conclusion as follows:

> Altera's customers use software to create a bitstream (which is essentially information) and provide that information to Clear Logic, despite the terms of the agreement that restrict the customers to using that information for programming Altera products. The right at issue is not the reproduction of the software as Clear Logic argues, but is more appropriately characterized as the use of the bitstream.

Id. at 1089.

Here, as in *Altera,* the right at issue is not the **[*27]** reproduction of Silicon Image's semiconductor chip -- a right that is protected under the Copyright Act -- but rather, the use of Silicon Image's software in a manner that is in violation of the Software License Agreement. The latter provides the "extra element" necessary to avoid preemption.

Accordingly, to the extent the UCL claim is based on tortious interference with contract, the claim is not preempted by the Copyright Act.

2. Preemption Under the UTSA

California's Uniform Trade Secrets Act ("UTSA") explicitly states that it does not preempt claims which derive from "(1) contractual remedies, whether or not based upon misappropriation of a trade secret, (2) other civil remedies that are not based upon misappropriation of a trade secret, or (3) criminal remedies, whether or not based upon misappropriation of a trade secret." *Cal. Civ. Code § 3426.7(b)*. Courts have held that where a claim is based on the "identical nucleus" of facts as a trade secrets misappropriation claim, it is preempted by UTSA. *See* *Digital Envoy, Inc. v. Google, Inc., 370 F. Supp. 2d 1025, 1033 (N.D. Cal. 2005)* (holding that unfair competition claim was preempted **[*28]** by UTSA because it was based on same nucleus of facts as trade secret misappropriation claim); *cf.* *Postx Corp. v. Secure Data In Motion, Inc., 2004 U.S. Dist. LEXIS 24260, 2004 WL 266 3518 (N.D. Cal. Nov. 20, 2004) at * 3* (holding that unfair competition claim was not preempted by UTSA where the claim was based on "an alternative theory of liability as well as new facts").

Here, both the false advertising and tortious interference allegations are based on new facts that go beyond the alleged misappropriation of trade secrets, namely facts relating to the Software License Agreement. Further, neither the false advertising claim nor the tortious interference claim is based on the theory that the wrong for which redress is sought is the misappropriation of trade secrets. In contrast, in *Ernest Paper Products, Inc. v. Mobil Chemical Co., Inc., 1997 U.S. Dist. LEXIS 21781, 1997 WL 33483520 (C.D. Cal. Dec. 2, 1997)*, on which Analogix relies, a claim for intentional interference with contractual relations was found to be preempted by UTSA because the wrongful conduct on which the tortious interference claim was based was the alleged misappropriation by the defendant of the plaintiff's confidential customer lists. The **[*29]** Court also rejects Analogix's reliance on *Samsung Electronics America, Inc. v. Bilbruck,* 2006 WL 301287 (Cal. Super. Ct. Oct. 19, 2006). In that case, the court held that a claim for intentional interference with contract was preempted by UTSA because the claim was based on misappropriation of trade secrets but the court did not describe the facts on which either claim was based.

The Court concludes that the UCL Claim is not preempted by the UTSA.

IV. CONCLUSION

For the reasons stated above, the Motion is GRANTED IN PART and DENIED IN PART. In particular, the Unfair Competition Claim is deficient to the extent it fails to identify any specific theories in the Claim other than copyright infringement and trade secret theft, both of which are preempted. On the other hand, the factual allegations in the Complaint are sufficient to support the theories of liability on the UCL Claim identified by Plaintiff in its Opposition brief. Further, to the extent that the UCL Claim is based on those theories, it is not preempted. Plaintiff shall be given leave to amend the Complaint, within ten (10) days of the date of this Order, to expressly allege in the UCL Claim **[*30]** the theories identified in its Opposition brief.

IT IS SO ORDERED.

Dated: May 16, 2007

JOSEPH C. SPERO

United States Magistrate Judge

End of Document

Bell Atl. Corp. v. Twombly

Supreme Court of the United States

November 27, 2006, Argued ; May 21, 2007, Decided

No. 05-1126

Reporter

550 U.S. 544 *; 127 S. Ct. 1955 **; 167 L. Ed. 2d 929 ***; 2007 U.S. LEXIS 5901 ****; 75 U.S.L.W. 4337; 2007-1 Trade Cas. (CCH) P75,709; 68 Fed. R. Serv. 3d (Callaghan) 661; 20 Fla. L. Weekly Fed. S 267; 41 Comm. Reg. (P & F) 567

BELL ATLANTIC CORPORATION, et al., Petitioners v.WILLIAM TWOMBLY, et al.

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Twombly v. Bell Atl. Corp., 425 F.3d 99, 2005 U.S. App. LEXIS 21390 (2d Cir., 2005)

Disposition: Reversed and remanded.

Core Terms

conspiracy, discovery, allegations, antitrust, set of facts, pleadings, markets, district court, federal rule, Sherman Act, territory, network, cases, local telephone, Telecommunications, compete, resist, factual allegations, motion to dismiss, civil procedure, antitrust case, competitors, entitle, decisions, appears, survive, summary judgment stage, alleged conspiracy, internet service, legal conclusion

LexisNexis® Headnotes

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

HN1[] **Sherman Act, Scope**

Liability under *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act requires a contract, combination, or conspiracy, in restraint of trade or commerce.

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

HN2[] **Sherman Act, Scope**

15 U.S.C.S. § 1 prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations.

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

HN3[] Sherman Act, Scope

Because § 1 (15 U.S.C.S. § 1) of the Sherman Act does not prohibit all unreasonable restraints of trade, but only restraints effected by a contract, combination, or conspiracy, the crucial question is whether challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express. While a showing of parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement, it falls short of conclusively establishing agreement or itself constituting a Sherman Act offense. Even conscious parallelism, a common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions is not in itself unlawful. The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN4[] Complaints, Requirements for Complaint

Fed. R. Civ. P. 8(a)(2) requires only a short and plain statement of a claim showing that the pleader is entitled to relief, in order to give a defendant fair notice of what the claim is and the grounds upon which it rests.

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

HN5[] Motions to Dismiss, Failure to State Claim

While a complaint attacked by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.

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

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

HN6[] Sherman Act, Scope

Stating a claim under § 1 (15 U.S.C.S. § 1) of the Sherman Act requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely. In identifying facts that are suggestive enough to render a § 1 conspiracy plausible, courts have the benefit of the prior rulings and considered views of leading commentators that lawful parallel conduct fails to bespeak unlawful agreement. It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

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

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN7[] **Sherman Act, Scope**

The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement in violation of *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act reflects the threshold requirement of *Fed. R. Civ. P. 8(a)(2)* that a plain statement possess enough heft to show that the pleader is entitled to relief. A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a claim under *§ 1* of the Sherman Act; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a *§ 1* complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief.

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

HN8[] **Motions to Dismiss, Failure to State Claim**

When the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court.

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

HN9[] **Motions to Dismiss, Failure to State Claim**

A district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.

Evidence > Burdens of Proof > General Overview

HN10[] **Evidence, Burdens of Proof**

Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.

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

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

When a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder.

Lawyers' Edition Display

Decision

[*929]** Telephone and Internet service subscribers held to have failed to state claim against local exchange carriers for alleged parallel billing and contracting designed to discourage competition in asserted violation of § 1 of Sherman Act (*15 U.S.C.S. § 1*).

Summary

Procedural posture: Respondent subscribers to local telephone and Internet services brought an action against petitioner local exchange carriers, alleging that the carriers engaged in parallel conduct to preclude competition in violation of § 1 of the Sherman Act, *15 U.S.C.S. § 1*. Upon the grant of a writ of certiorari, the carriers appealed the judgment of the U.S. Court of Appeals for the Second Circuit which held that the subscribers sufficiently stated a claim.

Overview: The subscribers asserted that the carriers were former local monopolies which engaged in parallel billing and contracting misconduct designed to discourage new competitors from entering their markets through sharing of the carriers' networks. The subscribers also alleged that the carriers agreed not to compete outside their own markets. The U.S. Supreme Court held that the subscribers' allegations that the carriers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, were insufficient to state a claim under *§ 1* of the Sherman Act. To state such a violation, allegations of parallel conduct were required to be placed in a factual context which raised a plausible suggestion of a preceding agreement rather than identical independent action. Further, the subscribers' complaint did not indicate that the carriers' resistance to competitors was anything more than the natural, unilateral reaction of each carrier which was intent on keeping its regional dominance. Also, the alleged **[***930]** anti-competitive conduct of the carriers itself indicated that a carrier's attempt to compete in another carrier's market would not be profitable.

Outcome: The judgment finding that the subscribers' complaint stated a claim was reversed, and the case was remanded for further proceedings.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 5 > SHERMAN ACT LIABILITY > Headnote:
LEdHN[1][] [1]

Liability under § 1 (*15 U.S.C.S. § 1*) of the Sherman Act requires a contract, combination, or conspiracy, in restraint of trade or commerce. (Souter, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 5 > SHERMAN ACT PROHIBITIONS > Headnote:
LEdHN[2][] [2]

15 U.S.C.S. § 1 prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations. (Souter, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 14 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 15 > SHERMAN ACT -- TRADE RESTRAINTS PROHIBITED -- PARALLEL BUSINESS BEHAVIOR > Headnote:
LEdHN[3][] [3]

Because § 1 (*15 U.S.C.S. § 1*) of the Sherman Act does not prohibit all unreasonable restraints of trade, but only restraints effected by a contract, combination, or conspiracy, the crucial question is whether challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express. While a showing of parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement, it falls short of conclusively establishing agreement or itself constituting a Sherman Act offense. Even conscious parallelism, a common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions is not in itself unlawful. The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. (Souter, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ.)

PLEADING § 130 > PLEADING -- PLAIN STATEMENT > Headnote:
LEdHN[4][] [4]

Fed. R. Civ. P. 8(a)(2) requires only a short and plain statement of a claim showing that the pleader is entitled to relief, in order to give a defendant fair notice of what the claim is and the grounds upon which it rests. (Souter, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ.)

[*931]**

PLEADING § 103 > COMPLAINT -- MOTION TO DISMISS > Headnote:
LEdHN[5][] [5]

While a complaint attacked by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. (Souter, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 63 > SHERMAN ACT -- STATING ANTITRUST CLAIM -- ILLEGAL AGREEMENT -- PARALLEL CONDUCT > Headnote:
LEdHN[6][] [6]

Stating a claim under § 1 (*15 U.S.C.S. § 1*) of the Sherman Act requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely. In identifying facts that are suggestive enough to render a *§ 1* conspiracy plausible, courts have the benefit of the prior rulings and considered views of leading commentators that lawful parallel conduct fails to bespeak unlawful agreement. It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action. (Souter, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ.)

PLEADING § 176 > PLEADING -- ANTITRUST ALLEGATIONS -- ENTITLEMENT TO RELIEF > Headnote:
LEdHN[7][] [7]

The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement in violation of § 1 (*15 U.S.C.S. § 1*) of the Sherman Act reflects the threshold requirement of *Fed. R. Civ. P. 8(a)(2)* that a plain statement possess enough heft to show that the pleader is entitled to relief. A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a claim under *§ 1* of the Sherman Act; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief. (Souter, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ.)

[*932]**

PLEADING § 106 > FAILURE TO RAISE CLAIM > Headnote:
LEdHN[8][] [8]

When the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court. (Souter, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ.)

PLEADING § 103 > PLEADING -- SPECIFICITY > Headnote:
LEdHN[9][] [9]

A district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed. (Souter, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ.)

PLEADING § 130 > PLEADING -- CONSISTENT FACTS > Headnote:
LEdHN[10][] [10]

Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. (Souter, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ.)

[*933]**

PLEADING § 103 > DISMISSAL OF COMPLAINT > Headnote:
LEdHN[11][] [11]

When a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder. (Souter, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ.)

Syllabus

The 1984 divestiture of the American Telephone & Telegraph Company's (AT&T) local telephone business left a system of regional service monopolies, sometimes called Incumbent Local Exchange Carriers (ILECs), and a separate long-distance market from which the ILECs were excluded. The Telecommunications Act of 1996 withdrew approval of the ILECs' monopolies, "fundamentally restructur[ing] local telephone markets" and "subject[ing] [ILECs] to a host of duties intended to facilitate market entry." *AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 371, 119 S. Ct. 721, 142 L. Ed. 2d 834*. It also authorized them to enter the long-distance market. **[****2]** "Central to the [new] scheme [was each ILEC's] obligation . . . to share its network with" competitive local exchange carriers (CLECs). *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 402, 124 S. Ct. 872, 157 L. Ed. 2d 823*.

Respondents (hereinafter plaintiffs) represent a class of subscribers of local telephone and/or high speed Internet services in this action against petitioner ILECs for claimed violations of *§ 1* of the Sherman Act, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." The complaint alleges that the ILECs conspired to restrain trade (1) by engaging in parallel conduct in their respective service areas to inhibit the growth of upstart CLECs; and (2) by agreeing to refrain from competing against one another, as indicated by their common failure to pursue attractive business opportunities in contiguous markets and by a statement by one ILEC's chief executive officer that competing in another ILEC's territory did not seem right. The District Court dismissed the complaint, concluding that parallel business conduct **[****3]** allegations, taken alone, do not state a claim under *§ 1*; plaintiffs must allege additional facts tending to exclude independent self-interested conduct as an explanation for the parallel actions. Reversing, the Second Circuit held that plaintiffs' parallel conduct allegations were sufficient to withstand a motion to dismiss because the ILECs failed to show that there is no set of facts that would permit plaintiffs to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.

Held:

1. Stating a *§ 1* claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. An allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Pp. 6-17

(a) Because *§ 1* prohibits "only restraints effected by a contract, combination, or conspiracy," *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775, 104 S. Ct. 2731, 81 L. Ed. 2d 628*, "[t]he crucial question" is whether the challenged anticompetitive conduct "stem[s] from independent decision or from an agreement," *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 540, 74 S. Ct. 257, 98 L.* ***[***934]*** *Ed. 273*.

While **[****4]** a showing of parallel "business behavior is admissible circumstantial evidence from which" agreement may be inferred, it falls short of "conclusively establish[ing] agreement or . . . itself constitut[ing] a Sherman Act offense." *Id., at 540-541, 540, 74 S. Ct. 257, 98 L. Ed. 273*. The inadequacy of showing parallel conduct or interdependence, without more, mirrors the behavior's ambiguity: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. Thus, this Court has hedged against false inferences from identical behavior at a number of points in the trial sequence, *e.g.,* at the summary judgment stage, see *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538*.

(b) This case presents the antecedent question of what a plaintiff must plead in order to state a *§ 1* claim. *Federal Rule of Civil Procedure 8(a)(2)* requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80.* **[****5]** While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, *ibid.,* a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true. Applying these general standards to a § 1 claim, stating a claim requires a complaint with enough factual matter to suggest an agreement. Asking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects *Rule 8(a)(2)*'s threshold requirement that the "plain statement" possess enough heft to "sho[w] that the pleader is entitled to relief." A parallel conduct allegation gets the § 1 complaint close to stating a claim, but without further factual enhancement **[****6]** it stops short of the line between possibility and plausibility. The requirement of allegations suggesting an agreement serves the practical purpose of preventing a plaintiff with "'a largely groundless claim'" from "'tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'" *Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347, 125 S. Ct. 1627, 161 L. Ed. 2d 577*. It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive. That potential expense is obvious here, where plaintiffs represent a putative class of at least 90 percent of subscribers to local telephone or high-speed Internet service in an action against America's largest telecommunications firms for unspecified instances of antitrust violations that allegedly occurred over a 7-year period. It is no answer to say that a claim just shy of plausible **[***935]** entitlement can be weeded out early in the discovery process, given the common lament that the success of judicial supervision in checking discovery abuse has been modest. Plaintiffs' main **[****7]** argument against the plausibility standard at the pleading stage is its ostensible conflict with a literal reading of *Conley*'s statement construing *Rule 8*: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *355 U.S., at 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80*. The "no set of facts" language has been questioned, criticized, and explained away long enough by courts and commentators, and is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. *Conley* described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.

2. Under the plausibility standard, plaintiffs' claim of conspiracy in restraint of trade comes up short. First, the complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct, not on any independent allegation of actual agreement **[****8]** among the ILECs. The nub of the complaint is the ILECs' parallel behavior, and its sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience. Nothing in the complaint invests either the action or inaction alleged with a plausible conspiracy suggestion. As to the ILECs' supposed agreement to disobey the 1996 Act and thwart the CLECs' attempts to compete, the District Court correctly found that nothing in the complaint intimates that resisting the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on preserving its regional dominance. The complaint's general collusion premise fails to answer the point that there was no need for joint encouragement to resist the 1996 Act, since each ILEC had reason to try to avoid dealing with CLECs and would

have tried to keep them out, regardless of the other ILECs' actions. Plaintiffs' second conspiracy theory rests on the competitive reticence among the ILECs themselves in the wake of the 1996 Act to enter into their competitors' territories, leaving the relevant market highly compartmentalized geographically, with minimal competition. This parallel conduct did **[****9]** not suggest conspiracy, not if history teaches anything. Monopoly was the norm in telecommunications, not the exception. Because the ILECs were born in that world, doubtless liked it, and surely knew the adage about him who lives by the sword, a natural explanation for the noncompetition is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same. Antitrust conspiracy was not suggested by the facts adduced under either theory of the complaint, which thus fails to state a valid § 1 claim. This analysis does not run counter to *Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508, 122 S. Ct. 992, 152 L. Ed. 2d 1*, which held that "a complaint in an employment discrimination lawsuit [need] not contain specific facts establishing a prima facie case of discrimination." Here, the Court is not requiring heightened fact **[***936]** pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.

425 F.3d 99, reversed and remanded.

Counsel: Michael Kellogg argued the cause for petitioners.

Thomas O. Barnett argued the cause for the United States, as amicus curiae, by special leave of court.

J. Douglas Richards argued the cause for respondents.

Judges: Souter, J., delivered the opinion **[****10]** of the Court, in which Roberts, C. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ., joined. Stevens, J., filed a dissenting opinion, in which Ginsburg, J., joined, except as to Part IV, *post*, p. 570.

Opinion by: SOUTER

Opinion

[*548] **[**1961]** Justice **Souter** delivered the opinion of the Court.

HN1[] ***LEdHN[1]***[] [1] Liability under *§ 1* of the Sherman Act, *15 U.S.C. § 1*, requires a "contract, combination . . ., or conspiracy, in restraint of trade or commerce." The question in this putative class action is whether a *§ 1* complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to **[*549]** competition, absent some factual context suggesting agreement, as distinct from identical, independent action. We hold that such a complaint should be dismissed.

I

The upshot of the 1984 divestiture of the American Telephone & Telegraph Company's (AT&T) local telephone business was a system of regional service monopolies (variously called "Regional Bell Operating Companies," "Baby Bells," or "Incumbent Local Exchange Carriers" (ILECs)), and a separate, competitive market for long-distance service from which the ILECs were excluded. More than a decade **[****11]** later, Congress withdrew approval of the ILECs' monopolies by enacting the Telecommunications Act of 1996 (1996 Act), *110 Stat. 56*, which "fundamentally restructure[d] local telephone markets" and "subject[ed] [ILECs] to a host of duties intended to facilitate market entry." *AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 371, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999)*. In recompense, the 1996 Act set conditions for authorizing ILECs to enter the long-distance market. See *47 U.S.C. § 271*.

"Central to the [new] scheme [was each ILEC's] obligation . . . to share its network with competitors," *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 402, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*, which came to be known as "competitive local exchange carriers" (CLECs), Pet. for Cert. 6, n 1. A CLEC could make use of an ILEC's network in any of three ways: by (1) "purchas[ing] local telephone services at wholesale rates for resale to end users," (2) "leas[ing] elements of the [ILEC's] network 'on an unbundled basis,'" or (3) "interconnect[ing] its own facilities with the [ILEC's] network." *Iowa Utilities Bd., supra, at 371, 119 S. Ct. 721, 142 L. Ed. 2d 834* (quoting *47 U.S.C. § 251(c)* **[****12]**). Owing to the "considerable expense and effort" required to make unbundled network elements available to rivals at wholesale prices, *Trinko, supra, at 410, 124 S. Ct. 872, 157 L. Ed. 2d 823*, the ILECs vigorously litigated the scope of the sharing obligation imposed by the 1996 Act, with the result that the Federal Communications Commission (FCC) **[***937]** three times **[*550]** revised **[**1962]** its regulations to narrow the range of network elements to be shared with the CLECs. See *Covad Communs. Co. v. FCC, 450 F.3d 528, 533-534 (CADC 2006)* (summarizing the 10-year-long regulatory struggle between the ILECs and CLECs).

Respondents William Twombly and Lawrence Marcus (hereinafter plaintiffs) represent a putative class consisting of all "subscribers of local telephone and/or high speed internet services . . . from February 8, 1996 to present." Amended Complaint in No. 02 CIV. 10220 (GEL) (SDNY) P 53, App. 28 (hereinafter Complaint). In this action against petitioners, a group of ILECs,[1] plaintiffs seek treble damages and declaratory and injunctive relief for claimed violations of *§ 1* of the Sherman Act, ch. 647, 26 Stat. 209, as amended, ***HN2***[] ***LEdHN[2]***[] [2]*15 U.S.C. § 1*, which prohibits "[e]very contract, **[****13]** combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."

The complaint alleges that the ILECs conspired to restrain trade in two ways, each supposedly inflating charges for local telephone and high-speed Internet services. Plaintiffs say, first, that the ILECs "engaged in parallel conduct" in their respective service areas to inhibit the growth **[****14]** of upstart CLECs. Complaint P 47, App. 23-26. Their actions allegedly included making unfair agreements with the CLECs for access to ILEC networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs' relations with their own customers. *Ibid.* According to the complaint, the ILECs' **[*551]** "compelling common motivatio[n]" to thwart the CLECs' competitive efforts naturally led them to form a conspiracy; "[h]ad any one [ILEC] not sought to prevent CLECs . . . from competing effectively . . ., the resulting greater competitive inroads into that [ILEC's] territory would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories in the absence of such conduct." *Id.*, P 50, App. 26-27.

Second, the complaint charges agreements by the ILECs to refrain from competing against one another. These are to be inferred from the ILECs' common failure "meaningfully [to] pursu[e]" "attractive business opportunit[ies]" in contiguous markets where they possessed "substantial competitive advantages," *id.*, PP 40-41, App. 21-22, and from a statement of Richard Notebaert, chief executive officer **[****15]** (CEO) of the ILEC Qwest, that competing in the territory of another ILEC "'might be a good way to turn a quick dollar but that doesn't make it right,'" *id.*, P 42, App. 22.

The complaint couches its ultimate allegations this way:

> "In the absence of any meaningful competition between the [ILECs] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within **[***938]** their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information **[**1963]** and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local

[1] The 1984 divestiture of AT&T's local telephone service created seven Regional Bell Operating Companies. Through a series of mergers and acquisitions, those seven companies were consolidated into the four ILECs named in this suit: BellSouth Corporation, Qwest Communications International, Inc., SBC Communications, Inc., and Verizon Communications, Inc. (successor-in-interest to Bell Atlantic Corporation). Complaint P 21, App. 16. Together, these ILECs allegedly control 90 percent or more of the market for local telephone service in the 48 contiguous States. *Id.*, P 48, App. 26.

telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another." *Id.*, P 51, App. 27.[2]

[*552] **[****16]** The United States District Court for the Southern District of New York dismissed the complaint for failure to state a claim upon which relief can be granted. The District Court acknowledged that "plaintiffs may allege a conspiracy by citing instances of parallel business behavior that suggest an agreement," but emphasized that "while '[c]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy[, . . .] "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.'" *313 F. Supp. 2d 174, 179 (2003)* (quoting *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 541, 74 S. Ct. 257, 98 L. Ed. 273 (1954)*; alterations in original). Thus, the District Court understood that allegations of parallel business conduct, taken alone, do not state a claim under *§ 1*; plaintiffs must allege additional facts that "ten[d] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior." *313 F. Supp. 2d, at 179*. The District Court found plaintiffs' allegations of parallel ILEC actions to discourage competition inadequate **[****17]** because "the behavior of each ILEC in resisting the incursion of CLECs is fully explained by the ILEC's own interests in defending its individual territory." *Id., at 183*. As to the ILECs' supposed agreement against competing with each other, the District Court found that the complaint does not "alleg[e] facts . . . suggesting that refraining from competing in other territories as CLECs was contrary to [the ILECs'] apparent economic interests, and consequently [does] not rais[e] an inference that [the ILECs'] actions were the result of a conspiracy." *Id., at 188*.

[*553] The Court of Appeals for the Second Circuit reversed, holding that the District Court tested the complaint by the wrong standard. It held that "plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal." *425 F.3d 99, 114 (2005)* (emphasis in original). Although the Court of Appeals took the view that plaintiffs must plead facts that "include conspiracy among the realm of 'plausible' possibilities in order to survive a motion to dismiss," it then said that "to rule that allegations of parallel anticompetitive conduct **[****18]** fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a **[***939]** plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *Ibid.*

We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct, *548 U.S. 903, 126 S. Ct. 2965, 165 L. Ed. 2d 949 (2006)*, and now reverse.

[1964]** II

A

HN3[] ***LEdHN[3]***[] [3] Because *§ 1* of the Sherman Act "does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy," *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*, "[t]he crucial question" is whether the challenged anticompetitive conduct "stem[s] from independent decision or from an agreement, tacit or express," *Theatre Enterprises, 346 U.S., at 540, 74 S. Ct. 257, 98 L. Ed. 273*. While a showing of parallel "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement," it falls short of "conclusively establish[ing] agreement or . . . itself constitut[ing] a Sherman Act offense." *Id., at 540-541, 74 S. Ct. 257, 98 L. Ed. 273*. Even "conscious **[****19]** parallelism," a common reaction of "firms in a concentrated market [that] recogniz[e]

---

[2] In setting forth the grounds for § 1 relief, the complaint repeats these allegations in substantially similar language:

"Beginning at least as early as February 6, 1996, and continuing to the present, the exact dates being unknown to Plaintiffs, Defendants and their co-conspirators engaged in a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another in violation of *Section 1* of the Sherman Act." Id., P 64, App. 30-31.

their shared economic interests and their interdependence with respect to price and output decisions" **[*554]** is "not in itself unlawful." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*; see 6 P. Areeda & H. Hovenkamp, ***Antitrust Law*** P 1433a, p 236 (2d ed. 2003) (hereinafter Areeda & Hovenkamp) ("The courts are nearly unanimous in saying that mere interdependent parallelism does not establish the contract, combination, or conspiracy required by Sherman Act *§ 1*"); Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655, 672 (1962) ("[M]ere interdependence of basic price decisions is not conspiracy").

The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. See, *e.g.*, AEI-Brookings Joint Center for Regulatory Studies, Epstein, Motions to Dismiss **[****20]** Antitrust Cases: Separating Fact from Fantasy, Related Publication 06-08, pp 3-4 (2006) (discussing problem of "false positives" in § 1 suits). Accordingly, we have previously hedged against false inferences from identical behavior at a number of points in the trial sequence. An antitrust conspiracy plaintiff with evidence showing nothing beyond parallel conduct is not entitled to a directed verdict, see *Theatre Enterprises, supra;* proof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action, see *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*; and at the summary judgment stage a *§ 1* plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently, see *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. **[***940]**

B

This case presents the antecedent question of what a plaintiff must plead in order to state a claim under *§ 1* of the **[*555]** Sherman Act. ***HN4***[] ***LEdHN[4]***[] [4]*Federal Rule of Civil Procedure 8(a)(2)* requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in **[****21]** order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. ***HN5***[] ***LEdHN[5]***[] [5] While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, *ibid.; Sanjuan v. American Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (CA7 1994)*, a plaintiff's obligation to provide the **[**1965]** "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)* (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp 235-236 (3d ed. 2004) (hereinafter Wright & Miller) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"),[3] on the assumption that all the allegations **[****22]** in the complaint are true (even if doubtful in fact), see, *e.g.*, *Swierkiewicz v.* ***[*556]*** *Sorema N. A., 534 U.S. 506, 508, n. 1, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)*; *Neitzke v. Williams, 490 U.S. 319, 327, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989)* ("*Rule 12(b)(6)* does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations"); *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)* (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").

---

[3] The dissent greatly oversimplifies matters by suggesting that the Federal Rules somehow dispensed with the pleading of facts altogether. See *post, at 580, 167 L. Ed. 2d, at 955* (opinion of Stevens, J.) (pleading standard of Federal Rules "does not require, or even invite, the pleading of facts"). While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant "set out *in detail* the facts upon which he bases his claim," *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)* (emphasis added), *Rule 8(a)(2)* still requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests. See 5 Wright & Miller § 1202, at 94, 95 (*Rule 8(a)* "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented" and does not authorize a pleader's "bare averment that he wants relief and is entitled to it").

[**23]** In applying these general standards to a § 1 claim, we hold that ***HN6***[] ***LEdHN[6]***[] [6] stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.[4] And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof **[***941]** of those facts is improbable, and "that a recovery is very remote and unlikely." *Ibid.* In identifying facts that are suggestive enough to render a § 1 conspiracy plausible, we have the benefit **[**1966]** of the prior rulings and considered views of leading commentators, already quoted, that lawful parallel conduct fails to bespeak unlawful agreement. It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without **[*557]** more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when **[****24]** allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

LEdHN[7][] [7] **[****25]** ***HN7***[] The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of *Rule 8(a)(2)* that the "plain statement" possess enough heft to "sho[w] that the pleader is entitled to relief." A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of "entitle[ment] to relief." Cf. *DM Research, Inc. v. College of Am. Pathologists, 170 F.3d 53, 56 (CA1 1999)* ("[T]erms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient in conjunction with a more specific allegation--for example, identifying a written agreement or even a basis for inferring a tacit agreement, . . . but a court **[****26]** is not required to accept such terms as a sufficient basis for a complaint").[5]

We alluded to the practical significance of the *Rule 8* entitlement requirement in *Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005)*, when we explained that something beyond the mere possibility of loss causation must be **[*558]** alleged, lest a plaintiff with "'a largely groundless claim'" be allowed to "'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'" *Id., at 347, 125 S. Ct. 1627, **[***942]** 161 L. Ed. 2d 577* (quoting *Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975))*. So, ***HN8***[] ***LEdHN[8]***[] [8] when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, "'this basic deficiency **[****27]** should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" 5 Wright & Miller § 1216, at 233-234 (quoting *Daves v. Hawaiian Dredging Co., 114 F. Supp. 643, 645 (Haw. 1953))*; see also *Dura, supra, at 346, 125 S. Ct. 1627, 161 L. Ed. 2d 577*; *Asahi Glass Co. v. Pentech Pharmaceuticals, Inc., 289 F. Supp. 2d 986, 995 (ND Ill. 2003)* (Posner, J., sitting by designation) ("[S]ome

---

[4] Commentators have offered several examples of parallel conduct allegations that would state a § 1 claim under this standard. See, *e.g.*, 6 Areeda & Hovenkamp P 1425, at 167-185 (discussing "parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties"); Blechman, Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws, 24 N. Y. L. S. L. Rev. 881, 899 (1979) (describing "conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement"). The parties in this case agree that "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason," would support a plausible inference of conspiracy. Brief for Respondents 37; see also Reply Brief for Petitioners 12.

[5] The border in *DM Research* was the line between the conclusory and the factual. Here it lies between the factually neutral and the factually suggestive. Each must be crossed to enter the realm of plausible liability.

threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase").

Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, cf. **[**1967]** *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*, but quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated over 20 years ago in *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528, n. 17, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, ***HN9***[] ***LEdHN[9]***[] [9]"a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy **[****28]** to proceed." See also *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (CA7 1984)* ("[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint"); Note, Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation, *78 N. Y. U. L. Rev. 1887, 1898-1899 (2003)* (discussing the unusually high cost of discovery in antitrust cases); Manual for Complex Litigation, **[*559]** Fourth, § 30, p. 519 (2004) (describing extensive scope of discovery in antitrust cases); Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000) (reporting that discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed). That potential expense is obvious enough in the present case: plaintiffs represent a putative class of at least 90 percent of all **[****29]** subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years.

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," *post, at 573, 167 L. Ed. 2d, at 951*, given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. See, *e.g.*, Easterbrook, Discovery as Abuse, *69 B. U. L. Rev. 635, 638 (1989)* ("Judges can do little about impositional discovery when parties control the legal claims **[***943]** to be presented and conduct the discovery themselves"). And it is self-evident that the problem of discovery abuse cannot be solved by "careful scrutiny of evidence at the summary judgment stage," much less "lucid instructions to juries," *post, at 573, 167 L. Ed. 2d, at 951*; the threat of discovery expense will push cost-conscious defendants to settle even **[****30]** anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no "'reasonably founded hope that the [discovery] process will reveal relevant evidence'" to support a § 1 claim. *Dura, **[*560]** 544 U.S., at 347, 125 S. Ct. 1627, 161 L. Ed. 2d 577* (quoting *Blue Chip Stamps, supra, at 741, 95 S. Ct. 1917, 44 L. Ed. 2d 539*; alteration in *Dura*).[6]

---

[6] The dissent takes heart in the reassurances of plaintiffs' counsel that discovery would be ""phased"" and "limited to the existence of the alleged conspiracy and class certification." *Post, at 593, 167 L. Ed. 2d, at 963*. But determining whether some illegal agreement may have taken place between unspecified persons at different ILECs (each a multibillion dollar corporation with legions of management level employees) at some point over seven years is a sprawling, costly, and hugely time-consuming undertaking not easily susceptible to the kind of line-drawing and case management that the dissent envisions. Perhaps the best answer to the dissent's optimism that antitrust discovery is open to effective judicial control is a more extensive quotation of the authority just cited, a judge with a background in ***antitrust law***. Given the system that we have, the hope of effective judicial supervision is slim: "The timing is all wrong. The plaintiff files a sketchy complaint (the Rules of Civil Procedure discourage fulsome documents), and discovery is launched. A judicial officer does not know the details of the case the parties will present and in theory *cannot* know the details. Discovery is used to find the details. The judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find. A magistrate supervising discovery does not--cannot--know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be,

[**31]** **[**1968]** Plaintiffs do not, of course, dispute the requirement of plausibility and the need for something more than merely parallel behavior explained in *Theatre Enterprises, Monsanto*, and *Matsushita*, and their main argument against the plausibility standard at the pleading stage is its ostensible **[*561]** conflict with an early statement of ours construing *Rule 8*. Justice Black's opinion for the Court in *Conley* v. *Gibson* spoke not only of the need for fair notice of the grounds for entitlement to relief but of "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *355 U.S., at 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80*. This "no set of facts" language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read *Conley* in some such way when formulating its understanding of the proper pleading standard, see *425 F.3d at 106, 114* (invoking *Conley*'s "no set **[****32]** of **[***944]** facts" language in describing the standard for dismissal).[7]

[**33]** On such a focused and literal reading of *Conley*'s "no set of facts," a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some "set of [undisclosed] facts" to support recovery. So here, the Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint **[**1969]** does not set forth a single **[*562]** fact in a context that suggests an agreement. *425 F.3d, at 106, 114*. It seems fair to say that this approach to pleading would dispense with any showing of a "'reasonably founded hope'" that a plaintiff would be able to make a case, see *Dura, 544 U.S., at 347, 125 S. Ct. 1627, 161 L. Ed. 2d 577* (quoting *Blue Chip Stamps, 421 U.S., at 741, 95 S. Ct. 1917, 44 L. Ed. 2d 539*); Mr. Micawber's optimism would be enough.

Seeing this, a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard. See, *e.g.*, *Car Carriers, 745 F.2d at 1106* ("*Conley* has never been interpreted literally" and, "[i]n practice, a complaint . . . must contain either direct or **[****34]** inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory" (internal quotation marks omitted; emphasis and omission in original); *Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1155 (CA9 1989)* (tension between *Conley*'s "no set of facts" language and its acknowledgment that a plaintiff must provide the "grounds" on which his claim rests); *O'Brien v. Di Grazia, 544 F.2d 543, 546, n. 3 (CA1 1976)* ("[W]hen a plaintiff . . . supplies facts to support his claim, we do not think that *Conley* imposes a duty on the courts to conjure up unpleaded facts that might turn a frivolous claim of unconstitutional . . . action into a substantial one"); *McGregor v. Industrial Excess Landfill, Inc., 856 F.2d 39, 42-43 (CA6 1988)* (quoting *O'Brien*'s analysis); Hazard, From Whom No Secrets Are Hid, *76 Texas L. Rev. 1665, 1685 (1998)* (describing *Conley* as having "turned *Rule 8* on its head"); Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, *86 Colum. L. Rev. 433, 463-465 (1986)* (noting tension between **[****35]** *Conley* and subsequent understandings of *Rule 8*).

We could go on, but there is no need to pile up further citations to show that *Conley*'s "no set of facts" language has been questioned, criticized, and explained away long enough. To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the complaint's **[*563]** concrete allegations, which the Court quite reasonably understood as amply stating a claim for **[***945]** relief. But the passage so often quoted

---

hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define 'abusive' discovery except in theory, because in practice we lack essential information." Easterbrook, Discovery as Abuse, *69 B. U. L. Rev. 635, 638-639 (1989)* (footnote omitted).

[7] The Court of Appeals also relied on Chief Judge Clark's suggestion in *Nagler v. Admiral Corp., 248 F.2d 319 (CA2 1957)*, that facts indicating parallel conduct alone suffice to state a claim under *§ 1*. *425 F.3d at 114* (citing *Nagler, supra, at 325*). But *Nagler* gave no explanation for citing *Theatre Enterprises* (which upheld a denial of a directed verdict for plaintiff on the ground that proof of parallelism was not proof of conspiracy) as authority that pleading parallel conduct sufficed to plead a Sherman Act conspiracy. Now that *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*, and *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, have made it clear that neither parallel conduct nor conscious parallelism, taken alone, raise the necessary implication of conspiracy, it is time for a fresh look at adequacy of pleading when a claim rests on parallel action.

fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: ***HN10***[] ***LEdHN[10]***[] [10]once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. See *Sanjuan, 40 F.3d at 251* (once a claim for relief has been stated, a plaintiff "receives the benefit of imagination, so long as the hypotheses are consistent with the complaint"); accord, *Swierkiewicz, 534 U.S., at 514, 122 S. Ct. 992, 152 L. Ed. 2d 1*; *National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 256, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994)*; **[****36]** *H. J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 249-250, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)*; *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)*. *Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.[8]

[*946]**

[**37]** **[**1970]** **[*564]** III

When we look for plausibility in this complaint, we agree with the District Court that plaintiffs' claim of conspiracy in restraint of trade comes up short. To begin with, the complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs. *Supra, at 550-551, 167 L. Ed. 2d, at 937-938*. Although in form a few stray statements speak directly of agreement,[9] on fair reading these are merely legal conclusions resting on the prior allegations. Thus, the complaint **[*565]** first takes account of the alleged "absence of any meaningful competition between [the ILECs] in one another's markets," "the parallel course of conduct that each [ILEC] engaged in to prevent competition from

---

[8] Because *Conley*'s "'no set of facts'" language was one of our earliest statements about pleading under the Federal Rules, it is no surprise that it has since been "cited as authority" by this Court and others. *Post, at 577, 167 L. Ed. 2d, at 953*. Although we have not previously explained the circumstances and rejected the literal reading of the passage embraced by the Court of Appeals, our analysis comports with this Court's statements in the years since *Conley*. See *Dura Pharmaceuticals, Inc. v Broudo, 544 U.S., at 336, 347, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005)* (requiring "'reasonably founded hope that the [discovery] process will reveal relevant evidence'" to support the claim (alteration in *Dura*) (quoting *Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975)*; alteration in *Dura*)); *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* ("It is not . . . proper to assume that [the plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged"); *Wilson v. Schnettler, 365 U.S. 381, 383, 81 S. Ct. 632, 5 L. Ed. 2d 620 (1961)* ("In the absence of . . . an allegation [that the arrest was made without probable cause] the courts below could not, nor can we, assume that respondents arrested petitioner without probable cause to believe that he had committed . . . a narcotics offense"). Nor are we reaching out to decide this issue in a case where the matter was not raised by the parties, see *post, at 579, 167 L. Ed. 2d, at 955*, since both the ILECs and the Government highlight the problems stemming from a literal interpretation of *Conley*'s "no set of facts" language and seek clarification of the standard. Brief for Petitioners 27-28; Brief for United States as *Amicus Curiae* 22-25; see also Brief for Respondents 17 (describing "[p]etitioners and their amici" as mounting an "attack on *Conley*'s 'no set of facts' standard")

The dissent finds relevance in Court of Appeals precedents from the 1940s, which allegedly gave rise to Conley's "no set of facts" language. *See post, at 580-583, 167 L. Ed. 2d, at 955-957*. Even indulging this line of analysis, these cases do not challenge the understanding that, before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct. See, e.g., *Leimer v. State Mut. Life Assurance Co. of Worcester, Mass., 108 F.2d 302, 305 (CA8 1940)* ("'[I]f, in view of what is alleged, it can reasonably be conceived that the plaintiffs . . . could, upon a trial, establish a case which would entitle them to . . . relief, the motion to dismiss should not have been granted'"); *Continental Collieries, Inc. v. Shober, 130 F.2d 631, 635 (CA3 1942)* ("No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it"). Rather, these cases stand for the unobjectionable proposition that, ***HN11***[] ***LEdHN[11]***[] [11] when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder. Cf. *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)* (a district court weighing a motion to dismiss asks "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims").

[9] See Complaint PP 51, 64, App. 27, 30-31 (alleging that ILECs engaged in a "contract, combination or conspiracy" and agreed not to compete with one another).

CLECs," "and the other facts and market circumstances alleged [earlier]"; "in light of" these, the complaint concludes "that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry into their . . . markets and have agreed not to compete with one another." Complaint P 51, App. 27.[10] **[****39]** The nub of the **[**1971]** complaint, then, is the ILECs' parallel behavior, consisting of steps to keep the CLECs out **[****38]** and manifest disinterest in becoming CLECs themselves, and its sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience.[11]

[*566] We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy. As to the ILECs' supposed agreement to disobey the 1996 Act and thwart the CLECs' attempts to compete, we agree with the District Court that nothing in the complaint intimates that the resistance to the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance. The 1996 Act did more than just subject the ILECs to competition; it obliged them to subsidize their competitors with their own equipment at **[***947]** wholesale rates. The economic incentive to resist was powerful, but resisting competition is routine market conduct, and even if the ILECs flouted the 1996 **[****40]** Act in all the ways the plaintiffs allege, see *id.,* P 47, App. 23-24, there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway; so natural, in fact, that if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing.

The complaint makes its closest pass at a predicate for conspiracy with the claim that collusion was necessary because success by even one CLEC in an ILEC's territory "would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories." *Id.,* P 50, App. 26-27. But, its logic aside, this general premise still fails to answer the point that there was just no need for joint encouragement to resist the 1996 Act; as the District Court said, "each ILEC has reason to want to avoid dealing with CLECs" and "each ILEC would attempt to keep CLECs out, regardless of the actions of the other ILECs." *313 F. Supp. 2d, at 184*; cf. *Kramer v. Pollock-Krasner Foundation, 890 F. Supp. 250, 256 (SDNY 1995)* (while the **[****41]** plaintiff "may believe the defendants conspired . . ., the defendants' allegedly conspiratorial actions **[*567]** could equally have been prompted by lawful, independent goals which do not constitute a conspiracy").[12]

[1972]** Plaintiffs' second conspiracy theory rests on the competitive reticence among the ILECs themselves in the wake of the 1996 Act, which was **[****42]** supposedly passed in the "'hop[e] that the large incumbent local

---

[10] If the complaint had not explained that the claim of agreement rested on the parallel conduct described, we doubt that the complaint's references to an agreement among the ILECs would have given the notice required by *Rule 8*. Apart from identifying a 7-year span in which the § 1 violations were supposed to have occurred (*i.e.*, "[b]eginning at least as early as February 6, 1996, and continuing to the present," *id.,* P 64, App. 30), the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies. This lack of notice contrasts sharply with the model form for pleading negligence, Form 9, which the dissent says exemplifies the kind of "bare allegation" that survives a motion to dismiss. *Post, at 576, 167 L. Ed. 2d, at 953*. Whereas the model form alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time, the complaint here furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place. A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiffs' conclusory allegations in the *§ 1* context would have little idea where to begin.

[11] The dissent's quotations from the complaint leave the impression that plaintiffs directly allege illegal agreement; in fact, they proceed exclusively via allegations of parallel conduct, as both the District Court and Court of Appeals recognized. See *313 F. Supp. 2d 174, 182 (SDNY 2003)*; *425 F.3d 99, 102-104 (CA2 2005)*.

[12] From the allegation that the ILECs belong to various trade associations, see Complaint P 46, App. 23, the dissent playfully suggests that they conspired to restrain trade, an inference said to be "buttressed by the common sense of Adam Smith." *Post, at 591, 594, 167 L. Ed. 2d, at 962, 963-964*. If Adam Smith is peering down today, he may be surprised to learn that his tongue-in-cheek remark would be authority to force his famous pinmaker to devote financial and human capital to hire lawyers, prepare for depositions, and otherwise fend off allegations of conspiracy; all this just because he belonged to the same trade guild as one of his competitors when their pins carried the same price tag.

monopoly companies . . . might attack their neighbors' service areas, as they are the best situated to do so.'" Complaint P 38, App. 20 (quoting Consumer Federation of America, Lessons from 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster, p 12 (Feb. 2000)). Contrary to hope, the ILECs declined "'to enter each other's service territories in any significant way,'" Complaint P 38, App. 20, and the local telephone and high speed Internet market remains highly compartmentalized geographically, with minimal competition. Based on this state of affairs, and perceiving the ILECs to be blessed with "especially attractive business opportunities" in surrounding markets dominated by other ILECs, the plaintiffs assert that the ILECs' parallel conduct was "strongly suggestive of conspiracy." *Id.,* P 40, App. 21.

But it was not suggestive of conspiracy, not if history teaches anything. In a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement, **[****43]** but here we have an obvious alternative **[***948]** explanation. In the decade **[*568]** preceding the 1996 Act and well before that, monopoly was the norm in telecommunications, not the exception. See *Verizon Communs., Inc. v. FCC, 535 U.S. 467, 477-478, 122 S. Ct. 1646, 152 L. Ed. 2d 701 (2002)* (describing telephone service providers as traditional public monopolies). The ILECs were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.

In fact, the complaint itself gives reasons to believe that the ILECs would see their best interests in keeping to their old turf. Although the complaint says generally that the ILECs passed up "especially attractive business opportunit[ies]" by declining to compete as CLECs against other ILECs, Complaint P 40, App. 21, it does not allege that competition as CLECs was potentially any more lucrative than other opportunities being pursued by the ILECs during the same period,[13] **[****45]** and **[**1973]** the complaint is replete with indications that any CLEC faced **[****44]** nearly insurmountable barriers to profitability owing to the ILECs' flagrant resistance to the network sharing requirements of the 1996 Act, *id.*, P 47, App. **[*569]** 23-26. Not only that, but even without a monopolistic tradition and the peculiar difficulty of mandating shared networks, "[f]irms do not expand without limit and none of them enters every market that an outside observer might regard as profitable, or even a small portion of such markets." Areeda & Hovenkamp P 307d, at 155 (Supp. 2006) (commenting on the case at bar). The upshot is that Congress may have expected some ILECs to become CLECs in the legacy territories of other ILECs, but the disappointment does not make conspiracy plausible. We agree with the District Court's assessment that antitrust conspiracy was not suggested by the facts adduced under either theory of the complaint, which thus fails to state a valid § 1 claim.[14]

---

[13] The complaint quoted a reported statement of Qwest's CEO, Richard Notebaert, to suggest that the ILECs declined to compete against each other despite recognizing that it "'might be a good way to turn a quick dollar.'" P 42, App. 22 (quoting Chicago Tribune, Oct. 31, 2002, Business Section, p 1). This was only part of what he reportedly said, however, and the District Court was entitled to take notice of the full contents of the published articles referenced in the complaint, from which the truncated quotations were drawn. See *Fed. Rule Evid. 201*. Notebaert was also quoted as saying that entering new markets as a CLEC would not be "a sustainable economic model" because the CLEC pricing model is "just . . . nuts." Chicago Tribune, Oct. 31, 2002, Business Section, p 1 (cited at Complaint P 42, App. 22). Another source cited in the complaint quotes Notebaert as saying he thought it "unwise" to "base a business plan" on the privileges accorded to CLECs under the 1996 Act because the regulatory environment was too unstable. Chicago Tribune, Dec. 19, 2002, Business Section, p 2 (cited at Complaint P 45, App. 23).

[14] In reaching this conclusion, we do not apply any "heightened" pleading standard, nor do we seek to broaden the scope of *Federal Rule of Civil Procedure 9*, which can only be accomplished "'by the process of amending the Federal Rules, and not by judicial interpretation.'" *Swierkiewicz v. Sorema N. A., 534 U.S. 506, 515, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)* (quoting *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993))*. On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than *Rule 8* requires. *Fed. Rules Civ. Proc. 9(b)-(c)*. Here, our concern is not that the allegations in the complaint were insufficiently "particular[ized]," *ibid.;* rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible.

Plaintiffs say that our analysis runs counter to *Swierkiewicz v. Sorema N. A., 534 U.S. at 508, 122 S. Ct. 992, **[***949]** 152 L. Ed. 2d 1*, which held that "a complaint in an employment discrimination **[****46]** lawsuit [need] not contain specific facts establishing a prima facie case of discrimination under the framework set forth in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*." They argue that just as the prima facie case is a "flexible evidentiary standard" that "should not be transposed into a rigid pleading standard for discrimination cases," *Swierkiewicz, supra, at 512, 122 S. Ct. 992, 152 L. Ed. 2d 1*, "transpos[ing] 'plus factor' summary judgment analysis woodenly into a rigid *Rule 12(b)(6)* pleading standard . . . would be unwise," Brief for Respondents 39. As the District Court **[*570]** correctly understood, however, "*Swierkiewicz* did not change the law of pleading, but simply re-emphasized . . . that the Second Circuit's use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules' structure of liberal pleading requirements." *313 F. Supp. 2d, at 181* (citation and footnote omitted). Even though Swierkiewicz's pleadings "detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination," the Court of Appeals dismissed **[****47]** his complaint for failing to allege certain additional facts that Swierkiewicz would need at the trial stage to support his claim in the absence of direct evidence of discrimination. *Swierkiewicz, 534 U.S., at 514, 122 S. Ct. 992, 152 L. Ed. 2d 1*. We reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading requirement by insisting that Swierkiewicz allege "specific facts" beyondthose necessary to state his **[**1974]** claim and the grounds showing entitlement to relief. *Id., at 508, 122 S. Ct. 992, 152 L. Ed. 2d 1*.

Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.

* * *

The judgment of the Court of Appeals for the Second Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Dissent by: STEVENS

Dissent

Justice **Stevens,** with whom Justice **Ginsburg** joins except as to Part IV, dissenting.

In the first paragraph of its 23-page opinion the Court states that the question to be **[****48]** decided is whether allegations that "major telecommunications providers engaged in certain **[*571]** parallel conduct unfavorable to competition" suffice to state a violation of *§ 1* of the Sherman Act. *Ante, at 548-549, 167 L. Ed. 2d, at 936*. The answer to that question has been settled for more than 50 years. If that were indeed the issue, a summary reversal citing *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 74 S. Ct. 257, 98 L. Ed. 273 (1954)*, would adequately resolve **[***950]** this case. As *Theatre Enterprises* held, parallel conduct is circumstantial evidence admissible on the issue of conspiracy, but it is not itself illegal. *Id., at 540-542, 74 S. Ct. 257, 98 L. Ed. 273*.

Thus, this is a case in which there is no dispute about the substantive law. If the defendants acted independently, their conduct was perfectly lawful. If, however, that conduct is the product of a horizontal agreement among potential competitors, it was unlawful. The plaintiffs have alleged such an agreement and, because the complaint was dismissed in advance of answer, the allegation has not even been denied. Why, then, does the case not proceed? Does a judicial opinion that the charge is not "plausible" provide a legally acceptable reason **[****49]** for dismissing the complaint? I think not.

Respondents' amended complaint describes a variety of circumstantial evidence and makes the straightforward allegation that petitioners

> "entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another." Amended Complaint in No. 02 CIV. 10220 (GEL) (SDNY) P 51, App. 27 (hereinafter Complaint).

The complaint explains that, contrary to Congress' expectation when it enacted the 1996 Telecommunications Act, and consistent with their own economic self-interests, petitioner Incumbent Local Exchange Carriers (ILECs) have assiduously avoided infringing upon each other's markets and have **[*572]** refused to permit nonincumbent competitors to access their networks. The complaint quotes Richard Notebaert, the former chief executive officer of one such ILEC, as saying that competing in a neighboring ILEC's territory "'might be a good way to turn a quick dollar but that doesn't make it right.'" *Id.,* P 42, App. 22. Moreover, respondents allege that petitioners "communicate **[****50]** amongst themselves" through numerous industry associations. *Id.,* P 46, App. 23. In sum, respondents allege that petitioners entered into an agreement that has long been recognized as a classic *per se* **[**1975]** violation of the Sherman Act. See Reportof the Attorney General's National Committee to Study the Antitrust Laws 26 (1955).

Under rules of procedure that have been well settled since well before our decision in *Theatre Enterprises*, a judge ruling on a defendant's motion to dismiss a complaint "must accept as true all of the factual allegations contained in the complaint." *Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508, n. 1, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)*; see *Overstreet v. North Shore Corp., 318 U.S. 125, 127, 63 S. Ct. 494, 87 L. Ed. 656 (1943)*. But instead of requiring knowledgeable executives such as Notebaert to respond to these allegations by way of sworn depositions or other limited discovery--and indeed without so much as requiring petitioners to file an answer denying that they entered into any agreement--the majority permits immediate dismissal based on the assurances of company lawyers that nothing untoward was afoot. The Court embraces the argument of those lawyers that **[****51]** "there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway," *ante, at 566, 167 L. Ed. 2d, at 947*; that "there was just no need for joint encouragement **[***951]** to resist the 1996 Act," *ibid.*; and that the "natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing," *ante, at 568, 167 L. Ed. 2d, at 948*.

The Court and petitioners' legal team are no doubt correct that the parallel conduct alleged is consistent with the absence **[*573]** of any contract, combination, or conspiracy. But that conduct is also entirely consistent with the *presence* of the illegal agreement alleged in the complaint. And the charge that petitioners "agreed not to compete with one another" is not just one of "a few stray statements," *ante, at 564, 167 L. Ed. 2d, at 946*; it is an allegation describing unlawful conduct. As such, the Federal Rules of Civil Procedure, our longstanding precedent, and sound practice mandate that the District Court at least require some sort of response from petitioners before dismissing the case.

Two practical concerns presumably explain the Court's dramatic departure from settled procedural **[****52]** law. Private antitrust litigation can be enormously expensive, and there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions. Those concerns merit careful case management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries; they do not, however, justify the dismissal of an adequately pleaded complaint without even requiring the defendants to file answers denying a charge that they in fact engaged in collective decisionmaking. More importantly, they do not justify an interpretation of *Federal Rule of Civil Procedure 12(b)(6)* that seems to be driven by the majority's appraisal of the plausibility of the ultimate factual allegation rather than its legal sufficiency.

I

Rule 8(a)(2) of the Federal Rules requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The Rule did not come about by happenstance, and its language is not inadvertent. The English experience with Byzantine special pleading rules **[****53]** --illustrated by the hypertechnical Hilary rules of **[*574]** 1834[1] -- made **[**1976]** obvious the appeal of a pleading standard that was easy for the common litigant to understand and sufficed to put the defendant on notice as to the nature of the claim against him and the relief sought. Stateside, David Dudley Field developed the highly influential New York Code of 1848, which required "[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State, ch. 379, § 120(2), 1848 N. Y. Laws pp. 497, 521. Substantially similar language appeared in the Federal Equity Rules adopted in 1912. See Fed. Equity Rule 25 (requiring "a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence").

[**54]** **[***952]** A difficulty arose, however, in that the Field Code and its progeny required a plaintiff to plead "facts" rather than "conclusions," a distinction that proved far easier to say than to apply. As commentators have noted,

> "it is virtually impossible logically to distinguish among 'ultimate facts,' 'evidence,' and 'conclusions.' Essentially any allegation in a pleading must be an assertion that certain occurrences took place. The pleading spectrum, passing from evidence through ultimate facts to conclusions, is largely a continuum varying only in the degree of particularity with which the occurrences are described." Weinstein & Distler, Comments on Procedural Reform: Drafting Pleading Rules, 57 Colum. L. Rev. 518, 520-521 (1957).

See also Cook, Statements of Fact in Pleading Under the Codes, 21 Colum. L. Rev. 416, 417 (1921) (hereinafter Cook) ("[T]here is no logical distinction between statements which are grouped by the courts under the phrases 'statements of **[*575]** fact' and 'conclusions of law'"). *Rule 8* was directly responsive to this difficulty. Its drafters intentionally avoided any reference to "facts" or "evidence" or "conclusions." See 5 C. **[****55]** Wright & A. Miller, Federal Practice and Procedure § 1216, p 207 (3d ed. 2004) (hereinafter Wright & Miller) ("The substitution of 'claim showing that the pleader is entitled to relief' for the code formulation of the 'facts' constituting a 'cause of action' was intended to avoid the distinctions drawn under the codes among 'evidentiary facts,' 'ultimate facts,' and 'conclusions' . . .").

Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial. See *Swierkiewicz, 534 U.S., at 514, 122 S. Ct. 992, 152 L. Ed. 2d 1* ("The liberal notice pleading of *Rule 8(a)* is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim"). Charles E. Clark, the "principal draftsman" of the Federal Rules,[2] put it thus:

> "Experience has shown . . . that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function. We can expect a general statement distinguishing the case from all others, so **[****56]** that the manner and form of trial and remedy expected are clear, and so that a permanent judgment will result." The **[**1977]** New Federal Rules of Civil Procedure: The Last Phase--Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure, 23 A. B. A. J. 976, 977 (1937) (hereinafter Clark, New Federal Rules).

The pleading paradigm under the new Federal Rules was well illustrated by the inclusion in the appendix of Form 9, **[*576]** a complaint for negligence. As relevant, the Form 9 complaint states only: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then **[***953]** crossing said highway." Form 9, Complaint for Negligence, Forms App., Fed. Rules Civ. Proc., 28 U.S.C. App., p 829 (hereinafter Form 9). The complaint then describes the plaintiff's injuries and

---

[1] See 9 W. Holdsworth, History of English Law 324-327 (1926).

[2] *Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 283, 108 S. Ct. 1133, 99 L. Ed. 2d 296 (1988)*.

demands judgment. The asserted ground for relief--namely, the defendant's negligent driving--would have been called a "'conclusion of law'" under the code pleading of old. See, *e.g.*, Cook 419. But that bare allegation suffices under a system that "restrict[s] the pleadings to **[****57]** the task of general notice-giving and invest[s] the deposition-discovery process with a vital role in the preparation for trial."[3] *Hickman v. Taylor, 329 U.S. 495, 501, 67 S. Ct. 385, 91 L. Ed. 451 (1947)*; see also *Swierkiewicz, 534 U.S., at 513, n. 4, 122 S. Ct. 992, 152 L. Ed. 2d 1* (citing Form 9 as an example of "'the simplicity and brevity of statement which the rules contemplate'"); *Thomson v. Washington, 362 F.3d 969, 970 (CA7 2004)* (Posner, J.) ("The federal rules replaced fact pleading with notice pleading").

II

[**58]** It is in the context of this history that *Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*, must be understood. The *Conley* plaintiffs were black railroad workers who alleged that their union local had refused to protect them against discriminatory discharges, in violation of the National Railway Labor Act. The union sought to dismiss the complaint on the ground that its general allegations of discriminatory treatment by the defendants lacked sufficient specificity. Writing **[*577]** for a unanimous Court, Justice Black rejected the union's claim as foreclosed by the language of *Rule 8*. *Id., at 47-48, 78 S. Ct. 99, 2 L. Ed. 2d 80*. In the course of doing so, he articulated the formulation the Court rejects today: "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id., at 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80*.

Consistent with the design of the Federal Rules, *Conley*'s "no set of facts" formulation permits outright dismissal only when proceeding to discovery or beyond **[****59]** would be futile. Once it is clear that a plaintiff has stated a claim that, if true, would entitle him to relief, matters of proof are appropriately relegated to other stages of the trial process. Today, however, in its explanation of a decision to dismiss a complaint that it regards as a fishing expedition, the Court scraps *Conley*'s "no set of facts " language. Concluding that the phrase has been "questioned, criticized, and explained away long enough," *ante, at 562, 167 L. Ed. 2d, at 944*, the Court dismisses it as careless composition.

[1978]** If *Conley*'s "no set of facts" language is to be interred, let it not be without a eulogy. That exact language, which the majority says has "puzzl[ed] the profession for 50 years," *ante, at 563, 167 L. Ed. 2d, at 945*, has been cited as authority in a dozen opinions of this Court and four separate **[***954]** writings.[4] **[****61]** In not one of **[*578]** those 16 opinions was the language "questioned," "criticized," or "explained away." Indeed, today's opinion

---

[3] The Federal Rules do impose a "particularity" requirement on "all averments of fraud or mistake," *Fed. Rule Civ. Proc. 9(b)*, neither of which has been alleged in this case. We have recognized that the canon of *expressio unius est exclusio alterius* applies to *Rule 9(b)*. See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993)*.

[4] *SEC v. Zandford, 535 U.S. 813, 818, 122 S. Ct. 1899, 153 L. Ed. 2d 1 (2002)*; *Davis v. Monroe County Bd. of Ed., 526 U.S. 629, 654, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999)*; *Hartford Fire Ins. Co. v. California, 509 U.S. 764, 811, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993)*; *Brower v. County of Inyo, 489 U.S. 593, 598, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989)*; *Hughes v. Rowe, 449 U.S. 5, 10, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980)* *(per curiam); McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 246, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980)*; *Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)*; *Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)*; *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*; *Cruz v. Beto, 405 U.S. 319, 322, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972)* *(per curiam); Haines v. Kerner, 404 U.S. 519, 521, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972)* *(per curiam); Jenkins v. McKeithen, 395 U.S. 411, 422, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969)* (plurality opinion); see also *Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 554, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)* (Brennan, J., concurring in part and dissenting in part); *Hoover v. Ronwin, 466 U.S. 558, 587, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984)* (Stevens, J., dissenting); *United Air Lines, Inc. v. Evans, 431 U.S. 553, 561, n. 1, 97 S. Ct. 1885, 52 L. Ed. 2d 571 (1977)* (Marshall, J., dissenting); *Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 55, n. 6, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976)* (Brennan, J., concurring in judgment).

is the first by any Member of this Court to express *any* doubt as to the adequacy of the *Conley* formulation. Taking their cues from the federal courts, 26 States and the District of Columbia utilize as their standard for dismissal of a complaint the very language **[****60]** the majority repudiates: whether it appears "beyond doubt" that "no set of facts" in support of the claim would entitle the plaintiff to relief.[5]

[**62]** **[**1979]** **[*579]** Petitioners have not requested that the *Conley* formulation be retired, nor have any of the six *amici* who filed **[***955]** briefs in support of petitioners. I would not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so. Congress has established a process--a rulemaking process--for revisions of that order. See *28 U.S.C. §§ 2072-2074 (2000 ed. and Supp. IV)*.

Today's majority calls *Conley*'s "'no set of facts'" language "an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be **[*580]** supported by showing any set of facts consistent with the allegations in the complaint." *Ante, at 563, 167 L. Ed. 2d, at 945*. This is not and cannot be what the *Conley* Court meant. First, as I have explained, and as the *Conley* Court well knew, the pleading standard the Federal Rules meant to codify does not require, or even invite, the pleading of facts.[6] The "pleading standard"

---

[5] See, *e.g.*, *EB Invs., LLC v. Atlantis Development, Inc., 930 So. 2d 502, 507 (Ala. 2005)*; *Department of Health & Social Servs. v. Native Village of Curyung, 151 P. 3d 388, 396 (Alaska 2006)*; *Newman v. Maricopa Cty., 167 Ariz. 501, 503, 808 P.2d 1253, 1255* (App. 1991*)*; *Public Serv. Co. of Colo. v. Van Wyk, 27 P. 3d 377, 385-386 (Colo. 2001)* (en banc); *Clawson v. St. Louis Post-Dispatch, LLC, 906 A.2d 308, 312 (D. C. 2006)*; *Hillman Constr. Corp. v. Wainer, 636 So. 2d 576, 578 (Fla. App. 1994)*; *Kaplan v. Kaplan, 266 Ga. 612, 613, 469 S. E. 2d 198, 199 (1996)*; *Wright v. Home Depot U.S.A., Inc., 111 Haw. 401, 406, 142 P. 3d 265, 270 (2006)*; *Taylor v. Maile, 142 Idaho 253, 257, 127 P. 3d 156, 160 (2005)*; *Fink v. Bryant, 2001-CC-0987, p. 4 (La. 11/28/01), 801 So. 2d 346, 349*; *Gagne v. Cianbro Corp., 431 A.2d 1313, 1318-1319 (Me. 1981)*; *Gasior v. Massachusetts Gen. Hospital, 446 Mass. 645, 647, 846 N.E.2d 1133, 1135 (2006)*; *Ralph Walker, Inc. v. Gallagher, 926 So. 2d 890, 893 (Miss. 2006)*; *Jones v. Montana Univ. System, 337 Mont. 1, 7, 155 P. 3d 1247, 1252 (2007)*; *Johnston v. Neb. Dep't of Corr. Servs., 270 Neb. 987, 989, 709 N.W.2d 321, 324 (2006)*; *Blackjack Bonding v. Las Vegas Munic. Ct., 116 Nev. 1213, 1217, 14 P. 3d 1275, 1278 (2000)*; *Shepard v. Ocwen Fed. Bank, 361 N. C. 137, 139, 638 S. E. 2d 197, 199 (2006)*; *Rose v. United Equitable Ins. Co., 2001 ND 154, P10, 632 N.W.2d 429, 434*; *State ex rel. Turner v. Houk, 112 Ohio St. 3d 561, 562, 2007-Ohio-814, P5, 862 N.E.2d 104, 105* *(per curiam)*; *Moneypenney v. Dawson, 2006 OK 53, P2, 141 P. 3d 549, 551*; *Gagnon v. State, 570 A.2d 656, 659 (R. I. 1990)*; *Osloond v. Farrier, 2003 SD 28, P4, 659 N.W.2d 20, 22* *(per curiam)*; *Smith v. Lincoln Brass Works, Inc., 712 S.W.2d 470, 471 (Tenn. 1986)*; *Association of Haystack Property Owners, Inc. v. Sprague, 145 Vt. 443, 446, 494 A.2d 122, 124 (1985)*; *In re Coday, 156 Wn. 2d 485, 497, 130 P. 3d 809, 815 (2006)* (en banc); *Haines v. Hampshire Cty. Comm'n, 216 W. Va. 499, 502, 607 S. E. 2d 828, 831 (2004)*; *Warren v. Hart, 747 P.2d 511, 512 (Wyo. 1987)*; see also *Malpiede v. Townson, 780 A.2d 1075, 1082-1083 (Del. 2001)* (permitting dismissal only "where the court determines with reasonable certainty that the plaintiff could prevail on no set of facts that may be inferred from the well-pleaded allegations in the complaint" (internal quotation marks omitted)); *Canel v. Topinka, 212 Ill. 2d 311, 318, 818 N.E.2d 311, 317, 288 Ill. Dec. 623 (2004)* (replacing "appears beyond doubt" in the *Conley* formulation with "is clearly apparent"); *In re Young, 522 N.E.2d 386, 388 (Ind. 1988)* *(per curiam)* (replacing "appears beyond doubt" with "appears to a certainty"); *Barkema v. Williams Pipeline Co., 666 N.W.2d 612, 614 (Iowa 2003)* (holding that a motion to dismiss should be sustained "only when there exists no conceivable set of facts entitling the non-moving party to relief"); *Pioneer Village v. Bullitt Cty., 104 S. W. 3d 757, 759 (Ky. 2003)* (holding that judgment on the pleadings should be granted "if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief"); *Corley v. Detroit Bd. of Ed., 470 Mich. 274, 277, 681 N.W.2d 342, 345 (2004)* *(per curiam)* (holding that a motion for judgment on the pleadings should be granted only "'if no factual development could possibly justify recovery'"); *Oberkramer v. Ellisville, 706 S.W.2d 440, 441 (Mo. 1986)* (en banc) (omitting the words "beyond doubt" from the *Conley* formulation); *Colman v. Utah State Land Bd., 795 P.2d 622, 624 (Utah 1990)* (holding that a motion to dismiss is appropriate "only if it clearly appears that [the plaintiff] can prove no set of facts in support of his claim"); *NRC Mgmt. Servs. Corp. v. First Va. Bank - Southwest, 63 Va. Cir. 68, 70 (2003)* ("The Virginia standard is identical [to the *Conley* formulation], though the Supreme Court of Virginia may not have used the same words to describe it").

[6] The majority is correct to say that what the Federal Rules require is a "'showing'" of entitlement to relief. *Ante, at 555, n 3, 167 L. Ed. 2d, at 940*. Whether and to what extent that "showing" requires allegations of fact will depend on the particulars of the claim. For example, had the amended complaint in this case alleged *only* parallel conduct, it would not have made the required "showing." See *supra, at 570-571, 167 L. Ed. 2d, at 949*. Similarly, had the pleadings contained *only* an allegation of agreement, without specifying the nature or object of that agreement, they would have been susceptible to the charge that they

label the majority gives to what it reads into the *Conley* opinion--a statement of the permissible factual support for an adequately **[****63]** pleaded complaint--would not, therefore, have impressed the *Conley* Court itself. Rather, that Court would have understood the majority's remodeling of its language to express an *evidentiary* standard, which the *Conley* Court had neither need nor want to explicate. Second, it is pellucidly clear that the *Conley* Court was interested in what a complaint *must* contain, not what it *may* contain. In fact, the Court said without qualification that it was "appraising the *sufficiency* of **[**1980]** the complaint." *355 U.S., at 45, 78 S. Ct. 99, 2 L. Ed. 2d 80* (emphasis added). It was, to paraphrase today's majority, describing "the minimum standard of adequate pleading to govern a complaint's survival," *ante, at 563, 167 L. Ed. 2d, at 945*.

[**64]** We can be triply sure as to *Conley*'s meaning by examining the three Court of Appeals cases the *Conley* Court cited as support for the "accepted rule" that "a complaint should not **[*581]** be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of **[***956]** facts in support of his claim which would entitle him to relief." *355 U.S., at 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80*. In the first case, *Leimer v. State Mut. Life Assurance Co. of Worcester, Mass., 108 F.2d 302 (CA8 1940)*, the plaintiff alleged that she was the beneficiary of a life insurance plan and that the insurance company was wrongfully withholding proceeds from her. In reversing the District Court's grant of the defendant's motion to dismiss, the Eighth Circuit noted that court's own longstanding rule that, to warrant dismissal, "'it should appear from the allegations that a cause of action does not exist, rather than that a cause of action has been defectively stated.'" *Id., at 305* (quoting *Winget v. Rockwood, 69 F.2d 326, 329 (CA8 1934))*.

The *Leimer* court viewed the Federal Rules--specifically *Rules 8(a)(2)*, *12(b)(6)*, *12(e)* (motion for **[****65]** a more definite statement), and 56 (motion for summary judgment)--as reinforcing the notion that "there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim." *108 F.2d at 306*. The court refuted in the strongest terms any suggestion that the unlikelihood of recovery should determine the fate of a complaint: "No matter how improbable it may be that she can prove her claim, she is entitled to an opportunity to make the attempt, and is not required to accept as final a determination of her rights based upon inferences drawn in favor of the defendant from her amended complaint." *Ibid.*

The Third Circuit relied on *Leimer*'s admonition in *Continental Collieries, Inc. v. Shober, 130 F.2d 631 (1942)*, which the *Conley* Court also cited in support of its "no set of facts" formulation. In a diversity action the plaintiff alleged breach of contract, but the District Court dismissed the complaint on the ground that the contract appeared to be unenforceable under state **[****66]** law. The Court of Appeals reversed, **[*582]** concluding that there were facts in dispute that went to the enforceability of the contract, and that the rule at the pleading stage was as in *Leimer:* "No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it." *130 F.2d at 635*.

The third case the *Conley* Court cited approvingly was written by Judge Clark himself. In *Dioguardi v. Durning, 139 F.2d 774 (CA2 1944)*, the *pro se* plaintiff, an importer of "tonics," charged the customs inspector with auctioning off the plaintiff's former merchandise for less than was bid for it--and indeed for an amount equal to the plaintiff's own bid--and complained that two cases of tonics went missing three weeks before the sale. The inference, hinted at by the averments but never stated in so many words, was that the defendant fraudulently denied the plaintiff his rightful claim to the tonics, which, if true, would have violated federal law. Writing six years after the adoption of the Federal Rules he held the lead rein in drafting, Judge Clark said that the defendant **[****67]**

> "could have disclosed the facts from his point of view, in advance of a trial if he **[**1981]** chose, by asking for a pre-trial hearing or by moving for a summary judgment with supporting affidavits. But, as it stands, we do not see how the plaintiff may properly be deprived of his day in court to show what he obviously so **[***957]** firmly believes and what for present purposes defendant must be taken as admitting." *Id., at 775*.

---

did not provide sufficient notice that the defendants may answer intelligently. Omissions of that sort instance the type of "bareness" with which the Federal Rules are concerned. A plaintiff's inability to persuade a district court that the allegations actually included in her complaint are "plausible" is an altogether different kind of failing, and one that should not be fatal at the pleading stage.

As any civil procedure student knows, Judge Clark's opinion disquieted the defense bar and gave rise to a movement to revise *Rule 8* to require a plaintiff to plead a "'cause of action.'" See 5 Wright & Miller § 1201, at 86-87. The movement failed, see *ibid.; Dioguardi* was explicitly approved in *Conley;* and "[i]n retrospect the case itself seems to be a **[*583]** routine application of principles that are universally accepted," 5 Wright & Miller § 1220, at 284-285.

In light of *Leimer, Continental Collieries*, and *Dioguardi, Conley*'s statement that a complaint is not to be dismissed unless "no set of facts" in support thereof would entitle the plaintiff to relief is hardly "puzzling," *ante, at 562-563, 167 L. Ed. 2d, at 945*. It reflects a philosophy that, unlike **[****68]** in the days of code pleading, separating the wheat from the chaff is a task assigned to the pretrial and trial process. *Conley*'s language, in short, captures the policy choice embodied in the Federal Rules and binding on the federal courts.

We have consistently reaffirmed that basic understanding of the Federal Rules in the half century since *Conley.* For example, in *Scheuer v. Rhodes, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*, we reversed the Court of Appeals' dismissal on the pleadings when the respondents, the Governor and other officials of the State of Ohio, argued that the petitioners' claims were barred by sovereign immunity. In a unanimous opinion by then-Justice Rehnquist, we emphasized:

> "[W]hen a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. *Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.*" *Id., at 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90* (emphasis added). **[****69]**

The *Rhodes* plaintiffs had "alleged generally and in conclusory terms" that the defendants, by calling out the National Guard to suppress the Kent State University student protests, "were guilty of wanton, wilful and negligent conduct." *Krause v. Rhodes, 471 F.2d 430, 433 (CA6 1972)*. We reversed the Court of Appeals on the ground that "[w]hatever **[*584]** the plaintiffs may or may not be able to establish as to the merits of their allegations, their claims, as stated in the complaints, given the favorable reading required by the Federal Rules of Civil Procedure," were not barred by the *Eleventh Amendment* because they were styled as suits against the defendants in their individual capacities. *416 U.S., at 238, 94 S. Ct. 1683, 40 L. Ed. 2d 90*.

We again spoke with one voice against efforts to expand pleading requirements beyond their appointed limits in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993)*. Writing for the unanimous Court, Chief Justice Rehnquist rebuffed the Fifth Circuit's effort to craft a standard for pleading municipal liability that accounted for "the enormous expense involved today in litigation," **[****70]** *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* ***[***958]*** *954 F.2d 1054, 1057 (1992)* (internal quotation marks omitted), by requiring a plaintiff to "state with factual **[**1982]** detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity," *507 U.S., at 167, 113 S. Ct. 1160, 122 L. Ed. 2d 517* (internal quotation marks omitted). We found this language inconsistent with *Rules 8(a)(2)* and *9(b)* and emphasized that motions to dismiss were not the place to combat discovery abuse: "In the absence of [an amendment to *Rule 9(b)*], federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Id., at 168-169,113 S. Ct. 1160, 122 L. Ed. 2d 517*.

Most recently, in *Swierkiewicz, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1*, we were faced with a case more similar to the present one than the majority will allow. In discrimination cases, our precedents require a plaintiff at the summary judgment stage to produce either direct evidence of discrimination or, if the claim is based primarily on circumstantial evidence, to meet the shifting **[****71]** evidentiary burdens imposed under the framework articulated in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*. *See, e.g.*, *Trans World Airlines, Inc. v. Thurston,* ***[*585]*** *469 U.S. 111, 121, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985)*. Swierkiewicz alleged that he had been terminated on account of national origin in violation of Title VII of the Civil Rights Act of 1964. The Second Circuit dismissed the suit on the pleadings because he had not pleaded a prima facie case of discrimination under the *McDonnell Douglas* standard.

We reversed in another unanimous opinion, holding that "under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case." *Swierkiewicz, 534 U.S., at 511, 122 S. Ct. 992, 152 L. Ed. 2d 1*. We also observed that *Rule 8(a)(2)* does not contemplate a court's passing on the merits of a litigant's claim at the pleading stage. Rather, the "simplified notice pleading standard" of the Federal Rules "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious **[****72]** claims." *Id., at 512, 122 S. Ct. 992, 152 L. Ed. 2d 1*; see Brief for United States et al. as *Amici Curiae* in *Swierkiewicz* v. *Sorema N. A.*, O. T. 2001, No. 00-1853, p 10 (stating that a *Rule 12(b)(6)* motion is not "an appropriate device for testing the truth of what is asserted or for determining whether a plaintiff has any evidence to back up what is in the complaint" (internal quotation marks omitted)).[7]

As in the discrimination context, we have developed **[****73]** an evidentiary framework for evaluating claims under *§ 1* of the Sherman Act when those claims rest on entirely circumstantial evidence of conspiracy. See *Matsushita **[***959]** Elec. Industrial **[*586]** Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Under *Matsushita*, a plaintiff's allegations of an illegal conspiracy may not, at the summary judgment stage, rest solely on the inferences that may be drawn from the parallel conduct of the defendants. In order to survive a *Rule 56* motion, a *§ 1* plaintiff "must present evidence 'that tends **[**1983]** to exclude the possibility' that the alleged conspirators acted independently.'" *Id., at 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538* (quoting *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984))*. That is, the plaintiff "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action." *475 U.S., at 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538*.

Everything today's majority says would therefore make perfect sense if it were ruling on a *Rule 56* motion for summary judgment and the evidence included nothing more than the Court has described. But it should go without saying in the wake of *Swierkiewicz* **[****74]** that a heightened production burden at the summary judgment stage does not translate into a heightened pleading burden at the complaint stage. The majority rejects the complaint in this case because--in light of the fact that the parallel conduct alleged is consistent with ordinary market behavior--the claimed conspiracy is "conceivable" but not "plausible," *ante, at 570, 167 L. Ed. 2d, at 949*. I have my doubts about the majority's assessment of the plausibility of this alleged conspiracy. See Part III, *infra.* But even if the majority's speculation is correct, its "plausibility" standard is irreconcilable with *Rule 8* and with our governing precedents. As we made clear in *Swierkiewicz* and *Leatherman*, fear of the burdens of litigation does not justify factual conclusions supported only by lawyers' arguments rather than sworn denials or admissible evidence.

This case is a poor vehicle for the Court's new pleading rule, for we have observed that "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' . . . dismissals prior to giving the plaintiff ample **[*587]** opportunity for discovery should be granted very sparingly." *Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)* **[****75]** (quoting *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962))*; see also *Knuth v. Erie-Crawford Dairy Cooperative Asso., 395 F.2d 420, 423 (CA3 1968)* ("The 'liberal' approach to the consideration of antitrust complaints is important because inherent in such an action is the fact that all the details and specific facts relied upon cannot properly be set forth as part of the pleadings"). Moreover, the fact that the Sherman Act authorizes the recovery of treble damages and attorney's fees for successful plaintiffs indicates that Congress intended to encourage, rather than discourage, private enforcement of the law. See *Radovich v. National Football League, 352 U.S. 445, 454, 77 S. Ct. 390, 1 L. Ed. 2d 456 (1957)* ("Congress itself has placed the private antitrust litigant in a most favorable position . . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws"). It is therefore more, not less, important in antitrust cases to resist the urge to **[***960]** engage in armchair economics at the pleading stage.

---

[7] See also 5 Wright & Miller § 1202, at 89-90 ("[P]leadings under the rules simply may be a general summary of the party's position that is sufficient to advise the other party of the event being sued upon, to provide some guidance in a subsequent proceeding as to what was decided for purposes of res judicata and collateral estoppel, and to indicate whether the case should be tried to the court or to a jury. No more is demanded of the pleadings than this; indeed, history shows that no more can be performed successfully by the pleadings" (footnotes omitted)).

The same year we decided *Conley* **[****76]** , Judge Clark wrote, presciently,

> "I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings, i.e., the formalistic claims of the parties. Experience has found no quick and easy short cut for trials in cases generally *and antitrust cases in particular.*" Special Pleading in the "Big Case"? in Procedure--The Handmaid of Justice 147, 148 (C. Wright & H. Reasoner eds. 1965) (hereinafter **[**1984]** Clark, Special Pleading in the Big Case) (emphasis added).

[*588] In this "Big Case," the Court succumbs to the temptation that previous Courts have steadfastly resisted.[8] While the majority assures us that it is not applying any "'heightened'" pleading standard, see *ante, at 569, n 14, 167 L. Ed. 2d, at 948-949*, I shall now explain why I have a difficult time understanding its opinion any other way.

[**77]** III

The Court does not suggest that an agreement to do what the plaintiffs allege would be permissible under the antitrust laws, *see, e.g.*, *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 526-527, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. Nor does the Court hold that these plaintiffs have failed to allege an injury entitling them to sue for damages under those laws, see *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489-490, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Rather, the theory on which the Court permits **[*589]** dismissal is that, so far as the Federal Rules are concerned, no agreement has been alleged at all. This is a mind-boggling conclusion.

As the Court explains, prior to the enactment of the Telecommunications Act of 1996 the law prohibited the defendants from competing with each other. The new statute was enacted to replace a monopolistic market with a competitive one. The Act did not merely require the regional monopolists **[***961]** to take affirmative steps to facilitate entry to new competitors, see *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 402, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*; it also permitted the existing firms to compete with each **[****78]** other and to expand their operations into previously forbidden territory. See *47 U.S.C. § 271*. Each of the defendants decided not to take the latter step. That was obviously an extremely important business decision, and I am willing to presume that each company acted entirely independently in reaching that decision. I am even willing to entertain the majority's belief that any agreement among the companies was unlikely. But the plaintiffs allege in three places in their complaint, PP 4, 51, 64, App. 11, 27, 30, that the ILECs did in fact agree both to prevent competitors from entering into their local markets and to forgo competition with each other. And as the Court **[**1985]** recognizes, at the motion to dismiss stage, a judge assumes "that all the allegations in the complaint are true (even if doubtful in fact)." *Ante, at 555, 167 L. Ed. 2d, at 940*.

The majority circumvents this obvious obstacle to dismissal by pretending that it does not exist. The Court admits that "in form a few stray statements in the complaint speak directly of agreement," but disregards those allegations

---

[8] Our decision in *Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005)*, is not to the contrary. There, the plaintiffs failed adequately to allege loss causation, a required element in a private securities fraud action. Because it alleged nothing more than that the prices of the securities the plaintiffs purchased were artificially inflated, the *Dura* complaint failed to "provid[e] the defendants with notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the [alleged] misrepresentation." *Id., at 347, 125 S. Ct. 1627, 161 L. Ed. 2d 577*. Here, the failure the majority identifies is not a failure of notice--which "notice pleading" rightly condemns--but rather a failure to satisfy the Court that the agreement alleged might plausibly have occurred. That being a question not of *notice* but of *proof*, it should not be answered without first hearing from the defendants (as apart from their lawyers). Similarly, in *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, in which we also found an antitrust complaint wanting, the problem was not that the injuries the plaintiffs alleged failed to satisfy some threshold of plausibility, but rather that the injuries as alleged were not "the type that the antitrust statute was intended to forestall." *Id., at 540, 103 S. Ct. 897, 74 L. Ed. 2d 723*; see *id., at 526, 103 S. Ct. 897, 74 L. Ed. 2d 723* ("As the case comes to us, we must assume that the Union can prove the facts alleged in its amended complaint. It is not, however, proper to assume that the Union can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged").

by saying that "on fair reading these are merely legal conclusions resting on the prior allegations" of parallel **[****79]** conduct. *Ante, at 564, 167 L. Ed. 2d, at 946*. The Court's dichotomy between factual allegations and "legal conclusions" is the stuff of a bygone era, *supra, at 574-576, 167 L. Ed. 2d, at 938-939*. That distinction was a defining feature of code pleading, see generally Clark, The Complaint in **[*590]** Code Pleading, 35 Yale L. J. 259 (1925-1926), but was conspicuously abolished when the Federal Rules were enacted in 1938. See *United States v. Employing Plasterers Ass'n, 347 U.S. 186, 188, 74 S. Ct. 452, 98 L. Ed. 618 (1954)* (holding, in an antitrust case, that the Government's allegations of effects on interstate commerce must be taken into account in deciding whether to dismiss the complaint "[w]hether these charges be called 'allegations of fact' or 'mere conclusions of the pleader'"); *Brownlee v. Conine, 957 F.2d 353, 354 (CA7 1992)* ("The Federal Rules of Civil Procedure establish a system of notice pleading rather than of fact pleading, . . . so the happenstance that a complaint is 'conclusory,' whatever exactly that overused lawyers' cliche means, does not automatically condemn it"); *Walker Distributing Co. v. Lucky Lager Brewing Co., 323 F.2d 1, 3-4 (CA9 1963)* ("[O]ne purpose of *Rule 8* **[****80]** was to get away from the highly technical distinction between statements of fact and conclusions of law . . ."); *Oil, Chemical & Atomic Workers Int'l Union v. Delta, 277 F.2d 694, 697 (CA6 1960)* ("Under the notice system of pleading established by the Rules of Civil Procedure, . . . the ancient distinction between pleading 'facts' and 'conclusions' is no longer significant"); 5 Wright & Miller § 1218, at 267 ("[T]he federal rules do not prohibit the pleading of facts or legal conclusions as long as fair notice is given to the parties"). "Defendants entered into a contract" is no more a legal conclusion than "defendant negligently drove," see Form 9; *supra, at* ***[***962]*** *575-576, 167 L. Ed. 2d, at 952*. Indeed it is less of one.[9]

[**81]** **[*591]** Even if I were inclined to accept the Court's anachronistic dichotomy and ignore the complaint's actual allegations, I would dispute the Court's suggestion that any inference of agreement from petitioners' parallel conduct is "implausible." Many years ago a truly great economist perceptively observed that "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." A. Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations, in 39 Great Books of the Western World 55 (R. Hutchins & M. Adler eds. 1952). I am not so cynical as to accept that sentiment at face value, but I need not do so here. Respondents' complaint **[**1986]** points not only to petitioners' numerous opportunities to meet with each other, Complaint P 46, App. 23,[10] but also to Notebaert's curious statement that encroaching on a fellow incumbent's territory "might be a good way to turn a quick dollar but that doesn't make it right," *id.,* P 42, App. 22. What did he mean by that? One possible (indeed plausible) inference is that he meant that while it would be in his company's economic self-interest **[****82]** to compete with its brethren, he had agreed with his competitors not to do so. According to the complaint, that is how the Illinois Coalition for Competitive Telecom construed Notebaert's statement, *id.,* P 44, App. 22 (calling the statement "evidence of potential collusion among regional Bell phone monopolies to not compete **[*592]** against one another and kill off potential competitors in local phone service"), and that is how Members of Congress construed his company's behavior, *id.,* P 45, App. 23 (describing a letter to the Justice Department requesting an investigation into the possibility that the ILECs'"very apparent non-competition policy'" was coordinated).

[9] The Court suggests that the allegation of an agreement, even if credited, might not give the notice required by *Rule 8* because it lacks specificity. *Ante, at 565, n 10, 167 L. Ed. 2d, at 946*. The remedy for an allegation lacking sufficient specificity to provide adequate notice is, of course, a *Rule 12(e)* motion for a more definite statement. See *Swierkiewicz v. Sorema N. A., 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)*. Petitioners made no such motion and indeed have conceded that "[o]ur problem with the current complaint is not a lack of specificity, it's quite specific." Tr. of Oral Arg. 14. Thus, the fact that "the pleadings mentioned no specific time, place, or persons involved in the alleged conspiracies," *ante, at 565, n 10, 167 L. Ed. 2d, at 946*, is, for our purposes, academic.

[10] The Court describes my reference to the allegation that the defendants belong to various trade associations as "playfully" suggesting that the defendants conspired to restrain trade. *Ante, at 567, n 12, 167 L. Ed. 2d, at 947*. Quite the contrary: An allegation that competitors meet on a regular basis, like the allegations of parallel conduct, is consistent with--though not sufficient to prove--the plaintiffs' entirely serious and unequivocal allegation that the defendants entered into an unlawful agreement. Indeed, if it were true that the plaintiffs "rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs," *ante, at 564, 167 L. Ed. 2d, at 946*, there would have been no purpose in including a reference to the trade association meetings in the amended complaint.

[**83]** Perhaps Notebaert meant instead that competition would be sensible in the short term but not in the long run. That's what his lawyers tell us anyway. See Brief for Petitioners 36. But I would think that no one would know better what Notebaert meant than Notebaert himself. Instead of permitting respondents to ask Notebaert, however, the Court looks to other **[***963]** quotes from that and other articles and decides that what he meant was that entering new markets as a competitive local exchange carrier would not be a "'sustainable economic model.'" *Ante, at 568, n 13, 167 L. Ed. 2d, at 948*. Never mind that--as anyone ever interviewed knows--a newspaper article is hardly a verbatim transcript; the writer selects quotes to package his story, not to record a subject's views for posterity. But more importantly the District Court was required at this stage of the proceedings to construe Notebaert's ambiguous statement in the plaintiffs' favor.[11] See *Allen v. Wright, 468 U.S. 737, 767-768, n. 1, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)* (Brennan, J., dissenting). The inference the statement supports--that simultaneous decisions by ILECs not even to attempt to poach customers from one another once the law authorized them to **[*593]** do so were the product of an agreement--sits comfortably within **[****84]** the realm of possibility. That is all the Rules require.

To be clear, if I had been the trial judge in this case, I would not have permitted the plaintiffs to engage in massive discovery based solely on the allegations in this complaint. On the other hand, I surely would not have dismissed the complaint **[**1987]** without requiring the defendants to answer the charge that they "have agreed not to compete with **[****85]** one another and otherwise allocated customers and markets to one another."[12] Complaint, P 51, App. 27. Even a sworn denial of that charge would not justify a summary dismissal without giving the plaintiffs the opportunity to take depositions from Notebaert and at least one responsible executive representing each of the other defendants.

Respondents in this case proposed a plan of "'phased discovery'" limited to the existence of the alleged conspiracy and class certification. Brief for Respondents 25-26. Two petitioners rejected the plan. *Ibid.* Whether or not respondents' proposed plan was sensible, it was an appropriate subject for negotiation.[13] Given the charge in the

---

[11] It is ironic that the Court seeks to justify its decision to draw factual inferences in the defendants' favor at the pleading stage by citing to a rule of evidence, *ante, at 568, n 13, 167 L. Ed. 2d, at 948*. Under *Federal Rule of Evidence 201(b)*, a judicially noticed fact "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Whether Notebaert's statements constitute evidence of a conspiracy is hardly beyond reasonable dispute.

[12] The Court worries that a defendant seeking to respond to this "conclusory" allegation "would have little idea where to begin." *Ante, at 565, n 10, 167 L. Ed. 2d, at 946*. A defendant could, of course, begin by either denying or admitting the charge.

[13] The potential for "sprawling, costly, and hugely time-consuming" discovery, *ante, at 560, n 6, 167 L. Ed. 2d, at 943*, is no reason to throw the baby out with the bathwater. The Court vastly underestimates a district court's case-management arsenal. Before discovery even begins, the court may grant a defendant's *Rule 12(e)* motion; *Rule 7(a)* permits a trial court to order a plaintiff to reply to a defendant's answer, see *Crawford-El v. Britton, 523 U.S. 574, 598, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998)*; and *Rule 23* requires "rigorous analysis" to ensure that class certification is appropriate, *General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*; see *In re Initial Public Offering Securities Litigation, 471 F.3d 24 (CA2 2006)* (holding that a district court may not certify a class without ruling that each *Rule 23* requirement is met, even if a requirement overlaps with a merits issue). *Rule 16* invests a trial judge with the power, backed by sanctions, to regulate pretrial proceedings via conferences and scheduling orders, at which the parties may discuss, *inter alia*, "the elimination of frivolous claims or defenses," *Rule 16(c)(1)*; "the necessity or desirability of amendments to the pleadings," *Rule 16(c)(2)*; "the control and scheduling of discovery," *Rule 16(c)(6)*; and "the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems," *Rule 16(c)(12)*. Subsequently, *Rule 26* confers broad discretion to control the combination of interrogatories, requests for admissions, production requests, and depositions permitted in a given case; the sequence in which such discovery devices may be deployed; and the limitations imposed upon them. See *523 U.S., at 598-599, 118 S. Ct. 1584, 140 L. Ed. 2d 759*. Indeed, *Rule 26(c)* specifically permits a court to take actions "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" by, for example, disallowing a particular discovery request, setting appropriate terms and conditions, or limiting its scope. In short, the Federal Rules contemplate that pretrial matters will be settled through a flexible process of give and take, of proffers, stipulations, and stonewalls, not by having trial judges screen allegations

complaint **[*594]** --buttressed **[***964]** by the common sense of Adam Smith--I cannot say that the possibility that joint discussions **[****86]** **[**1988]** and perhaps some agreements played a role in petitioners' decisionmaking process is so implausible that dismissing the complaint before any defendant has denied the charge is preferable to granting respondents even a minimal opportunity **[*595]** to prove their claims. See Clark, New Federal Rules 977 ("[T]hrough the weapons of discovery and summary judgment we have developed new devices, with more appropriate penalties to aid in matters of *proof*, and do not need to force the pleadings to their less appropriate function").

[**87]** I fear that the unfortunate result of the majority's new pleading rule will be to invite lawyers' debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence. It is no surprise that the antitrust defense bar--among whom "lament" as to inadequate judicial supervision of discovery is most "common," see *ante, at 559, 167 L. Ed. 2d, at 942*--should lobby for this state of affairs. But "we must recall that their primary responsibility is to win cases for their clients, not to improve law administration for the public." Clark, Special Pleading in the Big Case 152. As we did in our prior decisions, we should have instructed them that their remedy was to seek to amend the Federal Rules--not our interpretation of them.[14] See *Swierkiewicz, 534 U.S., at 515, 122 S. Ct. 992, 152 L. **[***965]** Ed. 2d 1*; *Crawford-El v. Britton, 523 U.S. 574, 595, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998)*; *Leatherman, 507 U.S., at 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517*.

[**88]** IV

Just a few weeks ago some of my colleagues explained that a strict interpretation of the literal text of statutory language **[*596]** is essential to avoid judicial decisions that are not faithful to the intent of Congress. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, *ante*, p. 108 (Scalia, J., dissenting). I happen to believe that there are cases in which other tools of construction are more reliable than text, but I agree of course that congressional intent should guide us in matters of statutory interpretation. *Ante, at 106* (Stevens, J., concurring). This is a case in which the intentions of the drafters of three important sources of law--the Sherman Act, the Telecommunications Act of 1996, and the Federal Rules of Civil Procedure--all point unmistakably in the same direction, yet the Court marches resolutely the other way. Whether the Court's actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer. But that the Court has announced a significant new rule that does not even purport to **[****89]** respond **[**1989]** to any congressional command is glaringly obvious.

---

for their plausibility vel non without requiring an answer from the defendant. See Societe Internationale pour Participations Industrielles et *Commerciales, S. A. v. Rogers, 357 U.S. 197, 206, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958)* ("*Rule 34* is sufficiently flexible to be adapted to the exigencies of particular litigation"). And should it become apparent over the course of litigation that a plaintiff's filings bespeak an in terrorem suit, the district court has at its call its own in terrorem device, in the form of a wide array of *Rule 11* sanctions. See *Rules 11(b)*, *(c)* (authorizing sanctions if a suit is presented "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"); see *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533, 111 S. Ct. 922, 112 L. Ed. 2d 1140 (1991)* (holding that *Rule 11* applies to a represented party who signs a pleading, motion, or other papers, as well as to attorneys); *Atkins v. Fischer, 232 F.R.D. 116, 126 (DC 2005)* ("As possible sanctions pursuant to *Rule 11*, the court has an arsenal of options at its disposal").

[14] Given his "background in ***antitrust law***," *ante, at 560, n 6, 167 L. Ed. 2d, at 943*, Judge Easterbrook has recognized that the most effective solution to discovery abuse lies in the legislative and rulemaking arenas. He has suggested that the remedy for the ills he complains of requires a revolution in the rules of civil procedure:

> "Perhaps a system in which judges pare away issues and focus on investigation is too radical to contemplate in this country--although it prevailed here before 1938, when the Federal Rules of Civil Procedure were adopted. The change could not be accomplished without abandoning notice pleading, increasing the number of judicial officers, and giving them more authority . . . . If we are to rule out judge-directed discovery, however, we must be prepared to pay the piper. Part of the price is the high cost of unnecessary discovery--impositional and otherwise." Discovery as Abuse, *69 B. U. L. Rev. 635, 645 (1989)*.

The transparent policy concern that drives the decision is the interest in protecting antitrust defendants--who in this case are some of the wealthiest corporations in our economy--from the burdens of pretrial discovery. *Ante, at 558-560, 167 L. Ed. 2d, at 942-943*. Even if it were not apparent that the legal fees petitioners have incurred in arguing the merits of their *Rule 12(b)* motion have far exceeded the cost of limited discovery, or that those discovery costs would burden respondents as well as petitioners,[15] that concern would not provide an adequate justification for this law-changing decision. For in the final analysis it is only a lack of confidence in the ability of trial judges to control discovery, buttressed by appellate judges' independent appraisal of the plausibility of profoundly **[*597]** serious factual allegations, that could account for this stark break from precedent.

[**90]** If the allegation of conspiracy happens to be true, today's decision obstructs the congressional policy favoring competition that undergirds both the Telecommunications Act of 1996 and the Sherman Act itself. More importantly, even if there is abundant evidence that the allegation is untrue, directing that the case be dismissed without even looking at any of that evidence marks a fundamental--and unjustified--change in the character of pretrial practice.

Accordingly, I respectfully dissent.

References

15 U.S.C.S. § 1

Antitrust Laws and Trade Regulation §§ 11.02, 164.01, 164.02 (Matthew Bender)

Moore's Federal Practice §§ 8.02, *12.03* (Matthew Bender 3d ed.)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices *§ 45*

L Ed Index, Sherman Act

Supreme Court's construction and application of *Rules 8* and *9 of Federal Rules of Civil Procedure*, concerning general rules of pleading and pleading special matters. *122 L. Ed. 2d 897*.

Supreme Court's views as to what constitutes per se illegal "price fixing" under the Sherman Act (*15 U.S.C.S. § 1 et seq.*). *64 L. Ed. 2d 997*.

Applicability of federal antitrust laws as affected by other federal statutes or by Federal Constitution--Supreme Court cases. *45 L. Ed. 2d 841*.

End of Document

[15] It would be quite wrong, of course, to assume that dismissal of an antitrust case after discovery is costless to plaintiffs. See *Fed. Rule Civ. Proc. 54(d)(1)* ("[C]osts other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs").

Merck & Co. v. Apotex, Inc.

United States District Court for the District of Delaware

May 21, 2007, Decided ; May 21, 2007, Filed

C.A. No. 06-230 (GMS)

Reporter

488 F. Supp. 2d 418 *; 2007 U.S. Dist. LEXIS 36859 **; 2008-2 Trade Cas. (CCH) P76,244

MERCK & CO., INC., Plaintiff, v. APOTEX, INC., Defendant.

Subsequent History: Affirmed in part and vacated in part by, Remanded by *Merck & Co. v. Apotex, Inc., 2008 U.S. App. LEXIS 15014 (Fed. Cir., July 16, 2008)*

Core Terms

patent, generic, antitrust, covenant, infringed, certification, declaratory judgment, expiration, invalidity, patent infringement, innovator, FDA, circumstances, marketing, motion to dismiss, generic drug, counterclaim, parties, case or controversy, patentee, court's decision, triggering, lack of subject matter jurisdiction, drug company, file suit, pioneer, notice, actual controversy, district court, new drug

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Patent Law > ... > Utility Patents > Product Patents > General Overview

HN1[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

Section 505(j) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) has established the abbreviated new drug application (ANDA) approval process, which permits generic versions of previously approved innovator drugs to be approved without submission of a full new drug application (NDA). An ANDA refers to a previously approved new drug application (listed drug) and relies upon the Food and Drug Administration's (FDA) finding of safety and effectiveness for that drug product. The timing of an ANDA approval depends in part on patent protections for the innovator drug. Innovator drug applicants must include in an NDA information about patents for the drug product that is the subject of the NDA. The FDA publishes patent information on approved drug products in the FDA's publication "Approved Drug Products with Therapeutic Equivalence Evaluations," otherwise known as the "Orange Book." The FD&C Act requires that an ANDA contain a certification for each patent listed in the Orange Book for the innovator drug. This certification must state one of the following: (i) that the required patent information relating to such patent has not been filed; (ii) that such patent has expired; (iii) that the patent will expire on a particular date; or (iv) that such patent is invalid or will not be infringed by the drug, for which approval is being sought.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Patent Law > Infringement Actions > General Overview

HN2[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

A certification under paragraph I or II of the Federal Food, Drug, and Cosmetic Act permits the abbreviated new drug application (ANDA) to be approved immediately, if it is otherwise eligible. A certification under paragraph III indicates that the ANDA may be approved on the patent expiration date. A paragraph IV certification begins a process in which the question of whether the listed patent is valid or will be infringed by the proposed generic product may be answered by the courts prior to the expiration of the patent. The ANDA applicant who files a paragraph IV certification to a listed patent must notify the patent owner and the new drug application (NDA) holder for the listed drug that it has filed an ANDA containing a patent challenge. The notice must include a detailed statement of the factual and legal basis for the ANDA applicant's opinion that the patent is not valid or will not be infringed. The submission of an ANDA for a drug product claimed in a patent is an infringing act if the generic product is intended to be marketed before expiration of the patent, and therefore, the ANDA applicant who submits an application containing a paragraph IV certification may be sued for patent infringement.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Patent Law > Infringement Actions > General Overview

HN3[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

If a new drug application sponsor or patent owner files a patent infringement suit against an abbreviated new drug application (ANDA) applicant within 45 days of the receipt of notice, the Food and Drug Administration may not give final approval to the ANDA for at least 30 months from the date of the notice. This 30-month stay will apply unless the court reaches a decision earlier in the patent infringement case, or otherwise orders a longer or shorter period for the stay.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Patent Law > Infringement Actions > General Overview

HN4[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The Federal Food, Drug, and Cosmetic Act provides an incentive of 180 days of market exclusivity to the "first" generic applicant who challenges a listed patent by filing a paragraph IV certification and running the risk of having to defend a patent infringement suit. The statute provides that the first applicant to file a substantially complete abbreviated new drug application containing a paragraph IV certification to a listed patent will be eligible for a 180-day period of exclusivity beginning either from the date it begins commercial marketing of the generic drug product, or from the date of a court decision finding the patent invalid, unenforceable or not infringed, whichever is first. These two events - first commercial marketing and a court decision favorable to the generic - are often called "triggering" events, because under the statute they can trigger the beginning of the 180-day exclusivity period.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN5[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

In some circumstances, an abbreviated new drug application (ANDA) applicant who obtains 180-day exclusivity may be the sole marketer of a generic competitor to the innovator product for 180 days. But 180-day exclusivity can begin to run, with a court decision, even before an applicant has received approval for its ANDA. In that case, some, or all, of the 180-day period could expire without the ANDA applicant marketing its generic drug. Conversely, if there is no court decision and the first applicant does not begin commercial marketing of the generic drug, there may be prolonged or indefinite delays in the beginning of the first applicant's 180-day exclusivity period. Approval of an ANDA has no effect on exclusivity, except if the sponsor begins to market the approved generic drug. Until an eligible ANDA applicant's 180-day exclusivity period has expired, the Food and Drug Administration cannot approve subsequently submitted ANDAs for the same drug, even if the later ANDAs are otherwise ready for approval and the sponsors are willing to immediately begin marketing. Therefore, an ANDA applicant who is eligible for exclusivity is often in the position to delay all generic competition for the innovator product.

Constitutional Law > The Judiciary > Case or Controversy > General Overview

HN6[] **The Judiciary, Case or Controversy**

The exercise of judicial power under Article III of the United States Constitution requires the existence of a case or controversy.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Constitutional Law > The Judiciary > Case or Controversy > General Overview

HN7[] **Declaratory Judgments, Federal Declaratory Judgments**

The Declaratory Judgment Act requires an actual controversy between the parties before a federal court may exercise jurisdiction over an action for a declaratory judgment. The actual controversy requirement is met when, the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issue of a declaratory judgment. When an actual controversy does exist sufficient to warrant subject matter jurisdiction, however, the district court is not required to exercise declaratory judgment jurisdiction, but has discretion to decline that jurisdiction.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Constitutional Law > The Judiciary > Case or Controversy > General Overview

HN8[] **Declaratory Judgments, Federal Declaratory Judgments**

The question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Constitutional Law > The Judiciary > Case or Controversy > General Overview

HN9[] **The Judiciary, Case or Controversy**

The actual controversy must be in existence at all stages of the litigation and cannot merely be present at the filing of the complaint.

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN10[] **Standing, Elements**

Article III standing requires a plaintiff to allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

HN11[] **Jurisdiction & Review, Subject Matter Jurisdiction**

It is well-established that a trial court may be divested or deprived of subject matter jurisdiction over a particular patent claim if the patentee covenants not to assert an infringement claim against a putative infringer.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

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

HN12[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Fed. R. Civ. P. 12(h)(3) states whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN13[] **Motions to Dismiss, Failure to State Claim**

Recognizing that motions to amend shall be granted freely under *Fed. R. Civ. P. 15(a)*, a court has discretion to deny leave to amend when there is undue delay, bad faith, dilatory motive or undue prejudice to the opposing party, or when the amendment would be futile. In assessing futility, the court applies the same standard of legal sufficiency as applies under *Fed. R. Civ. P. 12(b)(6)*.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN14[] **Standing, Requirements**

The United States Supreme Court has outlined the factors that courts should consider when determining whether a party has standing to bring a private action under the antitrust laws: (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN15[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

See *21 U.S.C.S. § 355(j)(5)(B)(iii)*.

Civil Procedure > Remedies > General Overview

HN16[] **Civil Procedure, Remedies**

A court cannot remedy every harm or prejudice a party endures. Moreover, not every business disadvantage is appropriately deemed legal injury.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN17[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The existing law does not provide an absolute right of a generic drug company to enter the market in which a pioneer drug company and a first-filing generic applicant have legally achieved some market exclusivity.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Patent Law > Infringement Actions > Exclusive Rights > Limitations

HN18[] **Misuse of Rights, Patent Misuse Defense**

A patent is an exception to the general rule against monopolies and to the right to access to a free and open market. Thus, by their nature, patents create an environment of exclusion, and consequently, cripple competition. The anticompetitive effect is already present. When patentees attempt to extend their legal monopoly beyond that which is permitted by their statutory grants, such actions can trigger antitrust liability.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Patent Law > Infringement Actions > Exclusive Rights > General Overview

HN19[] **Misuse of Rights, Patent Misuse Defense**

Any adverse effects within the scope of a patent or statutory right to exclude, however, cannot be redressed by ***antitrust law***.

Counsel: **[**1]** Mary B. Graham, Esquire, and James W. Parrett, Jr., Esquire, of MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware, and John DeQ. Briggs, Esquire, John F. Lynch, Esquire, Kenneth W. Donnelly, Esquire, Aaron Myers, Esquire, of HOWREY LLP, Washington, D.C., and Nicholas G. Barzoukas, Esquire, Suzy S. Harbison, Esquire, Jason C. Abair, Esquire, of WEIL, GOTSHAL & MANGES, Houston, Texas, and Paul D. Matukaitis, Edward W. Murray, Gerard M. Devlin, of MERCK & CO., INC., Attorneys for Plaintiff.

Richard L. Horwitz, Esquire, and Kenneth L. Dorsney, Esquire, of POTTER ANDERSON & CORROON, LLP, Wilmington, Delaware, and A. Sidney Katz, Esquire, Robert B. Breisblatt, Esquire, Louise T. Walsh, Esquire, Michael Krol, Esquire, of WELSH & KATZ, LTD., Chicago, Illinois, Attorneys for Defendant.

Judges: Gregory M. Sleet, District Judge.

Opinion by: Gregory M. Sleet

Opinion

[*420] **OPINION**

May 21, 2007

Wilmington, Delaware

Gregory M. Sleet, District Judge.

I. INTRODUCTION

The plaintiff Merck & Co., Inc. ("Merck") filed suit against the defendant Apotex, Inc. ("Apotex") in the above-captioned matter, alleging that Apotex committed an act of patent infringement under *35 U.S.C. § 271(e)(2)(A)* **[**2]** . Merck moves to dismiss its complaint for lack of subject matter jurisdiction because, since filing suit, it has given Apotex a comprehensive covenant not to sue, which removed the controversy between the parties. For the reasons that follow, Merck's motion is granted.

II. SUMMARY OF STATUTORY FRAMEWORK

The provisions of the Drug Price Competition and Patent Term Restoration Act of 1984 (the "Hatch-Waxman Amendments") govern the generic drug approval process. [1] The Food and Drug Administration ("FDA" or "Agency"), provides the following summary explanation of the Act's statutory provisions, at *http://www.fda.gov/cder/about/smallbiz/generic_exclusivity.htm*, which the court incorporates in pertinent part:

[3]** The Hatch-Waxman Amendments are intended to balance two important public policy goals. First, drug manufacturers need meaningful market protection incentives to encourage the development of valuable new drugs. Second, once the statutory patent protection and marketing exclusivity for these new drugs has expired, the public benefits from the rapid availability of lower priced generic versions of the innovator drug.

[1] The Hatch-Waxman Amendments were modified by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. ***Pub. L. No. 108-173, § 1101(a)(2)(A)(ii), 117 Stat. 2066*** (amended 2003). Herein, all references to the Hatch-Waxman Amendments and its regulatory framework include the scope of the provisions as later modified.

The Hatch-Waxman Amendments amended the Federal Food, Drug, and Cosmetic ("FD&C") Act and created **[*421]** *section 505(j)*. ***HN1***[] *Section 505(j)* established the abbreviated new drug application ("ANDA") approval process, which permits generic versions of previously approved innovator drugs to be approved without submission of a full new drug application ("NDA"). An ANDA refers to a previously approved new drug application (the "listed drug") and relies upon the Agency's finding of safety and effectiveness for that drug product. The timing of an ANDA approval depends in part on patent protections for the innovator drug. Innovator drug applicants must include in an NDA information about patents for the drug product that is the subject of the NDA. The FDA publishes patent information on approved **[**4]** drug products in the Agency's publication "Approved Drug Products with Therapeutic Equivalence Evaluations," otherwise known as the "Orange Book." The FD&C Act requires that an ANDA contain a certification for each patent listed in the Orange Book for the innovator drug. This certification must state one of the following: (i) that the required patent information relating to such patent has not been filed; (ii) that such patent has expired; (iii) that the patent will expire on a particular date; or (iv) that such patent is invalid or will not be infringed by the drug, for which approval is being sought.

HN2[] A certification under paragraph I or II permits the ANDA to be approved immediately, if it is otherwise eligible. A certification under paragraph III indicates that the ANDA may be approved on the patent expiration date. A paragraph IV certification begins a process in which the question of whether the listed patent is valid or will be infringed by the proposed generic product may be answered by the courts prior to the expiration of the patent. The ANDA applicant who files a paragraph IV certification to a listed patent must notify the patent owner and the NDA holder for the listed **[**5]** drug that it has filed an ANDA containing a patent challenge. The notice must include a detailed statement of the factual and legal basis for the ANDA applicant's opinion that the patent is not valid or will not be infringed. The submission of an ANDA for a drug product claimed in a patent is an infringing act if the generic product is intended to be marketed before expiration of the patent, and therefore, the ANDA applicant who submits an application containing a paragraph IV certification may be sued for patent infringement. ***HN3***[] If the NDA sponsor or patent owner files a patent infringement suit against the ANDA applicant within 45 days of the receipt of notice, the FDA may not give final approval to the ANDA for at least 30 months from the date of the notice. This 30-month stay will apply unless the court reaches a decision earlier in the patent infringement case, or otherwise orders a longer or shorter period for the stay.

HN4[] The statute provides an incentive of 180 days of market exclusivity to the "first" generic applicant who challenges a listed patent by filing a paragraph IV certification and running the risk of having to defend a patent infringement suit. The statute provides that **[**6]** the first applicant to file a substantially complete ANDA containing a paragraph IV certification to a listed patent will be eligible for a 180-day period of exclusivity beginning either from the date it begins commercial marketing of the generic drug product, or from the date of a court decision finding the patent invalid, unenforceable or not infringed, whichever is first. These two events--first commercial marketing and a court decision favorable to the generic--are often called "triggering" events, because under the statute they can trigger the beginning of the 180-day exclusivity period.

HN5[] In some circumstances, an applicant who obtains 180-day exclusivity may be the **[*422]** sole marketer of a generic competitor to the innovator product for 180 days. But 180-day exclusivity can begin to run, with a court decision, even before an applicant has received approval for its ANDA. In that case, some, or all, of the 180-day period could expire without the ANDA applicant marketing its generic drug. Conversely, if there is no court decision and the first applicant does not begin commercial marketing of the generic drug, there may be prolonged or indefinite delays in the beginning of the first applicant's **[**7]** 180-day exclusivity period. Approval of an ANDA has no effect on exclusivity, except if the sponsor begins to market the approved generic drug. Until an eligible ANDA applicant's 180-day exclusivity period has expired, the FDA cannot approve subsequently submitted ANDAs for the same drug, even if the later ANDAs are otherwise ready for approval and the sponsors are willing to immediately begin marketing. Therefore, an ANDA applicant who is eligible for exclusivity is often in the position to delay all generic competition for the innovator product.

III. BACKGROUND

Merck is the owner of nine patents listed in the Orange Book for the drug alendronate sodium, which Merck markets and sells under the trademark Fosamax. [2] On February 24, 2006, Apotex sent Merck a letter informing Merck that Apotex filed ANDA No. 077-982, seeking approval from the FDA to market a generic version of Merck's Fosomax tablets. Apotex certified in its ANDA submission that certain Merck patents were invalid, unenforceable and/or will not be infringed by the commercial manufacture, use, or sale of Apotex's generic version. Apotex was not the first generic filer to challenge Merck's patents on the Fosamax **[**8]** drug.

In the absence of any further information than what Apotex provided in its February 2006 letter, on April 7, 2006, Merck filed this action to protect its rights under the Hatch-Waxman Act. Apotex counterclaimed for a declaratory judgment of invalidity and noninfringement of the nine patents at issue. In August 2006, after receiving more detailed information from Apotex regarding its generic version of Fosamax, Merck granted Apotex a comprehensive covenant not to sue.

IV. LEGAL STANDARD

HN6[] The exercise of judicial power under Article III of the United States Constitution requires the existence of a case or controversy. ***HN7***[] The Declaratory Judgment Act "requires an actual controversy between the parties before a federal court may exercise jurisdiction over an action for a declaratory judgment." *EMC Corp. v. Norand Corp., 89 F.3d 807, 810 (Fed. Cir. 1996).* **[**9]** The actual controversy requirement is met when, "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issue of a declaratory judgment." *Id.* (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826 (1941))*. When an actual controversy does exist sufficient to warrant subject matter jurisdiction, however, "the district court is not required to exercise declaratory judgment jurisdiction, but has discretion to decline that jurisdiction." *EMC Corp., 89 F.3d at 810*.

[*423] V. DISCUSSION

Merck argues that, as a result of its covenant not to sue Apotex on the asserted patents, this action is moot and the court lacks subject matter jurisdiction over the purported controversy. Conversely, Apotex asks that the court deny Merck's motion for the following reasons: (1) a dismissal without a finding of invalidity and/or noninfringement would operate to deny Apotex "its right to compete with Merck for want of a 'triggering event'" and that Apotex would be injured by delayed entry into the market; (2) **[**10]** the court should not sanction Merck's "manipulating the court's jurisdiction" by filing a patent infringement suit, later presenting a covenant not to sue, and then attempting to dismiss Apotex's counterclaims for lack of subject matter jurisdiction; and (3) the court has subject matter jurisdiction because this case satisfies the Supreme Court's test for determining an actual case or controversy. (D.I. 19 at 2.)

Existence of an Actual Case or Controversy

In *Teva v. Novartis,* the Court of Appeals for the Federal Circuit ("Federal Circuit") acknowledged that the Supreme Court, in *MedImmune v. Genentech, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)*, disagreed with the Federal Circuit's "reasonable apprehension of suit" test, and refocused the declaratory judgment jurisprudence on earlier Supreme Court precedent. *Teva Pharm. USA, Inc. v. Novartis Pharm. Corp., 482 F.3d 1330, 1339 (Fed. Cir. 2007)*. Thus, ***HN8***[] "the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory **[**11]** judgment." *MedImmune v. Genentech, 127 S. Ct. at 771* (citing

---

[2] The patents listed in Merck's NDA, which are the patents-in-suit, are U.S. Patent Nos. 5,358,941; 5,681,590; 5,849,726; 6,008,207; 6,090,410; 6,194,004; 5,994,329; 6,015,801; and 6,225,294.

Maryland Casualty Co., 312 U.S. at 273). In support of its argument that an actual case or controversy exists in this case, Apotex points to the Federal Circuit's observation in *Teva v. Novartis:*

> A justiciable declaratory judgment controversy arises for an ANDA filer when a patentee lists patents in the Orange Book, the ANDA applicant files its ANDA certifying the listed patents under paragraph IV, and the patentee brings an action against the submitted ANDA on one or more of the patents. The combination of these three circumstances is dispositive in establishing an actual declaratory judgment controversy as to all the paragraph IV certified patents, whether the patentee has sued on all or only some of the paragraph IV certified patents.

482 F.3d at 1344. The court agrees with the Federal Circuit's observation about what ***establishes*** a justiciable declaratory judgment controversy in the Hatch-Waxman context. Further, the court recognizes that, when filed, this case also presented a justiciable controversy. A significant distinction between the scenario in **[**12]** *Teva v. Novartis* and the case here is that Novartis had declined to give Teva a covenant not to sue. Here, after the case was filed, and Merck received further information upon which it could evaluate the infringement action, Merck presented Apotex with a comprehensive covenant not to sue. ***HN9***[] The actual controversy must be in existence at all stages of the litigation and cannot merely be present at the filing of the complaint. *Super Sack v. Chase, 57 F.3d 1054, 1058 (Fed. Cir. 1995)*.

HN10[] Article III standing requires "[a] plaintiff [to] allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright,* ***[*424]*** *468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)*. Here, having received a covenant not to sue, Apotex does not and cannot allege "*unlawful* conduct" attributable to Merck in connection with its declaratory judgment claim. Further, Apotex's articulated injury--delayed entry to the market--is not fairly traceable to Merck. There is no evidence to conclude that Apotex's delayed entry into the market is any different than what it would have been had Merck never sued it. Thus, Apotex's **[**13]** advancement of this case against Merck becomes merely a means to an end, where the desired "end" is a triggering event but the means to that end, the litigation itself, is not sanctioned under the current legal framework. To proceed to a substantive "court decision" on the merits of Apotex's claims of noninfringement or invalidity would amount to an impermissible advisory opinion. *See* *Preiser v. Newkirk, 422 U.S. 395, 401, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975)* (holding that courts may not render advisory opinions or decide questions that do not affect the rights of the parties to the case).

Merck's covenant not to sue removes any cause for concern that Apotex could be held liable for infringement of the patents in suit. *See* *Super Sack, 57 F.3d at 1059*. Moreover, ***HN11***[] "'[i]t is well-established that a trial court may be divested or deprived of subject matter jurisdiction over a particular patent claim if the patentee covenants not to assert an infringement claim against a putative infringer.'" *Crossbow Tech., Inc. v. Yh Tech., No. C 03-04360, 2007 U.S. Dist. LEXIS 8028, 2007 WL 174422, at *2 (N.D. Cal. Jan. 22, 2007)* (quoting *Eli Lilly & Co. v. Zenith Goldline Pharms., 101 F. Supp. 2d 1139, 1142 (S.D. Ind. 2000)).* **[**14]** ***HN12***[] *Federal Rule of Civil Procedure 12(h)(3)* states "[*w*]*henever* it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Accordingly, the court must dismiss this action for lack of subject matter jurisdiction. [3]

Manipulation of Court Jurisdiction

Notwithstanding the body of law that mandates dismissal, the court is sensitive to Apotex's argument that Merck is manipulating the court's jurisdiction. Indeed, the court must guard its jurisdiction jealously. Apotex highlights an interesting yet troublesome practice that has emerged from the interplay of the Hatch-Waxman regulatory scheme, covenants not to sue, subject-matter jurisdiction, and the typical time cycle of **[**15]** a patent litigation. This lawsuit exposes the ability of pioneer drug companies to potentially hold generics at bay by suing them, as they are

---

[3] Apotex also contends that the collateral consequences doctrine permits the court to retain jurisdiction. The court has considered the parties' arguments and finds Apotex's position to be without merit.

authorized to do when a paragraph IV certification is made in an ANDA, and then granting a covenant not to sue, which divests the court of subject-matter jurisdiction. In this way, district courts can be viewed as unwitting agents in a pioneer drug company's ability to defer competition for as long as possible. As unfortunate as it may be for Apotex, this is the framework that the Hatch-Waxman Act created. [4] The legislative **[*425]** history suggests that, in fact, Congress contemplated the use of covenants not to sue as a means of resolving any controversy created by the filing of an ANDA:

> The provision [a "civil action to obtain patent certainty"] . . . is intended to clarify that Federal district courts are to entertain such suits for declaratory judgments so long as there is a "case or controversy" under Article III of the Constitution. We fully expect that, in almost all situations where a generic applicant has challenged a patent [by filing an ANDA with a paragraph IV certification] and not been sued for patent infringement, a claim **[**16]** by the generic applicant seeking declaratory judgment on the patent will give rise to a justiciable "case or controversy" under the Constitution. ***We believe that the only circumstance in which a case or controversy might not exist would arise in the rare circumstance in which the patent owner and brand drug company have given the generic applicant a covenant not to sue, or otherwise formally acknowledge that the generic applicant's drug does not infringe.***

149 Cong. Rec. S15885 (Nov. 25, 2003) (remarks of Sen. Kennedy, ranking member of Senate HELP committee) (emphasis added)).

[17]** ANDA litigation reaches the federal courts through specialized legislation enacted by Congress, perhaps without the prescience of the maze it would be creating, and the ingenuity of motivated business persons and lawyers to capitalize on its imperfections. These cases represent the intersecting roles of all three branches of government and the pharmaceutical industry: the court's interest in interpreting the existing law so that it can provide justice and equity to injured parties; congressional interest in making laws that will encourage research and development, as well as to speed entry of generic drugs into the market; a regulatory agency's interest in advancing the public health by helping to speed innovations that make medicines and foods more effective, safer, and more affordable; and the pharmaceutical industry's interest in protecting its bottom line. This court is without the power, however, to ameliorate the problems that have emerged from this interplay.

Apotex argues that the Federal Circuit, in *Teva v. Novartis,* recognized that a patentee's actions of only suing on one of its patents frustrated the central purpose behind Hatch-Waxman, and that this court should **[**18]** similarly recognize the gamesmanship behind suing, covenanting not to sue, and moving to dismiss without a decision on the merits. In finding a justiciable controversy in *Teva v. Novartis,* however, the Federal Circuit found frustration of the Hatch-Waxman Act's purpose to be just one of numerous circumstances, in the "totality of circumstances" analysis, that warranted a finding of an actual controversy. *482 F.3d at 1344*. Moreover, in the past, both innovator and generic companies have been accused of "gaming" the Hatch-Waxman regulatory regime to their respective benefit. [5] Congress responded **[*426]** through legislation. *See* 149 Cong. Rec. S15882-03, S15885 (Nov. 25, 2003) ("[I]n recent years both brand-name and generic drug companies have exploited certain aspects of the

---

[4] The court is also troubled by the practical realities of a scheme, which in effect, if left as is, enmeshes the district courts in unnecessary, and in this court's opinion, improper involvement in business competition. This cycle not only contributes to court congestion but it wastes the court's valuable time and limited resources by conducting the business it must for these cases, until it reaches the merits of such contested motions to dismiss. The time-triggered provisions of the statute unrealistically presuppose the time in which the district courts are to manage their cases. While the court endeavors to be efficient and expeditious in resolving the matters pending before it, time proscriptions such as those that Congress has assumed in the Hatch-Waxman provisions, and those upon which the litigants press the court, are idealistic at best and unfeasible in practice. The joint effort of the branches of government to balance the interests of consumers with those of innovator and generic drug companies should not be so tunnel-visioned as to facilitate litigants in their attempts to catapult ANDA litigation as a priority in the district courts.

[5] The Federal Trade Commission issued studies in 2002 and 2003 that examined and commented on the conduct of drug companies in the generic drug approval process. Fed. Trade Comm'n, Generic Drug Entry Prior to Patent Expiration: An FTC Study (2002), available at *http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf;* Fed. Trade Comm'n, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy, (2003), available at *http://www.ftc.gov/os/2003/10/innovationrpt.pdf*.

Hatch-Waxman Act to delay generic competition. The changes to the [] Act . . . will stop these abuses.") (remarks of Sen. Kennedy, ranking member of the Senate HELP committee regarding the 'civil action to obtain patent certainty' provision under *21 U.S.C. § 355(j)(5)(C)*). Likewise, if it is the view of Congress that pharmaceutical companies are abusing the Act in the way **[**19]** that Apotex complains here, Congress can reform the Hatch-Waxman Amendments as it deems necessary.

Right to Competition -- Antitrust Claim

Apotex's argument that a dismissal without a finding of invalidity or noninfringement would operate to deny Apotex "its right to compete with Merck for want of a 'triggering event'" coincides with its proposed antitrust counterclaim presented in its motion to amend. As such, the court will address this argument and Apotex's motion together.

HN13[] Recognizing that motions to amend shall be **[**20]** granted freely under *Federal Rule of Civil Procedure 15(a)*, the court has discretion to deny leave to amend when there is undue delay, bad faith, dilatory motive or undue prejudice to the opposing party, or when the amendment would be futile. *See* *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*; *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997)*. In assessing futility, the court applies the same standard of legal sufficiency as applies under *Rule 12(b)(6)*. *Id.* Thus, the court looks to whether Apotex's antitrust claim, if allowed, would survive a motion to dismiss.

HN14[] The Supreme Court has outlined the factors that courts should consider when determining whether a party has standing to bring a private action under the antitrust laws: (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the **[**21]** concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages. *City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 263 (3d Cir. 1998)* (citing *Associated Gen. Contractors of California v. California State Council of Carpenters, 459 U.S. 519, 537-45, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*.

Apotex argues, both in its opposition to Merck's motion to dismiss and in Apotex's motion to amend, that if the court grants Merck's motion to dismiss, the 30-month stay on Apotex's ANDA application will not be terminated, the 180-day exclusivity period will not be triggered, and Apotex, as well as the other secondary generic applicants, will be prevented from entering the generic market until 180 days after the first generic applicant enters the market. With these consequences in mind, Apotex asserts that Merck's actions of filing suit, covenanting not to sue, and moving to dismiss for lack of subject matter jurisdiction, **[*427]** are an unlawfully anticompetitive and monopolistic scheme to delay entry by Apotex **[**22]** and other generic filers into the market for generic alendronate sodium.

One material aspect of this discussion is whether the FDA's 30-month stay on Apotex's ANDA will terminate upon the court's dismissal of the action. The 30-month stay was introduced to give the generic applicant and NDA holder the opportunity to resolve patent issues prior to commercial marketing. Fed. Trade Comm'n, Generic Drug Entry Prior to Patent Expiration: An FTC Study (2002), available at *http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf*, at 39. *21 U.S.C. § 355(j)(5)(B)(iii)(2003)* provides:

> ***HN15***[] If such an action is brought before the expiration of [45 days after the date that the paragraph IV notice is received], the approval shall be made effective upon the expiration of the thirty-month period beginning on the date of the receipt of the notice provided under paragraph (2)(B)(i) or such shorter or longer period as the court may order because either party to the action failed to reasonably cooperate in expediting the action, except that--
>
> **(I)** if before the expiration of such period the district court decides that the patent is invalid or not infringed (including **[**23]** any substantive determination that there is no cause of action for patent infringement or invalidity), the approval shall be made effective on--

(aa) the date on which the court enters judgment reflecting the decision; or

(bb) the date of a settlement order or consent decree signed and entered by the court stating that the patent that is the subject of the certification is invalid or not infringed;

Merck argues that the parenthetical clause of *§ 355(j)(5)(B)(iii)(I)*, "(including any substantive determination that there is no cause of action for patent infringement or invalidity)," instructs that a dismissal for lack of subject matter jurisdiction would lift the 30-month stay on an ANDA. Apotex contends that the FDA has not yet construed the provision, and that the FDA's construction of similar, previously disputed language suggests that nothing less than a court decision of invalidity, noninfringement or unenforceability would affect the stay. [6] Neither the parties nor the court can be certain of how the provision will be applied to Apotex. Moreover, the matters pending before the court do not mandate this court's interpretation of the statute. It is noteworthy, **[**24]** however, that the FDA considered a precise answer, by way of a proposed rule, but later withdrew it without comment. The FDA's proposed rule § 314.107(g) provided in pertinent part:

Effect of dismissal of litigation on 30-month stay. If the patent litigation between the ANDA applicant and the patent owner or NDA holder described in paragraph (b)(3)(A) of this section is dismissed without a court decision on the merits of the patent claim, whether the dismissal is with or without prejudice, the agency may immediately approve the ANDA that was the subject of the litigation, if it is otherwise eligible for approval.

180-*Day Generic Exclusivity for Abbreviated New Drug Applications, 64 Fed. Reg. 42873, 42886 (1999)* (to be codified at 21 C.F.R. pt. 314) (proposed Aug. 6, 1999), withdrawal of proposed rule reflected in *67 Fed. Reg. 66593 (2002)*.

[*428] [25]** Certainly, if the mere filing of a patent infringement suit can result in an irrevocable 30-month stay on an ANDA application, except in the limited circumstances of a "substantive decision" on the merits or other narrower circumstances where a court may shorten the stay, then Apotex has a legitimate concern about how such a policy is susceptible to abuse by pioneer drug companies. Ultimately, however, ***HN16***[] the court cannot remedy every harm or prejudice a party endures. Moreover, not every business disadvantage is appropriately deemed legal injury. The fiercely competitive pharmaceutical industry does not escape these realities. ***HN17***[] The existing law does not provide an absolute right of a generic drug company to enter the market in which a pioneer drug company and a first-filing generic applicant have legally achieved some market exclusivity.

The court understands that Apotex is at a competitive disadvantage, but as to the harm it claims to have endured, and the relief it seeks, the court's hands are tied. In *Teva v. Pfizer,* the Federal Circuit stated:

The fact that Teva is disadvantaged from a business standpoint by Ivax's 180-day exclusivity period and the fact that Pfizer's **[**26]** decision not to sue Teva creates an impediment to Teva's removing that disadvantage are matters separate and distinct from whether an Article III controversy exists between Teva and Pfizer. The injury about which Teva complains is the product of the Hatch-Waxman scheme and the fact that Pfizer has acted in a manner permitted under that scheme. It is not the product of a threat of suit by Pfizer.

395 F.3d 1324, 1338 (Fed. Cir. 2005), *abrogated by* *MedImmune v. Genentech, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)*. Notwithstanding the Supreme Court's abrogation of the Federal Circuit's reasonable apprehension test, the Federal Circuit's analysis of the distinction between a business disadvantage and an Article III controversy applies with equal force to Apotex's opposition to Merck's motion to dismiss, as well as its motion to add an antitrust counterclaim on the same grounds.

Apotex attempts to distinguish its case from *Teva v. Pfizer* by emphasizing that, unlike Pfizer, Merck chose to sue Apotex, knowing there was no infringement, and then covenanted not to sue. The court will not engage in fact

[6] *See* *Apotex, Inc. v. FDA, 449 F.3d 1249 (D.D.C. 2006)* (upholding FDA's decision finding that dismissal for lack of subject matter jurisdiction did not qualify as a "court decision" sufficient to trigger the 180-day exclusivity period).

finding as to the disputed accounts of what Merck knew about the merits **[**27]** of an infringement claim against Apotex at the time it filed suit, and whether and under what circumstances, Merck attempted to glean further information before filing suit. The court does not need to resolve these issues because the mere filing of a paragraph IV certification in an ANDA constitutes infringement. *See* *35 U.S.C. § 271(e)(2)(A)*. Accordingly, Apotex's filing of its ANDA on Merck's Fosamax drug was an act of infringement that afforded Merck the right to sue. The statutory provisions that allow suit under these circumstances render the patentee's subjective motivations for filing suit irrelevant. [7]

[*429] **[**28]** Intellectual property law and principles foster the creation of market power and ***antitrust law*** and principles respond to market power abuses, however, both systems operate to advance consumer welfare by allocating resources, cultivating innovation, and promoting technological progress. *See, e.g.,* Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook,* (West Group 2000), §§ 15.1 at 800-801.***HN18***[] A patent "is an exception to the general rule against monopolies and to the right to access to a free and open market." *See* *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 816, 65 S. Ct. 993, 89 L. Ed. 1381, 1945 Dec. Comm'r Pat. 582 (1945)*. Thus, "[b]y their nature, patents create an environment of exclusion, and consequently, cripple competition. The anticompetitive effect is already present." *Schering-Plough v. Federal Trade Comm'n, 402 F.3d 1056, 1065-1066 (11th Cir. 2005)*. When patentees attempt to extend their legal monopoly beyond that which is permitted by their statutory grants, such actions can trigger antitrust liability. *Andrx Pharms., Inc. v. Biovail Corp. Intern., 347 U.S. App. D.C. 178, 256 F.3d 799, 813 (D.C. Cir. 2001)* ("[E]ven a patent-right **[**29]** holder is not immune from antitrust liability.").

HN19[] Any adverse effects within the scope of a patent or statutory right to exclude, however, cannot be redressed by ***antitrust law***. *See* *United States v. Studiengesellschaft Kohle, m.b.H., 216 U.S. App. D.C. 303, 670 F.2d 1122, 1127 (D.C. Cir. 1981)* ("[T]he conduct at issue is illegal if it threatens competition in areas other than those protected by the patent *and is otherwise legal.*") (emphasis added). The existing body of case law involving antitrust allegations in the context of ANDA litigation tends to fall within two categories: cases in which the parties bilaterally entered into a collusive agreement that exceeded the scope of a patent grant, thus warranting antitrust scrutiny, [8] and cases in which the patentee was considered to have lawfully enforced its patent right, albeit with the consequence of delaying or inhibiting competition. *See, e.g.,* *In re Cardizem CD Antitrust Litig., 332 F.3d 896 (6th Cir. 2003)* and *Valley Drug Co. v. Geneva Pharms., 344 F.3d 1294 (11th Cir. 2003)* (involving agreements among innovator and generic drug companies that incurred antitrust liability).

[30]** The futility of Apotex's proposed amendment is further demonstrated by previously unsuccessful efforts to attach antitrust liability to pharmaceutical companies acting within the Hatch-Waxman regulatory framework and patent grant. *See, e.g.,* *In re Ciprofloxacin Hydrochloride Antitrust Litig., 363 F. Supp. 2d 514, 524 (E.D.N.Y. 2005)* (holding that conduct within the scope of the patent grant is exempt from antitrust scrutiny); *In re Tamoxifen Citrate Antitrust Litig., 466 F.3d 187 (2d Cir. 2006)* (affirming district court decision, which held that the claimed injury was not "antitrust injury," which must be caused by something other than the regulatory action limiting entry to the market); *Bristol-Myers Squibb Co. v. Copley Pharm., Inc., 144 F. Supp. 2d 21, 23-25 (D. Mass.* ***[*430]*** *2000)*

---

[7] The court is by no means discharging the requirements of *Rule 11* in the context of Hatch Waxman litigation. In this case, however, there are no alleged facts from which the court can conclude that, in fact, Merck knew that Apotex's generic version of Fosamax did not infringe Merck's patents at the time it filed suit pursuant to its statutory right to do so upon Apotex's paragraph IV certification. Although the *Rule 12(b)(6)* standard requires the court to accept all well-pleaded allegations as true, and to view them in the light most favorable to plaintiff, the court will not credit bald and conclusory allegations. *See* *United States v. Vespe, 868 F.2d 1328, 1340 (3d Cir. 1989)* (stating conclusory statements need not be credited).

[8] "It is widely understood that the 180-day exclusivity period offers the potential for collusive settlement arrangements between pioneers and generics. A pioneer could initiate a patent infringement suit against a first generic ANDA filer and settle the litigation with a 'non-entry' payment to the generic, under which the generic would delay commercialization of the generic product, thus postponing the commencement of the 180-day exclusivity period and locking other generics out of the market indefinitely." Herbert Hovenkamp et al., *Anticompetitive Settlement of Intellectual Property Disputes,* *87 Minn. L.Rev. 1719, 1755 (2003)*.

(dismissing an antitrust counterclaim of second ANDA filer against pioneer drug company because the counterclaimant failed to show antitrust injury where the statutory scheme, and not the pioneer drug company, prevented it from entering the market).

Thus, Merck's challenged conduct--filing suit upon notice of Apotex's paragraph IV certification and covenanting **[**31]** not to sue--are expressly sanctioned by the Hatch-Waxman Amendments or contemplated by its legislative history. Likewise, the consequences to Apotex--delayed entry in the market for alendronate sodium tablets--are specific products of the statute. Having failed to establish antitrust injury and causal connection between Merck's legal actions and Apotex's alleged harm, which are necessary requirements for antitrust standing, the court considers Apotex's requested amendment to be futile.

VI. CONCLUSION

Accordingly, Merck's motion to dismiss (D.I. 15) is granted as Apotex has failed to establish the existence of an actual case or controversy under the current state of the law. The Clerk of the Court shall mark this action closed and all other pending motions are denied.

Dated: May 21, 2007

Gregory M. Sleet

UNITED STATES DISTRICT JUDGE

ORDER

IT IS HEREBY ORDERED that:

1. Merck's motion to dismiss for lack of subject matter jurisdiction (D.I. 15) is GRANTED.
2. Apotex's motion for leave to file a surreply (D.I. 26) is DENIED.
3. Apotex's motion for leave to file its first amended answer, affirmative defenses, and counterclaims (D.I. 28) is **[**32]** DENIED.
4. Apotex's motion for leave to substitute corrected exhibits to its pending motion for leave (D.I. 36) is DENIED as moot.
5. Merck's motion to stay (D.I. 68) is DENIED as moot.
6. All claims in Merck's Complaint (D.I. 1) are DISMISSED.
7. All counterclaims in Apotex's Answer, Affirmative Defenses, and Counterclaims (D.I. 8) are DISMISSED.
8. Each party shall bear its own costs and attorneys' fees.

Dated: May 21, 2007

Gregory M. Sleet

UNITED STATES DISTRICT JUDGE

End of Document

One Indus. v. Jim O'Neal Distrib.

United States District Court for the Southern District of California

May 29, 2007, Decided; May 29, 2007, Filed

Civil No.06CV1133 JAH(AJB)

Reporter
2007 U.S. Dist. LEXIS 112738 *

ONE INDUSTRIES, LLC, a limited liability company, Plaintiff, v. JIM O'NEAL DISTRIBUTING, INC., a corporation, Defendant. AND ALL RELATED COUNTERCLAIMS AND THIRD PARTY COMPLAINTS.

Subsequent History: Summary judgment granted by, in part, Summary judgment denied by, in part, Request denied by, Motion denied by, As moot, Costs and fees proceeding at *One Indus. v. Jim O'Neal Distrib., 2008 U.S. Dist. LEXIS 140016 (S.D. Cal., Feb. 14, 2008)*

Affirmed by *One Indus., LLC v. Jim O'Neal Distrib., 578 F.3d 1154, 2009 U.S. App. LEXIS 18967 (9th Cir. Cal., Aug. 24, 2009)*

Core Terms

third party, trademark, motion to dismiss, allegations, counterclaims, definite statement, infringement, marks, unfair competition, cancellation, third party complaint, contends, counts, registration, defendants', trademark infringement, reply, false designation, trade dress, responsive pleading, cause of action, motions, parties, antitrust violation, products, argues, rights, cases

Counsel: **[*1]** For One Industries, LLC, a limited liability company, Plaintiff: Jonathan Hangartner, LEAD ATTORNEY, X-Patents, APC, La Jolla, CA.

For Jim O'Neal Distributing, Inc., a corporation, Defendant: R Joseph Trojan, LEAD ATTORNEY, Lauren M Mirsky, Trojan Law Offices, Beverly Hills, CA.

For Jim O'Neal Distributing, Inc., One Industries LLC, Counter Claimants: R Joseph Trojan, LEAD ATTORNEY, Trojan Law Offices, Beverly Hills, CA.

For Jim O'Neal Distributing, Inc., a corporation, ThirdParty Plaintiff: Lauren M Mirsky, Trojan Law Offices, Beverly Hills, CA.

For Marc Blanchard, Ludovic Boinnard, ThirdParty Defendants: Jonathan Hangartner, LEAD ATTORNEY, X-Patents, APC, La Jolla, CA.

For One Industries, LLC, Counter Defendant: Jonathan Hangartner, LEAD ATTORNEY, X-Patents, APC, La Jolla, CA.

Judges: HON. JOHN A. HOUSTON, United States District Judge.

Opinion by: JOHN A. HOUSTON

Opinion

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO DISMISS AND FOR MORE DEFINITE STATEMENT [DOC. # 11]; AND GRANTING IN PART AND DENYING IN PART THIRD PARTY DEFENDANTS LUDOVIC BOINNARD AND MARC BLANCHARD'S MOTION TO DISMISS AND FOR MORE DEFINITE STATEMENT [DOC. # 13]

INTRODUCTION

Currently pending before the Court are the motions filed by **[*2]** plaintiff One Industries, LLC ("One Industries") and third party defendants Ludovic Boinnard ("Boinnard") and Marc Blanchard ("Blanchard")(collectively "third party defendants") to dismiss, in part, the counterclaims and the third party complaint filed by Jim O'Neal Distributing, Inc. ("O'Neal"). The motions have been fully briefed by all parties. After a careful consideration of the pleadings and relevant exhibits submitted, and for the reasons set forth below, this Court GRANTS IN PART and DENIES IN PART One Industries' motion to dismiss and for more definite statement and GRANTS IN PART and DENIES IN PART third party defendants' motion to dismiss and for more definite statement.

BACKGROUND

One Industries markets and distributes motorcycle racing products. O'Neal manufactures and distributes motorcycle and bicycle related products. O'Neal claims ownership of various trademarks for multiple variations of the marks O'Neal and O' that appear on its products. One Industries is a licensee of products that use two marks referred to in the complaint as the "One Icon Mark" and the "One Angular Mark" which are owned by third party defendants Blanchard and Boinnard. In the instant complaint, **[*3]** filed on May 25, 2006, One Industries seeks a declaratory judgment of non-infringement of O'Neal's trademark rights and a declaration of no unfair competition as it relates to One Industries' marketing.

On August 21, 2006, O'Neal filed an answer to the complaint and alleged six counterclaims for trademark and trade dress infringement and unfair competition. On September 5, 2006, O'Neal filed a third party complaint against Boinnard and Blanchard, alleging nine causes of action. One Industries, on September 13, 2006, filed its motion to dismiss three of O'Neal's counterclaims and for a more definite statement of two other counterclaims. Third party defendants filed their motion to dismiss on September 26, 2006, seeking dismissal of various causes of action alleged in the third party complaint as well as for a more definite statement concerning other causes of action. O'Neal filed its oppositions to each of the motions on October 26, 2006 and the moving parties' replies were filed on November 2, 2006. This Court subsequently took both motions under submission without oral argument. *See* CivLR 7.1(d.1).

DISCUSSION

Both One Industries and third party defendants move to dismiss the various **[*4]** counterclaims and causes of action for failure to state a claim upon which relief may be granted pursuant to *Federal Rule of Civil Procedure 12(b)(6)* and for a more definite statement pursuant to *Federal Rule of Civil Procedure 12(e)*.

1. Legal Standards

a. *Fed.R.Civ.P. 12(b)(6)*

A motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* tests the sufficiency of the complaint. *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*. Dismissal of a claim under this Rule is appropriate only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*; *Navarro, 250 F.3d at 732*. Dismissal is also warranted under *Rule 12(b)(6)* where the complaint lacks a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984)*; *see* *Neitzke v. Williams, 490 U.S. 319, 326, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989)* ("*Rule 12(b)(6)* authorizes a court to dismiss a claim on the basis of a dispositive issue of law."). Alternatively, a complaint may be dismissed where it presents a cognizable legal theory yet fails to plead essential facts under that theory. *Robertson, 749 F.2d at 534*.

In reviewing a motion to dismiss under *Rule 12(b)(6)*, the court must assume the truth of all factual allegations and must construe all inferences from them in the light most favorable to the nonmoving party. *Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002)*; *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. However, legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. *Ileto v. Glock, Inc., 349 F.3d 1191, 1200 (9th Cir. 2003)*; *Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981)*. When ruling on a motion to dismiss, the Court may consider the facts alleged in the complaint, documents attached **[*5]** to the complaint, documents relied upon but not attached to the complaint when authenticity is not contested, and matters of which the Court takes judicial notice. *Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001)*.

b. *Fed.R.Civ.P. 12(e)*

Rule 12(e) of the Federal Rules of Civil Procedure states, in relevant part:

> If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired.

Fed. R. Civ. P. 12(e). *Rule 12(e)* motions are disfavored and rarely granted. *United States v. Sequel Contractors, 402 F. Supp.2d 1142, 1147 (C.D. Cal. 2005)* (citing *Margarita Cellars v. Pacific Coast Packaging, Inc., 189 F.R.D. 575, 578 (N.D. Cal. 1999))*. The Court must evaluate a motion for more definite statement in conjunction with the liberal pleading standards of the Federal Rules of Civil Procedure. *Bureerong v. Uvawas, 922 F. Supp. 1450, 1461 (C.D. Cal. 1996)*. Unless the complaint at issue is unintelligible and not merely lacking in detail, "[the] court will deny the motion where the complaint is specific enough to apprise the defendant of the substance of the claim being asserted." *Beery v. Hitachi Home Elecs. (Am.), Inc., 157 F.R.D. 477, 480 (C.D. Cal 1993)*. Courts will grant a *Rule 12(e)* motion "only when the pleading is so vague or ambiguous that the opposing party cannot respond, even with a simple denial, in good faith or without prejudice to himself." *Delta Educ., Inc. V. Langlois, 719 F. Supp. 42, 50 (D.N.H. 1989)*. Accordingly, a *Rule 12(e)* motion "should not be granted **[*6]** unless the defendant literally cannot frame a responsive pleading." *Bureerong, 922 F. Supp. at 1461*.

2. Analysis

a. One Industries' Motions

1. Motion to Dismiss

One Industries moves to dismiss O'Neal's counterclaims for trade dress infringement under *15 U.S.C. § 1125* (count three), false designation of origin under *15 U.S.C. § 1125* (count four), and unfair competition (count six) for failure to state a claim under *Rule 12(b)(6)*. However, One Industries, in its reply brief, withdrew its motion to dismiss count three. *See* Doc. # 19 at 1n.1. The remaining two counts challenged by One Industries are addressed below.

A. False Designation of Origin

One Industries moves to dismiss O'Neal's counterclaim for false designation of origin under *section 42(a)(1)(A)* of the Lanham Act, *15 U.S.C. § 1125*, on the grounds that O'Neal does not have standing to allege the claim.[1]

15 U.S.C. § 1125(a) provides, in pertinent part, that:

> (1) Any person who . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which - -
>
>> (A) is likely to cause confusion, or to cause mistake, or the deceive as to the affiliation, connection, or association of such person with another person . . .
>
> shall be **[*7]** liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1)(A).

One Industries argues that O'Neal must allege "'commercial injury based upon the deceptive use of a trademark or its equivalent to satisfy standing requirements'" to seek relief for false designation of origin under *15 U.S.C. § 1125*. Doc. # 11 at 5. One Industries further argues that, because the owners of the One Icon and One Angular Marks are third party defendants Boinnard and Blanchard, they are "the only parties that could possibly suffer injury" based on the facts alleged in this case. Id. at 6. In opposition, O'Neal contends it need not allege its injury stemmed from the deceptive use of a trademark to have standing because the statute does not require it. Doc. # 16 at 6. One Industries responds that the counterclaim at issue is "based exclusively on the allegation that 'One Industries improperly represented itself as a source of [the One Icon and One Angular Marks] in its allegations of infringement against O'Neal.'" Doc. # 19 at 2 (quoting Ans. ¶ 92). One Industries points out that the only factual allegation supporting this claim is O'Neal's reference to a May 16, 2006 letter between counsel for **[*8]** the parties, which, according to One Industries, "provides no possible basis to allege any commercial injury that could support its counterclaim." Id. at 2-3.

This Court's review of O'Neal's false designation counterclaim reveals One Industries is correct. O'Neal clearly alleges, in its answer and counterclaims, that its damage stemmed solely from private correspondence between counsel. This Court finds that there is no possibility that O'Neal might suffer injury based solely on the representation of counsel in a letter to opposing counsel. Therefore, this Court finds that the facts alleged by O'Neal are insufficient to support standing to sue for false designation of origin under *Section 1125*. Accordingly, One Industries' motion to dismiss count four of O'Neal's counterclaims is GRANTED.

B. Unfair Competition

One Industries next moves to dismiss O'Neal's sixth counterclaim for unfair competition under *California Business and Professions Code § 17200*, which is based on allegations of monopoly and restraint of trade. One Industries argues that the counterclaim fails to state a claim upon which relief may be granted because O'Neal fails to allege facts to support the claim. Doc. # 11 at 7. Specifically, One Industries explains that an unfair competition claim **[*9]** must derive from a violation of the antitrust laws and argues O'Neal fails to allege facts to support such a violation. Id. at 7-8 (citing *Cel-Tech Com., Inc. v. Los Angeles Cellular Tel. Co., 20 Cal.4th 163, 186, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999))*.

---

[1] One Industries also moves for dismissal due to O'Neal's failure to allege all necessary elements of this claim. Because this Court ultimately finds the facts alleged by O'Neal does not support standing to sue on this claim, this Court will not address One Industries' remaining argument.

California Business and Professions Code §§ 17200 defines unfair competition to include "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising . . . ." *Cal.Bus.& Prof. Code § 17200*. *Section 17203* provides:

> Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

Cal.Bus.&Prof. Code § 17203. O'Neal contends its allegations counsel represented, in the May 16, 2006 letter, that One Industries intended to enforce trademarks it does not own nor have standing to sue to enforce is sufficient to state a claim for unfair competition and no further allegation is necessary. Doc. # 16 at 7-8. O'Neal also contends that misuse of trademark is, nevertheless, considered an antitrust violation. Id. at 8.

In reply, One Industries asserts it cannot be held liable under *Section 17200* because it never filed an action for infringement or sought to enforce any trademark **[*10]** rights and, thus, has not attempted enforcement as a matter of law. Doc. # 19 at 4-5. This Court is not persuaded that the representations of counsel in the May 16, 2006 letter cannot be considered an attempt to enforce trademark rights to the marks at issue. This Court must, pursuant to *Rule 12(b)(6)*, view the facts alleged as true and construe all inferences in the light most favorable to the non-moving party. *See* *Thompson, 295 F.3d at 895*; *Cahill, 80 F.3d 336 at 337-38*. Thus, O'Neal's allegations that counsel's May 16, 2006 representations were an attempt to enforce trademark rights to the marks at issue must be viewed as true. Therefore, One Industries' contention on that basis fails.

One Industries further asserts that, even if the May 16, 2006 letter is considered an attempt to enforce trademark rights, misuse of trademarks can only be an antitrust violation if it is brought as an affirmative defense against anti-competitive behavior. Doc. # 19 at 6 (citing *Carl Zeiss Steiftung v. V.E.B. Carl Zeiss, Jena., 298 F.Supp. 1309, 1315 (S.D.N.Y. 1969))*. The California Supreme Court defines the word "unfair" as used in *Section 17200* to mean "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws ... or otherwise significantly threatens or harms competition." *Cel-Tech, 20 Cal.4th at 187*. Thus, One Industries is correct **[*11]** in its position that O'Neal must allege an antitrust violation to state a claim under *Section 17200*. O'Neal claims that trademark misuse is considered an antitrust violation and cites various cases that have found instances where such a consideration is proper. *See* Doc. # 16 at 8-9. Although One Industries attempts to distinguish the cases cited by O'Neal, again, this Court is required to construe all inferences in the light most favorable to O'Neal. *See* *Thompson, 295 F.3d at 895*; *Cahill, 80 F.3d 336 at 337-38*. This Court, therefore, cannot, at this juncture, find definitively that the facts of this case are not one of the instances where trademark misuse should not be considered an antitrust violation. Accordingly, One Industries' motion to dismiss on this basis is DENIED.

2. Motion for More Definite Statement

One Industries also moves for a more definite statement of count two seeking redress under *15 U.S.C. §§ 1114* and *1125* for trademark infringement of its O' mark and count five seeking redress under the *California Business and Professions Code § 17200*. According to One Industries, O'Neal's counterclaim describe five different and distinct O' marks used by O'Neal over the past fifteen years. Doc. # 11 at 9. One Industries contends it cannot frame a responsive pleading to the allegations presented in these two claims **[*12]** because O'Neal fails to identify which of its distinctive marks are alleged to have been infringed. Id. In addition, One Industries contends this identification failure undermines O'Neal's claim for unfair competition, which alleges "One Industries' unlawful use of confusingly similar trademarks . . . constitutes unfair competition . . .," Ans. ¶ 96, presented in count five because "One Industries is left to guess which underlying claim or claims are invoked to support this unfair competition claim." Doc. # 11 at 9.

In opposition, O'Neal takes issue with One Industries' characterization of its O' mark as multiple separate marks, claiming it has used only one O' mark that has "changed slightly over the years." Doc. # 16 at 9. Nevertheless, O'Neal contends that a more definite statement is unnecessary because its claims for trademark infringement of the O' mark and unfair competition "are plainly specific enough to apprise One Industries of the substance of the claim being asserted." Id. at 10. O'Neal further contends that no further statement is necessary given the "well-settled law that a party is entitled to modify a mark over the years if the change neither creates a new mark nor changes the **[*13]** commercial impression created by the old, especially where the only change concerned is lettering style." Id. at 11.

One Industries, in reply, contends that a trademark infringement claim requires "an assessment of 'whether a reasonably prudent consumer in the marketplace is likely to be confused as to the origin of the good or service bearing one of the marks.'" Doc. # 19 at 7 (quoting *AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348 (9th Cir. 1979)*(additional internal quotation marks omitted). Thus, according to One Industries, the identification of the mark alleged to have been infringed is "crucial" in determining likelihood of confusion Id. One Industries, in support of its contention, provides a table graphically depicting the five "distinct and very different" marks alleged to have been infringed in O'Neal's counterclaims to support its contention that it cannot form a response based on the allegations presented. *See* id. at 7-8. One Industries argues that "[e]ven a cursory inspection makes clear that, as a matter of law, this is not a single mark," since the "shape, font, orientation, placement, and color of the marks have all changed dramatically over the years" and, given the fact that "O'Neal has sought at least two separate trademark registrations with **[*14]** respect to the [] identified marks."

This Court agrees with One Industries. A careful review of the counterclaims reveals that it is unclear which of the O'marks identified are alleged to have been infringed. This Court is unpersuaded by O'Neal's claim that it uses only one mark that has been slightly altered over the years because two of the marks alleged to be one have been registered separately and the marks presented appear to this Court to be more than just slightly different. Therefore, this Court finds that, in order for One Industries to form a proper response to the allegations contained in counts two and five, O'Neal must provide a more definite statement concerning the mark alleged to have been infringed. Accordingly, One Industries' motion for a more definite statement of counts two and five of O'Neal's counterclaims is GRANTED.

b. Third Party Defendants' Motion

1. Motion to Dismiss

Third party defendants Blanchard and Boinnard move to dismiss certain portions of O'Neal's third party complaint. Specifically, third party defendant Blanchard moves to dismiss all allegations against him which are contained in counts four through eight and both third party defendants move to dismiss **[*15]** O'Neals claims for cancellation of trademark registration contained in counts seven and eight for failure to state a claim upon which relief may be granted. In their reply brief, third party defendants withdrew their motion to dismiss O'Neal's trade dress infringement claims presented in count three of the third party complaint. *See* Doc. # 20 at 1 n.1.[2] This Court address the remaining contentions below.

A. Third Party Defendant Blanchard

---

[2] Third party defendants state, in this footnote, that "One Industries hereby withdraws its motion to dismiss Count III" concerning trade dress infringement based on the clarification made by O'Neal in its opposition. Doc. # 20 at 1 n.1. This Court is mindful that One Industries and third party defendants are represented by the same counsel and filed their respective pleadings simultaneously containing identical footnotes. *See* id.; *compare* Doc. # 19 at 1 n.1. This Court is also mindful that third party defendants present no argument in reply concerning count three of the third party complaint which alleges trade dress infringement. This Court assumes the error in third party defendants' reply brief is merely typographical and, therefore, construes the statement as a withdrawal by third party defendants of their motion to dismiss count three of the third party complaint.

Third party defendant Blanchard separately moves to dismiss all claims against him because the complaint does not contain allegations of any individual action by Blanchard in regards to the alleged infringement of the intellectual property at issue. Doc. # 13 at 4-5. Blanchard claims that "[a] corporate officer may be held personally liable for trademark infringement 'in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf'" but a complaint must allege that "individual 'directs, controls, ratifies, participates in, or is the moving force behind the infringing activity . . ." Id. at 4 (quoting *Committee for Idaho's High Desert, Inc. v. Yost, 92 F.3d 814, 824 (9th Cir. 1996)*; *Babbit Electronics, Inc. v. Dynascan Corp., 38 F.3d 1161, 1181 (11th Cir. 1994))*.

Blanchard explains that, although third party defendant Broinnard, co-founder and current president **[*16]** of One Industries, is alleged to have "'authorize[d] and direct[ed] One Industries to use'" the marks at bar "'in conjunction with distribution and sales of motocross related products . . .,'" no such allegations are presented in regards to Blanchard. Id. at 2 (quoting TPC[3] ¶¶ 27, 28). Therefore, absent the requisite allegations of individual action on Blanchard's part, Blanchard contends the third party complaint's allegations against him on all causes of action must be dismissed. Id. at 5.

In opposition, O'Neal contends it is sufficient that the third party complaint alleges Blanchard is a co-owner of the infringing marks in order to confer liability upon him. Doc. # 18 at 3. O'Neal claims that, as long as it can reasonably be inferred that "Blanchard knew, or should have known, about the infringing uses of the [marks]" . . . through his co-owner Boinnard," the third party complaint states a claim for trademark and trade dress infringement as well as the related unfair competition claim. Id. Blanchard contends, in reply, there is no authority for O'Neal's proposition that "'mere ownership is enough to confer liability.'" Doc. # 20 at 2 (quoting Doc. # 18 at 3).

Although both parties cite various cases **[*17]** that purport to support their respective positions, *see* Doc. # 18 at 3; Doc. # 20 at 2-3, this Court's review of the case authority cited, as well as its own independent research in this area, reveals that Blanchard's position is the correct one. The cases cited by O'Neal do not support the contention that simple ownership is enough to impose liability upon Blanchard absent some concrete action or intentional act on his part. *See, e.g.*, *Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 854, 102 S. Ct. 2182, 72 L. Ed. 2d 606 (1982)*(liability may be imposed upon manufacturer if it "intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement . . ."); *Mini Maid Services Co. v. Maid Brigade Systems, Inc., 967 F.2d 1516, 1522 (11th Cir. 1992)*("we hold that the franchisor may be held accountable only if it intentionally induced its franchisees to infringe another's trademark or if it knowingly participated in a scheme of trademark infringement carried out by its franchisees."). The third party complaint here alleges no concrete action or intentional act concerning the alleged infringement of the marks by Blanchard. Therefore, this Court finds that the third party complaint fails to state a claim upon which relief may be granted against third party defendant **[*18]** Blanchard for trademark or trade dress infringement as well as the related claim for unfair competition. Accordingly, third party defendant Blanchard's motion to dismiss the third party complaint's allegations against him in its entirety is GRANTED and the claims against third party defendant Blanchard contained in counts four through eight are DISMISSED without prejudice.

B. Cancellation of Trademark Registration

Third party defendants[4] move to dismiss the allegations concerning cancellation of trademark registration contained in counts four through eight in the third party complaint. *See* Doc. # 13 at 6-7. Third party defendants point out that O'Neal's allegations are brought under the Lanham Act, *15 U.S.C. § 1064*, but that section "'does not authorize suits for cancellation in district courts'" but, instead "authorizes persons to petition the Patent and Trademark Office to cancel registration of those marks." Id. at 7 (quoting *Windsurfing International, Inc. v. AMF, Inc., 828 F.2d 755, 758 (Fed.Cir. 1986))*. O'Neal, in opposition, contends this Court has "concurrent jurisdiction to trademark cancellation proceedings and routinely consider trademark cancellations under *[section 1064]*." Doc. # 18 at 7(citing

[3] The third party complaint is referenced herein as "TPC."

[4] Because this Court dismisses third party defendant Blanchard, the remainder of the order relates only to third party defendant Boinnard even though the Court references both third party defendants as the moving parties.

cases). In addition, O'Neal distinguishes the instant case from the Windsurfing case, noting **[*19]** that, in *Windsurfing*, the court found no jurisdiction to consider trademark cancellation because there, unlike in this case, no justiciable trademark infringement controversy existed. Id.

Third party defendants state, in reply, that they do not dispute O'Neal's basis for cancellation or O'Neal's standing to seek cancellation. Doc. # 20 at 4. Third party defendants also indicate they do not dispute the district courts have concurrent jurisdiction with the United States Patent and Trademark office in regards to cancellation proceedings. Id. Third party defendants contend, however, that the section of the Lanham Act that O'Neal brings its claims under is "limited to authorizing *inter partes* proceedings and does not establish a cause of action to seek cancellation." Id. at 4-5. Therefore, third party defendants contend that, absent proper amendment, O'Neal's allegations fail to state a claim. Id.

This Court disagrees with third party defendants. As the Windsurfing court explained:

> district courts have the power to cancel registrations, but only in an 'action involving a registered mark. *15 U.S.C. § 1119*. 'Involving' cannot mean the mere presence of a registered trademark, but must be read as involving the right to **[*20]** use the mark and thus the right to maintain the registration. [internal citations omitted]. There must, therefore, be something beyond the mere competitor status of the parties to serve as a basis for the court's jurisdiction. . . Such a basis may, for example, be a suit for trademark infringement . . . or a 'case of actual controversy' referred to in the Declaratory Judgment Act.

828 F.2d at 758. The third party complaint here clearly contains allegations of trademark and trade dress infringement. Third party defendants cannot and do not dispute that there is live case or controversy concerning those issues. Thus, this Court finds it has jurisdiction to consider trademark cancellation under *Section 1064*. Therefore, third party defendants' motion to dismiss O'Neal's claims concerning cancellation of trademark registration under *Section 1064* is DENIED.

2. Motion for More Definite Statement

Lastly, third party defendants move for a more definite statement of O'Neal's second, fourth, fifth, sixth and ninth causes of action for the same reasons presented in support of One Industries' motion under *Rule 12(e)*, that is, that the complaint contains allegations concerning five different and distinct logos identified as the O' mark . The arguments **[*21]** presented by the parties in support and opposition to One Industries' motion are almost identical to those presented here. After a careful consideration of the arguments and authority presented, this Court is also unpersuaded by O'Neal's claim in response to third party defendants' motion that it uses only one mark for the same reasons presented previously. Therefore, this Court finds that, in order for third party defendants to form a proper response to the allegations contained in counts two, four, five, six and nine of O'Neal's third party complaint, O'Neal must provide a more definite statement concerning the mark alleged to have been infringed. Accordingly, third party defendants' motion for a more definite statement under *Rule 12(e)* is GRANTED.

CONCLUSION AND ORDER

Based on the foregoing, IT IS HEREBY ORDERED that:

1. One Industries' motion to dismiss and for a more definite statement is **GRANTED IN PART** and **DENIED IN PART** as follows:

    a. One Industries' motion to dismiss count four of O'Neal's counterclaims is **GRANTED**;

    b. One Industries' motion to dismiss O'Neal's sixth counterclaim for unfair competition under *California Business and Professions Code § 17200* is **DENIED**; and

c. One Industries' motion for a more definite statement of counts **[*22]** two and five of O'Neal's counterclaims is **GRANTED**.

2. Third party defendants Blanchard and Boinnard's motion to dismiss and for a more definite statement is **GRANTED IN PART** and **DENIED IN PART** as follows:

a. Third party defendants' motion to dismiss all claims against third party defendant Blanchard is **GRANTED** and all claims against third party defendant Blanchard are hereby **DISMISSED without prejudice**;

b. Third party defendants' motion to dismiss O'Neal's claims for cancellation of trademark registration pursuant to *15 U.S.C. § 1064* is **DENIED**; and

c. Third party defendants' motion for a more definite statement of counts two, four, five, six and nine of the third party complaint is **GRANTED**.

3. One Industries' and third party defendants' motions to dismiss O'Neal's trade dress infringement claims are **WITHDRAWN** based on the parties' representations in their respective reply briefs.

This Court notes that neither One Industries nor third party defendants seek dismissal with prejudice nor indicate that an amendment of the counterclaims or third party complaint is unwarranted. Although a scheduling order has issued, this case is currently in the midst of discovery and the pretrial conference is scheduled to take **[*23]** place in November 2007. There does not appear, from the record currently before this Court, that any party will be severely prejudiced by allowing O'Neal the opportunity to correct the deficiencies outlined herein through amendment of its pleadings.

Therefore, IT IS FURTHER ORDERED that O'Neal may file amended counterclaims and/or an amended third party complaint within thirty (30) days of the date this Order is filed. Counter-defendants and third party defendants shall file their respective responsive pleadings to any amended pleadings filed by O'Neal in accordance with the Federal Rules of Civil Procedure and the Local Rules of this District.

Dated: May 29, 2007

/s/ John A. Houston

HON. JOHN A. HOUSTON

United States District Judge

[Dailyedeals.com, Inc. v. Ecoupons Inc.](#)

United States District Court for the Southern District of California

May 31, 2007, Decided; May 31, 2007, Filed

CASE NO. 06-CV-01522 H (JMA)

Reporter

2007 U.S. Dist. LEXIS 106872 *; 2007 WL 9776581

DAILYEDEALS.COM, INC., a California corporation, Plaintiff, vs. ECOUPONS INC, a New York corporation; ECOUPONS INC, a New Jersey corporation; MATTHEW CHENG; MAKSIM RUBIS; ANDREW MILLS; and HTTP://WWW.ECOUPONS.COM, Defendants.ECOUPONS, INC., a New Jersey corporation and MATTHEW CHENG, an individual, Counterclaimants, vs. DAILYEDEALS, INC., a California corporation; AUGUST STUDIO LLC, a Kentucky limited liability company; MICHAEL K. KOVARIK, an individual; BAO T. PHAM, an individual; and TRANG T. PHAM, an individual, Counterdefendants.

Core Terms

eCoupons, retailers', alleges, affiliate, websites, monopolization, trademarks, unfair competition, Counterclaimant, sites, summary adjudication motion, Lanham Act, false designation, relevant market, ranking, unfair, moot, definite statement, motion to dismiss, search engine, misleading, linked, fail to state a claim, false advertising, common law, advertising, manipulate, traffic, Google, anchor

Counsel: **[*1]** For Dailydeals Inc, a California corporation, Plaintiff: Nathaniel Bruno, LEAD ATTORNEY, Sheppard, Mullin, Richter & Hampton LLP, San Francisco, CA; Robert S Gerber, LEAD ATTORNEY, Michael R. Murphy, Sheppard Mullin Richter and Hampton, San Diego, CA.

For Ecoupons Inc, a New York corporation, Defendant: Kenneth M. Fitzgerald, LEAD ATTORNEY, Fitzgerald Knaier LLP, San Diego, CA; Robert S Huie, U S Attorneys Office, Southern District of California, San Diego, CA.

For Matthew Cheng, an individual, Maksim Rubis, an individual, Andrew Mills, an individual, HTTP://WWW.Ecoupons.com, Defendants: Kenneth M. Fitzgerald, LEAD ATTORNEY, Fitzgerald Knaier LLP, San Diego, CA.

For Michael K. Kovarik, Counter Defendant: Nathaniel Bruno, LEAD ATTORNEY, Sheppard, Mullin, Richter & Hampton LLP, San Francisco, CA; Robert S Gerber, LEAD ATTORNEY, Michael R. Murphy, Sheppard Mullin Richter and Hampton, San Diego, CA.

For BAO T. PHAM, TRANG T. PHAM, Counter Defendants: Andrew B. Kaplan, LEAD ATTORNEY, Kaplan Ludmer LLP, San Diego, CA.

For Dailydeals Inc, a California corporation, Michael K. Kovarik, Counter Defendants: Robert S Gerber, LEAD ATTORNEY, Sheppard Mullin Richter and Hampton, San Diego, CA.

Judges: MARILYN L. **[*2]** HUFF, UNITED STATES DISTRICT JUDGE.

Opinion by: MARILYN L. HUFF

Opinion

ORDER: (1) GRANTING MOTIONS TO DISMISS AND DISMISSING COUNTERCLAIM WITHOUT PREJUDICE; (2) DENYING MOTION FOR MORE DEFINITE STATEMENT AS MOOT (3) DENYING MOTION FOR SUMMARY ADJUDICATION WITHOUT PREJUDICE; AND (4) DENYING MOTION TO CONTINUE AS MOOT

On January 30, 2007, Dailyedeals.com, Inc., filed a first amended complaint ("FAC") against eCoupons Inc., a New York corporation, eCoupons Inc., a New Jersey corporation, Matthew Cheng Jr., Maksim Rubis, Andrew Mills, and the internet site http://www.ecoupons.com. (Doc. No. 65.) On February 9, 2007, all Defendants filed an answer, and eCoupons, Inc., a New Jersey corporation ("eCoupons") filed a counterclaim. (Doc. No. 66.) In the counterclaim, eCoupons asserts claims against Dailyedeals, Inc., August Studio LLC, Michael K. Kovarik, Bao T. Pham, and Trang T. Pham (collectively "Counterdefendants").[1]

On April 2, 2007, Dailyedeals.com, Inc. ("Dailyedeals") and Michael K. Kovarik filed a motion for summary adjudication regarding two of eCoupons' counterclaims and for dismissal of all the counterclaims. (Doc. No. 83.) On May 21, 2007, eCoupons filed a response in opposition. (Doc. No. 101.) Also **[*3]** on that date, eCoupons filed a motion seeking a continuance of Dailyedeals and Kovarik's motion for summary adjudication. (Doc. No. 99.) Dailyedeals and Kovarik filed a reply in support of their motion for summary adjudication and for dismissal on May 24, 2007. (Doc. No. 105.)

On April 12, 2007, Counterdefendants Bao T. Pham, Trang T. Pham (collectively "the Phams"), and August Studio, LLC ("August Studio") filed a motion to dismiss eCoupons' counterclaims against them. (Doc. No. 92 & 93.) Additionally, they sought an order requiring a more definite statement from eCoupons. (Id.) On May 21, 2007, eCoupons filed a response in opposition. (Doc. No. 100.) The Phams and August Studio filed a reply on May 25, 2007. (Doc. No. 106-08.)

Pursuant to its discretion under Civil *Local Rule 7.1(d)(1)*, the Court finds this matter appropriate for decision without oral argument. For the reasons stated below, the Court **GRANTS** Counterdefendants' motions to dismiss. (Doc. Nos. 83, 92.) The Court **DISMISSES** without prejudice eCoupons' counterclaim. Accordingly, the Court **DENIES** without prejudice Dailyedeals and Kovarik's motion for summary adjudication. (Doc. No. 83.) The Court **DENIES** as moot the Phams and August Studio's motion **[*4]** for a more definite statement. (Doc. No. 93.) Further, the Court **DENIES** as moot eCoupons' motion to continue the motion for summary adjudication. (Doc. No. 99.)

Background

Counterclaimant eCoupons owns several websites, including www.ecoupons.com. (AC ¶ 10.) Dailyedeals owns and operates several competing websites, such as www.allonlinecoupons.com and www.amazingcounters.com. (Id. ¶ 2.) According to the AC, these websites derive revenue from "affiliate programs," through which retailers pay these websites for increasing website traffic and revenue to the retailers' websites. (Id. ¶ 11.) The more traffic that an affiliate drives to the retailers' sites, the large the revenue garnered by the affiliate. (Id. ¶ 13.) According to eCoupons, as part of the agreement to become an affiliate of a particular retailer, the affiliates must agree not to link the retailers' sites from third party sites. (Id. ¶ 12.) According to the AC, many of the affiliate agreements expressly prohibit affiliates from unfairly competing with the retailers by using the retailers' trademarks or from diluting the trademarks by using any of the retailers' trademarks, directly or indirectly, on their websites. (Id.) Further, **[*5]** some of the affiliate agreements also expressly prohibit affiliates from engineering their web sites in such a way so as to pull internet traffic away from the retailers' sites. (Id.)

According to eCoupons, internet traffic is driven to retailers' sites through search engines such as Google and Yahoo, which rank web pages based on their relevance to search terms. (Id. ¶ 14.) Higher ranked pages receive more traffic. (Id.) The AC alleges that these rankings may be manipulated through a concept known as "google

---

[1] The caption to the counterclaim designates that Matthew Cheng is also a counterclaimant. The allegations in the counterclaim do not include Matthew Cheng, however, but only state that eCoupons is a counterclaimant. (See AC.)

bombing." (Id. ¶ 15.) Google bombing involves linking to a particular website using specific and allegedly relevant language to describe the link ("anchor text"). (Id.) According to eCoupons, more often than not the anchor text is not at all relevant to the linked site. (Id.)

A. Intentional Manipulation of Search Engine Rankings

The AC alleges that Counterdefendants used their websites to participate in affiliate programs. (Id. ¶ 16.) Using amazingcounters.com, Counterdefendants allegedly distributed hundreds of thousands of incoming links containing retailers' trademarks as anchor text to third party websites that linked to allonlinecoupons.com and numerous other websites that Counterdefendants **[*6]** allegedly owned. (Id. ¶ 17.) As a result, allonlinecoupons.com and other Counterdefendants' websites together have generated over $500,000 per month in net revenue and constitute one of the largest affiliates. (Id. ¶ 18.) Between March 2006 and May 2006, allonlinecoupons.com was the top search result in Google's index for "joanns," "overtons.com," "spiegel," "oldnavy," "blair.com," "best buy," and "target.com." (Id. ¶ 19.) As of May 2006, Counterdefendants' websites allonlinecoupons.com and amazingcounters.com have been removed from the Google index. (Id. ¶ 20.) The page ranks for these two websites have been set to zero. (Id.) Without these two websites in the Google index, the top search result for each of the various search terms noted above is the official website of each retailer. (Id. ¶ 21.)

Counterclaimant eCoupons alleges that Counterdefendants also use retailers' trademarks in a misleading and unfair way in order to manipulate the search engines into ranking Counterdefendants' websites higher. (Id. ¶ 22.) In particular, the AC alleges that Counterdefendants embed retailers' trademarks as hidden or very small text in their web counters. (Id. ¶ 23.) The AC alleges that Counterdefendants **[*7]** misleadingly and unfairly use retailers' trademarks as anchor text to manipulate the search engines into ranking Counterdefendants' websites higher. (Id. ¶ 24.) The AC also alleges that Counterdefendants create websites for the sole purpose of linking in order to achieve higher rankings in the search engine results. (Id. ¶ 25.)

B. Intentional Breach of Affiliate Program Agreements

According to eCoupons, Counterdefendants agreed with retailers under the affiliate agreements to refrain from unfairly competing with the retailers by using the retailers' trademarks or from diluting the retailers' trademarks by using the trademarks in metatags, in hidden text or source code, in affiliates' domain or sub domain, or in any other manner. (Id. ¶¶ 26-27.) According to the AC, Counterdefendants agreed under some of the affiliate agreements to refrain from engineering their affiliate sites to pull internet traffic away from the retailers' websites. (Id. ¶ 28.) Counterclaimant eCoupons alleges that Counterdefendants use the retailers' trademarks in a misleading way in conjunction with webcounters. (Id. ¶ 30.) According to the AC, Counterdefendants use retailers' trademarks as anchor text when in fact **[*8]** the linked site is another site owned or operated by Counterdefendants. (Id. ¶ 31.) According to eCoupons, by misrepresenting that the anchor text is a link to the infringed-upon retailers' site, Counterdefendants engage in misleading advertising. (Id.) Finally, eCoupons alleges that, by using the third party retailers' trademarks on Counterdefendants' linked sites, Counterdefendants infringe upon the retailers' trademarks and unfairly compete with the retailer in violation of the affiliate agreement and state and federal unfair competition law. (Id. ¶ 32.)

C. Counterclaims

Based upon these allegations, eCoupons brings four counterclaims against Counterdefendants. First, eCoupons alleges a claim for false designation of origin and false advertising against all Counterdefendants under *§ 43(a)* of the Lanham Act, *15 U.S.C. § 1125(a)*. Second, eCoupons brings a claim for monopolization and attempted monopolization under *15 U.S.C. § 2* against Dailyedeals and Kovarik. Third, eCoupons alleges a claim of common law unfair competition against all Counterdefendants. Fourth, eCoupons brings a claim for unfair competition against all Counterdefendants under *California Business and Professions Code § 17200*.

Discussion

A. Legal Standard for Motion to Dismiss

Rule 12(b)(6) permits dismissal of a claim **[*9]** either where that claim lacks a cognizable legal theory, or where insufficient facts are alleged to support the plaintiff's theory. See *Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)*. In resolving a *Rule 12(b)(6)* motion, the court must: (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine whether plaintiff can prove facts to support a claim that would merit relief. See *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. While a plaintiff need not give "detailed factual allegations," he must plead sufficient facts that, if true, "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929, 2007 U.S. LEXIS 5901 at *21 (2007)*.

Dismissal for failure to state a claim upon which relief can be granted is proper if a complaint is vague, conclusory, and fails to set forth any material facts in support of the allegation. See *North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 583 (9th Cir. 1983)*. Furthermore, a court may not "supply essential elements of the claim that were not initially pled." *Ivey v. Bd. of Regents of the Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982)*. If a complaint fails to state a claim, the court should grant leave to amend unless it determines that the pleading could not possibly be cured by the allegation of other facts. See *Doe v. United States, 58 F.3d 494, 497 (9th Cir.1995)*.

B. Lanham Act Claims

In its first counterclaim, eCoupons brings a claim against all Counterdefendants for false designation of origin and false **[*10]** advertising. Counterdefendants argue that eCoupons has failed to allege sufficient facts to state a claim.

Section 43(a) of the Lanham Act, *15 U.S.C. § 1125(a)(1)*, provides in pertinent part:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--
>
> > (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
> >
> > (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

1. False Designation of Origin

To state a claim for false designation of origin under *§ 1125(a)(1)(A)*, a plaintiff must allege five elements:

> (1) defendant uses a **[*11]** designation (any word, term, name, device, or any combination thereof) or false designation of origin;
> (2) the use was in interstate commerce;
> (3) the use was in connection with goods or services;
> (4) the designation or false designation is likely to cause confusion, mistake, or deception as to (a) the affiliation, connection, or association of defendant with another person, or (b) as to the origin, sponsorship, or approval of defendant's goods, services, or commercial activities by another person; and
> (5) plaintiff has been or is likely to be damaged by these acts.

Summit Tech., Inc. v. High-Line Med. Instruments, Co., 933 F. Supp. 918, 928 (C.D. Cal. 1996) (citing J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 27.03[1][a]). "A likelihood of confusion exists when consumers 'are likely to assume that a product or service is associated with a source other than its actual source because of similarities between the two sources' marks or marketing techniques.'" Metro Publishing, Ltd. v. San Jose Mercury News, 987 F.2d 637, 640 (9th Cir.1993) (quoting Nutri/System, Inc. v. Con-Stan Indus., Inc., 809 F.2d 601, 604 (9th Cir. 1987) and Shakey's Inc. v. Covalt, 704 F.2d 426, 431 (9th Cir. 1983)).

Examining the allegations in the AC, eCoupons has failed to allege facts sufficient to state a claim for false designation of origin. While eCoupons alleges that "Counterdefendants have used retailers' trademarks . . . in a manner likely to cause confusion or mistake in the consumer market for online **[*12]** goods," it has not alleged a single mark or a single retailer. (AC ¶ 34.) Similarly, eCoupons alleges that "many" or "some" of the affiliate agreements prohibit certain uses of retailers' marks. (Id. ¶ 12.) Further, eCoupons has not pleaded sufficient facts regarding why consumers are likely to be confused regarding Counterdefendants' affiliation with retailers or the origin of goods purchased through Counterdefendants' websites. Instead, eCoupons' claim consists of conclusory and vague language. As the Supreme Court has recently observed, "[f]actual allegations must be enough to raise a right to relief above a speculative level." Bell Atlantic Corp., 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929, 2007 U.S. LEXIS 5901 at *21. Accordingly, eCoupons has failed to state a Lanham Act claim for false designation of origin.

2. False Advertising

To state a claim for false advertising under § 1125(a)(1)(B), a plaintiff must allege five elements:

1) in advertisements, defendant made false statements of fact about its own or another's product;

2) those advertisements actually deceived or have the tendency to deceive a substantial segment of their audience;

3) such deception is material, in that it is likely to influence the purchasing decision;

4) defendant caused its falsely advertised goods to enter interstate **[*13]** commerce; and

5) plaintiff has been or is likely to be injured as the result of the foregoing either by direct diversion of sales from itself to defendant, or by lessening of the goodwill which its products enjoy with the buying public.

Rice v. Fox Broad. Co., 330 F.3d 1170, 1180 (9th Cir. 2003).

Looking at the AC, eCoupons does not allege that Counterdefendants made false statements of fact about their own products or any retailers' products. Moreover, eCoupons has not pleaded sufficient facts as to the remaining elements of a false advertising claim, but instead simply recites the statutory language of § 1125(a)(1)(B). (AC ¶ 35.) Accordingly, eCoupons has failed to state a claim for false advertising under the Lanham Act.

C. Monopolization and Attempted Monopolization

In its second claim, eCoupons alleges a claim against Dailyedeals and Kovarik for monopolization and attempted monopolization under 15 U.S.C. § 2. Dailyedeals and Kovarik move to dismiss this claim.

"The offense of monopolization under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." **[*14]** United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966); High Tech. Careers v. San Jose Mercury News, 996 F.2d 987, 989-90 (9th Cir. 1993). Monopoly power is the power to control prices or exclude competition in the relevant market. High Tech. Careers, 996 F.2d at 990. Monopoly power "exists whenever prices can be raised above competitive market levels." Id.

To state a claim for attempted monopolization, a plaintiff must allege "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. To determine whether there is a dangerous probability of monopolization, courts consider the relevant market and the defendant's ability to lessen or destroy competition in the market. Id.

Looking at the AC, eCoupons alleges that the relevant market is the "Affiliate Programs' online coupon market." (AC ¶ 40.) Further, because Dailyedeals and Kovarik used the internet to conduct business, eCoupons alleges that "there are at least two relevant geographical markets: (1) North America [U.S.] and (2) international (i.e., outside of North America [U.S.])." (Id.) With regard to market share, eCoupons alleges:

> Daily eDeals has market power in the relevant market and a substantial or monopoly share of the relevant market as evidenced by its more than $500,000 **[*15]** net per month. Daily eDeals and Kovarik monopolized, or attempted to monopolize, each of these markets in violation of *Section 2* of the Sherman Act. To the extent that Daily eDeals and Kovarik have not yet monopolized the relevant markets, there is a dangerous probability that they will successfully do so.

(Id. ¶ 42.) These allegations fail to state a claim for either monopolization or attempted monopolization. In particular, Counterclaimant eCoupons has not pleaded any facts regarding the size of the relevant market or Dailyedeals' share of the market. Further, eCoupons has not pleaded facts showing a dangerous probability that Dailyedeals and Kovarik will monopolize the market. Instead, eCoupons simply recites the elements of a claim for monopolization or attempted monopolization. Accordingly, eCoupons has not pleaded facts sufficient to state a claim for monopolization or attempted monopolization.

D. Common Law Unfair Competition

In the third claim for relief, eCoupons brings a claim against all Counterdefendants for common law unfair competition. All Counterdefendants move to dismiss this claim.

Under California law, a plaintiff must allege four elements to state a claim for common law unfair **[*16]** competition: (1) the plaintiff has invested substantial time, skill, or money in developing its property; (2) the defendant appropriated and used the plaintiff's property at little or no cost; (3) the defendant's appropriation was without authorization or consent of the plaintiff; and (4) the plaintiff was injured by the defendant's conduct. See, e.g., *City Solutions, Inc. v. Clear Channel Commc'ns, 365 F.3d 835, 842 (9th Cir. 2004)*; see also *Balboa Ins. Co. v. Trans Global Equities, 218 Cal. App. 3d 1327, 1342, 267 Cal. Rptr. 787 (1990)*. "The common law tort of unfair competition is generally thought to be synonymous with the act of 'passing off' one's goods as those of another . . . [or] acts analogous to 'passing off,' such as the sale of confusingly similar products, by which a person exploits a competitor's reputation in the market." *Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1264, 10 Cal. Rptr. 2d 538, 833 P.2d 545 (1992)*; *Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1147 (9th Cir. 1997)* (same).

In its common law unfair competition claim, eCoupons alleges that Counterdefendants' "conduct . . . in manipulating search engine results and the deceptive and misleading way that 'free' webcounters are used constitute unfair competition with eCoupons, in violation of the common law of the United States and California." (AC ¶ 46.) All of eCoupons allegations relate to Counterdefendants' use of third party retailers' marks and goodwill. Thus, eCoupons fails to allege that it has invested substantial time, skill, **[*17]** or money in developing any property. Further, eCoupons does not allege that any Counterdefendant appropriated any of eCoupons' property. Thus, eCoupons has failed to allege that Counterdefendants exploited eCoupons' reputation in the market. Moreover, eCoupons has not alleged actions analogous to passing off the goods of another. Finally, eCoupons has not directed the Court to any authority supporting a common law unfair competition claim against a defendant for appropriating and using a third party's trademarks. Accordingly, eCoupons' common law unfair competition claim fails.

E. Statutory Unfair Competition

In its fourth claim for relief, eCoupons brings a claim against all Counterdefendants for unfair competition under *California Business & Professions Code § 17200*. *Section 17200* provides, in pertinent part, "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." The California Supreme Court has provided guidance with regard to *§ 17200* claims in which a competitor alleges anticompetitive practices:

> When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes *section 17200*, the word "unfair" in that section **[*18]** means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Cal-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 & n.12 (1999). For an act to be unfair within the meaning of the statute, the unfairness must "be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Id. at 186-87*. Moreover, the Ninth Circuit has observed that unfair competition claims pursuant to *§ 17200* are "substantially congruent" to claims made under the Lanham Act. See, e.g., *Cleary v. News Corp., 30 F.3d 1255, 1262-63 (9th Cir. 1994)* (affirming dismissal of *§ 17200* claim for same reasons as dismissal of Lanham Act claim).

In its fourth claim, eCoupons relies largely on allegations made with regard to its other claims. Additionally, eCoupons concludes that "Counterdefendants' conduct relating to search engine manipulation, intentional breach of Affiliate Agreements, and infringement of retailers' trademarks, has intentionally caused a likelihood of confusion among online shopping consumers and has unfairly competed with eCoupons in violation" of *§ 17200*. According to Counterdefendants, like its three previous claims, **[*19]** eCoupons' *§ 17200* claim fails to state facts upon which relief may be granted. In opposition, eCoupons argues that it has alleged violations of the Lanham Act and the Sherman Act, as well as other unfair practices, and thus, it has made out a claim for relief under *§ 17200*.

The Court has already concluded that eCoupons has failed to state a claim under either the Lanham Act or the Sherman Act, and likewise, it has failed to state a claim for common law unfair competition. Thus, the Ninth Circuit's observation that *§ 17200* claims are largely congruous with Lanham Act claims weighs in favor of dismissal here. Moreover, eCoupons provides few additional facts in support of its *§ 17200* claim. Examining the AC, other than stating the legal standard, eCoupons has not alleged that Counterdefendants' actions threaten an incipient violation of an ***antitrust law*** or that they otherwise significantly harm competition. See *Cal-Tech Commc'ns, Inc., 20 Cal. 4th at 187*. Therefore, eCoupons fails to state a claim under *§ 17200* against any of the Counterdefendants.

F. The Phams and August Studio's Motion for More Definite Statement

Besides moving to dismiss all three claims alleged against them, the Phams and August Studio ask the Court to require a more definite statement from eCoupons. **[*20]** Given that the Court has dismissed all of eCoupons' claims, the Court **DENIES** as moot the Phams and August Studio's motion for more definite statement.

G. Dailyedeals and Kovarik's Motion for Summary Adjudication

As the Court has dismissed all of the claims pending against Dailyedeals and Kovarik, the Court **DENIES** Dailyedeals and Kovarik's motion for summary adjudication without prejudice. Further, the Court **DENIES** as moot eCoupons' motion to continue the motion for summary adjudication.

Conclusion

For the reasons stated above, the Court **GRANTS** Counterdefendants' motions to dismiss. (Doc. Nos. 83, 92.) Therefore, the Court **DISMISSES** without prejudice eCoupons' counterclaim in its entirety. Accordingly, the Court **DENIES** without prejudice Dailyedeals and Kovarik's motion for summary adjudication. (Doc. No. 83.) The Court

DENIES as moot the Phams and August Studio's motion for a more definite statement. (Doc. No. 93.) Further, the Court **DENIES** as moot eCoupons' motion to continue the motion for summary adjudication. (Doc. No. 99.) Counterclaimant eCoupons shall file any amended complaint addressing the deficiencies noted above within 30 days of the date this order is filed.

IT IS SO ORDERED. **[*21]**

DATED: May 31, 2007

/s/ Marilyn L. Huff

MARILYN L. HUFF, District Judge

UNITED STATES DISTRICT COURT

In re Dynamic Random Access Memory Antitrust Litig.

United States District Court for the Northern District of California

June 1, 2007, Decided

No. M 02-1486 PJH

Reporter

516 F. Supp. 2d 1072 *; 2007 U.S. Dist. LEXIS 44354 **; 2007-1 Trade Cas. (CCH) P75,736

In re DYNAMIC RANDOM ACCESS MEMORY (DRAM) ANTITRUST LITIGATION; This Document Relates to: All Indirect Purchaser Actions

Subsequent History: Request denied by *In re Dynamic Random Access Memory Antitrust Litig., 2007 U.S. Dist. LEXIS 101249 (N.D. Cal., July 9, 2007)*

Motion granted by *In re Dynamic Random Access Memory Antitrust Litig., 2007 U.S. Dist. LEXIS 66785 (N.D. Cal., Aug. 17, 2007)*

Prior History: *In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 2007 U.S. Dist. LEXIS 20570 (N.D. Cal., Mar. 6, 2007)*

Core Terms

purchaser, plaintiffs', indirect, antitrust, defendants', pleadings, allegations, antitrust statute, factors, class action, consumer protection, price-fixing, cases, motion for judgment, antitrust violation, products, reasons, unfair, Cartwright Act, deceptive, tolling, anti trust law, state law, damages, conspiracy, practices, consumers, cause of action, interpreting, commerce

LexisNexis® Headnotes

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN1[] Pretrial Judgments, Judgment on Pleadings

Fed. R. Civ. P. 12(c) provides that any party may move for judgment on the pleadings after the pleadings are closed, but within such time as not to delay the trial. A motion for judgment on the pleadings challenges the legal sufficiency of the opposing party's pleadings, and the allegations contained therein.

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

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN2[] Motions to Dismiss, Failure to State Claim

The standard applied by the court in treating a motion for judgment on the pleadings is the same as that applied by the court in considering motions to dismiss under *Fed. R. Civ. P. 12(b)(6)*. In short, judgment on the pleadings is appropriate when, even if all material facts in the pleading under attack are true, the moving party is entitled to judgment as a matter of law. The United States Supreme Court, in passing on the *Rule 12(b)(6)* standard in the antitrust context recently, also noted that while a complaint attacked by a motion to dismiss for failure to state a claim upon which relief can be granted does not need detailed factual allegations, a plaintiffs obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN3[] **Pretrial Judgments, Judgment on Pleadings**

Fed. R. Civ. P. 12(c) does not mention leave to amend; however, courts generally have discretion in granting 12(c) motions with leave to amend, particularly in cases where the motion is based on a pleading technicality. There is a strong policy in favor of allowing amendment, unless amendment would be futile, results from bad faith or undue delay, or will unfairly prejudice the opposing party. Courts also have discretion to grant dismissal on a 12(c) motion, in lieu of judgment, on any given claim.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN4[] **Standing, Requirements**

The concept of antitrust standing has its roots in federal law. It refers to the standing requirements that a plaintiff must satisfy in all private antitrust suits seeking monetary damages under the federal antitrust statutes. *15 U.S.C.S. § 15(a)*. A plaintiff seeking monetary damages for antitrust violations must prove that he or she has been (1) injured in his business or property; (2) by reason of anything forbidden in the antitrust laws. *15 U.S.C.S. § 15(a)*. Under the first element, a plaintiff must demonstrate injury--or the fact of damage--to his or her business or property interests, which injury is causally linked to an antitrust violation. Generally speaking, allegations that plaintiff consumers have paid higher prices for goods purchased for personal use due to defendants' conduct have satisfied this element. Under the more critical second element, referred to as antitrust injury, a plaintiff must also demonstrate injury of the type the antitrust laws were intended to prevent. In other words, a plaintiff must connect any alleged injury to the purposes of the antitrust laws.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN5[] **Standing, Requirements**

Even assuming that a plaintiff is able to make a showing of antitrust injury, the antitrust standing inquiry is not at an end. This is because a plaintiff's right to sue for money damages is nonetheless subject to certain limitations, based upon policies found by the courts to be inherent in the structure and purpose of the antitrust laws. Where a plaintiff's injury, for example, is derivative of a more direct injury to some other person, and that person would have a strong motivation to pursue its own antitrust claim against the defendant, standing is likely to be denied. This is the rationale underlying Illinois Brick Co. v. Illinois in which the United States Supreme Court held that indirect purchasers are too remote to suffer true antitrust injury, and therefore do not have standing under federal ***antitrust law*** to pursue antitrust claims. In recognition of this and other concerns that impact the antitrust standing analysis, the Supreme Court has fashioned a general balancing test to be used in determining whether a plaintiff is a proper party to bring an antitrust claim.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN6[] **Private Actions, Remedies**

The AGC test, as it is called, enumerates a variety of factors that are employed in evaluating the plaintiffs harm, the alleged wrongdoing by the defendants, and the relationship between them, in order to determine standing. These factors include the nature of the injury alleged, the directness of the injury, the speculative nature of the harm, the risk of duplicative recovery, and the complexity in apportioning damages. The United States Court of Appeals for the Ninth Circuit has embraced this test, announcing its commitment to the AGC factors in American Ad Mgmt., Inc. v. Gen. Tel. Co.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN7[] **Deceptive & Unfair Trade Practices, State Regulation**

The Cartwright Act prohibits unlawful restrictions on competition, and grants any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by the Act the right to bring a civil action for treble damages, regardless of whether such injured person dealt directly or indirectly with the defendant. *Cal. Bus. & Prof. Code §§ 16720*, *16726*, *16750*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN8[] **Deceptive & Unfair Trade Practices, State Regulation**

California's Cartwright Act is an Illinois Brick repealer statute, under which indirect purchaser standing is permissible in private actions alleging violations of ***antitrust law***. However, while the Cartwright Act directly contradicts federal law insofar as indirect purchaser standing is generally concerned, it does not follow from this either that indirect purchaser status is itself sufficient under California law to establish antitrust standing, or that California law necessarily eschews the general test for antitrust standing as set forth in AGC.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN9[] **Standing, Requirements**

The federal antitrust standing inquiry is based on consideration of more than merely a plaintiff's status as direct or indirect purchaser. This reasoning - which underscores the federal courts' determination that antitrust standing must be affirmatively demonstrated with regard to other factors - logically should apply to consideration of the Cartwright Act, as well.

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

HN10[] **Private Actions, State Regulation**

The Cartwright Act's, *Cal. Bus. & Prof. Code § 16720*, grant of indirect purchaser standing, while ensuring that plaintiffs' status as indirect purchasers cannot bar their claim under the Cartwright Act, does not in actuality set forth the sum total of what a given plaintiff must establish in order to satisfy antitrust standing generally.

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

HN11[] **Private Actions, Remedies**

A plaintiff may only pursue an antitrust action if it can show antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The United States Court of Appeals for the Ninth Circuit has identified four requirements for antitrust injury, which serve as a helpful guide here: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent. A central concern of the antitrust injury analysis is in protecting the economic freedom of participants in the relevant market. To that end, antitrust standing is granted only where the plaintiff is a participant in the relevant market - e.g., a consumer or competitor in the relevant market alleged.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN12[] **Deceptive & Unfair Trade Practices, State Regulation**

The Ohio Supreme Court has expressly stated that it adopts and follows Illinois Brick's direct-purchaser requirement and holds that an indirect purchaser of goods may not assert a Valentine Act claim for alleged violations of Ohio ***antitrust law***.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN13[] **Deceptive & Unfair Trade Practices, State Regulation**

Federal decisional law interpreting the Sherman Act is to be applied in interpreting West Virginia's parallel antitrust statute. However, while this would seem to suggest that the Illinois Brick doctrine also extends to indirect purchaser actions brought under West Virginia's state antitrust statute, this conclusion is called into question by the fact that the West Virginia attorney general has promulgated a legislative rule expressly permitting antitrust suits brought by indirect purchasers. The attorney general's ability to promulgate such a rule is contemplated by the state's antitrust statute itself, which explicitly grants the state attorney general the right to adopt rules and regulations interpreting and, enforcing West Virginia's antitrust statute.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN14[] **Deceptive & Unfair Trade Practices, State Regulation**

South Dakota's antitrust statute should be read to cover unlawful anticompetitive conduct, as long as any part of it is within South Dakota--i.e., as long as any part of it takes place or has an effect within the state. *S.D. Codified Laws § 37-1-3.1*. A contract, combination, or conspiracy between two or more persons in restraint of trade or commerce any part of which is within this state is unlawful. This reading is supported by the literal language of the statute.

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN15[] **Special Proceedings, Class Actions**

The class tolling doctrine holds that the commencement of a class action stops the running of statutes of limitations as to all claims that might be asserted by all members of the class. The United States Supreme Court has held that the doctrine helps to safeguard the principal purposes of the *Fed. R. Civ. P. 23* class action procedure - promotion of efficiency and economy of litigation.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN16[] **Deceptive & Unfair Trade Practices, State Regulation**

La. Rev. Stat. § 51:1409(A) provides that plaintiffs may bring an action individually but not in a representative capacity to recover actual damages under the statute.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN17[] **Deceptive & Unfair Trade Practices, State Regulation**

Mont. Code Ann. § 30-14-133(1) provides that consumers may bring an individual but not a class action.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN18[] **Deceptive & Unfair Trade Practices, State Regulation**

N.Y. CPLR 901(b) presents no bar to class action suits seeking actual damages pursuant to *N.Y. Gen. Bus. Law § 349*.

Governments > Legislation > Interpretation

HN19[] **Legislation, Interpretation**

Where no controlling state law cases are available, the court has looked to state legislative history - where available and relied on by the parties - as persuasive authority regarding proper statutory interpretation.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN20[] **Deceptive & Unfair Trade Practices, State Regulation**

The Alaska's Unfair Trade Practices and Consumer Protection Act (AUTPCPA) provides: A person who suffers an ascertainable loss of money or property as a result of another person's act or practice declared unlawful under AUTPCPA may bring a civil action to recover for each unlawful act or practice three times the actual damages or $ 500, whichever is greater. *Alaska Stat. § 45.50.531*. There is nothing in the statute's wording or definitions, however, that specifically defines either direct or indirect purchasers as persons, or that distinguishes between the two. Nor is there any guidance provided by the language of the statute as to whether, more generally, indirect purchaser standing in the antitrust context suffices under the AUTPCPA.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN21[] **Deceptive & Unfair Trade Practices, State Regulation**

The Arkansas Deceptive Trade Practices Act, *Ark. Code Ann. § 4-75-315(b)*, does not limit suits by indirect purchasers expressly to the state attorney general. It merely provides an affirmative right of action for the attorney general, which the attorney general may, in his or her discretion, exercise.

Governments > Legislation > Effect & Operation > Retrospective Operation

HN22[] **Effect & Operation, Retrospective Operation**

Under Hawaii case law, a statute has retroactive effect only if the language of the statute itself or the legislative history expressly indicate that the statute should be applied retroactively.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN23[] **Deceptive & Unfair Trade Practices, State Regulation**

Any person may bring an action based on unfair methods of competition declared unlawful by this section. Haw. Stat. Ann. § 480-2(e). Thus, it is the bringing, or filing, of an action to which the statute applies.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN24[] **Deceptive & Unfair Trade Practices, State Regulation**

The Idaho Supreme Court has explicitly held that indirect purchasers of price-fixed products cannot sue under Idaho's consumer protection statute, the Consumer Protection Act, *Idaho Code Ann. § 48-601 et seq.*, since the statute specifically lists the types of conduct that are unlawful, and price-fixing is not one of them.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN25[] **Deceptive & Unfair Trade Practices, State Regulation**

Price-fixing is not listed in *Idaho Code § 48-603* as conduct that constitutes either an unfair method of competition or an unfair or deceptive act or practice.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN26[] **Deceptive & Unfair Trade Practices, State Regulation**

The Montana Unfair Trade Practices Act's, *Mont . Code Ann. § 30-14-101 et seq.*, consumer protection provisions provide that the proper source of analogous federal law is the Federal Trade Commission Act.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN27[] **Deceptive & Unfair Trade Practices, State Regulation**

As a general matter, a claim under *N.Y. Gen. Bus. Law § 349* may be predicated on allegations of antitrust violations.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN28[] **Deceptive & Unfair Trade Practices, State Regulation**

New York's state antitrust statute, the Donnelly Act, *N.Y. Gen. Bus. Law § 340(6)*, expressly repeals Illinois Brick and allows for indirect purchaser standing.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN29[] **Deceptive & Unfair Trade Practices, State Regulation**

In order to state a claim under *section 349*, plaintiffs must allege first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN30[] **Deceptive & Unfair Trade Practices, State Regulation**

The Oregon Unfair Trade Practices Act expressly states that no action or suit may be brought under *Or. Rev. Stat. § 646.608(1)(u)* unless the Attorney General has first established a rule in accordance with the provisions of Or. Rev. Stat. ch. 183 declaring the conduct to be unfair or deceptive in trade or commerce.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN31[] **Deceptive & Unfair Trade Practices, State Regulation**

The Rhode Island Supreme Court has construed the Rhode Island Unfair Trade Practices and Consumer Protection Act, *R.I. Gen. Laws § 6-13.1-1 et seq.*, to require that only natural persons are permitted to bring private rights of action under the statute, which natural persons must have purchased or leased goods or services primarily for personal, family, or household purposes.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN32[] **Deceptive & Unfair Trade Practices, State Regulation**

The West Virginia Consumer Credit and Protection Statute, *W. Va. Code § 46A-6-101 et seq.*, prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. The statute also purports to define what is meant by unfair methods of competition and unfair or deceptive acts or practices, and does so by enumerating a list of various acts and practices that the statute defines as unfair or deceptive.

Counsel: [1]** For Internet Integration Inc. on its own behalf and on behalf of all others similarly situated, Plaintiff: Cardio Zirpoli, LEAD ATTORNEY, Geoffrey C. Rushing, Guido Saveri, Richard Alexander Saveri, Saveri & Saveri Inc., San Francisco, CA.; Fred Taylor Isquith, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLP, New York, NY, US.; Joseph J. Tabacco, Jr., LEAD ATTORNEY, Berman DeValerio Pease Tabacco Burt & Pu, San Francisco, CA.; Merrick Scott Rayle, LEAD ATTORNEY, Lovell Stewart Halebian LLP, Pacific Grove, CA.; Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA.; Anthony J. Gaughan, Madison, WI, US.; Anthony D. Shapiro, Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Seattle, WA.; Christopher Lovell, Lovell Stewart Halebian LLP, New York, NY.; D. Scott Macrae, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA.; Eugene A. Spector, Jeffrey J. Corrigan, John A. Macoretta, Spector Roseman & Kodroff PC, Philadelphia, PA.; Francis A. Bottini, Jr., Johnson Bottini, LLP, San Diego, CA.; Francis M. Gregorek, Wolf Haldenstein Adler Freeman & Herz LLP, San Diego, CA.; Garrett D. Blanchfield, Jr., Mark Reinhardt, Reinhardt Wendorf & Blanchfield, **[**2]** St. Paul, MN.; Joel Cary Meredith, Steven J. Greenfogel, Meredith Cohen Greenfogel & Skirnick PC, Philadelphia, PA.; Kevin J. O'Connor, Linda S. Schmidt, Madison, WI, US.; Paul J. Stancil, Milwaukee, WI, US.; Steven A. Kanner, Much Shelist Freed Denenberg & Ament PC, Chicago, IL.; Susan G. Kupfer, Glancy & Binkow LLP, San Francisco, CA.

For William Breck Seiniger, Jr., Plaintiff: Joseph J. Tabacco, Jr., LEAD ATTORNEY, Berman DeValerio Pease Tabacco Burt & Pu, San Francisco, CA.; Steve W. Berman, LEAD ATTORNEY, Anthony D. Shapiro, Hagens Berman Sobol Shapiro LLP, Seattle, WA.; Craig R. Spiegel, Hagens Berman Sobol Shapiro LLP, Seattle, WA.; Eugene A. Spector, Jeffrey J. Corrigan, John A. Macoretta, Spector Roseman & Kodroff PC, Philadelphia, PA.; Garrett D. Blanchfield, Jr., Mark Reinhardt, Reinhardt Wendorf & Blanchfield, St. Paul, MN.; Philip Howard Gordon, Gordon Law Offices Chartered, Boise, ID.; Joel Cary Meredith, Steven J. Greenfogel, Meredith Cohen Greenfogel & Skirnick PC, Philadelphia, PA.; Steven A. Kanner, Much Shelist Freed Denenberg & Ament PC, Chicago, IL.; Susan G. Kupfer, Glancy & Binkow LLP, San Francisco, CA.

For C3 Information Technology LLC, Midland Solutions **[**3]** Group Inc., Plaintiffs: Joseph J. Tabacco, Jr., LEAD ATTORNEY, Berman DeValerio Pease Tabacco Burt & Pu, San Francisco, CA.; Steven A. Kanner, LEAD ATTORNEY, Much Shelist Freed Denenberg & Ament PC, Chicago, IL.; Anthony D. Shapiro, Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Seattle, WA.; Eugene A. Spector, Jeffrey J. Corrigan, John A. Macoretta, Spector Roseman & Kodroff PC, Philadelphia, PA.; Garrett D. Blanchfield, Jr., Mark Reinhardt, Reinhardt Wendorf & Blanchfield, St. Paul, MN.; Joel Cary Meredith, Steven J. Greenfogel, Meredith Cohen Greenfogel & Skirnick PC, Philadelphia, PA.; Philip Howard Gordon, Gordon Law Offices Chartered, Boise, ID.; Susan G. Kupfer, Glancy & Binkow LLP, San Francisco, CA.

For Continental Promotion Group Inc., Plaintiff: Joseph J. Tabacco, Jr., LEAD ATTORNEY, Berman DeValerio Pease Tabacco Burt & Pu, San Francisco, CA.; Mark Reinhardt, LEAD ATTORNEY, Garrett D. Blanchfield, Jr., Mark A. Wendorf, Reinhardt Wendorf & Blanchfield, St. Paul, MN.; Anthony D. Shapiro, Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Seattle, WA.; Eugene A. Spector, Jeffrey J. Corrigan, John A. Macoretta, Spector Roseman & Kodroff PC, Philadelphia, PA.; Joel Cary **[**4]** Meredith, Steven J. Greenfogel, Meredith Cohen Greenfogel & Skirnick PC, Philadelphia, PA.; Philip Howard Gordon, Gordon Law Offices Chartered, Boise, ID.; Steven A. Kanner, LEAD ATTORNEY, Much Shelist Freed Denenberg & Ament PC, Chicago, IL.; Susan G. Kupfer, Glancy & Binkow LLP, San Francisco, CA.

For Web Ideals LLC, Plaintiff: Eugene A. Spector, LEAD ATTORNEY, Jeffrey J. Corrigan, John A. Macoretta, Spector Roseman & Kodroff PC, Philadelphia, PA.; Joseph J. Tabacco, Jr., LEAD ATTORNEY, Berman DeValerio

Pease Tabacco Burt & Pu, San Francisco, CA.; Anthony D. Shapiro, Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Seattle, WA.; Garrett D. Blanchfield, Jr., Mark Reinhardt, Reinhardt Wendorf & Blanchfield, St. Paul, MN.; Joel Cary Meredith, Steven J. Greenfogel, Meredith Cohen Greenfogel & Skirnick PC, Philadelphia, PA.; Philip Howard Gordon, Gordon Law Offices Chartered, Boise, ID.; Steven A. Kanner, LEAD ATTORNEY, Much Shelist Freed Denenberg & Ament PC, Chicago, IL.; Susan G. Kupfer, Glancy & Binkow LLP, San Francisco, CA.

For 5207 Inc., Plaintiff: Joseph J. Tabacco, Jr., LEAD ATTORNEY, Berman DeValerio Pease Tabacco Burt & Pu, San Francisco, CA.; Laurence D. King, LEAD **[**5]** ATTORNEY, Kaplan Fox & Kilsheimer LLP, San Francisco, CA.; Mary Jane Edelstein, LEAD ATTORNEY, Wolf Heldenstein Alder Freeman & Herz, Chicago, IL.; Anthony D. Shapiro, Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Seattle, WA.; Daniel E. Gustafson, Renae Diane Steiner, Gustafson Gluek PLLC, Minneapolis, MN.; Emilio Eugene Varanini, IV, California Office of the Attorney General, Los Angeles, CA.; Eugene A. Spector, Jeffrey J. Corrigan, John A. Macoretta, Spector Roseman & Kodroff PC, Philadelphia, PA.; Francis A. Bottini, Jr., Johnson Bottini, LLP, San Diego, CA.; Garrett D. Blanchfield, Jr., Mark Reinhardt, Reinhardt Wendorf & Blanchfield, St. Paul, MN.; Gary L. Specks, Kaplan Fox & Kilsheimer, LLP, Chicago, IL, US.; Joel Cary Meredith, Steven J. Greenfogel, Meredith Cohen Greenfogel & Skirnick PC, Philadelphia, PA.; Steven A. Kanner, Much Shelist Freed Denenberg & Ament PC, Chicago, IL.; Susan G. Kupfer, Glancy & Binkow LLP, San Francisco, CA.

For JEM Electronics Distributors Inc, Plaintiff: Bonny E. Sweeney, LEAD ATTORNEY, Lerach Coughlin Stoia Geller Rudman & Robbins LLP, San Diego, CA.

For PC Doctor Inc., Plaintiff: Alfred Glenn Yates, Jr., LEAD ATTORNEY, Law Office **[**6]** of Alfred G. Yates Jr, P.C, Pittsburgh, PA.; Stephen E. Connolly, LEAD ATTORNEY, Schiffrin & Barrowy, LLP, Radnor, PA.

For Network Business Solutions, Plaintiff: Susan G. Kupfer, LEAD ATTORNEY, Glancy & Binkow LLP, San Francisco, CA.; Joseph J. Tabacco, Jr., Berman DeValerio Pease Tabacco Burt & Pu, San Francisco, CA.

For Advanced Technology Distributors Inc., Plaintiff: Roger M. Schrimp, LEAD ATTORNEY, Clinton P. Walker, Gene J. Stonebarger, Damrell, Nelson, Schrimp, Pathos, Pache, Modesto, CA.; Anthony D. Shapiro, Hagens Berman Sobol Shapiro LLP, Seattle, WA.; Bonny E. Sweeney, Lerach Coughlin Stoia Geller Rudman & Robbins LLP, San Diego, CA.; Bruce Lee Simon, Pearson, Simon, Soter, Warshaw & Penny, LLP, San Francisco, CA.; Steven Noel Williams, Cotchett Pitre & McCarthy, Burlingame, CA.

For Michael Wilkser, Plaintiff: Willem F. Jonckheer, LEAD ATTORNEY, Schubert & Reed LLP, San Francisco, CA.; Bernard Persky, Goodkind Labaton Rudoff & Sucharow, New York, NY.; Juden Justice Reed, Schubert & Reed LLP, San Francisco, CA.; Marvin Alan Miller, Miller Law LLC, Chicago, IL.

For Dolphin Consulting Inc., Plaintiff: Kevin Bruce Love, LEAD ATTORNEY, Hanzman Criden & Love, **[**7]** P.A., South Miami, FL.

For Gregory M. Nespole, Plaintiff: Mary Jane Edelstein Fait, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman Herz LLP, Chicago, IL.; Fred Taylor Isquith, Wolf Haldenstein Adler Freeman & Herz LLP, LEAD ATTORNEY, New York, NY, US.

For Onshore Inc., Plaintiff: Francis A. Bottini, Jr., LEAD ATTORNEY, Johnson Bottini, LLP, San Diego, CA.; Mary Jane Edelstein Fait, LEAD ATTORNEY, Wolf Heldenstein Alder Freeman & Herz, Chicago, IL.; Francis M. Gregorek, Wolf Haldenstein Adler Freeman & Herz LLP, San Diego, CA.; Fred Taylor Isquith, Wolf Haldenstein Adler Freeman & Herz LLP, LEAD ATTORNEY, New York, NY, US.

For Daniel E. Clement, Plaintiff: Ryan M. Hagan, Alexander Hawes & Audet, LLP, San Jose, CA.

For Dawn Thompson, Plaintiff: Kenneth George Gilman, LEAD ATTORNEY, Gilman and Pastor, LLP, Boston, MA.

For Bernard Weisburgh, on behalf of himself and all others similarly situated, Plaintiff: Allan Steyer, LEAD ATTORNEY, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA.; Dennis James Johnson, LEAD ATTORNEY, Peter John McDougall, Johnson & Perkinson, South Burlington, VT. Ian Otto, Straus & Boies LLP, Fairfax, VA.; Lisa Marie Williams, **[**8]** Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA.

For Mike Kinkade, Plaintiff: Allan Steyer, LEAD ATTORNEY, Lisa Marie Williams, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA.; C. Dewey Branstetter, Jr., LEAD ATTORNEY, Branstetter Kilgore Stranch & Jennings, Nashville, TN.; Dennis Stewart, Hulett Harper Stewart LLP, San Diego, CA.; Ian Otto, Straus & Boies LLP, Fairfax, VA.; James G. Stranch, III, James G. Stranch, IV, Branstetter Stranch & Jennings, Nashville, TN.

For Lance Jennings, Jeff Lindsey, on behalf of themselves and all others similarly situated, Plaintiffs: C. Dewey Branstetter, Jr., LEAD ATTORNEY, James G. Stranch, IV, James G. Stranch, III, Branstetter Stranch & Jennings, Nashville, TN.

For Don Greene, on behalf of himself and all others similarly situated in Tennessee, Plaintiff: Allan Steyer, LEAD ATTORNEY, Lisa Marie Williams, Steyer Lowenthal Broodrookas Alvarez, & Smith LLP, San Francisco, CA.; Douglas S. Johnston, LEAD ATTORNEY, Barrett, Johnston & Parsley, Nashville, TN.; Dennis Stewart, Hulett Harper Stewart LLP, San Diego, CA.; Ian Otto, Straus & Boies LLP, Fairfax, VA.; Jeffrey A. Bartos, Guerrieri Edmond **[**9]** & Clayman PC, Washington, DC.; Wyatt B. Durrette, Jr., Durrette Bradshaw, Richmond, VA.

For Chiengthong Kongkham, Plaintiff: Allan Steyer, LEAD ATTORNEY, Lisa Marie Williams, Steyer Lowenthal Broodrookas Alvarez, & Smith LLP, San Francisco, CA.; James F. Wyatt, III, LEAD ATTORNEY, Wyatt & Blake LLP, Charlotte, NC.; Ian Otto, Timothy D. Battin, Straus & Boies LLP, Fairfax, VA.

For John G. Elias, on behalf of himself and all other similarly situated in Tennessee, Plaintiff: Allan Steyer, LEAD ATTORNEY, Lisa Marie Williams, Steyer Lowenthal Broodrookas Alvarez, & Smith LLP, San Francisco, CA.; Matthew Maniscalco, LEAD ATTORNEY, Timothy D. Battin, David Boles, Ian Otto, Straus & Boies LLP, Fairfax, VA.; Hal Hardin, Nashville, TN.; Michael N. Widener, Van Bunch, Bonnett Fairbourn Friedman & Balint PC, Signal Mountain, TN.

For Petro Computer Systems, Inc., Plaintiff: Christine Pedigo Bartholomew, LEAD ATTORNEY, Shannon P. Cereghino, Finkelstein Thompson & Loughran, San Francisco, CA.; Craig C. Corbitt, LEAD ATTORNEY, Anna C. Conley, Christopher T. Micheletti, Francis O. Scarpulla, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA.; John J. Bogdanor, LEAD ATTORNEY, **[**10]** Josef D. Cooper, Tracy R. Kirkham, Cooper & Kirkham, P.C., San Francisco, CA.; Adam C. Belsky, Monique Alonso, Terry Gross, Gross & Belsky LLP, San Francisco, CA.; Alan R Plutzik, Daniel Edward Birkhaeuser, Bramson, Plutzik, Mahler & Birkhaeuser, LLP, Walnut Creek, CA.; Alexander M. Schack, Law Offices of Alexander M. Schack, San Diego, CA.; Allan Steyer, LEAD ATTORNEY, Lisa Marie Williams, Steyer Lowenthal Broodrookas Alvarez, & Smith LLP, San Francisco, CA.; Chad M. McManamy, Daniel J. Mogin, Lisa J. Frisella, The Mogin Law Firm, PC, San Diego, CA.; Christopher Lee Lebsock, Michael P. Lehmann, Furth Lehmann & Grant LLP, San Francisco, CA.; Daniel S. Glaser, Peter J. McNulty, McNulty Law Firm, Bel Air, CA.; Douglas G. Thompson, Jr., Mila Bartos, Finkelstein Thompson & Loughran, Washington, DC.; Jenelle Welling, Robert S. Green, Green Welling LLP, San Francisco, CA.; Joseph M. Patane, Law Office of Joseph M. Patane, San Francisco, CA.; Lauren Clare Russell, Mario Nunzio Alioto, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA.; Lynnette D. Chen, William Timothy Needham, Janssen Malloy Needham Morrison & Reinholtsen, LLP, Eureka, CA.; Ralph B. Kalfayan, Krause Kalfayan Benink **[**11]** & Slavens, San Diego, CA.; Richard M. Hagstrom, Richard L. Voelbel, Zelle Hofmann Voelbel Mason & Gette LLP, Minneapolis, MN.; Richard G. Urquhart, Zelle Hofmann Voelbel Mason & Gette LLP, Dallas, TX.; Scott Ames, Serratore & Ames, Los Angeles, CA.; Steven J. Serratore, Serratore & Ames, Los Angeles, CA.

For Gary Petersen, Dale Dickman, Plaintiffs: Craig C. Corbitt, LEAD ATTORNEY, Anna C. Conley, Christopher T. Micheletti, Francis O. Scarpulla, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA.; Adam C. Belsky, Monique Alonso, Terry Gross, Gross & Belsky LLP, San Francisco, CA.; Alan R Plutzik, Daniel Edward Birkhaeuser, Bramson, Plutzik, Mahler &, Birkhaeuser, LLP, Walnut Creek, CA.; Alexander M. Schack, Law Offices of Alexander M. Schack, San Diego, CA.; Chad M. McManamy, Daniel J. Mogin, Lisa J. Frisella, The Mogin Law Firm, PC, San Diego, CA.; Daniel S. Glaser, Peter J. McNulty, McNulty Law Firm, Bel Air, CA.; Douglas G. Thompson, Jr., Mila Bartos, Finkelstein Thompson & Loughran, Washington, DC.; Douglas G. Thompson, Jr., Mila Bartos, Finkelstein Thompson & Loughran, Washington, DC.; John J. Bogdanor, Josef D. Cooper, Tracy R. Kirkham, Cooper & Kirkham, P.C., **[**12]** San Francisco, CA.; Joseph M. Patane, Law Office of Joseph M. Patane, San Francisco, CA.; Joseph M. Patane, Law Office of Joseph M. Patane, San Francisco, CA.; Mario Nunzio Alioto, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA.; Michael P. Lehmann, Furth Lehmann & Grant LLP, San

Francisco, CA.; Jenelle Welling, Robert S. Green, Green Welling LLP, San Francisco, CA.; Lynnette D. Chen, William Timothy Needham, Janssen Malloy Needham Morrison & Reinholtsen, LLP, Eureka, CA.; Ralph B. Kalfayan, Krause Kalfayan Benink & Slavens, San Diego, CA.; Richard M. Hagstrom, Richard L. Voelbel, Zelle Hofmann Voelbel Mason & Gette LLP, Minneapolis, MN.; Richard G. Urquhart, Zelle Hofmann Voelbel Mason & Gette LLP, Dallas, TX.; Scott Ames, Serratore & Ames, Los Angeles, CA.; Shannon P. Cereghino, Finkelstein Thompson & Loughran, San Francisco, CA.

For Pamela Uglem, Plaintiff: Craig C. Corbitt, LEAD ATTORNEY, Anna C. Conley, Christopher T. Micheletti, Francis O. Scarpulla, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA.; Adam C. Belsky, Monique Alonso, Terry Gross, Gross & Belsky LLP, San Francisco, CA.; Alan R Plutzik, Daniel Edward Birkhaeuser, Bramson, Plutzik, Mahler **[**13]** & Birkhaeuser, LLP, Walnut Creek, CA.; Alexander M. Schack, Law Offices of Alexander M. Schack, San Diego, CA.; Chad M. McManamy, Daniel J. Mogin, Lisa J. Frisella, The Mogin Law Firm, PC, San Diego, CA.; Peter J. McNulty, McNulty Law Firm, Bel Air, CA.; Douglas G. Thompson, Jr., Mila Bartos, Finkelstein Thompson & Loughran, Washington, DC.; Douglas G. Thompson, Jr., Mila Bartos, Finkelstein Thompson & Loughran, Washington, DC.; John J. Bogdanor, Josef D. Cooper, Tracy R. Kirkham, Cooper & Kirkham, P.C., San Francisco, CA.; Joseph M. Patane, Law Office of Joseph M. Patane, San Francisco, CA.; Joseph M. Patane, Law Office of Joseph M. Patane, San Francisco, CA.; Mario Nunzio Alioto, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA.; Michael P. Lehmann, Furth Lehmann & Grant LLP, San Francisco, CA.; Jenelle Welling, Robert S. Green, Green Welling LLP, San Francisco, CA.; Lynnette D. Chen, William Timothy Needham, Janssen Malloy Needham Morrison & Reinholtsen, LLP, Eureka, CA.; Ralph B. Kalfayan, Krause Kalfayan Benink & Slavens, San Diego, CA.; Richard M. Hagstrom, Richard L. Voelbel, Zelle Hofmann Voelbel Mason & Gette LLP, Minneapolis, MN.; Richard G. Urquhart, Zelle Hofmann **[**14]** Voelbel Mason & Gette LLP, Dallas, TX.; Scott Ames, Serratore & Ames, Los Angeles, CA.; Shannon P. Cereghino, Finkelstein Thompson & Loughran, San Francisco, CA.

For Michael Juetten, Ben Stewart, Melissa Barron, Plaintiffs: Craig C. Corbitt, Anna C. Conley, Francis O. Scarpulla, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA.; Adam C. Belsky, Monique Alonso, Terry Gross, Gross & Belsky LLP, San Francisco, CA.; Alan R Plutzik, Daniel Edward Birkhaeuser, Bramson, Plutzik, Mahler & Birkhaeuser, LLP, Walnut Creek, CA.; Alexander M. Schack, Law Offices of Alexander M. Schack, San Diego, CA.; Chad M. McManamy, Daniel J. Mogin, Lisa J. Frisella, The Mogin Law Firm P.C., San Diego, CA.; Christopher Lee Lebsock, Michael P. Lehmann, Furth Lehmann & Grant LLP, San Francisco, CA.; Daniel S. Glaser, Peter J. McNulty, McNulty Law Firm, Bel Air, CA.; Douglas G. Thompson, Jr., Mila Bartos, Finkelstein Thompson & Loughran, Washington, DC.; John J. Bogdanor, Josef D. Cooper, Tracy R. Kirkham, Cooper & Kirkham, P.C., San Francisco, CA.; Joseph M. Patane, Law Office of Joseph M. Patane, San Francisco, CA.; Lynnette D. Chen, William Timothy Needham, Janssen Malloy Needham Morrison & **[**15]** Reinholtsen, LLP, Eureka, CA.; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA.; Ralph B. Kalfayan, Krause Kalfayan Benink & Slavens, San Diego, CA.; Richard M. Hagstrom, Richard L. Voelbel, Zelle Hofmann Voelbel Mason & Gette, Minneapolis, MN.; Richard G. Urquhart, Zelle Hofmann Voelbel Mason & Gette LLP, Dallas, TX.; Robert S. Green, Green Welling LLP, San Francisco, CA.; Scott Ames, Steven J. Serratore, Serratore & Ames, Los Angeles, CA.; Shannon P. Cereghino, Finkelstein Thompson & Loughran, San Francisco, CA.

For Blumenthal & Associates, Heather Delaney, Johnson & Jennings, G.C.A. Strategies, Inc., Plaintiffs: Craig C. Corbitt, Anna C. Conley, Francis O. Scarpulla, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA.; Jenelle Welling, Robert S. Green, Green Welling LLP, San Francisco, CA.; Adam C. Belsky, Monique Alonso, Terry Gross, Gross & Belsky LLP, San Francisco, CA.; Alan R Plutzik, Daniel Edward Birkhaeuser, Bramson, Plutzik, Mahler & Birkhaeuser, LLP, Walnut Creek, CA.; Alexander M. Schack, Law Offices of Alexander M. Schack, San Diego, CA.; Chad M. McManamy, Daniel J. Mogin, Lisa J. Frisella, The Mogin Law Firm P.C., San Diego, **[**16]** CA.; Christopher Lee Lebsock, Michael P. Lehmann, Furth Lehmann & Grant LLP, San Francisco, CA.; Daniel S. Glaser, Peter J. McNulty, McNulty Law Firm, Bel Air, CA.; Douglas G. Thompson, Jr., Mila Bartos, Finkelstein Thompson & Loughran, Washington, DC.; John J. Bogdanor, Josef D. Cooper, Tracy R. Kirkham, Cooper & Kirkham, P.C., San Francisco, CA.; Joseph M. Patane, Law Office of Joseph M. Patane, San Francisco, CA.; Lynnette D. Chen, William Timothy Needham, Janssen Malloy Needham Morrison & Reinholtsen, LLP, Eureka, CA.; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA.; Ralph B. Kalfayan, Krause Kalfayan Benink & Slavens, San Diego, CA.; Richard M. Hagstrom, Richard L. Voelbel, Zelle Hofmann Voelbel

Mason & Gette, Minneapolis, MN.; Richard G. Urquhart, Zelle Hofmann Voelbel Mason & Gette LLP, Dallas, TX.; Scott Ames, Steven J. Serratore, Serratore & Ames, Los Angeles, CA.; Shannon P. Cereghino, Finkelstein Thompson & Loughran, San Francisco, CA.

For Leonard Kaplan, Plaintiff: Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA.; William F. Patterson, Jr., LEAD ATTORNEY, Forman Rossabi Black P.A., Greensboro, NC.; Dennis **[**17]** Stewart, Hulett Harper Stewart LLP, San Diego, CA.; Ian Otto, Straus & Boies LLP, Fairfax, VA.; Lisa Marie Williams, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA.

For Microprocessor Designs, Inc., Plaintiff: Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA.; Daniel R. Karon, LEAD ATTORNEY, Goldman Scarlato and Karon, PC, Cleveland, OH.; Dennis Stewart, Hulett Harper Stewart LLP, San Diego, CA.; Ian Otto, Straus & Boies LLP, Fairfax, VA.; Lisa Marie Williams, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA.; Mary Gilmore Kirkpatrick, Lisman Webster Kirkpatrick & Leckerling, RC., Burlington, VT.

For Centerprise International, Ltd., Plaintiff: Kevin Peter Roddy, LEAD ATTORNEY, Wilentz Goldman & Spitzer, PA, Woodbridge, NJ.; Gary Kostow, James C. Shah, Scott R. Shepherd, Media, PA.; Henry H. Rossbacher, The Rossbacher Firm, Los Angeles, CA.; Ira Neil Richards, Trujillo Rodriguez & Richards LLC, Philadelphia, PA.; James E. Miller, Shepherd, Finkelman, Miller & Shah, LLC, Chester, CT, US.; Natalie Finkelman Bennett, Attorney at Law, Media, PA.

For Geraldine Brown, Plaintiff: Charlene Haught Johnson, **[**18]** Jeremiah F. Hallisey, John St. John, Hallisey and Johnson, San Francisco, CA.

For Franza Giffen, Linda Harrington, Matthew Lynch, Mary McDevitt, Plaintiffs: John St. John, Hallisey and Johnson, San Francisco, CA.

For Lawrence Alder, Ashley Pritchett, Anna Underwood, Brighid Flaherty, Kimberly Moore, Sandra Sardinha, Jeromi Quade, Edward Battitori, Andrew James Maclenna, John McKinnon, Vincent Fagan, Donna Siler, Jacqueline Bendoraitif, Dereck Patterson, John Brushia, Prokofiew, Julie J. Vargas, Ingrid Gomez, Charles Draughn, Kevin O. Denver, David Meyer, Bethanne Hasson, Monica Browne, Laura Stewart, Kimberly Shea Dowden, George Valton Jones, Donna McCann, Joseph Batwinus, Mark B. Richards, Frank Pasvola, Plaintiffs: Robert J. Bonsignore, LEAD ATTORNEY, Bonsignore & Brewer, Medford, MA.

For John McKinnon, individually and on behalf of himself and all others similarly situated, Todd Hill, individually and on behalf of himself and all others similarly situated, Plaintiffs: D. Michael Noonan, LEAD ATTORNEY, Shaheen & Gordon, PA, Dover, NH.; Robert J. Bonsignore, Bonsignore & Brewer, Medford, MA.; Steven M. Gordon, Concord, NH.

For Shelly Smith, on behalf of herself **[**19]** and all others similarly situated, Plaintiff: D. Michael Noonan, LEAD ATTORNEY, William Shaheen, Shaheen & Gordon, P.A., Dover, NH.

For Donna McCann, on behalf of herself and all others similarly situated, Plaintiff: D. Michael Noonan, LEAD ATTORNEY, Shaheen & Gordon, PA, Dover, NH.

For Thomas K. Maher, on behalf of himself and all others, similarly situated in North Carolina, Plaintiff: Adam Stein, LEAD ATTORNEY, Ferguson Stein Wallas Adkins Gresham & Sumter, PA, Chapel Hill, NC.; Jeffrey A. Bartos, Guerrieri Edmond & Clayman PC, Washington, DC.; Wyatt B. Durrette, Jr., Durrette Bradshaw, Richmond, VA.

For Michael Solomon, Notice of Motion for Administrative Relief to Determine That the Instant Case Is A Related Case, Gayle Helwani, on behalf of themselves and all others similarly situated and the public, Plaintiffs: Lingel H. Winters, LEAD ATTORNEY, Lingel H. Winters, Esq., San Francisco, CA, U.S.A.

For Corabell B. Arps, Plaintiff: Samuel W. Lanham, Jr., LEAD ATTORNEY, Cuddy & Lanham, Bangor, ME, US.; Ian Otto, Starus & Boies LLP, Fairfax, VA.

For Maritza Mass-Carrero, Plaintiff: Arturo Luciano-Delgado, LEAD ATTORNEY, Arturo Luciano Law Office, San Juan, **[**20]** PR, US.; David Boles, III, Ian Otto, Timothy D. Battin, Straus & Boies, LLP, Fairfax, VA.; Kenneth G. Walsh, Barrett, Gravante, Carpinello & Stein, New York, NY, US.

For Sandra Bishop, On Behalf of Herself and All Others Similarly Situated in Mississippi, Plaintiff: LeRoy Davis Percy, LEAD ATTORNEY, Tollison Law Firm P.A., Oxford, MS, US.

For Jason Neeley, on behalf of themselves and all others similarly situated in the State of Utah, Aaron Stobbe, on behalf of themselves and all others similarly situated in the State of Utah, Plaintiffs: Allan O. Walsh, LEAD ATTORNEY, Jeremy C. Sink, McKay Burton & Thurman, Salt Lake City, UT, US.

For Stuart Schupler, On behalf of himself and all others similarly situated, Plaintiff: Scott Alan George, LEAD ATTORNEY, Sheller, Ludwig & Badey, Philadelphia, PA.

For Honeywell International, Inc., Plaintiff: James M. Lockhart, LEAD ATTORNEY, Mark Alan Jacobson, Lindquist & Vennum, P.L.L.P., Minneapolis, MN, U.S.; James J. Ficenec, Sellar Hazard McNeely & Manning, Walnut Creek, CA.

For State of California et al, Plaintiff: Emilio Eugene Varanini, IV, LEAD ATTORNEY, California Office of the Attorney General, Los Angeles, CA. **[**21]** ; Kathleen E. Foote, Office of the Attorney General, San Francisco, CA.

For State of Oregon, Plaintiff: Tim David Nord, LEAD ATTORNEY, Oregon Department of Justice, Financial Fraud/Consumer Protection, Salem, OR.

For State of New York, Plaintiff: Jay L. Himes, LEAD ATTORNEY, Office of the Attorney General of New York, New York, NY.

For State of Alaska, Plaintiff: Clyde E Sniffen, Jr, LEAD ATTORNEY, State of Alaska, Department of Law, Anchorage, AK.

For State of Michigan, Plaintiff: D. J. Pascoe, LEAD ATTORNEY, Michigan Department of Attorney General, Lansing, MI, US.

State of Maryland, Plaintiff, Pro se.

For Dram Claims Liquidation Trust, Plaintiff: James J. Ficenec, LEAD ATTORNEY, Sellar Hazard McNeely & Manning, Walnut Creek, CA.

For Micron Technology Inc., Defendant: G. Michael Barnhill, Jim D. Cooley, LEAD ATTORNEY, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC.; Joel S. Sanders, LEAD ATTORNEY, Christine Hart Clay, Joshua David Hess, Michael Cecchini, Rachel Brass, Gibson, Dunn & Crutcher LLP, San Francisco, CA.; Christopher James Flack, Jonathan L. Stern, William J. Baer, Wilson D. Mudge, Arnold & Porter LLP, Washington, DC, US.; **[**22]** Debra L. Bouffard, R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT.; Ronald C. Redcay, Arnold & Porter LLP, Los Angeles, CA.

For Micron Semiconductor Products Inc. Defendant: Debra L. Bouffard, LEAD ATTORNEY, R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT.; G. Michael Barnhill, LEAD ATTORNEY, Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC.; Joel S. Sanders, LEAD ATTORNEY, Christine Hart Clay, Joshua David Hess, Michael Cecchini, Rachel Brass, Gibson, Dunn & Crutcher LLP, San Francisco, CA.; Christopher James Flack, Jonathan L. Stern, William J. Baer, Wilson D. Mudge, Arnold & Porter LLP, Washington, DC, US.; Ronald C. Redcay, Arnold & Porter LLP, Los Angeles, CA.

For Infineon Technologies AG, Defendant: Christopher J. Heck, LEAD ATTORNEY, Sarretta McDonough, Kirkland & Ellis, Los Angeles, CA.; Karen Walker, Tefft W. Smith, Kirkland & Ellis, Washington, DC.; Debra L. Bouffard, LEAD ATTORNEY, R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT.; Jim D. Cooley, LEAD ATTORNEY, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC.; Aton Arbisser, Joshua Stewart Stambaugh, Julian Brew, Tanja K. Shipman, Kaye Scholer LLP, Los Angeles, **[**23]** CA, US.

For Infineon Technologies North America Corp., Defendant: Alexander F. MacKinnon, LEAD ATTORNEY, Christopher J. Heck, Eileen Barish, Jeffrey S. Davidson, Sarretta McDonough, Kirkland & Ellis, Los Angeles, CA.; Debra L. Bouffard, LEAD ATTORNEY, R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT.; Aton Arbisser, Joshua Stewart Stambaugh, Julian Brew, Tanja K. Shipman, Kaye Scholer LLP, Los Angeles, CA, U.S.; Karen Walker, Tefft W. Smith, Kirkland & Ellis, Washington, DC.

For Hynix Semiconductor Inc., Defendant: Albert J. Boro, Jr., LEAD ATTORNEY, Cecil S. Chung, Peter Manfred Bransten, Terrence A. Callan, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA.; Debra L. Bouffard, LEAD ATTORNEY, R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT.; Peter Bruce Nemerovski, Steven H. Bergman, LEAD ATTORNEYS, Daniel Lee Alexander, O'Melveny & Myers LLP, Los Angeles, CA.; Paul R. Griffin, Thelen Reid Brown Raysman & Steiner LLP, San Francisco, CA.

For Hynix Semiconductor America Inc., Defendant: Albert J. Boro, Jr., LEAD ATTORNEY, Cecil S. Chung, Peter Manfred Bransten, Terrence A. Callan, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA.; G. **[**24]** Michael Barnhill, LEAD ATTORNEY, Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC.; Debra L. Bouffard, LEAD ATTORNEY, R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT.; Peter Bruce Nemerovski, Steven H. Bergman, LEAD ATTORNEYS, Daniel Lee Alexander, Kenneth R. O'Rourke, O'Melveny & Myers LLP, Los Angeles, CA.; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC.; Paul R. Griffin, Thelen Reid Brown Raysman & Steiner LLP, San Francisco, CA.

For Samsung Electronics Co. Ltd., Defendant: Debra L. Bouffard, LEAD ATTORNEY, R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT.; Mona Solouki, LEAD ATTORNEY, Gary L. Hailing, James L. McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.; David A. Donohoe, Steven A. Mansfield, Akin Gump Strauss Hauer & Feld LLP, New York, NY.; David Dong-In Sohn, Skadden, Arps, Slate, Meagher & Flom LLP, San Francisco, CA.; Jonathan M. Jacobson, Wilson Sonsini Goodrich & Rosati, New York, NY.

For Samsung Semiconductor Inc., Defendant: Debra L. Bouffard, LEAD ATTORNEY, R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT.; G. Michael Barnhill, LEAD ATTORNEY, Jim D. Cooley, Womble Carlyle Sandridge **[**25]** & Rice PLLC, Charlotte, NC.; Gary L. Hailing, James L. McGinnis, Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.; David A. Donohoe, Steven A. Mansfield, Akin Gump Strauss Hauer & Feld LLP, New York, NY.; David Dong-In Sohn, Skadden, Arps, Slate, Meagher & Flom LLP, San Francisco, CA.; Jonathan M. Jacobson, Wilson Sonsini Goodrich & Rosati, New York, NY.

For Nanya Technology Corporation USA, Defendant: Debra L. Bouffard, LEAD ATTORNEY, R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT.; G. Michael Barnhill, LEAD ATTORNEY, Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC.; Robert E. Freitas, LEAD ATTORNEY, Cynthia A. Zuniga, Nail Benjamin, Orrick, Herrington & Sutcliffe LLP, Menlo Park, CA.; E. Anne Hawkins, Howard Mark Ullman, Orrick, Herrington & Sutcliffe LLP, San Francisco, CA.

For Elpida Memory USA Inc., Defendant: Debra L. Bouffard, LEAD ATTORNEY, R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT.; G. Michael Barnhill, LEAD ATTORNEY, Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC.; Robert B. Pringle, LEAD ATTORNEY, Jonathan E. Swartz, Thelen Reid Brown Raysman & Steiner LLP, San Francisco, **[**26]** CA.; Harrison J. Frahn, IV, Simpson Thacher & Bartlett, Palo Alto, CA.; Kevin Arquit, Simpson Thacher & Bartlett LLP, New York, NY, US.; Peter F. Burns, Thelen Reid & Priest LLP, San Francisco, CA.

For Mosel Vitelic Corporation USA, Defendant: Debra L. Bouffard, LEAD ATTORNEY, R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT.; G. Michael Barnhill, LEAD ATTORNEY, Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC.

For Winbond Electronics Corporation America, Defendant: Debra L. Bouffard, LEAD ATTORNEY, R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT.; Steven H. Morrissett, LEAD ATTORNEY, Finnegan, Henderson, Farabow, Garrett & Stanford Research Park, Palo Alto, CA.; William S Farmer, LEAD ATTORNEY, Collette Erickson Farmer & O'Neill LLP, San Francisco, CA.

For NEC Electronics America Inc., Defendant: Debra L. Bouffard, LEAD ATTORNEY, R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT.; G. Michael Barnhill, LEAD ATTORNEY, Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC.; Robert B. Pringle, LEAD ATTORNEY, Jonathan E. Swartz, Thelen Reid Brown Raysman & Steiner LLP, San Francisco, CA.; Peter F. Burns, Thelen **[**27]** Reid & Priest LLP, San Francisco, CA.

For Crucial Technology Inc., NEC Electronics Corporation, Defendants: Debra L. Bouffard, LEAD ATTORNEY, R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT.

For Mosel Vitelic Inc., Defendant: R. Dale Grimes, LEAD ATTORNEY, David R. Esquivel, Matthew J. Sinback, Bass Berry & Sims PLC, Nashville, TN.; David C. Brownstein, Heller Ehrman White & McAuliffe LLP, San Francisco, CA.

For Elpida Memory Inc., Defendant: G. Michael Barnhill, LEAD ATTORNEY, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC. R. Dale Grimes, LEAD ATTORNEY, David R. Esquivel, Matthew J. Sinback, Bass Berry & Sims PLC, Nashville, TN.; Robert B. Pringle, LEAD ATTORNEY, Jonathan E. Swartz, Thelen Reid Brown Raysman & Steiner LLP, San Francisco, CA.; Debra L. Bouffard, R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT.; Harrison J. Frahn, IV, Simpson Thacher & Bartlett, Palo Alto, CA.; Kevin Arquit, Simpson Thacher & Bartlett LLP, New York, NY, US.; Paul R. Griffin, Thelen Reid Brown Raysman & Steiner LLP, San Francisco, CA.

For Nanya Technology Corporation, Defendant: Debra L. Bouffard, LEAD ATTORNEY, R. Jeffrey Behm, Sheehey Furlong & Behm **[**28]** PC, Burlington, VT.; G. Michael Barnhill, LEAD ATTORNEY, Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC.; R. Dale Grimes, LEAD ATTORNEY, David R. Esquivel, Matthew J. Sinback, Bass Berry & Sims PLC, Nashville, TN.; Robert E. Freitas, LEAD ATTORNEY, Cynthia A. Zuniga, Nail Benjamin, Orrick, Herrington & Sutcliffe LLP, Menlo Park, CA.; E. Anne Hawkins, Howard Mark Ullman, Orrick, Herrington & Sutcliffe LLP, San Francisco, CA.

For Winbond Electronics Corporation, Defendant: David R. Esquivel, LEAD ATTORNEY, Bass Berry & Sims PLC, Nashville, TN.; Debra L. Bouffard, LEAD ATTORNEY, R. Jeffrey Behm, Sheehey Furlong & Behm PC, Burlington, VT.; Steven H. Morrissett, Finnegan, Henderson, Farabow, Garrett & Stanford Research Park, Palo Alto, CA.; William S Farmer, Collette Erickson Farmer & O'Neill LLP, San Francisco, CA.

For Mosel Vitelic Corporation, Defendant: David C. Brownstein, Heller Ehrman White & McAuliffe LLP, San Francisco, CA.

For Samsung Electronics America, Inc., Defendant: Jonathan M. Jacobson, Wilson Sonsini Goodrich & Rosati, New York, NY.

For Samsung Electronics, Inc., Ltd., Defendant: Jonathan M. Jacobson, LEAD ATTORNEY, Wilson Sonsini **[**29]** Goodrich & Rosati, New York, NY.; David Dong-In Sohn, Skadden, Arps, Slate, Meagher & Flom LLP, San Francisco, CA.; Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC.

For Hynix Semi., Inc., Defendant: G. Michael Barnhill, LEAD ATTORNEY, Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC.; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC.; Kenneth R. O'Rourke, Steven H. Bergman, O'Melveny & Myers LLP, Los Angeles, CA.

For Winbound Electronics Corporation, Winbound Electronics Corporation America, Defendants: G. Michael Barnhill, LEAD ATTORNEY, Jim D. Cooley, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC.; William S Farmer, Collette Erickson Farmer & O'Neill LLP, San Francisco, CA.

For Micron Technology Puerto Rico Inc., Defendant: Edward W. Hill-Tollinche, LEAD ATTORNEY, Humberto Guzman-Rodriguez, San Juan, PR, US.

For Mortgage Ramp, on behalf of themselves and all others similarly situated in the State of Utah, Defendant: Allan O. Walsh, LEAD ATTORNEY, Jeremy C. Sink, Mckay Burton & Thurman, Salt Lake City, UT, US.

For Chip-Tech, Ltd., Respondent: Joseph M. Barton, LEAD ATTORNEY, Gold Bennett Cera & Sidener LLP, **[**30]** San Francisco, CA.

For Sun System, Inc., Movant: Christine Elaine Cwiertny, Crowell & Moring LLP, Irvine, CA.; Jerome A. Murphy, Kathryn D. Kirmayer, Kent A. Gardiner, Crowell & Moring LLP, Washington, DC, US.

For Unisys Corporation, All American Semiconductor Inc., JACO Electronics, Inc., Edge Electronics, Inc., Movants: Christine Elaine Cwiertny, Crowell & Moring LLP, Irvine, CA.

For Celestica Corporation, Interested Party: Servando R. Sandoval, Pahl & Gosselin, APC, San Jose, CA.

For United States of America, Miscellaneous: Nathaniel M. Cousins, LEAD ATTORNEY, United States Attorney, San Francisco, CA.; Charles Philip Reichmann, San Francisco, CA.; May Lee Heye, Niall E. Lynch, United States Department of Justice, San Francisco, CA.

For IBM Corporation, Miscellaneous: David Eiseman, Quinn Emanuel Urquhart Oliver & Hedges, San Francisco, CA.

Judges: PHYLLIS J. HAMILTON, United States District Judge.

Opinion by: PHYLLIS J. HAMILTON

Opinion

[*1082] ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS

Defendants' motions for judgment on the pleadings came on for hearing on December 6, 2006 before this court. Plaintiffs, indirect **[**31]** purchasers ("plaintiffs"), appeared through their counsel, Allan Steyer, Josef D. Cooper, Tracy B. Kirkham, Daniel E. Gustafson, Christopher L. Lebsock, Terry Gross, Michael P. Lehman, Francis O. Scarpula, Daniel J. Mogin, and Jill M. Manning. Defendants appeared through their counsel, Julian Brew, Kenneth R. O'Rourke, Peter Nemerovski, Joshua Stambaugh, Jonathan Houden, Ronald C. Redcay, Joel S. Sanders, Steven H. Bergman, Andrew P. Deshazo, and Alejandro Steyer. Having read all the papers submitted and carefully considered the relevant legal authority, the court hereby GRANTS the, motions for judgment on the pleadings in part and DENIES the motions for judgment on the pleadings in part, for the reasons stated at the hearing, and as follows.

BACKGROUND

The actions before the court are part of a larger antitrust MDL action, in which plaintiffs generally allege a horizontal price-fixing conspiracy carried out by numerous defendants, in violation of various state and federal antitrust laws.

Plaintiffs in the instant action before the court allege that they indirectly purchased dynamic random access memory ("DRAM") from defendants. [1] DRAM is a type of semiconductor chip **[**32]** used in computers and other electronic equipment. Defendants are either foreign corporations, or U.S. subsidiaries of foreign corporations, who manufacture and sell DRAM in the United States. [2]

[*1083] Specifically, plaintiffs - on behalf of themselves **[**33]** and all others similarly situated - allege that they either (1) indirectly purchased DRAM from one or more of the defendants for use in manufacturing electronic devices for resale; or (2) indirectly purchased DRAM from one or more of the defendants for end use and not for resale. See Petro Class Action Complaint ("Complaint"), PP 7-17. Regardless whether plaintiffs purchased DRAM for end use or for resale, plaintiffs allege that they were forced to pay artificially high prices for DRAM, as a result of defendants' unlawful conspiracy and agreement to raise, fix, maintain, and/or stabilize prices for DRAM in the United States. See, e.g., Complaint, PP 71, 74.

Plaintiffs' complaint, styled as a class action, alleges five causes of action against defendants: (1) violation of *section 1 of the Sherman Act*; (2) violation of the California Cartwright Act; (3) violation of *California Business and*

---

[1] For purposes of pretrial proceedings, all parties in the indirect purchaser cases have agreed to litigate under one lead case - Petro Computer Sys., Inc. v. Micron Technology et al., No. C 05-2472 PJH.

[2] The specific defendants at issue are as follows: Micron Technology, Inc.; Micron Semiconductor Products, Inc.; Infineon Technologies AG; Infineon Technologies North America Corporation; Mosel Vitelic Corporation; Mosel Vitelic Corporation USA; Nanya Technology Corporation; Nanya Technology Corporation USA; Elpida Memory, Inc.; Elpida Memory (USA), Inc.; Hynix Semiconductor, Inc.; Hynix Semiconductor America, Inc.; Winbond Electronics Corporation; Winbond Electronics Corporation America, Inc.; and NEC Electronics America, Inc. (collectively "defendants").

Professions Code §§ 16720 et seq.; (4) violation of various state antitrust and unfair competition laws; and (5) violation of state consumer protection and unfair competition laws. See id. at PP 70-142. The latter two causes of action, however, are each in **[**34]** turn comprised of numerous individual state law claims: the fourth cause of action alleges violations of 22 states' antitrust and unfair competition laws, and the fifth cause of action alleges violations of 22 states' consumer protection and unfair competition laws.

Defendants now move for judgment on the pleadings with respect to plaintiffs' complaint. They have filed two separate motions: the first seeks judgment on the pleadings with respect to plaintiffs' second and fourth causes of action. The second seeks judgment on the pleadings with respect to plaintiffs' fifth cause of action. [3]

[35] DISCUSSION**

I. Legal Standard

HN1[] *Federal Rule of Civil Procedure 12(c)* provides that any party may move for judgment on the pleadings "after the pleadings are closed, but within such time as not to delay the trial." See *Fed. R. Civ. Proc. 12(c)*. A motion for judgment on the pleadings challenges the legal sufficiency of the opposing party's pleadings, and the allegations contained therein.

HN2[] The standard applied by the court in treating a motion for judgment on the pleadings is the same as that applied by the court in considering motions to dismiss under *FRCP 12(b)(6)*. In short, judgment on the pleadings is appropriate when, even if all material facts in the pleading under attack are true, the moving party is entitled to judgment as a matter of law. See, e.g., *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1989)*. The Supreme Court, in passing on the 12(b)(6) standard in the antitrust context recently, also noted that while a complaint attacked by a motion to dismiss for failure to state a **[**36]** claim upon which relief can be granted does not need detailed factual allegations, a plaintiffs obligation to provide the grounds of his entitlement to relief requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." See *Bell **[*1084]** Atl. Corp. v. Twombly, 127 S. Ct. 1955, 167 L. Ed. 2d 929, 2007 WL 1461066 (2007)*. Although Twombly dealt with a motion to dismiss a *section 1* conspiracy claim, given the similarity in standards to be applied on motions to dismiss and motions for judgment on the pleadings, the court finds Twombly's language instructive here.

HN3[] *Rule 12(c)* does not mention leave to amend; however, courts generally have discretion in granting 12(c) motions with leave to amend, particularly in cases where the motion is based on a pleading technicality. See, e.g., *Swanson v. United States Forest Serv., 87 F.3d 339, 343 (9th Cir.1996)*(Leave to amend generally within discretion of trial court). There is a strong policy in favor of allowing amendment, unless amendment would be futile, results from bad faith or undue delay, or will unfairly prejudice the opposing party." *Kaplan v. Rose, 49 F.3d 1363, 1370 (9th Cir.1994).* **[**37]**

Courts also have discretion to grant dismissal on a 12(c) motion, in lieu of judgment, on any given claim. See, e.g., *Amersbach v. City of Cleveland, 598 F.2d 1033, 1038 (6th Cir. 1979)*, disapproved on other grounds in *Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985)*; see also *McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988)*(affirming dismissal of plaintiffs' antitrust claim by judgment on pleadings).

---

[3] Plaintiffs have also filed two separate requests for judicial notice, and defendants have submitted at least one set of objections thereto. Plaintiffs specifically ask the court to grant judicial notice as to 23 different orders and pleadings that were entered in various cases throughout the country, as well as three different class action complaints filed in California state courts. Having considered the requests, and defendants' objections, the court hereby GRANTS plaintiffs' request for judicial notice, as it finds the subject matter proper for judicial notice pursuant to *Federal Rule of Evidence 201*.

II. Motion for Judgment on the Pleadings re Second and Fourth Claims for Relief

Defendants bring two motions for judgment on the pleadings. The first attacks plaintiffs' second and fourth causes of action as pled in the complaint. Plaintiffs' second cause of action alleges a violation of California's state antitrust statute - the Cartwright Act. See *Cal. Bus. & Prof. Code § 16720*. Plaintiffs' fourth cause of action alleges a violation of twenty-two individual state antitrust laws, although defendants challenge plaintiffs' claims under only fourteen of those laws.

Generally speaking, defendants' challenge to both causes of action is rooted in the **[**38]** same argument: that plaintiffs cannot allege antitrust standing under any of the state laws in question, and their claims under each are accordingly barred.

1. Antitrust Standing Principles

HN4[] The concept of "antitrust standing" has its roots in federal law. It refers to the standing requirements that a plaintiff must satisfy in all private antitrust suits seeking monetary damages under the federal antitrust statutes. See *15 U.S.C. § 15(a)*. A plaintiff seeking monetary damages for antitrust violations must prove that he or she has been (1) "injured in his business or property;" (2) "by reason of anything forbidden in the antitrust laws…". See *15 U.S.C. § 15(a)*.

Under the first element, a plaintiff must demonstrate injury - or the fact of damage - to his or her business or property interests, which injury is causally linked to an antitrust violation. Generally speaking, allegations that plaintiff consumers have paid higher prices for goods purchased for personal use due to defendants' conduct have satisfied this element. See, e.g., *Reiter v. Sonotone Corp., 442 U.S. 330, 342, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)*("where petitioner alleges a **[**39]** wrongful deprivation of her money because the price of the [good] she bought was artificially inflated by reason of respondents' anticompetitive conduct, she has alleged an injury in her "property" under *§ 4*"). Under the more critical second element, referred to as "antitrust injury," a plaintiff must also demonstrate "injury of the type the antitrust laws were intended to prevent." In other words, a plaintiff must connect any **[*1085]** alleged injury to the purposes of the antitrust laws. See *Atl. Richfield Co. v. USA Petroleum, 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*; *American Ad Mgmt., Inc. v. Gen. Tel. Co., 190 F.3d 1051, 1055 (9th Cir. 1999)*.

HN5[] Even assuming, however, that a plaintiff is able to make this showing, the antitrust standing inquiry is not at an end. This is because a plaintiff's right to sue for money damages is nonetheless subject to certain limitations, based upon policies found by the courts to be inherent in the structure and purpose of the antitrust laws. See, e.g., *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 110 n.5, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*(although showing of antitrust injury is necessary, it still is "not always sufficient to establish **[**40]** standing under *section 4* because a party may have suffered antitrust injury but may not be the proper plaintiff under *section 4* for other reasons"). Where a plaintiff's injury, for example, is derivative of a more direct injury to some other person, and that person would have a strong motivation to pursue its own antitrust claim against the defendant, standing is likely to be denied. This is the rationale underlying *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, in which the Supreme Court held that indirect purchasers are too remote to suffer true "antitrust injury," and therefore do not have standing under federal ***antitrust law*** to pursue antitrust claims.

In recognition of this and other concerns that impact the antitrust standing analysis, the Supreme Court has fashioned a general balancing test to be used in determining whether a plaintiff is a proper party to bring an antitrust claim. See *Assoc. Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 535, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*("AGC"). ***HN6***[] The AGC test, as it is called, enumerates a variety of factors that are employed in "evaluat[ing] the plaintiffs harm, the alleged wrongdoing by **[**41]** the defendants, and the relationship between them," in order to determine standing. Id. These factors include the nature of the injury alleged, the directness of the injury, the speculative nature of the harm, the risk of duplicative recovery, and the complexity in apportioning damages. The Ninth Circuit has embraced this test, announcing its commitment to the AGC factors in *American Ad Mgmt., Inc. v. Gen. Tel. Co., 190 F.3d 1051, 1054-55 (9th Cir. 1999)*.

Although this discussion highlights federal antitrust standing principles, these federal principles - and in particular, federal concern over the remoteness of a plaintiff's injury - are central to defendants' arguments and the court's discussion here. For although defendants' motion challenges the viability of plaintiffs' *state* antitrust claims and does not directly invoke the federal antitrust scheme, the gist of defendants' motion is (1) that even under state law, plaintiffs must independently prove antitrust standing; (2) that antitrust standing under state law should be assessed using the federal AGC factors; and (3) that plaintiffs cannot meet the ACG requirements in any event.

With these **[**42]** principles and background in mind, the court turns to the two claims that defendants challenge.

2. Cartwright Act

Defendants challenge plaintiffs' ability to bring their second claim for relief alleging a violation of California's antitrust statute, the Cartwright Act. [4] ***HN7***[] The Cartwright **[*1086]** Act prohibits unlawful restrictions on competition, and grants "[a]ny person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by [the Act]" the right to bring a civil action for treble damages, "regardless of whether such injured person dealt directly or indirectly with the defendant." See *Cal. Bus. & Prof. Code §§ 16720*, *16726*, *16750*. Defendants essentially argue that, although California is an Illinois Brick repealer state that allows indirect purchasers to sue under the Cartwright Act, plaintiffs still cannot allege the requisite antitrust standing, since even as indirect purchasers, they cannot satisfy the AGC factors. Defendants presume, as a matter of course, that the AGC standing test applies to claims arising under the state's Cartwright Act.

[43]** Plaintiffs, by contrast, contend that California law is much broader than federal law relating to antitrust standing, and the fact that the Cartwright Act expressly repeals *Illinois Brick* and allows indirect purchasers to sue is dispositive of defendants' standing arguments, without need of recourse to the AGC factors. While plaintiffs do not go on to specifically address the question whether the AGC antitrust standing factors employed under federal law are satisfied here, they do assert that, contrary to defendants' contention, there are no concerns that are raised here with respect to duplicative or speculative damages.

Preliminarily, the court notes that at the hearing on the instant motions, defendants clarified for the court that they do not actually seek dismissal on standing grounds of all plaintiffs' claims. Rather, their motion is targeted only at those plaintiffs who allege that they paid artificially inflated prices "for personal computers and other products in which DRAM is a component...". See Complaint, P 74. Defendants did not further clarify whether this means that their motion is targeted at *all* plaintiffs who allege they paid higher prices for **[**44]** products in which DRAM is a component - regardless whether they also made other purchases of DRAM that was not in component form - or only at plaintiffs' specific claims based on purchases in which DRAM is a component. [5] Without further clarification, therefore, it is impossible to tell whether defendants seek judgment as to the former, or the latter.

Given defendants' silence on this issue, however, the court interprets defendants' arguments as reaching the narrower issue only, and specifically targeted, therefore, only at those claims raised by plaintiffs that are based on purchases of products in which DRAM is **[**45]** a component. Accordingly, the issues actually before the court, and which the court must decide, are (a) whether the AGC standing factors apply to Cartwright Act claims; and (b) if so, whether those factors are satisfied with respect to plaintiffs' claims based on indirect purchases, of products in which DRAM is a component.

a. whether AGC factors apply

---

[4] Defendants' briefs are somewhat confusing on this point, since they include discussion of the Cartwright Act within the broader discussion of antitrust standing as to all fourteen states at issue.

[5] The possibility that plaintiffs may be alleging claims based on purchases of both component DRAM and non-component DRAM is evidenced by the ambiguity of plaintiffs' allegations. See, e.g., Complaint, PP 9-17 (stating only that plaintiffs indirectly purchased DRAM "for end use and not for resale," without distinguishing between purchases of DRAM, and purchases of DRAM as a product component).

Plaintiffs urge the court to conclude that because California's Cartwright Act expressly allows indirect purchasers to sue, no other factors need be satisfied in order for antitrust standing to be found. In other words, plaintiffs argue that they have standing here by virtue of their indirect purchaser status, and need not separately **[*1087]** prove standing under the general AGC factors or otherwise.

As a general matter, plaintiffs are correct - and defendants concede - that ***HN8***[] California's Cartwright Act is an Illinois Brick repealer statute, under which indirect purchaser standing is permissible in private actions alleging violations of ***antitrust law***. See *Cal. Bus. & Prof. Code § 16750*; see also *Union Carbide v. Superior Court, 36 Cal.3d 15, 20, 201 Cal. Rptr. 580, 679 P.2d 14 (1984)*. However, while the **[**46]** Cartwright Act directly contradicts federal law insofar as indirect purchaser standing is generally concerned, it does not follow from this either that indirect purchaser status is itself sufficient under California law to establish antitrust standing, or that California law necessarily eschews the general test for antitrust standing as set forth in AGC. For as defendants point out, the question whether indirect purchasers have standing under state law, and the question whether antitrust plaintiffs - which may include indirect purchasers - have antitrust standing for a particular claim, are two "analytically distinct" issues. An affirmative answer to the former simply does not compel an affirmative finding of the latter.

While neither party has cited any conclusive state authority on this point, the conclusion that indirect purchaser standing is distinct from antitrust standing under California state law is nonetheless warranted, in view of persuasive federal and state authority. First, and as noted above, consideration of federal authorities reveals that ***HN9***[] the federal antitrust standing inquiry is based on consideration of *more* than merely a plaintiff's status as direct or **[**47]** indirect purchaser. Standing may be found lacking, for instance, for reasons separate and apart from the fact that plaintiffs are indirect purchasers. See, e.g., *Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1034 (9th Cir.2001)*(if plaintiff's injury stems from, e.g., "aspects of the defendant's conduct that are beneficial or neutral to competition," there is no antitrust injury and as a result, no antitrust standing). This reasoning - which underscores the federal courts' determination that antitrust standing must be affirmatively demonstrated with regard to other factors - logically should apply to consideration of the Cartwright Act, as well. See, e.g., *Mailand v. Burckle, 20 Cal.3d 367, 376, 143 Cal. Rptr. 1, 572 P.2d 1142 (1978)*(federal cases interpreting the Sherman Act are applicable in construing [California] state laws"). And it counsels in favor of concluding that the Cartwright Act's mere recognition that indirect purchasers may sue is distinct from an automatic grant of antitrust standing generally, and that antitrust standing must be determined with reference to other factors aside from purchaser status.

Second, consideration of California state authorities compels **[**48]** the same conclusion. For even though no case law answers the question directly, the case law that does exist - and which even plaintiffs rely on - does not suggest that a finding of indirect purchaser standing is tantamount to a finding of antitrust standing. Plaintiffs rely, for example, on *Cellular Plus, Inc. v. Superior Court of San Diego County, 14 Cal. App. 4th 1224, 18 Cal. Rptr. 2d 308 (1993)*. While they are correct that the Cellular Plus court noted that the concept of "antitrust injury" - a component of antitrust standing - is broader than under federal case law, and further cited to California's Illinois Brick repealer statute as proof of this fact, the court also expressly noted that "[t]he exact parameters of 'antitrust injury' under [the Cartwright Act] have not yet been established through either court decisions or legislation." See *14 Cal. App. 4th at 1234*. The Cellular Plus court then held that indirect purchasers of cellular services had alleged sufficient antitrust injury to maintain **[*1088]** actions for wholesale and retail price-fixing, by only generally concluding that the plaintiffs alleged "injuries of the type [the Cartwright Act] seeks **[**49]** to prevent and which stem from the 'anticompetitive aspect' of [defendants'] alleged conduct." See *14 Cal. App. 4th at 1234*. Accordingly, while Cellular Plus properly took note of the Cartwright Act's express provision allowing indirect purchasers to seek private remedies, it did not actually hold that indirect purchaser status is all that must be demonstrated in order to satisfy antitrust injury or standing. Indeed, the Cellular Plus court did not even consider the question whether the AGC factors apply in determining antitrust standing, thereby leaving the question open.

In short, and in view of the above, the court is of the opinion that ***HN10***[] the Cartwright Act's grant of indirect purchaser standing, while ensuring that plaintiffs' status as indirect purchasers cannot bar their claim under the Cartwright Act, does not in actuality set forth the sum total of what a given plaintiff must establish in order to satisfy antitrust standing generally.

Naturally, this begs the question what precise showing must *affirmatively* be made by plaintiffs - both direct and indirect purchasers - to satisfy antitrust standing requirements under the Cartwright Act. For **[**50]** the reasons that follow, defendants have persuaded the court that the AGC test originally set forth by the Supreme Court in interpreting antitrust standing under the federal antitrust statutes, is the appropriate guide to follow.

Once again, there is no California case directly on point that conclusively sets forth the parameters of antitrust standing under the Cartwright Act. However, while California state courts have not specifically weighed in on the issue, the Ninth Circuit has. In Knevelbaard Dairies v. Kraft Foods, Inc., the Ninth Circuit undertook an exhaustive analysis of the antitrust standing doctrine in relation to both federal law and the Cartwright Act. See *232 F.3d 979 (9th Cir. 2000)*. The Ninth Circuit acknowledged that distinctions exist between both laws, and the limited role that federal law provides in furnishing precedent under the Cartwright Act. Nonetheless, the court still found that "[a]ntitrust standing is required under the Cartwright Act." See *id. at 987*. The court simply reconciled the differences in California law by stating that, within the framework of the antitrust standing inquiry, "California law affords **[**51]** standing more liberally than does federal law." Id. The Ninth Circuit then proceeded to analyze the case within the framework of the AGC factors, and when the time came to consider the "directness of injury" factor, took into account the broader principles relating to indirect purchasers provided by state law.

At least one California court has also applied the AGC antitrust standing factors to antitrust claims under the Cartwright Act, although it did not engage in a detailed discussion of the issue. In *Vinci v. Waste Mgmt. Inc., 36 Cal. App. 4th 1811, 43 Cal. Rptr. 2d 337 (1995)*, a state appellate court applied the AGC factors in determining whether the particular plaintiff before it had standing. While plaintiff is correct that the case is distinguishable on its facts (since plaintiff was not an indirect purchaser, there were no price-fixing allegations, and the case arose in the employment context), the relevant point is that the state court applied the broader antitrust standing test under AGC to the Cartwright Act.

In conclusion, then, and in view of the Ninth Circuit and California authorities discussed above, the court finds that plaintiffs here proceeding **[**52]** under the Cartwright Act are required to satisfy general antitrust **[*1089]** standing requirements enunciated by the Supreme Court in *AGC*, and embraced by the Ninth Circuit in *Knevelbaard*. Plaintiffs cannot satisfy antitrust standing requirements by simply invoking their status as indirect purchasers.

b. whether AGC factors are satisfied

In view of the court's conclusion that plaintiffs alleging claims based on purchases of products in which DRAM is a component are required to satisfy the relevant AGC factors to establish antitrust standing, the final issue to be addressed is whether these plaintiffs have, in fact, done so. In deciding the issue, the court must "evaluate the plaintiff[s]' harm, the alleged wrongdoing by the defendants, and the relationship between them." See *Knevelbaard, 232 F.3d at 987*. The factors relevant to this evaluation are, once again: (1) the nature of the plaintiffs' injury; (2) the directness of the injury; (3) the speculative nature of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages. See id.; see also *American Ad Mgmt., 190 F.3d at 1054-55*.

Defendants argue **[**53]** that standing under the AGC factors should be held lacking here, for the following reasons: the plaintiffs here were not participants in the relevant market for the DRAM at issue, since many only purchased the DRAM in question in end products like computers, or as end users; the distribution chain is long and complicated; calculating and apportioning damages would be complex, and the economic analysis speculative; more direct victims exist and have sought relief (i.e., the related direct purchaser litigation); and it would be difficult to determine a non-duplicative measure of damages. Defendants rely on recent case law in the rubber tires ("rubber tire cases") and the credit card industries ("credit card cases"), in which similar indirect purchasers' claims were dismissed for lack of standing at the pleading stage. See, e.g., *Crouch v. Crompton Corp., 2004 NCBC 7, 2004 WL 2414027 (N.C. Super. Ct., 2004)*; Stark v. Visa U.S.A., Inc., 2004 WL 1879003 (Mich. Cir. Ct. 2004).

Plaintiffs, for their part, challenge defendants' reliance on the credit card cases and the rubber tire cases, arguing their facts are distinguishable from the present facts. They contend, **[**54]** furthermore, that it is irrelevant whether plaintiffs purchased DRAM standing alone, or as part of an ultimate product (e.g., computers). The seminal point, according to plaintiffs, is that where they are a link in the chain of distribution for an overcharged product, then standing exists. Plaintiffs invoke the "Microsoft cases," a line of cases in which plaintiffs assert that standing was found to exist. See, e.g., Gordon v. Microsoft Corp., 2001 WL 366432 (D. Minn. 2001).

The issues raised by the parties are complicated, and devoid of ready or simple answer. Ultimately, however, in view of the AGC factors that are applied and considered below, the court believes that it is defendants who present the more persuasive arguments. See, e.g., *Assoc. Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723*; *Am. Ad Mgmt., Inc. v. Gen. Tel. Co., 190 F.3d at 1054-55* (setting forth AGC factors).

1. antitrust injury

HN11[] A plaintiff may only pursue an antitrust action if it can show antitrust injury, which is to say "injury of the type the antitrust laws were intended to prevent and that flows from that which makes **[**55]** defendants' acts unlawful." See *American Ad. Mgmt, 190 F.3d at 1055*. The Ninth Circuit has identified four requirements for antitrust injury, which serve as a helpful guide here: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that **[*1090]** flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent. Id.

Plaintiffs here have satisfactorily alleged both unlawful conduct - by way of defendants' conspiracy to horizontally restrain trade - and that such conduct caused plaintiffs to suffer injury in the form of having paid artificially high prices for DRAM. See, e.g., Complaint, PP 80, 81, 83; see also *American Ad. Mgmt., 190 F.3d at 1056* (allegations of injury caused by unlawful conduct sufficient if they allege that plaintiff suffered from defendants' participation in alleged conspiracy). Similarly, the injury that plaintiffs allege - i.e., payment of artificially high prices for DRAM - flows directly from the alleged conspiracy to fix and raise the price of DRAM. The more troubling issue for the court, however, centers on the fourth element identified by the Ninth Circuit **[**56]** above - i.e., whether plaintiffs' injury is "of the type the antitrust laws were intended to prevent."

In passing on this question, both the Supreme Court and the Ninth Circuit have noted that a central concern of the antitrust injury analysis is in "protecting the economic freedom of participants in the relevant market." See *Assoc. Gen. Contractors, 459 U.S. at 538*; *American Ad. Mgmt., 190 F.3d at 1057*. To that end, antitrust standing is granted only where the plaintiff is a participant in the relevant market - e.g., a consumer or competitor in the relevant market alleged. See id.

Here, defendants assert that, since plaintiffs purchased DRAM as a component of other products - such as computers - these plaintiffs are not participants in the alleged market for DRAM. Rather, they are participants in separate, albeit related, markets for products that include DRAM. As such, defendants claim that plaintiffs have not alleged antitrust injury, since they do not have grounds from which to argue that they are participants in the allegedly restrained market.

This argument is persuasive. As defendants point out, cases that have considered similar price-fixing **[**57]** claims and other *section 1* claims in the rubber tire and credit card industries have found that indirect purchasers are not participants in the relevant market where the ultimate goods they purchased - and which were the alleged source of artificially raised prices - were part of a market that was secondary to the allegedly price-tied market. See, e.g.. *Crouch v. Crompton Corp., 2004 NCBC 7, 2004 WL 2414027 at *24* (noting that plaintiff, as purchaser of rubber product rather than rubber chemicals, was in "market secondarily affected by the restraint in the original chemical market"); Stark v. Visa U.S.A., Inc., 2004 WL 1879003 at *2 (no standing where "plaintiff is not a consumer or competitor in the allegedly restrained market").

Indeed, the Visa debit card cases, typified by the Stark case and others like it, are instructive. In these cases, the indirect purchasers were ultimate consumers of various "goods" that they purchased from merchants who were themselves the alleged victims of defendants' conspiracy to illegally tie products in violation of *section 1*. The numerous courts considering antitrust standing in this context generally found that, although **[**58]** an artificially raised price had been passed down from defendants to merchants in the market for credit card services, the indirect purchasers were not participants in the actual market for credit card services, just for goods sold by those merchants. See, e.g., Stark, 2004 WL 1879003 at *2; Strang v. Visa U.S.A., Inc., 2005 WL 1403769, *4 (Wis. Cir. Ct. Feb. 8, 2005). Similarly, with respect to the rubber chemical case relied on by defendants, the court found that there were **[*1091]** two relevant markets - one for rubber chemicals, which was the price-fixed market, and a second one for the tires that were made with the price-fixed chemicals. In holding that antitrust standing was lacking, the court held that the indirect purchasers - who had purchased the allegedly price-fixed tires from retailers - were not participants in the market, and were only secondarily affected. See *Crouch, 2004 NCBC 7, 2004 WL 2414027 at *24*.

These factual scenarios are analogous to the situation before the court here. Plaintiffs are indirect purchasers and consumers who purchased DRAM as a component in computers and other electronic products, for "end use and not for resale. **[**59]** " See Complaint, PP 9-17, 74. However, the market that plaintiffs allege as the source for the purportedly illegal price-fixing conspiracy was the general market for DRAM, a market that is distinct from the market for electronic products that include DRAM. See, e.g., Complaint, P 41. As such, plaintiffs who are purchasing products in which DRAM is a component, rather than DRAM itself, are participating in a secondary market that is incidental to the primary price-fixed market (i.e., the market for DRAM modules themselves).

Plaintiffs urge the opposite conclusion with reliance on several Microsoft cases, but these cases are inapposite. The Microsoft cases they rely on deal with class certification, and fail to frame their inquiry in terms of antitrust standing. See, e.g., Gordon, 2001 WL 366432 at *11; Bellinder v. Microsoft Corp., (D. Kan. Sept. 7, 2001). For that reason, these class certification decisions, while they may undoubtedly be relevant at the class certification stage, are of limited relevance now.

In sum, for all the above reasons, the court believes that this first factor - i.e., the nature of plaintiffs' antitrust injury - weighs against **[**60]** standing.

2. Directness of the injury

This factor looks to whether plaintiffs' alleged injury was the direct result of defendants' alleged anticompetitive conduct. To assess the directness of plaintiffs' injury, the court must look "to the chain of causation between [plaintiffs'] injury and the alleged restraint in the [alleged] market." See *American Ad. Mgmt., 190 F.3d at 1058*; *Assoc. Gen. Contractors, 459 U.S. at 540*. The fact that plaintiffs are indirect purchasers does not, as mentioned previously, have negative bearing on this factor, as plaintiffs have explicitly been granted indirect purchaser standing pursuant to state law. Accordingly, the court must simply consider whether, as indirect purchasers, there is a direct link in the causation chain between defendants' alleged conspiracy to restrain prices, and the artificially high prices paid by plaintiffs who purchased products in which DRAM is a component.

On balance, the court finds that this is not the case. To be sure, in most instances, some portion of a price-fixed cost gets passed directly along to the ultimate consumer, and this could readily apply to a DRAM component that was **[**61]** eventually incorporated into an end product. However, as the Crouch court accurately noted, "the directness can be impacted by the nature of the item subject to price-fixing, be it a component, labor cost, or something used in the manufacturing process." See *2004 NCBC 7, 2004 WL 2414027 at *24*. This is because the nature of the item "can influence the directness of the impact on the price of the end product at retail." Id.

Here, DRAM's nature as a ubiquitous component in all manner of personal electronic devices that are purchased for end use, lessens the directness of its impact on price. For example, while plaintiffs have alleged that one example of an electronic device containing DRAM might be a personal **[*1092]** computer, they have simultaneously alleged that personal computers are but one of *many* examples of electronic devices containing DRAM, and they have furthermore failed to allege the precise type of electronic device that any given plaintiff purchased for end use. See, e.g., Complaint at 15 (DRAM "means the memory chip most commonly used in electronic devices, such as *personal computers,* around the world")(emphasis added). As such, it is possible and even **[**62]** likely that plaintiffs have purchased DRAM not only in computers, but in other products. It requires no leap of logic to conclude that each product in which DRAM is a component, contains numerous other components, all of which *collectively* determine the final price actually paid by plaintiffs for the final product. In other words, the price for the actual product paid by plaintiffs is reflective of much more than just the component price for DRAM. Yet plaintiffs' complaint sets forth no allegations that demonstrate that, within the final purchase price of a given product purchased by plaintiffs for "end use," the ultimate cost of the DRAM component is somehow directly traceable and/or distinguishable. Seen from this viewpoint, the directness of plaintiffs' injury - with respect to those who purchased DRAM as a component product - is too remote to warrant tipping this factor in favor of standing. See also, e.g., Crouch, 2004 NCBC 7, 2004 WL 2414027 at *24 ("[t]he smaller the component, the less likely there will be impact on the final price.").

For these reasons, this factor also weighs against standing.

3. Speculative Nature of the Harm, Risk of Duplicative Recovery, **[**63]** Complexity in Apportioning Damages

The final three factors can be considered together - the speculative nature of the harm, the risk of duplicative recovery, and the complexity in apportioning damages. See, e.g., Assoc. Gen. Contractors, 459 U.S. at 535; Am. Ad Mgmt., Inc. v. Gen. Tel. Co., 190 F.3d 1051, 1054-55 (9th Cir. 1999).

First, with respect to the first and third of these factors, the court's consideration of them overlaps. Defendants justly point out that the injury suffered by the indirect purchaser plaintiffs is unduly speculative, and that damages would be difficult to apportion, in view of the fact that the plaintiffs in question purchased their DRAM in the form of a component product. There are a variety of factors, for example, that could have influenced the price that each plaintiff paid for their computer (or other products) - the cost of various other components, whether those costs were themselves artificially high, etc. In such a situation, as defendants note, courts have found that these two factors weigh against standing. See, e.g. Weaver v. Cabot Corp., 2004 WL 3406119 (N.C. Super Ct. 2004). Indeed, as the **[**64]** Weaver court - which considered allegations of price-fixing in the rubber chemical industry - stated, plaintiffs who are in secondary markets in which they purchase the price-fixed product as a component, would need to allege that the secondary market sellers themselves were in an oligopoly and fixing prices, in order to demonstrate non-speculative damages. See id. at *1. In Weaver, plaintiffs who had purchased rubber tires as part of the secondary market - the market for rubber chemicals used to make the tires was the primary restrained market - were held to lack standing. So here. Plaintiffs, who have purchased DRAM as a component in products such as personal computers and other devices, would need to allege that the market for personal computers and other secondary markets was itself restrained as a result of defendants' conduct, in order to establish that the damages ultimately suffered **[*1093]** by them are sufficiently concrete, and capable of determination. These two factors, therefore, weigh against standing.

As for the risk of duplicative recovery, however, plaintiffs have the better argument. States such as California, which have repealed Illinois Brick and allowed **[**65]** indirect purchasers to sue for antitrust violations, have necessarily made the policy decision that duplicative recovery may permissibly occur. Duplicative recovery is, in many if not all cases alleging a nationwide conspiracy with both direct and indirect purchaser classes, a necessary consequence that flows from indirect purchaser recovery. Accordingly, it is no bar against standing, and this factor does not weigh against standing.

In sum, however, after consideration of all the AGC factors, and for all the above reasons, the court ultimately concludes that there are more reasons to deny standing in the instant case. Accordingly, the court finds that the indirect purchaser plaintiffs whose claims are based on the purchase of products in which DRAM is a component, lack standing to assert a claim under California's Cartwright Act. As such, defendants' motion for judgment on the pleadings, with respect to these particular claims, is GRANTED.

3. State Antitrust Claims

Defendants also challenge plaintiffs' fourth claim for relief, which alleges violations of twenty-two different states' antitrust laws. As with plaintiffs' second claim for relief under the Cartwright Act, defendants **[**66]** argue that, with respect to thirteen [6] of these state antitrust laws, no antitrust standing exists for those plaintiffs whose claims are based on purchases of products in which DRAM is a component. The thirteen states are: Arizona, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, South Dakota, and Wisconsin. Defendants additionally argue that, with all plaintiffs' claims under five state laws - Ohio, West Virginia, Alabama, South Dakota, and Pennsylvania - judgment on the pleadings is also warranted for other reasons.

a. antitrust standing

Defendants contend that plaintiffs' **[**67]** claims under the thirteen state antitrust statutes at issue fail for lack of antitrust standing. Their arguments mimic those made in connection with plaintiffs' Cartwright Act claim. In essence, defendants argue that, although each state is an Illinois Brick repealer state, antitrust standing must still be determined under each state statute with reference to the AGC factors. Defendants claim further that plaintiffs with claims based on purchases of products in which DRAM is a component cannot satisfy those factors. In response, plaintiffs rely on numerous cases as part of a broad argument that standing exists with respect to all the above mentioned states.

Preliminarily, the court must first resolve, as it did with respect to California's antitrust statute, whether antitrust standing under the laws of all thirteen states at issue must be determined with reference to the AGC factors. The issue is whether the thirteen states themselves would support application of the AGC test in assessing antitrust standing.

[*1094] With respect to eight of the thirteen states, the court finds that they would. As defendants point out, state courts in each of these eight states have concluded **[**68]** not only that antitrust standing is distinct from the issue of indirect purchaser standing, but that application of the AGC factors is a proper means of determining antitrust standing. See Wrobel v. A Very Dennison Corp., et al., No. 05-CV-1 296 (Ks. Dist. Ct., Feb. 1 2006)(**Kansas**)("the Court finds that this AGC standing test may be applied to this action even though the [Kansas Restraint of Trade Act] specifically contemplates indirect purchaser suits"); *Orr v. Beamon, 77 F. Supp. 2d 1208, 1212 (D. Kan. 1999)*(**Kansas**)(federal district court in Kansas concluded "that standing under the Kansas antitrust statutes requires an antitrust injury similar to that required under the Sherman and Clayton Acts"); *Knowles v. Visa U.S.A., Inc., 2004 Me. Super. LEXIS 227, 2004 WL 2475284, *5 (Me. Super. Ct. 2004)*(**Maine**)("It is probable that the Maine Law Court, if presented with this issue, would look to the [AGC] factors in determining standing under Maine's antitrust laws and would apply those factors except to the extent that those factors cannot be reconciled with the legislature's adoption of the Illinois Brick repealer"); Stark v. Visa U.S.A., Inc., 2004 WL 1879003, **2-3 (Mich. Cir. Ct. 2004) **[**69]** (**Michigan**)(applying AGC factors to determine antitrust standing under Michigan antitrust statute); *Gutzwiller v. Visa U.S.A., Inc., 2004 WL 2114991, *6 (Minn. Dist. Ct. 2004)*(**Minnesota**)("Utilizing factors (1), (4) and (5) of the [AGC] case in assessing the issue of standing [under Minnesota antitrust statute], is consistent with the concerns addressed by the state legislators who debated the 1984 amendment prior to its passage, and consistent with federal law"); *Crouch v. Crompton, 2004 NCBC 7, 2004 WL 2414027, *18 (N.C. Superior Ct. 2004)*(**North Carolina**)("North Carolina courts would apply a multi-factor test to determine standing in indirect purchaser cases. The requirements would recognize indirect purchaser standing, but engraft upon the statute the requirements of standing enunciated in AGC, modified to recognize the right to recover for injury created by statute for indirect purchasers"); Beckler v. Visa U.S.A., Inc., 2004 WL 2115144, **2-3 (N.D. Dist. 2004)(**North Dakota**)(finding indirect purchaser claims too remote and implying reliance on AGC factors in determining lack **[**70]** of standing); Cornelison v. Visa U.S.A., Inc., No. CIV 03-1350 (S.D. Cir. Ct. 2004), Ex. A to Defendants' Motion for Judgment on the Pleadings re Second and Fourth Claims for Relief [7] (**South Dakota**)(hearing transcript noting state trial court's bench ruling employing AGC factors and granting dismissal based on lack of antitrust

[6] Plaintiffs' fourth claim for relief also re-states a claim under California's antitrust statute, the Cartwright Act, which defendants have targeted on this motion. See Complaint, P 97. Since standing under California's Cartwright Act has already been discussed in connection with plaintiffs' second claim for relief, however, the court omits discussion of that statute here.

[7] Plaintiffs do not appear to have objected to defendants' submission of this material.

standing); Strang v. Visa, 2005 WL 1403769, *3 (Wis. Cir. Ct. 2005)(**Wisconsin**)("our appellate courts would look to AGC factors for guidance in assessing an indirect or remote purchaser's standing"). [8]

[71]** The court finds these authorities persuasive, and has relied on them as helpful guidance in concluding that application of **[*1095]** the AGC factors to the instant case is appropriate. While the cases do not emanate from the states' highest courts, they do emanate from courts with jurisdictional authority over the individual states in question, which courts are called upon to interpret the individual state laws at issue with more frequency and regularity than this court. Moreover, plaintiffs have failed to come forward with any contrary authority from the states in question. As such, the court concludes that plaintiffs' antitrust standing under the antitrust statutes of Kansas, Maine, Michigan, Minnesota, North Carolina, North Dakota, South Dakota, and Wisconsin, is to be determined with reference to the AGC factors.

As for the remaining five states - Arizona, Mississippi, Nebraska, Nevada and New Mexico - the court's analysis is different, as the court is unaware of any case law from these states that specifically considers and determines whether the AGC antitrust standing factors generally apply. However, as defendants point out, almost all of these states have harmonization **[**72]** provisions contained within their antitrust statutes calling for the statutes to be construed in accordance with federal law. See, e.g., *Ariz. Rev. Stat. Ann. § 44-1412* ("in construing this article, the courts may use as a guide interpretations given by the federal courts to comparable federal antitrust statutes"); *Neb. Rev. Stat. § 59-829* ("the courts of this state in construing [Nebraska's antitrust statute] shall follow the construction given to the federal law by the federal courts"); *Nev. Rev. Stat. § 598A.050* ("The provisions of this chapter shall be construed in harmony with prevailing judicial interpretations of the federal antitrust statutes"); *N.M. Stat. Ann. § 57-1-15* ("the Antitrust Act shall be construed in harmony with judicial interpretations of the federal antitrust laws"). While Mississippi is the sole state without a harmonization provision, its Supreme Court has previously looked to federal law in interpreting the state's antitrust statute. See, e.g., *Harrah's Vicksburg Corp. v. Pennebaker, 812 So. 2d 163 (Miss. 2002)*(relying on federal **[**73]** interpretation of Noerr-Pennington doctrine to determine applicability of same under state antitrust statute). Collectively, this suggests, and the court concludes, that the antitrust statutes of these five states are to be applied with federal antitrust principles in mind. As such, and looking to those federal principles insofar as antitrust standing is concerned, the court furthermore concludes that application of the AGC multi-factor test is appropriate in determining plaintiffs' antitrust standing under the antitrust statutes of Arizona, Mississippi, Nebraska, Nevada and New Mexico. Once again, this conclusion is further buttressed by the fact that plaintiffs offer no relevant state legal authority holding directly to the contrary.

In sum, then, taking all the above into account, and consistent with the discussion set forth above in connection with the Cartwright Act claim, the court finds that, even though the thirteen states at issue allow for indirect purchaser standing, plaintiffs here must still-satisfy the general antitrust standing requirements with reference to the multi-factor test set forth in AGC. Application of this multi-factor test, naturally, shall **[**74]** be applied in a fashion that takes into account the broader standing principles that each state adheres to with respect to indirect purchasers.

Having concluded that antitrust standing requirements as set forth in AGC should apply, the question before the court is now whether a consideration of those factors demonstrates that the indirect purchaser plaintiffs at issue have adequately alleged antitrust standing.

With respect to this question, the parties' arguments are identical to those made **[*1096]** in connection with the court's discussion of antitrust standing under the *Cartwright Act, supra.* Accordingly, the court's analysis of these factors is the same. For the same reasons, therefore, that the court found antitrust standing to be lacking pursuant to the Cartwright Act claim, the court also finds that antitrust standing is lacking with respect to the thirteen

[8] Many of the cases included in the preceding string cite were included as part of plaintiffs' lodging of relevant opinions, which occurred after briefing on the instant motions was complete, but before the hearing. Similarly, after the hearing, defendants also filed an application for leave to lodge a recent opinion, which the court granted on April 18, 2007. To the extent that many of the cases - and others included in plaintiffs' accompanying requests for judicial notice - are unpublished and/or not included in any electronic database, the court has considered the cases only to the extent relevant on an issue directly before the court.

remaining state law claims, for those plaintiffs with claims based on purchases of products in which DRAM is a component.

As such, the court similarly GRANTS defendants' motion for judgment on the pleadings with respect to these particular claims brought under the thirteen state laws at issue.

b. remaining five states

[75]** In addition to challenging the above claims under the thirteen state laws, defendants argue that with respect to five of the twenty-two states whose antitrust statutes are invoked in plaintiffs' fourth claim for relief - Ohio, West Virginia, Alabama, South Dakota, and Pennsylvania - plaintiffs lack antitrust standing as a matter of law, for reasons in addition to failure to adequately satisfy the AGC factors. Defendants' arguments here, unlike those made heretofore, do not appear to be limited only to those plaintiffs with claims based on purchases of products in which DRAM is a component. Rather, defendants appear to argue that *all* plaintiffs lack antitrust standing to bring their claims under the five state laws discussed below, as a matter of law.

1. Ohio and West Virginia

Defendants contend that both Ohio and West Virginia have laws that prohibit indirect purchaser standing for private actions. With respect to Ohio's Valentine Act, defendants argue that the Ohio Supreme Court expressly held as much in *Johnson v. Microsoft Corp., 106 Ohio St. 3d 278, 2005 Ohio 4985, 834 N.E.2d 791 (Ohio 2005)*, and that decision should control here. With respect to West Virginia, defendants assert that **[**76]** its antitrust statute contains a harmonization provision, which West Virginia state courts have construed as requiring them to "apply the federal decisional law interpreting the Sherman Act to [West Virginia's] own parallel anti-trust statute." *Gray v. Marshall County Bd. of Educ., 179 W. Va. 282, 367 S.E. 2d 751, 755 (W. Va. 1988)*. According to defendants, this mandates that the court apply *Illinois Brick's* prohibitions to West Virginia law, and prohibit the indirect purchasers from bringing suit here.

With respect to Ohio's antitrust statute, defendants are correct. ***HN12***[] The Ohio Supreme Court has expressly stated that it "adopt[s] and follow[s] Illinois Brick's direct-purchaser requirement and hold[s] that an indirect purchaser of goods may not assert a Valentine Act claim for alleged violations of Ohio ***antitrust law***". *Johnson, 834 N.E.2d at 798*. Plaintiffs, for their part, "concur" that Ohio's Valentine Act has been construed "not to afford a cause of action to indirect purchasers…". See Pl. Opp. Br. Re Second and Fourth Claims for Relief, at 20:8-10. While they profess that they may nonetheless sue under Ohio common law, as alleged in a separate **[**77]** related action currently before the court brought by various state attorneys general, the court does not address that complaint by way of the instant order, and plaintiffs arguments in this regard are therefore irrelevant. Accordingly, in view of the Ohio Supreme Court's express holding in Johnson, and plaintiffs' recognition and concession regarding that holding, the court finds that the indirect purchaser plaintiffs' claim pursuant to the Ohio Valentine Act is barred as a matter of law. The court hereby GRANTS judgment on the pleadings with respect to this claim.

This leaves West Virginia for consideration. Generally speaking, defendants **[*1097]** are correct that***HN13***[] federal decisional law interpreting the Sherman Act is to be applied in interpreting West Virginia's parallel antitrust statute. See *W. Va. Code § 47-18-16*; *Gray, 179 W. Va. 282, 367 S.E. 2d 751*. However, while this would seem to suggest that the Illinois Brick doctrine also extends to indirect purchaser actions brought under West Virginia's state antitrust statute, this conclusion is called into question by the fact that the West Virginia attorney general has promulgated a legislative rule **[**78]** expressly *permitting* antitrust suits brought by indirect purchasers. The attorney general's ability to promulgate such a rule is contemplated by the state's antitrust statute itself, which explicitly grants the state attorney general the right to adopt rules and regulations interpreting and, enforcing West Virginia's antitrust statute. See *W. Va. Code § 47-18-20* ("[t]he attorney general may make and adopt such rules and regulations as may be necessary for the enforcement and administration of [the statute]").

Moreover, as plaintiffs point out, at least two federal courts have found that the West Virginia legislative rule allowing indirect purchaser standing is valid, and should be given effect. See *In re New Motor Vehicles, 350 F. Supp. 2d 160, 173-75 (D. Me 2004)*; *In re Terazosin Hydrochloride Antitrust Litig., 160 F. Supp. 2d 1365, 1376, n.8*

(S.D. Fla. 2001). While neither case emanates from a court with jurisdictional authority over West Virginia, they are nonetheless instructive. In re New Motor Vehicles is particularly helpful. The federal court there dealt with the precise issue now before the **[**79]** court - i.e., whether indirect purchaser standing is granted under West Virginia law, in the face of apparent conflict between the state attorney general's rule, and the harmonization provision of the state antitrust statute. After engaging in a fairly comprehensive overview of West Virginia rules of statutory interpretation and the relevant legislative history, the In re New Motor Vehicles court concluded that, since the harmonization provision at issue did not speak to indirect purchaser standing specifically, but was more broadly worded to provide for a "liberal" general interpretive approach, the state attorney general's subsequent rule interpreting the statute to allow for indirect purchaser standing was a "permissible" reading of the statute, and entitled to deference. See id.

The court applies that reasoning here. Moreover, unless and until this issue is raised and resolved by West Virginia state courts, the West Virginia attorney general - who is expressly granted the authority to interpret the very antitrust statute at issue here - is entitled to some deference.

Accordingly, the court finds that the indirect purchaser plaintiffs' claim pursuant to West Virginia's **[**80]** state antitrust statute is not barred by incorporation of the Illinois Brick doctrine, and defendants' motion for judgment on the pleadings with respect to plaintiffs' claim under West Virginia law is hereby DENIED.

2. Alabama

Defendants contend that plaintiffs' state antitrust claim under Alabama's Unfair Trade Practices Act ("UTPA") is barred by the statute of limitations, since (1) the statute of limitations required plaintiffs to file their UTPA claim within two years of the 2002 time frame in which plaintiffs allege they discovered defendants' violations, and (2) plaintiffs filed their complaint in 2005, well more than two years after plaintiffs concede that they knew of their potential claims. Defendants argue, in the alternative, that plaintiffs' claim is barred because the UTPA applies solely to intrastate activities, which are not properly alleged here.

In response, plaintiffs do not dispute the timing discrepancy highlighted by defendants **[*1098]** but argue that, under the doctrine of class tolling, the statute of limitations was tolled by the filing of prior class actions in California state court in 2002 and 2003, both of which were filed on behalf of a nationwide class **[**81]** that included Alabama residents. With respect to defendants' alternative argument, plaintiffs contend that the complaint may reasonably be inferred to state anticompetitive effects on both interstate and intrastate commerce.

The parties' arguments regarding the timeliness of plaintiffs' UTPA claim overlap with those raised by the parties in conjunction with defendants' motion for judgment on the pleadings as to plaintiffs' fifth cause of action, and are discussed in detail below. While the court will not repeat that analysis here, it holds that for the same reasons as those highlighted below, and consistent with the court's decision therein, the doctrine of class tolling does not apply to plaintiffs' antitrust claim under the UTPA. As such, the court finds that plaintiffs' antitrust claim pursuant to the UTPA is barred by the two-year statute of limitations, and defendants' motion for judgment on the pleadings with respect to this claim is therefore GRANTED.

In view of this holding, it is unnecessary for the court to consider whether the UTPA applies to intrastate activity.

3. South Dakota

Defendants assert that plaintiffs cannot bring their claim under South Dakota's antitrust **[**82]** statute because the statute requires an allegation that the alleged conduct affected "trade or commerce wholly within the state," an allegation that plaintiffs do not and cannot make. Plaintiffs, in response, argue that defendants are relying on an older version of the statute, and that the current statute applies to any conspiracy "in restraint of trade or commerce *any part of which is within this state,"* which means that the statute applies to any interstate conduct, so long as it has an intrastate component as well. And since plaintiffs allege a national conspiracy here, they argue that allegations as to this national conspiracy presume the requisite effects within the state of South Dakota.

Turning first to the language of the statute itself, the court agrees with plaintiffs that ***HN14***[] South Dakota's antitrust statute should be read to cover unlawful anticompetitive conduct, as long as any part of it "is within [South Dakota]" - i.e., as long as any part of it takes place or has an effect within the state. See *S.D. Codified Laws § 37-1-3.1* ("A contract, combination, or conspiracy between two or more persons in restraint of trade or commerce any **[**83]** part of which is within this state is unlawful"). This reading is supported by the literal language of the statute, and defendants have submitted no South Dakota case law that holds differently. Indeed, neither party has submitted any relevant South Dakota case law interpreting this provision of the statute. To be sure, defendants' differing view that the statute reaches conduct that is "wholly within the state" and therefore, exclusively within the state - is premised upon South Dakota case law. However, that case law predates the current version of the antitrust statute. See *State v. Fullerton Lumber, 35 S.D. 410, 152 N.W. 708, 712 (S.D. 1915)*. And while defendants are correct that no case relied on by plaintiffs - nor any case unearthed by the court - expressly overrules Fullerton Lumber, that case was nonetheless issued more than sixty years prior to 1977, the year in which South Dakota's antitrust statute was amended to state, as it does currently, that the statute covers unlawful conspiracies to restrain trade or commerce as long as any, part of it is "within the state." See, e.g., *S.D. Codified Laws §§ 37-1-1 to 37-1-3* (repealed in 1977).

[84] [*1099]** As such, and since no South Dakota case has been cited or discovered that interprets the current language of the statute, or more particularly, its effect on the type of interstate/intrastate conduct that a plaintiff is required to allege, the current operative language of the statute controls. Plaintiffs are therefore able to state a claim under the statute as long as they allege an unlawful conspiracy to restrain trade or commerce, any part of which is within the state of South Dakota.

The court notes, however, that plaintiffs complaint does not specifically allege any conduct or conspiracy that takes place, or has any effect within South Dakota. At most, plaintiffs have alleged only that defendants' activities had "a substantial effect on the foreign and interstate commerce of the United States." See Complaint, 14. This is insufficient, in the court's view, to allege the requisite activity or effects within the state of South Dakota that the statute requires.

Accordingly, for this reason, the court GRANTS defendants' motion for judgment on the pleadings with respect to plaintiffs' claim pursuant to South Dakota's antitrust statute. In view of the fact that judgment is **[**85]** being granted with respect to a technical pleading deficiency that might be cured by amendment, however, the court also grants plaintiffs leave to amend their complaint in order to cure the above pleading deficiency.

The court notes that leave to amend is granted only with respect to those plaintiffs who do not have claims under this statute based on purchases of products in which DRAM is a component. For as discussed above, plaintiffs who have purchased products in which DRAM is a component cannot assert claims based on those purchases under South Dakota's antitrust statute, as they lack antitrust standing. In view of this fundamental deficiency, therefore, any amendment here would be futile.

4. Pennsylvania

Plaintiffs bring a claim for unlawful "restraint of trade" in violation of "the Pennsylvania common law." See Complaint, P111. Defendants argue, however, that Pennsylvania does not recognize either statutory or common law actions for restraint of trade. Plaintiffs, in response, assert that there are "conflicting authorities" on this point, and that certain "pronouncements" from both the state's highest court and several federal courts suggest that a remedy is, indeed, **[**86]** available under Pennsylvania common law.

Defendants' arguments are more persuasive. They have relied on two separate state court opinions, in which the courts expressly stated that neither statutory nor common law actions exist in Pennsylvania for claims seeking money damages for antitrust violations. See, e.g., *XF Enters. v. BASF Corp., 47 Pa. D. & C.4th 147, 150-51 (Pa. Comm. Pl. 2000)*("No court to date has held that a private remedy is available for damages under Pennsylvania's common law on antitrust violations"); *Stutzle v. Rhone-Poulenc S.A., 2003 Phila. Ct. Com. Pl. LEXIS 74, 2003 WL 22250424, *2 (Pa. Comm. Pl. 2003)*(same). As these cases noted, no state court has ever held to the contrary, nor has the state legislature provided residents of Pennsylvania with a private right of action authorizing a suit for damages.

Plaintiffs rely on contrary state authorities for support in arguing that Pennsylvania has recognized common law actions for antitrust violations in the past. See, e.g., *Schwartz v. Laundry & Linen Supply Drivers' Union, 339 Pa. 353, 14 A.2d 438, 440 (Pa. 1940)*; *Collins v. Main Line Bd. Of Realtors, 452 Pa. 342, 304 A.2d 493, 498 (Pa. 1973)*. These authorities, **[**87]** however, are **[*1100]** inapposite, and of limited relevance here. For none of these cases held that Pennsylvania common law supports a cause of action for antitrust damages. To the extent that the cases discussed the availability of a common law cause of action, they dealt specifically with injunctive, or equitable relief. Moreover, and as the XF Enterprises court pointed out when it considered the Collins case, the language in that opinion, and upon which plaintiffs rely, "is dicta and is ambiguous at best." See *XF Entperprises, 47 Pa. D & C 4th 147 at 150*.

In light of the fact that no Pennsylvania state court has ever affirmatively held that a common law cause of action for antitrust damages may lie, and furthermore in light of the existence of cases based on state law expressly stating that no such cause of action may lie, the court declines plaintiffs' invitation to hold that such an action is permissible. To that end, the court hereby GRANTS defendants' motion for judgment on the pleadings with respect to plaintiffs' claim, based solely on Pennsylvania common law.

III. Motion for Judgment on the Pleadings re Fifth Claim for Relief

Defendants' second **[**88]** motion seeks judgment on the pleadings with respect to plaintiffs' fifth claim for relief. Like defendants' fourth claim for relief, the fifth claim also alleges the violation of twenty-two different state statutes, but whereas defendants' fourth claim alleged violations of state antitrust statutes, defendants' fifth claim alleges violations of consumer protection and unfair competition statutes. Of the twenty-two consumer protection statutes at issue, defendants challenge only thirteen, arguing that they do not as a matter of law provide a vehicle for bringing plaintiffs' antitrust claims. See Complaint, PP 118-142. The thirteen states whose statutes are challenged are: Alaska, Arkansas, Hawaii, Idaho, Louisiana, Montana, New York, Oregon, Rhode Island, South Carolina, Utah, West Virginia, and Wyoming.

Specifically, defendants assert that four grounds, either separately or in combination, support dismissal of plaintiffs' claims under the thirteen state laws at issue: (1) the statutory claims are barred by applicable statutes of limitations; (2) the statutes contain limitations that prohibit class actions; (3) plaintiffs should not be allowed to circumvent separate state antitrust **[**89]** laws that prohibit indirect purchaser standing; and/or (4) the statutes do not apply to the allegations in the instant case.

The court addresses defendants' first two grounds individually. However, because the latter two grounds go to the actual substance of plaintiffs' claims under the individual statutes, the court will address the latter two grounds together, in a state by state analysis.

1. Statutes of Limitations

Defendants contend that claims brought pursuant to the consumer protection and unfair protection statutes of seven states are barred pursuant to the relevant statutes of limitations applicable in those states. Specifically, defendants point out that both Louisiana and Oregon have a one year statute of limitations applicable to claims brought under their consumer protection and unfair competition laws, while Alaska, Idaho, Montana, Utah, and Wyoming all have two-year statutes of limitations. Defendants then note that, while plaintiffs' complaint alleges that plaintiffs "did not discover, and could not have discovered" the alleged conspiracy in question "until shortly before class action litigation was commenced against the Defendants in 2002," the complaint itself **[**90]** was not filed until June 17, 2005. See Complaint, P 68. Defendants argue that, since the complaint establishes 2002 as the general time frame during which plaintiffs became aware of **[*1101]** their claims and from which the statute of limitations therefore began running on those claims, the claims brought under the laws of all seven states are accordingly barred.

Plaintiffs invoke the class tolling doctrine in response. [9] They argue that, as of 2002, the various statutes of limitations on their claims have been tolled, by virtue of three related class actions filed in California state courts on behalf of plaintiff classes that include residents of the seven states at issue. Those state class actions, which were filed in 2002 and 2003, remain pending, with no decision yet issued as to either certification or the merits. Since those actions tolled the limitations period for all claims that could have been brought by any class member, and since plaintiffs in the instant case were part of those earlier classes, plaintiffs assert that their challenged claims here are timely.

[91]** ***HN15***[] The class tolling doctrine holds that the commencement of a class action stops the running of statutes of limitations as to all claims that might be asserted by all members of the class. See *Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)*("[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."); see also *Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 350, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983)*(same). The Supreme Court has held that the doctrine helps to safeguard the "principal purposes of the [*Rule 23*] class action procedure - promotion of efficiency and economy of litigation … See *Crown. Cork & Seal, 462 U.S. at 349*.

The Ninth Circuit has had a few occasions on which to consider the class tolling doctrine. In Tosti v. City of Los Angeles, for example, the Ninth Circuit applied class tolling to a plaintiff's subsequent individual action alleging sex discrimination - filed outside the limitations period - where the plaintiff had opted out of an earlier class action lawsuit involving the **[**92]** same allegations. See *754 F.2d 1485 (9th Cir. 1985)*. The Ninth Circuit held that the doctrine applied, even though plaintiffs individual claims - alleging violations of the *fourteenth amendment* and *42 U.S.C. § 1983* - were slightly different than the prior class action claims, which alleged Title VII violations in addition to claims under *section 1983* and the *fourteenth amendment*. See *id. at 1489* (finding "no persuasive authority for a rule which would require that the individual suit must be identical in every respect to the class suit").

Then, in Robbin v. Fluor Corp., the Ninth Circuit considered whether the pendency of an earlier class action tolled the applicable statutes of limitations for a subsequently filed class action, in addition to a subsequently filed individual action. See *835 F.2d 213 (9th Cir. 1987)*. The Ninth Circuit held that the class tolling doctrine did not apply to the subsequently filed class action (although it allowed the individual action to go forward). Central to the court's ruling was the fact that the district court had denied class certification **[*1102]** in the earlier class action, **[**93]** which denial the subsequent class action sought to re-litigate, and thereby circumvent. The court reasoned that the policy considerations underlying the tolling doctrines of American Pipe and Crown, Cork & Seal did not support application of the class tolling doctrine in such circumstances. *Id. at 214*.

The Ninth Circuit arrived at a different conclusion, however, in *Catholic Social Servs. v. INS, 232 F.3d 1139 (9th Cir. 2000)*. There, the court applied class action tolling and allowed a subsequent class action to go forward. The court distinguished its decision from Robbin on grounds that plaintiffs in Catholic Social Serv., unlike the plaintiffs in Robbin, were not attempting to re-litigate an earlier denial of class certification. See *232 F.3d at 1149*. Nor were they attempting to correct a procedural deficiency in an earlier would-be class, a factor that other, out-of-circuit authorities have relied on as a basis for refusal to apply class tolling. Id. While distinguishing the case before it from those other cases, however, the Ninth Circuit appeared to cite with approval the language employed by those **[**94]** other authorities - including the US Supreme Court - stating that plaintiffs may not "piggyback one class action onto another … and thereby engage in endless rounds of litigation…". See *id. at 1148*.

As these cases demonstrate, the Ninth Circuit has thus far applied class tolling in situations where plaintiffs in the subsequently filed class action have opted out of an earlier certified class, or where plaintiffs are not seeking to

---

[9] Plaintiffs also argue, in conclusory fashion, that "[w]here, as here, the timeliness of the claims depends on an examination of fact-intensive issues such as concealment, discovery and tolling, the issue cannot properly be resolved in a judgment on the pleadings." See Pl. Opp. Br. at 2:18-3:1. Aside from this brief statement, however, plaintiffs make no showing as to why or how the issues of concealment, discovery, and/or tolling are fact-intensive as applied to this case, such that resolution of the statute of limitations issue - via 12(c) motion - is improper. Accordingly, plaintiffs' argument in this regard is unpersuasive.

circumvent an earlier denial of class certification, or to otherwise correct procedural deficiencies that formed the basis for such a denial.

The Ninth Circuit has never had occasion, however, to pass on the particular situation before the court here - i.e., where plaintiffs seek application of class tolling to a subsequently filed class action, where *no decision* as to certification has yet been made in the earlier filed class action. Unsurprisingly, the parties disagree as to the import of the above cases on this issue, and rely on varying persuasive authority in pressing their arguments upon the court.

Plaintiffs, for example, read the Catholic Social Serv. holding, permitting class action tolling, expansively. They read **[**95]** it as setting forth the proposition that, *unless* a decision on the merits or on class certification has issued in the earlier filed class action, class tolling applies. They further invoke *In re Linerboard, 223 F.R.D. 335, 351 (E.D. Pa. 2004)*, for the proposition that application of class tolling is particularly appropriate in cross-jurisdictional class actions, such as those at issue here, since it prevents courts around the country from being flooded with substantially similar class actions "anytime a nationwide class action is filed."

Defendants, on the other hand, point to the policy reasons behind the class tolling doctrine and argue that these reasons counsel against applying class tolling to later-filed actions where no decision on certification or the merits has been reached in the earlier filed action. They specifically rely on *In re Heritage Bond Litig., 289 F. Supp. 2d 1132 (C.D. Cal. 2003)*, a district court case that considered the identical issue before the court here, and which declined to apply class tolling. The In re Heritage Bond court noted that the class tolling doctrine as originally set forth in American Pipe, promotes **[**96]** judicial efficiency: for if tolling were withheld for subsequently filed claims, putative class members would be forced to prematurely file their own actions prior to a determination on certification in the earlier class action, in order to preserve their claims - 'precisely the multiplicity of activity which *Rule 23* was designed to avoid…". See *In re Heritage Bond, 289 F. Supp. 2d at* ***[*1103]*** *1150*. The In re Heritage Bond court then went on to reason that, in view of these policy considerations, the doctrine "does not apply to individuals who would not be parties to the earlier filed class action if it continued as a class action." Id. Indeed, the class tolling doctrine, continued the court, "was never intended to apply to plaintiffs 'who file separate suits prior to a decision being reached on the class certification issue,' because none of the judicial efficiency purposes of the doctrine [would be] served by applying it to plaintiffs who voluntarily pursue their individual claims even before the court determines whether the class is viable…". See id. As such, the court held that class action tolling did *not* apply to a subsequent class action filed prior **[**97]** to a certification decision in the earlier filed action. Id.

While the issue is far from clear cut, the court is nonetheless persuaded that class tolling should not be applied to plaintiffs' state law claims here. Both the Ninth Circuit's reasoning in *Catholic Social Serv.,* which appears to cite with approval other courts' concerns for the potential multiplicity of actions that could result from allowing subsequent classes of plaintiffs to unfairly "piggyback" on prior class actions, and the court's own view that the policy reasons behind the class tolling doctrine are better served by declining to apply class tolling under the facts of this case, urge this result. The court is particularly concerned, for example, that if it were to conclude otherwise, and class tolling were held to apply, then plaintiffs would essentially be permitted to file class action after class action, until the state court class actions finally decide either the merits of the earlier cases, or the class certification issue.

For these reasons, the court declines to apply the class tolling doctrine to plaintiffs' claims brought under the seven state statutes at issue. Accordingly, since no tolling **[**98]** applies, defendants' motion for judgment on the pleadings with respect to plaintiffs' claims under the laws of Alaska, Idaho, Louisiana, Montana, Oregon, Utah, and Wyoming, as stated in plaintiffs' fifth claim for relief, is hereby GRANTED.

2. State Limitations on Class Actions

Defendants also contend that the consumer protection statutes of Louisiana, Montana, New York, and South Carolina, all prohibit plaintiffs from bringing a class action suit, and require dismissal of plaintiffs' claims under those statutes. Defendants' arguments with respect to Louisiana, Montana, and South Carolina are similar, while they make a separate argument with respect to New York. The court therefore groups its discussion of these states accordingly.

a. Louisiana, Montana, South Carolina

With respect to these states, defendants make two general arguments. First, they point out that their consumer protection statutes expressly prohibit representative actions for damages, such as the one filed by plaintiffs here. Second, defendants note that plaintiffs also have no individual claims under any of the state statutes at issue that could support any representative claims - no plaintiff is a resident **[**99]** of any of the three states in question, nor do plaintiffs allege that they have bought any affected goods in the relevant states. Accordingly, defendants argue that plaintiffs' claims under those statutes are not viable.

Defendants are correct. First, as they point out, the statutes cannot be enforced by way of a class action suit. The clear language of all three statutes expressly states as much. See *La. Rev. Stat. § 51:1409(A)*(***HN16***[] plaintiffs "may bring an action individually but not in a representative capacity to recover actual damages" under statute"); *Morris v. Sears, Roebuck & Co., 765 So. 2d 419, 421 (4th* ***[*1104]*** *Cir. 2000)*(Louisiana statute "expressly prohibits a private class action");***HN17***[] *Mont. Code Ann. § 30-14-133(1)*(consumers "may bring an individual but not a class action"); *S.C. Code Ann. § 39-5-140*(persons bringing suit under statute "may bring an action individually, but not in a representative capacity, to recover actual damages"). Moreover, other federal courts have also read the express language of the statutes in question to prohibit class actions. See, e.g., *Hamilton v. United Healthcare of La., 310 F.3d 385, 393 (5th Cir. 2002)* **[**100]** (district court "[c]onclud[ed], correctly, that the [Louisiana consumer protection statute] does not allow class action claims"); *In re Pharm. Indus. Average Wholesale Price Litig., 230 F.R.D. 61, 84 (D. Mass. 2005)*(stating that under Louisiana and Montana law, "there is no right to bring a class action to enforce the consumer protection statutes"); *Gunnells v. Healthplan Servs., 348 F.3d 417, 423 (4th Cir. 2003)*(impliedly affirming district court's refusal to certify class under South Carolina consumer protection statute in statutory prohibition on representative actions to recover monetary damages).

Plaintiffs attempt to avoid the above conclusion by arguing that the statutory limitations set forth in each of the three statutes constitute across-the-board limits on class adjudication that are inconsistent with *Rule 23*, and must therefore be disregarded. Plaintiffs rely specifically on three out of circuit district court cases for support of their argument. See *O'Keefe v. Mercedes-Benz, USA, LLC, 214 F.R.D. 266, 285-86 (E.D. Pa. 2003)*; *In re Bridgestone/Firestone Inc., 205 F.R.D. 503, 514-15 (S.D. Ind. 2001),* **[**101]** rev'd in part on other grounds, *288 F.3d 1012 (7th Cir. 2002)*; *Kristiansen v. John Mullins & Sons, Inc., 59 F.R.D. 99, 109-110, n. 113 (E.D. N.Y. 1973)*. As defendants point out, however, none of these cases actually addresses the three specific state statutes in question, or otherwise provides a basis for refusing to follow both the express statutory language contained therein prohibiting private class actions for monetary damages, and decisional authority from relevant jurisdictions confirming this interpretation. As such, plaintiffs' representative claims under these three statutes fail.

Second, and significantly, defendants are also correct that plaintiffs have not, in the first instance, laid the proper groundwork for a representative claim. No named plaintiff is a resident of any of the three states in question, nor is there any allegation of any conduct or activity taking place within the targeted states that sets forth a basis for connecting plaintiffs' individual claims with representative claims under Louisiana, Montana, or South Carolina statutes. Plaintiffs, for their part, fail to argue otherwise, thereby conceding the issue.

In sum, **[**102]** and for the above reasons, the court concludes that defendants' motion for judgment on the pleadings as to plaintiffs' representative claims under the consumer protection statutes of Louisiana, Montana, and South Carolina must be, and are hereby is, GRANTED, as the statutes prohibit private class action suits for money damages, and plaintiffs have furthermore failed to set forth any allegations allowing such representative claims to go forward.

b. New York

Defendants also target plaintiffs' claim pursuant to New York's consumer protection statute, General Business Law *§ 349 et seq.* Specifically, they argue that a separate state statute - *New York C.P.L.R. § 901(b)* - prohibits plaintiffs' representative claim under General Business Law *§ 349*. *Section 901(b)* prohibits any class action "to recover a penalty, or a minimum measure of recovery created or imposed by statute." Defendants assert that this prohibition extends to plaintiffs' **[*1105]** claim under *section 349*, since that statute permits plaintiffs to seek "actual damages or fifty dollars, whichever is greater," as well as treble damages for willful violations. See *N.Y. Gen. Bus. Law § 349(h)* **[**103]** . According to defendants, plaintiffs' claim under *section 349* therefore improperly seeks recovery of a "penalty" by way of a representative claim, and must be dismissed.

In response, plaintiffs argue that they do not seek treble damages or penalties under *section 349*, but only actual damages, thereby making *C.P.L.R. § 901(b)* inapplicable. Plaintiffs further noted at the hearing that the complaint expressly requests that relief in the form of damages be awarded only "as provided by federal and state antitrust laws…". See Complaint, at 28:7-9. As such, plaintiffs contend that they are only seeking those damages that are permissible under any given state's laws.

Plaintiffs' arguments are more persuasive. As the controlling state cases they rely on hold, *section 901(b)* only proscribes class actions that seek to recover either statutory penalties, or statutory minimum damage awards; it does not proscribe class actions that seek recovery of actual damages. See, e.g., *Cox v. Microsoft Corp., 8 A.D.3d 39, 778 N.Y.S. 2d 147, 148-49 (N.Y. App. Div. 1st Dep't 2004)*(rejecting defendant's argument that plaintiffs were not entitled to class action relief under *§ 349* based on fact **[**104]** that statutorily prescribed $ 50 minimum damages constitutes a "penalty" under *C.P.L.R. 901(b)*); *Super Glue Corp. v. Avis Rent a Car Sys., Inc., 132 A.D.2d 604, 517 N.Y.S. 2d 764, 767 (N.Y. App. Div. 2nd Dep't 1987)*("a class action may be maintained to recover actual damages and injunctive relief pursuant to *[section] 349(h)*"). These cases are directly on point, since they considered the very same issue before the court here - i.e., whether *C.P.L.R. § 901(b)* prohibits class action claims brought under *Gen. Bus. Law § 349*. Furthermore, the court is compelled to defer to the New York state courts' interpretation of their own state law. Accordingly, the court concludes that there is no bar to plaintiffs' class action claim under *section 349*, provided that plaintiffs are seeking only actual damages.

On this point, the court is persuaded that plaintiffs' complaint does indeed set forth a claim for actual damages only. For, as plaintiffs pointed out at the hearing on the instant motions, the complaint's prayer for relief seeks damages only "as provided by federal and state antitrust laws." See Complaint at 28:7-9. Although defendants respond by stating that this allegation is **[**105]** contradicted by a subsequent allegation of the complaint, which states that plaintiffs are seeking judgment "in an amount to be trebled in accordance with such laws," the court does not believe that this allegation undermines plaintiffs' argument. For it still remains true, as alleged, that plaintiffs are limited to seeking judgment "in accordance with" the laws pursuant to which they seek relief. And, as just explained above, the statute pursuant to which plaintiffs seeks relief via a representative claim allows for only actual damages.

In sum, and for all these reasons, the court concludes (1) that***HN18***[] *C.P.L.R. § 901(b)* presents no bar to class action suits seeking actual damages pursuant to *Gen. Bus. Law § 349*; and (2) that plaintiffs' complaint sufficiently alleges that plaintiffs are seeking actual damages only under *section 349*, in accordance with New York law. Accordingly, the court DENIES defendants' motion for judgment on the pleadings in connection with plaintiffs' representative claim pursuant to *New York's Gen. Bus. Law § 349*. Plaintiffs' claim under the statute remains valid. [10]

[106]** **[*1106]** 3. Substantive State by State Analysis

[10] The court notes that there is a larger potential problem suggested by plaintiffs' complaint, which the parties have not addressed. Notwithstanding their arguments regarding the fact that plaintiffs are only seeking damages that are consistent with "federal and state antitrust laws," plaintiffs have not actually alleged that they are seeking any damages pursuant to any of the consumer protection statutes alleged in the complaint. See Complaint, Prayer for Relief at 28:27:19-28:27. Accordingly, and based on their failure to allege as such, there is an argument to be made that plaintiffs are unable to recover any damages pursuant to the consumer protection statutes alleged in their complaint, in the event those statutes provide for damages. Since the parties have not raised this argument, however, the court refrains from making a final determination as to this issue.

Defendants' remaining arguments are targeted at the consumer protection statutes of eleven states: Alaska, Arkansas, Hawaii, Idaho, Montana, New York, Oregon, Rhode Island, Utah, West Virginia, and Wyoming. Defendants urge the court to dismiss plaintiffs' claims brought pursuant to these statutes on two grounds. First, that plaintiffs' indirect purchaser claims under these state statutes are improper, because each state specifically prohibits or limits - whether by operation of separate statute or other laws - indirect purchasers from bringing antitrust suits, pursuant to *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. According to defendants, since these states follow Illinois Brick's general prohibition on indirect purchaser suits alleging antitrust violations, allowing plaintiffs to seek the same relief by *way* of consumer protection statutes would be improper. Second, and in a closely related argument, defendants assert that plaintiffs' consumer protection claims are improper because the consumer protection statutes pursuant to which the claims are brought are truly intended to cover allegations of false advertising, **[**107]** and deceptive or fraudulent conduct - i.e., classic consumer protection violations - and do not cover plaintiffs' antitrust allegations.

In essence, the gist of defendants' arguments with respect to the substance of the consumer protection claims at issue here, is simply that the statutes pursuant to which plaintiffs bring their claims are aimed solely at true consumer protection violations actually suffered by injured parties - i.e., they are not meant to cover, and cannot be interpreted to cover; antitrust violations brought by indirect purchasers of goods.

Preliminarily, the court notes that defendants' arguments touch upon areas of law that are unsettled in the majority of the states at issue. While the court has attempted, for example, to construe the individual state statutes at issue with reference to the actual state courts' interpretation of their own law state laws, the court has not always found case law that is both directly on point and which constitutes controlling legal authority within the given state in question, as discussed more thoroughly below. For that reason, the court has construed the statutes in question with reference to certain overriding principles. **[**108]** First, where possible, the court has relied on controlling state law cases. Second, and***HN19***[] where no controlling state law cases are available, the court has looked to state legislative history - where available and relied on by the parties - as persuasive authority regarding proper statutory interpretation. In the event neither of these preceding sources proved helpful, the court has looked to other, persuasive jurisdictions that interpret the specific statute in question.

Moreover, and particularly with respect to the issue whether indirect purchaser standing exists under the consumer protection statutes in question, where there is no state law authority regarding the issue, the court's approach to statutory interpretation **[*1107]** is conservative in nature. Where possible, the court has avoided making affirmative pronouncements regarding state law that would have the effect of substantially broadening the legal rights available pursuant to that law.

With these guidelines in mind, the court turns to each individual state at issue, and evaluates the arguments with respect to each, as follows.

a. Alaska

Plaintiffs assert a representative claim pursuant to Alaska's Unfair Trade Practices **[**109]** and Consumer Protection Act ("AUTPCPA"). See *Alaska Stat. § 45.50.531*. Defendants argue that, since Alaska's antitrust statute expressly prohibits indirect purchasers from bringing private suits for antitrust violations and limits such actions to those brought by only the state attorney general, plaintiffs should not be allowed to circumvent that prohibition by proceeding under the AUTPCPA. In response, plaintiffs argue that the AUTPCPA applies broadly to any "persons" who have been injured, regardless whether they are indirect or direct purchasers, and that the Alaska Supreme Court has previously held that private parties may sue under AUTPCPA for conduct that also violates Alaska's antitrust statute - as is the case here. Plaintiffs also assert that the AUTPCPA was modeled after the Federal Trade Commission Act ("FTCA"), which has been held to apply to antitrust violations, and that both state and federal courts have consistently granted indirect purchaser standing where those indirect purchasers bring suit under statutes that are modeled after the FTCA.

HN20[] The AUTPCPA provides: "A person who suffers an ascertainable loss of money or property as a **[**110]** result of another person's act or practice declared unlawful [under AUTPCPA] may bring a civil action to recover for each unlawful act or practice three times the actual damages or $ 500, whichever is greater." See *Alaska St. § 45.50.531*. There is nothing in the statute's wording or definitions, however, that specifically defines either direct or indirect purchasers as "persons," or that distinguishes between the two. Nor is there any guidance provided by the language of the statute as to whether, more generally, indirect purchaser standing in the antitrust context suffices under the AUTPCPA. Furthermore, neither party has submitted any controlling case authority - or, for that matter, any persuasive case authority - directly on point as to this issue. Defendants merely assert that the absence of any case law expressly allowing indirect purchasers to sue under the AUTPCPA requires the conclusion that no indirect purchaser standing exists under it, while plaintiffs assert that the absence of any case law disallowing indirect purchasers to sue requires the conclusion that such standing does exist.

Recognizing the absence of authority that is directly on point, the parties extrapolate **[**111]** from non-controlling authority to support their positions. Defendants rely on Alaska's amended antitrust statute, for example, to establish that prior to July 2003, indirect purchaser suits alleging antitrust violations were flatly prohibited. See *Alaska Statute § 45.50.577* (amended to state that, after July 2003, "only the attorney general" may sue under the antitrust statute on behalf of violations alleged by indirect purchasers). Based on the statute's amendment permitting the attorney general to sue after July 2003, defendants reason that permitting indirect purchaser claims under the AUTPCPA would frustrate the purpose and goals of the state legislature as set forth in the amended state antitrust statute. Plaintiffs, by contrast, rely on legislative history that expresses no opinion about indirect purchaser standing, and the Supreme Court's decision in *Odom v. Fairbanks Mem. **[*1108]** Hosp., 999 P.2d 123, 131-32 (Alaska 2000)*, a controlling state court case in which the court held that certain conduct may give rise to violations under both Alaska's state antitrust statutes and the AUTPCPA, but made no pronouncement on the issue of indirect **[**112]** purchaser standing.

None of these authorities is obviously directly on point. As such, and furthermore recognizing that this court is not in the best position to decide unresolved legal issues for the state of Alaska, the court chooses to adopt the interpretation that will wreak the least amount of havoc on the existing law in Alaska. To that end, the court therefore declines to read the AUTPCPA to permit indirect purchaser standing, since no court has affirmatively found to the contrary, and since, under the current status of the law in Alaska, only the attorney general may sue for money damages on behalf of indirect purchasers as a result of antitrust violations.

Defendants' motion for judgment on the pleadings with respect to this claim is GRANTED.

b. Arkansas

Plaintiffs' representative claim under Arkansas law is brought under the Arkansas Deceptive Trade Practices Act ("ADTPA"). See *Ark. Code Ann. § 4-88-113*. As with Alaska, defendants first argue that antitrust standing should be denied to indirect purchaser plaintiffs under ADTPA, because indirect purchaser standing would be denied to them under the Arkansas antitrust statute. Second, **[**113]** defendants contend that the ADTPA does not cover plaintiffs' allegations of antitrust price-fixing at any rate, since the statute only prohibits "unconscionable, false or deceptive acts or practices," none of which are alleged here.

In support of these arguments, defendants point out that Arkansas' antitrust statute does not permit indirect purchasers to bring private actions for money damages, as plaintiffs seek to do here. This is because the antitrust statute permits only the state attorney general to bring actions for money damages. See *Ark. Code Ann. § 4-75-315(b)*. Defendants point out further that the Arkansas legislature went so far as to reject a proposed amendment in 2001 that would have allowed private plaintiffs to bring antitrust suits for monetary damages. All of which means, according to defendants, that the legislature has expressly made clear not only that antitrust standing should be denied to indirect purchaser plaintiffs under the Arkansas antitrust statute, but that it should also be denied to indirect purchaser plaintiffs under ADTPA.

Plaintiffs, however, correctly point out that, contrary to defendants' argument, ***HN21***[] the ADTPA does **[**114]** not limit suits by indirect purchasers expressly to the state attorney general, as Alaska's statute does. It merely provides an affirmative right of action for the attorney general, which the attorney general "may," in his or her discretion, exercise. See *Ark. Code Ann. § 4-75-315*. Indeed, even defendants concede in their reply that Arkansas allows *some* indirect purchaser suits for money damages. Moreover, unlike with the court's review of Alaska's statute, here there is at least persuasive authority directly on point that provides some guidance suggesting that indirect purchaser suits alleging antitrust violations can also state claims under ADTPA. [11]

[115] [*1109]** Plaintiffs specifically point to *In re New Motor Vehicles Canadian Export Antitrust Litig., 350 F. Supp. 2d 160, 178-79 (D. Me. 2004)*, in which the court considered the precise issue here, and stated that it "find[s] no support in the ADTPA or Arkansas case law for a ban on indirect purchaser suits. The ADTPA provides a private cause of action for damages for any person injured by a violation of the ADTPA, and is not limited to a cause of action for direct purchasers." The court also noted that Arkansas "does not prohibit indirect purchaser suits under its antitrust laws." See id.

Defendants take issue with plaintiffs' reliance on this case, particularly in light of the fact that the ADTPA does not contain language specifically prohibiting "unfair competition" - the language in the analogous federal consumer protection statute (i.e., the FTCA) that has been interpreted to cover antitrust violations. However, defendants present no controlling legal authority supporting their claim. They, too, rely on persuasive authority, in which other states' judicial tribunals hold that other states' consumer protections statutes that fail to address "unfair competition" **[**116]** do not cover antitrust claims generally or price-fixing claims. Given, however, that *In re Motor Vehicles* is the only cited case that actually construes the application of actual antitrust conspiracy claims to *the ADTPA specifically,* the court finds it more persuasive here. For these reasons, and in view of the fact that Arkansas' antitrust statute allows for indirect purchaser standing in certain circumstances, and the absence of state law authority holding otherwise, the court concludes that plaintiffs' claim under the ADTPA is viable, and may proceed.

Accordingly, the court DENIES defendants' motion for judgment on the pleadings with respect to this claim.

c. Hawaii

Plaintiffs assert a representative claim pursuant to *Haw. Rev. Stat § 480-2 et seq.* Both parties apparently concede that Hawaii's consumer protection statute - *section 480-2(e)* - allows "any person" to bring an act under the statute, and that this would apply to indirect purchasers. They dispute, however, whether the statute - which was amended on June 28, 2002 to allow private suits by indirect purchasers alleging unfair competition - applies to plaintiffs' claim. Defendants assert **[**117]** that the statute has no retroactive effect and does not cover the allegations of plaintiffs' complaint, which are based on conduct that occurred *prior* to adoption of the amendment in June 2002. Plaintiffs, for their part, allege that it is the timing of the complaint's filing that counts, and that the amended statute applies, since it had already been enacted by the time plaintiffs' suit was actually *filed.*

Defendants are generally correct that, ***HN22***[] under Hawaii case law, a statute has retroactive effect only if the language of the statute itself or the legislative history expressly indicate that the statute should be applied retroactively. See, e.g., *Dash v. Wayne, 700 F. Supp. 1056, 1059 (D. Haw. 1988)*(holding that *subsection (d)* of same statute does not apply retroactively). However, even if the statute applies only prospectively as of the June 2002 date of enactment, it still remains the case that plaintiffs' complaint was not filed until June 17, 2005, nearly three years later. Thus, the critical question is not whether the statute itself takes effect retroactively or prospectively, it is whether the statute, once enacted in June 2002, applied - and continues **[**118]** to apply - according to the date of alleged conduct, or according to filing date. If the statute applies with reference to the former, then defendants are correct that plaintiffs' claim, which is based on **[*1110]** allegations of conduct that occurred prior to June 2002, does not benefit from the rule permitting indirect purchaser standing. If the statute applies with reference to the latter, by contrast, plaintiffs are correct that their claim stands, since the filing date came well after the date of the amended statute's enactment.

---

[11] Plaintiffs also point to Arkansas state law authority that purportedly expressly ruled that indirect purchasers may bring antitrust claims under the ADTPA. See Pl. Opp. Br. Re Fifth Claim for Relief at 11:6-8. However, that decision has not been attached, and the court was unable to procure it from the standard electronic publishing databases. Accordingly, the court takes note of the existence of this authority, but does not rely on it.

Turning to the language of the statutory provision at issue, the court finds that it is the date of filing that should control, and which determines whether the amended section 480-2(e) applies. Looking at the amended statute, it simply states that **HN23**[] "[a]ny person *may bring an action* based on unfair methods of competition declared unlawful by this section." See Hi. Stat. Ann. § 480-2(e)(emphasis added). Thus, it is the bringing - or filing - of an action to which the statute applies. Defendants' arguments to the contrary, asserting that the statute applies to conduct, overreach. Furthermore, defendants provide no legal authority in support of their reading **[**119]** of the statute.

Accordingly, the court concludes that the amended statutory language should control, that it applies prospectively to claims filed pursuant to the statute on or after the June 2002 date of enactment, and that plaintiffs' claim under the statute is therefore proper. As such, defendants' motion for judgment on the pleadings with respect to the instant claim is DENIED.

d. Idaho

Plaintiffs' complaint asserts a claim pursuant to the Idaho Consumer Protection Act ("ICPA"). See Idaho Code Ann. § 48-601 et seq. Defendants argue that **HN24**[] the Idaho Supreme Court has explicitly held that indirect purchasers of price-fixed products cannot sue under Idaho's consumer protection statute - the CPA - since the statute specifically lists the types of conduct that are unlawful, and price-fixing is not one of them.

Defendants are correct, and Wasden v. Daicel Chemical Indus., 141 Idaho 102, 106 P.3d 428 (Idaho 2005), is dispositive. Wasden expressly held that allegations of antitrust price-fixing do not qualify as a type of prohibited conduct under the CPA. See id. at 434-35. The Idaho Supreme Court's finding in this regard was explicit: **[**120]** **HN25**[] "[p]rice-fixing is not listed in § 48-603 as conduct that constitutes either an unfair method of competition or an unfair or deceptive act or practice." Id. at 434. In setting forth its reasoning, the Wasden court specifically noted that the legislative intent behind the CPA required the court to give due consideration and weight to federal interpretation of the FTCA, but held that the CPA was distinct from the FTCA in that it specifically "defines what constitutes an unfair method of competition," and excludes price-fixing from that definition. See id. at 433-34. Wasden is directly on point, and compels the conclusion here that plaintiffs' claim pursuant to the CPA, based on similar allegations of price-fixing and horizontal price restraints, must fail.

Plaintiffs' reliance on alternative case law does persuade otherwise. The majority of the case law that plaintiffs rely on predates the Wasden opinion that explicitly construes the statute in question, or it constitutes only persuasive authority. See, e.g., In re Western Acceptance Corp., 117 Idaho 399, 788 P.2d 214, 216 (Idaho 1996); State ex rel. Lance v. Hobby Horse Ranch Tractor and Equip. Co., 129 Idaho 565, 929 P.2d 741, 743 (Idaho 1996); **[**121]** In re New Motor Vehicles, 350 F. Supp. 2d at 184-85; DBSI Signature Place, LLC v. BL Greensboro, L.P., 2006 U.S. Dist. LEXIS 30387, 2006 WL 1275394 (D. Idaho 2006). Moreover, DBSI Signature Place, which plaintiffs take particular note of for the proposition that it both distinguishes Wasden and suggests that plaintiffs' allegations are covered as a practice that is "otherwise misleading, false or deceptive" **[*1111]** under enumerated provision 603(17) of the CPA, is off-point. To begin with, DBSI Signature Place did not distinguish Wasden, as plaintiffs contend, but rather *reaffirmed* its principal holding that the CPA defines the sum total of actionable conduct under it. Second, the case did not consider traditional horizontal restraint violations such as those alleged by plaintiffs here - which Wasden specifically holds are excluded under the CPA.

In sum, in view of Wasden, which constitutes dispositive and controlling legal authority directly on point, and in view of plaintiffs' failure to controvert Wasden, the court concludes that plaintiffs' claim pursuant to the Idaho CPA is barred. Defendants' motion for judgment on the pleadings with respect to **[**122]** this claim is accordingly GRANTED.

e. Montana

Plaintiffs' claim under Montana law is brought pursuant to that state's Unfair Trade Practices Act ("MUTPA"). See Mont. Code Ann. § 30-14-101 et seq. Defendants argue that judgment on the pleadings is warranted with respect to this claim, for two reasons. First, while Montana courts have not directly addressed the indirect purchaser standing issue, the Montana Supreme Court has held that consideration should be given to federal ***antitrust law*** when interpreting similar portions of MUTPA. See, e.g., *Smith v. Video Lottery Consultants. Inc., 260 Mont. 54, 858 P.2d 11, 13 (Mont. 1993)*. Accordingly, since federal law prohibits indirect purchaser standing by virtue of Illinois Brick, so should MUTPA. Second, defendants contend that only "consumers" may bring actions under the MUTPA, which the act specifically defines as "persons" who purchase or lease goods or services "primarily for personal, family, or household purposes." Since some of the plaintiffs here are business entities, they have no standing as consumers. Furthermore, standing as to the individual plaintiffs is lacking because they have not **[**123]** alleged any use for personal, family, or household purposes.

In response, plaintiffs first point out that MUTPA is modeled after the FTCA, which has been interpreted to allow indirect purchaser standing for antitrust violations. Plaintiffs argue that MUTPA should be interpreted the same way. Second, and in response to defendants' arguments regarding plaintiffs' standing as "consumers", plaintiffs refrain from addressing defendants' challenge to the business entity plaintiffs, but argue that the individual plaintiffs' claims should effectively be read to support the inference that plaintiffs' use was for personal, family, or household purposes, since the complaint does not allege to the contrary.

With respect to whether Illinois Brick's prohibition on indirect purchaser standing should extend to claims under MUTPA, the parties in essence agree that consideration of analogous federal law is useful in interpreting Montana law, but disagree on which federal law is analogous - the Sherman Act, which adopts Illinois Brick, or the FTCA, which plaintiffs contend permits indirect purchasers to sue. Defendants rely primarily on *Smith v. Video Lottery Consultants. Inc., 260 Mont. 54, 858 P.2d 11 (Mont. 1993)* **[**124]** for proof that federal interpretation of the Sherman Act controls, while plaintiffs rely primarily on *In re New Motor Vehicles, 350 F. Supp. 2d at 192* for proof that FTCA interpretation controls.

Defendants' reliance on Smith is misplaced. While *Smith* issued from Montana's highest court and is controlling authority regarding interpretation of Montana law, that case did not construe the particular consumer protection provision of MUTPA that is at issue here. Rather, that case construed the provisions of MUTPA that specifically deal **[*1112]** with unlawful restraints of trade. See, e.g., *Mont. Code Ann. §§ 30-14-205(2)(c*, *g)*(prohibiting horizontal restraints of trade and monopolies); *Smith, 858 P.2d at 12-14* (comparing MUTPA restraint of trade provisions with *sections 1* and *2 of the Sherman Act*). This is why, in looking to federal law for guidance, the Smith court turned to the federal courts' interpretation of the Sherman Act; the Sherman Act is the analogous federal statute that deals specifically with unlawful restraints of trade. The consumer protection provisions of MUTPA, by contrast, prohibit "[u]nfair methods **[**125]** of competition and unfair or deceptive acts or practices" in the conduct of trade or commerce, rather than unlawful restraints of trade. See *Mont. Code Ann. §§ 30-14-103*. These provisions are therefore not analogous to the Sherman Act, and their construction is not aided by interpretation of the Sherman Act, as suggested by the Montana Supreme Court in Smith.

Rather, ***HN26***[] MUTPA's consumer protection provisions provide that the proper source of analogous federal law is, as plaintiffs, attest, the FTCA. See id. at *§ 30-14-104(1)*("It is the intent of the legislature that in construing 30-14-103 due consideration and weight shall be given to the interpretations of the federal trade commission and the federal courts relating to section 5(a)(1) of the Federal Trade Commission Act"). Accordingly, the court looks to federal interpretation of the FTCA, and not the Sherman Act, for guidance. Since there is no Montana authority directly on point construing MUTPA's consumer protection provisions specifically, and in light of the FTCA, plaintiff's reliance on In re New Motor Vehicles - which, although persuasive authority only, is directly on point - is **[**126]** appropriate and helpful.

In New Motor Vehicles, the court considered various plaintiffs' ability to bring a claim alleging an unlawful group boycott - a traditional antitrust claim - under MUTPA. The court held that since MUTPA is modeled after the FTCA, and since MUTPA further directs that the statute be interpreted in accordance with federal law, the real question was simply whether the antitrust violations alleged by plaintiffs had been interpreted as actionable under the FTCA. If so, then they would be actionable under MUTPA. See *350 F. Supp. 2d at 192-93*. After taking stock of several federal cases interpreting the FTCA, the court concluded that Sherman Act violations, such as the *section 1* violations alleged by plaintiffs there, did state claims under the FTCA, and were accordingly valid under MUTPA - even as to indirect purchasers. See id.

The court finds the reasoning of In re New Motor Vehicles instructive. For it is true that allegations of Sherman Act violations - including price-fixing such as that alleged by plaintiffs here have been interpreted by federal authorities to state a claim under the FTCA. See Federal Trade Commission v. Cement Institute, 333 U.S. 683, 68 S. Ct. 793, 92 L. Ed. 1010, 44 F.T.C. 1460 (1948) **[**127]** (price-fixing can violate both FTCA and Sherman Antitrust Act). As such, the only question is whether indirect purchasers may bring such a claim under the FTCA and/or MUTPA, and In re New Motor Vehicles provides useful guidance in answering this question in the affirmative. Moreover, and significantly, defendants have not introduced any Montana authority establishing that indirect purchasers have no standing under Montana's antitrust provisions. As such, a finding that plaintiffs here have standing to bring their claim under MUTPA does not represent an undue expansion of existing law prohibiting indirect purchasers from suing in Montana. Accordingly, and for the above reasons, the court concludes that plaintiffs' claim under MUTPA is viable.

[*1113] Even if plaintiffs' claim is viable, however, defendants next argue that plaintiffs have no standing as "consumers" under MUTPA, since they are either business entities, or individuals who have failed to allege that they purchased DRAM for personal, family, or household purposes. MUTPA defines a "consumer" as a "person who purchases or leases goods, services, real property, or information primarily for personal, family, or household purposes. **[**128]** " See Mont. Code Ann. § 30-14-102(1). "Person" is in turn defined as "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity." See id. at § 30-14-102(6).

The term "person" accordingly includes both individuals and businesses in its definition, and the provision of MUTPA that specifically authorizes individual suits incorporates this definition, as it allows all "consumers" to bring suit, without distinction as to natural persons or otherwise. It is true, however, that plaintiffs have failed to allege that the DRAM they purchased, even as "end users," was primarily for "personal, family, our household purposes." As such, and since MUTPA expressly contemplates this requirement for all qualifying consumers, the court GRANTS defendants' motion for judgment on the pleadings as to plaintiffs' claim under MUTPA, on the ground that the claim, as stated, is deficient.

Ordinarily, the court would grant plaintiffs leave to amend in order to cure the deficiency discussed above. However, since the court has granted judgment on the pleadings with respect to plaintiffs' MUTPA claim on the **[**129]** additional grounds that the statute of limitations bars the claim and class action suits are furthermore prohibited under MUTPA, see discussion supra, any amendment here would be futile. As such, judgment on the pleadings is granted without leave to amend.

f. New York

Plaintiffs assert a claim under New York's General Business Law § 349. See N.Y. Gen. Bus. Law § 349 et seq. In challenging this claim, defendants make two arguments. First, that no indirect purchaser standing exists for antitrust claims under New York's consumer protection statute because, as the legislative history and New York case law illustrate, antitrust claims are simply not meant to come within the purview of New York's consumer protection statute. Second, that section 349 is limited to deceptive practices in the conduct of trade or commerce occurring in New York itself, and only covers deceptive practices personally directed at plaintiffs by defendants - which plaintiffs have not alleged.

In response, plaintiffs first contend that the court must look to the FTCA for guidance under section 349, and since the FTCA prohibits antitrust violations such as those alleged **[**130]** here, the statute covers plaintiffs' claim - something that several New York state courts have already recognized. Second, plaintiffs respond that, contrary to defendants' challenge under section 349 itself, plaintiffs need not allege conduct or activity within New York State, but need only allege conduct that is consumer oriented and affects the public interest in New York, which the complaint does.

Plaintiffs are correct that, ***HN27***[] as a general matter, a claim under New York's General Business Law § 349 may be predicated on allegations of antitrust violations. See, e.g., Cox v. Microsoft Corp., 8 A.D.3d 39, 778 N.Y.S.2d 147, 148 (N.Y. App. Div. 2004)(allegations that defendant entered into secret agreements with competitors to inhibit competition and artificially inflate prices for defendant's products are sufficient to state a claim under *§ 349*); *New York Jets LLC v. Cablevision* ***[*1114]*** *Sys. Corp., 2005 U.S. Dist. LEXIS 23763, 2005 WL 2649330 (S.D. N.Y. 2005)*(anticompetitive conduct violating *section 2* qualifies as deceptive business practice under New York consumer protection statute); *New York v. Feldman, 210 F. Supp. 2d 294, 300-01 (S.D. N.Y. 2002)*(collusive activity alleged **[**131]** under *section 2* of the Sherman Act qualifies as deceptive activity under *§ 349*). While defendants argue that contrary New York case law has held that price-fixing claims are outside the ambit of *section 349*, they appear to have misconstrued those cases. The claims alleged in the cited cases failed, not because they were based on anticompetitive conduct falling outside the scope of the statute, but because the conduct, as alleged, did not sufficiently set forth any materially deceptive activity or otherwise satisfy the requisite allegations under the statute. See, e.g., *Paltre v. Gen. Motors, 26 A.D.3d 481, 810 N.Y.S.2d 496, 498 (N.Y. App. Div. 2006)*.

Plaintiffs have not cited, and the court has not found, a case that expressly holds that a claim under *section 349* may be predicated on anticompetitive conduct alleged specifically by indirect purchasers. However, the court notes that***HN28***[] New York's state antitrust statute, the Donnelly Act, expressly repeals *Illinois Brick* and allows for indirect purchaser standing. See *N.Y. Gen. Bus. Law § 340(6)*(the "fact that the state, or any political subdivision or public authority of the state, or any person **[**132]** who has sustained damages by reason of violation of this section has not dealt directly with the defendant shall not bar or otherwise limit recovery"). Accordingly, in view of the fact that New York courts and statutory authority support both the invocation of *section 349* as a remedy for allegations of anticompetitive conduct, as well as a policy allowing indirect purchasers to bring suit, the court concludes that plaintiffs' claim here pursuant to *section 349* is viable.

Even if the claim is viable, however, defendants contend that plaintiffs have failed to set forth the requisite allegations under the statute. ***HN29***[] In order to state a claim under *section 349*, plaintiffs must allege "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." See *New York Jets, 2005 U.S. Dist. LEXIS 23763, 2005 WL 2649330 at *11*. Plaintiffs are therefore generally correct in stating that they need only allege deceptive activity that constitutes consumer-oriented conduct implicating the public interest in New York. See, e.g., *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y. 2d 20, 25, 647 N.E.2d 741, 623 N.Y.S.2d 529 (N.Y. 1995).* **[**133]** Here, however, defendants are right to point out that plaintiffs' complaint fails to do so. It nowhere mentions any conduct by defendants that is consumer-oriented and aimed at affecting the public interest in New York. Nor does it state in any concrete terms that defendants' conduct was misleading in a material way, or injured plaintiffs. Plaintiffs would have the court "reasonably infer" these facts from the allegations stating that two New York residents indirectly purchased DRAM, and were forced to pay supra-competitive prices for DRAM as a result of defendants' unlawful practices. See, e.g., Complaint at PP 13-14, 47-48. This is insufficient, however. Indeed, these allegations do not come close to setting forth the requisite allegations for a claim under *section 349*. On this basis, therefore, plaintiffs' claim pursuant to *section 349* is deficient.

As such, the court GRANTS judgment on the pleadings with respect to this claim. Plaintiffs are given leave to amend their complaint, however, in order to cure the deficiencies noted above, and to set forth **[*1115]** allegations properly pleading a claim under *section 349*.

g. Oregon

Plaintiffs assert a claim under Oregon's Unfair Trade **[**134]** Practices Act ("OUTPA"). *See* *Or. Rev. Stat. § 646.605*. Defendants argue that Oregon's consumer protection statute - the OUTPA - defines unlawful acts under the statute as those appearing in a specifically enumerated list of practices, or as violations of other specified Oregon statutory provisions - neither of which covers antitrust price-fixing. Defendants also argue that, although one of the OUTPA's enumerated provisions is a catch-all provision that states that "other unfair or deceptive conduct in trade or commerce" may qualify as an unlawful practice under the act, an action may only be brought under that provision if the state attorney general first establishes a rule declaring the conduct alleged to be unfair or deceptive in trade or commerce - something that the attorney general has not done with respect to price-fixing. In response, plaintiffs acknowledge the attorney general rule requirement, but argue that the catch-all provision permitting suit for "other unfair or deceptive conduct in trade or commerce" is satisfied as long as plaintiffs allege a likelihood of confusion or of misunderstanding, which plaintiffs have sufficiently done.

[135]** Neither party relies on Oregon case law that is directly on point, or dispositive of the issue before the court - i.e., whether the OUTPA extends to indirect purchaser suits alleging price-fixing activity. Nor have the parties cited any persuasive authority that is directly on point. As such, the court turns directly to the language of OUTPA itself.

Review of the statute suggests that defendants have the better argument. To begin with, plaintiffs do not really dispute either that OUTPA specifically enumerates the type of activity that can qualify as an unlawful practice, or the fact that price-fixing such as that alleged by plaintiffs here is not one of those enumerated activities. To the extent plaintiffs do contend that their allegations nonetheless state a claim under OUTPA, since they allege conduct likely to cause "confusion or misunderstanding" or "false and misleading representations," the court finds that this is not so. None of the allegations of plaintiffs' complaint specifically allege false and misleading representations made by defendants to plaintiffs, or set forth conduct that caused plaintiffs confusion or misunderstanding, as is intended by OUTPA. While plaintiffs **[**136]** for the first time, at the hearing on the instant motions, identified paragraphs 68, 72, 80, 88, and 119 of the complaint as setting forth such allegations, review of these paragraphs does nothing to highlight for the court the actual nature of the conduct undertaken by defendants that constitutes false and misleading activity or activity that is likely to cause confusion or misunderstanding.

Rather, the argument before the court boils down to the narrower issue of whether plaintiffs' allegations may be covered by OUTPA's catch-all provision prohibiting a person from engaging in "any other unfair or deceptive conduct in trade or commerce." See *Or. Rev. Stat. § 646.608(1)(u)*. And as defendants correctly note, ***HN30***[] OUTPA expressly states that no action or suit "may [] be brought under *subsection (1)(u)* of this section unless the Attorney General has first established a rule in accordance with the provisions of OR chapter 183 declaring the conduct to be unfair or deceptive in trade or commerce." See id. at *§ 646.608(4)*. Here, plaintiffs neither point to nor rely on any rule proscribed by the attorney general pursuant to Oregon Revised Statute chapter **[**137]** 183 that establishes price- fixing as an unfair or deceptive practice.

[*1116] As such, and in accordance with the language of OUTPA, plaintiffs' claim pursuant to *section 646.608(1)(u)* fails. The court thereby GRANTS defendants' motion for judgment on the pleadings with respect to this claim.

h. Rhode Island

Plaintiffs bring a representative claim under Rhode Island's Unfair Trade Practices and Consumer Protection Act ("UTPCPA"). See *R.I. Gen. Laws § 6-13.1-1 et seq.* **[*1117]** Defendants argue that, as with Montana and Oregon, Rhode Island's UTPCPA allows only natural persons to sue who "purchase or lease goods primarily for personal, family or household purposes," and furthermore to sue only when they are alleging that a defendant engaged in conduct that truly creates "a likelihood of confusion" or that is otherwise unfair or deceptive, as expressed under the terms of the UTPCPA. Defendants assert that no such allegations are present here.

Defendants are correct. First, ***HN31***[] the Rhode Island Supreme Court has construed the UTPCPA to require that only natural persons are permitted to bring private rights of action under the statute, which natural persons must have **[**138]** "purchase[d] or lease[d] goods or services primarily for personal, family, or household purposes." See *ERI Max Entertainment, Inc. v. Streisand, 690 A.2d 1351, 1354 (R.I. 1997)*("plaintiff, a Rhode Island corporation doing business as a video store, plainly does not have standing to bring a private action under this statute."). Since at least four of the named plaintiffs here are business entities, they therefore do not come within the statute's definition of "person," and have no standing to sue. As for the remaining plaintiffs, there is no allegation that they purchased goods "primarily for personal, family, or household purposes." Although plaintiffs assert that the court should reasonably infer this allegation from the complaint's allegation that the plaintiffs purchased DRAM "for end use and not for resale," it is not necessarily true that just because a plaintiff has purchased DRAM for "end use," he or she has purchased DRAM for any of the above named purposes. As such, the court finds plaintiffs' claim barred as to the business entity plaintiffs, and deficient with respect to the remaining individual plaintiffs.

Second, even if plaintiffs' individual claims **[**139]** were not deficient for the above reason, the claim is also deficient because, as defendants argue, the complaint does not allege conduct on defendants' part that creates "a likelihood of confusion" or that is otherwise unfair or deceptive, as expressed under the terms of the UTPCPA. Preliminarily, the court does not find that plaintiffs' allegations of price-fixing and conspiracy fall within the enumerated list of conduct and activity that the UTPCPA defines as "unfair methods of competition and unfair or deceptive acts or practices." See *R.I. Gen. Laws § 6-13.1-1(6)*. With respect to whether plaintiffs' allegations *otherwise* illustrate conduct causing a "likelihood of confusion" or that is deceptive or fraudulent under the terms of the UTPCPA, the court finds that plaintiffs' allegations do not, for the same reasons as discussed above in connection with plaintiffs' claim under Oregon's consumer protection statute.

Accordingly, for all the above reasons, the court hereby GRANTS judgment on the pleadings with respect to this claim. Leave to amend is granted to the individual plaintiffs, however, so that they may attempt to cure the deficiencies noted **[**140]** above.

i. Utah

Plaintiffs' claim under Utah law is brought pursuant to that state's Consumer Sales Practices Act ("CSPA"). See *Utah Code Ann. § 13-11-1 et seq.* Defendants argue that the Utah CSPA prohibits only "deceptive" and "unconscionable" acts, which are expressly enumerated in the statute, and none of which include antitrust violations. Defendants also point to the regulations issued by the Utah Division of Consumer Protection, which additionally specify the deceptive and unconscionable acts prohibited by the CSPA - again, none of which include antitrust violations. In response, plaintiffs counter that the CSPA was meant to be interpreted in accordance with the FTCA, and therefore covers price-fixing claims such as those alleged here.

Plaintiffs are correct that one of the goals of the drafters of the, CSPA was to model the FTCA. See *Utah Code Ann. § 13-11-2(4)*(purpose of the CSPA is, in part, "to make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection"). Defendants, however, are also correct that, unlike the FTCA **[**141]** upon which the CSPA is modeled, the CSPA does *not* include any provision directly analogous to *section 5 of the FTCA*, which specifically prohibits "unfair competition." See *15 U.S.C. § 45* ("[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful"). For that reason, and since federal case law that has interpreted the FTCA to cover antitrust price-fixing allegations, has done so pursuant to *section 5 of the FTCA* specifically, see, e.g., *FTC v. Cement Inst., 333 U.S. at 690*, the FTCA's prohibition on antitrust price-fixing should *not* be read into the CSPA here, despite the fact that the CSPA is admittedly to be construed broadly. Accordingly, and since plaintiffs have not cited to authority - controlling or otherwise - that is expressly on point on the question whether allegations of price-fixing constitute actionable conduct pursuant to the CSPA, the court refrains from unnecessarily enlarging the scope of the CSPA, and declines to hold that plaintiffs' antitrust claim, as alleged in the complaint, may be asserted under the statute.

[142]** Moreover, to the extent that plaintiffs assert that the allegations of the complaint independently set forth "deceptive" and "unconscionable" conduct, the court has been unable to determine where this is so. Plaintiffs rely upon paragraph 68 of the complaint, which sets forth allegations of active concealment on defendants' part. Plaintiffs therein allege that defendants "publicly provided pre-textual and false justifications regarding their price increases." This single statement is the strongest allegation of deception that plaintiffs' rely on, both in their papers and at the hearing on the instant matter. However, the court is of the opinion that this bare allegation is insufficient to set forth an adequate basis from which plaintiffs can assert qualifying "deceptive" and "unconscionable" conduct pursuant to the CSPA. Plaintiffs must provide more facts that demonstrate that defendants have undertaken specific and identifiable conduct, or acts of a deceptive, fraudulent and/or unconscionable nature, that have harmed plaintiffs in a fashion contemplated by the CSPA.

Accordingly, the court hereby GRANTS defendants' motion for judgment on the pleadings with respect to this claim. **[**143]** As noted in connection with other claims before the court, the court would ordinarily grant plaintiffs leave to amend in order to cure the deficiencies discussed above. However, since the court granted judgment on the pleadings with respect to plaintiffs' claim under the CSPA on the additional ground that the statute of limitations bars the claim, see discussion supra, any amendment here would be futile. As such, judgment on the pleadings is granted without leave to amend.

[*1118] j. West Virginia

Defendants also target plaintiffs' claim pursuant to West Virginia's Consumer Credit and Protection Statute ("WVCCP"). See *W. Va. Code § 46A-6-101 et seq.* Defendants argue that the WVCCP cannot be employed, as plaintiffs purport to do here, as an end-run around West Virginia's prohibition on indirect purchaser standing. This is so, say defendants, for two reasons. First, the WVCCP specifically enumerates the practices and conduct that constitute unfair competition or deceptive and unfair practices, and antitrust violations are not included in that enumerated list. Second, defendants contend that plaintiffs have failed to allege that they are natural persons **[**144]** who purchased goods for household, personal, or family purposes, as required by the WVCCP.

HN32[] The WVCCP prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." See id. at *§ 46A-6-104*. As defendants point out, the statute also purports to define what is meant by "[u]nfair methods of competition and unfair or deceptive acts or practices," and does so by enumerating a list of various acts and practices that the statute defines as "unfair" or "deceptive." See id. at *§ 46A-6-102(7)*. Neither party points to any case law that addresses this list, or otherwise establishes the meaning of unfair or deceptive practices under the statute. Nonetheless, reading the list literally, nothing on the list targets what might be called traditional antitrust conduct - e.g., price-fixing and market allocation such as that alleged by plaintiffs here, or conduct otherwise constituting a horizontal or vertical restraint on trade or commerce. Rather, the list is aimed at conduct that, in one way or another, "creates a likelihood of confusion or of misunderstanding" with respect to goods, services or businesses, or involves deceptive, **[**145]** false, or misleading statements and representations in connection with goods, services and businesses. See id. at *§ 46A-6-102(7)(A-P)*. While the WVCCP expressly states that the list of enumerated acts and practices is not meant to be exclusive, it is nonetheless clear that the statute is aimed at conduct different from the allegations of price-fixing asserted by plaintiffs here. And since the provision of the WVCCP that authorizes plaintiffs' private action expressly states that any such action may only be brought by a person or persons injured as a *result* "of the use or employment by another person *of a method, act or practice prohibited or declared to be unlawful by the provisions of this article,"* it is also clear that no such qualifying action has been asserted by plaintiffs here, there being no allegations of a method, act or practice that the court believes may be deemed "unlawful" under the statute.

It is true, as plaintiffs point out, that the WVCCP also contains a provision providing for the court's liberal construction of the statute, and setting forth a legislative declaration that the statute should be construed in accordance with similar federal statutes **[**146]** dealing with unfair competition and deceptive practices, and with "the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters" as the WVCCP. See *W. Va. Code § 46A-6-101*. However, plaintiffs have failed to set forth any legal authority that actually stands for the proposition that this provision of the WVCCP justifies allowing allegations of antitrust price-fixing brought by indirect purchasers to go forward. Similarly, while plaintiffs rely on several district court decisions - FTC v. Mylan Labs, Inc., and In re Pharm. Indus. Average Wholesale Price Litig. - as support for their point, those decisions are not helpful here. See *99 F. Supp. 2d 1, 10 (D. D.C. 1999)*; *233 F.R.D. **[*1119]** 229 (D. Mass. 2006)*. While it is true that those courts may have ultimately allowed indirect purchaser claims to go forward under the WVCCPA, the decisions do not contain any detailed rationale for finding indirect purchaser standing under the statute, or how price-fixing allegations fall within the purview of the statute. Mylan, which provided the more in-depth discussion of the **[**147]** two, simply cites four different provisions of the statute, before concluding without discussion that they compelled the result therein. See *99 F. Supp. 2d at 10*.

For these reasons, the court finds that the motion for judgment on the pleadings with respect to plaintiffs' claim for antitrust violations under WVCCP must be, and hereby is, GRANTED. The court does not read the WVCCP to cover the allegations of anti-trust price-fixing in question.

The court is also of the view that plaintiffs have failed to allege that they are natural persons who purchased goods for household, personal, or family purposes, as required pursuant to the WVCCP. Any amendment to cure this deficiency would prove futile, however, since judgment on the pleadings is nonetheless granted here on grounds that the WVCCP fails to cover plaintiffs' allegations in any event. [12] Accordingly, no leave to amend is granted.

[148]** k. Wyoming

Plaintiffs assert a claim under Wyoming's Consumer Protection Act ("CPA"). See *Wyo. Stat. Ann. § 40-12-101 et seq.* Defendants argue that the CPA does not extend to price-fixing. As with many of the other statutes under discussion herein, defendants point out that the CPA proscribes only specified conduct, none of which constitutes price-fixing. Moreover, defendants assert that no court has ever extended the CPA to antitrust claims, and that the Wyoming Supreme Court has expressly stated that the CPA's purpose is to protect against "fraudulent marketing practices" that are simply not at issue here. In response, plaintiffs invoke the statute's broad language, and point out that no case has limited the CPA's reach.

The court is of the view that the CPA was not intended to create a private cause of action for plaintiffs to sue for antitrust violations such as those at issue here. While plaintiffs are correct that no controlling state authority - or even persuasive authority - has expressly excluded antitrust violations from the ambit of the CPA, the controlling authority that does exist suggests otherwise. For as defendants point out, the **[**149]** Wyoming Supreme Court had occasion to pass on the CPA in Herrig v. Herrig. See *844 P.2d 487, 495 (Wyo. 1992)*. Although the court considered the CPA in the insurance context rather than the antitrust context, the court nonetheless made clear its view that the CPA "was drafted primarily to protect consumers from unscrupulous and fraudulent marketing practices." See id. The court then declined to allow a third-party claimant action to go forward against a third-party liability insurer, noting that the state legislature had addressed the insurance issues between the parties when it enacted Wyoming's Insurance Code. Id.

[*1120] In the court's view, the Wyoming Supreme Court would be of a similar mind set here, and if given the opportunity, would hold that plaintiffs' claim pursuant to the CPA, which is based on allegations of antitrust violations, is not cognizable under the statute. The CPA is targeted at "unscrupulous and fraudulent marketing practices" that are distinguishable from allegations of antitrust violations, and moreover, the Wyoming legislature has seen fit to provide a scheme to redress antitrust violations through enactment of a separate antitrust statute. **[**150]** See *Wyo. Stat. Ann. § 40-4-114 et seq.*

Further, plaintiffs' complaint nowhere alleges "unscrupulous and fraudulent marketing practices." Although plaintiffs have professed reliance on various paragraphs of the complaint already discussed herein, none of those paragraphs even mention defendants' marketing practices, let alone do they detail the way in which such marketing practices are fraudulent or unscrupulous. See, e.g., Complaint at PP 68, 72, 80, 88, 119.

In sum, and for all the above reasons, the court declines to permit plaintiffs' claim to go forward as pled under the CPA. The CPA does not extend to antitrust violations as alleged by plaintiffs in the first instance, and in the second, plaintiffs have failed to otherwise allege the type of "fraudulent" or "unscrupulous" marketing practices contemplated by the CPA. According, the court hereby GRANTS judgment on the pleadings with respect to this claim.

IV. Conclusion

In sum, and for all the above reasons, the court holds as follows:

---

[12] Moreover, defendants are also correct, and plaintiffs do not dispute, that the WVCCP defines "consumer" to mean "a natural person to whom a sale or lease is made … for a personal, family, household or agricultural purpose." *W. Va. Code § 46A-6-102(2)*. And since the only provision pursuant to which plaintiffs may bring their claim is entitled, "Actions by consumers," it is correct that the instant claim can only be brought by natural persons who purchased the goods in question for a personal, family, household or agricultural purpose.

1. Defendants' motion for judgment on the pleadings with respect to plaintiffs' second claim for relief under the Cartwright Act is GRANTED for **[**151]** lack of antitrust standing, with respect to those claims based on purchases of products in which DRAM is a component.

2. Defendants' motion for judgment on the pleadings with respect to plaintiffs' fourth claim for relief is GRANTED for lack of antitrust standing as to plaintiffs' claims pursuant to the laws of Arizona, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, North Carolina, North. Dakota, South Dakota, and Wisconsin. Judgment on the pleadings on this ground is limited, as above, to those claims based on purchases of products in which DRAM is a component.

The court additionally GRANTS, for other reasons as noted, defendants' motion with respect to all plaintiffs' claims pursuant to the laws of Ohio, Alabama, South Dakota, and Pennsylvania - regardless whether those claims are based on purchases of non- component DRAM, or products in which DRAM is a component. Leave to amend is granted with respect to plaintiffs' claim under South Dakota law, but only with respect to plaintiffs whose claims are based on non-component DRAM purchases (i.e., purchases of free-standing DRAM).

The court DENIES defendants' motion for judgment on the pleadings with **[**152]** respect to plaintiffs' claim pursuant to West Virginia's antitrust statute.

3. Defendants' motion for judgment on the pleadings with respect to plaintiffs' fifth claim for relief is GRANTED in part and DENIED in part. The motion is GRANTED on statute of limitations grounds with respect to plaintiffs' claims under the laws of Alaska, Idaho, Louisiana, Montana, Oregon, Utah, and Wyoming. The motion is furthermore GRANTED as to plaintiffs' claims under the statutes of Louisiana, Montana, and South Carolina, as the statutes prohibit private class action suits for money damages, **[*1121]** but DENIED as to plaintiffs' claim under New York's consumer protection statute. Finally, the motion is GRANTED, for failure to set forth a viable claim, as to plaintiffs' claims under the statutes of Alaska, Idaho, Montana, New York, Oregon, Rhode Island, Utah, West Virginia, and Wyoming, and DENIED as to plaintiffs' claims under the statutes of Arkansas, and Hawaii. Plaintiffs are given leave to amend their claims under New York and Rhode Island law, however, in order to cure the deficiencies noted herein.

Leave to amend is permitted *only* as specified above. Amendment as to additional matters is not permitted **[**153]** without prior leave of court. As such, and in the event plaintiffs wish to amend their prayer for relief, based on the court's discussion herein, plaintiffs must first seek leave of court in order to do so.

Any amended complaint shall be filed no later than **June 29, 2007**.

IT IS SO ORDERED.

Dated: June 1, 2007

PHYLLIS J. HAMILTON

United States District Judge

LiveUniverse, Inc. v. MySpace, Inc.

United States District Court for the Central District of California

June 4, 2007, Decided

Case No. CV 06-6994 AHM (RZx)

Reporter
2007 U.S. Dist. LEXIS 43739 *; 2007-2 Trade Cas. (CCH) P75,782; 2007 WL 6865852

LIVEUNIVERSE, INC. v. MYSPACE, INC.

Subsequent History: Affirmed by *Liveuniverse, Inc. v. Myspace, 2008 U.S. App. LEXIS 27141 (9th Cir., Dec. 22, 2008)*

Core Terms

MySpace, networking, alleges, websites, sites, users, monopolization, advertising, antitrust, relevant market, consumers, vidiLife, Internet, competitors, profiles, motion to dismiss, Sherman Act, barriers, effects, causal, monopoly power, anticompetitive, rival, products, links, anticompetitive conduct, operating system, anti trust law, reasons, Online

Counsel: **[*1]** For LiveUniverse Inc, a California corporation, Plaintiff: Daryl M Crone, Jaime W Marquart, Ryan G Baker, LEAD ATTORNEYS, Baker Marquart Crone and Hawxhurst, Los Angeles, CA.

For MySpace Inc, a Delaware corporation, Defendant: David R Singer, Richard L Stone, LEAD ATTORNEY, Hogan & Hartson, Los Angeles, CA.

Judges: The Honorable A. HOWARD MATZ, U.S. DISTRICT JUDGE.

Opinion by: A. HOWARD MATZ

Opinion

I. INTRODUCTION

Plaintiff LiveUniverse, Inc. ("LiveUniverse") and Defendant MySpace, Inc. ("MySpace") operate online "social networking" websites at *www.vidilife.com* and *www.myspace.com*, respectively. Social networking websites allow visitors to create personal profiles containing text, graphics, and videos, as well as to view profiles of their friends and other users with similar interests. LiveUniverse alleges that MySpace prevents users from watching vidiLife videos that they or other users previously loaded onto their MySpace webpage, deletes references to "vidilife.com" on MySpace, and prevents MySpace users from mentioning "vidilife.com." LiveUniverse alleges that this conduct violates *Section 2* of the Sherman Act ("*Section 2*") and *California Business & Professions Code § 17200* **[*2]** . On November 22, 2006, MySpace filed a motion to dismiss LiveUniverse's Complaint. This Court conducted a hearing on December 18, 2006, in which it granted that motion, with leave given to plaintiff to amend to clarify the "network effects" premise on which LiveUniverse relies. (See below).

On January 16, 2007, LiveUniverse filed a First Amended Complaint ("FAC") that again alleges that MySpace's conduct violates *Section 2* of the Sherman Act and *Cal. Bus. & Prof. Code § 17200*. Specifically, the FAC alleges claims for monopolization and attempted monopolization in both the market for Internet-based social networking sites and in the market for advertising on Internet-based social networking websites.

On February 5, 2007, MySpace filed the present motion to dismiss the FAC. A hearing on that motion was held on March 5, 2007. MySpace argues that LiveUniverse's claim for violation of *Section 2* of the Sherman Act should be dismissed, because LiveUniverse has failed to allege: (1) a relevant antitrust market; (2) monopoly power or the probability of monopoly power in a relevant market; (3) any cognizable predatory or anticompetitive conduct to maintain or **[*3]** acquire a monopoly; and (4) any cognizable causal antitrust injury. MySpace further argues that LiveUniverse's claim for violation of *Cal. Bus. & Prof. Code § 17200* should be dismissed, because it is derivative of LiveUniverse's defective antitrust claims.

As to the antitrust claims, I GRANT MySpace's motion, and this time with prejudice, because the conduct that LiveUniverse alleges to be exclusionary and hence anticompetitive is not actionable and because it has not alleged causal antitrust injury. As a consequence, its monopolization claims as to both markets are deficient. For much the same reasons, I find that LiveUniverse fails to sufficiently allege an *attempted* monopolization claim in either market. Finally, I also dismiss LiveUniverse's remaining *Section 17200* cause of action, because it fails to state a claim for violation of that provision in the Business and Professions Code. (As to the *Section 17200* claim, the dismissal is with leave to amend.)

II. GENERAL PRINCIPLES

A. Motion to Dismiss

On a motion to dismiss pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* for **[*4]** failure to state a claim, the allegations of the complaint must be accepted as true and are to be construed in the light most favorable to the nonmoving party. *Wyler Summit P'ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998)*. A *Rule 12(b)(6)* motion tests the legal sufficiency of the claims asserted in the complaint. Thus, if the complaint states a claim under any legal theory, even if the plaintiff erroneously relies on a different legal theory, the complaint should not be dismissed. *Haddock v. Bd. of Dental Examiners, 777 F.2d 462, 464 (9th Cir. 1985)*.

Federal Rule of Civil Procedure 8(a)(2) requires

> "only a short and plain statement of the claim showing that the pleader is entitled to relief," in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests[.]" . . . While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations . . ., a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements **[*5]** of a cause of action will not do . . . . Factual allegations must be enough to raise a right to relief above the speculative level."

*Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 167 L. Ed. 2d 929, 2007 WL 1461066, *8 (2007)* (internal citations omitted).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a *Rule 12(b)(6)* motion. . . . However, material which is properly submitted as part of the complaint may be considered" on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990)* (citations omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a *Rule 12(b)(6)* motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)*. If the documents are not physically attached to the complaint, they may be considered if their "authenticity … is not contested" and "the plaintiff's complaint necessarily relies" **[*6]** on them. *Parrino v. FHP, Inc., 146 F.3d 699, 705-06 (9th Cir. 1998)*. "The district court will not accept as hue pleading allegations that are contradicted by facts that can be judicially noticed or by other allegations or exhibits attached to or incorporated in the pleading." 5C Wright & Miller, *Fed. Prac. and Pro.* § 1363 (3d ed. 2004).

Where a motion to dismiss is granted, a district court should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Chang v. Chen, 80 F.3d 1293, 1296 (9th Cir. 1996)*.

B. Applicable Antitrust Pleading Standards

An antitrust claim may be dismissed "only if proof of no set of facts outlined by the complaint would justify relief." *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 507 (9th Cir. 1989)*. The Ninth Circuit has stated that "summary dismissals of antitrust actions are disfavored." *Western Concrete Structures Co., Inc. v. Mitsui & Co., Inc., 760 F.2d 1013, 1016 (9th Cir. 1985)* (internal citations omitted) (reversing dismissal of antitrust claims). However, "if the facts do not at least outline or adumbrate **[*7]** a violation of the Sherman Act, the [plaintiff] will get nowhere merely by dressing them up in the language of antitrust." *Rutman Wine Co. v. E. & Gallo Winery, 829 F.2d 729, 736 (9th Cir. 1987)* (internal citations omitted) (granting a motion to dismiss antitrust claims).

The Court is aware that many of the cases cited below are final judgments or rulings on summary judgment motions. Although the legal standards for such judgments and motions differ from those of a motion to dismiss, these cases define what is required to satisfy the elements of a Sherman Act claim as a matter of law.

C. Elements of a Claim Under *Section 2* of the Sherman Act

Section 2 of the Sherman Antitrust Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ." *15 U.S.C. § 2*. LiveUniverse alleges a violation of *Section 2* based on two theories: (1) monopolization and (2) attempted monopolization.

1. Monopolization

The elements of a monopolization **[*8]** claim are: (1) possession of monopoly power in the relevant market; (2) "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident;" and (3) causal antitrust injury. *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (internal citations omitted); *Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)* (causal antitrust injury is an element of all antitrust suits brought by private parties seeking damages).

2. Attempted Monopolization

In determining whether a plaintiff has pled an attempted monopolization claim, the Court must first define the relevant market. *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 455-56, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. The plaintiff must then allege four elements in that market: "(1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving monopoly power; and (4) causal antitrust injury." *Rebel Oil, 51 F.3d at 1433* **[*9]** (internal citations omitted).

III. "MONOPOLIZATION" ALLEGATIONS IN MARKET CONSISTING OF "INTERNET-BASED SOCIAL NETWORKING SITES"

A. Relevant Market

"A relevant market has two dimensions: (1) the relevant product market, which identifies the products or services that compete with each other, and (2) the relevant geographic market, which identifies the geographic area within which competition takes place." *America Online, Inc. v. GreatDeals.Net, 49 F.Supp.2d 851, 857-58 (E.D.Va. 1999)* [hereinafter "*America Online*"], *citing* *Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. "The outer boundaries of a relevant market are determined by reasonable interchangeability of use." *America Online, 49 F.Supp.2d at 858*, citing *Eastman Kodak, 504 U.S. at 482*. "Reasonable interchangeability of use" refers to consumers' practicable ability to switch from one product or service to another. *America Online, 49 F.Supp.2d at 858*, *citing ABA Section of* ***Antitrust Law***, ***Antitrust Law*** *Developments* 500 (4th ed. 1997). "The test of reasonable interchangeability… [requires] the District Court **[*10]** to consider only substitutes that constrain pricing in the reasonably foreseeable future, and only products that can enter the market in a relatively short time can perform this function." *United States v. Microsoft Corp., 346 U.S. App. D.C. 330, 253 F.3d 34, 53-54 (D.C. Cir. 2001)* (internal citations omitted), *cert. denied 534 U.S. 952, 122 S. Ct. 350, 151 L. Ed. 2d 264 (2001)* (hereinafter, "*Microsoft*").

The geographic market extends to the 'area of effective competition' . . . where buyers can turn for alternative sources of supply. The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand. Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim." *Tanaka v. Univ. of Southern Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)* (internal citations omitted) (granting a motion to dismiss an antitrust claim for failure to allege a relevant market).

The FAC defines the first relevant market as "Internet-based social networking in the geographic region of the United States." (FAC P 19). This market consists of websites that create a "virtual community to bring people together in a central **[*11]** location to chat, gossip, share ideas, share interests, make new friends, and engage in other social activities." (FAC P 11). Although anyone with Internet access may visit these websites, users not only can visit, but can also create a unique personal profile on one or more site, as well as provide links to other users' personal profiles. (FAC P 12). These personal profiles are publicly accessible on the social networking website and are intended to be shared with other users. (FAC P 14). Users may incorporate text, audio, and video elements into their profiles, including streaming videos and links that can take visitors to other Internet websites not affiliated with MySpace. (FAC PP 14, 16). The FAC alleges that "the overwhelming majority of the content accessible through social networking websites is generated by users. The sites themselves merely provide the means for generating and/or displaying the content . . . ." (FAC P 13).

According to a November 2006 "U.S. Consumer Generated Media Report" published by Hitwise USA (hereinafter, the "Hitwise Report"), "[s]ocial networking websites have emerged to become an integral part of web activity for many Internet users - in September **[*12]** 2006, one in every 20 Internet visits went to one of the top 20 social networks." (FAC P 17; Hitwise Report, p. 29). [1]

The FAC also alleges that:

> Social networking websites offer a set of unique products and services that competing media cannot offer. The interactive, user-generated aspects of Internet-based social networking offer consumers an unprecedented degree of control over their experience, allowing them to collectively determine both the content and structure of networks of friends that **[*13]** they and others create. Passive internet media sites and other communication products such as e-mail do not possess these organic, interactive qualities.

(FAC P 19).

---

[1] Hitwise describes itself as "the leading online competitive intelligence service." (Opp'n, Ex. A ("Hitwise Report"), p. 28). According to Hitwise, "[t]hrough relationships with [Internet Service Providers] around the world, Hitwise's patented methodology captures the anonymous online usage, search, and conversion behavior of 25 million Internet users." (*Id.*). In this order I cite this report frequently because it is specifically referred to in the FAC and MySpace attached it in support of its motion.

MySpace argues that the market consisting of "Internet-based social networking sites" is not a "plausible" market for purposes of the Sherman Act. It claims that LiveUniverse has failed to account for other kinds of social networking that are interchangeable and has also failed to address differences in network sites' products, qualities, prices, etc. MySpace's main argument, however, is that its allegedly anticompetitive conduct consists only of the exclusion of LiveUniverse - - more accurately, the exclusion of the words "vidilife.com" and links to it - - from its own website. MySpace argues that a defendant's product alone cannot constitute the entire relevant market, citing *TV Communications Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1025 (10th Cir. 1992)*. In that case, the plaintiff alleged that defendant Turner Network Television ("TNT") had monopolized, or attempted to monopolize, "the market for the TNT channel in Metropolitan Denver." *Id. at 1025-26.* **[*14]** The Tenth Circuit dismissed that claim for failure to allege a relevant market, because "a company does not violate the Sherman Act by virtue of the natural monopoly it holds over its own product." *Id. at 1025*, *citing* *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 393, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)* [hereinafter "*du Pont*"]. [2] *TV Communications* and other cases like it are inapposite, because LiveUniverse simply does not allege that the MySpace site alone is the relevant market. Instead, LiveUniverse alleges that the MySpace site is one of many Internet-based social networking websites that compete with each other.

[*15] MySpace further argues that the proposed market is implausible, because there are "minimal limits to the number and scope of social networking sites." This argument is based on *America Online,* where the court dismissed defendants' antitrust counterclaim for failure to allege a relevant market. *49 F.Supp.2d at 859*. The defendants in that case counter-claimed that America Online ("AOL") violated *Section 2* of the Sherman Act by attempting to block the transmission to AOL subscribers of unsolicited bulk e-mail advertising. *Id. at 854*. [3] The court rejected the defendants' proposed relevant market of "e-mail advertising" and their proposed sub-market of Internet subscribers who are "accessed" through AOL, because it found that defendants could have advertised via numerous other means, including other advertising on the Internet, direct mail, and billboards. *Id. at 857-58*. The *America Online* court further found that the Internet could not be the relevant geographic market, because the Internet "cannot be defined with outer boundaries. It is not a place or location; it is infinite." *Id. at 858*. The court concluded that **[*16]** because the relevant market that counterclaimants alleged did not include interchangeable substitutes, their counterclaim should be dismissed.

America Online does not affect the "plausibility" of the relevant market that LiveUniverse has alleged here. Social networking websites have become, by now, an economic and social phenomenon. There is no mystery as to what they are, how they work, how they position themselves *vis-a-vis* other networks, or how they make money. Furthermore, LiveUniverse has alleged that the United States, rather than the worldwide Internet, is the relevant geographic market, and MySpace does not challenge the geographic scope of the proposed market.

MySpace cites *Tanaka v. University of Southern California, 252 F.3d 1059, 1063 (9th Cir. 2001)*, for the additional proposition that an allegation of a relevant market requires more than a conclusory assertion **[*17]** that the proposed market is "unique." In *Tanaka,* the plaintiff was a college soccer player who claimed that a rule that prevented her from playing for one year following her transfer to another university violated *Section 1* of the Sherman Act. *Id. at 1061*. The complaint alleged that the relevant product market was the University of California, Los Angeles ("UCLA") women's soccer program. *Id. at 1063*. In trying to justify why the market was limited to only that soccer program, rather than encompassing other college soccer programs or athletic conferences, the plaintiff simply stated that the UCLA program was "unique" and "not interchangeable with any other program in Los Angeles." *Id.* The Ninth Circuit upheld the district court's dismissal of her claim, finding that "the very existence of any given intercollegiate athletic program is predicated upon the existence of a field of competition composed of

---

[2] *See also, Futurevision Cable Systems of Wiggins, Inc. v. Multivision Cable TV Corp.,* in which the court dismissed an antitrust claim for failure to state a relevant market. *789 F.Supp. 760 (S.D. Miss. 1992)*. The court found that the only markets in which the defendant television stations, The Learning Channel and ESPN, possibly had market power were the markets for their own programs. *Id. at 776*. Thus, the plaintiff had not alleged a relevant market, because a manufacturer's natural monopoly over its own product is not a basis for antitrust liability under *Section 2* of the Sherman Act. *Id.*

[3] AOL's suit sought damages and an injunction to prohibit the sending of such e-mail. *Id. at 854*.

other, similar programs," and that these other programs were interchangeable with the UCLA program for antitrust purposes. *Id. at 1063-64*.

Unlike the plaintiff in *Tanaka,* LiveUniverse's allegation that the proposed market is **[*18]** unique is not conclusory; it alleges that the market has "unique products and services" and that the "interactive, user-generated aspects" give users "an unprecedented degree of control over their experience, allowing them to collectively determine both the content and structure of networks of friends that they and others create." (FAC P 19). The FAC also alleges that because other websites and means of communication, such as e-mail, do not contain these "organic, interactive qualities," they are not reasonably interchangeable substitutes for Internet-based social networking websites. (FAC P 19). MySpace nevertheless argues that even these allegations are insufficient, because they do not "distinguish online dating sites and Internet connectivity services like America Online." The Court disagrees. Internet connectivity services are not reasonable substitutes, because their primary function is simply to give users the ability to access the Internet. As to online dating sites, although they do have similar "organic, interactive qualities" to social networking websites, their dominant function and purpose is to enable users to meet potential dates. Online dating sites are not reasonable **[*19]** substitutes for social networking websites, because the latter websites have significantly more functions and appeal than do online dating sites. For example, social networking websites are used to get in touch with old friends and to keep current friends informed about what's new and exciting. Although social networking websites may also be used for dating, if MySpace suddenly were to shut down, its members would not fill the social void by turning to online dating sites. Instead, they would likely set up profiles on a different social networking website.

For the foregoing reasons, the Court finds that LiveUniverse sufficiently alleges a relevant antitrust market of Internet-based social networking websites.

B. Monopoly Power

"Monopoly power is the power to control prices or exclude competition." *du Pont, 351 U.S. at 391*. It may be demonstrated through either direct evidence or circumstantial evidence. *Rebel Oil, 51 F.3d at 1434*. LiveUniverse alleges that MySpace's market power may be inferred from its having a dominant share of the market (social networking websites) and from its being protected from competition by entry barriers. This requires **[*20]** that plaintiff: "(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run." *Id.* (internal citations omitted).

1. LiveUniverse Adequately Alleges That Myspace Owns The Dominant Share of the Market

The FAC alleges that "[a]ccording to comScore Media Metrix, a leading Internet traffic measurement service, approximately 55.8 million of the more than 62.7 million individuals who frequented social networking sites in the United States in September 2006 visited MySpace, equal to 89% of the market." (FAC P 24). "According to Hitwise, another leading Internet traffic measurement service, in September 2006, MySpace accounted for nearly '82% of visits to the leading social networking websites. . . .'" (FAC P 25).

Courts have consistently found that an 80 percent share of the market constitutes a dominant share, with the Supreme Court having found that even a two-thirds share of the market can be considered dominant. *American Tobacco Co. v. United States, 328 U.S. 781, 797, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946).* **[*21]** In *United States v. Grinnell Corp.,* the Supreme Court found that an 87-percent share of the central stations that monitored fire and security alarms was sufficient to establish monopoly power. *384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. More recently, the Supreme Court found that Kodak's control of 80 percent to 95 percent of the photocopier and micrographic equipment service market "easily resolved" the requirement of monopoly power. *Eastman Kodak, 504 U.S. at 481*.

Even MySpace does not argue that, assuming that visits and visitors are a permissible indicator, the alleged percentages are not large enough to constitute a dominant share of the market.

MySpace does argue that the percentage of visits or visitors cannot be used to measure market share, because the "appropriate measure of a firm's share is the quantity of goods or services actually sold to consumers." *US. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 999 (11th Cir. 1993)*. Carried to its logical conclusion, MySpace's argument would mean that a company offering a free product, such as a social networking website, could never acquire market power, but MySpace offers no basis in ***antitrust*** **[*22]** ***law***, much less logic, for this conclusion. Indeed, market share can be measured by figures other than just sales or revenue. For example, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 590, 105 S. Ct. 2847, 86 L. Ed. 2d 467*n.8 (1985), the Supreme Court used the number of skier visits to particular ski mountains to measure market share, because that number was correlated to revenue. Consistent with that approach, the FAC alleges that "[t]he primary source of revenue for MySpace -- and, on information and belief, for the overwhelming majority of all United States social networking web sites -- is advertising revenue generated from the number of visitors to the personal profiles and networks of friends generated with and contained within the social networking web platform." (FAC P 18). "According to press reports, shortly after it purchased MySpace, News Corporation sold certain rights regarding ad-based searching of MySpace user profiles to Google in a deal whereby Google agreed to pay at least $ 900 million to MySpace over the first three years of the deal . . . ." *Id.*

For the foregoing reasons, the Court finds that Live Universe sufficiently alleges that MySpace has a dominant **[*23]** share of the market.

2. Live Universe Adequately Alleges Barriers to Entry

"A mere showing of substantial or even dominant market share alone cannot establish market power sufficient [for an antitrust violation]. The plaintiff must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output to challenge the [market leader's anticompetitive conduct]." *Rebel Oil, 51 F.3d at 1439*. LiveUniverse's allegations of barriers to entry are based on the concept of "network effects" in the market for Internet-based social networking websites.

In *Microsoft, supra,* the D.C. Circuit Court of Appeals characterized "network effects" as follows: "In markets characterized by network effects, one product or standard tends towards dominance, because the utility that a user derives from consumption of the good increases with the number of other agents consuming the good." *253 F.3d at 49* (internal citations omitted). For example, an individual consumer's demand for and benefit from a telephone network increases if there are more people using that network whom the consumer can **[*24]** call or from whom she can receive calls. *Id.* "Once a product or standard achieves wide acceptance, it becomes more or less entrenched. Competition in such industries is 'for the field' rather than 'within the field.'" *Id.*

The FAC alleges that in the market for Internet-based social networking websites, network effects occur largely due to the "user-generated nature" of the content on those websites. (FAC P 21). Quoting the Hitwise Report, the FAC alleges that "[t]he network effect in relation to social networking websites means that the more people use a website by adding profiles and content, the more valuable it becomes to each of its users. These users will be more likely to find content that interests them and connect with people they know. Thus more new people want to join it because they know they can be further assured of finding friends and interesting content." (FAC P 22). Based on these network effects, LiveUniverse alleges that it is "difficult for new entrants to acquire any more than a very small market share without an enormous capital investment." (FAC P 23).

In *Microsoft,* the plaintiffs argued that network effects were the basis for the alleged barriers **[*25]** to entry in the market for Intel-compatible PC operating systems. *Microsoft, 253 F.3d at 49-50, 55*. The Court of Appeals agreed that there was an "applications barrier to entry" and consequently upheld the district court's finding that Microsoft possessed monopoly power in that market. *Id. at 55*. This conclusion stemmed from "two characteristics of the software market: (1) most consumers prefer operating systems for which a large number of applications have already been written; and (2) most developers prefer to write for operating systems that already have a substantial consumer base." *Id.* The court explained that "[t]his 'chicken-and-egg' situation ensures that applications will continue to be written for the already dominant Windows, which in turn ensures that consumers will continue to prefer it over other operating systems." *Id.* The court also noted that this applications barrier to entry leads consumers to prefer the dominant operating system, even if they do not need all the available applications, because the consumers want an operating system that can run the types of applications in which they might later develop an interest. **[*26]** *Id.*

In *Microsoft,* the Court of Appeals affirmed the district court's judgment that Microsoft violated *Section 2* of the Sherman Act by using anticompetitive means to maintain the monopoly of its Windows operating system. *Microsoft, 253 F.3d at 46*. However, the court reversed the district court's additional judgment that Microsoft violated *Section 2* by attempting to monopolize the internet browser market. *Id.* The Court found that plaintiffs failed to prove that network effects could create barriers to entry in that market, rejecting the opposite conclusion of the district court because the district court "did not make two key findings: (1) that network effects were a necessary or even probable, rather than merely possible, consequence of high market share in the browser market and (2) that a barrier to entry resulting from network effects would be 'significant' enough to confer monopoly power." *Id. at 83*.

MySpace does not dispute that the phenomenon of network effects applies to the proposed market of Internet-based social networking websites. Instead, it argues that LiveUniverse fails to allege how these network effects result in barriers **[*27]** to *entry* in the relevant market. It stresses that the *Microsoft* court cautioned that "[s]imply invoking the phrase 'network effects' without pointing to more evidence does not suffice to carry plaintiffs' burden in this respect." *Id. at 84*.

The Court rejects MySpace's contention on this point; the allegations of barriers to entry in the FAC are adequate, not only because *Microsoft* was decided after a trial, and hence the court held the plaintiffs to a higher standard than applicable for a motion to dismiss, but also because in addition to alleging "network effects," LiveUniverse alleges other characteristics of the market that *combine* with network effects to create barriers to entry. Quoting the Hitwise Report, for example, the FAC alleges that social networking websites rely on users to create profiles and content that, in turn, attract new users and visitors. (FAC P 22). Just as the *Microsoft* court noted that an operating system requires developers to write applications for it, *Microsoft, 253 F.3d at 55*, social networking websites require a large number of profiles, content, and potential friends. (FAC PP 13, 19, 22.) Just **[*28]** as "most developers prefer to write for operating systems that already have a substantial consumer base," *Microsoft, 253 F.3d at 55*, users of social networking websites prefer to create their profiles and add content to a website where they are likely to be viewed by a greater number of users. (FAC PP 13, 19, 22.)

MySpace goes on to argue that notwithstanding "network effects," the dynamic nature of the market and the constant entry and exit of competitors undermine plaintiff's allegations about barriers to entry. It contends that "anyone with a computer and Internet access can start his or her own network and . . . there is no limit (other than time) to the number of websites a user can access." There is some merit to this argument. MySpace itself quickly overtook the former market leader, Friendster, despite the same alleged barriers to entry in the market. (Hitwise Report, p. 31). In addition, as the Hitwise Report points out, four social networking websites experienced market growth that outpaced the category between March and September 2006. (*Id.* at p.32) Moreover, social networking websites with special niches have shown the capacity to compete with MySpace. **[*29]** For example, Facebook became the preferred network among college students, because it was closed to non-students and thus appeared safer than MySpace. (*Id.* at p.31). (According to the Hitwise Report, Facebook has the second highest market share among social networking websites. (*Id.*)). Furthermore, at the March 5, 2007 hearing, this Court mentioned a then-recent New York Times article stating that "[s]ocial networks are sprouting on the Internet these days like wild mushrooms." Brad Stone, *Social Networking's Next Phase,* N.Y. Times, March 3, 2007, at B 1, B9 [hereinafter "Social Networking's Next Phase"]. [4]

---

[4] In the short interval since the hearing on this motion, other articles have appeared in the print media about the mounting increase in the popularity of social networking sites. *E.g.,* Patrick Day, *MySpace competition? The world is big enough,* Los Angeles Times, April 1, 2007, at E15 (noting that in internet social websites created in foreign countries, which are not within the

[*30] Although the fluidity that currently characterizes this industry does beg the question as to just how long MySpace can retain its market power, that there are many new entrants does not necessarily mean that LiveUniverse's allegations about barriers to entry are deficient. [5] "The fact that entry has occurred does not necessarily preclude the existence of 'significant' entry barriers. If the output or capacity of the new entrant is insufficient to take significant business away from the [monopolist], they are unlikely to represent a challenge to the [monopolist's] market power." *Rebel Oil, 51 F.3d at 1440* (internal citations omitted). The article *"Social Networking's Next Phase"* itself notes that although there are many new social networking websites entering the market, at least some of the new entrants are finding it difficult to attract users when there are only a relatively few other members at the outset. *Social Networking's Next Phase,* at 89. For example, Google helped Nike design a soccer community site, but the site "does not appear to have significantly attracted users." *Id.* at B9. If two companies having the size, power and reputation of **[*31]** Google and Nike are encountering such difficulties, it is likely that other new entrants would, too.

The Hitwise Report concludes that "[w]hether or not **[*32]** any of these websites or other emerging websites erode MySpace's dominance is dependent on the ability to harness the network effect." (Hitwise Report, p.32). Data showed that in September 2006, 24% of the visits to the 19 other social networking websites with the highest market share came directly from MySpace. (*Id.*). This gives MySpace control over almost one in every four visits to its biggest potential competitors.

The recent and rapid growth of other social networking websites does not necessarily prove their ability to challenge MySpace's dominant share of the market. The four social networking websites whose growth outpaced that of the market combined for only 2.19% of the total market share, even after their rapid growth between March and September 2006. (Hitwise Report, pp. 31-32). The market share of visits to MySpace increased by 51% during the same period and increased by 129% between September 2005 and September 2006. (*Id.,* at p.32). As the Hitwise Report points out, the "growth of other social networking websites has not yet chipped away at MySpace's dominance in the category" and the potential for any website to challenge MySpace's dominance will depend on its **[*33]** "ability to harness the network effect." (*Id.*).

For the foregoing reasons, the Court finds, LiveUniverse sufficiently alleges that MySpace has monopoly power in the relevant market.

C. Exclusionary Conduct

To establish monopolization, plaintiff must allege and prove that MySpace acquired or maintains monopoly power by engaging in exclusionary conduct, "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. "The [Sherman Act] directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. "[T]o be condemned as exclusionary, a monopolist's act

---

market LiveUniverse alleges to be part of, MySpace is encountering formidable competition); Brad Stone & Matt Richtel, *One Call to Tell the World All about You,* N.Y. Times, April 30, 2007, at Cl (noting the growth of social networking via cell phones); Brad Stone, *Facebook Goes off the Campus,* N.Y. Times, May 25, 2007, at Cl (describing expansion of "Facebook" into MySpace's "turf").

[5] In *Microsoft,* the Court of Appeals observed that "Once a product or standard achieves wide acceptance, it becomes more or less entrenched. Competition in such industries is 'for the field' rather than 'within the field.' . . . In technologically dynamic markets, however, such entrenchment may be temporary, because innovation may alter the field altogether. . . . Rapid technological change leads to markets in which firms compete through innovation for temporary market dominance, from which they may be displaced by the next wave of product advancements. . . . [T]here is no consensus among commentators on the question of whether, and to what extent, current monopolization doctrine should be amended to account for competition in technologically dynamic markets characterized by network effects." *253 F.3d at 49-50* (internal citations omitted).

must have an 'anticompetitive effect.' That is, it must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice." *Microsoft, 253 F.3d at 58*.

LiveUniverse alleges that MySpace committed three anticompetitive acts. First, MySpace destroyed **[*34]** users' ability to load and display their vidiLife videos on the MySpace system by redesigning its platform so that "*all* links to vidiLife video content embedded by MySpace users in their online profiles no longer function." (FAC P 32) (emphasis in original). Second, MySpace deleted all references to "vidilife.com." Third, MySpace has blocked users not only from mentioning "vidiLife.com" on the MySpace system, but also from embedding links to the vidiLife website in their personal profiles. (FAC P 33). MySpace also has allegedly blocked users from using social networking services offered by stickam.com, another Internet-based social networking service, and it deleted all references to yet another social networking site, revver.com. (FAC P 36).

LiveUniverse alleges that this conduct is "part of a pattern and practice of anticompetitive behavior" against other social networking websites. (FAC P 36). It alleges that MySpace's design changes "have no legitimate business purpose" and are "solely intended to maintain and extend [MySpace's] monopoly in Internet-based social networking and advertising on Internet-based social networking sites in the United States by stifling competition **[*35]** and enlarging existing barriers to entry." (FAC P 35).

LiveUniverse further alleges that MySpace's behavior "discourages and effectively precludes new competitors from entering the market for social networking services, which also harms the consumer public." (FAC P 37). "[C]onsumers who might otherwise have preferred the applications of rivals such as vidiLife to those of MySpace" must now "maintain their MySpace personal profiles without using rivals' products, or they may use rival's [sic] products but be cut off from the overwhelming majority of the content and viewers in the market." (FAC P 37). MySpace has allegedly "diminished the quality of the consumer experience, thus injuring consumers and competition as a whole." (FAC P 38). [6]

[*36] MySpace proffers several arguments why its conduct is not anticompetitive as a matter of law. The Court will deal with the two that are appropriate for determination on a motion to dismiss: First, that MySpace has the right to refuse to deal with a rival in the promotion of its own products and services, and second, that it has the right to prevent plaintiff from "free riding" off its investment and innovation.

1. Refusal to Deal and "Free Riding"

A company generally has a right to deal, or refuse to deal, with whomever it likes. *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*. As the Supreme Court stated in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407-08, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*:

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of ***antitrust law***, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust **[*37]** courts to act as central planners, identifying the proper price, quantity, and other terms of dealing-a role for which they are ill suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, as a general matter, the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." . . . However, "[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." *Aspen Skiing Co. v. Aspen Highlands Skiing*

---

[6] It remains to be seen whether causing this alleged "injury" to consumers will in fact backfire against MySpace. With Internet users being only (at most) a few clicks away from other sites on the Web, if MySpace's users/members react with hostility to these measures, they may choose to use and visit rival sites.

> *Corp., 472 U.S. 585, 601, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985)*. Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate *§ 2*.

In *Aspen Skiing,* the defendant owned three of the four Aspen, Colorado ski areas. *472 U.S. at 587-88, n.204*. The plaintiff owned the fourth. They had cooperated for years in selling a joint ski ticket that allowed skiers to visit all four areas. The defendant ultimately cancelled the **[*38]** joint ticket after repeatedly seeking a larger share of the revenue. The plaintiff attempted to re-create the joint ticket, even offering to buy the defendant's tickets at retail price, but the defendant refused. The Supreme Court upheld the jury's finding of monopolization and its verdict for the plaintiff, finding that "[t]he jury may well have concluded that [the defendant] elected to forgo these short-term benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor." *Id. at 608*. In other words, the defendant revealed an anticompetitive motive by refusing to continue the joint ticket, even if compensated at retail price.

In *Verizon,* in contrast, the Supreme Court unanimously held that a complaint alleging a breach of Verizon's statutory duty to share its telephone network with competitors did not state a monopolization claim under *Section 2*. *Verizon, 540 U.S. at 416*. The Telecommunications Act of 1996 attempted to facilitate the entry of competitors into the telecommunications market by imposing such a duty on incumbent phone companies. *Id. at 402.* **[*39]** The complaint alleged that Verizon filled rivals' service orders in a discriminatory manner as part of an anticompetitive scheme to discourage customers from using the competing phone companies. *Id. at 404*. Stating that *Aspen* "is at or near the outer boundary of *§ 2* liability," *Id. at 409*, the Supreme Court distinguished that case from *Verizon.* It noted that in *Verizon* the complaint did not allege that Verizon had ever voluntarily engaged in a course of dealing with its rivals or that it would have done so absent statutory compulsion. *Id. at 409*. "Here, therefore, the defendant's prior conduct sheds no light upon the motivation of its refusal to deal . . .." *Id.* In *Verizon,* in short, there was no indication that the defendant's refusal to deal with competitors was "prompted not by competitive zeal but by anticompetitive malice." *Id.*

In *MetroNet Services Corp. v. Qwest Corp., 383 F.3d 1124 (9th Cir. 2004)*, the Ninth Circuit, too, rejected a Sherman Act *Section 2* claim based on the Telecommunications Act's requirement that incumbent local exchange carriers ("ILEC's") provide access to competitors. **[*40]** Qwest, the ILEC, initially had a pricing structure for sales of phone services under which plaintiff MetroNet could resell phone services at a profit. *Id. at 1127*. When Qwest adopted a new pricing structure that eliminated Metronet's ability to resell the services at a profit, MetroNet filed suit, alleging that Qwest illegally maintained a monopoly over the market for small business local telephone services in the Seattle/Tacoma area. *Id. at 1126*. In light of *Verizon,* the Ninth Circuit granted summary judgment in favor of Qwest. It ruled that *MetroNet* did not present circumstances that *Verizon* found significant to give rise to a refusal to deal claim under *Aspen Skiing.* For example, there was no evidence that Qwest sacrificed short-term profits for long-term exclusion of competition. *Id. at 1132-33*. The Court also stressed that Qwest did not refuse to provide the service to MetroNet, but merely imposed the same terms that it charged direct consumers. *Id. at 1133*.

Here, the FAC alleges that MySpace's previous "practice of allowing users the unfettered ability to reference other websites, including rival **[*41]** websites, was a prior course of dealing in the market. . . ." (FAC P 32). LiveUniverse argues that this "prior course of dealing" distinguishes this case from *Verizon* and brings it within *Aspen Skiing.* This argument is flawed and unpersuasive. What was missing in *Verizon* and in *MetroNet* is missing here, too. In *Aspen Skiing,* the parties formally agreed to share revenues and expenses in a joint venture that lasted for more than 15 years. *Aspen Skiing, 472 U.S. at 589-93*. Moreover, as the *Verizon* court stressed, the *Aspen* defendant's "unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing" was evidence of predatory intent. *Verizon, 540 U.S. at 409* (emphasis in original). Here, the "course of dealing" that the FAC alleges concerns the relationship of LiveUniverse and its users; the FAC contains no allegations of an affirmative decision or arrangement between MySpace and LiveUniverse to cooperate in any way, not even an informal agreement relating to their respective websites.

MySpace also argues that it has a right to prevent LiveUniverse from "free-riding" on MySpace's investment in its own **[*42]** website. In *Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370* (7th Cir. 1986), the plaintiff won a judgment in district court that the defendant violated *Section 2* by changing its policies so that its sales force no longer referred customers to the plaintiff. In an opinion authored by Judge Posner, the Seventh Circuit reversed. *Id. at 383*. The opinion distinguished *Aspen* and concluded that the plaintiff had no right under ***antitrust law*** to benefit from its competitor's sales force: "Advertising a competitor's products free of charge is not a form of cooperation commonly found in competitive markets; it is the antithesis of competition." *Id. at 377-378*.

MySpace's allegedly anticompetitive conduct is somewhat similar to the conduct that the court found permissible in *Olympia*. Social networking websites derive the bulk of their income from advertising displayed on their sites, with revenue directly related to the number of visits to the site. Every time a user "travels" from the MySpace site to the vidiLife site by clicking on a link, vidiLife's advertising revenue stands to grow. Assuming that advertisers' **[*43]** budgets are not unlimited, that could lead to a diminution in MySpace's revenue. Looked at another way, by eliminating any references to vidiLife.com and by deleting links to that site, MySpace may be viewed as merely preventing LiveUniverse from advertising its website free of charge on the MySpace site.

In *Morris Communications Corp. v. PGA Tours, Inc., 364 F.3d 1288, 1290 (11th Cir. 2004)*, a media company challenged the PGA Tour, Inc.'s ("PGA") alleged monopolization of markets for publication of real-time golf scores on the Internet and the sale of these scores. The PGA had developed a Real-Time Scoring System that quickly recorded players' scores, which it would not allow the plaintiff to re-sell to other Internet website publishers without first buying a license to do so. Plaintiff claimed this constituted an unlawful refusal to deal. The Eleventh Circuit affirmed the District Court's grant of summary judgment to the PGA. *Id. at 1290*. It stated that a "refusal to deal that is designed to protect or further the legitimate business purposes of a defendant does not violate the antitrust laws even if that refusal injures competition." *Id. at 1295.* **[*44]** The Court found that the PGA's justification for its conduct was sufficient: it sought to prevent plaintiff from "free-riding" on its technology. *Id. at 1295-98*. The court stressed that unlike the cases plaintiff relied on, the PGA was not preventing plaintiff from selling a product that plaintiff created and owned. *Id. at 1297*. Here, too, MySpace has taken no action that prevents plaintiff from promoting and operating its own site, independently of MySpace.

For the foregoing reasons, LiveUniverse fails to state a refusal to deal claim.

2. Product Design Changes

In general, it is not inherently anticompetitive for even a monopolist to make changes to its product design. "A monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits, and any success it may achieve solely through 'the process of invention and innovation' is necessarily tolerated by the antitrust laws." *Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 544-45 (9th Cir. 1983)* (holding that plaintiff-photofinisher failed to state a *Section 2* claim against defendant-manufacturer who allegedly **[*45]** developed new products that were incompatible with then-existing products and with photofinishing equipment); *overruled on other grounds and on another claim* by *Hasbrouck v. Texaco, Inc., 842 F.2d 1034 (9th Cir. 1987)*. As the Ninth Circuit noted, the defendant had no duty "to constrict[] product development so as to facilitate sales of rival products" or to help competitors "survive or expand." *Id. at 545* (internal citations omitted).

Despite these principles, LiveUniverse nevertheless argues that MySpace modified its system so as to delete links to vidiLife.com from the MySpace site, to delete users' references to "vidilife.com" and to prevent users from making any future mention of or links to vidiLife.com. LiveUniverse alleges that these modifications constitute a change of product design that is actionable. For this contention, it relies entirely on *Microsoft, supra.* In that case, the D.C. Circuit found that Microsoft had a monopoly in the operating systems market and that it violated *Section 2* by engaging in conduct that strengthened that monopoly by reducing the market share of Netscape, its primary competitor in a second, separate market, **[*46]** that of Internet browsers. *253 F.3d at 59-60*.

LiveUniverse focuses on that portion of the fact-dependent, lengthy and complex opinion in *Microsoft* where the Court of Appeals noted that the District Court had found that Microsoft designed its Windows 98 operating system in a manner that "would override the user's choice of a browser other than [Microsoft's] Internet Explorer as his or her default browser." *Id. at 65*. The Court of Appeals also noted that Microsoft did not deny that "overriding the user's preference prevents some people from using other browsers" and it observed that "[b]ecause the override reduces [browser] rivals' usage share and protects Microsoft's [operating systems] monopoly, it too is anticompetitive." I*d.* [7] **[*47]** Here, LiveUniverse argues, MySpace engaged in similar conduct: it destroyed links to vidiLife content embedded in user profiles on the MySpace site. [8]

Live Universe's allegations are not sufficient to establish anticompetitive conduct. MySpace's conduct is distinguishable from that of Microsoft, because it in no way prevents consumers from accessing the vidiLife site. It simply prevents them from using the MySpace site to do so. Unlike Microsoft's override of users' choice of default browsers, the destruction of links to vidiLife.com does not "override" users' preferences. Nor is the content of these links converted into MySpace content. Moreover, users are not restricted to MySpace content in the manner that the override restricted **[*48]** Windows users to Microsoft's browser, Internet Explorer. Users are only prevented from viewing and creating links to the vidiLife site directly through the MySpace site- they may still do so elsewhere. Thus, the only product design change by MySpace was an algorithm that enables it to compete in the relevant market without enabling LiveUniverse to take advantage of MySpace's success. Such behavior even a monopolist has the right to display. *Foremost Pro Color, 703 F.2d at 545*.

For the foregoing reasons, the FAC fails to state a claim containing justiciable allegations of exclusionary conduct.

D. Causal Antitrust Injury

Given that the FAC does not state a viable claim of anticompetitive, predatory misconduct, in principle it would be unnecessary to address this remaining element of a Sherman Act *§ 2* monopolization claim. But in order to provide a complete record on appeal, the Court will do so - - briefly.

> "A private plaintiff may not recover damages [for an antitrust violation] merely by showing injury causally linked to an illegal presence in the market. Instead, a plaintiff must prove the existence of antitrust injury, which is to say injury of **[*49]** the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. . . . [I]njury, although causally related to an antitrust violation, nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anti-competitive aspect of the practice under scrutiny, since it is inimical to the antitrust laws to award damages for losses stemming from continued competition."

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990) (internal citations omitted). Phrased another way, antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations . . . would be likely to cause." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701, (1977)* (internal citations omitted).

In addition to the previously-discussed allegations of MySpace's conduct directed toward LiveUniverse, the FAC alleges **[*50]** similar anticompetitive conduct toward two other competitors in the market. (FAC P 36). LiveUniverse alleges that MySpace's behavior "discourages and effectively precludes new competitors from entering the market for social networking services, which also harms the consumer public. Users of vidiLife and other services that have spent long hours uploading and creating written, audio, and video self expression now find these efforts destroyed

---

[7] Because in the trial court the plaintiffs had not proffered evidence to rebut Microsoft's proffered justification for this conduct, the Court of Appeals reversed the District Court's finding of liability for this design change. *253 F.3d at 67*.

[8] This overstates what actually has occurred, evidently. As MySpace argues (without refutation), "Users - including MySpace users - can email, blog and chat with their friends about 'LiveUniverse' and 'vidiLife' to their heart's content. The only thing that has been eliminated - and the only conduct at issue - is the presence of separate active links (*i.e.,* website addresses like '*www.vidiLife.com*') on the MySpace.com website that take users directly from MySpace.com to vidiLife.com in a single mouse click."

as they cannot use their content on MySpace." (FAC P 37). "[C]onsumers who might otherwise have preferred the applications of rivals such as vidiLife to those of MySpace" must now "maintain their MySpace personal profiles without using rivals' products, or they may use rival's [sic] products but be cut off from the overwhelming majority of the content and viewers in the market." (FAC P 37). The FAC further alleges that MySpace has "diminished the quality of the consumer experience, thus injuring consumers and competition as a whole." (FAC P 38).

Harm to one or more competitors is not sufficient to constitute antitrust injury unless a plaintiff alleges harm to the competitive process, which in turn harms consumers. *Microsoft, 253 F.3d at 58.* **[*51]** Here, the harm to consumers that Live Universe has alleged is fanciful. The "long hours" that consumers devoted to "self expression" have not been wasted; the content they created is still available, and readily accessible. Internet aficionados easily move from one website to another in seconds. Although purporting to address the impact on competition generally, LiveUniverse really complains about the impact on LiveUniverse itself.

At the hearing, LiveUniverse's counsel analogized the alleged harm to consumers here to the harm in *Aspen Skiing.* It is unnecessary to go to lengths to show how misplaced that notion is. In *Aspen Skiing* the joint ticket covering four ski areas provided skiers with convenience and flexibility by expanding the number of runs available and allowing skiers to decide each day on which mountain they preferred to ski. *Aspen Skiing, 472 U.S. at 605-06*. The Court provided anecdotal evidence of skiers coming to the fourth mountain and being angered when told that the joint ticket did not include this mountain. *Id. at 606-07*. Skiers were then forced to either (1) purchase an additional ticket and waste one day of their six-day **[*52]** joint ticket; (2) obtain a refund, which could take all morning and entailed the forfeit of the six-day discount; or (3) leave the mountain and waste time getting to one of the other ski areas. *Id. at 607*. The harm to these skiers greatly exceeds the harm suffered by patrons of social networking websites. To exit MySpace and visit vidiLife.com presents nothing comparable to the hassles endured by the *Aspen* skiers. Similarly, MySpace users who have placed links on the MySpace site to content on their vidiLife pages can easily place that content directly onto their MySpace site. In short, LiveUniverse does not sufficiently allege causal antitrust injury.

E. Conclusion Re Monopolization of Social Network Market

For the foregoing reasons, LiveUniverse has not alleged and cannot allege exclusionary conduct or causal antitrust injury in the market for Internet-based social networking websites. Therefore, the Court GRANTS MySpace's motion to dismiss LiveUniverse's monopolization claim in this market.

IV. "ATTEMPTED MONOPOLIZATION" ALLEGATIONS IN MARKET CONSISTING OF "INTERNET-BASED SOCIAL NETWORKING SITES"

As stated above, LiveUniverse must allege **[*53]** four elements in the relevant market to plead an attempted monopolization claim: "(1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving monopoly power; and (4) causal antitrust injury." *Rebel Oil, 51 F.3d at 1433*.

In the FAC, LiveUniverse does not differentiate between its allegations of monopolization and attempted monopolization in the market consisting of Internet-based social networking websites. Thus, the Court need not repeat the foregoing analysis. The Court finds that for the same reasons stated above regarding the monopolization claim, LiveUniverse fails to allege the "predatory or anticompetitive conduct" or "causal antitrust injury" required to state an attempted monopolization claim and therefore fails to allege an attempted monopolization claim.

V. ALLEGATIONS RE MARKET CONSISTING OF "ADVERTISING ON INTERNET-BASED SOCIAL NETWORKING SITES"

LiveUniverse also alleges monopolization and attempted monopolization claims in the market for *advertising* on Internet-based social networking sites. Its allegations of anticompetitive **[*54]** conduct and causal antitrust injury are insufficient and therefore, without having to make findings regarding the other required elements, the Court dismisses these claims.

A. LiveUniverse's Monopolization Claim

1. Relevant Market

The FAC alleges that the "primary source of revenue for . . . the overwhelming majority of all United States social networking web sites . . . is advertising revenue generated from the number of visitors to the personal profiles and networks of friends generated with and contained within the social networking web platform." (FAC P 18). The FAC alleges that "there are no good substitutes for" advertising on internet social networking sites, because:

> Such sites offer advertisers the unique ability to tap into user-generated content and to establish "buzz" about their products through word of mouth as users comment upon and share the advertising with others, essentially integrating an advertiser's message into the rumor mill. In addition, such sites offer the ability to reach an extremely targeted demographic based upon specific interests that traditional, passive advertising cannot offer. As more and more consumers share the advertiser's **[*55]** message with their likeminded friends, the message becomes the subject of a conversation detached from its commercial context and the advertiser is capable of targeting and penetrating its desired market in ways that are simply not possible through traditional advertising in passive media. . . . On information and belief, rival advertising media are not sufficiently close substitutes to force the defendant to sell its advertising at a competitive price and the defendant therefore earns monopoly margins on its advertising by charging a premium over prices that would prevail in a healthy competitive market.

(FAC P 20).

Without making a finding as to whether LiveUniverse adequately alleges a relevant market or whether it even has standing as a participant in this alleged market to challenge MySpace's conduct, the Court will assume that this allegation is adequate.

2. Monopoly Power

Without making a finding as to whether LiveUniverse adequately alleges monopoly power, the Court will assume that it does.

3. Anticompetitive Conduct

MySpace argues, and LiveUniverse does not dispute, that the FAC "does not contain a single sentence of exclusionary conduct" in the market **[*56]** for advertising on Internet-based social networking websites. Assuming that LiveUniverse intended to incorporate by reference its allegations as to MySpace's conduct in the market for websites, the Court finds that LiveUniverse has not sufficiently alleged anticompetitive conduct, for the reasons discussed above.

4. Causal Antitrust Injury

LiveUniverse's allegations of causal antitrust injury in the market for advertising on Internet-based social networking sites also are insufficient. The FAC alleges that advertising is the primary source of revenue for all social networking sites, and that LiveUniverse's advertising revenue has declined due to MySpace's conduct. (FAC P 39). But without adequate allegations of injury to competition itself, an injury suffered by one competitor is not sufficient to establish antitrust injury. *Microsoft, 253 F.3d at 58*. In an apparent effort to avoid this pitfall, LiveUniverse further alleges that MySpace reduces users' ability to generate content as they please, which in turn hurts advertisers who would benefit from the "unique ability to . . . establish 'buzz' about their products through word of mouth as users comment upon **[*57]** and share the advertising with others." (FAC P 20). As stated above, however, the only conduct of MySpace that is alleged to affect users' ability to generate content does not in fact do so; they can generate whatever content they want on vidiLife.com. And advertisers can create or exploit "buzz" on that website. Thus, the Court finds that LiveUniverse does not sufficiently allege causal antitrust injury in the market for advertising on Internet-based social networking sites.

5. Conclusion

For the foregoing reasons, LiveUniverse cannot allege exclusionary conduct or causal antitrust injury in the market for advertising on Internet-based social networking websites. Therefore, the Court GRANTS MySpace's motion to dismiss LiveUniverse's monopolization claim in this market.

B. LiveUniverse's Attempted Monopolization Claim

Like its allegations in the first relevant market, LiveUniverse does not differentiate between its allegations of monopolization and attempted monopolization in the market for advertising on Internet-based social networking websites. For the same reasons set forth just above, LiveUniverse fails to allege an attempted monopolization claim in the market **[*58]** for advertising on Internet-based social networking websites.

VI. LIVE UNIVERSE'S STATE LAW CLAIM

The second claim for relief in the FAC alleges that MySpace has engaged in "unlawful, unfair or fraudulent business practices," in violation of *Cal. Bus. & Prof. Code § 17200, et seq.* The Court separately addresses each of these three prongs. Based largely on the preceding analysis concerning the *Section 2* claims, the Court finds that LiveUniverse fails to allege a statutory unfair competition claim under *§ 17200*.

A. "Unlawful" Business Act or Practice Prong

"The 'unlawful' practices prohibited by *Section 17200* are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc., 178 F.Supp.2d 1099, 1120 (C.D.Cal. 2001)*. In the FAC, the only law allegedly violated by MySpace is *Section 2* of the Sherman Act. Since this Court has already found that LiveUniverse fails to allege a *Section 2* claim, the Court necessarily finds that LiveUniverse fails to allege an "unlawful" business act or practice.

B. [*59] "Unfair" Business Act or Practice Prong

In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Company, 20 Cal.4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (Cal. 1999)*, the California Supreme Court adopted the following test for the "unfair" business act or practice prong:

> When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes *section 17200*, the word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition. (emphasis added).

As LiveUniverse points out, this test is disjunctive, meaning that there are three alternative ways to state a claim under this prong. LiveUniverse fails to establish any of these alternatives.

As to the first alternative, the Court has already found that MySpace's conduct does not violate ***antitrust law***. As to the second alternative, requiring effects that are "comparable to or the same as a violation of [***antitrust] law***," the Court has already found that LiveUniverse **[*60]** failed to allege that MySpace's conduct caused an anticompetitive effect. Similarly, the third alternative fails because LiveUniverse failed to allege how MySpace's conduct "significantly threaten[ed] or harm[ed] competition," as opposed to harming LiveUniverse. [9]

C. "Fraudulent" Business Act or Practice Prong

"This 'prong' of *§ 17200* is comparable to the 'unfair' prong at issue in *Cel-Tech, supra;* just as it is necessary under the 'unfair' prong to show harm not merely to the plaintiff-competitor but also to competition, so, too, should it **[*61]** be necessary under the 'fraudulent' prong to show deception to some members of the public, or harm to the public interest, and not merely to the direct competitor or other non-consumer party to a contract." *Watson Laboratories, 178 F.Supp.2d at 1121*. As addressed in detail above, LiveUniverse solely alleges harm to itself, rather than harm to the public interest. The FAC also fails to allege any deception to members of the public. Thus, LiveUniverse fails to allege a "fraudulent" business act or practice.

D. Conclusion re LiveUniverse's State Claim

For the foregoing reasons, the Court finds that LiveUniverse fails to state a claim under *Cal. Bus. & Prof. Code § 17200*. Therefore, the Court GRANTS MySpace's motion to dismiss this claim. Although the Court doubts that within the requirements of *Fed. R. Civ. P. 11*, plaintiff can state a different and viable *Section 17200* claim, given that the scope of that section is potentially broad, the Court will permit plaintiff to attempt to do so. Any Second Amended Complaint shall be filed by not later than June 15, 2007. If no such amended complaint **[*62]** is filed by then, then the dismissal of the *Section 17200* claim shall be with prejudice.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS MySpace's motion to dismiss the Sherman Act *Section 2* claims with prejudice. [10] The Court GRANTS MySpace's motion to dismiss LiveUniverse's state claim without prejudice.

---

[9] In *Chavez v. Whirlpool Corp., 93 Cal.App. 4th 363, 375, 113 Cal. Rptr. 2d 175 (Cal. Ct. App. 2001)*, the Court of Appeal held that "conduct alleged to be 'unfair' because it unreasonably restrains competition and harms consumers . . . is not 'unfair' if the conduct is deemed reasonable and condoned under the antitrust laws." Although the California Supreme Court has not articulated this principle, it appears to be sound and to be applicable here.

[10] Dkt. No. 17.

A. LiveUniverse's Monopolization Claim

1. Relevant Market

(a) Defining a Relevant Market

(b) Allegations in the FAC

(c) The "Internet-Based Social Networking Sites" Market is Plausible

(d) Conclusion re Relevant Market

2. Monopoly Power

(a) Elements of Market Power

(b) LiveUniverse Adequately Alleges That Myspace Owns Dominant Share of the Market

(c) Barriers to Entry

3. Exclusionary Conduct

(a) Allegations in the FAC

(b) Refusal to Deal

(c) Product Design Changes

4. Causal Antitrust Injury

(a) Allegations in the FAC

(b) No Cognizable Harm to LiveUniverse

D. LiveUniverse's Attempted Monopolization Claim

III. ALLEGATIONS RE MARKET FOR ADVERTISING ON INTERNET-BASED SOCIAL NETWORKING SITES

IV. MOTION TO DISMISS LIVEUNIVERSE'S STATE LAW CLAIM

V. CONCLUSION

[*63]

End of Document

Cole v. Champion Enters.

United States District Court for the Middle District of North Carolina

June 5, 2007, Decided; June 5, 2007, Filed

1:05CV00415

Reporter

496 F. Supp. 2d 613 *; 2007 U.S. Dist. LEXIS 54017 **

M. MARK COLE, Plaintiff, v. CHAMPION ENTERPRISES, INC., SOUTHERN SHOWCASE HOUSING, INC., THE CHAMPION ENTERPRISES, INC. DEFERRED COMPENSATION PLAN, and THE CHAMPION ENTERPRISES, INC. CORPORATE OFFICERS STOCK PURCHASE PLAN, Defendants.

Subsequent History: Adopted by, Summary judgment granted, in part, summary judgment denied, in part by, Motion denied by, Dismissed by *Cole v. Champion Enters., 496 F. Supp. 2d 613, 2007 U.S. Dist. LEXIS 54012 (M.D.N.C., July 23, 2007)*

Prior History: *Cole v. Champion Enters., 2005 U.S. Dist. LEXIS 46735, 2005 WL 8167130 (M.D.N.C., Nov. 1, 2005)*

Core Terms

terms, parties, severance, terminated, benefits, contends, covenants, shares, retail, negotiations, vesting, salary, bonus, stock, without cause, promise, stock option, Hour Act, executive officer, wages, restraint of trade, anti trust law, antitrust, targeted, compete, rule of reason, retail operations, special assistant, Sherman Act, manufactured

LexisNexis® Headnotes

Business & Corporate Law > ... > Corporate Governance > Directors & Officers > General Overview

Securities Law > Postoffering & Secondary Distributions > Recordkeeping & Reporting Requirements > General Overview

HN1[] **Corporate Governance, Directors & Officers**

Executive officers of public companies are generally referred to as "Rule 16(b)" officers.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN2[] Entitlement as Matter of Law, Appropriateness

Under *Fed. R. Civ. P. 56(c)*, summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN3[] Burdens of Proof, Movant Persuasion & Proof

A party seeking summary judgment bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN4[] Burdens of Proof, Movant Persuasion & Proof

Once a moving party has met its summary judgment burden, the non-moving party must then set forth specific facts showing that there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Absence of Essential Element

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN5[] Burdens of Proof, Absence of Essential Element

In making a determination on a summary judgment motion, a court views the evidence in the light most favorable to the non-moving party, according that party the benefit of all reasonable inferences. Mere allegations and denials, however, are insufficient to establish a genuine issue of material fact. Judges are not required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Thus, the moving party can bear its burden either by presenting affirmative evidence or by demonstrating that the non-moving party's evidence is insufficient to establish its claim. A complete failure of proof concerning an essential element of a plaintiff's case necessarily renders all other facts immaterial.

Contracts Law > Contract Formation > General Overview

HN6[] Contracts Law, Contract Formation

Generally, North Carolina applies the doctrine of lex loci contractus, which means a contract is formed in the place at which the last act was done by either of the parties essential to a meeting of the minds.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

HN7[] Breach of Contract Actions, Elements of Contract Claims

The elements of a claim for breach of contract are the existence of a valid contract and a breach of the terms of that contract. The intentions of the parties may be discerned from both their writings and their actions.

Business & Corporate Compliance > ... > Contract Formation > Offers > Definite Terms

HN8[] Offers, Definite Terms

To be enforceable, the terms of a contract must be sufficiently definite and certain. A contract leaving material portions open for future agreement is nugatory and void for indefiniteness.

Business & Corporate Compliance > ... > Contract Formation > Offers > Definite Terms

Business & Corporate Compliance > ... > Contract Formation > Acceptance > Meeting of Minds

HN9[] Offers, Definite Terms

In addition to setting forth its terms with the requisite level of certainty, to be enforceable a contract must contain an expression of mutual assent, or a meeting of the minds. There is no contract unless the parties thereto assent, and they must assent to the same thing, in the same sense. A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind.

Business & Corporate Compliance > ... > Contract Formation > Offers > Definite Terms

Business & Corporate Compliance > ... > Contracts Law > Contract Formation > Execution & Delivery

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Oral Agreements

HN10[] Offers, Definite Terms

Where the evidence is sufficient to support a plaintiff's contention that a definite oral agreement was made by the parties, the contract is complete even though the parties contemplated that they would ultimately reduce the agreement to writing. Nevertheless, if it appears that the parties are merely negotiating to see if they can agree upon terms, and that the writing is to be a contract, then there is no contract until the writing is executed. If the parties intend to signal their agreement only by the execution of a written document and do not intend to be bound unless and until all parties sign, no amount of negotiation or oral agreement, no matter how specific, will result in the formation of a binding contract.

Business & Corporate Compliance > ... > Contracts Law > Contract Formation > Execution & Delivery

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Oral Agreements

HN11[] Contract Formation, Execution & Delivery

Under Michigan law, in determining whether the parties intended to require a written document in order for a contract to be binding, a court applies the following factors: (1) whether the contract is of that class which are usually found to be in writing; (2) whether it is of such nature as to need a formal writing for its full expression; (3) whether it has few or many details; (4) whether the amount involved is large or small; (5) whether it is a common or unusual contract; and (6) whether the negotiations themselves indicate that a written draft is contemplated as a final conclusion of the negotiations.

Business & Corporate Compliance > ... > Labor & Employment Law > Wage & Hour Laws > Wage Payments

Labor & Employment Law > Wage & Hour Laws > Remedies > Costs & Attorney Fees

Labor & Employment Law > Wage & Hour Laws > Remedies > Judgment Interest

Labor & Employment Law > ... > Remedies > Damages > Liquidated Damages

Labor & Employment Law > Wage & Hour Laws > Remedies > Private Suits

HN12[] Wage & Hour Laws, Wage Payments

The North Carolina Wage and Hour Act, *N.C. Gen. Stat. § 95-25.1 et seq.*, provides a private right of action to employees for recovery of unpaid wages owed, interest at the legal rate set forth in *N.C. Gen. Stat. § 24-1*, liquidated damages, and attorneys fees. *N.C. Gen. Stat. § 95-25.22*. The Wage and Hour Act defines "wages" as compensation for labor or services rendered by an employee whether determined on a time, task, piece, job, day, commission, or other basis of calculation.

Business & Corporate Compliance > ... > Labor & Employment Law > Wage & Hour Laws > Wage Payments

Labor & Employment Law > Wage & Hour Laws > Scope & Definitions > General Overview

HN13[] Wage & Hour Laws, Wage Payments

For the purposes of N.C. Gen. Stat. *§ 95-25.6 through N.C. Gen. Stat.* § 95-25.13 "wage" includes sick pay, vacation pay, severance pay, commissions, bonuses, and other amounts promised when the employer has a policy or a practice of making such payments. *N.C. Gen. Stat. § 95-25.2(16)*.

Business & Corporate Compliance > ... > Labor & Employment Law > Wage & Hour Laws > Wage Payments

Labor & Employment Law > Wage & Hour Laws > Scope & Definitions > General Overview

HN14[] Wage & Hour Laws, Wage Payments

See *N.C. Gen. Stat. § 95-25.7*.

Business & Corporate Compliance > ... > Labor & Employment Law > Wage & Hour Laws > Wage Payments

HN15[] **Wage & Hour Laws, Wage Payments**

In accordance with *N.C. Gen. Stat. § 95-25.13.3*, once an employee meets conditions for the receipt of benefits, an employer may not rescind.

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

Contracts Law > Breach > Breach of Contract Actions > General Overview

HN16[] **Contract Conditions & Provisions, Conditions Precedent**

Under Michigan law, where a contract contains a clear condition precedent, and the condition is not met, a plaintiff has no contract claim.

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > Liability of Principals

Business & Corporate Law > Agency Relationships > Duties & Liabilities > Third Parties

HN17[] **Authorized Acts of Agents, Liability of Principals**

A third party acquires no rights against a principal when the third party has either actual or constructive knowledge of what the principal has authorized his agent to do.

Business & Corporate Law > ... > Corporate Governance > Directors & Officers > General Overview

HN18[] **Corporate Governance, Directors & Officers**

In July 2002 Congress enacted the Sarbanes Oxley Act, and the New York Stock Exchange later adopted rules for listed companies that, among other things, required stricter oversight by the board of executive management, a compensation committee comprised entirely of independent directors, the adoption of a charter for the compensation committee that specifically set out the committee's authority regarding executive compensation, the required adoption of corporate governance guidelines, and the disclosure of those guidelines and committee charters on the listed company's website.

Business & Corporate Law > Types of Transactions > Transfers of Stock

HN19[] **Types of Transactions, Transfers of Stock**

A "change in control" generally refers to a transfer of ownership in which a new person or entity obtains a 50 percent or greater ownership interest.

Business & Corporate Compliance > ... > Labor & Employment Law > Wage & Hour Laws > Wage Payments

HN20[] **Wage & Hour Laws, Wage Payments**

The North Carolina Wage and Hour Act protects employees from being denied payment of earned wages. Thus, the Act only requires an employer to pay those wages and benefits due when the employee has actually performed the work required to earn them.

Business & Corporate Compliance > ... > Contract Formation > Offers > Counteroffers

HN21[] **Offers, Counteroffers**

Under both North Carolina and Michigan law, when a party makes a counteroffer, the original offer has been rejected and ceases to exist.

Contracts Law > Statute of Frauds > General Overview

HN22[] **Contracts Law, Statute of Frauds**

Under Michigan law, contracts that, by their terms, cannot be completed within a year from their making are subject to Michigan's statute of frauds. *Mich. Comp. Laws § 566.132(1)(a)* applies specifically to an agreement that, by its terms, is not to be performed within one year from the making of the agreement.

Business & Corporate Compliance > ... > ERISA Pension Plan Qualification Requirements > Participation & Vesting > Participation Requirements

Pensions & Benefits Law > ERISA > Civil Litigation > Standing

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > Suits to Recover Plan Benefits

Business & Corporate Compliance > ... > ERISA Pension Plan Qualification Requirements > Participation & Vesting > Vesting Requirements

HN23[] **Participation & Vesting, Participation Requirements**

For a former employee to have standing as a "participant" under an Employee Retirement Income Security Act of 1974 benefits plan, he must expect to return to covered employment or have a colorable claim to vested benefits. Without a definite promise from an employer, the employer is not bound to pay benefits; there is no obligation when the plan contains no statement which could conceivably be read as creating an obligation on the part of the employer to provide benefits.

Civil Procedure > ... > Justiciability > Mootness > General Overview

Civil Procedure > Judgments > Declaratory Judgments > General Overview

HN24[] **Justiciability, Mootness**

A declaratory judgment cannot be given, if a matter has become moot.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN25[] **Regulated Practices, Price Fixing & Restraints of Trade**

North Carolina's Chapter 75, inter alia, prohibits illegal restraints of trade and provides for treble damages. *N.C. Gen. Stat. § 75-16*. More specifically, North Carolina's restraint of trade statute provides that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal. *N.C. Gen. Stat. § 75-1*.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN26[] **Trade Secrets & Unfair Competition, Noncompetition & Nondisclosure Agreements**

A covenant not to compete is basically an agreement in restraint of trade. However, North Carolina courts have recognized the rule that a covenant not to compete is enforceable in equity in some circumstances. A covenant not to compete is generally enforceable and not in restraint of trade only if it is (1) in writing; (2) made part of a contract of employment; (3) based on valuable consideration; (4) reasonable both as to time and territory; and (5) designed to protect a legitimate business interest of the employer. When considering the enforceability of a covenant not to compete, a court examines the reasonableness of its time and geographic restrictions, balancing the substantial right of the employee to work with that of the employer to protect its legitimate business interests.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN27[] **Sherman Act, Claims**

N.C. Gen. Stat. § 75-1 was based upon § 1 of the Sherman Act. Accordingly, the body of law applying the Sherman Act, although not binding upon a court in applying *N.C. Gen. Stat. § 75-1*, is nonetheless instructive. Consistent with federal ***antitrust law*** and in order to recover damages for an unenforceable noncompete under North Carolina ***antitrust law***, a plaintiff must prove both adverse impact and antitrust injury. The requirement of antitrust injury reflects the oft-stated principle that the antitrust laws were enacted for the protection of competition, not competitors. To prove antitrust injury, an antitrust plaintiff must prove more than mere individual injury. Actionable antitrust violations require broad interference with the interest of the public. *N.C. Gen. Stat. § 75-1* requires a prejudice to the public interest on a broad basis, not just action affording a fair protection to the parties, to be actionable.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN28[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

The rule of reason is the standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract. Under the rule of reason, a party must show an adverse effect on competition as a whole within the relevant market. Therefore, a non-competition covenant may be unreasonable between the parties, yet still not violate a state's antitrust laws if the plaintiff cannot show an adverse effect on competition as a whole within the relevant market.

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

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN29[] **Sherman Act, Scope**

There can be little doubt that the Sherman Act applies to non-competition agreements. However, it appears that no such noncompetition agreement has ever been held to violate the Sherman Act. One explanation for this absence of precedent may be the difficulty involved in proving that a post-employment noncompetition agreement violates the Sherman Act. Such agreements are not per se violations of the Sherman Act but must be analyzed under the rule of reason. To establish a violation under the rule of reason, one must prove that the agreement has an adverse effect on competition in the relevant market. This is distinguished from the effect a post-employment noncompetition agreement has on the particular employer and employee involved. Rule of reason analysis under antitrust laws must not be confused with reasonableness analysis under the common law. Rule of reason analysis tests the effect of a restraint of trade on competition. By contrast, whether a noncompetition agreement is reasonable depends upon its effect on the parties, the competitors, as it were. The two standards are not directly related. An agreement may be reasonable as between the parties and nevertheless violate antitrust laws. Conversely, an agreement may be unreasonable as between the parties and yet not violate the rule of reason test under the antitrust laws.

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

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN30[] **Actual Monopolization, Claims**

Even an unreasonable covenant not to compete does not necessarily violate the states' antitrust laws; to constitute such a violation, there must be an adverse effect on the relevant market.

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

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN31[] **Actual Monopolization, Claims**

The antitrust laws were not intended as a vehicle for converting business tort claims into antitrust causes of action. A plaintiff cannot make out a federal antitrust claim merely by showing that it caused him an economic injury, and if the law were otherwise, many a workplace grievance would be elevated to the status of an antitrust action.

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

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN32[] **Actual Monopolization, Claims**

An essential aspect of an antitrust claim is that the plaintiff must show an intention and capacity to compete against the defendant.

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

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN33[] **Actual Monopolization, Claims**

A prospective plaintiff cannot simply imagine a venture he might have undertaken in order to recover on an antitrust claim.

Counsel: **[**1]** For M. MARK COLE, Plaintiff: DENA BETH LANGLEY, J. ALEXANDER S. BARRETT, LEAD ATTORNEYS, HAGAN DAVIS MANGUM BARRETT LANGLEY AND HALE, PLLC, GREENSBORO, NC; JASON BENJAMIN BUCKLAND, HAGAN DAVIS MANGUM BARRETT LANGLEY AND HALE, PLLC, GREENSBORO, NC.

For CHAMPION ENTERPRISES, INC., SOUTHERN SHOWCASE HOUSING, INC., Defendants: ANGELIQUE R. VINCENT, BAXTER CHAD EWING, DAVID C. WRIGHT, III, JULIAN HUGH WRIGHT, JR., PEARLYNN G. HOUCK, LEAD ATTORNEYS, ROBINSON BRADSHAW & HINSON, P.A., CHARLOTTE, NC; DIXIE THOMAS WELLS, JAMES DONALD COWAN, JR., SMITH MOORE, L.L.P., GREENSBORO, NC.

For THE CHAMPIOIN ENTERPRISES, INC. CORPORATE OFFICERS STOCK PURCHASE PLAN, Defendants: DAVID C. WRIGHT, III, JULIAN HUGH WRIGHT, JR., LEAD ATTORNEYS, ROBINSON BRADSHAW & HINSON, P.A., CHARLOTTE, NC; ANGELIQUE R. VINCENT, ROBINSON BRADSHAW & HINSON, P.A., CHARLOTTE, NC.

For THE CHAMPION ENTERPRISES, INC. DEFERRED COMPENSATION PLAN, Defendants: ANGELIQUE R. VINCENT,DAVID C. WRIGHT, III , JULIAN HUGH WRIGHT, JR., LEAD ATTORNEYS, ROBINSON BRADSHAW & HINSON, P.A., CHARLOTTE, NC.

Judges: WALLACE W. DIXON, UNITED STATES MAGISTRATE JUDGE.

Opinion by: WALLACE W. DIXON

Opinion

[*614] RECOMMENDATION BY UNITED STATES MAGISTRATE JUDGE

This matter is before the court **[**2]** on a motion for summary judgment (docket no. 113) filed by Defendants Champion Enterprises, Inc. and Southern Showcase Housing, Inc. and on a motion for summary judgment (docket no. 116) filed by Plaintiff M. Mark Cole. The parties have responded to the motions and, in this posture, the matter is ripe for disposition. Furthermore, because the parties have not consented to the jurisdiction of the magistrate judge, I must address the motions by way of recommendation. For the following reasons, it will be recommended that the court grant summary judgment to Champion and Southern Showcase Housing as to all of Plaintiff Cole's claims.

STATEMENT OF CASE AND BACKGROUND

Plaintiff M. Mark Cole filed his initial complaint against Defendants Champion Enterprises, Inc. ("Champion") and Southern Showcase Housing, Inc. ("SSH") in the **[*615]** Guilford County Superior Court on April 11, 2005. Champion and SSH removed the case to this court on May 12, 2005, based on federal question jurisdiction and filed a motion to dismiss on May 19, 2005. On July 25, 2005, Cole filed an amended complaint and added two of Champion's employee benefit plans, The Champion Enterprises, Inc. Deferred Compensation Plan ("DCP") and **[**3]** The Champion Enterprises, Inc. Corporate Officers Stock Purchase Plan ("SPP"), as parties pursuant to *29 U.S.C. § 1132(d)*. Cole was for years an employee of Champion working on an at-will basis. The gist of Cole's lawsuit against Defendants is that when Champion fired him without cause in October 2004, Champion breached its contract with Cole regarding various terms of his employment and failed to pay him certain wages and benefits owed.

By previous order, the court dismissed DCP and SPP as Defendants; thus, the only remaining defendants are Champion and SSH. Furthermore, the court has dismissed certain ERISA claims as well as an unfair trade practices claim under Chapter 75 of the North Carolina statutes. The claims remaining are a claim for breach of contract/repudiation of contract, a claim under the North Carolina Wage and Hour Act, a claim for restraint of trade under Chapter 75 of the North Carolina statutes, and a claim arising under ERISA regarding an alleged oral severance package. Cole, Champion, and SSH have now moved for summary judgment on the remaining claims, and the motions have been referred to the undersigned. [1]

UNDISPUTED FACTS AND CLAIMS

Cole is a citizen and resident of Greensboro, North Carolina (Am. Compl. P 1.) Defendant Champion, a housing manufacturer, is a Michigan corporation. (Am. Compl. P 2.) Defendant SSH is a North Carolina corporation that is owned by a wholly owned subsidiary of Champion. In or around January 1998, Cole was the majority shareholder and President of SSH. (*Id.* P 12). Cole sold his shares of SSH to a wholly owned subsidiary of Champion and entered into an "Employment and Non-Competition Agreement" with Champion and SSH on January 8, 1998 (the "January 1998 Agreement"). (Id. P 13 & Ex. 1.) The January 1998 Agreement stated that its terms would expire in five years and that after the initial five-year term the agreement could be extended for additional periods as may be agreed upon in writing by Cole and Champion. (*Id.* Ex. 1, P 2.) The January 1998 Agreement included, among other things, terms **[**5]** regarding Cole's compensation amount as well as his right to a performance bonus each year during the term of the Agreement, and his right to a severance package and a performance bonus (prorated for the year in which he was terminated) in the event that he was terminated without cause. (*Id.* P 4.)

Effective September 11, 1998, Champion promoted Cole to President of its retail operations, which was memorialized by a letter agreement dated September 11, 1998 (the "September 1998 Letter Agreement"). (*See* Letter Agreement, Am. Compl. Ex. 2.) The September 1998 Letter Agreement outlined in bullet-point form the basic terms of Cole's employment with Champion, including his salary and benefits, and made clear that all terms from the January 1998 Agreement remained in full force and effect. (Am. Compl. P 17.) As President, Retail Operations, **[*616]** Cole was considered an "executive" officer of Champion and was subject to applicable SEC Rules regarding executive compensation and other employment terms. [2] ***HN1***[] Executive officers of public companies

---

[1] The only allegations against SSH concern its alleged **[**4]** violation of restraint of trade by attempting with Champion to enforce certain noncompetition agreements against Cole. Although SSH has joined with Champion in the motion for summary judgment, I will refer primarily to Champion when addressing the parties' respective arguments.

[2] More **[**6]** specifically, during the time that he served as President, Retail Operations, Cole was a "named executive officer" in Champion's proxy materials, as one of the company's "four most highly compensated executive officers other than the CEO." This meant that his compensation and any employment contract or arrangement that he had with Champion was subject to disclosure under various SEC regulations. (*See* Collins Aff. P 6, docket no. 114.)

are generally referred to as "Rule 16(b)" officers. Cole's position as President, Retail Operations, was based in Greensboro, North Carolina. (*Id.* Ex. 2.)

In 1999, the mobile home industry faced a major economic downturn, which continued for several years. (Young Dep. 7-8, Pl.'s Ex. B-1, docket no. 119.) Champion's stock price dropped significantly, going from $ 30 a share in 1997 to under $ 2 a share in early 2003. (*Id.* 7, 10-11.) In response to the downturn, Champion closed over 300 retail locations, which Cole oversaw. As a result of the decline in stock price, Cole and other senior executives were asked in 2000 to voluntarily surrender their stock options. Champion subsequently granted Cole new stock options in separate agreements dated January 2, 2001. (Am. Compl. PP 18, 22, Exs. 3, 4). The stock option agreements contained identical, non-competition provisions, which stated that for two years after **[**7]** termination of employment, Cole could not:

> directly or indirectly . . . as owner, partner, joint venturer, employee, broker, agent, principal, trustee, corporate officer, licensor, consultant, or in any capacity whatsoever, engage in, become financially interested in, or have any connection with, any business located in the United States or Canada engaged in the production, sales, financing, insuring, or marketing of manufactured homes or the development of manufactured housing parks.

(*Id.*)

In or around April 2003, Cole met with Champion's then Chief Executive Officer, Walt Young ("Young"), and Chief Operating Officer, Philip Surles ("Surles"), in Las Vegas, Nevada to discuss Cole's concerns about his future with Champion. (Young Dep. 38-49, 112-13, Pl.'s Exs. B-1, B-3, docket no. 119; Cole Dep. 56-57, 180-87, Pl.'s Ex. D-1, docket no. 119; Surles Dep. 119-20, Pl.'s Ex. C, docket no. 119; Pl.'s Ex. 75, docket no. 122.) By then, the terms of Cole's January 1998 Agreement had expired, and Cole wanted to obtain written agreements from Young regarding the severance and equity components of his compensation. (Young Dep. 42.) Young told Cole that Champion had been able to work out similar arrangements **[**8]** with other executive officers in the past, but that he would need approval from Champion's Board of Directors ("the Board") to finalize the arrangement. (Young Dep. 43-44, 84-89; *see also* Pl.'s Exs. 78, 79, docket no. 122.) Young's receipt of approval from Champion's Compensation Committee and Board had not been an issue in the past. According to Cole, the parties orally agreed to a number of terms and conditions concerning Cole's continued employment and Cole consequently relied on the Agreement in continuing his employment, while expecting Champion to reduce the agreements in writing. (Am. Compl. PP 29-32.) More specifically, Cole alleges that Young told him that in the event that Champion fired Cole without cause, he would (1) receive a lump sum severance payment equal to one **[*617]** year's salary; (2) he would be released from all covenants against competition; and (3) that all forms of deferred compensation, all performance shares, stock grants, and options would fully vest and Cole could hold them until maturity. (Am. Compl. P 29.)

Champion terminated the employment of Young and Surles in June and July of 2003, respectively, and Albert Koch ("Koch") was subsequently appointed as Champion's **[**9]** Interim CEO. Early on in Koch's tenure as Interim CEO, Cole went to Koch and informed Koch about the compensation commitments that Young had agreed to. (Cole Dep. 279-80, Pl.'s Ex. D-2; Koch Dep. 26-29, 34-35, Pl.'s Ex. F-1, docket no. 119.) Koch was not willing at such an early stage in his tenure as Interim CEO to address with the Board Cole's concerns, and Cole agreed to delay final resolution until the 2004 compensation plan was rolled out for him and other Rule 16(b) officers. Due to delays, the 2004 compensation plan for Rule 16(b) officers was not finalized and disseminated until March 15, 2004. (Pl.'s Exs. 96, 97, docket no. 122.) These annual incentive compensation agreements, which were amendments to each Rule 16(b) officer's employment arrangements, were regularly sent out by letter or memorandum after approval by Champion's Board. (Pl.'s Exs. 96, 97, 176, 191, docket nos. 122 & 123.)

Cole was not pleased with certain terms of his incentive compensation arrangements because they were inconsistent with what Young promised him when they met in 2003. On or about March 25, 2004, Cole met with Koch in Detroit to discuss Cole's concerns that the March 15, 2004, incentive compensation **[**10]** arrangements did not address the terms agreed to by Young on behalf of Champion in April 2003. (Cole Dep. 21-25, 287-324, 327-28, Pl.'s Exs. D-1, D-2, D-3; Koch Dep. 35-36, 124-25, Pl.'s Ex. F-1, F-2; Pl.'s Exs. 105-107, docket no. 123.) Cole was very concerned about the equity portions of his compensation being at risk in the event that Champion ever terminated his employment without cause, especially since there was a possibility that Champion might decide to exit the retail business altogether. (*Id.*; Cole Dep. 28-29, 170-71, 179-81, 184, 186-95, 196-99, 200-03, 244-45, 310-11.) Cole informed Koch of his unwillingness to continue his employment with Champion without confirmation of certain terms and that he would give Koch until March 29 to return to him an agreement that addressed Cole's concerns. (Koch Dep. 36, 52-53; Cole Dep. 290, 293.) Cole informed Koch that if they did not reach an agreement by March 29, he would no longer work for Champion.

By the conclusion of Cole's and Koch's meeting in Detroit on March 25, Koch and Cole had agreed only that Cole would be a participant in the executive severance plan that was being developed by Champion's outside compensation consultant, **[**11]** Edward Graskamp, and which was expected to be finalized and in place by July 2004. (Cole Dep. 72-75, 259-61.) Cole left Koch's office and flew back to Greensboro, making notes of his conversation with Koch during the flight. (Cole Dep. 57-58; Pl.'s Ex. 105, docket no. 123.) As Cole was disembarking the airplane at the Greensboro airport, he received a call on his cell phone from Koch and Collins, Champion's general counsel. According to Cole, in the telephone call, Koch and Collins proposed, and Cole agreed to, the following terms regarding Cole's compensation:

> (1) Cole's salary would be increased by $ 20,000 to $ 300,000 for calendar year 2004 and would be retroactive to January 1, 2004, with the increase triggered upon Champion achieving two consecutive profitable quarters; (2) Cole would enter into a change of control agreement with Champion; (3) Champion would not **[*618]** waive Cole's noncompete in the event of termination without cause, but would modify it so that in the event Champion exited its retail operations Champion would agree to allow Cole to operate at least one retail center anywhere in the United States as long as Cole operated the location as a "Champion Home Center"; and **[**12]** (4) Champion would protect the equity pieces of Cole's compensation, particularly any unvested portions of stock options or performance shares, by continuing to employ Cole in another capacity for the time necessary for all equity pieces to fully vest.

(Cole Dep. 306-07, 321-22.) Koch informed Cole that he could not get Board approval by March 29, but that he would put the agreement on fast track and obtain Board approval swiftly. (Koch Dep. 53-54; Pl.'s Ex. 107; Cole Dep. 36, 290-93.)

Cole maintains that he remained employed with Champion in reliance on the March 2004 agreement and with the understanding that portions of the agreement were subject to the Board's approval. (Cole Aff. P 59, docket no. 141.) Koch called Cole about a week later and told Cole that both Bob Anestis, Chair of Champion's Compensation Committee, and Graskamp had approved the terms of the Agreement between Cole and Koch. (Koch Dep. 37-38, 54-55; Cole Aff. P 59.) At the Annual Meeting of the Board of Directors held on April 27, 2004, Koch made a presentation to the Board which included details about Cole's current employment contract and details of compensation in the event that his employment were to be terminated. **[**13]** Koch used a Power Point presentation to make the following recommendations to the Board for approval:

APPROVAL REQUEST TO BOARD

> . Increase Mark Cole salary by $ 20,000
> . Salary will increase to $ 300,000 after two profitable quarters (versus 285,000 now)
>
> . Give Mark an option to: Retain current restricted stock (40,000 shares) and target bonus of 80%, **or** Take restricted stock of 50,000 shares and reduce target bonus to 60%
> . Give Mark a change of control agreement
> . If Cole is removed as President of Retail without cause, then: He may continue as a CHC retailer with a different assignment requiring about 10 days per year. His salary would be reduced to approximately $ 20,000 to $ 30,000 per year. This will preserve Mark's existing restricted stock and option grants. Vesting would occur on targeted dates if he is still employed.

(Pl.'s Ex. 17, docket no. 122.) The redacted minutes from the annual meeting state that the Company's Compensation Committee and the Board approved Koch's proposals regarding Cole's employment terms. Specifically, the minutes state, in part, that at the meeting Koch had

> outlined to the Board an approval request to make certain modifications to Mark Cole's compensation **[**14]** arrangement. . . . After discussion, both the Compensation Committee and the Board approved Mr. Koch's request and authorized him to proceed with Mr. Cole, with the understanding that the changes

> approved would not trigger an accounting charge based on modifications to the equity components of Mr. Cole's compensation package.

(Pl.'s Ex. 18, docket no. 122.) After the Board meeting, Koch contacted Cole and notified him that the Board had approved the terms of the March 25, 2004, agreement between Koch and Cole. (Cole Aff. P 60.) Koch testified:

> I believe I called Mark and told him that . . . we had made a presentation along the lines that had been discussed and that we would . . . turn the ball over to **[*619]** John Collins to prepare a contract for his--Mark's review, and I do recall Mark saying in that conversation, I thought maybe we would move pretty quickly, but I remember Mark saying it would need to be reviewed by his advisors and I said that, you know, okay, let's get it done as quick as we can.

(Koch Dep. 88-89.) Koch then instructed Collins to memorialize the terms of the agreement approved by the Board and to provide the confirmation to Cole. (*Id.*) On May 21, 2004, Koch sent a memo to **[**15]** the Board indicating that Champion's legal department had sent a writing to Cole's "advisors" to "paper the deal" approved by the Board on April 27, 2004. (Pl.'s Ex. 264, docket no. 123, filed under seal.) In fact, by then Collins had still not prepared the paperwork documenting the Board's approval. On June 11, 2004, Champion's in-house counsel Jay Kreindler sent to Cole a draft document of certain employment terms that failed to embody the key components of the agreement approved by the Board on April 27, 2004. On July 20, 2004, Cole's counsel provided to Kreindler a black-lined version of Kreindler's June 11, 2004, draft. In the meantime, Champion had ended Koch's employment as Interim CEO on or about July 14, 2004, and replaced him with William C. Griffiths ("Griffiths") on or about August 1, 2004. (Am. Compl. P 43.) In August, Champion's legal department responded to the July 20, 2004, black-lined document, informing Cole that Champion was not willing to accept certain proposed terms in the black-lined draft. (Kreindler Dep. 111, 151-58, 175-76, Pl.'s Ex. I-1, docket no. 119; Pl.'s Exs. 100-01, docket no. 123.) For the remainder of August, the parties negotiated back and forth **[**16]** through telephone and e-mail over various terms of Cole's employment without reaching a written agreement.

In September 2004, Griffiths announced to Cole and other managers of Champion Retail that Champion needed to exit or sell its retail business because retail was neither Champion's core business nor "a fit for Champion." (Am. Compl. P 44.) Following this announcement, Champion and SSH proposed that Cole purchase certain assets of SSH. In the ensuing discussions and negotiations, Champion and SSH sought to extract concessions from Cole as a condition to the sale of SSH assets concerning his entitlement to salary, bonus, performance shares, stock options, and other benefits of his employment. (Am. Compl. P 45.) On September 30, 2004, Cole's assistant faxed a "letter of intent" to Champion for Champion's review. (Collins Aff. P 45, docket no. 114.) The letter of intent addressed terms relating to many of the severance, noncompete, and benefits issues that had been the subject of negotiations between Cole's counsel and Champion's counsel since June 2004. On or about October 15, 2004, Champion and SSH gave Cole an ultimatum to purchase certain SSH assets on terms requiring him to relinquish **[**17]** certain benefits; Cole declined. (Am. Compl. P 46.)

Champion terminated Cole's employment without cause on or about October 18, 2004. (Am. Compl. P 47.) At the time of his termination, Champion's human resource officers presented Cole with a separation agreement that would have required Cole to release Champion from all obligations, including all of the alleged obligations under Cole's agreement with Koch that the Board approved on April 27, 2004, in exchange for one year's salary. Cole did not sign the separation agreement. Cole notified Champion on or about October 28, 2004, that he was electing to be employed as a special assistant to Champion's Vice President of Marketing pursuant to the March 2004 Agreement. (Am. Compl. P 48, Ex. 5.) By letter dated November 2, 2004, Griffiths wrote back to Cole and told him that there was never an agreement between Cole and Champion. **[*620]** (Am. Compl. P 49, Ex. 6.) Griffiths also refused to employ Cole as a special assistant to Champion's Vice President of Marketing, and confirmed Cole's termination date. Cole contends that although several promising opportunities in the manufacturing industry were presented to him during the two years after his termination **[**18]** of employment, he abided by the terms of the non-compete agreements and he stayed out of the manufactured housing industry. (Cole Aff. PP 91-93.) Cole maintains that he lost various investment opportunities due to Champion's stated position that it intended to enforce the non-competition agreements.

On the parties' motions for summary judgment, Cole contends: (1) that Champion violated the North Carolina Wage and Hour Act by failing to pay him various entitled compensation; (2) that Champion breached its contract to pay him various entitled compensation; (3) that Champion breached/repudiated its contract to hire and employ him as a special assistant to the Vice President of Marketing until the complete vesting of his benefits, following the termination of his employment without cause; (4) that the covenants not to compete from the 2001 stock option agreements are invalid and unenforceable; (5) that Champion and SSH's attempts to enforce the covenants not to compete constitute illegal restraints of trade for which Cole is entitled to recover treble damages under *N.C. Gen. Stat. § 75-1*; and (6) that Champion violated ERISA by failing to pay him what was due under an oral severance plan **[**19]** agreement.

STANDARD OF REVIEW

HN2[] Under *Rule 56(c)*, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *FED. R. CIV. P. 56(c)*. ***HN3***[] A party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the [record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. ***HN4***[] Once the moving party has met its burden, the non-moving party must then "set forth specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (quoting *FED. R. CIV. P. 56(e)*).

HN5[] In making a determination on a summary judgment motion, the court views the evidence in the light most favorable to the non-moving party, according that party the benefit of all reasonable inferences. *Bailey v. Blue Cross & Blue Shield of Va., 67 F.3d 53, 56 (4th Cir. 1995)*. Mere **[**20]** allegations and denials, however, are insufficient to establish a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Judges are not "required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party." *Id. at 251* (citations omitted). Thus, the moving party can bear its burden either by presenting affirmative evidence or by demonstrating that the non-moving party's evidence is insufficient to establish its claim. *Celotex, 477 U.S. at 331* (Brennan, J., dissenting). "[A] complete failure of proof concerning an essential element of [a plaintiff's] case necessarily renders all other facts immaterial." *Celotex, 477 U.S. at 323*. With these principles **[*621]** in mind, the court will address the motions for summary judgment.

DISCUSSION

A. Whether Cole is Entitled to Recover on his Claims for Breach of Contract, Repudiation of Contract, and for Unpaid Wages under the North Carolina Wage and Hour Act

Cole claims that Champion violated the North Carolina Wage and Hour Act and breached **[**21]** and repudiated a contract by failing to pay various entitled compensation owed to Cole. Since the Wage and Hour Act claim and the breach of contract/repudiation of contract claim are based on the same alleged facts, I will analyze these claims together. The court must first decide, however, which state's law applies to the breach of contract claim. In deciding non-federal questions, the court must apply North Carolina conflict of laws analysis to Cole's contract claims. *Eli Research, Inc. v. United Commc'ns Group, LLC, 312 F. Supp. 2d 748, 754 (M.D.N.C. 2004)*. ***HN6***[] Generally, North Carolina applies the doctrine of lex loci contractus, which means a contract is formed in the place at which the last act was done by either of the parties essential to a meeting of the minds. *Id.* Cole argues that the last act essential to the meeting of the minds was Cole's acceptance of the terms of the alleged contract between him and Koch at the Greensboro, North Carolina airport on March 25, 2004. Champion argues, on the other hand, that Michigan law controls because the Board had to give final approval to any compensation package given to Cole and the Board would have made that decision in Michigan. I agree **[**22]** with Champion that Michigan law should control because the parties would not be bound by any terms of an alleged contract until the Board gave its approval, and the Board gave its approval in Michigan. In any event, there is no substantive difference in the law of contracts between North Carolina and Michigan. Thus, I will refer to both Michigan and North Carolina law in analyzing the breach of contract claims.

HN7[] The elements of a claim for breach of contract are the existence of a valid contract and a breach of the terms of that contract. *See Johnson v. Colonial Life & Accident Ins. Co., 173 N.C. App. 365, 369, 618 S.E.2d 867, 870 (2005)*. The intentions of the parties may be discerned from both their writings and their actions. *Arndt v. First Union Nat'l Bank, 170 N.C. App. 518, 522, 613 S.E.2d 274, 278 (2005)*. ***HN8***[] To be enforceable, the terms of a contract must be sufficiently definite and certain. *Lassiter v. Bank of N.C., 146 N.C. App. 264, 269, 551 S.E.2d 920, 923 (2001)*. A contract leaving material portions open for future agreement is nugatory and void for indefiniteness. *Boyce v. McMahan, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974)*. ***HN9***[] In addition to setting forth its terms with the **[**23]** requisite level of certainty, to be enforceable a contract must contain an expression of mutual assent, or a meeting of the minds. *See Volumetrics Med. Imaging, Inc. v. ATL Ultrasound, Inc., 243 F. Supp. 2d 386, 400 (M.D.N.C. 2003)* ("There is no contract unless the parties thereto assent, and they must assent to the same thing, in the same sense."). "A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind." *Kamalnath v. Mercy Mem'l Hosp. Corp., 194 Mich. App. 543, 487 N.W.2d 499, 503 (Mich. Ct. App. 1992)*.

Furthermore, ***HN10***[] where the evidence is sufficient to support plaintiff's contention that a definite oral agreement was made by the parties, the contract is complete even though the parties contemplated that they would ultimately reduce the agreement to writing. *Williams v. Jones, 322 N.C. 42, 52, 366 S.E.2d 433, 440* ***[*622]*** *(1988)*; *see also Dow Chem. Co. v. GE., No. 04-10275-BC, 2005 U.S. Dist. LEXIS 40866, 2005 WL 1862418, at *32 (E.D. Mich. Aug. 4, 2005)* (stating that a binding oral contract may exist even though the parties intend to reduce their agreement to a fully executed document). Nevertheless, if it appears that the **[**24]** parties are merely negotiating to see if they can agree upon terms, and that the writing is to be a contract, then there is no contract until the writing is executed. *Key Motorsports, Inc. v. Speedvision Network, L.L.C., 40 F. Supp. 2d 344, 347 (M.D.N.C. 1999)*. "If the parties intend to signal their agreement only by the execution of a written document and do not intend to be bound unless and until all parties sign, no amount of negotiation or oral agreement, no matter how specific, will result in the formation of a binding contract." *Dow Chem. Co., 2005 U.S. Dist. LEXIS 40866, 2005 WL 1862418, at *32*; *see also Manon v. Corp. Solutions, LLC, No. 04-73649, 2005 U.S. Dist. LEXIS 35465, 2005 WL 3534765, at *6 (E.D. Mich. Dec. 23, 2005)* (finding facts that parties worked on preparing final written documents and scheduled a closing to execute those documents demonstrated that no enforceable contract was entered into absent execution of a mutually agreeable and definitive written agreement). [3]

HN12[] The North Carolina Wage and Hour Act, *N.C. GEN. STAT. § 95-25.1 et seq.* ("Wage and Hour Act"), provides a private right of action to employees for recovery of unpaid wages owed, interest at the legal rate set forth in *N.C. GEN. STAT. § 24-1*, liquidated damages, and attorneys fees. *N.C. GEN. STAT. § 95-25.22*. The Wage and Hour Act defines "Wages" as

> compensation for labor or services rendered by an employee whether determined on a time, task, piece, job, day, commission, or other basis of calculation . . . . ***HN13***[] For the purposes of *G.S. 95-25.6 through G.S. 95-25.13* 'wage' includes sick pay, vacation pay, severance pay, commissions, bonuses, and other amounts promised when the employer has a policy or a practice of making such payments.

N.C. GEN. STAT. § 95-25.2(16). Moreover, *section 95-25.7* **[**26]** provides:

---

[3] Furthermore, ***HN11***[] under Michigan law, in determining whether the parties intended to require a written document in order for a contract to be binding, a court applies the following factors: (1) whether the contract is of that class which are usually found to be **[**25]** in writing; (2) whether it is of such nature as to need a formal writing for its full expression; (3) whether it has few or many details; (4) whether the amount involved is large or small; (5) whether it is a common or unusual contract; and (6) whether the negotiations themselves indicate that a written draft is contemplated as a final conclusion of the negotiations. *Dow Chem. Co., 2005 U.S. Dist. LEXIS 40866, 2005 WL 1862418, at *33*.

> HN14[] Employees whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday either through the regular pay channels or by mail if requested by the employee. Wages based on bonuses, commissions or other forms of calculation shall be paid on the first regular payday after the amount becomes calculable when a separation occurs. Such wages may not be forfeited unless the employee has been notified in accordance with G.S. 95-25.13 of the employer's policy or practice which results in forfeiture. Employees not so notified are not subject to such loss or forfeiture.

N.C. GEN. STAT. § 95-25.7.

Cole contends that Koch's presentation to Champion's Board on April 27, 2004, made clear that the request sought was designed to address Cole's concerns about his compensation and benefits in the event he was terminated without cause. In his summary judgment motion, Cole asserts that Koch sought and received Board approval regarding Cole's "wages" as follows **[*623]** and that Champion has failed to pay Cole these wages due:

> 1. The Board agreed to increase Cole's grant of restricted shares [performance shares] to 50,000 shares in 2004 if Cole reduced his target **[**27]** bonus to 60%.
> 2. The Board agreed to protect Cole's "financial opportunity loss" of restricted shares [performance shares] and stock options if he was terminated without cause by employing him "in a different capacity" to prevent forfeiture of Cole's benefits and compensation.
> 3. The Board agreed to grant Cole a $ 20,000 salary increase to $ 300,000 after two profitable quarters. [4]

(Pl.'s Br. Supp. Summ. J. at 19-20.) First, with regard to the promise to continue to employ Cole to protect his equity interests, according to Cole, per the Agreement with Champion, in the event Cole was terminated without cause as President of Champion Retail, the equity pieces of his compensation would be due and payable to him on the targeted vesting dates, in order to "give Mark protection against economic equity value loss . . . ." (Pl.'s Ex. 17, docket no. 122.) Cole would continue with Champion in a different capacity for "about 10 days a year" as a mechanism designed to protect Cole's equity interests without having to amend the following equity plans: Champion's Deferred Compensation Plan; Champion's Corporate Officer's Stock Purchase Plan; Champion's 1995 Stock Option Plans (per the 2001 January **[**28]** and September Stock Option Agreements) and the 2003/2004 Performance Share and Incentive Bonus grants. Thus, according to Cole, Champion entered into an Agreement to employ Cole for a definite term--until his equity pieces had vested at their targeted vesting dates. The latest equity component to vest was Cole's 2004 performance shares, which vested when Champion announced its 2006 earnings on a specified date in 2007. Cole contends that Champion cannot repudiate the contract simply because it stalled and failed to "paper" the deal, and Cole argues that all of the components of his compensation were promised "wages" within the meaning of N.C. GEN. STAT. § 95-25.2(16). Furthermore, Cole contends that the letter from CEO Griffiths to Cole in response to Cole's election to remain employed by Champion in a different capacity constituted a retroactive notice of a change in Cole's compensation, which is expressly prohibited by HN15[] N.C. GEN. STAT. § 95-25.13.3. *See* Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 11, 454 S.E.2d 278, 283 (1995) (stating that once an employee meets conditions for the receipt of benefits, an employer may not rescind).

Cole further contends that Champion tied Cole's 2004 bonus to the increase in Cole's 2004 performance share grant. According to Cole, Champion calculated Cole's 2004 prorated bonus following his termination without cause, but refused to pay him the amounts owed. (Collins 30(b)(6) Dep. 177-78, Pl.'s Ex. E, docket no. 119; Pl.'s Exs. 52, 53, 54, docket no. 122.) Finally, Cole contends that Champion owes him for a salary increase that was never effectuated. Cole notes that Champion **[*624]** was profitable during the second and third quarters of 2004.

---

[4] In the Amended Complaint, Cole alleged that **[**29]** Champion failed to pay Cole the following, all of which constitute wages under N.C. GEN. STAT. 95-25.2(16): Cole's increased salary retroactive to January 2004; Cole's additional increases upon Champion experiencing two consecutive profitable quarters; Cole's bonus compensation for 2004 through and including the date of termination; Cole's vested performance shares; Cole's right to hold, as vested and not immediately exercisable, his stock option grants per the terms of the January and February 2001 stock option agreements; and severance benefits pursuant to a March 2004 agreement with Champion. (Am. Compl. P 62.)

(Griffiths Dep. 72, Pl.'s Ex. K, docket **[**30]** no. 119; Knight Dep. 32-33, Pl.'s Ex. G, docket no. 119; Pl.'s Ex. 14, docket no. 122.) Moreover, at a Board meeting on September 14, 2004, while Cole was still employed by Champion, Champion's Board voted to abolish the voluntary salary reductions for executive officers. (Griffiths Dep. 217-19; Pl.'s Ex. 25, docket no. 122.) According to Cole, not only did Champion refuse to reinstate Cole's salary to the pre-reduction amount, Champion also refused to implement the salary increase agreed upon and approved by Champion's Board on April 27, 2004. Cole contends that Champion's willful refusal to pay Cole his agreed-upon compensation is the exact conduct the Wage and Hour Act is designed to prohibit. Cole further argues that Champion has produced no evidence that the Board changed Cole's compensation and provided the requisite notice to Cole after April 27, 2004. Cole contends that he is, therefore, entitled to judgment as a matter of law on this claim. In response, Champion contends that Cole has neither a claim under the N.C. Wage and Hour Act nor a claim for breach of contract.

Applying the above-stated law to the evidence on summary judgment, I find that there was never an enforceable **[**31]** contract between the parties with the terms as alleged by Cole. First, because Cole was a named executive officer subject to the Securities Exchange Act, his compensation was set exclusively by the Board of Directors and the Compensation Committee of the Board. Cole's incentive compensation, which included his stock options, his annual incentive (bonus) and any performance shares, was administered by the Compensation Committee, pursuant to terms of the 1995 Stock Option and Incentive Plan. (Collins Aff. P 31, docket no. 114.) Thus, the Board, and not another executive officer, decided each officer's compensation. [5] Cole has not disputed that the Board is responsible for setting compensation for Champion's executive officers. Indeed, during Cole's employment, the Board, not management, made determinations regarding employment terms such as incentive grants, salary increases, and annual bonuses. (Collins Aff. P 35, docket no. 114.) Therefore, with regard to any of Cole's April 2003 discussions with Walt Young in a Las Vegas hotel room, Young had no authority to reach an agreement with Cole concerning the terms of his compensation. Indeed, Cole has admitted that his purported verbal agreement **[**32]** with Young was "subject to board approval." Because the Board indisputably did not approve the "agreement" between Cole and Young, an express condition to the enforceability of the agreement was never fulfilled. *See BMS Natural Resources v. Krupp Lonrho Mining Corp. 74 F.3d 1230, 1996 WL 7988, at *2 (4th Cir. 1996)*(unpublished) (applying ***HN16***[] Michigan law, holding that where a contract contained a clear condition precedent--approval by defendant's board of directors--and where the condition was not met, plaintiff had no contract claim). Furthermore, Cole's claims relating to his discussions with Interim **[*625]** CEO Koch in 2004 suffer from the same legal deficiencies as his claims relating to discussions with Young in 2003. Koch, as Interim CEO, had no authority to set or revise the terms of Cole's salary, incentive compensation, or benefits and Cole knew this. Indeed, Cole has admitted that Koch told him twice that the Board would have to approve the terms of any compensation package because Cole was an executive officer. Thus, any argument by Cole that he reasonably believed that either Young or Koch had apparent authority to negotiate terms of Cole's employment on Champion's behalf has no **[**33]** merit. *See* Estate of Redding v. Welborn, 170 N.C. App. 324, 331, 612 S.E.2d 664, 669 (2005) (***HN17***[] "A third party [Cole] acquires no rights against a principal [Champion] when the third party has either actual or constructive knowledge of what the principal has authorized his agent [Young] to do.").

Next, as to the terms that the Board approved at the April 27, 2004, Board meeting, I agree with Champion that the Board approval did not give rise to an enforceable **[**34]** oral contract between Cole and Champion. First, although Board approval was certainly necessary to alter the terms of Cole's employment, the evidence in this case shows that the Board's approval alone was not sufficient to constitute an enforceable contract without further negotiations for several reasons. First, several of the terms proposed to the Board were simply too indefinite to be enforceable without further negotiations and clarification. Moreover, the alleged contract that Cole now seeks to enforce differs

[5] As Champion notes, in the wake of Enron and other corporate governance scandals, ***HN18***[] in July 2002 Congress enacted the Sarbanes Oxley Act, and the New York Stock Exchange began to consider, and later adopted, rules for listed companies that, among other things, required stricter oversight by the Board of executive management, a compensation committee comprised entirely of independent directors, the adoption of a charter for the compensation committee that specifically set out the committee's authority regarding executive compensation, the required adoption of corporate governance guidelines, and the disclosure of those guidelines and committee charters on the listed company's website. (*See* Defs.' Br. Supp. Mot. Summ. J. at 5-6, docket no. 121.)

in concept fundamentally from what the Board actually considered and approved. As noted, at the Board meeting, Koch made a Power Point presentation, which contained the following outline of suggested changes to Cole's employment terms.

APPROVAL REQUEST TO BOARD

. Increase Mark Cole salary by $ 20,000.
. Salary will increase to $ 300,000 after two profitable quarters (versus 285,000 now).

. Give Mark an option to: Retain current restricted stock (40,000 shares) and target bonus of 80%, **or** Take restricted stock of 50,000 shares and reduce target bonus to 60%
. Give Mark a change of control agreement

. If Cole is removed as President of Retail without cause, then: He may continue **[**35]** as a CHC retailer with a different assignment requiring about 10 days per year. His salary would be reduced to approximately $ 20,000 to $ 30,000 per year. This will preserve Mark's existing restricted stock and option grants. Vesting would occur on targeted dates if he is still employed.

As for Cole's claim that Champion agreed that his options would be vested if he were fired without cause, this is not what the Board approved. The Board specifically approved the concept of maintaining Cole as an employee in a limited capacity so that his options could vest "on targeted dates if he is still employed." Cole's duties in "assisting" with Champion's "retail program" in a limited capacity as "advisor" or "facilitator" are never spelled out. Nor is the Power Point outline specific as to when or how often Cole would be required to perform this role, stating only that the duties will require "about 10 days per year." Although the Power Point slides speak of Cole choosing a higher cash bonus and a greater number of performance shares, there is no suggestion of when Cole might or must make an election. Finally, although the Board approved a $ 20,000 raise for Cole generally, there is no mention **[**36]** of whether the raise would be retroactive as Cole contends. Thus, even after the Board's April 2004 approval, there were still many issues left **[*626]** open regarding the terms of Cole's continued employment with Champion. *See Volumetrics, 243 F. Supp. 2d at 402* (detailing the lack of definitive terms, including "the parties' respective duties," in a document held not to be a contract and noting the parties' notion of incompleteness of the agreement).

Similarly, Cole's argument that the Board approved a definite term for his limited employment is without merit. Cole contends that the Board approved employing him in a limited capacity until his shares vested, which would occur in 2007. Cole maintains, therefore, that the Board approved retaining him as a Champion employee for a definite term (until 2007) so that his options could vest. The proposed terms that were presented to the Board, however, specifically stated that the Board approved of employing Cole in a limited capacity and that "[v]esting would occur on targeted dates *if he is still employed.*" There is no evidence that the Board approved of retaining Cole as a limited employee for a definite term. *See also Braun v. Glade Valley Sch., Inc., 77 N.C. App. 83, 89-90, 334 S.E.2d 404, 408 (1985)*(stating **[**37]** that there was no enforceable contract where the parties "never reached a mutual understanding as to salary, fringe benefits, length of employment, duties and responsibilities, or housing arrangements"). Thus, to the extent that Cole contends that the parties reached an agreement regarding a definite term of employment and that his options would vest upon being terminated without cause, the court finds no such agreement as a matter of law. Finally, the approval of a change of control agreement is also too indefinite to be enforced. [6] Beyond approving a change of control agreement generally, the Board specified absolutely no terms of such an agreement.

In addition, Cole contends that Champion is bound to several terms that were either never presented to the Board or that are fundamentally inconsistent with what the Board did approve. For instance, Cole claims that the oral contract **[**38]** with Koch relieved him of his noncompetition agreements, but the Power Point slides are directly to the contrary. Furthermore, Cole contends that he was promised severance, but the Board never discussed

---

[6] ***HN19***[] A "change in control" generally refers to a transfer of ownership in which a new person or entity obtains a fifty percent or greater ownership interest. Senior executive contracts often contain a change in control clause, which provides for certain protections in the event of a change of control in the company.

severance for Cole. Finally, as to Cole's allegations regarding his right to a prorated bonus, the Power Point presentation does not refer to any payment of a pro-rated bonus upon termination, and Cole has not shown that the Board ever approved such a bonus. Moreover, Cole's entitlement to an annual incentive bonus is derived from the 1995 Stock Option and Incentive Plan, which is administered by the Board's Compensation Committee. The Plan, however, clearly provides that employees terminated before the end of a fiscal year are not entitled to an annual incentive for the year. (*See* Collins Aff. & Ex. O, docket no. 114.) Thus, Cole has simply failed to raise an issue of fact as to whether Champion ever promised him certain benefits that would constitute wages under the North Carolina Wage and Hour Act. [7]

[*627] Moreover, the objective conduct of the parties demonstrates that all parties contemplated that, notwithstanding the Board's approval, the terms of Cole's employment would need to be finalized in a written agreement. For instance, Champion's legal department sent the first draft of an employment **[**40]** agreement to Cole on or around June 11, 2004. (Collins Aff. P 41, docket no. 114.) Upon receiving the draft, Cole's counsel did not reject the draft as an inappropriate modification of an already binding oral agreement. Instead, counsel thanked Champion's counsel for sending him the draft. (*Id.*) The draft contained a merger clause stating that the written agreement would constitute the "sole agreement" between the parties, and Cole's counsel never objected to that provision. Indeed, at no time during the ongoing negotiations did Cole's counsel Barrett ever take the position that Cole already had an oral contract relating to Cole's benefit and employment claims that would be enforceable without being put into writing and approved by the Board. (Kreindler Aff. P 16, docket no. 115.)

I further note that well after the April 2004 Board approval, the parties continued to negotiate the terms of Cole's employment by sending proposed modifications back and forth, and there is no evidence that Cole behaved as if the Board's approval to his salary increase was effective on the date that the Board gave approval to an increase. That is, after the April meeting, Cole did not go to the payroll department **[**41]** and ask why his salary had not been increased, nor did he inquire as to where his additional performance shares were. Nor did he complain, between April and his termination in October 2004, to anyone at Champion about the implementation of an alleged oral agreement to raise his salary. Rather, in response to the June draft sent by Champion's counsel on July 20, 2004, Cole's counsel submitted a black-lined "revision" and "modification" to Champion's draft. Many of Cole's proposed revisions were not only significant, but also they were irreconcilable with the agreement that he says the Board approved. (*See* Kreindler Aff. PP 10-13, docket no. 115.) For instance, in the black-lined agreement that Barrett prepared on Cole's behalf and forwarded to Champion's legal department on July 20, 2004, Cole proposed the following changes that were not initially acceptable to Champion: (1) Cole's ability to be an officer of another company while employed with Champion without Champion's prior approval; (2) removing Champion's discretion from the determination of profitability in Section 4(a); (3) removing the reduction in incentive compensation while retaining the increase in performance shares; (4) **[**42]** immediate vesting of Cole's performance shares were he to be removed as President, Retail Operations; (5) modifying the term of Cole's employment as Special Assistant; (6) retaining full benefits during his part-time employment as Special Assistant; (7) the ability to operate one sales location at any location without Champion's approval while employed as Special Assistant; and (8) the removal of the stocking requirement for Champion-built homes. (Kreindler Aff. P 9 & Ex. F, docket no. 115.)

After Champion received the black-lined draft, negotiations between the parties continued, with attorney Kreindler handling **[*628]** the negotiations with Cole's attorney Barrett. (Collins Aff. P 43, docket no. 114.) By August 31, 2004, Barrett and Kreindler had communicated by telephone and e-mail in an attempt to negotiate Cole's

---

[7] In addition, as Champion notes, as to certain alleged wages, such as his alleged right to a bonus, Cole's Wage and Hour Act claim is fatally deficient because he is attempting to transform **[**39]** alleged contractual damages into a claim for wages under the Act. ***HN20***[] The N.C. Wage and Hour Act protects employees from being denied payment of earned wages. *See Hamilton, 118 N.C. App. at 8, 454 S.E.2d at 282*. Thus, the Act only requires an employer to pay those wages and benefits due when the employee has *actually performed the work* required to earn them. *Narron v. Hardee's Food Sys., Inc., 75 N.C. App. 579, 583, 331 S.E.2d 205, 208 (1985)*. Since at the time of his October 18, 2004, termination, Cole had not performed the work required to earn the wages and bonuses he alleges, any possible remedy could only lie in breach of contract, not the Wage and Hour Act. The same is true for his claim under the Act related to his alleged right to "performance shares" and Champion's alleged promise to allow him to continue working for Champion in a limited capacity so that his equity interests could vest.

employment agreement. Champion rejected and was not willing to negotiate the following significant changes that Barrett had made to the proposed employment agreement: (1) Cole's ability to be an officer of another company while employed with Champion without Champion's prior approval; (2) removing the reduction in incentive compensation while retaining the increase in performance **[**43]** shares; (3) the immediate vesting of his performance shares were he to be removed as President, Retail Operations; (4) retaining full benefits during his part-time employment as Special Assistant; (5) the ability to operate one sales location at any location without Champion's approval while employed as Special Assistant; and (6) the removal of the stocking requirement for Champion-built homes. (Kreindler Aff. P 10, docket no. 115.) Kreindler communicated to Barrett that these items were unacceptable to Champion, and Barrett and Kreindler discussed alternative proposals for each party to consider. For instance, Champion indicated to Cole that it was willing to discuss five open items, some of which arose from the alternative proposals discussed during negotiations. [8] On September 2, 2004, Kreindler sent an e-mail to Barrett, responding to questions Barrett had asked Kreindler about two of the five open issues that Champion was willing to discuss, including the cost of COBRA benefits and whether Cole's employment as a Special Assistant would constitute employment under the terms of Champion's deferred compensation plans. Kreindler informed Barrett in the e-mail that he was waiting from **[**44]** Collins on two of the other issues Champion was willing to discuss. (Kreindler Aff. P 12, docket no. 115.) Ultimately, the parties never reached a written agreement before Cole was terminated in October 2004.

The black-lined revision of the June draft constituted a counteroffer that operated as a rejection of an offer extended by Champion. ***HN21***[] Under both North Carolina and Michigan law, when a party makes a counteroffer, the original offer has been rejected and ceases to exist. *See* *Normile v. Miller, 313 N.C. 98, 106, 326 S.E.2d 11, 17 (N.C. 1985)*; *Kashat v. Prangs, 16 Mich. App. 76, 167 N.W.2d 603, 604 (Mich. Ct. App. 1969)*. Moreover, the September 2004 letter of intent from Cole to Champion contained proposals concerning Cole's compensation that were fundamentally inconsistent with the concept approved by the Board at its April 27 meeting. (Collins Aff. P 45, docket no. 114.) For instance, Cole presented the following terms concerning his compensation in the September 30, 2004, letter of intent: (1) a stock grant of 50,000 **[*629]** shares (in lieu of performance shares vesting over time); (2) immediate exercisability of all stock options; (3) the ability to exercise stock options at any time until the stated expiration date; (4) immediate vesting of deferred compensation; **[**46]** and (5) immediate release from all noncompetition terms. (Kreindler Aff. P 14 & Ex. H, docket no. 115.) Each of these requests was inconsistent with the concept outlined in the Power Point and the "agreement" that Cole contends that the parties had entered into. Furthermore, the proposal included additional terms that were not discussed in the Board materials or presentation from April 2004, including payment of certain retroactive salary amounts, payment of a $ 300,000 severance benefit, and payment of a pro-rated annual incentive based on a 9-month calculation period. (Collins Aff. P 45, docket no. 114.) The letter of intent also specifically stated that "the parties recognize again that this letter is intended to set forth a proposal . . . and . . . does not create any binding obligations." After Cole sent the letter of intent, the parties continued to negotiate on the proposed asset purchase and the various employment issues, with at least one more draft going back and forth, until Champion ultimately decided to terminate Cole's employment in October. (Kreindler Aff. P 15-17, docket no. 115.) Given the ongoing negotiations during the Summer of 2004, Cole's own objective conduct **[**47]** in this case demonstrates that he did not consider the terms that were presented to the Board to constitute a binding oral agreement.

---

[8] These items included the following: (1) as an alternative to the immediate vesting of Cole's performance shares if he were removed as President, Retail Operations, Barrett asked if Champion would consider alternative corporate-based benchmarks to replace the retail benchmarks in Cole's performance shares award; (2) modifying the term of Cole's employment as Special Assistant through early 2007 so that more potential performance shares and other equity compensation could vest; (3) as an alternative to full benefits during his part-time employment as Special Assistant, whether Champion was willing to allow Cole to pay for those benefits under COBRA; (4) as an alternative to no stocking requirement, whether Champion would consider lowering the percentage from 80% to 50%; and (5) as an alternative to the immediate vesting of Cole's performance shares if he were removed as President, Retail Operations, whether Champion would confirm that Cole's employment as Special Assistant would **[**45]** constitute employment under the terms of Champion's compensation plans and would not trigger a distribution. (Kreindler Aff. P 10, docket no. 115.)

In sum, I find that application of the following factors compels a conclusion that the parties intended a written agreement to govern any agreement regarding Cole's employment terms: (1) by virtue of the SEC rules alone, contracts with named executive officers are virtually always in writing; (2) the Power Point presentation was incomplete and the agreements and associated incentive compensation plans were complicated and detailed; (3) the amounts of Cole's incentive compensation, particularly if Champion's stock price rose, were significant; (4) the contract was novel and complicated; and (5) the parties indisputably--and without registering objection--negotiated, albeit unsuccessfully, the written agreements reflecting Cole's new arrangement. Moreover, all of Cole's prior employment agreements with Champion were reduced to writing and signed by Cole; the employment arrangement contemplated by the parties was unusual and "complicated"; Cole has admitted that from the time that discussions began with Champion about compensation, Cole contemplated that **[**48]** the agreements would be put into writing; Cole's own notes reveal that in July 2003, Collins--Champion's general counsel at the time--explained that any agreement about the terms and conditions of Cole's compensation needed to be in writing; Koch informed Cole that Champion's legal department would be preparing a writing for Cole's review; and during negotiations Cole's attorneys sent back substantial and substantive black-lined comments, but they never suggested that some "oral agreement" was already in place. These undisputed facts all demonstrate the existence of ongoing negotiations, rather than a "mere memorial" of an already agreed-upon contract. *See, e.g.,* *Key Motorsports, Inc., 40 F. Supp. 2d at 347-48* ("The exchange of letters between the parties here indicates that issues remained open for negotiation after the [alleged oral contract] meeting."). For all these reasons, I find that there was no enforceable contract according to the terms alleged by Cole. [9] In sum, viewed **[*630]** objectively, neither of the parties' actions evidence an intent to bind Champion to an employment agreement involving millions of dollars in wages, bonuses, and stock options based on a bullet-point sketch **[**49]** in the form of Power Point slides. Thus, it will be recommended that the court grant summary judgment to Champion as to Cole's breach of contract and N.C. Wage and Hour Act claims.

B. Whether Cole is Entitled to Severance Benefits under an Alleged March 2004 Oral Severance Agreement Between the Parties Pursuant to ERISA, *29 U.S.C. § 1132(a)(1)(B)*

In its prior motion to dismiss, Champion sought the dismissal of Cole's North Carolina Wage and Hour Act and breach of contract claims based on grounds of ERISA preemption. The court, in adopting the Recommendation **[**50]** of the undersigned on Champion's motion to dismiss, ruled that Cole had sufficiently alleged that the parties had entered into an oral agreement in 2004 for Champion to provide Cole with a severance plan. The court also ruled that the alleged March 2004 oral severance plan constitutes an employee welfare benefit plan under ERISA. The court further held that the N.C. Wage and Hour Act claim regarding the alleged severance plan was preempted by ERISA, but that it should be treated as a federal claim under ERISA, *29 U.S.C. § 1132(a)(1)(B)*. On summary judgment, Champion and SSH now argue that the undisputed facts show that Cole and Champion never entered into an enforceable agreement for a severance plan. Cole argues, on the other hand, that Koch and Cole entered into an oral agreement on March 25, 2004, in which Koch, acting on behalf of Champion, agreed that Cole would receive the same severance benefits that Champion was developing for all of Champion's *Rule 16(b)* officers. Cole further contends that the severance plan met all the requirements for it to constitute an "informal" severance plan under ERISA. According to Cole, Koch assured him that the severance plan would be in place **[**51]** by July 2004. Cole further contends that Koch also told him that the severance benefits would be comprised of salary continuations for at least one year and probably for longer than a year.

[9] Champion contends additionally that, to the extent there was an oral contract, Michigan's statute of frauds bars Cole's contract claims because Cole has alleged that he was promised to be employed for a term of 3 years. ***HN22***[] Under Michigan law, contracts that, by their terms, cannot be completed within a year from their making are subject to Michigan's statute of frauds. *MICH. COMP. LAWS § 566.132(1)(a)* (applying specifically to "[a]n agreement that, by its terms, is not to be performed within 1 year from the making of the agreement"). Since there was no oral contract to begin with, there is no need to address the statute of frauds argument.

It is undisputed that Champion's compensation officer Graskamp had been working on putting together severance agreements for Champion's *Rule 16(b)* officers but, due to Champion's delay, those agreements were not in place in July 2004. The Executive Officer Severance Pay Plan was not ready to go until September 13, 2004, and Graskamp presented the plan to Champion's Compensation Committee and Board in a meeting held on September 14, 2004. (Pl.'s Ex. 235, docket no. 123, filed under seal.) During the September 14 meeting, Graskamp learned that Cole was to be fired and scratched Cole's name off of the list of proposed participants of the severance plan. (Graskamp Dep. 290-92, Pl.'s Ex. H, docket no. 119.) Furthermore, at the same meeting, Griffiths obtained Board approval to terminate Cole's employment. Champion did not adopt the severance plan at the September 14, 2004, meeting. Instead, the plan was not adopted until November 22, 2004, after Cole was fired, with an effective date of December 1, 2004. **[**52]** Cole contends, nevertheless, **[*631]** that he should have received all of the benefits in the Executive Officer Severance Pay Plan which he was unlawfully deprived of by Champion's termination of his employment without cause on October 18, 2004. Cole contends that the Executive Officer Severance Pay Plan was clearly developed and the terms known at the time of Cole's termination. Cole contends, moreover, that these benefits had been promised to Cole on March 25, 2004, and based on this promise Cole agreed to remain employed by Champion.

The undisputed facts show that Cole is not entitled to any severance benefits. First, Cole's alleged promises about severance benefits came from individuals who had no authority to establish the severance plans. That is, regardless of Koch's alleged promises to Cole in March 2004 about the severance plan, it is undisputed that neither the Board nor the Compensation Committee approved any severance promise made by Koch. Furthermore, although the Board did adopt a severance plan in December 2004, Cole undisputably was not a participant in that plan, as his employment had already been terminated when the plan became operative. [10] Moreover, the "severance promises" **[**53]** that Cole seeks to enforce are far too vague and indefinite to give rise to a colorable claim for ERISA benefits. *See generally* *Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989)* (stating that ***HN23***[] for a former employee to have standing as a "participant," he must expect to return to covered employment or have a colorable claim to vested benefits); *McNabb v. Mich. Consol Gas Co., 656 F. Supp. 866, 868 (E.D. Mich. 1987)* (stating that "without a definite promise from" an employer, the employer was not bound to pay benefits; there is no obligation when the plan "contain[s] no 'statement which could conceivably be read as creating an obligation on the part of [the employer] to provide . . . benefits'"). That is, by Cole's own testimony, the terms of the severance plan were not known when Koch made his "severance promise." (*See* Cole Dep. 305 ("We had not reached agreement on the exact terms of that severance issue." [11])) Cole cannot create an enforceable right to severance benefits simply by relying on Koch's "predictions" as to the amount of severance benefits that would be payable under the plan then being developed by the Board's compensation consultant. Furthermore, Young's **[**54]** alleged brief reference in 2003 to Cole "having" a year's severance--without discussing the way in which the benefits would be paid, the conditions for their receipt, any definition of "cause," and any obligation of mitigation--cannot constitute the kind of definite promise to give rise to a claim for benefits under ERISA. *See* *Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077, 1082 (1st Cir. 1990)*.

Finally, **[**55]** it is undisputed that Champion offered Cole one year's salary as a severance payment after he was terminated. Although the severance package that was ultimately offered to Cole, but which Cole **[*632]** rejected, carried with it an obligation to sign a release, the same release is required by the severance benefit plan that Champion adopted for its *Rule 16(b)* officers in December 2004. For all these reasons, it will be recommended that the court find that the parties had not entered into an enforceable agreement for Cole to participate in a severance plan.

---

[10] Cole argues, alternatively, that Koch promised a severance plan that was independent of the Executive Officer Severance Pay Plan developed by Graskamp. Cole testified in his deposition, however, that Koch told him that he was going to be part of the plan being developed by Graskamp. (Cole Dep. 73.) Cole was clear that he was not being promised some "separate" severance agreement from other senior management. (Cole Dep. 72-73.) Thus, the only "severance benefit plan" that Koch discussed was the plan the Board adopted in December, after Cole's termination.

[11] Indeed, as Champion notes, Cole himself stopped short of claiming that he and Koch had "a deal" regarding severance. Cole testified only that Koch told him he would be included in the plan under development. (Cole Dep. 72.)

C. Whether Champion's Alleged Enforcement of the Noncompete Agreements Constituted an Illegal Restraint on Trade under *N.C. GEN. STAT. § 75-1*

Next, Cole is seeking a declaratory judgment from the court that the covenants not to compete that Cole entered into in the 2001 stock option agreements are invalid and unenforceable because their terms are unreasonable restraints on trade. When Cole filed his amended complaint in July 2005 seeking a declaratory judgment regarding the enforceability of the covenants, the covenants were still operative. By their own terms, however, both of those covenants expired in October 2006, which was two years after **[**56]** Cole's employment was terminated in October 2004. Thus, the court agrees with Champion that Cole's request for a declaratory judgment regarding the reasonableness of the covenants is moot. *See* 10B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2757 (3d ed. 1998) (***HN24***[] "[A] declaratory judgment cannot be given, if a matter has become moot.").

Cole, nevertheless, has asked the court to find that the covenants were unreasonable in order to further his argument that he is entitled to damages based on Champion's alleged violations of ***HN25***[] North Carolina's Chapter 75, which, *inter alia,* prohibits illegal restraints of trade and which provides for treble damages. [12] More specifically, North Carolina's restraint of trade statute provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal . . . ." *N.C. GEN. STAT. § 75-1*. In **[**57]** response, Champion has argued that the terms of the covenants were reasonable and, in any event, Champion is entitled to summary judgment on Cole's Chapter 75 restraint of trade claim. For the following reasons, I agree with Champion.

HN26[] "A covenant not to compete is 'basically an agreement in restraint of trade.'" *Market Am., Inc. v. Rossi, No. 1:97CV891, 1999 U.S. Dist. LEXIS 9793, 1999 WL 1939247, at *20 (M.D.N.C. Apr. 15, 1999)* (quoting *Wilmar, Inc. v. Liles, 13 N.C. App. 71, 74, 185 S.E.2d 278, 280 (1971))*. "'However, [North Carolina] courts have recognized the rule that a covenant not to compete is enforceable in equity' in some circumstances." *Id.* (quoting *Starkings Court Reporting Servs., Inc. v. Collins, 67 N.C. App. 540, 541, 313 S.E.2d 614, 615 (1984))*. A covenant not to compete is generally enforceable and not in restraint of trade only if it is (1) in writing; (2) made part of a contract of employment; (3) based on valuable consideration; (4) reasonable both as to time and territory; and (5) designed to protect a legitimate business interest of the employer. *Okuma Am. Corp. v. Bowers, 181 N.C. App. 85, 638 S.E.2d 617, 620 (N.C. Ct. App. 2007)*. When considering **[**58]** the enforceability of a covenant not to compete, a court examines the reasonableness of its time and geographic restrictions, balancing the substantial right of the employee to work with that of the employer to protect its legitimate business interests. *Id. at 618*. The covenants at issue state that Cole, for two years after his termination of employment, could not

> **[*633]** directly or indirectly . . . as owner, partner, joint venturer, employee, broker, agent, principal, trustee, corporate officer, licensor, consultant, or in any capacity whatsoever, engage in, become financially interested in, or have any connection with, any business located in the United States or Canada engaged in the production, sales, financing, insuring, or marketing of manufactured homes or the development of manufactured housing parks.

(Am. Compl. PP 18, 22, Exs. 3,4.) In arguing that the covenants are not enforceable, Cole contends that the covenants do not protect a legitimate business interest and, furthermore, that they are overbroad. Cole notes that Champion completely divested from its traditional retail housing operations in mid-2005 and that Champion divested from its financing company in 2003 and from its manufactured **[**59]** housing development division in 2005. Cole also notes that while working for the company, Cole was President of Champion Retail, and he did not have responsibility for Champion's manufacturing or other divisions. Cole asserts that the covenants are too broad to protect a legitimate business purpose, particularly considering Champion's divestiture of its retail division. *See, e.g., VisionAIR, Inc. v. James, 167 N.C. App. 504, 606 S.E.2d 359 (2004)* (holding that broad restrictions to areas

---

[12] *See* *N.C. GEN. STAT. § 75-16* (providing for treble damages).

beyond similar work performed were invalid); *Hartman v. W.H. Odell & Assocs., Inc., 117 N.C. App. 307, 317,450 S.E.2d 912, 920 (1994)* (holding that a covenant stating that an employee "may not 'own, manage, lease control, operate, participate, consult or assist' any 'entity' that provides 'actuarial services'" was overbroad and therefore not enforceable).

In response, Champion contends that the terms of the noncompetition agreements were entirely reasonably and the noncompetes were therefore enforceable against Cole. Champion notes that it did not immediately sell all of its traditional retail lots upon Cole's termination in October 2004 and that Champion retained significant traditional retail operations **[**60]** of its own through July 2005. (Collins Aff. PP 14-15, docket no. 114.) Champion further argues that even though it sold the traditional retail operations that it had owned, that Champion still retains a retail business in California with revenues exceeding $ 100 million a year and that Cole, as President of Retail, had direct responsibility for that business. Champion further contends that as a wholesaler it cannot be successful if its retail buyers dry up and that the vast majority of Champion's revenues, even when Company-owned retail was at its zenith, have been through independent dealers. (*Id.* P 18.) Champion contends that, for these reasons, Champion retained a valid interest in keeping an individual who ran its nationwide retail operations out of the traditional retail market for a reasonable period of time. According to Champion, Cole's entrance into the retail market on behalf of a competitor could easily threaten Champion's core business of selling product to retailers. Champion contends that not only does Cole have substantial resources, but he also has extensive, intimate, and confidential knowledge about virtually all aspects of Champion's business, derived from his receipt **[**61]** of detailed financial information, receipt of regular reports from the Company's CEO and CFO, and his participating in senior management meetings. (Collins Aff. PP 12, 18, 25-29, docket no. 114.) Champion contends that, for this reason alone, the noncompete agreements are enforceable against Cole.

Champion has sufficiently shown that the covenants not to compete were reasonably drafted to protect Champion's legitimate interests and they were, therefore, enforceable before they expired on their **[*634]** own terms. [13] In any event, Champion is not trying to enforce the covenants not to compete since they have expired on their terms. Rather, the parties have asked for a ruling on the issue of reasonableness on the assumption that it affects Cole's Chapter 75 restraint of trade claim. Even if I were to find, however, that the covenants at issue were unreasonable as to time, territory, etc., for the following reasons I would still find that Cole cannot recover damages for a Chapter 75 claim based on illegal restraint of trade.

HN27[] *N.C. GEN. STAT. § 75-1* "was based upon section one of the Sherman Act." *Rose v. Vulcan Materials Co., 282 N.C. 643, 655, 194 S.E.2d 521, 530 (1973)*. Accordingly, "the body of law applying the Sherman Act, although not binding upon [a court] in applying G.S. *§ 75-1*, is nonetheless instructive." *Id.; see also Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1196, 1220 (W.D.N.C. 1989)* (applying an identical analysis in dismissing both the Sherman Act and *N.C. GEN. STAT. § 75-1* claims), *aff'd, 912 F.2d 463 (4th Cir. 1990)*. Consistent with federal ***antitrust law*** and in order to recover damages for an unenforceable noncompete under North Carolina ***antitrust law***, Cole must prove both adverse impact and "antitrust injury." The requirement of "antitrust injury" reflects **[**63]** the oft-stated principle that the antitrust laws "were enacted for the 'protection of competition, not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*. To prove "antitrust injury," an antitrust plaintiff must prove "more than mere individual injury." *Patel v. Scotland Memorial Hosp., No. 3:94CV284, 1995 U.S. Dist. LEXIS 5258, 1995 WL 319213, at *5 (M.D.N.C. Mar. 31, 1995)*, *aff'd, 91 F.3d 132, 1996 WL 383920 (4th Cir. 1996)*; *see also* *Rose, 282 N.C. at 656, 194 S.E.2d at 530-31* (observing that actionable antitrust violations require "broad . . . interfere[nce] with the interest of the public");

[13] Moreover, the covenants not to compete specifically state that

> [i]f any one o[r] more of the terms contained [in the noncompetition agreement] shall for any reason be held **[**62]** to be excessively broad with regard to time, duration, geographic scope, or activity, that term shall be construed in a matter to enable it to be enforced to the maximum extent compatible with applicable law.

Thus, the terms of the noncompetition agreements specifically authorize the court to remove any unreasonable terms in the agreements so that the agreements could, nevertheless, be enforced with the reasonable terms intact.

NORTH CAROLINA LAW OF DAMAGES § 29-5 (5th ed. 2006) ("[N.C. GEN. STAT. § 75-1] was based upon section one of the Sherman Act and requires a prejudice to the public interest on a broad basis, not just action affording a fair protection to the parties, to be actionable.").

Furthermore, because the noncompetition provision that Cole challenges is contained in a stock option agreement, his antitrust claim is necessarily analyzed under a "rule of reason." The United States Supreme Court has stated that ***HN28***[] the rule of reason is the **[**64]** "standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract." *Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 689, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*; *see also* Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 269 (7th Cir. 1981) (applying rule of reason to antitrust claim based on employee noncompete agreements). Under the rule of reason, a party must show an adverse effect on competition as a whole within the relevant market. *See* R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 199 F. Supp. 2d 362, 380 (M.D.N.C. 2002); Stearns v. Genrad, Inc., 564 F. Supp. 1309, 1315 & 1318 **[*635]** (M.D.N.C. 1983). Therefore, a non-competition covenant may be unreasonable between the parties, yet still not violate a state's antitrust laws if the plaintiff cannot show an adverse effect on competition as a whole within the relevant market. As another state's supreme court has succinctly explained in discussing the rule of reason:

> Until recently, there were few attempts to apply ***antitrust law*** to post-employment noncompetition agreements. ***HN29***[] There can be little doubt that the Sherman Act applies to such agreements. However, it appears that **[**65]** no such noncompetition agreement has ever been held to violate the Sherman Act. One explanation for this absence of precedent may be the difficulty involved in proving that a post-employment noncompetition agreement violates the Sherman Act. Such agreements are not per se violations of the Sherman Act but must be analyzed under the rule of reason. To establish a violation under the rule of reason, one must prove that the agreement has an adverse effect on competition in the relevant market. This is distinguished from the effect a post-employment noncompetition agreement has on the particular employer and employee involved. Rule of reason analysis under antitrust laws must not be confused with reasonableness analysis under the common law. Rule of reason analysis tests the effect of a restraint of trade on *competition.* By contrast, whether a noncompetition agreement is reasonable depends upon its effect on the parties, the *competitors,* as it were. The two standards are not directly related. An agreement may be reasonable as between the parties and nevertheless violate antitrust laws. Conversely, an agreement may be unreasonable as between the parties and yet not violate the rule of reason **[**66]** test under the antitrust laws.

DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 687-88 (Tex. 1990) (citations omitted) (emphasis in original); *see also* 54A AM. JUR. 2d Monopolies § 841 (2007) (stating that ***HN30***[] "[e]ven an unreasonable covenant not to compete does not necessarily violate the [states'] antitrust laws; to constitute such a violation, there must be an adverse effect on the relevant market").

Moreover, as the Fourth Circuit has emphasized, ***HN31***[] "[t]he antitrust laws were not intended . . . as a vehicle for converting business tort claims into antitrust causes of action." *Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 711 (4th Cir. 1991)*. In *Oksanen,* the Fourth Circuit specifically "affirm[ed] the district court's . . . refusal to cloak in federal ***antitrust law*** what is in essence a workplace dispute." *Id. at 699*. The court reasoned that the plaintiff could not make out a federal antitrust claim "merely by showing that it caused him an economic injury" and stated that "[i]f the law were otherwise, many a . . . workplace grievance . . . would be elevated to the status of an antitrust action." *Id. at 708*. The court went on to hold that "[b]ecause [plaintiff] has failed to establish his restraint **[**67]** of trade and monopoly claims under federal law, his state law antitrust claims likewise fail." *Id. at 710*. *Accord* Patel, 1995 U.S. Dist. LEXIS 5258, 1995 WL 319213, at *5 (where a hospital's actions allegedly "destroyed" the plaintiff's medical practice, dismissing the plaintiff's federal and state antitrust claims because the plaintiff "failed to allege a cognizable antitrust injury" instead of a "mere individual injury," where there was no evidence of an effect of the hospital's actions on competition in the relevant market).

Cole cannot show an adverse effect on competition by merely showing that he was unreasonably restrained from competing with Champion. [14] The court agrees **[*636]** with Champion that keeping one individual out of the highly competitive and disperse mobile home market does not rise to the level necessary to show an antitrust violation. Rather, Cole must prove an adverse effect on competition as a whole in the relevant market, which he has failed to do; thus, Cole has not established the required antitrust injury. [15] *Accord* Stearns, 564 F. Supp. 1309, 1315 (granting summary judgment to the defendant on the plaintiff's Sherman Act and section 75-1 claims where the plaintiff "made no attempt to show **[**68]** any adverse effect upon competition in any relevant market. . . . [Plaintiff] made no study or other analysis of the other competitors in the market, or to what extent, if any, overall competition has been impaired as a result of the alleged restrictions."). Finally, I note that Cole's sole claims of damages based on "exclusion" from the market are personal investment losses he supposedly suffered. Cole has not shown, however, that he took any steps to do that which he now claims Champion unlawfully restrained him from doing during the two-year period after termination of his employment. ***HN32***[] An essential aspect of an antitrust claim is that the plaintiff must show "an intention and capacity to compete" against the defendant. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041, 1049 (E.D.N.C. 1979). To be sure, Cole maintains that he turned down several potentially lucrative investment opportunities during the two-year period before the noncompetes expired, but ***HN33***[] a prospective plaintiff cannot simply imagine a venture he *might* have undertaken in order to recover on an antitrust claim. *See generally* Hayes v. Solomon, 597 F.2d 958, 974, 976-77 (5th Cir. 1979) (holding that when **[**69]** facts showed "how far the proposed shopping center was from realization," plaintiffs could not recover antitrust damages for support "frustration of so ethereal a project"). For all these reasons, it will be recommended that the court grant summary judgment to Champion and SSH as to Cole's Chapter 75 restraint of trade claim.

CONCLUSION

For the reasons stated above, it is **RECOMMENDED** that the court **GRANT** summary judgment to Champion and SSH (docket no. 113) as to all of Cole's claims. It necessarily follows that Cole's own motion for summary judgment (docket no. 116) should be **DENIED.**

WALLACE W. DIXON

UNITED STATES MAGISTRATE JUDGE

June 5, 2007

End of Document

---

[14] Indeed, as Champion has pointed out, allowing Cole to prove a restraint of trade claim based on single injury alone would not only trivialize the antitrust laws, elevating mere workplace grievances to the status of an antitrust action, but http://vikings.kfan.com/sports/nflguide/default.aspxit would also turn the ever-changing field of noncompete law into a high-stakes gamble for employers, who could potentially face criminal sanctions under federal anti-trust laws for attempting to enforce a noncompete agreement that a court subsequently declares to be overbroad.

[15] Champion argues, alternatively, that North Carolina's restraint of trade statute does not even apply because Michigan, not North Carolina, bears the "most significant relationship" to the covenants not to compete. The court need not delve into the choice of law issue because, even assuming that the Michigan statute applies, Champion is entitled to summary **[**70]** judgment on the restraint of trade claim.

LexisNexis®

Kessel v. Monongalia County Gen. Hosp. Co.

Supreme Court of Appeals of West Virginia

February 27, 2007, Submitted; June 6, 2007, Filed

No. 33096

Reporter

220 W. Va. 602 *; 648 S.E.2d 366 **; 2007 W. Va. LEXIS 52 ***; 2007-1 Trade Cas. (CCH) P75,755

James S. Kessel, M.D., Richard M. Vaglienti, M.D., and Stanford J. Huber, M.D., Plaintiffs Below, Appellants v. Monongalia County General Hospital Company, d/b/a Monongalia General Hospital, a West Virginia non-profit corporation, Mark Bennett, M.D., individually, Bennett Anesthesia Consultants, P.L.L.C. and Professional Anesthesia Services, Inc., Defendants Below, Appellees,

Subsequent History: Dissenting Opinion by Justice Starcher Filed June 29, 2007.

Prior History: [*1]** Appeal from the Circuit Court of Monongalia County. The Honorable Russell M. Clawges, Jr., Judge. Civil Action No. 00-C-131.

Kessel v. Monongalia County Gen. Hosp. Co., 215 W. Va. 609, 600 S.E.2d 321, 2004 W. Va. LEXIS 32 (2004)

Disposition: AFFIRMED.

Core Terms

anti trust law, Sherman Act, per se violation, federal law, comparable, restraint of trade, antitrust statute, Appellants', provisions, contracts, interpreting, Antitrust, courts, circuit court, legislative rule, anesthesia, prices, Contractor, commerce, competitors, harmony, bid, conspiracy, regulation, partial summary judgment, judicial interpretation, price-fixing, depart, legislative intent, court's decision

LexisNexis® Headnotes

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Healthcare Law > Business Administration & Organization > General Overview

HN1[] **State Regulation, Claims**

Simply because a public or quasi-public hospital is prohibited, under West Virginia law, from entering into an exclusive contract with certain service providers does not automatically result in that same contract violating West Virginia antitrust laws. Violation of antitrust laws constitutes a separate legal inquiry.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

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

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

HN2[] **State Regulation, Claims**

See *W. Va. Code § 47-18-3*.

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

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

HN3[] **Standards of Review, De Novo Review**

Appellate review of a partial summary judgment order is the same as that of a summary judgment order, which is de novo. An appellate court will affirm the grant of summary judgment if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

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

Governments > Legislation > Interpretation

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

Where the issue on appeal is clearly a question of law or involving an interpretation of a statute, an appellate court applies a de novo standard of review.

Antitrust & Trade Law > General Overview

Governments > Legislation > Interpretation

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] **Antitrust & Trade Law**

Pursuant to *W. Va. Code § 47-18-16* (1978), the legislature has directed that the West Virginia Antitrust Act, *W. Va. Code § 47-18-1 et seq.*, shall be construed liberally and in harmony with ruling judicial interpretations of comparable federal antitrust statutes.

Antitrust & Trade Law > General Overview

Governments > Legislation > Interpretation

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN6[] **Antitrust & Trade Law**

The courts of West Virginia are directed by the legislature in *W. Va. Code § 47-18-16* (1978) to apply the federal decisional law interpreting the Sherman Act, *15 U.S.C.S. § 1*, to West Virginia's parallel antitrust statute, *W. Va. Code § 47-18-3(a)* (1978).

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

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Sherman Act, Scope**

See *15 U.S.C.S. § 1 (2004)*.

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN8[] **Sherman Act, Scope**

The primary distinction between *W. Va. Code § 47-18-3(a)* and *15 U.S.C.S. § 1 (2004)* is that the West Virginia statute applies to contracts and conspiracies in restraint of trade "in this State" while the federal statute is applicable to contracts and conspiracies "in restraint of trade or commerce among the several States, or with foreign nations."

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN9[] **Sherman Act, Scope**

The Sherman Act, *15 U.S.C.S. § 1 (2004)* et seq., may only apply to contracts which impact interstate commerce, and, absent a finding that interstate commerce is affected, would not apply to contracts affecting solely state matters. While the federal government may enact legislation declaring certain contracts illegal if they tend to lessen competition and impact interstate commerce, a state is not precluded from legislating as to matters of public policy with reference to contracts in restraint of trade by virtue of its inherent police power.

Governments > Legislation > Interpretation

HN10[] **Legislation, Interpretation**

A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it was intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

Governments > Legislation > Interpretation

HN11[] **Legislation, Interpretation**

When the legislature enacts laws, it is presumed to be aware of all pertinent judgments rendered by the judicial branch. By borrowing terms of art in which are accumulated the legal tradition and meaning of centuries of practice, the legislature presumably knows and adopts the cluster of ideas attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

Antitrust & Trade Law > General Overview

Governments > Legislation > Interpretation

HN12[] **Antitrust & Trade Law**

It is appropriate to consider the status of federal law at the time the West Virginia Antitrust Act, *W. Va. Code § 47-18-1 et seq.*, was enacted and determine whether the provisions of *W. Va. Code § 47-18-3(b)* evidenced an intent by the legislature to depart from federal ***antitrust law***, or whether the provisions of *W. Va. Code § 47-18-3(b)* are simply a codification of federal judicial decisions setting forth conduct deemed to be per se violations of *15 U.S.C.S. § 1 (2004)*.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] **Sherman Act, Scope**

Congress did not intend to prohibit all contracts by the Sherman Act, *15 U.S.C.S. § 1 (2004)* et seq., nor even all contracts that might in some insignificant degree or attenuated sense restrain trade or competition. In lieu of the narrowest possible reading of *15 U.S.C.S. § 1 (2004)*, the United States Supreme Court has adopted a "rule of reason" analysis for determining whether most business combinations or contracts violate the prohibitions of the Sherman Act. An analysis of the reasonableness of particular restraints includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption. While the court has utilized the "rule of reason" in evaluating the legality of most restraints alleged to be violative of the Sherman Act, it has also developed the doctrine that certain business relationships are per se violations of the Sherman Act without regard to a consideration of their reasonableness. It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act. One of the classic examples of a per se violation of *15 U.S.C.S. § 1* is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] **Regulated Practices, Price Fixing & Restraints of Trade**

Practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements. Price-fixing under *15 U.S.C.S. § 1* has been defined as a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce. Illegal price-fixing involves the elimination of competition because the power to fix prices, whether reasonably exercised or not, involves the power to control the market and to fix arbitrary and unreasonable prices. An agreement that interferes with the setting of price by free market forces is deemed per se illegal.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN15[] **Regulated Practices, Price Fixing & Restraints of Trade**

Noting the differing tests applicable to alleged per se activities and other violations of *15 U.S.C.S. § 1*, the United States Supreme Court has explained: certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused. Other combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect.

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN16[] **Sherman Act, Scope**

The legislature intended to codify certain activities deemed under federal law to be per se violations of *15 U.S.C.S. § 1* as per se violations of the West Virginia Antitrust Act, *W. Va. Code § 47-18-1 et seq.*

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Interpretation

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN17[] **Antitrust & Trade Law, Sherman Act**

Consistent with those activities deemed by federal judicial interpretation to be per se violations of *15 U.S.C.S. § 1*, *W. Va. Code § 47-18-3(b)* (1978) codifies comparable activities as per se violations of West Virginia ***antitrust law***. To the extent *W. Va. Code § 47-18-3* (1978) utilizes terms which are deemed "terms of art" under federal ***antitrust law***, the meanings attributed to such "terms of art" under federal ***antitrust law*** are incorporated into *W. Va. Code § 47-18-3* (1978) absent contrary statutory definitions set forth in the West Virginia Antitrust Act, *W. Va. Code § 47-18-1 et seq.*

Antitrust & Trade Law > General Overview

Governments > Legislation > Interpretation

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN18[] **Antitrust & Trade Law**

The West Virginia Antitrust Act, *W. Va. Code § 47-18-1 et seq.*, should be construed liberally and in harmony with federal decisional law interpreting comparable federal ***antitrust law*** provisions.

Constitutional Law > Separation of Powers

HN19[] **Constitutional Law, Separation of Powers**

While the legislature may indicate its intention that a statutory enactment be harmonized with federal law, fundamental principles of separations of powers preclude the legislature from requiring the courts of West Virginia to construe or interpret a statutory enactment in a particular manner. *W. Va. Const. art. VIII, § 1* vests the judicial power of West Virginia solely in a supreme court of appeals and in the circuit courts, and in such intermediate appellate courts and magistrate courts as shall be established by the legislature, and in the justices, judges, and magistrates of such courts. While the courts of West Virginia may elect to honor legislative enactments in aid of judicial power, they are clearly not bound to do so. The question therefore becomes, when should the Supreme Court of Appeals of West Virginia depart from a direction to look to federal law in interpreting or applying West Virginia law?

Constitutional Law > Separation of Powers

HN20[] **Constitutional Law, Separation of Powers**

See *W. Va. Const. art. V, § 1*.

Constitutional Law > Separation of Powers

HN21[] **Constitutional Law, Separation of Powers**

Direction for the Supreme Court of Appeals of West Virginia may come from legislative enactments or its own precedent.

Governments > Legislation > Interpretation

HN22[] **Legislation, Interpretation**

When presented with a recommendation from the legislature to look to federal law in interpreting a statute or with West Virginia's own precedent looking to federal law for guidance on a particular issue, several factors should guide a court's determination as to whether it should follow the federal courts' direction or whether it should determine that its interpretation of West Virginia law should be unique. For this consideration, a comparison of the specific language of the federal and state provisions at issue must be our primary starting point. A lack of significant distinctive language between the state and federal law at issue should dissuade the Supreme Court of Appeals of West Virginia from proceeding in a distinctive manner. Thus, where there is no significant distinction in the wording of the federal and state provisions, the Supreme Court of Appeals of West Virginia should be guided by federal decisions interpreting or applying the same unless a compelling reason to depart from the federal guidance is demonstrated. Accordingly, the legislative histories of the specific provisions at issue are important factors for the court to consider.

Governments > Legislation > Interpretation

HN23[] **Legislation, Interpretation**

The following factors are relevant to a determination as to when courts should comply with or depart from a specific statutory direction from the legislature to construe a particular statutory scheme in harmony with comparable federal statutes and judicial interpretations thereof: (1) similarity of language between the federal and West Virginia enactments, (2) similarities or distinctions between federal and state precedent interpreting and/or applying the particular enactment, (3) whether the legislative history of the West Virginia enactment evidenced an intent to follow federal law and precedent, (4) the use of terms of art or unique phrases which have gained accepted or uniform judicial interpretations or meanings, (5) the competing or similar interests the federal and state enactments were designed to protect, (6) whether harmonization of federal and state law will facilitate significant policy interests, and (7) such other factors as may serve as compelling considerations under the circumstances presented.

Antitrust & Trade Law > General Overview

Governments > Legislation > Interpretation

Antitrust & Trade Law > Sherman Act > General Overview

HN24[] **Antitrust & Trade Law**

W. Va. Code § 47-18-3(a) is comparable to federal antitrust statutes, specifically *15 U.S.C.S. § 1*, and *W. Va. Code § 47-18-3(b)* is likewise comparable in light of the federal jurisprudence construing *15 U.S.C.S. § 1*.

Antitrust & Trade Law > General Overview

HN25[] Antitrust & Trade Law

Both the West Virginia Antitrust Act, *W. Va. Code § 47-18-1 et seq.*, and the Sherman Act, *15 U.S.C.S. § 1 (2004)* et seq., appear designed to protect and promote a similar interest-competition in the marketplace.

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Governments > Legislation > Enactment

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

HN26[] Separation of Powers, Legislative Controls

A legislative rule can be deemed unenforceable if the regulation was beyond the constitutional or statutory authority extended to the agency involved or if the rule is determined to be arbitrary or capricious.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Governments > Legislation > Enactment

HN27[] Agency Rulemaking, Rule Application & Interpretation

Once a disputed regulation in legislatively approved, it has the force of a statute itself. Being an act of the West Virginia legislature, it is entitled to more than mere deference; it is entitled to controlling weight. As authorized by legislation, a legislative rule should be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

HN28[] Agency Rulemaking, Rule Application & Interpretation

To the extent an agency has exceeded its constitutional or statutory authority in promulgating a legislatively approved rule or regulation, the legislative rule "should be ignored."

Administrative Law > Agency Rulemaking > General Overview

HN29[] Administrative Law, Agency Rulemaking

See *W. Va. Code § 47-18-20* (1978).

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Governments > Legislation > Interpretation

HN30[] **Agency Rulemaking, Rule Application & Interpretation**

There is no question that when the rules of an agency come into conflict with a statute that the statute must control. Any rules or regulations drafted by an agency must faithfully reflect the intention of the legislature, as expressed in the controlling legislation. Where a statute contains clear and unambiguous language, an agency's rules or regulations must give that language the same clear and unambiguous force and effect that the language commands in the statute.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Governments > Legislation > Interpretation

HN31[] **Agency Rulemaking, Rule Application & Interpretation**

Though the courts have the power to harmonize a rule with an ambiguous statute, the courts must follow the will of the legislature when expressed with clarity.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Governments > Legislation > Interpretation

HN32[] **Agency Rulemaking, Rule Application & Interpretation**

The judiciary is the final authority on issues of statutory construction, and the courts are obliged to reject administrative constructions that are contrary to the clear language of a statute.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Governments > Legislation > Interpretation

HN33[] **Agency Rulemaking, Rule Application & Interpretation**

Even if a rule has the authority of a legislative rule, the deference the courts owe does not change. Even when considering a legislative rule, when a statute is clear, the courts owe no deference to the agency’s rule.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Governments > Legislation > Interpretation

HN34[] **Agency Rulemaking, Rule Application & Interpretation**

The clarity of legislative intent when enacting a statute is a primary consideration in determining the significance with attaches to a legislative rule promulgated thereunder. A court must reject administrative rules that are contrary to legislative intent.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Governments > Legislation > Interpretation

HN35[] Agency Rulemaking, Rule Application & Interpretation

Judicial review of an agency's legislative rule and the construction of a statute that it administers involves two separate but interrelated questions, only the second of which furnishes an occasion for deference. In deciding whether an administrative agency's position should be sustained, a reviewing court first must ask whether the legislature has directly spoken to the precise question at issue. If the intention of the legislature is clear, that is the end of the matter, and the agency's position only can be upheld if it conforms to the legislature's intent. No deference is due the agency's interpretation at this stage.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Governments > Legislation > Interpretation

HN36[] Agency Rulemaking, Rule Application & Interpretation

The courts are obligated to defer to an agency's view only when there is a statutory gap or ambiguity. However, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based upon a permissible construction of the statute.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Governments > Legislation > Interpretation

HN37[] Price Fixing & Restraints of Trade, Tying Arrangements

Tying is a concept distinct from those activities set forth in *W. Va. Code § 47-18-3(b)*. By specifically setting forth in *W. Va. Code § 47-18-3(b)* those activities it intended to constitute per se restraints of trade, the legislature triggered use of a fundamental principle of statutory construction, being expressio unius est exclusio alterius.

Governments > Legislation > Interpretation

HN38[] Legislation, Interpretation

In the interpretation of statutory provisions, the familiar maxim expressio unius est exclusio alterius, the express mention of one thing implies the exclusion of another, applies.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Governments > Legislation > Interpretation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

HN39[] Regulated Practices, Price Fixing & Restraints of Trade

Absent ambiguity in the enabling statute or the need to clarify what activities constitute the per se violations set forth in *W. Va. Code § 47-18-3(b)*, a legislative rule may not establish another category of per se violations. The legislative rule in *W. Va. C.S.R. § 142-15-3* may not reasonably be seen as an attempt to give meaning or clarify conduct satisfying the requirements of *W. Va. Code § 47-18-3(b)*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN40[] **Regulated Practices, Price Fixing & Restraints of Trade**

Illegal price-fixing requires a power to control the market and fix arbitrary prices, including an interference with the setting of prices by market forces. Simply requiring a contractor to set reasonable prices in accordance with prevailing market rates is insufficient as a matter of West Virginia law to establish a violation of West Virginia's ***antitrust law***.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

HN41[] **Regulated Practices, Price Fixing & Restraints of Trade**

Federal ***antitrust law*** clearly defines illegal market allocation as the division of territories by competitors at the same level of the market structure to minimize competition.

Antitrust & Trade Law > General Overview

HN42[] **Antitrust & Trade Law**

An illegal refusal to deal under *W. Va. Code § 47-18-3(b)(3)* is statutorily defined by reference to activities violating *W. Va. Code § 47-18-3(b)(1)*, *(2)*.

Syllabus

BY THE COURT

1. "Appellate review of a partial summary judgment order is the same as that of a summary judgment order, which is *de novo*." Syllabus Point 1, *West Virginia Department of Transportation, Division of Highways v. Robertson, 217 W. Va. 497, 618 S.E.2d 506 (2005)*.

2. "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syllabus Point 2, *Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995)*.

3. "The courts of this state are directed by the legislature in *W. Va. Code, 47-18-16* [1978] to apply the federal decisional law interpreting the Sherman Act, *15 U.S.C. § 1*, to our own parallel antitrust statute, *W. Va. Code, 47-18-3(a)* [1978]." Syllabus Point 2, *Gray v. Marshall County Board of Education, 179 W. Va. 282, 367 S.E.2d 751 (1988)*.

4. "A statute should be so read and applied as **[***2]** to make it accord with the spirit, purposes and objects of the general system of law of which it was intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith." Syllabus Point 5, *State v. Snyder, 64 W. Va. 659, 63 S.E. 385 (1908)*.

5. "'When the Legislature enacts laws, it is presumed to be aware of all pertinent judgments rendered by the judicial branch. By borrowing terms of art in which are accumulated the legal tradition and meaning of centuries of practice, the Legislature presumably knows and adopts the cluster of ideas attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.' Syl. pt. 2, in part, *Stephen L.H. v. Sherry L.H., 195 W. Va. 384, 465 S.E.2d 841 (1995)*." Syllabus Point 3, *CB&T Operations Company, Inc. v. Tax Commissioner of the State of West Virginia, 211 W. Va. 198, 564 S.E.2d 408 (2002)*.

6. **[***3]** Consistent with those activities deemed by federal judicial interpretation to be *per se* violations of Section 1 of the Sherman Act, *West Virginia Code § 47-18-3 (b)* (1978) codifies comparable activities as *per se* violations of West Virginia ***antitrust law***. To the extent *W. Va. Code § 47-18-3* (1978) utilizes terms which are deemed "terms of art" under federal ***antitrust law***, the meanings attributed to such "terms of art" under federal ***antitrust law*** are incorporated into *W. Va. Code § 47-18-3* (1978) absent contrary statutory definitions set forth in the West Virginia Antitrust Act.

7. Factors relevant to a determination that West Virginia courts should comply with or depart from a specific statutory direction from the Legislature to construe a particular statutory scheme in harmony with federal statutes and judicial interpretations thereof include: (1) similarity of language between the federal and West Virginia enactments; (2) similarities or distinctions between federal and state precedent interpreting and/or applying the particular enactment; (3) whether the legislative history of the West Virginia enactment evidenced an intent to follow federal law and precedent; (4) the use of terms **[***4]** of art or unique phrases which have gained accepted or uniform judicial interpretations or meanings; (5) the competing or similar interests the federal and state enactments were designed to protect; (6) whether harmonization of federal and state law will facilitate significant policy interests; and (7) such other factors as may serve as compelling considerations under the circumstances presented.

8. "Once a disputed regulation in legislatively approved, it has the force of a statute itself. Being an act of the West Virginia Legislature, it is entitled to more than mere deference; it is entitled to controlling weight. As authorized by legislation, a legislative rule should be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious." Syllabus Point 2, *West Virginia Health Care Review Authority v. Boone Memorial Hospital, 196 W. Va. 326, 472 S.E.2d 411 (1996)*.

9. "Judicial review of an agency's legislative rule and the construction of a statute that it administers involves two separate but interrelated questions, only the second of which furnishes an occasion for deference. In deciding whether an administrative agency's position should **[***5]** be sustained, a reviewing court applies the standards set out by the *United States Supreme Court in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)*. The court first must ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency's position only can be upheld if it conforms to the Legislature's intent. No deference is due the agency's interpretation at this stage. Syllabus Point 3, *Appalachian Power Co. v. State Tax Department of West Virginia, 195 W. Va. 573, 466 S.E.2d 424 (1995)*." Syllabus Point 4, *West Virginia Health Care Review Authority v. Boone Memorial Hospital, 196 W. Va. 326, 472 S.E.2d 411 (1996)*.

Counsel: Anthony J. Majestro, Powell & Majestro, P.L.L.C., Charleston, West Virginia and C. Michael Bee, Susan B. Tucker, Hill Peterson Carper Bee & Deitzler, P.L.L.C., Charleston, West Virginia, Attorneys for Appellants Richard D. Vaglienti, M.D. and Stanford J. Huber, M.D.

Frank E. Simmerman, Jr., Simmerman Law Office, P.L.L.C., Clarksburg, West Virginia, Attorney for Appellant James W. Kessel, M.D.

Gordon **[***6]** H. Copland, Amy M. Smith, Steptoe & Johnson, P.L.L.C., Clarksburg, West Virginia and John M. Fitzpatrick, LeClair Ryan, Richmond, Virginia, Attorneys for Appellee Monongalia County General Hospital d/b/a Monongalia General Hospital.

Charles T. Berry, Bowles Rice McDavid Graff & Love, L.L.P., Morgantown, West Virginia, Attorney for Appellees Bennett Anesthesia Consultants, P.L.L.C. and Mark Bennett, M.D.

Charles C. Wise, III, Bowles Rice McDavid Graff & Love, L.L.P., Morgantown, West Virginia, Attorney for Appellee Professional Anesthesia Services, Inc.

Brenda Nichols Harper, Charleston, West Virginia, Attorney for Amicus Curiae West Virginia Chamber of Commerce.

Kent J. George, Robinson & McElwee, P.L.L.C., Charleston, West Virginia, Attorney for Amicus Curiae, West Virginia Business and Industry Council.

Judges: JUSTICE BENJAMIN delivered the opinion of the Court. JUSTICE STARCHER dissents and reserves the right to file a dissenting opinion.

Opinion by: BENJAMIN

Opinion

[370] [*606] Benjamin, Justice:**

On December 29, 2005, the Circuit Court of Monongalia County entered an order granting partial summary judgment with respect to all claims arising under state ***antitrust law*** asserted by James W. Kessel, M.D., Richard D. Vaglienti, M.D. **[***7]** and Stanford J. Huber, M.D. (hereinafter collectively "Appellants") against Monongalia County General Hospital d/b/a Monongalia General Hospital (hereinafter "Monongalia General"), Mark Bennett, M.D., and Bennett Anesthesia Consultants, P.L.L.C. (hereinafter collectively "BAC"), and Professional Anesthesia Services, Inc. (hereinafter "PAS"). [1] In Count III of their complaints, which were consolidated for resolution before the circuit court, Appellants asserted that two "exclusive" contracts, one between Monongalia General and BAC and one between Monongalia General and PAS, for the provision of operative anesthesiology services at Monongalia General constituted a "restraint of trade" in violation of the West Virginia Antitrust Act, W. Va. *§ 47-18-1, et seq.*, (hereinafter the "WVATA"). According to the Appellants, the circuit court erred by (1) following federal precedent developed under the Sherman Act, *15 U.S.C. § 1, et seq.*, in interpreting the WVATA; (2) determining that the provisions of *W. Va. Code § 47-18-3(b)* (1978), were "comparable" **[**371] [*607]** to the Sherman Act; and (3) finding that the contracts at issue do not violate the *per se* restrictions contained in *W. Va. Code § 47-18-3(b)* and **[***8]** *W. Va. C.S.R. § 142-15-3* (1991). Upon due consideration of the arguments presented by the parties and the pertinent legal authorities, we affirm the circuit court's partial summary judgment order. [2]

I.

---

[1] By order dated March 30, 2006, the Circuit Court of Monongalia County amended its December 29, 2005, order to include language required by Rule 54(b) of the *West Virginia Rules of Civil Procedure* to permit Appellants to immediately appeal the December 29, 2005, order to this Court without waiting for their remaining claims to be adjudicated.

[2] We also acknowledge and appreciate the contribution of *amici curia* the West Virginia Chamber of Commerce and the West Virginia Business and Industry Council to the legal arguments presented for our consideration herein.

FACTUAL AND PROCEDURAL HISTORY

On March 24, 1975, Monongalia Anesthesia Associates (hereinafter "MAA") entered into a contract with Monongalia General for the exclusive provision of anesthesia services at the hospital. [3] Each of the appellants were shareholders and employees of MAA. In the early 1990's the MAA and Monongalia General began a renegotiation of the contract. Although the result of these negotiations is not clear from the **[***9]** record before this Court, it appears that MAA continued to exclusively provide the anesthesiological services, except for cardio-thoracic surgeries, at Monongalia General until December 30, 1998, when Monongalia General entered the contract with BAC, at issue herein, for the exclusive provision of orthopedic surgical anesthesia. Thereafter, Monongalia General and MAA were unable to reach an agreement regarding MAA's exclusive provision of all non-cardio-thoracic and non-orthopedic surgical anesthesia services at the hospital. Monongalia General then solicited a request for proposal from a number of providers of surgical anesthesia services, including MAA, for the exclusive provision of these remaining surgical anesthesia services. As a result of this solicitation, Monongalia General entered the contract with PAS, at issue herein.

Subsequently, Appellants initiated suit alleging tortious interference with business relationships, due process violation/failure to provide a fair hearing pursuant to medical staff by-laws, restraint of trade, breach of contract and breach of the covenants of good faith and fair dealing. Previously, in *Kessel v. Monongalia General Hospital Company, DBA Monongalia General Hospital, 215 W. Va. 609, 600 S.E.2d 321 (2004)* (hereinafter "*Kessel I*"), this Court responded to a question certified by the circuit court regarding Monongalia General's ability to enter into exclusive contracts. Appellants' antitrust claims were not at issue in *Kessel I*. In *Kessel I*, this Court examined Monongalia General's legal authority to enter into exclusive contracts in light of its status as a quasi-public hospital. Monongalia General's status as a quasi-public hospital was significant because, subject to compliance with applicable law and hospital rules and regulations, a "physician or surgeon is entitled to **[***12]** practice in the public hospitals of this state" and that "quasi-public hospitals have the same duty as public hospitals to admit regularly licensed **[**372]** **[*608]** physicians to membership on their medical staffs." Syl. pts. 9 and 11, *Kessel I*, in part. In light of these findings, this Court held, in syllabus point 12 of *Kessel I*, that "a public or quasi-public hospital may not enter into exclusive contracts with medical service providers that have the effect of completely excluding other physicians who have regular staff privileges at the hospital from the use of the hospital's medical facilities." An important consideration for the Court in *Kessel I* was a patient's right to choose his or her physician. Therefore, while prohibiting exclusive contracts in public and quasi-public hospitals, the Court noted that the hospital may still enter into preferential contracts pursuant to which the hospital contracts with primary service providers who then provide the designated service *unless* a patient requests that another staff physician perform the service. *Kessel I, 215 W. Va. at 621, 600 S.E.2d at 333*.

Contrary to Appellants' suggestion, this Court's decision in *Kessel I* does not impact their claims regarding **[***13]** violation of the WVATA. ***HN1***[] Simply because a public or quasi-public hospital is prohibited, under West

[3] Although an actual copy of the 1975 contract does not appear in the record before this Court, various letters written by MAA counsel and representatives are contained within the record and confirm the existence of such a contract. For example, a June 30, 1989, letter written by Michael J. Dempster, counsel for MAA during renegotiation of the contract states **[***10]** "the current agreement, that was signed on March 24, 1975, contemplates anesthesia services being provided exclusively by Mon Anesthesia Associates." Additionally, a June 20, 1987, letter authored by Erdogan Ternan, M.D., MAA President, related to the "provision of anesthesia services for the open heart surgical procedures" by an anesthesia team from West Virginia University Hospital and gave "our consent to this approach *as an exception to our otherwise exclusive right to provide anesthesia services at Monongalia General Hospital*." (Emphasis added). The June 20, 1987, letter also stated that the consent was "limited to the provision of anesthesia services in connection with open heart surgery. In all other respects, the existing agreement between [MAA] and the Hospital [was to] continue[] in full force and effect." Additionally, a Letter of Agreement was signed by Appellant Huber, as president of MAA, on June 23, 1992, documented a preliminary agreement between MAA and Monongalia General for the provision of anesthesia services through December 31, 1992, and an agreement to work "in good faith to develop and execute, by December 31, 1992, a contract for exclusive anesthesia services, **[***11]** excluding cardio-thoracic (open-heart) surgery services." Further, Monongalia General agreed therein to "not seek a permanent anesthesia services contract from any other group" during that time period.

Virginia law, from entering into an exclusive contract with certain service providers does not automatically result in that same contract violating our antitrust laws. [4] Violation of anti-trust laws constitutes a separate legal inquiry.

Appellants' complaints allege that Monongalia General's contracts with BAC and PAS are a "restraint of trade" which constitute "exclusive dealings." Although their complaints simply assert "restraint of trade," Appellants rely upon *W. Va. Code § 47-18-3(b)* and *W. Va. C.S.R. § 142-15-3* in support of their claims before both the circuit court and this Court. *West Virginia Code § 47-18-3*, entitled "Contracts and combinations in restraint of trade," provides:

> (***HN2***[] a) **[***14]** Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in this State shall be unlawful.
> (b) Without limiting the effect of subsection (a) of this section, the following shall be deemed to restrain trade or commerce unreasonably and are unlawful:
> (1) A contract, combination or conspiracy between two or more persons:
> (A) For the purpose or with the effect of fixing, controlling, or maintaining the market price, rate or fee of any commodity or service; or
> (B) Fixing, controlling, maintaining, limiting or discontinuing the production, manufacture, mining, sale or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect of fixing, controlling or maintaining the market price, rate or fee of the commodity or service; or
> (C) Allocating or dividing customers or markets, functional or geographic, for any commodity or service.
> (2) A contract, combination or conspiracy between two or more persons whereby, in the letting of any public or private contract:
> (A) The price quotation of any bid is fixed or controlled; or
>
> (B) One or more persons submits a bid intending it to be higher than another bid and thus complementary **[***15]** thereto, submits a bid intending it to be substantially identical to another bid, or refrains from the submission of a bid.
> (3) A contract, combination or conspiracy between two or more persons refusing to deal with any other person or persons for the purpose of effecting any of the acts described in subdivisions (1) and (2) of this subsection.

According to Appellants, the provisions of *W. Va. Code § 47-18-3(b)* deem contracts which fix prices, allocate markets or create exclusive dealing to be *per se* illegal. Additionally, Appellants contend that *W. Va. C.S.R. § 142-15-3.1*, which provides:

> [i]t shall be unlawful under *W. Va. Code §§ 47-18-3*, *4* for any person or group of persons to enter into tie-in agreements. **[**373]** **[*609]** Such agreements include, but are not limited to, agreements which condition or have the effect of conditioning the sale of one product or service upon the purchase of another product or service[,]

creates another category of practices, i.e., tying arrangements, which are *per se* illegal under West Virginia law. Relying upon the argued *per se* designation, Appellants maintain that they are not required to undergo a market analysis to proceed with their claims. Pursuant to this argument, **[***16]** Appellants need only point to contractual provisions which fix prices, allocate anesthesia services at Monongalia General to a particular provider and/or demonstrate an agreement to deal exclusively in order to prevail.

Appellants argue that Monongalia General's contracts with BAC and PAS constitute market allocation and exclusive dealings because they limit the persons who may provide surgical anesthesia services at the hospital. Further, the contracts constitute tying arrangements, according to Appellants, because they tie the availability of surgical procedures at Monongalia General to specific anesthesia providers. Finally, Appellants argue that the contracts at

---

[4] In undertaking this analysis it is significant to remember that the exclusive contracts at issue herein where entered *prior to* this Court's determination that Monongalia General could not enter into exclusive contracts due to its status as a quasi-public hospital.

issue constitute price fixing due to specific contractual provisions regarding the fees BAC and PAS will charge for anesthesia services performed. The provision in the BAC contract relied upon by Appellants states:

> 5.1-1 **Schedule(s) of Contractor Charges.** Contractor will establish schedule of fees, which fees shall be reasonable in light of those fees prevailing in the Hospital's service area, to be charged to all third party payors and patients for Orthopedic Anesthesiology Services to Patients by Contractor. The fees charged **[***17]** by Contractor on the date of this Agreement shall be the initial schedule of fees for the Contractor. If at any time during the term of this Agreement Contractor desires to revise its schedule of fees, it shall provide Hospital with written notice of its proposed schedule of fees, which notice shall specify the date (at least 45 days after the date of delivery of the notice) on which the new fees are to come into effect. . . .

This contractual provision continues to provide a procedure for Monongalia General to object to the proposed fee change. The BAC contract requires BAC to bill patients separately for its services and to be responsible for its own fee collections. Further, the contract provides that Monongalia General will not compensate BAC for the services provided to patients in the hospital. Similarly, the fee provision in the PAS contract relied upon by Appellants states:

> 5.1-1 **Schedule(s) of Contractor Charges.** Contractor shall establish a schedule of fees representing Contractor's full compensations for professional services rendered by contractor to patients. Such schedule must, at all times, comply with the applicable laws, rules, regulations, and contractual arrangements **[***18]** with and between Contractor and third party payors. The fees set out therein must, at all times, be reasonable and competitive.

The PAS contract likewise provides that PAS will bill and collect separately for its services and is not entitled to additional compensation from Monongalia General.

Appellees counter that terms such as "price-fixing," "market allocation," "exclusive dealing" and "tying" are terms of art which, pursuant to West Virginia law, require a court to look to well-developed federal precedent to define. Appellees argue that conduct or agreements which constitute the *per se* violations outlined in *W. Va. Code § 47-18-3(b)* gain meaning by examination of federal court decisions defining *per se* violations of the Sherman Act. Further, Appellees argue that a legislative rule cannot create a *per se* violation which is not set forth within the WVATA where the WVATA enumerates certain *per se* violations.

After detailed analysis of the parties' arguments, the circuit court granted Appellee's motion for partial summary judgment finding that the Appellants' antitrust claims fail as a matter of law. This appeal followed. For the reasons set forth below, we agree that partial summary **[***19]** judgment was appropriate in this matter. Accordingly, we affirm the decision of the Circuit Court of Monongalia County finding Appellant's antitrust claims fail as a matter of law.

[374] [*610] II.**

STANDARD OF REVIEW

We begin by recognizing that the ***HN3***[] "[a]ppellate review of a partial summary judgment order is the same as that of a summary judgment order, which is *de novo*." Syllabus Point 1, *West Virginia Department of Transportation, Division of Highways v. Robertson, 217 W. Va. 497, 618 S.E.2d 506 (2005)*. *See also* Syl. Pt. 1*, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994)* ("[a] circuit court's entry of summary judgment is reviewed *de novo*."). We will affirm the grant of summary judgment "if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 2, *Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995)*. However, to the extent this matter may be construed as presenting a question of statutory interpretation, the applicable standard of review is likewise **[***20]** *de novo*. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995)* (***HN4***[] "Where the issue on appeal is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.").

III.

DISCUSSION

In order to resolve the matter presented herein, we must resolve several legal issues. First, this Court must clarify the extent to which West Virginia courts should look to federal law for guidance in applying the provisions of the WVATA. Additionally, we will address Appellants' argument that a legislative rule may designate practices deemed to be violations of our antitrust laws when the same are not included within those practices specifically set forth within the enabling statute itself. Finally, once the appropriate legal standards are clarified, analysis of Appellants' claims in light of the same is required.

A.

Federal Law as Persuasive Authority

In their first assignment of error, Appellants contend that the circuit court erred in applying federal law when analyzing their claims. ***HN5***[] Pursuant to *W. Va. Code § 47-18-16* (1978), the Legislature has directed that the WVATA "shall be construed liberally and in harmony with ruling judicial interpretations **[***21]** of comparable federal antitrust statutes." Moreover, this Court held in Syllabus Point 2 of *Gray v. Marshall County Board of Education, 179 W. Va. 282, 367 S.E.2d 751 (1988)*, that ***HN6***[] "[t]he courts of this state are directed by the legislature in *W. Va. Code, 47-18-16* [1978] to apply the federal decisional law interpreting the Sherman Act, *15 U.S.C. § 1*, to our own parallel antitrust statute, *W. Va. Code, 47-18-3(a)* [1978]." Appellants argue that because their claims are based upon *subsection (b) of W. Va. Code § 47-18-3* and not *subsection (a)*, federal decisional law is irrelevant. Indeed, this Court has noted that it is not bound to apply federal law in determining the scope of the WVATA where the federal and state provisions are not "comparable." *State ex rel. Palumbo v. Graley's Body Shop, Inc., 188 W. Va. 501, 507, 425 S.E.2d 177, 183 (1992)*.

The distinction between *subsections (a)* and *(b) of W. Va. Code § 47-18-3* is not as clear as Appellants would argue. As noted above, Appellants simply alleged "restraint of trade" in their complaint. Arguably, *subsection (a)* which provides that contracts "in restraint of trade or commerce" are deemed unlawful in this State is therefore relevant. **[***22]** In an effort to avoid reference to federal law, however, Appellants contend that their claims are based solely upon *W. Va. Code § 47-18-3(b)*, which they deem as a codification of practices deemed to be *per se* restraints of trade without reference to either *subsection (a)* or federal law. Arguing that the Sherman Act does not codify similar *per se* practices deemed to restrain trade, Appellants maintain there is no "comparable" federal law to apply. After consideration of the status of federal law at the time the WVATA was enacted, we reject Appellants' comparability argument.

[375] [*611] i.**

Comparability of *W. Va. Code § 47-18-3(b)* to federal Sherman Act precedent

The crux of Appellants' argument is that *W. Va. Code § 47-18-16*'s direction to construe the WVATA "in harmony with ruling judicial interpretations of comparable federal antitrust statutes" applies only to those claims brought under *W. Va. Code § 14-18-3(a)* because it is that provision which corresponds to the Sherman Act. Specifically, Appellant's argue the only "comparable" federal antitrust statute is *15 U.S.C. § 1* (hereinafter "Section 1 of Sherman Act") which states:

> ***HN7***[] Every contract, combination in the form of trust or otherwise, or conspiracy, **[***23]** in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 100,000,000 if a corporation, or, if any other person, $ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (2004). [5] **HN8**[] The primary distinction between W. Va. Code § 47-18-3 (a) and Section 1 of the Sherman Act is that the West Virginia statute applies to contracts and conspiracies in restraint of trade "in this State" while the federal statute is applicable to contracts and conspiracies "in restraint of trade or commerce among the several States, or with foreign nations." [6]

The Sherman Act was initially enacted in 1890, eighty-eight years prior to the WVATA. In National Society of Professional Engineers v. United States, 435 U.S. 679, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978), the United States Supreme Court recognized that "Congress, . . ., did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it **[***25]** expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." National Soc. of Prof. Eng., 435 U.S. at 688, 98 S. Ct. at 1363. Nearly a century of judicial precedent defining and interpreting the scope of Section 1 of the Sherman Act and conduct constituting a violation thereof was therefore available to the Legislature at the time the WVATA was enacted with its direction that it be construed in harmony with judicial interpretations of comparable federal antitrust statutes. This Court has long held that:

> **HN10**[] A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it was intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

Syl. Pt. 5, State v. Snyder, 64 W. Va. 659, 63 S.E. 385 (1908). *See also*, Syl. Pt. 1, State v. White, 188 W. Va. 534, 425 S.E.2d 210 (1992) **[***26]** (same). Additionally, this Court has held:

> **[**376] [*612]** **HN11**[] '[w]hen the Legislature enacts laws, it is presumed to be aware of all pertinent judgments rendered by the judicial branch. By borrowing terms of art in which are accumulated the legal tradition and meaning of centuries of practice, the Legislature presumably knows and adopts the cluster of ideas attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.' Syl. pt. 2, in part, Stephen L.H. v. Sherry L.H., 195 W. Va. 384, 465 S.E.2d 841 (1995).

Syl. Pt. 3, CB&T Operations Co., Inc. v. Tax Comm'r, 211 W. Va. 198, 564 S.E.2d 408 (2002). In light of these decisions, we must presume that the Legislature knew the scope of federal ***antitrust law*** and the terms of art utilized therein at the time it enacted the WVATA and directed its construction in harmony with federal law. Therefore, **HN12**[] it is appropriate to consider the status of federal law at the time the WVATA was enacted and determine whether the provisions of W. Va. Code § 47-18-3 (b) evidenced an intent by the Legislature to depart from federal ***antitrust law***, as Appellants argue, or whether the **[***27]** provisions of W. Va. Code § 47-18-3 (b) are simply a codification of federal judicial decisions setting forth conduct deemed to be *per se* violations of Section 1 of the Sherman Act.

---

[5] Although Section 1 of the Sherman Act has been amended since the time that the WVATA was enacted, those amendments do not affect the substantive portion at issue herein, i.e., the first sentence, but, instead, impact the penalty provisions.

[6] Appellants' argument that to construe the WVATA in harmony with federal **[***24]** law creates a redundancy pursuant to which the WVATA is superfluous for the federal act is easily dismissed under fundamental principles of federalism. **HN9**[] The federal act may only apply to contracts which impact interstate commerce, and, absent a finding that interstate commerce is affected, would not apply to contracts affecting solely state matters. While the federal government may enact legislation declaring certain contracts illegal if they tend to lessen competition and impact interstate commerce, a state is not precluded from legislating as to matters of public policy with reference to contracts in restraint of trade by virtue of its inherent police power. Mathews Conveyer, Co. v. Palmer-Bee, Co., 135 F.2d 73, 82 (6th Cir. 1943).

In United States v. Topco Associates, Inc., 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972), the United States Supreme Court explained the development of law, including *per se* restrictions, under Section 1 of the Sherman Act as follows:

> On its face, § 1 of the Sherman Act appears to bar any combination of entrepreneurs so long as it is "in restraint of trade." Theoretically, all manufacturers, distributors, merchants, sellers, and buyers could be considered as potential competitors of each other. Were § 1 to be read in the narrowest possible way, any commercial contract could be deemed to violate it. The history underlying the formulation of the antitrust laws led this Court to conclude, however, that **HN13**[] Congress did not intend to prohibit all contracts, nor even all contracts that might in some insignificant degree or attenuated sense restrain trade or competition. In lieu of the narrowest possible reading of § 1, the Court adopted a "rule of reason" analysis for determining whether most business combinations **[***28]** or contracts violate the prohibitions of the Sherman Act. An analysis of the reasonableness of particular restraints includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption.
>
> While the Court has utilized the "rule of reason" in evaluating the legality of most restraints alleged to be violative of the Sherman Act, it has also developed the doctrine that certain business relationships are *per se* violations of the Act without regard to a consideration of their reasonableness.
>
> . . .
>
> It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act. One of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition.

Topco, 405 U.S. at 606-8, 92 S. Ct. at 1133 (internal citations omitted). Discussing *per se* violations of Section 1 of the Sherman Act, the Supreme Court, has recognized that **HN14**[] "practices which the courts have heretofore deemed to be unlawful **[***29]** in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements." Northern Pacific Railway Company v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L.E.2d 545 (1958) (internal citations omitted). [7] Price-fixing under Section 1 of the **[**377]** **[*613]** Sherman Act has been defined as "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 60 S. Ct. 811, 844, 84 L. Ed. 1129 (1940). Illegal price-fixing involves the elimination of competition because the "power to fix prices, whether reasonably exercised or not, involves the power to control the market and to fix arbitrary and unreasonable prices." Arizona v. Maricopa Cnty. Med. Soc., 457 U.S. 332, 345,102 S. Ct. 2466, 2473, 73 L. Ed. 2d 48 (1982), *quoting* United States v. Trenton Potteries Co., 273 U.S. 392, 397-8, 47 S. Ct. 377, 379, 71 L. Ed. 700 (1927). An agreement that "interfere[s] with the setting of price by free market forces"

---

[7] **HN15**[] Noting **[***30]** the differing tests applicable to alleged *per se* activities and other violations of Section 1 of the Sherman Act, the Supreme Court has explained:

> Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal *per se* without inquiry into the harm it has actually caused. See generally Northern Pacific R. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958). Other combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect. See, *e.g.,* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568, (1977); Chicago Board of Trade v. United States, 246 U.S. 231, 38 S. Ct. 242, 62 L. Ed. 683, (1918).

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 2740, 81 L. Ed. 2d 628 (1984).

is deemed *per se* illegal. *United States v. Container Corp., 393 U.S. 333, 337, 89 S. Ct. 510, 512, 21 L. Ed. 2d 526 (1969)*.

Likewise, an "agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition" was recognized as a classic example **[***31]** of a *per se* Sherman Act violation. *Topco, 405 U.S. at 608, 92 S. Ct. at 1133*. Agreements to control bids submitted during the letting of a contract in an effort to control the price or diminish competition are also deemed *per se* violations. *Addyston Pipe and Steel Company v. United States, 175 U.S. 211, 242-5 20 S. Ct. 96, 107-9, 44 L. Ed. 136 (1899)* (an agreement between competitors to establish bids to be submitted for letting of a contract, permitting one party to obtain the minimum bid and the others to bid higher constitutes a violation of the Sherman Act); *National Soc. of Prof. Engineers v. United States, 435 U.S. 679, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)* (engineering association's canon of ethics that prohibits competitive bidding by its members constituted a *per se* Sherman Act violation). In *Fashion Originators' Guild of America v. Federal Trade Commission, 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949, 32 F.T.C. 1856 L. Ed. 2d (1941)*, the Supreme Court found an agreement which:

> narrows the outlets to which garment and textile manufacturers can sell and the sources from which retailers can buy; subjects all retailers and manufacturers who decline to comply with the Guild's program to an organized boycott; **[***32]** takes away the freedom of action of members by requiring each to reveal to the Guild the intimate details of their individual affairs; and has both as its necessary tendency and as its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copied designs

to violate *Section 1* of the Sherman Act. *Fashion Originators' Guild, 312 U.S. at 465, 61 S. Ct. at 707* (internal citations omitted). As the Supreme Court further explained:

> Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court [has] said such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.

Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212, 79 S. Ct. 705, 709, 3 ***[**378] [*614]*** *L. Ed. 2d 741 (1959)* **[***33]** (internal quotations and citations omitted).

As recognized above, the Legislature is presumed to have known the status of federal ***antitrust law*** at the time it enacted the WVATA and directed its construction in harmony therewith. After exhaustive examination and consideration of the United States Supreme Court Sherman Act cases cited above and their progeny, this Court believes that ***HN16***[] the Legislature intended to codify certain activities deemed under federal law to be *per se* violations of *Section 1* of the Sherman Act as *per se* violations of the WVATA. This conclusion is reinforced by the two jurisdictions noted by the Appellants to have similar *per se* violation codifications.

In arguing that the *per se* provisions included in *W. Va. Code § 47-18-3 (b)* should be applied without consideration of federal ***antitrust law***, Appellants point to the inclusion of similar *per se* statutory violations codified in Illinois and Minnesota law. However, upon examination of Minnesota and Illinois law to determine the position of those jurisdictions upon the consideration of federal ***antitrust law*** in applying their statutory *per se* provision, this Court notes that both Illinois and Minnesota find federal ***antitrust*** **[***34]** ***law*** relevant and persuasive.

For example, Illinois has codified what are deemed to be *per se* violations of its ***antitrust law*** in *740 Ill.Comp.Stat. 10/3(1)* (1982). [8] The bar committee notes accompanying this statutory enactment specifically acknowledge the relevance of federal law. Explaining the purpose of the *per se* statutory provisions, the Committee stated:

---

[8] This statute states, in pertinent part,

> The basic prohibitions of the [antitrust] statute are found in Section 3. *Section 3(1) proscribes certain of the offenses which under federal law are termed "per se" offenses* and are commonly deemed to constitute the most serious restraints upon competition. To them, criminal as well as civil penalties are attached. The conduct proscribed by Section 3(1) is violative of the Act without regard to, and the courts need not examine, the competitive and economic purposes and consequences of such conduct.
>
> Section 3(1) is expressly limited to agreements between two classes of persons: (a) those who are competitors and (b) those persons who, but for a prior agreement, would be competitors. This latter class includes agreements between persons who are not currently competitors, but were at some time in the past and subsequently agreed to **[***35]** cease competing. It also includes agreements not to compete between persons who have never been competitors, but who would have become competitors but for such an agreement.
> In general, Section 3(1) is designed to reach the "hard core" conspiratorial offenses of price fixing, limitations on production, and allocation of markets or customers.

(Emphasis added). In *People v. Crawford Distributing Company, 53 Ill. 2d 332, 291 N.E.2d 648, 652 (Ill. 1972)*, the Illinois Supreme Court noted that while not binding, "the Federal antitrust experience under the Sherman Act is applicable to questions arising under the Illinois Antitrust Act and can serve as a useful guide." *See also*, *Collins v. Associated Pathologists, Ltd., 844 F.2d 473, 480 (7th Cir. 1988)*, *cert. denied 488 U.S. 852, 109 S. Ct. 137, 102 L. Ed. 2d 110 (1988)* (noting that where state ***antitrust law*** claims are based on statutory language which parallels the Sherman **[**379]** **[*615]** Act, the state law claims will fail where a Sherman Act claim also fails).

Further, in *State by Humphrey v. Alpine Air Products, Inc., 490 N.W.2d 888 (Minn. Ct. App. 1992)*, *aff'd*, *500 N.W.2d 788 (Minn. 1993)*, the Minnesota Court of Appeals noted that Minnesota's antitrust act [9] "codified the pre-

---

> *§ 3*. Every person shall be deemed to have committed a violation of this Act who shall:
>
> > (1) Make any contract with, or engage in any combination or conspiracy with, any other **[***36]** person who is, or but for a prior agreement would be, a competitor of such person:
> >
> > a. for the purpose or with the effect of fixing, controlling, or maintaining the price or rate charged for any commodity sold or bought by the parties thereto, or the fee charged or paid for any service performed or received by the parties thereto;
> >
> > b. fixing, controlling, maintaining, limiting, or discontinuing the production, manufacture, mining, sale or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect stated in paragraph a. of subsection (1);
> >
> > c. allocating or dividing customers, territories, supplies, sales, or markets, functional or geographical, for any commodity or service[.]

[9] We note that the Minnesota antitrust statutes at issue in *Alpine Air* are substantively identical to *W. Va. Code § 47-18-3 (a)* and *(b)(1)*. *Minn.Stat. § 325D.51*, at issue in *Alpine Air* provided "a contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade is unlawful." *W. Va. Code § 47-18-3 (a)*, by contrast includes the term "every" before contract **[***38]** and includes the phrase "in this State shall" in lieu of the term "is" in the Minnesota statute. Similarly, the statutory *per se* violations set forth in *Minn. Stat. § 325D.53* at issue in *Alpine Air* were set forth in Subdivision 1 of that statute and state:

> Without limiting *section 325D.51*, the following shall be deemed to restrain trade or commerce unreasonably and are unlawful:
>
> (1) A contract, combination, or conspiracy between two or more persons in competition:
>
> > (a) for the purpose or with the effect of affecting, fixing, controlling or maintaining the market price, rate, or fee of any commodity or service;

1971 federal case law and follows the provisions of the Sherman Act to a significant degree." *Alpine Air, 490 N.W.2d at 893* (internal citations omitted). Therein, the court recognized Minnesota's established practice of interpreting its ***antitrust law*** consistently **[***37]** with the construction given federal ***antitrust law*** by federal courts. *Id. at 894*. We tend to agree with the policy considerations outlined by the court in *Alpine Air* for such interpretation and construction wherein the Minnesota court explained:

> We believe policy considerations suggest following federal precedent for substantive offenses. Without uniform construction between state and federal antitrust laws, businesses will have a difficult time predicting the antitrust implications of their business decisions. Enforcement of state and federal antitrust laws will also be aided by a policy of uniform interpretation. Therefore we conclude Minnesota ***antitrust law*** should be interpreted consistently with federal court interpretations of the Sherman Act unless state law is clearly in conflict with federal law.

Id.

Having thoroughly **[***39]** examined the status of federal ***antitrust law*** at the time the WVATA was enacted, of which the Legislature is presumed to have been aware, this Court finds that the Legislature intended to incorporate certain activities deemed by federal courts to be *per se* violations of *Section 1* of the Sherman Act into West Virginia ***antitrust law***. Just as *W. Va. Code § 47-18-3 (a)* is comparable to *Section 1* of the Sherman Act, *W. Va. Code § 47-18-3 (b)* is comparable to federal court decisions defining activities deemed to be *per se* violations of *Section 1* of the Sherman Act. As such, we now hold that ***HN17***[] consistent with those activities deemed by federal judicial interpretation to be *per se* violations of *Section 1* of the Sherman Act, *West Virginia Code § 47-18-3 (b)* (1978) codifies comparable activities as *per se* violations of West Virginia ***antitrust law***. To the extent *W. Va. Code § 47-18-3* (1978) utilizes terms which are deemed "terms of art" under federal ***antitrust law***, the meanings attributed to such "terms of art" under federal ***antitrust law*** are incorporated into *W. Va. Code § 47-18-3* (1978) absent contrary statutory definitions set forth in the West Virginia Antitrust Act.

ii.

Construction of *W. Va. Code § 47-18-3(b)* **[***40]** in Harmony with Federal ***Antitrust law***

Both *W. Va. Code § 47-18-16* and this Court's decision in *Graley* indicate that ***HN18***[] the WVATA should be construed liberally and in harmony with federal decisional law interpreting comparable federal ***antitrust law*** **[**380]** **[*616]** provisions. Having found that *W. Va. Code § 47-18-3 (b)* is comparable to *Section 1* of the Sherman Act, we must now determine the extent to which this Court is bound to apply federal decisional law relative to *per se* violations of *Section 1* of the Sherman Act in determining the scope of activities constituting *per se* violations of the WVATA. ***HN19***[] While we acknowledge that the Legislature may indicate its intention that a statutory enactment be harmonized with federal law, fundamental principles of separations of powers [10] preclude the Legislature from requiring the courts of this State to construe or interpret a statutory enactment in a particular manner. *Article VIII, Section 1* of our Constitution vests the judicial power of the State "solely in a supreme court of appeals and in the circuit courts, and in such intermediate appellate courts and magistrate courts as shall be hereafter established by

---

> (b) affecting, fixing, controlling, maintaining, limiting, or discontinuing the production, manufacture, mining, sale or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect of affecting, fixing, controlling, or maintaining the market price, rate, or fee of the commodity or service.

The only differences between this statutory provision and *W. Va. Code § 47-18-3(b) (1) (A)-(B)*, are the inclusion of the phrase "in competition" in the introductory language and the inclusion of the term "affecting" in subdivisions (a) and (b).

[10] Article V, *Section 1* of our Constitution provides, in relevant part:

> ***HN20***[] The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to the either of the others; nor shall any person exercise the powers of more than one of them at the same time[.]

the legislature, and in the justices, judges and **[***41]** magistrates of such courts." While the courts of this State may elect to "honor legislative enactments in aid of judicial power," we are "clearly not bound to do so." State ex rel. Quelch v. Daugherty, 172 W. Va. 422, 424, 306 S.E.2d 233, 235 (1983). The question therefore becomes, when should this Court depart from a direction [11] to look to federal law in interpreting or applying West Virginia law?

HN22[] When presented with a recommendation from the Legislature to look to federal law in interpreting a statute or with our own precedent looking to federal law for guidance on a particular issue, several factors should guide our determination as to whether we should follow the federal courts' direction or whether we should determine that our interpretation of West Virginia law should be unique. For this consideration, a comparison of the specific language of the federal and state provisions at issue must be our primary starting point. A lack of significant distinctive language between the state and federal law at issue should dissuade this Court from proceeding in a distinctive manner. Thus, where there is no significant distinction in the wording of the federal and state provisions, this court should be guided by federal decisions interpreting or applying the same unless a compelling reason **[***43]** to depart from the federal guidance is demonstrated. Accordingly, the legislative histories of the specific provisions at issue are important factors for us to consider. For example, did our Legislature intend the West Virginia statute to correspond to federal law or to depart therefrom? Does the legislative enactment at issue contain terms of art or unique phrases which have gained accepted or uniform judicial interpretations or meanings? Are there differences in the extent and type of interests which the Federal and the West Virginia provisions are designed to protect? If so, a compelling reason to depart from federal precedent may arise.

Finding that the judges, lawyers, governmental actors and citizens of this State are entitled to guidance from this Court as to when courts should comply with or depart from a specific statutory direction from the Legislature to construe a particular statutory scheme in harmony with comparable federal statutes and judicial interpretations thereof, we now hold that ***HN23***[] the following factors are relevant to such a determination: (1) similarity of language between the federal and West Virginia enactments; (2) similarities or distinctions between federal **[***44]** and state precedent interpreting and/or applying the particular enactment; (3) whether the legislative **[**381]** **[*617]** history of the West Virginia enactment evidenced an intent to follow federal law and precedent; (4) the use of terms of art or unique phrases which have gained accepted or uniform judicial interpretations or meanings; (5) the competing or similar interests the federal and state enactments were designed to protect; (6) whether harmonization of federal and state law will facilitate significant policy interests; and (7) such other factors as may serve as compelling considerations under the circumstances presented.

Applying these factors to the instant matter, we find no reason to depart from federal precedent when analyzing the viability of Appellants' claims. Appellants do not dispute that ***HN24***[] W. Va. Code § 47-18-3 (a) is comparable to federal antitrust statutes, specifically Section 1 of the Sherman Act and we have held herein that W. Va. Code § 47-18-3 (b) is likewise comparable in light of the federal jurisprudence construing Section 1 of the Sherman Act. Our own lack of substantial precedent involving the WVATA favors looking to federal law for guidance in applying and construing these **[***45]** comparable statutes. Further, the Legislature specifically evidenced an intent that the WVATA be harmonized to comparable federal ***antitrust law*** through its inclusion of W. Va. Code § 47-18-16 in the statutory scheme. Similarly, the Legislature utilized terms of art in this statutory scheme, terms which have gained wide-spread meaning and acceptance through the development of federal ***antitrust law***. ***HN25***[] Both the WVATA and Sherman Act appear designed to protect and promote a similar interest -- competition in the marketplace. While federal and state law may overlap, incidents may arise where state law would apply when federal law would not, such as where interstate commerce is not effected. Further, we find the policy reasons set forth by the court in Alpine Air, supra, for the harmonization of federal and state ***antitrust law*** to be particularly

[11] ***HN21***[] Such direction may come from Legislative enactments or our own precedent. For example, in State v. Andrews, 91 W. Va. 720, 114 S.E. 257 (1922), this Court held "[t]he provisions of our constitution relating to unreasonable search and seizure and protecting one accused of a crime from being compelled to a be a witness against himself, being substantially the same as the corresponding provisions of the federal constitution and taken therefrom, should be given a construction **[***42]** in harmony with the construction of federal provisions by the Supreme Court of the United States." Syl. Pt. 2, *Andrews*. *See also*, State v. Duvernoy, 156 W. Va. 578, 582, 195 S.E.2d 631, 634 (1973) ("this Court has traditionally construed Article III, Section 6 in harmony with the Fourth Amendment.")

persuasive. Finally, Appellants have put forth no compelling argument which would persuade this Court to depart from the guidance provided by federal law and we have failed to discover such a reason on our own. Accordingly, we find that Appellants' claims should be analyzed under the guidance provided by federal law, including federal application of **[***46]** *per se* antitrust rules.

B.

W. Va. C.S.R. § 142-15-3

Prior to examining Appellants' individual claims to determine whether they qualify as *per se* violations of W. Va. Code § 47-18-3 (b), we must briefly address Appellants' argument that a legislative rule, specifically W. Va. C.S.R. § 142-15-3, designates another activity, "tying" [12], as a *per se* violation of West **[**382]** **[*618]** Virginia ***antitrust law***. Relying upon this Court's decision in West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital, 196 W. Va. 326, 472 S.E.2d 411 (1996), Appellants argue that, as a legislative rule, W. Va. C.S.R. § 142-15-3 has the force and effect of statutory law and, being enacted after W. Va. Code § 47-18-3, "prevails as the most recent expression of the legislative will" even if it is deemed to be in conflict with W. Va. Code § 47-18-3. We disagree with such an expansive interpretation of our decision in Boone Memorial.

Recently, this court reiterated that ***HN26***[] a legislative rule can be deemed "unenforceable if the regulation was beyond the constitutional or statutory authority extended to the agency involved or if the rule is determined to be arbitrary or capricious." Swiger v. UGI/Amerigas, Inc., 216 W. Va. 756, 763, 613 S.E.2d 904, 911 (2005), *citing* Syl. Pt. 4, Appalachian Power Co. v. State Tax Department, 195 W. Va. 573, 466 S.E.2d 424 (1995). Similarly, we held in Syllabus Point 2 of *Boone Memorial* that:

---

[12] In Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984), abrogated in part by statute as recognized in Illinois Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006) (*Illinois Tool* found statutory **[***47]** changes necessitated conclusion that fact a tying product is patented does not support presumption of market power), the United States Supreme Court addressed the concept of "tying" under federal ***antitrust law*** in a case strikingly similar to the instant action as it involved a hospital's exclusive contract with an anesthesia provider. Therein the Supreme Court recognized that their:

> cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

Jefferson Parish, 466 U.S. at 12, 104 S. Ct. at 1558. The Supreme Court went on to note that tying arrangements are condemned "when the seller has some special ability -- usually called "market power" to force a purchaser to do something that he would not do in a competitive market." Further, "Per se condemnation-condemnation without inquiry into actual **[***48]** market conditions-is only appropriate if the existence of forcing is probable. . . . as a threshold matter there must be a substantial potential for impact on competition in order to justify per se condemnation." Id. at 15-16, 104 S. Ct. at 1560. "Tying" arrangements are not condemned "unless a substantial volume of commerce is foreclosed thereby." *Id.* Finding the relevant market to be the geographical area and not the specific hospital, the Supreme Court upheld the contract against charges of antitrust violations.

In Siegel v. Chicken Delight, Inc.,448 F.2d 43 (9th Cir. 1971), the Ninth Circuit Court of Appeals summarized the concept of "tying" under the Sherman Act as follows:

> In order to establish that there exists an unlawful tying arrangement plaintiffs must demonstrate *First*, that the scheme in question involves two distinct items and provides that one (the tying product) may not be obtained unless the other (the tied product) is also purchased. *Second*, that the tying product possesses sufficient economic power appreciably to restrain competition in the tied product market. *Third*, that a "not insubstantial" amount of commerce is affected by the arrangement.

Siegel, 448 F.2d at 47 **[***49]** (internal citations omitted). The Ninth Circuit went on to note that "[u]nder the per se theory of illegality, plaintiffs are required to establish not only the existence of a tying arrangement but also that the tying product possesses sufficient economic power to appreciably restrain free competition in the tied product markets." Id. at 49.

> ***HN27***[] Once a disputed regulation in legislatively approved, it has the force of a statute itself. Being an act of the West Virginia Legislature, it is entitled to more than mere deference; it is entitled to controlling weight. As authorized by legislation, a legislative rule should be ignored only if the agency has exceeded its constitutional or statutory authority **[***50]** or is arbitrary or capricious.

Accordingly, ***HN28***[] to the extent the agency has exceeded its constitutional or statutory authority in promulgating a legislatively approved rule or regulation, the legislative rule "should be ignored." Syl. Pt. 2, *Boone Memorial.* Thus, the first question which must be answered is what, if any, authority the Attorney General had to enact the legislative rule at issue herein, which Appellants argue deems "tying" to be a *per se* violation of West Virginia ***antitrust law***.

The Attorney General's authority to enact rules and regulations applicable to West Virginia ***antitrust law*** is set forth in *W. Va. Code § 47-18-20* (1978), which provides that ***HN29***[] "[t]he attorney general may make and adopt such rules and regulations as may be necessary for the enforcement and administration of this Article." Thus, we must consider whether the designation of "tying" as an "unlawful" activity in *W. Va. C.S.R. § 142-15-3* is necessary to the enforcement and administration of *W. Va. Code §§ 47-18-3*, *4*, (the statutes cited within the rule itself); *i.e.*, whether it clarifies or gives meaning to the specific statutory provisions or whether it conflicts with them.

In *Repass v. Workers' Compensation Division, 212 W. Va. 86, 569 S.E.2d 162 (2002)*, **[***51]** this Court addressed a challenge to a rule[13] arguably at odds with our workers' compensation statutes. In *Repass* we explained:

> ***HN30***[] There is no question that when the rules of an agency come into conflict with a statute that the statute must control:
>
> > Any rules or regulations drafted by an agency must faithfully reflect the intention of the Legislature, as expressed in the controlling legislation. Where a statute contains clear and unambiguous **[**383]** **[*619]** language, an agency's rules or regulations must give that language the same clear and unambiguous force and effect that the language commands in the statute.
>
> Or in other words: "Although an agency may have power to promulgate rules and regulations, the rules and regulations must be reasonable and conform to the laws enacted by the Legislature."
> The power of the Legislature is paramount when a court is faced with a conflict between a statute and a rule:
>
> > It is fundamental law that Legislature [sic] may delegate to an administrative agency power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with, or which alters **[***52]** or limits its statutory authority.
>
> ***HN31***[] Though the courts have the power to harmonize a rule with an ambiguous statute, we must follow the will of the Legislature when expressed with clarity. ***HN32***[] "The judiciary is the final authority on issues of statutory construction, and we are obliged to reject administrative constructions that are contrary to the clear language of a statute."
> . . .in those instances where an agency rule addresses some issue that is already the subject of Legislative action, "[i]f the intention of the Legislature is clear, that is the end of the matter, and the agency's position only can be upheld if it conforms to the Legislature's intent."

Repass, 212 W. Va. at 102-03, 569 S.E.2d at 178-9 (internal citations and footnote omitted)

[13] In footnote 7 of the majority opinion in Repass, the Court acknowledged that there was a dispute as to whether or not the rule at issue was a legislative rule. The Court noted, however, that ***HN33***[] even if the rule had the "authority of a legislative rule, the deference we owe does not change. Even when considering a legislative rule, under *Appalachian Power Co. v. State Tax Department of West Virginia, 195 W. Va. 573, 466 S.E.2d 424 (1995)*, and its **[***53]** progeny, when a statute is clear, we owe no deference to the agency's rule."

HN34[] The clarity of legislative intent when enacting a statute is a primary consideration in determining the significance with attaches to a legislative rule promulgated thereunder. This Court has recognized that it must reject administrative "rules that are contrary to legislative intent." *Boone Memorial, 196 W. Va. at 335, 472 S.E.2d at 420*. In *Boone Memorial*, this Court explained the initial analysis to be undertaken, stating:

> ***HN35***[] Judicial review of an agency's legislative rule and the construction of a statute that it administers involves two separate but interrelated questions, only the second of which furnishes an occasion for deference. In deciding whether an administrative agency's position should be sustained, a reviewing court applies the standards set out by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*. The court first must ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency's position **[***54]** only can be upheld if it conforms to the Legislature's intent. No deference is due the agency's interpretation at this stage. Syllabus Point 3, *Appalachian Power Co. v. State Tax Department of West Virginia, 195 W. Va. 573, 466 S.E.2d 424 (1995)*.

Syl. Pt. 4, *Boone Memorial*. In *Boone Memorial*, this Court stated that it will "defer to an agency's reasonable interpretation of a statute it administers unless the intent of the statute is clear. In other words, ***HN36***[] we are obligated to defer to an agency's view only when there is a statutory gap or ambiguity." *Boone Memorial, 196 W. Va. at 337, 472 S.E.2d at 422*. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based upon a permissible construction of the statute." *Id*., *quoting*, Syl. Pt. 4, *Appalachian Power*.

As noted above, the Legislature has specifically designated certain activities as "unlawful" restraints of trade under our antitrust laws in *W. Va. Code § 47-18-3 (b)*. [14] Those activities include price-fixing, market allocation, bid-fixing and exclusive dealing as activities which have been defined under federal ***antitrust law*** as *per se* restraints **[***55]** of trade. ***HN37***[] Tying, however, is a concept distinct from those activities set forth in *W. Va. Code § 47-18-3 (b)*. By specifically setting forth **[**384] [*620]** in *W. Va. Code § 47-18-3 (b)* those activities it intended to constitute *per se* restraints of trade, the Legislature triggered use of a fundamental principle of statutory construction, being *expressio unius est exclusio alterius*. *See*, Syl. Pt. 3, *Manchin v. Dunfee, 174 W. Va. 532, 327 S.E.2d 710 (1984)* (***HN38***[] "In the interpretation of statutory provisions, the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies"). ***HN39***[] Absent ambiguity in the enabling statute or the need to clarify what activities constitute the *per se* violations set forth in *W. Va. Code § 47-18-3 (b)*, a legislative rule may not establish another category of *per se* violations. The legislative rule relied upon by Appellants, *W. Va. C.S.R. § 142-15-3*, may not reasonably be seen as an attempt to give meaning or clarify conduct satisfying the requirements of *W. Va. Code § 47-18-3 (b)*. [15] As such, Appellants' "tying" allegations are insufficient as a matter of law to establish a violation of our antitrust laws because "tying" **[***56]** is not a statutory *per se* violation. [16]

C.

Propriety of Partial Summary Judgment

Having found that Appellants' allegations of *per se* restraints of trade must be analyzed in reference to definitions and tests developed under federal law, the Circuit Court of Monongalia County's order granting Appellees' motion

---

[14] We limit our analysis of *W. Va. C.S.R. § 142-15-3* herein to its relationship with *W. Va. Code § 47-18-3* as *W. Va. Code § 47-18-4* (1978) is not at issue in this litigation.

[15] If *W. Va. C.S.R. § 142-15-3* could reasonably be deemed an attempt to clarify ambiguity in *W. Va. Code § 47-18-3 (b)*, then ordinary canons of statutory construction may be used to attempt to resolve any apparent conflict between the legislative rule and the initial statute. *See* Syl. Pt. 3, *Boone Memorial*.

[16] Even if this Court were to have recognized "tying" as a type of *per se* violation of our ***antitrust law***, the allegations herein are insufficient to trigger such *per se* status as that status has developed under federal law. *See* note 12, *supra*.

for partial summary judgment is easily affirmed. Relying exclusively upon their position that federal ***antitrust law*** is irrelevant to their claims, Appellants have not explained **[***57]** how their claims constitute price-fixing, market allocation and refusal to deal. However, as we have found, federal law is relevant to give meaning to our ***antitrust law***.

According to Appellants, the contracts between Monongalia General, PAS and BAC constitute *per se* violations of *W. Va. Code § 47-18-3(b)(1)(A)* because they contain terms setting prices and a market analysis is not required. The price provisions of the contracts at issue, quoted above, do not set forth specific prices, but simply required PAS and BAC to set "reasonable" prices in light of the prevailing and competitive market rates. Illegal price-fixing requires more. ***HN40***[] It requires a power to control the market and fix arbitrary prices, including an interference with the setting of prices by market forces. *See, Socony-Vacuum, 310 U.S. at 223, 60 S. Ct. at 844*; *Maricopa County Medical Society, 457 U.S. at 345, 102 S. Ct. at 2473*; and *Container Corp., 393 U.S. at 337, 89 S. Ct. at 512*. Simply requiring a contractor to set reasonable prices in accordance with prevailing market rates is insufficient as a matter of West Virginia law to establish a violation of our ***antitrust law***. Accordingly, to the extent Appellants rely upon **[***58]** a theory of *per se* price-fixing to establish their claims, their claims were properly dismissed by the circuit court.

Similarly, Appellants' market allocation theory fails as a matter of law. Appellants argue that the relevant market is the hospital itself. According to Appellants, the contracts allocate the provision of anesthesia services at the hospital, thus constituting *per se* violations of *W. Va. Code § 47-18-3(b)(1)(C)*. However, such a narrow definition of "market" was rejected by the United States Supreme Court in *Jefferson Parish, supra.* Additionally, ***HN41***[] federal ***antitrust law*** clearly defines illegal market allocation as the division of territories by competitors at the same level of the market structure to minimize competition. *See Topco, 405 U.S. at 608, 92 S. Ct. at 1133*. Because there is no agreement by competitors to allocate a market, Appellants' claims based upon a theory of market allocation fail as a matter of law.

[385] [*621]** Finally, because their price-fixing and market allocation claims fail as a matter of law, Appellants' refusal to deal claims likewise also fail. ***HN42***[] An illegal refusal to deal under *W. Va. Code § 47-18-3 (b) (3)*, is statutorily defined by reference to activities **[***59]** violating *W. Va. Code § 47-18-3 (b) (1)* or *(2)*. Because we have found that Appellants' claims under *W. Va. Code § 47-18-3(b)(1)* fail as a matter of law and that no claims have been properly asserted under *W. Va. Code § 47-18-3(b)(2)*, Appellants' claims for violation of *W. Va. Code § 47-18-3 (b)(3)* must also fail. Accordingly, summary judgment as to all of Appellants' antitrust claims was appropriate.

IV.

CONCLUSION

The Circuit Court of Monongalia County did not err in looking to federal law to give meaning to the state antitrust claims asserted by Appellants against Monongalia General, PAS and BAC herein. *W. Va. Code § 47-18-3 (b)* sets forth activities constituting *per se* violations of our ***antitrust law*** which are comparable to those activities deemed to be *per se* violations of federal antitrust statutes, thereby triggering an analysis of the same in harmony with federal law. The allegations asserted in the instant action do not meet the legal threshold of *per se* antitrust violations. Appellants admit that their position on appeal is founded solely upon this Court's determination that their claims constitute *per se* violations of West Virginia law. They do not. Accordingly, we affirm the **[***60]** Circuit Court of Monongalia County's grant of partial summary judgment as to all antitrust claims asserted in this civil action.

Affirmed.

Dissent by: Starcher

Dissent

Starcher, J., dissenting:

The main issue in this case was whether the circuit court was bound to apply federal antitrust precedents to the appellants' case, when the circuit court was interpreting West Virginia antitrust statutes that were markedly different from the federal antitrust statutes.

I dissent because I think the question answers itself: because West Virginia's statutes are different from the federal statutes, then the Legislature must have intended for our statutes to have a different interpretation and reach than the federal statutes. That means that federal antitrust cases shouldn't be relied upon as binding authority by West Virginia courts.

The majority opinion holds otherwise, and in its interpretation of the West Virginia antitrust statutes at issue, almost exclusively parrots federal cases interpreting federal ***antitrust law***. I believe this was a mistake, for several reasons.

First, this Court is duty-bound to operate independently of federal courts, and should not view federal court decisions as a sacred script to be followed **[***61]** by faith and not reason. We made clear in Syllabus Point 3 of *Brooks v. Isinghood, 213 W.Va. 675, 584 S.E.2d 531 (2003)* that "[a] federal case interpreting a federal counterpart to a West Virginia rule . . . may be persuasive, but it is not binding or controlling." The Court in *Brooks* - interpreting a state *Rule of Civil Procedure* that paralleled the *Federal Rules of Civil Procedure* - unanimously reasoned that the Court should avoid having our legal analysis of West Virginia law "amount to nothing more than Pavlovian responses to federal decisional law." *213 W.Va. at 675, 584 S.E.2d at 531*. Likewise, in *Stone v. St. Joseph's Hosp. of Parkersburg, 208 W.Va. 91, 538 S.E.2d 389 (2000)*, this Court recognized that the West Virginia Human Rights Act mirrored federal civil rights statutes in many ways. Still, the Court went on to find that the Act, "as created by our Legislature and as applied by our courts and administrative agencies, represents an independent approach to the law of disability discrimination that is not mechanically tied to federal disability discrimination jurisprudence." *208 W.Va. at 106, 538 S.E.2d at 404*.

Second, *W.Va. Code, 47-18-16* [1978] says that the West Virginia Antitrust Act is to be (a) "construed liberally" and (b) construed "in harmony with ruling judicial interpretations of comparable federal antitrust statutes." The Legislature didn't say West Virginia courts were supposed to mimic **[***62]** federal courts. West Virginia **[**386]** **[*622]** courts are to harmonize their rulings with federal rulings when the case involves a "comparable federal antitrust statute[]," but do so in a way that liberally and generously accomplishes the remedial goals of the West Virginia Antitrust Act. And if there is no comparable federal antitrust statute, then courts are to construe the Act "liberally." Period. This Court is under no duty to apply federal case law in determining the scope of the Act where the federal and state statutes are not "comparable." *See State ex rel. Palumbo v. Graley's Body Shop, Inc., 188 W.Va. 501, 507 n.1, 425 S.E.2d 177, 183 n.1 (1992)* ("[A] violation of West Virginia's Antitrust Act may not necessarily give rise to a violation of the federal antitrust laws.")

The majority opinion, however, resigns this Court to being a sock puppet for the federal judiciary, regardless of whether the federal antitrust statute is comparable to West Virginia's antitrust statute.

The federal antitrust statute, the Sherman Act, is written in very general terms. The federal statute declares broadly that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the various States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*.

The first half **[***63]** of the West Virginia Antitrust Act mirrors the federal statute. *W.Va. Code, 47-18-3(a)* [1978] states that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in this State shall be unlawful." Clearly, without question, *W.Va. Code, 47-18-16* is a legislative mandate that *W.Va. Code, 47-18-3(a)* be interpreted in harmony with federal cases interpreting *15 U.S.C. § 1*, because the two statutes are not just "comparable," they are virtually identical.

But the second half of the West Virginia Antitrust Act is found nowhere in the federal antitrust statutes. *W.Va. Code, 47-18-3(b)* lays out various actions that are defined as *per se* restraints on trade or commerce. Further, other *per se* violations are listed in legislative rules enacted by the Legislature, violations which have no corollary in federal antitrust statutes. *See* 142 C.S.R. *§ 15.3.1*. These provisions were designed by the Legislature to make West Virginia's ***antitrust law*** different from federal law. Different means that the statutes are not "comparable."

The majority opinion, however, ignores the mandate of *W.Va. Code, 47-18-16*, which talks only about "comparable federal antitrust *statutes*." The majority opinion hinges upon the fact that there was "federal ***antitrust law***," in the form of federal court **[***64]** decisions interpreting the Sherman Act, at the time the Legislature enacted *W.Va. Code, 47-18-3(b)*. Again and again, the majority opinion talks about "the development of *law* . . . under *Section 1* of the Sherman Act," the "status of federal *law* at the time the WVATA was enacted," and "the status of federal ***antitrust law*** at the time [the Legislature] enacted the WVATA."

The end result is that the majority opinion re-interprets the phrase "federal antitrust statutes" in *W.Va. Code, 47-18-16* to mean "federal court cases interpreting federal antitrust statutes."

This plainly was not what the Legislature meant when it adopted the West Virginia Antitrust Act. The Legislature created *per se* categories of restraints of trade and commerce in *W.Va. Code, 47-18-3(b)*, categories that are not found in any federal statute. Accordingly, these categories should be liberally construed to accomplish the goal of free trade and commerce in West Virginia. There might be a federal court case or two that could offer persuasive reasoning to assist in interpreting *W.Va. Code, 47-18-3(b)*. Instead, the majority opinion has decided not to interpret West Virginia's law, but rather has chosen to mechanically tie up and cripple the effect of the West Virginia Antitrust Act with federal decisional jurisprudence. **[***65]**

I therefore respectfully dissent.

Belton v. Comcast Cable Holdings, LLC

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

June 8, 2007, Filed

A112591

Reporter

151 Cal. App. 4th 1224 *; 60 Cal. Rptr. 3d 631 **; 2007 Cal. App. LEXIS 947 ***; 2007-1 Trade Cas. (CCH) P75,765

THOMAS BELTON et al., Plaintiffs and Appellants, v. COMCAST CABLE HOLDINGS, LLC, Defendant and Respondent.

Prior History: **[***1]** Superior Court of Sonoma County, No. 234091, Elaine T. Rushing, Judge.

Core Terms

music, cable, tier, subscribers, trap, undisputed, cable service, package, plaintiffs', consumer, customer, unfair, blind, unfair competition, cause of action, television, signal, tied product, reasons, carte, radio, technical reason, Sherman Act, unconscionable, matter of law, billing, prong, summary adjudication, conscience, cards

LexisNexis® Headnotes

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

HN1[] **Appellate Review, Standards of Review**

On review of a summary judgment or summary adjudication favoring the defendant, an appellate court looks at the record anew to determine whether the defendant conclusively has shown that (1) one or more elements of a cause of action cannot be established, or (2) there is a complete defense.

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

HN2[] **State Regulation, Claims**

Bus. & Prof. Code, § 17200, establishes three varieties of unfair competition--acts or practices which are unlawful, or unfair, or fraudulent. In other words, a practice is prohibited as unfair or deceptive even if not unlawful and vice versa. It governs anti-competitive business practices as well as injuries to consumers, and has as a major purpose the preservation of fair business competition. By proscribing any unlawful business practice, *§ 17200* borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN3[] Tying Arrangements, Sherman Act Violations

Both the Sherman Act, 15 U.S.C. § 1, and California's Cartwright Act, Bus. & Prof. Code, § 16720, prohibit tying arrangements that operate as unreasonable restraints on trade. A tying arrangement under antitrust laws exists when a party agrees to sell one product (the tying product) on the condition that the buyer also purchases a different product (the tied product), thereby curbing competition in the sale of the tied product. Assuming that separate products in separate markets exist, a plaintiff claiming an illegal tying arrangement must plead: (1) a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product; (2) the party had sufficient economic power in the tying market to coerce the purchase of the tied product; and (3) a substantial amount of sale was effected in the tied product. The latter element is sometimes referred to as tied market foreclosure. Under both the Cartwright Act and the Sherman Act, in the absence of evidence of some tied market foreclosure or anticompetitive impact in the tied product market, the plaintiff cannot establish an unlawful tying claim.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN4[] Tying Arrangements, Sherman Act Violations

The mere sale of products packaged together, or refusal to sell such products separately, does not constitute unlawful tying. Not every refusal to sell two products separately can be said to restrain competition. If each of the products may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market, particularly if competing suppliers are free to sell either the entire package or its several parts. Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively--conduct that is entirely consistent with the Sherman Act, 15 U.S.C. § 1. Many tying arrangements, even those involving patents and requirements ties, are fully consistent with a free, competitive market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN5[] Tying Arrangements, Sherman Act Violations

When a purchaser is forced to buy a product he or she would not have otherwise bought even from another seller in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed. Without an adverse impact on competition in the tied product market, there is no harm to competition, and no unlawful tying.

Communications Law > ... > Regulated Entities > Cable Systems > Rate Regulation

HN6[] Cable Systems, Rate Regulation

47 U.S.C. § 543(f) prohibits a cable operator from charging a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. For purposes of the subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment. 47 U.S.C. § 543(f). The section does not, by its terms, prohibit the practice of packaging cable services in tiers. In fact, the practice of packaging cable services in tiers was recognized and addressed by the federal regulations concerning negative option billing, specifying that in some circumstances a cable provider can drop particular channels from a package and then bill for them separately. Instead, § 543(f) prohibits the practice of providing a service the customer had not affirmatively requested by name, and then charging for it if the customer fails to exercise the negative option of canceling or opting out of the proffered service.

Civil Rights Law > Protection of Rights > Public Facilities > Defenses

Civil Rights Law > Protection of Rights > Public Facilities > Scope

HN7[] **Public Facilities, Defenses**

California's Unruh Act, *Civ. Code, § 51*, secures equal access to public accommodations and prohibits discrimination by business establishments. It, however, explicitly exempts standards that are applicable alike to persons of every sex, color, race, religion, ancestry, national origin, or blindness or other physical disability.

Civil Rights Law > Protection of Rights > Public Facilities > Defenses

Civil Rights Law > Protection of Rights > Public Facilities > Scope

HN8[] **Public Facilities, Defenses**

An adverse impact claim challenges a standard that is applicable alike to all such persons based on the premise that, notwithstanding its universal applicability, its actual impact demands scrutiny. If the legislature had intended to include adverse impact claims, it would have omitted or at least qualified the language in *Civ. Code, § 51*, of California's Unruh Act that expressly exempts standards that are applicable alike to persons of every sex, color, race, religion, ancestry, national origin, or blindness or other physical disability. A policy that is neutral on its face is not actionable, even if it has a disproportionate impact on a protected class.

Civil Rights Law > ... > Protection of Disabled Persons > Americans With Disabilities Act > Scope

HN9[] **Protection of Disabled Persons, Americans With Disabilities Act**

Civ. Code, § 51, subd. (f), provides that a violation of the right of any individual under the Americans with Disabilities Act of 1990 (ADA) shall also constitute a violation of *§ 51*. If a California Unruh Act claim is based upon *§ 51, subd. (f)*, the plaintiff need not prove discriminatory intent when such intent is not required to prove the claim under the ADA, because *§ 51, subd. (f)*, essentially incorporates the ADA. To state a claim under the ADA, plaintiffs must show that they have been denied access to a place of public accommodation and, as a matter of law, cable services are not such a place.

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

HN10[] **State Regulation, Claims**

In the context of an unfair competition claim by a competitor, "unfair" has been defined as conduct that threatens an incipient violation of an ***antitrust law*** or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition. Any finding of unfairness to competitors under *Bus. & Prof. Code, § 17200*, are required to be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition. The question of whether this definition should also apply in the context of unfair competition claims brought by consumers has been left open. The allegedly unfair business practice is required to be tethered to a legislatively declared policy or have some actual or threatened impact on competition.

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

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN11[] **State Regulation, Claims**

The purpose of federal and state antitrust laws is to protect and promote competition for the benefit of consumers. Antitrust laws are designed to prohibit only unreasonable restraints of trade, meaning conduct that unreasonably impairs competition and harms consumers. If the same conduct is alleged to be both an antitrust violation and an unfair business act or practice for the same reason--because it unreasonably restrains competition and harms consumers--the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not unfair toward consumers. To permit a separate inquiry into essentially the same question under the unfair competition law would only invite conflict and uncertainty and could lead to the enjoining of procompetitive conduct. In the absence of some restraint upon competition, the mere practice of packaging services together is not inherently anticompetitive or harmful to consumers.

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

HN12[] **State Regulation, Claims**

To establish an unfair competition claim under the fraudulent prong of *Bus. & Prof. Code, § 17200*, plaintiffs must show that these representations were false or were likely to have misled reasonable consumers.

Contracts Law > Defenses > Unconscionability > General Overview

HN13[] **Defenses, Unconscionability**

A court may deem a contract provision unconscionable, and therefore unenforceable, only if it is both procedurally and substantively unconscionable. The procedural element of unconscionability focuses on two factors: oppression and surprise. Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms. The substantive element of unconscionability focuses on the actual terms of the agreement and evaluates whether they create overly harsh or one-sided results as to shock the conscience. The availability of alternative sources from which to obtain the desired service defeats any claim of oppression, because the consumer has a meaningful choice. Moreover, when the challenged term is in a contract concerning a nonessential recreational activity, the consumer always has the option of simply foregoing the activity.

Contracts Law > Defenses > Unconscionability > General Overview

HN14[] **Defenses, Unconscionability**

A provision is substantively unconscionable if it involves contract terms that are so one-sided as to shock the conscience, or that impose harsh or oppressive terms. The phrases “harsh,” “oppressive,” and “shock the conscience” are not synonymous with “unreasonable.” Basing an unconscionability determination on the reasonableness of a contract provision would inject an inappropriate level of judicial subjectivity into the analysis.

The question instead is whether the terms of the agreement are such an extreme departure from common business practice, and so one-sided as to shock the conscience.

Contracts Law > Defenses > Unconscionability > General Overview

HN15[] **Defenses, Unconscionability**

It is not uncommon for businesses to package discrete goods or services together, nor is the practice necessarily undesirable from the standpoint of the consumer. To hold that it is unconscionable for a business that has the technical and legal capability to offer a service or good separately, to instead offer it only as part of a package, would be an unwise excursion into an area of economic policy that is better left to the legislature.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

In an action filed by two cable service subscribers, one of whom was blind, the trial court entered judgment in favor of a cable service provider after granting the provider's motion for summary adjudication with respect to the subscribers' causes of action for unfair competition (*Bus. & Prof. Code, § 17200*) and violation of the Unruh Civil Rights Act (*Civ. Code, § 51*). The trial court also dismissed, pursuant to *Civ. Code, § 1781, subd. (c)(3)*, the remaining cause of action alleging violation of the Consumers Legal Remedies Act (CLRA) (*Civ. Code, § 1750 et seq.*). The amended complaint alleged that the provider's practice of requiring its subscribers to purchase the basic cable tier, which included television programming they did not want, in order to obtain the FM or music cable service that was also included, violated many predicate statutes. (Superior Court of Sonoma County, No. 234091, Elaine M. Rushing, Judge.)

The Court of Appeal affirmed the judgment. The court found that the provider's practice was not an unlawful tying arrangement. Because the undisputed facts established that neither subscriber was provided or billed for a service he did not order by name, the subscribers could not, as a matter of law, establish that the provider's practice constituted negative option billing in violation of *47 U.S.C. § 543(f)*. It was undisputed that the blind subscriber was treated exactly the same as sighted subscribers and that the provider applied its policy of requiring its customers to subscribe to the basic cable tier of video service in order to receive music service to all residential subscribers regardless of disability. The contention that the provider's policy, despite its equal application to all subscribers, had an adverse impact on blind persons failed, as a matter of law, to state a violation of the Unruh Civil Rights Act. The subscribers' claims that the trial court erred in sustaining the provider's objection to certain evidence they offered and in overruling their **[*1225]** objections to some of the provider's assertions of undisputed facts failed either on the merits or because any error was harmless. The subscribers also failed to show a violation of the CLRA. Listening to music or FM radio was a nonessential recreational activity that the subscribers could simply have forgone if they disliked the requirement that they purchase the basic cable tier. Moreover, the subscribers had other means of listening to music or the radio, some of which were available for free. Therefore, the provider's requirement that subscribers purchase the basic tier in order to receive FM or music service was not oppressive. The requirement that the subscribers purchase the basic cable tier did not "shock the conscience" simply because it included television programming they did not want. (Opinion by Stein, J., with Marchiano, P. J., and Swager, J., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] (1)

Unfair Competition § 1—Anticompetitive Business Practices—Violations of Other Laws.

Bus. & Prof. Code, § 17200, establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent. A practice is prohibited as unfair or deceptive even if not unlawful, and vice versa. The law governs anticompetitive business practices as well as injuries to consumers, and has as a major purpose the preservation of fair business competition. By proscribing any unlawful business practice, *§ 17200* borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable.

CA(2)[] (2)

Unfair Competition § 8—Cable Provider's Practice of Packaging Services in Tiers—Illegality, Unfairness, or Fraud.

Under the unlawful prong of *Bus. & Prof. Code, § 17200*, the undisputed facts established that a cable service provider's practice of requiring its subscribers to purchase the basic cable tier, which included television programming they did not want, in order to obtain the FM or music cable service that was also included did not violate any predicate statutes and therefore was not illegal or unfair. Furthermore, the provider's practice was not fraudulent or deceptive.

[13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 123; 4 Witkin, Summary of Cal. Law (10th ed. 2005) Sales, § 296; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 606.]

CA(3)[] (3)

Monopolies and Restraints of Trade § 7.4—Sherman and Cartwright Acts—Tying Arrangements—Elements of Claim—Adverse Impact.

Both the Sherman Act (*15 U.S.C. § 1*) and the Cartwright Act (*Bus. & Prof. Code, § 16720*) prohibit tying arrangements that operate as **[*1226]** unreasonable restraints on trade. A tying arrangement under antitrust laws exists when a party agrees to sell one product (the tying product) on the condition that the buyer also purchases a different product (the tied product), thereby curbing competition in the sale of the tied product. Assuming that separate products in separate markets exist, a plaintiff claiming an illegal tying arrangement must plead: (1) a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product; (2) the party had sufficient economic power in the tying market to coerce the purchase of the tied product; and (3) a substantial amount of sale was effected in the tied product. The latter element is sometimes referred to as tied market foreclosure. Under both the Cartwright Act and the Sherman Act, in the absence of evidence of some tied market foreclosure or anticompetitive impact in the tied product market, the plaintiff cannot establish an unlawful tying claim. When a purchaser is forced to buy a product he or she would not have otherwise bought even from another seller in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed. Without an adverse impact on competition in the tied product market, there is no harm to competition, and no unlawful tying.

CA(4)[] (4)

Telecommunications § 18—Cable Television—Packaging of Services in Tiers—Charges to Subscribers.

47 U.S.C. § 543(f) prohibits a cable operator from charging a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. For purposes of the subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment (*47 U.S.C. § 543(f)*). The section does not, by its terms, prohibit the practice of packaging cable services in tiers. In fact, the practice of packaging cable services in tiers was recognized and addressed by the federal regulations concerning negative option billing, specifying that in some circumstances a cable provider can drop particular channels from a package and then bill for them separately. Instead, *§ 543(f)* prohibits the practice of providing a service the customer had not affirmatively requested by name, and then charging for it if the customer fails to exercise the negative option of canceling or opting out of the proffered service.

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

Civil Rights § 4—Public Accommodations and Services—Unruh Civil Rights Act—Adverse Impact Claims.

The Unruh Civil Rights Act (*Civ. Code, § 51*) secures equal access to public accommodations and prohibits discrimination by business establishments. It, however, explicitly exempts standards that are applicable alike to persons of every sex, color, race, religion, ancestry, national origin, or blindness or other **[*1227]** physical disability. An adverse impact claim challenges a standard that is applicable alike to all such persons based on the premise that, notwithstanding its universal applicability, its actual impact demands scrutiny. If the Legislature had intended to include adverse impact claims, it would have omitted or at least qualified the language in *§ 51* that expressly exempts standards that are applicable alike to persons of every sex, color, race, religion, ancestry, national origin, or blindness or other physical disability. A policy that is neutral on its face is not actionable, even if it has a disproportionate impact on a protected class.

CA(6)[] **(6)**

Civil Rights § 4—Public Accommodations and Services—American With Disabilities Act As Violation of Unruh Civil Rights Act—Elements of Claim.

Civ. Code, § 51, subd. (f), provides that a violation of the right of any individual under the Americans with Disabilities Act of 1990 (ADA) shall also constitute a violation of *§ 51*. If an Unruh Civil Rights Act claim is based upon *§ 51, subd. (f)*, the plaintiff need not prove discriminatory intent when such intent is not required to prove the claim under the ADA, because *§ 51, subd. (f)*, essentially incorporates the ADA. To state a claim under the ADA, plaintiffs must show that they have been denied access to a place of public accommodation and, as a matter of law, cable services are not such a place.

CA(7)[] **(7)**

Unfair Competition § 1—Prongs—Unfairness—Fraudulent Representations.

In the context of an unfair competition claim by a competitor, "unfair" has been defined as conduct that threatens an incipient violation of an ***antitrust law*** or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition. Any finding of unfairness to competitors under *Bus. & Prof. Code, § 17200*, are required to be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition. The question of whether this definition should also apply in the context of unfair competition claims brought by consumers has been left open. The allegedly unfair business practice is required to be tethered to a legislatively declared policy or have some actual or threatened impact on competition. To establish an unfair competition claim under the fraudulent prong of *§ 17200*, plaintiffs must show that these representations were false or were likely to have misled reasonable consumers.

CA(8)[] **(8)**

Monopolies and Restraints of Trade § 1—Purpose of Federal and State Laws—Packaging of Services Together.

The purpose of federal and state antitrust laws is to protect and promote competition for the benefit of consumers. Antitrust laws are designed to prohibit only unreasonable restraints of trade, meaning conduct that unreasonably impairs competition and harms consumers. If the same conduct is **[*1228]** alleged to be both an antitrust violation and an unfair business act or practice for the same reason—because it unreasonably restrains competition and harms consumers—the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not unfair toward consumers. To permit a separate inquiry into essentially the same question under the unfair competition law would only invite conflict and uncertainty and could lead to the enjoining of procompetitive conduct. In the absence of some restraint upon competition, the mere practice of packaging services together is not inherently anticompetitive or harmful to consumers.

CA(9)[] **(9)**

Contracts § 13.4—Legality—Enforceability—Unconscionable Contracts—Elements.

A court may deem a contract provision unconscionable, and therefore unenforceable, only if it is both procedurally and substantively unconscionable. The procedural element of unconscionability focuses on two factors: oppression and surprise. Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms. The substantive element of unconscionability focuses on the actual terms of the agreement and evaluates whether they create overly harsh or one-sided results as to shock the conscience. The availability of alternative sources from which to obtain the desired service defeats any claim of oppression, because the consumer has a meaningful choice. Moreover, when the challenged term is in a contract concerning a nonessential recreational activity, the consumer always has the option of simply forgoing the activity. A provision is substantively unconscionable if it involves contract terms that are so one-sided as to shock the conscience, or that impose harsh or oppressive terms. The terms “harsh,” “oppressive,” and “shock the conscience” are not synonymous with “unreasonable.” Basing an unconscionability determination on the reasonableness of a contract provision would inject an inappropriate level of judicial subjectivity into the analysis. The question instead is whether the terms of the agreement are such an extreme departure from common business practice, and so one-sided as to shock the conscience.

CA(10)[] **(10)**

Contracts § 13.4—Legality—Enforceability—Unconscionable Contracts—Packaging of Goods or Services Together.

It is not uncommon for businesses to package discrete goods or services together, nor is the practice necessarily undesirable from the standpoint of the consumer. To hold that it is unconscionable for a business that has the technical and legal capability to offer a service or good separately, to instead offer it only as part of a package, would be an unwise excursion into an area of economic policy that is better left to the Legislature.

[*1229]

Counsel: Norbert C. Babin and Michael J. Langston for Plaintiffs and Appellants.

Coblentz, Patch, Duffy & Bass, Richard R. Patch, Virginia A. Crisp and Susan K. Jamison for Defendant and Respondent.

Judges: Stein, J., with Marchiano, P. J., and Swager, J., concurring.

Opinion by: Stein

Opinion

[636]** **STEIN, J.**—Thomas Belton and Larry Hall (hereafter plaintiffs) are subscribers to cable service provided by Comcast Cable Holdings, LLC (Comcast). They appeal from a judgment entered in Comcast's favor after the court granted Comcast's motion for summary adjudication with respect to plaintiffs' causes of action for unfair competition (*Bus. & Prof. Code, § 17200*) and violation of the Unruh Civil Rights Act (*Civ. Code, § 51*; the Act). The court also dismissed, pursuant to *Civil Code section 1781, subdivision (c)(3)*, the remaining cause of action alleging violation of the Consumers Legal Remedies Act, *Civil Code section 1750 et seq.* (CLRA).

We shall affirm the judgment.

FACTS

The amended complaint alleged that plaintiffs are residents of Sonoma County and subscribers to Comcast cable services. Larry Hall is legally blind. All of the causes of action were premised upon the common allegation **[***2]** that Comcast offered FM or music services to Sonoma County residents only as a part of a basic cable tier package that included television cable service. Plaintiffs alleged that this practice forced them to purchase television cable services that they did not want because they had no other practicable means of **[**637]** obtaining access to the FM or music services. With respect to Hall, the complaint also alleged Comcast's practice was discriminatory because Hall was blind and could not use the television cable service. Plaintiffs further alleged that Comcast expressly or impliedly falsely represented to the public that it was "technologically or legally necessary" to subscribe to the basic cable tier "in order to receive the FM/music service." Finally, they alleged that Comcast's advertisements did not "conspicuously disclose the actual price of the FM and/or music services."

After deposing plaintiffs, Comcast moved for summary adjudication of the first cause of action for unfair competition (*Bus. & Prof. Code, § 17200*), and the third cause of action for a violation of the Act. Comcast also filed a **[*1230]** motion, pursuant to *Civil Code section 1781, subdivision (c)(3)*, to dismiss the remaining **[***3]** cause of action alleging violation of the CLRA.

As relevant to the issues on appeal, the motions were based upon the following undisputed facts:

When Mr. Belton subscribed, he was informed that a subscription to the basic cable tier, which included television service, was required to receive the FM or music service that was also included in that tier. Belton later asked a Comcast customer service representative whether he could get FM service only, and was told he could not. He did not ask why he had to purchase the basic cable tier because he had asked the same question of several of Comcast's predecessors, and he was always told that it was "technical." Mr. Belton did not want television cable service. He subscribed to it only in order to get the audio. Although Mr. Belton protested the unavailability of FM or music services á la carte, [1] he did ask Comcast to provide the basic cable tier of service, and he has never been billed for a service he did not request.

When Mr. Hall subscribed to Comcast services, **[***4]** he was informed and understood that he had to subscribe to basic cable programming in order to get the audio service that he wanted. [2] Approximately a year after Mr. Hall subscribed to Comcast services, he twice inquired about the availability of the FM audio service á la carte. He informed the representative that he was blind, and that was why he was making the request. He initially testified

[1] For convenience we adopt the parties' use of the phrase "á la carte" to describe the unbundling of the services included in a tier of cable service, and offering them separately.

[2] Plaintiffs cited no evidence to dispute the asserted fact that "Hall … was informed that a subscription to basic cable programming was required to receive cable music service." Instead they objected only that Comcast "misquoted" his testimony because Hall's testimony referred to "certain video services" not to "basic cable." The court overruled this objection.

that he was told Comcast did not have the technology to do that. Yet, later in the deposition he stated he was informed that it was not “possible” to get audio only, but could not recall whether the representative said it was technically not possible. Hall testified Comcast treated him the same as their sighted subscribers. It was also undisputed that Comcast applies its policy of requiring its customers to subscribe to the basic cable tier of service in order to receive FM or music service to all residential subscribers. Hall subscribed to a premium cable package, and placed an order to add a digital video and audio package. He, like Belton, did not want the television service included in the package. Both plaintiffs admitted that they “understood basic cable is required to receive music service.” **[***5]**

[638]** Both Hall and Belton could obtain FM or music service by listening to remote stations live over the Internet, and they both had computers and **[*1231]** Internet service. [3] It was undisputed that DIRECTV, a satellite service, also offered digital quality music. Both plaintiffs could also receive a number of FM stations on the radio at home. [4]

With respect to their allegation of misrepresentations or false advertising, both plaintiffs admitted they had not seen any false written statements from Comcast suggesting that music service was offered á la carte. It was also undisputed that the rate cards attached to the complaint did not contain any representations that legal or technical reasons prevented Comcast from offering FM or music service separately from the rest of the basic cable package. Plaintiffs further admitted that the cards stated either that basic cable is required to receive any other services, or that basic service was the minimum level of cable service that could be purchased. They also admitted that all of the rate cards stated the correct price for basic cable service, which included FM service. [5]

With respect to plaintiffs' assertion that representatives of Comcast had orally represented to them there were technical reasons why they could not get FM or music service á la carte, Comcast offered the declarations of James Bordessa, its construction manager, and Shirley I. Gulbransen, its regional vice-president. Bordessa declared that Comcast's basic television service was the service automatically provided when cable service is installed. The signal for all other services must be either “trapped,” i.e., blocked by a physical device installed at the curb, or electronically “scrambled,” for those customers who do not order and pay for them. To receive a trapped service the physical trap is removed by the installer. To receive a scrambled service the customer must obtain and hook up a converter box that “unscrambles the signal.” In order to provide music service without the basic television service, it would be necessary either **[***8]** to install a trap that blocks the basic television signal but allows the music signal through, or to scramble the basic signal. Comcast had not designed or manufactured a trap for, and did not scramble, the basic signal so that it could offer “stand-alone” music service, **[*1232]** for several reasons. The same expense of installation, customer service, and other costs would still exist whether the customer received the basic cable package or music service alone. Therefore provision of music service alone would not be profitable unless priced at a level close to that charged for the basic cable service package. At the same time, because Comcast also faced extensive competition from other providers **[**639]** of music service, such as local radio stations, Internet-based radio services, and satellite entertainment providers, there was a significant risk that the demand for such “stand-alone” music service would not be high enough to allow it to recoup its “roll-out” costs and the administrative and infrastructure expenses it would incur. Also, scrambling or trapping posed a significant risk of theft of service because a knowledgeable customer can remove the trap, or obtain boxes that will unscramble **[***9]** the signal.

---

[3] Although plaintiffs stated that they disputed this fact, they offered no evidence to dispute the availability of FM stations over the Internet. Instead they simply pointed out that although Belton testified that he knew FM stations were available over the Internet, he also stated he had not gone through the “elaborate process” to use his computer this way.

[4] Although plaintiffs asserted this fact was disputed as to Belton, they cited the same deposition testimony that Comcast relied upon and disputed **[***6]** only the assertion that Belton testified that three stations “are available easily over the air.” In the cited testimony Belton testified that he could get KPFA and KQED with a large outdoor antenna, and KRCB, a local station.

[5] Plaintiffs stated they disputed the additional assertions of fact that the rate cards stated the correct price for FM service, and for DMX music, a digital music service that Hall ordered **[***7]** in addition to basic cable, but cited only the cards themselves as their evidence. Plaintiffs offered no argument to explain how these cards misrepresented the price, and the court therefore concluded that they failed to create a triable issue of fact.

Plaintiffs offered an expert declaration disputing the assertion that reconfiguring Comcast's system to trap out basic cable television would be costly, because another company already manufactured a trap that could trap out the basic television cable, but let the FM or other music service signal through. The expert also challenged the business reasons Comcast's witnesses had stated for Comcast's decision not to implement the technical changes that would allow it to offer FM or music service á la carte. He declared that because a trap that could accomplish this was already being manufactured, it would not be costly for Comcast to deploy such a trap. He further declared that the risk of theft of service would not be any greater than under Comcast's current configuration of its tiers of service because "a savvy customer can learn how to remove any trap."

After ruling on the parties' evidentiary objections, the court, in a detailed order, found that there were no material triable issues of fact, and stated its reasons for concluding that Comcast was entitled to judgment as a matter of law on the causes of action for violation of *Business and Professions Code section 17200* and for a violation of the **[***10]** Act. In a separate order, the court determined that the cause of action for violation of the CLRA was without merit. It entered judgment in Comcast's favor. Plaintiffs filed a timely notice of appeal.

ANALYSIS

I.

Unfair Competition and the Act

The motion for summary adjudication was directed to the first cause of action for unfair competition based upon *Business and Professions Code* ***[*1233]*** *section 17200*, and the third cause of action for violation of the Act. ***HN1***[] "On review of a summary judgment [or summary adjudication] favoring the defendant, we look at the record anew to determine whether the defendant conclusively has shown that (1) one or more elements of a cause of action cannot be established, or (2) there is a complete defense." (*Van Ness v. Blue Cross of California (2001) 87 Cal.App.4th 364, 371 [104 Cal. Rptr. 2d 511]*.)

A. *Unfair Competition*

HN2[] ***CA(1)***[] **(1)** " '*Business and Professions Code section 17200* … establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent. "In other words, a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa." ' " (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180 [83 Cal. Rptr. 2d 548, 973 P.2d 527]* **[***11]** (*Cel-Tech*).) "It governs 'anti-competitive business practices' as well as injuries to consumers, and has as a major purpose 'the preservation of fair business competition.' [Citations.] By proscribing 'any unlawful' business practice, '*section 17200* "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable." (*Ibid*.)

[640]** The amended complaint alleged that Comcast's practice of requiring its subscribers to purchase the basic cable tier, which included television programming they did not want, in order to obtain the FM or music service that was also included, violated many predicate statutes. In their opening brief on appeal, however, plaintiffs contend that the court erred in granting Comcast's motion for summary adjudication only with respect to their contentions that Comcast's practice constituted: (1) unlawful tying in violation of the Sherman Act (*15 U.S.C. § 1 et seq.*; the Sherman Act); (2) negative option billing in violation of *47 United States Code section 543(f)*; and (3) a violation of the Act. [6]

[6] In the proceedings below plaintiffs also alleged Comcast's practice violated other predicate statutes, **[***12]** including *Business and Professions Code sections 17509* and *17000*, the Americans with Disabilities Act of 1990 (*42 U.S.C. § 12101 et seq.*; ADA) and the Cartwright Act (*Bus. & Prof. Code, §§ 16720* & *16727*). Yet, in their opening brief they did not raise any claim of error

[*1234]

CA(2)[] **(2)** We shall first review the court's determination under the "unlawful prong" of *Business and Professions Code section 17200* that the undisputed facts established that Comcast's **[***13]** practice did not violate any of these predicate statutes and therefore was not illegal. Next we address the court's determination that Comcast was entitled to summary adjudication with respect to the unfairness prong, based upon these same predicate statutes. Third, we review the determination, based upon the undisputed facts, that Comcast's practice was not fraudulent or deceptive. Finally, we address plaintiffs' contention that numerous errors in evidentiary rulings prevented them from creating a triable issue of fact.

1. *Unlawful Prong*

a. *Tying*

HN3[] *CA(3)*[] **(3)** Both the Sherman Act and the Cartwright Act (*Bus. & Prof. Code, § 16720*; the Cartwright Act) prohibit tying arrangements that operate as unreasonable restraints on trade. "A tying arrangement under antitrust laws exists when a party agrees to sell one product (the tying product) on the condition that the buyer also purchases a different product (the tied product), thereby curbing competition in the sale of the tied product." (*Freeman v. San Diego Assn. of Realtors (1999) 77 Cal.App.4th 171, 183–184 [91 Cal. Rptr. 2d 534]* (*Freeman*), citing *Northern Pac. R. Co. v. United States (1958) 356 U.S. 1, 5–6 [2 L. Ed. 2d 545, 78 S. Ct. 514]*.) "Assuming that separate products in separate markets exist, a plaintiff **[***14]** claiming an illegal tying arrangement must plead: '(1) a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product; (2) the party had sufficient economic power in the tying market to coerce the purchase of the tied product; and (3) a substantial amount of sale was effected in the tied product.' " (*Freeman, supra, at p. 184*.) The latter element is sometimes referred **[**641]** to as "tied market foreclosure." Under both the Cartwright Act and the Sherman Act, in the absence of evidence of some tied market foreclosure or anticompetitive impact in the tied product market, the plaintiff cannot establish an unlawful tying claim. (*Morrison v. Viacom, Inc. (1998) 66 Cal.App.4th 534, 540–541 [78 Cal. Rptr. 2d 133]* (*Viacom*); *Jefferson Parish Hospital Dist. No. 2 v. Hyde (1984) 466 U.S. 2, 16 [80 L. Ed. 2d 2, 104 S. Ct. 1551]* (*Jefferson Parish*).) [7]

[*1235]

Plaintiffs' unlawful tying theory was that the basic tier of cable television was the "tied" service that they were required to purchase in order to obtain the "tying" service, i.e., music or FM services. The court correctly determined that this claim, whether stated as a violation of the Cartwright Act or as a violation of the Sherman Act, was precluded as a matter of law based upon the undisputed fact that neither plaintiff wanted cable television service. Since plaintiffs would not otherwise have **[***16]** purchased the tied product, i.e., basic cable television programming, the alleged business practice could not have foreclosed or injured competition in the tied product

---

with respect to the court's disposition of these claims. We therefore deem any contention based upon these predicate statutes to have been waived, and shall not consider plaintiffs' contentions based upon predicate violations of *Business and Professions Code sections 17509*, *16727* and *16720*, which they reassert on appeal for the first time in their reply brief. (See, e.g., *Neighbours v. Buzz Oates Enterprises (1990) 217 Cal.App.3d 325, 335, fn. 8 [265 Cal. Rptr. 788]*.)

On appeal, plaintiffs also rely on violations of the CLRA as yet another predicate statute for their unfair competition claim. To avoid repetition, we shall address these arguments in the context of review of the motion that the separate cause of action for violation of the CLRA was without merit. (See fn. 17, *post*.)

[7] *HN4*[] The mere sale of products packaged together, or refusal to sell such products separately, does not constitute unlawful tying. "[N]ot every refusal to sell two products separately can be said to restrain competition. If each of the products may be purchased separately in a competitive market, one seller's decision to sell the two in a single **[***15]** package imposes no unreasonable restraint on either market, particularly if competing suppliers are free to sell either the entire package or its several parts." (*Jefferson Parish, supra, 466 U.S. at pp. 11–12*.) "Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively—conduct that is entirely consistent with the Sherman Act." (*Ibid*.) Recently, in *Illinois Tool Works Inc. v. Independent Ink, Inc. (2006) 547 U.S. 28 [164 L. Ed. 2d 26, 126 S. Ct. 1281]*, the court reaffirmed that "[m]any tying arrangements, even those involving patents and requirements ties, are fully consistent with a free, competitive market." (*Id. at p. 1292*.)

market. ***HN5***[] "[W]hen a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed." (*Jefferson Parish, supra, 466 U.S. at p. 16*; see also *Freeman, supra, 77 Cal.App.4th at p. 187*.)

In *Viacom, supra, 66 Cal.App.4th 534*, the court applied this principle to hold that a practice similar to Comcast's did not constitute an unlawful tying arrangement. The plaintiffs alleged that Viacom required them to purchase broadcast channels as a prerequisite to purchasing satellite cable channels. (*Id. at p. 539*.) The court held, among other things, that "devastating to their case is [the] concession in their pleading that, if not for Viacom's business practice, plaintiffs would not buy broadcast channels at all because they are available for free over the airwaves. This concession establishes that the challenged practice **[***17]** has no effect on competition in the tied product market." (*Id. at p. 543*.) Without an adverse impact on competition in the tied product market there is no harm to competition, and no unlawful tying. (*Id. at pp. 543–544*.)

Plaintiffs' attempt to distinguish *Viacom* on the ground that it interpreted and applied the Cartwright Act, not section 1 of the Sherman Act, is unavailing. Although *Viacom, supra, 66 Cal.App.4th 534*, interprets and applies *Business and Professions Code section 16727*, this section was patterned after section 1 of the Sherman Act, and the court relied **[**642]** upon United States Supreme Court authority interpreting the Sherman Act in reaching its conclusion that the plaintiff failed to state a claim under the Cartwright Act. (*Viacom, p. 541* & fn. 2.)

Based upon the foregoing authorities, the court correctly concluded that the undisputed material facts established that plaintiffs could not show market **[*1236]** foreclosure in the tied product market, and therefore Comcast's practice was not an unlawful tying arrangement under section 1 of the Sherman Act.

b. *Negative Option Billing*

CA(4)[] **(4)** The next statutory predicate for plaintiffs' *Business and Professions Code section 17200* claim was that Comcast's **[***18]** practice of providing FM or music service only as part of a basic tier that included television programming constituted "negative option billing" in violation of *47 United States Code section 543(f)*. ***HN6***[] *Section 543(f)* prohibits a cable operator from charging "a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. For purposes of this subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment." (*47 U.S.C. § 543(f)*.)

This section does not, by its terms, prohibit the practice of packaging cable services in tiers. In fact, the practice of packaging cable services in tiers was recognized and addressed by the federal regulations concerning negative option billing, specifying that in some circumstances a cable provider can drop particular channels from a package and then bill for them separately. (See *Time Warner Cable v. Doyle (7th Cir. 1995) 66 F.3d 867, 872–873, 878–882*; see also *Morrison v. Viacom, Inc. (1997) 52 Cal.App.4th 1514, 1529 [61 Cal. Rptr. 2d 544]*.) Instead, *47 United States Code section 543(f)* prohibits the practice of providing a **[***19]** service the customer had not affirmatively requested by name, and then charging for it if the customer fails to exercise the "negative option" of canceling or opting out of the proffered service. Therefore, to establish a violation of this predicate statute plaintiffs had to show that Comcast provided a service to the plaintiffs they had not affirmatively requested by name.

The undisputed facts, however, were that both plaintiffs understood they were purchasing a package or tier of cable service that included television service and FM or music service, as opposed to á la carte FM or music service, and that each plaintiff affirmatively placed an order for the tier of cable services they were billed for. [8] Although plaintiffs disputed defendant's assertion of fact that Belton affirmatively requested "by name" the basic tier of service, the only evidence they cited was Belton's testimony that he requested the basic tier of service "under protest." This evidence does not create a material issue of disputed fact because, whether or not Belton *liked* the fact that he had

---

[8] Belton testified that he was never charged for a service he did not request. Hall testified that he ordered an additional tier of digital programming, understanding that music was only a part of the programming in that tier.

to order the basic tier of cable service to get the music **[*1237]** services, it was nonetheless undisputed that he affirmatively placed an order **[***20]** for that tier, understanding that it was a package including television programming and FM or music services. Since the undisputed facts established that neither plaintiff was provided or billed for a service he did not order by name plaintiffs could not, as a matter of law, establish that Comcast's **[**643]** practice constituted negative option billing in violation of *47 United States Code section 543(f)*.

c. *The Act*

The third predicate statute we address is plaintiffs' allegation that Comcast's practice of packaging FM or music service together with television programming, or refusing to provide FM or music service by itself, violated the Act.

HN7[] ***CA(5)***[] **(5)** "[T]he Unruh [Civil Rights] Act secures equal access to public accommodations and prohibits discrimination by business establishments." (*Harris v. Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 1150 [278 Cal. Rptr. 614, 805 P.2d 873]*.) It, however, "explicitly exempts standards that are **[*1238]** applicable alike to persons of every sex, color, race, religion, ancestry, national origin, or **[***21]** blindness or other physical disability.' " (*Id. at p. 1172*.) It was undisputed that Hall was treated exactly the same as sighted subscribers, and that Comcast applied its "policy of requiring its customers to subscribe to the basic cable tier [of video] service in order to receive music service to *all* residential subscribers regardless of … disability." Any inference that the policy discriminated against blind persons is precluded by the undisputed fact that both Hall, who was blind, and Belton, who was not, were required to purchase the basic cable tier, which included television programming they did not want. On its face, the policy therefore applied equally to sighted and blind subscribers.

Plaintiffs nonetheless contend that Comcast's practice was discriminatory "in fact" because sighted persons, even if they do not want cable TV, could use it, whereas blind persons could not. In other words, they argue that although the policy is facially neutral, it disproportionately and adversely impacts blind people. The contention that Comcast's policy, despite its equal application to all subscribers, has an adverse impact on blind persons fails, as a matter of law, to state a violation **[***22]** of the Act. In *Harris v. Capital Growth Investors XIV, supra, 52 Cal.3d 1142*, the court held, ***HN8***[] "an adverse impact claim challenges a standard that is applicable alike to all such persons based on the premise that, notwithstanding its universal applicability, its actual impact demands scrutiny. If the Legislature had intended to include adverse impact claims, it would have omitted or at least qualified" the language in *section 51* of the Civil Code that expressly exempts standards that are applicable alike to persons of every sex, color, race, religion, ancestry, national origin, or blindness or other physical disability. (*Harris, at pp. 1172–1173*.) In *Koebke v. Bernardo Heights Country Club (2005) 36 Cal.4th 824, 853 [31 Cal. Rptr. 3d 565, 115 P.3d 1212]*, the court reaffirmed that a policy that is neutral on its face is not actionable, even if it has a disproportionate impact on a protected class. [9]

CA(6)[] **(6)** Plaintiffs argue that they need not show discriminatory intent because Hall's claim states a violation of *subdivision (f) of Civil Code section 51*. *Subdivision (f) of Civil Code section 51* ***HN9***[] provides that "[a] violation of the right of any individual under the Americans with Disabilities Act of 1990 … shall also constitute a violation of this **[**644]** section." A federal district court, in *Presta v. Peninsula Corridor Joint Powers Bd. (N.D.Cal. 1998) 16 F.Supp.2d 1134* (*Presta*), held that if an Act claim is based upon *subdivision (f) of Civil Code section 51*, the plaintiff need not prove discriminatory intent when such intent is not required to prove the claim under the ADA, because *subdivision (f)* essentially incorporates the ADA. (*Presta, supra, at pp. 1135–1136*.)

Even if we assume arguendo that the *Presta* court (*Presta, supra, 16 F. Supp. 2d 1134*) correctly interpreted California law (see *Howard Contracting, Inc. v. G. A. MacDonald Construction Co. (1998) 71 Cal.App.4th 38, 52 [83 Cal. Rptr. 2d 590]* [decisions of the federal courts on issues of interpretation of California law are not binding precedent]), it is unavailing because plaintiffs cannot show any denial **[***24]** of access to a place of public accommodation in violation of the ADA, and therefore a claim under *subdivision (f) of Civil Code section 51* fails as

---

[9] Plaintiffs did not allege or contend below a claim of *disparate treatment* in the application of a facially neutral policy, which may be cognizable under the Act. (See *Koebke v. Bernando Heights County Club, supra, 26 Cal.4th at p. 853*.) Moreover, in their separate statement they did not dispute that Comcast treated Hall **[***23]** the same as their sighted subscribers.

a matter of law. Hall's claim is that, except for the FM or music service, the programming provided in the basic cable tier is “inaccessible” to blind people, and therefore Comcast must accommodate blind individuals by providing FM or music services á la carte. Yet, to state a claim under the ADA, plaintiffs must show that they have been denied access to *a place of public accommodation* and, as a matter of law, cable services are not such a place. (*Torres v. AT&T Broadband, LLC (2001) 158 F. Supp. 2d 1035* (*Torres*).) In *Torres,* a blind plaintiff contended that the on-screen channel menu provided by a digital cable service was inaccessible to blind people. The court held that “[t]he ADA includes an exhaustive list of private entities that constitute a public accommodation, and a digital cable system is not one of them.” (*Id. at p. 1037*.) It also rejected the plaintiff's argument that “when he uses the defendants' digital cable channel menu, his television set becomes a place of exhibition or entertainment. [T]he plaintiff's home cannot reasonably **[***25]** be classified as a place of *public* exhibition or **[*1239]** entertainment. Thus, neither the digital cable system nor its on-screen channel menu can be considered a place of public accommodation within the meaning of the ADA.” (*Id. at pp. 1037–1038*.) Since the undisputed facts did not establish a violation of the right of any individual under the ADA, plaintiffs failed as a matter of law to establish an Act claim under *subdivision (f) of Civil Code section 51*. Any exception recognized in *Presta* to the requirement under the Act that plaintiffs show unequal treatment and discriminatory intent was inapplicable.

The court therefore correctly concluded based upon the undisputed fact that Comcast's practice of requiring all subscribers to purchase the basic cable tier, which included television programming, in order to obtain FM or music service, did not as a matter of law violate the Act. [10]

2. *Unfairness Prong*

Plaintiffs contend that, even if not unlawful, Comcast's challenged practice is **[***26]** nonetheless actionable under the *unfairness* prong of *Business and Professions Code section 17200*. Specifically they argue that the practice of bundling FM radio or music service with video service in the basic tier violates at least “the policy or spirit,” if not the letter, of the Sherman Act's prohibition of unlawful tying.

CA(7)[] **(7)** They rely upon the definition of “unfair” set forth in *Cel-Tech, supra, 20 Cal.4th* ***[**645]*** *163*. In *Cel-Tech*, the court, ***HN10***[] in the context of an unfair competition claim by a competitor, defined “unfair” as “conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.” (*Id. at p. 187*.) The *Cel-Tech* court further required “that any finding of unfairness to competitors under [*Business and Professions Code] section 17200* be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.” (*Id. at pp. 186–187*.) The court left open the question whether this definition should also apply in the context of unfair competition claims brought by consumers (*id. at p. 187, fn. 12*), **[***27]** leading to a split of authority on this question among the Courts of Appeal. (See *Bardin v. DaimlerChrysler Corp. (2006) 136 Cal.App.4th 1255, 1273–1274 [39 Cal. Rptr. 3d 634]* [noting the split of authority and urging the California Supreme Court to resolve it].) This court, however, has followed the line of authority that also requires the allegedly unfair business practice be “tethered” to a legislatively declared policy or has some actual or threatened **[*1240]** impact on competition. (See *Gregory v. Albertson's, Inc. (2002) 104 Cal.App.4th 845, 853–854 [128 Cal. Rptr. 2d 389]*.)

CA(8)[] **(8)** Plaintiffs' attempt to restate the unlawful tying theory under the unfairness prong fails because the same undisputed facts that establish the absence of any anticompetitive effect in the tied product market preclude a finding that Comcast's practice threatened an incipient violation of section 1 of the Sherman Act, or violated its policy or spirit, or otherwise threatens competition. ***HN11***[] “The purpose of federal and state antitrust laws is to protect and promote competition for the benefit of consumers. [Citations.] Antitrust laws are designed to prohibit only unreasonable restraints of trade, meaning conduct that unreasonably impairs competition and harms consumers. **[***28]** [Citations.] If the same conduct is alleged to be both an antitrust violation and an ‘unfair’ business act or practice for the same reason—because it unreasonably restrains competition and harms

---

[10] This same analysis also supports the court order granting summary adjudication of the separate cause of action for a violation of the Act.

consumers—the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' toward consumers. To permit a separate inquiry into essentially the same question under the unfair competition law would only invite conflict and uncertainty and could lead to the enjoining of procompetitive conduct." (*Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 375 [113 Cal. Rptr. 2d 175]*; see also *RLH Industries, Inc. v. SBC Communications, Inc. (2005) 133 Cal.App.4th 1277, 1286 [35 Cal. Rptr. 3d 469]*.) In the absence of some restraint upon competition, the mere practice of packaging services together is not inherently anticompetitive or harmful to consumers. (See *Jefferson Parish, supra, 466 U.S. at pp. 11–12*; see also *Illinois Tool Works, Inc. v. Independent Ink, Inc., supra, 126 S. Ct. at p. 1292* ["Many tying arrangements, even those involving patents and requirements ties, are fully consistent with a free, competitive market"].) Plaintiff identifies no other anticompetitive effect caused **[***29]** by the packaging of these services together, and identifies no other policy underlying section 1 of the Sherman Act that Comcast's practice violated. Therefore the court correctly concluded that, as a matter of law, Comcast's practice **[**646]** was not unfair. [11]

[*1241]

3. *Fraudulent Prong*

Plaintiffs alleged two types of misrepresentations or false advertising in support of their unfair competition claim under the fraudulent prong of *Business and Professions Code section 17200*: **[***30]** (1) those made in "advertisements and/or promotional material," specifically rate cards attached as exhibits to their complaint, and (2) oral statements that there was a legal or technical reason why they were not offered FM or music services separately from the television or video services included in the basic tier, or why it was necessary to subscribe to the basic tier in order to get the FM or music service. ***HN12***[] To establish an unfair competition claim under the fraudulent prong, plaintiffs must show that these representations were false or were likely to have misled "reasonable consumer[s]." (*South Bay Chevrolet v. General Motors Acceptance Corp. (1999) 72 Cal.App.4th 861, 878 [85 Cal. Rptr. 2d 301]*.)

In support of the fraudulent prong of their unfair competition claim, plaintiffs first relied upon rate cards distributed by Comcast or its predecessors. In their opposition to Comcast's statement of undisputed material facts, plaintiffs admitted that the rate cards upon which they relied did not make any affirmative representations that legal or technological reasons prevented the provision of FM radio or music service á la carte. [12] They also admitted the cards clearly stated that subscription to basic cable **[***31]** "is required" in order to receive any other service. Plaintiffs further conceded that, if Comcast had simply used the active voice and stated, "*Comcast* requires subscription to basic cable TV in order to obtain any other services," the statement would not be misleading. Nonetheless, they argued that "[b]y saying that subscription to basic cable is 'required' without spelling out that it is only [Comcast's] *policy* to do so, the unwitting subscriber who wishes only audio services is forced into accepting the unwanted Basic Cable TV." They asserted that the use of the passive voice created a "clear implication that legal or technological reasons require subscription to basic cable" when the truth was that the requirement was "a mere profit strategy of the cable company."

---

[11] In their reply brief plaintiffs also rely upon the ADA and the Act, and the federal law proscribing negative option billing, as a "tether" to a legislatively declared policy that they contend Comcast's practice violated. They assert in conclusory fashion that Comcast's practice was unfair because it violated the spirit, if not the letter, of each of these statutes, but offer no supporting argument or authorities other than for the general assertion that *Business and Professions Code section 17200* claims have been based upon the Act and federal consumer protection statutes. We shall not consider this argument because they are raised for the first time in the reply. (*Neighbours v. Buzz Oates Enterprises, supra, 217 Cal. App. 3d at p. 335, fn. 8*.)

[12] The court ruled that plaintiffs failed to create a triable issue with respect to respondent's asserted fact that these cards did not misrepresent the price for FM and DMX service. Although this fact was disputed, the only evidence they cited was the cards themselves.

We shall not consider plaintiffs' argument that two of the rate cards were confusing concerning the statement charges for digital (DMX) service, because **[***32]** these arguments were not raised below. (See *Jordan-Lyon Productions, Ltd. v. Cineplex Odeon Corp. (1994) 29 Cal.App.4th 1459, 1472 [35 Cal. Rptr. 2d 200]*; *Munro v. Regents of University of California (1989) 215 Cal. App. 3d 977, 989 [263 Cal. Rptr. 878]*.)

Since the material facts were undisputed, the court may decide as a matter of law whether members of the public were likely to be deceived. (See, e.g., *Van Ness v.* ***[**647]*** *Blue Cross of California, supra, 87 Cal.App.4th at p. 376*.) We **[*1242]** conclude, as did the court below, that a reasonable consumer would not likely be deceived by the mere use of the passive voice in the statements in the rate cards. In context, any reasonable consumer would understand that the requirement that every subscriber purchase the basic cable service, in order to receive any other service, was imposed by Comcast. Nor would any reasonable consumer infer from the mere *absence* of any stated reason for the requirement that there were legal or technical reasons why they had to purchase the basic cable tier of service.

The other evidence plaintiffs offered was their own testimony about conversations they had with representatives of Comcast or its predecessors. Nothing in this testimony identifies any oral statement **[***33]** that there were *legal* reasons why FM or music service was not available á la carte. Generously construed, it did establish that at some point after subscribing, plaintiffs were told by a Comcast employee, or one of its predecessors, that there were technical reasons why music or FM services were not provided á la carte.

Assuming arguendo that this evidence was sufficient to create a triable issue of fact as to whether Comcast made such a representation to the public, the court correctly concluded that there was no triable issue of fact as to whether the statement was false or misleading. Comcast met its burden to show these oral statements were neither false nor misleading by submitting the declaration of its construction manager, James Bordessa. Bordessa declared that at the time any such representations were made, Comcast's system was configured to provide basic cable television service to every subscriber, and did not trap out or scramble the basic television cable signal. He acknowledged that the basic television cable signal could be trapped out, but declared that to do so would entail technical changes in the traps Comcast used, or the provision of converter boxes **[***34]** to unscramble the television signal for all subscribers who wanted that service. Bordessa also explained some of the business reasons why Comcast had not designed, manufactured or deployed a trap in its system to allow only the musci service through.

Plaintiffs' expert, Milan Petrovich, declared that another company already manufactured a trap that could allow the FM or music service signal through while blocking everything else. Petrovich disputed Bordessa's assertion that it would be costly for Comcast to deploy such a trap. He noted that since another company already manufactured the device, there would be no development costs, and Comcast could charge the customer for the cost of installation. Petrovich's declaration failed to create a triable issue that at the time the alleged oral representations were made to plaintiffs they were false or misleading. Nothing in his declaration disputed Bordessa's description of how Comcast's system was then configured and that the system did not deploy such a trap. That it was possible to reconfigure the system to use such **[*1243]** a trap simply did not create a dispute that until such a trap was deployed there were, in fact, technical reasons why Comcast did not offer FM **[***35]** or music services á la carte. The remainder of plaintiffs' expert's declaration merely disagreed with the business reasons Bordessa and another expert gave for why Comcast had not reconfigured its system to trap or scramble the basic television signal. This dispute was not material to the truth of the statement that there were technical reasons why plaintiffs could not **[**648]** get the music or FM service on a stand-alone basis. [13]

4. *Evidentiary rulings*

Plaintiffs also argue that the court erred in sustaining Comcast's objection to certain evidence they offered, and in overruling their objections to some of Comcast's assertions of undisputed facts. These contentions fail either on the merits, or because any error was harmless.

Plaintiffs first argue that if the court had not **[***36]** abused its discretion by sustaining Comcast's evidentiary objections to certain declarations filed by Belton and Hall, they could have created a triable issue as to the truth of

---

[13] Of course, a "perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable." (*Consumer Advocates v. Echostar Satellite Corp. (2003) 113 Cal.App.4th 1351, 1362 [8 Cal. Rptr. 3d 22]*.) Yet, in the proceedings below and on appeal plaintiffs fail to articulate in what respect the oral statement, even if truthful, might be misleading.

the oral statements that there were technical reasons why FM or music service was not offered separately from the basic cable television programming. Belton declared that in April of 2005, after the motion for summary adjudication was filed, but before the opposition was due, he spoke to a Comcast supervisor who informed him that FM service was now available on a "stand-alone basis" in Santa Rosa, but had been dropped in Healdsburg, where Belton resided. Hall declared that also in April 2005 he talked to a representative who told him FM service had been cancelled. [14] Any error with respect to this evidentiary ruling is harmless. A decision in March or April 2005 to drop FM service, or unbundle it in a limited area, does not render false the statements of representatives made prior to April 2005 that there were technical reasons why FM service was not offered on a stand-alone basis. (See *Stockinger v. Feather River Community College (2003) 111 Cal.App.4th 1014, 1028 [4 Cal. Rptr. 3d 385]* [error in excluding evidence **[*1244]** opposing summary **[***37]** judgment is harmless because admission of evidence would not have changed the outcome].)

Plaintiffs also challenge the court's ruling sustaining Comcast's objection to portions of Hall's and Belton's deposition testimony attached as exhibits C, Q and R to the declaration of plaintiffs' counsel, Norbert Babin. Plaintiffs contend this excluded testimony would have created a triable issue because it would have shown that they only wanted FM service and were nevertheless required to purchase basic cable, and that Hall was told Comcast did not have the "technology" to provide FM service alone. We need not address the merits of the evidentiary **[***38]** ruling because, again, any error was harmless. Plaintiffs failed to reference any of the excluded testimony in their separate statement of disputed facts. Nor did they identify which fact or facts this testimony placed in dispute. In the absence of a reference to this evidence in the separate statement, the court was free to disregard it, and plaintiffs are precluded from now contending that it created a triable issue of fact. (See *North Coast Business Park v. **[**649]** Nielsen Construction Co. (1993) 17 Cal.App.4th 22, 30–31 [21 Cal. Rptr. 2d 104]* [it is not enough to create a triable issue of fact to submit a document that may support it without referencing the evidence in the separate statement and identifying facts to which it relates].) Moreover, the legal analysis of whether Comcast's practice was illegal, unfair, or deceptive assumed the truth of plaintiffs' allegation that they had to buy basic cable to get FM or music service and that they did not want video. It also assumed they had been told there were technical reasons why FM or music service was not offered á la carte. Therefore, even if the court had admitted this evidence, it would not have changed the court's ruling on the motions, and any error was **[***39]** therefore harmless.

Finally, plaintiffs assert that the court should have sustained their objection that several of Comcast's asserted undisputed facts "misquoted" plaintiffs' testimony. The court was well within its discretion to conclude it could simply review the testimony itself to determine whether any material discrepancies existed.

For the foregoing reasons, we conclude that the court did not err in granting the motion for summary adjudication as to plaintiffs' causes of action for unfair competition, and a violation of the Act.

II.

Consumers Legal Remedies Act

The court also granted Comcast's motion, pursuant to *Civil Code section 1781, subdivision (c)(3)*, that plaintiffs' second cause of action was without **[*1245]** merit. (*Consumer Advocates v. Echostar Satellite Corp., supra, 113 Cal.App.4th at p. 1359* [the CLRA does not permit summary judgment motions, and instead provides this alternate, but similar, procedure to establish that the action is without merit].) In their second cause of action, plaintiffs alleged

---

[14] Gulbransen, Comcast's regional vice-president, in a reply declaration, explained that in March 2005, Comcast discontinued FM service in Healdsburg and other northern California communities to free up bandwidth and enable Comcast to offer more high-definition digital and pay-per-view video programming options. She further declared that, in Santa Rosa, "due to certain franchise requirements, FM music service has not been dropped, and it is now offered on a stand-alone basis," at "a price close to what is charged for the basic television tier of service."

that Comcast violated two provisions of the CLRA: First, they alleged that Comcast violated *Civil Code section 1770, subdivision (a)(19)* by inserting an unconscionable term **[***40]** in its contract, i.e., the requirement that customers buy the basic tier of cable service even when the customer only wanted the music or FM service included in that tier. Second, they alleged Comcast violated *Civil Code section 1770, subdivision (a)(14)* because this requirement constituted negative option billing and discrimination against visually impaired subscribers, in violation of the Act.

The court properly determined that the contentions based upon negative option billing and the Act were without merit for the same reasons that it granted summary adjudication on the unfair competition cause of action, and there is no need to repeat that analysis here. With respect to the allegation that the requirement that customers purchase the basic tier was unconscionable, the question is "one of law which we consider de novo." (*Olsen v. Breeze, Inc. (1996) 48 Cal.App.4th 608, 621 [55 Cal. Rptr. 2d 818]*.)

HN13[] ***CA(9)***[] **(9)** A court may deem a contract provision unconscionable, and therefore unenforceable, only if it is *both* procedurally and substantively unconscionable. (See *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 114 [99 Cal. Rptr. 2d 745, 6 P.3d 669]*.) "The procedural element of unconscionability focuses on two **[***41]** factors: oppression and surprise. [Citation.] ' "Oppression" arises from an inequality of bargaining power which results in no real negotiation and "an absence of meaningful choice." ' [Citation.] ' "Surprise" involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to **[**650]** enforce the disputed terms.' [Citation.] [¶] The substantive element of unconscionability focuses on the actual terms of the agreement and evaluates whether they create ' "overly harsh" ' or ' "one-sided" ' results as to ' "shock the conscience." ' " (*Aron v. U-Haul Co. of California (2006) 143 Cal.App.4th 796, 808 [49 Cal. Rptr. 3d 555]*.)

The availability of alternative sources from which to obtain the desired service defeats any claim of oppression, because the consumer has a meaningful choice. (See, e.g., *Freeman v. Wal-Mart Stores, Inc. (2003) 111 Cal.App.4th 660, 670 [3 Cal. Rptr. 3d 860]*.) Moreover, when the challenged term is in a contract concerning a nonessential recreational activity, the consumer always has the option of simply forgoing the activity. (*Olsen v. Breeze, Inc., supra, 48 Cal.App.4th at pp. 621–622* [ski binding adjustment **[*1246]** company's contract provision releasing **[***42]** company from liability for injury resulting from its work is not unconscionable even though release was alleged to be a standard practice in the industry because skiing is a nonessential recreational activity].) Listening to music or FM radio is also a nonessential recreational activity that plaintiffs could simply have forgone if they disliked the requirement that they purchase the basic cable tier. Moreover, the undisputed facts established that Hall and Belton had other means of listening to music or the radio, some of which were available for free. Broadcast FM programming was available for free from local radio stations, and Hall admitted that he could receive a number of FM stations on the radio at his home and could also listen to music on a compact disc player. Moreover, almost all of the remote stations carried by Comcast in Sonoma County offered live broadcasts of their programming over the Internet, and both Hall and Belton had computers and Internet service. It was also undisputed that DIRECTV, a satellite service, offered digital-quality music. Plaintiffs asserted various reasons why they considered these alternatives less desirable, including that the satellite service **[***43]** was expensive, and that in their opinion the quality of sound when listening to FM radio over the Internet was inferior. These variables may have explained why plaintiffs preferred listening through a cable hookup, but did not create a dispute that these alternatives existed. Plaintiffs did not lack *meaningful choice*, including obtaining the same service for free over the Internet or radio airwaves, or simply forgoing the nonessential recreational activity. (See, e.g., *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc. (2001) 89 Cal.App.4th 1042, 1056 [107 Cal. Rptr. 2d 645]*; *Shadoan v. World Savings & Loan Assn. (1990) 219 Cal. App. 3d 97, 103 [268 Cal. Rptr. 207]*; *Dean Witter Reynolds, Inc. v. Superior Court (1989) 211 Cal. App. 3d 758, 771 [259 Cal. Rptr. 789]*.) Therefore Comcast's requirement that subscribers purchase the basic tier in order to receive FM or music service was not oppressive.

Moreover, there was no element of "surprise," because the requirement that they purchase the basic cable tier was not hidden and plaintiffs admitted that, although they disliked the policy, they understood they had to purchase the basic cable tier, which included television cable programming, to obtain the music or FM service. (See *Wayne v.*

Staples, Inc. (2006) 135 Cal.App.4th 466, 481–482 [37 Cal. Rptr. 3d 544] **[***44]** [no surprise when terms are clearly disclosed].)

In any event, any factual dispute about the practicability of the alternative ways of listening to FM radio or music is immaterial because the contract term must be *both* procedurally and substantively **[**651]** unconscionable. We are satisfied that the requirement that plaintiffs purchase the basic cable tier did not "shock the conscience" simply because it included television programming they did not want. ***HN14***[] A provision is substantively unconscionable if it " 'involves contract terms that are so one-sided as to "shock the conscience," or that impose harsh or oppressive terms.' " (*Morris v. Redwood Empire* ***[*1247]*** *Bancorp (2005) 128 Cal.App.4th 1305, 1322 [27 Cal. Rptr. 3d 797]*. "The phrases 'harsh,' 'oppressive,' and 'shock the conscience' are not synonymous with 'unreasonable.' Basing an unconscionability determination on the reasonableness of a contract provision would inject an inappropriate level of judicial subjectivity into the analysis." (*Ibid.*) The question instead is whether the terms of the agreement are such an extreme departure from common business practice, and so one-sided as to "shock the conscience." (*Id. at p. 1323*; see also *American Software, Inc. v. Ali (1996) 46 Cal.App.4th 1386, 1391–1393 [54 Cal. Rptr. 2d 477]*.)

CA(10)[] **(10)** Plaintiffs **[***45]** argue that this contract term "shocks the conscience" because music or FM services are "discrete services" and "there is no legal or technical reason" why they could not be provided separately. [15] In effect, they argue that if Comcast was legally and technically *able* to provide the service separately, it "shocks the conscience" for them not to do so. Even if we accept arguendo that it was legally and technically possible to provide these services separately, it does not "shock the conscience" for Comcast to make a business decision to package them together. ***HN15***[] It is not uncommon for businesses to package discrete goods or services together, nor is the practice necessarily undesirable from the standpoint of the consumer. (See *Jefferson Parish, supra, 466 U.S. at pp. 11–12* ["Buyers often find package sales attractive"].) [16] To hold that it is "unconscionable" for a business that has the technical and legal capability to offer a service or good separately, to instead offer it only as part of a package, would be an unwise excursion into an area of economic policy that is better left to the Legislature. (See *California Grocers Assn. v. Bank of America (1994) 22 Cal.App.4th 205, 218 [27 Cal.Rptr.2d 396]* [" 'It **[***46]** is primarily a legislative and not a judicial function to determine economic policy' "].) **[*1248]**

For the foregoing reasons we also uphold the court's determination that plaintiffs' cause of action for violation of the CLRA should be dismissed as without merit. [17]

[652]** **CONCLUSION**

The judgment is affirmed. Respondent is entitled to costs on appeal.

---

[15] Plaintiffs' contention in their reply brief that Comcast's policy also "shocked the conscience" because it violated the law against negative option billing (*47 U.S.C. § 543*) and was discriminatory in violation of section 51 of the Act is disposed of by our determination that the court properly granted summary adjudication of their unfair competition cause of action based upon alleged violation of these same predicate laws.

[16] Indeed the Federal Communications Commission (FCC), in two separate reports, one of which was part of the record below, reached different conclusions about whether consumers would benefit from regulations requiring cable services to be provided "á la carte." In a November 18, 2004 report entitled Report on the Packaging and Sale of Video Programming Services to the Public, the FCC stated, among other things, that such regulation could result in less diverse preprogramming and consumers having to pay more for fewer channels. In February 2006, a second report, entitled Further Report on the Packaging and Sale of Video Programming Services to the Public, however, identified **[***47]** substantial benefits in terms of an increase of choices. (<*http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-263740A1.pdf*> [as of June 8, 2007].)

[17] These same reasons also support the conclusion that Comcast's practice was not "unlawful" within the meaning of *Business and Professions Code section 17200*, based upon a predicate violation of the CLRA.

Marchiano, P. J., and Swager, J., concurred.

The People ex rel. Edmund G. Brown v. Powerex Corp.

Court of Appeal of California, Third Appellate District

June 11, 2007, Filed

C051868

Reporter
2007 Cal. App. Unpub. LEXIS 4656 *

THE PEOPLE ex rel. EDMUND G. BROWN, Jr., as Attorney General, etc., Plaintiff and Appellant, v. POWEREX CORPORATION, Defendant and Respondent.

Notice: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 8.1115(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 8.1115(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 8.1115.

Prior History: **[*1]** Superior Court of Sacramento County. No. 04AS05129.

Core Terms

rates, tariffs, filed rate doctrine, energy, market-based, electricity, wholesale, sellers, refunds, regulation, markets, preemption, congestion, violations, transmission, schemes, energy crisis, file a tariff, fraudulently, leave to amend, gaming, grid, district court, trial court, consumers, schedules, intertie, damages, relieve, entity

Judges: MORRISON, J.; BLEASE, Acting P.J., BUTZ, J. concurred.

Opinion by: MORRISON

Opinion

After the collapse of Enron Corporation, the Attorney General concluded wholesale energy companies, including Powerex Corporation, had engaged in schemes damaging California energy consumers. He sued Powerex, alleging violations of the Unfair Competition Law (*Bus. & Prof. Code, § 17200 et seq.*, "UCL") and the California Commodity Law of 1990 (*Corp. Code, § 29500 et seq.*, "CCL") seeking damages, penalties and injunctive relief.

The trial court sustained Powerex's demurrer without leave to amend on the ground the claims were barred by the Federal Power Act (*16 U.S.C.A. § 791 et seq.*, "FPA") which grants the Federal Energy Regulatory Commission ("FERC") exclusive jurisdiction over the wholesale energy market.

Several Ninth Circuit decisions arising out of the energy crisis have concluded that claims similar to the Attorney General's are barred by the FPA, specifically by implied preemption (field and conflict preemption), and by the filed rate doctrine. Field preemption exists when a federal scheme is comprehensive, leaving no room for state regulation; conflict preemption exists **[*2]** when state regulation would conflict with federal regulation; the filed rate doctrine bars claims which assume rates different from a federal tariff. (See *Public Utility v. Dynegy Power*

Marketing(9th Cir. 2004) 384 F.3d 756 (*Snohomish*); *Public Util., Grays Harbor, WA v. Idacorp (9th Cir. 2004) 379 F.3d 641* (*Grays Harbor*); *California ex rel. Lockyer v. Dynegy, Inc. (9th Cir. 2004) 375 F.3d 831* (*Dynegy*).)

We conclude the filed rate doctrine bars all of the Attorney General's monetary and injunctive claims. Further, no injunction is warranted because there is no threat that the misconduct will continue. Because the Attorney General does not explain how his complaint might be amended, we shall affirm.

STANDARD OF REVIEW

We accept the well-pleaded facts alleged in the complaint and matters judicially noticeable, but not rhetoric or conclusions of law. We consider de novo whether the complaint states a viable claim for relief. (*Schifando v. City of Los Angeles (2003) 31 Cal.4th 1074, 1081*; *Faulkner v. Cal. Toll Bridge Authority (1953) 40 Cal.2d 317, 329*.)

BACKGROUND

A. The Complaint

"The California Independent System Operator ('ISO') is a not-for-profit corporation established through California's **[*3]** deregulation legislation. The ISO is responsible for operating the high-voltage transmission grid serving most of California. The area encompassing this transmission grid is known as the ISO control area."

Powerex sells wholesale energy within the ISO control area. It engaged in fraudulent trading (or "gaming") schemes which used false and misleading information.

We quote from a decision summarizing background facts which are also alleged in the complaint:

> "Before 1996, FERC reviewed electricity rates that were cost-based. The primary factor in setting the rate was the cost of producing and transmitting the electricity. Power suppliers proposed rates by adding up their costs and accounting for an expected rate of return. FERC reviewed and approved tariffs that contained detailed breakdowns of costs and specified rates of return. . . .
>
> "In 1996, California changed this cost-based system of setting wholesale electricity rates to a market-based system, where the rate was determined in a structured market. The California legislature passed Assembly Bill 1890, *Cal. Pub. Util. Code § 330 et seq.*, in an effort to reduce the price of electricity by replacing cost-based rate regulation with rates **[*4]** that were determined by competitive forces. [Citations.] The legislation created two non-governmental entities to operate markets and otherwise manage the sale of electricity: the California Power Exchange ('PX') and the [ISO]. These entities were subject to FERC's regulation. [Citation.]
>
> "The PX operated a market for the purchase and sale of electricity in the 'day-ahead' and 'day-of' markets. The price in these markets was set by evaluating bids submitted by market participants. A seller could submit a series of bids that consisted of price-quantity pairs representing offers to sell (e.g. 5 units at $50 each, but 10 units if the price is $100 each). Similarly, a buyer could submit a series of bids that consisted of price-quantity pairs representing offers to buy. The PX would then establish aggregate supply and demand curves and set the 'market clearing price' at the intersection of the two curves. Then every exchange would take place at the market clearing price, even though some buyers had been willing to pay more and some sellers had been willing to sell for less.
>
> "The ISO managed the transmission network, managing imbalances between supply and demand and maintaining the reliability **[*5]** of the transmission grid. As part of these responsibilities, it operated a 'real-time' or 'spot' market used to balance supply and demand at precise points in time. For example, if customer demand for a particular hour was not met, then the ISO was required to procure power on the spot market to maintain the stability of the grid. In the markets the PX and ISO managed, rates for wholesale electricity rose dramatically during 2000 and 2001. This caused consumer utilities to pay record high prices to traders and generators." (*Snohomish*, *supra*, 384 F.3d at pp. 758-759; see also *Dynegy, supra, 375 F.3d at pp. 835-836*; *United States v. Reliant Energy (N.D. Cal. 2006) 420 F. Supp. 2d 1043, 1045-1046*.)

In May 2000 the price of wholesale power rose sharply, buyers "incurred massive losses[,]" and the two largest investor-owned utilities, Southern California Edison and Pacific Gas & Electric, defaulted on payments to the PX and ISO; by March 2001 the PX had declared bankruptcy. Meanwhile, Governor Gray Davis had declared an emergency and "authorized the State, through the California Department of Water Resources" to purchase electricity, which it did to the tune of $10 billion. These costs were **[*6]** passed on to California consumers.

Beginning in 1999 Powerex had employed fraudulent schemes to justify "'congestive relief' payments for taking actions that did not relieve any congestion, to receive payment for excess generation through the submission of false schedules, and to circumvent the ISO's price cap by falsely representing the source of the energy." These schemes came to light in connection with the collapse of Enron and are "widely known as the 'Enron trading strategies' but were in fact employed by several market participants, including" Powerex.

These schemes acquired colorful names, such as Death Star, Get Shorty, Fat Boy and Ricochet. The details of each scheme are not important, but we will describe two for illustration.

In Ricochet, Powerex exploited an ISO rule which allowed payments above the price cap for power generated outside the state in times of shortage. Powerex would export power outside the ISO area, then import it back to California, representing it as out-of-market power and exempt from the price cap even though "no energy ever left or re-entered the State."

In Death Star, Powerex submitted false energy schedules: "In one schedule, energy is imported into **[*7]** the ISO control area through a transmission interface. This energy is scheduled to flow in a direction opposite to congestion and is then exported over another transmission interface. The counterflow created by this schedule is supposed to relieve congestion, and the market participant receives a congestion relief payment. However, in a second schedule, the same energy is then circled back to the ISO control area along transmission lines outside of the ISO system. . . . As [a] result . . . no congestion is relieved because no energy is put onto or taken off of the ISO grid."

The Attorney General alleged these and similar schemes were unlawful and unfair business practices proscribed by the UCL and alleged that they represented unlawful artifices and false statements in violation of the CCL. In particular the Attorney General alleged Powerex violated both laws by:

> "(a) willfully and fraudulently offering to sell ancillary services to the ISO without having any physical resources backing up the sale, and collecting payment for ancillary services it did not provide and had no intention of providing;
>
> "(b) willfully and fraudulently misrepresenting 'out-of-market' sales of power to ISO as **[*8]** 'imports,' and collecting payment for 'out-of-market' sales at prices above the price cap, when in fact the power never left or re-entered California;
>
> "(c) willfully and fraudulently overstating the amount of load it expected to serve, and thereby collecting payment for the 'excess' generation at the market clearing price;
>
> "(d) willfully and fraudulently scheduling non-firm energy in the opposite direction of congestion to a point outside the ISO control area without having any intention of delivering the power, collecting payment for purportedly relieving congestion, and then cutting the schedule before putting any energy on the grid;
>
> "(e) willfully and fraudulently scheduling power in the opposite direction of congestion without having any intention of delivering the power, and collecting payment for purportedly relieving congestion, when in fact no congestion was relieved[.]"

Californians were "subjected to the risks and dangers of power supply interruptions, rolling blackouts and other adverse consequences." The complaint sought an injunction, restitution, disgorgement, civil penalties and damages.

B. Federal Court

Powerex removed the case to federal court, alleging the complaint **[*9]** raised questions about violations of the FPA, which fell within the exclusive jurisdiction of federal courts. (See *16 U.S.C.A. § 825p*.) Powerex also claimed it was an arm of the Canadian government, interposing the Foreign Sovereign Immunities Act of 1976 (*28 U.S.C.A. §*

1602 et seq., "FSIA"). The district court remanded the case. The Ninth Circuit dismissed Powerex's appeal. Powerex's petition for writ of certiorari on the FSIA claim is still pending in the United States Supreme Court. (*Powerex Corp. v. California*, Dkt. No. 05-584.)

C. The Demurrer in State Court

Powerex demurred, claiming preemption and the filed rate doctrine barred the Attorney General's claims. The parties submitted lengthy supporting and opposing papers.

The trial court sustained the demurrer, finding it could not grant "any remedy that would assume a rate different from that determined by FERC. The filed rate doctrine and federal preemption apply to market based rates at issue here."

The Attorney General timely appealed.

DISCUSSION

The Attorney General acknowledges FERC's authority over wholesale energy rates but states this action "at best, has only a tenuous, remote, or peripheral effect on rates," and therefore **[*10]** it would not "impinge on FERC's jurisdiction." He also asserts he "does not allege unreasonable electricity rates or seek a determination of the reasonableness of rates charged by Powerex." We disagree with these characterizations.

The gist of the complaint is that *had Powerex acted fairly* the amount charged for wholesale energy would have been less. The propriety of what was charged falls within FERC's bailiwick. Not only did FERC issue tariffs used by Powerex to charge (or overcharge) the ISO, FERC is adjudicating refunds based on its findings of what would have been just and reasonable, amending the tariffs. To impose further amounts would in effect raise those adjusted tariffs beyond what FERC finds is appropriate.

We will first summarize Ninth Circuit cases applying the filed rate doctrine in the context of the FPA, and then apply the doctrine to the Attorney General's claims in this case.

I. The Filed Rate Doctrine

A. *TANC*

In *Transmission Agency, North. Cal. v. Sierra Pacific (9th Cir. 2002) 295 F.3d 918* (*TANC*), TANC had a deal with the Bonneville Power Administration and others (collectively, BPA) which in part called for TANC to build an "intertie" to move energy between California **[*11]** and Oregon. BPA then made a deal with Sierra Pacific to build another intertie. TANC protested to FERC, claiming the new intertie would reduce the energy carried by its intertie. FERC approved the new intertie, but began hearings on the issue. Before those hearings were over TANC sued BPA and others, alleging breach of contract and related theories. (*Id. at pp. 923-924*.) The court concluded some of TANC's claims were preempted by the FPA and others were barred by the filed rate doctrine, which it viewed as a species of preemption:

> "[T]he filed rate doctrine provides that state law, and some federal law (e.g. ***antitrust law***), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question. . . . [T]he Supreme Court has extended the doctrine to the [FPA] and to electricity rates.
>
> "In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co. [(1951) 341 U.S. 246, 251 95 L. Ed. 912]*, the Supreme Court held that a plaintiff in a case involving electricity rates set by the Federal Power Commission (the precursor to FERC) could 'claim no rate as a legal right that is other than the filed rate, whether fixed **[*12]** or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.' The Court has explained that this rule is without exception: 'Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction. . . . This was done in the [FPA] by making [Federal Power Commission] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.' [Citations.]

"As further developed, the filed rate doctrine has prohibited not just a state court (or a federal court applying state law) from setting a rate different from that chosen by FERC, but also from assuming a hypothetical rate different from that actually set by FERC. In *Arkansas Louisiana Gas Co.* [*v. Hall (1981) 453 U.S. 571, 579 69 L. Ed. 2d 856]*, the Court stated:

> 'It would undermine the congressional scheme of uniform regulation of rate regulation to allow a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the [Natural Gas] Act. Following that course would permit state courts to grant **[*13]** regulated sellers greater relief than they could obtain from the Commission itself.'

"The Court has also expanded the reach of the filed rate doctrine beyond just rates. In *Nantahala Power* [*& Light Co. v. Thornburg (1986) 476 U.S. 953 90 L. Ed. 2d 943],* the Supreme Court held that 'the filed rate doctrine is not limited to rates *per se.'* [*476 U.S. at 966*.] Instead, any allocation of power that directly affects rates is protected by the filed rate doctrine. [*Id. at 966-967*.] Thus, following *Nantahala Power,* we recognized that an allocation of natural gas . . . is covered by the filed rate doctrine, just as if the allocation had been a decision on rates. [P] . . . [P]
"In the present case, the common theme in TANC's claims against the utility company defendants for breach of contract, intentional interference with a contractual relationship, and intentional interference with a prospective economic advantage is the contention that TANC is, or would have been, entitled to 4800 MW of transfer capability . . . .

"For a district or state court to conclude that under state contract law the Northwest Parties breached the Agreements . . . by failing to increase the capacity of the Northwest **[*14]** AC Intertie to 5100 MW, the court would have to hold that under state contract law TANC was entitled to 4800 MW of transfer capacity. Yet, state law can no more assume how FERC would allocate access to interstate transmission capacity than it can assume how FERC would set rates. . . . Although this resolution may leave TANC's state law claims unredressed, such a circumstance is not an unlikely result of preemption." (*295 F.3d at pp. 929-932*.)

TANC thus establishes that state-law claims which depend on assumptions contrary to rates or allocations approved by FERC are barred by the filed rate doctrine. The fact this may leave claims "unredressed" is no basis to depart from the doctrine.

B. *Dynegy*

Dynegy, supra, 375 F.3d 831, arose from the energy crisis, and the Attorney General was the plaintiff. The gist was that "producers fraudulently sold energy on the spot market from reserve capacity that they had contracted to hold in reserve. . . . According to this theory, the companies' unauthorized sale of ancillary services energy threatened the stability of the grid system and left residents of the state vulnerable to blackouts and other disruptions." (*Id. at p. 836*.) The complaint sought "injunctions, **[*15]** restitution, disgorgement, and civil penalties against multiple companies for double-selling reserve generation capacity in violation of" the UCL. (*Id. at pp. 836-837*.) After holding the claims barred by preemption the court found they were also barred by the filed rate doctrine:

"Under the filed rate doctrine, the terms of the filed tariff 'are considered to be "the law" and to therefore "conclusively and exclusively enumerate the rights and liabilities"' of the contracting parties. [Citations.] As a result, 'the filed rate doctrine bars all claims-state and federal-that attempt to challenge [the terms of a tariff] that a federal agency has reviewed and filed.' [Citations.] Thus, to the extent that California argues that the companies owe 'obligations . . . *beyond those* set out in the filed tariffs . . . [such claim] is also barred by the filed rate doctrine.' [Citation.]

"'*[T]he filed rate doctrine's purpose is to ensure that the filed rates are the exclusive source of the terms and conditions by which the [regulated entity] provides . . . the services covered by the tariff*.' [Citation.] To the extent that California is seeking to enforce the penalty provisions of the tariff, or **[*16]** to have them expanded,[fn.] this conflicts with the filed rate doctrine and the exclusive authority conferred to FERC to enforce its tariff." (*375 F.3d at p. 853*, italics added.)

In the footnote the court observed:

> "While the State concedes that the tariff prohibits double-selling of reserve capacity, it contends that restitution and disgorgement of the companies' ill-begot gains does not conflict with the filed tariff. But the tariff itself specifies the penalties to which companies are subject for violating their reserve capacity commitments." (375 F.3d at p. 853, fn. 24.)

Thus, *Dynegy* held that the Attorney General may not base UCL claims on *violations* of filed tariffs, inasmuch as FERC oversees such violations:

> "16 U.S.C. § 824e provides that upon a determination by FERC that 'any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, **[*17]** rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.'" (Id. at p. 850, fn. 18.)

C. *Grays Harbor*

Grays Harbor, supra, 379 F.3d 641 also dealt with claims arising out of the energy crisis. Grays Harbor contracted to buy power *at a price to be set by the market*. It later sued, seeking contract rescission or reformation. "In essence, the complaint alleges that the market rate of $249 per megawatt hour price was agreed to only because Grays Harbor believed that the rate was based on a properly functioning market, when in fact the price resulted from a dysfunctional, manipulated market." (Id. at p. 646.) Grays Harbor also alleged unjust enrichment, to the extent it paid over *what it would have paid in a fair market*. After the case was removed the district court dismissed it because "the relief sought would require the court to determine a fair price." (Id. at pp. 645-646.)

After finding field and conflict preemption barred the complaint *Grays Harbor* addressed the filed rate doctrine:

> "The relief sought by Grays Harbor would require the court to set damages by assuming a hypothetical rate, the 'fair value,' in violation of the filed **[*18]** rate doctrine. [Citing *TANC*, *supra*, 295 F.3d at p. 933.]
> "Grays Harbor describes at length the reasons why the filed rate doctrine should not apply here, but its arguments all center on the market-based nature of the rates at issue in this case. Grays Harbor contends that the $249 per megawatt hour that was charged was not 'filed' with FERC and approved by FERC before it was charged. In short, according to Grays Harbor, FERC simply did not set any rates. Grays Harbor contends that to apply the filed rate doctrine to market-based rates that have not been filed with FERC would be an unwise and unprecedented expansion of the doctrine.
>
> "But, as described above, the market-based rate regime established by FERC continues FERC's oversight of the rates charged. FERC only permits power sales at market-based rates after scrutinizing whether 'the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry.' [Citation.] According to FERC, these conditions assure that the market-based rates charged comply with the FPA's requirement that rates be just and reasonable. [Citations.] This oversight is ongoing, **[*19]** in this case requiring Idaho Power Company to provide notice of any change in status, to file an updated market analysis every three years, and to file various sales agreements and transaction summaries. [Citation.]
> "Further, FERC contends that such procedures effectively constitute review of rates prior to their implementation. [Citation.] FERC has clearly stated its belief that these procedures 'satisfy the filed rate doctrine for market-based rates. . . .' [Citations.] Grays Harbor, on the other hand, provides no persuasive authority that the filed rate doctrine does not apply to market-based rates. [Citation.]
>
> "Therefore, while market-based rates may not have historically been the type of rate envisioned by the filed rate doctrine, we conclude that they do not fall outside of the purview of the doctrine. Therefore, the relief sought by Grays Harbor is barred under the filed rate doctrine." (379 F.3d at pp. 651-652.)

The majority went on to conclude that Grays Harbor should have been given leave to amend, stating, "A complaint that merely seeks declaratory relief as to contract formation issues would not necessarily intrude upon the rate-setting jurisdiction of FERC." (379 F.3d at p. 652.) **[*20]** Although the court cautioned that an amended complaint "must not require the district court to make a determination as to what the 'fair' rate would have been" (id. at pp. 652-653), the court did not explain how this would be possible, inasmuch as the claimed mistake was that Grays Harbor did not know *the market price it paid* "resulted from a dysfunctional, manipulated market." (Id. at p. 645.)

Because the claimed mistake hinged on an unfair price, leave to amend should have been denied, as Judge Callahan explained in her separate opinion. (Grays Harbor, supra, 379 F.3d at pp. 653-654 [conc. & dis. opn. of Callahan, J.].)

D. *Snohomish*

In *Snohomish*, *supra*, 384 F.3d 756, the court discussed preemption and the filed rate doctrine together. Snohomish sued wholesale energy sellers based on "California state antitrust and consumer protection laws. Snohomish charges that the defendants manipulated the market and restricted electricity supplies in order to cause artificially high prices in the market from which Snohomish purchased power." (Id. at p. 758.) *Snohomish* upheld market-based rates:

> "Under the system at issue here, FERC has waived many of the requirements that applied under the cost-based **[*21]** system. For example . . . the utilities do not provide FERC with detailed schedules of their costs. Instead, the price of wholesale electricity is determined in the markets operated by the PX and the ISO.
> "FERC continued to oversee wholesale electricity rates, however, by reviewing and approving a variety of documents filed by the defendants, the PX, and the ISO. First, each seller was to file a market-based umbrella tariff, which 'preauthorizes the seller to engage in market-based sales and puts the public on notice that the seller may do so.' [Citation.] FERC approved these market-based tariffs only upon a showing that the seller lacked or had mitigated its market power. . . . [P]
>
> "Second, FERC required each seller to file quarterly reports, which contained certain required information including the minimum and maximum rate charged and the total amount of power delivered during the quarter. FERC has found this requirement necessary to ensure that rates will be on file as required by FPA § 205(c), 16 U.S.C. § 824d(c), to allow FERC to evaluate the reasonableness of the charges as required by FPA § 205(a), 16 U.S.C. § 824d(a), and to allow FERC to continually monitor the seller's ability **[*22]** to exercise market power. [Citation.]
> "Third, FERC reviewed and approved detailed tariffs filed by the PX and the ISO, which described in detail how the markets operated by each entity would function. Many of the rules governing market operations were originally submitted by the PX and the ISO for information purposes only, but FERC required that these protocols be filed with and approved by the Commission as part of the PX and ISO tariffs. [Citation.] Each participant in the PX and the ISO markets was required to sign an agreement acknowledging that the tariff filed by either the PX or the ISO would govern all transactions in that market.
> "After the energy crisis unfolded, FERC ordered wholesalers to disgorge profits that resulted from the kinds of practices Snohomish has alleged here. FERC found that many of these practices were prohibited by the protocols that were filed as part of the PX and ISO tariffs. [Citation.]
>
> "This court has rejected Snohomish's argument that the preemption-related doctrines at issue do not apply when market-based rates are involved. Grays Harbor, 379 F.3d 641. . . . We concluded that the district court was precluded from giving [Grays Harbor] the relief **[*23]** it sought because, to award that relief, the district court would have had to determine a 'fair price.' Id. at 648. We held that this would interfere with FERC's exclusive jurisdiction to set wholesale rates and was therefore barred by field preemption, conflict preemption, and the filed rate doctrine. Id. at 648, 650, 651, 653.
>
> "Snohomish's claims in this case allege violations of state antitrust and unfair competition law rather than the state contract law claims involved in *Grays Harbor,* but Snohomish's claims also ask the district court to determine the rates that 'would have been achieved in a competitive market.' This is the same determination as

> the 'fair price' determination that we held was barred by preemption principles in *Grays Harbor.* We therefore hold that Snohomish's claims are barred by the filed rate doctrine, by field preemption, and by conflict preemption.
>
> "Snohomish also requests injunctive relief, but our court has also held that this relief is barred by the filed rate doctrine and preemption principles. [*Dynegy, supra, 375 F.3d at pp. 836-839*.] In *Dynegy,* we held that the State of California's claims for violations of California's [UCL], which included a claim **[*24]** for injunctive relief, were barred. *Id. at 835, 836-39*. We said: 'remedies for breach and non-performance of FERC-approved operating agreements in the interstate wholesale electricity market fall within the exclusive domain of FERC.' *Id. at 836*. Here, FERC approved tariffs that included the market protocols that governed sales in the PX and ISO markets. FERC has found that most, if not all, of the practices alleged in Snohomish's complaint violated these protocols. [Citation.] Snohomish's claim for injunctive relief is therefore preempted. It 'encroach[es] upon the substantive provisions of the tariff, an area reserved exclusively to FERC, both to enforce and to seek remedy.' *See* *Dynegy, 375 F.3d at 836* (citations omitted).
>
> "*FERC approved tariffs that governed the California wholesale electricity markets. Therefore, if the prices in those markets were not just and reasonable or if the defendants sold electricity in violation of the filed tariffs, Snohomish's only option is to seek a remedy before FERC*." (*384 F.3d at pp. 760-762*, italics added.)

Snohomish thus reaffirms that FERC tariffs were operative during the crisis, although they were unfairly manipulated.

E. Refund Cases

Recently **[*25]** the Ninth Circuit issued two decisions which illustrate FERC's prerogatives regarding tariffs.

In *Public Utilities Com'n of State, Cal. v. F.E.R.C. (9th Cir. 2006) 462 F.3d 1027* (*PUC*), in which the Attorney General and Powerex were parties, the court vacated FERC orders which unduly limited the scope of refund proceedings. The court explained that FERC is making orders to correct the unfair payments generated by the colorfully-named schemes. (*Id. at pp. 1040-1065*.)

In *Pacific Gas and Elec. v. F.E.R.C. (9th Cir. 2006) 464 F.3d 861* (*PG&E*) the court upheld FERC decisions allowing ISO to apply rates found by FERC to be reasonable to billings which had been paid during the crisis. The new rates are referred to as the Mitigated Market Clearing Price, or MMCP.

II. The Attorney General's Claims

A. Existence of a Filed Rate

The Attorney General argues "the filed rate doctrine does not apply because there was 'in effect' no properly filed tariff during the energy crisis." Market-based rate tariffs were approved by FERC and are being retroactively modified to preclude payments for gaming the market. (See *PG&E*, *supra*, 464 F.3d at pp. 864-868; *PUC*, *supra*, 462 F.3d at pp. 1040-1065; *Snohomish*, *supra*, **[*26]** 384 F.3d at pp. 760-762; see also *Town of Norwood, Mass v. New England Power Co. (1st Cir. 2000) 202 F.2d 408, 419* [upholding market-based tariffs] (*Norwood*).) The Attorney General's argument is based upon snippets of a case that, fairly read, undermines his argument.

In *California ex rel. Lockyer v. F.E.R.C. (9th Cir. 2004) 383 F.3d 1006* (*Lockyer*), the court held FERC had the authority to order refunds to account for the gaming schemes employed by some energy companies, which we have described above. The holding was "that FERC's authorization of market-based tariffs in this case complied with the [FPA], but that FERC abused its administrative discretion by declining to order refunds for violations of its reporting requirements." (*Id. at p. 1008*.)

The court described FERC's approval of the tariffs:

> "A condition of FERC's approval of an entity's market-based rate authority was a FERC determination that the entity lacked, or had adequately mitigated market power in the California markets. FERC conducted these

> inquiries as a means of carrying out its statutory mandate under the [FPA] to ensure 'just and reasonable' wholesale rates for electricity. *16 U.S.C. § 824d(a)*. FERC approved the utilities' **[*27]** requests, and granted permission for the utilities to sell electricity at market-based rates in California. FERC also approved the establishment of the ISO and [PX], . . . [P]
>
> "In June 2000, wholesale electricity prices increased dramatically. In August, San Diego Gas & Electric Company filed a complaint under [the FPA], against all sellers of energy and ancillary services into the [PX] and ISO markets. In response, FERC instituted hearing procedures . . . to investigate the justness and reasonableness of the rates of sellers that were subject to FERC jurisdiction into the ISO and [PX] markets." (*383 F.3d at p. 1009*.)

During the hearings FERC found that the market structure had, contrary to its intent, allowed some sellers to exercise market power, resulting in "'unjust and unreasonable'" rates. "In addition to ordering structural and rule changes, FERC ordered an evidentiary hearing to determine the appropriate refund. However, FERC limited the refund to ISO and [PX] spot market transactions during the period from October 2, 2000 through June 20, 2001." (*383 F.3d at p. 1010*.) Later, California filed a broader complaint with FERC against all power sellers subject to FERC jurisdiction, **[*28]** "alleging that FERC's market-based rate filing requirements violated the FPA and that, even if valid, the reports filed by electricity sellers did not contain the transaction-specific information the FPA requires. California claimed that FERC's improper decision to limit the refund period reduced the refunds owed to California purchasers by as much as $2.8 billion." (*Ibid*.)

The Ninth Circuit rejected California's attack on market-based tariffs. (*383 F.3d at pp. 1011-1013*.) However, the court agreed that "FERC failed to administer the tariffs in accordance with their terms and abused its discretion in limiting available remedies for regulatory violations." (*Id. at p. 1014*.) The sellers had reporting requirements to enable FERC to monitor the market and ensure the tariffs were just and reasonable. However, sellers had failed to provide accurate transaction reports, as required by the tariffs. (*Id. at pp. 1014-1015*.)

In a rhetorical passage the court stated:

> "Thus, the very mechanism that distinguished FERC's tariff from those prohibited by the Supreme Court . . . was, for all practical purposes, non-existent while energy prices skyrocketed and rolling brown-outs threatened California's **[*29]** businesses and citizens.
>
> "Despite the promise of truly competitive market-based rates, the California energy market was subjected to artificial manipulation on a massive scale. With FERC abdicating its regulatory responsibility, California consumers were subjected to a variety of market machinations, . . ." (*383 F.3d at pp. 1014-1015*.)

The court then rejected FERC's position that the reporting violations were "technical" and did not authorize refunds:

> "FERC misapprehends its legal authority in this context. In fact, FERC possesses broad remedial authority to address anti-competitive behavior. [Citation.] Indeed, in the past, FERC has ordered refunds in instances where utilities violated FPA § 205, either by violating the terms of an accepted rate, or by charging rates without first seeking approval under FPA § 205. . . . [P]
>
> "Here, because the reporting requirements were an integral part of a market-based tariff that could pass legal muster, FERC cannot dismiss the requirements as mere punctilio. If the ability to monitor the market, or gauge the 'just and reasonable' nature of the rates is eliminated, then effective federal regulation is removed altogether. Without the required filings, **[*30]** neither FERC nor any affected party may challenge the rate. *Pragmatically, under such circumstances, there is no filed tariff in place at all*. The power to order retroactive refunds when a company's non-compliance has been so egregious that it eviscerates the tariff is inherent in FERC's authority to approve a market-based tariff in the first instance. FERC may elect not to exercise its remedial discretion by requiring refunds, but it unquestionably has the power to do so. *In fact, if no retroactive refunds were legally available, then the refund mechanism under a market-based tariff would be illusory. Parties aggrieved by the illegal rate would have no FERC remedy, and the filed rate doctrine would preclude a*

> *direct action against the offending seller*. That result does not comport with the underlying theory or the regulatory structure established by the FPA." (383 F.3d at pp. 1015-1016, italics added.)

Thus, the court was not actually holding that no tariffs existed, as the Attorney General claims, the court was holding that if FERC's position about the triviality of the reporting requirements were upheld, the tariffs would be unenforceable, or "[p]ragmatically," there would be no **[*31]** tariffs. The passage read in context does not support the Attorney General's claim that the court held no valid tariffs were in place. Indeed, the passage makes the point that FERC alone has the power to enforce the tariffs by awarding refunds where the market machinations resulted in other than "just and reasonable rates," because of the filed rate doctrine. This refutes the claim that the court held no filed tariffs were in place. (See In re Enron Corp. (Bankr. S.D.N.Y. 2005) 327 B.R. 526, 534-535 (*Enron*) [rejecting California Attorney General's claim that doctrine does not apply because no filed rates existed].)

B. Application of the Filed Rate Doctrine

The Attorney General argues the filed rate doctrine does not apply because "what is at issue . . . is the manner under which Powerex conducted itself in the California energy market during the energy crisis." "[T]he Attorney General's claims neither rely on any filed tariff term, directly affect a filed rate or tariff provision, nor collaterally attack the reasonableness of any filed rate[.]" We disagree.

The complaint sought restitution, disgorgement of profits, civil penalties and damages as a result of Powerex's trading activities, **[*32]** alleging the gaming of the market resulted in unfair payments to Powerex which harmed California electricity consumers and de-stabilized the power delivery system. Any monetary relief would be in excess of the tariffs eventually applied by FERC and therefore are barred by the filed rate doctrine. (*Snohomish*, *supra*, 384 F.3d at pp. 760-762; Dynegy, supra, 375 F.3d at p. 853; Grays Harbor, supra, 379 F.3d at pp. 651-652; *TANC*, *supra*, 295 F.3d at pp. 929-932; Enron, supra, 327 B.R. at pp. 535-537 [barring California Attorney General's claims under UCL and CCL based on gaming the market].) Further, civil penalties are regulatory and "to impose a civil penalty upon an incident or event, without regard to whether injury was suffered, is to regulate the activity that gave rise to the incident or event." (People v. Union Pacific Railroad Co.(2006) 141 Cal.App.4th 1228, 1257-1258.) Regulating gaming schemes by imposing penalties would grant relief in excess of the tariffs and conflict with FERC's exclusive regulatory power over the wholesale energy market. (See Duke Energy Trading and Marketing, L.L.C. v. Davis (9th Cir. 2001) 267 F.3d 1042, 1056-1057 [state "commandeering orders directly nullify **[*33]** the security and default mitigation provisions of the FERC-approved CTS rate schedule, and hence cross the 'bright line' between state and federal jurisdiction established by the FPA"].)

The claim of entitlement to injunctive relief, too, is barred by the filed rate doctrine. (*Snohomish*, *supra*, 384 F.3d at pp. 760-762; Dynegy, supra, 375 F.3d at pp. 836-839, 852-853; see *Norwood*, *supra*, 202 F.3d at pp. 419-420.) Further, we rejected an injunctive claim arising from the energy crisis, for lack of any "threat that the misconduct to be enjoined is likely to be repeated in the future." (Madrid v. Perot Systems Corp. (2005) 130 Cal.App.4th 440, 465.) The Attorney General's complaint and briefing predicates liability on conduct *during the energy crisis*. Gaming could not be successfully attempted now, when the ISO, FERC and the Attorney General are all watching the power companies like hawks.

Because the complaint fails to state any good claim for relief the trial court properly sustained the demurrer.

III. Leave to Amend

At the hearing in the trial court the Attorney General sought leave to amend to drop the restitution claim. In a footnote on appeal he suggests leave to amend should have been **[*34]** given to "amend the complaint in a manner that would address the court's concerns." Later he states "the court may grant relief that will not conflict with the filed rate doctrine and FERC's exclusive regulation of rates and remedies provided in a tariff."

A party may propose amendments on appeal where a demurrer has been sustained, in order to show that the trial court abused its discretion in denying leave to amend. (Code Civ. Proc., § 472c, subd. (a).) However, the vague claim that "concerns" could be "address[ed]" by an amendment or there may be a type of relief "that will not conflict with the filed rate doctrine" does not satisfy an appellant's duty to spell out in his brief the specific proposed amendments on appeal. (*Cooper v. Leslie Salt Co. (1969) 70 Cal.2d 627, 636-637*; *Paterno v. State of California (1999) 74 Cal.App.4th 68, 110*.) The Attorney General has not carried his burden as the appellant to show an abuse of discretion by the trial court in declining to grant leave to amend. (Cf. *Code Civ. Proc., § 472c, subd. (a)*.)

DISPOSITION

The judgment is affirmed. The Attorney General shall pay Powerex's costs on appeal. (*Cal. Rules of Court, rule 8.276*.)

MORRISON, J.

We concur:

BLEASE, **[*35]** Acting P.J.

BUTZ, J.

County of Milwaukee v. Williams

Supreme Court of Wisconsin

March 6, 2007, Oral Argument; June 12, 2007, Filed

Nos. 2005AP2686 & 2005AP2687

Reporter

2007 WI 69 *; 301 Wis. 2d 134 **; 732 N.W.2d 770 ***; 2007 Wisc. LEXIS 396 ****

County of Milwaukee, Plaintiff-Respondent, v. Lawrence C. Williams, Defendant-Appellant-Petitioner.

Prior History: [**1]** REVIEW of a decision of the Court of Appeals. COURT: Circuit Court. COUNTY: Milwaukee. JUDGE: Daniel L. Konkol. (L.C. Nos. 2005FO107 & 2005FO110).

County of Milwaukee v. Williams, 2006 WI App 153, 295 Wis. 2d 389, 720 N.W.2d 177, 2006 Wisc. App. LEXIS 567 (2006).

Disposition: Reversed and cause remanded.

Core Terms

Airport, taxis, Ordinance, permits, prearranged, passengers, regulation, taxicab, transportation, wait, limousines, conflicts, invalid, deprived, pickups, lease, Cab, do business, license, traffic, fares, prereserved, congestion, taxi service, petitioners', municipality, open system, decreased, curbside, pick

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Governments > Local Governments > Ordinances & Regulations

Transportation Law > Air & Space Transportation > Airports > General Overview

HN1[] **Common Carrier Duties & Liabilities, State & Local Regulation**

Milwaukee, Wis., County Ord. 4.05 prohibits taxis without General Mitchell International Airport permits from making prearranged pickups, conflicts with the requirement under *Wis. Stat. § 114.14* (2005-2006) that the public have equal access to airport services, and to that extent is invalid and unenforceable. Milwaukee, Wis., County Ord. 4.05 does not conflict with *Wis. Stat. §§ 133.01*, *349.24*, and *194.02* (2005-2006).

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Governments > Local Governments > Ordinances & Regulations

Transportation Law > Air & Space Transportation > Airports > General Overview

HN2[] **Common Carrier Duties & Liabilities, State & Local Regulation**

Milwaukee, Wis., County Ord. 4.05 regulates commercial ground transportation at the General Mitchell International Airport. The ordinance requires that taxis picking up passengers at the airport have a permit from the Airport in addition to the city, town, or village license required under *Wis. Stat. § 349.24* (2005-2006). Milwaukee, Wis., County Ord. 4.05(3)(b)(5), 4.05(3)(b)(1). Under Milwaukee, Wis., County Ord. 4.05, the number of permits issued for taxis to do business is capped at 50, though the Airport is authorized to request additional taxis to meet immediate demand under extraordinary circumstances (for example, large conventions or inclement weather). Milwaukee, Wis., County Ord. 4.05(3)(b)(3)(a). Under an exception to the permit rule, taxis are not required to have permits in order to drop off passengers at the Airport. Milwaukee, Wis., County Ord. 4.05(3)(b)(5).

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Governments > Local Governments > Ordinances & Regulations

Transportation Law > Air & Space Transportation > Airports > General Overview

HN3[] **Common Carrier Duties & Liabilities, State & Local Regulation**

Limousines are not subject to permit requirements, but are allowed to take customers only on a prearranged (or in the words of the ordinance, "prereserved") basis. Milwaukee, Wis., County Ord. 4.05(6). Under the ordinance, the limousines have a designated area to meet their prearranged passengers. Non-permitted taxis are prohibited from using that designated area and are excluded from being at the General Mitchell International Airport to meet prearranged passengers.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

Governments > Legislation > Interpretation

Governments > Local Governments > Ordinances & Regulations

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

The interpretation of an ordinance and statute each presents a question of law which is reviewed independently.

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Governments > Local Governments > Ordinances & Regulations

Transportation Law > Air & Space Transportation > Airports > General Overview

HN5[] Common Carrier Duties & Liabilities, State & Local Regulation

The authority for counties to regulate the operation of airports derives from Wis. Stat. ch. 114 (2005-2006). Specifically, *Wis. Stat. § 114.14(1)* provides that the governing body of a county may adopt regulations, and establish fees or charges for the use of its airport. Wis. Stat. ch. 114 does not explicitly provide for the regulation of traffic or ground transportation, it has long been recognized that under the chapter, counties may regulate airport ground transportation.

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Governments > Local Governments > Ordinances & Regulations

Transportation Law > Air & Space Transportation > Airports > General Overview

HN6[] Common Carrier Duties & Liabilities, State & Local Regulation

See *Wis. Stat. § 114.14(1)* (2005-2006).

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Governments > Local Governments > Ordinances & Regulations

Transportation Law > Air & Space Transportation > Airports > General Overview

HN7[] Common Carrier Duties & Liabilities, State & Local Regulation

While *Wis. Stat. § 114.14* (2005-2006) allows counties to regulate commercial ground transportation at airports, a county may not promulgate regulations that are inconsistent with Wisconsin State Legislation. A county has only such powers as are expressly conferred upon it or necessarily implied from the powers expressly given or from the nature of the grant of power. As a creature of the Legislature, a county must exercise its powers within the scope of authority that the State confers upon it. Where a county promulgates an ordinance that conflicts with its statutory authority, it is an invalid exercise of authority. Where a local governmental body enacts an ordinance pursuant to express statutory authority, all presumptions are in favor of its validity, and any person attacking it must make the fact of its invalidity clearly appear.

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Governments > Local Governments > Ordinances & Regulations

Transportation Law > Air & Space Transportation > Airports > General Overview

HN8[] Common Carrier Duties & Liabilities, State & Local Regulation

Milwaukee, Wis., County Ord. 4.05(3)(b) sets forth the requirement that taxis must have an airport permit in order to conduct business at the General Mitchell International Airport.

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Governments > Local Governments > Ordinances & Regulations

Transportation Law > Air & Space Transportation > Airports > General Overview

HN9[] **Common Carrier Duties & Liabilities, State & Local Regulation**

See Milwaukee, Wis., County Ord. 4.05(3)(b).

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Governments > Local Governments > Ordinances & Regulations

Transportation Law > Air & Space Transportation > Airports > General Overview

HN10[] **Common Carrier Duties & Liabilities, State & Local Regulation**

Milwaukee, Wis., County Ord. 4.05 does allow limousines without airport permits to conduct business transporting passengers from the General Mitchell International Airport on a prearranged basis. Milwaukee, Wis., County Ord. 4.05(6)(a)(2).

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Governments > Local Governments > Ordinances & Regulations

Transportation Law > Air & Space Transportation > Airports > General Overview

HN11[] **Common Carrier Duties & Liabilities, State & Local Regulation**

Milwaukee, Wis., County Ord. 4.08(2)(b) sets forth the penalties for violating Milwaukee, Wis., County Ord. 4.05(3)(b)

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Governments > Local Governments > Ordinances & Regulations

Transportation Law > Air & Space Transportation > Airports > General Overview

HN12[] **Common Carrier Duties & Liabilities, State & Local Regulation**

See Milwaukee, Wis., County Ord. 4.08(2)(b).

Transportation Law > Air & Space Transportation > Airports > General Overview

HN13[] **Air & Space Transportation, Airports**

See *Wis. Stat. § 114.14(3)* (2005-2006).

Transportation Law > Air & Space Transportation > Airports > General Overview

HN14[] **Air & Space Transportation, Airports**

Wis. Stat. § 114.14(3) (2005-2006) prohibits depriving the public of equal and uniform use of airports. *Wis. Stat. § 114.14(3)*, provides that although contracts may be made with private parties for the operation of municipal airports, they may in no case deprive the public of equal and uniform use of the airports.

Transportation Law > Air & Space Transportation > Airports > General Overview

HN15[] **Air & Space Transportation, Airports**

No distinction between private or personal and commercial use can be read into the clear words of the statute. Under *Wis. Stat. § 114.14(3)(b)1* (2005-2006), arbitrarily excluding members of the public (whether private or commercial) from the use of the airport will constitute depriving the public of equal and uniform use of airports.

Transportation Law > Air & Space Transportation > Airports > General Overview

HN16[] **Air & Space Transportation, Airports**

In regulating an airport there may be many instances of unequal or non-uniform treatment. Such unequal or non-uniform treatment does not by itself constitute "depriving" members of the public of equal and uniform use under the statute. Rather, it is the arbitrary exclusion, which is to say exclusion without a reasonable justification, that "deprives the public of equal and uniform use" of an airport under *Wis. Stat. § 114.14(3)(b)1* (2005-2006).

Transportation Law > Air & Space Transportation > Airports > General Overview

HN17[] **Air & Space Transportation, Airports**

Wis. Stat. § 114.14(2)(a) (2005-2006) provides that the governing body of a city, village, town or county which has established an airport may vest jurisdiction for the construction, improvement, equipment, maintenance and operation of the airport in an airport commission. Once such a governing body has vested jurisdiction for the operation of an airport in an airport commission, the commission shall have complete and exclusive control and management over the airport for which it has been appointed. *Wis. Stat. § 114.14(2)(e)* (2005-2006). Thus, the Wisconsin Legislature intended that counties and other municipalities could establish commissions with complete control over airports, and that such commissions could not exercise control so as to deprive the public of equal and uniform use of those airports.

Transportation Law > Air & Space Transportation > Airports > General Overview

HN18[] **Air & Space Transportation, Airports**

A county's authority to regulate an airport is limited to the power conferred by the statute. Nothing in *Wis. Stat. § 114.14* (2005-2006) can be read to confer or imply authority for a county to exercise its power arbitrarily, so as to deprive members of the public of equal and uniform use of airports.

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Governments > Local Governments > Ordinances & Regulations

Transportation Law > Air & Space Transportation > Airports > General Overview

HN19[] **Common Carrier Duties & Liabilities, State & Local Regulation**

Arbitrary exclusions conflict with the rule under *Wis. Stat. § 114.14(3)(b)1* (2005-2006) that the public may in no case be deprived of equal and uniform use of an airport. Precluding taxis without airport permits from providing prearranged services conflicts with *Wis. Stat. § 114.14(3)(b)1* and is an invalid exercise of a county's authority. To that extent, Milwaukee, Wis., County Ord. 4.05 is invalid and therefore unenforceable.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN20[] **Regulated Practices, Monopolies & Monopolization**

Wis. Stat. ch. 133 (2005-2006) is titled "Trusts and Monopolies." The first section of the chapter, *Wis. Stat. § 133.01*, is captioned "Legislative Intent."

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN21[] **Regulated Practices, Monopolies & Monopolization**

See *Wis. Stat. § 133.01* (2005-2006).

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN22[] **Regulated Practices, Monopolies & Monopolization**

Wis. Stat. § 133.01 (2005-2006) expressly describes the Wisconsin Legislature's intent as applying to the Wis. Stat. ch. 133 92005-2006), and nowhere states that it is the intent of the section that the entire Wisconsin Code be interpreted in light of *Wis. Stat. § 133.01*. Rather, the section applies in circumstances in which parties assert violations of ***antitrust law***.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN23[] **Regulated Practices, Monopolies & Monopolization**

Wis. Stat. § 133.01 (2005-2006) applies when a party brings a cause of action in antitrust.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN24[ ] Regulated Practices, Monopolies & Monopolization

Under *Wis. Stat. § 133.01* (2005-2006), a court should not lightly reach the conclusion that monopoly or restraint of trade is authorized by extraneous statutes that do not quite clearly indicate that intent.

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Governments > Local Governments > Ordinances & Regulations

Transportation Law > Air & Space Transportation > Airports > General Overview

HN25[ ] Common Carrier Duties & Liabilities, State & Local Regulation

If an adverse effect on competition is, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed. If a regulation's adverse effect on competition allows an affirmative defense that less restrictive means are available, the State's power to engage in economic regulation would be hobbled. Milwaukee, Wis., County Ord. 4.05 does not conflict with *Wis. Stat. § 133.01* (2005-2006).

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Governments > Local Governments > Ordinances & Regulations

HN26[ ] Common Carrier Duties & Liabilities, State & Local Regulation

Under *Wis. Stat. § 349.24* (2005-2006), city councils and village and town boards may regulate and license taxis and drivers. *Wis. Stat. § 349.24(1)*. Further, taxis and drivers licensed by any city, village or town may not be required to procure such a license in any other municipality for the purpose of carrying taxi passengers for hire from one municipality to another. *Wis. Stat. § 349.24(2)*.

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Governments > Local Governments > Ordinances & Regulations

HN27[ ] Common Carrier Duties & Liabilities, State & Local Regulation

See *Wis. Stat. § 349.24* (2005-2006).

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Governments > Local Governments > Ordinances & Regulations

Transportation Law > Air & Space Transportation > Airports > General Overview

HN28[] **Common Carrier Duties & Liabilities, State & Local Regulation**

Wis. Stat. § 349.24 (2005-2006) makes no mention of counties or airports. Further, *Wis. Stat. § 349.01* provides that words used in Wis. Stat. ch. 349 (2005-2006) are used in the same sense as those words are defined in *Wis. Stat. § 340.01* (2005-2006). *Wis. Stat. § 340.01(36m)* states that "municipality" means city, village or town. Neither Milwaukee County, Wisconsin, nor the General Mitchell International Airport is a municipality under this definition. Thus, the restrictions in *Wis. Stat. § 349.24(2)* that prevent "municipalities" from requiring licenses from taxis and drivers with licenses from other municipalities does not pertain to the permits required under Milwaukee, Wis., County Ord. 4.05, for neither the County nor the Airport is a municipality in the relevant sense.

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Governments > Local Governments > Ordinances & Regulations

Transportation Law > Air & Space Transportation > Airports > General Overview

HN29[] **Common Carrier Duties & Liabilities, State & Local Regulation**

The purpose of *Wis. Stat. § 349.24* (2005-2006) is to allow taxis and drivers to convey passengers through cities, towns, and villages without having to obtain a license in each one. In contrast, the permit requirement of Milwaukee, Wis., County Ord. 4.05(3)(b)(3) is to promote efficient and safe ground transportation at the General Mitchell International Airport. Regulations promoting this goal are within the County's purview under *Wis. Stat. § 114.14(1)* (2005-2006) and Town of Lake. *Wis. Stat. § 349.24* does not conflict with Milwaukee, Wis., County Ord. 4.05.

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

HN30[] **Common Carrier Duties & Liabilities, State & Local Regulation**

See *Wis. Stat. § 194.02* (2005-2006).

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

HN31[] **Common Carrier Duties & Liabilities, State & Local Regulation**

The very first subsection of Wis. Stat. ch. 194 (2005-2006), *Wis. Stat. § 194.01(1)*, specifically excludes taxis from the definition of "common motor carrier."

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

HN32[] **Common Carrier Duties & Liabilities, State & Local Regulation**

See *Wis. Stat. § 194.01(1)* (2005-2006).

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Governments > Local Governments > Ordinances & Regulations

Transportation Law > Air & Space Transportation > Airports > General Overview

HN33[] **Common Carrier Duties & Liabilities, State & Local Regulation**

Milwaukee, Wis., County Ord. 4.05 does not conflict with *Wis. Stat. § 194.02* (2005-2006).

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Governments > Local Governments > Ordinances & Regulations

Transportation Law > Air & Space Transportation > Airports > General Overview

HN34[] **Common Carrier Duties & Liabilities, State & Local Regulation**

The requirement under Milwaukee, Wis., County Ord. 4.05 that taxis have one of a limited number of permits in order to do business at the General Mitchell International Airport does not conflict with *Wis. Stat. §§ 133.01*, *349.24*, or *194.02* (2005-2006). *Wis. Stat. § 133.01* does not give rise to an independent cause of action, *Wis. Stat. § 349.24* does not apply to counties or airports, and taxis are explicitly excluded from the scope of Wis. Stat. ch. 194.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

HN35[] **Case or Controversy, Constitutionality of Legislation**

It is fundamental that a court should not reach a constitutional question unless it is essential to the determination of the case before it.

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Governments > Local Governments > Ordinances & Regulations

Transportation Law > Air & Space Transportation > Airports > General Overview

HN36[] **Common Carrier Duties & Liabilities, State & Local Regulation**

By prohibiting taxis without airport permits from accepting prearranged fares, Milwaukee, Wis., County Ord. 4.05 conflicts with *Wis. Stat. § 114.14* (2005-2006) and to that extent is invalid and unenforceable.

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Governments > Local Governments > Ordinances & Regulations

Transportation Law > Air & Space Transportation > Airports > General Overview

HN37[] Common Carrier Duties & Liabilities, State & Local Regulation

Milwaukee, Wis., County Ord. 4.05, which prohibits taxis without airport permits from making prearranged pickups, conflicts with the requirement under *Wis. Stat. § 114.14* (2005-2006) that the public have equal access to airport services, and to that extent is invalid and unenforceable. Milwaukee, Wis., County Ord. 4.05 does not conflict with *Wis. Stat. §§ 133.01*, *349.24*, and *194.02* (2005-2006).

Counsel: For the defendants-appellants-petitioners there were briefs by Peter C. Carstensen & William Rosales and University of Wisconsin Law School, Madison, and Douglas P. Dehler and Shepherd, Finkelman, Miller & Shah, LLC, Milwaukee, and oral argument by Peter C. Carstensen.

For the plaintiffs-respondents there was a brief by Thomas J. McAdams, assistant district attorney and E. Michael McCann, district attorney, Milwaukee, and William J. Domina, Milwaukee County Corporation Counsel and Timothy R. Karaskiewicz, principal assistant corporation counsel, Milwaukee, and oral argument by Timothy R. Karaskiewicz.

An amicus curiae brief was filed by Gwendolyn J. Cooley, assistant attorney general with whom on the brief was J.B. Van Hollen, attorney general.

Judges: ANN WALSH BRADLEY, J. PROSSER, J., dissents. BUTLER, JR., J., joins the dissent.

Opinion by: ANN WALSH BRADLEY

Opinion

[*P1] [138] [***772]** ANN WALSH BRADLEY, J. The petitioners, Lawrence C. Williams and Russell L. Hegney, seek review of a published court of appeals decision that affirmed judgments of conviction. **[****2]** The defendants **[***773]** were found guilty of picking up passengers in their taxis at General Mitchell International Airport ("Airport") without an Airport permit, in violation Milwaukee County Ordinance 4.05. [1] They assert that Ordinance 4.05 is invalid on several grounds: (1) that Ordinance 4.05 conflicts with *Wis. Stat. § 114.14*; [2] (2) that Ordinance 4.05 conflicts with *Wis. Stat. §§ 133.01*, *349.24*, and *194.02*; and (3) that the restrictions on prearranged taxi service in Ordinance 4.05 are unconstitutional because they impermissibly interfere with interstate commerce.

[*P2] We determine that **HN1[]** Ordinance 4.05, which prohibits taxis without Airport permits from making prearranged pickups, conflicts with the requirement under *§ 114.14* that the public have equal access to airport services, and to that extent **[****3]** is invalid and unenforceable. However, we determine that Ordinance 4.05 does not conflict with *Wis. Stat. §§ 133.01*, *349.24*, and *194.02*. Because our decision rests on statutory grounds, we do not reach the question of whether the restrictions on prearranged taxi service in Ordinance 4.05 impermissibly interfere with interstate commerce.

[*P3] Fundamentally, this case is about whether part of a county ordinance conflicts with a state statute **[**139]** passed by the legislature. Ultimately, it is about whether that part of the Ordinance arbitrarily excludes members of the public from equal and uniform use of the Airport.

[1] See *County of Milwaukee v. Williams, County of Milwaukee v. Hegney, 2006 WI App 153, 295 Wis. 2d 389, 720 N.W.2d 177* (affirming judgments of the circuit court for Milwaukee County, Daniel L. Konkol, Judge). The court of appeals granted a motion by Williams and Hegney to consolidate their cases for appeal.

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[*P4] This case, however, is not about requiring the Airport to return to an "open" taxi system where there was no limitation on taxis conducting business at the Airport. The record demonstrates the need for Milwaukee County to regulate commercial ground transportation at the Airport. It recognizes how Milwaukee County has made great strides in reducing congestion, increasing efficiency, and enhancing safety at the Airport.

[*P5] The error here is not remedied by a return to the open system. Rather, it is remedied by the elimination of an arbitrary exclusion. Accordingly, we reverse the court of **[****4]** appeals, and remand with instructions to vacate the judgments of conviction.

I

[*P6] The factual record is limited in this case. It is based on a stipulation of facts agreed to by the parties together with affidavits incorporated into the stipulation.

[*P7] Until the late 1980s, General Mitchell International Airport had an "open" taxi system that did not limit taxis from conducting business at the Airport. The open system led to a number of problems. Taxis had to wait up to five hours for customers, and because of the long wait they sometimes would refuse "short-haul" fares. The Airport's limited space led to a chaotic taxi staging area, with taxi traffic that spilled onto the Airport's roadway. This created a safety problem for the **[**140]** Airport's non-taxi traffic. The congestion and chaos from taxis jockeying for position led to fights between taxi drivers.

[*P8] In addition to problems created by too many taxis vying for fares, the open system created problems of too few taxis **[***774]** at off-peak times. Passengers seeking curbside taxi pickups endured long waits for rides.

[*P9] In the late 1980s, Milwaukee County ("County") addressed these problems by adopting ***HN2***[] Ordinance 4.05, which regulates commercial ground transportation **[****5]** at the Airport. The Ordinance requires that taxis picking up passengers at the Airport have a permit from the Airport in addition to the city, town, or village license required under *Wis. Stat. § 349.24*. Milw. County Ord. 4.05(3)(b)(5), 4.05(3)(b)(1). Under Ordinance 4.05, the number of permits issued for taxis to do business is capped at 50, though the Airport Director is authorized to request additional taxis to meet immediate demand under extraordinary circumstances (for example, large conventions or inclement weather). Milw. County Ord. 4.05(3)(b)(3)(a). Under an exception to the permit rule, taxis are not required to have permits in order to drop off passengers at the Airport. Milw. County Ord. 4.05(3)(b)(5).

[*P10] ***HN3***[] Limousines are not subject to permit requirements, but are allowed to take customers only on a prearranged (or in the words of the Ordinance, "prereserved") basis. Milw. County Ord. 4.05(6). Under the Ordinance, the limousines have a designated area to meet their prearranged passengers. [3] Non-permitted **[**141]** taxis are prohibited from using that designated area and are excluded from being at the Airport to meet prearranged passengers.

[*P11] Since the adoption of Ordinance 4.05, the problems of the open system have abated. The time that taxis must wait for fares has decreased, and the time that passengers must wait for curbside taxi service has decreased. The cap on taxi permits has reduced the congestion problems, and taxis no longer spill into the Airport roadway to create a hazard for other Airport traffic. The limited number of taxis also allows Airport staff to inspect periodically the taxis servicing the Airport, which has resulted in taxis that are better maintained and cleaner than under the open system.

---

[3] The Ordinance defines "luxury limousine" as:

> [A] **[****6]** for-hire ground transportation vehicle, regularly engaged in the business of carrying passengers for hire, having a maximum seating capacity of six (6) persons, unless the size of the group dictates a larger vehicle, behind the driver and which is a top of the line American or foreign production or custom automobile designated by its manufacturer as a limousine and which has custom nonproduction features.

Milw. County Ord. 4.05(6)(a)(2).

[*P12] Taxis provide service using two distinct methods. The first is curbside service, which is on-demand service where passengers get taxis without having made a prior agreement to **[****7]** meet the taxi. The second is "prearranged" or "prereserved" service. It involves a prior agreement to pick up a passenger at a particular time and place. In the case of prearranged airport service, a reservation typically is made prior to the traveler's departure. The requirement that taxis have an Airport permit to "do business" at the Airport encompasses both curbside and prearranged pickup services. [4]

[*P13] **[**142]** **[***775]** Williams and Hegney were taxi drivers for Quality Cab Company, which is based in Fond du Lac. Quality Cab has relationships with individuals and businesses in the Fond du Lac area **[****8]** that request Quality Cab provide transportation to and from the Airport. As of January 2005, Quality Cab did not have a valid Airport permit, and thus Williams and Hegney did not possess valid permits pursuant to Ordinance 4.05(3)(b)(5).

[*P14] On different dates in January 2005, Williams and Hegney traveled to the Airport to pick up passengers who had made prior arrangements for pickups by Quality Cab. After ignoring warnings that they could not accept departing taxi fares from the Airport, Williams and Hegney were issued citations for violating Ordinance 4.05(3)(b)(5).

[*P15] The petitioners did not dispute that they lacked the appropriate permits under Ordinance 4.05. Rather, they moved the circuit court to dismiss the citations, arguing that the Ordinance is invalid because it conflicts with *Wis. Stat. §§ 349.24*, *194.02*, and *133.01*. After the circuit court denied the motion, Williams and Hegney stipulated to facts and received fines of $250. The court of appeals affirmed, holding that *Wis. Stat. § 114.14* provides Milwaukee County the authority to regulate taxis at the Airport, that *Wis. Stat. §§ 349.24*, *194.02*, and *133.01* are consistent with Ordinance 4.05, and that Ordinance 4.05 was therefore **[****9]** valid.

[143]** II

[*P16] In this case we address Milwaukee County's ability to enact an ordinance that prohibits taxis without Airport permits from making prearranged pickups of customers, where the same ordinance allows limousines without permits to make such pickups. [5]

[*P17] We examine whether Milwaukee County Ordinance 4.05 is in part invalid and unenforceable because it conflicts with a state statute. Resolution of this inquiry involves ***HN4***[] the interpretation of the Ordinance and the statute. Each presents a question of law which we review independently. *State ex rel. Teunas v. County of Kenosha, 142 Wis. 2d 498, 504, 418 N.W.2d 833 (1988)*; *Milwaukee Police Ass'n v. Hegerty, 2005 WI 28, P11, 279 Wis. 2d 150, 693 N.W.2d 738*.

III

[*P18] At oral argument, the petitioners aptly described the case **[****10]** as follows.

> This case is about the validity of an absolute ban on my clients' providing prereserved service to arriving travelers at Milwaukee Airport just because they drive taxis rather than limousines . . . . In other words, if they drove a limousine, they could have met their passengers and taken them back to Fond du Lac. The basic

---

[4] The petitioners appear to assert that Ordinance 4.05 creates an "absolute" ban on taxis providing prearranged service. There is nothing in the record that supports this claim, and they do not cite a provision in the Ordinance (or elsewhere) that sets forth such a prohibition. In fact, the Ordinance explicitly contemplates prearranged service by permitted taxis: "Where prereserved (reservation) business is engaged in, driver shall check in with the ground transportation coordinator and provide the name(s), flight number(s) and arrival time(s) for the reserved passenger(s)." Milw. County Ord. 4.05(3)(f)(7).

[5] The petitioners do not argue that this case is about the County's ability to enact an ordinance that prohibits taxis without Airport permits from making prearranged pickups where that ordinance allows taxis with Airport permits to make such pickups. As noted above in footnote 4, they appear to assert without citation or support in the record that all taxis are prohibited from providing prearranged service at the Airport.

> **[**144]** question in this case is why does the Ordinance impose this restraint on taxi drivers and taxi companies? . . .
> No one disputes the authority of Milwaukee County to regulate traffic and other aspects of the Airport. Petitioners do challenge the County's claim that it has unfettered discretion to impose any regulation it sees fit, regardless of the public interest.

[*P19] **[***776]** The petitioners contend that the restriction is problematic in two respects. First, they argue that it is not within the County's authority to treat them (taxis without Airport permits) differently from limousines (which are not required to have Airport permits) with respect to providing prearranged service at the Airport. Second, they argue that it is not within the County's authority to require taxis to have one of a limited number of Airport permits in order to do business at the Airport.

[*P20] **[****11]** ***HN5***[] The authority for counties to regulate the operation of airports derives from chapter 114. Specifically, *Wis. Stat. § 114.14(1)* provides that the "governing body of a . . . county may adopt regulations, and establish fees or charges for the use of [its] airport." [6] While **[**145]** the petitioners correctly note that chapter 114 does not explicitly provide for the regulation of traffic or ground transportation, it has long been recognized that under that chapter, counties may regulate airport ground transportation.

[*P21] In Milwaukee County v. Town of Lake, for example, the court examined contracts between airlines and General Mitchell Field which allowed the airlines to provide ground transportation between the air field and Milwaukee. *259 Wis. 208, 48 N.W.2d 1 (1951)*. The Town of Lake, adjacent to the airport, passed an ordinance prohibiting taxis not licensed by the Town from operating within its limits, and began ticketing taxis without such a license as they passed through the Town. *Id. at 227*. This court determined that the ordinance impermissibly interfered with Milwaukee County's authority to regulate the air field. It affirmed the circuit court's determination that under chapter 114, as the owner of General Mitchell Field, Milwaukee County "has the exclusive right to manage said field, including the right to regulate the ground transportation to be furnished **[****13]** to airline passengers arriving at and departing from General Mitchell Field." *Id. at 231*.

[*P22] Further, the Town of Lake court determined that, beyond having the authority to regulate the air field, the county must regulate the field to assure the field's efficient and safe operation:

> The county . . . was bound to regulate the matters affecting the use of the field so as to produce efficiency and good order and to prevent confusion which necessarily would arise at an airfield where hundreds of thousands of passengers are annually passing through **[**146]** the gates, and which if left without regulation would hobble operations and seriously interfere with the safety and comfort of the traveling public.

Id. See also *Courtesy Cab Co. v. Johnson, 10 Wis. 2d 426, 431-32, 434, 103 N.W.2d 17 (1960)*.

[*P23] **[***777]** The petitioners argue, however, that the ability of the County to regulate commercial ground transportation at the Airport is limited by *Wis. Stat. § 114.14(3)(b)1*. It provides that "[t]he public may in no case be deprived of equal and uniform use of the airport." Citing to this court's decision in *Wussow v. Gaida, 251 Wis. 328, 29 N.W.2d 42 (1947)*, they assert that the "equal and uniform use" requirement under **[****14]** *§ 114.14(3)(b)1*

---

[6] *Wis. Stat. § 114.14(1)* states:

> ***HN6***[] The governing body of a city, village, town or county which has established an airport or landing field, or landing and take-off strip, and acquired, leased or set apart real property for such purpose may construct, improve, equip, maintain and operate the same, or may vest jurisdiction for the construction, improvement, equipment, maintenance and operation thereof in any suitable officer, board or body of such city, village, town or county. The expenses of such construction, improvement, equipment, maintenance and operation shall be a city, village, town or county charge as the case may be. The governing body of a city, village, town or county may adopt **[****12]** regulations, and establish fees or charges for the use of such airport or landing field, or may authorize an officer, board or body of such village, city, town or county having jurisdiction to adopt such regulations and establish such fees or charges, subject however to the approval of such governing body before they shall take effect.

applies to commercial entities as well as to non-commercial entities. They contend that prohibiting taxis without Airport permits from making prearranged pickups at the Airport deprives the public of equal and uniform use of the Airport. Thus, because Ordinance 4.05 has such a prohibition, it conflicts with state law, and therefore is invalid.

[*P24] ***HN7***[] While *§ 114.14* allows counties to regulate commercial ground transportation at airports, a county may not promulgate regulations that are inconsistent with state legislation. A county "has only such powers as are expressly conferred upon it or necessarily implied from the powers expressly given or from the nature of the grant of power." *Teunas, 142 Wis. 2d at 504* (quoting *Town of Vernon v. Waukesha County, 102 Wis. 2d 686, 689, 307 N.W.2d 227 (1981))*. "As a creature of the legislature, a county must exercise its powers within the scope of authority that the State confers upon it." *Mommsen v. Schueller, 228 Wis. 2d 627, 634-35, 599 N.W.2d 21 (Ct. App. 1999)*(citation omitted). Where a **[**147]** county promulgates an ordinance that conflicts with its statutory authority, it is an invalid exercise of authority. *Teunas, 142 Wis. 2d at 515-16*. **[****15]** Where a local governmental body enacts an ordinance pursuant to express statutory authority, "all presumptions are in favor of its validity, and any person attacking it must make the fact of its invalidity clearly appear." *State ex rel. B'nai B'rith Found. v. Walworth County Bd. of Adjustment, 59 Wis. 2d 296, 307, 208 N.W.2d 113 (1973)* (quoting *Newman v. Pagels, 212 Wis. 475, 479, 250 N.W. 430 (1933))*.

[*P25] In determining whether Ordinance 4.05 conflicts with the statute, and is therefore not within the County's authority, we examine both the language of the Ordinance and the relevant provisions of the statute. ***HN8***[] Ordinance 4.05(3)(b) sets forth the requirement that taxis must have an Airport permit in order to conduct business at the Airport:

> ***HN9***[] 4.05(3)(b) License, permits, fees.
>
> . . . .
>
> (3)(a) On and after September 1, 1990, taxicab owner permits will be issued only to those owners who whose vehicles(s) have been permitted during the period October 1, 1989, through July 5, 1990. Taxicab owner permits must be renewed and remain in full force and effect on a continuous basis . . . . In the event an owner does not renew the taxicab owner permit prior to the annual dates prescribed herein below, **[****16]** that owner shall forfeit his/her privilege to operate at the airport. . . .
>
> (5) Any person who is not in possession of the necessary permits required under this section and who operates a taxicab at General Mitchell International Airport in such a manner as to constitute doing business, or who attempts to do business thereon shall, without limitation **[**148]** because of enumeration, be deemed to be in violation of chapter 4 of the Code. . . . [7]

[*778]** At the same time, however, ***HN10***[] Ordinance 4.05 does allow limousines without Airport permits to conduct business transporting passengers from the Airport on a prearranged basis. Milw. County Ord. 4.05(6)(a)(2). [8]

[*P26] ***HN11***[] Milwaukee County Ordinance 4.08(2)(b) **[****17]** sets forth the penalties for violating section 4.05(3)(b):

> ***HN12***[] (b) Commercial ground transportation violations. Persons violating section 4.05 of this chapter . . . shall, upon conviction of the violation, forfeit to the county a sum not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00) as the court in its discretion shall determine, together with the

---

[7] A taxi that drops off passengers at the Airport is not doing business under the meaning of 4.05(3):

> A taxicab driver entering upon General Mitchell International Airport for the sole purpose of discharging a taxicab patron at said airport shall not be deemed to be doing business thereon if, after discharging said passenger, he/she shall immediately leave the airport premises.

Milw. County Ord. 4.05(3)(b)(5).

[8] "[L]imousines must operate on a pre-reserved (reservation) basis only . . . ." Milw. County Ord. 4.05(6)(a)(2).

> costs of the action to collect such forfeiture, and upon default of payment thereof, such persons shall be imprisoned in the county jail or the house of correction in the county for a period of not less than five (5) days nor more than ninety (90) days in the discretion of the court.

[*P27] *Section 114.14(3)* provides in relevant part:

> ***HN13***[] (3)(a) Except as provided in par. (b), in carrying out its duties the airport commission may do any of the following:
> . . . .
>
> **[**149]** (b) The exercise of authority by the airport commission under par. (a) shall be subject to all of the following conditions:
> 1. The public may in no case be deprived of equal and uniform use of the airport.

[*P28] In Wussow, this court examined *§ 114.14(3)* and focused on the provision that the public may not be "deprived of equal and uniform use of the airport." Wussow **[****18]** leased the Shawano Municipal Airport from the Shawano County airport committee. Under the lease, Wussow was to operate the airport and receive the income from concessions and rentals. *251 Wis. at 329-30*. Gaida operated a business adjacent to the airport that sold aircraft, gave flying instruction, and provided a taxi service. He had used the airport for two years prior to Wussow's lease, and continued to use the airport after the lease had been executed. *Id. at 330*.

[*P29] Wussow sought to enjoin Gaida's use of the airport on the grounds that giving flying lessons and providing taxi services impinged on Wussow's rights under the contract and caused him to lose profits. *Id. at 330-31*. The circuit court granted the injunction. On review, this court determined that the lease did not provide Wussow with the right to exclusive commercial use of the airport because ***HN14***[] *§ 114.14(3)* prohibits depriving the public of equal and uniform use of airports:

> The lease itself does not attempt to give [Wussow] the right to arbitrarily exclude members of the public from the use of the airport, as indeed it could not, for *sec. 114.14(3)*, Stats., clearly precludes the granting of such a right. That section provides **[****19]** that although contracts may be made with private parties for the operation of municipal airports, they may in no case deprive the public of equal and uniform use of the airports.

[*779]** ***[**150]*** *Id. at 331* (emphasis added). [9]

[*P30] Further, the *Wussow* court declined to adopt the argument that *§ 114.14(3)* requires equal and uniform use only for private use. Rather, it determined that ***HN15***[] "no distinction between private or personal and commercial use can be read into the clear words of the statute." Id. Wussow makes clear that under *§ 114.14(3)(b)*1, arbitrarily excluding members of the public (whether private or commercial) from the use of the Airport will constitute depriving the public of equal and uniform use of airports.

[*P31] We recognize that ***HN16***[] in regulating an airport there may be many instances of unequal or non-uniform treatment. Such unequal or non-uniform treatment does not by itself constitute "depriving" members **[****20]** of the public of equal and uniform use under the statute. Rather, according to *Wussow*, it is the arbitrary exclusion, which is to say exclusion without a reasonable justification, that "deprive[s] the public of equal and uniform use" of an airport under *§ 114.14(3)(b)1*. Thus, in order to determine whether Ordinance 4.05 conflicts with

---

[9] The wording of *Wis. Stat. § 114.14(3)* was amended by 1999 Wis. Act 83, §§ 187-188. The changes do not affect the meaning of the statute for the purposes of the analysis here, and the language requiring that "[t]he public may in no case be deprived of equal and uniform use of the airport" was unchanged.

§ 114.14(3)(b)1, we must examine whether the exclusion is arbitrary, or whether there exists a reasonable justification for the unequal and non-uniform use of the Airport pertaining to the pre-reserved pickup. [10]

[*P32] [151]** In determining whether Ordinance 4.05 conflicts with § 114.14, we are limited by a sparse record. Nonetheless, the record before us indicates that under the open taxi system, there were problems of congestion, long waits for both taxis and customers, taxis refusing to provide short rides, traffic hazards, and fights among taxi drivers.

[*P33] [152]** The record also indicates that under Ordinance 4.05, these problems have abated **[***780]** and that the taxis servicing the Airport are better maintained. The effect of the Ordinance on the problems that attended the open system is explained in an affidavit by the Airport Director, which was incorporated by reference into the stipulation of facts. [11]

[*P34] The affidavit provides **[****23]** that the cap on the number of Airport taxi permits has decreased the wait time for both taxis and passengers:

> 4. Since the adoption of Mil. County Ord. 4.05, the number of permits issued to taxicabs has been capped at 50. Consequently, the wait time for fares has decreased to two to three hours and passenger wait time for a taxi has decreased to one to two minutes. Under the previous system, wait times were longer and passengers were less certain because there were often fewer cabs during off-peak hours and cabs often refused fares. The new system ensures enough business for the taxis so that they receive fares within a reasonable amount of time and gives them the incentive to return immediately to the airport, even during off-peak hours.

[*P35] Further, the affidavit asserts that the cap on Airport taxi permits allows for greater inspection of taxis, relieves traffic congestion, and reduces traffic hazards.

> 5. . . . The limited number of cabs makes it possible for the staff to inspect periodically the permitted taxis. . . .
>
> 6. Capping the number of taxis at 50 has also reduced congestion problems. The staging area in front of the **[**153]** terminal can only accommodate four taxis, and there is not enough **[****24]** room for taxis to double park. Under the "open" system, taxis would frequently clog the staging area by double parking, and fights between taxi drivers would break out due to the congestion and aggression caused by drivers cutting in line

---

[10] The County argues that the express language of § 114.14(3) subjects only the exercise of authority by the airport commission to the condition that the public may not be deprived of equal and uniform use. Because Ordinance 4.05 is an exercise of the County's authority, rather than an exercise of an airport commission's authority, the County contends that the requirement that the public not be deprived of equal and uniform use is not applicable. This is incorrect.

HN17[] Section 114.14(2)(a) provides that the "governing body of a city, village, town or county which has established an airport may vest jurisdiction for the construction, improvement, equipment, **[****21]** maintenance and operation of the airport in an airport commission. . . ." Once such a governing body has vested jurisdiction for the operation of an airport in an airport commission, "[t]he commission shall have complete and exclusive control and management over the airport for which it has been appointed." Wis. Stat. § 114.14(2)(e). Thus, the legislature intended that counties and other municipalities could establish commissions with complete control over airports, and that such commissions could not exercise control so as to deprive the public of equal and uniform use of those airports.

Here, the County has vested authority in an airport commission to operate the airport with "complete and exclusive" control. At the same time, however, it has promulgated a rule which arbitrarily deprives the public of equal and uniform airport use. The promulgation of such a rule allows the County to circumvent the statutory protection of the public's equal and uniform use of the Airport afforded by Wis. Stat. § 114.14(3)(b)1. Further, ***HN18***[] the County's authority to regulate the Airport is limited to the power conferred by the statute. Mommsen v. Schueller, 228 Wis. 2d 627, 634-35, 599 N.W.2d 21 (Ct. App. 1999)(citations **[****22]** omitted). Nothing in § 114.14 can be read to confer or imply authority for the County to exercise its power arbitrarily, so as to deprive members of the public of equal and uniform use of airports.

[11] There is nothing in the stipulated facts that would counter the County's claim that the Ordinance has resolved the problems of the open system. The affidavits submitted by the petitioners address only the way that Quality Cab conducts its business and ways in which Ordinance 4.05 is anticompetitive.

> and jockeying for position. The limited space would also cause taxis to spill over into the roadway and create a hazard for passenger traffic. Under the current system the problems relating to overflow and double parking have been greatly reduced. . . .

[*P36] Moreover, the affidavit contends that allowing taxis without Airport permits would add to congestion problems, but at the same time would not aid in providing reliable and efficient transportation for most of the Airport's customers.

> 7. There are good reasons for granting permits only to cabs that will base themselves at the Airport to provide a constant supply of cab services for arriving passengers. For example, since a Fond du Lac cab would not transport a customer who wanted to travel from the Airport to another location within the City of Milwaukee, the Fond du Lac cab would have less incentive to wait in the staging area for a fare. That would mean that the Fond du Lac cab would add to the congestion **[****25]** when it did appear but could not be relied upon to provide a steady supply of services to arriving passengers.

[*P37] The County argues that these are precisely the kinds of benefits that justify regulation under *§ 114.14* and Town of Lake. By decreasing wait times, assuring adequate business, minimizing traffic hazards, and allowing inspections, the regulations ensure "good order," "efficiency," "prevent[ion of] confusion," and the "safety **[***781]** and comfort of the traveling public." *Town of Lake, 259 Wis. at 231*.

[*P38] **[**154]** We agree that the record supports the County's argument that some regulation of taxi traffic comports with *§ 114.14*. However, the Airport Director's affidavit does not proffer any sort of justification for prohibiting taxis without Airport permits from providing prearranged service, despite limousines being able to provide such service. Rather, the proffered justifications reflect reasons for limiting only taxis that provide curbside service. [12]

[*P39] Taxis picking up prearranged fares need not wait in line with **[****26]** taxis offering curbside pickups, thereby contributing to congestion. Similarly, if taxis meeting prearranged fares are not in line with the curbside taxis, they would not contribute to taxi traffic spilling onto the Airport's roadway. Because prearranged taxi service must by definition have been arranged ahead of time, there is no reason to suspect that the wait time for customers would increase if non-permitted taxis could retrieve prearranged fares from the Airport. Finally, were some passengers to use taxis for prearranged service, it would not affect the ability of the Airport to inspect its permitted taxis regularly to assure that they are well-maintained.

[*P40] Thus, the County's proffered justifications for Ordinance 4.05 relate only to the Ordinance's restrictions on taxis' ability to provide curbside service, and provide no justification for precluding taxis without permits from providing prearranged service. However, under the Ordinance only limousines may provide prearranged service without Airport permits.

[*P41] **[**155]** Similar to Wussow, a commercial enterprise has been arbitrarily excluded from using an airport, depriving it of equal and uniform use under *§ 114.14(3)(b)1*. *251 Wis. at 331*. **[****27]** More importantly, the Ordinance arbitrarily limits the options of the general public--the people who need to make the transportation arrangements. They do not have the option of choosing a taxi without a permit for prearranged pick-ups from the airport. [13]

---

[12] The dissent asserts that the majority is forcing Milwaukee County to return to an open system. Dissent, P83. This assertion is incorrect and should not be allowed to cause confusion.

[13] Milwaukee County Ordinance 4.05(5)(a) also provides that "out-of-county shuttle services" may operate on a prearranged basis from the Airport:

> "Out-of-county" shuttle service, under this subsection shall mean a company, partnership or person which operates on a prereserved basis from General Mitchell International Airport to destinations beyond the county limits.

[*P42] The County contends that passengers wanting pre-arranged taxi service from the petitioners may take a shuttle to an off-Airport location and meet the taxi for a prearranged ride there, and that the petitioners could offer prearranged service by providing limousine services. These arguments miss the mark. The issue is whether prohibiting taxis without permits from making prearranged pickups, and depriving the public from meeting prearranged **[***782]** taxis at the Airport, is justified **[**156]** in the first instance. The possibility that the petitioners could expand their business to include a limousine service or meet passengers at other locations does not provide a justification for prohibiting taxis without Airport permits from providing prearranged pickups.

[*P43] The County also asserts, based on an affidavit, that it "does not limit the number of limousine operators due to a federal law applicable to interstate limousine transports." [14] However, the question in this **[**157]** case is whether the limitation on taxis without Airport permits providing prearranged pickups is justified by the benefits outlined in the County's affidavits, **[****29]** not whether the County has the power to restrict the number of limousines providing services at the Airport. The County has provided nothing in the record to support the claim that allowing taxis without permits to make prearranged pickups would create the problems associated with the open system, even though prearranged service by limousines does not cause such problems.

[*P44] As the *Wussow* court noted, such ***HN19***[] arbitrary exclusions conflict with the rule under *§ 114.14(3)(b)1* that "[t]he public may in no case be deprived of equal and uniform use of the airport." We therefore determine that precluding taxis without Airport permits from providing prearranged services conflicts with *§ 114.14(3)(b)1* and is an invalid exercise of the County's authority. To that extent, Ordinance 4.05 is invalid and therefore unenforceable.

IV

[*P45] We consider next Williams and Hegney's arguments that by requiring taxis to have one of a limited number of permits in order to do business at the Airport, Ordinance 4.05 conflicts with *Wis. Stat. §§ 133.01*, *349.24*, **[****31]** and *194.02*.

[*P46] The essence of their argument under *§ 133.01* is that every single Wisconsin statute that affects economic competition must be interpreted through the lens of *§ 133.01*. They argue that the section "establish[es] a clear

---

> The vehicle(s) which make up "out-of-county" shuttle service(s) shall be van(s) regularly engaged in the business of carrying passengers for hire, having a maximum seating capacity of twenty-two (22) persons behind the driver, with heating and air conditioning and be in good operating condition.

Milw. County Ord. 4.05(5)(a). The record does not provide details about such services. It is unclear from the record whether such service operates in Fond du Lac. However, the possibility of prearranged van services does not affect the analysis here, for it does not provide a reason **[****28]** for excluding taxis without Airport permits from providing prearranged services.

[14] Neither the affidavit nor the briefs cite to a statute or case law on this point. The County may be referring to *Executive Town & Country Servs., Inc. v. City of Atlanta, 789 F.2d 1523, 1525-26 (11th Cir. 1986)*. In that case, the Eleventh Circuit determined that while taxis generally do not operate in the stream of interstate commerce, a limousine service that received the vast majority of its business from an international airport, received many of its incoming calls on 800 number lines, and served multi-national corporate clients was within the stream of interstate commerce. *Id. at 1525-26*. See also *Charter Limousine, Inc. v. Dade County Bd. of County Comm'rs, 678 F.2d 586 (Former 5th Cir. 1982)*; *United States v. Yellow Cab Co., 332 U.S. 218, 231-32, 67 S. Ct. 1560, 91 L. Ed. 2010 (1947)*.

The dissent posits that the County is instead referring **[****30]** to *49 U.S.C. § 14501(d)*. This seems unlikely because that statute clearly states that it does not limit airports from providing preferential access to providers of pre-arranged ground transportation services:

> (3) Matters not covered. Nothing in this subsection shall be construed-
>
> . . .
>
> (B) as prohibiting or restricting an airport, train, or bus terminal operator from contracting to provide preferential access or facilities to one or more providers of pre-arranged ground transportation service . . . . *49 U.S.C. § 14501(d)(3) (2006)*.

public policy governing all regulatory agencies in this state that requires maximizing **[**158]** economic competition, including commercial ground transportation, subject only to those limits necessary to achieve the legislature's goals." They contend that the decision in *Cedarhurst Air Charter, Inc. v. Waukesha County, 110 F. Supp. 2d 891 (E.D. Wis. 2000)*, and this **[***783]** court's decision in *American Med. Transp. of Wisconsin, Inc. v. Curtis-Universal, Inc., 154 Wis. 2d 135, 452 N.W.2d 575 (1990)*, warrant a broad application of *§ 133.01*. Thus, they argue, any regulation must "employ the least anticompetitive means to achieve any legislatively mandated goal."

[*P47] The petitioners' view is supported by neither the language of *§ 133.01* nor the cases cited. Further, the petitioners' view would subject the enforcement of any regulation affecting competition to litigation regarding the regulation's effect on competition. We therefore decline to adopt it here.

[*P48] ***HN20***[] Chapter 133 of the Wisconsin **[****32]** Code is titled "Trusts and Monopolies." The first section of the chapter, *§ 133.01*, is captioned "Legislative Intent" and states:

> ***HN21***[] The intent of this chapter is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory business practices which destroy or hamper competition. It is the intent of the legislature that this chapter be interpreted in a manner which gives the most liberal construction to achieve the aim of competition. It is the intent of the legislature to make competition the fundamental economic policy of this state and, to that end, state regulatory agencies shall regard the public interest as requiring the preservation and promotion of the maximum level of competition in any regulated industry consistent with the other public interest goals established by the legislature.

(Emphasis added). ***HN22***[] The section expressly describes the legislature's intent as applying to this chapter (that is, **[**159]** chapter 133), and nowhere states that it is the intent of the section that the entire Wisconsin Code be interpreted in light of *§ 133.01*. Rather, the section applies in circumstances in which parties **[****33]** assert violations of ***antitrust law***.

[*P49] The petitioners' contention that case law supports the view that *§ 133.01* should be used to interpret all state actions regulating competition is incorrect. The case law cited by the petitioners supports the view that ***HN23***[] *§ 133.01* applies when a party brings a cause of action in antitrust. American Medical Transport involved a complaint filed by three private ambulance companies alleging that the City of Milwaukee and four other private ambulance companies had violated *§ 133.03* of the state ***antitrust law***. *154 Wis. 2d at 138*. The complaint concerned a system that gave the four defendant companies primary responsibility for the city's ambulance service and relegated the plaintiff companies to providing backup service. *Id. at 139*.

[*P50] The circuit court granted the defendants' motions to dismiss on the ground that the city was authorized to implement such a system under home-rule authority pursuant to *Wis. Stat. § 62.11(5)*. *Id. at 141*. This court relied upon *§ 133.01* in considering whether *§ 62.11(5)* did in fact authorize such "anticompetitive, monopolistic regulation." *Id. at 151*. It determined that ***HN24***[] under *§ 133.01*, "we should not lightly reach the conclusion **[****34]** that monopoly or restraint of trade is authorized by extraneous statutes that do not quite clearly indicate that intent." *Id. at 151-52*. Thus, it allowed the plaintiffs' antitrust suit to move forward. [15]

[*P51] **[**160]** **[***784]** In Cedarhurst, the plaintiff claimed that Waukesha County had conspired with the operator of Waukesha County Airport to monopolize the market for aircraft fuel, in violation of federal antitrust laws, specifically *15 U.S.C. §§ 1-2*. *110 F. Supp. 2d at 892-93*. The county moved to dismiss, asserting that the claims were barred by state action immunity. Id. (citing *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943))*. Specifically, the county stated that it was immune on the ground that *§ 114.14* gave it wide authority to engage in anticompetitive conduct. In its consideration of whether the legislature intended that *§ 114.14* authorize the county's conduct, the court recognized that *§ 133.01* requires that courts liberally interpret statutes to promote

---

[15] *Wis. Stat. § 133.03* no longer applies "to ambulance service contracted for under *ss. 59.54(1)*, *60.565*, *61.64* and *62.133*." *Wis. Stat. § 133.03(4)*.

competition. *Id. at 895*. The court determined that *§ 114.14* did not provide the "'clear articulation of a **[****35]** state policy to authorize anticompetitive conduct' needed to support [the county's] defense of state action immunity." *Id. at 895* (quoting *City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 372, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991))*.

[*P52] Both American Medical Transport and Cedarhurst involved causes of action under ***antitrust law***. In each case, *§ 133.01* was used as an interpretive tool in determining whether a statute had authorized the regulation that formed the basis of the antitrust action. In contrast to *American Medical Transport*, in which plaintiffs alleged violations of *§ 133.03*, and in contrast to *Cedarhurst*, where plaintiffs alleged violations of the Sherman Antitrust Act, Williams and Hegney's only assertion of a violation of antitrust laws comes from its invocation of *§ 133.01*. [16]

[*P53] **[**161]** The petitioners concede that their view of *§ 133.01* does not give rise to an independent cause of action. However, that assertion belies the potential sweep of their interpretation of *§ 133.01*. In the petitioners' view, because there is some less restrictive **[****36]** alternative to the Ordinance consistent with the goals of the statutes that authorize the Ordinance, the Ordinance conflicts with the statutes as a matter of law.

[*P54] As the Attorney General notes in an amicus brief, every form of economic regulation restrains trade to some degree. However, the petitioners' theory would allow as a defense to any enforcement action of any such regulation the claim that there is a less restrictive alternative consistent with the statute authorizing the regulation. Thus, even if *§ 133.01* does not give rise to a cause of action in its own right, the petitioners' theory has the potential to precipitate litigation across every area of economic regulation in the state. In their view, any time a party is cited for a violation of a regulation, that party could assert that the regulation is unenforceable because there is a less restrictive alternative consistent with the goals of the statute authorizing the Ordinance.

[*P55] The Supreme Court noted in Exxon Corp. v. Governor of Maryland that ***HN25***[] "if **[****37]** an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed." *437 U.S. 117, 133, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978)*. As a corollary, we could add that if a regulation's adverse effect on competition allowed an affirmative defense that less restrictive means were available, this state's power to engage in economic regulation would be hobbled. We therefore determine that Ordinance **[***785]** 4.05 does not conflict with *§ 133.01*.

[*P56] **[**162]** The petitioners' argument that Ordinance 4.05 conflicts with *Wis. Stat. § 349.24* is also unavailing. ***HN26***[] Under that section, city councils and village and town boards may regulate and license taxis and drivers. *Wis. Stat. § 349.24(1)*. [17] Further, taxis and drivers licensed by any city, village or town may not be required to

---

[16] We note, too, that *§ 133.01* expressly applies to "state regulatory agencies." We decline to address whether Milwaukee County is a state regulatory agency under *§ 133.01*.

[17] *Wis. Stat. § 349.24* **[****38]** provides in relevant part:

> ***HN27***[] Authority to license taxicab operators and taxicabs. (1) The council of any city and every village or town board may:
>
> (a) Regulate and license chauffeurs and operators of taxicabs used for hire;
>
> (b) Regulate and license the taxicab business by licensing each taxicab used for hire;
>
> (c) Prohibit any person from operating any motor vehicle for taxicab purposes upon the highways of the city, village or town unless the person is licensed as a chauffeur and operator and unless the taxicab business is licensed by the licensing of each taxicab;
>
> (d) Revoke any license mentioned in this section when in its judgment the public safety so requires.
>
> (2) Any person licensed by any city, village or town as a chauffeur and operator shall not be required to procure either a chauffeur's and operator's license or a taxicab license in any other municipality for the purpose of carrying taxicab

procure such a license "in any other municipality for the purpose of carrying taxi passengers for hire from one municipality to another." *Wis. Stat. § 349.24(2)*. The petitioners argue that the requirement under Ordinance 4.05(3)(b)(3) that taxis doing business at the Airport have an Airport permit conflicts with *§ 349.24(2)*, and is therefore unenforceable.

[*P57] The petitioners' view is contrary to the very words of the **[****39]** statute. As the court of appeals here **[**163]** explained, ***HN28***[] *§ 349.24* makes no mention of counties or airports. *2006 WI App 153, 295 Wis. 2d 389, P21, 720 N.W.2d 177*. Further, *Wis. Stat. § 349.01* provides that words used in chapter 349 are used in the same sense as those words are defined in *Wis. Stat. § 340.01*. *Section 340.01(36m)* states that "'[m]unicipality' means city, village or town." Neither the county nor the Airport is a municipality under this definition. Thus, the restrictions in *§ 349.24(2)* that prevent "municipalities" from requiring licenses from taxis and drivers with licenses from other municipalities do not pertain to the permits required under Ordinance 4.05, for neither the County nor the Airport is a municipality in the relevant sense.

[*P58] We also agree with the court of appeals that ***HN29***[] the purpose of *§ 349.24* is to allow taxis and drivers to convey passengers through cities, towns, and villages without having to obtain a license in each one. *2006 WI App 153, 295 Wis. 2d 389, P21, 720 N.W.2d 177*. In contrast, the permit requirement of Ordinance 4.05(3)(b)(3) is to promote efficient and safe ground transportation at the Airport. Regulations promoting this goal are within the County's purview under *§ 114.14(1)* and *Town of Lake. 259 Wis. at 231*. Thus, **[****40]** we determine that *§ 349.24* does not conflict with Ordinance 4.05.

[*P59] The petitioners' final statutory argument is based on *§ 194.02*. That section states:

> ***HN30***[] It is the intent of the legislature to remove the economic regulations which limit motor carrier operations in the state. The legislature intends to let the market promote competitive and efficient transportation services, while maintaining the safety regulations necessary to protect the welfare of the traveling **[***786]** and shipping public. It is the intent of the legislature that this chapter be interpreted in a manner which gives the **[**164]** most liberal construction to achieve the aim of a safe, competitive transportation industry.

The petitioners maintain that the statement of intent to promote "competitive and efficient transportation services" in *§ 194.02* extends to the regulation of taxis. They argue that the language of *§ 194.02* requires that regulation of any transportation services be "the minimum necessary to achieve the other goals the legislature has adopted." Because Ordinance 4.05 is not the minimum regulation necessary to achieve other legislative goals, the petitioners claim that the Ordinance is unenforceable on the ground that it contradicts **[****41]** *§ 194.02*.

[*P60] Their argument, however, is belied by the express scope of chapter 194. ***HN31***[] The very first subsection of the chapter, *§ 194.01(1)*, specifically excludes taxis from the definition of "common motor carrier." It states:

> ***HN32***[] "Common motor carrier" means any person who holds himself or herself out to the public as willing to undertake for hire to transport passengers by motor vehicle between fixed end points or over a regular route upon the public highways or property over regular or irregular routes upon the public highways. <u>The transportation of passengers in taxicab service . . . shall not be construed as being that of a common motor carrier</u>.

(Emphasis added.) The other two types of vehicles covered by the section ("contract motor carrier" and "private motor carrier") do not include taxis, for both are defined as transporting property rather than passengers. [18]

---

passengers for hire from one municipality to another, but this exception does not permit the chauffeur or operator to operate a taxicab wholly within the limits of any municipality in which the chauffeur or operator is not licensed.

[18] *Wis. Stat. §§ 194.01(2)*, *(11)*.

[*P61] The petitioners argue that *§ 194.02*'s statement of intent "to let the market promote competitive and efficient transportation services" is not specific to **[**165]** motor carriers, and therefore applies to regulations regarding taxis. However, that statement follows a sentence specifically stating that the **[****42]** intent of the legislature is to remove regulations "which limit motor carrier operations" (emphasis added). Thus, one sentence in a statement of legislative intent refers to "transportation services," while the rest of the chapter expressly excludes taxis from its scope. This is simply not a sufficient foundation to conclude that any regulation of taxis must be the least restrictive to competition consistent with legislative goals, as the petitioners claim. We therefore determine that the ***HN33***[] Ordinance does not conflict with *§ 194.02*.

[*P62] Accordingly, we conclude that ***HN34***[] the requirement under Ordinance 4.05 that taxis have one of a limited number of permits in order to do business at the Airport does not conflict with *Wis. Stat. §§ 133.01*, *349.24*, or *194.02*. *Section 133.01* does not give rise to an independent cause of action, *§ 349.24* does not apply to counties or airports, and taxis are explicitly excluded from the scope of chapter 194.

[*P63] Finally, the petitioners assert that the restriction on prearranged taxi service in Ordinance 4.05 is an unconstitutional interference with interstate commerce. However, ***HN35***[] it is fundamental that a court should not reach a constitutional question unless it is essential **[****43]** to the determination of the case before it. *Kollasch v. Adamany, 104 Wis. 2d 552, 561, 313 N.W.2d 47 (1981)*. Because we determine that ***HN36***[] by prohibiting taxis without Airport permits from accepting prearranged fares, Ordinance 4.05 conflicts with **[***787]** *§ 114.14* and to that extent is invalid and unenforceable, we do not reach the constitutional question.

[166]** V

[*P64] In sum, we determine that ***HN37***[] Ordinance 4.05, which prohibits taxis without Airport permits from making prearranged pickups, conflicts with the requirement under *§ 114.14* that the public have equal access to airport services, and to that extent is invalid and unenforceable. However, we determine that Ordinance 4.05 does not conflict with *Wis. Stat. §§ 133.01*, *349.24*, and *194.02*. Because our decision rests on statutory grounds, we do not reach the question of whether the restrictions on prearranged taxi service in Ordinance 4.05 impermissibly interfere with interstate commerce. Accordingly, we reverse the court of appeals, and remand the cause to the circuit court with instructions to vacate the judgments of conviction.

By the Court.--the decision of the court of appeals is reversed and the cause is remanded to the circuit court.

Dissent by: DAVID T. PROSSER

Dissent

[*P65] **[****44]** DAVID T. PROSSER, J. *(dissenting).* This case interprets Milwaukee County's power to regulate ground transportation at General Mitchell International Airport. Although I might seek changes to Milwaukee County's Ordinance 4.05 if I were a member of the Milwaukee County Board, this court should not force changes to the ordinance unless there is very clear proof that the ordinance is invalid. Because I am not persuaded that the petitioners have satisfied their burden to establish invalidity, I respectfully dissent.

I

[*P66] The Wisconsin Legislature has given local governments broad powers to "construct, improve, equip, maintain and operate" an airport. *Wis. Stat. § 114.14(1)*. "The governing body of a city, village, town or county may adopt regulations, and establish fees or charges for the use of such airport." Id.

[*P67] **[**167]** Pursuant to the authority granted to Milwaukee County by this statute, the County Board adopted Milwaukee County Ordinance 4.05. The ordinance provides in part:

(1) Purpose. The purpose and intent of this section is to regulate all commercial ground transportation including prereserved (reservation) service, by the issuance of permit(s) to both those owning or operating a commercial **[****45]** ground transportation service and those driving commercial ground transportation vehicles at General Mitchell International Airport. Prereserved (reservation) service means ground transportation that is contracted for prior to the actual time passengers are picked up.

. . . .

(3) Taxicabs.

(a) Definition. "Taxicab" under this section is a motor vehicle regularly engaged in the business of carrying passengers for hire, with heating and air conditioning, be in good operating condition, metered, and not operated on an affixed route.

(b) License, permits, fees.

(1) An owner or operator of a taxicab shall not do business or attempt to do business on General Mitchell International Airport unless such owner or operator has been licensed as owner or operator of a taxicab business by any city, village or town consistent with *Wis. Stats. § 349.24*, and unless such license remains in full force and effect.

. . . .

[*788]** (3)(a) On and after September 1, 1990, taxicab **[**168]** owner permits will be issued only to those owners whose vehicle(s) have been permitted during the period October 1, 1989, through July 5, 1990. Taxicab owner permits must be renewed and remain in full force and effect on a continuous basis, in **[****46]** accordance with subparagraph (b) below. In the event an owner does not renew the taxicab owner permit prior to the annual dates prescribed herein below, that owner shall forfeit his/her privilege to operate at the airport. At such time that the total number of taxicab permits issued decreases below fifty (50), additional permits, to maintain the total issued at fifty (50), will be issued to those taxicab owners who are on the waiting list. Permits will be issued based upon date of request on the waiting list. In the event of extraordinary circumstances, i.e. large conventions, inclement weather or inability of the permitted taxicab fleet to meet immediate passenger demand, the airport director or his/her designated representative is authorized to request temporary taxicab service from local providers in order to meet such extraordinary demand. Additional taxicabs will follow all policies, rules and regulations pertaining to the operation of taxicabs at General Mitchell International Airport.

. . . .

(5) Any person who is not in possession of the necessary permits required under this section and who operates a taxicab at General Mitchell International Airport in such a manner as to constitute **[****47]** doing business, or who attempts to do business thereon shall, without limitation because of enumeration, be deemed to be in violation of chapter 4 of the Code. A taxicab driver entering upon General Mitchell International Airport for the sole purpose of discharging a taxicab patron at said airport shall not be deemed to be doing business thereon if, after discharging said passenger, he/she shall immediately leave the airport premises.

[169]** Milwaukee County, WI, Code of General Ordinances, ch. 4 (2006) (emphasis added).

[*P68] Persons challenging this ordinance have a heavy burden. The police power of the state, exercised by municipalities under the authority of the legislature, extends to the public safety, health, morals, and general welfare. *Highway 100 Auto Wreckers, Inc. v. City of West Allis, 6 Wis. 2d 637, 643, 96 N.W.2d 85 (1959)*, rehearing denied, *6 Wis. 2d 637, 97 N.W.2d 423 (1959)*. The police power embraces regulations designed to promote the public convenience or general prosperity. *Courtesy Cab Co. v. Johnson, 10 Wis. 2d 426, 432, 103 N.W.2d 17 (1960)*. "This court has often recognized the principle that the court will not interfere with the exercise of police power by a municipality **[****48]** unless the illegality of the exercise is clear." Highway 100 Auto Wreckers, 6 Wis. 2d at 643. "If there are any reasons which can fairly have weight, the reasons for a given ordinance are for the legislative body and not for the courts." *Courtesy Cab, 10 Wis. 2d at 432*.

[*P69] The county "does not have the burden of proving the validity of its ordinance . . . . Rather, [a challenger] has the burden of showing its invalidity." *State ex rel. B'nai B'rith Found. v. Walworth County Bd. of Adjustment, 59 Wis. 2d 296, 307, 208 N.W.2d 113 (1973)*. "[W]here a municipal body enacts regulations pursuant to authority expressly granted, all presumptions are in favor of its validity, and any person attacking it must make the fact of its invalidity clearly appear." *State ex rel. Newman v. Pagels, 212 Wis. 475, 250 N.W. 430 (1933)*.

[*P70] **[***789]** The majority opinion carefully explains the history and purpose of the County ordinance. See majority op., PP7, 8, 9, 11, 32, 33, 34, 35, 36, and 37. This is summarized well in the following sentences:

> **[**170]** Since the adoption of Ordinance 4.05, the problems of the open system have abated. The time that taxis must wait for fares has decreased, and the time that passengers must wait for **[****49]** curbside taxi service has decreased. The cap on taxi permits has reduced the congestion problems, and taxis no longer spill into the Airport roadway to create a hazard for other Airport traffic.

Id., P11.

[*P71] Surprisingly, the majority invalidates the ordinance in part in spite of this success.

II

[*P72] To support their attack on Ordinance 4.05, petitioners point to *Wis. Stat. § 114.14(3)(b)1*.: "(b) The exercise of authority by the airport commission under par. (a) shall be subject to all of the following conditions: 1. The public may in no case be deprived of equal and uniform use of the airport." (Emphasis added.) They contend that Ordinance 4.05(3)(b)(5), prohibiting the operation of a taxicab at General Mitchell International Airport without a permit, violates the statutory rule on "equal and uniform use of the airport" if the taxicab merely picks up passengers on a "prearranged" or "prereserved" basis. They argue that it is not within the County's authority to treat taxis without permits differently from luxury limousines (which are not required to have airport permits) with respect to providing prearranged service at the Airport. See majority op., P19.

[*P73] They also argue that it is not within **[****50]** the County's authority to require taxis to have one of a limited number (50) of Airport permits to do business at the Airport. Id. According to petitioners, "[f]orbidding the provision of [prereserved] service [by taxis without **[**171]** permits] serves only to protect the favored 50 Milwaukee taxis and the providers of more expensive prereserved services from competition."

[*P74] Before responding to these arguments, it is helpful to understand the history of the language at issue. The present sentence, "The public may in no case be deprived of equal and uniform use of the airport," *Wis. Stat. § 114.14(3)(b)1*., first appeared in our statutes in slightly different form in 1943. See § 15, ch. 269, Laws of 1943. Newly created *§ 114.14(3)* gave airport commissions certain powers, including the power to "contract with private parties for the operation of the airport, including all necessary arrangements for the improvement and equipment and successful operation thereof. Provided, that in no case shall the public be deprived of equal and uniform use of the airport." *Wis. Stat. § 114.14(3)* (1943).

[*P75] Legislative Reference Bureau drafting records for 1943 S.B. 123, the source of Chapter 269, do not explain this **[****51]** proviso. Although the drafting records are incomplete, they show that the bill went through significant drafting changes before introduction. At some point, the bill drafter appears to have borrowed language from the Uniform Airports Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 1935.

[*P76] For instance, Section 5 of the Uniform Airports Act reads in part:

> Section 5. Authority to Equip, Improve, Establish Fees and Charges and Lease.--Counties, municipalities, or other political subdivisions of this state which have established or may hereafter establish airports or landing fields, or **[***790]** which acquire, lease, or set apart real property for such purpose or purposes, are hereby authorized:

> **[**172]** (a) to construct, equip, improve, maintain, and operate the same, or to vest authority for the construction, equipment, improvement, maintenance, and operation thereof, in an officer, board or body of such political subdivision. . . .
> . . . .
>
> (c) to lease for a term not exceeding [ ] years such airports or landing fields to private parties for operation, or to lease or assign for a term not exceeding [ ] years to private parties for operation space, area, improvements, and **[****52]** equipment on such airports or landing fields, provided in each case that in so doing the public is not deprived of its rightful, equal and uniform use thereof.

Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Forty-Fifth Annual Conference, Uniform Airports Act 216-17 (1935) (emphasis added). [19] The underscored words were substantially incorporated into *Wis. Stat. § 114.14(3)* (1943).

[*P77] Admittedly, the language of our statute is somewhat broader than the language of the uniform law. This helps to explain the comment in *Wussow v. Gaida, 251 Wis. 328, 331, 29 N.W.2d 42 (1947)*, that "no distinction between private or personal and commercial use can be read into the clear words of the statute." Yet, the Wussow decision--which is vital to petitioners' argument--was influenced by more than the language of the statute. Both the statute and Wussow were influenced by contemporary practices.

[*P78] In a 1941 article, John M. Hunter, Jr., an attorney for the Civil Aeronautics Administration of the United States Department of Commerce, **[****53]** wrote:

> **[**173]** The principal legal developments of interest in the field of airport operation during the last year [1940] were with regard to the leasing of municipal airports or airport facilities to private persons and the grant by cities of airport operating privileges. These developments included the adoption of several city resolutions authorizing airport leases and grants of privileges and concessions . . . .
> In addition to these developments, there have been three cases in which informal complaint has been made to the Civil Aeronautics Authority of violation of the exclusive right provision of Section 303 of the Civil Aeronautics Act of 1938, which reads: "There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended." In all of these cases the complaint was that the city in question had granted a private operator an exclusive right to conduct commercial flying activities at the municipal airport, including operation of a flying school and a charter flying service.

John M. Hunter, Jr., Airport Legal Developments of Interest to Municipalities--1940, The Journal of Air Law and Commerce 153 (Vol. XII, 1941) (citation **[****54]** omitted).

[*P79] Hunter's article was prescient, for it anticipated the very facts of the Wussow case. Wussow entered into a lease to operate the Shawano Municipal Airport and to "have sole charge of said airport." *Wussow, 251 Wis. at 329-30*. **[***791]** Gaida, who owned an aircraft sales company on adjacent land and had regularly used the airport for landing and taking off, continued to use the airport to give "flying instructions and taxi service" (likely meaning air charter service). *Id. at 330*. Wussow sought an injunction to bar such use, claiming that Gaida was forceably taking Wussow's rights under the contract and causing him "great loss in profits and **[**174]** earnings." Id. This court reversed the circuit court and denied the injunction. It cited the procedural posture of the case as well as the language of the statute, then added: "The final answer to the immediate question must be arrived at in the light of this determination that [Wussow's] right to equitable relief does not exist. We do not decide whether a cause of action at law may exist." *Id. at 331* (emphasis added).

[*P80] Thus, close examination of the Wussow case suggests that petitioners may be reading too much into it. A 1958 opinion of the Wisconsin **[****55]** Attorney General presents a more balanced discussion of the law on airport contracts. The Attorney General concluded in summary:

---

[19] See also *Ga. Code Ann. § 6-3-25(3)* (1995); *S.C. Code Ann. § 55-9-190(3)* (1992); *Utah Code Ann. § 72-10-207(1)(c)* (2001).

> Where the county is the owner and operator of an airport it can lawfully lease space in its terminal building to a car rental agency upon the condition that it will not lease space to any other car rental agency, but it is doubtful whether it can lawfully exclude other rental agencies from soliciting business in the airport or terminal unless such regulation can be shown to be necessary for the convenience of the flying public or the efficiency of the operation of the airport.

47 Op. Att'y Gen. 29 (1958).

[*P81] An annotation at 40 A.L.R.2d 1060 (1955) ("Validity, construction, and operation of airport operator's grant of exclusive or discriminatory privilege or concession") cites several cases upholding exclusive ground transportation service contracts at public airports. Thus, it is difficult to believe that the Wisconsin Legislature intended to hamstring the operation of Wisconsin airports by prohibiting the reasonable regulation of competition.

[*P82] This background has a direct relationship to petitioners' argument that a 50-permit limit on taxicabs at the Airport **[****56]** violates *Wis. Stat. § 114.14(3)(b)1*. If **[**175]** Milwaukee County may not limit the number of taxicab permits at its Airport, it is hard to see how it can limit the number of other service providers and vendors by regulation or contract.

[*P83] Clearly, Quality Cab, which employs Williams and Hegney, is not the only taxicab company in the region that may wish to conduct a prereserved pick up and return business if an Airport permit is not required. Hence, the majority opinion appears to be forcing Milwaukee County to return to an open system. This would be a substitution of judicial policy for county regulation.

[*P84] Milwaukee County Ordinance 4.05 is a comprehensive, detailed ordinance. It governs taxicabs (subsection 3), in-county shuttle service (subsection 4), out-of-county shuttle service (subsection 5), luxury limousines (subsection 6), courtesy cars (subsection 7), and buses (subsection 8), as well as car and truck rentals (subsection 9). The ordinance addresses prereserved service for taxicabs (4.05(3)(f)(7)), out-of-county shuttle service (4.05(5)(a)), and luxury limousines (4.05(6)(a)(2)).

[*P85] The kind of prereserved taxicab service, without permit, contemplated by the majority will be in direct **[****57]** competition against (1) taxicabs with permits; (2) in-county shuttle service under negotiated contract and permit; and (3) out-of-county shuttle services that have paid for permits. Traffic congestion, fairness to permit holders, reliable service to the public, and revenue **[***792]** to the County all factor into the present regulatory scheme.

[*P86] Unaccountably, the majority opinion faults the County for not anticipating and countering every argument the majority adduces in favor of open competition for prereserved taxicab service. See, e.g., majority op., P39. After all, the County does not have the **[**176]** burden of proving the validity of its ordinance. The majority's assumption that there will be no longer wait time if non-permitted taxis are able to retrieve prearranged fares at the Airport is, frankly, unrealistic. Passengers get out of their taxicabs when the cabs arrive at the Airport. Passengers get into their taxicabs after their planes arrive at the Airport and after they have picked up any luggage. No extra wait time? Even the residents of Lake Wobegon would smile at the suggestion that planes are never late and luggage is never delayed or lost at General Mitchell International Airport.

[*P87] As for **[****58]** arbitrary discrimination, petitioners make much of the fact that luxury limousines are not required to have permits. This distinction appears to be based upon federal law, which prohibits local governments from requiring a license or fee for certain motor vehicles providing prearranged ground transportation service. See *49 U.S.C. § 14501(d)*. [20] Complying with federal law is not being arbitrary.

---

[20] *49 U.S.C. § 14501(d) (1955)*, reads as follows:

> (d) Pre-arranged ground transportation.--
>
> (1) In general.--No State or political subdivision thereof and no interstate agency, or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law

[*P88] [177]** Milwaukee County Ordinance 4.05(3) is defensible as applied in these citations. Because the majority holds otherwise, I respectfully dissent.

[*P89] I am authorized to state that Justice LOUIS B. BUTLER, JR., joins this opinion.

---

requiring a license or fee on account of the fact that a motor vehicle is providing pre-arranged ground transportation service if the motor carrier providing such service--

(A) meets all applicable registration requirements under chapter 139 for the interstate transportation of passengers;

(B) meets all applicable vehicle and intrastate passenger licensing requirements of the State or States in which the motor carrier is domiciled or registered to do business; and

(C) **[****59]** is providing such service pursuant to a contract for--

(i) transportation by the motor carrier from one State, including intermediate stops, to a destination in another State; or

(ii) transportation by the motor carrier from one State, including intermediate stops in another State, to a destination in the original State.

Shane v. Humana, Inc.

United States Court of Appeals for the Eleventh Circuit

June 13, 2007, Decided ; June 13, 2007, Filed

Nos. 06-14222 & 06-14497

Reporter

228 Fed. Appx. 927 *; 2007 U.S. App. LEXIS 13813 **

CHARLES B. SHANE, M.D., JEFFREY BOOK, D.O., H. ROBERT HARRISON, M.D., GLENN L. KELLY, M.D., LEONARD J., KLAY, M.D., MARTIN MORAN, M.D., MANUEL PORTH, M.D., THOMAS BACKER, M.D., SUSAN HANSEN, M.D., ANDRES TALEISNIK, M.D., JULIO TALEISNIK, M.D., ROGER WILSON, M.D., MEDICAL ASSOCIATION OF GEORGIA, FLORIDA MEDICAL ASSOCIATION, LOUISIANA STATE MEDICAL SOCIETY, Plaintiffs-Appellants, versus HUMANA, INC., COVENTRY HEALTH CARE, INC., HUMANA HEALTH PLAN, INC., PACIFICARE HEALTH SYSTEMS, INC., PRUDENTIAL INSURANCE COMPANY OF AMERICA, et al., Defendants-Appellees.

Notice: **[**1]** PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: Related proceeding at *Grider v. Keystone Health Plan Cent., Inc., 500 F.3d 322, 2007 U.S. App. LEXIS 20633 (3d Cir. Pa., Aug. 28, 2007)*

Prior History: Appeals from the United States District Court for the Southern District of Florida. D. C. Docket Nos. 04-21589-CV-FAM & 00-01334-MD-FAM.

In re Managed Care Litig., 430 F. Supp. 2d 1336, 2006 U.S. Dist. LEXIS 40846 (S.D. Fla., June 19, 2006)

Disposition: AFFIRMED.

Judges: Before CARNES and WILSON, Circuit Judges, and WALTER, [*] District Judge.

Opinion

[*928] PER CURIAM:

The judgment of the district court is affirmed for the reasons set out in the district court's order granting summary judgment, which was filed on June 19, 2006, except that we do not reach the issue of whether the "plus factors" requirement from ***antitrust law*** is applicable in civil RICO cases. Even if that requirement is not applicable, the district court's judgment is still due to be affirmed under the facts and circumstances of this case.

AFFIRMED.

---

[*] Honorable Donald E. Walter, United States District Judge for the Western District of Louisiana, sitting by designation.

In re Netflix Antitrust Litig.

United States District Court for the Northern District of California

June 14, 2007, Decided; June 14, 2007, Filed

No. C 07-00643 WHA Related to: No. C 07-01266 WHA, No. C 07-01978 WHA

Reporter
506 F. Supp. 2d 308 *; 2007 U.S. Dist. LEXIS 45207 **; 2007-1 Trade Cas. (CCH) P75,749

IN RE NETFLIX ANTITRUST LITIGATION; This Document Relates To: ALL ACTIONS

Core Terms

patent, antitrust, competitors, consumers, plaintiffs', allegations, pleaded, discovery, federal patent law, references, preempted, motion to dismiss, anti trust law, relevant market, state-law, deterred, standing to bring, district court, prior art, patentee, damages, exited, online, enforcement activity, restraint of trade, lack standing, patent-infringement, counterclaims, particularity, infringement

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* tests for legal sufficiency of the claims alleged in the complaint. While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. All allegations of material fact are taken as true and construed in the light most favorable to a plaintiff. However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim.

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

HN2[] **Inequitable Conduct, Anticompetitive Conduct**

As a general rule, behavior conforming to the patent laws oriented towards procuring or enforcing a patent enjoys immunity from the antitrust laws. But this immunity is hardly absolute. An inventor who obtains a patent by defrauding the patent office deserves no immunity. Such antitrust claims are known as Walker Process claims, refer to the United States Supreme Court's decision in Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp. In order to achieve a suitable accommodation in this area between the differing policies of the patent and antitrust laws, a distinction must be maintained between patents procured by "deliberate fraud" and those rendered invalid or unenforceable for other reasons.

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

HN3[] **Inequitable Conduct, Anticompetitive Conduct**

To succeed on a claim for Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., fraud, the antitrust claimant must show: (1) that the asserted patent was obtained by knowingly and willfully misrepresenting the facts to the United States Patent and Trademark Office; (2) that the party enforcing the patent was aware of the fraud when bringing suit; (3) independent and clear evidence of deceptive intent; (4) a clear showing of reliance, i.e., that the patent would not have issued but for the misrepresentation or omission; and (5) the necessary additional elements of an underlying violation of the antitrust laws.

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

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

HN4[] **Regulated Practices, Private Actions**

Generally, the law of the circuit in which the district court sits governs issues in ***antitrust law***. The United States Court of Appeals for the Federal Circuit law controls as to matters within its jurisdiction. More specifically, whether conduct in procuring or enforcing a patent is sufficient to strip a patentee of its immunity from the antitrust laws is to be decided as a question of Federal Circuit law. When a courts consider a patentee's behavior under Federal Circuit law and determines that it involved either an inappropriate attempt to procure a patent or an inappropriate attempt to enforce a patent, the remainder of the antitrust inquiry must proceed under the law of the regional circuit.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN5[] **Standing, Requirements**

A plaintiff must be a "proper party" to have standing to bring an antitrust action, regardless of whether they have suffered an antitrust injury in fact. A plaintiff must show five factors to demonstrate antitrust standing: (1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages.

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

HN6[] **Sherman Act, Scope**

Antitrust injury, consists of the following elements: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, (4) that is of the type the antitrust laws were intended to prevent, and (5) that the plaintiff be a participant in the same market as the alleged malefactors.

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

HN7[] **Inequitable Conduct, Anticompetitive Conduct**

The harm in a Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., claim comes not from fraudulently obtaining a patent, it comes from creating or maintaining an unlawful monopoly using that patent. Even though Walker Process claims are predicated on enforcement of a fraudulently-obtained patent, the harm still accrues directly to consumers. Competitors are excluded from the market allowing the patentee to create or maintain an unlawful monopoly.

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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN8[] **Inequitable Conduct, Anticompetitive Conduct**

Like all fraud-based claims, Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., allegations are subject to the pleading requirements of *Fed. R. Civ. P. 9(b)*. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally. *Rule 9(b)*. For Walker Process claims, a party must allege that but for the fraud the affected patents would not have issued. A party need not plead the intent element of its Walker Process claim with particularity. Instead, it is the "circumstances" constituting the fraud that must be alleged with specificity.

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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN9[] **Inequitable Conduct, Anticompetitive Conduct**

To plead a claim of Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., fraud, plaintiffs must plead that the fraudulently-procured patent was enforced; merely procuring a patent by fraud is not sufficient. If a plaintiff cannot plead the minimum level of enforcement necessary to sustain a declaratory judgment action, the plaintiff likewise cannot plead a Walker Process claim.

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Patent Law > Jurisdiction & Review > General Overview

HN10[] **Case or Controversy, Standing**

Where a patentee asserts rights under a patent based on certain identified ongoing or planned activity of another party, and where that party contends that it has the right to engage in the accused activity without a license, an U.S. Const. art. III case or controversy will arise and the party need not risk a suit for infringement by engaging in the identified activity before seeking a declaration of its legal rights. In the context of conduct prior to a existence of a license, declaratory judgment jurisdiction generally will not arise merely on the basis that a party learns of the existence of a patent owned by another or even perceives such a patent to pose a risk of infringement, without some affirmative act by the patentee.

Patent Law > Jurisdiction & Review > General Overview

HN11[] **Patent Law, Jurisdiction & Review**

United States Court of Appeals for the Federal Circuit law governs whether federal patent law preempts a state law claim. Claims that are predicated on no more than bad-faith misconduct or fraud before the United States Patent and Trademark Office (PTO) or that are identical in scope to an inequitable conduct defense are preempted by federal patent law. Tort claims under state law are not preempted by federal patent law where they include additional elements not found in federal patent law claims.

Patent Law > US Patent & Trademark Office Proceedings > General Overview

HN12[] **Patent Law, US Patent & Trademark Office Proceedings**

Conduct in front of the United States Patent and Trademark Office is regulated by federal patent laws.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

HN13[] **Trade Practices & Unfair Competition, State Regulation**

California's Cartwright Act makes unlawful any agreements or trusts having the effect of restraining trade. *Cal. Bus. & Prof. Code §§ 16720*, *16726*. By the statute's own terms, a trust is a combination of capital, skill or acts by two or more persons. *Cal. Bus. & Prof. Code § 16720*. Attorneys and employees are generally considered agents and not co-conspirators, however, an attorney is not immune from antitrust liability if he becomes an active participant in formulating policy decisions with his client to restrain competition.

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

HN14[] **State Regulation, Claims**

California Cartwright Act claims are properly dismissed where the complaint makes conclusory allegations of a combination and does not allege with factual particularity that separate entities maintaining separate and independent interests combined for the purpose to restrain trade.

Antitrust & Trade Law > General Overview

Civil Procedure > Discovery & Disclosure > General Overview

HN15[] **Antitrust & Trade Law**

District courts have broad discretion to stay discovery pending the resolution of a potentially dispositive motion, including a motion to dismiss. Staying discovery may be particularly appropriate in antitrust cases, where discovery tends to be broad, time-consuming and expensive.

Counsel: [1]** For Mr. Dennis Dilbeck, an individual, on his own behalf and on behalf of all similarly situated, Plaintiff: Alan Himmelfarb, LEAD ATTORNEY, Law Offices of Himmelfarb & Himmelfarb, Vernon, CA.; Ethan Mark Preston, New York, NY.; Rachele R. Rickert, Wolf Haldenstein Adler Freeman & Herz LLP, San Diego, CA.; Richard A. Lockridge, Robert K. Shelquist, Yvonne M. Flaherty, Lockridge Grindal Nauen, Minneapolis, MN.; Scott A Kamber, Kamber and Associates, LLC, New York, NY.

For Melanie Polk-Stamps, individually, and on behalf of themselves and on behalf of all others similarly situated, Barbacar Diene, Plaintiffs: Betsy Carol Manifold, Francis M. Gregorek, Mary Jane Edelstein Fait, Rachele R. Rickert, Wolf Haldenstein Adler Freeman & Herz LLP, San Diego, CA.

For Steven Dassa, an individual, on his own behalf and on behalf of all similarly situated, Plaintiff: Jayne Arnold Goldstein, Mager & Goldstein LLP, Weston, FL.; Jenelle Welling, Robert S. Green, Green Welling LLP, San Francisco, CA.

For Netflix, Inc., a Declaware corporation, Defendant: Anthony J Weibell, Attorney at Law, Palo Alto, CA.; Keith E. Eggleton, Maura Lea Rees, Wilson Sonsini Goodrich & Rosati, Palo Alto, CA.

Judges: WILLIAM ALSUP, UNITED **[**2]** STATES DISTRICT JUDGE.

Opinion by: WILLIAM ALSUP

Opinion

[*311] ORDER GRANTING MOTION TO DISMISS

INTRODUCTION

In this putative antitrust class action, defendant Netflix, Inc., moves to dismiss plaintiffs' antitrust claims for lack of **[*312]** standing and for failure to state a claim. Plaintiffs have demonstrated that they have standing to bring a *Walker Process* claim. Defendant has shown, however, that plaintiffs have not pleaded a sufficient level of patent enforcement against Netflix's potential competitors, so plaintiffs' federal antitrust claims fail. Plaintiffs also bring state-law claims. To the extent that they are based on defendant's conduct before the Patent and Trademark Office, they are preempted by federal patent law. Plaintiffs' state-law claims fail because they have not pleaded any injury resulting from defendant's enforcing its patents. Accordingly, defendants' motion to dismiss is **GRANTED.** Limited discovery will be permitted, and plaintiffs will be given leave to file an amended complaint.

STATEMENT

Plaintiff **[**3]** Dennis Dilbeck resides in Los Angeles and has been a Netflix subscriber since October 2002 (Compl. P 8). Plaintiffs in the two other actions consolidated with this action are also current Netflix subscribers.

Netflix operates an online DVD-rental service that claims 5.2 million subscribers (Compl. P 9). It is headquartered in Los Gatos, California. Netflix obtained two patents on its online DVD-rental service that describe methods of ordering DVDs via the internet, but not transmitting them via the internet. Its first patent, United States Patent No. 6,584,450 (the '450 patent), issued on June 23, 2003. Its second patent, United States Patent No. 7,024,381 (the '381 patent), issued on April 4, 2006.

Netflix filed an application for the '450 patent on April 28, 2000. During prosecution, Netflix allegedly did not disclose *any* prior art references to the Patent and Trademark Office in connection with the application (*id.* at P 19). While the '450 application was still pending, Netflix filed a continuation application on May 14, 2003. It ultimately issued as the '381 patent (*id.* at P 17). After the '450 patent issued on June 23, 2003, Netflix allegedly flooded the PTO with over 100 references **[**4]** in support of the '381 application, none of which Netflix had disclosed in prosecuting the '450 patent (*id.* at P 20). Plaintiffs allege that both maneuvers were done for the purpose of concealing material, non-cumulative prior art.

Plaintiffs also allege that Netflix purposefully withheld some material prior art references in conjunction with both applications (*id.* at P 27). These included several patents owned by NCR Corporation, four of which issued prior to the filing of the '450 application, describing methods such as "Ordering and Downloading Resources from Computerized Repositories" and "Mechanism for Dependably Organizing and Managing Information for Web Synchronization and Tracking Among Multiple Browsers" (*id.* at 28). Netflix initiated a declaratory-judgment action against NCR seeking a declaration of non-infringement in March of 2006. *Netflix, Inc. v. NCR Corp.,* CV No. 06-1892 EDL. That action was dismissed on June 23, 2006. Plaintiffs allege that Netflix was aware of these patents at least as of 2003 and had a reasonable apprehension of suit sufficient to sustain a declaratory-judgment action. Plaintiffs also allege that Netflix withheld other material, non-cumulative prior **[**5]** art references from the PTO, including references describing subscription libraries, pay television services, and other prior art drawn to selecting and ordering items on the internet (*id.* at P 30).

One of Netflix's competitors, Blockbuster, Inc., launched its own online DVD-rental service in August 2004, after the '450 patent had issued and while the application for the '381 patent was still pending (*id.* at P 58). In January 2005, Reed Hastings, Netflix's chief executive officer, and **[*313]** Edward Stead, Blockbuster's then-executive vice president, purportedly met. During that meeting, Hastings allegedly "praised Blockbuster's competitive position in the online rental business and asked Stead when he had figured out that Netflix's '450 patent was a 'joke'" (*id.* at P 45). Netflix then filed a patent-infringement action against Blockbuster when the '381 patent issued on April 4, 2006. Netflix allegedly knew that the litigation was objectively and subjectively a sham (*id.* at P 48--49). Plaintiffs also allege that Blockbuster was "ready, willing, and able" to enter the market before August 2004, but "delayed entering into the Relevant Market after learning of the '450 patent until August 2004" **[**6]** (*id.* at P 59).

Allegedly, Wal-Mart Stores, Inc., competed in the online DVD-rental market from June 2004 to June 2005 (*id.* at P 60). Dilbeck's counsel inquired about Wal-Mart's exit from the market with an attorney in Wal-Mart's legal department. The only answer received was that the company does not publicly discuss its business dealings (*ibid.*). On information and belief, Dilbeck alleges that Wal-Mart withdrew from the relevant market after Netflix alerted it to the '450 patent to induce it to exit the market (*id.* at 61). He bases this belief on his allegation that "Wal-Mart is not the shrinking violet of our national economy" and that it is unlikely that Wal-Mart would withdraw of its own accord (*ibid.*).

Plaintiffs also allege that Amazon.com, Inc. could have entered the market but was induced not to enter. Hastings' announcement that Amazon planned to enter the market in October 2004 led to a 41% drop in Netflix's stock valuation (*id.* at P 62). Amazon did not end up entering the market in the United States; it instead introduced a similar service in the United Kingdom and Germany starting in August 2006 (*ibid.*). As with Wal-Mart, Amazon's legal department did not respond to plaintiffs' **[**7]** inquiries (*ibid.*). Based on these circumstances, "[o]n information and belief, Dilbeck alleged that 1) Amazon learned of Netflix's '450 Patent either by its own efforts or by Netflix's effort, and 2) made the decision to enter the Relevant Market outside the United States, but 3) discarded its plans to enter the Relevant Market in the United States in August 2004 because of the '450 Patent" (*id.* at P 63).

On April 4, 2006, the same day that the '381 patent issued, Netflix filed an action for patent infringement against Blockbuster. Blockbuster's answer included defenses of inequitable conduct and patent misuse and counterclaims for monopolization and attempted monopolization under *Section 2* of the Sherman Act. Dilbeck filed a motion to intervene as a consumer in Blockbuster's antitrust counterclaims on October 11, 2006. His motion was denied on December 7, 2006. On April 26, 2007, Netflix and Blockbuster filed a notice of stipulated dismissal of Blockbuster's antitrust counterclaims.

On January 31, 2007, plaintiff Dennis Dilbeck filed this action alleging violations of *Section 2* of the Sherman Act, California's Cartwright Act, and California's unfair competition law. Two additional complaints **[**8]** were later filed by plaintiff Melanie Polk-Stamps on March 2, 2007, and by plaintiff Steven Dassa on April 6, 2007. All three actions were consolidated. On April 20, 2007, plaintiffs designated Dilbeck's complaint as the operative consolidated complaint. Discovery was stayed on April 26, 2007. Defendant was allowed to proceed with its motion to dismiss.

ANALYSIS

HN1[] A motion to dismiss under Rule 12(b)(6) tests for legal sufficiency of the claims alleged in the complaint. "While a complaint attacked by a Rule 12(b)(6) motion **[*314]** to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1964--65, 167 L. Ed. 2d 929 (May 21, 2007). "All allegations of material fact are taken as true and construed in the light most favorable to plaintiff. However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996).

1. *WALKER PROCESS* CLAIM.

HN2[] "As a **[**9]** general rule, behavior conforming to the patent laws oriented towards procuring or enforcing a patent enjoys immunity from the antitrust laws." Unitherm Food Sys., Inc. v. Swift Eckrich, Inc., 375 F.3d 1341, 1356 (Fed. Cir. 2004), *rev'd in part on other grounds,* 546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006). "But this immunity is hardly absolute. Nearly forty years ago, the Supreme Court recognized that an inventor who obtains a patent by defrauding the patent office deserves no immunity." *Ibid.* Such antitrust claims are known as *Walker Process* claims, referring to the Supreme Court's decision in Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 176, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965). In order to "'achiev[e] a suitable accommodation in this area between the differing policies of the patent and antitrust laws,' a distinction must be maintained between patents procured by 'deliberate fraud' and those rendered invalid or unenforceable for other reasons." Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1069 (Fed. Cir. 1998) (quoting Walker Process, 382 U.S. at 178-79 (Harlan, J., concurring)).

HN3[] To succeed on a claim for *Walker Process* fraud, the antitrust claimant must show:

> (1) that the asserted patent **[**10]** was obtained by knowingly and willfully misrepresenting the facts to the PTO;
> (2) that the party enforcing the patent was aware of the fraud when bringing suit;
> (3) independent and clear evidence of deceptive intent;
>
> (4) a clear showing of reliance, i.e., that the patent would not have issued but for the misrepresentation or omission; and
>
> (5) the necessary additional elements of an underlying violation of the antitrust laws.

Nobelpharma, 141 F.3d at 1068-71.

HN4[] Generally, the law of the circuit in which the district court sits governs issues in ***antitrust law***. Federal Circuit law controls as to matters within its jurisdiction. More specifically, "whether conduct in procuring or enforcing a patent is sufficient to strip a patentee of its immunity from the antitrust laws is to be decided as a question of Federal Circuit law." Nobelpharma, 141 F.3d at 1068. "When . . . the courts consider a patentee's behavior under Federal Circuit law and determine that it involved either an inappropriate attempt to procure a patent or an inappropriate attempt to enforce a patent, the remainder of the antitrust inquiry must proceed under the law of the regional circuit." Unitherm, 375 F.3d at 1357.

A. Standing.

HN5[] A **[**11]** plaintiff must be a "proper party" to have standing to bring an antitrust action, regardless of whether they have suffered an antitrust injury in fact. Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110--11, nn. 5, 6, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986). A plaintiff must show **[*315]** five factors to demonstrate antitrust standing: "(1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages." Amarel v. Connell, 102 F.3d 1494, 1507 (9th

Cir. 1996) (citing Assoc. Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 535, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983).

The first factor, **HN6**[] antitrust injury, consists of the following elements: "(1) unlawful conduct, (2) causing an injury to plaintiffs, (3) that flows from that which makes the conduct unlawful, (4) that is of the type the antitrust laws were intended to prevent" and (5) that the plaintiff "be a participant in the same market as the alleged malefactors." Glen Holly Entm't, Inc. v. Tektronix, Inc., 352 F.3d 367, 372 (9th Cir. 2003). Here, plaintiffs have **[**12]** alleged that Netflix fraudulently obtained a patent, which it then used to keep competitors out of the market. Plaintiffs were injured by the monopolistic overcharges Netflix could exact absent competition. Consumers were participants in the same market because they purchased Netflix's products. Assuming plaintiffs successfully plead unlawful conduct, they have shown that they have suffered an antitrust injury.

Defendant argues that consumers' injuries would be too remote from the alleged patent fraud, that is, the fraud's true target was competitors, not consumers. Where the defendant's actions were targeted at its competitors, however, consumers still may have standing to sue for their antitrust injuries. *See, e.g.,* Blue Shield of Virginia v. McCready, 457 U.S. 465, 478--79, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982). Here, plaintiffs have alleged that their injuries flow from Netflix's having asserted its patents to keep competitors out of the market. Absent Netflix's enforcement of its fraudulently-procured patents, plaintiffs would not be harmed, or so the argument goes. This alleged injury is not so remote as to bar the courthouse doors against consumers.

As to the remaining factors, the speculative measure of the **[**13]** harm is quite straightforward, at least for pleading purposes. Netflix exacted a monopolistic overcharge from its subscribers. Netflix allegedly dropped its prices by a significant amount when Blockbuster entered the market as a competitor. The risk of duplicative recovery is small because consumers have a different measure of damages than competitors. Consumers' damages come from paying a supracompetitive price, while competitors' damages are measured by foregone profits. Andrx Pharm., Inc. v Biovail Corp. Int'l, 347 U.S. App. D.C. 178, 256 F.3d 799, 817 (D.C. Cir. 2001). Because measures of damages are different, complexity in apportioning damages becomes minimal.

Netflix argues that consumers, even where they are direct purchasers, do not have standing to bring *Walker Process* claims. Consumers' injuries, defendant contends, are simply too far removed from the fraud allegedly committed by the defendant on the patent office and defendant's subsequent enforcement of the patent. The Ninth Circuit has recognized the rule that only those potential competitors who are ready to enter the market may have standing to bring *Walker Process* claims. Bourns, Inc., v. RayChem Corp., 331 F.3d 704, 711--12 (9th Cir. 2003). **[**14]** In that decision, the plaintiff lacked standing because it had not shown that it was prepared to enter the market at the time the patent was asserted against it. The plaintiff in *Bourns* did not suffer injury because it was not in the market or prepared to enter the market. The *Bourns* decision did not squarely address the question of **[*316]** consumer standing. Neither party presents any appellate authority on the precise question of whether purchasers have standing to assert a *Walker Process* claim, and the Court found none. Nor has any decision from this Court been found on the subject.

Defendant cites several district court decisions. All involve allegedly anti-competitive practices, such as collusive patent-infringement settlements or attempts to game the FDA's generic drug approval process, in connection with pharmaceutical patents. In In re DDAVP Direct & Indirect Purchaser Antitrust Litig., No. 05-2237, 2006 U.S. Dist. LEXIS 96201 at *21 (S.D.N.Y. 2006), a district court dismissed the consumers' *Walker Process* claims for lack of standing. The Court held that since the patents were not asserted or threatened to be asserted against them, they lacked standing. A similar conclusion was reached in In re Ciprofloxacin Hydrochloride Antitrust Litig., 363 F. Supp. 2d 514, 547 (E.D. N.Y. 2005), **[**15]** however, the holding to dismiss the consumers' *Walker Process* claims was actually predicated on a failure to allege enforcement activity. Two additional decisions reached the conclusion that consumers lacked standing to bring *Walker Process* claims because consumers did not suffer the kind of antitrust injury that *Walker Process* claims were meant to address. In re Remeron Antitrust Litig., 335 F. Supp. 2d 522, 529 (D. N.J. 2004); *In re K-Dur Antitrust Litig.,* No. 01-1652, slip op. at 24--30 (D. N.J. Mar, 1, 2007) (Netflix's App. Exh. 5). Finally, Judge Posner, sitting by designation, held that because the fraud at issue in a *Walker Process* claim was directed at a patentee's competitors, suppliers of inactive pharmaceutical ingredients for those competitors lacked standing. *Asahi Glass Co. v. Pentech Pharm., Inc., 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003)*. The supplier's injuries were too remote to support standing.

A single district court decision has held that consumers had standing to bring *Walker Process* claims. That decision held that *Walker Process* claims are properly viewed as antitrust claims, so standing under them should be viewed in the same way as well. *Molecular Diagnostics Labs. v. Hoffmann-La Roche, Inc., 402 F. Supp. 2d 276, 280 (D. D.C. 2005)*. **[**16]** In reaching this conclusion, the district court stated that "[i]f one believes that one of the primary purposes of a treble damages action is deterrence, then increasing the number of parties scrutinizing the actions of potential monopolists will further that goal." *Id. at 281*. Furthermore, that decision also recognized that ***HN7***[] the harm in a *Walker Process* claim comes not from fraudulently obtaining a patent, it comes from creating or maintaining an unlawful monopoly using that patent. This order finds *Molecular Diagnostics* persuasive. Even though *Walker Process* claims are predicated on enforcement of a fraudulently-obtained patent, the harm still accrues directly to consumers. Competitors are excluded from the market allowing the patentee to create or maintain an unlawful monopoly. Accordingly, if plaintiffs can plead the other elements of their *Walker Process* claim, they have standing.

B. Fraud and *Rule 9(b)*.

HN8[] "Like all fraud-based claims, *Walker Process* allegations are subject to the pleading requirements of *Fed. R. Civ. P. 9(b)*." *Medimmune, Inc. v. Genentech, Inc., 427 F.3d 958, 967 (Fed. Cir. 2005)*. "In all averments of fraud or mistake, the circumstances constituting fraud or mistake **[**17]** shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." *FRCP 9(b)*; *see also Vess v. Ciba-Geigy Corp., 317 F.3d 1097, 1106 (9th Cir. 2003)*. Plaintiffs must identify with particularity the reference or group of references **[*317]** that, but for their omission from Netflix's patent applications, the PTO would not have granted the applications. *See, e.g., Grid Sys. Corp. v. Texas Instruments Inc., 771 F. Supp. 1033, 1039 (N.D. Cal. 1991)* (for *Walker Process* claims, a party must allege that "but for the fraud the affected patents would not have issued"). A party need not plead the intent element of its *Walker Process* claim with particularity. Instead, "it is the 'circumstances' constituting the fraud that must be alleged with specificity." *Competitive Techs. v. Fujitsu Ltd., 286 F. Supp. 2d 1118, 1149 (N.D. Cal. 2003)*.

Here, plaintiffs have identified the references that Netflix allegedly withheld from the PTO in prosecution -- the NCR patents. For purposes of this motion, plaintiffs have alleged that Netflix was aware of the NCR patents' existence. Indeed, Netflix filed a declaratory-judgment action against NCR. In that complaint, **[**18]** Netflix alleged that NCR had sent notice as early as January 2003 that Netflix infringed some of NCR's patents (Compl. P 34). Plaintiffs have also pleaded that but for the NCR references being withheld, the '450 patent and the '381 patent would not have issued. In doing so, they have identified parallels between the NCR patents and Netflix's applications that indicated that the NCR patents were material. Plaintiffs also point out that Netflix submitted no prior art references to the examiner in connection with the '450 patent. Plaintiffs have pleaded with sufficient particularity that but for the fraud, the patents would not have issued.

C. Level of Enforcement.

HN9[] To plead a claim of *Walker Process* fraud, plaintiffs must plead that the fraudulently-procured patent was enforced; merely procuring a patent by fraud is not sufficient. *Unitherm, 375 F.3d at 1355*. If a plaintiff cannot plead the minimum level of enforcement necessary to sustain a declaratory judgment action, the plaintiffs likewise cannot plead a *Walker Process* claim. *Id. at 1357--58*. To determine standing in declaratory judgment actions, the Federal Circuit formerly used a "reasonable apprehension of suit" standard. *Id. at 1358*. **[**19]** The Supreme Court recently criticized this standard in *Medimmune Inc. v. Genentech, Inc., 127 S.Ct. 764, 771-72, 166 L. Ed. 2d 604 (Jan. 9, 2007)*. Thereafter, the Federal Circuit held that ***HN10***[] "where a patentee asserts rights under a patent based on certain identified ongoing or planned activity of another party, and where that party contends that it has the right to engage in the accused activity without a license, an Article III case or controversy will arise and the party need not risk a suit for infringement by engaging in the identified activity before seeking a declaration of its legal rights." *SanDisk Corp. v. STMicroelectronics, Inc., 480 F.3d 1372,1381 (Fed. Cir. Mar. 26, 2007)*. "In the context of conduct prior to a existence of a license, declaratory judgment jurisdiction generally will not arise merely on the basis that a party learns of the existence of a patent owned by another or even perceives such a patent to pose a risk of infringement, without some affirmative act by the patentee." *Id. at 1380--81*.

Plaintiffs allege that Netflix deterred three of its potential competitors from entering the market using the '450 patent: Wal-Mart, Amazon, and Blockbuster. Plaintiffs' allegations as to Wal-Mart **[**20]** and Amazon are similar. Wal-Mart introduced its own online DVD-rental service in June 2004. It exited the market in June 2005. Amazon announced plans to start its own service in October 2004, but ended up not doing so. It later started a similar service in the United Kingdom and Germany in August 2006. As to both companies, plaintiffs allege that they either exited the market or declined to enter the market, **[*318]** the '450 patent was in existence at the time, so they must have known about it. The '450 patent must have deterred them from competing.

Plaintiffs' allegations as to Wal-Mart and Amazon fail for two reasons. First, plaintiffs' bare-bones allegations that Wal-Mart and Amazon were aware of the '450 patent do not support the inference that they declined to enter the market or exited the market because Netflix threatened to assert it against them. They may have decided that barriers to entry were too high, they may have decided to focus on other parts of their business, or they may have decided not to enter the market for any number of other reasons. Simply pleading that the '450 patent was in existence, so Wal-Mart and Amazon surely must have known about it, does not support the inference **[**21]** that they exited because Netflix was threatening enforcement against them. Plaintiffs have pleaded no facts supporting an inference of any action taken by Netflix toward Wal-Mart or Amazon, so they have not pleaded a sufficient level of enforcement. Second, taking plaintiffs allegations as true, defendant's "alerting" Amazon and Wal-Mart to the existence of the '450 patent is not sufficient under the standards set out by the Federal Circuit. Merely notifying them to the existence of the patent, without any threat or implication at all that they must either stop practicing the patented method or risk Netflix's filing suit, would not meet the minimum standard for sustaining an action for declaratory judgment. In turn, these allegations could not form the basis of a *Walker Process* claim. Enforcement requires some affirmative act which is lacking in the pleadings.

As to Blockbuster, plaintiffs first allege that because Blockbuster did not enter the market until August 2004, the presence of the '450 patent must have delayed Blockbuster's entry. Specifically, plaintiffs allege (Compl. P 58):

> The only reasonable inference drawn from Blockbuster's allegation [in its antitrust counterclaim against **[**22]** Netflix] that Netflix's CEO asked Blockbuster's general counsel when he "figured out" that the '450 patent was a "joke" is that Blockbuster delayed its entry into the relevant market because of the '450 Patent, at least for as long as it took Blockbuster to "figure[] out" that the '450 Patent was "a joke."

Plaintiffs attempt to draw the inference from the meeting between Blockbuster's general counsel and Netflix's CEO that there was enforcement activity at some time before that meeting. The timing does not work. That meeting allegedly took place in January 2005. Blockbuster had already entered the market in August 2004. Hastings' alleged statements are not sufficient to support an inference of enforcement activity nearly two years before those statements were made. At most, this allegation supports an inference that Blockbuster knew of the '450 patent, not an inference that Netflix attempted to enforce it against Blockbuster. Additionally, Blockbuster, in its own antitrust counterclaims against Netflix, alleged that Netflix had given it no warning that Netflix believed that Blockbuster infringed their patents until Netflix filed a complaint.

Next, plaintiffs identify the patent-infringement **[**23]** action Netflix filed against Blockbuster on April 4, 2006, as enforcement action. It is undisputed that actually filing a patent-infringement complaint constitutes sufficient enforcement activity. Also undisputed is that Blockbuster entered the market in August 2004. Plaintiffs so pleaded (Compl. P 58). Thus, to the extent that plaintiffs allege that the lawsuit delayed Blockbuster's entry into the market, they cannot do so. Blockbuster **[*319]** had already entered the market nearly two years before the action was filed and has never left it.

Plaintiffs next argue that their claim is based Netflix's action against Blockbuster deterring *other* competitors from entering the relevant market. Other than its previous allegations regarding Amazon and Wal-Mart, plaintiffs do not identify who these potential competitors might have been or what actions Netflix took against them. Perhaps plaintiffs could have pleaded that Amazon's decision to enter the European market but not the domestic market could have been based on Netflix's actions. They would still have to plead, however, that Netflix took some kind of enforcement action against Amazon to maintain a *Walker Process* claim. Plaintiffs could possibly **[**24]** plead that Netflix's lawsuit against Blockbuster may have deterred Blockbuster from fully entering the market or practicing all aspects of the patented method. This in turn could have prevented Blockbuster from competing effectively with Netflix. This theory is not developed in the pleadings. Plaintiffs simply allege that potential competitors' awareness of Netflix's patents deterred competition. Plaintiffs have not alleged that Netflix enforced or attempted to enforce its patents to unlawfully create or maintain a monopoly. Accordingly, defendant's motion to dismiss is **GRANTED,** and this claim must be **DISMISSED.** Plaintiffs will be granted leave to amend.

2. STATE-LAW CLAIMS.

Plaintiffs' complaint includes claims for violations of California's Cartwright Act, *Cal. Bus. & Prof. Code §§ 16720* and *16726*, and for injunctive and restitutionary relief under California's unfair competition law, *Cal. Bus. & Prof. Code § 17200*. Defendant first argues that plaintiffs lack standing to bring these claims. Because this order has already determined that plaintiffs have standing under the federal antitrust laws if plaintiffs can demonstrate antitrust injury, consumers such as plaintiffs have standing **[**25]** to bring these claims under California law.

A. Preemption.

Netflix first argues that plaintiffs' state law claims are preempted by federal patent law. ***HN11***[] "Federal Circuit law governs whether federal patent law preempts a state law claim." *Ultra-Precision Mfg., Ltd. v. Ford Motor Co., 411 F.3d 1369, 1376 (Fed. Cir. 2005)* (citing *Midwest Indus., Inc. v. Karavan Trailers, Inc., 175 F.3d 1356, 1361 (Fed. Cir. 1999))*. Claims that are predicated on no more than bad-faith misconduct or fraud before the PTO or that are identical in scope to an inequitable conduct defense are preempted by federal patent law. *Semiconductor Energy Lab. Co. v. Samsung Elecs. Co., 204 F.3d 1368, 1382 (Fed. Cir. 2000)*. Tort claims under state law are not preempted by federal patent law where they include additional elements not found in federal patent law claims. *Dow Chemical Co. v. Exxon Corp., 139 F.3d 1470, 1473 (Fed. Cir. 1998)*.

Plaintiffs may not predicate their state-law claims solely on Netflix's allegedly having obtained its patents through fraud. ***HN12***[] Conduct in front of the PTO is regulated by federal patent laws. To the extent that plaintiffs so plead, their claims are preempted by federal patent law. Plaintiffs **[**26]** contend that they "would recover under their California-law claims if the jury found they had proved . . . that Netflix's conduct before the Patent Office was inequitable and in bad faith, but their evidence fell short of actual fraud" (Opp. at 19-20). Plaintiffs are wrong. Absent proof of some other element, plaintiffs would merely be showing that Netflix engaged in misconduct before the PTO. At most, that would be a claim for inequitable conduct. **[*320]** Such claims are preempted by federal patent law. For the state-law claims to survive, some element other than misconduct or fraud before the PTO is needed.

Plaintiffs then argue that they have met the requirement for an additional element because they have alleged that Netflix "deterred" its potential competitors from entering the market using its ill-gotten patents. As with the federal claims, plaintiffs have failed to plead conduct by Netflix that would have deterred its competitors from entering. Plaintiffs have failed to allege any enforcement activity against potential competitors Wal-Mart or Amazon. As to Blockbuster, plaintiffs have perhaps alleged that Netflix's patent-infringement action against them was brought in bad faith, however, **[**27]** they have failed to plead any antitrust injury as a result of that action. Blockbuster entered the market in August 2004, it never left the market, and plaintiffs have not pleaded that there was any adverse effect on the market from defendant's actions to Blockbuster. Accordingly, at this point, plaintiffs have failed to plead state-law claims that are not preempted by federal law. For purposes of plaintiffs' *Section 17200* claim, they have failed to plead conduct outside of fraudulently obtaining a patent that would constitute unfair competition.

B. Cartwright Act Claim.

Plaintiffs assert a claim under ***HN13***[] California's Cartwright Act, which makes unlawful any agreements or trusts having the effect of restraining trade. *Cal. Bus. & Prof. Code §§ 16720*, *16726*. By the statute's own terms, a trust is a "combination of capital, skill or acts by two or more persons." *Cal. Bus. & Prof. Code 16720*. Attorneys and employees are generally considered agents and not co-conspirators, however, "[a]n attorney is not immune from antitrust liability if he becomes an active participant in formulating policy decisions with his client to restrain competition." *Pinhas v. Summit Health, Ltd., 894 F.2d 1024, 1033 (9th Cir. 1989)*.

Allegedly, **[**28]** the "Netflix Patent Applicants," including Netflix, its employees, and its patent counsel Edward A. Becker and Hickman Palermo Truong & Becker LLP, formed a trust for the purpose of restraining trade (Compl. PP 100-102). As discussed above, these allegations of conspiracy are preempted by federal patent law to the extent that this alleged conspiracy was created solely to commit fraud on the PTO. There is no allegation that Becker or the Hickman firm helped Netflix actually assert its fraudulently-obtained patents. Nor is such an inference supported by the pleadings. Furthermore, plaintiffs have not pleaded facts that would support the inference that Becker or the Hickman firm was an active participant in formulating policy decisions related to enforcing the patents. In the pleadings, Becker's involvement is limited to patent prosecution. Accordingly, plaintiffs' theory that Netflix and its patent prosecution counsel were in a conspiracy fails.

HN14[] Cartwright Act claims are properly dismissed "where the complaint makes conclusory allegations of a combination and does not allege with factual particularity that separate entities maintaining separate and independent interests combined for the **[**29]** purpose to restrain trade." *Freeman v. San Diego Ass'n of Realtors, 77 Cal. App. 4th 171, 189, 91 Cal. Rptr. 2d 534 (1999)*. In their opposition brief, plaintiffs for the first time advance the theory that Netflix and its competitors were in a tacit but unwilling conspiracy to restrain trade. Specifically, plaintiffs point to their allegation that "[w]hen Wal-Mart discontinued offering services in the Relevant Market, it referred its customers to Netflix and marketed (and continues to market) Netflix's services" (Compl. P 60). In their opposition, plaintiffs argue that this allegation **[*321]** would lead to the inference that there was an unlawful agreement between the two entities. This allegation is simply too conclusory. Plaintiffs' allegation does not support the conclusion that Netflix and Wal-Mart entered into an agreement to restrain trade. The complaint hints at the possibility, but that is not sufficient even at the pleading stage. Furthermore, it is not clear whether plaintiffs allege that Netflix used its patent position to get Wal-Mart to agree to leave the market, or if plaintiffs allege that Wal-Mart just agreed to stay out of the market.

Because plaintiffs have failed to plead state-law claims, this **[**30]** order does not reach the issue of whether plaintiffs' claims were barred by California's litigation privilege. Accordingly, defendant's motion to dismiss is **GRANTED** as to plaintiffs' Cartwright Act and unfair competition claims. Plaintiffs will be granted leave to amend.

3. STAY OF DISCOVERY.

An order dated April 26, 2007, stayed discovery in this action. ***HN15***[] District courts have broad discretion to stay discovery pending the resolution of a potentially dispositive motion, including a motion to dismiss. *Jarvis v. Regan, 833 F.2d 149, 155 (9th Cir. 1987)*. Recently, the Supreme Court has recognized that staying discovery may be particularly appropriate in antitrust cases, where discovery tends to be broad, time-consuming and expensive. *Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1967, 167 L. Ed. 2d 929 (May 21, 2007)*. The Supreme Court pointed out that "determining whether some illegal agreement may have taken place between unspecified persons at different [companies] . . . at some point over seven years is a sprawling, costly, and hugely time-consuming undertaking . . . ." *Id. at n.6*.

In this action, discovery could indeed prove expansive if allowed to proceed. Plaintiffs' claims have been dismissed because **[**31]** they have failed to plead the requisite level of enforcement to sustain a *Walker Process* claim. At this stage, however, discovery should remain stayed except for a specific narrowly-tailored request. Unlike in *Twombly,* the players are known at least in the general sense -- Netflix, Wal-Mart, Amazon, and Blockbuster. The subject-matter of communications relevant to plaintiffs' *Walker Process* allegations is narrow as well -- communications regarding the '450 patent and the '381 patent. Accordingly, narrowly-tailored discovery will be permitted to go forward.

Discovery in this action remains stayed with the following exception. Netflix is ordered to disclose all documents summarizing, describing, referring to or constituting written or oral communications between Netflix (or a representative), on one hand, and Wal-Mart or Amazon (or a representative), on the other hand, on the subject of the patents in suit (or either or them) from the date of issuance of the patents in suit (or either or them) to the filing of the complaint in this action. These are to be produced no later than **JULY 2, 2007.** Plaintiffs should file their amended complaint no later than **JULY 16, 2007.**

CONCLUSION

For all of **[**32]** the above-stated reasons, defendants' motion to dismiss is **GRANTED.** Plaintiffs will be granted leave to amend their complaint. Discovery remains stayed except for the narrow request described above.

IT IS SO ORDERED.

Dated: June 14, 2007.

WILLIAM ALSUP

UNITED STATES DISTRICT JUDGE

Credit Suisse Sec. (USA) LLC v. Billing

Supreme Court of the United States

March 27, 2007, Argued ; June 18, 2007, Decided

No. 05-1157

Reporter

551 U.S. 264 *; 127 S. Ct. 2383 **; 168 L. Ed. 2d 145 ***; 2007 U.S. LEXIS 7724 ****; 75 U.S.L.W. 4449; 2007-1 Trade Cas. (CCH) P75,738; Fed. Sec. L. Rep. (CCH) P94,334; 20 Fla. L. Weekly Fed. S 369

CREDIT SUISSE SECURITIES (USA) LLC, fka CREDIT SUISSE FIRST BOSTON LLC, et al., Petitioners v. GLEN BILLING et al.

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Billing v. Credit Suisse First Boston Ltd., 426 F.3d 130, 2005 U.S. App. LEXIS 21019 (2d Cir. N.Y., 2005)

Disposition: Reversed.

Core Terms

antitrust, underwriters, securities law, shares, anti trust law, investors, syndicate, practices, remedies, regulations, saving clause, complaints, courts, commissions, marketing, lawsuit, prices, rights, forbid, rates, customer, buy, immunity, Stock, incompatible, respondents', precludes, securities-related, anticompetitive, provisions

LexisNexis® Headnotes

Antitrust & Trade Law > General Overview

HN1[] **Antitrust & Trade Law**

Where regulatory statutes are silent in respect to antitrust, courts must determine whether, and in what respects, they implicitly preclude application of the antitrust laws. Those determinations may vary from statute to statute, depending upon the relation between the antitrust laws and the regulatory program set forth in the particular statute, and the relation of the specific conduct at issue to both sets of laws.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Securities Law > Postoffering & Secondary Distributions > Scope of Provisions > Statutory Application & Interpretation

HN2[] **Regulated Industries, Financial Institutions**

Where possible, courts should reconcile the operation of both antitrust and securities statutory schemes rather than holding one completely ousted. The United States Supreme Court has set forth a standard, namely that repeal of the antitrust laws is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Securities Law > Postoffering & Secondary Distributions > Exchanges & Other Markets > General Overview

Securities Law > Postoffering & Secondary Distributions > Scope of Provisions > Statutory Application & Interpretation

HN3[] **Regulated Industries, Financial Institutions**

The United States Supreme Court has noted that the Securities and Exchange Commission lacks jurisdiction under the securities law to review particular instances of enforcement of exchange rules and that nothing has been built into the regulatory scheme which performs the antitrust function of insuring that rules that injure competition are nonetheless justified as furthering legitimate regulatory "ends."

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Securities Law > Postoffering & Secondary Distributions > Scope of Provisions > Statutory Application & Interpretation

Business & Corporate Compliance > ... > Regulators > US Securities & Exchange Commission > Rules & Regulations

HN4[] **Regulated Industries, Financial Institutions**

An "implied repeal" of the antitrust laws will be found only where there is a plain repugnancy between the antitrust and regulatory provisions. The securities law gives the Securities and Exchange Commission direct regulatory power over exchange rules and practices with respect to the fixing of reasonable rates of commission.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Securities Law > Postoffering & Secondary Distributions > Scope of Provisions > Statutory Application & Interpretation

HN5[] **Regulated Industries, Financial Institutions**

The United States Supreme Court has found that the securities law precludes antitrust liability even in respect to a practice that both ***antitrust law*** and securities law might forbid.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

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

Securities Law > Postoffering & Secondary Distributions > Scope of Provisions > Statutory Application & Interpretation

HN6[] **Regulated Industries, Financial Institutions**

It is wrong to regard *15 U.S.C.S. §§ 77p(a)* and *78bb(a)* as saving clauses so broad as to preserve all antitrust actions.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Securities Law > Postoffering & Secondary Distributions > Scope of Provisions > Statutory Application & Interpretation

HN7[] **Regulated Industries, Financial Institutions**

When a court decides whether securities law precludes ***antitrust law***, it is deciding whether, given context and likely consequences, there is a "clear repugnancy" between the securities law and the antitrust complaint--or whether the two are "clearly incompatible." Moreover, in finding sufficient incompatibility to warrant an implication of preclusion, the United States Supreme Court has treated the following factors as critical: (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct. In prior decisions, the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.

Securities Law > ... > Remedies > Damages > Compensatory Damages

Securities Law > Initial Offerings of Securities > General Overview

HN8[] **Damages, Compensatory Damages**

The Securities and Exchange Commission possesses considerable power to forbid, permit, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect of the practices in which underwriters engage. Private individuals who suffer harm as a result of a violation of pertinent statutes and regulations may also recover damages. *15 U.S.C.S. §§ 78bb*, *78u-4*, *77k*.

Securities Law > Initial Offerings of Securities > General Overview

HN9[] **Securities Law, Initial Offerings of Securities**

In respect to "laddering" the Securities and Exchange Commission (SEC) forbids an underwriter to solicit customers prior to the completion of the distribution regarding whether and at what price and in what quantity they intend to place immediate aftermarket orders for initial public offering stock, *17 C.F.R. §§ 242.100-242.105*. But at the same time the SEC permits, indeed encourages, underwriters (as part of the "bookbuilding" process) to inquire as to a customer's desired future position in the longer term (for example, three to six months), and the price or prices at which the customer might accumulate that position without reference to immediate aftermarket activity.

Securities Law > Initial Offerings of Securities > General Overview

HN10[] **Securities Law, Initial Offerings of Securities**

In respect to "tying" and other efforts to obtain an increased commission from future sales, the Securities and Exchange Commission (SEC) has sought to prohibit an underwriter from demanding an offer from their customers of any payment or other consideration such as the purchase of a different security in addition to the security's stated consideration. But the SEC would permit a firm to allocate initial public offering shares to a customer because the customer has separately retained the firm for other services, when the customer has not paid excessive compensation in relation to those services.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Business & Corporate Compliance > ... > Regulators > US Securities & Exchange Commission > Rules & Regulations

HN11[] **Regulated Industries, Financial Institutions**

The Securities and Exchange Commission (SEC) is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations. And that fact makes it somewhat less necessary to rely upon antitrust actions to address anticompetitive behavior. *15 U.S.C.S. §§ 77b(b)*, *78w(a)(2)*. *15 U.S.C.S. § 77b(b)* instructs the SEC to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. The SEC shall consider among other matters the impact any such rule or regulation would have on competition. *15 U.S.C.S. § 78w(a)(2)*.

Lawyers' Edition Display

Decision

[*145]** Federal securities laws held to implicitly preclude application of antitrust laws to allegedly illegal conduct of underwriters during initial public offerings of shares of some companies.

Summary

Procedural posture: Respondent investors filed antitrust class-action lawsuits against petitioner underwriters under the Sherman Act, the Clayton Act, as amended by the Robinson-Patman Act, and state antitrust laws. The district court dismissed the complaints based on incompatibility with securities laws. The United States Court of Appeals for the Second Circuit reversed and reinstated the complaints. The underwriters' petition for certiorari was granted.

Overview: The investors alleged that the underwriters, during initial public offerings, unlawfully agreed with one another that they would not sell shares of a popular new issue to an investor unless that investor committed (1) to buy additional shares of that security later at escalating prices ("laddering"), (2) to pay unusually high commissions on subsequent security purchases from the underwriters, or (3) to purchase from the underwriters other less desirable securities ("tying"). The Court determined that the securities laws implicitly precluded the application of the antitrust laws to the conduct alleged because the securities laws were "clearly incompatible" with the application of the antitrust laws in this context since (1) the conduct was squarely within the heartland of securities regulations, (2) the Securities and Exchange Commission (SEC) had a clear and adequate authority to regulate the conduct, (3) the SEC actively enforced the rules and regulations regarding the conduct, and (4) there was a serious conflict between the antitrust and regulatory regimes. An **[***146]** antitrust action in this context would be accompanied by a substantial risk of injury to the securities markets.

Outcome: The Court reversed the appellate court's judgment.

Headnotes

STATUTES §248.5 > REGULATORY STATUTES -- ANTITRUST > Headnote:
LEdHN[1][] [1]

Where regulatory statutes are silent in respect to antitrust, courts must determine whether, and in what respects, they implicitly preclude application of the antitrust laws. Those determinations may vary from statute to statute, depending upon the relation between the antitrust laws and the regulatory program set forth in the particular statute, and the relation of the specific conduct at issue to both sets of laws. (Breyer, J., joined by Roberts, Ch. J., and Scalia, Souter, Ginsburg, and Alito, JJ.)

STATUTES §248.5 > ANTITRUST LAWS -- IMPLIED REPEAL -- SECURITIES STATUTES > Headnote:
LEdHN[2][] [2]

Where possible, courts should reconcile the operation of both antitrust and securities statutory schemes rather than holding one completely ousted. The United States Supreme Court has set forth a standard, namely that repeal of the antitrust laws is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary. (Breyer, J., joined by Roberts, Ch. J., and Scalia, Souter, Ginsburg, and Alito, JJ.)

STOCK AND COMMODITIES EXCHANGES §5 > SECURITIES EXCHANGE COMMISSION -- EXCHANGE RULES > Headnote:
LEdHN[3][] [3]

The United States Supreme Court has noted that the Securities and Exchange Commission lacks jurisdiction under the securities law to review particular instances of enforcement of exchange rules and that nothing has been built into the regulatory scheme which performs the antitrust function of insuring that rules that injure competition are nonetheless justified as furthering legitimate regulatory "ends." (Breyer, J., joined by Roberts, Ch. J., and Scalia, Souter, Ginsburg, and Alito, JJ.)

STATUTES §248.5STOCK AND COMMODITIES EXCHANGES §5 > ANTITRUST LAWS -- IMPLIED REPEAL -- SECURITIES EXCHANGES > Headnote:
LEdHN[4][] [4]

An "implied repeal" of the antitrust laws will be found only where there is a plain repugnancy between the antitrust and regulatory provisions. The securities law gives the Securities and Exchange Commission direct regulatory power over exchange rules and practices with respect to the fixing of reasonable rates of commission. (Breyer, J., joined by Roberts, Ch. J., and Scalia, Souter, Ginsburg, and Alito, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §20 > ANTITRUST LIABILITY -- SECURITIES LAW > Headnote:
LEdHN[5][] [5]

The United States Supreme Court has found that the securities law precludes antitrust liability even in respect to a practice that both ***antitrust law*** and securities law might forbid. (Breyer, J., joined by Roberts, Ch. J., and Scalia, Souter, Ginsburg, and Alito, JJ.)

[*147]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §20 > ANTITRUST ACTIONS -- SECURITIES LAW > Headnote:
LEdHN[6][] [6]

It is wrong to regard *15 U.S.C.S. §§ 77p(a)* and *78bb(a)* as saving clauses so broad as to preserve all antitrust actions. (Breyer, J., joined by Roberts, Ch. J., and Scalia, Souter, Ginsburg, and Alito, JJ.)

STATUTES §248.5 > ***ANTITRUST LAW*** -- IMPLIED PRECLUSION BY SECURITIES LAW > Headnote:
LEdHN[7][] [7]

When a court decides whether securities law precludes ***antitrust law***, it is deciding whether, given context and likely consequences, there is a "clear repugnancy" between the securities law and the antitrust complaint--or whether the two are "clearly incompatible." Moreover, in finding sufficient incompatibility to warrant an implication of preclusion, the United States Supreme Court has treated the following factors as critical: (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct. In prior decisions, the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate. (Breyer, J., joined by Roberts, Ch. J., and Scalia, Souter, Ginsburg, and Alito, JJ.)

SECURITIES REGULATION §6 SECURITIES REGULATION §15 > REGULATION OF UNDERWRITERS -- DAMAGES > Headnote:
LEdHN[8][] [8]

The Securities and Exchange Commission possesses considerable power to forbid, permit, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect of the practices in which underwriters engage. Private individuals who suffer harm as a result of a violation of pertinent statutes and regulations may also recover damages. *15 U.S.C.S. §§ 78bb*, *78u-4*, *77k*. (Breyer, J., joined by Roberts, Ch. J., and Scalia, Souter, Ginsburg, and Alito, JJ.)

SECURITIES REGULATION §6 > REGULATION OF UNDERWRITERS -- "LADDERING" -- "BOOK BUILDING" > Headnote:
LEdHN[9][] [9]

In respect to "laddering" the Securities and Exchange Commission (SEC) forbids an underwriter to solicit customers prior to the completion of the distribution regarding whether and at what price and in what quantity they intend to place immediate aftermarket orders for initial public offering stock, *17 C.F.R. §§ 242.100-242.105*. But at the same time the SEC permits, indeed encourages, underwriters (as part of the "book building" process) to inquire as to a customer's desired future position in the longer term (for example, three to six months), and the price or prices at which the customer might accumulate that position without reference to immediate aftermarket activity. (Breyer, J., joined by Roberts, Ch. J., and Scalia, Souter, Ginsburg, and Alito, JJ.)

[*148]**

SECURITIES REGULATION §6 > REGULATION OF UNDERWRITERS -- "TYING" > Headnote:
LEdHN[10][] [10]

In respect to "tying" and other efforts to obtain an increased commission from future sales, the Securities and Exchange Commission (SEC) has sought to prohibit an underwriter from demanding an offer from their customers of any payment or other consideration such as the purchase of a different security in addition to the security's stated consideration. But the SEC would permit a firm to allocate initial public offering shares to a customer because the customer has separately retained the firm for other services, when the customer has not paid excessive compensation in relation to those services. (Breyer, J., joined by Roberts, Ch. J., and Scalia, Souter, Ginsburg, and Alito, JJ.)

SECURITIES REGULATION §10 > SECURITIES AND EXCHANGE COMMISSION -- COMPETITIVE CONSIDERATIONS > Headnote:
LEdHN[11][] [11]

The Securities and Exchange Commission (SEC) is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations. And that fact makes it somewhat less necessary to rely upon antitrust actions to address anticompetitive behavior. *15 U.S.C.S. §§ 77b(b)*, *78w(a)(2)*. *15 U.S.C.S. § 77b(b)* instructs the SEC to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. The SEC shall consider among other matters the impact any such rule or regulation would have on competition. *15 U.S.C.S. § 78w(a)(2)*. (Breyer, J., joined by Roberts, Ch. J., and Scalia, Souter, Ginsburg, and Alito, JJ.)

Syllabus

[*149]** Respondent investors filed suit, alleging that petitioner investment banks, acting as underwriters, violated antitrust laws when they formed syndicates to help execute initial public offerings for several hundred technology-related companies. Respondents claim that the underwriters unlawfully agreed that they would not sell newly issued securities to a buyer unless the buyer committed (1) to buy additional shares of that security later at escalating prices (known as "laddering"), (2) to pay unusually high commissions on subsequent security purchases from the underwriters, or (3) to purchase from the underwriters other less desirable **[****2]** securities (known as "tying"). The underwriters moved to dismiss, claiming that federal securities law impliedly precludes application of antitrust laws to the conduct in question. The District Court dismissed the complaints, but the Second Circuit reversed.

Held: The securities law implicitly precludes the application of the antitrust laws to the conduct alleged in this case. Pp. 4-20.

(a) Where regulatory statutes are silent in respect to antitrust, courts must determine whether, and in what respects, they implicitly preclude the antitrust laws' application. Taken together, *Silver v. New York Stock Exchange, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389*; *Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 95 S. Ct. 2598, 45 L. Ed. 2d 463*; and *United States v. National Assn. of Securities Dealers, Inc., 422 U.S. 694, 95 S. Ct. 2427, 45 L. Ed. 2d 486 (NASD)*, make clear that a court deciding this preclusion issue is deciding whether, given context and likely consequences, there is a "clear repugnancy" between the securities law and the antitrust complaint, *i.e.,* whether the two are "clearly incompatible." Moreover, *Gordon* and *NASD*, in finding sufficient incompatibility to warrant an implication **[****3]** of preclusion, treated as critical: (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct. In addition, (4) in *Gordon* and *NASD* the possible conflict affected practices that lie squarely within an area of financial market activity that securities law seeks to regulate. Pp. 4-10.

(b) Several considerations--the underwriters' efforts jointly to promote and sell newly issued securities is central to the proper functioning of well-regulated capital markets; the law grants the Securities and Exchange Commission (SEC) authority to supervise such activities; and the SEC has continuously exercised its legal authority to regulate this type of conduct--show that the first, second, and fourth conditions are satisfied in this case. This leaves the third condition: whether there is a conflict rising to the level of incompatibility. Pp. 10-12.

(c) The complaints here can be read as attacking the *manner* in **[****4]** which the underwriters jointly seek to collect "excessive" commissions through the practices of laddering, tying, and collecting excessive commissions, which according to respondents the SEC itself has already disapproved and, in all likelihood, will not approve in the foreseeable future. Nonetheless, certain considerations, taken together, **[***150]** lead to the conclusion that securities law and ***antitrust law*** are clearly incompatible in this context. Pp. 12-19.

(1) First, to permit antitrust actions such as this threatens serious securities-related harm. For one thing, a fine, complex, detailed line separates activity that the SEC permits or encourages from activity that it forbids. And the SEC has the expertise to distinguish what is forbidden from what is allowed. For another thing, reasonable but contradictory inferences may be drawn from overlapping evidence that shows both unlawful antitrust activity and lawful securities marketing activity. Further, there is a serious risk that antitrust courts, with different nonexpert judges and different nonexpert juries, will produce inconsistent results. Together these factors mean there is no practical way to confine antitrust suits so that **[****5]** they challenge only the kind of activity the investors seek to target, which is presently unlawful and will likely remain unlawful under the securities law. Rather, these considerations suggest that antitrust courts are likely to make unusually serious mistakes in this respect. And that threat means that underwriters must act to avoid not simply conduct that the securities law forbids, but also joint conduct that the securities law permits or encourages. Thus, allowing an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities market. Pp. 14-17.

(2) Second, any enforcement-related need for an antitrust lawsuit is unusually small. For one thing, the SEC actively enforces the rules and regulations that forbid the conduct in question. For another, investors harmed by underwriters' unlawful practices may sue and obtain damages under the securities law. Finally, the fact that the SEC is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations makes it somewhat less necessary to rely on antitrust actions to address anticompetitive behavior. Pp. 17-18.

(3) **[****6]** In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct. Together these considerations indicate a serious conflict between application of the antitrust laws and proper enforcement of the securities law. The Solicitor General's proposal to avoid this conflict does not convincingly address these concerns. Pp. 18-19.

426 F.3d 130, reversed.

Counsel: Stephen M. Shapiro argued the cause for petitioners.

Paul D. Clement argued the cause for the United States, as amicus curiae, by special leave of court.

Christopher Lovell argued the cause for respondents.

Judges: Breyer, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Souter, Ginsburg, and Alito, JJ., joined. Stevens, J., filed an opinion concurring in the judgment; post, p. 285. Thomas, J., filed a dissenting opinion; post, p. 287. Kennedy, J., took no part in the consideration or decision of the case.

Opinion by: Breyer

Opinion

[*267] **[**2387]** Justice **Breyer** delivered the opinion of the Court.

A group of buyers of newly issued securities have filed an antitrust lawsuit against underwriting firms that market and distribute those issues. The buyers claim that the underwriters unlawfully agreed with one another that they would not sell shares of a popular new issue to a buyer unless that buyer committed (1) to buy additional **[****7]** shares of that security later at escalating prices (a practice called "laddering"), (2) to pay unusually **[***151]** high commissions on subsequent security purchases from the underwriters, or (3) to purchase from the underwriters other less desirable securities (a practice called "tying"). The question before us is whether there is a "'plain repugnancy'" between these antitrust claims and the federal securities law. See *Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 682, 95 S. Ct. 2598, 45 L. Ed. 2d 463 (1975)* (quoting *United States v. Philadelphia Nat. Bank, 374 U.S. 321, 350-351, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963))*. We conclude that there is. Consequently we must interpret the securities laws as implicitly precluding the application of the antitrust laws to the conduct alleged **[*268]** in this case. See *422 U.S., at 682, 689, 691, 95 S. Ct. 2598, 45 L. Ed. 2d 463*; see also *United States v. National Assn. of Securities Dealers, Inc., 422 U.S. 694, 95 S. Ct. 2427, 45 L. Ed. 2d 486 (1975)* *(NASD)*; *Silver v.* ***[**2388]*** *New York Stock Exchange, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963)*.

I

A

The underwriting practices at issue take place during the course of an initial public offering (IPO) of shares in a company. An IPO presents an opportunity to raise capital for a new enterprise **[****8]** by selling shares to the investing public. A group of underwriters will typically form a syndicate to help market the shares. The syndicate will investigate and estimate likely market demand for the shares at various prices. It will then recommend to the firm a price and the number of shares it believes the firm should offer. Ultimately, the syndicate will promise to buy from the firm all the newly issued shares on a specified date at a fixed, agreed-upon price, which price the syndicate will then charge investors when it resells the shares. When the syndicate buys the shares from the issuing firm, however, the firm gives the syndicate a price discount, which amounts to the syndicate's commission. See generally L. Loss & J. Seligman, Fundamentals of Securities Regulation 66-72 (4th ed. 2001).

At the heart of the syndicate's IPO marketing activity lie its efforts to determine suitable initial share prices and quantities. At first, the syndicate makes a preliminary estimate that it submits in a registration statement to the Securities and Exchange Commission (SEC). It then conducts a "road show" during which syndicate underwriters and representatives of the offering firm meet potential **[****9]** investors and engage in a process that the industry calls "bookbuilding." During this time, the underwriters and firm representatives present information to investors about the company and the stock. And they attempt to gauge the strength of the investors' interest in purchasing the stock. For this purpose, underwriters **[*269]** might well ask the investors how their interest would vary depending upon price and the number of shares that are offered. They will learn, among other things, which investors might buy shares, in what quantities, at what prices, and for how long each is likely to hold purchased shares before selling them to others.

On the basis of this kind of information, the members of the underwriting syndicate work out final arrangements with the issuing firm, fixing the price per share and specifying the number of shares for which the underwriters will be jointly responsible. **[***152]** As we have said, after buying the shares at a discounted price, the syndicate resells the shares to investors at the fixed price, in effect earning its commission in the process.

B

In January 2002, respondents, a group of 60 investors, filed two antitrust class-action lawsuits against petitioners, **[****10]** 10 leading investment banks. They sought relief under § 1 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, *15 U.S.C. § 1*; § 2(c) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1527, *15 U.S.C. § 13(c)*; and state antitrust laws. App. 1, 14. The investors stated that between March 1997 and December 2000 the banks had acted as underwriters, forming syndicates that helped execute the IPOs of several hundred technology-related companies. *Id.,* at 22. Respondents' antitrust complaints allege that the underwriters "abused the . . . practice of combining into underwriting syndicates" by agreeing among themselves to impose harmful conditions upon potential investors--conditions that the investors apparently were willing to accept in order to obtain an allocation of new shares that were in high demand. *Id.,* at 12.

[2389]** These conditions, according to respondents, consist of a requirement that the investors pay "additional anticompetitive charges" over and above the agreed-upon IPO share price plus underwriting commission. In particular, these additional **[*270]** charges took the form of (1) investor promises "to place **[****11]** bids . . . in the aftermarket at prices above the IPO price" (*i.e.*, "laddering" agreements); (2) investor "commitments to purchase other, less attractive securities" (*i.e.*, "tying" arrangements); and (3) investor payment of "non-competitively determined" (*i.e.*, excessive) "commissions," including the "purchas[e] of an issuer's shares in follow-up or 'secondary' public offerings (for which the underwriters would earn underwriting discounts)." *Id.,* at 12-13. The complaint added that the underwriters' agreement to engage in some or all of these practices artificially inflated the share prices of the securities in question. *Id.,* at 32.

The underwriters moved to dismiss the investors' complaints on the ground that federal securities law impliedly precludes application of antitrust laws to the conduct in question. (The antitrust laws at issue include the commercial bribery provisions of the Robinson-Patman Act.) The District Court agreed with petitioners and dismissed the complaints against them. See *In re Initial Public Offering Antitrust Litigation, 287 F. Supp. 2d 497, 524-525 (SDNY 2003)* *(IPO Antitrust).* The Court of Appeals for the Second **[****12]** Circuit reversed, however, and reinstated the complaints. *426 F.3d 130, 170, 172 (2005)*. We granted the underwriters' petition for certiorari. And we now reverse the judgment of the Court of Appeals.

II

A

Sometimes regulatory statutes explicitly state whether they preclude application of the antitrust laws. Compare, *e.g.*, Webb-Pomerene Act, *15 U.S.C. § 62* (expressly providing antitrust immunity) with § 601(b)(1) of the Telecommunications Act of 1996, *47 U.S.C. § 152* (stating that antitrust laws remain applicable). See also *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko,* ***[***153]*** *LLP, 540 U.S. 398, 406-407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (analyzing the antitrust saving clause of the **[*271]** Telecommunications Act). ***HN1***[] ***LEdHN[1]***[] [1] Where regulatory statutes are silent in respect to antitrust, however, courts must determine whether, and in what respects, they implicitly preclude application of the antitrust laws. Those determinations may vary from statute to statute, depending upon the relation between the antitrust laws and the regulatory program set forth in the particular statute, and the relation of the specific conduct at issue to both sets of laws. Compare **[****13]** *Gordon, 422 U.S., at 689, 95 S. Ct. 2598, 45 L. Ed. 2d 463* (finding implied preclusion of antitrust laws); and *NASD, 422 U.S., at 729-730, 95 S. Ct. 2427, 45 L. Ed. 2d 486* (same), with *Otter Tail Power Co. v. United States, 410 U.S. 366, 374-375, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)* (finding no implied immunity); *Philadelphia Nat. Bank, 374 U.S., at 352, 83 S. Ct. 1715, 10 L. Ed. 2d 915* (same); and *Silver, 373 U.S., at 360, 83 S. Ct. 1246, 10 L. Ed. 2d 389* (same). See also *Phonetele, Inc. v. American Tel. & Tel. Co., 664 F.2d 716, 727 (CA9 1981)*.

Three decisions from this Court specifically address the relation of securities law to ***antitrust law***. In *Silver* the Court considered a dealer's claim that, by expelling him from the New York Stock Exchange, the exchange had violated the antitrust prohibition against group "boycott[s]." *373 U.S., at 347, 83 S. Ct. 1246, 10 L. Ed. 2d 389*. The Court wrote that, ***HN2***[] ***LEdHN[2]***[] [2] where possible, courts should "reconcil[e] the operation of both [*i.e.*, antitrust and securities] statutory schemes . . . **[**2390]** rather than holding one completely ousted." *Id., at 357, 83 S. Ct. 1246, 10 L. Ed. 2d 389*. It also set forth a standard, namely, that "[r]epeal [of the antitrust laws] is to be regarded as implied only if necessary to make the Securities Exchange **[****14]** Act work, and even then only to the minimum extent necessary." *Ibid.* And it held that the securities law did *not* preclude application of the antitrust laws to the claimed boycott *insofar as the exchange denied the expelled dealer a right to fair procedures. Id., at 359-360, 83 S. Ct. 1246, 10 L. Ed. 2d 389*.

In reaching this conclusion, ***HN3***[] ***LEdHN[3]***[] [3] the Court noted that the SEC lacked jurisdiction under the securities law "to review particular instances of enforcement of exchange rules"; that "nothing [was] built into the regulatory scheme which performs the antitrust function of insuring" that rules that injure **[*272]** competition are nonetheless "justified as furthering" legitimate regulatory "ends"; that the expulsion "would clearly" violate "the Sherman Act unless justified by reference to the purposes of the Securities Exchange Act"; and that it could find *no such justifying purpose* where the exchange took "anticompetitive collective action . . . *without according fair procedures.*" *Id., at 357-358, 364, 83 S. Ct. 1246, 10 L. Ed. 2d 389* (emphasis added).

In *Gordon* the Court considered an antitrust complaint that essentially alleged "price fixing" among stockbrokers. It charged that members of the New York **[****15]** Stock Exchange had agreed to fix their commissions on sales under $ 500,000. And it sought damages and an injunction forbidding future agreements. *422 U.S., at 661, and n 3, 95 S. Ct. 2598, 45 L. Ed. 2d 463*. The lawsuit was filed at a time when regulatory attitudes toward fixed stockbroker commissions were changing. The fixed commissions challenged in the complaint were applied during a **[***154]** period when the SEC approved of the practice of fixing broker-commission rates. But Congress and the SEC had both subsequently disapproved for the future the fixing of some of those rates. See *id., at 690-691, 95 S. Ct. 2598, 45 L. Ed. 2d 463*.

In deciding whether antitrust liability could lie, the Court repeated *Silver*'s general standard in somewhat different terms: It said that ***HN4***[] ***LEdHN[4]***[] [4] an "implied repeal" of the antitrust laws would be found only "where there is a 'plain repugnancy between the antitrust and regulatory provisions.'" *422 U.S., at 682, 95 S. Ct. 2598, 45 L. Ed. 2d 463* (quoting *Philadelphia Nat. Bank, supra, at 350-351, 83 S. Ct. 1715, 10 L. Ed. 2d 915*). It then held that the securities laws impliedly precluded application of the antitrust laws in the case at hand. The Court rested this conclusion on three sets of considerations. For one thing, the securities law "gave the **[****16]** SEC direct regulatory power over exchange rules and practices with respect to the fixing of reasonable rates of commission." *422 U.S., at 685, 95 S. Ct. 2598, 45 L. Ed. 2d 463* (internal quotation marks omitted). For another, the SEC had "taken an active role in review of proposed rate changes during the last 15 years," and had engaged in "continuing **[*273]** activity" in respect to the regulation of commission rates. *Ibid.* Finally, without antitrust immunity, "the exchanges and their members" would be subject to "conflicting standards." *Id., at 689, 95 S. Ct. 2598, 45 L. Ed. 2d 463*.

This last consideration--the conflict--was complicated due to Congress', and the agency's, changing views about the validity of fixed commissions. As far as the *past* fixing of rates was concerned, the conflict was clear: The ***antitrust law*** had forbidden the very thing that the securities law had then permitted, namely, an anticompetitive ratesetting process. In respect to the future, however, the conflict was less apparent. That was because the SEC's new (congressionally authorized) prohibition of (certain) fixed rates would take effect in **[**2391]** the near-term future.

And after that time the SEC and the ***antitrust law*** would *both* likely prohibit **[****17]** some of the ratefixing to which the plaintiff's injunction would likely apply. See *id., at 690-691, 95 S. Ct. 2598, 45 L. Ed. 2d 463*.

Despite the likely compatibility of the laws in the future, the Court nonetheless expressly found *conflict.* The conflict arose from the fact that the law permitted the SEC to supervise the competitive setting of rates and to "*reintroduc[e] . . . fixed rates,*" *id., at 691, 95 S. Ct. 2598, 45 L. Ed. 2d 463* (emphasis added), under certain conditions. The Court consequently wrote that "failure to imply repeal would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates." *Ibid.* The upshot is that, in light of potential future conflict, ***HN5***[] ***LEdHN[5]***[] [5] the Court found that the securities law precluded antitrust liability even in respect to a practice that both ***antitrust law*** and securities law might forbid.

In *NASD* the Court considered a Department of Justice antitrust complaint claiming that mutual fund companies had agreed with securities broker-dealers (1) to fix "resale" prices, *i.e.*, the prices at which a broker-dealer would sell a mutual fund's shares to an investor or buy mutual fund shares from a fund investor (who wished to **[****18]** redeem the shares); (2) to fix other terms of sale including those related **[*274]** to when, how, to whom, and from whom the broker-dealers **[***155]** might sell and buy mutual fund shares; and (3) to prohibit broker-dealers from freely selling to, and buying shares from, one another. See *422 U.S., at 700-703, 95 S. Ct. 2427, 45 L. Ed. 2d 486*.

The Court again found "clear repugnancy," and it held that the securities law, by implication, precluded all parts of the antitrust claim. *Id., at 719, 95 S. Ct. 2427, 45 L. Ed. 2d 486*. In reaching this conclusion, the Court found that ***antitrust law*** (*e.g.*, forbidding resale price maintenance) and securities law (*e.g.*, permitting resale price maintenance) were in conflict. In deciding that the latter trumped the former, the Court relied upon the same kinds of considerations it found determinative in *Gordon.* In respect to the last set of allegations (restricting a free market in mutual fund shares among brokers), the Court said that (1) the relevant securities law "enables [the SEC] to monitor the activities questioned"; (2) "the history of Commission regulations suggests no laxity in the exercise of this authority"; and hence (3) allowing an antitrust suit to proceed that is "so directly **[****19]** related to the SEC's responsibilities" would present "a substantial danger that [broker-dealers and other defendants] would be subjected to duplicative and inconsistent standards." *NASD, 422 U.S., at 734-735, 95 S. Ct. 2427, 45 L. Ed. 2d 486*.

As to the other practices alleged in the complaint (concerning, *e.g.*, resale price maintenance), the Court emphasized that (1) the securities law "vested in the SEC final authority to determine whether and to what extent" the relevant practices "should be tolerated," *id., at 729, 95 S. Ct. 2427, 45 L. Ed. 2d 486*; (2) although the SEC has not actively supervised the relevant practices, that is only because the statute "reflects a clear congressional determination that, subject to Commission oversight, mutual funds should be allowed to retain the initiative in dealing with the potentially adverse effects of disruptive trading practices," *id., at 727, 95 S. Ct. 2427, 45 L. Ed. 2d 486*; and (3) the SEC has supervised the funds insofar as its "acceptance of fund-initiated restrictions for more than three decades . . . manifests an informed administrative **[*275]** judgment that the contractual restrictions . . . were appropriate means for combating the problems of the industry," *id., at 728, 95 S. Ct. 2427, 45 L. Ed. 2d 486.* **[****20]** The Court added that, in these respects, the SEC had engaged in "precisely the kind of **[**2392]** administrative oversight of private practices that Congress contemplated." *Ibid.*

As an initial matter these cases make clear that Justice Thomas ***HN6***[] ***LEdHN[6]***[] [6] is wrong to regard *§§ 77p(a)* and *78bb(a)* as saving clauses so broad as to preserve all antitrust actions. See *post*, p. 287, 168 L. Ed. 2d, at ____ (dissenting opinion). The United States advanced the same argument in *Gordon.* See Brief for United States as *Amicus Curiae* in *Gordon* v. *New York Stock Exchange, Inc.*, O. T. 1974, No. 74-304, pp 8, 42. And the Court, in finding immunity, necessarily rejected it. See also *NASD, supra, at 694, 95 S. Ct. 2427, 45 L. Ed. 2d 463* (same holding); *Herman & MacLean v. Huddleston, 459 U.S. 375, 383, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983)* (finding saving clause applicable to overlap between *securities* laws where that "overlap [was] neither unusual nor unfortunate" (internal quotation marks omitted)). Although one party has made the argument in this Court, it was not presented in the courts below. And we shall not reexamine it.

[*156]** This Court's prior decisions also make clear that, ***HN7***[] ***LEdHN[7]***[] [7] when a court decides whether securities law precludes ***antitrust*** **[****21]** ***law***, it is deciding whether, given context and likely consequences, there is a "clear repugnancy" between the securities law and the antitrust complaint--or as we shall subsequently describe the matter, whether the two are "clearly incompatible." Moreover, *Gordon* and *NASD*, in finding sufficient incompatibility to warrant an implication of preclusion, have treated the following factors as critical: (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, **[*276]** duties, privileges, or standards of conduct. We also note (4) that in *Gordon* and *NASD* the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.

B

These principles, applied to the complaints before us, considerably narrow our legal task. For the parties cannot reasonably dispute the existence here of several of the conditions that this Court previously regarded as crucial **[****22]** to finding that the securities law impliedly precludes the application of the antitrust laws.

First, the activities in question here--the underwriters' efforts jointly to promote and to sell newly issued securities--is central to the proper functioning of well-regulated capital markets. The IPO process supports new firms that seek to raise capital; it helps to spread ownership of those firms broadly among investors; it directs capital flows in ways that better correspond to the public's demand for goods and services. Moreover, financial experts, including the securities regulators, consider the general kind of joint underwriting activity at issue in this case, including road shows and bookbuilding efforts essential to the successful marketing of an IPO. See Memorandum *Amicus Curiae* of SEC in *IPO Antitrust,* Case No. 01 CIV 2014 (WHP) (SDNY), pp 15, 39-40, App. D to Pet. for Cert. 124a, 138a, 155a-157a (hereinafter Brief for SEC). Thus, the antitrust complaints before us concern practices that lie at the very heart of the securities marketing enterprise.

Second, the law grants the SEC authority to supervise all of the activities here in question. Indeed, ***HN8***[] ***LEdHN[8]***[] [8] the SEC possesses **[****23]** considerable power to forbid, permit, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect of the practices in which underwriters engage. **[**2393]** See, *e.g.*, *15 U.S.C. §§ 77b(a)(3)*, *77j*, *77z-2* (granting SEC power to regulate the process of bookbuilding, solicitations **[*277]** of "indications of interest," and communications between underwriting participants and their customers, including those that occur during road shows); *§ 78o(c)(2)(D)* (granting SEC power to define and prevent through rules and regulations acts and practices that are fraudulent, deceptive, or manipulative); *§ 78i(a)(6)* (similar); *§ 78j(b)* (similar). Private individuals who suffer harm as a result of a violation of pertinent statutes and regulations may also recover damages. See *§§ 78bb*, *78u-4*, *77k*.

Third, the SEC has continuously exercised its legal authority to regulate conduct of the general kind now **[***157]** at issue. It has defined in detail, for example, what underwriters may and may not do and say during their road shows. Compare, *e.g.*, Guidance Regarding Prohibited Conduct in Connection with *IPO Allocations, 70 Fed. Reg. 19672 (2005)*, with Regulation M, **[****24]** *17 CFR §§ 242.100-242.105 (2006)*. It has brought actions against underwriters who have violated these SEC regulations. See Brief for SEC 13-14, App. D to Pet. for Cert. 136a-138a. And private litigants, too, have brought securities actions complaining of conduct virtually identical to the conduct at issue here; and they have obtained damages. *See, e.g., In re Initial Pub. Offering Securities Litigation, 241 F. Supp. 2d 281 (SDNY 2003)*.

The preceding considerations show that the first condition (legal regulatory authority), the second condition (exercise of that authority), and the fourth condition (heartland securities activity) that were present in *Gordon* and *NASD* are satisfied in this case as well. Unlike *Silver,* there is here no question of the existence of appropriate regulatory authority, nor is there doubt as to whether the regulators have exercised that authority. Rather, the question before us concerns the third condition: Is there a conflict that rises to the level of incompatibility? Is an antitrust suit such as this likely to prove practically incompatible with the SEC's administration of the Nation's securities laws?

[*278] III

A

Given the **[****25]** SEC's comprehensive authority to regulate IPO underwriting syndicates, its active and ongoing exercise of that authority, and the undisputed need for joint IPO underwriter activity, we do not read the complaints as attacking the bare existence of IPO underwriting syndicates or any of the joint activity that the SEC considers a necessary component of IPO-related syndicate activity. See Brief for SEC 15, 39-40, App. D to Pet. for Cert. 138a, 155a-157a. See also *IPO Antitrust, 287 F. Supp. 2d, at 507* (discussing the history of syndicate marketing of IPOs); App. 12 (complaint attacks underwriters "*abus[e]*" of "the preexisting practice of combining into underwriting syndicates" (emphasis added)); H. R. Rep. No. 1383, 73d Cong., 2d Sess., 6-7 (1934); S. Rep. No. 792, 73d Cong., 2d Sess., 5 (1934) (law must give to securities agencies freedom to regulate agreements among syndicate members). Nor do we understand the complaints as questioning underwriter agreements to fix the levels of their commissions, whether or not the resulting price is "excessive." See *Gordon, 422 U.S., at 688-689, 95 S. Ct. 2598, 45 L. Ed. 2d 463* (securities law conflicts with, and therefore precludes, antitrust attack **[****26]** on the fixing of commissions where the SEC has not approved, but later *might* approve, the practice).

We nonetheless can read the complaints as attacking the *manner* in which the underwriters jointly seek to collect "excessive" commissions. The complaints attack **[**2394]** underwriter efforts to collect commissions through certain practices (*i.e.*, laddering, tying, collecting excessive commissions in the form of later sales of the issued shares), which according to respondents the SEC itself has already disapproved and, in all likelihood, will not approve in the foreseeable future. In respect to this set of claims, they contend that there is no possible "conflict" **[***158]** since both securities law and ***antitrust law*** aim to prohibit the same undesirable activity. Without a **[*279]** conflict, they add, there is no "repugnance" or "incompatibility," and this Court may not imply that securities law precludes an antitrust suit.

B

We accept the premises of respondents' argument--that the SEC has full regulatory authority over these practices, that it has actively exercised that authority, but that the SEC has *disapproved* (and, for argument's sake, we assume that it will continue to disapprove) the conduct **[****27]** that the antitrust complaints attack. Nonetheless, we cannot accept respondents' conclusion. Rather, several considerations taken together lead us to find that, even on these prorespondent assumptions, securities law and ***antitrust law*** are clearly incompatible.

First, to permit antitrust actions such as the present one *still* threatens serious securities-related harm. For one thing, an unusually serious legal line-drawing problem remains unabated. In the present context only a fine, complex, detailed line separates activity that the SEC permits or encourages (for which respondents must concede antitrust immunity) from activity that the SEC must (and inevitably will) forbid (and which, on respondents' theory, should be open to antitrust attack).

For example, ***HN9***[] ***LEdHN[9]***[] [9] in respect to "laddering" the SEC forbids an underwriter to "[s]olici[t] customers prior to the completion of the distribution regarding whether and at what price and in what quantity they intend to place immediate aftermarket orders for IPO stock," *70 Fed. Reg. 19675-19676* (emphasis deleted); *17 CFR §§ 242.100-242.105*. But at the same time the SEC permits, indeed encourages, underwriters (as part of the "bookbuilding" **[****28]** process) to "inquir[e] as to a customer's desired future position in the longer term (for example, three to six months), and the price or prices at which the customer might accumulate that position without reference to immediate aftermarket activity." *70 Fed. Reg. 19676*.

[*280] It will often be difficult for someone who is not familiar with accepted syndicate practices to determine with confidence whether an underwriter has insisted that an investor buy more shares in the immediate aftermarket (forbidden), or has simply allocated more shares to an investor willing to purchase additional shares of that issue in the long run (permitted). And who but a securities expert could say whether the present SEC rules set forth a virtually permanent line, unlikely to change in ways that would permit the sorts of "laddering-like" conduct that it now seems to forbid? Cf. *Gordon, supra, at 690-691, 95 S. Ct. 2598, 45 L. Ed. 2d 463*.

Similarly, ***HN10***[] ***LEdHN[10]***[] [10] in respect to "tying" and other efforts to obtain an increased commission from future sales, the SEC has sought to prohibit an underwriter "from demanding . . . an offer from [its] customers of any payment or other consideration [such as the purchase of a different **[****29]** security] in addition to the security's stated consideration." *69 Fed. Reg. 75785 (2004)*. But the SEC would permit a firm to "allocat[e] IPO shares to a customer because the customer has separately retained the firm for other services, when the customer has not paid excessive compensation in relation to those services." *Ibid., and* n 108. The **[**2395]** National Association of Securities Dealers (NASD), over which the SEC exercises supervisory authority, **[***159]** has also proposed a rule that would prohibit a member underwriter from "offering or threatening to withhold" IPO shares "as consideration or inducement for the receipt of compensation that is excessive in relation to the services provided." *Id., at 77810*. The NASD would allow, however, a customer legitimately to compete for IPO shares by increasing the level and quantity of compensation it pays to the underwriter. See *ibid.* (describing NASD Proposed Rule 2712(a)).

Under these standards, to distinguish what is forbidden from what is allowed requires an understanding of just when, in relation to services provided, a commission is "excessive," indeed, so "excessive" that it will remain *permanently* forbidden, **[*281]** see *Gordon, 422 U.S., at 690-691, 95 S. Ct. 2598, 45 L. Ed. 2d 463.* **[****30]** And who but the SEC itself could do so with confidence?

For another thing, evidence tending to show unlawful antitrust activity and evidence tending to show lawful securities marketing activity may overlap, or prove identical. Consider, for instance, a conversation between an underwriter and an investor about how long an investor intends to hold the new shares (and at what price), say, a conversation that elicits comments concerning both the investor's short and longer term plans. That exchange might, as a plaintiff sees it, provide evidence of an underwriter's insistence upon "laddering" or, as a defendant sees it, provide evidence of a lawful effort to allocate shares to those who will hold them for a longer time. See Brief for United States as *Amicus Curiae* 27.

Similarly, the same somewhat ambiguous conversation might help to establish an effort to collect an unlawfully high commission through atypically high commissions on later sales or through the sales of less popular stocks. Or it might prove only that the underwriter allocates more popular shares to investors who will help stabilize the aftermarket share price. See, *e.g., Department of Enforcement v. Respondent,* Disciplinary Proc. **[****31]** No. CAF030014, (NASD Hearing Mar. 3, 2006), pp. 12-13 (redacted decision), called for review, Complaint No. CAFD30014 (NASD Nat. Adjudicatory Council, Apr. 11, 2006).

Further, antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries. In light of the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible, it will prove difficult for those many different courts to reach consistent results. And, given the fact-related nature of many such evaluations, it will also prove difficult to ensure that the different courts evaluate similar fact patterns consistently. The result is an unusually high risk that different **[*282]** courts will evaluate similar factual circumstances differently. See Hovenkamp, Antitrust Violations in Securities Markets, 28 J. Corp. L. 607, 629 (2003) ("Once regulation of an industry is entrusted to jury trials, the outcomes of antitrust proceedings will be inconsistent with one another . . .").

Now consider these factors together--the fine securities-related lines separating the permissible from the impermissible; the need for securities-related expertise (particularly to determine whether an SEC rule is **[****32]** likely permanent); the overlapping evidence from which reasonable but contradictory inferences may be drawn; and the risk of inconsistent court results. Together these factors mean there is no practical way to **[***160]** confine antitrust suits so that they challenge only activity of the kind the investors seek to target, activity that is presently unlawful and will likely remain unlawful under the securities law. Rather, **[**2396]** these factors suggest that antitrust courts are likely to make unusually serious mistakes in this respect. And the threat of antitrust mistakes, *i.e.*, results that stray outside the narrow bounds that plaintiffs seek to set, means that underwriters must act in ways that will avoid not simply conduct that the securities law forbids (and will likely continue to forbid), but also a wide range of joint conduct that the securities law permits or encourages (but which they fear could lead to an antitrust lawsuit and the risk of treble damages). And therein lies the problem.

This kind of problem exists to some degree in respect to other antitrust lawsuits. But here the factors we have mentioned make mistakes unusually likely (a matter relevant to Congress' determination of which **[****33]** institution should regulate a particular set of market activities). And the role that joint conduct plays in respect to the marketing of IPOs, along with the important role IPOs themselves play in relation to the effective functioning of capital markets, means that the securities-related costs of mistakes is unusually high. It is no wonder, then, that the SEC told the District Court (consistent **[*283]** with what the Government tells us here) that a "failure to hold that the alleged conduct was immunized would threaten to disrupt the full range of the Commission's ability to exercise its regulatory authority," adding that it would have a "chilling effect" on "lawful joint activities . . . of tremendous importance to the economy of the country." Brief for SEC 39-40, App. D to Pet. for Cert. 157a.

We believe it fair to conclude that, where conduct at the core of the marketing of new securities is at issue; where securities regulators proceed with great care to distinguish the encouraged and permissible from the forbidden; where the threat of antitrust lawsuits, through error and disincentive, could seriously alter underwriter conduct in undesirable ways, to allow an antitrust lawsuit would threaten **[****34]** serious harm to the efficient functioning of the securities markets.

Second, any enforcement-related need for an antitrust lawsuit is unusually small. For one thing, the SEC actively enforces the rules and regulations that forbid the conduct in question. For another, as we have said, investors harmed by underwriters' unlawful practices may bring lawsuits and obtain damages under the securities law. See *supra, at 276-277, 168 L. Ed. 2d, at 156-157*. Finally, ***HN11***[] ***LEdHN[11]***[] [11] the SEC is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations. And that fact makes it somewhat less necessary to rely upon antitrust actions to address anticompetitive behavior. See *15 U.S.C. § 77b(b)* (instructing the SEC to consider, "in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation"); *§ 78w(a)(2)* (the SEC "shall consider among other matters the impact any such rule or regulation would have on competition"); *Trinko, 540 U.S., at 412, 124 S. Ct. 872, 157 L. Ed. 2d 823* ("[T]he additional benefit to competition provided by antitrust enforcement will tend to be small" where other laws **[****35]** and regulatory structures **[***161]** are "designed to deter and remedy anticompetitive harm").

[*284] We also note that Congress, in an effort to weed out unmeritorious securities lawsuits, has recently tightened the procedural requirements that plaintiffs must satisfy when they file those suits. To permit an antitrust lawsuit risks circumventing these requirements by permitting plaintiffs to dress what is essentially a securities complaint in antitrust clothing. See generally Private Securities Litigation Reform Act of 1995, *109 Stat. 737*; Securities Litigation **[**2397]** Uniform Standards Act of 1998, *112 Stat. 3227*.

In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct. Together these considerations indicate a serious conflict between, on the one hand, application of the antitrust laws and, on the other, proper enforcement of the securities law.

We are aware that the Solicitor General, while recognizing the conflict, suggests a procedural device that he believes will avoid it (in effect, a compromise between the differing positions that the SEC and Antitrust **[****36]** Division of the Department of Justice took in the courts below). Compare Brief for Dept. of Justice, Antitrust Division, as *Amicus Curiae* in Case No. 01 CIV 2014, p 23 (seeking no preclusion of the antitrust laws), with Brief for SEC 39-40, App. D to Pet. for Cert. 155a-157a (seeking total preclusion of the antitrust laws). He asks us to remand this case to the District Court so that it can determine "whether respondents' allegations of prohibited conduct can, as a practical matter, be separated from conduct that is permitted by the regulatory scheme," and in doing so, the lower court should decide whether SEC-permitted and SEC-prohibited conduct are "inextricably intertwined." See Brief for United States as *Amicus Curiae* 9, 26. The Solicitor General fears that otherwise, we might read the law as totally precluding application of the ***antitrust law*** to underwriting syndicate behavior, even were underwriters, say, overtly to divide markets.

[*285] The Solicitor General's proposed disposition, however, does not convincingly address the concerns we have set forth here--the difficulty of drawing a complex, sinuous line separating securities-permitted from securities-forbidden conduct, the **[****37]** need for securities-related expertise to draw that line, the likelihood that litigating parties will depend upon the same evidence yet expect courts to draw different inferences from it, and the serious risk that antitrust courts will produce inconsistent results that, in turn, will overly deter syndicate practices important in the marketing of new issues. (We also note that market divisions appear to fall well outside the heartland of activities related to the underwriting process than the conduct before us here, and we express no view in respect to that kind of activity.)

The upshot is that all four elements present in *Gordon* are present here: (1) an area of conduct squarely within the heartland of securities regulations; (2) clear and adequate SEC authority to regulate; (3) active and ongoing agency regulation; and (4) a serious conflict between the antitrust and regulatory regimes. We therefore **[***162]** conclude that the securities laws are "clearly incompatible" with the application of the antitrust laws in this context.

The Second Circuit's contrary judgment is reversed.

Justice **Kennedy** took no part in the consideration or decision of this case.

Concur by: Stevens

Concur

Justice **Stevens, [****38]** concurring in the judgment.

When investment bankers cooperate in underwriting an initial public offering (IPO), they increase the amount of capital available to firms producing goods and services and make additional securities available for purchase. By agglomerating networks of investors and spreading the risk of overvaluation, syndicates make positive contributions to the economy that could not be achieved through independent action. See *426 F.3d 130, 137-138 (CA2 2005)*. **[**2398]** In my view, agreements **[*286]** among underwriters on how best to market IPOs, including agreements on price and other terms of sale to initial investors, should be treated as procompetitive joint ventures for purposes of antitrust analysis. In all but the rarest of cases, they cannot be conspiracies in restraint of trade within the meaning of § 1 of the Sherman Act, *15 U.S.C. § 1*.

After the initial purchase, the prices of newly issued stocks or bonds are determined by competition among the vast multitude of other securities traded in a free market. To suggest that an underwriting syndicate can restrain trade in that market by manipulating the terms of IPOs is frivolous. See *United States v. Morgan, 118 F. Supp. 621, 689 (SDNY 1953)* **[****39]** (Medina, J.) ("[T]he syndicate system has no effect whatever on general market prices, nor do the participating underwriters and dealers intend it to have any. On the contrary, it is the general market prices of securities of comparable rating and quality which control the public offering price . . . . The particular issue, even if a large one, is but an infinitesimal unit of trade in the ocean of security issues running into the billions, which constitutes the general market"); see also Hovenkamp, Antitrust Violations in Securities Markets, 28 J. Corp. L. 607, 615-618 (2003). It is possible, of course, that the practices described in the complaints in these two cases may have enabled the underwriters to divert some of the benefits of the offerings from the issuers to themselves, thus breaching the agents' fiduciary obligations to their principals. But if such an injury did occur, it is not an "antitrust injury" giving rise to a damages claim by investors. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*.

Nor do I believe that the so-called "laddering" and "tying" described in the complaints constitute vertical restraints that **[****40]** violate either the Sherman Act or § 2(c) of the Robinson-Patman Act, *15 U.S.C. § 13(c)*. Given the magnitude of the market these practices are alleged to have influenced, I think it obvious as a matter of law that there has **[*287]** been no injury to any relevant competition. Unlike in *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, there is no need to **[***163]** engage in discovery to determine whether there is any merit to the plaintiffs' claims. See *id., at 593-595, 127 S. Ct. 1955, 1974-1989*(Stevens, J., dissenting).

The defendants moved to dismiss for failure to state a claim on the ground, among others, that the plaintiffs' claims challenge "the ordinary activities of participants in underwriting syndicates, which are recognized to be completely lawful and procompetitive." Record, Doc. 98, p 72. I agree and would hold, as we did in *Parker v. Brown, 317 U.S. 341, 351-352, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, that the defendants' alleged conduct does not violate the antitrust laws, rather than holding that Congress has implicitly granted them immunity from those laws. Surely I would not suggest, as the Court did in *Twombly*, and as it does again today, **[****41]** that either the burdens of antitrust litigation or the risk "that antitrust courts are likely to make unusually serious mistakes," *ante, at 282, 168 L. Ed. 2d, at 160*, should play any role in the analysis of the question of law presented in a case such as this.

Accordingly, I concur in the Court's judgment but not in its opinion.

Dissent by: Thomas

Dissent

Justice **Thomas,** dissenting.

The Court believes it must decide whether the securities laws implicitly preclude application of the antitrust laws because **[**2399]** the securities statutes "are silent in respect to antitrust." See *ante, at 271, 168 L. Ed. 2d, at 153*. I disagree with that basic premise. The securities statutes are not silent. Both the Securities Act and the Securities Exchange Act contain broad saving clauses that preserve rights and remedies existing outside of the securities laws.

Section 16 of the Securities Act of 1933 states that "the rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity." *15 U.S.C. § 77p(a)*. In parallel **[*288]** fashion, *§ 28* of the Securities Exchange Act of 1934 states that "the rights and remedies provided by this chapter shall be in addition to **[****42]** any and all other rights and remedies that may exist at law or in equity." *§ 78bb(a)*. This Court has previously characterized those clauses as "confirm[ing] that the remedies in each Act were to be supplemented by 'any and all' additional remedies." *Herman & MacLean v. Huddleston, 459 U.S. 375, 383, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983)*.

The Sherman Act was enacted in 1890. See *26 Stat. 209*. Accordingly, rights and remedies under the federal antitrust laws certainly would have been thought of as "rights and remedies" that existed "at law or in equity" by the Congresses that enacted that Securities Act and the Securities Exchange Act in the early 1930's. See *§ 77p*; *§ 78bb*. Therefore, both statutes explicitly save the very remedies the Court holds to be impliedly precluded. There is no convincing argument for why these saving provisions should not resolve this case in respondents' favor.

The Court's opinion overlooks the saving clauses seemingly because they do not "explicitly state whether they preclude application of the antitrust laws." *Ante, at 270, 168 L. Ed. 2d, at 152*; see also Brief for Petitioners **[***164]** 33, n 5. [1] As the Court observes, some statutes contain saving clauses specific to antitrust. See, **[****43]** *e.g., Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 406, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*("'[N]othing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of **[*289]** any of the antitrust laws' (quoting Telecommunications Act of 1996, § 601(b)(1), 110 Stat. 143, note following *47 U.S.C. § 152*")). But the mere existence of targeted saving clauses does not demonstrate--or even suggest--that antitrust remedies are not included within the "any and all" other remedies to which the securities saving clauses refer. Although Congress may have singled out antitrust remedies

---

[1] The Court suggests that the argument advanced in my opinion was not preserved by respondents. See *ante, at 275, 168 L. Ed. 2d, at 155*. Respondents' principal contention in the Court of Appeals below was that "[t]he federal securities laws do not expressly immunize Defendants' alleged conduct from prosecution under the federal antitrust laws." See, *e.g.*, Brief for Appellants in No. 03-9288 (CA2), pp 15-16. Because a full reading of the securities laws is essential to analyzing respondents' central argument, I do not consider arguments based on the saving clauses unpreserved. Cf. *United States v. Morton, 467 U.S. 822, 828, 104 S. Ct. 2769, 81 L. Ed. 2d 680 (1984)* ("[W]e read statutes as a whole").

for special treatment in some statutes, it is not precluded from using more general saving provisions that encompass antitrust and other remedies. Surely Congress is not required to enumerate every cause of action--state and federal--that may be brought. When Congress wants to preserve all other remedies, using the word "all" is sufficient.

[**44]** Petitioners also argue that the saving clauses should not apply because the clauses did not play a role in the Court's prior securities-antitrust pre-emption cases. Brief for Petitioners 33, n 5 ("[N]either **[**2400]** provision was found to bar immunity in *Gordon [v. New York Stock Exchange, Inc., 422 U.S. 659, 95 S. Ct. 2598, 45 L. Ed. 2d 463 (1975),]* or *[United States v. National Assn. of Securities Dealers, Inc., 422 U.S. 694 , 95 S. Ct. 2427, 45 L. Ed. 2d 486 (1975)](NASD)]*"). Be that as it may, none of the opinions in *Silver v. New York Stock Exchange, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963)*, *Gordon*, or *NASD*--majority or dissent--offered any analysis of the saving clauses. Omitted reasoning has little claim to precedential value. Absent any indication that these omissions were the product of reasoned analysis instead of inadvertent oversight, I would not allow the Court's prior silence on this issue to erect a perpetual bar to arguments based on a full reading of the statute's relevant text.

Finally, it might be argued that the saving clauses preserve only state-law rights and remedies. This argument has no textual basis. If Congress had intended to limit the clauses to state law, it surely would **[****45]** not have phrased them to preserve "*any and all*" rights and remedies. Other provisions in both Acts, including a later sentence in the section containing the Securities Exchange Act's saving clause, **[*290]** suggest that Congress explicitly referred to States when it intended to impose a state-law limitation. See, *e.g.*, *15 U.S.C. § 77v(a)* (referring to "State and Territorial courts"); *§ 78bb(a)* (referring to the "securities commission . . . of any State"); cf. *17 U.S.C. § 301(b)* ("Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State . . ."). Given Congress' demonstrated ability **[***165]** to limit provisions of the securities laws to States and the lack of any such limitation here, the saving clauses cannot be understood as limited only to state-law rights and remedies. [2]

[**46]** A straightforward application of the saving clauses to this case leads to the conclusion that respondents' antitrust suits must proceed. Accordingly, we do not need to reconcile any conflict between the securities laws and the antitrust laws. I respectfully dissent.

References

15 U.S.C.S. §§ 77p(a), *78bb(a)*

Antitrust Law and Trade Regulation §§ 66.01, 66.02 (Matthew Bender)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices § 20

L Ed Index, Robinson-Patman Act; Securities Regulation; Sherman Act

Applicability of federal antitrust laws as affected by other federal statutes or by Federal Constitution--Supreme Court cases. *45 L. Ed. 2d 841*.

The doctrine of primary administrative jurisdiction as defined and applied by the Supreme Court. *38 L. Ed. 2d 796*.

[2] The Court's suggestion that the clauses were intended to save only securities-related rights and remedies is subject to many of the same criticisms. See *ante, at 275, 168 L. Ed. 2d, at 155-156*. The Securities Act of 1933 provided no private federal remedy for fraud in the purchase or sale of registered securities. On the Court's proposed reading of *§ 77p*, however, a federal action for mail or wire fraud and a state-law action for fraud, which are not securities-related rights or remedies, would not have been included within the Securities Act's saving provision.

Craftsmen Limousine, Inc. v. Ford Motor Co.

United States Court of Appeals for the Eighth Circuit

January 11, 2007, Submitted ; June 19, 2007, Filed

No. 06-1559

Reporter

491 F.3d 380 *; 2007 U.S. App. LEXIS 14366 **; 2007-1 Trade Cas. (CCH) P75,748; 73 Fed. R. Evid. Serv. (Callaghan) 1070

Craftsmen Limousine, Inc.; JMRL Sales & Service, doing business as Craftsmen Limousine, Inc., a Missouri corporation, Plaintiffs-Appellants, v. Ford Motor Company, a Delaware corporation, Defendant-Appellee, General Motors Corporation, a Missouri corporation; Cadillac, a division or affiliate of General Motors Corporation; LIMO, an association of limousine builders; AHA Automotive Design, a Canadian corporation, Defendants, American Custom Coachworks, a California corporation, Defendant-Appellee, Classic Limousine & Armouring, a California corporation; DaBryan Coach Builders, a Missouri corporation; Eagle Coach, an Ohio corporation; Executive Coachbuilders, a Missouri corporation; Federal Coach, an Arkansas corporation; Image Coaches, an Indiana corporation; International Armor & Limousine, an Illinois corporation; Krystal Koach, a California corporation; LCW, a Texas corporation; Picasso Coach Builder, a New York corporation; Royale Limousine Manufacturers, a Massachusetts corporation; R-D Group, a California corporation, doing business as Tiffany Coachworks; Accubuilt, Inc., an Ohio corporation, formerly known as S&S/Superior of Ohio; Tri-State Custom Coach, a New Jersey corporation; United States Coachworks, a New York corporation; Viking Coachworks, a Florida corporation, Defendants.

Subsequent History: US Supreme Court certiorari denied by *Craftsmen Limousine, Inc. v. Ford Motor Co., 128 S. Ct. 654, 169 L. Ed. 2d 510, 2007 U.S. LEXIS 12350 (U.S., 2007)*

Related proceeding at *Craftsmen Limousine, Inc. v. Ford Motor Co., 2009 U.S. App. LEXIS 19641 (8th Cir. Mo., Sept. 1, 2009)*

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

Craftsmen Limousine, Inc. v. Ford Motor Co., 2005 U.S. Dist. LEXIS 34987 (W.D. Mo., Dec. 1, 2005)

Core Terms

limousines, coachbuilders, restrictions, district court, anticompetitive, advertising, specialty, stretched, market power, summary judgment, rule of reason, inches, competitors, cartel, sales, consumers, trade publication, guidelines, converted, detrimental effect, reasonable jury, procompetitive, conspiracy, products, compete, prices, antitrust violation, safety standards, burden of proof, no evidence

LexisNexis® Headnotes

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

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

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

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

The appellate court reviews a grant of summary judgment de novo, viewing the record in the light most favorable to the non-movant. Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. To avoid summary judgment, a non-moving party must allege specific facts supported by evidence sufficient to allow a reasonable jury to return a verdict in its favor; a mere "scintilla of evidence" will not suffice.

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

HN2[] **Sherman Act, Scope**

The Sherman Act, *15 U.S.C.S. § 1*, prohibits every contract, combination or conspiracy, in restraint of trade or commerce. The United States Supreme Court has long accepted that Congress does not intend a literal interpretation of that language, and it has read the law as prohibiting only those practices that impose an unreasonable restraint on competition. The burden of proving the unreasonableness of a restraint lies with a plaintiff.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN3[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Some antitrust plaintiffs face a lighter burden than others, depending upon the nature of the restraint at issue. Plaintiffs challenging restraints subject to the "per se rule" enjoy the lightest burden of proving unreasonableness. Judicial experience has proven certain types of restraints to be so strongly linked with anti-competitive activity, and their economic impact so immediately obvious, that we presume unreasonableness and deem them unlawful restraints of trade per se. When challenging such naked restraints, the plaintiff meets its burden of proving the unreasonableness of the restraint merely by proving the existence and substance of the restraint itself.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN4[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In a limited number of cases, the restraint on trade appears pernicious enough on its face to fall within the category of restraints that are unlawful per se, but judicial inexperience with the particular type of restraint warrants a "quick look" at the relevant market and the defendant's alleged justifications for imposing the restraint. This amounts to an abbreviated analysis of whether the restraint was unreasonable (though not as abbreviated as an outright condemnation of the restraint as unlawful per se).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN5[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The per se and "quick look" standards are exceptional and their application is reserved for the most patently anticompetitive restraints. Given the danger of applying truncated modes of analysis too freely, most antitrust claims are analyzed under a "rule of reason," according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN6[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Due to the number of variables involved, including the type of restraint, the nature of the market at issue, and the level of judicial experience with a particular type of restraint in any given case, determining which mode of analysis is appropriate rarely allows for the mechanical application of precedent: There is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an appropriate inquiry given the facts of the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN7[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

United States Supreme Court precedent holds either the per se or "quick look" modes of analysis improper when the alleged substance of the restraint and any purported justifications for it did not create the obvious impression that the restraint would be unreasonably anticompetitive.

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

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

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN8[] **Relevant Market, Geographic Market Definition**

The antitrust plaintiff's burden begins with the task of properly defining the relevant market. The plaintiff must define both the relevant product market, which includes all reasonably interchangeable products, and the relevant geographic market, which consists of the area in which consumers can practically seek alternative sources of the product. After properly defining the market, the rule of reason also requires the plaintiff to show that the restraint has "detrimental effects" upon the competitiveness of the market.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

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

HN9[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

An antitrust plaintiff may satisfy the "detrimental effects" element of its burden in one of two ways. First, a plaintiff may put forth evidence of actual, sustained adverse effects on competition in the relevant market. If the plaintiff cannot submit such evidence, it is relegated to the more challenging course of proving detrimental effects on competition by making an inquiry into market power and market structure designed to assess the restraint's actual effect. A defendant or cartel of defendants has market power if it has the ability to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN10[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Only after satisfying the "detrimental effects" requirements does the antitrust plaintiff's burden shift to the defendant to justify its conduct by reference to rational, procompetitive economic principles. If the defendant can do so, the burden returns to the plaintiff to show that the defendant can achieve the same rational, procompetitive ends through means less likely to harm overall competition in the market. If so, the court will ultimately balance the harms and benefits to determine if the behavior is reasonable on the whole.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN11[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

The proven ability to act collectively to exercise influence over trade publication advertising policies does not demonstrate an ability to act collectively to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN12[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Demanding certain standards for advertising that exclude some competitors may make the exercise of market power more feasible, but such acts do not alone prove the possession of market power.

Counsel: For Craftsmen Limousine, INC., JMRL Sales & Service, INC., a Missouri Corporation, doing business as Craftsmen Limousine, Plaintiffs-Appellants: Richard A. Ford Jr., Diane Hinkle, Gary L. Richardson, Keith A. Ward, RICHARDSON & STOOPS, Tulsa, OK; Charles Loy Richarson, RICHARDSON & WARD, Tulsa, OK; Fred E. Stoops Sr., STOOPS LAW OFFICE, Jenks, OK; Matthew Francis Trokey, CANTWELL & SMITH, Branson, MO.

For Ford Motor Company, a Delaware Corporation, Defendant-Appellee: David C. Hilliard, Janet A. Marvel, PATTISHALL & MCAULIFFE, Chicago, IL; Kirk A. Peterson, BERKOWITZ & OLIVER, Prairie Village, KS.

For America, Custom Coachworks, a California corporation, Defendant-Appellee: Dennis P. Riley, MESISCA & RILEY, Los Angeles, CA.

Judges: Before WOLLMAN and MELLOY, Circuit Judges, and NANGLE, [1] District Judge.

Opinion by: MELLOY

Opinion

[*382]

MELLOY, Circuit Judge.

Plaintiff Craftsmen Limousine, Inc. ("Craftsmen") brought an antitrust claim against vehicle manufacturers Ford Motor **[**2]** Company ("Ford") and the General Motors Corporation ("GM"), the Limousine Industry Manufacturers' Organization ("LIMO"), and numerous coachbuilding companies engaged in the business of stretching Ford and GM vehicles into limousines. Over the course of the lawsuit, Craftsmen reached settlements with and/or voluntarily dismissed all defendants except Ford and American Custom Coachworks ("American Coach"), one of the coachbuilding companies. In an initial trial, the district court found that an alleged conspiracy between Ford and American Coach to influence the advertising and trade-show policies of two trade publications constituted a per se antitrust violation, and the jury returned a verdict for Craftsmen.

Ford appealed to this court, and we reversed the judgment. *Craftsmen Limousine, Inc. v. Ford Motor Co. ("Craftsmen I"), 363 F.3d 761 (8th Cir. 2004)*. We held that the district court erred in applying a per se rule to the alleged antitrust violation; it instead should have applied the rule of reason. We remanded the case and instructed the district court to apply the rule of reason to Craftsmen's antitrust claim.

After further discovery, the district court **[**3]** [2] granted Ford's motion to exclude Craftsmen's expert witness under *Federal Rule of Evidence 702* and granted the motions of Ford and American Coach for summary judgment in their favor. Craftsmen now appeals those decisions. We affirm.

I. BACKGROUND

A. Pre-Litigation Background

The factual background is fairly extensive, and we presented it at length in our first opinion in this case. *Craftsmen I, 363 F.3d at 764-71*. We will not reiterate it in full here, but we discuss those facts necessary to understand the nature of the claim at issue. Because the district court granted the defendants' motion for summary judgment in this case, we present the facts in the light most favorable to Craftsmen. *Bathke v. Casey's Gen. Stores, Inc., 64 F.3d 340, 343 (8th Cir. 1995)*.

Craftsmen is a Missouri corporation engaged in the business of stretching **[**4]** standard **[*383]** base vehicles into limousines and buses. This process involves cutting the base vehicle in two, inserting structural pieces between the two halves of the base vehicle, and welding the parts back together to create a "stretched" limousine. In general, longer structural inserts (and, accordingly, longer stretched limousines) add weight and create greater stress upon the vehicle frame. Craftsmen, however, asserts that its specialized rebuilding process allows for the conversion of

[1] The Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri, sitting by designation.

[2] The Honorable Dean Whipple, United States District Judge for the Western District of Missouri.

base vehicles, including the Ford-manufactured Lincoln Town Car, into very long limousines without sacrificing safety.

The National Highway Traffic Safety Administration requires coachbuilders to self-certify that their limousines meet federal safety standards and to provide some objective basis for that belief. Federal authorities began investigating the safety of limousines following a well-publicized crash and other incidents in the late 1980s. Ford sought to protect its image and, at the same time, to increase its share of the market for base vehicles. In 1990, while Craftsmen was actively engaged in the business of building stretched limousines, Ford formed a vehicle certification program that **[**5]** provided guidelines for the conversion of its vehicles into limousines that met national safety standards. Ford would certify a participant in the program as a "Quality Vehicle Modifier" ("QVM") if it abided by Ford guidelines for converting limousines and purchased insurance naming Ford as the insured. The guidelines limited the conversion options of coachbuilders. Among Ford products, coachbuilders could only convert Lincoln Town Cars, and there were limits upon the total weight of the resulting limousines and the length to which they could be stretched (no more than 120 additional inches). Coachbuilders that followed the guidelines gained some assurance that their vehicles met federal standard standards, and they received cash incentives from Ford for their participation in the QVM program. GM adopted a similar but separate program in 1992, the Cadillac Master Coachbuilders ("CMC") program. Coachbuilders who wished to stretch a vehicle in a manner that did not conform to QVM guidelines could retain QVM membership only if they submitted independent test data regarding vehicle safety to Ford. Most coachbuilders, including all of the original defendants in this case, participated in **[**6]** one or both of the QVM and CMC programs.

Craftsmen was one of a minority of American coachbuilding companies that chose not to participate in either program. Many of Craftsmen's conversions at the time resulted in vehicles longer than the limits imposed by the QVM and CMC programs (hereinafter "specialty limousines"), and joining the QVM program would have required Craftsmen to abandon its practice of building specialty limousines or to seek costly independent safety analysis. In addition, Craftsmen was already using techniques described in the QVM guidelines, and Craftsmen's owners had no reason to believe that the company's converted vehicles were unsafe. A federal inspection of its converted vehicles in the early 1990s resulted only in some minor, federally-mandated safety modifications.

Ford was also a nonvoting member of LIMO, an industry group of coachbuilders that formed in 1989 to pool resources for product testing and to promote consumer confidence in limousines. American Coach was a voting member. Among coachbuilders, LIMO membership was open only to those businesses who participated in the QVM and/or CMC programs; eventually, LIMO amended its bylaws to allow non-participating **[**7]** coachbuilders to join if they submitted independent crash-test data. Craftsmen did not join either program or perform independent crash tests, and **[*384]** therefore it was ineligible to become a member of LIMO.

Ford, American Coach, and other LIMO members soon began to act through the organization to exert influence over marketing outlets in the limousine industry. In 1995, LIMO received a commitment from one trade publication to remove all non-QVM and non-CMC advertisers and to deny non-QVM and non-CMC coachbuilders access to its trade show. In a 1996 LIMO teleconference, its members unanimously agreed that they would "not endorse or participate in any publication which continues to promote non-CMC/QVM limousine manufacturers" or "any limousine trade show which promotes the interests of non-CMC/QVM products." By 1996, both of the major trade publications in the limousine industry had adopted restrictive policies that barred coachbuilders that did not participate in the QVM or CMC programs from placing advertisements unless they submitted independent crash-test data to prove that their vehicles complied with federal safety standards. Non-participating coachbuilders also faced restrictions **[**8]** upon their participation in the publications' annual trade shows. In the face of these limitations, Craftsmen's business suffered. It found creative ways to market its company name, such as promoting its ability to customize buses and stretch sport-utility vehicles (neither of these services were subject to advertising restrictions). Craftsmen also maintained a company Web site for marketing purposes, and Craftsmen was able to remain profitable in 1995 and 1996. In 1997--the first year since at least 1991 in which Craftsmen did not turn a profit--Craftsmen began to advertise in a new trade publication that did not require proof of certification or QVM/CMC participation. Craftsmen's expert concedes that, by some point in 1998, any adverse impact of the advertising ban upon Craftsmen's business had evaporated. The same year, Craftsmen filed suit against Ford, American Coach, and several other defendants in the United States District Court for the Western District of Missouri. Craftsmen alleged, *inter alia*, that the defendants engaged in a conspiracy in restraint of trade in violation of federal ***antitrust law***, *15 U.S.C. § 1*, and that this conspiracy harmed Craftsmen's **[**9]** business from 1995 to 1998.

B. Trial, First Appeal, and Craftsmen I

Craftsmen's claims against Ford and American Coach proceeded to a jury trial in 2002. The jury returned a verdict of favor of Craftsmen for more than $ 2 million in damages, which the district court tripled pursuant to *15 U.S.C. § 15(a)*. Ford and American Coach appealed to this court, arguing that the evidence was insufficient to establish a conspiracy among them, *Craftsmen I, 363 F.3d at 771*, and that the district court erred in finding that the alleged restraint of trade constituted a per se antitrust violation. *Id. at 772*. We disagreed with the first contention and held that Craftsmen submitted evidence sufficient for a reasonable jury to conclude that Ford and American Coach acted through LIMO to exclude Craftsmen and other specialty coachbuilders from advertising in trade publications and participating in trade shows. Id.

We agreed with Ford and American Coach, however, that these actions did not amount to a per se violation of ***antitrust law***. *Id. at 772-76*. We came to this conclusion because restrictions upon coachbuilders that **[**10]** had not submitted particular evidence that their products met certain safety standards are not necessarily anti-competitive: "[T]he creation and enforcement of standards, including safety standards, often has pro-competitive effects. For example, having unsafe limousines in **[*385]** the market could tend to undercut consumer confidence in all limousines, and thereby decrease overall limousine sales." *Id. at 774*. In short, we found that "the economic impact of safety standards is not immediately discernable." Id. Therefore, the case demanded a more thorough analysis than the abbreviated one employed by the district court to determine whether the restraint was unreasonable. Id.

We held that the district court should have instead applied the rule of reason to determine whether the actions of Ford and American Coach unreasonably restrained trade in the industry. *Id. at 776*. Under the rule of reason, the factfinder probes more deeply into the relevant circumstances to determine whether the actions at issue created an unreasonable restraint on competition. *Id. at 772-73*. Because this question was never posed to the jury, we remanded the **[**11]** case to the district court. *Id. at 777*. We also ruled that the testimony of Craftsmen's expert, David Cole, was inadmissible insofar as it purported to prove an antitrust violation or measure damages arising out of assumed anticompetitive conduct. Id. While Cole was qualified and provided expert testimony with regard to Craftsmen's damages, his testimony was not helpful to a jury in a rule-of-reason case because he "*assumed* that Craftsmen's alleged lost growth from 1995 through 1998 was caused by [the] defendants' alleged conspiracy. He did not determine whether other factors . . . may have affected Craftsmen's growth rate. Under the rule of reason analysis, which should have been applied in this case, such an analysis was required." Id.

C. Post-Remand Proceedings

Upon its return to the district court, Craftsmen retained economist John Scoggins to perform expert analysis consistent with our opinion in Craftsmen I. To carry out this task, Scoggins used statistical models to show what the demand for Craftsmen limousines should have been during the years at issue and noted that the actual demand was significantly smaller. He identified several variables **[**12]** that could have caused the reduced demand, such as the national economy or competition from other coachbuilders. After running regressions to determine the impact of these variables, he found that none could account for Craftsmen's disappointing sales figures from 1995 to 1998. Therefore, by process of elimination, he concluded that the advertising and trade-show restrictions must have been the primary cause of the dampened demand for Craftsmen's services during that period. Through the use of a dummy variable to gauge this impact, he was able to estimate the total amount of sales that Craftsmen lost as a result of the restrictions.

Craftsmen merely asked Scoggins to analyze the impact of the behavior of Ford and American Coach upon Craftsmen's net income from 1995 to 1998, and to specifically look into alternative causes for disappointing sales for Craftsmen during the years in question. He performed that task, and went no further. He did not explore whether the restraints had or could have an anti-competitive impact upon the limousine industry as a whole. He did, however, undertake some research into the limousine industry as a whole insofar as it related to Craftsmen's damages, **[**13]** and he found that the number of competitors in the industry had not changed significantly over a thirteen-year period. He also acquired limited, anecdotal evidence of the adverse impact of the advertising and trade-show restrictions upon the sales figures of one other specialty limousine manufacturer during the same time period.

Ford moved to exclude Scoggins's testimony under *Federal Rule of Evidence 702*, **[*386]** and both Ford and American Coach moved for summary judgment. The district court granted the motions. It concluded that Scoggins's opinion would not "assist the trier of fact to understand the evidence or to determine a fact in issue," *Fed. R. Evid. 702*, because Scoggins did not analyze whether the restraints at issue were anti-competitive under the rule of reason; he merely analyzed their effect upon Craftsmen. Further, the district court took issue with Scoggins's definition of the relevant market. Scoggins claimed that he analyzed the effects of the allegedly anti-competitive behavior upon the "specialty limousine market"--that is, a market for limousines stretched beyond QVM and CMC limits. He acknowledged **[**14]** that QVM- and CMC-compliant limousines and specialty limousines are substitute products and manufacturers of each type "do compete at some level," but he asserted that they are not "close substitutes." Scoggins offered no empirical support for this market definition. Therefore, the district court found his testimony inadmissible under *Rule 702*.

The district court also noted that Craftsmen's opposition to summary judgment depended upon the admissibility of Scoggins's testimony. It therefore granted the motions of Ford and American Coach for summary judgment in the case.

II. DISCUSSION

Craftsmen appeals, arguing that the district court erred in excluding Scoggins's opinion under *Rule 702* and in granting summary judgment in favor of Ford and American Coach. The issues are closely related, and we need not address them both. The reasons for the district court's determination that Scoggins's opinion would not assist the trier of fact, if valid, would be the same reasons that his opinion cannot save Craftsmen from an adverse summary judgment ruling in this case. Therefore, we review the question of whether summary judgment was appropriate in light of the record as a whole, including **[**15]** Scoggins's opinion.

A. General Principles of Law

HN1[] We review a grant of summary judgment de novo, viewing the record in the light most favorable to the non-movant. *Bathke, 64 F.3d at 343*. Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. To avoid summary judgment, a non-moving party must allege specific facts supported by evidence sufficient to allow a reasonable jury to return a verdict in its favor; a mere "scintilla of evidence" will not suffice. *Rolscreen Co. v. Pella Prods. of St. Louis, Inc., 64 F.3d 1202, 1211 (8th Cir. 1995)*.

HN2[] The Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce." *15 U.S.C. § 1*. The Supreme Court has long accepted that Congress did not intend a literal interpretation of that language, and it has read the law as prohibiting only those practices that "impose[] an unreasonable restraint on competition." *Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 342-43, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982).* **[**16]** The burden of proving the unreasonableness of a restraint lies with the plaintiff. *United States v. Arnold, Schwinn & Co., 388 U.S. 365, 374 n.5, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967)*, *overruled on other grounds by* *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*; *Paschall v. Kansas City Star Co., 727 F.2d 692, 701-02 (8th Cir. 1984)*; *United States v. Empire Gas Corp., 537 F.2d 296, 308 (8th Cir. 1976)*.

HN3[] **[*387]** Some antitrust plaintiffs face a lighter burden than others, depending upon the nature of the restraint at issue. Plaintiffs challenging restraints subject to the "per se rule" enjoy the lightest burden of proving unreasonableness. Judicial experience has proven certain types of restraints to be so strongly linked with anti-competitive activity, and their economic impact so immediately obvious, that we presume unreasonableness and deem them unlawful restraints of trade per se. *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*; *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 100, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*. When challenging such **[**17]** naked restraints, the plaintiff meets its burden of proving the unreasonableness of the restraint merely by proving the existence and substance of the restraint itself. See *Nat'l Soc. of Prof. Eng'rs v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)* ("In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality--they are 'illegal *per se*.'"). The district court applied this approach to the advertising restrictions at issue here prior to our opinion in Craftsmen I.

HN4[] In a limited number of other cases, the restraint appears pernicious enough on its face to fall within the category of restraints that are unlawful per se, but judicial inexperience with the particular type of restraint warrants a "quick look" at the relevant market and the defendant's alleged justifications for imposing the restraint. *Craftsmen I, 363 F.3d at 773*; see also *Calif. Dental Ass'n v. FTC, 526 U.S. 756, 769-71, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)* (acknowledging the existence of the "quick look" mode of analysis). This amounts to an abbreviated **[**18]** analysis of whether the restraint was unreasonable (though not as abbreviated as an outright condemnation of the restraint as unlawful per se).

HN5[] These two standards are exceptional, however, and their application is reserved for the most patently anticompetitive restraints. Given the danger of applying those truncated modes of analysis too freely, *State Oil Co., 522 U.S. at 18*, "most antitrust claims are analyzed under a 'rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *Id. at 10*.

HN6[] Due to the number of variables involved, including the type of restraint, the nature of the market at issue, and the level of judicial experience with a particular type of restraint in any given case, determining which mode of analysis is appropriate rarely allows for the mechanical application of precedent:

> [T]here is generally no categorical line to be drawn **[**19]** between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an [appropriate inquiry given the facts of] the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.

Calif. Dental Ass'n, 526 U.S. at 780-81.

[*388] B. The Scope of Craftsmen I

In Craftsmen I, we held that the district court erred in applying a per se mode of analysis to the restraint at issue in this case. We noted that the restraint appeared to be an attempt to alter the competitive field in the limousine industry: "[i]n essence, defendants' alleged restraint was an attempt to force Craftsmen to either comply with QVM guidelines or stop selling limousines." *Craftsmen I, 363 F.3d at 774*. We also found, however, that the defendants' plausible safety justifications for pursuing the restrictive **[**20]** advertising standards could have procompetitive effects and therefore an abbreviated analysis of its anticompetitive impact was inappropriate. *Id. at 776*. This decision followed a line of recent ***HN7***[] Supreme Court precedent holding either the per se or "quick look" modes of analysis improper when the alleged substance of the restraint and any purported justifications for it did not create the obvious impression that the restraint would be unreasonably anticompetitive. See, e.g., *Calif. Dental Ass'n, 526 U.S. at 781*; *State Oil Co., 522 U.S. at 19, 21-22*. Under that reasoning, we held in Craftsmen I that the experience of the market and the type of restraint at issue in this case were not so clearly anticompetitive that the district court could properly substitute an abbreviated analysis "in place of a more sedulous one." *Calif. Dental Ass'n, 526 U.S. at 781*.

Therefore, on remand, Craftsmen had the burden of proving the unreasonableness of the restraint given "a variety of factors" under the rule of reason, *State Oil Co., 522 U.S. at 10*; it would not enjoy a presumption of unreasonableness based solely **[**21]** upon the existence of the restraint itself. ***HN8***[] This burden begins with the task of properly defining the relevant market. *Double D Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554, 560 (8th Cir. 1998)*. The plaintiff must define both the relevant product market, which includes "all reasonably interchangeable products," and the relevant geographic market, which consists of the "area in which consumers can practically seek alternative sources of the product." *Id.* After properly defining the market, the rule of reason also requires the plaintiff to show that the restraint has "detrimental effects" upon the competitiveness of the market. *FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)* (quotation omitted).

HN9[] A plaintiff may satisfy the "detrimental effects" element of its burden in one of two ways. First, a plaintiff may put forth evidence of "actual, sustained adverse effects on competition" in the relevant market. *Id. at 461*. If the plaintiff cannot submit such evidence, it is relegated to the more challenging course of proving detrimental effects on competition by making "an inquiry into market power **[**22]** and market structure designed to assess the [restraint]'s actual effect." *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. A defendant or cartel of defendants has market power if it has the ability "'to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded.'" *Midwestern Mach. Co. v. Nw. Airlines, Inc., 392 F.3d 265, 274 (8th Cir. 2004)* (quoting William A. Landes & Richard A. Posner, Market Power in Antitrust Cases, 94 Harv. L. Rev. 937, 937 (1981)).

HN10[] Only after satisfying the above requirements does the burden shift to the defendant to "justify its conduct by reference to rational, procompetitive economic principles." *Flegel v. Christian Hosp., Ne.-Nw., 4 F.3d 682, 688 & n.4 (8th* ***[*389]*** *Cir. 1993)* (quotation omitted). If the defendant can do so, the burden returns to the plaintiff to show that the defendant can achieve the same rational, procompetitive ends through means less likely to harm overall competition in the market. *Id. at 688*. If so, the court will ultimately balance **[**23]** "'the harms and benefits to determine if the behavior is reasonable'" on the whole. Id. (quoting *Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1413 (9th Cir. 1991))*.

Contrary to Craftsmen's assertions on the present appeal, none of the elements of this burden were addressed or decided in Craftsmen I. Indeed, we could not have decided them, because Craftsmen's case had never gone before a factfinder charged with deciding the dispute under the rule of reason approach. Craftsmen I did discuss the procompetitive justifications of Ford and American Coach, but only insofar as they related to the question of which analysis to apply to the case: per se, "quick look," or rule of reason. We did not purport to actually apply the proper approach (the rule of reason), and we did not address the procompetitive justifications in that context.

C. The Propriety of Summary Judgment on Remand

For the following reasons, we hold that Craftsmen failed to produce evidence sufficient to allow a reasonable jury to conclude that it satisfied its burden of proof as defined above. Therefore, the district court did not err in granting summary judgment to Ford and American Coach.

1. **[**24]** Market Definition

The parties do not appear to dispute the relevant geographic market in this case, but they contest the relevant product market. Ford and American Coach claim that the relevant product market consists of the market for limousines generally, while Craftsmen argues for the existence and relevance of a smaller sub-market for longer specialty limousines. The district court found Craftsmen's definition unavailing, and so do we. Craftsmen's attempt to define the relevant product market as the "specialty limousine market" lacks any evidentiary support aside from Scoggins's bald assertions and is inconsistent with Craftsmen's overall claim. As such, no reasonable juror could find that the specialty limousine market is the relevant product market for this antitrust claim.

Craftsmen defines the specialty limousine market as the market for limousines stretched longer than QVM standards (120 inches) or CMC standards (130 inches) during the time frame at issue. Under that definition, a Lincoln Town Car stretched by 85 inches competes in the same product market as one stretched by 120 inches, while a Town Car stretched by 120 inches competes in a separate market from one stretched **[**25]** by 121 inches. Further, a Town Car stretched by 85 inches would compete in the same market as a Cadillac DeVille stretched by 130 inches, while a Town Car stretched by 125 inches would compete in a separate market than a DeVille stretched by the exact same length. Any reasonable juror would find it implausible that consumers would make such arbitrary and illogical distinctions when buying limousines, and Craftsmen presented no evidence that consumers act in such a manner. Put simply, no reasonable juror could find that Town Cars stretched by 120 and 121 inches, respectively, were not "reasonably interchangeable products," *Double D Spotting Serv., Inc., 136 F.3d at 560*, particularly given that Craftsmen maintains that Town Cars stretched by 120 and 85 inches are reasonably interchangeable.

[*390] Even if Craftsmen had sufficient evidence to support such an apparently arbitrary definition of the product market, we note that it would ultimately undermine Craftsmen's claim. The restrictions at issue arguably aided QVM and CMC members to the general detriment of Craftsmen and all other specialty limousine builders. Assuming those facts to be true, the restrictions certainly harmed **[**26]** some of the *competitors* within the specialty limousine market. There is no evidence, however, that the restrictions harmed *competition* within that market. See *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)* (stating that, when the rule of reason applies, a plaintiff "must allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself"). From the record, it does not appear that the restrictions gave any particular competitor or cartel of competitors within the specialty limousine industry the power to profitably raise prices above or restrict output below a competitive level. To the extent they did, Craftsmen was a likely beneficiary of any anti-competitive environment within the specialty limousine industry; the restrictions may have discouraged upstart coachbuilders from engaging in the process of building specialty limousines and clearly barred QVM and CMC members from serving that allegedly separate market. Thus, the restrictions insulated well-established coachbuilders like Craftsmen from competition in the specialty limousine market. In short, if the restrictions created **[**27]** the risk of an anti-competitive environment *within* some discrete market for specialty limousines, that risk did not stand to harm Craftsmen. Indeed, under the market definition Craftsmen proposes, Craftsmen would have been the beneficiary--not the victim--of reduced competition and artificially high prices within that market.

2. Detrimental Effects

Even though we hold that no reasonable jury could find that Craftsmen properly defined the market as the "specialty limousine market," Craftsmen contends that it presented sufficient evidence of an antitrust violation to avoid summary judgment regardless of whether the relevant product market is defined as the market for specialty limousines or the market for limousines generally. Therefore, we proceed to examine whether Craftsmen presented evidence sufficient for a jury to find detrimental effects on competition in the correct product market--the market for limousines generally.

We first look to whether Craftsmen submitted evidence of "actual, sustained adverse effects on competition" in the general market for limousines. *Ind. Fed'n of Dentists, 476 U.S. at 461*. Craftsmen points to no evidence that such effects occurred **[**28]** in the limousine industry as a result of the restrictions. Craftsmen did not show an increase in limousine prices above the competitive level during that time period, nor a decrease in the total number of competitors, nor a reduction in overall limousine output, nor some other economic indicator that the coachbuilding industry as a whole suffered anticompetitive consequences due to the advertising restrictions. The mere fact that the restrictions may have reduced demand for specialty limousines relative to their shorter counterparts does not, without more, show an actual, sustained adverse effect on competition in the market as a whole. Any action that a profit-seeking business takes could increase its market share relative to some other segment of that market; indeed, most rational businesses actively take such steps at every available opportunity. Such steps impact competitors, but that alone does not prove **[*391]** an adverse impact upon the competitive process.

There may have been other conceivable avenues of proving detrimental effects upon the competitive process in this case. For example, Craftsmen may have been able to show that the restrictions stifled industry research and development **[**29]** by effectively forcing innovative coachbuilders to perform costly independent safety testing of vehicles that did not comply with QVM or CMC guidelines. If Craftsmen offered more than a scintilla of evidence that the restrictions were so detrimental to the survival of non-QVM/CMC participants and independent testing so cost-prohibitive that the defendants created an artificial and illegitimately high barrier to competition by means of innovation, then Craftsmen's case might survive summary judgment. Cf. *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 495-98, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)* (describing a jury verdict for the plaintiff on facts similar to those hypothesized above); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 659-60, 81 S. Ct. 365, 5 L. Ed. 2d 358 (1961)* (per curiam) (reversing the dismissal of the plaintiff's antitrust claim based upon allegations that the defendants refused to offer their seal of approval for the plaintiff's product and effectively forced it from the market for anticompetitive reasons). Craftsmen does not direct our attention to any such evidence, and facts that do appear in the record would not permit **[**30]** a reasonable jury to find that the advertising restraints had "actual, sustained adverse effects on competition" of the type hypothesized above. *Ind. Fed'n of Dentists, 476 U.S. at 461*.

Because Craftsmen cannot directly prove actual adverse effects on competition during the years at issue, we turn to the question of whether it has presented evidence to prove those effects indirectly through "an inquiry into market power and market structure." *Copperweld Corp., 467 U.S. at 768*. We find that Craftsmen did not submit evidence sufficient to satisfy its burden of proof under this alternative means of proving the detrimental, anticompetitive effects of the advertising restrictions, and therefore it cannot avoid summary judgment.

First, it is clear that Ford and American Coach, acting independently, do not wield power in the limousine market; that is, neither one has the ability "to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded." *Midwestern Mach. Co., 392 F.3d at 274* (quotation omitted). Ford sells motor vehicles, a tiny percentage of which are **[**31]** converted into limousines (as are a tiny percentage of vehicles sold by other car manufacturers). It does not sell limousines, and therefore it can individually affect the competitiveness of the limousine market only by unilaterally raising the prices of its pre-conversion vehicles or by entering into an agreement to sell a certain line of vehicles solely to a certain coachbuilder, thus making that coachbuilder the exclusive dealer of limousines converted from that particular base vehicle. The common-sense realities of the market show that Ford lacks the ability to profitably take either step. If Ford were to raise the prices of its motor vehicles generally above competitive levels, it would lose sales to competitors in the much larger market for off-the-lot vehicles, as well as the market for base vehicles to be converted into limousines. Ford also lacks the ability to profitably sell an existing line of vehicles exclusively to a particular coachbuilder, even if it made those sales at a price far above the competitive level. According to Scoggins, there were only 2,250 limousine conversions of any vehicle **[*392]** make in the United States in 1994. If Ford were, for example, to make its Lincoln **[**32]** Town Cars unavailable to the public and sell them exclusively to one coachbuilder, the loss in profits from sales to individuals and other businesses would obviously outweigh the marginal profits of making and selling far fewer Town Cars at a higher price. Craftsmen presents no evidence to contradict these apparent realities of the market.

American Coach does compete in the limousine industry, but the record reveals that it by no means dominates that market. It is merely one of many competitors engaged in the business of coachbuilding, and therefore any attempt to unilaterally increase its prices above competitive levels would be thwarted by consumer flight to American Coach's competitors.

Because neither Ford nor American Coach has the ability to wield market power on their own, we must assume that Craftsmen's theory of the case depends upon the concerted actions of Ford, GM, and the members of their QVM and CMC programs, including American Coach. Acting together, these businesses could conceivably exercise market power in the industry. If a broad cartel of QVM and CMC members agreed to collectively raise prices above competitive levels, the action could be profitable due in large **[**33]** part to advertising restrictions that would have made it more difficult for consumers to learn about competitively-priced alternatives to doing business with cartel members. In other words, through price-fixing and cutting off the means for non-members to compete effectively, the cartel could collectively act as a monopoly within the coachbuilding industry.

This theory, if proven, could support a finding of market power and an antitrust violation in this case. On the record before us, however, no reasonable jury could find such market power, particularly given the structure of the limousine market. Craftsmen's only evidence of market power is the fact that Ford, GM, and several QVM and CMC coachbuilders acted collectively through LIMO to pressure trade publications into restricting marketing opportunities for coachbuilders who did not belong to the QVM or CMC programs and did not perform independent crash testing. ***HN11***[] This proven ability to act collectively to exercise influence over trade publication advertising policies does not demonstrate an ability to act collectively "to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable **[**34]** and must be rescinded." *Midwestern Mach. Co., 392 F.3d at 274* (quotation omitted). We noted in Craftsmen I that Craftsmen had presented sufficient evidence to prove an agreement among the defendants to set advertising standards; it had not proven that such an agreement was unreasonably anticompetitive. We did not find that the agreement at issue, without more, was sufficient evidence of market power, and we do not make that finding now. We note that***HN12***[] demanding certain standards for advertising that exclude some competitors may make the exercise of market power more feasible, but such acts do not alone prove the possession of market power.

Craftsmen did not fill this evidentiary void on remand. The record offers no other evidence to show that these coachbuilders formed a cartel with the ability to collectively exercise market power. For example, there is no evidence that these coachbuilders exchanged price or output information or took some other step that would facilitate price-fixing among them. There is also no evidence that the structure of the coachbuilding market would allow for a well-disciplined cartel. Indeed, the record suggests that the market consists **[**35]** **[*393]** of a large number of small coachbuilding firms who engage in individually negotiated sales for customized products, facts that make the detection and punishment of firms that "cheat" on any price-fixing agreement difficult if not impossible. There appear to be low costs to entry into and exit from the market, and the minimum efficient scale within the industry appears to be fairly small; both facts weigh against the sustainability of any anticompetitive cartel because its membership would necessarily consist of a large number of firms who would face new and frequent price competition from upstart firms. For example, a small-scale cartel member selling vehicles to livery operators in St. Louis and Kansas City above the competitive price (per an agreement with the cartel) would be hard-pressed to remain faithful to that agreement if a new, non-cartel firm took advantage of the ease of entry into the limousine market and began marketing directly to those same livery operators through personal visits, phone calls, mailings, or advertisements in sources other than trade shows or the two major trade publications. Multiply this likely scenario many times over for the numerous small-scale **[**36]** firms in the industry, and it becomes clear that the structure of the limousine market during the years at issue in this case made the attainment and exercise of market power nearly impossible.

Finally, even if Craftsmen could show the feasibility of such a cartel that would have market power, Craftsmen has identified no motive for Ford to engage in such a conspiracy. Ford makes motor vehicles; it does not convert them into limousines. Any anticompetitive agreement among coachbuilders would likely reduce output in the limousine industry and therefore hurt Ford's sales of base vehicles without any apparent benefits to Ford. In sum, Craftsmen simply has not submitted sufficient evidence of the existence of some entity--whether an individual defendant or the defendants acting as a cartel--with the means to exercise market power in the limousine industry.

III. CONCLUSION

As we noted in Craftsmen I, the advertising restrictions in this case may be legitimately procompetitive insofar as they protect both consumers and the public image of the limousine market generally. *Craftsmen I, 363 F.3d at 774-75*. Thus, the restrictions could promote consumer confidence **[**37]** in the industry as a whole, as well as avoid a situation in which the entire market for limousines--safe and unsafe alike--would be dampened due to an accident involving a limousine made by a single coachbuilder that did not adequately test the safety of its vehicles.

At the same time, the circumstances surrounding the adoption of the restrictions in this case are somewhat troubling, and we wish to make clear that our decision today does not foreclose plaintiffs from succeeding in antitrust suits for similar restrictions in future cases. LIMO members may very well have had anticompetitive motives in mind when they sought the restrictions at issue here, and those restrictions may have had some detrimental effects upon competition in the limousine industry. Craftsmen simply did not offer proof sufficient for a reasonable jury to make such a finding. Therefore, we affirm the judgment of the district court.

Republic of Colom. v. Diageo N. Am. Inc.

United States District Court for the Eastern District of New York

June 19, 2007, Decided ; June 19, 2007, Filed

04-CV-4372 (NGG)

Reporter

531 F. Supp. 2d 365 *; 2007 U.S. Dist. LEXIS 44366 **

The REPUBLIC OF COLOMBIA, et al., Plaintiffs, v. DIAGEO NORTH AMERICA INC., et al., Defendants.

Subsequent History: Motion granted by *Republic of Colom. v. Diageo N. Am., Inc., 2007 U.S. Dist. LEXIS 66407 (E.D.N.Y., Sept. 7, 2007)*

Core Terms

enterprise, Defendants', liquor, Plaintiffs', money laundering, amended complaint, allegations, courts, taxes, money-laundering, laundering, sovereign, mail, narcotics, proceeds, cases, products, distributors, profits, damages, dollars, sales, smuggling, factors, parties, tax evasion, tax law, quotation, marks, revenue law

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

With respect to a defendant's *Fed. R. Civ. P. 12(b)(6)* motion, the court must accept all factual allegations in plaintiffs' pleadings and must draw inferences from those allegations in the light most favorable to plaintiffs.

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

HN2[] **Defenses, Demurrers & Objections, Motions to Dismiss**

With respect to a defendant's *Fed. R. Civ. P. 12(b)(1)* motion, the court must accept all undisputed factual allegations as true and draw all reasonable inferences in the light most favorable to plaintiffs.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Evidence > Burdens of Proof > Preponderance of Evidence

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

HN3[] Jurisdiction, Subject Matter Jurisdiction

It is well ingrained in the law that subject-matter jurisdiction can be called into question either by challenging the sufficiency of the allegation or by challenging the accuracy of the jurisdictional facts alleged. If the defendant challenges only the legal sufficiency of the plaintiff's jurisdictional allegations, the court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff. If the parties present factual evidence that is relevant to the jurisdictional question, the court may consider such evidence. The district court must consider facts outside the pleadings if resolution of a proffered factual issue may result in the dismissal of the complaint for want of jurisdiction. The party asserting subject-matter jurisdiction bears the burden of proving by a preponderance of the evidence that jurisdiction exists.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN4[] Jurisdiction, Subject Matter Jurisdiction

The basic statutory grants of federal-court subject-matter jurisdiction are contained in *28 U.S.C.S. §§ 1331* and *1332*, and other statutory requirements for recovery should not be treated as jurisdictional unless the Legislature clearly states that a threshold limitation on a statute's scope shall be jurisdictional.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

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

HN5[] Jurisdiction, Subject Matter Jurisdiction

If the defendant challenges only the legal sufficiency of the plaintiff's jurisdictional allegations, the court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff.

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN6[] Motions to Dismiss, Failure to State Claim

Plaintiffs must allege enough facts to state a claim to relief that is plausible on its face. If they have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN7[] Complaints, Requirements for Complaint

The United States Court of Appeals for the Second Circuit is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible "plausibility standard," which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible.

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN8[] Motions to Dismiss, Failure to State Claim

The district court must accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN9[] Racketeer Influenced & Corrupt Organizations, Claims

Racketeering Influenced and Corrupt Organizations Act (RICO) claims must be reviewed with appreciation of the extreme sanctions it provides so that actions traditionally brought in state courts do not gain access to treble damages and attorneys fees in federal court simply because they are cast in terms of RICO violations.

International Law > Individuals & Sovereign States > General Overview

Tax Law > International Taxes > General Overview

International Law > Authority to Regulate > International Regulation of Taxation

HN10[] International Law, Individuals & Sovereign States

The United States Court of Appeals for the Second Circuit recently explained that the revenue rule is a longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns. The revenue rule was originally created by eighteenth-century English courts as what amounted to a subsidy for British trade: English courts refused to enforce foreign customs laws that would have had the effect of interfering with or diminishing British trade. More recently, federal courts have found that the revenue rule should continue to be applied to serve separation of powers and sovereignty concerns.

International Law > Authority to Regulate > International Regulation of Taxation

Tax Law > International Taxes > General Overview

HN11[] Authority to Regulate, International Regulation of Taxation

A court will not recognize those liabilities arising in a foreign state, if they run counter to the "settled public policy" of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state. To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.

International Law > Authority to Regulate > International Regulation of Taxation

Tax Law > International Taxes > General Overview

HN12[] Authority to Regulate, International Regulation of Taxation

The revenue rule is implicated whenever the substance of the claim is, either directly or indirectly, one for tax revenues, such that the whole object of the suit is to collect tax for a foreign revenue, and that this will be the sole result of a decision in favour of the plaintiff. What matters is not the form of the action, but the substance of the claim.

International Law > Authority to Regulate > International Regulation of Taxation

Tax Law > International Taxes > General Overview

HN13[] Authority to Regulate, International Regulation of Taxation

A suit directly seeks to enforce foreign tax laws when a judgment in favor of the plaintiffs would require the defendants to reimburse them for lost tax revenues.

International Law > ... > Exceptions > Commercial Activities > General Overview

HN14[] Exceptions, Commercial Activities

Under the Foreign Sovereign Immunities Act, a foreign sovereign is subject to jurisdiction in federal courts with respect to actions arising out of a commercial activity carried on by the foreign state, provided that there is some connection between the commercial activity and the United States.

International Law > ... > Exceptions > Commercial Activities > General Overview

Tax Law > International Taxes > General Overview

International Law > Authority to Regulate > International Regulation of Taxation

HN15[] Exceptions, Commercial Activities

Because (1) claims by a foreign sovereign for damages sustained in its capacity as a commercial actor do not raise the same policy concerns as claims brought by a foreign sovereign in its sovereign capacity and (2) foreign sovereigns are subject to suit in the federal courts for claims arising out of commercial actions, claims brought by a foreign sovereign in a commercial capacity do not constitute the kind of direct enforcement of a foreign revenue law that is barred by the revenue rule.

International Law > Authority to Regulate > International Regulation of Taxation

Tax Law > International Taxes > General Overview

HN16[] Authority to Regulate, International Regulation of Taxation

The revenue rule bars claims for costs resulting from enforcement of foreign tax laws because such claims seek indirectly to enforce the laws.

International Law > Authority to Regulate > International Regulation of Taxation

Tax Law > International Taxes > General Overview

HN17[] **Authority to Regulate, International Regulation of Taxation**

Any action in which the court will have to pass on the validity of foreign revenue laws and their applicability to the claims at bar constitutes enforcing foreign revenue laws, and thereby triggers the revenue rule.

International Law > Authority to Regulate > International Regulation of Taxation

Tax Law > International Taxes > General Overview

HN18[] **Authority to Regulate, International Regulation of Taxation**

There is a continuum along which a claim will require a court to consider or "pass on" a foreign tax law. At the least problematic end of the continuum is the mere recognition of a foreign tax law. At the next point along the continuum, a court must apply such a foreign law. Next, a claim might require a court to rule on the validity of a foreign tax law. Finally, a claim might require a court to explicitly enforce a foreign revenue law. The United States Court of Appeals for the Second Circuit cases make clear that the revenue rule clearly bars explicit enforcement. However, whether lesser forms of consideration of a foreign revenue law--recognition, application, and determination of validity--are permissible depends on the extent to which the consideration of the foreign revenue law raises separation of powers and sovereignty concerns.

International Law > Authority to Regulate > International Regulation of Taxation

Tax Law > International Taxes > General Overview

HN19[] **Authority to Regulate, International Regulation of Taxation**

In the typical case where a court will have to rule on the validity of a foreign tax law, the court will have to determine whether the law is consistent with its own public policy. The revenue rule bars such a determination in most, if not all, circumstances.

International Law > Authority to Regulate > International Regulation of Taxation

Tax Law > International Taxes > General Overview

HN20[] **Authority to Regulate, International Regulation of Taxation**

The approach to the revenue rule--allowing a federal court to assess the policy implications of considering, applying, and determining the validity of a foreign revenue law before determining whether a claim that triggers such consideration is barred by the revenue rule--is most consistent with the United States Court of Appeals for the Second Circuit's recent revenue law jurisprudence.

International Law > Authority to Regulate > International Regulation of Taxation

Tax Law > International Taxes > General Overview

HN21[] Authority to Regulate, International Regulation of Taxation

Determining whether a claim involves proscribed indirect enforcement of a revenue law requires an analysis of the facts of the case and policy concerns behind the revenue rule.

International Law > Authority to Regulate > International Regulation of Taxation

Tax Law > International Taxes > General Overview

HN22[] Authority to Regulate, International Regulation of Taxation

Indirect enforcement of the revenue rule occurs when a foreign state seeks a remedy that would give extraterritorial effect to its tax laws; for instance, a suit seeking damages based on law enforcement costs is an attempt to shift the cost of enforcing the tax laws onto the defendants, and would therefore require the court indirectly to enforce the tax laws.

International Law > Authority to Regulate > International Regulation of Taxation

Tax Law > International Taxes > General Overview

HN23[] Authority to Regulate, International Regulation of Taxation

The revenue rule is not absolute. Even if the substance of the claim invokes foreign tax laws, the revenue rule will not be triggered where the sovereignty and extraterritoriality concerns that inform the rule's application are not present.

International Law > Authority to Regulate > International Regulation of Taxation

Tax Law > International Taxes > General Overview

HN24[] Authority to Regulate, International Regulation of Taxation

The revenue rule is designed to address two concerns: first, that policy complications and embarrassment may follow when one nation's courts analyze the validity of another nation's tax laws; and second, that the executive branch, not the judicial branch, should decide when our nation will aid others in enforcing their tax laws. These twin concerns for sovereignty and separation of powers are important to the revenue rule analysis, because they imply certain exceptions to the rule.

International Law > Authority to Regulate > International Regulation of Taxation

Tax Law > International Taxes > General Overview

HN25[] Authority to Regulate, International Regulation of Taxation

The United States Court of Appeals for the Eleventh Circuit considers the policy implications of a claim in determining whether it is barred by the revenue rule.

International Law > Authority to Regulate > International Regulation of Taxation

Tax Law > International Taxes > General Overview

HN26[] Authority to Regulate, International Regulation of Taxation

Determining whether a claim for damages that requires a court to recognize, apply, or rule on the validity of a foreign sovereign's tax laws constitutes the kind of indirect enforcement that is proscribed by the revenue rule requires both an analysis of the facts of the case and the policy concerns motivating the revenue rule.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

International Law > Authority to Regulate > International Regulation of Taxation

Tax Law > International Taxes > General Overview

HN27[] Racketeer Influenced & Corrupt Organizations, Claims

Racketeering Influenced and Corrupt Organizations Act claims seeking lost taxes are barred by revenue rule.

International Law > General Overview

HN28[] International Law

A sovereign suffers harms in its sovereign capacity when its injury concerns activity undertaken by the government by virtue of its sovereign authority.

International Law > General Overview

HN29[] International Law

Manufacturing and/or selling liquor is not within the class of acts that are "jure imperii," that is, that are expressions of a foreign's sovereign's will or are carried out by virtue of that sovereign authority. Sales of liquor in a national or international market can be made by a government agency authorized to sell liquor by the government's constitution, a private entity that is authorized by a law permitting (or the absence of a law prohibiting) any private individual to sell liquor, a private entity that was granted corporate status by the sovereign, or a private entity that was specially licensed by the sovereign to sell liquor. Although the regulation of liquor distributing and sale is clearly a sovereign act, a sovereign's participation in a liquor manufacturing and distribution market is a purely commercial act. The fact that the sovereign may have decided to enter the liquor business itself as opposed to allowing or licensing others to enter the business in no way transforms the sale of liquor into a sovereign act.

International Law > ... > Exceptions > Commercial Activities > General Overview

HN30[] Exceptions, Commercial Activities

How the profits of a business are used is irrelevant in determining whether the act is an inherently sovereign act or an inherently commercial act.

International Law > Authority to Regulate > International Regulation of Taxation

Tax Law > International Taxes > General Overview

HN31[] **Authority to Regulate, International Regulation of Taxation**

An action seeking to recover lost revenues and profits plaintiffs suffered in their commercial capacity as participants in the liquor manufacturing and distributing businesses does not seek the kind of direct enforcement of a foreign revenue law that is prohibited by the revenue rule.

International Law > Authority to Regulate > International Regulation of Taxation

Tax Law > International Taxes > General Overview

HN32[] **Authority to Regulate, International Regulation of Taxation**

Indirect enforcement of the revenue rule occurs when a foreign state seeks a remedy that would give extraterritorial effect to its tax laws; for instance, a suit seeking damages based on law enforcement costs is an attempt to shift the cost of enforcing the tax laws onto the defendants, and would therefore require the court indirectly to enforce the tax laws.

Governments > Courts > Authority to Adjudicate

Tax Law > International Taxes > General Overview

HN33[] **Courts, Authority to Adjudicate**

A court will not recognize those liabilities arising in a foreign state, if they run counter to the settled public policy of its own. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.

International Law > Authority to Regulate > General Overview

HN34[] **International Law, Authority to Regulate**

The penal law rule provides that federal courts do not possess jurisdiction over an action to enforce the penal laws of a sovereign state: By the law of England and of the United States the penal laws of a country do not reach beyond its own territory except when extended by express treaty or statute to offenses committed abroad by its own citizens; and they must be administered in its own courts only, and cannot be enforced by the courts of another country.

International Law > Authority to Regulate > General Overview

HN35[] **International Law, Authority to Regulate**

The rule that the courts of no country execute the penal laws of another applies, not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties.

International Law > Authority to Regulate > General Overview

HN36[] **International Law, Authority to Regulate**

Nothing about the penal law rule prohibits foreign sovereigns from bringing a civil cause of action that is not penal in nature: A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in the courts.

Governments > Legislation > Types of Statutes

HN37[] **Legislation, Types of Statutes**

The United States Supreme Court announced the standard for determining whether an action is one for violation of a "civil" wrong as opposed to one to enforce a "penal" law. The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual. Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals and are thereupon frequently termed "civil injuries;" the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and are distinguished by the harsher appellation of crimes and misdemeanors.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN38[] **Conflict of Law, Forum Selection**

The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. The decision as to whether to dismiss a case on forum non conveniens grounds is trusted to the sound discretion of the trial court. The United States Court of Appeals for the Second Circuit has explained that district courts should follow a three-step process when exercising this discretion: At step one, a court determines the degree of deference properly accorded the plaintiff's choice of forum. At step two, it considers whether the alternative forum proposed by the defendants is adequate to adjudicate the parties' dispute. Finally, at step three, a court balances the private and public interests implicated in the choice of forum.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN39[] **Conflict of Law, Forum Selection**

Step one in considering whether to dismiss a case on forum non conveniens grounds requires the court to determine what degree of deference should be afforded to the plaintiff's choice of forum. When a plaintiff selects her home as a forum, the plaintiff should be given "great deference," but when a foreign resident selects a United States forum, the plaintiff is entitled to "less deference." In order to determine how much deference a plaintiff should be accorded, the court must determine the extent to which the plaintiff's choice of forum was based on legitimate convenience concerns and to what extent the choice constitutes mere forum shopping.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN40[] **Conflict of Law, Forum Selection**

In considering whether to dismiss a case on forum non conveniens grounds the more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice. Stated differently, the greater the plaintiff's or the lawsuit's bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for forum non conveniens. Thus, factors that argue against forum non conveniens dismissal include the convenience of the plaintiff's residence in relation to the chosen forum, the availability of witnesses or evidence to the forum district, the defendant's amenability to suit in the forum district, the availability of appropriate legal assistance, and other reasons relating to convenience or expense.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN41[] **Conflict of Law, Forum Selection**

In considering whether to dismiss a case on forum non conveniens grounds, the more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons--such as attempts to win a tactical advantage resulting form local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum--the less deference the plaintiff's choice commands and, consequently, the easier it becomes for the defendant to succeed on a forum non conveniens motion by showing that convenience would be better served by litigating in another country's courts.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN42[] **Conflict of Law, Forum Selection**

At step two in considering whether to dismiss a case on forum non conveniens grounds , the plaintiff bears the burden of establishing that an adequate alternative forum exists. An alternative forum is adequate if the defendants are amendable to service of process there, and if it permits litigation of the subject matter of the dispute.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN43[] **Conflict of Law, Forum Selection**

In considering whether to dismiss a case on forum non conveniens grounds, in the event the court determines that an adequate alternative forum exists, the court proceeds to step three, which requires the court to balance two sets of factors to determine which forum is best suited to adjudicate the case. The first set of factors are the "private interest" factors, which are designed to assess which forum is most convenient for the parties: the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN44[] **Conflict of Law, Forum Selection**

In considering whether to dismiss a case on forum non conveniens grounds, in making the private interest analysis, the court should focus on the precise issues that are likely to be actually tried. In a suit alleging negligence, for example, the court might reach different results depending on whether the alleged negligence lay in the conduct of actors at the scene of the accident, or in the design or manufacture of equipment at a plant distant from the scene of the accident.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN45[] **Conflict of Law, Forum Selection**

In considering whether to dismiss a case on forum non conveniens grounds, the court must also consider the following public interest factors: Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN46[] **Conflict of Law, Forum Selection**

A plaintiff's choice to initiate suit in the defendant's home forum--as opposed to any other where the defendant is also amenable to suit--only merits heightened deference to the extent that the plaintiff and the case possess bona fide connections to, and convenience factors favor, that forum.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN47[] **Conflict of Law, Forum Selection**

In considering whether to dismiss a case on forum non conveniens grounds, where Colombian courts have subject-matter jurisdiction over a matter and personal jurisdiction over the parties to a dispute, the Colombian courts have the procedures required to constitute an adequate alternative forum.

Civil Procedure > ... > Discovery > Methods of Discovery > Foreign Discovery

HN48[] **Methods of Discovery, Foreign Discovery**

Pursuant to *28 U.S.C.S. § 1782*, United States courts can compel third-party witnesses to a proceeding before a foreign or international tribunal.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN49[] **Conflict of Law, Forum Selection**

In considering whether to dismiss a case on forum non conveniens grounds, while the inability to implead a third party is a factor that weighs in defendant's favor, it is not conclusive and courts have refused to dismiss actions on such grounds.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN50[] **Conflict of Law, Forum Selection**

In considering whether to dismiss a case on forum non conveniens grounds, a defendant need not submit affidavits identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum but the defendant must provide enough information to enable the district court to balance the parties' interests.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN51[] **Conflict of Law, Forum Selection**

In considering whether to dismiss a case on forum non conveniens grounds, there is a local interest in having localized controversies decided at home. Of course, claims arising out of the alleged international money-laundering enterprise are not localized controversies.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

HN52[] **Racketeer Influenced & Corrupt Organizations, Claims**

In considering whether to dismiss a case on forum non conveniens grounds, public interest ordinarily favors the enforcement of the federal law, such as the Racketeering Influenced and Corrupt Organizations Act statutes, in the United States courts.

International Law > Dispute Resolution > Comity Doctrine > General Overview

HN53[] **Dispute Resolution, Comity Doctrine**

International comity is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience. Whatever its precise contours, international comity is clearly concerned with maintaining amicable working relationships between nations, a shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards. The doctrine of international comity provides that, in certain circumstances, a federal court will (1) recognize or provide res judicata effect to foreign judgments and/or (2) dismiss a case before it in deference to a parallel action pending in a foreign jurisdiction.

International Law > Dispute Resolution > Comity Doctrine > General Overview

HN54[] **Dispute Resolution, Comity Doctrine**

Ordinarily, parallel proceedings in a foreign jurisdiction do not warrant dismissal: The mere existence of parallel foreign proceedings does not negate the district courts virtually unflagging obligation to exercise the jurisdiction given them. In fact, "exceptional circumstances" must exist in order to warrant dismissal in deference to a foreign action.

International Law > ... > Comity Doctrine > Comity Doctrine Procedures > General Overview

HN55[] **Comity Doctrine, Comity Doctrine Procedures**

The United States Court of Appeals for the Second Circuit has described international comity's boundaries as "amorphous" and "fuzzy" and has declined to articulate a precise set of factors that district courts should consider in determining whether to dismiss an action in deference to an action pending in a foreign court. However, the Second Circuit has explained that in the context of parallel proceedings in a foreign court, a district court should be guided by the principles upon which international comity is based: the proper respect for litigation in and the courts of a sovereign nation, fairness to litigants, and judicial efficiency. Proper consideration of these principles will no doubt require an evaluation of various factors, such as the similarity of the parties, the similarity of the issues, the order in which the actions were filed, the adequacy of the alternative forum, the potential prejudice to either party, the convenience of the parties, the connection between the litigation and the United States, and the connection between the litigation and the foreign jurisdiction. This list is not exhaustive, and a district court should examine the totality of the circumstances, to determine whether the specific facts before it are sufficiently exceptional to justify abstention.

International Law > ... > Comity Doctrine > Comity Doctrine Procedures > General Overview

HN56[] **Comity Doctrine, Comity Doctrine Procedures**

In the context of international comity, for two actions to be considered parallel, the parties in the actions need not be the same, but they must be substantially the same, litigating substantially the same issues in both actions.

International Law > ... > Comity Doctrine > Comity Doctrine Procedures > General Overview

HN57[] **Comity Doctrine, Comity Doctrine Procedures**

Courts have found that two parties are "similar" for purposes of international comity when one party is a subsidiary of the other or one party has a substantial ownership interest in the other.

International Law > ... > Comity Doctrine > Comity Doctrine Procedures > General Overview

HN58[] **Comity Doctrine, Comity Doctrine Procedures**

The doctrine of international comity may require that a foreign pending action be parallel to the United States action in order to dismiss the case pending in federal court in deference to the pending foreign action.

International Law > ... > Comity Doctrine > Comity Doctrine Procedures > General Overview

HN59[] **Comity Doctrine, Comity Doctrine Procedures**

Assuming arguendo that a pending parallel foreign action is not necessary for dismissal under the doctrine of international comity, defendants must still show that exceptional circumstances justify dismissal. Circumstances that routinely exist in connection with parallel litigation cannot reasonably be considered exceptional circumstances. Additional circumstances must present--such as a foreign nation's interest in uniform bankruptcy proceedings--that outweigh the district court's general obligation to exercise its jurisdiction.

Civil Procedure > ... > Justiciability > Political Questions > General Overview

HN60[] **Justiciability, Political Questions**

The United States Supreme Court has identified those situations in which an issue is non-justiciable under the political question doctrine. Prominent on the surface of any case held to involve a political question is found (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Civil Procedure > ... > Justiciability > Political Questions > General Overview

HN61[] Justiciability, Political Questions

Because the nonjusticiability of political questions is primarily a function of the constitutional separation of powers the dominant consideration in any political question inquiry is whether there is a textually demonstrable constitutional commitment of the issue to a coordinate political department. Dismissal under the political question doctrine is inappropriate in the absence of an issue whose adjudication would likely result in improper judicial encroachment upon the foreign relations power committed to the coordinate political branches.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

International Law > Dispute Resolution > General Overview

HN62[] Private Actions, Racketeer Influenced & Corrupt Organizations

The Racketeering Influenced and Corrupt Organizations Act (RICO) statute does not speak to whether or under what circumstances it should be applied extraterritorially and, as a result, the court must ascertain whether Congress would have intended that federal courts should be concerned with specific international controversies. The ultimate inquiry is whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to foreign transactions rather than leave the problem to foreign countries. The United States Court of Appeals for the Second Circuit has, thus far, declined to determine the precise standard for determining whether a particular RICO claim has a sufficient connection to the United States. The Second Circuit has, however, applied the standards used in antitrust and securities cases to the civil RICO context.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

International Law > Dispute Resolution > General Overview

HN63[] Subject Matter Jurisdiction, Jurisdiction Over Actions

In the United States Court of Appeals for the Second Circuit, the territoriality requirement is met where either the effects or conduct tests is satisfied.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN64[] Racketeer Influenced & Corrupt Organizations, Claims

Under the Racketeering Influenced and Corrupt Organizations Act (RICO), an "enterprise" is any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. *18 U.S.C.S. § 1961(4)*. The United States Supreme Court has defined a RICO enterprise as a group of persons associated together for a common purpose of engaging in a course of conduct, the existence of which is proven by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The enterprise must be separate from the pattern of racketeering activity, and distinct from the person conducting the affairs of the enterprise.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN65[] **Racketeer Influenced & Corrupt Organizations, Claims**

Under the Racketeering Influenced and Corrupt Organizations Act, the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure. As a result, proof of racketeering activity may therefore be relied upon to establish the existence of an enterprise.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN66[] **Racketeer Influenced & Corrupt Organizations, Claims**

Under the Racketeering Influenced and Corrupt Organizations Act, an enterprise is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN67[] **Racketeer Influenced & Corrupt Organizations, Claims**

Under the Racketeering Influenced and Corrupt Organizations Act, in assessing whether an alleged enterprise has an ascertainable structure distinct from that inherent in a pattern of racketeering, it is appropriate to consider whether the enterprise would still exist were the predicate acts removed from the equation.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN68[] **Racketeer Influenced & Corrupt Organizations, Claims**

Under the Racketeering Influenced and Corrupt Organizations Act, for an association of individuals to constitute an enterprise, the individuals must share a common purpose to engage in a particular course of conduct and work together to achieve such purpose.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN69[] **Racketeer Influenced & Corrupt Organizations, Claims**

In order to plead a Racketeering Influenced and Corrupt Organizations Act (RICO) claim successfully, a plaintiff must allege that the defendant violated *18 U.S.C.S. § 1962(a)*, *(b)*, *(c)*, or *(d)*. *Section 1962(a)* provides that it shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in the acquisition of any interest in, or the establishment or operation of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. *18 U.S.C.S. § 1962(a)*. Under the plain language of this section, a violation of *§ 1962(a)* consists of investing income derived from a pattern of racketeering activity to acquire an interest in, establish, or operate an enterprise; the violation is not established by mere participation in predicate acts of racketeering. As a matter of law, reinvestment of racketeering income is insufficient to make out a cause of action under RICO.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN70[] **Racketeer Influenced & Corrupt Organizations, Claims**

18 U.S.C.S. § 1962(b) provides that an individual violates the Racketeering Influenced and Corrupt Organizations Act (RICO) when he acquires or maintains, directly or indirectly, any interest in or control of any RICO enterprise. In order to prevail under this section, the plaintiff must show an acquisition or maintenance injury separate and apart from the injury suffered as a result of the predicate acts of racketeering. The purpose of *§ 1962(b)* is to prevent proceeds from racketeering activities to be used to takeover a legitimate business.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN71[] **Racketeer Influenced & Corrupt Organizations, Claims**

In order to conduct or participate, directly or indirectly, in the conduct of a Racketeering Influenced and Corrupt Organizations Act (RICO) enterprise's affairs under *18 U.S.C.S. § 1962(c)*, one must have some part in directing those affairs. Of course, the word "participate" makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" makes clear that RICO liability is not limited to those with a formal position in the enterprise, but some part in directing the enterprise's affairs is required. Under the "operation or management" test, one is liable under RICO if he participated in the operation or management of the enterprise itself. Individuals participate in the operation or management of an enterprise when they serve as lower rung participants in the enterprise who are under the direction of upper management or are others associated with the enterprise who exert control over it as, for example, by bribery.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN72[] **Racketeer Influenced & Corrupt Organizations, Claims**

18 U.S.C.S. § 1962(d) makes it unlawful to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section. *18 U.S.C.S. § 1962(d)*. A Racketeering Influenced and Corrupt Organizations Act (RICO) conspiracy requires evidence that a defendant participated in the enterprise through a pattern of racketeering activity, or agreed to do so.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN73[] **Racketeer Influenced & Corrupt Organizations, Claims**

In order to state a claim under *18 U.S.C.S. § 1962(d)*, the complaint should state with specificity what the agreement was, who entered into the agreement, when the agreement commenced, and what actions were taken in furtherance of it. Conclusory allegations concerning the conspiracy are insufficient. Recently, in the analogous antitrust context, the United States Supreme Court held that stating a conspiracy claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN74[] **Racketeer Influenced & Corrupt Organizations, Claims**

Under the civil Racketeering Influenced and Corrupt Organizations Act (RICO) statute, which requires a plaintiff to establish that he was injured "by reason" of a RICO violation, *18 U.S.C.S. § 1964(c)*, plaintiffs must establish that their injuries were proximately caused by the alleged violation. Proximate cause reflects ideas of what justice demands, or of what is administratively possible or convenient and requires some direct relation between the injury asserted and the injurious conduct alleged.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN75[] **Racketeer Influenced & Corrupt Organizations, Claims**

In order to recover for a civil Racketeering Influenced and Corrupt Organizations Act (RICO) claim, the compensable injury flowing from a violation of RICO necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Torts > ... > Causation > Proximate Cause > General Overview

HN76[] **Racketeer Influenced & Corrupt Organizations, Claims**

The proximate cause element has a different meaning in the Racketeering Influenced and Corrupt Organizations Act context than it does in the common law context. At common law, so long as the plaintiff category is foreseeable, there is no requirement that the risk of injury to the plaintiff, and the risk of the harm that actually occurred, were what made the defendant's actions wrongful in the first place. With statutory claims, the issue is, instead, one of statutory intent: was the plaintiff (even though foreseeably injured) in the category the statute meant to protect, and was the harm that occurred (again, even if foreseeable), the "mischief" the statute sought to avoid.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN77[] **Racketeer Influenced & Corrupt Organizations, Claims**

When factors other than the defendant's fraud are an intervening direct cause of a plaintiff's injury, that same injury cannot be said to have occurred by reason of the defendant's actions. In certain cases, civil Racketeering Influenced and Corrupt Organizations Act claims are barred when it is difficult to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other independent factors such as poor business practices or plaintiff's failure to anticipate developments in the financial markets.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN78[] **Racketeer Influenced & Corrupt Organizations, Claims**

First, the less direct an injury is, the more difficult it becomes to determine what portion of the damages are attributable to the Racketeering Influenced and Corrupt Organizations Act (RICO) violation as distinct from other, independent, factors. Second, if recovery by indirectly injured plaintiffs were not barred, courts would be forced, in order to prevent multiple recovery, to develop complicated rules apportioning damages among groups of plaintiffs depending on how far each group was removed from the defendant's underlying RICO violation. Third, there was no need to permit indirectly injured plaintiffs to sue, as directly injured victims could be counted on to vindicate the aims of the RICO statute, and their recovery would fix the injury to those harmed as the result of the injury they suffered.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN79[] **Racketeer Influenced & Corrupt Organizations, Claims**

Congress has classified intranational and international money laundering as a predicate act that can give rise to Racketeering Influenced and Corrupt Organizations Act (RICO) liability. In doing so, Congress clearly created a private RICO cause of action predicated on money laundering.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN80[] **Racketeer Influenced & Corrupt Organizations, Claims**

In considering whether plaintiffs have pled proximate cause, the United States Court of Appeals for the Second Circuit requires a court to make the following determination: was the plaintiff (even though foreseeably injured) in the category the statute meant to protect, and was the harm that occurred (again, even if foreseeable), the "mischief" the statute sought to avoid?

Banking Law > ... > Racketeering > Money Laundering > Elements

HN81[] **Money Laundering, Elements**

18 U.S.C.S. § 1956 requires that: (1) the individual conducted a financial transaction in interstate commerce, (2) with knowledge that the property involved in the transaction represented some form of unlawful activity, (3) with the transaction in fact involving the proceeds of specified unlawful activity, (4) with the purpose, in whole or in part, of concealing or disguising the nature, the location, the source, the ownership or the control of the illegally acquired proceeds.

Banking Law > ... > Racketeering > Money Laundering > Elements

HN82[] **Money Laundering, Elements**

18 U.S.C.S. § 1957 requires that the defendant (1) knowingly engaged or attempted to engage in a monetary transaction involving criminally derived property, (2) with such property being valued at more than $ 10,000, and (3) with such money actually being derived from specific criminal activity.

Criminal Law & Procedure > ... > Racketeering > Money Laundering > General Overview

HN83[] **Racketeering, Money Laundering**

A money-laundering claim cannot be plead with wholly conclusory allegations.

Criminal Law & Procedure > ... > Racketeering > Travel Act > Elements

HN84[] **Travel Act, Elements**

In order to prove violation of the Travel Act, *18 U.S.C.S. § 1952* , the plaintiff must show (1) travel in or use of the mail or any facility of interstate or foreign commerce, (2) intent to facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and (3) performance of an additional act in furtherance of the specified unlawful activity.

Criminal Law & Procedure > ... > Racketeering > Travel Act > Elements

HN85[] **Travel Act, Elements**

The United States Court of Appeals for the Seventh Circuit has held that in a Travel Act prosecution, the interstate travel or use must relate significantly, rather than incidentally or minimally, to the illegal activity.

Criminal Law & Procedure > ... > Racketeering > Travel Act > Elements

HN86[] **Travel Act, Elements**

The United States Court of Appeals for the Ninth Circuit has held that the mens rea element of the Travel Act requires the plaintiff to show that the defendant in some significant manner associated himself with the criminal venture for the purpose of its advancement.

Criminal Law & Procedure > ... > Racketeering > Travel Act > Elements

HN87[] **Travel Act, Elements**

The United States Court of Appeals for the Fifth Circuit has held that in order to state a Travel Act claim on the basis of an illegal narcotics business, the plaintiff must allege a narcotics "business enterprise" within the meaning of *18 U.S.C.S. § 1952(b)*, which requires a continuous course of conduct as opposed to sporadic casual involvement in a proscribed activity.

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

HN88[] **Wire Fraud, Elements**

A complaint alleging mail and wire fraud must show (1) the existence of a scheme to defraud, (2) defendant's knowing or intentional participation in the scheme, and (3) the use of interstate mails or transmission facilities in furtherance of the scheme. In order to state a Racketeering Influenced and Corrupt Organizations Act claim on the basis of wire or mail fraud, the use of the mails need not be essential to the fraudulent scheme as long as the mailing is incident to an essential part of the scheme. Fraud requires a misrepresentation or concealment of material fact.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

Criminal Law & Procedure > ... > Fraud > Wire Fraud > General Overview

HN89[] **Heightened Pleading Requirements, Fraud Claims**

In most cases, mail and wire fraud predicate Racketeering Influenced and Corrupt Organizations Act (RICO) acts are subject to the heightened pleading requirements of *Fed. R. Civ. P. 9(b)*. Generally, in the RICO context, *Rule 9(b)* calls for the complaint to specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiffs contend the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements. The complaint must also identify the purpose of the mailing within the defendant's fraudulent scheme. The purpose of *Rule 9(b)* is threefold--it is designed to provide a defendant with fair notice of a plaintiff's claim, to safeguard a defendant's reputation from improvident charges of wrongdoing, and to protect a defendant against the institution of a strike suit.

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

HN90[] **Wire Fraud, Elements**

The United States Court of Appeals for the Second Circuit has held that lulling the victim of a fraud into believing that no fraud had been committed is a necessary step in executing the fraud and, thus, can serve as the basis for a mail or wire fraud claim. In fact, such "lulling" mailings are essential to the fraudulent schemes in cases where the frauds are not isolated and unrelated swindles.

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

HN91[] **Wire Fraud, Elements**

In the context of mail and wire fraud, innocent mailings--ones that contain no false information--may supply the mailing element. The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN92[] **Heightened Pleading Requirements, Fraud Claims**

In the typical case in which multiple defendants are accused of fraud, *Fed. R. Civ. P. 9(b)* requires at least some connection between the individual defendants and the fraud.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN93[] **Heightened Pleading Requirements, Fraud Claims**

Where individual investors bring fraud claims against the same defendants, courts have required the investors to specify which statements were made to which investors.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

HN94[] **Heightened Pleading Requirements, Fraud Claims**

In order to state a claim for wire or mail fraud, the plaintiff must allege intent to defraud. Because it would be unrealistic to expect a plaintiff to plead a defendant's actual state of mind, *Fed. R. Civ. P. 9(b)* permits plaintiffs to allege fraudulent intent generally while the circumstances amounting to fraud must be averred with particularity. However, the plaintiff must provide some minimal factual basis for conclusory allegations of scienter that give rise to a strong inference of fraudulent intent. When the plaintiff alleges a motive for committing fraud and a clear opportunity for doing so, the complaint gives rise to a sufficient inference of fraudulent intent.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Statute of Limitations

HN95[] **Racketeer Influenced & Corrupt Organizations, Statute of Limitations**

Racketeering Influenced and Corrupt Organizations Act (RICO) claims are subject to a four-year statute of limitations. Although the United States Supreme Court has yet to specify precisely when the RICO period of limitations begins to run, the United States Court of Appeals for the Second Circuit has held that it begins to run when the plaintiff discovers or should have discovered the RICO injury.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Statute of Limitations

HN96[] **Racketeer Influenced & Corrupt Organizations, Statute of Limitations**

In the context of the Racketeering Influenced and Corrupt Organizations Act, the United States Court of Appeals for the Second Circuit recognizes a "separate accrual" rule under which a new claim accrues and the four-year limitation period begins anew each time a plaintiff discovers or should have discovered a new and independent injury. At this time, the case law in the Second Circuit leaves some ambiguity as to precisely what constitutes a "new and independent injury."

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Statute of Limitations

HN97[] Racketeer Influenced & Corrupt Organizations, Statute of Limitations

In the context of the Racketeering Influenced and Corrupt Organizations Act, in some instances a continuing series of fraudulent transactions undertaken within a common scheme can produce multiple injuries which each have separate limitations periods. As a result, the United States Court of Appeals for the Second Circuit case law appears to have made the following clear: injuries suffered as a result of separate schemes are "new and independent;" injuries suffered as a result of the same scheme are sometimes but not always "new and independent."

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

HN98[] Motions to Dismiss, Failure to State Claim

Fed. R. Civ. P. 12(b) unequivocally states that if, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in *Rule 56*. This language has been read to mean that, on a *Rule 12(b)(6)* motion, courts, without converting the motion to one under *Fed. R. Civ. P. 56*, may consider documents attached to the complaint as an exhibit or incorporated in it by reference matters of which judicial notice may be taken, or documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit.

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

HN99[] Motions to Dismiss, Failure to State Claim

A finding that plaintiff has had notice of documents used by defendant in a *Fed. R. Civ. P. 12(b)(6)* motion is significant, since the problem that arises when a court reviews statements extraneous to a complaint generally is the lack of notice to the plaintiff that they may be so considered; it is for that reason--requiring notice so that the party against whom the motion to dismiss is made may respond--that *Fed. R. Civ. P. 12(b)(6)* motions are ordinarily converted into summary judgment motions. Where plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint the necessity of translating a *Rule 12(b)(6)* motion into one under *Rule 56* is largely dissipated.

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

HN100[] Reviewability of Lower Court Decisions, Preservation for Review

Arguments made for the first time in a reply brief need not be considered by a court.

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

HN101[] **Motions to Dismiss, Failure to State Claim**

A ruling on a motion for dismissal pursuant to *Fed. R. Civ. P. 12(b)(6)* is not an occasion for the court to make findings of fact.

Counsel: **[**1]** For Republic of Colombia, acting on its own behalf and on behalf of the Departments it has power to represent, Plaintiff: Andrew B. Sacks, John K. Weston, LEAD ATTORNEYS, Sacks & Smith, LLC, Philadelphia, PA; Charles Arthur Acevedo, Kevin A. Malone, LEAD ATTORNEYS, Krupnick, Campbell, Malone, Buser, Slama, Hancock, McNelis, Liberman & McKee, P.A., Fort Lauderdale, FL.

For Department of Antioquia Department of Arauca, Department of Caldas, Department of Choco, Department of Cundinamarca, Department of Putumayo, Department of Santander, Bogota, Capital District, individually, Plaintiffs: Andrew B. Sacks, John K. Weston, LEAD ATTORNEYS, Sacks & Smith, LLC, Philadelphia, PA; Charles Arthur Acevedo, Kevin A. Malone, LEAD ATTORNEYS, Krupnick, Campbell, Malone, Buser, Slama, Hancock, McNelis, Liberman & McKee, P.A., Fort Lauderdale, FL; Joel S. Perwin, LEAD ATTORNEY, JOEL S. PERWIN P.A., Miami, FL.

For Department of Amazonas, Department of Atlantico, Department of Caqueta, Department of Cordoba, Department of Guaviare, Department of Huila, Department of Sucre, Department of Tolima, Department of Valle Del Cauca, Department of Vichada, Department of Bolivar, Department of Narino, **[**2]** Department of Norte De Santander, Department of Risaralda, Department of San Andres y Providencia, Plaintiff: Charles Arthur Acevedo, Kevin A. Malone, LEAD ATTORNEYS, Krupnick, Campbell, Malone, Buser, Slama, Hancock, McNelis, Liberman & McKee, P.A., Fort Lauderdale, FL; Joel S. Perwin, LEAD ATTORNEY, JOEL S. PERWIN P.A., Miami, FL; John K. Weston, Sacks & Smith, LLC, Philadelphia, PA.

For Diageo North America, Inc, formerly known as UDV North America, Inc., formerly known as Guinness UDV North America, Inc., formerly known as IDV North America Inc., formerly known as Hueblein, Inc., United Distillers Manufacturing Inc., Diageo PLC, Defendants: Laurie U. Mathews, Marty L Steinberg, Samuel A. Danon, LEAD ATTORNEYS, Hunton & William, LLP Miami, FL; Shawn Patrick Regan, LEAD ATTORNEY, Hunton & William, New York, NY.

For Seagram Export Sales Company Inc., Defendant: David W. Ichel, Robert H. Smit, Simpson, Thacher & Barlett, New York, NY; Mary Elizabeth McGarry, Simpson Thacher & Bartlett LLP, New York, NY.

For Pernod Ricard USA LLC, Pernod-Ricard S.A., Defendants: Beth A. Levene, Matthew L. Fore, Peter J. Kahn, William P. Ashworth, LEAD ATTORNEYS, Williams & Connolly, **[**3]** LLP, Washington, DC.

Judges: NICHOLAS G. GARAUFIS, United States District Judge.

Opinion by: NICHOLAS G. GARAUFIS

Opinion

[*375] MEMORANDUM & ORDER

GARAUFIS, United States District Judge:

The Republic of Colombia, Colombia's Capital District of Bogota, and a number of Departments of the Republic of Colombia (collectively, "Plaintiffs") bring a civil Racketeering Influenced and Corrupt Organizations Act ("RICO") claim and common law claims against Diageo North America Inc., United Distillers Manufacturing Inc., Diageo PLC, Seagram Export Sales Company Inc., Pernod Ricard USA LLC, and Pernod-Ricard S.A. (collectively, "Defendants"). Essentially, Plaintiffs allege that Defendants are members of a RICO enterprise composed of illegal narcotics traffickers and Defendants' distributors for the purpose of laundering the proceeds of illegal narcotics sales and illegally smuggling liquor into Colombia.

At this time, Defendants Diageo North America Inc., United Distillers Manufacturing Inc., Seagram Export Sales Company Inc., and Pernod Ricard USA LLC move for dismissal on a number of grounds. [1] First, Defendants assert that the action is barred by the revenue and penal rules. Second, Defendants move **[**4]** for dismissal under the doctrine of *forum non conveniens.* Third, Defendants request **[*376]** that this court abstain from hearing the action under the doctrine of international comity. Fourth, Defendants assert that this case is barred because it presents non-justiciable political questions. Fifth, Defendants argue that Plaintiffs' RICO claim should be dismissed because RICO should not be applied extraterritorially to the alleged conduct, which largely occurred outside of the United States. Sixth, Defendants argue that the RICO claim should be dismissed because the Second Amended Complaint fails to plead adequately a RICO claim. Finally, the Defendants assert that Plaintiffs' RICO claim is barred by the statute of limitations. For the reasons described below, Defendants' motion to dismiss on the ground that the revenue rule bars the instant action is granted in part and denied in part. Defendants' other motions are denied.

[**5] I. FACTUAL BACKGROUND

Defendants move to dismiss under *Federal Rules of Civil Procedure 12(b)(1)* and *12(b)(6)*. ***HN1***[] With respect to Defendants' *Rule 12(b)(6)* motion, the court must accept all factual allegations in Plaintiffs' pleadings and must draw inferences from those allegations in the light most favorable to Plaintiffs. *United States v. The Baylor Univ. Med. Ctr., 469 F.3d 263, 267 (2d Cir. 2006)*. ***HN2***[] With respect to Defendants' *Rule 12(b)(1)* motion, the court must accept all *undisputed* factual allegations as true and draw all reasonable inferences in the light most favorable to Plaintiffs. *Robinson v. Malaysia, 269 F.3d 133, 140 (2d Cir. 2001)*. To the extent the parties dispute facts relevant to Defendants' *Rule 12(b)(1)* motion using evidentiary submissions, the court will consider the submitted evidence and, if necessary, decide the disputed factual questions. See *id. at 140 n.6* (in context of motion to dismiss for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act, district court "must" consult factual submissions **[**6]** "if resolution of a proffered factual issue may result in the dismissal of the complaint for want of jurisdiction"). With very few exceptions, the material facts are undisputed. Where the court makes a factual finding, it will do so explicitly. That being said, this statement of facts is not intended to be a comprehensive description of all of the factual issues relevant to this motion. Rather, this section is limited to a description of Plaintiffs' claims. Other factual issues are discussed in detail in subsequent sections.

Plaintiffs

Plaintiffs are various Columbian national and regional governmental agencies. The Plaintiff Departments of the Republic of Colombia possess a "constitutional monopoly on the domestic manufacture and sale of liquor products." (Second Amended Complaint ("SAC") P 1.) Some Plaintiffs manufacture and/or distill liquor and some of the Plaintiffs sell and distribute liquor in Colombia. (Id.) Plaintiffs "are by far the largest sellers and producers of liquor products within the Republic of Colombia." (Id.)

Defendants

Defendant Diageo North America is a Connecticut corporation authorized to do business in the State of New **[**7]** York. (Id. P 11.) Defendant United Distillers Manufacturing is a Delaware Corporation authorized to do business in the State of New York with a principal place of business in Stamford, Connecticut. (Id. P 12.) Diageo PLC is a British corporation that purchased United Distillers in 1997. (Id. P 13.) Defendant Seagram Export Sales Co., Inc. is a New York corporation. (Id. P 14.) Defendant Pernod Ricard USA, LLC is an Indiana corporation with a principal place of business in White Plains, New York. (Id. P 15.) Defendant Pernod-Ricard S.A. is a French corporation with a principal place of business in **[*377]** France. (Id. P 16.) Defendants manufacture, distill and/or distribute liquor

[1] Defendants Diageo PLC and Pernod-Ricard S.A. do not move for dismissal at this time. However, all of the parties have stipulated that Diageo PLC and Pernod-Ricard S.A. (1) will be bound by the court's decision with respect to the instant motions and (2) may move for dismissal on grounds not raised in the instant motions once they are decided.

and other alcoholic beverages on an international scale, including such well-known brands as Tanqueray gin, Smirnoff vodka, Seagram's 7, Guinness stout, and Baileys Original Irish Cream. (Id. P 16; Declaration of Carlos Acevedo ("Acevedo Decl.") Exh. 2 at 9.)

The Enterprise

Plaintiffs allege that all of the Defendants were part of a single RICO enterprise. (SAC P 108.) Although Defendants competed with each other, "they were well aware of each other's activities, copied **[**8]** each other's strategies when they were successful, and in most cases utilized the same distributors to conduct their illegal sales." (Id. P 26.) Defendants' "co-conspirators, in the money laundering schemes, including associated distributors, shippers, currency dealers, wholesalers, money brokers, and other participants" were also members of the enterprise. (Id. P 108.)

The Second Amended Complaint alleges that Defendants knowingly entered into a money-laundering enterprise with narcotics traffickers and, at all times, controlled the enterprise. Defendants "controlled every aspect of the financial transactions involving the purchase of their liquor products." (SAC P 28.) "Defendants also controlled the exact methods and means by which they were paid for the liquor products." (Id.) Defendants controlled the distribution channels through which their liquor traveled. (Id. P 30.) Defendants worked with their co-conspirators to create a "complex web of companies located in Aruba and Panama to disguise the true nature and origin of the criminal proceeds" that were being laundered. (Id. P 31, 35.) "Defendants and their co-conspirators knew that the purpose and design **[**9]** of this system of seemingly unrelated parties to the financial transaction was to conceal, hide and/or disguise the true nature of the criminal proceeds they were accepting." (Id. P 27(d).)

Although the Second Amended Complaint consists of 180 pages and 227 paragraphs, the Plaintiffs essentially allege that Defendants are part of illegal RICO enterprise engaged in money laundering, smuggling, tax evasion, as well as wire and mail fraud.

The Scheme

The alleged scheme begins with the United States Dollars or other currency that a Colombian narcotics trafficking organization obtains from illegal drug sales. (Id. P 27(c); Acevedo Decl. Exh. 6 at 13.) At least some of these moneys are deposited into bank accounts in the United States in small amounts. (SAC P 27(c).) "A large percentage of the narcotics laundering process that occurs in regard to these narcotics sales occur in the Eastern District of New York. By virtue of demographics, population, and other factors, a large percentage of individuals involved in laundering these narcotics proceeds reside in and conduct their money-laundering activities in the Eastern District of New York." (Acevedo Decl. Exh. 6, **[**10]** Affidavit of Alvin C. James ("James Aff.") P 12.) These cash deposits are in sufficiently small amounts so as to avoid detection by law enforcement authorities. (SAC P 27(c).) A large number of individuals called "smurfs" are used to make these small bank deposits. "The key to the 'smurf' system is the use of a lot of accounts--and a lot of smurfs." (Id.)

At this point, the Colombian narcotics organization must find a way to convert its United States Dollars into Colombian pesos without disclosing its illegal operation to law enforcement authorities. (James Aff. PP 5-6.) Because currency and banking laws preclude drug dealers from laundering their money through banks or other **[*378]** financial institutions, the drug traffickers and money launderers launder their unlawfully obtained funds primarily through the purchase and sale of commercial goods. (Id. P 6.)

Ultimately, the proceeds from the illegal narcotics sales are transferred to Defendants. (SAC P 27.) Precisely how this occurs is far less clear. Often, multiple intermediaries are used. (Id. PP 27(a), 29.) Defendants' Aruban distributors often serve as intermediaries. (Id. PP 27(f), 30.) Checks drawn from U.S. accounts **[**11]** in which cash proceeds from narcotics sales were deposited in small amounts appear to be paid directly to Defendants. (See id. P 27(c) ("Checks are then drawn on these accounts--which represent narcotics proceeds--and these checks are then exchanged by Colombian criminal organizations for liquor products manufactured by the Defendants.").)

This transfer of the narcotics proceeds is one aspect of an informal currency exchange known as the Black Market Peso Exchange ("BMPE"). (James. Aff. PP 2-7.) Plaintiffs have retained Alvin C. James, the former Senior Policy Advisor for Money Laundering of the United States Treasury Department's Financial Crimes Enforcement Network ("FinCEN") and founding chairman of the Treasury Department's BMPE working group. (James Aff. P 2.) James states that, prior to his retirement in 2000, he "was the Treasury Department's leading authority on money laundering via international trade financing." (Id.) In his testimony before the Senate Caucus on International Narcotics Control, James explained the BMPE:

> The Colombian narcotics trafficker has a constant need to repatriate a large part of his drug sale proceeds to Colombia in the form of Colombian **[**12]** pesos. He needs these pesos to operate his illicit business, attempt to avoid government intervention in his activities, and maintain his wealthy lifestyle. It is important to note that the narcotics trafficker's situation is the opposite of the Colombian dollar/peso broker, since the trafficker has dollars in the U.S. and needs pesos in Colombia; the peso broker has pesos in Colombia and needs dollars in the U.S.
> The trafficker sells the dollars to the broker. The broker pays for the dollars with pesos in Colombia. . . .
> . . . .
>
> The dollar/peso broker uses two parallel bank accounts to facilitate the sale of dollars to the Colombian importer. The first was a peso account in Colombia. The second was [a] U.S. dollar account in the United States. The dollar/peso broker takes an order for U.S. dollars and receives payment in pesos in Colombia. The dollars are not delivered to the Colombian purchaser, but instead at the time of order, the purchaser instructs the dollar/peso broker to deliver the U.S. dollars to the trade goods supplier to whom he owes payment. These suppliers are often in the U.S., although they may also be in Panama or other ports of trade in Asia or **[**13]** Europe. The trade goods are shipped to Colombia and smuggled into the country to avoid tariffs and taxes[.]

(Acevedo Decl. Exh. 2 at 20-21.)

In their brief, Plaintiffs assert that tax evasion is not a purpose of the alleged RICO enterprise. (See Pl. FNC Opp. at 18 ("Defendants' buyers cannot use the legitimate importation system, not because they don't want to pay taxes, but because they cannot risk having their use of narcotics-derived funds discovered by the Colombian authorities. . . . In other words, Defendants' coconspirators are not selling illegally in order to avoid taxes, they are selling illegally in order to avoid detection of their use of laundered funds derived from narcotics trafficking.")) Plaintiffs **[*379]** cite only Alvin James's Affidavit in support of this proposition. The court has carefully reviewed the James Affidavit, however, and finds that at no point does James dispute that tax evasion is a purpose or effect of the alleged enterprise.

Further, James's testimony before United States House of Representatives Subcommittee on General Oversight and Investigations of the Committee on Banking and Financial Services and the United States Senate Caucus on International **[**14]** Narcotics Control, which is attached to James's affidavit, [2] confirms that both tax evasion and money laundering are purposes and functions of the smuggling scheme alleged by Plaintiffs. James testified that Colombian importers need U.S. dollars to purchase foreign goods, and Colombian laws prevent importers from obtaining U.S. dollars legally without paying the "high Colombian tariffs and taxes." (Acevedo Decl. Exh. 6 at 20.) James also testified that the Colombian importer "needs to obtain these [U.S.] dollars discreetly so that he can evade the duties and taxes applicable to his imports." (Id. at 12.) Similarly, James testified that the BMPE provides a means through which Colombian narcotics traffickers can launder the proceeds of illegal drug sales: "[O]nce the trafficker has sold the dollars located in the United States and has received his pesos in accounts in Colombia, he has effectively laundered those dollars." (Id. at 21; see also James Aff. P 6.)

[15]** One significant aspect of the BMPE is that the narcotics trafficker is willing to sell each dollar for less than a dollar because he values the service of having his dollars laundered: "[T]he narcotics trafficker sells the currency to

---

[2] The exhibits to the James Affidavit are not set off from the James Affidavit with tabs. However, both the James Affidavit and exhibits thereto are Exhibit 6 of the Acevedo Declaration. As a result, the court will cite to exhibits to the James Affidavit as "Acevedo Decl. Exh. 6."

the dollar/peso broker at a substantial discount, often amounting to as much as 30 percent. . . . As a result, the dollar/peso broker is now able to offer his clients, notably Colombian importers, not only a [discreet] source of U.S. dollars, but at a rate significantly less than the rate offered by the Colombian central bank." (Acevedo Decl. Exh. 6 at 21.)

Plaintiffs allege that Defendants benefit from their RICO enterprise in three distinct ways. First, Defendants are able to charge the Colombian importers higher prices than they would be able to charge in a legal market because the importers obtain the U.S. dollars that they use to purchase the goods at a discount, i.e., the importers purchase each U.S. dollar for less than one dollar. (James Aff. P 7.) Second, because the enterprise allows importers to obtain a very large amount of U.S. dollars at a price that is lower than the importers would pay in the absence of the enterprise, the enterprise **[**16]** permits importers to sell large quantities of liquor to consumers at below-market prices. (Id.) In doing so, Defendants increase their market share and their profits by selling a far larger quantity of liquor to Colombian consumers at reduced prices. (Id.) Third, Defendants assert that "because liquor demand is relatively elastic, the manufacturers are able to change demographic buying patterns, so that, for example, consumers will purchase more Johnny Walker or Lucky Strike and less rum or a domestic cigarette brand, because the Johnny Walker and the Lucky Strike are relatively cheaper than they would be if legitimately imported and sold." (Id.) Although it is not entirely clear how this the third alleged benefit is materially different from the second alleged benefit, for purposes of **[*380]** this motion, the court accepts all three allegations as true.

Damages

Plaintiffs seek numerous categories of damages. Only a few key categories will be discussed here. First, Plaintiffs seek "the total amount of criminal proceeds laundered by the Defendants." (SAC P 104.) Second, Plaintiffs seek to recover "large amounts of money [expended] in their efforts to stop money **[**17]** laundering and to recoup funds that they have lost as a result of the activities of the Defendants[.]" (Id. P 105.) Third, Plaintiffs, as liquor manufacturers and distributors, seek compensation for the revenues and profits lost as a result of the Defendants' enterprise. (Id. P 103(a).)

Alleged Relationship between Plaintiffs' Lost Sales and Profits and Defendants' Money Laundering and Tax Evasion

Defendants dedicate a lot of time, energy, and words to their argument that the Second Amended Complaint asserts claims for damages resulting from tax evasion and smuggling as opposed to money laundering. (E.g., Def. FNC Rep. at 18-19.) I find that the Second Amended Complaint states a claim for damages resulting from both money laundering and tax evasion.

The alleged enterprise permits the Colombian importers to purchase liquor from Defendants and/or their agents with U.S. dollars that are acquired at a discounted price, i.e., because each dollar is acquired for less than one dollar. (James Aff. P 6.) Some portion of this discount clearly results from the amount of the Colombian taxes that the importers are unlawfully evading through the enterprise. (Acevedo **[**18]** Decl. Exh. 6 at 12.) Another portion of the discount (if not the remainder of the discount) results from the fact that narcotics traffickers are willing to "sell" their U.S. dollars for less than their face value, i.e., drug dealers sell each dollar for less than one dollar. (Acevedo Decl. Exh. 6 at 20-21.) In effect, the narcotics dealers are paying, as a money laundering fee to the enterprise, the difference between the face value of the money and the price which they are paid for the money. This means that some portion of the discounted price at which the Colombian importers are purchasing the Defendants' liquor results from tax evasion (the "tax evasion discount") and some portion of the discounted price at which the Colombian importers are purchasing the Defendants' liquor results exclusively from laundering the proceeds from narcotics sales (the "money-laundering discount" or the "narco-laundering discount").

The Second Amended Complaint alleges that the price discount that Colombian importers pay for their goods is passed along to consumers. (SAC P 103(c).) The discounted retail prices cause Colombian consumers to purchase more of Defendants' liquor than they would otherwise **[**19]** purchase. This increase in consumption of

Defendants' products leads (1) to a decrease in consumption of Plaintiffs' competing liquor and/or (2) Plaintiffs to decrease their prices so as to be able to compete with Defendants. Either way, the enterprise causes Plaintiffs to lose revenues and profits. (Id. PP 103(a), (c), (d).)

II. STANDARD OF REVIEW

A. *Rule 12(b)(1)* Motions

On a number of different grounds, Defendants move to dismiss the Second Amended Complaint for lack of subject-matter jurisdiction pursuant to *Fed. R. Civ. P. 12(b)(1)*. ***HN3***[] "It is well ingrained in the law that subject-matter jurisdiction can be called into question *either* by challenging the sufficiency of the allegation *or* by challenging the accuracy of the jurisdictional facts alleged." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay **[*381]** Found., Inc., 484 U.S. 49, 68, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987)* (Scalia, J., concurring in part and concurring in the judgment) (citations omitted; emphasis in original). "If the defendant challenges only the legal sufficiency of the plaintiff's jurisdictional allegations, the court must take all facts alleged in **[**20]** the complaint as true and draw all reasonable inferences in favor of plaintiff." *Robinson, 269 F.3d at 140* (internal citations and quotation marks omitted). If the parties present factual evidence that is "relevant to the jurisdictional question," the court *may* consider such evidence. Id.; accord *Goonewardena v. New York, 475 F. Supp. 2d 310 (S.D.N.Y. 2007)*. The district court *must* consider facts outside the pleadings "if resolution of a proffered factual issue may result in the dismissal of the complaint for want of jurisdiction." *Robinson, 269 F.3d at 141 n.6*. The party asserting subject-matter jurisdiction bears the burden of proving by a preponderance of the evidence that jurisdiction exists. *Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000)*; accord *Goonewardena, 475 F. Supp. 2d at 310*.

The parties dispute whether Defendants' motion to dismiss the Second Amended Complaint on the basis of the revenue rule and Defendants' motion to dismiss Plaintiffs' RICO claims on the ground of extraterritoriality are properly brought under *Rule 12(b)(1)*, as opposed to *Rule 12(b)(6)*. Plaintiffs **[**21]** cite *Arbaugh v. Y&H Corporation, 546 U.S. 500, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)*, in support of the proposition that both of these motions may be brought only under *Rule 12(b)(6)*. In Arbaugh, the Supreme Court held that whether the employer had a sufficient number of employees to satisfy the definition of "employer" under Title VII of the Civil Rights Act of 1964 was merely an element of a Title VII claim as opposed to a jurisdictional prerequisite. The Arbaugh court held that ***HN4***[] "[t]he basic statutory grants of federal-court subject-matter jurisdiction are contained in *28 U.S.C. §§ 1331* and *1332*," and other statutory requirements for recovery should not be treated as jurisdictional unless "the Legislature clearly states that a threshold limitation on a statute's scope shall be jurisdictional[.]" *Id. at 514-15, 126 S. Ct. at 1244-45*.

With respect to Defendants' revenue rule motion, irrespective of whether the revenue and penal rules are characterized as limitations on subject-matter jurisdiction or abstention doctrines, *Rule 12(b)(1)* is an appropriate basis on which to make such a motion. See *United States v. Portrait of Wally, 99 Civ. 9940 (MBM), 2002 U.S. Dist. LEXIS 6445, 2002 WL 553532, **[**22]** at *6 (S.D.N.Y. Apr. 12, 2002)* (motion to dismiss on the basis of the act of state, international comity, and political question doctrines heard on a *Rule 12(b)(1)* motion even though "[t]hose doctrines go to justiciability rather than to jurisdiction"); 5B Wright & Miller § 1350 ("Courts have recognized a variety of other defenses that one normally would not think of as raising subject matter jurisdiction questions when considering a *Rule 12(b)(1)* motion, including claims that . . . the subject matter is one over which the federal court should abstain from exercising jurisdiction").

With respect to Defendants' motion to dismiss the RICO claim on the ground of extraterritoriality, I find that the standard of review will be the same whether it is brought under *Rule 12(b)(1)* or *Rule 12(b)(6)*. Although the Second Circuit treated civil RICO's territoriality requirement as jurisdictional prior to Arbaugh, see *North South Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1050-51 (2d Cir. 1996)*, at least one court has questioned whether Arbaugh requires courts to treat civil RICO's territorial requirement as merely an element of the claim. See *Ayyash v. Bank Al-Madina, No. 04 Civ. 9201 (GEL), 2006 U.S. Dist. LEXIS 9677, **[*382]** 2006 WL 587342, at *4 n.2 (S.D.N.Y. Mar. 9, 2006)* **[**23]** ("The Supreme Court's decision in Arbaugh may require that the Court of Appeals review its treatment of the question of RICO's extraterritorial effect."). This court agrees that there is, in the least, a serious question as to whether, in the civil RICO context, the territoriality requirement can be considered jurisdictional under Arbaugh.

In this case, there is no reason to resolve the question of whether RICO's territoriality requirement goes to the court's subject-matter jurisdiction. Defendants have made clear that they "do not rely upon material outside of the Complaint for" their motion to dismiss on the basis of extraterritoriality. (Def. RICO Rep. at 2.) Nor do Plaintiffs seek to introduce facts outside of the Second Amended Complaint for purposes of this motion. As a result, whether the motion on this ground is brought under Rule 12(b)(1) or Rule 12(b)(6), the court is required to treat the allegations in the Second Amended Complaint as true and to draw reasonable inferences on the basis of such allegations. See Robinson, 269 F.3d at 140 (**HN5**[] "If the defendant challenges only the legal sufficiency of the plaintiff's jurisdictional **[**24]** allegations, the court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff.") (citations and quotation marks omitted).

B. Rule 12(b)(6) Motions

With the exception of the mail and wire fraud predicate RICO acts, which are subject to a heightened pleading requirement under Federal Rule of Civil Procedure 9(b), the Second Amended Complaint is subject to the liberal pleading requirement set forth in Federal Rule of Civil Procedure 8. After briefing and oral argument on this motion were complete, the Supreme Court clarified the pleading standards under Federal Rule of Civil Procedure 8 and the standard under which Rule 12(b)(6) motions are reviewed. In Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007), the Court explained that **HN6**[] plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face." If they "have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." Id.; see also Goldstein v. Pataki, 488 F. Supp. 2d 254, No. 06-CV-5827 (NGG), 2007 U.S. Dist. LEXIS 41216, 2007 WL 1654009, at *33 (E.D.N.Y. June 6, 2007) **[**25]** (Garaufis, J.) (discussing Twombly).

Since Twombly, the Second Circuit has explained that Twombly imposes a plausibility requirement on pleadings under Rule 8, but does not, as a general matter, change the Rule 8 pleading standard:

> After careful consideration of the Court's [Twombly] opinion and the conflicting signals from it that we have identified, we believe**HN7**[] the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible "plausibility standard," which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible.

Iqbal v. Hasty, 490 F.3d 143, 2007 U.S. App. LEXIS 13911, at *35 (2d Cir. June 14, 2007). In another post-Twombly decision, the Second Circuit confirmed that **HN8**[] "the district court must accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe **[**26]** the complaint liberally." Roth v. Jennings, 489 F.3d 499, 2007 U.S. App. LEXIS 13035, 2007 WL 1629889, at *11 (2d Cir. June 6, 2007).

Of course, courts in this Circuit have noted that **HN9**[] RICO claims "'must be reviewed with appreciation of the extreme sanctions it provides so that actions traditionally brought in state courts do not gain access to treble damages and attorneys fees in federal court simply because they **[*383]** are cast in terms of RICO violations.'" Leung v. Law, 387 F. Supp. 2d 105, 112-13 (E.D.N.Y. 2005) (Garaufis, J.) (quoting Mathon v. Marine Midland Bank, N.A., 875 F. Supp. 986, 1001 (E.D.N.Y. 1995)). In this vein, it has also been said that "courts should strive to flush out frivolous RICO allegations at any early stage of the litigation." Burnett v. Al Baraka Inv. & Dev. Corp. (In re Terrorist Attacks on September 11, 2001), 349 F. Supp. 2d 765, 827 (S.D.N.Y. 2005) (quotation marks omitted).

III. REVENUE RULE

A. Background

HN10[] The Second Circuit recently explained that "[t]he revenue rule is a longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments **[**27]** or unadjudicated tax claims of other sovereigns." Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc. (hereinafter, "Canada"), *268 F.3d 103, 109 (2d Cir. 2001)*. The revenue rule was originally created by eighteenth-century English courts as what amounted to a subsidy for British trade: English courts refused to enforce foreign customs laws that would have had the effect of interfering with or diminishing British trade. *Id. at 110*. More recently, federal courts have found that the revenue rule should continue to be applied to serve separation of powers and sovereignty concerns. *Id. at 109-115*. Courts continue to refer to Judge Learned Hand's explanation of the rationale for the revenue rule:

> **HN11**[] [A] court will not recognize those [liabilities] arising in a foreign state, if they run counter to the 'settled public policy' of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state. . . . To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers **[**28]** of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.

Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929) (L. Hand, J., concurring).

Both this court and the Second Circuit recently addressed the revenue rule in the European Community cases. See European Community v. Japan Tobacco, Inc. (hereinafter, "Amazonas"), *186 F. Supp. 2d 231, 243 (E.D.N.Y. 2002)* (Garaufis, J.), aff'd in part and rev'd in part sub nom., European Community v. RJR Nabisco, Inc. (hereinafter, "European Community I"), *355 F.3d 123 (2d Cir. 2004)*, cert. granted, judgment vacated and remanded, *544 U.S. 1012, 125 S. Ct. 1968, 161 L. Ed. 2d 845 (2005)*, on reconsideration following **[**29]** remand, *424 F.3d 175 (2d Cir. 2005)* (hereinafter, "European Community II"), cert. denied, *546 U.S. 1092, 126 S. Ct. 1045, 163 L. Ed. 2d 858 (2006)*.

HN12[] "The revenue rule is implicated whenever the substance of the claim is, either *directly or indirectly,* one for tax revenues, such that the whole object of the suit is to collect tax for a foreign revenue, and that this will be the sole result of a decision in favour of the plaintiff." *European Community I, 355 F.3d at 131* (emphasis added; internal citations and quotation marks omitted). "What matters is not the form of the action, but the substance of the claim." *Canada, 268 F.3d at 130*.

[*384] 1. Direct Enforcement

HN13[] "A suit directly seeks to enforce foreign tax laws when a judgment in favor of the plaintiffs would require the defendants to reimburse them for lost tax revenues." *European Community I, 355 F.3d at 131*. Defendants argue that "the Revenue Rule bars Plaintiffs' claims regardless of whether these Colombian sovereign government entities sue for sovereign or commercial losses resulting from sovereign revenue law issues." (Def. FNC Rep. at 28.) In other words, Defendants **[**30]** are arguing that the instant claims for lost sales and profits are barred by the revenue rule because Plaintiffs are directly seeking compensation for lost revenues. Plaintiffs argue that the revenue rule bars only claims that a sovereign brings in its sovereign capacity and does not preclude claims by a sovereign in its commercial capacity. (Pl. FNC Opp. at 28-33.)

Plaintiffs cite *Banco Frances e Brasileiro S.A. v. Doe, 36 N.Y.2d 592, 331 N.E.2d 502, 370 N.Y.S.2d 534 (1975)* in support of this proposition. In Banco Frances, a private Brazilian bank brought a fraud claim against individuals, alleging that the individuals submitted false currency-exchange applications to the bank in violation of Brazilian currency regulations, thereby causing the bank to improperly exchange Brazilian cruzeiros into travelers checks in United States dollars. The Court of Appeals distinguished *Banco Do Brasil v. A.C. Israel Commodity Co., 12 N.Y.2d 371, 190 N.E.2d 235, 239 N.Y.S.2d 872 (1963)*, and found that the revenue rule did not bar the plaintiff's claims for a variety of reasons, including as follows:

> The [Banco Do Brasil] case relied upon by the Appellate Division is quite distinguishable. **[**31]** There the Government of Brazil, through Banco do Brasil, a government bank, sought redress for violations of its currency exchange regulations incident to a fraudulent coffee export transaction. Here, the plaintiff is a private bank seeking rescission of the fraudulent currency exchange transactions and damages. [] [N]o case has come to our attention where a private tort remedy arising from foreign currency regulations has been denied by the forum as an application of the revenue law rule and we decline so to extend the Banco do Brasil rationale. Thus, in the instant case we find no basis for reliance upon the revenue law rule to deny a forum for suit.

Banco Frances, 36 N.Y.2d at 598-99, 331 N.E.2d at 506-07. Without question, at least portions of the *Banco Frances* decision are no longer good law in federal courts. Above all else, the Banco Frances court's conclusion that the revenue rule is not "analytically justifiable" is clearly inconsistent with the Supreme Court's decision in *Pasquantino v. United States, 544 U.S. 349, 125 S. Ct. 1766, 161 L. Ed. 2d 619 (2005)*, and the Second Circuit's decisions in *Canada* and the European Community cases. **[**32]** That being said, Banco Frances does support the proposition that a commercial actor may bring a private tort claim even though the claim involves a foreign revenue law.

Defendants rely on *Banco Do Brasil, 12 N.Y.2d at 377, 190 N.E.2d at 237*, and *Ludlow v. Van Rensselaer, 1 Johns. 94 (N.Y. 1806)*. These cases are inapposite. Banco Do Brasil is inapposite because, as the Banco Frances court observed, the plaintiff-sovereign was clearly suing in its sovereign capacity as opposed to its capacity as a commercial actor. *Banco Do Brasil, 12 N.Y.2d at 377, 190 N.E.2d at 237* (holding that the action by Brazil for damages caused by defendant's evasion of foreign currency exchange laws was barred by revenue rule). Ludlow is a very old and curious decision. In Ludlow, a breach of contract action between two private parties, **[*385]** the court held that the revenue rule barred the court from considering a defense based on a French stamp tax law. Ludlow seems to stand for the proposition that, where a claim constitutes a justiciable cause of action to which there exists a potentially meritorious defense based on a foreign tax law **[**33]** that the revenue rule precludes the courts from considering, the court should hear the action and ignore the defense. In this way, Ludlow appears to be inconsistent with those Second Circuit cases that state that the revenue rule precludes a court from hearing a claim that would require the court to consider the validity of a foreign tax law. In European Community I, the Second Circuit explained that foreign tax laws "embody the political and social judgments of the sovereign and its people" and that:

> judicial examination and enforcement of foreign tax laws at the behest of foreign nations may conflict with the other branches' policy choices with respect to cooperation in tax enforcement, and create the risk that the judiciary will be drawn into issues and disputes of foreign relations policy that are assigned to--and better handled by--the political branches of government.

European Community I, 355 F.3d at 131 (internal quotation marks omitted).

The Second Circuit's *Canada* decision strongly supports the conclusion that a claim constitutes proscribed direct enforcement of a revenue law only when the sovereign is seeking damages it sustained **[**34]** in its capacity as sovereign. In considering which types of damages are barred by the revenue rule, Canada recognized a distinction between damages that a government suffers in its sovereign capacity and damages that a government suffers as a commercial actor. See *Canada, 268 F.3d at 132*. Thus, Canada could not recover law enforcement costs that the defendants' unlawful acts caused Canada to incur in part because they were a cost that Canada had incurred in its capacity as a sovereign:

> Law enforcement costs incurred to secure taxes for the sovereign are qualitatively different from the damages suffered by a private individual; they fall within the class of acts that are *"jure imperii,"* that is, that are expressions of a foreign sovereign's will or are carried out by virtue of that sovereign authority. United States courts have traditionally been reluctant to enforce foreign laws that are *"jure imperii."*

Id. at 132 (internal citation omitted). The Second Circuit continued to explain that costs that are *jure imperii* are distinct from those that are *jure gestionis:* "An example of a private, *'jure gestionis'* act **[**35]** is operating a business." *Id. at 132 n.41*.

This distinction between a sovereign suing in its sovereign capacity as opposed to in its capacity as a private actor is consistent with *Canada's* reading of the purpose of the revenue rule. In Canada, the Second Circuit explained that suits involving a foreign sovereign's revenue laws are problematic because they raise public policy concerns that go to the heart of sovereignty:

> Tax laws embody a sovereign's political will. They create property rights and affect each individual's relationship to his or her sovereign. They mirror the moral and social sensibilities of a society. Sales taxes, for example, may enforce political and moral judgments about certain products. Import and export taxes may reflect a country's ideological leanings and the political goals of its commercial relationships with other nations.

Id. at 111. Under this reasoning, tax laws are problematic not because they raise revenue for the government and the government may use such revenues for a controversial purpose, but because the laws, in and of themselves, embody policy choices **[*386]** that are infused with moral and political **[**36]** judgments. As a result, *Canada's* reading of the revenue rule strongly supports the proposition that the rule is not triggered by every foreign law that causes a foreign sovereign to generate revenue; rather, the rule is targeted to those revenue-generating statutes that involve moral and political judgments. [3]

A sovereign's commercial activities do not involve the kind of moral and political judgments that the tax or revenue laws typically involve. A sovereign engages in commercial activity for the same reason a private individual or corporation participates in such activity--to **[**37]** turn a profit. A sovereign's decision to drill for oil, manufacture airplanes, or provide postal services is not infused with the kinds of moral and political judgments necessarily involved in taxing cigarettes or providing a tax credit for higher education spending.

To read the revenue rule to prohibit sovereigns from bringing damages claims irrespective of the nature of the damages claim would have extremely troubling consequences. As Plaintiffs urged at oral argument, if the revenue rule prohibits sovereigns from bringing all claims for damages, then the Venezuelan government could not bring a claim arising out of a contract dispute with an American corporation concerning Venezuela's oil business. (Feb. 2, 2007 Oral Argument Transcript at 40.) If the United Kingdom had such a revenue rule, the United States Postal Service could not bring a contract claim in the United Kingdom against a British corporation that it had retained to deliver American mail in the U.K. Such an interpretation of the revenue rule would (1) make it very difficult for sovereigns to participate in commercial activities and (2) provide strong disincentives for foreign sovereigns to do business with United States **[**38]** corporations. Such a reading of the revenue rule would cause these problems while achieving absolutely no public policy purpose: prohibiting sovereigns from bringing claims arising out of purely commercial activities would in no way serve the separation of powers or extraterritoriality concerns that currently motivate federal courts to recognize the revenue rule.

Further, if the revenue rule barred suits by foreign sovereigns suing in their commercial capacity, foreign sovereigns would find themselves at a unique disadvantage in federal courts. ***HN14***[] Under the Foreign Sovereign Immunities Act ("FSIA"), a foreign sovereign is subject to jurisdiction in federal courts with respect to actions arising out of a commercial activity carried on by the foreign state, provided that there is some connection between the commercial activity and the United States. See *Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 611, 112 S. Ct. 2160, 2164, 119 L. Ed. 2d 394 (1992)*. Thus, under Defendants' reading of the revenue rule, a private plaintiff could sue a foreign sovereign in United States courts for claims arising out of commercial activity but the foreign sovereign could not bring a counterclaim arising **[**39]** out of that same course of conduct. Such an outcome would be manifestly unjust.

HN15[] Because (1) claims by a foreign sovereign for damages sustained in its capacity as a commercial actor do not raise the same policy concerns as claims brought by a foreign sovereign in its sovereign capacity **[*387]** and (2) foreign sovereigns are subject to suit in the federal courts for claims arising out of commercial actions, I

---

[3] As discussed in detail below in the Section addressing the penal law rule, the distinction between injuries that a sovereign suffers in its sovereign capacity and injuries a sovereign suffers in a commercial capacity is also supported by federal case law addressing the penal law rule. As the penal law rule and revenue rule are analogous, the penal law jurisprudence supports such a distinction in the context of the revenue rule.

conclude that claims brought by a foreign sovereign in a commercial capacity do not constitute the kind of direct enforcement of a foreign revenue law that is barred by the revenue rule. Of course, such a claim may require a court to rule upon the validity of a foreign revenue law. In those circumstances, such a claim could still constitute indirect enforcement of a foreign revenue law that is barred by the revenue rule.

2. Indirect Enforcement

The reality is that "[i]ndirect enforcement is . . . easier to describe than to define[.]" *Pasquantino, 544 U.S. at 368, 125 S. Ct. at 1778-79* (internal quotation marks omitted). The parties vigorously contest precisely what constitutes indirect enforcement of a revenue law. Defendants argue that any claim that would **[**40]** require the court to have to consider, apply or otherwise pass on a foreign tax law is barred by the revenue rule. (E.g., Def. FNC Rep. at 7-8.) Plaintiffs argue that the revenue rule bars only claims that seek to collect unpaid foreign taxes. (Pl. FNC Opp. at 25.) According to Plaintiffs, whether a claim requires a court to rule on the validity of a foreign tax law is irrelevant. (Id.)

What is clear is that ***HN16***[] the revenue rule bars claims for costs resulting from enforcement of foreign tax laws because such claims seek indirectly to enforce the laws. See *European Community II, 424 F.3d at 179*; *Canada, 268 F.3d at 132*. However, much as other aspects of the revenue rule presented in this case, no binding authority has clarified the extent to which the revenue rule prohibits courts from considering the validity of or recognizing foreign tax laws. The Canada and the European Community courts did not have occasion to determine whether a federal cause of action that is substantively unrelated to foreign tax laws but requires the federal court to recognize and apply foreign tax laws is the kind of indirect enforcement that runs afoul of the **[**41]** revenue rule. There is language in Canada that could be read to mean that a federal court may not hear any claim that requires the court to recognize and apply a foreign tax law:

> Additional considerations reinforce our determination that Canada's claim for law enforcement costs must be dismissed. To proceed with the law enforcement costs claim, we would have to examine the tax laws at issue in order to assess the causation aspect of this claim. For example, we would have to assess whether the law enforcement costs were in fact spent on achieving the cessation of cigarette smuggling. So doing, we would have to examine whether, when and to what extent the smuggling existed, which would require a determination that tax laws were applicable to defendants. These inquiries could draw the courts into troubled waters.

Id. at 133; see also *Amazonas, 186 F. Supp. 2d at 237* (quoting some of this same language).

The Attorney General of Canada specifically argued that "the revenue rule may prohibit the enforcement of Canadian tax laws, but not their recognition in order to calculate damages." *Id. at 133*. In support of this proposition, **[**42]** the Attorney General of Canada cited In re State of Norway's Application (Nos. 1 and 2), [1990] A.C. 723, 724 (H.L.) and Regazzoni v. K.C. Sethia (1944) Ltd., [1956] 2 Q.B. 490, 515-16 (C.A.), aff'd [1957] 3 All. E.R. 287 (H.L.). The Second Circuit explained that:

> In both of these cases, the court permitted recognition but not enforcement of foreign revenue laws. However, in neither Norway nor K.C. Sethia was the **[*388]** British court called upon to allow damages that would serve as a substitute for previously unpaid taxes to be paid in the United Kingdom to a foreign sovereign.

Canada, 268 F.3d at 133-34. In concluding that Norway and K.C. Sethia were distinguishable, the Second Circuit did not reject the distinction between recognition and enforcement of a foreign tax law. Further, in Pasquantino, the Supreme Court suggested that a distinction was to be made between recognition of a foreign tax law and enforcement, stating "[i]ndirect enforcement is . . . easier to describe than to define, and it is sometimes difficult to draw the line between an issue involving mere[] *recognition* of **[**43]** a foreign law and indirect *enforcement* of it." *Pasquantino, 544 U.S. at 368, 125 S. Ct. at 1778-79* (emphasis added and internal quotation marks omitted).

In the European Community cases, this court stated that ***HN17***[] "any action in which the court 'will have to pass on[] the validity of [foreign] revenue laws and their applicability [to the claims at bar]' constitutes 'enforcing [foreign] revenue laws,' and thereby triggers the revenue rule." *Amazonas, 186 F. Supp. 2d at 235*. That passage quoted a portion of the Second Circuit's decision in *Canada, 268 F.3d at 108*, that, in turn, quoted the district court's decision in *Canada, Attorney General of Canada v. RJ Reynolds Tobacco Holdings, Inc., 103 F. Supp. 2d 134, 143 (N.D.N.Y. 2000)*. As the claims in the European Community cases were essentially identical to the claims in Canada, in *Amazonas*, I did not confront the issue I confront here: whether a claim that requires a court to recognize, apply, or consider the validity of a foreign tax law is barred by the revenue rule. Further, I did not dismiss the Amazonas plaintiffs' money laundering claims **[**44]** on the basis of the revenue rule. In Amazonas, I found only that the smuggling claims were barred by the revenue rule. *Amazonas, 186 F. Supp. 2d at 236* ("In this [revenue rule] section of the opinion, the court will consider the RICO claims pursuant to smuggling grounds. The court will consider the claims in light of the money laundering grounds at Part IV of this opinion."). Other than the *dicta* relied upon by Defendants, nothing in Amazonas supports the proposition that any time an action forces a court to consider a foreign revenue law, the action constitutes an attempt to indirectly enforce a foreign revenue law that is proscribed by the revenue rule.

As I am now explicitly confronted with this issue, this is my first opportunity to clarify the extent to which consideration of a foreign revenue law violates the revenue rule. ***HN18***[] There is a continuum along which a claim will require a court to consider or "pass on" a foreign tax law. At the least problematic end of the continuum is the mere recognition of a foreign tax law. At the next point along the continuum, a court must apply such a foreign law. Next, a claim might require a court to rule on the **[**45]** validity of a foreign tax law. Finally, a claim might require a court to explicitly enforce a foreign revenue law. The Second Circuit cases make clear that the revenue rule clearly bars explicit enforcement. However, I find that whether lesser forms of consideration of a foreign revenue law--recognition, application, and determination of validity--are permissible depends on the extent to which the consideration of the foreign revenue law raises separation of powers and sovereignty concerns.

I recognize that the Second Circuit cases and the language in this court's Amazonas decision make clear that ruling upon the validity of a foreign law will raise significant policy concerns in many, if not all, cases. As Judge Learned Hand explained, "[n]o court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant **[*389]** with its own notions of what is proper." *Moore, 30 F.2d at 604* (L. Hand, J., concurring). ***HN19***[] In the typical case where a court will have to rule on the validity of a foreign tax law, the court will have to determine whether the law is consistent with its own public policy. The revenue rule bars such a determination **[**46]** in most, if not all, circumstances. See *Canada, 268 F.3d at 113* ("Addressing the public policy concerns raised by the imposition of such foreign taxes could embroil United States courts in delicate issues in which they have little expertise or capacity"); see also *Kelley v. CINAR Corp. (In re CINAR Corp. Secs. Litig.), 186 F. Supp. 2d 279, 293 n.9 (E.D.N.Y. 2002)* (revenue rule "mandates that courts refrain from adjudicating cases where they will have to pass upon the validity of the revenue laws of foreign nations"; holding that the revenue rule did not apply where "[t]he Court would not be commenting on the validity of the Canadian incentive scheme, but rather deciding whether the defendants' admitted abuse of that scheme defrauded American investors.")

HN20[] This approach to the revenue rule--allowing a federal court to assess the policy implications of considering, applying, and determining the validity of a foreign revenue law before determining whether a claim that triggers such consideration is barred by the revenue rule--is most consistent with the Second Circuit's recent revenue law jurisprudence. The Canada court explicitly held that determining whether the revenue **[**47]** rule barred a claim required both an analysis of the facts of the case and the policy concerns behind the revenue rule:

> We do not suggest that the revenue rule always bars United States courts from furthering the tax policies of foreign sovereigns. . . . These concerns about sovereignty and [extraterritoriality] are therefore not absolute, and are not implicated in every case involving foreign tax laws. However, as explained below [], the particular facts of this case--most notably, the fact that a foreign sovereign plaintiff is directly seeking to enforce its tax laws, and that our government has negotiated and signed a treaty with this sovereign providing for limited extraterritorial tax enforcement assistance but stopping well short of the assistance requested here--lead us to be wary in this instance of becoming the enforcer of foreign tax policy.

Canada, 268 F.3d at 113.

Similarly, in the European Community cases, the Second Circuit reaffirmed that HN21[] determining whether a claim involves proscribed indirect enforcement of a revenue law requires an analysis of the facts of the case and policy concerns behind the revenue rule. In European **[**48]** Community I, the court's very definition of indirect enforcement incorporated the policy concerns motivating the revenue rule: HN22[] "[I]ndirect enforcement occurs when a foreign state seeks a remedy that would give extraterritorial effect to its tax laws; for instance, a suit seeking damages based on law enforcement costs is an attempt to shift the cost of enforcing the tax laws onto the defendants, and would therefore require the court indirectly to enforce the tax laws." *European Community I, 355 F.3d at 131*. The Second Circuit continued to explain that "HN23[] [t]he revenue rule is therefore not absolute. Even if the substance of the claim invokes foreign tax laws, the revenue rule will not be triggered where the sovereignty and extraterritoriality concerns that inform the rule's application are not present." *Id. at 131-32*. Similarly, the European Community court explained that the argument that the revenue rule is discretionary "is also foreclosed by Canada, which clearly establishes that, once the sovereignty and separation of powers concerns that inform the rule are implicated by the substance of a plaintiff's claims, the court may not hear **[**49]** those claims absent **[*390]** evidence that the rule has been abrogated." *European Community I, 355 F.3d at 138*. In re-evaluating the Circuit's revenue rule jurisprudence in the wake of Pasquantino, the Second Circuit continued to hold that the scope of the revenue rule would be informed by the dual policy concerns motivating the rule:

> We stressed in our [Canada] opinion that HN24[] the revenue rule is designed to address two concerns: first, that policy complications and embarrassment may follow when one nation's courts analyze the validity of another nation's tax laws; and second, that the executive branch, not the judicial branch, should decide when our nation will aid others in enforcing their tax laws. These twin concerns for sovereignty and separation of powers are important to the revenue rule analysis, because they imply certain exceptions to the rule.

European Community II, 424 F.3d at 180 (citation omitted).

This is consistent with the Eleventh Circuit's approach to the revenue rule, in that HN25[] the Eleventh Circuit also considers the policy implications of a claim in determining whether it is barred by the revenue rule. See *Republic of Honduras v. Philip Morris Cos., 341 F.3d 1253, 1257 (11th Cir. 2003)* **[**50]** ("The Republics' complaints make clear that their tax laws embody anti-smoking policies directed at protecting their citizens from the health hazards of smoking, both by attempting to discourage smoking by raising the price of cigarettes and by providing revenue for anti-smoking programs. . . . *Because the tax laws underlying the Republics' RICO claims embody specific policy choices,* we hold that the revenue rule applies to these claims and prevents us from considering them.") (emphasis added).

As a result, HN26[] determining whether a claim for damages that requires a court to recognize, apply, or rule on the validity of a foreign sovereign's tax laws constitutes the kind of indirect enforcement that is proscribed by the revenue rule requires both an analysis of the facts of the case and the policy concerns motivating the revenue rule.

B. Analysis

Although Defendants do not characterize them as such, Defendants have two central arguments as to why the revenue rule bars the instant claims. First, Defendants argue that the instant claims are an effort to directly enforce the Colombian revenue law providing that the Colombian government shall have a monopoly on certain liquor manufacturing **[**51]** and distribution businesses by awarding Plaintiffs revenues to which they are allegedly entitled under the monopoly law. Second, Defendants argue that the instant claims constitute impermissible indirect enforcement of Colombian revenue laws because they require the court to "pass on" Colombian revenue laws. Each of these arguments will be considered in turn.

1. Direct Enforcement

Colombian law provides that the Colombian government shall have a monopoly on certain liquor manufacturing and distribution businesses. Defendants argue that the instant claims are an effort to directly enforce this law by awarding Plaintiffs revenues to which they are allegedly entitled under the monopoly law. As discussed above, determining whether the instant claims constitute proscribed direct enforcement of a revenue law depends on whether Plaintiffs are suing in their sovereign capacity or in a purely commercial capacity. Defendants argue that Plaintiffs are suing in their sovereign capacity because they engage in the following sovereign acts: "(1) monopolizing the entire liquor industry; (2) collecting revenues to be placed in the government coffers for the general health and welfare of the **[**52]** Colombian people; **[*391]** (3) collecting a 'consumption' tax on liquor that is given to the Departments [of the Colombian Government]; and (4) enacting and charging discriminatory taxes." (Def. FNC Rep. at 29.) Defendants point to the fact that Colombia's Constitution requires that revenues generated by government monopolies must be used for the public welfare and that "[r]evenues obtained through the exercise of liquor monopolies shall be used preferably for health care services and education." (Declaration of Mauricio A. Plazas Vega ("Plazas Decl.") PP 11-12 (quoting the Colombia Constitution).) Defendants are partially correct.

Two categories of claims are clearly barred. First, to the extent Plaintiffs are stating claims for damages resulting from lost liquor taxes, such claims are barred by the revenue rule and are dismissed. See *European Community I, 355 F.3d at 132* (***HN27***[] RICO claims seeking lost taxes are barred by revenue rule); *Canada, 268 F.3d at 131* (same). In this case, lost liquor taxes include both the consumption taxes charged on imported liquor and the so-called "monopoly participations." [4]

[53]** Second, to the extent Plaintiffs are seeking damages that they suffered in their sovereign capacity, such claims are also barred by the revenue rule. ***HN28***[] A sovereign suffers harms in its sovereign capacity when its injury concerns activity undertaken by the government "by virtue of [its] sovereign authority." *Canada, 268 F.3d at 132* (holding that revenue rule barred plaintiffs' claim for law enforcement costs because such costs were suffered by plaintiffs in their sovereign capacities).

The Second Amended Complaint is extremely lengthy and identifies countless forms of injury. On pages 31 and 32 of their Reply Brief, Defendants have identified eighteen allegations of injury that they believe are objectionable. [5] At this **[*392]** time, the court will address only those eighteen alleged injuries. The court agrees that at least sixteen of the eighteen forms of injury are injuries that Plaintiffs could suffer only in their sovereign capacity and, as a result, are barred by the revenue rule. However, two of the eighteen identified forms of injury are not necessarily barred by the revenue rule: (1) "adverse economic impact" of the Colombian "underground economy;" and (2) harm

---

[4] Although the exact nature of the so-called "monopoly participations" is not clear, they appear to be another consumption tax. Under Colombian law, each Department has the choice of (1) exploiting its liquor monopoly or (2) imposing a consumption tax on liquor. (Plazas Decl. P 15.) If a Department opts to exploit its liquor monopoly, it "may collect a 'participation' from liquors instead of the consumption tax[.]" (Id. P 23.) Although Plazas's description of the "monopoly participation" is less than clear (perhaps because of an imperfect translation of Plazas's declaration), Defendants explain that a monopoly participation is essentially a consumption tax by another name: "Where a Department chooses to exploit the monopoly, the Department will charge a monopoly 'participation' on every bottle of liquor introduced into its territory 'instead of the consumption tax.'" (Def. FNC Mem. at 19 (quoting, Plazas Decl. P 23).) Colombian law requires the monopoly participation to be no lower than the consumption. (Plazas Decl. P 23 n.10.) In fact the only distinction between the consumption tax and the monopoly participation that the court can discern is that a centralized Colombian government agency collects the consumption tax, whereas the individual Departments collect the monopoly participations.

[5] These eighteen categories of injury are: failure of Defendants' smuggled products to bear labels with the information required by Colombian law; "adverse economic impact" of the Colombian "underground economy;" "eros[ion] of the stability and credibility" of the Colombian peso; "[d]istortion of the [m]oney supply;" distort[ion] [of] the official balance of payments;" "permeation of the Colombian border and the Territory of the Republic;" threat to the "safety, security, and well-being of governmental personnel and property;" interference with "the regulatory system and authority of the Republic;" "disruption of public services;" "expenses to stabilize unstable political situations in entire regions of Colombia;" damage to the Colombian "trade and the economy;" "interfere[nce] with use by the public of a public space;" "endanger[ment] and injur[y] [to] the property, life, health, safety, and comfort of a considerable number of persons;" "injur[y] [to] the economic well being of the citizens of the Republic of Colombia and the Departments;" "creat[ing] great dangers to the community, including Plaintiffs' economic and non-economic interests;" and "fraud on the public." (Def. FNC Rep. at 31-32.)

resulting **[**54]** from Defendants' failure to properly label goods. Each of these two types of injury will be considered in turn.

[55]** First, the "adverse economic impact" of the Colombian "underground economy" is simply too general and vague a term to encompass only injury that is barred by the revenue rule. For instance, Plaintiffs' lost sales and profits resulting from Defendants' money laundering are presumably included within the "adverse economic impact" of the Colombian "underground economy." Although the claim for such "adverse economic impact" does not run afoul of the revenue rule, this allegation, read independently, is too vague to withstand *Federal Rule of Civil Procedure 8*'s liberal pleading requirements and, thus, is dismissed. Specific allegations of injury that fall within the category of "adverse economic impact" survive, however. For instance, Plaintiffs have pled a claim for lost sales and profits, which is an injury Plaintiffs suffer in a commercial as opposed to a sovereign capacity.

Second, harm resulting from Defendants' failure to properly label their goods is arguably a harm that Plaintiffs suffer in a commercial capacity. Although Plaintiffs may bring the improper labeling claim in a purely commercial capacity, such a claim may still be barred by **[**56]** the revenue and/or penal rules if it requires the court to enforce Colombian labeling laws. In any event, at this time, the court will dismiss on revenue rule grounds only the sixteen harms that are clearly suffered by Plaintiffs in their sovereign capacities.

However, Plaintiffs' claims for lost revenues and profits seek redress for a harm that Plaintiffs allegedly suffered in a commercial--as opposed to sovereign--capacity and, as a result, do not constitute the kind of direct enforcement of foreign revenue laws that runs afoul of the revenue rule. ***HN29***[] Manufacturing and/or selling liquor is not "within the class of acts that are *'jure imperii,'* that is, that are expressions of a foreign's sovereign's will or are carried out by virtue of that sovereign authority." *Canada, 268 F.3d at 132*. Sales of liquor in a national or international market can be made by a government agency authorized to sell liquor by the government's constitution, a private entity that is authorized by a law permitting (or the absence of a law prohibiting) any private individual to sell liquor, a private entity that was granted corporate status by the sovereign, or a private entity that was specially **[**57]** licensed by the sovereign to sell liquor. Although the regulation of liquor distributing and sale is clearly a sovereign act, a sovereign's participation in a liquor manufacturing and distribution market is a purely commercial act. The fact that the sovereign may have decided to enter the liquor business itself as opposed to allowing or licensing others to enter the business in no way transforms the sale of liquor into a sovereign act.

The fact that Colombian law appears to provide that Plaintiffs' profits from the liquor business are to be used for **[*393]** the health and welfare of Colombian citizens in no way changes this conclusion. (Plazas Decl. PP 11-12.) ***HN30***[] How the profits of a business are used is irrelevant in determining whether the act is an inherently sovereign act or an inherently commercial act. For purposes of the revenue rule, the sale of liquor to the general public is not one of the *jure imperii* of which the Second Circuit spoke in Canada. As a result,***HN31***[] an action seeking to recover lost revenues and profits Plaintiffs suffered in their commercial capacity as participants in the liquor manufacturing and distributing businesses does not seek the kind of direct enforcement **[**58]** of a foreign revenue law that is prohibited by the revenue rule. [6]

---

[6] Although no party has made this argument, an economist might argue that, at least in some contexts, a sovereign's decision to create a state-owned monopoly for a particular good is functionally equivalent to enacting a sales tax on that good: in a state-owned monopoly, the government can set prices so as to obtain a monopoly profit, whereas a sales tax may be simply another means of receiving revenue that is often similar or equal in value to the monopoly profit. As a result, under this court's reading of the revenue rule, foreign sovereigns may be able to do an end run around the revenue rule by creating a state-owned monopoly that sells a good or service as opposed to taxing a good or service. In certain markets, creating a state-owned monopoly and charging a monopoly price may be able to provide the sovereign with the same or similar net revenue and have similar effects on supply, demand, and other market characteristics as would charging a sales tax. This problem is more theoretical than real. The political and public policy issues surrounding a sovereign's decision as to whether to tax a good or service or simply create a state-owned monopoly are typically of far greater importance than whether a foreign sovereign can bring claims related to that good or service in United States federal courts. It is very hard to imagine a scenario in which a sovereign would create a state-owned monopoly for the exclusive purpose of bringing an action concerning that business in federal court.

[59] 2. Indirect Enforcement**

Whether Plaintiffs' claim for lost revenues and profits constitutes the kind of indirect enforcement proscribed by the revenue rule is a close question. Neither *Canada* nor the European Community cases confronted the precise question presented by the instant claims: whether the revenue rule bars a civil RICO claim brought by a party other than the United States for damages resulting from an enterprise's money laundering when the enterprise is simultaneously engaged in money laundering and tax evasion, both of which caused the plaintiff's alleged damages.

As a preliminary matter, nothing about the instant claims requires the court to pass on the validity of the Colombian laws authorizing the government to manufacture and sell liquor. Defendants repeatedly argue that, in order to rule on Plaintiffs' claims for lost revenues and profits, "this Court would have to *examine* Colombia's revenue laws, including its constitutional authorization of a revenue-raising liquor monopoly to further Colombia's public policy[.]" (Def. FNC Mem. at 52-54 (emphasis added).) Defendants do *not* argue that adjudicating the instant case will require the court **[**60]** *to rule on the validity of* the rules authorizing the Colombian liquor monopolies. Defendants have not articulated any claim, argument or defense raised by or in response to the Second Amended Complaint that would require the court to consider the validity of laws authorizing Plaintiffs' involvement in the liquor business. This conclusion is further supported by the fact that, although Defendants have brought numerous actions in Colombia challenging various aspects of Colombia's liquor laws, none or virtually none of these Colombian actions challenge the legality of Plaintiffs' monopolies. As discussed in **[*394]** greater detail in Section VI(B), the court has carefully reviewed (1) the Declaration of Juan Rafael Bravo Arteaga, which describes these Colombian actions, and (2) the description of these cases contained in Defendants' briefs (Def. FNC Mem. at 19-22). Based on the substantial materials submitted by Defendants concerning the Columbian cases, it is clear that nothing about the instant claims will require this court to consider the validity of Colombian laws authorizing Plaintiffs to manufacture and sell liquor. [7]

[61]** Further, it is of no moment that Colombian law appears to provide that Plaintiffs' profits from the liquor business are to be used for the health and welfare of Colombian citizens. (Plazas Decl. PP 11-12.) How Plaintiffs decide to spend the proceeds from a judgment or settlement in this case is no more relevant to the adjudication of this case than how a private plaintiff intends to spend the proceeds from a judgment or settlement would be to a civil case. Whether a plaintiff will use an award to open a factory that illegally employs child labor or will donate the award to a university to found a children's hospital has no bearing on whether the plaintiff's claims have merit.

As discussed above, Plaintiffs' claims for lost revenues result from two different aspects of the alleged enterprise: Defendants can charge lower prices, and in doing so increase sales and profits, because they benefit from a (1) tax evasion discount and (2) narco-laundering discount. Permitting Plaintiffs to bring a claim for lost revenues and/or profits for that portion of their losses which results from the alleged enterprise's tax evasion would permit Plaintiffs to bring an indirect claim for lost tax revenues; **[**62]** however, Plaintiffs' claim for that portion of their lost revenues and/or profits resulting from the alleged enterprise's money laundering does not constitute an indirect claim for lost tax revenues.

(a) Damages Resulting from Tax Evasion

---

[7] It is important to note one apparent inconsistency between this court's analysis of the direct and indirect enforcement components of the revenue rule. With respect to direct enforcement, the court concludes that revenues the Colombian government earns from its liquor monopoly are earned by the government in a commercial as opposed to a sovereign capacity. In effect, the court concludes that revenue generated by the monopoly law is not "revenue" within the meaning of the revenue rule. With respect to indirect enforcement, however, this court treats the law that authorizes the liquor monopoly as a "revenue" law for purposes of the revenue rule: the court's analysis strongly suggests that, if Plaintiffs' claims required the court to pass on the validity of the monopoly law, the revenue rule would be violated. Despite appearances, there is no inconsistency here. As discussed above, application of the revenue rule must be based on the policy purposes underlying the rule. There are no policy concerns with allowing the foreign sovereign to bring a claim for damages suffered in its commercial capacity. There are, however, policy concerns with a federal court's passing on the validity of a foreign law that authorizes a state-owned monopoly.

Plaintiffs' claims for lost revenues and profits resulting from the alleged enterprise's tax evasion clearly constitute indirect enforcement of Colombian tax laws and, as a result, are barred by the revenue rule. These claims are nothing more than an attempt to use a United States tort claim to seek compensation for harms suffered as a result of the evasion of a foreign sovereign's tax laws. There is no question that hearing these claims would give extraterritorial effect to Colombian liquor tax laws. As the Second Circuit explained in European Community I, ***HN32***[] "indirect enforcement occurs when a foreign state seeks a remedy that would give extraterritorial effect to its tax laws; for instance, a suit seeking damages based on law enforcement **[*395]** costs is an attempt to shift the cost of enforcing the tax laws onto the defendants, and would therefore require the court indirectly to enforce the tax laws." *European Community I, 355 F.3d at 123.*

[63]** Permitting Plaintiffs to recover the portion of their lost revenues and/or profits resulting from Defendants' tax evasion is particularly problematic in this case because it would draw this court into a dispute that is currently the subject of heated litigation in Colombia, namely, whether the Colombian taxes on liquor are legal. Defendants argue that if Plaintiffs' claims are allowed to proceed, Defendants will assert that the Colombian taxes on liquor are illegal and, as a result, Defendants' scheme to evade them does not give rise to a RICO claim. (Def. FNC Mem. at 19-22, 47.) Plaintiffs have not challenged Defendants' assertion that a determination that the Colombian taxes on liquor are illegal would not serve as at least a partial defense to Plaintiffs' claims for lost revenues and/or profits. Although Plaintiffs have not explicitly briefed the issue, this court is aware of no reason why the illegality of the liquor taxes would not be a meritorious defense to the tax evasion portion of Plaintiffs' claims: Plaintiffs would not be entitled to recover damages for lost revenues and profits resulting from Defendants' evasion of liquor taxes that were illegal in the first place. **[**64]** Cf. *United States v. Pierce, 224 F.3d 158, 166-68 (2d Cir. 2000)* (reversing wire fraud conviction for scheme to defraud the Canadian government of taxes to which it was entitled where prosecution failed to introduce any evidence that Canadian government was actually entitled to the taxes at issue).

(b) Damages Resulting from the Laundering of Proceeds of Narcotics Sales

In contrast to Plaintiffs' claims for lost revenues and profits resulting from the enterprise's smuggling and tax evasion, the revenue rule does not bar Plaintiffs' claims for lost revenues and profits resulting from the enterprise's money laundering. First, the European Community cases and Canada do not bar such claims. Those cases addressed only tort claims by foreign governments that would have had the effect of compensating the foreign governments for taxes that should have been paid and the related costs of collecting such taxes. *European Community I, 355 F.3d at 132* ("Because plaintiffs' claims arise exclusively from tax-related losses and costs, adjudicating these claims would implicate the concerns discussed in Canada, requiring the court to evaluate the **[**65]** policies behind the relevant foreign tax laws, interpret their provisions, and enforce them by awarding damages."); *Canada, 268 F.3d at 131-32*. In both cases, the Second Circuit held that such claims were barred by the revenue rule. *European Community I, 355 F.3d at 132*; *Canada, 268 F.3d at 131-32*.

Because (1) Plaintiffs are seeking damages to their liquor manufacturing and distribution businesses resulting from Defendants' enterprise, (2) Defendants' enterprise causes Plaintiffs' damages by (a) evading taxes and (b) laundering proceeds from illegal narcotics sales, and (3) Plaintiffs are entitled to recover damages resulting only from the money laundering aspect of Defendants' enterprise, the Plaintiffs' claims will require the factfinder to distinguish which of Plaintiffs' lost revenues and profits result from narcotics laundering and which result from tax evasion. As a result, the factfinder will be forced to recognize the existence of Colombian tax laws and, to some extent, evaluate the effects that evasion of such taxes had and are having on both Plaintiffs' and Defendants' liquor revenues and profits.

[*396] The pure narcotics-laundering **[**66]** claim will not, however, require the court to pass on the validity of the Colombian tax laws. At this time, there are actions pending in Colombia in which the Diageo companies have alleged that some or all of the Colombian taxes on liquor are invalid. (Def. FNC Mem. at 19-22.) The illegality or invalidity of the tax laws will not serve as a defense to the pure narcotics-laundering claim because it would be irrelevant to determining Plaintiffs' lost revenues and profits resulting from Defendants' narcotics-laundering enterprise. This court's consideration of Colombian tax laws will be limited to recognizing their applicability and determining their economic effect. The fact that the parties dispute the legality of the tax laws is irrelevant; the only question this court will have to answer is which taxes were actually levied (legally or illegally) during the relevant period.

Admittedly, in the event the instant claims were to reach trial, Defendants may very well introduce factual evidence that Plaintiffs' failure to enforce their own tax laws (e.g., through *de facto* validation of the *Sanandresitos*--local Colombian markets in which smuggled goods are sold) led to the development **[**67]** of the BMPE and the alleged smuggling enterprise. (Def. FNC Mem. at 25.) In effect, Defendants are suggesting that they should not be liable for engaging in money laundering; instead, Plaintiffs should be liable for Defendants' money laundering because Plaintiffs should have stopped Defendants from engaging in such misconduct. The fact that Plaintiffs' acts and omissions led to the alleged enterprise, even if true, is in no way a defense to claims relating to Defendants' decision to join that enterprise by laundering narcotics revenues. That Plaintiffs could have done a better job of enforcing their tax and other laws in no way means that Defendants are somehow less liable for money laundering. Thus, although Plaintiffs' claim for lost revenues and profits resulting from Defendants' narcotics laundering requires the court to recognize the existence of Colombian tax laws and analyze their effects, it does not require the court to consider the validity of such laws. [8]

[68]** In this case, the mere recognition of Colombian tax laws and their economic effects does not trigger the revenue rule. As discussed above, *Canada* and the European Community cases leave open the possibility that a court could consider a tort claim that requires it to recognize a foreign tax law without running afoul of the revenue rule. The recognition and consideration of Colombian revenue laws required by Plaintiffs' claims for lost revenues and profits resulting from the narco-laundering discount simply do not raise sufficient policy concerns to warrant application of the revenue rule.

As a preliminary matter, the policy and political problems resulting from the mere recognition of a foreign tax law and its effects are far smaller in magnitude than those in the core revenue rule case in which the court must rule on the validity of the foreign law. Long ago, Judge Learned Hand explained that ***HN33***[] "a court will not recognize those [liabilities] arising in a foreign state, if they run counter to the 'settled public policy' of its own. . . . No court ought to undertake an inquiry which **[*397]** it cannot prosecute without determining whether those laws are consonant with its own notions **[**69]** of what is proper." *Moore, 30 F.2d at 604* (L. Hand, J., concurring). More recently, in the European Community cases, the Second Circuit explained that "policy complications and embarrassment may follow when one nation's courts analyze the *validity* of another nation's tax laws." *European Community II, 424 F.3d at 180* (emphasis added). In hearing the pure narcotics-laundering claim, this court will not be required to make any value-laden judgment as to whether Colombia's tax laws are consistent with American public policies.

Instead, those claims will require the factfinder to measure certain effects of Colombia's tax laws. In distinguishing which of Plaintiffs' lost sales result from Defendants' evasion of Colombian taxes and which of Plaintiffs' lost sales result from Defendants' narco-laundering scheme, the factfinder will most likely make certain judgments as to the effect that Colombian liquor taxes have on overall liquor consumption in Colombia, Plaintiffs' liquor sales and, possibly, Defendants' liquor sales. These are determinations that can in many contexts, including perhaps this context, be very sensitive to both Colombia and the **[**70]** United States. See *Canada, 268 F.3d at 113* (discussing this sensitivity and noting that taxes on tobacco could be entirely consistent with New York public policy but entirely inconsistent with the public policy of a tobacco-growing state). The court is not aware of the extent to which liquor taxes are or will become a political issue in Colombia. Nor does this court know whether the Executive or Legislative branches of the United States government have an interest in Colombia's liquor taxation laws. [9] It is

---

[8] Defendants argue that, under *Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*, and *Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006)*, when Plaintiffs' claims are stripped of the tax evasion aspect of the alleged enterprise, as a matter of law, Plaintiffs cannot prove that the enterprise's money laundering was the proximate cause of Plaintiffs' injuries. This argument will be considered below in the context of Defendants' numerous arguments that Plaintiffs have failed to state a claim upon which relief can be granted.

entirely possible that one of these branches has taken a position with respect to the economic effects of the Colombian liquor scheme and the factfinder in this case may very well reach a determination that is inconsistent with that position.

[71]** However, the policy concerns presented by this recognition and consideration of the Colombian tax laws and their effects are not sufficient to warrant applying the revenue rule in this case. There are federal causes of action that, even if brought by a private party, would require a federal court or jury to make the same analyses of the effects of Colombian liquor taxes that may very well need to be made in this case. For instance, if a liquor manufacturer brought an antitrust claim against another manufacturer alleging that the defendant had monopolized an international liquor market that included Colombia, the federal court would have to reach conclusions about the nature of Colombian liquor sales, including elasticity of demand, effects of Colombian taxes, and the extent of evasion of Colombian taxes. The fact that the factfinder in this case may have to make certain determinations as to the economic effects of Colombia's taxes simply does not create policy concerns of sufficient magnitude to justify applying the revenue rule in this case.

Further, applying the revenue rule in this case would raise extremely troubling policy implications for RICO and other federal efforts to stop **[**72]** illegal narcotics trafficking. If Defendants' enterprise was involved exclusively in laundering the proceeds **[*398]** of narcotics sales, the instant claims would not trigger the policy concerns associated with recognizing and considering Colombian liquor tax laws, which will probably be necessary in order to distinguish which of Plaintiffs' lost sales resulted from tax evasion and which resulted from narco-laundering. However, the alleged enterprise is engaged in both tax evasion and money laundering. Defendants are, in effect, asserting as follows: if our enterprise paid the taxes that it owed and was exclusively engaged in the laundering of proceeds of narcotics sales, Plaintiffs' claims would not indirectly enforce a foreign revenue law; however, because the enterprise was engaged in tax evasion and money laundering, claims concerning the enterprise are barred by the revenue rule. Defendants go so far as to argue that "[m]oney laundering--like transportation, storage, corruption of border guards and false customs documents--is merely a logistical component of smuggling contraband into Colombia." (Def. FNC Rep. at 19.) To deny Plaintiffs an opportunity to bring claims for damages resulting **[**73]** from the enterprise's money laundering merely because the enterprise is also engaged in tax evasion creates an obvious perverse incentive and moral hazard: individuals engaged in a money-laundering enterprise could shield their conduct from civil RICO claims by expanding their enterprise to include evading a foreign sovereign's taxes. [10]

---

[9] Colombia and the United States do appear to be negotiating a trade agreement. (See Trade Promotion Agreement, U.S.-Colomb., draft of May 8, 2006 ("Trade Draft"), available at *http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Draft_Text/Section_Index.html;* see also Def. FNC Rep. at 101-02.) It is not possible, however, to divine the Executive or Legislative branch's position, if any, on Colombian liquor taxation from this draft treaty.

[10] Defendants also argue that tax agreements between Columbia and the United States, which do not provide for United States courts to hear adjudicated or unadjudicated Colombian tax claims, further suggest that the revenue rule bars this claim. (Def. FNC Mem. at 47.) Defendants are correct about the existence and substance of tax agreements between Colombia and the United States. (Plazas Decl. P 24, n.11.) Defendants may be correct that, when a court is considering a revenue rule issue, the existence of such tax agreements is noteworthy:

> It seems to us that the usual absence in our negotiated tax conventions of any provision for the extraterritorial enforcement of a sovereign's tax judgments or claims cannot be not accidental, but instead must reflect the considered policy of the political branches of our government. Thus, the political branches of our government have clearly expressed their intention to define and strictly limit the parameters of any assistance given with regard to the extraterritorial enforcement of a foreign sovereign's tax laws. In this area of foreign relations policy where the political branches have primacy, courts must be wary of intruding in a way that undermines carefully conceived and negotiated policy choices.

Canada, 268 F.3d at 119. This reasoning, however, was called into question in the Supreme Court's decision in Pasquantino. See *European Community II, 424 F.3d at 182 n.9*. In any event, as this court concludes that Plaintiffs' claims for damages resulting only from the alleged enterprise's laundering of proceeds of narcotics sales neither constitutes enforcement of a Colombian tax law nor requires the court to consider the validity of Colombian tax or revenue laws, this point is inapposite.

[74]** In the final analysis, nothing about Plaintiffs' claims for lost revenues and profits will in any way lead this court to "indirectly enforce" Colombia's tax or revenue laws. As discussed in detail above, the Second Amended Complaint alleges that Plaintiffs have lost sales as a result of Defendants' money laundering and tax evasion scheme. In this action, Plaintiffs will only be able to recover for lost sales resulting from Defendants' money laundering. Presumably, one of the primary factual issues in this case will be the extent to which Plaintiffs can prove that their lost sales were caused by Defendants' money laundering as opposed to some other cause. As a result, Plaintiffs will have every incentive to show that Defendants (1) are engaged in little or no tax evasion, and/or (2) tax evasion has little or no effect on Plaintiffs' sales. In contrast, Defendants will have every incentive to show **[*399]** that tax evasion in Colombia is rampant and that the tax evasion is the primary if not exclusive cause of Plaintiffs' lost sales. As the nature of this action requires Plaintiffs to attempt to disprove the existence and effects of Defendants' tax evasion, the argument that Plaintiffs are using **[**75]** this action to "indirectly enforce" Colombian tax law fails.

In short, Plaintiffs' claims for taxes and other damages suffered in Plaintiffs' sovereign capacity is dismissed as barred by the revenue rule. Plaintiffs' claims for damages suffered in Plaintiffs' commercial capacity resulting from Defendants' tax evasion are also barred by the revenue rule. Plaintiffs claims for damages suffered in a commercial capacity resulting from Defendants' money laundering are not barred by the revenue rule. [11]

IV. PENAL LAW RULE

A. Background

The penal law rule is very similar **[**76]** to the revenue rule.***HN34***[] It provides that federal courts do not possess jurisdiction over an action to enforce the penal laws of a sovereign state: "By the law of England and of the United States the penal laws of a country do not reach beyond its own territory except when extended by express treaty or statute to offenses committed abroad by its own citizens; and they must be administered in its own courts only, and cannot be enforced by the courts of another country." *Wisconsin v. Pelican Ins. Co. of New Orleans, 127 U.S. 265, 289-90, 8 S. Ct. 1370, 1374, 32 L. Ed. 239 (1888)*.

Defendants argue that the revenue and penal law rules are parallel and that the penal law rule prevents this court from hearing actions that directly or indirectly enforce a foreign sovereign's penal laws to the same extent that the revenue rule prevents this court from hearing actions to enforce a foreign sovereign's revenue laws. (Def. FNC Rep. at 35-45.) Defendants are correct.

The policy concerns underlying the penal law rule are the same as those that drive the revenue rule. As Judge Learned Hand explained in Moore v. Mitchell, "[t]o pass upon the provisions for the public order of another state . . . involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted to other authorities." *Moore, 30 F.2d at 604* **[**77]** (L. Hand, J., concurring). Judge Hand went on to write that "[r]evenue laws fall within the same reasoning[.]" Id. More recently, the Supreme Court stated that, "[s]ince the late 19th and early 20th century, courts have treated the common-law revenue rule as a corollary of the rule that, as Chief Justice Marshall put it, '[t]he Courts of no country execute the penal laws of another.'" *Pasquantino, 544 U.S. at 360-61, 125 S. Ct. at 1774* (quoting *The Antelope, 23 U.S. 66, 10 Wheat. 66, 123, 6 L. Ed. 268 (1825))*. In fact, "[t]he basis for inferring the revenue rule from the rule against foreign penal enforcement was an analogy between foreign revenue laws and penal laws." *Pasquantino, 544 U.S. at 361, 125 S. Ct. at 1775*.

---

[11] Defendants argue that the Republic of Colombia, the Bogota Capital District, and those Departments that do not exercise their right to a liquor monopoly suffer no competitive harm. (Def. RICO Mem. at 29-31.) To the extent these Plaintiffs suffer no injury in their commercial capacity--as defined in the revenue rule section of this opinion--these Plaintiffs' claims are barred by the revenue rule and, as a result, are dismissed.

Because there are even fewer recent cases discussing the penal law rule than there are discussing the revenue rule, the exact scope of the penal law rule is far from clear. The Supreme Court has held **[*400]** that the rule can apply to laws that are civil:

> ***HN35***[] The rule that the courts of no country execute the penal laws of another applies, not only to prosecutions and sentences for crimes and misdemeanors, but to all suits **[**78]** in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties.

Wisconsin, 127 U.S. at 290, 8 S. Ct. at 1374. ***HN36***[] Nothing about the penal law rule, however, prohibits foreign sovereigns from bringing a civil cause of action that is not penal in nature: "A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts." Id. (internal quotation marks omitted). Long ago, ***HN37***[] the Supreme Court announced the standard for determining whether an action is one for violation of a "civil" wrong as opposed to one to enforce a "penal" law:

> The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual, according to the familiar classification of Blackstone: ["]Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals **[**79]** and are thereupon frequently termed 'civil injuries;' the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and are distinguished by the harsher appellation of 'crimes and misdemeanors.["] 3 Bl. Comm. 2.

Huntington v. Attrill, 146 U.S. 657, 668-69, 13 S. Ct. 224, 228, 36 L. Ed. 1123 (1892). See also *Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 413 n.15, 84 S. Ct. 923, 933, 11 L. Ed. 2d 804 (1964)* ("As appears from the cases cited, a penal law for the purposes of this doctrine is one which seeks to redress a public rather than a private wrong."). In light of the shared origins and purposes of the revenue and penal law rules, I read this distinction between "private" and "public" wrongs to be entirely coterminous with the distinction between harms that are *jure gestionis* and *jure imperii.*

B. Analysis

The parties vigorously contest the extent to which the instant claims are barred by the penal law rule. Just as in the context of the revenue rule, the penal law rule bars claims for damages that Plaintiffs suffer in their sovereign capacity, but permits claims for damages that Plaintiffs **[**80]** suffer in a commercial capacity.

Plaintiffs' alleged lost revenue and profit is a harm that Plaintiffs suffer in their private capacity as commercial actors and, as a result, claims based on that harm are not barred by the penal law rule. Such claims are for damages suffered by Plaintiffs' liquor businesses. Defendants cite *Oklahoma ex rel. West v. Gulf, Colorado, & Santa Fe Railway Co., 220 U.S. 290, 31 S. Ct. 437, 55 L. Ed. 469 (1911)*, for the proposition that a sovereign's civil claim for violation of a variety of liquor laws--including violation of a state-owned liquor monopoly--is barred by the penal law rule. *Oklahoma* is inapposite. In Oklahoma, the State of Oklahoma brought suit to enjoin corporations from violating a variety of Oklahoma state liquor laws by importing liquor into the state. *Id., at 291-95, 31 S. Ct. at 438-440*. One of the laws that the defendants were accused of violating was a law that granted the State of Oklahoma a monopoly over liquor sales. *Id., at 297, 31 S. Ct. at 439-40*. The court concluded that the action was barred by the penal law rule: "The present suit, **[*401]** although in form one of a civil nature is, in its **[**81]** essential character, one to enforce by injunction regulations prescribed by a state for violations of one of its penal statutes, and is therefore one of which this court cannot take original cognizance at the instance of the state." *Id. at 300, 31 S. Ct. at 441*. The instant claim for lost revenues and profits is distinguishable because such claims are for damages suffered by Plaintiffs in their commercial capacities by Defendants' money-laundering enterprise, whereas the plaintiff in Oklahoma was suing in its sovereign capacity to enforce Oklahoma's liquor laws.

With respect to their penal law rule motion, Defendants make a number of arguments that, understandably, are similar or identical to arguments they made in the context of the revenue rule motion. These arguments fail for the same reasons described in the discussion of the revenue rule motion. First, nothing about Plaintiffs' RICO or other claims requires this court to pass on the validity of Colombian penal laws. Second, Defendants' argument that Plaintiffs "are seeking to enforce a public right granted to the Departments under the Colombian Constitution, which permits the Departments to sell liquor as **[**82]** no private entity can, for the public benefit" (Def. FNC Rep. at 44) also fails. Plaintiffs, in their commercial capacity, bring federal and state civil tort claims. This suit does not involve the laws authorizing the Colombian liquor monopoly any more than does a suit by a specially licensed liquor retailer involve the laws that authorized the retailer to sell liquor. Third, nothing about Plaintiffs' claims for lost revenues and profits constitutes an impermissible effort to indirectly enforce Colombia's penal laws. The fact that Defendants' conduct that allegedly violates federal and state law may also violate Colombian law is of no consequence: the mere fact that a defendant's conduct happens to violate the laws of some foreign sovereign (in addition to U.S. law) is no defense to a federal civil claim. Any other rule would create the perverse incentives to violate foreign laws.

Defendants are correct, however, that the Second Amended Complaint appears to identify certain types of damages claims that constitute an attempt to directly enforce Colombian penal laws. Above all else, Plaintiffs appear to state that they are seeking to enforce the Colombian law providing that the Colombian **[**83]** government may seize instrumentalities of crime: "Under the laws of the Republic of Colombia, the Republic of Colombia and the Departments of the Republic of Colombia possess title in, or have a right to, any property used in the commission of a crime conducted within their borders, including money and goods, including illegal liquor products." (SAC P 103(g).) This claim is an attempt to directly enforce a Colombian law that constitutes a penal law within the meaning of the penal law rule and, as a result, is dismissed. As this court has already determined that the revenue rule bars most of the other categories of damages that Defendants assert violate the penal law rule, there is no reason to address them again in the context of the penal law rule. (See, e.g., Def. FNC Rep. at 43 (Colombian government's expenditures to prevent money laundering, law enforcement costs, damages other than lost revenues are profits that result from violation of Colombia's borders).) Defendants' motion to dismiss the Second Amended Complaint on the ground that it is barred by the penal law rule is granted in part and denied in part, to the same extent as their motion based on the revenue rule.

[**84] V. *FORUM NON CONVENIENS*

A. Background

HN38[] "The principle of *forum non conveniens* is simply that a court may **[*402]** resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507, 67 S. Ct. 839, 842, 91 L. Ed. 1055 (1947)*. The decision as to whether to dismiss a case on *forum non conveniens* grounds is trusted to the sound discretion of the trial court. *Iragorri v. United Techs. Corp., 274 F.3d 65, 72 (2d Cir. 2001)*. The Second Circuit has explained that district courts should follow a three-step process when exercising this discretion:

> At step one, a court determines the degree of deference properly accorded the plaintiff's choice of forum. At step two, it considers whether the alternative forum proposed by the defendants is adequate to adjudicate the parties' dispute. Finally, at step three, a court balances the private and public interests implicated in the choice of forum.

Norex Petroleum Ltd. v. Access Indus., Inc., 416 F.3d 146, 153 (2d Cir. 2005) (internal citations omitted).

HN39[] Step one requires the court to determine **[**85]** what degree of deference should be afforded to the plaintiff's choice of forum. *Iragorri, 274 F.3d at 71*. When a plaintiff selects her home as a forum, the plaintiff should be given "great deference," but when a foreign resident selects a United States forum, the plaintiff is entitled to "less deference." Id. In order to determine how much deference a plaintiff should be accorded, the court must determine the extent to which the plaintiff's choice of forum was based on legitimate convenience concerns and to what extent the choice constitutes mere forum shopping:

> HN40[] The more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice. Stated differently, the greater the plaintiff's or the lawsuit's bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for *forum non conveniens.* Thus, factors that argue against *forum non* **[**86]** *conveniens* dismissal include the convenience of the plaintiff's residence in relation to the chosen forum, the availability of witnesses or evidence to the forum district, the defendant's amenability to suit in the forum district, the availability of appropriate legal assistance, and other reasons relating to convenience or expense. On the other hand, HN41[] the more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons--such as attempts to win a tactical advantage resulting form local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum--the less deference the plaintiff's choice commands and, consequently, the easier it becomes for the defendant to succeed on a *forum non conveniens* motion by showing that convenience would be better served by litigating in another country's courts.

Iragorri, 274 F.3d at 71-72 (footnote omitted).

HN42[] At step two, the plaintiff bears the burden of establishing that **[**87]** an adequate alternative forum exists. *Norex, 416 F.3d at 157*. "'An alternative forum is adequate if the defendants are amendable to service of process there, and if it permits litigation of the subject matter of the dispute.'" *Id.* (quoting *Pollux Holding* ***[*403]*** *Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 75 (2d Cir. 2003))*.

HN43[] In the event the court determines that an adequate alternative forum exists, the court proceeds to step three, which requires the court to balance two sets of factors to determine which forum is best suited to adjudicate the case. *Iragorri, 274 F.3d at 73*. The first set of factors are the "private interest" factors, which are designed to assess which forum is most convenient for the parties: "'the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive.'" *Id. at 73-74* (quoting *Gilbert, 330 U.S. at 508*). HN44[] In **[**88]** making this private interest analysis,

> [T]he court should focus on the precise issues that are likely to be actually tried. . . . In a suit alleging negligence, for example, the court might reach different results depending on whether the alleged negligence lay in the conduct of actors at the scene of the accident, or in the design or manufacture of equipment at a plant distant from the scene of the accident.

Id. at 74. HN45[] During this third step, the court must also consider the following public interest factors:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that **[**89]** must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Id. (quoting *Gilbert, 330 U.S. at 508-09*).

B. Analysis

Both parties' submissions on the *forum non conveniens* issue appear far more like treatises exhaustively prepared for the purpose of cataloguing every conceivable *forum non conveniens* argument than like focused "briefs" designed to cut to the heart of the *forum non conveniens* issue. As a result, I will not take the time to identify each of the arguments made by the parties. Instead, I note that the court has reviewed the briefs very carefully and will address the most relevant arguments presented. Although it is a close question, I conclude that the instant case should not be dismissed under the doctrine of *forum non conveniens.* My analysis follows the three-step approach the Second Circuit announced in *Iragorri.*

1. Deference to Plaintiffs' Choice of Forum

Plaintiffs argue that their choice of the instant forum is entitled to a "strong presumption of correctness" (Pl. FNC Opp. at 52 (internal quotation marks omitted)), while the Defendants **[**90]** argue that Plaintiffs' choice of forum should be "accorded little deference" (Def. FNC Mem. at 58). The answer lies somewhere in between. After considering all of the factors described in the Second Circuit's decision in *Iragorri*, the court finds three factors are most influential in this case and, thus, warrant further discussion here.

[*404] First, the parties agree that Plaintiffs are foreign entities. Plaintiffs do not argue that their liquor businesses have any connection to the United States. This factor weighs in favor of attaching little deference to their choice of forum. See *Base Metal Trading SA v. Russian Aluminum, 253 F. Supp. 2d 681, 693-98 (S.D.N.Y. 2003)*, aff'd *98 F. Appx. 47 (2d Cir. 2004)* (plaintiffs' choice of U.S. forum is entitled to "little deference" where seven of ten plaintiffs were foreign, three plaintiffs that were U.S. citizens were shell corporations, the conduct at issue did not occur in the United States, and, with one exception, forum selection clauses in relevant contracts choose foreign fora, confirming that the United States was not a convenient forum for the parties).

Second, the four Defendants that are seeking **[**91]** dismissal on the ground of *forum non conveniens* are United States corporations with offices near this courthouse. As described in greater detail above, Plaintiffs allege that Defendants masterminded a money-laundering enterprise from offices a few miles from the Brooklyn Bridge. While it is possible that Plaintiffs could have brought claims against a number of other entities that are alleged to be a part of the enterprise (*e.g.,* Defendants' distributors or drug dealers whose revenues are being laundered), Plaintiffs have decided--as is their right to do--to seek compensation exclusively from Defendants. In order to most efficiently gather evidence against Defendants, it would make sense to bring a claim in a United States forum that is geographically proximate to Defendants' witnesses and documents. While it certainly would be possible to obtain at least some evidence from Defendants by bringing suit in Colombia, Plaintiffs may have reasonably concluded that the easiest way to obtain evidence from American Defendants is to retain American lawyers to seek discovery from them in an American court.

A significant amount of evidence essential to Plaintiffs' case that may be located **[**92]** in Colombia. This includes evidence describing (1) the effects of Defendants' money laundering on the Colombian liquor market and (2) Plaintiffs' injuries. However, Plaintiffs may have reasonably concluded that they are already in possession of many if not all of the documents in the latter category and therefore do not require discovery to obtain them. With respect to documents concerning the effects of Defendants' money laundering, Plaintiffs may intend to rely upon documents already in their possession and/or documents to be obtained from Defendants in discovery. As a result, this factor suggests that Plaintiffs selected the instant forum because it was convenient, as opposed to purely for the sake of forum shopping. [12] See *Pollux, 329 F.3d at 74* **[*405]** ("[***HN46***[] A] plaintiff's choice to initiate suit in the

[12] It appears that Colombian courts may not possess personal jurisdiction over the two non-U.S. Defendants, Pernod-Ricard S.A. and Diageo PLC. No party has asserted that Colombian courts possess personal jurisdiction over them. Of course, these two Defendants, which are not parties to the instant motions, assert that this court does not possess personal jurisdiction over them. In the event this court determines it possesses personal jurisdiction over these two Defendants, Plaintiffs' decision to bring suit in this forum would be supported by yet another legitimate consideration. See *Norex, 416 F.3d at 155* ("Notably, it appears doubtful from the record that [plaintiff] could have perfected jurisdiction over all defendants in either of its presumptively convenient home forums, Canada or Cyprus, or even in defendants' preferred forum, Russia. Thus, [plaintiff's] decision to litigate in New York,

defendant's home forum--as opposed to any other where the defendant is also amenable to suit--only merits heightened deference to the extent that the plaintiff and the case possess bona fide connections to, and convenience factors favor, that forum.").

[93]** Third, the fact that RICO permits successful Plaintiffs to recover treble damages suggests that Plaintiffs may have selected this forum purely for tactical reasons. See *Norex, 416 F.3d at 155* ("[W]e recognize that the possibility of a RICO treble damages award might have made the choice of a United States forum attractive to [plaintiff] regardless of convenience.")

After considering all of the *Iragorri* factors, I find that this case falls somewhere in between those cases where courts accord "little deference" to the plaintiff's choice of forum and those in which courts accord "substantial deference." Compare *Pollux, 329 F.3d at 71-72* (foreign plaintiff with only minimal connections to U.S. forum entitled to "lesser degree of deference") with *Norex, 416 F.3d at 155* (where "it appear[ed] doubtful from the record that [plaintiff] could have perfected jurisdiction over all defendants in either of its presumptively convenient home forums" and much evidence was located in New York forum, plaintiff's choice of forum was entitled to significant deference). As a result, this court will accord reasonable, but not substantial, deference **[**94]** to Plaintiffs' choice of forum. See *Giaguaro S.p.A. v. Amiglio, 257 F. Supp. 2d 529, 535-37 (E.D.N.Y. 2003)* (foreign plaintiffs' choice of New York forum "entitled to some weight" where defendant was New York resident and defendant alleged to have committed fraud and breach of contract in New York).

2. Adequate Alternative Forum

Plaintiffs' only argument that Colombia is not an adequate alternative forum is that Defendants have failed to adduce evidence that Colombia courts could and would entertain claims against the French and United Kingdom Defendants, Pernod-Ricard S.A. and Diageo PLC. (Pl. FNC Opp. at 48.) Plaintiffs' argument appears to go to both the subject-matter and personal jurisdiction of the Colombian courts.

As a preliminary matter, the court notes that, ***HN47***[] where Colombian courts have subject-matter jurisdiction over a matter and personal jurisdiction over the parties to a dispute, the Colombian courts have the procedures required to constitute an adequate alternative forum. See, e.g., *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 190 F. Supp. 2d 1125, 1134 (S.D. Ind. 2002)*; *Iragorri v. United Techs. Corp., 46 F. Supp. 2d 159, 162-63 (D. Conn. 1999),* **[**95]** vacated on other grounds, *274 F.3d 65 (2d Cir. 2001)*.

The parties have submitted conflicting evidence as to whether Colombian courts possess subject matter jurisdiction over this matter. Plaintiffs' expert, Rafael Nieto Navia, who has been a judge on various international courts (including those of Rwanda and the former Yugoslavia) and a professor of international public law, states, "I believe that Colombian judges do not have jurisdiction to hear this case." (Acevedo Decl. Exh. 7 ("Nieto Decl.") P 9.) This appears to be because "Colombian law does not apply extraterritorially. The general rule is that Colombian judges do not have jurisdiction over events that occur abroad[.]" (Id.)

Plaintiffs' other expert, Alfonso Miranda Londono, who teaches, studies, and practices competition law in Colombia, testified that Colombian courts do have subject matter jurisdiction over the instant matter: Colombian courts "would surely take cognizance **[*406]** of the case, since some of the effects of the conduct[] described took place in Colombian territory." (Acevedo Decl. Exh. 8 ("Miranda Decl.") P 11.) This conclusion is consistent with both Miranda's and Defendants' expert's **[**96]** description of the scope of Colombian courts' subject matter jurisdiction. Miranda testified that "[i]f the act of unfair competition has been carried out abroad, the judge of the place in which the act produced its effect shall also have jurisdiction." (Id. P 10(b)(iv).)

Defendants' expert is Jorge Santos Ballesteros, a professor of law who has practiced law in Colombia and served as a Justice and the President of the Colombian Supreme Court Civil Division. (Declaration of Jorge Santos

---

where all defendants were amenable to suit (and where some reside or are incorporated) is properly viewed as a strong indicator that convenience, and not tactical harassment of an adversary, informed its decision to sue outside its home forum.").

Ballesteros ("Santos Decl.") P 1.) According to Santos, Colombian courts possess "jurisdiction over a defendant in situations, such as those described in the [instant] Complaint, in which the defendant is alleged to have engaged or assisted in wrongdoing that caused injury in Colombia. This is true even if the defendant's actions took place outside of Colombia and had effects in Colombia." (Id. P 21.)

The bulk of the evidence clearly supports the conclusion that Colombian courts possess subject matter jurisdiction over the instant dispute. Only Nieto's testimony contradicts this conclusion. I do not credit Nieto's testimony on this point because (1) Nieto specializes in public international **[**97]** law as opposed to the private tort law at issue in this case and (2) Nieto's testimony on this point fails to address the doctrine that Colombian courts will hear tort claims that cause injuries in Colombia. As a result, I conclude that Colombian courts possess subject-matter jurisdiction over the instant dispute.

Plaintiffs also argue that Colombian courts do not possess personal jurisdiction over Pernod-Ricard S.A. and Diageo PLC. These two Defendants have indicated that they will consent to the jurisdiction of the Colombian courts if this case is dismissed under the doctrine of *forum non conveniens.* (Def. FNC Rep. at 55 n.42 ("Should this Court determine that the *forum non conveniens* dismissal depends on the Foreign Defendants consenting to jurisdiction in Colombia, they also are prepared to so consent.").) This willingness to consent disposes of the personal jurisdiction issue. See *Norex, 416 F.3d at 157* ("In urging Russia as an adequate alternative forum for [plaintiff's] claims, defendants satisfied the [amenable-to-service-of-process-in-Russia] prong of [the *forum non conveniens*] test by representing that they would all submit to the jurisdiction **[**98]** of Russian courts in any comparable action field against them by plaintiff."); *Jota v. Texaco Inc., 157 F.3d 153, 159 (2d Cir. 1998)* (reversing dismissal for *forum non conveniens* where defendant was not amenable to suit in alternative forum and remanding for, *inter alia,* determination as to whether defendant would consent to suit in alternative forum); *Skelton Fibres Ltd. v. Canas, No. 96 Civ. 6031 (DLC), 1997 U.S. Dist. LEXIS 2365, 1997 WL 97835, at *4 (S.D.N.Y. Mar. 6, 1997)* ("The first prong of the *forum non conveniens* test is satisfied as defendants represented to this Court . . . that the American defendants consent to the jurisdiction of the Spanish courts.").

As the Colombian courts possess subject matter over the matter and the British and French Defendants have consented to the Colombian courts exercising personal jurisdiction over them, the Colombian courts constitute an adequate alternative forum.

3. Interest-Balancing

It would be a gross understatement to say that the parties have "over-briefed" the interest balancing issue. Although the court has carefully considered each and every of the seemingly countless arguments **[*407]** included in both parties' **[**99]** briefs, the court will address only those factors that are the most significant. First, the private interest factors will be considered. A discussion of the public interest factors will follow.

(a) Private-Interest Factors

(I) Location and Convenience of Evidence and Witnesses

This factor favors neither the instant forum nor the Colombian forum. There are two significant categories of evidence that are present in the United States. First, Plaintiffs allege that Defendants masterminded a money-laundering enterprise from offices within a few miles of this courthouse. Plaintiffs allege that Defendants "controlled" the money-laundering enterprise at issue in this case. (SAC PP 2, 28-30.) Further, Plaintiffs continue to allege that "[m]any of the activities of the Defendants that are the subject matter of this complaint, including management decisions and direction of the schemes, are conducted by the Defendants in the United States and, more particularly, from the Defendants' offices in the State and City of New York." (Id. P 100.) The Second Amended Complaint contains numerous specific allegations of money laundering. (E.g., PP 27(c), 32, 37.) This suggests **[**100]** that Plaintiffs already possess significant evidence that money laundering occurred. As a result, the most important aspect of discovery in this case will be an examination of whether and, if so, in what ways and to what extent, Defendants were involved in the money laundering. As Defendants are alleged to have managed the money-laundering enterprise from the United States, this category of evidence will most likely be found in the United States.

Defendants argue that the evidence that is in Defendants' possession in the United States would be just as accessible to Plaintiffs if this case is heard in Colombia as if it is heard in the United States because the Colombian court will have the power to order the Defendants to turn over any evidence in their possession to which Plaintiffs are entitled, irrespective of where it is located. (Def. FNC Rep. at 66-67.) Defendants argue that "[w]hat is most relevant for the *forum non conveniens* analysis is the location of evidence in the hands of *non-parties* who may *not* be subject to the jurisdiction of the court that ultimately hears this case." (Id. at 67 (emphasis in original).) To some extent, this may be true. However, **[**101]** the fact that evidence in Defendants' possession is already located here suggests that it may be cheaper and more expeditious to litigate the dispute here.

Second, Plaintiffs allege that the initial stages of the money laundering occurred in the United States. (James Aff. P 12.) Also, Plaintiffs have stated that at least some of the narcotics traffickers who are alleged to be involved in the enterprise currently reside in the United States. (Pl. FNC Opp. at 65 ("[T]o the extent that the Defendants actually believe that they may call some of the narcotics traffickers and money launderers as witnesses in this case, it happens that now most of them reside in the United States as guests of the United States government.").) As a result, at least some evidence of money laundering is also likely to be located here.

Similarly, there are two categories of evidence that are likely to be located in Colombia. First, the overwhelming majority of evidence of how Defendants' enterprise affected Colombian liquor market(s) and injured Plaintiffs is likely to be in Colombia. This is an extremely significant body of evidence. Adjudicating Plaintiffs' claims in this court will require distinguishing **[**102]** the extent to which Plaintiffs' sales were reduced by (1) money laundering, (2) tax evasion, and/or (3) other economic **[*408]** factors, such as consumer preferences and elasticity of demand. Although it is possible that Defendants possess such evidence in their United States facilities (e.g., Acevedo Decl. Exhs. 2-5), the bulk of this evidence is most likely found in Colombia.

Second, it appears that a significant amount of the money laundering process occurred in Colombia and, as a result, documents concerning and witnesses to those stages of the money laundering process will be located in Colombia. (Acevedo Decl. Exh. 6 at 13.)

In addition to evidence in Colombia and the United States, the Second Amended Complaint states that Defendants' enterprise conducted much of their activities in Aruba. (E.g., SAC PP 27(f), 30.) As a result, it appears that there will be a substantial amount of evidence and number of witnesses located in the Caribbean. Similarly, two of the Defendants are located in Europe, and, irrespective of whether the court finds that it possesses personal jurisdiction over these European Defendants, some evidence and witnesses will presumably be located there. There **[**103]** is no reason to believe the instant forum or a Colombian forum is more accessible to these Caribbean and European witnesses and evidence.

Finally, I note that Defendants assert that numerous additional categories of evidence are located in Colombia. (Def. FNC Rep. at 62-65.) Although I will not address each category individually, it is sufficient to state that those categories that I have not mentioned are either irrelevant or of far less relevance to the instant claims than the categories that have been discussed herein. [13]

[104]** Overall, the evidence in this case is scattered across the United States, Colombia, the Caribbean, and Europe. As a result, Colombia and the instant forum are equally accessible and convenient to the evidence in this case. See *Maritima Aragua, S.A. v. M/T Trade Resolve, 823 F. Supp. 143, 147 (S.D.N.Y. 1993)* ("[T]he evidence

---

[13] Defendants identify several categories of damages included in the Second Amended Complaint that are based virtually exclusively on evidence that is to be found in Colombia. (Def. FNC Mem. at 73.) As discussed above in the Section addressing the revenue rule, virtually all (if not all) of these categories of damages are barred by the revenue rule. As a result, evidence concerning these categories of damages will not be relevant to the adjudication of this case. Similarly, as discussed in the revenue rule Section, this case does not require the court to pass upon the validity of Colombian tax laws and, as a result, evidence concerning the validity of such laws is not pertinent. (See Def. FNC Mem. at 74.)

and witnesses to be produced by the U.S. corporations, combined with the possibility of evidence to be produced from Germany, England, or Greece prevent the convenience of witnesses and the location of the evidence from being [particularly] determinative of the appropriate forum").

(ii) Compulsion of Attendance of Unwilling Witnesses

Defendants argue that key non-party witnesses are located in Colombia and that Colombia does not have any procedural device for compelling the testimony of a witness to a case pending in this court. (Def. FNC Mem. at 78-81.) Defendants note that, ***HN48***[] pursuant to *28 U.S.C. § 1782*, United States courts can compel third-party witnesses to a proceeding before a Colombian court. (Def. FNC Mem. at 78 n.41.) For the most part, Defendants appear to already be in possession of evidence concerning **[**105]** the Colombian liquor market and the related tax evasion. Further, Plaintiffs undoubtedly possess a significant amount of evidence on the same subject. This court is, of course, capable of requiring Plaintiffs to produce employees located in Colombia for depositions **[*409]** and/or trials. This eliminates any concern that adjudicating the dispute in the instant forum will prevent Defendants from obtaining evidence that Plaintiffs' revenue and profits losses are the result of their own inefficiency and mismanagement as opposed to Defendants' money laundering.

The one significant category of third-party witnesses to whom Defendants may not have access in this forum is money launderers located in Colombia. Such individuals could conceivably provide evidence that Defendants were not involved in those individuals' money laundering. Two factors diminish the significance of this shortcoming of the American tribunal. First, even if this action were tried in Colombia and the money launderers could be compelled to testify, the money launderers are unlikely to provide truthful testimony concerning their money laundering. Second, the Second Amended Complaint clearly alleges a transnational money-laundering **[**106]** enterprise. Thus, money launderers located in the United States, the Caribbean, or Colombia could provide evidence that Defendants were involved in the laundering. The fact that money launderers in Colombia were not familiar with Defendants or believed Defendants were not involved in the laundering is far from dispositive. In the final analysis, this factor slightly favors dismissal.

(iii) Joinder of Additional Parties

Defendants argue that there are several categories of third-party plaintiffs that Defendants will be able to implead in Colombia but not in this court, including Defendants' distributors and importers, Defendants' "criminal customers," and Colombian and Venezuelan individuals and entities involved in money laundering. (Def. FNC Rep. at 74.) Plaintiffs argue that Defendants' vague argument on this ground is largely theoretical because "[t]here is no chance that either in Colombia or the United States, the liquor companies are going to implead into this case their criminal coconspirators, the distributors, narcotics traffickers, and money launderers. To do so would only prove the Plaintiffs' case of the close collaboration between these Defendants and those **[**107]** criminal groups." (Pl. FNC Opp. at 66-67.) Plaintiffs are largely correct.

There can be no question that this is a highly significant factor. Had Defendants identified specific third-parties that they wish to implead, this would weigh heavily in favor of dismissal under the doctrine of *forum non conveniens.* However, Defendants do not appear to be sincere in their assertion that there are essential third-parties in Colombia. Defendants have not identified a single such third party despite the fact that they are almost certainly familiar with the identities of the individuals and/or entities that compose their distribution chain. Further, Defendants have not requested an opportunity to conduct discovery to identify potential third parties against whom they wish to bring suit. In light of the vagueness of Plaintiffs' argument concerning impleading third parties, I will accord this factor significantly less weight than I ordinarily would. [14] See *Massaquoi v. Virgin Atl. Airways, 945 F. Supp. 58, 63*

---

[14] In *Piper Aircraft Company v. Reyno, 454 U.S. 235, 258, 102 S. Ct. 252, 267, 70 L. Ed. 2d 419 (1981)*, the Supreme Court explained that ***HN50***[] a defendant need not "submit affidavits identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum" but the defendant "must provide enough information to enable the District Court to balance the parties' interests." Of course, identifying third-party witnesses is different from

*[*410] (S.D.N.Y. 1996)* ("***HN49***[] While the inability to implead a third party is a factor that weighs in defendant's favor, it is not conclusive and courts have refused to dismiss actions **[**108]** on such grounds."); see also *Murray v. British Broad. Corp., 81 F.3d 287, 293 n. 2 (2d Cir. 1996)* (dismissal on *forum non conveniens* grounds appropriate even though joinder of third-party may be "impede[d]" where third-party "is not essential to the adjudication of the core issues.").

[109]** ***(iv) View of Premises***

There is no question that the Colombian forum would have a better perspective on the alleged enterprise's effects on Plaintiffs and the Colombian liquor market. The instant forum has a better perspective on Defendants' United States conduct and the early stages of the money laundering process, which allegedly largely occurred here. This factor is not particularly significant in this case, however, because in a money laundering case, there is little if any benefit to conducting a physical inspection of any of the stages of the money laundering. Cf. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India, 634 F. Supp. 842, 860 (S.D.N.Y. 1986)* (finding that a physical inspection of an industrial plant in which a serious accident had occurred "would probably not be of utmost importance"). Overall, this factor is neutral.

(b) Public Interest Factors

Again, the parties dedicate many pages to this issue and the court has carefully considered each of their arguments carefully. The relevant factors are addressed below.

(I) Colombia's and the United States' Interest in the Dispute

HN51[] "There is a local interest in having **[**110]** localized controversies decided at home." *Gilbert, 330 U.S. at 509, 67 S. Ct. at 843*. Of course, claims arising out of the alleged international money-laundering enterprise are not "localized controversies." Both Colombia and the United States have an interest in the controversy because the parties are Colombian and American. See *Capital Currency Exch., N.V. v. Nat'l Westminster Bank PLC, 155 F.3d 603, 611 (2d Cir. 1998)* (United States had an interest in a case to which a New York corporation was a party, and the United Kingdom had an interest in the case because it involved two English banks).

Defendants are correct that Colombia has a far greater interest than the United States in the Colombian liquor market. Further, the fact that this action requires the court to consider the effects (albeit not the validity) of the Colombian liquor taxation system potentially raises politically sensitive issues in which Colombian courts are more interested than United States courts. Although Defendants are correct that Plaintiffs have alleged significant harm to Colombian society as a whole (Def. FNC Rep. at 82-83), as discussed above, this court will entertain **[**111]** only claims concerning Plaintiffs' injuries as liquor manufacturers and distributors.

The instant forum has a far greater interest than Colombia in determining whether United States corporations are engaged in the laundering of proceeds from illegal narcotics sales that are occurring in the United States. [15] See *Alfadda v. [*411] Fenn, 159 F.3d 41, 47 (2d Cir. 1998)* (United States has an interest in applying RICO and securities laws to international financial transactions; this is one factor that should be considered in Gilbert analysis). Congress's enactment of a private RICO cause of action predicated on international money laundering evinces a determination that federal courts should hear such claims, which will almost universally involve evidence located abroad. There are obvious difficulties in weighing whether Colombia has a greater interest in regulating its

---

identifying third parties that a defendant wishes to implead. This is particularly true in this case where Defendants appear to be aware of the identities of narcotics traffickers and other individuals and entities within their distribution chains.

[15] Defendants cite *Usha (India), Ltd. v. Honeywell Int'l, Inc., No. 03 Civ. 0494 (DC), 2004 U.S. Dist. LEXIS 4236, 2004 WL 540441 (S.D.N.Y. Mar. 17, 2004)*, for the proposition that the fact that a United States corporation controlled foreign business activities does not mean that the United States has an interest in the dispute. (Def. FNC Rep. at 87.) *Usha* is distinguishable because "Usha's claims are based on issues of Indian corporate governance, the duties between shareholders of Indian corporations, and the duties between joint venture partners under Indian partnership law." *Usha, 2004 U.S. Dist. LEXIS 4236, 2004 WL 540441, at *7*. In contrast, this case is about whether Defendants violated U.S. money laundering and related laws.

liquor market than the United States has in prohibiting American corporations from laundering the proceeds of illegal U.S. narcotics sales. And it is of no small moment that our federal courts are overrun with criminal cases involving conspiracies to import illegal drugs. Allegations that domestic corporations **[**112]** are complicit in such wrongdoing weigh in favor of accepting jurisdiction. Overall, however, the instant forum has a slightly greater interest in adjudicating the instant dispute than does Colombia.

(ii) Law Governing the Instant Dispute

Although the court will not at this preliminary **[**113]** stage reach any definitive conclusions as to any choice of law issues in this case, it appears that United States law predominates in this dispute. The primary claim is a RICO claim, which clearly raises questions of federal law. Similarly, as Defendants are alleged to have masterminded the tortious conduct that caused Plaintiffs' damages from the United States, it is likely that Plaintiffs' common law claims (fraud, public nuisance, unjust enrichment, negligence, negligent misrepresentation, conversion, and money had and received) are governed by the laws of one or more of the United States. Because Defendants' conduct is alleged to have largely occurred in the United States, the law of the state in which the conduct occurred often applies. See *Curley v. AMR Corp., 153 F.3d 5, 12 (2d Cir. 1998)* (New York choice of law rules apply and, under New York's "interest analysis," where the claim is brought under a conduct-regulating law, the law where the conduct occurred generally applies).

As discussed above, although Defendants argue that the instant claims require this court to pass upon the validity of Colombia's tax laws (Def. FNC Mem. at 90), nothing about the instant **[**114]** claims will require such consideration. However, the instant claims will most likely require this court to calculate the amount of Colombian taxes owed on various liquor products. Such a determination requires the application of Colombian law. This entails only a relatively modest and purely mechanical application of Colombian law. Overall, this factor weighs in favor of the dispute being heard in the instant forum. See *Daventree Ltd. v. Republic of Azerbaijan, 349 F. Supp. 2d 736, 756 (S.D.N.Y. 2004)* ("***HN52***[] Public interest ordinarily favors the enforcement of the federal law, such as the RICO statutes, in the United States courts[.]").

(iii) Judicial Burden

Defendants argue that hearing the instant case in this forum would create an unfair and disproportionate burden on the court and a jury selected from the residents of this District. There is no question that this case has already required and will continue to require significant judicial resources. If the case ultimately proceeds to a jury trial, the cost will be borne by residents of this District in addition to the court. Whether this burden is unfair in some way really depends on (1) **[*412]** the two fora's **[**115]** relative interests in the dispute and (2) how congested the two courts are. As this court has already determined that the Colombian and American fora have relatively similar interests in the dispute, there is nothing unfair about this court bearing the burden resulting from this litigation. Further, although this District and, specifically, this court are clearly highly congested, it is not clear from the record whether Colombian courts are any more or less congested. This factor is neutral.

* * *

Whether this case should be dismissed under the doctrine of *forum non conveniens* is a very close and difficult question. With respect to the private interest analysis, two factors weigh slightly in favor of dismissal and two factors are neutral. With respect to the public interest analysis, two factors support retaining the case and one factor is neutral. Overall, the *Gilbert* analysis suggests the factors favoring retaining the case and the factors favoring retention of the case are in equipoise. Plaintiffs' choice of the instant forum is entitled to reasonable deference. The balance of interests are neutral and, as a result, do not overcome Plaintiffs' choice of forum. See *Peregrine Myanmar Ltd v. Segal, 89 F.3d 41, 46-47 (2d Cir. 1996)* **[**116]** (foreign plaintiffs' selection of New York forum entitled to deference where some witnesses located in New York and other witnesses were located in the Far East, defendant resides in New York, and critical events occurred in New York). Defendants' motion for dismissal on this ground is therefore denied.

VI. INTERNATIONAL COMITY

A. Background

HN53[] International comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience." *Hilton v. Guyot, 159 U.S. 113, 164, 16 S. Ct. 139, 143, 40 L. Ed. 95 (1895)*. "Whatever its precise contours, international comity is clearly concerned with maintaining amicable working relationships between nations, a 'shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards.'" *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 423 (2d Cir. 2005)* (quoting British Airways Bd. v. Laker Airways Ltd., [1984] E.C.C. 36, 41 (Eng. C.A.)). The doctrine of international comity provides that, in certain circumstances, **[**117]** a federal court will (1) recognize or provide *res judicata* effect to foreign judgments and/or (2) dismiss a case before it in deference to a parallel action pending in a foreign jurisdiction. See *Royal and Sun Alliance Ins. Co. of Canada v. Century Int'l Arms, Inc., 466 F.3d 88, 92 (2d Cir. 2006)*. In this case, Defendants seek dismissal based only on the latter branch of international comity.

HN54[] Ordinarily, parallel proceedings in a foreign jurisdiction do not warrant dismissal: "The mere existence of parallel foreign proceedings does not negate the district courts' 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" *Id. at 92* (quoting *Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976))*. In fact, "exceptional circumstances" must exist in order to warrant dismissal in deference to a foreign action. *Royal and Sun Alliance, 466 F.3d at 93*.

HN55[] The Second Circuit has "described [international comity's] boundaries as 'amorphous' and 'fuzzy'" and has declined to articulate a precise set of factors that district courts should consider in determining **[**118]** whether to dismiss an action in deference to **[*413]** an action pending in a foreign court. *Id. at 92-93*. However, the Second Circuit has explained:

> In the context of parallel proceedings in a foreign court, a district court should be guided by the principles upon which international comity is based: the proper respect for litigation in and the courts of a sovereign nation, fairness to litigants, and judicial efficiency. See *Turner Entm't Co. v. Degeto Film GmbH, 25 F.3d 1512, 1518 (11th Cir. 1994)*; see also *United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc., 216 F. Supp. 2d 198, 212 (S.D.N.Y. 2002)*. Proper consideration of these principles will no doubt require an evaluation of various factors, such as the similarity of the parties, the similarity of the issues, the order in which the actions were filed, the adequacy of the alternative forum, the potential prejudice to either party, the convenience of the parties, the connection between the litigation and the United States, and the connection between the litigation and the foreign jurisdiction. See, e.g., [*Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc., 180 F.3d 896, 898-99 (7th Cir. 1999)*; **[**119]** see also *Bigio v. Coca-Cola Co., 239 F.3d 440, 454 (2d Cir. 2000)*.] This list is not exhaustive, and a district court should examine the "totality of the circumstances," *Finova Capital Corp., 180 F.3d at 900*, to determine whether the specific facts before it are sufficiently exceptional to justify abstention.

Id. at 94.

B. Analysis

The overwhelming majority of the factors identified by the *Royal and Sun Alliance* court have already been addressed above in the context of the *forum non conveniens* motion. There is no reason to repeat a discussion of those factors here. Instead, the court will address those factors that are specific to the international comity question.

1. Similarity of the Issues and Parties

HN56[] "For two actions to be considered parallel, the parties in the actions need not be the same, but they must be substantially the same, litigating substantially the same issues in both actions." *Id. at 94*. Defendants argue that twenty-seven actions filed in Colombian courts beginning in 2000 involve parties and issues similar to those in this case. (Def. FNC Mem. at 102-04.) Plaintiffs vigorously dispute this. **[**120]** (Pl. FNC Opp. at 77-79.)

Similarity of Issues. The instant case and the Colombian Actions do not raise similar issues. Defendants argue that the validity of Colombian tax laws is at issue in both. (Def. FNC Mem. at 100.) Defendants' primary argument appears to be that Plaintiffs are not entitled to recover damages for lost taxes if the taxes themselves were void because of their illegality. As discussed in Section III above, to the extent that Plaintiffs are seeking lost taxes, all claims for lost taxes are dismissed. Thus, this argument fails.

Defendants also appear to be arguing that Plaintiffs are not entitled to recover lost profits because they lack a valid right under Colombian law to sell liquor: "If a Department's ordinances and decrees implementing the monopoly are null and void, because they do not comply with national law, for example, the Department cannot complain of lost profits to its illegal business." (Def. FNC Mem. at 100.) As a preliminary matter, Defendants' brief provides a detailed description of the Colombian Actions. (Def. FNC Mem. at 19-22.) That detailed description identifies the arguments that the Diageo companies are making in the Colombian **[**121]** Action; nowhere does it suggest that the Diageo companies **[*414]** are asserting that the Plaintiffs' liquor monopolies are not legal.

This conclusion is confirmed by the Declaration of Juan Rafael Bravo Arteaga ("Bravo Decl."), which describes twenty-seven Colombian Actions that Diageo companies have filed against Plaintiffs. (Bravo Decl. PP 6-13.) Bravo is an attorney licensed to practice law in Colombia, is the *Universidad del Roario's* Chair of Tax Law, and has served, *inter alia,* as the Director of National Taxes at the National Directorate of Taxes, President of the Colombian Institute of Tax Law, and President of the Board of Directors of *Banco de Colombia.* (Id. PP 3-4.) Bravo's testimony indicates that the Colombian Actions have two primary purposes: (1) to "challenge[] the discriminatory tax treatment of foreign liquors as compared with Colombian national liquors" and (2) to "challenge[] the Departments' ordinances in effect at the time the suits were instituted that permitted the Departments to collect simultaneously the monopoly participation and the consumption tax." (Id. PP 7, 8.) Bravo describes all of the suits motivated by these two purposes, and it is **[**122]** clear that they are aimed at challenging the validity of liquor taxes charged by Colombian government agencies. None of these suits challenges the legality of Plaintiffs' monopoly. As a result, these Colombian Actions neither affect the outcome of this case nor bear any relevant similarity to the instant case. [16]

[123]** Bravo also testifies that, in three of the Colombian Actions, "the Diageo Companies challenged the Departments whose ordinances or decrees were in effect prior to the passage of Law 223 of 1995 which were not changed to comply with the law once it entered into force." (Id. P 9.) Only one of the instant Plaintiffs, the Department of Vichada, is involved in those three actions. (Id. at page 5 n.3.) Bravo's Declaration does not appear to describe Law 223 of 1995 or identify which of the Department of Vichada's "ordinances or decrees" are alleged to be invalid. To the extent that one or more of these three Colombian Actions challenges Vichada's power to manufacture or distribute liquor, it is similar to the instant case because it addresses an argument that could potentially serve as a defense to the instant action. Given the Defendants' extraordinary investment of resources in preparing the instant moving papers, it is highly unlikely that one or more of the Colombian Actions address such an argument without Defendants describing the Colombian Action(s) and the argument in great detail. In any event, at

[16] Defendants also point to an action pending in the Andean Court of Justice that "has considered the Colombian taxation scheme and found it to be anti-competitive." (Bravo Decl. P 13.) However, Defendants acknowledge that nothing about that case suggests that Defendants' liquor monopoly is somehow inconsistent with Colombian or international law: "The Andean Court of Justice ruled that, given their nature as a mechanism for raising public revenue, the mere constitutional authorization of liquor monopolies did not itself violate Andean Community law, but that the Colombian taxation regime and the manner in which the sale of imported goods is made 'more difficult or more costly than goods produce nationally,' did violate Colombian law proscriptions on anticompetitive discrimination against imported goods." (Def. FNC Mem. at 21-22.)

most, the Colombian Actions address whether one of the twenty-four instant **[**124]** Plaintiffs is authorized to manufacture and/or distribute liquor. As far as the court can tell, there is no reason to conclude that the Department of Vichada's alleged damages are greater than those of any of the other twenty-three Plaintiffs. As a result, even if one to three of the Colombian Actions addresses the Department of Vichada's authority to manufacture and/or distribute liquor, such an action would be similar to the instant action **[*415]** only in that it addresses a potential defense to the claims of one of the twenty-four instant Plaintiffs' claims. This very narrow similarity between the instant case and the Columbian Actions--even if true--in no way suggests the actions are parallel.

Otherwise, the Colombian Actions appear to bear no relationship to the instant claims. Defendants have not introduced any evidence that Plaintiffs have raised RICO, fraud, competition, or other tort claims in the Colombian Actions. In fact, with the exception of the three actions against the Department of Vichada, there is no evidence that the Colombian Actions raise any issue relevant to the instant RICO and common law claims.

It is telling that there are twenty-seven pending and decided Colombian **[**125]** Actions and not one of them addresses Plaintiffs' claims. Defendants assert that Plaintiffs could bring tort claims akin to those raised in this case in Colombia. Yet, Plaintiffs have not. This confirms that Plaintiffs strongly prefer the instant forum.

Similarity of the Parties. The instant case and the Colombian Actions involve relatively similar parties. Eighteen of the twenty-four instant Plaintiffs are also parties to the Colombian actions. (Bravo Decl. at footnotes 1 and 2.) Further, the Colombian actions were filed by Guinness UDV Colombia S.A., United Distillers & Vinters (Florida), Inc., and United Distillers and Vintners (ER) Limited (the "Colombian Actions Plaintiffs"), which are all affiliates of two of the instant Defendants--Diageo North America, Inc. and Diageo PLC. (See Def. FNC Rep. at 95.) ***HN57***[] Courts have found that two parties are "similar" for purposes of international comity when one party is a subsidiary of the other or one party has a substantial ownership interest in the other. See *Goldhammer v. Dunkin' Donuts, Inc., 59 F. Supp. 2d 248, 253 (D. Mass. 1999)* (for purposes of international comity, one party that owns a two-thirds interest **[**126]** in another party is similar to the other party); *Caspian Investments, Ltd. v. Vicom Holdings, Ltd., 770 F. Supp. 880, 884 (S.D.N.Y. 1991)* (Irish action has similar parties to U.S. action where holding company was party to Irish action and holding company and its subsidiary were parties to the U.S. action). Although the exact relationship between Diageo North America, Inc. and Diageo PLC and the Colombian Actions Plaintiffs is not made clear in the papers submitted in support of and opposition to the instant motions, they are affiliated in some way. As a result, the parties are relatively similar.

2. Temporal Sequence of Filings

The Colombian Actions were filed over a period of time beginning in late 2000, whereas the instant case was filed in 2004. (Bravo Decl. P 6.) The fact that the first-filed foreign action was filed four years before the U.S. action weighs in favor of dismissing the action in favor of the foreign forum. See *Dragon Capital Partners L.P. v. Merrill Lynch Capital Servs. Inc., 949 F. Supp 1123, 1128 (S.D.N.Y. 1997)* (deferring to foreign action where it was filed eighteen months before American suit); *Advantage Int'l Mgmt., Inc. v. Martinez, No. 93 Civ. 6227 (MBM), 1994 U.S. Dist. LEXIS 12535, 1994 WL 482114, **[**127]** at *3 (S.D.N.Y. Sept. 7, 1994)* (defendant's choice of forum entitled to "judicial deference" where foreign suit commenced more than three years before American suit).

Plaintiffs argue that the Colombian Actions were filed as a result of a race to the courthouse: they assert that the filing of the Actions was a purely procedural maneuver designed to gain a tactical advantage. (Pl. FNC Opp. at 81.) They assert that the actions were filed and then permitted to "sit dormant for six years." In their lengthy briefs, they point to no factual citation to support the proposition that **[*416]** the Actions have sat dormant for six years, making it impossible for this court to conclude as a factual matter that the Actions did, in fact, sit dormant. Further, even if there were evidence in the record suggesting that the Colombian Actions sat dormant for several years, it would be difficult to find that actions challenging the legality of Colombian taxes were filed in Colombia merely for the purpose of procedural fencing.

* * *

After considering the "totality of the circumstances," including all of the factors mentioned in Royal and Sun Alliance, the court finds that dismissal under the doctrine of **[**128]** international comity in deference to the Colombian Actions is not appropriate. Above all else, the instant action and the Colombian Actions simply involve different claims and issues. As a preliminary matter, because the issues in the instant and Colombian actions are not substantially similar, the instant and Colombian actions are not parallel. ***HN58***[] The doctrine of international comity may require that a foreign pending action be parallel to the United States action in order to dismiss the case pending in federal court in deference to the pending foreign action. Cf. *Royal and Sun Alliance, 466 F.3d at 95* ("The existence of a parallel action in an adequate foreign jurisdiction *must be the beginning,* not the end, of a district court's determination of whether abstention is appropriate. . . . [T]he mere existence of an adequate parallel action, by itself, does not justify the dismissal of a case on grounds of international comity abstention.") (emphasis added); *Turner Entmt. Co. v. Degeto Fil, GmbH, 25 F.3d 1512, 1518* ("The issue is whether a federal court, which properly has jurisdiction over an action, should exercise its jurisdiction where parallel **[**129]** proceedings are ongoing in a foreign nation and a judgment has been reached on the merits in the litigation abroad"); European Community v. RJR Nabisco, Inc. (hereinafter, "RJR Nabisco"), *150 F. Supp. 2d 456, 476 (E.D.N.Y. 2001)* (Garaufis, J.) ("international comity is not at issue because there is no need for this court to defer to the legislative or judicial acts of a foreign sovereign"). The court, however, need not reach this question.

HN59[] Assuming *arguendo* that a pending parallel foreign action is not necessary for dismissal under the doctrine of international comity, Defendants must still show that exceptional circumstances justify dismissal:

> [C]ircumstances that routinely exist in connection with parallel litigation cannot reasonably be considered exceptional circumstances. . . . Additional circumstances must present--such as a foreign nation's interest in uniform bankruptcy proceedings--that outweigh the district court's general obligation to exercise its jurisdiction.

Royal and Sun Alliance, 466 F.3d at 95. Defendants have failed to identify any "exceptional circumstances" that warrant dismissal on the ground of international **[**130]** comity. Id. Defendants make two arguments in favor of dismissal: (1) the Colombian courts should be given an opportunity to adjudicate the Colombian Actions "without duplication or interference;" and (2) judicial efficiency will be served by ensuring the issues are only adjudicated once and preventing inconsistent decisions on the same legal and factual questions. (Def. FNC Mem. at 100-107.) However, each of these arguments fails because the Colombian Actions and the instant action do not raise the same issues. Dismissal on the ground of international comity simply is not warranted in this case. See *Royal and Sun Alliance, 466 F.3d at 94-95* (dismissal not warranted even where district court found existence of parallel Canadian action and that Canadian judicial procedures were adequate); *Bigio v. Coca-Cola Co., **[*417]** 448 F.3d 176, 178-79 (2d Cir. 2006)* (dismissal of damages dispute between Canadian citizens and United States company not warranted even though claims may "require some modest application of Egyptian law").

VII. POLITICAL QUESTION DOCTRINE

A. Background

HN60[] The Supreme Court has identified those situations in which an issue **[**131]** is non-justiciable under the political question doctrine:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). Although the Supreme Court has identified these six separate contexts in which the political question doctrine applies, **HN61**[] "[b]ecause the nonjusticiability of political questions is primarily a function of the constitutional separation of powers . . . the dominant consideration in any political **[**132]** question inquiry is whether there is a textually demonstrable constitutional commitment of the issue to a coordinate political department." 767 Third Avenue Assocs. v. Consultate Gen. of Socialist Fed. Rep. of Yugoslavia, 218 F.3d 152, 160 (2d Cir. 2000) (internal quotation marks omitted). Dismissal under the political question doctrine is inappropriate "in the absence of an issue whose adjudication would likely result in improper judicial encroachment upon the foreign relations power committed to the coordinate political branches." RJR Nabisco, 150 F. Supp. 2d at 475-76.

B. Analysis

Defendants argue that this action is barred by the political question doctrine because: (1) it requires the court "to enforce anti-competitive foreign laws and support an anti-competitive monopoly regime;" (2) it requires the court to review Colombia's role in "facilitating" liquor smuggling and money laundering; (3) it requires the court to review "corruption and mismanagement in the Departments' monopolies that are the principal cause of their financial difficulties;" (4) the United States Constitution assigns the Executive and Legislative branches power over **[**133]** foreign relations, and Colombia and the United States are negotiating a treaty that will impact the Colombian government's liquor monopoly and Colombian liquor taxes; (5) Colombian courts "are providing decisions essential to this matter;" (6) to the extent this case requires the court to rule on Colombian constitutional issues and "esoteric applications" of other Colombian laws, the case presents "a lack of judicially discoverable and manageable standards for resol[ution];" and (7) the case presents "the potentiality for multifarious pronouncements by various departments of the [U.S. government] on one question." (Def. FNC Mem. at 110; Def. FNC Rep. at 101-03.)

As discussed extensively above, the instant case is a commercial dispute. One liquor business is alleging that other liquor businesses have injured it by engaging in money laundering. The fact that the Plaintiffs' liquor businesses are owned **[*418]** by the Colombian government is irrelevant to the merits of the dispute. The fact that the Colombian government's liquor business are authorized by Colombian law, including the Colombian Constitution, is of no moment. Foreign entities whose very existence depends on foreign law, such **[**134]** as corporations, routinely bring claims in federal courts without the federal court having to analyze the foreign law that creates or authorizes the creation of the foreign corporation. As a result, Defendants' first argument fails. Similarly, Defendants' sixth argument fails because (1) this case does not raise questions that arise under Colombian law (except to the extent that Plaintiffs' common law claims arise under Colombian law) and (2) even if it does to some extent arise under Colombian law, federal courts routinely consider questions under foreign law.

As discussed above, Defendants' second argument fails because the fact that the Colombian government could have done more to enforce smuggling and money laundering laws is irrelevant to the instant dispute.

Defendants' third argument fails even though the instant action may require substantial adjudication of the profitability of Plaintiffs' liquor businesses. This will include consideration of any "corruption and mismanagement." Although, as a practical matter, this could entail some embarrassment to the Colombian government and resulting complications for the Executive and Legislative branches' administration of Colombian **[**135]** foreign policy, (1) there is no "textually demonstrable constitutional commitment" of foreign governments' commercial injuries to the Executive or Legislative branches, and (2) the resulting complications simply are not sufficient to make the dispute non-justiciable.

The fact that the Executive and Legislative branches are negotiating a treaty that addresses issues related to Plaintiffs' liquor monopoly and liquor taxation scheme in no way disposes of the question of whether Defendants' past conduct has caused Plaintiffs' cognizable injuries. Admittedly, this action may result in findings by the court or a jury as to the economic effects of Plaintiffs' liquor businesses and/or Defendants' money laundering. In theory, such findings could be inconsistent with positions that are being taken by the Executive and Legislative branches in the treaty negotiation. However, Defendants have not identified a single case in which a federal court found that the political question doctrine barred a commercial claim against private corporations. As a result, Defendants' fourth and seventh arguments fail.

Finally, Defendants' fifth argument fails because, as discussed above, the pending and decided **[**136]** Colombian Actions have little or no relationship to the instant case. For these reasons, the instant claims are not barred by the political question doctrine. See *RJR Nabisco, 150 F. Supp. 2d at 474-76* (political question doctrine does not bar foreign governments' claims against tobacco companies).

VIII. EXTRATERRITORIALITY

A. Background

Defendants argue that Plaintiffs' RICO claims constitute an impermissible attempt to apply the RICO law extraterritorially. ***HN62***[] The RICO statute does not speak to whether or under what circumstances it should be applied extraterritorially and, as a result, the court "must ascertain whether Congress would have intended that federal courts should be concerned with specific international controversies." *North South Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1051 (2d Cir. 1996)*. "[T]he ultimate inquiry is . . . whether 'Congress would have wished the precious resources of United States courts and law enforcement agencies **[*419]** to be devoted to [foreign transactions] rather than leave the problem to foreign countries.'" *Id. at 1052* (quoting *Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975)* **[**137]** (Friendly, J.)). The Second Circuit has, thus far, declined to determine the precise standard for determining whether a particular RICO claim has a sufficient connection to the United States. *Id. at 1052*. The Second Circuit has, however, applied the standards used in antitrust and securities cases to the civil RICO context. *Id. at 1051-52*; see also *Ayyash, 2006 U.S. Dist. LEXIS 9677, 2006 WL 587342, at *6*.

In securities cases, "analysis in the past has focused on whether one of two alternative tests has been satisfied: the 'conduct test' and the 'effects test.'" *Al-Turki, at 1051*; accord *Ayyash, 2006 U.S. Dist. LEXIS 9677, 2006 WL 587342, at *4*; *Roquette Am., Inc. v. Alymum N.V., No. 03 Civ. 0434 (DC), 2004 U.S. Dist. LEXIS 12297, 2004 WL 1488384, at *7 (S.D.N.Y. July 1, 2004)*. In securities fraud cases, the conduct test has been described as follows:

> [W]e entertain suits by aliens only where conduct material to the completion of the fraud occurred in the United States. Mere preparatory activities, and conduct far removed from the consummation of the fraud, will not suffice to establish jurisdiction. Only where conduct within the United States directly caused the loss **[**138]** will a district court have jurisdiction over suits by foreigners who have lost money through sales abroad.

Al-Turki, 100 F.3d at 1051 (internal quotation marks omitted). This test is premised "on the theory that Congress did not want to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners." *Al-Turki, 100 F.3d at 1051* (internal quotation marks omitted).

In federal securities law, under the effects test, "the United States prohibition of securities fraud may be given extraterritorial reach whenever a predominantly foreign transaction has substantial effects within the United States. Transactions with only remote and indirect effects in the United States do not qualify as substantial." *Al-Turki, 100 F.3d at 1051* (internal quotation marks and citation omitted).

In ***antitrust law***, "the analysis proceeds along similar lines, but there is more emphasis on the effects of the relevant conduct in the United States and less emphasis on where that conduct took place." *Al-Turki, 100 F.3d at 1051*. Defendants argue that, in the **[**139]** context of RICO, the effects test as understood in ***antitrust law*** is the more appropriate test. (Def. RICO Rep. at 6.) Defendants rely upon language in the Second Circuit's Al-Turki decision:

> It may be that the effects-oriented approach borrowed from antitrust cases is an equally or even more appropriate test, especially since the civil action provision of RICO was patterned after the Clayton Act.' *Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 150, 107 S. Ct. 2759, 2764, 97 L. Ed. 2d 121*

> (1987). Moreover, RICO (like the antitrust laws) provides for treble damages, which heightens concerns about international comity and foreign enforcement. Compare 18 U.S.C. § 1964(c) with 15 U.S.C. § 15(a).

Al-Turki, 100 F.3d at 1052.

Despite this language in Al-Turki, post-Al-Turki decisions in this Circuit have held that ***HN63***[] the territoriality requirement is met where either the effects or conduct tests is satisfied. See OSRecovery, Inc. v. One Groupe Int'l, Inc., 354 F. Supp. 2d 357, 366 (S.D.N.Y. 2005) (applying conduct and effects tests); Roquette, 2004 U.S. Dist. LEXIS 12297, 2004 WL 1488384, at *7 **[**140]** ("Although the Second Circuit has not specified a precise standard, courts in this circuit have generally applied two alternative tests derived from transnational **[*420]** and antitrust cases in RICO extraterritoriality cases: the 'conduct test' and the 'effects test.' Because it is not clear which test should be used in the context of RICO, jurisdiction will exist where either test is satisfied.") (internal citations and quotation marks omitted); Johnson Elec. N. Am. Inc. v. Mabuchi Motor Am. Corp., 98 F. Supp. 2d 480, 486 (S.D.N.Y. 2004). This court agrees with other district courts that have continued to apply the effects and conduct tests in the alternative, despite the language in Al-Turki suggesting that there should be an emphasis on the effects test as it is applied in ***antitrust law***.

B. Analysis

The Second Amended Complaint alleges that three types of conduct at the heart of the money-laundering enterprise occurred in the United States. First, Plaintiffs allege that Defendants controlled their money-laundering enterprise at least in part from the United States. The Second Amended Complaint alleges that Defendants "controlled every aspect of the financial **[**141]** transactions involving the purchase of their liquor products." (SAC P 28.) "Defendants also controlled the exact methods and means by which they were paid for the liquor products." (Id.) Defendants controlled the distribution channels through which their liquor traveled. (Id. P 30.) Defendants worked with their co-conspirators to create a "complex web of companies located in Aruba and Panama to disguise the true nature and origin of the criminal proceeds" that were being laundered. (Id. PP 31, 35.) "Defendants and their co-conspirators knew that the purpose and design of this system of seemingly unrelated parties to the financial transaction was to conceal, hide and/or disguise the true nature of the criminal proceeds they were accepting." (SAC P 27(d).)

Plaintiffs have explicitly alleged that this management and control occurred in the United States: "Many of the activities of the Defendants that are the subject matter of this complaint, including management decisions and direction of the schemes, are conducted by the Defendants in the United States and, more particularly, from the Defendants' offices in the State and City of New York." (Id. P 100.)

Second, Plaintiffs **[**142]** clearly allege that Defendants made communications and took other overt acts in furtherance of the enterprise while in the United States. Defendants maintained "direct ongoing relationships" with the money-laundering organizations. (Id. P 23(o).) An agent of the Seagram Defendants located in New York and Florida "directly serviced the accounts of the principal money launderers who were providing criminal proceeds to Seagram in exchange for Seagram products." (Id. P 53.) Defendants' employees made trips to Aruba to meet with known drug dealers. (Id. P 27(h).) "At such meetings both the Defendants' distributors and the criminal customers explained the criminal nature of the business in great detail including that narcotics proceeds were utilized to pay for the liquor[.]" (Id.) "Defendants' criminal customers were obtained, serviced, and supervised by [] Defendant employees in the United States, Panama, and Colombia[.]" (Id. P 27(l).) While in the United States, Defendants' employees, through U.S. wires and mail, requested and received information concerning shipments of the liquor. (Id.) Defendants' employees "were personally involved" in the alleged money **[**143]** laundering. (Id. P 27(g).) On trips to Colombia, Defendants' "employees received large volumes of cash that they took into their personal possession or these employees were present when large volumes of cash and third party checks were turned over to" Defendants' distributors. (Id. P27(g).)

Again, even where these allegations do not specifically state that they occurred in **[*421]** the United States, this court is required to infer that at least some of these communications and other acts occurred in the United States.

To the extent these allegations state that Defendants' employees committed the acts outside the United States, the court is required to infer that these employees were often directed and controlled by Defendants' supervisory employees located in the United States.

Third, the Second Amended Complaint clearly alleges that the first steps of the complex money laundering process occurred in the United States. The money laundering chain begins with sales of illegal narcotics in the United States. (Id. P 27(c).) The cash revenues generated by these illegal sales are then deposited in small amounts in numerous bank accounts in the United States. (Id.) "Checks are then **[**144]** drawn on these accounts--which represent narcotics proceeds--and these checks are then exchanged by Colombian criminal organizations for liquor products manufactured by the Defendants." (Id.) The Second Amended Complaint identifies three such checks, all of which were drawn from accounts at banks in the State of New York and then "smuggled into Colombia." (Id.)

All three categories of the conduct that is alleged to have occurred in the United States--controlling the money-laundering enterprise, communications and other overt acts in furtherance of the enterprise, and the initial stage of depositing proceeds from illegal narcotics sales into U.S. bank accounts and then withdrawing the funds using checks--are material to the alleged money-laundering enterprise. See *Johnson, 98 F. Supp. 2d at 486* (sales in United States and use of U.S. mail to commit mail fraud satisfied the conduct test). None of these categories of conduct constitutes "[m]ere preparatory activities" or "conduct far removed from the consummation of the fraud." *Al-Turki, 100 F.3d at 1051* (internal quotation marks omitted). Even if each of these categories of U.S. conduct was **[**145]** not, in and of itself, material, the three are certainly material when considered as a whole.

As discussed in further detail below in the Section addressing proximate cause, whether these three categories of conduct "directly caused" Plaintiffs' injuries is a far closer question. Plaintiffs' allegation that Defendants "controlled" the money-laundering enterprise from the United States would appear to satisfy the "direct causation" requirement because, as discussed below, the money-laundering enterprise as a whole constitutes the factual and proximate cause of Plaintiffs' injuries.

Defendants argue that Plaintiffs have failed to satisfy their pleading burden:

> [A]ll of the United States conduct alleged by Plaintiffs falls into one of the following categories: (a) it is based on conclusory allegations with no supporting facts; (b) it dates from beyond the applicable limitations period and is therefore not actionable; (c) it is insubstantial and/or far removed from the alleged illegal activities; (d) it does not involve Defendants; or (e) it is not an essential part of the conduct that caused Plaintiffs' alleged losses.

(Def. RICO Rep. at 10.) Arguments (c), (d), and **[**146]** (e) have already been considered and rejected.

Defendants' assertion that the allegations in the Second Amended Complaint concerning United States conduct are conclusory fails. Although some of the allegations are relatively general, they are supported by numerous highly specific allegations. This court is constrained by the *Federal Rule of Civil Procedure 8* pleading standards and Plaintiffs have satisfied them on this point.

Defendants' assertion that the allegations concern conduct that is no longer actionable because it gave rise to claims **[*422]** that are barred by the statute of limitations also fails. Assuming *arguendo* that the statute of limitations bars any claim for injury suffered prior to October 8, 2000 (Def. RICO Rep. at 10 n. 14), the Second Amended Complaint clearly states that the conduct at issue occurred continuously beginning in the early 1990s and continued to occur as of the filing of the Complaint. (SAC PP 27(e), 27(n) ("Since at least 1991, all the Defendants were selling liquor to individuals whom they knew were reputed narcotics traffickers."), 27(R).) As a result, even though the Second Amended Complaint makes reference **[**147]** to conduct that occurred long before October 2000 (e.g., id. P 27(c)), the Second Amended Complaint is merely citing these as specific examples of conduct that is still occurring as of the filing of the Second Amended Complaint.

In short, in light of Rule 8's liberal pleading standard, this court is constrained to find that Plaintiffs have adequately alleged sufficient United States conduct by Defendants to satisfy the "conduct test." [17] As a result, Plaintiffs have adequately alleged territoriality at this stage. Nothing contained in this opinion precludes Defendants from re-raising the territoriality issue once discovery is complete in an appropriate motion.

IX. RICO ALLEGATION

A. Enterprise

1. Background

HN64[] Under RICO, an "enterprise" is "any individual, partnership, corporation, association, **[**148]** or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *18 U.S.C. § 1961(4)*. The Supreme Court has defined a RICO enterprise as "a group of persons associated together for a common purpose of engaging in a course of conduct[,]" the existence of which is proven "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *United States v. Turkette, 452 U.S. 576, 583, 101 S. Ct. 2524, 2528, 69 L. Ed. 2d 246 (1981)*. "The enterprise must be separate from the pattern of racketeering activity, and distinct from the person conducting the affairs of the enterprise." [18] *First Capital Asset Mgmt., Inc. v. Satinwood, Inc., 385 F.3d 159, 173 (2d Cir. 2004)* (internal citations omitted). A RICO enterprise can be a legal entity or a "discrete economic association existing separately from the racketeering activity." Id. (internal quotation marks omitted).

[149]** ***HN65***[] "[T]he existence of an association-in-fact is oftentimes more readily proven by what it *does,* rather than by abstract analysis of its structure." *United States v. Coonan, 938 F.2d 1553, 1559 (2d Cir. 1991)* (internal quotation marks omitted; emphasis in original). As a result, "[p]roof of racketeering activity may therefore be relied upon to establish the existence of an enterprise." *Black Radio Network, Inc. v. NYNEX Corp., 44 F. Supp. 2d 565, 580 (S.D.N.Y. 1999)* (citing *Coonan, 938 F.2d at 1559-60*).

[*423] 2. Analysis

Defendants argue that Plaintiffs have failed to plead a RICO enterprise because (1) Plaintiffs have failed to allege sufficiently an organizational structure for the enterprise, (2) Plaintiffs do not allege an enterprise that is separate and distinct from the pattern of racketeering activity, and (3) the alleged enterprise is implausible. (Def. RICO Mem. at 33-40.)

Defendants rely upon *Amsterdam Tobacco Inc. v. Philip Morris Inc., 107 F. Supp. 2d 210 (S.D.N.Y. 2000)*, to support their argument that Plaintiffs have failed adequately to plead an organizational structure for the enterprise. In **[**150]** Amsterdam, the plaintiffs, wholesale cigarette distributors, alleged that the defendant, Philip Morris, was involved in a RICO enterprise that smuggled cigarettes from Virginia to New York to evade New York taxes on cigarettes. *Id. at 211-13*. The plaintiffs alleged that "Philip Morris sold cigarettes to entities who then sold cigarettes

---

[17] As Plaintiffs have successfully satisfied the "conduct test," there is no reason for this court to reach the "effects test" or the "precious resources test." (See Pl. RICO Opp. at 15.)

[18] Plaintiffs cite *World Wrestling Entertainment, Inc. v. Jakks Pacific, Inc., 425 F. Supp. 2d 484, 493-500 (S.D.N.Y. 2006)*, which read Turkette and a number of Second Circuit cases to state that a RICO plaintiff need not prove a RICO enterprise that is separate from a pattern of racketeering activity. (Pl. RICO Opp. at 39.) As it is not material to the outcome of this decision, the court will assume, without deciding, that Plaintiffs must establish both a pattern of racketeering activity and a RICO enterprise that is separate from that activity.

to cigarette smugglers[.]" *Id. at 214*. The court found that the plaintiffs had failed to allege adequately an organizational structure because "there [were] insufficient allegations of 'an ongoing organization' involving Philip Morris which functioned as a 'continuing unit.'" Id.

Amsterdam is distinguishable because the Second Amended Complaint contains many more allegations concerning organizational structure than did the complaint in Amsterdam. Plaintiffs describe the enterprise as follows:

> The Defendants, along with their co-conspirators in the money-laundering schemes, including associated distributors, shippers, currency dealers, wholesalers, money brokers, and other participants in the schemes identified above, were, at relevant times, an association-in-fact of individuals and corporations **[**151]** . . . [and] constituted an "enterprise" within the meaning of *18 U.S.C. § 1961(4)* (the "Defendants' Money-Laundering Enterprise"). These persons and entities were and are associated in fact for the purpose, among others, of illegally laundering criminal proceeds of criminal activity to the economic detriment of Plaintiffs. The Defendants' Money-Laundering Enterprise is an ongoing organization whose constituent elements function as a continuing unit for the common purpose of maximizing the sale of liquor products through illegal means and carrying out other elements of the Defendants' scheme. The Defendants' Money-Laundering Enterprise has an ascertainable structure and purpose beyond the scope of the Defendants' predicate acts and the conspiracy to commit such acts.

(SAC P 108.)

The Second Amended Complaint includes "concrete allegations to the effect that [the members of the enterprise] continued in 'the enterprise's hierarchy, organization, and activities[]'" throughout the duration of the enterprise. *Black Radio Network, Inc., 44 F. Supp. 2d at 581* (quoting *Coonan, 938 F.2d at 1560-61*). First, the Second Amended **[**152]** Complaint alleges that Defendants were at the top of the enterprise's hierarchy. Defendants "have directed, managed, and controlled" the enterprise. (SAC P 2.) Defendants "controlled every aspect of the financial transactions involving the purchase of their liquor products. The Defendants also controlled the exact methods and means by which they were paid for the liquor products." (Id. P 28.) Defendants "also dictated that their criminal customers route payments to them through intermediary distributors, shippers, and other cut outs." (Id. P 29.) Perhaps above all else, Defendants controlled the prices of the liquor at many, if not all, levels of the distribution chain. (Id. P 27(m).) Defendants' decision to create the distribution **[*424]** chain "was made at the highest executive levels." (Id. P 27(a).)

In addition to alleging that Defendants controlled the illegal enterprise, the Second Amended Complaint provides significant detail as to how Defendants exercised control over it. Defendants' employees were "personally involved" in the money laundering. (Id. P 27(g).) Defendants' employees would travel to Colombia in order to effect the money laundering by collecting large **[**153]** amounts of cash. (Id.) While in Colombia, Defendants' employees also witnessed other aspects of the money laundering, including transmitting large volumes of cash and third-party checks to Defendants' distributors. (Id.) Defendants' employees would travel to Aruba for meetings with Defendants' customers, who were involved in narcotics trafficking. (Id. P 27(h).) Members of the enterprise had "regular communications" with Defendants' employees. (Id. P 27(l).) Defendants used the wires and mails to track distribution of their liquor products to consumers. (Id.) Defendants "maintained direct ongoing relationships with the money laundering organizations[,]" which were Defendants' customers. (Id. P 27(o).) Defendants utilized these relationships and communications "so as to keep a close eye on the market." (Id. P 30.)

Second, in addition to alleging how Defendants controlled the enterprise, the Second Amended Complaint describes the balance of the enterprise's membership and structure. Members of the enterprise include "the Defendants, the distributors, the shippers, the criminal customers, currency brokers, and the Defendants' agents and subsidiaries who **[**154]** receive payment for the liquor products[.]" (Id. P 3.) "The activities of this core group constitute a conspiracy in law and in fact." (Id.) The enterprise is administered, in part, "by restructuring the corporate structure of the Defendants, to direct and implement their money-laundering schemes and to assist in the avoidance of detection by U.S. and Colombian law enforcement." (Id. P 6.) Although Defendants compete with each other in liquor markets, "they were well aware of each other's activities, copied each other's strategies when they were successful, and in most cases utilized the same distributors to conduct their illegal sales." (Id. P 26.) The enterprise uses "cut outs" and multiple layers of intermediaries to conceal the money laundering, including Romar, Mansur Trading Freezone, Manimex, Tansimex, Marlex, Litani, Mitani, Runam Holdings, Doubletree Investments, Cardgame, Ltd., and Licores Aruba. (Id. PP 27(a), (b), (p).) All of the Mansur group and Romar group entities used the same tactics for effecting the money laundering. (Id. P 27(c).)

Third, the Second Amended Complaint provides significant information about the enterprise's activities. In **[**155]** the most general sense, the enterprise constituted a vertically integrated liquor manufacturing and distribution business. Defendants created and managed "umbrella operations," Colombian corporations ostensibly involved in legitimate businesses. (Id. P 27(j).) Defendants, through the umbrella operations, advertised and conducted other commercial activities in Colombia. (Id.) Defendants also illegally manipulated and controlled the prices, including retail prices, of their products that are sold in Colombia. (Id. P 27(m).) Defendants closely monitored the ways in which enterprise members used marketing allowances provided by Defendants. (Id. P 27(p).) Defendants conducted extensive advertising campaigns to promote their brands in Colombia. (Id. P 27(k).)

Finally, Plaintiffs have alleged that the enterprise has existed continuously for more than twelve years. (Id. PP 27(n), 122.) The continuity of the enterprise is **[*425]** also established by the fact that the enterprise is largely synonymous with the liquor distribution chain, which has been consistently distributing liquor to Colombia for the same period. (Id. P 27(n).)

Defendants are correct that the Second Amended **[**156]** Complaint fails to detail certain aspects of the enterprise's organizational structure. Most notably, the Second Amended Complaint does not identify by name all of the participants in the enterprise and, other than explaining that Defendants control the enterprise, fails to explain how enterprise participants other than Defendants fit into the enterprise's hierarchy. (Def. RICO Mem. at 35-36.) However, Plaintiffs have essentially alleged that the entire vertical distribution chain is involved in the conspiracy, and, given the numerous other specific allegations about the enterprise's organization, this is sufficient to permit meaningful discovery. See *Coonan, 938 F.2d at 1559*. Overall, the Second Amended Complaint provides sufficient allegations concerning the enterprise's organization to withstand a *Rule 12(b)(6)* motion.

(a) Enterprise that Is Separate and Distinct from the Pattern of Racketeering Activity

HN66[] An enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Turkette, 452 U.S. at 583, 101 S. Ct. at 2528*. In *Stein v. N.Y. Stair Cushion Co. Cushion Company, No. 04-cv-4741 (DRH), 2006 U.S. Dist. LEXIS 8410, 2006 WL 319300 (E.D.N.Y. Feb. 10, 2006)* **[**157]** , relied upon by Defendants, the court found that the plaintiff failed to plead an enterprise separate from the course of conduct because the plaintiff did not allege that the **[*426]** "association-in-fact enterprise ha[d] any purpose other than the execution of [the illegal] scheme[.]" *2006 U.S. Dist. LEXIS 8410, [WL] at *4*. As the Amsterdam court explained, ***HN67***[] "[i]n assessing whether an alleged enterprise has an ascertainable structure distinct from that inherent in a pattern of racketeering, it is appropriate to consider whether the enterprise would still exist were the predicate acts removed from the equation." *Amsterdam, 107 F. Supp. 2d at 215*.

In contrast to *Stein*, in this case, many--if not all--of the members of the alleged enterprise formed a liquor-distribution chain. In addition to the illegal pattern of money laundering and fraud, the enterprise was engaged in the manufacturing and distribution of liquor. This manufacturing and distribution of liquor is a purpose that is separate from money laundering and fraud. Defendants controlled many aspects of this distribution chain, most notably **[**158]** the prices of the liquor being distributed. To the extent that narcotics traffickers are alleged to be members of the enterprise, the narcotics traffickers are also a part of the distribution chain by converting Colombian Pesos into United States Dollars, a conversion that is required to make the distribution chain function. Even if Defendants did not engage in the alleged money laundering and fraud, they would still distribute their liquor through the distribution chain entities that comprise the alleged enterprise. See *Amsterdam, 107 F. Supp. 2d at 215* (suggesting that courts pose this counterfactual question to determine whether a separate enterprise has been alleged). As a result, Plaintiffs have adequately alleged an enterprise separate and distinct from the racketeering activity. [19]

[159]** ***(b) Defendants' Membership in a Single Enterprise***

Defendants argue that the allegation of a single enterprise composed of companies that compete with each other is implausible and not adequately alleged. (Def. RICO Mem. at 38-40.) ***HN68***[] "[F]or an association of individuals to constitute an enterprise, the individuals must share a common purpose to engage in a particular . . . course of conduct and work together to achieve such purpose[]." *First Capital Asset Mgmt., 385 F.3d at 174* (quotation marks omitted). Defendants are correct that courts dismiss civil RICO cases when the complaint fails to allege adequately that defendants are part of a single enterprise. See, e.g., *Nat'l Group for Commc'ns and Computers Ltd. v. Lucent Techs. Inc., 420 F. Supp. 2d 253, 271-72 (S.D.N.Y. 2006)* (complaint alleging two separate schemes with different purposes failed to allege a single enterprise even though some defendants participated in both schemes); *Doe I v. State of Israel, 400 F. Supp. 2d 86, 120 (D.D.C. 2005)* ("Plaintiff's complaint never explains how the several groups of defendants associated or operated together, or were otherwise **[**160]** organized into an enterprise with a shared decision-making infrastructure.").

Plaintiffs argue that they have adequately alleged that all Defendants are involved in a money-laundering scheme with the Mansur group and Roy and Milton Harms. (SAC PP 31-39.) Plaintiffs also allege that "[a]ll the Defendants share the common goal of increasing their market share in Colombia by selling their products through illegal means." (Id. P 27.) Of course, there are a variety of situations in which competitors do enter into horizontal agreements **[*427]** for the purpose of exploiting a market and, in doing so, increasing profits (*e.g.,* horizontal price-fixing agreements). In this case, it is plausible that Defendants are engaged in a joint money-laundering enterprise because it is, for some reason, easier to launder the money collectively. For instance, it may be that there are a limited number of narcotics traffickers who work through an even more limited number of distributors.

The Second Amended Complaint also provides some specific allegations as to how the Defendants, which generally compete with each other, cooperate with each other in the Colombian market. First, the Diageo Defendants and **[**161]** the Pernod Ricard Defendants have cooperated in the purchase and management of Seagram, which was formerly owned by Vivendi. (SAC PP 59-60.) The Diageo and Pernod Ricard Defendants, and entities affiliated with one or both of these groups, purchased Seagram from Vivendi. (Id. P 59.) Through the sale, the Diageo and Pernod Ricard Defendants each came to individually own certain Seagram assets. (Id.) However, the Diageo and Pernod Ricard Defendants retained joint ownership of certain assets, including the Seagram "umbrella operation" located in Colombia. (Id. PP 60-61.) Similarly, the Diageo and Pernod Ricard Defendants agreed to be jointly liable for "any liabilities arising out of claims made against Seagram entities for involvement in illegal activities in Colombia[.]" (Id. P 64.) The purpose of this joint liability and joint management "was and is to further the money-laundering scheme[.]" (Id. P 65.)

Second, all of the Defendants joined to form an industry association, the alleged purpose of which is to lobby the Colombian government and conceal Defendants' money-laundering scheme. (Id. PP 44-45.) The Second Amended Complaint does provide some detail **[**162]** about who is involved in the industry association and how the association is used, and details specific deceptive communications that the association allegedly made to the Colombian government. (Id.) Overall, by alleging that (1) Defendants utilize the same distributors, (2) Defendants have formed an industry association, and (3) some of the Defendants have cooperated in the management of their Colombian business activities, Plaintiffs have adequately alleged a single enterprise composed of all Defendants.

B. Participation in the Enterprise

---

[19] *Dale v. Banque SCS Alliance S.A., No. 02 Civ. 3592 (RCC) (KNF), 2005 U.S. Dist. LEXIS 20967, 2005 WL 2347853, at *7 (S.D.N.Y. Sept. 22, 2005)*, relied upon by Defendants, is also inapposite. In Dale, the court found that an association-in-fact enterprise was not separate from the pattern of racketeering activity where plaintiffs failed to allege as such.

1. Background

HN69[] In order to plead a RICO claim successfully, a plaintiff must allege that the defendant violated *18 U.S.C. §§ 1962(a)*, *(b)*, *(c)*, or *(d)*. *Section 1962(a)* provides that "[i]t shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in the acquisition of any interest in, or the establishment or operation of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. **[**163]** " *18 U.S.C. § 1962(a)*. "Under the plain language of this section, a violation of *§ 1962(a)* consists of investing income derived from a pattern of racketeering activity to acquire an interest in, establish, or operate an enterprise; the violation is not established by mere participation in predicate acts of racketeering." *Ouaknine v. MacFarlane, 897 F.2d 75, 82 (2d Cir. 1990)*. See also *United States Fire Ins. Co. v. United Limousine Serv., Inc., 303 F. Supp. 2d 432, 448-49 (S.D.N.Y. 2004)* ("Claims under *Section 1962(a)* alleging injury resulting from racketeering activity alone, rather than from the investment of income so derived, are subject to dismissal.") **[*428]** "As a matter of law, reinvestment of racketeering income is insufficient to make out a cause of action under RICO." *United States Fire Ins., 303 F. Supp. 2d at 449* (internal quotation marks omitted).

HN70[] *Section 1962(b)* provides that an individual violates RICO when he "acquire[s] or maintain[s], directly or indirectly, any interest in or control of any [RICO] enterprise[.]" In order to prevail under this section, the plaintiff must show "an acquisition **[**164]** or maintenance injury separate and apart from the injury suffered as a result of the predicate acts of racketeering." *United States Fire Ins., 303 F. Supp. 2d at 450* (internal quotation marks omitted). The purpose of *Section 1962(b)* is to prevent proceeds from racketeering activities to be used to takeover a legitimate business. Id.

HN71[] In order "to conduct or participate, directly or indirectly, in the conduct of [a RICO] enterprise's affairs" under *18 U.S.C. § 1962(c)*:

> [O]ne must have some part in directing those affairs. Of course, the word "participate" makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" makes clear that RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the enterprise's affairs is required.

Reves v. Ernst & Young, 507 U.S. 170, 179, 113 S. Ct. 1163, 1170, 122 L. Ed. 2d 525 (1993) (internal footnote omitted; emphasis in original). Under the "operation or management" test, one is liable under RICO if he "participated in the operation or management **[**165]** of the enterprise itself." *Id. at 184, 113 S. Ct. at 1173*. Individuals participate in the operation or management of an enterprise when they serve as "lower rung participants in the enterprise who are under the direction of upper management" or are "others 'associated with' the enterprise who exert control over it as, for example, by bribery." *Id. at 184, 113 S. Ct. at 1173*.

HN72[] *Section 1962(d)* makes it unlawful "to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." *18 U.S.C. § 1962(d)*. "A 'RICO conspiracy requires evidence that [a defendant] participated in the enterprise through a pattern of racketeering activity, or agreed to do so.'" *FD Prop. Holding, Inc. v. U.S. Traffic Corp., 206 F. Supp. 2d 362, 373 (E.D.N.Y. 2002)* (quoting *United States v. Tellier, 83 F.3d 578, 581 (2d Cir. 1996))*; accord *United States Fire Ins., 303 F. Supp. 2d at 453* ("In order to allege a conspiracy under *§ 1962(d)*, the plaintiff must assert that each defendant by words or actions, manifested an agreement to commit two predicate acts in furtherance of the common **[**166]** purpose of a RICO enterprise") (internal quotation marks omitted).**HN73**[] In order to state a claim under *Section 1962(d)*, the complaint "should state with specificity what the agreement was, who entered into the agreement, when the agreement commenced, and what actions were taken in furtherance of it." *FD Prop. Holding, 206 F. Supp. 2d at 373*. Conclusory allegations concerning the conspiracy are insufficient. *United States Fire Ins., 303 F. Supp. 2d at 453-54*. Recently, in the analogous antitrust context, the Supreme Court held that stating a conspiracy claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made . . . it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly, 127 S. Ct. at 1959*.

2. Analysis

With respect to *§ 1962(a)*, the Second Amended Complaint alleges that Defendants **[*429]** purchased legitimate Colombian importation and distribution entities. (SAC P 78.) Specifically, the Second Amended Complaint alleges that Defendants "first brought these legitimate importers/distributors to the brink of financial **[**167]** insolvency by selling liquor products to them for 'legitimate' importation into Colombia while at the same time dumping large volumes of product on the illegal market." (Id.) Defendants would simultaneously sell the same product to illegitimate distributors who were part of Defendants' money-laundering and tax-evasion scheme. (Id.) They made these illegal sales "with the full knowledge that the product would cannibalize the legitimate importer/distributor's sales. After driving the Colombian importer/distributor to bankruptcy, the Defendants then purchased the importing/distributing entities." (Id.) Plaintiffs identified several specific legitimate importers/distributors that Defendants purchased: Rueda; Puyana & Cia.; and Fonandes. (Id.)

Similarly, the Second Amended Complaint alleges that the Diageo and Pernod Ricard Defendants agreed to purchase certain assets and liabilities of the Seagram spirits and wine business. (Id. PP 58, 59.) "The Diageo and Pernod Ricard Defendants agreed to purchase the Seagram Spirits and Wine Division to further their illegal and anti-competitive activities" and, in doing so, "knowingly acquired a money laundering enterprise." (**[**168]** Id. P 60.)

As a result, Plaintiffs have specifically alleged that Defendants purchased new businesses to further their money-laundering enterprise. In doing so, they "acquire[d] an interest in, or the establishment" of a RICO enterprise. *18 U.S.C. § 1962(a)*. The Second Amended Complaint does not appear to state explicitly that Defendants used proceeds from the RICO enterprise to make these investments. However, given the lengthy allegations concerning the extent to which Defendants profited from the enterprise, the fact that at least some of the enterprise profits were used to make these investments can be reasonably inferred. Plaintiffs have successfully pleaded a *Section 1962(a)* violation.

These allegations concerning the purchase of the Colombian entities and the Seagram Spirits and Wine Division also satisfy *Section 1962(b)*. Such allegations constitute a claim that Plaintiffs suffered "an acquisition or maintenance injury separate and apart from the injury suffered as a result of the predicate acts of racketeering[:]" Plaintiffs allege that the purchase of these businesses injured Plaintiffs by allowing Defendants to broaden and deepen the enterprise **[**169]** and its effects. *United States Fire. Ins., 303 F. Supp. 2d at 450* (internal quotation marks omitted). Defendants argue that it is unreasonable to infer that the Diageo and Pernod Ricard Defendants' purchase of the Seagram business lines was for the purpose of furthering the RICO enterprise. (Def. RICO Rep. at 38.) Assuming *arguendo* that Plaintiffs are required to plead that the purchases were for the *purpose* of furthering the enterprise, such an inference is warranted in this case.

The Second Amended Complaint also satisfies the operation and management test and, in doing so, successfully pleads a violation of *Section 1962(c)*. As described in detail above, Plaintiffs have alleged that Defendants, with the knowledge and support of high-level executives, have controlled the enterprise. They have accomplished this through a variety of means, including setting prices, visiting Colombia and the Caribbean, being present when the money laundering was actually occurring, and having frequent communications with other participants in the RICO enterprise. This is not a case, as **[*430]** Defendants argue, in which Defendants are merely alleged to have provided essential goods **[**170]** to the enterprise, engaged in a business relationship with the enterprise, aided and abetted the enterprise, or concealed the enterprise's illegal conduct. (Def. RICO Mem. at 45.)

With respect to *Section 1962(d)*, the Second Amended Complaint provides significant information about the conspiracy alleged. First, the purpose of the conspiracy is to use the liquor manufacturing and distribution business to launder money. The geographic scope of the conspiracy includes Colombia but extends to other countries, including Aruba and Panama. Second, Defendants are alleged to have conspired with each other as well as with every person and entity beneath Defendants on their vertical distribution chain(s). Third, the conspiracy is alleged to have begun in the early 1990s and to continue to this day. Finally, the Second Amended Complaint identifies numerous instances of communications and other activities taken in furtherance of the conspiracy.

As discussed above, there are certain aspects of the conspiracy that receive less attention in the Second Amended Complaint. Above all else, in contrast to the numerous allegations concerning Defendants' communications and control over the vertical chain **[**171]** through which their products are distributed, there are fewer factual assertions concerning the horizontal conspiracy amongst Defendants. Further, the allegations concerning specific transactions through which money was laundered are old and may fall outside of the statute of limitations. Even when these shortcomings are considered, however, the Second Amended Complaint adequately pleads a violation of *Section 1962(d)*.

C. Proximate Cause

1. Background

Defendants assert that Plaintiffs have failed to adequately plead proximate cause. [20] ***HN74***[] Under the civil RICO statute, which requires a plaintiff to establish that he was injured "by reason" of a RICO violation, *18 U.S.C. § 1964(c)*, Plaintiffs must establish that their injuries were proximately caused by the alleged violation. *Holmes v. Sec. Investor Protection Corp., 503 U.S. 258, 265-68, 112 S. Ct. 1311, 1316-18, 117 L. Ed. 2d 532 (1992)*. Proximate cause "reflects ideas of what justice demands, or of what is administratively possible or convenient" and requires "some direct relation between the injury asserted and the injurious conduct alleged." *Id. at 268* (internal quotation marks **[**172]** omitted); see also *Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 126 S. Ct. 1991, 1998, 164 L. Ed. 2d 720 (2006)* ("When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries."); *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc., 271 F.3d 374, 381 (2d Cir. 2001)* (Holmes "expressly warned against applying a mechanical test detached from the policy considerations associated with the proximate cause analysis at play in this case. We have accordingly turned to those policy considerations explained in Holmes to guide any application of the Court's direct relation test.") (internal citation omitted). ***HN75***[] In order to recover **[*431]** for a civil RICO claim, the "compensable injury flowing from a violation of [RICO] necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise." *Anza, 126 S. Ct. at 1996* (internal quotation marks omitted).

[173]** There is significant uncertainty in the case law as to the RICO proximate cause requirement. *Lerner v. Fleet Bank, N.A., 459 F.3d 273, 284 (2d Cir. 2006)*. It is clear, however, that ***HN76***[] the proximate cause element has a different meaning in the RICO context than it does in the common law context:

> At common law, so long as the plaintiff category is foreseeable, there is no requirement that the risk of injury to the plaintiff, and the risk of the harm that actually occurred, were what made the defendant's actions wrongful in the first place. With statutory claims, the issue is, instead, one of statutory intent: was the plaintiff (even though foreseeably injured) in the category the statute meant to protect, and was the harm that occurred (again, even if foreseeable), the "mischief" the statute sought to avoid.

Id. (internal quotation marks and citation omitted).

Further, ***HN77***[] "when factors other than the defendant's fraud are an intervening direct cause of a plaintiff's injury, that same injury cannot be said to have occurred by reason of the defendant's actions." *First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 769 (2d Cir. 1994)*; **[**174]** see also *Amsterdam Tobacco Inc. v. Philip Morris Inc., 107 F. Supp. 2d 210, 218-20 (S.D.N.Y. 2000)* (dismissing civil RICO claim on the ground that intervening factors were the proximate cause of plaintiffs' injuries). As the Supreme Court has explained, in certain cases, civil RICO claims are barred when it is difficult to "ascertain the amount of a plaintiff's damages attributable

---

[20] In their initial moving brief, Defendants argued that Plaintiffs failed to allege that they had standing to bring a RICO claim. (Def. RICO Mem. at 21-22.) In their Reply brief, Defendants characterize very similar (if not identical) arguments as an assertion that Plaintiffs have failed to allege proximate cause. (Def. RICO Rep. at 14-15.) As a result, the court will treat this argument as a proximate cause argument.

to the violation, as distinct from other independent factors" such as "poor business practices or [plaintiff's] failure[] to anticipate developments in the financial markets." Holmes, 503 U.S. at 269-73, 112 S. Ct. at 1318-20.

2. Analysis

Defendants argue that Plaintiffs have failed to plead proximate cause as a matter of law because (1) Plaintiffs have not alleged a sufficient causal connection between Defendants' money laundering and the injury they suffer, (2) the alleged connection between money laundering and Plaintiffs' lost sales is too speculative, and (3) intervening acts break the causal chain between money laundering and Plaintiffs' lost sales. (Def. RICO Rep. at 14-26.) For the reasons discussed below, these arguments fail.

(a) Direct and Non-Speculative* [**175] *Causal Connection

First, Plaintiffs have sufficiently alleged that their injuries were caused by the stated predicate acts. Defendants argue that "the products with which the Departmental monopolies' products allegedly compete are the *smuggled* liquor products, not the laundered money, and thus it is only the smuggling that could even conceivably cause competitive harm." (Def. RICO Rep. at 18.) Defendants cite this court's Amazonas decision in support. In considering a money laundering claim that was similar to the instant claim, this court explained that:

> On the pleadings, the only apparent connection between the injury alleged and the allegations of money laundering is the harm visited by money laundering as a link in the smuggling chain. . . .
>
> . . . .
>
> **[*432]** Stripped of the harms suffered from smuggling, the complaint offers no additional, distinct causal connection between the allegations of money laundering and the injuries asserted. Simply put, Plaintiffs' complaint attacks a smuggling scheme. The money laundering claims are merely asserted as part of the overarching claims of injury from smuggling. Deprived of that context, Plaintiffs' particular money **[**176]** laundering claims lose all connection to the injuries alleged. While there may yet exist a discreet connection between money laundering and harm suffered by Plaintiffs, this court cannot divine that connection.

Amazonas, 186 F. Supp. 2d at 243. As both parties have stated in their motion papers, and the published European Community cases make clear, the European Community cases, including Amazonas, primarily addressed smuggling claims as opposed to money laundering claims. Further, the Amazonas opinion makes clear that a causal connection between money laundering and the European Community plaintiffs might exist. Certainly, this court's initial decision in European Community to dismiss the money laundering claims without prejudice makes clear that the plaintiffs should have been given an opportunity to re-plead the causation element of their civil RICO claim. See Amazonas, 186 F. Supp. 2d at 245 ("Plaintiffs' RICO and common law claims predicated on Defendants' money laundering transactions are DISMISSED without prejudice to replead.").

In this case, the allegations concerning money laundering are far better developed **[**177]** than they were in Amazonas. The Second Amended Complaint states that Defendants' laundering of narcotics proceeds and the associated mail and wire fraud enabled Defendants to sell their liquor at lower prices (the money-laundering discount) which, in turn, caused Plaintiffs to lose profits and revenues. Although this is a close case that falls somewhere in between the Supreme Court's decision in Anza v. Ideal Steel Supply Corp. and the Second Circuit's decision in Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc., this case falls closer to Commercial Cleaning and, as a result, Plaintiffs have adequately pled a direct and non-speculative relationship between Defendants' money-laundering enterprise and Plaintiffs' injury.

In Anza, the Supreme Court held that a manufacturer of steel mill products failed to plead the proximate cause element of a civil RICO claim when it alleged that a competitor had harmed it by repeatedly failing to pay taxes. Anza, 126 S. Ct. at 1996-99. The plaintiff had asserted that, by evading sales taxes through an enterprise engaged in mail and wire fraud, the defendants reduced their prices without altering **[**178]** their profit margin. Id. at 1994. The Court concluded that the "[t]he cause of [plaintiff's] asserted harms, however, is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)." Id. at 1997. The court cited several factors in reaching the conclusion that no proximate cause existed: (1) New York State, which was defrauded of its sales taxes, was a direct victim of the enterprise, whereas the plaintiffs were not "direct" victims; (2) it would be very difficult to determine the extent to which the defendants' decrease in prices resulted from the defendants' tax evasion rather than other, independent reasons; (3) the fact that the defendants committed tax evasion did not necessarily mean that they would reduce their prices--they could have kept some of the money resulting from the tax evasion as profit or re-invested it into their corporation; (4) plaintiff's lost sales could have resulted from some fact other than tax evasion; (5) requiring a direct causal connection is "especially warranted" where the directly injured victim-- **[*433]** the State of New York--"can be expected to vindicate the laws by **[**179]** pursuing its own claims;" and (6) it would be far easier to adjudicate a claim brought by the State of New York because it would require a simple calculation of the amount of the tax evasion. *Id. at 1996-98*; see also *Gelt Funding, 27 F.3d at 770-72* (lender's civil RICO claim alleging it was fraudulently induced to make nonrecourse loans by intentionally inflated real estate valuations dismissed for failure to plead proximate cause where (1) the magnitude of the overstatement was unclear because the methodologies used by the plaintiff were faulty and (2) five-year interval between the plaintiff's losses and the defendants' misrepresentations coupled with the collapse of the real estate market at that time meant the nexus between the misrepresentation and the injury was too tenuous).

In Commercial Cleaning, the Second Circuit held that the plaintiffs had adequately plead the proximate cause element of a civil RICO claim where they alleged that the defendant obtained an unfair business advantage over its competitors in the cleaning services industry by knowingly hiring "[h]undreds of illegal immigrants at low wages." *Commercial Cleaning, 271 F.3d at 378-79, 380-85.* **[**180]** Specifically, the plaintiffs alleged that the defendant's hiring of illegal immigrants permitted them to out-bid the plaintiffs on a lucrative cleaning contract to clean a specific facility. *Id. at 379*. As Commercial Cleaning was decided before Anza, the Commercial Cleaning court based its analysis on three factors cited in Holmes:

> ***HN78***[] First, the less direct an injury is, the more difficult it becomes to determine what portion of the damages are attributable to the RICO violation as distinct from other, independent, factors. Second, if recovery by indirectly injured plaintiffs were not barred, courts would be forced, in order to prevent multiple recovery, to develop complicated rules apportioning damages among groups of plaintiffs depending on how far each group was removed from the defendant's underlying RICO violation. Third, there was no need to permit indirectly injured plaintiffs to sue, as directly injured victims could be counted on to vindicate the aims of the RICO statute, and their recovery would fix the injury to those harmed as the result of the injury they suffered.

Id. at 381-82 (citations to Holmes omitted). **[**181]** The Commercial Cleaning court applied the three Holmes factors as follows: (1) although defendants may be able to argue that they won the head-to-head bid for the Pratt & Whitney contract for a variety of reasons other than the defendants' hiring of illegal immigrants (e.g., by providing higher quality services or having a better reputation), "the plaintiffs may well show that they lost contracts directly because of the cost savings defendant realized through its scheme to employ illegal workers;" (2) there was no risk that defendants would have to compensate multiple plaintiffs for the same injuries because each plaintiff would have to prove that defendant's hiring of illegal immigrants was the "but-for" cause of its losing a given contract; and (3) there was no other individual who was injured more directly than plaintiffs and could be counted on to bring a civil RICO claim to deter such conduct. *Id. at 382-85*.

The instant case is similar to *Commercial Cleaning* in that there is no person who has been injured more directly than Plaintiffs. As a result, if Plaintiffs are not permitted to bring the instant claim, it would appear that Defendants' money-laundering **[**182]** enterprise would not give rise to an actionable civil RICO claim. See *Commercial Cleaning, 271 F.3d at 385* ("There is no class of potential plaintiffs who have been more directly injured by the alleged RICO conspiracy than the defendant's **[*434]** business competitors, who have a greater incentive to ensure that a RICO violation does not go undetected or unremedied, and whose recovery would indirectly cure the loss suffered by these plaintiffs."). Defendants assert that Colombian tax authorities are directly injured by the alleged enterprise in the same way that New York State was directly injured in Anza. (Def. RICO Rep. at 28.) Defendants are certainly correct with respect to Plaintiffs' claims for lost taxes. As discussed above, such claims are being dismissed because they are barred by the revenue rule. With respect to Plaintiffs' money-laundering claims, however, Colombian tax authorities do not appear to be a victim. Defendants do not point to any financial harm that

Colombian tax authorities suffer as a result of the money-laundering exterprise. Defendants argue only that "[j]ust as with tax laws, the Republic would be expected to enforce its own currency laws **[**183]** and would be the direct victim." (Id.) Defendants' argument fails because Plaintiffs are alleging that they have been injured by Defendants' violation of United States money laundering laws as opposed to Colombia currency laws. [21] In this way, the case is distinguishable from Anza, where there was a third-party--the state--that directly lost tax revenues as a result of the defendants' tax evasion and, as a result, was better suited to bring a civil RICO claim.

HN79[] Congress has classified intranational and international money laundering as a predicate act that can give rise to RICO liability. See *European Community I, 355 F.3d at 133-35* (describing **[**184]** how the Patriot Act amended RICO to add additional money-laundering predicate acts). In doing so, Congress clearly created a private RICO cause of action predicated on money laundering. It is conceivable that, in contrast to the context of tax evasion addressed in Anza, in many money-laundering cases, a competitor of the defendant is the person that is most likely to be directly injured as a result of the money laundering. After all, other participants in the defendant's distribution chain are likely to benefit from the defendant's money laundering: the drug dealers obtain the benefit of having their money laundered; at best, consumers may benefit from cheaper prices resulting from the narco-laundering discount and, at worst, consumers should not be harmed. ***HN80***[] In considering whether Plaintiffs have pled proximate cause, the Second Circuit requires this court to make the following determination: "was the plaintiff (even though foreseeably injured) in the category the statute meant to protect, and was the harm that occurred (again, even if foreseeable), the 'mischief' the statute sought to avoid[?]" *Abrahams v. Young & Rubicam Inc., 79 F.3d 234, 237 (2d Cir. 1996).* **[**185]** Certainly, the instant claims appear to be well within Congress's core purpose in creating a RICO cause of action predicated on money laundering.

This case does, however, appear to fall closer to *Anza* than *Commercial Cleaning* in one respect: the instant claims will require the factfinder to sort out the extent to which Plaintiffs' losses result from money laundering as opposed to other factors. Plaintiffs' revenues and profits are directly related to the quantity of goods sold and the price at which they are sold. The price and quantity figures are, in turn, potentially based on a wide variety of factors, including consumer preferences, the extent of tax evasion, the extent of money laundering, manufacturing and shipping **[*435]** costs, effectiveness of Plaintiffs' management of their liquor businesses, and the values of United States Dollars and Colombian Pesos. As the Supreme Court explained in Anza, sorting out what portion of a plaintiff's losses resulted from a defendant's illegal acts can be difficult, particularly when the plaintiff and defendant are competitors:

> The injury [plaintiff] alleges is its own loss of sales resulting from [defendant's] decreased prices **[**186]** for cash paying customers. [Defendant], however, could have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud. It may have received a cash inflow from some other source or concluded that the additional sales would justify a smaller profit margin. Its lowering of prices in no sense required it to defraud the state tax authority. Likewise, the fact that a company commits tax fraud does not mean the company will lower its prices; the additional cash could go anywhere from asset acquisition to research and development to dividend payouts.
> There is, in addition, a second discontinuity between the RICO violation and the asserted injury. [Plaintiff's] lost sales could have resulted from factors other than petitioner's alleged acts of fraud. Businesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of [plaintiff's] lost sales were the product of [defendant's] decreased prices. . . .
> . . . .
>
> Further illustrating this point is the speculative nature of the proceedings that would follow if [plaintiff] were permitted to maintain its claim. A court considering the claim **[**187]** would need to begin by calculating the portion of [defendant's] price drop attributable to the alleged pattern of racketeering activity. It next would have to calculate the portion of [plaintiff's] lost sales attributable to the relevant part of the price drop. The element of

[21] In a footnote, Defendants argue that "the United States is another entity that could be expected to pursue these Defendants." (Def. RICO Rep. at 28.) Although the United States could bring a criminal case against Defendants, the United States has not suffered a direct financial injury in the way that the State of New York had in Anza.

> proximate causation recognized in Holmes is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation. It has particular resonance when applied to claims brought by economic competitors, which, if left unchecked, could blur the line between RICO and the antitrust laws.

Anza, 126 S. Ct. at 1997-98.

In this same sense, the instant case is distinguishable from *Commercial Cleaning* where the plaintiff was claiming that defendants' hiring of illegal immigrants at very low wages permitted them to reduce their prices and, in doing so, secure a specific cleaning services contract with Pratt & Whitney. The Second Circuit explained that determining causation and damages is simpler in the context of head-to-head bidders:

> Where, as here, the parties have bid against each other, the difference between the lowest and second lowest bid is readily **[**188]** discoverable. If [plaintiff] can prove that but for [defendant's] lower wage costs attributable to its illegal hiring scheme, [plaintiff] would have won the contract and would have earned a profit on it, it will have shown a proximately caused injury, compensable under RICO.

Commercial Lending, 271 F.3d at 382-83. Proving causation and damages will most likely be far more difficult in the instant case than in the head-to-head bidding context of Commercial Lending.

Even though this case may fall closer to Anza than to Commercial Lending with respect to how difficult it will be to prove causation and damages, dismissal at this time is not appropriate. As discussed above, (1) Plaintiffs state a reasonably direct claim that Defendants' illegal money-laundering **[*436]** enterprise caused Plaintiffs to lose revenues and sales and (2) there is no more direct plaintiff to bring a civil RICO claim against Defendants. At this early stage of the litigation, it is not possible to determine that, as a matter of law, Plaintiffs will not be able to prove to a reasonable degree of certainty that Defendants' money laundering caused Plaintiffs to lose revenues and **[**189]** profits. At this time, the court has no way of knowing what facts will emerge in discovery or what methodologies the parties' experts will use to prove and disprove damages. For instance, it is entirely possible that Defendants possess market analyses that reach conclusions as to the effects of key market variables, such as consumer preferences, Colombian taxes, and elasticity of demand. To the extent Plaintiffs simply seek to use Defendants' real-time market analyses, it may be very simple for Plaintiffs to prove at least some level of damages. Similarly, it very well may be that Plaintiffs' and Defendants' experts share key assumptions or methodologies that greatly simplify many of the problematic issues raised in Anza. [22]

[190]** ***(b) Intervening Acts***

---

[22] Defendants' reliance on *First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763 (2d Cir. 2004)*, is misplaced. In that case, the Second Circuit held that a civil RICO case alleging that a lender was fraudulently induced to make loans on the basis of intentionally inflated valuations should be dismissed under *Rule 12(b)(6)* because the plaintiff failed to plead proximate cause. *Id. at 769-72*. Gelt Funding is distinguishable on a number of grounds. First, the Second Circuit appeared to require the plaintiff to plead a methodology for calculating damages that was far more specific than is typically required on a *Rule 12(b)(6)* motion because the plaintiffs had lost money on real estate loans in the midst of a crash in the real estate market: "Given the complexity of the New York real estate market, and the fact that [plaintiff's] losses came in the wake of a downturn in the real estate market, [plaintiff] must allege loss causation with sufficient particularity such that we can determine whether the factual basis for its claim, if proven, could support an inference of proximate cause." *Id. at 770*. The court ultimately concluded that "[t]he methodology employed by [plaintiff] in determining the magnitude of the defendants' alleged[ly fraudulent] overstatements of income is so defective, and the conclusions reached so defy logic, that no 'reasonable inferences' can be drawn therefrom." *Id. at 772*. Here, there is no reason to require Plaintiffs to plead a specific methodology for proving causation and damages and, thus, the Plaintiffs are entitled to the benefit of all reasonable inferences. Second, in Gelt Funding, there was a five-year difference between the time of the alleged misstatements and the time of the losses whereas, in the instant case, the losses are alleged to occur more or less contemporaneously. Id. Finally, in Gelt Funding, the Second Circuit pointed to the real estate crash that had occurred in the relevant market during the relevant five-year period as an intervening factor that tended to disrupt any inference of proximate causation. Id. In the instant case, Defendants have not pointed the court to any intervening variable of even remotely similar magnitude.

Defendants argue that the following intervening acts break the chain of causation between Defendants' alleged conduct and Plaintiffs' injuries:

> (1) [T]he Republic creating Duty-Free Ports and Special Customs Regime Areas ("SCRAs") out of which liquor products can easily--and often legally--be brought into the interior of Colombia without payment of taxes; (2) the importers' selling liquor products to customers in Colombia's Duty-Free Ports and SCRAs; (3) the customers in the Duty-Free Ports and SCRAs smuggling the products or selling to others who smuggle the products into the interior of Colombia; (4) the custom agents overlooking or facilitating the smuggling of liquor products; (5) the Colombian distributors transporting smuggled liquor products throughout Colombia; (6) the retailers selling smuggled liquor products **[*437]** to retail customers in Colombia; (7) the retail customers choosing not to purchase Plaintiffs' products; (8) the business practices of the Departmental monopolies that may adversely impact their ability to compete; and (9) the Republic's protectionist policies, such as monopolies and high taxes, which create incentives to smuggle **[**191]** liquor products.

(Def. RICO Mem. at 26-27.)

Several of these so-called "intervening" acts (1, 4, and 9) are nothing more than tax and money laundering laws and law-enforcement policies and practices. Defendants have not cited and this court is not aware of any precedent that stands for the proposition that an actor--such as a RICO enterprise--that engages in tax evasion or money laundering is not the proximate cause of injuries resulting from the evasion or laundering because the government whose laws are being violated "intervened" by not enacting optimal laws or not enforcing the laws that are being broken in an optimal way (or in the way that the actor believes is optimal). In effect, Defendants are arguing that they should not be liable because Defendants have enacted and enforced laws in such a way as to create economic incentives to violate the laws. This line of argument is without precedent and, without question, fails.

Several of the "intervening" acts to which Defendants point involve distributors and middle-men smuggling and selling the liquor after Defendants sell it to them. Defendants cite Amsterdam Tobacco Incorporated v. Philip Morris Incorporated for **[**192]** the proposition that such smuggling and sales constitute intervening acts. (Def. RICO Mem. at 27-29.) In Amsterdam, the plaintiffs alleged that the defendant, Philip Morris, was a member of a RICO enterprise engaged in the following scheme: Philip Morris sold cigarettes to Virginia distributors; the distributors then smuggled the cigarettes to other states with cigarette taxes that are higher than those in Virginia; the distributors then sold the cigarettes to consumers in high-tax states without paying the higher cigarette taxes. *Amsterdam, 107 F. Supp. 2d at 212-13*. The district court granted summary judgment for the defendant, finding, *inter alia,* that the plaintiffs had failed to create a material question of fact as to whether the defendant had participated in the alleged enterprise and that the plaintiffs' injuries were proximately caused by the defendant's conduct. *Id. at 216-20*. The defendant did not participate in the RICO enterprise because the defendant did not "play[] a part by operating or managing [the enterprise's] affairs, either by being part of upper management or by exerting control over the enterprise." *Id. at 216.* **[**193]** As a result, all of the sales that occurred downstream of the defendant constituted independent acts that intervened in the chain of causation between the defendant's initial sale of the goods and the ultimate purchase of the goods by the consumer. *Id. at 218-20* ("The (direct) cause of Plaintiffs' lost profits was not any activity of Philip Morris'. Rather, the 'but for' cause of Plaintiff's alleged loss was, among other things, the smuggling activity and the decision by New York consumers not to purchase cigarettes from Plaintiffs."). The court also found that, as the Supreme Court did in Anza, when "the primary purpose of an alleged racketeering enterprise is to avoid paying taxes or otherwise defraud the government, indirectly injured parties do not have standing to bring RICO claims." *Id. at 219*.

In contrast to *Amsterdam*, the instant Plaintiffs allege that Defendants are actively managing an enterprise that is engaged in smuggling and downstream sales. The Second Amended Complaint alleges that "Defendants controlled every aspect of the financial transactions involving the purchase of their liquor products. The **[*438]** Defendants also controlled **[**194]** the exact methods and means by which they were paid for the liquor products." (SAC P 28.) "Defendants also dictated that their criminal customers route payments to them through intermediary distributors, shippers, and other cut outs. This procedure, known in money-laundering jargon as 'layering,' is conducted for the sole purpose of concealing the payments' true source from Colombian and United States law enforcement." (*Id. P 29*.) Defendants' distributors "maintained [distribution] channels according to specific instructions from the

Defendants, which included special handling instructions for shipments designated for Colombian customers that the Defendants knew were involved in criminal activities." (*Id. P 30*.) Defendants' representatives would visit Colombian customers along with distributors "so as to keep a close eye on the market." (Id.)

Because Defendants' actively managed the enterprise, unlike *Amsterdam*, Defendants may very well have managed, directed, and/or controlled downstream sales, particularly downstream sales to and by cut outs that Defendants were involved in creating for the exclusive or primary purpose of laundering money. Because Plaintiffs are **[**195]** entitled to every reasonable inference, the Second Amended Complaint's allegation that "Defendants controlled every aspect of the financial transactions involving the purchase of their liquor products" constrains this court to find that, for purposes of this motion, Defendants controlled the entire distribution system up to and including the actual sale to the ultimate consumer. [23] As a result, in contrast to Amsterdam, Plaintiffs have successfully alleged that there were no intervening acts between their Defendants' conduct and Plaintiffs' injury.

[196] D. Predicate Acts**

The Second Amended Complaint alleges four types of predicate acts: money laundering; wire fraud; mail fraud; and violation of the Travel Act. Defendants argue that the Second Amended Complaint fails to plead adequately each of these predicate acts. Each predicate act will be considered in turn.

1. Money Laundering

Plaintiffs allege the predicate act of money laundering under both *18 U.S.C. §§ 1956* and *1957*. ***HN81***[] *Section 1956* requires that:

> (1) the individual conducted a financial transaction in interstate commerce, (2) with knowledge that the property involved in the transaction represented some form of unlawful activity, (3) with the transaction in fact involving the proceeds of specified unlawful activity, (4) with the purpose, in whole or in part, of concealing or disguising the nature, the location, the source, the ownership or the control of the illegally acquired proceeds.

Bernstein v. Misk, 948 F. Supp. 228, 236 n.2 (E.D.N.Y. 1997) (internal quotation marks omitted); see also *United States v. Maher, 108 F.3d 1513, 1527-28 (2d Cir. 1997)*. ***HN82***[] *Section 1957* requires **[**197]** that the defendant "(1) knowingly engaged or attempted to engage in a monetary transaction involving criminally derived property, (2) with such property being valued at more than **[*439]** $ 10,000, and (3) with such money actually being derived from specific criminal activity." *Bernstein, 948 F. Supp. at 236 n.2*.

Defendants argue that the Second Amended Complaint fails to allege money laundering as a predicate act because (1) Plaintiffs have failed to state that Defendants were furthering a specified unlawful activity, and (2) Plaintiffs have failed to state intent or knowledge. (Def. RICO Mem. at 51-56.) Defendants also argue that the allegations concerning these points were conclusory. (Def. RICO Rep. at 42-45.)

The Second Amended Complaint contains numerous allegations that Defendants had actual knowledge and intent and that Defendants were furthering illegal narcotics trafficking. Defendants "have directed, managed, and controlled a criminal scheme . . . by knowingly selling their products into illegal channels and receiving payment in the form of laundered proceeds from narcotics sales and other criminal activities[.]" (SAC P 2.) "Defendants knowingly sell their products **[**198]** to organized crime, arrange for secret payments from organized crime, and launder such proceeds in the United States or offshore venues known for bank secrecy." (Id. P 4.) "Defendants created a circuitous and clandestine distribution chain so as to sell their liquor to criminal organizations and to

[23] It is not entirely clear that Plaintiffs need to establish that Defendants controlled every sale in the distribution chain in order to recover: if Plaintiffs establish that Defendants controlled a sale to a distributor located in whole or in part in Colombia, Plaintiffs may be able to show that the enterprise caused Defendant to lose revenues and/or profits. At this time, the parties have not briefed this issue and there is no reason for the court to reach it.

receive payment for their products with criminal proceeds while at the same time concealing their activities from Colombian and U.S. law enforcement." (Id. P 27(a).)

Defendants' employees traveled to Aruba to meet with narcotics traffickers and, at such meetings, Defendants' "distributors and criminal customers explained the criminal nature of the business in great detail including that narcotics proceeds were utilized to pay for the liquor. . . . In spite of these detailed explanations of the criminal nature of the liquor sales, all these Defendants continued not only to conduct this business but to take all possible steps to expand this business." (Id. P 27(h).) The Second Amended Complaint describes the types of communications that Defendants had with their distributors concerning the Defendants' entire distribution chain(s) and avers that, "[i]n this way, the Defendants **[**199]** knew who their ultimate customers were and knew that they were receiving criminal proceeds in payment for their products." (Id. P 27(l).) "Since at least 1991, all the Defendants were selling liquor to individuals whom they knew were reputed narcotics traffickers." [24] (Id. P 27(n).)

Defendants were aware that their Aruban distributors used numerous corporate entities to conceal the source of their funds: "Defendants, aware of the artifice and design of the Aruban distributors and the need to disguise the nature, source and origin of the narcotics and other criminal proceeds they were receiving, adapted themselves to and received payment continually from these various [cut out] companies and **[**200]** the accounts they held." (Id. P 27(q).) In fact, "Defendants structured their payment schemes to maximize their own security from detection by United States and Colombian law enforcement." (Id. P 29.) "Defendants also dictated that their criminal customers route payments to them through intermediary distributors, shippers, and other cut outs." (Id.) With respect to the Colombian money-laundering transactions, intermediaries included Romar, Transimex, Licores Aruba, and brokers in Colombia, such as Victor Ojeda and Samuel Santander Lopesierra. (Id.) **[*440]** Defendants' employees would visit storage and distribution companies that were organized along product lines and would accompany representatives of such companies on trips to visit Colombian customers. (Id. P 30.) On such trips, Colombians would gain knowledge about the source of the illegal narcotics proceeds that they were receiving. (Id.)

Defendants correctly cite *Casio Computer Co., Ltd. v. Sayo, No. 98-cv-3772 (WK), 2000 U.S. Dist. LEXIS 15411, 2000 WL 1877516, at *17 (S.D.N.Y. Oct. 13, 2000)* and *Bernstein, 948 F. Supp. at 236 n.2*, for the proposition that ***HN83***[] a money-laundering claim cannot be plead with wholly **[**201]** conclusory allegations. Here, however, the Second Amended Complaint provides substantial facts concerning the alleged money laundering: Defendants laundered the proceeds from illegal United States narcotics sales; at least some of the drug traffickers whose funds were being laundered are specifically identified; specifics as to the money-laundering process are provided, including how smurfs deposit funds in bank accounts and how various corporate entities are utilized for the purpose of concealing the nature of the transactions; Defendants learned of the source of the funds that they were receiving through their employees' trips to Aruba and Colombia and through close supervision of their distribution chain. Defendants are correct that the Second Amended Complaint fails to provide significant specifics as to each Defendant's money-laundering acts. Because, however, Plaintiffs allege that each of the Defendants is engaged in the same enterprise and each of the Defendants utilizes identical tactics, this defect is not fatal. The Second Amended Complaint adequately pleads money-laundering predicate acts.

2. Travel Act Violation

HN84[] In order to prove violation of The Travel Act, *18 U.S.C. § 1952* **[**202]** , the plaintiff must show (1) travel in or use of the mail or any facility of interstate or foreign commerce, (2) "intent to 'facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,'" and (3) performance of "an additional act in furtherance of the specified unlawful activity." *United States v. Jenkins, 943 F.2d 167, 172 (2d Cir. 1991)* (quoting *18 U.S.C. § 1952(a)*).

---

[24] Although P 27(n) states at one point that Defendants 'knew or should have known' that one individual was a narcotics trafficker and that he used certain companies for money laundering, this paragraph also alleges that Defendants had actual knowledge that some of their customers were narcotics traffickers.

Other than this enumeration of the elements of a violation of The Travel Act, Defendants primarily cite cases outside the Second Circuit for a description of the scope of The Travel Act and the elements of a Travel Act violation. Plaintiffs have not argued that the cases from outside of the Second Circuit are inconsistent with Second Circuit case law. The court assumes, for purposes of this motion, that the cases cited by Defendants are consistent with Second Circuit case law.***HN85***[] The Seventh Circuit has held that "in a Travel Act prosecution, the interstate travel or use must relate significantly, rather than incidentally or minimally, to the illegal activity." *United States v. McNeal, 77 F.3d 938, 944 (7th Cir. 1996)* (internal **[**203]** quotation marks omitted); see also *United States v. Archer, 486 F.2d 670, 685 (2d Cir. 1973)* ("[T]he overriding Congressional purpose [of The Travel Act] was to permit federal government to act against members of organized crime whose activity crossed state lines when local law enforcement officers were unable or unwilling to do so--not to extend federal power to deal with corruption in local prosecutors' offices by affording the corrupters an opportunity to use interstate or foreign telephone facilities in dealing with an undercover agent on any such 'casual and incidental basis' as here.") (quoting *United States v. Corallo, 413 F.2d 1306, 1325 (2d Cir. 1969))*.

HN86[] The Ninth Circuit has held that the mens rea element of The Travel Act requires **[*441]** the plaintiff to show that the defendant "in some significant manner associated himself with the . . . criminal venture for the purpose of its advancement." *United States v. Gibson Specialty Co., 507 F.2d 446, 449 (9th Cir. 1974)*. ***HN87***[] The Fifth Circuit has held that in order to state a Travel Act claim on the basis of an illegal narcotics business, the plaintiff must allege a narcotics "business **[**204]** enterprise" within the meaning of *18 U.S.C. § 1952(b)*, which requires a "continuous course of conduct" as opposed to "sporadic casual involvement in a proscribed activity." *United States v. Davis, 666 F.2d 195, 202 n.10 (5th Cir. 1982)*.

Defendants argue that the Second Amended Complaint fails to state a violation of The Travel Act because (1) the allegations are conclusory, (2) the conduct that is alleged to violate The Travel Act is "merely incidental" to the overall scheme, (3) intent is not adequately alleged, and (4) the stated connection between the conduct that violates The Travel Act and the narcotics trafficking is "only sporadic." (Def. RICO Mem. at 56-58.) Each argument will be considered in turn.

First, the Second Amended Complaint adequately alleges specific foreign travel. Two categories of trips are most notable: (1) Defendants' employees' trips to Aruba to meet with Defendants' distributors and criminal customers for the purpose of negotiating liquor prices and at which Defendants were advised that proceeds of narcotics sales were used to pay for the liquor (SAC P 27(h)); and (2) Defendants' employees trips to Colombia for the **[**205]** purpose of monitoring Defendants' distribution chain, during which Defendants' employees on multiple occasions observed large amounts of cash changing hands (Id. P 27(g)). The allegations include specific facts about these trips, including the names of some of the individuals who participated in them and the substance of the discussions held. Such allegations are not conclusory. (Id. PP 27(g), (h).)

Second, these same two categories of trips are essential to the overall scheme. The alleged enterprise includes the entire chain through which Defendants' liquor is distributed to Colombia, and managing such an enterprise would ordinarily require significant foreign travel. The travel alleged in this case included a negotiation of prices (and, hence, the money-laundering discount) and an exchange of substantive information about the scope of the scheme. Such travel is in no way incidental to the enterprise.

Third, as described in Section IX(F)(1) above, the Second Amended Complaint adequately alleges that Defendants had the requisite intent because Defendants are alleged to have (1) actively managed the enterprise and (2) knowingly received the proceeds of illegal narcotics sales.

[206]** Finally, the alleged money-laundering enterprise is claimed to have begun operating in the early 1990s and to have operated continuously through the filing of the complaint. As a result, it is a "continuous course of conduct" as opposed to "sporadic casual involvement." See *Davis, 666 F.2d at 202* (Travel Act conviction upheld even where, although only one narcotics transaction was proved, the evidence showed that two individuals "had for some time engaged in a continuous business relationship in illegal drug trafficking").

3. Mail and Wire Fraud

HN88[] "'[A] complaint alleging mail and wire fraud must show (1) the existence of a scheme to defraud, (2) defendant's knowing or intentional participation in the scheme, and (3) the use of interstate mails or transmission facilities in furtherance of the scheme.'" Leung v. Law, 387 F. Supp. 2d 105, 115-16 (E.D.N.Y. 2005) (Garaufis, J.) (quoting S.Q.K.F.C., Inc. v. Bell Atl. TriCon Leasing Corp., 84 F.3d 629, 633 **[*442]** (2d Cir. 1996)). In order to state a RICO claim on the basis of wire or mail fraud, "[t]he use of the mails need not be essential to the fraudulent scheme as long as the mailing **[**207]** is incident to an essential part of the scheme." Id. at 116 (quotation marks omitted). Fraud "require[s] a misrepresentation or concealment of *material* fact." Neder v. United States, 527 U.S. 1, 22, 119 S. Ct. 1827, 1840, 144 L. Ed. 2d 35 (1999) (emphasis in original). In the Second Circuit, a civil RICO plaintiff asserting a predicate act of mail or wire fraud must also show that the plaintiff or a third party relied upon the fraud. Ideal Steel Supply Corp. v. Anza, 373 F.3d 251, 257-64 (2d Cir. 2004), rev'd in part, vacated in part by, 547 U.S. 451, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006) (the Second Circuit has "accepted the principle that a RICO claim based on mail fraud may be proven where the misrepresentations were relied on by a third person, rather than by the plaintiff"). [25] Irrespective of who relied on the fraud, the plaintiff must have been injured as a proximate result of the fraud in order to recover. Id. ("[A] plaintiff who is injured as a proximate result of fraud should be able to recover regardless of whether he or a third party is the one deceived") (quotation marks omitted).

[208]** **HN89**[] In most cases, mail and wire fraud predicate RICO acts are subject to the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure. E.g., Moore v. PaineWebber, Inc., 189 F.3d 165, 172-73 (2d Cir. 1999); McLaughlin v. Anderson, 962 F.2d 187, 190-91 (2d Cir. 1992). Generally, "[i]n the RICO context, Rule 9(b) calls for the complaint to specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiffs contend the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements." Moore, 189 F.3d at 173 (internal quotation marks omitted). The complaint "must also identify the purpose of the mailing within the defendant's fraudulent scheme." Id. (quotation marks omitted). "The purpose of Rule 9(b) is threefold--it is designed to provide a defendant with fair notice of a plaintiff's claim, to safeguard a defendant's reputation from improvident charges of wrongdoing, and to protect a defendant against the institution of a strike suit." O'Brien v. Nat'l Prop. Analysts Partners, 936 F.2d 674, 676 (2d Cir. 1991) **[**209]** (internal quotation marks omitted).

The parties dispute how Rule 9(b) should be applied in this case. Plaintiffs point to several district court decisions in this Circuit in which courts confronted with allegations of mail or wire fraud in the context of an underlying scheme have required only a particularized description of the underlying scheme and its connection to the mail or wire fraud. See In re Sumitomo Copper Litig., 995 F. Supp. 451, 456 (S.D.N.Y. 1998) ("In cases in which the plaintiff claims that the mails or wires were simply used in furtherance of a master plan to defraud . . . . a detailed description of the underlying scheme and the connection therewith of the mail and/or wire communications, is sufficient to satisfy Rule 9(b)"); Spira v. Nick, 876 F. Supp. 553, 559 (S.D.N.Y. 1995) ("we do not regard mailings in furtherance of the scheme, but which are not themselves false or misleading, as 'averments of fraud' within the language of Rule 9(b)"); Giuliano v. Everything Yogurt, Inc., 819 F. Supp. 240, 244 **[*443]** (E.D.N.Y. 1993) ("the complaint need not specify the time, place and content of each mail communication where the **[**210]** nature and mechanics of the underlying scheme is sufficiently detailed, and it is enough to plead the general content of the misrepresentation without stating the exact words used[.]") (quotation marks omitted).

Defendants point to the fact that, in Leung v. Law, this court held as follows: "In order to satisfy the particularity standard set forth in Rule 9(b), a plaintiff's complaint must '(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.'" Leung, 387 F. Supp. 2d at 112 (quoting Anatian v. Coutts Bank (Switz.) Ltd., 193

[25] In Anza, the Supreme Court specifically declined to reach the question of whether a RICO plaintiff had to show reliance. Anza, 126 S. Ct. at 1998 ("Because Ideal has not satisfied the proximate-cause requirement articulated in Holmes, we have no occasion to address the substantial question whether a showing of reliance is required."). As a result, this court remains bound by the Second Circuit's holding in Anza that a RICO plaintiff must show reliance by the plaintiff or a third party.

F.3d 85, 88 (2d Cir. 1999)). In Leung, however, this court was not confronted with the argument that, in cases where a mail or wire fraud scheme was alleged in detail, communications that traveled via mail and/or wire need only to be alleged with less particularity.

As Judge Kaplan explained in Spira:

> [I]t is difficult to see any useful purpose in requiring that a RICO complaint specifically allege each mailing in furtherance of a complex commercial scheme, **[**211]** at least where, as here, the complaint alleges that numerous mailings of particular kinds were made in furtherance of the scheme. Once the plaintiff alleges with particularity the circumstances constituting the fraudulent scheme, neither the reputational interests nor the notice function served by Rule 9(b) would be advanced in any material way by insisting that a complaint contain a list of letters or telephone calls.

Spira, 876 F. Supp. at 559 (internal footnote omitted). The same is largely true in this case: irrespective of whether the fraud predicate acts are dismissed at this time, the court has found that Plaintiffs have adequately stated a claim against Defendants predicated on laundering proceeds of illegal narcotics traffickers; it is not clear to this court how Defendants suffer greater reputational harm if they have to face an allegation that, somewhere in the midst of this elaborate money-laundering scheme, Defendants made a fraudulent wire or mail communication. Further, irrespective of whether the money laundering predicate acts are dismissed, Plaintiffs will be entitled to seek discovery about the money-laundering scheme, including communications **[**212]** that occurred through mail and wires and Defendants' understanding of such communications. As a result, it does not appear that declining to dismiss the fraud predicate acts will in any way reduce the very substantial discovery costs that this case forces Defendants to bear. In any event, as discussed below, even under the Rule 9(b) pleading standard, the court finds that the Second Amended Complaint adequately pleads the fraud predicate acts.

Defendants argue that the Second Amended Complaint fails to plead predicate acts of wire and mail fraud because: (1) the fraud identified in the Second Amended Complaint is not alleged to be essential to the overall scheme; (2) there is no allegation that Plaintiffs or some third party reasonably relied upon the fraudulent statements; (3) the Second Amended Complaint fails to particularize which Defendants committed which tortious conduct; (4) Plaintiffs fail to identify which Plaintiffs were the victim of which fraud; and (5) fraudulent intent has not been adequately plead. [26] Each argument will be considered in turn.

[*444] [213]** First, Plaintiffs do allege fraud that is in furtherance of the scheme. Specifically, Plaintiffs allege that Defendants made false statements to Colombian authorities, including Plaintiffs, "to systematically misinform the Plaintiffs about their true role in the criminal money-laundering scheme, and to prevent the Plaintiffs from discovering the role of the Defendants in the money laundering enterprise." (SAC P 27(1). [27]) In fact, Plaintiffs allege Defendants purported to fight against Colombian black markets for the purpose of deceiving Plaintiffs as to

---

[26] Defendants raise these arguments in two separate sections of their brief. (Def. RICO Mem. at 58-71.) In one of those sections in Defendants' moving brief, Defendants assert that the state law claims for fraud, negligent misrepresentations, conversion, money had and received, public nuisance, and unjust enrichment have not been plead with the particularity required under Fed. R. Civ. P. 9(b). (Def. RICO Mem. at 63.) In their Reply Brief, Defendants appear to change their position, stating that the state law fraud claim is subject to Rule 9(b)'s pleading requirements, but that the claims for negligent representation, conversion, money had and received, public nuisance, and unjust enrichment "potentially" fall under Rule 9(b). (Def. RICO Rep. at 50.) In any event, other than these blanket statements, Defendants do not address the Plaintiffs' state law claims. Defendants do not identify the elements of these state law claims or explain how the Second Amended Complaint fails to plead them. On this basis, the court denies Defendants' motion to dismiss the state law claims on Rule 9(b) grounds.

[27] Paragraph 27(l) does not explicitly state that the communications alleged therein were made through United States mail or wires. Arguably, it is possible to read this allegation in connection with the numerous allegations concerning use of United States wires and mails and, in doing so, draw a reasonable inference that at least some of the false statements made to the Colombian government were made with the use of United States wires and mails. This court, however, need not reach this question because, as discussed below, the Second Amended Complaint contains numerous other allegations that specifically cite to use of the United States wires and mail.

the nature of such black markets. (Id.) The Second Amended Complaint alleges that all Defendants participated in an industry association called the Colombian Association of Importers of Liquor and Wines ("ACODIL"). (SAC P 44.) On June 30, 1998, ACODIL sent a letter to the Colombian Ministry of Foreign Trade entitled, "Proposal for the Fight against the Informal Market of Wine and Liquor." (Id. P 45.) The alleged purpose of this proposal was to conceal Defendants' money-laundering scheme and prevent Defendants from making efforts to interfere with the scheme. (See id.) Defendants argue that the June 1998 letter cannot **[**214]** serve as the basis for a mail or wire fraud claim because the Second Amended Complaint does not explicitly state that this letter was sent through U.S. mails or wires. (Def. RICO Rep. at 52 n.56.) However, this court must read the allegations concerning this letter along with (1) the allegation that Defendants participated in hundreds of telephone conversations and faxes through U.S. wires and mails in furtherance of the scheme "on virtually a daily basis" (SAC P 122) and (2) the allegation that all of the Defendants had "External Affairs" divisions of their corporations for the purpose of lobbying the Colombian government and concealing their illegal activities (id. PP 79-80). When these allegations are considered collectively, it is clear that Plaintiffs have adequately alleged that Defendants used the U.S. wires and mails to communicate with each other and Colombian government officials in order to fraudulently conceal their enterprise.

[215]** ***HN90***[] The Second Circuit has held that lulling the victim of a fraud into believing that no fraud had been committed is a "necessary step in executing" the fraud and, thus, can serve as the basis for a mail or wire fraud claim." *United States v. Angelilli, 660 F.2d 23, 36 (2d Cir. 1981)*. In fact, "[s]uch 'lulling' mailings are essential to the fraudulent schemes in cases . . . where the **[*445]** frauds are not isolated and unrelated swindles[.]" *Id. at 37* (internal quotation marks omitted); see also *Leung, 387 F. Supp. 2d at 116* ("It is therefore clear that if it appears from the face of [the] complaint that the alleged falsifications of the tax statements were made by the defendants, and subsequently mailed, with an eye toward keeping [the plaintiff] from discovering the defendants' fraudulent scheme, then the 'in furtherance' element of the mail fraud statute is present.").

Similarly, the Second Amended Complaint identifies numerous other mailings. Throughout the alleged scheme, checks reflecting proceeds of illegal narcotics sales, were deposited in Transimex's Interbank account and were wired or mailed from this account to Defendants. **[**216]** (SAC P 27(e).) Details of the shipments of liquor were routinely sent through United States wires and mails. (Id. P 27(e).) Defendants' Aruban and Panamanian distributors "would constantly use the wires and mails to communicate every detail about their activities. They would send details of product movement of their own products, as well as information on the movement of competitor's products, including prices." (Id. P 30.) Plaintiffs also allege that "[i]n addition to using the mail and wire communications themselves to advance the money-laundering schemes, the Defendants[] caused the use of the U.S. mails and wires in furtherance of the money-laundering schemes by acting with knowledge that the use of the U.S. mails and/or wires would follow in the ordinary course of business and/or could be reasonably foreseen as a result of their activities." (Id. P 87.) Although not all of these allegations refer to mailings or wire transmissions that, in and of themselves, constitute fraud or contain a misrepresentation, they are alleged to be essential to the overall fraud scheme. ***HN91***[] "[I]nnocent mailings--ones that contain no false information--may supply the mailing element. **[**217]** . . . The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud." *Schmuck v. United States, 489 U.S. 705, 109 S. Ct. 1443, 1448, 103 L. Ed. 2d 734 (1989)* (holding that mailing of truthful vehicle information to state agency to transfer titles could serve as the basis for mail fraud because defendant knew that transferring title was an essential element of selling used vehicles whose odometers had been fraudulently rolled back). Similarly, in the instant case, Plaintiffs have alleged that Defendants' use of U.S. mail and wires--often to convey truthful communications--was essential to the overall fraud. As discussed below, to the extent such communications were reasonably relied upon by third parties that were not a part of the racketeering enterprise, such communications may constitute wire or mail fraud.

Second, Plaintiffs have adequately alleged reasonable reliance. The Second Amended Complaint clearly alleges that Plaintiffs relied upon misrepresentations **[**218]** about Colombian black markets and/or Defendants' involvement in them. (SAC P 27(l).) Defendants argue that "Plaintiffs are government entities with a responsibility to halt smuggling and with the full arsenal of sovereign powers to enforce their own laws. They cannot have reasonably relied on alleged assurances from entities they suspected of being involved in smuggling as the basis for any inaction." (Def. RICO Mem. at 62.) Regulators and other government agencies routinely rely upon statements made by the entities that they regulate. Defendants have not cited any case in which a court held that reliance by a government agency upon a statement made by an entity subject to its **[*446]** jurisdiction is unreasonable as a matter of law. [28] Without a clear precedent, the court is not prepared, at this time, to find Plaintiffs' alleged reliance upon Defendants' statements unreasonable as a matter of law. Also, even though Plaintiffs are government agencies, they are also liquor manufacturers and distributors that compete with Defendants. Even if Plaintiffs, in their capacity as a sovereign, cannot rely upon a fraudulent communication as a matter of law, Plaintiffs, in their commercial capacities, **[**219]** may still be entitled to rely on fraudulent communications.

[220]** Further, Plaintiffs argue that third parties such as bankers, shippers, importers, and exporters may have reasonably relied upon shipping and other logistical information about the distribution of Defendants' products. (Pl. RICO Opp. at 53.) To the extent such individuals and entities were outside of the alleged enterprise, Plaintiffs may be able to prove their claim by demonstrating that they reasonably relied.

Third, the Second Amended Complaint's allegations concerning the conduct of individual Defendants is adequate to satisfy *Rule 9(b)*. Defendants are correct that, ***HN92***[] in the typical case in which multiple defendants are accused of fraud, *Rule 9(b)* requires at least some connection between the individual defendants and the fraud. See *DiVittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1247 (2d Cir. 1987)* (In most contexts, "[w]here multiple defendants are asked to respond to allegations of fraud, the complaint should inform each defendant of the nature of his alleged participation in the fraud."); *Colony at Holbrook, Inc. v. Strata G.C., Inc., 928 F. Supp. 1224, 1232 (E.D.N.Y. 1996)* (dismissing mail and wire fraud predicate acts in **[**221]** part because "the amended complaint contains sweeping and general allegations of mail and wire fraud directed at all the defendants rather than connecting the alleged fraud to the individual defendants").

Defendants argue that the Second Amended Complaint improperly groups (a) competitors with each other and (b) parent and subsidiary corporations. Defendants are correct that the Second Amended Complaint could include far more specific allegations as to each Defendant. However, the Second Amended Complaint provides sufficient allegations as to each Defendant to survive a motion to dismiss. Plaintiffs allege that each of the Defendants participated in ACODIL and, in doing so, participated in fraudulent communications intended to deceive Plaintiffs and conceal Defendants' role in the alleged money-laundering enterprise. (SAC PP 44-45.) Similarly, Plaintiffs allege that **[*447]** each of the Defendants maintained lobbying divisions for the purpose of deceiving Plaintiffs about the alleged enterprise and generally concealing the existence of the enterprise. (Id. PP 79-80.) In doing so, Plaintiffs have adequately alleged that each Defendant was connected to the fraud.

Fourth, the Second Amended **[**222]** Complaint's allegations concerning which statements were made to which Plaintiffs are adequate. ***HN93***[] Where individual investors bring fraud claims against the same defendants, courts have required the investors to specify which statements were made to which investors. See *Kolbeck v. Lit America, Inc., 923 F. Supp. 557, 568-69 (S.D.N.Y. 1996)*; *Butala v. Agashiwala, 916 F. Supp. 314, 322 (S.D.N.Y. 1996)*. In

[28] Defendants cite *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 113 F. Supp. 2d 345, 369-70 (E.D.N.Y. 2000)* (health insurer's reliance unreasonable as a matter of law), and *Grumman Allied Indus., Inc. v. Rohr Indus., Inc., 748 F.2d 729, 737-38 (2d Cir. 1984)* (dealing with "sophisticated businessmen"). (Def. RICO Mem. at 62-63.) In Blue Cross, Judge Weinstein granted defendants' motion for summary judgment on the issue of whether a sophisticated insurance company's reliance upon a tobacco company's allegedly fraudulent campaign denying negative health effects of smoking was reasonable. Judge Weinstein's decision was fact-specific: the insurer had a "large corps of doctors, bio-technicians, and other health care experts" capable of learning the health effects of smoking; the insurer had a "strong financial interest in discovering" the health effects; as a provider of medical care, the insurer most likely had "first-hand information on the negative health effects of smoking [and] the opportunity to catalogue and study the rates and patterns of injuries being suffered by smokers". *Id. at 369-70*. Because this court confronts the reasonableness of Plaintiffs' reliance on a motion to dismiss, the court simply does not, at this time, have a factual basis for determining how sophisticated Plaintiffs are with respect to detecting, investigating or understanding the type of multinational RICO enterprise at issue in this case.

contrast, in this case, Plaintiffs are agencies of the same government. Also, Plaintiffs' allegation that each of the Plaintiffs was defrauded by the same disingenuous communications satisfies *Rule 9(b)*.

Fifth, Plaintiffs adequately plead fraudulent intent. ***HN94***[] In order to state a claim for wire or mail fraud, the plaintiff must allege intent to defraud. *Powers v. British Vita, P.L.C., 57 F.3d 176, 184 (2d Cir. 1995)*. "Because it would be unrealistic to expect a plaintiff to plead a defendant's actual state of mind, *Federal Rule of Civil Procedure 9(b)* permits plaintiffs to allege fraudulent intent generally while the circumstances amounting to fraud must be averred with particularity." Id. (internal **[**223]** quotation marks and citations omitted). However, "the plaintiff must provide some minimal factual basis for conclusory allegations of scienter that give rise to a strong inference of fraudulent intent." Id. (internal quotation marks omitted). When the plaintiff alleges "a motive for committing fraud and a clear opportunity for doing so," the complaint gives rise to a sufficient inference of fraudulent intent. Id.

Plaintiffs have sufficiently alleged motive and a clear opportunity. The Second Amended Complaint alleges that Defendants are engaged in a complex transnational money-laundering enterprise that launders the proceeds of illegal narcotics sales through the Colombian liquor market. Entities that engage in illegal conduct of such seriousness and scope have a clear and unequivocal incentive to go to great lengths to conceal the enterprise, including misleading government officials. As a result, Plaintiffs have pled a clear motive. Defendants' participation in ACODIL--an industry association that represents Defendants' interests in the Colombian liquor business--creates an excellent opportunity to mislead and conceal their conduct. In fact, Plaintiffs allege that the very **[**224]** purpose of ACODIL was to "deceive and defraud the Colombian government." (SAC P 45.) As a result, the Second Amended Complaint adequately pleads fraudulent intent.

Defendants' assertion that Defendants have failed to plead the wire and mail fraud predicate acts is rejected.

E. Equitable Relief

Defendants argue that RICO does not permit equitable remedies for civil RICO plaintiffs. (Def. RICO Mem. at 71-73.) Plaintiffs argue that the court should not address the issue at this time because (1) the Supreme Court and Second Circuit have yet to determine whether RICO permits equitable remedies and either court may have determined the issue by the time this court grants relief (if ever) in this case, (2) Plaintiffs are entitled to equitable relief under their state law claims, and (3) declining to dismiss the claim for equitable relief will in no way affect discovery. (Pl. RICO Opp. at 61-62.) The court agrees with the Plaintiffs' first and third points. Further, Defendants fail to cite any authority **[*448]** for the proposition that Plaintiffs are not entitled to equitable relief on their state law claims. As a result, even if the court were inclined to determine at this early stage whether **[**225]** RICO permitted equitable relief, the issue of whether Plaintiffs are entitled to equitable relief under the state law claims has not been adequately briefed and, thus, the court cannot reach a decision on the issue at this time. As a result, the court declines to address Defendants' motion to dismiss the claim for equitable relief at this time. Defendants are free to re-raise this argument in an appropriate motion at the conclusion of discovery.

X. STATUTE OF LIMITATIONS

A. Background

Defendants argue that Plaintiffs' RICO claims are barred by the statute of limitations and must be dismissed. The parties agree that Plaintiffs' ***HN95***[] RICO claims are subject to a four-year statute of limitations. See *Rotella v. Wood, 528 U.S. 549, 553, 120 S. Ct. 1075, 1079-80, 145 L. Ed. 2d 1047 (2000)*. Although the Supreme Court has yet to specify precisely when the RICO period of limitations begins to run, see *id. at 554, 120 S. Ct. at 1080*, the Second Circuit has held that it "begins to run when the plaintiff discovers or should have discovered the RICO injury." *In re Merrill Lynch Partnerships Litig., 154 F.3d 56, 58 (2d Cir. 1998)* (hereinafter, "Merrill **[**226]** Lynch Partnerships").

HN96[] The Second Circuit "recognizes a 'separate accrual' rule under which a new claim accrues and the four-year limitation period begins anew each time a plaintiff discovers or should have discovered a *new and independent* injury." *Id. at 59* (emphasis added). At this time, the case law in this circuit leaves some ambiguity as to precisely what constitutes a "new and independent injury." In *Bingham v. Zolt, 66 F.3d 553, 561 (2d Cir. 1995)*, the Second Circuit held that a series of diversions of money and assets that were part of separate schemes each constituted a new and independent injury. In contrast, in Merrill Lynch Partnerships, the Second Circuit held that plaintiffs suffered a single injury when defendant, through a single scheme, fraudulently sold investments to them and then continued to make a number of false statements to plaintiffs as "continuing efforts to conceal the initial fraud." *Merrill Lynch Partnerships, 154 F.3d at 59-60*. Defendants argue that "to be a 'new and independent injury,' there must be a variety of different schemes." (Def. SOL Rep. at 13.) The Merrill Lynch Partnerships **[**227]** court, however, clearly did not hold that all injuries suffered as a result of a single scheme are not "new and independent injuries" *per se:* "We recognize that **HN97**[] *in some instances* a continuing series of fraudulent transactions undertaken within a common scheme can produce multiple injuries which each have separate limitations periods." *Merrill Lynch Partnerships, 154 F.3d at 59* (emphasis added). As a result, the Second Circuit case law appears to have made the following clear: injuries suffered as a result of separate schemes are "new and independent;" injuries suffered as a result of the same scheme are sometimes but not always "new and independent."

B. Analysis

Defendants argue that the RICO claims are barred by the statute of limitations because (1) Plaintiffs had actual or constructive knowledge of the instant RICO claims more than four years before they filed this case and (2) Plaintiffs allege a single injury. In order to prevail on their motion to dismiss the Second Amended Complaint on statute of limitations grounds, Defendants must show that they are entitled to judgment as a matter of law **[*449]** on both grounds. The court will consider the latter **[**228]** argument first.

Defendants are correct that Plaintiffs have alleged a single RICO enterprise that engaged in a money-laundering scheme. (SAC P 108 ("The Defendants, along with their co-conspirators in the money-laundering schemes, including associated distributors, shippers, currency dealers, wholesalers, moneybrokers, and other participants in the scheme identified above, were, at relevant times, an association-in-fact of individuals and corporations engaged in, and the activities of which affected, interstate and foreign commerce, and thus constituted an 'enterprise' within the meaning of *18 U.S.C. § 1961(4)*.").) Plaintiffs have clearly alleged that this money-laundering scheme continuously caused them competitive injury beginning in the 1990s and through the 2004 filing of the instant case. The Second Amended Complaint, however, alleges that the enterprise was dynamic and significantly changed in the few years before Plaintiffs filed this case. In 2003, the Diageo Defendants and Pernod Ricard Defendants agreed to jointly purchase and manage Seagram's assets, which included money-laundering operations. (SAC PP 58-66.) This potentially involved a significant **[**229]** substantive change in the activities and effects of the alleged enterprise. Further, the Second Amended Complaint claims that Defendants continued to launder proceeds of illegal narcotics sales by making additional sales of liquor from 2000 to 2004. (Id. PP 56, 70-76.)

In light of these allegations, it is impossible to conclude as a matter of law that Plaintiffs did not suffer any "new and independent" injuries between 2000 and 2004. This case is distinguishable from Merrill Lynch Partnerships, in which the plaintiffs' injury was complete the moment that they purchased the fraudulent investment. See *Merrill Lynch Partnerships, 154 F.3d at 59-60*. At the time of purchase, "the amount of damages was clear and definite, and the injury was ripe". *Id. at 59* (internal quotation marks omitted). In this case, however, Plaintiffs continued to suffer additional losses each time Defendants' laundered money by making an additional sale to narcotics traffickers and their co-conspirators. At any given point in time, there is no way for Plaintiffs to know how much liquor Defendants will sell or how much money Defendants will launder in the future. **[**230]** For this reason, the instant case is distinguishable from the other cases relied upon by Defendants. See *Nat'l Group for Commc'ns and Computers Ltd. v. Lucent Techs. Inc., 420 F. Supp. 2d 253, 266 (S.D.N.Y. 2006)* (no new and independent injury occurred where plaintiff was aware of damages it would suffer as a result of kickback scheme and defendants specified how much they would demand in kickbacks at the initiation of the scheme); *Pharr v. Evergreen Gardens, Inc., No. 03 Civ. 5520 (HB), 2004 U.S. Dist. LEXIS 158, 2004 WL 42262, at *2 (S.D.N.Y. Jan. 7, 2004)* (no new and independent injury occurred where plaintiffs suffered an illegal increase in their rent at one point in time even though inflated rent bills were sent monthly).

Instead, at this very initial stage, this case appears to be more similar to *AMA v. United Healthcare Corp., No. 00 Civ. 2800 (LMM), 2006 U.S. Dist. LEXIS 93864, 2006 WL 3833440 (S.D.N.Y. Dec. 29, 2006)*. In that case, plaintiffs alleged that defendants constituted a RICO enterprise that engaged in fraudulent schemes to send and wire false and misleading communications in order to obtain unlawful fees for health care services. *Id. at *3*. The court concluded that **[**231]** "the alleged injuries occurred each time the Defendants made a 'false [health care fee] reimbursement determination[],' and these multiple injuries cannot be said to have resulted from one initial event. Rather, they are 'new and independent' **[*450]** injuries within the meaning of the Second Circuit's rule of separate accrual." *Id. at *10* (internal citation omitted).

To be clear, the court is not, at this time, determining that each and every sale of liquor that Defendants made into the Colombian market(s) constitutes a new and independent injury for purposes of the statute of limitations. At this time, the court is merely concluding that it cannot determine as a matter of law that Plaintiffs suffered no new and independent injuries because (1) the enterprise is alleged to have changed significantly in the 2000-2004 time period and the exact nature and scope of such changes are not clear at this time, and (2) the Defendants are alleged to have continued to engage in additional money laundering acts through the 2004 filing of this case. Because the court cannot determine as a matter of law that Plaintiffs suffered no new and independent injuries after October 8, 2000, the court cannot **[**232]** grant Defendants' motions to dismiss the RICO claims on the ground that they are barred by the statute of limitations.

In the alternative, Defendants request that this court limit Defendants damages to only those sustained after October 8, 2000, i.e., to those damages sustained during the four-year period prior to which this case was filed. (Def. SOL Rep. at 15-16.) In support of this alternative motion, Defendants argue that the following evidence demonstrates as a matter of law that Plaintiffs knew or should have known of the instant claims before October 8, 2000: (1) statements in the Second Amended Complaint that, in the 1990s, Colombian law enforcement officials were aware of liquor smuggling and related money laundering; (2) exhibits to Plaintiffs' opposition papers, including evidence of communications among Plaintiffs and (a) Defendants and (b) law enforcement authorities in other countries (such as the United States), placed Plaintiffs on notice of the scheme; (3) in correspondence between Plaintiffs' counsel and counsel for Diageo in the four months preceding the filing of this case, Plaintiffs requested an agreement to toll the statute of limitations, suggesting Plaintiffs **[**233]** were aware of the scheme at least four months before this case was filed; (4) 1999 Congressional testimony by Colombia's Director of Revenue and Customs Service that "the problem of liquor contraband [in Colombia] focuses particularly on the major Scotch whisky brands sold by producers in the United Kingdom to distributors in Panama and Aruba" and that such liquor is "believed to be purchased with drug traffic dollars" (Laurie Uustal Matthews Aff. Exh. 9 at 82); and (5) in the years prior to October 8, 2000, the media published numerous reports about the smuggling of liquor products. (Def. SOL Rep. at 3-10.)

Plaintiffs respond by arguing that Defendants rely upon evidence that is extrinsic to the Second Amended Complaint and, therefore, may not be considered by the court on a motion to dismiss under *Rule 12(b)(6)*. ***HN98***[] *Rule 12(b)* unequivocally states that if, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in *Rule 56*." This language has been read to mean that, on a *Rule 12(b)(6)* motion, courts, without converting the motion to one under *Rule 56*, may consider "'documents attached **[**234]** to the complaint as an exhibit or incorporated in it by reference . . . matters of which judicial notice may be taken, or . . . documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit.'" *Republic of Ecuador v. ChevronTexaco Corp., 376 F. Supp. 2d 334, 375 (S.D.N.Y. 2005)* (quoting *Brass v. Am. Film Techs., Inc., 987 F.2d 142, 150 (2d Cir. 1993))*; see also *Watterson v. Page, 987 F.2d 1, 3-4* ***[*451]*** *(1st Cir. 1993)* (On *Rule 12(b)(6)* motions, courts will consider "documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint[]" without converting the motion into one under *Rule 56*).

Defendants cite primarily to *Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47-48 (2d Cir. 1991)*, for the proposition that a court may rely on documents that are extrinsic to the complaint when the plaintiff has notice of the documents relied upon. (See Def. SOL Rep. at 16-17.) Defendants are correct that relying upon evidence that is extrinsic **[**235]** to the complaint in ruling on a *Rule 12(b)(6)* motion is far less problematic when the plaintiff has notice of the evidence and an opportunity to respond:

> ***HN99***[] A finding that plaintiff has had notice of documents used by defendant in a 12(b)(6) motion is significant, since, as noted earlier, the problem that arises when a court reviews statements extraneous to a complaint generally is the lack of notice to the plaintiff that they may be so considered; it is for that reason--requiring notice so that the party against whom the motion to dismiss is made may respond--that *Rule 12(b)(6)* motions are ordinarily converted into summary judgment motions. Where plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint the necessity of translating a *Rule 12(b)(6)* motion into one under *Rule 56* is largely dissipated.

Cortec, 949 F.2d at 47-48. Defendants' argument that Plaintiffs had notice of all of the evidence upon which Defendants rely and that this notice resolves many of the policy concerns associated with considering evidence extrinsic to the complaint on a *Rule 12(b)(6)* motion is well-taken **[**236]** and clearly supported by Cortec. In Cortec, the Second Circuit held that, in ruling on a *Rule 12(b)(6)* motion, the district court could rely upon a stock-purchase agreement, an offering memorandum, and a warrant. Id. The court found that (1) each of these documents was "integral" to plaintiff's claim and (2) the plaintiff had notice of each of these documents. Id. Recently, the Second Circuit read Cortec in precisely this manner. See *Roth v. Jennings, __ F.3d __, 2007 U.S. App. LEXIS 13035, 2007 WL 1629889, at *10 (2d Cir. June 6, 2007)* ("[E]ven if not attached or incorporated by reference, a document 'upon which [the complaint] *solely* relies and which is *integral to the complaint*' may be considered by the court in ruling on such a motion.") (quoting, *Cortec, 949 F.2d at 47*) (emphasis added by Roth court).

The instant case is different from Cortec in that Defendants ask the court to consider evidence that goes far beyond contracts and other similar documents that are at the heart of the dispute. That being said, it may still be possible to read *Cortec* and the other precedents cited by Defendants to permit this court **[**237]** to consider the virtual mountain of extrinsic evidence that Defendants have submitted in support of their *Rule 12(b)(6)* motion. To do so, however, would be to carry a good joke too far.

Defendants do not argue that this court is required to consider evidence outside the pleadings on a motion under *Rule 12(b)(6)*; Defendants merely argue that the court "may" consider evidence outside of the pleadings. (Def. SOL Mem. at 8 n.8; Def. SOL Rep. at 16-21.) Similarly, Cortec merely states that the district court "could" have considered documents in ruling on a *Rule 12(b)(6)* motion. *Cortec, 949 F.2d at 48*.

There is simply no reason to consider at this time the evidence outside of the pleadings that Defendants have submitted. The parties do not seem that far apart in their positions on the statute of limitations issue. **[*452]** Plaintiffs appear to acknowledge that their claims will be partially barred by the statute of limitations. Defendants' alternative request for relief is to limit Plaintiffs' damages to those suffered after October 8, 2000. At oral argument, Plaintiffs' counsel went so far as to acknowledge that "there are certain parts of the claim for the 90's that are going **[**238]** to be barred because time has passed[.]" (Mar. 7, 2007 Oral Arg. Transcript at 97.) In another case, it might make sense to consider such a massive compilation of evidence at the motion to dismiss stage, such as if doing so might limit the scope of discovery, increase the likelihood of settlement, or achieve some other useful purpose. This, however, is not one of those cases and there are at least two reasons not to consider it at this time.

First, Defendants make this alternative argument almost exclusively in their Reply Brief. Defendants only reference to this argument in their moving brief was a single sentence towards the end of the brief. (See Def. SOL Mem. at 14-15.) It is not clear whether this single sentence saves Defendants from the rule that "[a]rguments raised for the first time in a reply brief are properly ignored." *In re Comverse Tech., Inc., No. 06-cv-1849 (NGG), 2006 U.S. Dist. LEXIS 80195, 2006 WL 3193709, at *5 n.3 (E.D.N.Y. Nov. 2, 2006)* (Reyes, M.J.); see also *Mason v. Jews for*

*Jesus, No. 06 Civ 6433 (RMB), 2006 U.S. Dist. LEXIS 81707, 2006 WL 3230279, *5 n.3 (S.D.N.Y. Nov. 8, 2006)* ("**HN100**[] Arguments made for the first time in a reply brief need not be considered **[**239]** by a court.").

Second, Defendants would have the court rely upon the following types of evidence in ruling on this *Rule 12(b)(6)* motion: (1) documents ranging from government reports to experts' declarations that were submitted by Plaintiffs; (2) correspondence between the parties' counsel; (3) Congressional testimony; and (4) news stories published in United States and foreign newspapers. Nothing about Defendants' request that this court find that Plaintiffs knew or should have known about their alleged injuries before October 8, 2000 resembles a *Rule 12(b)(6)* motion. The sheer breadth and volume of evidence submitted precludes any resemblance. As the Second Circuit recently explained, **HN101**[] "a ruling on a motion for dismissal pursuant to *Rule 12(b)(6)* is not an occasion for the court to make findings of fact." *Roth, 2007 U.S. App. LEXIS 13035, 2007 WL 1629889, at *10*. As a result, it simply does not make sense for the court to consider all of this evidence at this time.

Defendants' motion to dismiss Plaintiffs' RICO claims on the ground that they are barred by the statute of limitations is denied in its entirety without prejudice.

XI. SUPPLEMENTAL JURISDICTION

Defendants request that **[**240]** this court decline to exercise supplemental jurisdiction over Plaintiffs' state law claims in the event that the court dismisses Plaintiffs' RICO claims. (Def. RICO Mem. at 73-75.) As this court has not dismissed Plaintiffs' RICO claims, Defendants' request is premature and need not be considered.

XII. CONCLUSION

For the reasons set forth above, Defendants' motions to dismiss are GRANTED in part and DENIED in part. Specifically, Defendants' motions are denied with the following exceptions: Plaintiffs' RICO claims for lost taxes and other injuries suffered by Plaintiffs in their sovereign capacity are dismissed.

This case was filed on October 8, 2004 and discovery has yet to begin. [29] **[**241]** The **[*453]** parties are to contact Magistrate Judge Viktor V. Pohorelsky immediately to schedule a discovery conference. [30]

SO ORDERED.

Dated: June 19, 2007

Brooklyn, N.Y.

NICHOLAS G. GARAUFIS

United States District Judge

End of Document

---

[29] Shortly after this case was filed, the parties entered into a series of stipulations effectively staying this action while the United States Supreme Court and the United States Court of Appeals for the Second Circuit considered the European Community cases and other cases involving the revenue rule. Oral argument on the instant motions was held in February and March of this year.

[30] The briefs filed in support of and opposition to this motion were unduly long. Any subsequent requests for an extension of the page limits contained in this court's Individual Rules should include (1) a brief but detailed description of why the legal and/or factual issues are sufficiently complex so as to justify the extension and (2) an estimate of how many pages will be dedicated to each legal issue.

United States v. Stanko

United States Court of Appeals for the Eighth Circuit

January 11, 2007, Submitted ; June 20, 2007, Filed

No. 06-3157

Reporter
491 F.3d 408 *; 2007 U.S. App. LEXIS 14461 **

United States of America, Appellee, v. Rudolph George Stanko, Appellant.

Subsequent History: US Supreme Court certiorari denied by *Stanko v. United States, 552 U.S. 1314, 128 S. Ct. 1874, 170 L. Ed. 2d 752, 2008 U.S. LEXIS 3191 (2008)*

Motion denied by *United States v. Stanko, 2009 U.S. Dist. LEXIS 41630 (D. Neb., May 18, 2009)*

Subsequent civil proceeding at *Stanko v. United States, 2010 U.S. Dist. LEXIS 144706 (D. Neb., Nov. 18, 2010)*

Subsequent appeal at, Appeal dismissed by, As moot *United States v. Stanko, 2014 U.S. App. LEXIS 15415 (8th Cir. Neb., Aug. 12, 2014)*

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

United States v. Stanko, 2006 U.S. Dist. LEXIS 19847 (D. Neb., Apr. 12, 2006)

Core Terms

unfair trade practice, consumers, meat, convictions, offenses, firearm, similar offense, district court, practices, regulation of a business, restraint of trade, indictment, antitrust violation, Inspection, violations, labeling, effects, business practice, unfair-trade-practices, packaging, qualifies, commerce, courts, primary purpose, adulterated, enumerated, exemption, preempted, pertain, enumerated offense

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Weapons Offenses > Possession of Weapons > General Overview

HN1[] **Weapons Offenses, Possession of Weapons**

See *18 U.S.C.S. § 922(g)(1)*.

Criminal Law & Procedure > ... > Weapons Offenses > Possession of Weapons > General Overview

HN2[] Weapons Offenses, Possession of Weapons

See 18 U.S.C.S. § 921(a)(20)(A).

Criminal Law & Procedure > Appeals > Procedural Matters > Briefs

Criminal Law & Procedure > Counsel > General Overview

HN3[] Procedural Matters, Briefs

It is not the practice of the United States Court of Appeals for the Eighth Circuit to consider pro se briefs filed by parties represented by counsel.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

Criminal Law & Procedure > Trials > Motions for Acquittal

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Motions to Dismiss

HN4[] Standards of Review, De Novo Review

A court of appeals reviews de novo a district court's denial of a motion to dismiss an indictment, and the court of appeals also applies de novo review to a denial of a motion for judgment of acquittal.

Criminal Law & Procedure > ... > Grand Juries > Indictments > Contents

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

HN5[] Indictments, Contents

An indictment is legally sufficient on its face if it contains all of the elements of the offense charged, fairly informs the defendant of the charges against which he must defend, and alleges sufficient information to allow a defendant to plead a conviction or acquittal as a bar to a subsequent prosecution.

Criminal Law & Procedure > ... > Possession of Weapons > Unregistered Firearm > Elements

HN6[] Unregistered Firearm, Elements

The government must prove three essential elements for an 18 U.S.C.S. § 922(g)(1) conviction: (1) the defendant previously was convicted of a crime punishable by a term of imprisonment exceeding one year; (2) he knowingly possessed a firearm; and (3) the firearm traveled in or affected interstate commerce. The 18 U.S.C.S. § 921(a)(20)(A) exclusion has not been included as an element of an 18 U.S.C.S. § 922(g)(1) offense. The exclusions of 19 U.S.C.S. § 921(a)(20) are legal definitions rather than elements of an 18 U.S.C.S. § 922(g)(1) violation. The government has no obligation to prove that the exclusion is inapplicable where the defendant does not proffer evidence that a prior conviction falls within the exception. 18 U.S.C.S. 921(a)(20) is a legal definition that defines "conviction for a term exceeding one year."

Criminal Law & Procedure > ... > Weapons Offenses > Possession of Weapons > General Overview

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Legal Issues

HN7[] **Weapons Offenses, Possession of Weapons**

Whether a defendant's predicate convictions qualify under the *18 U.S.C.S. § 921(a)(20)(A)* exclusion is a question of law for the court rather than one of fact for the jury. The definitional nature of the *§ 921(a)(20)* exclusions places the responsibility on the court to determine as a matter of law whether the prior conviction qualifies as a "crime punishable by imprisonment for a term exceeding one year" under *18 U.S.C.S. § 922(g)(1)*.

Criminal Law & Procedure > ... > Weapons Offenses > Possession of Weapons > General Overview

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Legal Issues

HN8[] **Weapons Offenses, Possession of Weapons**

The question whether a felony conviction may serve as a predicate offense for a prosecution for being a felon in possession of a firearm pursuant to *18 U.S.C.S. § 922(g)(1)* is purely a legal one.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Elements of Offense

Criminal Law & Procedure > ... > Weapons Offenses > Possession of Weapons > General Overview

HN9[] **Criminal Process, Right to Jury Trial**

A defendant's *Sixth Amendment* right to a trial by jury is not violated by a district court's refusal to instruct the jury on the *18 U.S.C.S. § 921(a)(20)(A)* exclusion of predicate offenses from *18 U.S.C.S. § 922(g)(1)*. A trial judge must submit instructions to the jury on every element of the crime charged. By contrast, because the *18 U.S.C.S. § 921(a)(20)(A)* exclusion is not an element of an *18 U.S.C.S. § 922(g)(1)* offense, the jury is not required to be instructed on the exclusion.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

Governments > Legislation > Interpretation

HN10[] **Standards of Review, De Novo Review**

A court of appeals applies de novo review to questions of federal law involving statutory interpretation.

Governments > Legislation > Interpretation

HN11[] **Legislation, Interpretation**

In examining the meaning of a statute, a court's inquiry begins with the statute's plain language. A court will avoid an interpretation of a statute that renders some words altogether redundant and should avoid a statutory construction that would render another part of the same statute superfluous.

Governments > Legislation > Interpretation

HN12[] Legislation, Interpretation

Qualifying words or clauses in a statute refer to the next preceding antecedent except when evident sense and meaning require a different construction.

Criminal Law & Procedure > ... > Weapons Offenses > Possession of Weapons > General Overview

HN13[] Weapons Offenses, Possession of Weapons

The qualifying clause "relating to the regulation of business practices" in *18 U.S.C.S. § 921(a)(20)(A)* refers only to the preceding antecedent "other similar offenses" rather than functioning as descriptive of the commonalities between each of the enumerated offenses and as an indication of a congressional intent to exclude any business-related offense. Congress used the comparative term "similar" to modify "offenses," rather than saying "any other offenses" or simply "other offenses." The term "similar" indicates an intent to limit the business practices clause's reach to offenses which are "comparable" or "nearly corresponding" to the enumerated offenses. "Similar" is defined as having characteristics in common; very much alike; comparable; nearly corresponding; resembling in many respects; somewhat alike; having a general likeness. Thus, the general phrase "or other similar offenses relating to the regulation of business practices" refers back for its meaning to the three types of offenses Congress specifically enumerated--antitrust violations, unfair trade practices, and restraints of trade. Each enumerated offense is by definition an offense related to the regulation of business practices.

Criminal Law & Procedure > ... > Weapons Offenses > Possession of Weapons > General Overview

HN14[] Weapons Offenses, Possession of Weapons

The plain meaning of *18 U.S.C.S. § 921(a)(20)(A)* indicates Congress's intent to limit the offenses that fall within the *§ 921(a)(20)(A)* exclusion to those pertaining to antitrust violations, unfair trade practices, restraints of trade, or offenses similar to them.

Governments > Legislation > Interpretation

HN15[] Legislation, Interpretation

Ejusdem generis provides that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.

Criminal Law & Procedure > ... > Weapons Offenses > Possession of Weapons > General Overview

Governments > Legislation > Interpretation

HN16[] **Weapons Offenses, Possession of Weapons**

Congress chose to enumerate three types of offenses that qualify for the 18 U.S.C.S. § 921(a)(20)(A) exclusion and to add the residual clause "or other similar offenses relating to the regulation of business practices." Under the doctrine of ejusdem generis, the clause must be controlled and defined by reference to the enumerated offenses.

Governments > Legislation > Interpretation

HN17[] **Legislation, Interpretation**

A court does not resort to the rule of lenity where it can otherwise resolve the ambiguity of a statute.

Governments > Legislation > Vagueness

HN18[] **Legislation, Vagueness**

In order not to be unconstitutionally vague, a statute, first, must provide adequate notice of the proscribed conduct, and second, not lend itself to arbitrary enforcement.

Criminal Law & Procedure > ... > Reviewability > Waiver > Triggers of Waivers

HN19[] **Waiver, Triggers of Waivers**

Claims not meaningfully argued in an opening brief are waived.

Criminal Law & Procedure > ... > Weapons Offenses > Possession of Weapons > General Overview

HN20[] **Weapons Offenses, Possession of Weapons**

In analyzing whether an offense qualifies under the 18 U.S.C.S., § 921(a)(20)(A) exclusion, courts have focused on whether the statute of conviction constitutes the type of offense enumerated in § 921(a)(20)(A), as evidenced by the primary purpose of the criminal statute and the elements the government must prove for conviction under it.

Criminal Law & Procedure > ... > Weapons Offenses > Possession of Weapons > General Overview

HN21[] **Weapons Offenses, Possession of Weapons**

For purposes of determining whether an offense qualifies under the 18 U.S.C.S. § 921(a)(20)(A) exclusion, the focus on the purpose and elements of the statute of conviction endures notwithstanding the possibility that a defendant's criminal conduct may also have incidentally hampered competition or had negative economic effects on consumers. The term "offenses" in the context of § 921(a)(20)(A) refers to the charged violation of law. Thus, the primary purpose of the statute of conviction and the elements that the government must prove for conviction under it, rather than the possible incidental effects of the defendant's actions, are the proper focus of the § 921(a)(20)(A) inquiry.

Antitrust & Trade Law > Consumer Protection > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN22[] **Antitrust & Trade Law, Consumer Protection**

Implicit in the term "unfair trade practices" is the requirement of an adverse economic effect on competition or consumers. The standard dictionary definition of the term supports the requirement of adverse economic effects. Although unfair trade can include generally any inequitable business practice, it especially applies to the act or an instance of a competitor's repeating of words in a way that conveys a misrepresentation that materially injures the person who first used the words, by appropriating credit of some kind earned by the first user. "Unfair competition" is defined generally as dishonest or fraudulent rivalry in trade and commerce but especially the practice of endeavoring to pass off one's own goods or products in the market for those of another by means of imitating or counterfeiting the name, brand, size, shape, or other distinctive characteristic of the article or its packaging.

Governments > Legislation > Interpretation

HN23[] **Legislation, Interpretation**

Under the doctrine of noscitur a sociis, which instructs that a word is known by the company it keeps, a court avoids ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Criminal Law & Procedure > ... > Weapons Offenses > Possession of Weapons > General Overview

Antitrust & Trade Law > General Overview

Antitrust & Trade Law > Consumer Protection > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN24[] **Regulated Practices, Price Fixing & Restraints of Trade**

While the term "unfair trade practices" can apply broadly to any inequitable business practice, the meaning it carries under *18 U.S.C.S. § 921(a)(20)(A)* must be determined by reference to the other two enumerated terms--antitrust violations and restraints of trade--both of which clearly involve negative economic effects on consumers or competition. "***Antitrust law***" is defined as the body of law designed to protect trade and commerce from restraints, monopolies, price-fixing, and price discrimination. "Restraint of trade" is defined as (1) a limitation on business dealings or professional or gainful occupations; (2) antitrust: an agreement between or combination of businesses intended to eliminate competition, create a monopoly, artificially raise prices, or otherwise adversely affect the free market. This choice of enumerated terms suggests that Congress intended to exclude from *18 U.S.C.S. § 922(g)(1)*'s prohibition those felons convicted under criminal statutes addressing only economic harm to competition or consumers, but not to exclude those felons convicted under criminal statutes designed primarily to address other societal concerns.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Meat Inspections

HN25[] **Agriculture & Food, Meat Inspections**

It is true that the statement of congressional findings at *21 U.S.C.S. § 602* includes concerns about the effects of unwholesome meat on competition and markets. These concerns, however, are subordinate to the Federal Meat Inspection Act's primary public-health purpose of protecting consumers from unsafe meat: It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. *21 U.S.C.S. § 602*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Meat Inspections

HN26[] **Agriculture & Food, Meat Inspections**

Cases discussing the Federal Meat Inspection Act (FMIA), *21 U.S.C.S. § 601 et seq.*, uniformly describe the statute as concerned primarily with protecting public health. Congress expressly charged the United States Department of Agriculture with assuring that meat distributed to consumers is wholesome, not adulterated, and properly marked, labeled, and packaged. The purpose of the Meat Inspection Act of 1907, as amended, is to ensure a high level of cleanliness and safety in meat products. The Federal Meat Inspection Act has as its stated purpose, the enforcement of standards of sanitation throughout meatpacking plants. The Meat Inspection Act is, by its very terms, designed to protect the health and welfare of consumers. The primary purpose of the Wholesome Meat Act is to benefit the consumer and to enable him to have a correct understanding of and confidence in meat products purchased. Prohibitions against mislabeling are an integral part of this purpose. Thus, despite the fact that the FMIA statutory scheme necessarily involves regulating business and may have the effect of protecting consumers and competition from economic harm, the primary purpose of the FMIA is to protect public health from the effects of unwholesome meat.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Meat Inspections

HN27[] **Agriculture & Food, Meat Inspections**

None of the provisions of the Federal Meat Inspection Act requires the government to prove an effect on competition or consumers as an element of the offense. More specifically, *21 U.S.C.S. §§ 605*, *610*, and *611* do not require the government to prove such effects. *21 U.S.C.S. § 605* requires inspection of meat products, *21 U.S.C.S. § 610* prohibits adulteration or misbranding of meat products, and *21 U.S.C.S. § 611* prohibits mislabeling.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Meat Inspections

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Packers & Stockyards Act

HN28[] **Agriculture & Food, Meat Inspections**

In comparing the Packers and Stockyards Act (PSA) with the Federal Meat Inspection Act (FMIA), *21 U.S.C.S. § 601 et seq.*, the statutes have quite different purposes. The FMIA is a public health statute, aimed at preventing the use in commerce of meat and meat food products which are adulterated. By contrast, the Stockyards Act is a fair trade practices law, and the chief evil at which it was aimed was the monopoly of the packers, enabling them unduly and arbitrarily to injure consumers and suppliers by controlling pricing. The PSA's explicit prohibition of activities commercially and economically harmful to competition or consumers stands in marked contrast to the FMIA's public-health related prohibitions, none of which requires proof of economic effects on competition or consumers.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Meat Inspections

Criminal Law & Procedure > ... > Weapons Offenses > Possession of Weapons > General Overview

HN29[] **Agriculture & Food, Meat Inspections**

That a defendant's acts involved fraud and mislabeling does not transform an offense under the Federal Meat Inspection Act, *21 U.S.C.S. § 601 et seq.*, into an unfair-trade-practices offense or an offense similar to the enumerated offenses under *18 U.S.C.S. § 921(a)(20)(A)*, notwithstanding the fact that fraudulent conduct and mislabeling may be present in many unfair-trade-practices statutes.

Constitutional Law > Supremacy Clause > Federal Preemption

HN30[] **Supremacy Clause, Federal Preemption**

In assessing whether a federal law has preempted state law, courts start with the assumption that the historic police powers of the states were not to be superseded by a federal act unless that was the clear and manifest purpose of Congress. Congressional enactments may override state laws with which they conflict and where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Meat Inspections

Constitutional Law > Supremacy Clause > Federal Preemption

HN31[] **Agriculture & Food, Meat Inspections**

While it is true that the Federal Meat Inspection Act (FMIA) prohibits states from imposing marking, labeling, packaging, or ingredient requirements in addition to, or different than, those mandated under the FMIA, *21 U.S.C.S. § 678*, nothing in the text of the FMIA indicates an intent to preempt state unfair-trade-practices laws in general.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Meat Inspections

Constitutional Law > Supremacy Clause > Federal Preemption

HN32[] **Agriculture & Food, Meat Inspections**

21 U.S.C.S. § 678 prohibits the imposition of marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under the Federal Meat Inspection Act (FMIA). Meat ingredient standards, labeling and packaging have been preempted by the FMIA, and states cannot impose different or additional affirmative requirements on meat and meat food products. Jones v. Rath Packing does not, however, stand for the proposition that the FMIA has preempted state unfair-trade-practices laws in addition to state meat-product ingredient, labeling, and packaging laws.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Meat Inspections

Criminal Law & Procedure > Sentencing > Ranges

HN33[] **Agriculture & Food, Meat Inspections**

An "intent to defraud" is not required for conviction under the Federal Meat Inspection Act (FMIA). When an intent to defraud is present, the potential criminal punishment for the violation increases. 21 U.S.C.S. § 676(a) provides that any violation of any provision of the FMIA subjects a person to imprisonment for not more than one year, or a fine of not more than $ 1,000, or both such imprisonment and fine; but if such violation involves intent to defraud, such person shall be subject to imprisonment for not more than three years or a fine of not more than $ 10,000, or both.

Counsel: For United States of America, Plaintiff - Appellee: Frederick Douglas Franklin, U.S. ATTORNEY'S OFFICE, Omaha, NE.

For Rudolph George Stanko, Defendant - Appellant: Roger Isaac Roots, Livingston, MT.

Rudolph George Stanko, Defendant - Appellant, Pro se, Omaha, NE.

Judges: Before COLLOTON, BRIGHT, and GRUENDER, Circuit Judges. BRIGHT, Circuit Judge, dissenting.

Opinion by: GRUENDER

Opinion

[*410] GRUENDER, Circuit Judge.

Rudolph Stanko appeals his convictions for two counts of possessing firearms and ammunition by a prohibited person, in violation of 18 U.S.C. § 922(g)(1). On appeal, Stanko's primary argument is that the district court [1] erred in concluding that Stanko qualifies as a prohibited person under § 922(g)(1) because his 1984 conviction for violating the Federal Meat Inspection Act (FMIA) does not fall within the "business practices" exclusion of 18 U.S.C. § 921(a)(20)(A). We disagree and affirm the convictions.

[2] I. BACKGROUND**

In 1984, Cattle King Packing Co., Inc. and Stanko, an officer and shareholder of the corporation, were convicted after a jury trial of multiple counts of violating the FMIA, 21 U.S.C. § 601 et seq., and of conspiracy to violate the FMIA, 18 U.S.C. § 371. United States v. Cattle King Packing Co., 793 F.2d 232 (10th Cir. 1986). In its opinion affirming the conviction, the Tenth Circuit Court of Appeals described the substantive counts against the defendants as: "(1) the fraudulent distribution of adulterated meat products; (2) the intentional circumvention of federal law requiring an inspection by a federal meat inspector of all shipments returned to Cattle King by dissatisfied purchasers; and (3) the fraudulent misbranding of meat shipments by stamping on the shipment a false production date." Id. at 235.

Ten years later, Stanko sought a declaratory judgment that he was not prohibited from possessing firearms under § 922(g)(1) because his conviction fell within the § 921(a)(20)(A) exclusion. After the United States District Court for the District of Montana denied relief on **[**3]** the merits, the Ninth Circuit Court of Appeals reversed with instructions to dismiss the case for lack of standing. Stanko v. United States, No. 95-35289, 1995 U.S. App. LEXIS 24556, 1995 WL 499524, *1-2 (9th Cir. August 22, 1995) (unpublished table decision).

In 2005, a federal grand jury for the District of Nebraska returned an indictment charging Stanko with one count of possession of firearms by a prohibited person and one count of possession of ammunition by a prohibited person, both in **[*411]** violation of 18 U.S.C. § 922(g)(1), which provides:

---

[1] The Honorable Joseph Bataillon, Chief Judge, United States District Court for the District of Nebraska.

> HN1[] It shall be unlawful for any person--who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition . . . .

18 U.S.C. § 922(g)(1). Both counts cited Stanko's FMIA convictions to establish his prohibited person status.

After a pretrial hearing on Stanko's motion to dismiss the indictment, the district court concluded that Stanko's FMIA conviction did not fall within the § 921(a)(20)(A) exclusion, which states in relevant part: **[**4]**

> HN2[] The term "crime punishable by imprisonment for a term exceeding one year" does not include--(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices.

18 U.S.C. § 921(a)(20)(A). The district court reasoned that: (1) the exclusion was "directed towards illegal restraints of trade, monopolies, and anti-competitive forces in the marketplace," not towards fraud-related convictions such as Stanko's; (2) for the "similar offenses" language to apply, the offense must be similar in nature to antitrust, restraint of trade, or unfair trade practices, and must also relate to regulation of business practices; and (3) the FMIA conviction did not depend on its effect on consumers or on competition. The district court summarized by saying, "Although in some respect the allegations . . . could be considered unfair trade practices, the gravamen of these charges are issues of food and drug safety and fraud, not unfair trade practices." At trial and over Stanko's objections, the district court declined Stanko's request to instruct **[**5]** the jury on the exclusion and denied his motion for judgment of acquittal. The jury found Stanko guilty on both counts, and the district court sentenced him to 72 months in prison.

In addition to his substantive § 921(a)(20)(A) argument, Stanko contends on appeal that the indictment was fatally defective because it did not include the § 921(a)(20)(A) exclusion as an element of the charged offense and because the district court erred in treating his § 921(a)(20)(A) argument as a question of law for the court rather than one of fact for the jury. [2]

[**6] II. DISCUSSION

Stanko raised his challenges to the indictment and to the district court's refusal to submit the § 921(a)(20)(A) exclusion issue to the jury in his motions to dismiss the indictment and for judgment of acquittal. HN4[] We review de novo the district court's denial of a motion to dismiss the indictment, United States v. Postley, 449 F.3d 831, 832 (8th Cir. 2006), and we also apply de novo review to the denial of a motion for judgment of acquittal, United States v. Cannon, 475 F.3d 1013, 1020 (8th Cir. 2007).

HN5[] An indictment "is legally sufficient on its face if it contains all of the elements of the offense charged, fairly informs **[*412]** the defendant of the charges against which he must defend, and alleges sufficient information to allow a defendant to plead a conviction or acquittal as a bar to a subsequent prosecution." United States v. Hernandez, 299 F.3d 984, 992 (8th Cir. 2002). HN6[] The Government must prove three essential elements for a § 922(g)(1) conviction: (1) the defendant previously was convicted of a crime punishable by a term of imprisonment exceeding one year; (2) he knowingly possessed a firearm; and (3) **[**7]** the firearm traveled in or affected interstate commerce. United States v. Maxwell, 363 F.3d 815, 818 (8th Cir. 2004). We have not included the § 921(a)(20)(A) exclusion as an element of a § 922(g)(1) offense. In addition, several circuits have held that the exclusions of § 921(a)(20) are legal definitions rather than elements of a § 922(g)(1) violation. *E.g.,* United States v. Bartelho, 71 F.3d 436, 439-40 (1st Cir. 1995) (holding that the § 921(a)(20) exclusion is a legal definition, not an

[2] On appeal, in addition to his counseled briefs, Stanko has filed two pro se "Petition[s] for Great Writ of Habeas Corpus" in which he advances additional arguments as to why his convictions should be overturned. We construe these filings as supplemental pro se briefs and decline to address them. *See* United States v. Peck, 161 F.3d 1171, 1174 n.2 (8th Cir. 1998) (HN3[] "It is not our practice to consider pro se briefs filed by parties represented by counsel . . . .") (internal citation omitted).

element, and noting that the holding follows the approach taken by other circuits); United States v. Jackson, 57 F.3d 1012, 1015-17 (11th Cir. 1995); (rejecting the defendant's argument that § 921(a)(20) adds a new element to a § 922(g)(1) offense; holding that the government had no obligation to prove that the exclusion was inapplicable where the defendant did not proffer evidence that the prior conviction fell within the exception); United States v. Flower, 29 F.3d 530, 534 (10th Cir. 1994) (holding that § 921(a)(20) is a legal definition that defines "conviction for a term exceeding one year"). We agree and hold that **[**8]** the indictment was not defective because the § 921(a)(20)(A) exclusion is not an element of a § 922(g)(1) offense. The indictment in this case contained each element of the offense, fairly informed Stanko of the charges, and alleged sufficient information to allow Stanko to plead a conviction or acquittal as a bar to a subsequent prosecution. Therefore, the district court did not err in refusing to dismiss the indictment.

Likewise, we conclude that ***HN7***[] whether Stanko's predicate FMIA convictions qualified under the § 921(a)(20)(A) exclusion was a question of law for the court rather than one of fact for the jury. The definitional nature of the § 921(a)(20) exclusions places the responsibility on the court to determine as a matter of law whether the prior conviction qualifies as a "crime punishable by imprisonment for a term exceeding one year" under § 922(g)(1). Bartelho, 71 F.3d at 440 (considering the § 921(a)(20) exclusion of a conviction which has been expunged or set aside, or for which a person has been pardoned or has had civil rights restored); *see also* United States v. Hayes, 482 F.3d 749, 2007 WL 1112797, at *1 (4th Cir. 2007) **[**9]** (noting that questions regarding the definition of a predicate offense set forth in § 921(a)(33)(A) are questions of law); United States v. Bethurum, 343 F.3d 712, 716-17 (5th Cir. 2003) (holding that for purposes of § 922(g)(9), the trial judge rather than the jury should determine whether "a particular conviction is admissible as relevant evidence of a misdemeanor crime of domestic violence" as defined in § 921(a)(33); noting that numerous courts have treated questions regarding the definitions in § 921(a) as purely legal questions); *United States v. Akins, 276 F.3d 1141, 1146 (9th Cir. 2002)* ("Because § 921(a)(33)(B)(i)(I) is a legal definition, its application presents a question of law to be decided by the trial judge."); United States v. Daugherty, 264 F.3d 513, 514 (5th Cir. 2001) (***HN8***[] "The question whether a felony conviction may serve as a predicate offense for a prosecution for being a felon in possession of a firearm pursuant to § 922(g)(1) is purely a legal one.") (internal quotation omitted). We agree with these circuits and hold that whether a conviction falls within the exclusions defined **[*413]** in § 921(a)(20)(A) is a question **[**10]** of law for the court. [3] *Cf.* United States v. Mincks, 409 F.3d 898, 901 (8th Cir. 2005) (noting that whether a prior conviction is a violent felony under the Armed Career Criminal Act "is distinctly a question of law for the court, not a jury"), *cert. denied*, *546 U.S. 1176, 126 S. Ct. 1345, 164 L. Ed. 2d 59 (2006)*. Therefore, the district court did not err in rejecting Stanko's argument that the issue should have been submitted to the jury.

[11]** We now turn to the substantive question of whether the district court correctly concluded that Stanko's FMIA convictions do not fall within the § 921(a)(20)(A) exclusion, a question of first impression in this circuit. ***HN10***[] This court "appl[ies] de novo review to . . . questions of federal law involving statutory interpretation." United States v. Bach, 400 F.3d 622, 627 (8th Cir.) (internal citation omitted), *cert. denied*, *546 U.S. 901, 126 S. Ct. 243, 163 L. Ed. 2d 223 (2005)*. We begin our discussion by considering Stanko's argument, based upon his reading of the § 921(a)(20)(A) clause "or other similar offenses relating to the regulation of business practices" ("the business practices clause"), that Congress intended to exclude convictions for all business-related offenses from qualifying a defendant as a prohibited person under § 922(g)(1). We then consider whether, even if we reject Stanko's interpretation of the business practices clause, his FMIA convictions fall within the specifically enumerated offenses.

HN11[] In examining the meaning of a statute, our inquiry begins with the statute's plain language. United States v. Cacioppo, 460 F.3d 1012, 1016 (8th Cir. 2006). **[**12]** "The Court will avoid an interpretation of a statute that

---

[3] We also necessarily conclude that ***HN9***[] Stanko's Sixth Amendment right to a trial by jury was not violated by the district court's refusal to instruct the jury on the § 921(a)(20)(A) exclusion. Stanko's reliance on United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995), is misplaced. *Gaudin* held that a trial judge must submit instructions to the jury on every element of the crime charged, which included the element of the "materiality" of Gaudin's false statements on Department of Housing and Urban Development loan documents. Id. at 511, 522-23. By contrast here, because the § 921(a)(20)(A) exclusion is not an element of a § 922(g)(1) offense, *Gaudin* does not require the jury to be instructed on the exclusion.

renders some words altogether redundant," *United States v. Alaska, 521 U.S. 1, 59, 117 S. Ct. 1888, 138 L. Ed. 2d 231 (1997)* (internal quotation omitted), and should "avoid a statutory construction that would render another part of the same statute superfluous," *United States v. Gomez-Hernandez, 300 F.3d 974, 979 (8th Cir. 2002)*. Stanko argues that the enumerated offenses excluded by *§ 921(a)(20)(A)*--antitrust violations, unfair trade practices, and restraints of trade--encompass a vast array of business-related offenses and that the business practices clause serves simply to emphasize that Congress viewed the three enumerated offenses as similar, namely as related to the regulation of business practices broadly speaking. As a result, Stanko contends, any offense related to the regulation of business practices falls within the exclusion.

We do not agree with Stanko's broad interpretation of the business practices clause. First, ***HN12***[] "[q]ualifying words or clauses refer to the next preceding antecedent except when evident sense and meaning require a different construction." *United States v. Friedrich, 402 F.3d 842, 845 (8th Cir.)*, **[**13]** *cert. denied*, *546 U.S. 961, 126 S. Ct. 495, 163 L. Ed. 2d 365 (2005)*. We do not find any evident sense or meaning in the statute that would require us to avoid applying **[*414]** this grammatical rule. Thus, ***HN13***[] the qualifying clause "relating to the regulation of business practices" refers only to the preceding antecedent "other similar offenses" rather than functioning, as Stanko would have it, as descriptive of the commonalities between each of the enumerated offenses and as an indication of a congressional intent to exclude any business-related offense. [4] **[**15]** Second, Congress used the comparative term "similar" to modify "offenses," rather than saying "any other offenses" or simply "other offenses." The term "similar" indicates an intent to limit the business practices clause's reach to offenses which are "comparable" or "nearly corresponding" to the enumerated offenses. *See Webster's Third New International Dictionary* 2120 (2002) (defining "similar" as "having characteristics in common: very much alike: comparable"); *see also* *United States v. Lindsey, 782 F.2d 116, 117-18 (8th Cir. 1986)* (per curiam) (discussing whether crimes were **[**14]** of a similar character and defining "similar" as [n]early corresponding; resembling in many respects; somewhat alike; having a general likeness") (internal quotations omitted). Thus, we believe the general phrase "or other similar offenses relating to the regulation of business practices" refers back for its meaning to the three types of offenses Congress specifically enumerated--antitrust violations, unfair trade practices, and restraints of trade. Stanko's broad reading of the phrase would not only render the use of "similar" nonsensical, it would also render the enumerated terms superfluous because each enumerated offense is by definition an offense related to the regulation of business practices. Therefore, we conclude that ***HN14***[] the plain meaning of the statute indicates Congress's intent to limit the offenses that fall within the *§ 921(a)(20)(A)* exclusion to those pertaining to antitrust violations, unfair trade practices, restraints of trade, or offenses similar to them. [5]

---

[4] Until a 1986 amendment to the statute, *§ 921(a)(20)(A)* read "or similar offenses relating to the regulation of business practices *as the Secretary may by regulation designate*." *18 U.S.C. 921(a)(20)(A) (1968)*, *amended by* *Pub. L. No. 99-308 (1986)* (emphasis added). Our research has not revealed any offense so designated by the Secretary under this prior version, nor any indication of Congress's rationale for deleting that language.

[5] Even if we were to find ambiguity in the language of *§ 921(a)(20)(A)*, as suggested by Stanko, the application of the established maxim of statutory construction *ejusdem generis* would also support our interpretation. ***HN15***[] *Ejusdem generis* provides that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc., v. Adams, 532 U.S. 105, 114-15, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001)* (quotation omitted). In considering a phrase in the Federal Arbitration Act that excluded from the Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," *id. at 109*, the Court concluded that the residual clause "should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it," *id. at 115*. The same principle would apply here. ***HN16***[] Congress chose to enumerate three types of offenses that qualify for the *§ 921(a)(20)(A)* exclusion and to add the residual clause "or other similar offenses relating to the regulation of business practices." Were we to assume that the business practices clause is ambiguous, we would still conclude under the doctrine of *ejusdem generis* that the clause must be "controlled and defined" by reference to the enumerated offenses. *See id.*

In addition, Stanko's argument that any ambiguity in the statute requires resolution in his favor under the rule of lenity misinterprets the reach of that rule. *See* *Bernitt v. Martinez, 432 F.3d 868, 869 (8th Cir. 2005)* (per curiam) (***HN17***[] "We do not resort to the rule of lenity where, as here, we can otherwise resolve the ambiguity of the statute."). We also reject Stanko's

[*415] [16]** Having concluded that the *§ 921(a)(20)(A)* exclusion does not extend to all business-related offenses, we must now determine whether Stanko's FMIA offenses pertain to antitrust violations, unfair trade practices, restraints of trade, or "other similar offenses" so as to fall within the exclusion. Although Stanko briefly mentions antitrust violations and restraint of trade in his brief, he sets forth no substantive arguments that his FMIA convictions pertain to either. We therefore limit our discussion to whether they pertain to unfair-trade-practices offenses or are similar to antitrust violations, unfair trade practices, or restraints of trade collectively. *See Chay-Velasquez v. Ashcroft, 367 F.3d 751, 756 (8th Cir. 2004)* (noting that ***HN19***[] claims not meaningfully argued in the opening brief are waived).

Only three courts have ***HN20***[] analyzed whether an offense qualifies under the *§ 921(a)(20)(A)* exclusion. Each of these courts has focused on whether the statute of conviction constitutes the type of offense enumerated in *§ 921(a)(20)(A)*, as evidenced by the primary purpose of the criminal statute and the elements the Government must prove for conviction under it. In *Dreher* **[**17]** *v. United States*, after recounting the elements of the statute of conviction, the court held that convictions for mail fraud and conspiracy to commit mail fraud did not qualify under the exclusion "[b]ecause violations of *§§ 371* & *1341* in no way depend on whether they have an effect upon competition." *115 F.3d 330, 332-33 (5th Cir. 1997)*. In *United States v. Meldish*, the court noted that none of the elements of the offense of bringing a wristwatch into the United States by means of a false customs declaration included effects on competition or consumers and that "[s]ection 542 does not concern itself with matters" related to unfair trade practices. *722 F.2d 26, 27-28 (2d Cir. 1983)*. Finally, in *United States v. McLemore*, the court held that a conviction for rolling back odometers, in violation of *15 U.S.C. §§ 1984* and *1990c(a)*, did qualify as an unfair trade practice because the statutes "are meant to punish an 'unfair trade practice' within the meaning of *18 U.S.C. § 921(a)(20)*" and explicitly referred to the need to protect consumers from unfair trade practices. *792 F. Supp. 96, 98 (S. D. Ala. 1992).*

[18]** Significantly, ***HN21***[] the focus on the purpose and elements of the statute of conviction in these cases endures notwithstanding the possibility that the defendant's criminal conduct may also have incidentally hampered competition or had negative economic effects on consumers. For example, the *Dreher* court specifically rejected the argument that because Dreher's activities had destroyed the competitive billing process and injured his competitors, his offense should qualify under the *§ 921(a)(20)(A)* exclusion. *Dreher, 115 F.3d at 332*. Instead, the court concluded that the plain meaning of "offenses" referred solely to the charged violation of law and not to the possible incidental effects of the defendant's activities. *Id.* We agree that the term "offenses" in the context of *§ 921(a)(20)(A)* refers to the charged violation of law. Thus, the primary purpose of the statute of conviction and the elements that the Government must prove for conviction under it, rather than the possible incidental effects of the defendant's actions, are the proper focus of the *§ 921(a)(20)(A)* inquiry.

We also agree with the *Dreher* and *Meldish* courts that ***HN22***[] implicit in the term **[*416]** "unfair **[**19]** trade practices" is the requirement of an adverse economic effect on competition or consumers. *See Dreher, 115 F.3d at 332-33*; *Meldish, 722 F.2d at 28*. The standard dictionary definition of the term supports the requirement of adverse economic effects. Although unfair trade can include generally any "inequitable business practice," it especially applies to "the act or an instance of a competitor's repeating of words in a way that conveys a misrepresentation that materially injures the person who first used the words, by appropriating credit of some kind earned by the first user." *Black's Law Dictionary*, 1564 (8th ed. 2004); *see also id.* at 1563 (defining "unfair competition" generally as "dishonest or fraudulent rivalry in trade and commerce" but especially "the practice of endeavoring to pass off one's own goods or products in the market for those of another by means of imitating or counterfeiting the name, brand, size, shape, or other distinctive characteristic of the article or its packaging"). Moreover, ***HN23***[] under the doctrine of *noscitur a sociis*, which instructs that a word is "known by the company it keeps," *Gustafson v. Alloyd Co., 513 U.S. 561, 575, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995),* **[**20]** we "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress," *id.* (internal quotation omitted). Thus, ***HN24***[] while the term "unfair trade practices" *can* apply broadly

---

argument that the exclusion is unconstitutionally vague. *See United States v. Bamberg, 478 F.3d 934, 937 (8th Cir. 2007)* (***HN18***[] "The statute, first, must provide adequate notice of the proscribed conduct, and second, not lend itself to arbitrary enforcement.").

to any inequitable business practice, the meaning it carries here must be determined by reference to the other two enumerated terms--antitrust violations and restraints of trade--both of which clearly involve negative economic effects on consumers or competition. *See Black's Law Dictionary*, 104 (8th ed. 2004) (defining "***antitrust law***" as "[t]he body of law designed to protect trade and commerce from restraints, monopolies, price-fixing, and price discrimination."); *id*. at 1340 (defining "restraint of trade" as "1. A limitation on business dealings or professional or gainful occupations. 2. *Antitrust*. An agreement between or combination of businesses intended to eliminate competition, create a monopoly, artificially raise prices, or otherwise adversely affect the free market.") This choice of enumerated terms suggests that Congress intended to exclude from *§ 922(g)(1)*'s prohibition those felons convicted under **[**21]** criminal statutes addressing only economic harm to competition or consumers, but not to exclude those felons convicted under criminal statutes designed primarily to address other societal concerns.

Stanko argues that violating the FMIA is an unfair trade practice as a matter of clearly established law because one of the FMIA's main purposes is to protect the market from unfair competition and because the activities underlying his FMIA conviction harmed competition. He also argues that mislabeling products and committing business fraud constitute unfair trade practices by definition and that the FMIA must be an unfair-trade-practices law because it has preempted all state unfair-trade-practices laws.

We disagree with Stanko's characterization of the primary purpose of the FMIA as well as his reliance on the potential incidental adverse effects on competition and consumers resulting from his FMIA violations. ***HN25***[] It is true that the statement of congressional findings at *21 U.S.C. § 602* includes concerns about the effects of unwholesome meat on competition and markets. These concerns, however, are subordinate to the FMIA's primary public-health purpose of protecting **[**22]** consumers from unsafe meat: "It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, **[*417]** and properly marked, labeled, and packaged." *21 U.S.C. § 602*. Indeed, ***HN26***[] cases discussing the FMIA uniformly describe the statute as concerned primarily with protecting public health. *See, e.g., Nat'l Pork Producers Council v. Bergland, 631 F.2d 1353, 1361 (8th Cir. 1980)* (noting that Congress expressly charged the USDA with assuring that meat distributed to consumers is wholesome, not adulterated, and properly marked, labeled, and packaged); *United States v. Mullens, 583 F.2d 134, 139 (5th Cir. 1978)* ("The purpose of the Meat Inspection Act of 1907, as amended . . . is to ensure a high level of cleanliness and safety in meat products."); *Pac. Trading Co. v. Wilson & Co., 547 F.2d 367, 370 (7th Cir. 1976)* ("The Federal Meat Inspection Act has as its stated purpose, the enforcement of standards of sanitation throughout meatpacking plants."); *United States v. Articles of Food . . . Buffalo Jerky, 456 F. Supp. 207, 210 (D. Neb. 1978)* **[**23]** ("The Meat Inspection Act is, by its very terms, designed to protect the health and welfare of consumers: 'by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled and packaged'.") (citing *21 U.S.C. § 602*); *Fed'n. of Homemakers v. Hardin, 328 F. Supp. 181, 184 (D.D.C. 1971)* ("The primary purpose of the Wholesome Meat Act is to benefit the consumer and to enable him to have a correct understanding of and confidence in meat products purchased. Prohibitions against mislabeling are an integral part of this purpose."). Thus, despite the fact that the FMIA statutory scheme necessarily involves regulating business and may have the effect of protecting consumers and competition from economic harm, we conclude that the primary purpose of the FMIA is to protect public health from the effects of unwholesome meat.

Even more significantly, ***HN27***[] none of the provisions of the FMIA require the Government to prove an effect on competition or consumers as an element of the offense. More specifically, none of the provisions under which Stanko was convicted required the Government to prove such effects. **[**24]** *See 21 U.S.C. §§ 605* (requiring inspection of meat products), 610 (prohibiting adulteration or misbranding of meat products), and 611 (prohibiting mislabeling). Instead, Stanko's mislabeling, misbranding, adulteration of meat, and deliberate avoidance of inspection alone ran afoul of the FMIA, independent of the incidental effects those actions may have had on competition or consumers.

An instructive contrast to the FMIA is the Packers and Stockyards Act (PSA), *7 U.S.C. § 192*. Meatpackers run afoul of the PSA for such offenses as engaging in unfair, unjustly discriminatory or deceptive practices; apportioning supplies if such apportionment has the effect of restraining commerce or of creating a monopoly; and engaging in any course of business for the purpose or with the effect of manipulating or controlling prices. *7 U.S.C. § 192 (a)*, *(c)*, *(e)*. ***HN28***[] In comparing the PSA with the FMIA, the Sixth Circuit Court of Appeals has noted that "the statutes have quite different purposes. The FMIA is a public health statute, aimed at 'preventing the use in commerce of meat and meat food products which are adulterated.'" *D&W Food Centers, Inc. v. Block, 786 F.2d 751, 755 (6th Cir. 1986)* **[**25]** (quoting *21 U.S.C. § 603(a)*). By contrast, "the Stockyards Act is a fair trade practices law, and the chief evil at which it was aimed was the monopoly of the packers, enabling them unduly and arbitrarily to injure consumers and suppliers by controlling pricing." *Id.* (internal quotation omitted). The PSA's explicit prohibition of activities commercially and economically harmful to competition or consumers **[*418]** stands in marked contrast to the FMIA's public-health related prohibitions, none of which requires proof of economic effects on competition or consumers. Therefore, despite the potential for Stanko's criminal activities to have such incidental effects on competition and consumers, we find that none of the FMIA provisions under which Stanko was convicted requires the Government to prove an effect on competition or consumers as an element of the offense.

Having determined that the primary purpose of the FMIA is to protect public health and that the elements of Stanko's FMIA offenses of conviction do not involve an economic effect on competition or consumers, we find Stanko's additional arguments unavailing as well. ***HN29***[] That Stanko's acts involved fraud and mislabeling **[**26]** does not transform an FMIA offense into an unfair-trade-practices offense or an offense similar to the enumerated offenses, notwithstanding the fact that fraudulent conduct and mislabeling may be present in many unfair-trade-practices statutes. [6] In addition, Stanko's argument that the FMIA has preempted all state unfair-trade-practices laws and, therefore, must be one itself is meritless. ***HN30***[] In assessing whether a federal law has preempted state law, courts "start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)* (quotation omitted). Congressional enactments may "override state laws with which they conflict" and where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Jones v. Rath Packing Co., 430 U.S. 519, 525-26, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977)*. ***HN31***[] While it is true that the FMIA prohibits states from imposing "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different **[**27]** than, those" mandated under the FMIA, *21 U.S.C. § 678*, nothing in the text of the FMIA indicates an intent to preempt state unfair-trade-practices laws in general, nor have we found any cases supporting Stanko's claim that it does so. In *Rath Packing*, the Court held that where FMIA labeling requirements conflicted with California labeling requirements with respect to bacon, the FMIA requirements preempted California's. *Id. at 532*. The Court based its conclusion on ***HN32***[] *§ 678*'s prohibition of "the imposition of '[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under' the Act." *Id. at 530* (quoting *§ 678*); *see also Animal Legal Defense Fund v. Provimi Veal, 626 F. Supp. 278, 286 (D. Mass. 1986)* ("[M]eat ingredient standards, labeling and packaging have been pre-empted by the FMIA, and states cannot impose different or additional affirmative requirements on meat and meat food products.") (citation omitted). *Rath Packing* does not, however, stand for the proposition that the FMIA has preempted state unfair-trade-practices laws in addition to state meat-product **[**28]** ingredient, labeling, and packaging laws.

Therefore we conclude, based on the primary purpose of the FMIA and the **[*419]** requirements for conviction under it, that Stanko's FMIA offenses do not pertain to "antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices" under *§ 921(a)(20)(A)*.

III. CONCLUSION

---

[6] ***HN33***[] An "intent to defraud" is not required for conviction under the FMIA. When an intent to defraud is present, as in Stanko's convictions, the potential criminal punishment for the violation increases. *See 21 U.S.C. § 676(a)* (any violation of any provision of the FMIA subjects a person to imprisonment "for not more than one year, or a fine of not more than $ 1,000, or both such imprisonment and fine; but if such violation involves intent to defraud . . . such person . . . shall be subject to imprisonment for not more than three years or a fine of not more than $ 10,000, or both . . . .").

Accordingly, **[**29]** we hold that Stanko's FMIA convictions do not fall within *§ 921(a)(20)(A)* exclusion and, as a result, that he was a prohibited person under *§ 922(g)(1)*. We therefore affirm his convictions.

Dissent by: BRIGHT

Dissent

BRIGHT, Circuit Judge, dissenting.

It is ordinarily unlawful for anyone "who has been convicted in any court of, a crime publishable by imprisonment for a term exceeding one year" to possess a firearm or ammunition which has traveled in interstate commerce, *18 U.S.C. § 922(g)(1)*, but the congressional enactment before us exempts certain individuals who commit business crimes, *18 U.S.C. § 921(a)(20)(A)*. The exemption from the bar to gun ownership applies to persons convicted of "antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices[.]" *18 U.S.C. § 921(a)(20)(A)* (emphasis added). Thus a person who has committed a felony may still own a gun if that person's felony relates to certain business crimes.

The majority speculates that Congress, on passing this legislation, excluded only a limited subset of business crimes, **[**30]** and that the Stanko's Federal Meat Inspection Act ("FMIA") offenses, *21 U.S.C. § 601 et seq.*, are not "unfair trade practices" crimes or "similar offenses" within the scope of the exemption. The Gun Control Act of 1968 originally required the Secretary to designate the "similar offenses" that were within the scope of the exemption, *18 U.S.C. § 921(a)(20) (Supp. V. 1969)*. The 1986 Firearms Owners' Protection Act, *Pub. L. No. 99-308, 100 Stat. 449 (1986)*, however, eliminated the Secretary's role and left the courts to determine which business offenses are similar to antitrust violations, unfair trade practices, and restraints of trade.

A court's task of interpreting the exemption is complicated by the lack of Congressional commentary on *§ 921(a)(20)(A)*. Most recently, when Congress amended the Gun Control Act by enacting the Firearms Owners' Protection Act, the bill's sponsor, Senator James McClure, explained:

> [T]his bill [the Firearms Owners' Protection Act] has been painstakingly crafted to focus law enforcement on the kinds of Federal firearms law violations most likely to contribute to violent firearms crime . . . . We **[**31]** must compel the enforcing agency to stop harassing honest people and to direct their efforts at the violent criminals who give all gun owners a bad name.

131 Cong. Rec. S23 (daily ed. Jan 3, 1985) (statement of Sen. McClure).

The statement seems to limit the prohibition on gun ownership only to "those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.'" *Scarborough v. United States, 431 U.S. 563, 572, 97 S. Ct. 1963, 52 L. Ed. 2d 582 (1977)* (quoting 114 Cong. Rec. 14773 (1968)) (explaining the intent of the prohibitions against felons possessing firearms contained in the Omnibus Crime Control Act of 1968).

Congress, by enacting *§ 921(a)(20)(A)*, has deemed criminals who commit a subset of business crimes outside the definition of those who "may not be trusted," but it has done little to outline the contours of that subset. The parties here have not suggested **[*420]** any legislative history explaining the original meaning of the *§ 921(a)(20)(A)* exemption or the choice to remove the Secretary's role in defining its scope, and like the majority I have found none.

The result of Congress's abdication is a criminal statute **[**32]** that is impermissibly vague. See *Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)*; *United States v. Bass, 404 U.S. 336, 348, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971)*; see also *James v. United States, 127 S. Ct. 1586, 1601-03, 167 L. Ed. 2d 532 (2007)* (Scalia, J., dissenting). The definitions contained in *§ 921*, and those pertaining to the regulation of gun ownership generally, are loadstones for due process challenges predicated on vagueness. See, e.g., *United States v. Smith, 171 F.3d 617, 622 (8th Cir. 1999)*; *United States v. Decker, 446 F.2d 164, 166 (8th Cir. 1971)*; *United*

States v. Nieves-Castano, 480 F.3d 597, 603 (1st Cir. 2007) (collecting cases); White v. DOJ, 328 F.3d 1361, 1368 (Fed. Cir. 2003). The challenges have thus far proved unsuccessful.

But here the vagueness of statute goes beyond, for example, the uncertainty inherent in defining a "violent felony" for purposes of 18 U.S.C. § 924(e)(2)(B) (codifying in part the Armed Career Criminal Act), see James v. United States, 127 S.Ct. 1586, 1598 n.6, 167 L. Ed. 2d 532 (2007), or a "misdemeanor **[**33]** crime of domestic violence" for purposes of 18 U.S.C. § 922(g)(9), see United States v. Pfeifer, 371 F.3d 430, 437 (8th Cir. 2004). I recognize that the enumerated crimes of § 921(a)(20)(A) likely do not lack constitutionally required specificity; they are no more vague than "violent felony" or "misdemeanor crime of domestic violence." And, the majority plausibly distinguishes Stanko's FMIA violations from the category of excluded "unfair trade practices" crimes because the FMIA is a public health statute in addition to an economic regulation. However, § 921(a)(20)(A)'s exemption of similar offenses clause lacks the same specificity.

The "similar offenses" clause of § 921(a)(20)(A) is crucial to this appeal. If, as the majority notes, this court is to obey a fundamental tenet of statutory interpretation, the clause must contemplate some crimes or be relegated to "mere surplusage." See Potter v. United States, 155 U.S. 438, 446, 15 S. Ct. 144, 39 L. Ed. 214 (1894). But the clause is, at the moment, hollow: the Secretary seemingly failed to designate any crimes prior to 1986 and I am not familiar with any precedent placing a crime within **[**34]** its scope. Cf. United States v. McLemore, 792 F. Supp. 96, 98 (S.D. Ala. 1992) (crime of odometer tampering, 15 U.S.C. §§ 1984, 1990c(a), an "unfair trade practice" crime within the scope of § 921(a)(20)(A)). Courts have only, like the majority in this case, provided some guidance regarding crimes that are outside the clause. [7] See, e.g., United States v. Oldroyd, No. 97-30354, 1998 U.S. App. LEXIS 17501, 1998 WL 476395 (9th Cir. July 28, 1998) (unpublished opinion) (harboring illegal alien not offense relating to regulation of business practices); **[*421]** Dreher v. United States, 115 F.3d 330, 332 (5th Cir. 1997) (mail fraud and wire fraud not offenses excluded by § 921(a)(20)(A)); United States v. Kruckel, No. 92-611, 1993 U.S. Dist. LEXIS 20777, 1993 WL 765648 (D.N.J. Aug. 13, 1993) (crime of filing false tax returns not within similar offenses clause). It may be that the district court in Dreher was correct when it described the similar offenses clause to include "violations of laws which likewise seek to enhance competition and prevent injuries to consumers and businesses." Dreher v. United States, 943 F. Supp. 680, 683 (W.D. La. 1996). **[**35]** But, that judicially constructed definition may also be too restrictive to the extent that it excludes statutes--like the Federal Meat Inspection Act--that are primarily, or partially, designed to prevent evils beyond economic harm. Courts have yet to discover--or be presented with--an instance where the government sought to use such a purely economic crime, outside the three enumerated categories, to justify an 18 U.S.C. § 922 prosecution.

[36]** The complete absence of Congressional guidance and scarcity of federal precedent leaves the meaning of the similar offenses clause unconstitutionally vague, and thus the class of individuals who may possess a firearm without the threat of prosecution is in part undefined. All persons, including those like Stanko, enjoy the right to live under a system of laws in which "a penal statute define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender, 461 U.S. at 357. That right should not be jeopardized by an approach to statute drafting and interpretation that forces at least one individual (for each arguably economic crime) to learn, ex

[7] The majority includes United States v. Meldish, 722 F.2d 26 (2d Cir. 1983) in its catalogue of cases that have examined § 921(a)(20)(A)'s exemption. Meldish held that the crime of importation by means of a false customs declaration, 18 U.S.C. § 542, is not an unfair trade practices crime, and that determination provides some guidance. But, the case is unhelpful as an example of crimes not included in the similar offenses clause because Meldish analyzed the § 921(a)(20)(A) exemptions prior to 1986, when the Secretary was the gatekeeper of the similar offenses clause. It is at least possible that a court, examining the crime today, could conclude that § 542 offenses do not prohibit an unfair trade practice but are within the judicially constructed set of similar offenses.

post, whether he has committed a crime by possessing a firearm. [8] See *James, 127 S. Ct. at 1609-10* (Scalia, J., dissenting).

[37]** The similar offenses clause of *§ 921(a)(20)(A)* could be read as the majority determines, or otherwise, as contended by Stanko. Either is a plausible interpretation of the text. Stanko should not be convicted under a statute that is so uncertain as to its meaning, and therefore I respectfully dissent.

End of Document

[8] Stanko attempted but failed to get a final adjudication of his rights in a non-criminal setting. He sought a declaratory judgment that his FMIA offense was within the scope of *§ 921(a)(20)*, which a district court denied on the merits, but the Ninth Circuit vacated the court's order because Stanko had not, at that time, suffered a harm and thus lacked standing. See *Stanko v. United States, No. 95-35289, 1995 U.S. App. LEXIS 24556, 1995 WL 499524 (9th Cir. Aug. 22, 1995)* (unpublished opinion). The Ninth Circuit's decision highlights the concern I express in this dissent: our system of laws should not accept a statute so vague that an individual must suffer the harm of a *§ 922(g)* conviction before learning from the courts whether his prior conviction falls within the scope of *§ 921(a)(20)*'s exemptions.

In re Ocwen Loan Servicing, LLC

United States Court of Appeals for the Seventh Circuit

March 28, 2007, Argued ; June 22, 2007, Decided

No. 06-3132

Reporter
491 F.3d 638 *; 2007 U.S. App. LEXIS 14810 **

IN RE: OCWEN LOAN SERVICING, LLC MORTGAGE SERVICING LITIGATION. APPEAL OF: OCWEN LOAN SERVICING, LLC, and MOSS, CODILIS STAWIARSKI, MORRIS, SCHNEIDER & PRIOR, LLP.

Subsequent History: Later proceeding at *In re Ocwen Fed. Bank FSB Mortg. Servicing Litig., 2011 U.S. Dist. LEXIS 158783 (N.D. Ill., Jan. 10, 2011)*

Prior History: **[**1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 04 C 02714, MDL No. 1604. Charles R. Norgle, Sr., Judge.

In re Ocwen Fed. Bank FSB Mortg. Servicing Litig., 2006 U.S. Dist. LEXIS 21715 (N.D. Ill., Mar. 22, 2006)

Disposition: AFFIRMED.

Core Terms

preempted, mortgage, state law, charges, regulation, practices, deceptive, mortgagee, lending, Thrift, rights, unfair, allegations, borrowers, mortgagor, customers, Consumer, savings, loans, terms, federal savings association, breach of contract, transactions, contracts, homeowner, forbid

LexisNexis® Headnotes

Banking Law > ... > Banking & Finance > Federal Acts > Home Owners' Loan Act

HN1[] **Federal Acts, Home Owners' Loan Act**

Pursuant to *12 C.F.R. § 560.2(a)*, federal savings and loans are authorized to extend credit as authorized under federal law without regard to state laws purporting to regulate or otherwise affect their credit activities. *12 C.F.R. § 560.2(a)*.

Banking Law > ... > Banking & Finance > Federal Acts > Home Owners' Loan Act

HN2[] **Federal Acts, Home Owners' Loan Act**

See 12 C.F.R. § 560.2(b)-(c).

Banking Law > Consumer Protection > State Law > Federal Preemption

Banking Law > ... > Banking & Finance > Federal Acts > Home Owners' Loan Act

HN3[] State Law, Federal Preemption

Under 12 C.F.R. § 560.2(c), the list of state laws that are not preempted is designed merely to preserve the traditional infrastructure of basic state laws that undergird commercial transactions, not to open the door to state regulation of lending by federal savings associations. The list in subsection (c) is long and the categories it covers -- contract and commercial law, tort law, and so forth -- are very broad. It would not do to let the broad standards characteristic of such fields morph into a scheme of state regulation of federal savings and loans. Hence the statement in subsection (c) that state laws escape preemption only to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section.

Banking Law > ... > Banking & Finance > Federal Acts > Home Owners' Loan Act

Banking Law > ... > Banking & Finance > Regulators > US Office of Thrift Supervision

HN4[] Federal Acts, Home Owners' Loan Act

The Office of Thrift Supervision (OTS) has exclusive authority to regulate the savings and loan industry in the sense of fixing fees (including penalties), setting licensing requirements, prescribing certain terms in mortgages, establishing requirements for disclosure of credit information to customers, and setting standards for processing and servicing mortgages. 12 U.S.C.S. §§ 1462, 1463, 1464; 12 C.F.R. §§ 500.1, 500.10. But though it has some prosecutorial and adjudicatory powers ancillary to its regulatory functions, 12 U.S.C.S. § 1464(d); 12 C.F.R. § 509.1, the OTS has no power to adjudicate disputes between the savings and loans and their customers. So it cannot provide a remedy to persons injured by wrongful acts of savings and loan associations. Furthermore, the Home Owners' Loan Act (HOLA), 12 U.S.C.S. §§ 1461 et seq., creates no private right to sue to enforce the provisions of the statute or the OTS's regulations.

Banking Law > Consumer Protection > State Law > Federal Preemption

Banking Law > ... > Banking & Finance > Federal Acts > Home Owners' Loan Act

HN5[] State Law, Federal Preemption

The United States Court of Appeals for the Seventh Circuit reads 12 C.F.R. § 560.2(c) to mean that the Office of Thrift Supervision's assertion of plenary regulatory authority does not deprive persons harmed by the wrongful acts of savings and loan associations of their basic state common-law-type remedies.

Contracts Law > Standards of Performance > Assignments > General Overview

Contracts Law > Breach > Breach of Contract Actions > General Overview

HN6[] Standards of Performance, Assignments

If an original mortgagee can be sued under state law for breach of contract, so may the partial assignee if he violates the terms of the part of the mortgage contract that has been assigned to him.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN7[] Contract Interpretation, Good Faith & Fair Dealing

Most state laws impose a duty of good faith performance of contracts, meaning that a party to a contract cannot engage in opportunistic behavior.

Banking Law > Consumer Protection > State Law > Federal Preemption

Banking Law > ... > Banking & Finance > Federal Acts > Home Owners' Loan Act

HN8[] State Law, Federal Preemption

Not all state statutes that might be invoked against a federal savings and loan are preempted, any more than all common law doctrines are; for remember that contract and commercial law are among the laws listed in *12 C.F.R. § 560.2(c)*, and all states have adopted the Uniform Commercial Code.

Banking Law > Consumer Protection > State Law > Federal Preemption

Banking Law > ... > Banking & Finance > Federal Acts > Home Owners' Loan Act

HN9[] State Law, Federal Preemption

A claim brought against a federal savings and loan under *Cal. Civ. Code § 2954.4(a)*, which forbids a savings and loan from imposing a late charge for an installment payment that is no more than 10 days late, is clearly preempted by federal law.

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

HN10[] Regulated Practices, Private Actions

A complaint that charges an agreement between firms not to compete, in violation of ***antitrust law***, must contain enough factual matter (taken as true) to suggest that an agreement was made. An allegation of parallel conduct and a bare assertion of conspiracy will not suffice.

Counsel: For PLAINTIFF CLASS, Plaintiff - Appellee: Kelly M. Dermody, LIEFF, CABRASER, HEIMANN & BERNSTEIN, San Francisco, CA USA; Cathleen M. Combs, EDELMAN, COMBS & LATTURNER, Chicago, IL USA; Niall P. McCarthy, CROTCHETT, ILLSTON & PITRE, Burlingame, CA.

For MOSS, CODILIS, STAWIARSKI, MORRIS, SCHNEIDER & PRIOR, LLP, Defendant - Appellant: David J. Chizewer, GOLDBERG, KOHN, BELL, BLACK, ROSENBLOOM & MORTIZ, Chicago, IL USA.

For OCWEN LOAN SERVICING, LLC, Successor in interest to Ocwen Federal Bank, FSB, Defendant - Appellant: Daniel M. Noland, DYKEMA GOSSETT, Chicago, IL USA; Brian P. Brooks, O'MELVENY & MYERS, Washington, DC USA.

For MORTGAGE BANKERS ASSOCIATION, Amicus Curiae: Allen S. Rugg, POWELL GOLDSTEIN, Washington, DC.

For NATIONAL CONSUMER LAW CENTER, INCORPORATED, CENTER FOR RESPONSIBLE LENDING, TRIAL LAWYERS FOR PUBLIC JUSTICE, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, INCORPORATED, AMERICAN ASSOCIATION OF RETIRED PERSONS, Amici Curiae: Nina F. Simon, AARP FOUNDATION LITIGATION, **[**2]** Washington, DC USA.

Judges: Before POSNER, ROVNER, and SYKES, Circuit Judges.

Opinion by: POSNER

Opinion

[*641] POSNER, *Circuit Judge*. The defendants in this class action have been permitted to appeal under *28 U.S.C. § 1292(b)* from the district judge's refusal to dismiss, as preempted by the Home Owners Loan Act ("HOLA"), *12 U.S.C. §§ 1461 et seq.*, and implementing regulations promulgated by the Office of Thrift Supervision, *12 C.F.R. §§ 560.1 et seq*., the plaintiffs' claims under California, Connecticut, Illinois, New Mexico, and Pennsylvania law. Pursuant to *28 U.S.C. § 1367* (supplemental jurisdiction), the plaintiffs appended these state-law claims to their federal-law claims, upon which the district court's jurisdiction was premised; these are claims under the Fair Debt Collection Practices Act, *15 U.S.C. §§ 1692 et seq.*, the Real Estate Settlement Procedures Act, *12 U.S.C. §§ 2601 et seq.*, and the Truth in Lending Act, *15 U.S.C. §§ 1601 et seq.*

The complaint is a hideous sprawling mess, 40 pages in length with **[**3]** 221 paragraphs of allegations. We have found it difficult and in many instances impossible to ascertain the nature of the charges. It would have been better had the defendants deferred their motion, and the district judge his ruling, until either the defendants served contention interrogatories designed to smoke out what exactly the plaintiffs are charging, or better, because quicker and cheaper, the judge told the plaintiffs to specify the acts of the defendants that they are complaining about so that he could decide how much of the complaint was preempted. Still, the defendants can hardly be blamed for wanting to strangle the monster in its crib.

Ocwen, the principal defendant and the only one we need discuss (the other defendant is a law firm charged with having assisted Ocwen in the misconduct of which the plaintiffs complain), was at the times relevant to this case a federal savings and loan association engaged in servicing home mortgages originated by other lenders. When a loan is secured by a mortgage, the borrower may be asked to sign various transfer agreements that allow the mortgagee to assign not only the mortgage itself but also or instead various rights that the mortgage **[**4]** grants the mortgagee, such as the rights to collect monthly payments from the mortgagor, collect late payments from him, foreclose in the event of default, or place the mortgagor's payments for taxes and insurance premiums in escrow. The administration of these rights is called "servicing" the mortgage. If the firm doing the servicing, such as Ocwen in this case, exceeds its rights under the transfer agreements, the mortgagor's recourse is against that firm rather than against the original mortgagee or the current holder of the mortgage. See *OTS Regulatory Handbook: Thrift Activities* 571.1 (Jan. 1994), *www.ots.treas.gov/docs/4/429128.pdf* (visited June 5, 2007); "Mortgage Servicing Rights: Traded Like Baseball Cards?," *www.mortgagenewsdaily.com/662005_Mortgage_Servicing.asp* (visited June 5, 2007).

Enacted in 1933, HOLA is "a product of the Great Depression of the 1930's, [and] was intended 'to provide emergency relief with respect to home mortgage indebtedness' at a time when as many as **[*642]** half of all home loans in the country were in default *." Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 159, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982)* (citations omitted). **[**5]** HOLA empowered what is now the Office of Thrift Supervision in the Treasury Department to authorize the creation of federal savings and loan associations, to regulate them, and by its regulations to preempt conflicting state law. *Id. at 161-62*. Ocwen has given up its federal thrift charter; but this does not affect its defense that when it committed the acts for which the plaintiffs are suing any state-law claims based on those acts were preempted.

One of OTS's regulations, the validity of which is not questioned, allows ***HN1***[] federal S&Ls to "extend credit as authorized under federal law. . . without regard to state laws purporting to regulate or otherwise affect their credit activities." *12 C.F.R. § 560.2(a)*. The regulation goes on to provide:

> ***HN2***[] (b) Illustrative examples [of what federal S&Ls can do without regard to state laws]. Except as provided in § 560.110 of this part, the types of state laws preempted by paragraph (a) of this section include, without limitation, state laws purporting to impose requirements regarding:
> (1) Licensing, registration, filings, or reports by creditors;
>
> (2) The ability of a creditor to require **[**6]** or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements;
> (3) Loan-to-value ratios;
> (4) The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;
> (5) Loan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees;
> (6) Escrow accounts, impound accounts, and similar accounts;
> (7) Security property, including leaseholds;
> (8) Access to and use of credit reports;
> (9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants;
>
> (10) Processing, origination, servicing, sale or purchase of, or **[**7]** investment or participation in, mortgages;
> (11) Disbursements and repayments;
>
> (12) Usury and interest rate ceilings to the extent provided in *12 U.S.C. 1735f-7a* and part 590 of this chapter and *12 U.S.C. 1463(g)* and § 560.110 of this part; and
>
> (13) Due-on-sale clauses to the extent provided in *12 U.S.C. 1701j-3* and part 591 of this chapter.
> (c) State laws that are not preempted. State laws of the following types are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section:
> (1) Contract and commercial law;
> (2) Real property law;
>
> (3) Homestead laws specified in *12 U.S.C. 1462a(f)*(4) Tort law;
>
> **[*643]** (5) Criminal law; and
> (6) Any other law that OTS, upon review, finds:
> (i) Furthers a vital state interest; and
> (ii) Either has only an incidental effect on lending operations or is not otherwise contrary to the purposes expressed in paragraph (a) of this section.

Ocwen makes much of the fact that **[**8]** the Office of Thrift Supervision has said that in applying the regulation a court should first decide whether the state law in question is listed in *subsection (b)* and, if so, Ocwen argues, that is the end of the case. "OTS Final Rule," *61 Fed. Reg. 50951, 50966 (Sept. 30, 1996)*. Well, of course. And the OTS's statement further explains that ***HN3***[] *subsection (c)*, the list of laws that are not preempted, is designed merely "to preserve the traditional infrastructure of basic state laws that undergird commercial transactions, not to open the door to state regulation of lending by federal savings associations." *Id*. The list in *subsection (c)* is long and the categories it covers -- contract and commercial law, tort law, and so forth -- are very broad. It would not do to let the broad standards characteristic of such fields morph into a scheme of state regulation of federal S&Ls. Hence the statement in *subsection (c)* that state laws escape preemption only "to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of *paragraph (a)* of this section." See also *Bank of America v. City & County of San Francisco, 309 F.3d 551, 557-61 (9th Cir. 2002)*; **[**9]** *Haehl v. Washington Mutual Bank, F.A., 277 F. Supp. 2d 933, 939-40, 942-43 (S.D. Ind. 2003)*; cf. *Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 33-34, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996)*.

The line between *subsections (b)* and *(c)* is both intuitive and reasonably clear. ***HN4***[] The Office of Thrift Supervision has exclusive authority to regulate the savings and loan industry in the sense of fixing fees (including penalties), setting licensing requirements, prescribing certain terms in mortgages, establishing requirements for disclosure of credit information to customers, and setting standards for processing and servicing mortgages. See *12 U.S.C. §§ 1462*, *1463*, *1464*; *12 C.F.R. §§ 500.1*, *500.10*; "OTS Final Rule," *supra*, *61 Fed. Reg. at 50965*. But though it has some prosecutorial and adjudicatory powers ancillary to its regulatory functions, *12 U.S.C. § 1464(d)*; *12 C.F.R. § 509.1*; *Simpson v. Office of Thrift Supervision, 29 F.3d 1418, 1422 (9th Cir. 1994)*, the **[**10]** Office has no power to adjudicate disputes between the S&Ls and their customers. See OTS, "How to Resolve a Consumer Complaint" 1-2, *www.ots.treas.gov/docs/4/480924.pdf* (visited June 5, 2007). So it cannot provide a remedy to persons injured by wrongful acts of savings and loan associations, and furthermore HOLA creates no private right to sue to enforce the provisions of the statute or the OTS's regulations. *Burns Int'l Inc. v. Western Savings & Loan Ass'n, 978 F.2d 533, 535-37 (9th Cir. 1992)*.

Against this background of limited remedial authority, ***HN5***[] we read *subsection (c)* to mean that OTS's assertion of plenary regulatory authority does not deprive persons harmed by the wrongful acts of savings and loan associations of their basic state common-law-type remedies. Suppose an S&L signs a mortgage agreement with a homeowner that specifies an annual interest rate of 6 percent and a year later bills the homeowner at a rate of 10 percent and when the homeowner refuses to pay institutes foreclosure proceedings. It would be surprising for a federal regulation to forbid the homeowner's state to give the homeowner a defense based on **[*644]** the mortgagee's breach of contract. Or if **[**11]** the mortgagee (or a servicer like Ocwen) fraudulently represents to the mortgagor that it will forgive a default, and then forecloses, it would be surprising for a federal regulation to bar a suit for fraud. Some federal laws do create such bars, notably ERISA, see *29 U.S.C. §§ 1132(a)*, *(e)*, but this is recognized as exceptional. *American Airlines, Inc. v. Wolens, 513 U.S. 219, 232, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995)*; *Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142-43, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990)*. Enforcement of state law in either of the mortgage-servicing examples above would complement rather than substitute for the federal regulatory scheme.

This is well explained in "Preemption of State Laws Applicable to Credit Card Transactions" P IIC (Opinion of OTS Chief Counsel, Dec. 24, 1996, 1996 WL 767462):

> State laws prohibiting deceptive acts and practices in the course of commerce are not included in the illustrative list of preempted laws in *§ 560.2(b)*. . . . The [Indiana] DAP [deceptive acts and practices] statute prohibits specified acts and representations in all consumer transactions without regard to whether **[**12]** the transaction involves an extension of credit. Although not directly aimed at lenders, this law affects lending to the extent that it prohibits misleading statements and practices in loan transactions by a federal savings association. Accordingly, . . . a presumption arises that the DAP statute would be preempted in connection with loans made by the Association.
>
> The OTS has indicated, however, that it does not intend to preempt state laws that establish the basic norms that undergird commercial transactions. . . . The Indiana DAP falls within the category of traditional "contract and commercial" law under *§ 560.2(c)(1)*. While the DAP may affect lending relationships, the impact on lending appears to be only incidental to the primary purpose of the statute -- the regulation of the ethical practices of all businesses engaged in commerce in Indiana. There is no indication that the law is aimed at any state objective in conflict with the safe and sound regulation of federal savings associations, the best practices

> of thrift institutions in the United States, or any other federal objective identified in § 560.2(a). In fact, because federal thrifts are presumed to interact with their **[**13]** borrowers in a truthful manner, Indiana's general prohibition on deception should have no measurable impact on their lending operations. Accordingly, we conclude that the Indiana DAP is not preempted by federal law.

See also *Courtney v. Halleran, No. 05-1244, 485 F.3d 942, 2007 U.S. App. LEXIS 10789, 2007 WL 1309530, at *9 (7th Cir. May 7, 2007)*; *Binetti v. Washington Mutual Bank, 446 F. Supp. 2d 217, 220 (S.D.N.Y. 2006)* ("the New York Consumer Fraud Statute is precisely the type of general commercial law designed to 'establish the basic norms that undergird commercial transactions' that OTS has indicated it does not intend to preempt"); cf. *Cliff v. Payco General American Credits, Inc., 363 F.3d 1113, 1124-25 (11th Cir. 2004)*; *Bank of America v. City & County of San Francisco, supra, 309 F.3d at 559*.

We must decide, insofar as it is possible to do so with only the complaint to go on, which claims fall on the regulatory side of the ledger and which, for want of a better term, fall on the common law side.

The first 19 pages of the 40-page complaint accuse Ocwen of a variety of skullduggery, but do not indicate which bad acts are being charged **[**14]** as a violation of federal law and which as a violation of state law. Beginning at the bottom of page 19, however, the complaint lists the **[*645]** actual claims and indicates, though murkily, which are federal and which are state law claims. The first apparent state law claim is the third on the list and is entitled "fraudulent concealment." That term usually refers to a doctrine for tolling statutes of limitations, but the complaint seems to be using it to mean simply fraud. This claim alleges that Ocwen "concealed material facts" from the plaintiffs and the other members of the class, including "material terms of the loans." That sounds like a conventional fraud charge (though an implausible one -- how can the material terms of the loan be concealed, when they are set forth in the loan documents?), but there are also references to "unauthorized charges," and it is not indicated whether they are unauthorized by the loan agreements or forbidden by state law.

The breach of contract allegations are elaborated in the fifth claim (the fourth seeks restitution as a remedy for the third claim, the one we've just been discussing). Here we read that Ocwen assumed the obligations in the plaintiffs' **[**15]** loan agreements when it took over the loans for servicing, that the "plaintiffs satisfied their obligations by making timely payments of principal and interest on their loans," but that nevertheless "by charging late fees on payments that were not late, Ocwen breached its contracts with Plaintiffs and the Class" and also did so by "increasing the monthly payment amount due without notice" and "demanding payment of attorneys' fees in connection with legal proceedings that have not commenced and/or have not yet been incurred" (meaning of course that the *fees* have not yet been incurred, though the literal antecedent is "legal proceedings").

Although these seem like conventional breach of contract allegations, Ocwen argues that they are preempted by subsection (b)(10) of the OTS regulation: "Processing, origination, *servicing*, sale or purchase of, or investment or participation in, mortgages" (emphasis added). At least so far as bears on this case, servicing refers to the exercise of rights that are conferred by a partial assignment of a mortgage by the mortgagee. Instead of assigning the entire mortgage to Ocwen, the mortgagee in this case assigned some of the rights created **[**16]** by the mortgage contract -- the "servicing rights" -- to Ocwen, which according to the complaint proceeded to violate its contractual obligations. It is no different than if the original mortgagee, or an assignee of the entire mortgage, had violated the terms of the mortgage or defrauded the mortgagor. We would have a different case if state law purported to forbid servicing or prescribe the terms of the assignment -- suppose a state tried to limit the rights that the assignment conferred on the servicing S&L. But nothing like that is suggested here. ***HN6***[] If an original mortgagee can be sued under state law for breach of contract, so may the partial assignee if he violates the terms of the part of the mortgage contract that has been assigned to him.

The sixth claim is that Ocwen violated a "duty of good faith and fair dealing." ***HN7***[] Most state laws impose a duty of good faith performance of contracts, meaning that a party to a contract cannot engage in opportunistic behavior. *Martindell v. Lake Shore Nat'l Bank, 15 Ill. 2d 272, 154 N.E.2d 683, 690 (Ill. 1958)*; *Hentze v. Unverfehrt, 237 Ill. App. 3d 606, 604 N.E.2d 536, 539-40, 178 Ill. Dec. 280 (Ill. App. 1992)*; **[**17]** *Lockwood Int'l, B.V. v. Volm Bag Co., 273 F.3d 741, 745 (7th Cir. 2001)* (Wisconsin law); *Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 280 (7th Cir. 1992)* (Illinois law) ("contract law imposes a duty. . . to avoid taking advantage of gaps in a contract in order to exploit the vulnerabilities **[*646]** that arise when contractual performance is sequential rather than simultaneous"). An example of such behavior, from the *Lockwood* case, is a liability insurance company's paying a person who has sued the insured to convert his claim to one not covered by the insurance policy.

The full name of the duty, both in the complaint and in the cases -- "duty of good faith and *fair dealing* " -- could be thought ominously open-ended. But the full name is merely what is called a "doublet," a form of redundancy in which lawyers delight, as in "cease and desist" and "free and clear." Bryan A. Garner, *The Redbook: A Manual on Legal Style* § 11.2(f) (2d ed. 2006). "Fair dealing" adds nothing to "good faith." See, e.g., *Beraha v. Baxter Health Care Corp., 956 F.2d 1436, 1443-44 (7th Cir. 1992)* (Illinois **[**18]** law); *Restatement (Second) of Contracts § 205* (1979).

The seventh claim charges Ocwen with "conversion of funds." If Ocwen converted borrowers' funds that it was holding in escrow to its own use, it would be guilty of the tort of conversion, but for all we can tell the claim may be nothing more than a rewording of the fraud claims.

The eighth claim is purely remedial; it seeks injunctive relief. Of course it is not a claim, that is, a cause of action, and should not have been labeled as such; it is a further example of how poorly drafted the complaint is.

The ninth claim alleges violations of the *California Business & Professions Code §§ 17200 et seq*. ***HN8***[] Not all state statutes that might be invoked against a federal S&L are preempted, any more than all common law doctrines are; for remember that contract and commercial law are among the laws listed in *subsection (c)* of the regulation, and all states have adopted the Uniform Commercial Code. If the California Business & Professions Code is some modest supplement to the UCC, then presumably it is not preempted. But it may be more, since it forbids "unfair competition" **[**19]** defined as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Id*. *§ 17200*; see *Committee on Children's Television, Inc. v. General Foods Corp., 35 Cal. 3d 197, 673 P.2d 660, 668, 197 Cal. Rptr. 783 (Cal. 1983)*; *People v. Duz-Mor Diagnostic Laboratory, Inc., 68 Cal. App. 4th 654, 658, 80 Cal. Rptr. 2d 419 (1998)*. As interpreted by the complaint, this claim charges a gallimaufry -- a macedoine -- of unlawful acts, including failing to provide mortgagors with adequate monthly statements of their account balances, assessing "excessive" late fees, and "force placing insurance on properties that already have insurance coverage." There is no indication that these practices involve either breach of contract or misrepresentation, and it is apparent that prohibiting them could interfere with federal regulation of disclosure, fees, and credit terms.

Other allegations in the ninth claim may not be preempted, such as "failing to apply customers payments," "making improper negative reports about customers," or "forc[ing] customers to pay amounts they do not actually owe under threat of losing their homes." But **[**20]** one would have to know more about the specific conduct being charged to make a judgment. For example, those customers who "do not actually owe" anything -- is this by virtue of the terms of the loan, or by virtue of some state law that regulates credit terms? In the latter event, this part of the claim would be preempted.

The ninth claim also charges a violation of a provision of ***HN9***[] another California statute, which forbids imposing a late charge for an installment payment that is **[*647]** no more than ten days late. *Cal. Civ. Code § 2954.4(a)*. It is clearly preempted.

The tenth claim is based on still another California statute, the Consumers Legal Remedies Act, *Cal. Civ. Code §§ 1750 et seq*. The plaintiffs interpret the statute to forbid deceptive practices, such as falsely representing sponsorship or approval of Ocwen's services. If this is like common law fraud, then it probably is not preempted. But is it? One cannot tell from the complaint whether, for example, the charge is limited to deliberate deception or whether as interpreted by the plaintiffs the Act creates a code of truthful marketing that would constitute the regulation of **[**21]** advertising, which is one of the preempted categories listed in *subsection (b)*.

The eleventh claim continues with the Consumers Legal Remedies Act but adds that Ocwen has engaged in "unfair" debt collection, specifically by misrepresenting that it incurred fees or other charges for which it is entitled to reimbursement under its loan contracts. But the specifics are offered merely as examples of Ocwen's "unfair" practices in violation of the Act, rather than as the entirety of the allegations. Again we don't know whether the charge goes beyond common law fraud.

The twelfth claim is based on the Connecticut Unfair Trade Practices Act, *Conn. Gen. Stat. §§ 42-110a et seq*. Some of the specific charges may well be preempted, such as that Ocwen charged more for replacement hazard insurance than what the insurance cost. If this is meant to suggest that the Act can be used to impose a cost-plus pricing scheme on federal savings institutions, it is preempted, but maybe the loan contracts at issue forbade the mortgagee to charge more than the cost of the insurance. The other allegations in this claim are of abusive debt-collection practices similar to those forbidden **[**22]** by the federal Fair Debt Collection Practices Act, one of the plaintiffs' federal claims; it is unclear what the Connecticut Act adds that would not be preempted -- probably nothing. The claim that the plaintiffs "received exorbitant and usurious" mortgages is preempted. A mysterious claim that Ocwen knowingly concealed in its advertising "material facts about the deceptive mortgages" may not be preempted, depending however on what a "deceptive mortgage" is (probably a misprint).

The thirteenth claim repeats the charge of fraud, but this time under New Mexico's Unfair Trade Practices Act, *New Mexico Stat. Ann. §§ 57-12-1 et seq*. It goes on to charge "a gross disparity between the value received by the [class] members [in New Mexico] and the price paid," a charge that clearly is preempted.

The fourteenth claim is under the Illinois Consumer Fraud and Deceptive Business Practices Act, *815 ILCS 505/1 et seq*., and complains that Ocwen "demand[s] [from the mortgagors] payments of fees for an entire foreclosure case at its inception." If this demand is forbidden by the loan contract, then the charge is not preempted; **[**23]** otherwise, it probably is.

The fifteenth claim is under Pennsylvania's Uniform Trade Practices and Consumer Protection Law, *73 Pa. Stat. §§ 201-1 et seq*., and contains a number of preempted claims, such as charging "unreasonable fees," failing to provide borrowers with itemizations, "coercing borrowers to remit payments through EZ Pay," and imposing "predatory loan charges," along with straight fraud claims that probably are not preempted and charges that cannot be classified because too little information is provided, such as "applying loan payments to wrongful fees and charges first."

The sixteenth claim is under another Pennsylvania statute, the Fair Credit Extension **[*648]** Uniformity Act, *73 Pa. Stat. §§ 2270.1 et seq*. It is basically a claim of deceptive practices in collection, but the frequent references to "improper," "unfair," and "unconscionable" make classification impossible.

The seventeenth claim returns us to New Mexico law, but this time with charges of slander of title -- that, presumably to obtain repayment, Ocwen filed a *lis pendens* (a notice of litigation affecting real property, recorded in the registry **[**24]** of deeds) without a valid basis. This would not be preempted.

The eighteenth claim is against a bank that is no longer a defendant, or at least not a party to the appeal.

The nineteenth claim alleges negligence, with no further explanation. The twentieth alleges fraud, and does not appear to be preempted, though this could depend on the nature of the fraud, which is unexplained. This and other claims of fraud may fail to comply with the requirement in *Rule 9(b) of the Federal Rules of Civil Procedure* that the complaint plead fraud with particularity, but the issue is not before us on this interlocutory appeal.

The twenty-first claim, which is similar to the seventeenth, charges Ocwen with having defamed some of the plaintiffs by falsely representing that they were delinquent in repaying their loans. A charge of defamation (which would require, however, that Ocwen have made the false representation to third parties, and not just to the borrowers) is a good example of claim that the regulation does not preempt.

The twenty-second claim charges fraud, but without specifying the misrepresentations (or misleading omissions) constituting the fraud **[**25]** -- and thus almost certainly violates *Rule 9(b)*. The twenty-third and last claim is federal.

This tedious recital shows that the case is largely unripe for a determination of preemption. Despite its length, the complaint is vague. Some of the charges are pretty clearly, even certainly, preempted, as we have tried to indicate. Others probably are not, though this may depend on particulars omitted from the complaint. Many of the charges are so vaguely worded that we cannot guess whether they are preempted or not.

The complaint was filed in April 2004 after the transfer of the various suits against Ocwen to the Northern District of Illinois. Rather than trying to rule on preemption on the basis of an uninformative complaint, the district judge should have required the plaintiffs to specify the acts of Ocwen that they contend violate state law. Three years have been wasted. On remand, the judge must focus on the acts alleged in the complaint, seeking clarification from the plaintiffs where necessary and deciding in accordance with this opinion which are preempted and which are not. He must avoid the further protraction of this unwieldy litigation.

He will also want to consider whether **[**26]** any portions of the complaint should be dismissed for failure either to comply with *Rule 9(b)* or to comply with the recent pleading standard announced by the Supreme Court in *Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1967-69, 167 L. Ed. 2d 929 (2007)*. The Court held that ***HN10***[] a complaint that charges an agreement between firms not to compete, in violation of ***antitrust law***, must contain "enough factual matter (taken as true) to suggest that an agreement was made. . . . An allegation of parallel conduct and a bare assertion of conspiracy will not suffice." The Court rejected the heretofore canonical formula of *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*, "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his **[*649]** claim which would entitle him to relief." The Court was concerned that *Conley* 's formula might be invoked to condemn the defendant in an antitrust case to conducting expensive pretrial discovery, in order to demonstrate the groundlessness of the plaintiff's case. The present case is not an antitrust case, but the district court will want **[**27]** to determine whether the complaint contains "enough factual matter (taken as true)" to provide the minimum notice of the plaintiffs' claim that the Court believes a defendant entitled to.

In the present posture of the litigation, however, the denial of the motion to dismiss the complaint must be

AFFIRMED.

Southard v. Visa U.S.A. Inc.

Supreme Court of Iowa

June 22, 2007, Filed

No. 137 / 04-1972

Reporter

734 N.W.2d 192 *; 2007 Iowa Sup. LEXIS 82 **; 2007-1 Trade Cas. (CCH) P75,756

JEFF SOUTHARD, TRISH SOUTHARD, JEFFREY STICKEL, HEATHER STICKEL, MEL LINT, KEITH GOODYK, and GREG DANA, On Behalf of Themselves and All Others Similarly Situated in the State of Iowa, Appellants, vs. VISA U.S.A. INC. and MASTERCARD INTERNATIONAL INC., Appellees.

Prior History: [1]** Appeal from the Iowa District Court for Dallas County, Darrell J. Goodhue, Judge. Plaintiff consumers appeal the dismissal of their class action against defendant national bank card associations in which plaintiffs sought recovery based on defendants' alleged violation of Iowa's competition law, Iowa Code ch. 553 (2003), and based on a theory of unjust enrichment.

In re Visa Check/Mastermoney Antitrust Litig., 2006 U.S. Dist. LEXIS 41102 (E.D.N.Y., June 5, 2006)

Disposition: AFFIRMED.

Core Terms

remote, injuries, plaintiffs', purchasers, indirect, competition law, defendants', anti trust law, unjust enrichment, antitrust, district court, consumers, common-law, derivative, merchants, motion to dismiss, damages, bring suit, antitrust violation, factors, tying arrangement, target area, courts, prices, debit

LexisNexis® Headnotes

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

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[] **Motions to Dismiss, Failure to State Claim**

An appellate court reviews a ruling on a motion to dismiss for the correction of errors at law. A dismissal will be affirmed only if the petition shows no right of recovery under any state of the facts.

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

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

A motion to dismiss tests the legal sufficiency of the challenged pleading. Thus, the motion must stand or fall on the contents of the petition and matters of which the court can take judicial notice. Well-pled facts in the pleading assailed are deemed admitted. In addition, the petition is assessed in the light most favorable to the plaintiffs, and all doubts and ambiguities are resolved in the plaintiffs' favor.

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

HN3[] **Motions to Dismiss, Failure to State Claim**

If the viability of a claim is at all debatable, courts should not sustain a motion to dismiss. Although motions to dismiss are not favored, they continue to be used, particularly when the issue is standing or the capacity to sue.

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

HN4[] **Trade Practices & Unfair Competition, State Regulation**

See *Iowa Code § 553.12(2) (2003)*.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

HN5[] **Purchasers, Indirect Purchasers**

Iowa law bars recovery of derivative and remote injuries in a variety of situations. The remoteness doctrine is not based upon a factual inquiry to determine whether the damages claimed were foreseeable or whether they were a proximate cause; rather, it is a legal doctrine incorporating public policy considerations. In determining whether this doctrine precludes a plaintiff's antitrust claims, a court first examines whether recovery for derivative or remote injuries is permitted under Iowa's competition law.

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

HN6[] **Trade Practices & Unfair Competition, State Regulation**

The Iowa legislature does not intend to allow every person tangentially affected by a violation of *Iowa Code § 553.4 (2003)* to have a remedy in damages.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN7[] **Standing, Requirements**

To determine standing under ***antitrust law***, a court will examine the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them. Courts focus on five factors to guide their examination: (1) whether the claim alleges a causal connection between the antitrust violation and the plaintiff's alleged harm; (2) whether the plaintiff's alleged injury is of a type sought to be redressed by the antitrust laws; (3) the directness or indirectness of the asserted injury; (4) whether denying a remedy is likely to leave a significant antitrust violation undetected or unremedied; and (5) whether the damages claimed are highly speculative or abstract.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Contracts Law > Remedies > Restitution

HN8[] **Equitable Relief, Quantum Meruit**

Unjust enrichment can stand on its own as an open-ended, broad theory of restitution.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

HN9[] **Purchasers, Indirect Purchasers**

Iowa's competition law does not provide a remedy to every person who can trace an injury to a defendant's anticompetitive conduct. Injuries that are remote under the analysis used in Associated General Contractors may not be recovered under Iowa Code ch. 553 (2003).

Counsel: Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines, for appellants.

Edward W. Remsburg of Ahlers & Cooney, P.C., Des Moines; Robert C. Mason of Arnold & Porter LLP, New York, New York; and Stephen V. Bomse and David M. Goldstein of Heller Ehrman LLP, San Francisco, California, for appellee Visa U.S.A. Inc.

Kim J. Walker of Faegre & Benson LLP, Des Moines; Kenneth A. Gallo of Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, D.C.; and Gary R. Carney of Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, New York, for appellee MasterCard International Inc.

Judges: TERNUS, Chief Justice. All justices concur except Hecht and Appel, JJ., who take no part.

Opinion by: TERNUS

Opinion

TERNUS, Chief Justice.

[*193] The plaintiffs, Jeff Southard, Trish Southard, Jeffrey Stickel, Heather Stickel, Mel Lint, Keith Goodyk, and Greg Dana, **[**2]** filed this class action on September 18, 2003, alleging the defendants, Visa U.S.A. Inc. and MasterCard International Inc., violated Iowa's competition law, Iowa Code chapter 553 (2003). They also sought relief against the defendants on the common-law ground of unjust enrichment.

The defendants filed a motion to dismiss the plaintiffs' action on the basis that under well-established, common-law principles the plaintiffs could not recover for derivative or remote injuries. The district court granted the defendants' motion and dismissed the plaintiffs' petition in its entirety.

The plaintiffs appealed. We affirm.

[*194] I. *Standard of Review.*

HN1[] We review a ruling on a motion to dismiss for the correction of errors at law. *Comes v. Microsoft Corp., 646 N.W.2d 440, 442 (Iowa 2002)*. A dismissal will be affirmed "only if the petition shows no right of recovery under any state of the facts." *Id.*

HN2[] A motion to dismiss tests the legal sufficiency of the challenged pleading. *Haupt v. Miller, 514 N.W.2d 905, 907 (Iowa 1994)*. Thus, the motion must stand or fall on the contents of the petition and matters of which the court can take judicial notice. *See Leuchtenmacher v. Farm Bureau Mut. Ins. Co., 460 N.W.2d 858, 861 (Iowa 1990)*. **[**3]** Well-pled facts in the pleading assailed are deemed admitted. *Haupt, 514 N.W.2d at 907*. In addition, the petition is assessed in the light most favorable to the plaintiffs, and all doubts and ambiguities are resolved in the plaintiffs' favor. *State ex rel. Miller v. Philip Morris Inc., 577 N.W.2d 401, 403 (Iowa 1998)*.

HN3[] "If the viability of a claim is at all debatable, courts should not sustain a motion to dismiss." *Muzingo v. St. Luke's Hosp., 518 N.W.2d 776, 777 (Iowa 1994)*. Although motions to dismiss are not favored, they continue to be used, particularly when the issue is standing or the capacity to sue. *See*, *e.g.*, *Philip Morris Inc., 577 N.W.2d at 406-07* (affirming dismissal of State's claims against tobacco manufacturers as too remote and derivative).

II. *Background Proceedings.*

The plaintiffs filed a detailed, forty-eight-page petition. In their petition, they allege they are and they represent consumers who purchased goods for cash or used Visa or MasterCard debit cards to make purchases from merchants who accept Visa or MasterCard credit cards as a form of payment. The plaintiffs contend the defendants required merchants who accepted Visa and MasterCard credit cards to also **[**4]** accept Visa and MasterCard debit cards. Due to this tying arrangement, the plaintiffs allege, merchants were forced to pay inflated fees for processing debit transactions over the Visa and MasterCard networks. The plaintiffs assert these magnified costs were passed along to all consumers in the form of higher prices for the goods sold by the merchants.

The plaintiffs allege the tying arrangement orchestrated by the defendants was a violation of Iowa's competition law. *See Iowa Code §§ 553.4*, *.5*. They claim they and others in the class were injured by the defendants' illegal conduct because all consumers paid merchants artificially inflated prices for all merchandise. *See id. § 553.12(2)* (***HN4***[] "[A] person who is injured . . . by conduct prohibited under this chapter may bring suit to . . . [r]ecover actual damages resulting from conduct prohibited under this chapter.").

The plaintiffs also allege the same conduct of the defendants resulted in the defendants' unjust enrichment at the expense of the plaintiffs and other class members. The plaintiffs seek restitution of the monies received by the defendants as a result of the defendants' conduct. [1]

The defendants filed a motion to dismiss for failure to state a claim upon which **[*195]** relief can be granted. *See Iowa R. Civ. P. 1.421(1)*. They asserted the plaintiffs could not recover because the plaintiffs' injuries were derivative and remote. *See Philip Morris Inc., 577 N.W.2d at 406-07* (explaining and applying the remoteness doctrine). They further contended the plaintiffs were not "indirect purchasers" who may sue under Iowa's ***antitrust law***. *See Comes, 646 N.W.2d at 451* (allowing suit by indirect purchasers under Iowa's competition law). Finally, the defendants argued the plaintiffs' unjust enrichment claim was unsupported by the facts alleged in **[**6]** the petition.

---

[1] The plaintiffs also allege a claim for "money **[**5]** had and received." This claim was ultimately dismissed by the district court, who concluded this theory was indistinguishable from the plaintiffs' unjust enrichment claim. On appeal, the plaintiffs state the district court erred in dismissing their claim for money had and received, but make no argument with respect to this theory and cite no authorities to support this statement distinct from their briefing of the unjust enrichment claim. We therefore do not separately consider or discuss the plaintiffs' theory of money had and received.

The district court granted the defendants' motion to dismiss. Employing the test set forth in *Associated General Contractors v. California Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, the district court held the plaintiffs' injuries were too remote to support a claim under chapter 553. The court agreed with the defendants that the plaintiffs in this action were not indirect purchasers like the plaintiffs permitted to sue Microsoft in the *Comes* suit.

The district court also rejected the plaintiffs' claim of unjust enrichment. It concluded the same obstacles to recovery that existed with respect to the plaintiffs' statutory claim precluded their recovery under an unjust enrichment theory. The court further held that as a result of the merchants' previous recovery from the defendants for injuries the merchants sustained as a result of the defendants' illegal tying arrangement, the defendants had been stripped of their ill-gotten gains and no unjust enrichment remained. *See In re Visa Check/MasterMoney Antitrust Litig., 297 F. Supp. 2d 503, 506-09 (E.D.N.Y. 2003)*, *aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96 (2d Cir. 2005)*. **[**7]**

III. *Issues on Appeal.*

The plaintiffs claim the district court's dismissal of their antitrust claims due to the remoteness of their injuries was error. They maintain this court rejected such a limitation when we held in *Comes* that indirect purchasers could sue under Iowa's competition law. The plaintiffs argue that if we do not find *Comes* dispositive, we should use the "target area" test to analyze whether they can bring suit under the Iowa competition law, rather than the *Associated General Contractors* test employed by the district court.

The plaintiffs also claim the dismissal of their unjust enrichment claim constitutes error. They assert any deficiency in their antitrust claims should not impact the viability of their unjust enrichment theory. The plaintiffs further argue they have sufficiently alleged the required elements for this common-law claim. IV. *Applicability of* Comes.

We begin our analysis by addressing the plaintiffs' assertion that our decision in *Comes*--that indirect purchasers may bring suit under chapter 553--is dispositive of the present appeal. The premise underlying the plaintiffs' position is that this court in *Comes* held common-law rules barring recovery for remote **[**8]** and derivative injuries do not apply to actions brought under chapter 553.

Admittedly, our *Comes* decision contains some expansive statements with respect to the reach of Iowa's antitrust statute. *See*, *e.g.*, *Comes, 646 N.W.2d at 445* ("Given the clear, broad language of the state ***antitrust law***, we conclude the Iowa Competition Law creates a cause of action for *all* consumers, regardless of one's technical status as a direct or indirect purchaser."), *451* ("We conclude our ***antitrust law*** contemplates *all* injured consumers are authorized to bring suit to enforce our antitrust **[*196]** laws."). Nonetheless, these statements must be interpreted within the context in which they were made. As we stated in *Comes*: "The only issue on appeal is whether the United States Supreme Court case, *Illinois Brick [Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)]*, should be followed in interpreting the Iowa Competition Law." *Id. at 442*. It is appropriate, therefore, to briefly examine the holding in *Illinois Brick*.

In *Illinois Brick*, the Supreme Court held that "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business **[**9]** or property' within the meaning of [the federal ***antitrust law***.]" *431 U.S. at 729, 97 S. Ct. at 2066, 52 L. Ed. 2d at 714*. The Court pointed out that this issue was "analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages" under federal law. *Id. at 728 n.7, 97 S. Ct. at 2065 n.7, 52 L. Ed. 2d at 714 n.7*.

In *Comes*, this court decided the *Illinois Brick* rule prohibiting indirect-purchaser suits should not be followed in interpreting Iowa's competition law. *646 N.W.2d at 450*. Accordingly, we held "indirect purchasers may maintain an antitrust action in state court." *Id. at 441*. Because the plaintiffs in *Comes* qualified as indirect purchasers who had standing under state law, we had no need in that case to determine whether persons who were *not* indirect purchasers and who suffered injuries even more remote than those sustained by indirect purchasers had standing.

Thus, with respect to setting the outer limits of what injuries are compensable under Iowa's competition law, our decision in *Comes* is narrow. We simply rejected the federal rule barring claims by indirect purchasers. We certainly did not, as suggested **[**10]** by the plaintiffs, determine there were *no* limits on who could sue under chapter 553. *Cf. Kanne v. Visa U.S.A. Inc., 272 Neb. 489, 723 N.W.2d 293, 299-301 (Neb. 2006)* (holding Nebraska decision rejecting *Illinois Brick* indirect-purchaser rule in antitrust suit against Microsoft did not reject all standing requirements).

Before discussing what limits exist with respect to who may sue under Iowa ***antitrust law*** due to the common-law remoteness doctrine, we address the plaintiffs' argument that they are indirect purchasers in the same position as the *Comes* plaintiffs. The plaintiffs in *Comes* had purchased computers that came with the Windows 98 operating system preinstalled. *Comes, 646 N.W.2d at 441*. As a precondition to the use of this operating system, the plaintiffs became end-user licensees of Microsoft. *Id. at 441-42*. The plaintiffs alleged in the class action filed on behalf of all end-user licensees of Windows 98 living in Iowa that "Microsoft maintained or used a monopoly in conjunction with its Windows 98 operating system for the purpose of excluding competition or controlling, fixing, or maintaining prices in violation of the Iowa Competition Law." *Id. at 442*. As a result of this illegal conduct, **[**11]** alleged the plaintiffs, Microsoft charged a higher price for its Windows 98 system than what it would have been able to charge in a competitive market. *Id.*

The plaintiffs bringing suit in *Comes* were indirect purchasers of the Windows 98 operating system because "Microsoft did not directly sell its products [to the plaintiffs, but the plaintiffs] ultimately obtained the products through the stream of commerce." *Comes v. Microsoft Corp., 696 N.W.2d 318, 320 (Iowa 2005)*. The plaintiffs in the present action are not in a comparable position because they did not purchase, directly or indirectly, the product that is the subject of anticompetitive **[*197]** activity by Visa and MasterCard--debit processing services. It is clear from the petition that the plaintiffs are nonpurchasers; they simply bought merchandise from businesses that used the defendants' debit processing services. *Kanne, 723 N.W.2d at 301* (holding consumer plaintiffs in identical Nebraska antitrust suit were not indirect purchasers of Visa and MasterCard services). Consequently, our decision in *Comes* is not dispositive of the issue presented by the present appeal: can a nonpurchaser suffering a derivative injury recover under Iowa's **[**12]** competition statute?

V. *Recovery by Person Having a Derivative or Remote Injury.*

HN5[] Iowa law bars recovery of derivative and remote injuries in a variety of situations. *See*, *e.g.*, *Philip Morris Inc., 577 N.W.2d at 406-07* (suit by State against tobacco manufacturers for State's payment of medical expenses for citizens' tobacco-related illnesses); *Anderson Plasterers v. Meinecke, 543 N.W.2d 612, 613 (Iowa 1996)* (suit by employer for its losses due to third-party's negligent injury of employee). As we explained in *Philip Morris Inc.*, "The remoteness doctrine 'is not based upon a factual inquiry to determine whether the damages claimed were foreseeable or whether they were a proximate cause; rather, it is a legal doctrine incorporating public policy considerations.' " *577 N.W.2d at 406* (quoting *Kraft Chem. Co. v. Ill. Bell Tel. Co., 240 Ill. App. 3d 192, 608 N.E.2d 243, 245, 181 Ill. Dec. 170 (Ill. App. Ct. 1993)*).

In determining whether this doctrine precludes the plaintiffs' antitrust claims, we first examine whether recovery for derivative or remote injuries is permitted under Iowa's competition law. As we noted in *Comes*, the Iowa statute authorizes recovery by a very broad category of persons: "[A] person who is injured . . . **[**13]** by conduct prohibited under this chapter may bring suit to: . . . [r]ecover actual damages resulting from conduct prohibited under this chapter." *646 N.W.2d at 443* (quoting Iowa Code § 533.12(2)). In part due to the broad language of the statute, this court in *Comes* rejected application of the federal rule barring suits by indirect purchasers. *Id. at 445*. Our decision was also based on the fact that although Iowa's competition law "took its cues from federal law," the indirect-purchaser rule was not a part of federal ***antitrust law*** at the time the Iowa general assembly enacted its statute. *Id. at 447* (noting "six of the seven federal courts of appeals that considered this issue [had] held indirect purchasers could recover damages for antitrust violations"). We concluded, therefore, that "it was impossible for the legislature to have adopted a judicial construction which did not exist at that time." *Id.*

Obviously, in considering the application of the remoteness doctrine in the present case, we are dealing with the same broad statutory language interpreted in *Comes*. The history of federal ***antitrust law*** is, however, quite different with respect to the remoteness doctrine than it was with **[**14]** respect to the indirect-purchaser rule. Prior to the enactment of the Iowa competition law in 1976, *see* 1976 Iowa Acts ch. 1224, the United States Supreme

Court observed, "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii v. Standard Oil Co., 405 U.S. 251, 264 n.14, 92 S. Ct. 885, 892 n.14, 31 L. Ed. 2d 184, 193 n.14 (1972)*.

As we determined in *Comes*, the interpretation given to the federal ***antitrust law*** at the time the Iowa competition law was adopted informs our search for legislative **[*198]** intent. Therefore, we conclude ***HN6***[] the Iowa legislature did not intend to allow every person tangentially affected by a violation of the statute to have a remedy in damages. This conclusion leads us to consider whether the plaintiffs' injuries are too remote to be recoverable under chapter 553.

VI. *Test to Determine Antitrust Standing.*

Although lower courts had unanimously rejected claims for remote injuries prior to Iowa's adoption of its ***antitrust law*** in 1976, the United States Supreme Court did not directly address this issue until **[**15]** its 1983 decision in *Associated General Contractors.* In that case, the Court noted the federal antitrust statute was "broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation," but concluded "Congress intended the Act to be construed in the light of its common-law background." *Associated Gen. Contractors, 459 U.S. at 529, 531, 103 S. Ct. at 904-05, 74 L. Ed. 2d at 733*. This common-law background encompassed constraints on who could recover, including limitations on recovery for remote injuries. *Id. at 532 n.25, 103 S. Ct. at 905 n.25, 74 L. Ed. 2d at 734-35 n.25*. In determining who could recover under the federal act, i.e., who has "antitrust standing," the Court focused on "the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Id. at 535, 103 S. Ct. at 907, 74 L. Ed. 2d at 736*.

The defendants urge us to reject the *Associated General Contractors* (*AGC*) test and employ the "target area" test to analyze standing. Under the latter test, a plaintiff must simply be in the "target area" of the antitrust conspiracy, that is, "the area of the economy which is endangered by a **[**16]** breakdown of competitive conditions in a particular industry." *Id. at 537 n.33, 103 S. Ct. at 908 n.33, 74 L. Ed. 2d at 737 n.33*. The United States Supreme Court rejected this test in *Associated General Contractors*, instructing courts to consider the multiple factors set forth in that decision. *Id.* Moreover, contrary to the defendants' claim the "target area" test is more widely accepted, it appears federal and state courts have uniformly applied the *AGC* test.

The "target area" test, which is in essence an analysis of foreseeability, is inconsistent with Iowa's common-law limitation on recovery for remote injuries, which is *not* based on the foreseeability of the plaintiff's damages. *See Philip Morris Inc., 577 N.W.2d at 406* ("The remoteness doctrine 'is not based upon a factual inquiry to determine whether the damages claimed were foreseeable . . . .' " (quoting *Kraft Chem. Co., 608 N.E.2d at 245*)). We think the *AGC* test is more reflective of the legal context within which the Iowa legislature enacted Iowa's competition law. Therefore, we apply the *AGC* factors to determine whether the plaintiffs may recover under Iowa law.

VII. *Application of the* AGC *Test.*

HN7[] To determine standing under **[**17]** our ***antitrust law***, we will examine "the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Associated Gen. Contractors, 459 U.S. at 535, 103 S. Ct. at 907, 74 L. Ed. 2d at 736*. In *Associated General Contractors*, the Court focused on five factors to guide its examination: (1) whether the claim alleges a causal connection between the antitrust violation and the plaintiff's alleged harm; (2) whether the plaintiff's alleged injury is of a type sought to be redressed by the antitrust laws; (3) the directness or indirectness of the asserted injury; (4) whether denying a remedy is likely to leave a significant antitrust violation undetected **[*199]** or unremedied; and (5) whether the damages claimed are highly speculative or abstract. *Id. at 536-45, 103 S. Ct. at 908-12, 74 L. Ed. 2d at 737-43*. We think the district court properly applied these factors in deciding the plaintiffs had no standing under Iowa's competition law.

It is not disputed the plaintiffs have alleged a causal connection between the defendants' illegal conduct and the plaintiffs' alleged injuries. On the other hand, the plaintiffs are neither consumers of the defendants' products nor competitors **[**18]** of the defendants. Therefore, the plaintiffs are not "participants in the relevant market," and their injuries are not of the type sought to be compensated by antitrust laws. *Id. at 538, 103 S. Ct. at 908-09, 74 L. Ed. 2d at 738*. Clearly, the injuries alleged by the plaintiffs are not even indirect, as the plaintiffs are not in the chain of distribution. Their injuries are better described as derivative. Denying a remedy will not leave the alleged antitrust violation undetected or unremedied. Indeed, the action brought by merchants against Visa and MasterCard was settled by the defendants' payment of more than three billion dollars into a settlement fund and an agreement to abandon the alleged tying arrangements. *See In re Visa Check/MasterMoney Antitrust Litig., 297 F. Supp. 2d at 506-09*. Finally, a determination of the plaintiffs' damages would be a complex process at best and speculative at worst because many factors impact a retailer's decision-making process when setting prices on products sold to consumers. Considering the *AGC* factors, we hold the district court properly determined the plaintiffs' injuries were too remote to be compensable under Iowa's competition law. *See Kanne, 723 N.W.2d at 298-99* **[**19]** (affirming dismissal of identical action brought under Nebraska ***antitrust law***, holding consumers' injuries were too remote under *AGC* test); *Ho v. Visa U.S.A., Inc., 16 A.D.3d 256, 793 N.Y.S.2d 8, 9 (App. Div. 2005)* (same).

VIII. *Unjust Enrichment Claim*.

The plaintiffs alleged in their petition that the defendants' illegal tying arrangements unjustly enriched the defendants at the plaintiffs' expense because the merchants who paid artificially high prices for the defendants' debit processing services passed those costs along to the plaintiff consumers. The district court dismissed this claim, concluding it suffered from the same remoteness-of-injury problem as the plaintiffs' antitrust claims and that there was no enrichment due to the defendants' settlement of the antitrust action brought by merchants.

Plaintiffs rely on the broad and open-ended nature of the equitable doctrine of unjust enrichment to support their claim. *See State ex rel. Palmer v. Unisys Corp., 637 N.W.2d 142, 150 (Iowa 2001)* (stating that ***HN8***[] unjust enrichment "can stand on its own as an open-ended, broad theory of restitution"). Plaintiffs overlook that this common-law theory is subject to the common-law rule that bars recovery for **[**20]** remote injuries. Relying on the remoteness doctrine, this court, in *Philip Morris Inc.*, concluded the district court had correctly dismissed the State's claim for indemnity, a form of unjust enrichment. *577 N.W.2d at 406*. *See generally Unisys Corp., 637 N.W.2d at 149-50* (noting the theory of unjust enrichment has "given rise to specific derivative theories, such as contribution and indemnity"). We held the State's injury--payment of citizens' medical expenses made necessary by the defendants' conduct--was too remote to recover. *Philip Morris Inc., 577 N.W.2d at 406-07*.

The same conclusion must logically be reached here. Therefore, the district court did not err in dismissing the plaintiffs' **[*200]** unjust enrichment claim on the basis the plaintiffs' injuries were too remote.

IX.*Summary.*

HN9[] Iowa's competition law does not provide a remedy to every person who can trace an injury to a defendant's anticompetitive conduct. Injuries that are remote under the analysis used in the *Associated General Contractors* case may not be recovered under chapter 553.

In the present case, the plaintiff consumers' injuries are remote, and therefore, the plaintiffs lack antitrust standing. Moreover, the plaintiffs are **[**21]** not indirect purchasers of the defendants' services; they are nonpurchasers. Consequently, they cannot benefit from our decision in *Comes* to allow indirect purchasers to bring suit under Iowa's competition law.

Finally, the plaintiffs cannot recover under a theory of unjust enrichment because their injuries are too remote.

The district court correctly granted the defendants' motion to dismiss the plaintiffs' claims. Accordingly, we affirm.

AFFIRMED.

All justices concur except Hecht and Appel, JJ., who take no part.

Deich-Keibler v. Bank One

United States Court of Appeals for the Seventh Circuit

June 4, 2007, Argued; June 26, 2007, Decided

No. 06-3802

Reporter

243 Fed. Appx. 164 *; 2007 U.S. App. LEXIS 15419 **; 2008-1 Trade Cas. (CCH) P75,992; 41 Employee Benefits Cas. (BNA) 1728

ELIZABETH DEICH-KEIBLER and LARRY K. HALER, Plaintiffs-Appellants, v. BANK ONE and RBC MORTGAGE COMPANY, Defendants-Appellees.

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: Rehearing denied by, Rehearing, en banc, denied by *Deich-Keibler v. Bank One, 2007 U.S. App. LEXIS 21247 (7th Cir. Ind., Aug. 27, 2007)*

US Supreme Court certiorari denied by *Deich-Keibler v. Bank One, 552 U.S. 1182, 128 S. Ct. 1231, 170 L. Ed. 2d 63, 2008 U.S. LEXIS 1256 (Feb. 19, 2008)*

Prior History: [1]** Appeal from the United States District Court for the Southern District of Indiana, New Albany Division. No. 04 C 5. Sarah Evans Barker, Judge.

Deich-Keibler v. Bank One & RBC Mortg. Co., 2006 U.S. Dist. LEXIS 84336 (S.D. Ind., Sept. 19, 2006)

Disposition: AFFIRMED.

Core Terms

plaintiffs', benefits, terminated, antitrust, summary judgment, common law, employees, entitled to summary judgment, restraint of trade, antitrust statute, tortious interference, specific facts, rights, employment contract, discharged, proffered, no-hire

LexisNexis® Headnotes

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

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

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

A court of appeals reviews a district court's grant of summary judgment de novo.

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

HN2[] Summary Judgment, Entitlement as Matter of Law

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN3[] Preliminary Considerations, Federal & State Interrelationships

For claims brought under Indiana law, a federal court shall apply Indiana law as the federal court believes the Supreme Court of Indiana would if faced with the same issue.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Cross Motions

HN4[] Entitlement as Matter of Law, Appropriateness

On cross-motions for summary judgment, a court views all facts and draws all reasonable inferences therefrom in the light most favorable to the party against whom the motion is made. The non-moving party must come forward with evidence of specific facts demonstrating a genuine issue for trial with respect any issue for which that party bears the ultimate burden of proof at trial.

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

Torts > ... > Commercial Interference > Employment Relationships > Elements

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

HN5[] Employment Relationships, At Will Employment

Indiana recognizes a cause of action for tortious interference with a party's employment contract. This cause of action extends to an employee's rights under at-will employment contracts. A plaintiff must establish the following to make out a claim for tortious interference with a contractual relationship: (1) the existence of a valid, enforceable contract; (2) the defendant's knowledge of the contract's existence; (3) the defendant's intent to induce a breach of that contract; (4) the absence of justification; and (5) damages resulting from the defendant's inducement to breach the contract. To establish that a defendant acted without justification, the plaintiff must establish that the resulting breach was malicious and exclusively directed to the injury and damage of another. Additionally, where the contract at issue is an at-will employment contract, the plaintiff also must show that the defendant interferer acted intentionally and without a legitimate business purpose.

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

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

HN6[] Regulated Practices, Private Actions

The Indiana Antitrust Act provides for a private right of action by individuals injured as a result of violations of the Act. *Ind. Code § 24-1-2-7*. The elements of a private action for violation of the Indiana Act are: (1) a violation of the statute, (2) injury to a person's business or property proximately caused by the violation, and 3) actual damages. The second element of a private action also requires a showing of "antitrust injury": the type of injury which the antitrust laws intend to prevent and the type of injury which naturally flows from what makes the defendant's acts unlawful.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN7[] Preliminary Considerations, Federal & State Interrelationships

Where a claim arises under Indiana law, a federal court must decide the issue as it believes the Supreme Court of Indiana would if faced with the same issue. In doing so, the federal court may look to the decisions of the Indiana courts that construe a relevant statute.

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

HN8[] Private Actions, State Regulation

An exception for private individuals from the antitrust injury requirement under the Indiana Antitrust Act would be inconsistent with the statute authorizing a private right of action for violations of the Indiana Act. This statute provides a private right of action for any person who shall be injured in his business or property by any person or corporation by reason of the doing by any person or persons of anything forbidden or declared to be unlawful by the Indiana Act. *Ind. Code § 24-1-2-7*. The text of the statute makes clear that the private action provides recovery for injuries only when the violation of the Act is the reason for the injury. What the Act forbids or declares unlawful are schemes, contracts or combinations that restrain trade, as that concept is understood in federal ***antitrust law***. *Ind. Code § 24-1-2-1*. The Indiana Act was modeled after *15 U.S.C.S. § 1* of the Sherman Antitrust Act and has been interpreted consistent with the Sherman Act. It follows that anticompetitive conduct must be the reason for plaintiffs' injuries for their claims to fall within *Ind. Code § 24-1-2-7*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Torts > Business Torts > Unfair Business Practices > Elements

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

HN9[] Regulated Practices, Price Fixing & Restraints of Trade

Before enacting its antitrust statutes, Indiana recognized a common law private right of action in those individuals injured by acts in restraint of competition. The Indiana courts have held that the Indiana antitrust statute is intended to be declarative of the common law prohibition against restraint of trade. Indiana has no modern cases involving the common law tort of restraint of trade distinct from the elements of an action under Indiana's antitrust statutes. Because the Indiana antitrust statutes are considered to be declarative of the common law, there is no reason to believe that the elements of a common law action for restraint of trade differ from those of a statutory cause of action.

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > Interference With Protected Rights

HN10[] Causes of Action, Interference With Protected Rights

See *29 U.S.C.S. § 1140*.

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > Interference With Protected Rights

HN11[] Causes of Action, Interference With Protected Rights

A party may establish a violation of § 510 of the Employee Retirement Income Security Act (ERISA), *29 U.S.C.S. § 1140*, under circumstances involving the sale of a business unit, but only by showing that some ERISA-related characteristic special to the unit was essential to the firm's selecting the unit for closure or sale.

Evidence > Burdens of Proof > Burden Shifting

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > Interference With Protected Rights

HN12[] Burdens of Proof, Burden Shifting

The burden-shifting analysis of McDonnell-Douglas has been applied to claims under § 510 of the Employee Retirement Income Security Act, *29 U.S.C.S. § 1140*. To proceed under this approach, a plaintiff must first establish a prima facie case of discrimination by demonstrating that he (1) belongs to the protected class; (2) was qualified for his job position; and (3) was discharged or denied employment under circumstances that provide some basis for believing that the prohibited intent to retaliate was present. If the plaintiff makes this prima facie showing, the burden shifts to the employer to present a legitimate, nondiscriminatory reason for its action. The burden then shifts back to the plaintiff to demonstrate that the proffered explanation is pretext.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Evidence > Burdens of Proof > Burden Shifting

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN13[] Summary Judgment, Evidentiary Considerations

Under the McDonnell-Douglas burden-shifting analysis, to meet their burden on summary judgment to demonstrate that a defendant's proffered reason for an action was pretext, the plaintiffs must come forward with evidence of specific facts that call into question the veracity of the defendant's proffered reasons.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN14[] Summary Judgment, Evidentiary Considerations

Unsupported beliefs do not constitute evidence of specific facts for purposes of summary judgment. *Fed. R. Civ. P. 56(e)*.

Counsel: For ELIZABETH DEICH-KEIBLER, LARRY K. HALER, Plaintiffs - Appellants: Philip C. Kimball, Louisville, KY.

For BANK ONE, RBC MORTGAGE COMPANY, Defendants - Appellees: Dustin E. Meek, TACHAU, MADDOX, HOVIOUS, & DICKENS, Louisville, KY USA.

Judges: Before Hon. FRANK H. EASTERBROOK, Chief Judge, Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. DIANE S. SYKES, Circuit Judge.

Opinion

ORDER

[*165] The plaintiffs, Elizabeth Deich-Keibler and Larry Haler, brought this action against the defendants, Bank One and RBC Mortgage Co. ("RBC"), alleging violations of the Employee Retirement Income Security Act ("ERISA") by Bank One and violations of Indiana statutory and common law by both Bank One and RBC in connection with Bank One's sale of its brokered mortgage loan sales division ("Division") to RBC in June 2003. On cross-motions for summary judgment, the district court granted judgment in favor of Bank One and RBC on each of the plaintiffs' claims. The plaintiffs now appeal. For the reasons set forth in this order, we affirm.

I

BACKGROUND

A.

In June 2003, Bank One and RBC entered **[**2]** into an agreement whereby Bank One would sell the Division to RBC. RBC viewed employing Bank One's employees as advantageous, given the employees' established customer relationships; therefore, RBC planned to offer positions to Bank One's employees in the Division. To facilitate RBC's hiring, the sales agreement prohibited Bank One, for a period of 180 days, from soliciting for employment those Division employees to whom RBC offered jobs ("no-hire provision").

At the time of the sale, the plaintiffs worked in the Division. The plaintiffs were offered jobs by RBC, but rejected the offers. The plaintiffs attempted to find other positions in Bank One, as they had when prior reorganizations by Bank One eliminated the positions they had occupied, but were told that Bank One could **[*166]** not offer them employment under the sales agreement.

The plaintiffs then sought benefits from Bank One's Pay Continuation Plan ("Plan"). The Plan provided severance pay and other benefits to terminated Bank One employees. Following an amendment in 2002, however, the Plan did not provide benefits to terminated employees when the employee was terminated in connection with the sale of a portion of Bank One's business **[**3]** and the purchasing company offered the employee work pursuant to a requirement of the sales agreement. Because the plaintiffs had been offered employment by RBC under the terms of the sales agreement between RBC and Bank One, the plaintiffs were denied benefits under the Plan.

B.

The plaintiffs then brought this action against RBC and Bank One. They asserted an Indiana common law claim against RBC for tortious interference with their employment contracts with Bank One. The plaintiffs further asserted that the no-hire provision was an unlawful restraint of trade in violation of Indiana statutory and common law. The plaintiffs also contended that Bank One wrongfully had denied them benefits under the Plan and that Bank One had discharged them in retaliation for attempting to exercise their rights under the Plan in violation of *ERISA § 510*, *29 U.S.C. § 1140*.

The parties filed cross-motions for summary judgment. The district court concluded that the plaintiffs had failed to come forward with evidence that RBC had acted without justification when it purchased the Division, resulting in the plaintiffs' termination from Bank One. Therefore, the court held, RBC was entitled to summary judgment **[**4]** in its favor on the plaintiffs' tortious interference claims. The court further concluded that, because the plaintiffs had presented no evidence of an antitrust injury as a result of the agreement between RBC and Bank One, RBC and Bank One were entitled to summary judgment on the plaintiffs' Indiana statutory antitrust claims. The court also concluded that the no-hire provision did not constitute an unreasonable restraint of trade, thereby entitling RBC and Bank One to summary judgment on the plaintiffs' Indiana common law restraint of trade claims. Next, the court concluded that Bank One was entitled to summary judgment on the plaintiffs' ERISA denial of benefits claims because Bank One's denial of the plaintiffs' claims for benefits under the Plan was not arbitrary and capricious. Lastly, the court determined that the plaintiffs had failed to rebut Bank One's legitimate, non-discriminatory explanation for terminating the plaintiffs, and, therefore, Bank One was entitled to summary judgment on the plaintiffs' ERISA discriminatory termination claims.

II

DISCUSSION

The plaintiffs now appeal the district court's decision granting summary judgment in favor of RBC and Bank One. The plaintiffs **[**5]** first contend that RBC tortiously interfered with their contract rights with Bank One by inducing Bank One to terminate them in connection with the sale of the Division. The plaintiffs next contend that the no-hire provision of the sales agreement constituted an unreasonable restraint on trade in violation of Indiana's antitrust statutes and common law. The plaintiffs also appeal the district court's conclusion that Bank One had not discriminated against the plaintiffs for attempting to exercise their rights under ERISA. The plaintiffs have abandoned their claim **[*167]** of wrongful denial of benefits under ERISA on appeal.

HN1[] We review a district court's grant of summary judgment de novo. *Clark v. State Farm Mut. Auto. Ins. Co., 473 F.3d 708, 712 (7th Cir. 2007)*. ***HN2***[] Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. ***HN3***[] For those claims brought under Indiana law, we shall apply "Indiana law as we believe the Supreme Court of Indiana would if faced with the same issue." *Clark, 473 F.3d at 712*. ***HN4***[] On cross-motions for summary judgment, we view all **[**6]** facts and draw all reasonable inferences therefrom in the light most favorable to the party against whom the motion is made. *Employers Mut. Cas. Co. v. Skoutaris, 453 F.3d 915, 923 (7th Cir. 2006)*. The non-moving party must come forward with evidence of specific facts demonstrating a genuine issue for trial with respect any issue for which that party bears the ultimate burden of proof at trial. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

A. Plaintiffs' Tortious Interference Claims

The plaintiffs first contend that RBC tortiously interfered with their employment relationship with Bank One. ***HN5***[] Indiana recognizes a cause of action for tortious interference with a party's employment contract. *Trail v. Boys & Girls Clubs of N.W. Indiana, 845 N.E.2d 130, 138 (Ind. 2006)*. This cause of action extends to an employees' rights under at-will employment contracts, such as those between Bank One and the plaintiffs. *See id.* The plaintiffs must establish the following to make out a claim for tortious interference with a contractual relationship: (1) the existence of a valid, enforceable contract; (2) the defendant's knowledge of the contract's existence; (3) the defendant's intent to induce **[**7]** a breach of that contract; (4) the absence of justification; and (5) damages resulting from the defendant's inducement to breach the contract. *Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228, 1235 (Ind. 1994)*. To establish that a defendant acted without justification, the plaintiff must establish that the resulting breach was "malicious and exclusively directed to the injury and damage of another." *Bilimoria Computer Sys., LLC v. America Online, Inc., 829 N.E.2d 150, 156-57 (Ind. Ct. App. 2005)*. Additionally, because the contract at issue here is an at-will employment contract, the plaintiffs also must "show that the defendant interferer acted intentionally and without a legitimate business purpose." *Trail, 845 N.E.2d at 138* (citing *Bochnowski v. Peoples Fed. Sav. & Loan Ass'n, 571 N.E.2d 282, 285 (Ind. 1991))*.

The primary issue here is whether RBC acted without justification when it induced Bank One to terminate the plaintiffs in conjunction with the sale of the Division to RBC. The plaintiffs have come forward with no evidence that RBC was motivated by malice or an intent to injure or damage the plaintiffs. Indeed, RBC offered both plaintiffs positions and it is undisputed that **[**8]** RBC considered employment of Bank One's employees a key part of its business strategy. Furthermore, the plaintiffs recognize that RBC's decision to purchase Bank One's operations was a legitimate business interest: expanding RBC's own business. Because the plaintiffs cannot establish that RBC acted without justification and without a legitimate business purpose, RBC is entitled to summary judgment on the plaintiffs' claim of tortious **[*168]** interference with their employment contracts with Bank One. [1]

B. Indiana Statutory Antitrust Claims

The plaintiffs next assert that the no-hire provision was an unlawful restraint of trade on the part of RBC and Bank One, in violation of Indiana's antitrust act, *I.C. § 24-1-2-1, et seq.* ***HN6***[] The act provides for a private right of action by individuals injured as a result of violations of the act. *Id.* *§ 24-1-2-7*. The elements of a private action for violation **[**9]** of the Indiana act are: "1) a violation of the statute, 2) injury to a person's business or property proximately caused by the violation, and 3) actual damages." *City of Auburn v. Mavis, 468 N.E.2d 584, 585 (Ind. Ct. App. 1984)*. The second element of a private action also requires a showing of "antitrust injury": "the type of injury which the antitrust laws intend to prevent and the type of injury which naturally flows from what makes the defendant's acts unlawful." *Id. at 586*; *see also* *Berghausen v. Microsoft Corp., 765 N.E.2d 592, 597 (Ind. Ct. App. 2002)*.

The plaintiffs concede that they cannot demonstrate an antitrust injury, but contend that, because they are private individuals as opposed to corporations, they should be permitted to recover without demonstrating antitrust injury. ***HN7***[] Because this claim arises under Indiana law, we must decide the issue "as we believe the Supreme Court of Indiana would if faced with the same issue." *Clark, 473 F.3d at 712*. In doing so, we may look to the decisions of the Indiana courts that construe the Indiana antitrust statute. *Id.* We have found nothing in the decisions of the Indiana courts of appeals to indicate that the Supreme Court of Indiana **[**10]** would create the exception urged by the plaintiffs.

Further, such ***HN8***[] an exception would be inconsistent with the statute authorizing a private right of action for violations of the Indiana act. This statute provides a private right of action for "[a]ny person who shall be injured in his business or property by any person or corporation *by reason of the doing* by any person or persons of *anything forbidden or declared to be unlawful*" by the Indiana act. *I.C. § 24-1-2-7* (emphasis added). The text of the statute makes clear that the private action provides recovery for injuries only when the violation of the act is the reason for the injury. What the act forbids or declares unlawful are schemes, contracts or combinations that restrain trade, as that concept is understood in federal ***antitrust law***. *See* *I.C. § 24-1-2-1*; *see also* *Rumple v. Bloomington Hosp., 422 N.E.2d 1309, 1315 (Ind. Ct. App. 1991)* (noting that the Indiana act was modeled after section 1 of the

[1] The plaintiffs also submit that the no-hire provision offends public policy because it violates the *Thirteenth Amendment's* prohibition on slavery and involuntary servitude by preventing the plaintiffs from seeking employment with Bank One. We deem this contention frivolous and shall not address it further.

Sherman Antitrust Act, *15 U.S.C. § 1*, and has been interpreted consistent with the Sherman Act). It follows that the anti-competitive conduct must be the reason for the plaintiffs' injuries for their claims to fall within *I.C. § 24-1-2-7*.

Thus, **[**11]** there is nothing in the statute or the decisions of the courts of Indiana to support the view that the Supreme Court of Indiana would waive the element of proof of an antitrust injury for individuals in the plaintiffs' position. Because the plaintiffs cannot demonstrate antitrust injury, RBC and Bank One are entitled to summary judgment in their favor on the plaintiffs' Indiana statutory antitrust claims.

[*169] C. Indiana Common Law Restraint of Trade Claims

The plaintiffs also assert Indiana common law restraint of trade claims against RBC and Bank One. ***HN9***[] Before enacting its antitrust statutes, Indiana recognized a common law private right of action in those individuals injured by acts in restraint of competition. *See Knight & Jillson Co. v. Miller, 172 Ind. 27, 87 N.E. 823, 827-28 (Ind. 1909)*. The Indiana courts have held that the Indiana antitrust statute was intended to be declarative of the common law prohibition against restraint of trade. *See id. at 827*. Indiana has no modern cases involving the common law tort of restraint of trade distinct from the elements of an action under Indiana's antitrust statutes. [2] Because the Indiana antitrust statutes are considered to be declarative of the common law, **[**12]** *see id.,* there is no reason to believe that the elements of a common law action for restraint of trade differ from those of a statutory cause of action. Therefore, because the plaintiffs cannot establish a claim under Indiana's antitrust statute, their common law restraint of trade claims also fail.

D. Plaintiffs' ERISA Discriminatory Discharge Claims

Lastly, The plaintiffs allege that Bank One discharged them in order **[**13]** to prevent or otherwise discriminate against them from exercising their rights under the Plan in violation of *ERISA § 510*. [3] They assert two distinct theories in support of this claim. The plaintiffs first contend that the sale of the Division itself violated *ERISA § 510* because the sale was motivated by a desire to prevent all of the Division's employees from exercising their rights under the Plan.

We have not addressed the issue of whether the sale of a division may constitute a violation of *§ 510*. However, the Court of Appeals for the District of Columbia Circuit has held that ***HN11***[] a party may establish a violation of *§ 510* under such circumstances, but "only by showing that some ERISA-related characteristic special to the unit . . . was essential to the firm's **[**14]** selecting the unit for closure or sale." *Andes v. Ford Motor Co., 315 U.S. App. D.C. 120, 70 F.3d 1332, 1338 (D.C. Cir. 1995)*. Bank One met its initial burden on summary judgment by pointing to

---

[2] The plaintiffs cite *Fort Wayne Cleaners & Dryers Ass'n v. Price, 127 Ind. App. 13, 137 N.E.2d 738 (Ind. Ct. App. 1956)* (en banc), for the proposition that a party may pursue both common law and statutory actions for restraint of trade. Although *Fort Wayne Cleaners* involved both common law and statutory claims, nothing in the decision suggests that the common law claims were for the tort of restraint of trade. A close reading of the case suggests that the common law claims in that case were for tortious interference with business relations, a separate tort that remains actionable in Indiana. *See id. at 741-42* ("There can be no doubt in [Indiana] that it is an actionable wrong to interfere, either directly or indirectly, with the business of another without cause or justification . . . .").

[3] *Section 510* provides, in pertinent part:

> ***HN10***[] It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .

29 U.S.C. § 1140.

the absence of evidence that denial of the plaintiffs' *benefits* under the plan was essential to Bank One's decision to sell the Division. *See* *Celotex, 477 U.S. at 325*. In short, to survive summary judgment, the plaintiffs were required to come forward with evidence of specific facts to raise a genuine issue of fact as to whether Bank One intended to discriminate against this particular division **[*170]** because of some characteristic of the benefit plan. *See* *Fed. R. Civ. P. 56(e)*; *Anderson, 477 U.S. at 248*. The plaintiffs have not provided such evidence. Therefore, Bank One was entitled to summary judgment in its favor on this theory.

The plaintiffs also advance a theory of disparate treatment in support of their claim that Bank One discharged them in violation of *ERISA § 510*. They contend that Bank One either awarded benefits or allowed other employees of the Division who did not request benefits under the Plan to remain at Bank One.

The plaintiffs attempt to establish their theory of disparate treatment under the indirect method **[**15]** of proof using ***HN12***[] the burden-shifting analysis of *McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*, which we have applied to *ERISA § 510* claims. *See* *Salus v. GTE Directories Serv. Corp., 104 F.3d 131, 135 (7th Cir. 1997)*. To proceed under this approach, the plaintiff must first establish a prima facie case of discrimination "by demonstrating that he (1) belongs to the protected class; (2) was qualified for his job position; and (3) was discharged or denied employment under circumstances that provide some basis for believing that the prohibited intent to retaliate was present." *Id.* If the plaintiff makes this prima facie showing, the burden shifts to the employer to present a legitimate, non-discriminatory reason for its action. *Id.* The burden then shifts back to the plaintiff to demonstrate that the proffered explanation is pretext.

The plaintiffs have not made a prima facie case of discrimination or retaliation. The record demonstrates that the plaintiffs were notified that they would be terminated before any request for benefits was made. Further, there is no indication in the record that Bank One was aware that the plaintiffs intended to request benefits under the Plan at the time **[**16]** it discharged them. Such circumstances do not provide a "basis for believing that the prohibited intent to retaliate was present." *Id.*

Assuming that the plaintiffs have met their initial burden of establishing a prima facie case of discrimination, Bank One has come forward with a legitimate, non-pretextual explanation. Bank One explains that its decision to terminate the plaintiffs was the result of selling the Division. ***HN13***[] To meet their burden on summary judgment to demonstrate that Bank One's proffered reason was pretext, the plaintiffs must come forward with "evidence of specific facts that call into question the veracity" of Bank One's proffered reasons. *Hague v. Thompson Distribution Co., 436 F.3d 816, 827 (7th Cir. 2006)* (applying the *McDonnell-Douglas* burden-shifting analysis in the context of racial discrimination).

The plaintiffs attempt to meet this burden by pointing to three comparison employees. The first comparison employee, Chris Shrader, also was terminated by Bank One as a result of the sale to RBC, but allegedly received benefits under the Plan. The fact that Shrader also was terminated supports Bank One's proffered reason that the plaintiffs were terminated because of **[**17]** the sale. The plaintiffs submit no evidence regarding second comparison employee, Leo Liberio. Rather, the plaintiffs simply assert their belief that Liberio either still works for Bank One or received benefits under the Plan. Such ***HN14***[] unsupported beliefs do not constitute evidence of specific facts for purposes of summary judgment. *See* *Fed. R. Civ. P. 56(e)*. The third comparison employee, Jerry Bevers, formerly worked in the Division but now works for Chase Home Finance, a successor corporation to Bank One. The plaintiffs provide no specific facts with respect to how Bevers came to work there. In short, **[*171]** these comparisons provide no evidence of specific facts that would call into question the veracity of Bank One's proffered non-discriminatory explanation. Therefore, Bank One is entitled to summary judgment in its favor on the plaintiffs' disparate treatment theory of ERISA discrimination.

Conclusion

The decision of the district court granting summary judgment in favor of Bank One and RBC is affirmed.

AFFIRMED

Lucas v. Citizens Communs. Co.

United States Court of Appeals for the Ninth Circuit

June 6, 2007, Argued and Submitted, Honolulu, Hawaii; June 26, 2007, Filed

No. 05-17423

Reporter
244 Fed. Appx. 774 *; 2007 U.S. App. LEXIS 15578 **

PAUL LUCAS, dba Solar Engineering and Contracting, Plaintiff - Appellant, v. CITIZENS COMMUNICATIONS COMPANY; KAUAI ISLAND UTILITY COOPERATIVE, Defendants - Appellees.

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [1]** Appeal from the United States District Court for the District of Hawaii. D.C. No. CV-03-00295-HG. Helen Gillmor, District Judge, Presiding.

Lucas v. Citizens Communs. Co., 409 F. Supp. 2d 1206, 2005 U.S. Dist. LEXIS 39246 (D. Haw., 2005)

Core Terms

water heater, solar, Sherman Act, Robinson-Patman Act, installers, summary judgment, defamation, interstate commerce, adduce evidence, antitrust claim, district court, maximum price, competitors, monopolize, fails, jurisdictional requirement, anti trust law, anticompetitive, discriminatory, declaration, horizontal, interstate, Electric, concedes, construe, contends, customer, Island, prices, nexus

LexisNexis® Headnotes

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

HN1[] **Private Actions, Sherman Act**

A plaintiff's claims under the Sherman Act, *15 U.S.C.S. §§ 1* and *2*, are fundamentally flawed where the plaintiff fails to allege and prove harm, not just to a single competitor, but to the competitive process, that is, to competition itself. The purpose of the Sherman Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The United States Supreme Court has stated that the antitrust laws were enacted for the protection of competition not competitors.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN2[] **Sherman Act, Claims**

Two elements necessary to make out a claim under § 1 of the Sherman Act, 15 U.S.C.S. § 1, are concerted action between two or more entities and an unreasonable restraint of trade injuring competition. 15 U.S.C.S. § 1 is concerned only with unlawful restraints imposed pursuant to arrangements between two or more actors; an actor's unilateral action in fixing maximum price restraints does not fall within the bounds of conduct prohibited under 15 U.S.C.S. § 1.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN3[] **Antitrust & Trade Law, Sherman Act**

Simply alleging violations of the Sherman Act, 15 U.S.C.S. §§ 1 and 2, is not sufficient to make out a claim under the Robinson-Patman Act, 15 U.S.C.S. § 13, as the Robinson-Patman Act is separate legislation providing an independent ground for relief. Fed. R. Civ. P. 8(a).

Torts > ... > Defamation > Defenses > Truth

HN4[] **Defenses, Truth**

Truth is an absolute defense to defamation.

Counsel: For PAUL LUCAS, dba Solar Engineering and Contracting, Plaintiff - Appellant: Brian A. Duus, Esq., David J. Gierlach, Honolulu, HI.

For CITIZENS COMMUNICATIONS COMPANY, Defendant - Appellee: David W. Proudfoot, Esq., BELLES, GRAHAM & PROUDFOOT, Lihue, Kauai, HI; Jonathan J. Chun, Esq., BELLES GRAHAM PROUDFOOT & WILSON, Lihue, HI.

For KAUAI ISLAND UTILITY COOPERATIVE, Defendant - Appellee: Jeffrey S. Portnoy, Esq., CADES, SCHUTTE, FLEMING & WRIGHT, Honolulu, HI; Jonathan J. Chun, Esq., BELLES GRAHAM PROUDFOOT & WILSON, Lihue, HI.

Judges: Before: THOMPSON, BERZON, and TALLMAN, Circuit Judges.

Opinion

[*776] MEMORANDUM [*]

Before: THOMPSON, BERZON, and TALLMAN, Circuit Judges.

Paul Lucas, dba Solar Engineering and Contracting, appeals the district court's summary judgment in favor of Citizens Communications Company, dba Kauai Electric ("KE"), and its successor, Kauai Island Utility Cooperative

[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

("KIUC"). Lucas contends that KE violated the Sherman Act, 15 U.S.C. §§ 1, 2, **[**2]** and the Robinson-Patman Act, 15 U.S.C. § 13, by forcing solar water heater installers who were affiliated contractors under its Energy Wise program to sell solar water heaters at fixed low prices. Lucas was a participating Energy Wise solar water heater installer from 1998 until 2000, when he was terminated because, according to KE, he violated the terms of the Participation Agreement by charging customers in excess of the maximum allowable cost for a solar water heater system.

Lucas further contends that he is entitled to punitive damages and that KE defamed him by telling a potential customer that he "overcharged people."

Because Lucas establishes neither antitrust injury nor defamation, we affirm the district court's grant of summary judgment in favor of KE and KIUC on all claims.

Lucas failed to allege facts in his complaint sufficient to establish jurisdiction under the Sherman Act, which requires "the existence of a demonstrable nexus between the defendants' activity and interstate commerce." McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 246, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980). However, at oral argument, Lucas explained that such a nexus exists, as many of the solar water heaters are manufactured **[**3]** outside of the State of Hawai'i and KE's activities thus would have a substantial effect on interstate commerce. KE did not contest this explanation.

HN1[] Lucas's claims under §§ 1 & 2 of the Sherman Act, however, are fundamentally flawed because he fails to "allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.,* to competition itself." NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998). While Lucas has adduced evidence showing damage to his own business, he has failed to demonstrate damage to the solar water heater market as whole. *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993) ("The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market."). As the Supreme Court has often stated, "[t]he antitrust laws . . . were enacted for 'the protection of competition not competitors.'" Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977) (quoting **[*777]** Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)).

Furthermore, Lucas fails to establish **HN2**[] two elements necessary to make out a claim under § 1 of the Sherman Act: concerted action between two **[**4]** or more entities and an unreasonable restraint of trade injuring competition. Am. Ad Mgmt. v. GTE Corp., 92 F.3d 781, 788 (9th Cir. 1998). Section 1 of the Sherman Act is concerned only with unlawful restraints imposed pursuant to arrangements between two or more actors; KE's unilateral action in fixing maximum price restraints does not fall within the bounds of conduct prohibited under § 1. *See* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 726-27, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988); Fisher v. City of Berkeley, 475 U.S. 260, 266-67, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984); United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919).

In any event, no per se unlawful horizontal restraint exists. No matter how favorably one construes the facts in favor of Lucas, the Participation Agreement between KE and the installers cannot be interpreted as a horizontal agreement because KE and the installers operate at different levels of the market and are not competitors -- Lucas does not sell electricity and KE does not sell or install solar water heaters. *See* Bus. Elec. Corp., 485 U.S. at 730 & n.4.

If we were to construe the maximum prices established under the Energy Wise program as a **[**5]** vertical restraint, Lucas fails to establish under the rule-of-reason analysis that the restraint is unlawful. *See* Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977). Lucas has not adduced evidence demonstrating that KE intended to harm or restrain competition, that an actual injury to competition occurred, or that the restraint is unreasonable. *See* Am. Ad Mgmt., 92 F.3d at 789.

Lucas likewise has failed to adduce evidence to support his *§ 2* claim that KE monopolizes or attempts to monopolize the solar water heater market on Kauai. Lucas has not established that KE had a dominant market share in the solar water heater market; to the contrary, KE was not a participant in the relevant market because it neither sold nor bought water heaters. *See* *Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1206 (9th Cir. 1997)* (on remand). In addition, Lucas has made no showing that KE has engaged in predatory or anticompetitive conduct with a specific intent to monopolize. *See* *Spectrum Sports, 506 U.S. at 456*.

Lucas failed to amend his complaint in the district court to include a claim under the Robinson-Patman Act, *15 U.S.C. § 13*, and raised this issue only in his response **[**6]** to KE's motion for summary judgment. ***HN3***[] Simply alleging violations of the Sherman Act is not sufficient to make out a claim under the Robinson-Patman Act, as the Robinson-Patman Act is separate legislation providing an independent ground for relief. *See* *Fed. R. Civ. P. 8(a)*. As such, Lucas's *§ 13* claim is not properly before us. *See* *Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999)*; *United States v. Carlson, 900 F.2d 1346, 1349 (9th Cir. 1990)*.

If we were to exercise our discretion to consider Lucas's Robinson-Patman Act claim, however, we would dismiss it for lack of jurisdiction. In contrast to the Sherman Act, the jurisdictional requirements of the Robinson-Patman Act "cannot be satisfied merely by showing that allegedly anticompetitive acquisitions and activities affect commerce." *Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186, 195,* ***[*778]*** *95 S. Ct. 392, 42 L. Ed. 2d 378 (1974)*. Rather, under the Supreme Court's decision in *Gulf Oil,* Lucas must demonstrate that (1) KE engaged in interstate commercial activities, (2) KE's alleged unlawful rebate scheme and discriminatory pricing occurred in the course of its interstate activities, and (3) at least one of KE's allegedly discriminatory sales was made in interstate **[**7]** commerce. *Id.* Because Lucas concedes that the Energy Wise program operates only on the island of Kauai, Lucas cannot satisfy the jurisdictional requirements of *§ 13*.

Lucas concedes that his antitrust claims under Hawai'i State law rest on the same evidentiary bases and legal analysis as his federal antitrust claims; thus, his state antitrust claims must likewise fail. *See* *Island Tobacco Co. v. R.J. Reynolds Tobacco Co., 63 Haw. 289, 627 P.2d 260, 267-68 (Haw. 1981)*, *overruled on other grounds by* *Robert's Haw. Sch. Bus, Inc. v. Laupahoehoe Transp. Co., 91 Haw. 224, 982 P.2d 853 (Haw. 1999)*.

We also conclude that the district court did not abuse its discretion by excluding Walter Lewis's declaration, *see* *United States v. Alvarez, 358 F.3d 1194, 1205 (9th Cir. 2004)*, because the declaration was speculative, lacked foundation, was not based on personal knowledge, and was not relevant to Lucas's claims under ***antitrust law***, *see* *Fed. R. Evid. 401*, *402*, *701*, *702*, *703*.

Finally, the district court correctly granted summary judgment in favor of KE on Lucas's defamation claim because Lucas himself admitted that he charged people more than the set maximum price, ***HN4***[] and "[t]ruth is an absolute defense to defamation." *Gonsalves v. Nissan Motor Corp. in Haw., Ltd., 100 Haw. 149, 58 P.3d 1196, 1220 (Haw. 2002)* **[**8]** (internal quotation marks omitted) (alteration in original).

AFFIRMED.

[Leegin Creative Leather Prods. v. PSKS, Inc.](#)

Supreme Court of the United States

March 26, 2007, Argued ; June 28, 2007, Decided

No. 06-480

Reporter
551 U.S. 877 *; 127 S. Ct. 2705 **; 168 L. Ed. 2d 623 ***; 2007 U.S. LEXIS 8668 ****; 75 U.S.L.W. 4643; 2007-1 Trade Cas. (CCH) P75,753; 35 A.L.R. Fed. 2d 631; 20 Fla. L. Weekly Fed. S 466

LEEGIN CREATIVE LEATHER PRODUCTS, INC., Petitioner v. PSKS, INC., dba KAY'S KLOSET . . . KAY'S SHOES

Subsequent History: [**1]** On remand at, Remanded by *PSKS, Inc. v. Leegin Creative Leather Prods., 498 F.3d 486, 2007 U.S. App. LEXIS 20957 (5th Cir. Tex., Aug. 30, 2007)*

Prior History: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PSKS, Inc. v. Leegin Creative Leather Prods., 171 Fed. Appx. 464, 2006 U.S. App. LEXIS 6879 (5th Cir. Tex., 2006)

Disposition: Reversed and remanded.

Core Terms

resale price, manufacturer, retailers, vertical, consumers, per se rule, prices, antitrust, rule of reason, dealers, overruling, producer, courts, anticompetitive, distributors, brand, effects, cases, anti trust law, procompetitive, products, benefits, riding, cartel, Sherman Act, common-law, horizontal, Amici, discount, repealed

LexisNexis® Headnotes

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

HN1[] **Sherman Act, Scope**

Section 1 of the Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. *15 U.S.C.S. § 1*. While *§ 1* could be interpreted to proscribe all contracts, the United States Supreme Court has never taken a literal approach to its language. Rather, the Supreme Court has repeated time and again that *§ 1* outlaws only unreasonable restraints.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN2[] Per Se Rule & Rule of Reason, Sherman Act

The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act. Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. Appropriate factors to take into account include specific information about the relevant business and the restraint's history, nature, and effect. Whether the businesses involved have market power is a further, significant consideration. In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN3[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The rule of reason does not govern all restraints. Some types are deemed unlawful per se. The per se rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work, and, it must be acknowledged, the per se rule can give clear guidance for certain conduct. Restraints that are per se unlawful include horizontal agreements among competitors to fix prices or to divide markets.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN4[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Resort to per se rules is confined to restraints that would always or almost always tend to restrict competition and decrease output. To justify a per se prohibition a restraint must have "manifestly anticompetitive" effects, and lack any redeeming virtue. As a consequence, the per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason. It should come as no surprise, then, that the United States Supreme Court has expressed reluctance to adopt per se rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious. And a departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than upon formalistic line drawing.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN5[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The United States Supreme Court should be cautious about putting dispositive weight on doctrines from antiquity but of slight relevance. The state of the common law 400 or even 100 years ago is irrelevant to the issue of the effect of the antitrust laws upon vertical distributional restraints in the American economy today.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN6[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The United States Supreme Court has rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones. The Supreme Court's recent cases formulate antitrust principles in accordance with the appreciated differences in economic effect between vertical and horizontal agreements.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN7[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, per se unlawful. To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason. This type of agreement may also be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Resale Price Maintenance

HN8[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Notwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that resale price maintenance always or almost always tends to restrict competition and decrease output. Vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN9[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The United States Supreme Court has explained that administrative advantages are not sufficient in themselves to justify the creation of per se rules, and has relegated their use to restraints that are "manifestly anticompetitive." There are traditional "demanding standards" for adopting per se rules.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN10[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The antitrust laws are designed primarily to protect interbrand competition, from which lower prices can later result.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN11[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The rule of reason is designed and used to eliminate anticompetitive transactions from the market. This standard principle applies to vertical price restraints.

Governments > Courts > Judicial Precedent

HN12[] Courts, Judicial Precedent

Stare decisis reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right. And concerns about maintaining settled law are strong when the question is one of statutory interpretation.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN13[] Sherman Act, Scope

The general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act. From the beginning the United States Supreme Court has treated the Sherman Act as a common-law statute. Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on "restraints of trade" evolve to meet the dynamics of present economic conditions. The case-by-case adjudication contemplated by the rule of reason has implemented this common-law approach. Likewise, the boundaries of the doctrine of per se illegality should not be immovable.

Antitrust & Trade Law > General Overview

Governments > Courts > Judicial Precedent

HN14[] Antitrust & Trade Law

In the antitrust context the fact that a decision has been "called into serious question" justifies a court's reevaluation of it.

Governments > Courts > Judicial Precedent

HN15[] Courts, Judicial Precedent

The United States Supreme Court has overruled its precedents when subsequent cases have undermined their doctrinal underpinnings.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN16[] **Vertical Restraints, Price Fixing**

A manufacturer can announce suggested resale prices and refuse to deal with distributors who do not follow them.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

HN17[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The United States Supreme Court has overturned the per se rule for vertical nonprice restraints, adopting the rule of reason in its stead.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN18[] **Sherman Act, Claims**

The United States Supreme Court has required that antitrust plaintiffs alleging a 15 U.S.C.S. § 1 price-fixing conspiracy must present evidence tending to exclude the possibility a manufacturer and its distributors acted in an independent manner.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN19[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The per se rule applies only to specific agreements over price levels and not to an agreement between a manufacturer and a distributor to terminate a price-cutting distributor.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN20[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Vertical maximum price-fixing agreements should be evaluated under the traditional rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN21[] **Per Se Rule & Rule of Reason, Sherman Act**

The text of the Consumer Goods Pricing Act did not codify the rule of per se illegality for vertical price restraints. It rescinded statutory provisions that made them per se legal. Congress once again placed these restraints within the ambit of *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act. And Congress intended *§ 1* to give courts the ability to develop governing principles of law in the common-law tradition.

Antitrust & Trade Law > General Overview

Governments > Courts > Judicial Precedent

HN22[] **Antitrust & Trade Law**

Antitrust doctrines evolve with new circumstances and new wisdom.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN23[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The rule of reason is not inconsistent with the Consumer Goods Pricing Act. Unlike the earlier congressional exemption, it does not treat vertical price restraints as per se legal.

Antitrust & Trade Law > General Overview

HN24[] **Antitrust & Trade Law**

The purpose of the antitrust laws is the protection of competition, not competitors.

Governments > Courts > Judicial Precedent

HN25[] **Courts, Judicial Precedent**

Reliance on a judicial opinion is a significant reason to adhere to it, especially in cases involving property and contract rights.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Resale Price Maintenance

HN26[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The United States Supreme Court's decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)*, is now overruled. Vertical price restraints are to be judged according to the rule of reason.

Lawyers' Edition Display

Decision

[*623]** Manufacturer's agreement with distributor on minimum price that distributor could charge for manufacturer's goods held not per se illegal under § 1 of Sherman Act (*15 U.S.C.S. § 1*); vertical price restraints held required to be judged by rule of reason.

Summary

Procedural posture: Respondent retailer sued petitioner manufacturer, alleging an antitrust violation under § 1 (*15 U.S.C.S. § 1*) of the Sherman Act. Under the per se rule, the district court excluded the manufacturer's expert testimony regarding the procompetitive effects of its pricing policy. A jury found for the retailer, and the district court trebled the damages. The United States Court of Appeals for the Fifth Circuit affirmed. Certiorari was granted.

Overview: The manufacturer instituted a retail pricing and promotion policy, refusing to sell to retailers that discounted its goods below suggested prices. The manufacturer planned to introduce expert testimony describing the procompetitive effects of its pricing policy, but the district court excluded the testimony, relying on the rule that it was per se illegal under the Sherman Act for a manufacturer to agree with its distributor to set the minimum price the distributor could charge for the manufacturer's goods. The United States Supreme Court decided to overrule the per se rule and determined that vertical price restraints were to be judged according to the rule of reason. The rule of reason was the appropriate standard to judge vertical price restraints and vertical minimum resale price maintenance agreements because (1) procompetitive justifications existed for a manufacturer's use of resale price maintenance, (2) the primary purpose of the antitrust laws was to protect interbrand competition, (3) administrative advantages were not sufficient in themselves to justify the creation of per se rules, and (4) stare decisis did not compel the Court's continued adherence to the per se rule.

[*624] Outcome:** The Court reversed the appellate court's judgment and remanded the case for further proceedings.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 > UNREASONABLE RESTRAINTS OF TRADE > Headnote:
LEdHN[1][] [1]

Section 1 of the Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. *15 U.S.C.S. § 1*. While § 1 could be interpreted to proscribe all contracts, the United States Supreme Court has never taken a literal approach to its language. Rather, the Supreme Court has repeated time and again that § 1 outlaws only unreasonable restraints.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 > RESTRAINTS OF TRADE -- RULE OF REASON > Headnote:
LEdHN[2][] [2]

The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1 (*15 U.S.C.S. § 1*) of the Sherman Act. Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. Appropriate factors to take into account include specific information about the relevant business and the restraint's history, nature, and effect. Whether the businesses involved have market power is a further, significant consideration. In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > RESTRAINTS OF TRADE -- RULE OF REASON -- PER SE ILLEGALITY > Headnote:
LEdHN[3][] [3]

The rule of reason does not govern all restraints. Some types are deemed unlawful per se. The per se rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work, and, it must be acknowledged, the per se rule can give clear guidance for certain conduct. Restraints that are per se unlawful include horizontal agreements among competitors to fix prices or to divide markets.

[*625]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 > RESTRAINTS OF TRADE -- PER SE ILLEGALITY -- INVALIDITY UNDER RULE OF REASON > Headnote:
LEdHN[4][] [4]

Resort to per se rules is confined to restraints that would always or almost always tend to restrict competition and decrease output. To justify a per se prohibition a restraint must have "manifestly anticompetitive" effects, and lack any redeeming virtue. As a consequence, the per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason. It should come as no surprise, then, that the United States Supreme Court has expressed reluctance to adopt per se rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious. And a departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than upon formalistic line drawing.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §29 > VERTICAL RESTRAINTS OF TRADE -- COMMON LAW > Headnote:
LEdHN[5][] [5]

The United States Supreme Court should be cautious about putting dispositive weight on doctrines from antiquity but of slight relevance. The state of the common law 400 or even 100 years ago is irrelevant to the issue of the effect of the antitrust laws upon vertical distributional restraints in the American economy today.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §29 > RESTRAINTS OF TRADE -- HORIZONTAL -- VERTICAL > Headnote:
LEdHN[6][] [6]

The United States Supreme Court has rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones. The Supreme Court's recent cases formulate antitrust principles in accordance with the appreciated differences in economic effect between vertical and horizontal agreements.

EVIDENCE §979RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.5 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > PRICES -- RESTRAINTS OF TRADE -- HORIZONTAL -- VERTICAL > Headnote:
LEdHN[7][] [7]

A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, per se unlawful. To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason. This type of agreement may also be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > VERTICAL RESTRAINTS OF TRADE -- RESALE PRICE > Headnote:
LEdHN[8][] [8]

Notwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that resale price maintenance always or almost always tends to restrict competition and decrease output. Vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed.

[*626]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > RESTRAINTS OF TRADE -- PER SE ILLEGALITY > Headnote:
LEdHN[9][] [9]

The United States Supreme Court has explained that administrative advantages are not sufficient in themselves to justify the creation of per se rules, and has relegated their use to restraints that are "manifestly anticompetitive." There are traditional "demanding standards" for adopting per se rules.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.3 > ANTITRUST -- INTERBRAND COMPETITION > Headnote:
LEdHN[10][] [10]

The antitrust laws are designed primarily to protect interbrand competition, from which lower prices can later result.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > VERTICAL PRICE RESTRAINTS -- RULE OF REASON > Headnote:
LEdHN[11][] [11]

The rule of reason is designed and used to eliminate anticompetitive transactions from the market. This standard principle applies to vertical price restraints.

COURTS §766 COURTS §775.5 > COURTS -- STARE DECISIS > Headnote:
LEdHN[12][] [12]

Stare decisis reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right. And concerns about maintaining settled law are strong when the question is one of statutory interpretation.

EVIDENCE §343.5RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §7 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 > SHERMAN ACT -- RULE OF REASON -- PER SE ILLEGALITY > Headnote:
LEdHN[13][] [13]

The general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act. From the beginning the United States Supreme Court has treated the Sherman Act as a common-law statute. Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on "restraints of trade" evolve to meet the dynamics of present economic conditions. The case-by-case adjudication contemplated by the rule of reason has implemented this common-law approach. Likewise, the boundaries of the doctrine of per se illegality should not be immovable.

COURTS §775.5 > ANTITRUST -- REEVALUATION OF JUDICIAL DECISION > Headnote:
LEdHN[14][] [14]

In the antitrust context the fact that a decision has been "called into serious question" justifies a court's reevaluation of it.

COURTS §776 > SUPREME COURT -- OVERRULING PRECEDENTS > Headnote:
LEdHN[15][] [15]

The United States Supreme Court has overruled its precedents when subsequent cases have undermined their doctrinal underpinnings.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > ANTITRUST -- SUGGESTED RESALE PRICE > Headnote:
LEdHN[16][] [16]

A manufacturer can announce suggested resale prices and refuse to deal with distributors who do not follow them.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §29 > NONPRICE RESTRAINTS OF TRADE -- RULE OF REASON > Headnote:
LEdHN[17][] [17]

The United States Supreme Court has overturned the per se rule for vertical nonprice restraints, adopting the rule of reason in its stead.

[*627]**

EVIDENCE §979 > EVIDENCE OF ANTITRUST VIOLATION > Headnote:
LEdHN[18][] [18]

The United States Supreme Court has required that antitrust plaintiffs alleging a *15 U.S.C.S. § 1* price-fixing conspiracy must present evidence tending to exclude the possibility a manufacturer and its distributors acted in an independent manner.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > PRICES -- RESTRAINTS OF TRADE -- PER SE ILLEGALITY > Headnote:
LEdHN[19][] [19]

The per se rule applies only to specific agreements over price levels and not to an agreement between a manufacturer and a distributor to terminate a price-cutting distributor.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > PRICE FIXING -- RULE OF REASON > Headnote:
LEdHN[20][] [20]

Vertical maximum price-fixing agreements should be evaluated under the traditional rule of reason.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §7 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > VERTICAL PRICE RESTRAINTS -- PER SE ILLEGALITY > Headnote:
LEdHN[21][] [21]

The text of the Consumer Goods Pricing Act did not codify the rule of per se illegality for vertical price restraints. It rescinded statutory provisions that made them per se legal. Congress once again placed these restraints within the ambit of § 1 (*15 U.S.C.S. § 1*) of the Sherman Act. And Congress intended § 1 to give courts the ability to develop governing principles of law in the common-law tradition.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §4 > ANTITRUST DOCTRINES -- EVOLUTION > Headnote:
LEdHN[22][] [22]

Antitrust doctrines evolve with new circumstances and new wisdom.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > VERTICAL PRICE RESTRAINTS -- RULE OF REASON > Headnote:
LEdHN[23][] [23]

The rule of reason is not inconsistent with the Consumer Goods Pricing Act. Unlike the earlier congressional exemption, it does not treat vertical price restraints as per se legal.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §6 > ANTITRUST LAWS -- PURPOSE > Headnote:
LEdHN[24][] [24]

The purpose of the antitrust laws is the protection of competition, not competitors.

COURTS §775 > COURTS -- ADHERENCE TO PRIOR DECISION > Headnote:
LEdHN[25][] [25]

Reliance on a judicial opinion is a significant reason to adhere to it, especially in cases involving property and contract rights.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > VERTICAL PRICE RESTRAINTS -- OVERRULING PRIOR DECISION > Headnote:
LEdHN[26][] [26]

The United States Supreme Court's decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911)*, is now overruled. Vertical price restraints are to be judged according to the rule of reason.

Syllabus

[*628]** Given its policy of refusing to sell to retailers that discount its goods below suggested prices, petitioner (Leegin) stopped selling to respondent's (PSKS) store. PSKS filed suit, alleging, *inter alia,* that Leegin violated the antitrust laws by entering into vertical agreements with its retailers to set minimum resale prices. The District Court excluded expert testimony about Leegin's pricing policy's procompetitive effects on the ground that *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502*, makes it *per se* illegal under *§ 1* of the Sherman Act for a manufacturer and **[****2]** its distributor to agree on the minimum price the distributor can charge for the manufacturer's goods. At trial, PSKS alleged that Leegin and its retailers had agreed to fix prices, but Leegin argued that its pricing policy was lawful under *§ 1*. The jury found for PSKS. On appeal, the Fifth Circuit declined to apply the rule of reason to Leegin's vertical price-fixing agreements and affirmed, finding that *Dr. Miles*' *per se* rule rendered irrelevant any procompetitive justifications for Leegin's policy.

Held:

Dr. Miles is overruled, and vertical price restraints are to be judged by the rule of reason. Pp. 5-28.

[*629]** (a) The accepted standard for testing whether a practice restrains trade in violation of *§ 1* is the rule of reason, which requires the factfinder to weigh "all of the circumstances," *Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568*, including "specific information about the relevant business" and "the restraint's history, nature, and effect," *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199*. The rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and those with procompetitive **[****3]** effect that are in the consumer's best interest. However, when a restraint is deemed "unlawful *per se,*" *ibid.,* the need to study an individual restraint's reasonableness in light of real market forces is eliminated, *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808*. Resort to *per se* rules is confined to restraints "that would always or almost always tend to restrict competition and decrease output." *Ibid.* Thus, a *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, see *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 9, 99 S. Ct. 1551, 60 L. Ed. 2d 1*, and only if they can predict with confidence that the restraint would be invalidated in all or almost all instances under the rule of reason, see *Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 344, 102 S. Ct. 2466, 73 L. Ed. 2d 48*. Pp. 5-7.

(b) Because the reasons upon which *Dr. Miles* relied do not justify a *per se* rule, it is necessary to examine, in the first instance, the economic effects of vertical agreements to fix minimum resale prices and to determine whether the *per se* rule is **[****4]** nonetheless appropriate. Were this Court considering the issue as an original matter, the rule of reason, not a *per se* rule of unlawfulness, would be the appropriate standard to judge vertical price restraints. Pp. 7-19.

(1) Economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance, and the few recent studies on the subject also cast doubt on the conclusion that the practice meets the criteria for a *per se* rule. The justifications for vertical price restraints are similar to those for other vertical restraints. Minimum resale price maintenance can stimulate interbrand competition among manufacturers selling different brands of the same type of product by reducing intrabrand competition among retailers selling the same brand. This is important because the antitrust laws' "primary purpose . . . is to protect interbrand competition," *Khan, supra, at 15, 118 S. Ct. 275, 139 L. Ed. 2d 199*. A single manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in services or promotional efforts that aid the manufacturer's position as against rival manufacturers. **[****5]** Resale price maintenance may also give consumers more options to choose among low-price, low-service brands; high-price, high-service brands; and brands falling in between. Absent vertical price restraints, retail services that enhance interbrand competition might be underprovided because discounting retailers can free ride on retailers who furnish services and then capture some of the demand those services generate. Retail price maintenance can also increase interbrand competition **[***630]** by facilitating market entry for new firms and brands and by encouraging retailer services that would not be provided even absent free riding. Pp. 9-12.

(2) Setting minimum resale prices may also have anticompetitive effects; and unlawful price fixing, designed solely to obtain monopoly profits, is an ever-present temptation. Resale price maintenance may, for example, facilitate a manufacturer cartel or be used to organize retail cartels. It can also be abused by a powerful manufacturer or retailer. Thus, the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated. Pp. 12-14.

(3) Notwithstanding the risks of unlawful conduct, it cannot be stated **[****6]** with any degree of confidence that retail price maintenance "always or almost always tend[s] to restrict competition and decrease output," *Business Electronics, supra, at 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808*. Vertical retail price agreements have either procompetitive or anticompetitive effects, depending on the circumstances in which they were formed; and the limited empirical evidence available does not suggest efficient uses of the agreements are infrequent or hypothetical. A *per se* rule should not be adopted for administrative convenience alone. Such rules can be counterproductive, increasing the antitrust system's total cost by prohibiting procompetitive conduct the antitrust laws should encourage. And a *per se* rule cannot be justified by the possibility of higher prices absent a further showing of anticompetitive conduct. The antitrust laws primarily are designed to protect interbrand competition from which lower prices can later result. Respondent's argument overlooks that, in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins. Resale price maintenance has economic dangers. If the rule of reason were to apply, courts would have to **[****7]** be diligent in eliminating their anticompetitive uses from the market. Factors relevant to the inquiry are the number of manufacturers using the practice, the restraint's source, and a manufacturer's market power. The rule of reason is designed and used to ascertain whether transactions are anticompetitive or procompetitive. This standard principle applies to vertical price restraints. As courts gain experience with these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Pp. 14-19.

(c) *Stare decisis* does not compel continued adherence to the *per se* rule here. Because the Sherman Act is treated as a common-law statute, its prohibition on "restraint[s] of trade" evolves to meet the dynamics of present economic conditions. The rule of reason's case-by-case adjudication implements this common-law approach. Here, respected economics authorities suggest that the *per se* rule is inappropriate. And both the Department of Justice and the Federal Trade Commission recommend replacing the **[****8]** *per se* rule with the rule of reason. In addition, this Court has "overruled [its] precedents when subsequent cases have undermined their doctrinal underpinnings." *Dickerson v. United States, 530 U.S. 428, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405*. It is not surprising that the Court has distanced itself from *Dr. Miles*' rationales, for the case was decided not long **[***631]** after the Sherman Act was enacted, when the Court had little experience with antitrust analysis. Only eight years after *Dr. Miles*, the Court reined in the decision, holding that a manufacturer can suggest resale prices and refuse to deal with distributors who do not follow them, *United States v. Colgate & Co., 250 U.S. 300, 307-308, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460*; and more recently the Court has tempered, limited, or overruled once strict vertical restraint prohibitions, see, *e.g., GTE Sylvania, 433 U.S., at 57-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568*. The *Dr. Miles* rule is also inconsistent with a principled framework, for it makes little economic sense when analyzed with the Court's other vertical restraint cases. Deciding that procompetitive effects of resale price maintenance are insufficient to overrule *Dr. Miles* would call into question cases such **[****9]** as *Colgate* and *GTE Sylvania.* Respondent's arguments for reaffirming *Dr. Miles* based on *stare decisis* do not require a different result. Pp. 19-28.

171 Fed. Appx. 464, reversed and remanded.

Counsel: Theodore B. Olson argued the cause for petitioner.

Thomas G. Hungar argued the cause for the United States, as amicus curiae, by special leave of court.

Robert W. Coykendall argued the cause for respondent.

Barbara D. Underwood argued the cause for New York, et al., as amici curiae, by special leave of court.

Judges: Kennedy, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Thomas, and Alito, JJ., joined. Breyer, J., filed a dissenting opinion, in which Stevens, Souter, and Ginsburg, JJ., joined, post, p. 908.

Opinion by: KENNEDY

Opinion

[*881] **[**2710]** Justice **Kennedy** delivered the opinion of the Court.

In *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911)*, the Court established the rule that it is *per se* illegal under § 1 of the Sherman Act, *15 U.S.C. § 1*, for a manufacturer to agree with its distributor to set the minimum price the distributor can charge for the manufacturer's goods. The question presented by the instant case is **[*882]** whether the Court should overrule the *per se* rule and allow resale price maintenance agreements to be judged by the rule of reason, the usual standard applied to determine if there is a violation of *§ 1*. The Court has abandoned the rule of *per se* illegality for other vertical restraints **[****10]** a manufacturer imposes on its distributors. Respected economic analysts, furthermore, conclude that vertical price restraints can have procompetitive effects. We now hold that *Dr. Miles* should be overruled and that vertical price restraints are to be judged by the rule of reason.

I

Petitioner, Leegin Creative Leather Products, Inc. (Leegin), designs, manufactures, and distributes leather goods and accessories. In 1991, Leegin began to sell belts under the brand name "Brighton." The Brighton brand has now expanded into a variety of women's fashion accessories. It is sold across the United States in over 5,000 retail establishments, for the most part independent, small boutiques and specialty stores. Leegin's president, Jerry Kohl, also has an interest in about 70 stores that sell Brighton products. Leegin asserts that, at least for its products, small retailers treat customers better, **[**2711]** provide customers more services, and make their shopping experience more satisfactory than do larger, often impersonal retailers. Kohl explained: "[W]e want the consumers to get a different experience than they get in Sam's Club or in Wal-Mart. And you can't get that kind of experience or support or **[****11]** customer service from a store like Wal-Mart." 5 Record 127.

[*632]** Respondent, PSKS, Inc. (PSKS), operates Kay's Kloset, a women's apparel store in Lewisville, Texas. Kay's Kloset buys from about 75 different manufacturers and at one time sold the Brighton brand. It first started purchasing Brighton goods from Leegin in 1995. Once it began selling the brand, the store promoted Brighton. For example, it ran Brighton advertisements and had Brighton days in the store. **[*883]** Kay's Kloset became the destination retailer in the area to buy Brighton products. Brighton was the store's most important brand and once accounted for 40 to 50 percent of its profits.

In 1997, Leegin instituted the "Brighton Retail Pricing and Promotion Policy." 4 *id.,* at 939. Following the policy, Leegin refused to sell to retailers that discounted Brighton goods below suggested prices. The policy contained an exception for products not selling well that the retailer did not plan on reordering. In the letter to retailers establishing the policy, Leegin stated:

> "In this age of mega stores like Macy's, Bloomingdales, May Co. and others, consumers are perplexed by promises of product quality and support **[****12]** of product which we believe is lacking in these large stores. Consumers are further confused by the ever popular sale, sale, sale, etc.
> "We, at Leegin, choose to break away from the pack by selling [at] specialty stores; specialty stores that can offer the customer great quality merchandise, superb service, and support the Brighton product 365 days a year on a consistent basis.
>
> "We realize that half the equation is Leegin producing great Brighton product and the other half is you, our retailer, creating great looking stores selling our products in a quality manner." *Ibid.*

Leegin adopted the policy to give its retailers sufficient margins to provide customers the service central to its distribution strategy. It also expressed concern that discounting harmed Brighton's brand image and reputation.

A year after instituting the pricing policy Leegin introduced a marketing strategy known as the "Heart Store Program." See *id.,* at 962-972. It offered retailers incentives to become Heart Stores, and, in exchange, retailers pledged, among other things, to sell at Leegin's suggested prices. Kay's Kloset became a Heart Store soon after Leegin created **[*884]** the program. After a Leegin **[****13]** employee visited the store and found it unattractive, the parties appear to have agreed that Kay's Kloset would not be a Heart Store beyond 1998. Despite losing this status, Kay's Kloset continued to increase its Brighton sales.

In December 2002, Leegin discovered Kay's Kloset had been marking down Brighton's entire line by 20 percent. Kay's Kloset contended it placed Brighton products on sale to compete with nearby retailers who also were undercutting Leegin's suggested prices. Leegin, nonetheless, requested that Kay's Kloset cease discounting. Its request refused, Leegin stopped selling to the store. The loss of the Brighton brand had a considerable negative impact on the store's revenue from sales.

[2712]** PSKS sued Leegin in the United States District Court for the Eastern District of Texas. It alleged, among other claims, that Leegin had violated the antitrust laws by "enter[ing] into **[***633]** agreements with retailers to charge only those prices fixed by Leegin." *Id.,* at 1236. Leegin planned to introduce expert testimony describing the procompetitive effects of its pricing policy. The District Court excluded the testimony, relying on the *per se* rule established by *Dr. Miles.* At trial **[****14]** PSKS argued that the Heart Store program, among other things, demonstrated Leegin and its retailers had agreed to fix prices. Leegin responded that it had established a unilateral pricing policy lawful under *§ 1*, which applies only to concerted action. See *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*. The jury agreed with PSKS and awarded it $1.2 million. Pursuant to *15 U.S.C. § 15(a)*, the District Court trebled the damages and reimbursed PSKS for its attorney's fees and costs. It entered judgment against Leegin in the amount of $3,975,000.80.

The Court of Appeals for the Fifth Circuit affirmed. *171 Fed. Appx. 464 (2006)* *(per curiam).* On appeal Leegin did not dispute that it had entered into vertical price-fixing agreements with its retailers. Rather, it contended that the **[*885]** rule of reason should have applied to those agreements. The Court of Appeals rejected this argument. *Id., at 466-467*. It was correct to explain that it remained bound by *Dr. Miles* "[b]ecause [the Supreme] Court has consistently applied the *per se* rule to [vertical minimum price-fixing] agreements." *171 Fed. Appx., at 466*. **[****15]**

On this premise the Court of Appeals held that the District Court did not abuse its discretion in excluding the testimony of Leegin's economic expert, for the *per se* rule rendered irrelevant any procompetitive justifications for Leegin's pricing policy. *Id., at 467*. We granted certiorari to determine whether vertical minimum resale price maintenance agreements should continue to be treated as *per se* unlawful. *549 U.S. 1092, 127 S. Ct. 763, 166 L. Ed. 2d 590 (2006)*

II

HN1[] ***LEdHN***[] *Section 1* of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." Ch. 647, 26 Stat. 209, as amended, *15 U.S.C. § 1*. While *§ 1* could be interpreted to proscribe all contracts, see, *e.g., Board of Trade of Chicago v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*, the Court has never "taken a literal approach to [its] language," *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*. Rather, the Court has repeated time and again that *§ 1* "outlaw[s] only unreasonable restraints." *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*.

HN2[] ***LEdHN[2]***[] [2] The rule of reason **[****16]** is the accepted standard for testing whether a practice restrains trade in violation of *§ 1*. See *Texaco, supra, at 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1*. "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. Appropriate factors to take into account include "specific information about the relevant business" and "the restraint's history, nature, and effect." *Khan, supra, at 10, 118 S. Ct. 275, 139 L. Ed. 2d 199*. Whether the businesses **[*886]** involved have market power is **[***634]** a further, significant consideration. See, *e.g., Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (equating the rule of **[**2713]** reason with "an inquiry into market power and market structure designed to assess [a restraint's] actual effect"); see also *Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 45-46, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*. In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating **[****17]** competition that are in the consumer's best interest.

HN3[] ***LEdHN[3]***[] [3] The rule of reason does not govern all restraints. Some types "are deemed unlawful *per se*." *Khan, supra, at 10, 118 S. Ct. 275, 139 L. Ed. 2d 199*. The *per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work, *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*; and, it must be acknowledged, the *per se* rule can give clear guidance for certain conduct. Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices, see *Texaco, supra, at 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1*, or to divide markets, see *Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49-50, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)* *(per curiam).*

HN4[] ***LEdHN[4]***[] [4] Resort to *per se* rules is confined to restraints, like those mentioned, "that would always or almost always tend to restrict competition and decrease output." *Business Electronics, supra, at 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808* (internal quotation marks omitted). To justify a *per se* prohibition a restraint must have "manifestly anticompetitive" effects, **[****18]** *GTE Sylvania, supra, at 50, 97 S. Ct. 2549, 53 L. Ed. 2d 568*, and "lack . . . any redeeming virtue," *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)* (internal quotation marks omitted).

As a consequence, the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, see *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 9, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*, and only if courts can predict with confidence that it would be invalidated **[*887]** in all or almost all instances under the rule of reason, see *Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 344, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*. It should come as no surprise, then, that "we have expressed reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." *Khan, supra, at 10, 118 S. Ct. 275, 139 L. Ed. 2d 199* (internal quotation marks omitted); see also *White Motor Co. v. United States, 372 U.S. 253, 263, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963)* (refusing to adopt a *per se* rule for a vertical nonprice restraint **[****19]** because of the uncertainty concerning whether this type of restraint satisfied the demanding standards necessary to apply a *per se* rule). And, as we have stated, a "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *GTE Sylvania, supra, at 58-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568*.

[*635]** III

The Court has interpreted *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502*, as establishing a *per se* rule against a vertical agreement between a manufacturer and its distributor to set minimum resale prices. See, *e.g., Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*. In *Dr. Miles* the plaintiff, a manufacturer of medicines, sold its products only to distributors **[**2714]** who agreed to resell them at set prices. The Court found the manufacturer's control of resale prices to be unlawful. It relied on the common-law rule that "a general restraint upon alienation is ordinarily invalid." *220 U.S., at 404-405, 31 S. Ct. 376, 55 L. Ed. 2d 502*. The Court then explained that the agreements would advantage the distributors, not the manufacturer, and were analogous to a combination **[****20]** among competing distributors, which the law treated as void. *Id., at 407-408, 31 S. Ct. 376, 55 L. Ed. 2d 502*.

The reasoning of the Court's more recent jurisprudence has rejected the rationales on which *Dr. Miles* was based. By relying on the common-law rule against restraints on alienation, *id., at 404-405, 31 S. Ct. 376, 55 L. Ed. 2d 502*, the Court justified its decision **[*888]** based on "formalistic" legal doctrine rather than "demonstrable economic effect," *GTE Sylvania, 433 U.S., at 58-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568*. The Court in *Dr. Miles* relied on a treatise published in 1628, but failed to discuss in detail the business reasons that would motivate a manufacturer situated in 1911 to make use of vertical price restraints. Yet the Sherman Act's use of "restraint of trade" "invokes the common law itself, . . . not merely the static content that the common law had assigned to the term in 1890." *Business Electronics, supra, at 732, 108 S. Ct. 1515, 99 L. Ed. 2d 808*. The general restraint on alienation, especially in the age when then-Justice Hughes used the term, tended to evoke policy concerns extraneous to the question that controls here. Usually associated with land, not chattels, the rule arose from restrictions removing real property **[****21]** from the stream of commerce for generations. ***HN5***[] ***LEdHN[5]***[] [5] The Court should be cautious about putting dispositive weight on doctrines from antiquity but of slight relevance. We reaffirm that "the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today." *GTE Sylvania, supra, at 53, n. 21, 97 S. Ct. 2549, 53 L. Ed. 2d 568* (internal quotation marks omitted).

Dr. Miles, furthermore, treated vertical agreements a manufacturer makes with its distributors as analogous to a horizontal combination among competing distributors. See *220 U.S., at 407-408, 31 S. Ct. 376, 55 L. Ed. 2d 502*. In later cases, however, ***HN6***[] ***LEdHN[6]***[] [6] the Court rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones. See, *e.g., Business Electronics, supra, at 734, 108 S. Ct. 1515, 99 L. Ed. 2d 808* (disclaiming the "notion of equivalence between the scope of horizontal *per se* illegality and that of vertical *per se* illegality"); *Maricopa County, supra, at 348, n 18, 102 S. Ct. 2466, 73 L. Ed. 2d 48* (noting that "horizontal restraints are generally less defensible than vertical restraints"). Our recent **[****22]** cases formulate antitrust principles in accordance with the appreciated **[***636]** differences in economic effect between vertical and horizontal agreements, differences the *Dr. Miles* Court failed to consider.

[*889] The reasons upon which *Dr. Miles* relied do not justify a *per se* rule. As a consequence, it is necessary to examine, in the first instance, the economic effects of vertical agreements to fix minimum resale prices, and to determine whether the *per se* rule is nonetheless appropriate. See *Business Electronics, 485 U.S., at 726, 108 S. Ct. 1515, 99 L. Ed. 2d 808*.

A

Though each side of the debate can find sources to support its position, it suffices to say here that economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance. See, *e.g.,* Brief for Economists as *Amici Curiae* 16 ("In the theoretical literature, it is essentially undisputed **[**2715]** that minimum [resale price maintenance] can have procompetitive effects and that under a variety of market conditions it is unlikely to have anticompetitive effects"); Brief for United States as *Amicus Curiae* 9 ("[T]here is a widespread consensus that permitting a manufacturer to control **[****23]** the price at which its goods are sold may promote *inter*brand competition and consumer welfare in a variety of ways"); ABA Section of ***Antitrust Law***, ***Antitrust Law*** and Economics of Product Distribution 76 (2006) ("[T]he bulk of the economic literature on [resale price maintenance] suggests that [it] is more likely to be used to enhance efficiency than for anticompetitive purposes"); see also H. Hovenkamp, The Antitrust Enterprise: Principle and Execution 184-191 (2005) (hereinafter Hovenkamp); R. Bork, The Antitrust Paradox 288-291 (1978) (hereinafter Bork). Even those more skeptical of resale price maintenance acknowledge it can have procompetitive effects. See, *e.g.,* Brief for William S. Comanor et al. as *Amici Curiae* 3 ("[G]iven [the] diversity of effects [of resale price maintenance], one could reasonably take the position that a *rule of reason* rather than a *per se* approach is warranted"); F.Scherer & D. Ross, Industrial Market Structure and Economic Performance 558 (3d ed. 1990) (hereinafter Scherer & Ross) ("The overall balance **[*890]** between benefits and costs [of resale price maintenance] is probably close").

The few recent studies documenting the competitive **[****24]** effects of resale price maintenance also cast doubt on the conclusion that the practice meets the criteria for a *per se* rule. See Bureau of Economics Staff Report to the FTC, T. Overstreet, Resale Price Maintenance: Economic Theories and Empirical Evidence 170 (1983) (hereinafter Overstreet) (noting that "[e]fficient uses of [resale price maintenance] are evidently not unusual or rare"); see also Ippolito, Resale Price Maintenance: Empirical Evidence From Litigation, 34 J. Law & Econ. 263, 292-293 (1991) (hereinafter Ippolito).

The justifications for vertical price restraints are similar to those for other vertical restraints. See *GTE Sylvania, 433 U.S., at 54-57, 97 S. Ct. 2549, 53 L. Ed. 2d 568*. Minimum resale price maintenance can stimulate interbrand competition--the competition among manufacturers selling different brands of the same type of product--by reducing intrabrand competition--the competition among retailers selling the same brand. See *id., at 51-52, 97 S. Ct. 2549, 53 L. Ed. 2d 568*. The promotion **[***637]** of interbrand competition is important because "the primary purpose of the antitrust laws is to protect [this type of] competition." *Khan, 522 U.S., at 15, 118 S. Ct. 275, 139 L. Ed. 2d 199*. A single manufacturer's use of vertical price restraints **[****25]** tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers. Resale price maintenance also has the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between.

Absent vertical price restraints, the retail services that enhance interbrand competition might be underprovided. This is because discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate. *GTE Sylvania, supra, at 55, 97 S. Ct. 2549, 53 L. Ed. 2d 568*. Consumers might learn, for example, about **[*891]** the benefits of a manufacturer's product from a retailer that invests in fine showrooms, offers product demonstrations, or hires and trains knowledgeable employees. R. Posner, ***Antitrust Law*** 172-173 (2d ed. 2001) (hereinafter Posner). Or consumers might decide to buy the product because **[**2716]** they see it in a retail establishment that has a reputation for selling high-quality merchandise. Marvel & McCafferty, Resale **[****26]** Price Maintenance and Quality Certification, 15 Rand J. Econ. 346, 347-349 (1984) (hereinafter Marvel & McCafferty). If the consumer can then buy the product from a retailer that discounts because it has not spent capital providing services or developing a quality reputation, the high-service retailer will lose sales to the discounter, forcing it to cut back its services to a level lower than consumers would otherwise prefer. Minimum resale price maintenance alleviates the problem because it prevents the discounter from undercutting the service provider. With price competition decreased, the manufacturer's retailers compete among themselves over services.

Resale price maintenance, in addition, can increase interbrand competition by facilitating market entry for new firms and brands. "[N]ew manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer." *GTE Sylvania, supra, at 55, 97 S. Ct. 2549, 53 L. Ed. 2d*

568; see Marvel & McCafferty 349 (noting that reliance on a retailer's reputation "will decline **[****27]** as the manufacturer's brand becomes better known, so that [resale price maintenance] may be particularly important as a competitive device for new entrants"). New products and new brands are essential to a dynamic economy, and if markets can be penetrated by using resale price maintenance there is a procompetitive effect.

Resale price maintenance can also increase interbrand competition by encouraging retailer services that would not **[*892]** be provided even absent free riding. It may be difficult and inefficient for a manufacturer to make and enforce a contract with a retailer specifying the different services the retailer must perform. Offering the retailer a guaranteed margin and threatening termination if it does not live up to expectations may be the **[***638]** most efficient way to expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services. See Mathewson & Winter, The Law and Economics of Resale Price Maintenance, 13 Rev. Indus. Org. 57, 74-75 (1998) (hereinafter Mathewson & Winter); Klein & Murphy, Vertical Restraints as Contract Enforcement Mechanisms, 31 J. Law & Econ. 265, 295 (1988); **[****28]** see also Deneckere, Marvel, & Peck, Demand Uncertainty, Inventories, and Resale Price Maintenance, 111 Q. J. Econ. 885, 911 (1996) (noting that resale price maintenance may be beneficial to motivate retailers to stock adequate inventories of a manufacturer's goods in the face of uncertain consumer demand).

B

While vertical agreements setting minimum resale prices can have procompetitive justifications, they may have anticompetitive effects in other cases; and unlawful price fixing, designed solely to obtain monopoly profits, is an ever-present temptation. Resale price maintenance may, for example, facilitate a manufacturer cartel. See *Business Electronics, 485 U.S., at 725, 108 S. Ct. 1515, 99 L. Ed. 2d 808*. An unlawful cartel will seek to discover if some manufacturers are undercutting the cartel's fixed prices. Resale price maintenance could assist the cartel in identifying price-cutting manufacturers who benefit from the lower prices they offer. Resale price maintenance, furthermore, could discourage a manufacturer from cutting prices to retailers with the concomitant benefit of cheaper prices to **[**2717]** consumers. See *ibid.;* see also Posner 172; Overstreet 19-23.

[*893] Vertical price restraints also "might **[****29]** be used to organize cartels at the retailer level." *Business Electronics, supra, at 725-726, 108 S. Ct. 1515, 99 L. Ed. 2d 808*. A group of retailers might collude to fix prices to consumers and then compel a manufacturer to aid the unlawful arrangement with resale price maintenance. In that instance the manufacturer does not establish the practice to stimulate services or to promote its brand but to give inefficient retailers higher profits. Retailers with better distribution systems and lower cost structures would be prevented from charging lower prices by the agreement. See Posner 172; Overstreet 13-19. Historical examples suggest this possibility is a legitimate concern. See, *e.g.,* Marvel & McCafferty, The Welfare Effects of Resale Price Maintenance, 28 J. Law & Econ. 363, 373 (1985) (hereinafter Marvel) (providing an example of the power of the National Association of Retail Druggists to compel manufacturers to use resale price maintenance); Hovenkamp 186 (suggesting that the retail druggists in *Dr. Miles* formed a cartel and used manufacturers to enforce it).

HN7[] ***LEdHN[7]***[] [7] A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition **[****30]** in order to increase price is, and ought to be, *per se* unlawful. See *Texaco, 547 U.S., at 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1*; *GTE Sylvania, 433 U.S., at 58, n 28, 97 S. Ct. 2549, 53 L. Ed. 2d 568*. To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason. This type of agreement may also be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel.

[*639]** Resale price maintenance, furthermore, can be abused by a powerful manufacturer or retailer. A dominant retailer, for example, might request resale price maintenance to forestall innovation in distribution that decreases costs. A manufacturer might consider it has little choice but to accommodate the retailer's demands for vertical price restraints if the manufacturer believes it needs access to the retailer's **[*894]** distribution network. See Overstreet 31; 8 P. Areeda & H. Hovenkamp, ***Antitrust Law*** 47 (2d ed. 2004) (hereinafter Areeda & Hovenkamp); cf. *Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 937-938 (CA7 2000)*. A manufacturer with market power, by comparison, might use resale price maintenance to give **[****31]** retailers an incentive not to sell the products of smaller rivals or new entrants. See, *e.g.,* Marvel 366-368. As should be evident, the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated.

C

HN8[] ***LEdHN[8]***[] [8] Notwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that resale price maintenance "always or almost always tend[s] to restrict competition and decrease output." *Business Electronics, supra, at 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808* (internal quotation marks omitted). Vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed. And although the empirical evidence on the topic is limited, it does not suggest efficient uses of the agreements are infrequent or hypothetical. See Overstreet 170; see also *id.,* at 80 (noting that for the majority of enforcement actions brought by the Federal Trade Commission between 1965 and 1982, "the use of [resale price maintenance] was not likely motivated by collusive dealers who had successfully coerced their suppliers"); Ippolito 292 (reaching a similar conclusion). **[****32] [**2718]** As the rule would proscribe a significant amount of procompetitive conduct, these agreements appear ill suited for *per se* condemnation.

Respondent contends, nonetheless, that vertical price restraints should be *per se* unlawful because of the administrative convenience of *per se* rules. See, *e.g., GTE Sylvania, supra, at 50, n. 16, 97 S. Ct. 2549, 53 L. Ed. 2d 568* (noting "*per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system"). That argument suggests **[*895]** *per se* illegality is the rule rather than the exception. This misinterprets our ***antitrust law***. *Per se* rules may decrease administrative costs, but that is only part of the equation. Those rules can be counterproductive. They can increase the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage. See Easterbrook, Vertical Arrangements and the Rule of Reason, 53 Antitrust L. J. 135, 158 (1984) (hereinafter Easterbrook). They also may increase litigation costs by promoting frivolous suits against legitimate practices. ***HN9***[] ***LEdHN[9]***[] [9] The Court has thus explained that administrative "advantages are not sufficient **[****33]** in themselves to justify the creation of *per se* rules," *GTE Sylvania, 433 U.S., at 50, n. 16, 97 S. Ct. 2549, 53 L. Ed. 2d 568*, and has relegated their use to restraints that are "manifestly anticompetitive," *id., at 49-50, 97 S. Ct. 2549, 53 L. Ed. 2d 568*. Were the Court now to conclude **[***640]** that vertical price restraints should be *per se* illegal based on administrative costs, we would undermine, if not overrule, the traditional "demanding standards" for adopting *per se* rules. *Id., at 50, 97 S. Ct. 2549, 53 L. Ed. 2d 568*. Any possible reduction in administrative costs cannot alone justify the *Dr. Miles* rule.

Respondent also argues the *per se* rule is justified because a vertical price restraint can lead to higher prices for the manufacturer's goods. See also Overstreet 160 (noting that "price surveys indicate that [resale price maintenance] in most cases increased the prices of products sold"). Respondent is mistaken in relying on pricing effects absent a further showing of anticompetitive conduct. Cf. *id.,* at 106 (explaining that price surveys "do not necessarily tell us anything conclusive about the welfare effects of [resale price maintenance] because the results are generally consistent with **[****34]** both procompetitive and anticompetitive theories"). For, as has been indicated already, ***HN10***[] ***LEdHN[10]***[] [10] the antitrust laws are designed primarily to protect interbrand competition, from which lower prices can later result. See *Khan, 522 U.S., at 15, 118 S. Ct. 275, 139 L. Ed. 2d 199*. The Court, moreover, has evaluated other vertical restraints under the rule of reason even though prices can be **[*896]** increased in the course of promoting procompetitive effects. See, *e.g., Business Electronics, 485 U.S., at 728, 108 S. Ct. 1515, 99 L. Ed. 2d 808*. And resale price maintenance may reduce prices if manufacturers have resorted to costlier alternatives of controlling resale prices that are not *per se* unlawful. See *infra*, at 902-904, 168 L. Ed. 2d, at 643-646; see also Marvel 371.

Respondent's argument, furthermore, overlooks that, in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins. The difference between the price a manufacturer charges retailers and the price retailers charge consumers represents part of the manufacturer's cost of distribution, which, like any other cost, the manufacturer usually desires to minimize. See *GTE Sylvania, 433 U.S., at 56, n 24, 97 S. Ct. 2549, 53 L. Ed. 2d 568*; see also *id., at 56, 97 S. Ct. 2549, 53 L. Ed. 2d 568* **[****35]** ("Economists . . . have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products"). A manufacturer **[**2719]** has no incentive to overcompensate retailers with unjustified margins. The retailers, not the manufacturer, gain from higher retail prices. The manufacturer often loses; interbrand competition reduces its competitiveness and market share because consumers will "substitute a different brand of the same product." *Id., at 52, n 19, 97 S. Ct. 2549, 53 L. Ed. 2d 568*; see *Business Electronics, supra, at 725, 108 S. Ct. 1515, 99 L. Ed. 2d 808*. As a general matter, therefore, a single manufacturer will desire to set minimum resale prices only if the "increase in demand resulting from enhanced service . . . will more than offset a negative impact on demand of a higher retail price." Mathewson & Winter 67.

The implications of respondent's position are far reaching. Many decisions a manufacturer makes and carries out through concerted action can lead to higher prices. A manufacturer might, for example, contract with different suppliers to obtain better inputs that improve product quality. Or it might hire an advertising **[****36]** agency to **[***641]** promote awareness of its goods. Yet no one would think these actions violate the **[*897]** Sherman Act because they lead to higher prices. The antitrust laws do not require manufacturers to produce generic goods that consumers do not know about or want. The manufacturer strives to improve its product quality or to promote its brand because it believes this conduct will lead to increased demand despite higher prices. The same can hold true for resale price maintenance.

Resale price maintenance, it is true, does have economic dangers. If the rule of reason were to apply to vertical price restraints, courts would have to be diligent in eliminating their anticompetitive uses from the market. This is a realistic objective, and certain factors are relevant to the inquiry. For example, the number of manufacturers that make use of the practice in a given industry can provide important instruction. When only a few manufacturers lacking market power adopt the practice, there is little likelihood it is facilitating a manufacturer cartel, for a cartel then can be undercut by rival manufacturers. See Overstreet 22; Bork 294. Likewise, a retailer cartel is unlikely when only a single manufacturer **[****37]** in a competitive market uses resale price maintenance. Interbrand competition would divert consumers to lower priced substitutes and eliminate any gains to retailers from their price-fixing agreement over a single brand. See Posner 172; Bork 292. Resale price maintenance should be subject to more careful scrutiny, by contrast, if many competing manufacturers adopt the practice. Cf. Scherer & Ross 558 (noting that "except when [resale price maintenance] spreads to cover the bulk of an industry's output, depriving consumers of a meaningful choice between high-service and low-price outlets, most [resale price maintenance arrangements] are probably innocuous"); Easterbrook 162 (suggesting that "every one of the potentially-anti-competitive outcomes of vertical arrangements depends on the uniformity of the practice").

The source of the restraint may also be an important consideration. If there is evidence retailers were the impetus **[*898]** for a vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer. See Brief for William S. Comanor et al. as *Amici Curiae* 7-8. If, by contrast, a manufacturer adopted **[****38]** the policy independent of retailer pressure, the restraint is less likely to promote anticompetitive conduct. Cf. Posner 177 ("It makes all the difference whether minimum retail prices are imposed by the manufacturer in order to evoke point-of-sale services or by the dealers in order to obtain monopoly profits"). A manufacturer also has an incentive to protest inefficient retailer-induced **[**2720]** price restraints because they can harm its competitive position.

As a final matter, that a dominant manufacturer or retailer can abuse resale price maintenance for anticompetitive purposes may not be a serious concern unless the relevant entity has market power. If a retailer lacks market power, manufacturers likely can sell their goods through rival retailers. See also *Business Electronics, supra, at 727, n. 2, 108 S. Ct. 1515, 99 L. Ed. 2d 808* (noting "[r]etail market power is rare, because of the usual presence of interbrand competition and other dealers"). And if a manufacturer lacks market power, there is less likelihood it can use the practice **[***642]** to keep competitors away from distribution outlets.

HN11[] ***LEdHN[11]***[] [11] The rule of reason is designed and used to eliminate anticompetitive transactions from the market. This standard **[****39]** principle applies to vertical price restraints. A party alleging injury from a vertical agreement setting minimum resale prices will have, as a general matter, the information and resources available to show the existence of the agreement and its scope of operation. As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions **[*899]** where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.

For all of the foregoing reasons, we think that were the Court considering the issue as an original matter, the rule of reason, not a *per se* rule of unlawfulness, would be the appropriate standard to judge vertical price restraints.

IV

We do not write on a clean slate, for the decision in *Dr. Miles* is almost a century old. So there is an argument for its retention on the basis of **[****40]** *stare decisis* alone. Even if *Dr. Miles* established an erroneous rule, ***HN12***[] ***LEdHN[12]***[] [12] "*[s]tare decisis* reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Khan, 522 U.S., at 20, 118 S. Ct. 275, 139 L. Ed. 2d 199* (internal quotation marks omitted). And concerns about maintaining settled law are strong when the question is one of statutory interpretation. See, *e.g., Hohn v. United States, 524 U.S. 236, 251, 118 S. Ct. 1969, 141 L. Ed. 2d 242 (1998)*.

Stare decisis is not as significant in this case, however, because the issue before us is the scope of the Sherman Act. *Khan, supra, at 20, 118 S. Ct. 275, 139 L. Ed. 2d 199* (***HN13***[] ***LEdHN[13]***[] [13] "[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act"). From the beginning the Court has treated the Sherman Act as a common-law statute. See *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 688, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*; see also *Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 98, n 42, 101 S. Ct. 1571, 67 L. Ed. 2d 750 (1981)* ("In antitrust, the federal courts . . . act more as common-law courts than in other areas governed by federal **[****41]** statute"). Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on "restraint[s] of trade" evolve to meet the dynamics of present economic conditions. The case-by-case adjudication contemplated by the rule of reason has implemented this common-law approach. See *National Soc. of Professional* ***[*900]*** *Engineers, supra, at 688, 98 S. Ct. 1355, 55 L. Ed. 2d 637*. Likewise, the boundaries of **[**2721]** the doctrine of *per se* illegality should not be immovable. For "[i]t would make no sense to create out of the single term 'restraint of trade' a chronologically schizoid statute, in which a 'rule of reason' evolves with new circumstances and new wisdom, but a line of *per se* illegality remains forever fixed where it was." *Business Electronics,* ***[***643]*** *485 U.S., at 732, 108 S. Ct. 1515, 99 L. Ed. 2d 808*.

A

Stare decisis, we conclude, does not compel our continued adherence to the *per se* rule against vertical price restraints. As discussed earlier, respected authorities in the economics literature suggest the *per se* rule is inappropriate, and there is now widespread agreement that resale price maintenance can have procompetitive effects. See, *e.g.,* Brief for Economists **[****42]** as *Amici Curiae* 16. It is also significant that both the Department of Justice and the Federal Trade Commission--the antitrust enforcement agencies with the ability to assess the long-term impacts of resale price maintenance--have recommended that this Court replace the *per se* rule with the traditional rule of reason. See Brief for United States as *Amicus Curiae* 6. ***HN14***[] ***LEdHN[14]***[] [14] In the antitrust context the fact that a decision has been "called into serious question" justifies our reevaluation of it. *Khan, supra, at 21, 118 S. Ct. 275, 139 L. Ed. 2d 199*.

Other considerations reinforce the conclusion that *Dr. Miles* should be overturned. Of most relevance, ***HN15***[] ***LEdHN[15]***[] [15] "we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings." *Dickerson v. United States, 530 U.S. 428, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000)*. The Court's treatment of vertical restraints has progressed away from *Dr. Miles*' strict approach. We have distanced ourselves from the opinion's rationales. See *supra,* at 887-889, 168 L. Ed. 2d, at 635; see also *Khan, supra, at 21, 118 S. Ct. 275, 139 L. Ed. 2d 199* (overruling a case when "the views underlying [it had been] eroded by this Court's precedent"); *Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 480-481, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)* **[****43]** (same). This is unsurprising, for the case was decided not long after enactment of the **[*901]** Sherman Act when the Court had little experience with antitrust analysis. Only eight years after *Dr. Miles*, moreover, the Court reined in the decision by holding that ***HN16***[] ***LEdHN[16]***[] [16] a manufacturer can announce suggested resale prices and refuse to deal with distributors who do not follow them. *Colgate, 250 U.S., at 307-308, 39 S. Ct. 465, 63 L. Ed. 2d 992*.

In more recent cases the Court, following a common-law approach, has continued to temper, limit, or overrule once strict prohibitions on vertical restraints. In 1977, ***HN17***[🡅] ***LEdHN[17]***[🡅] [17] the Court overturned the *per se* rule for vertical nonprice restraints, adopting the rule of reason in its stead. *GTE Sylvania, 433 U.S., at 57-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568* (overruling *United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967))*; see also *433 U.S., at 58, n 29, 97 S. Ct. 2549, 53 L. Ed. 2d 568* (noting "that the advantages of vertical restrictions should not be limited to the categories of new entrants and failing firms"). While the Court in a footnote in *GTE Sylvania* suggested that differences between vertical price and nonprice restraints could support different legal treatment, see *id., at 51, n. 18, 97 S. Ct. 2549, 53 L. Ed. 2d 568*, **[****44]** the central part of the opinion relied on authorities and arguments that find unequal treatment "difficult to justify," *id., at 69-70, 97 S. Ct. 2549, 53 L. Ed. 2d 568* (White, J., concurring in judgment).

Continuing in this direction, in two cases in the 1980's the Court defined legal rules to limit the reach of *Dr.* **[***644]** *Miles* and to accommodate the doctrines enunciated in **[**2722]** *GTE Sylvania* and *Colgate.* See *Business Electronics, supra, at 726-728, 108 S. Ct. 1515, 99 L. Ed. 2d 808*; *Monsanto, 465 U.S., at 763-764, 104 S. Ct. 1464, 79 L. Ed. 2d 775*. In *Monsanto*, ***HN18***[🡅] ***LEdHN[18]***[🡅] [18] the Court required that antitrust plaintiffs alleging a *§ 1* price-fixing conspiracy must present evidence tending to exclude the possibility a manufacturer and its distributors acted in an independent manner. *Id., at 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775*. Unlike Justice Brennan's concurrence, which rejected arguments that *Dr. Miles* should be overruled, see *465 U.S., at 769, 104 S. Ct. 1464, 79 L. Ed. 2d 775*, the Court "decline[d] to reach the question" whether vertical agreements fixing resale prices always should be unlawful because neither party suggested otherwise, *id., at 761-762, n 7, 104 S. Ct. 1464, 79 L. Ed. 2d 775*. In **[*902]** *Business Electronics* the Court further narrowed the scope of *Dr. Miles.* It held that ***LEdHN[19]***[🡅] [19] **[****45]** ***HN19***[🡅] the *per se* rule applied only to specific agreements over price levels and not to an agreement between a manufacturer and a distributor to terminate a price-cutting distributor. *485 U.S., at 726-727, 735-736, 108 S. Ct. 1515, 99 L. Ed. 2d 808*.

Most recently, in 1997, after examining the issue of vertical maximum price-fixing agreements in light of commentary and real experience, the Court overruled a 29-year-old precedent treating those agreements as *per se* illegal. *Khan, 522 U.S., at 22, 118 S. Ct. 275, 139 L. Ed. 2d 199* (overruling *Albrecht v. Herald Co., 390 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968))*. It held instead that ***HN20***[🡅] ***LEdHN[20]***[🡅] [20] they should be evaluated under the traditional rule of reason. *522 U.S., at 22, 118 S. Ct. 275, 139 L. Ed. 2d 199*. Our continued limiting of the reach of the decision in *Dr. Miles* and our recent treatment of other vertical restraints justify the conclusion that *Dr. Miles* should not be retained.

The *Dr. Miles* rule is also inconsistent with a principled framework, for it makes little economic sense when analyzed with our other cases on vertical restraints. If we were to decide the procompetitive effects of resale price maintenance were insufficient to overrule *Dr. Miles*, then cases such as *Colgate* and **[****46]** *GTE Sylvania* themselves would be called into question. These later decisions, while they may result in less intrabrand competition, can be justified because they permit manufacturers to secure the procompetitive benefits associated with vertical price restraints through other methods. The other methods, however, could be less efficient for a particular manufacturer to establish and sustain. The end result hinders competition and consumer welfare because manufacturers are forced to engage in second-best alternatives and because consumers are required to shoulder the increased expense of the inferior practices.

The manufacturer has a number of legitimate options to achieve benefits similar to those provided by vertical price restraints. A manufacturer can exercise its *Colgate* right to refuse to deal with retailers that do not follow its suggested prices. See *250 U.S., at 307, 39 S. Ct. 465, 63 L. Ed. 2d 992*. The economic effects of unilateral **[*903]** and concerted price setting are in general the same. See, *e.g., Monsanto, 465 U.S., at 762-764, 104 S. Ct. 1464, 79 L. Ed. 2d 775*. The problem for the manufacturer is that a jury might conclude its unilateral policy was really a vertical agreement, subjecting it to treble damages **[****47]** and potential criminal liability. *Ibid.; Business Electronics, supra,* ***[***645]*** *at 728, 108 S. Ct. 1515, 99 L. Ed. 2d 808*. Even with the stringent standards in

Monsanto and *Business Electronics*, this danger can lead, and has led, rational manufacturers to take wasteful measures. See, *e.g.,* Brief for PING, Inc., as *Amicus Curiae* 9-18. A manufacturer might refuse to discuss its pricing policy with its distributors except through counsel knowledgeable of the subtle intricacies of the law. Or it might terminate longstanding distributors for minor violations without seeking an explanation. See *ibid.* The increased costs these burdensome **[**2723]** measures generate flow to consumers in the form of higher prices.

Furthermore, depending on the type of product it sells, a manufacturer might be able to achieve the procompetitive benefits of resale price maintenance by integrating downstream and selling its products directly to consumers. *Dr. Miles* tilts the relative costs of vertical integration and vertical agreement by making the former more attractive based on the *per se* rule, not on real market conditions. See *Business Electronics, supra, at 725, 108 S. Ct. 1515, 99 L. Ed. 2d 808*; see generally Coase, The Nature **[****48]** of the Firm, 4 Economica, New Series 386 (1937). This distortion might lead to inefficient integration that would not otherwise take place, so that consumers must again suffer the consequences of the suboptimal distribution strategy. And integration, unlike vertical price restraints, eliminates all intrabrand competition. See, *e.g., GTE Sylvania, supra, at 57, n 26, 97 S. Ct. 2549, 53 L. Ed. 2d 568*.

There is yet another consideration. A manufacturer can impose territorial restrictions on distributors and allow only one distributor to sell its goods in a given region. Our cases have recognized, and the economics literature confirms, that these vertical nonprice restraints have impacts similar to **[*904]** those of vertical price restraints; both reduce intrabrand competition and can stimulate retailer services. See, *e.g., Business Electronics, supra, at 728, 108 S. Ct. 1515, 99 L. Ed. 2d 808*; *Monsanto, supra, at 762-763, 104 S. Ct. 1464, 79 L. Ed. 2d 775*; see also Brief for Economists as *Amici Curiae* 17-18. Cf. Scherer & Ross 560 (noting that vertical nonprice restraints "can engender inefficiencies at least as serious as those imposed upon the consumer by resale price maintenance"); Steiner, How Manufacturers Deal with the Price-Cutting **[****49]** Retailer: When Are Vertical Restraints Efficient? 65 Antitrust L. J. 407, 446-447 (1997) (indicating that "***antitrust law*** should recognize that the consumer interest is often better served by [resale price maintenance]--contrary to its per se illegality and the rule-of-reason status of vertical nonprice restraints"). The same legal standard (*per se* unlawfulness) applies to horizontal market division and horizontal price fixing because both have similar economic effect. There is likewise little economic justification for the current differential treatment of vertical price and nonprice restraints. Furthermore, vertical nonprice restraints may prove less efficient for inducing desired services, and they reduce intrabrand competition more than vertical price restraints by eliminating both price and service competition. See Brief for Economists as *Amici Curiae* 17-18.

In sum, it is a flawed antitrust doctrine that serves the interests of lawyers--by creating legal distinctions that operate as traps for the **[***646]** unwary--more than the interests of consumers--by requiring manufacturers to choose second-best options to achieve sound business objectives.

B

Respondent's **[****50]** arguments for reaffirming *Dr. Miles* on the basis of *stare decisis* do not require a different result. Respondent looks to congressional action concerning vertical price restraints. In 1937, Congress passed the Miller-Tydings Fair Trade Act, 50 Stat. 693, which made vertical price restraints legal if authorized by a fair trade law **[*905]** enacted by a State. Fifteen years later, Congress expanded the exemption to permit vertical price-setting agreements between a manufacturer and a distributor to be enforced against other distributors not involved in the agreement. McGuire Act, 66 Stat. 632 . In 1975, however, Congress repealed both Acts. Consumer Goods Pricing Act, *89 Stat. 801* . That the *Dr. Miles* rule applied to vertical **[**2724]** price restraints in 1975, according to respondent, shows Congress ratified the rule.

This is not so. ***HN21***[] ***LEdHN[21]***[] [21] The text of the Consumer Goods Pricing Act did not codify the rule of *per se* illegality for vertical price restraints. It rescinded statutory provisions that made them *per se* legal. Congress once again placed these restraints within the ambit of *§ 1* of the Sherman Act. And, as has been discussed, Congress intended *§ 1* to give courts the ability "to develop **[****51]** governing principles of law" in the common-law tradition. *Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 643, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981)*; see *Business Electronics, 485 U.S., at 731, 108 S. Ct. 1515, 99 L. Ed. 2d 808* ("The changing content of the term 'restraint of trade' was well recognized at the time the Sherman Act was enacted"). Congress could have set the *Dr. Miles* rule in stone, but it chose a more flexible option. We respect its decision by analyzing vertical price restraints, like all restraints, in conformance with traditional *§ 1* principles, including the principle that our ***HN22***[] ***LEdHN[22]***[] [22] antitrust doctrines "evolv[e] with new circumstances and new wisdom." *Business Electronics, supra, at 732, 108 S. Ct. 1515, 99 L. Ed. 2d 808*; see also Easterbrook 139.

HN23[] ***LEdHN[23]***[] [23] The rule of reason, furthermore, is not inconsistent with the Consumer Goods Pricing Act. Unlike the earlier congressional exemption, it does not treat vertical price restraints as *per se* legal. In this respect, the justifications for the prior exemption are illuminating. Its goal "was to allow the States to protect small retail establishments that Congress thought might otherwise be driven from the marketplace by large-volume discounters." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 102, **[*906]** 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*. **[****52]** The state fair trade laws also appear to have been justified on similar grounds. See Areeda & Hovenkamp 298. The rationales for these provisions are foreign to the Sherman Act. Divorced from competition and consumer welfare, they were designed to save inefficient small retailers from their inability to compete. ***HN24***[] ***LEdHN[24]***[] [24] The purpose of the antitrust laws, by contrast, is "the protection of *competition*, not *competitors.*" *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (internal quotation marks omitted). To the extent Congress repealed the exemption for some vertical price restraints to end its prior practice of encouraging anti-competitive **[***647]** conduct, the rule of reason promotes the same objective.

Respondent also relies on several congressional appropriations in the mid-1980's in which Congress did not permit the Department of Justice or the Federal Trade Commission to use funds to advocate overturning *Dr. Miles.* See, *e.g., 97 Stat. 1071*. We need not pause long in addressing this argument. The conditions on funding are no longer in place, see, *e.g.,* Brief for United States as *Amicus Curiae* 21, and they were ambiguous at best. As **[****53]** much as they might show congressional approval for *Dr. Miles*, they might demonstrate a different proposition: that Congress could not pass legislation codifying the rule and reached a short-term compromise instead.

Reliance interests do not require us to reaffirm *Dr. Miles.* To be sure, ***HN25***[] ***LEdHN[25]***[] [25] reliance on a judicial opinion is a significant reason to adhere to it, *Payne v. Tennessee, 501 U.S. 808, 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)*, especially "in cases involving property and contract rights," *Khan, 522 U.S., at 20, 118 S. Ct. 275, 39 L. Ed. 2d 199*. The reliance interests here, however, like the reliance interests in *Khan,* cannot justify an inefficient rule, especially because the narrowness of the rule has allowed manufacturers **[**2725]** to set minimum resale prices in other ways. And while the *Dr. Miles* rule is longstanding, resale price maintenance was legal under fair trade laws **[*907]** in a majority of States for a large part of the past century up until 1975.

It is also of note that during this time "when the legal environment in the [United States] was most favorable for [resale price maintenance], no more than a tiny fraction of manufacturers ever employed [resale price maintenance] contracts." **[****54]** Overstreet 6; see also *id.,* at 169 (noting that "no more than one percent of manufacturers, accounting for no more than ten percent of consumer goods purchases, ever employed [resale price maintenance] in any single year in the [United States]"); Scherer & Ross 549 (noting that "[t]he fraction of U.S. retail sales covered by [resale price maintenance] in its heyday has been variously estimated at from 4 to 10 percent"). To the extent consumers demand cheap goods, judging vertical price restraints under the rule of reason will not prevent the market from providing them. Cf. Easterbrook 152-153 (noting that "S.S. Kresge (the old K-Mart) flourished during the days of manufacturers' greatest freedom" because "discount stores offer a combination of price and service that many customers value" and that "[n]othing in restricted dealing threatens the ability of consumers to find low prices"); Scherer & Ross 557 (noting that "for the most part, the effects of the [Consumer Goods Pricing Act] were imperceptible because the forces of competition had already repealed the [previous antitrust exemption] in their own quiet way").

For these reasons ***HN26***[] ***LEdHN[26]***[] [26] the Court's decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911),* **[****55]** is now overruled. Vertical price restraints are to be judged according to the rule of reason.

V

Noting that Leegin's president has an ownership interest in retail stores that sell Brighton, respondent claims Leegin participated in an unlawful horizontal cartel with competing **[*908]** retailers. Respondent did not make this **[***648]** allegation in the lower courts, and we do not consider it here.

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

Dissent by: BREYER

Dissent

Justice **Breyer,** with whom Justice **Stevens,** Justice **Souter,** and Justice **Ginsburg** join, dissenting.

In *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 394, 408-409, 31 S. Ct. 376, 55 L. Ed. 502 (1911)*, this Court held that an agreement between a manufacturer of proprietary medicines and its dealers to fix the minimum price at which its medicines could be sold was "invalid . . . under the [Sherman Act, *15 U.S.C. § 1*]." This Court has consistently read *Dr. Miles* as establishing a bright-line rule that agreements fixing minimum resale prices are *per se* illegal. See, *e.g., United States v. Trenton Potteries Co., 273 U.S. 392, 399-401, 47 S. Ct. 377, 71 L. Ed. 700 (1927)*; *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*. **[****56]** That *per se* rule is one upon which the legal profession, business, and the public have relied for close to a century. Today the Court holds that courts must determine the lawfulness of minimum resale price maintenance by applying, not a bright-line *per se* rule, but a circumstance-specific "rule of reason." *Ante*, at 907, 168 L. Ed. 2d, at 647. And in doing so it overturns *Dr. Miles.*

The Court justifies its departure from ordinary considerations of *stare decisis* by **[**2726]** pointing to a set of arguments well known in the antitrust literature for close to half a century. See *ante*, at 889-892, 168 L. Ed. 2d, at 636-638. Congress has repeatedly found in these arguments insufficient grounds for overturning the *per se* rule. See, *e.g.*, Hearings on H. R. 10527 et al. before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., 74-76, 89, 99, 101-102, 192-195, 261-262 (1958). And, **[*909]** in my view, they do not warrant the Court's now overturning so well-established a legal precedent.

I

The Sherman Act seeks to maintain a marketplace free of anticompetitive practices, in particular **[****57]** those enforced by agreement among private firms. The law assumes that such a marketplace, free of private restrictions, will tend to bring about the lower prices, better products, and more efficient production processes that consumers typically desire. In determining the lawfulness of particular practices, courts often apply a "rule of reason." They examine both a practice's likely anticompetitive effects and its beneficial business justifications. See, *e.g., National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 109-110, and n 39, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*; *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 688-691, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*; *Board of Trade of Chicago v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*.

Nonetheless, sometimes the likely anticompetitive consequences of a particular practice are so serious and the potential justifications so few (or, **[***649]** *e.g.*, so difficult to prove) that courts have departed from a pure "rule of reason" approach. And sometimes this Court has imposed a rule of *per se* unlawfulness--a rule that instructs courts to find the practice unlawful all (or nearly all) **[****58]** the time. See, *e.g., NYNEX, supra, at 133, 119 S. Ct. 493, 142 L. Ed. 2d 510*; *Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 343-344, and n 16, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*; *Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50, n. 16, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*; *United States v. Topco Associates, Inc., 405 U.S. 596, 609-611, 92 S. Ct. 1126, 31 L. Ed. 2d*

515 (1972); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 213-214, 60 S. Ct. 811, 84 L. Ed. 1129 (1940) (citing and quoting Trenton Potteries, supra, at 397-398, 47 S. Ct. 377, 71 L. Ed. 700).

The case before us asks which kind of approach the courts should follow where minimum resale price maintenance is at issue. Should they apply a *per se* rule (or a variation) that **[*910]** would make minimum resale price maintenance always (or *almost* always) unlawful? Should they apply a "rule of reason"? Were the Court writing on a blank slate, I would find these questions difficult. But, of course, the Court is not writing on a blank slate, and that fact makes a considerable legal difference.

To best explain why the question would be difficult were we deciding it afresh, I briefly summarize several classical arguments for and against the use of a *per se* rule. The arguments **[****59]** focus on three sets of considerations, those involving: (1) potential anticompetitive effects, (2) potential benefits, and (3) administration. The difficulty arises out of the fact that the different sets of considerations point in different directions. See, *e.g.*, 8 P. Areeda, ***Antitrust Law*** PP 1628-1633, pp 330-392 (1st ed. 1989) (hereinafter Areeda); 8 P. Areeda & H. Hovenkamp, ***Antitrust Law*** PP 1628-1633, pp 288-339 (2d ed. 2004) (hereinafter Areeda & Hovenkamp); Easterbrook, Vertical Arrangements and the Rule of Reason, 53 Antitrust L. J. 135, 146-152 (1984) **[**2727]** (hereinafter Easterbrook); Pitofsky, In Defense of Discounters: The No-Frills Case for a *Per Se* Rule Against Vertical Price Fixing, 71 Geo. L. J. 1487 (1983) (hereinafter Pitofsky); Scherer, The Economics of Vertical Restraints, 52 Antitrust L. J. 687, 706-707 (1983) (hereinafter Scherer); Posner, The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality, 48 U. Chi. L. Rev. 6, 22-26 (1981); Brief for William S. Comanor et al. as *Amici Curiae* 7-10.

On the one hand, agreements setting minimum resale prices may have serious **[****60]** anticompetitive consequences. *In respect to dealers:* Resale price maintenance agreements, rather like horizontal price agreements, can diminish or eliminate price competition among dealers of a single brand or (if practiced generally by manufacturers) among multibrand dealers. In doing so, they can prevent dealers from offering customers the lower prices that many customers prefer; they can prevent dealers from responding to changes **[*911]** in demand, say, falling demand, by cutting prices; they can encourage dealers to substitute service, for price, competition, thereby threatening wastefully to attract too many resources into that portion of the industry; they can inhibit expansion by more efficient dealers whose lower prices might otherwise attract more customers, stifling the development of new, more efficient **[***650]** modes of retailing; and so forth. See, *e.g.*, 8 Areeda & Hovenkamp P 1632c, at 319-321; Steiner, The Evolution and Applications of Dual-Stage Thinking, 49 The Antitrust Bulletin 877, 899-900 (2004); Comanor, Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy, 98 Harv. L. Rev. 983, 990-1000 (1985).

In respect to producers: Resale **[****61]** price maintenance agreements can help to reinforce the competition-inhibiting behavior of firms in concentrated industries. In such industries firms may tacitly collude, *i.e.*, observe each other's pricing behavior, each understanding that price cutting by one firm is likely to trigger price competition by all. See 8 Areeda & Hovenkamp P 1632d, at 321-323; P. Areeda & L. Kaplow, Antitrust Analysis PP 231-233, pp 276-283 (4th ed. 1988) (hereinafter Areeda & Kaplow). Cf. United States v. Container Corp. of America, 393 U.S. 333, 89 S. Ct. 510, 21 L. Ed. 2d 526 (1969); Areeda & Kaplow PP 247-253, at 327-348. Where that is so, resale price maintenance can make it easier for each producer to identify (by observing retail markets) when a competitor has begun to cut prices. And a producer who cuts wholesale prices *without* lowering the minimum resale price will stand to gain little, if anything, in increased profits, because the dealer will be unable to stimulate increased consumer demand by passing along the producer's price cut to consumers. In either case, resale price maintenance agreements will tend to prevent price competition from "breaking out"; and they will thereby tend to stabilize producer **[****62]** prices. See Pitofsky 1490-1491. Cf., *e.g.,* Container Corp., supra, at 336-337, 89 S. Ct. 510, 21 L. Ed. 2d 526.

[*912] Those who express concern about the potential anticompetitive effects find empirical support in the behavior of prices before, and then after, Congress in 1975 repealed the Miller-Tydings Fair Trade Act, 50 Stat. 693 , and the McGuire Act, 66 Stat. 631 . Those Acts had permitted (but not required) individual States to enact "fair trade" laws authorizing minimum resale price maintenance. At the time of repeal minimum resale price maintenance was lawful in 36 States; it was unlawful in 14 States. See Hearings on S. 408 before the

Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 173 (1975) **[**2728]** (hereinafter Hearings on S. 408) (statement of Thomas E. Kauper, Assistant Attorney General, Antitrust Division). Comparing prices in the former States with prices in the latter States, the Department of Justice argued that minimum resale price maintenance had raised prices by 19% to 27%. See Hearings on H. R. 2384 before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, 94th Cong., 1st Sess., 122 (1975) **[****63]** (hereinafter Hearings on H. R. 2384) (statement of Keith I. Clearwaters, Deputy Assistant Attorney General, Antitrust Division).

After repeal, minimum resale price maintenance agreements were unlawful *per se* in every State. The Federal Trade Commission (FTC) staff, after studying numerous price surveys, wrote that collectively the surveys "indicate[d] that [resale price maintenance] in most cases increased the prices of products sold with [resale price maintenance]." Bureau of Economics Staff Report to the FTC, T. Overstreet, Resale Price Maintenance: Economic Theories and Empirical **[***651]** Evidence 160 (1983) (hereinafter Overstreet). Most economists today agree that, in the words of a prominent antitrust treatise, "resale price maintenance tends to produce higher consumer prices than would otherwise be the case." 8 Areeda & Hovenkamp P 1604b, at 40 (finding "[t]he evidence . . . persuasive on this point"). See also Brief for William S. Comanor et al. as *Amici Curiae* 4 ("It is uniformly **[*913]** acknowledged that [resale price maintenance] and other vertical restraints lead to higher consumer prices").

On the other hand, those favoring resale price maintenance have long **[****64]** argued that resale price maintenance agreements can provide important consumer benefits. The majority lists two: First, such agreements can facilitate new entry. *Ante*, at 891, 168 L. Ed. 2d, at 637-638. For example, a newly entering producer wishing to build a product name might be able to convince dealers to help it do so--if, but only if, the producer can assure those dealers that they will later recoup their investment. Without resale price maintenance, late-entering dealers might take advantage of the earlier investment and, through price competition, drive prices down to the point where the early dealers cannot recover what they spent. By assuring the initial dealers that such later price competition will not occur, resale price maintenance can encourage them to carry the new product, thereby helping the new producer succeed. See 8 Areeda & Hovenkamp PP 1617a, 1631b, at 193-196, 308. The result might be increased competition at the producer level, *i.e.*, greater *inter*-brand competition, that brings with it net consumer benefits.

Second, without resale price maintenance a producer might find its efforts to sell a product undermined by what resale price maintenance advocates call "free riding. **[****65]** " *Ante*, at 890-891, 168 L. Ed. 2d, at 636-637. Suppose a producer concludes that it can succeed only if dealers provide certain services, say, product demonstrations, high quality shops, advertising that creates a certain product image, and so forth. Without resale price maintenance, some dealers might take a "free ride" on the investment that others make in providing those services. Such a dealer would save money by not paying for those services and could consequently cut its own price and increase its own sales. Under these circumstances, dealers might prove unwilling to invest in the provision of necessary services. See, *e.g.*, 8 Areeda & Hovenkamp PP 1611-1613, **[*914]** 1631c, at 126-165, 309-313; R. Posner, ***Antitrust Law*** 172-173 (2d ed. 2001); R. Bork, The Antitrust Paradox 290-291 (1978) (hereinafter Bork); Easterbrook 146-149.

[2729]** Moreover, where a producer and not a group of dealers seeks a resale price maintenance agreement, there is a special reason to believe some such benefits exist. That is because, other things being equal, producers should want to encourage price competition among their dealers. By doing so they will often increase profits by selling more of their product. See *Sylvania, 433 U.S., at 56, n. 24, 97 S. Ct. 2549, 53 L. Ed. 2d 568*; **[****66]** Bork 290. And that is so, even if the producer possesses sufficient market power to earn a supernormal profit. That is to say, other things being equal, the producer will benefit by charging his dealers a competitive (or even a higher-than-competitive) wholesale price while encouraging price competition **[***652]** among them. Hence, if the producer is the moving force, the producer must have some special reason for wanting resale price maintenance; and in the absence of, say, concentrated producer markets (where that special reason might consist of a desire to stabilize wholesale prices), that special reason may well reflect the special circumstances just described: new entry, "free riding," or variations on those themes.

The upshot is, as many economists suggest, sometimes resale price maintenance can prove harmful; sometimes it can bring benefits. See, *e.g.*, Brief for Economists as *Amici Curiae* 16; 8 Areeda & Hovenkamp PP 1631-1632, at

306-328; Pitofsky 1495; Scherer 706-707. But before concluding that courts should consequently apply a rule of reason, I would ask such questions as, how often are harms or benefits likely to occur? How easy is it to separate the beneficial sheep from **[****67]** the antitrust goats?

Economic discussion, such as the studies the Court relies upon, can *help* provide answers to these questions, and in doing so, economics can, and should, inform ***antitrust law***. But ***antitrust law*** cannot, and should not, precisely replicate **[*915]** economists' (sometimes conflicting) views. That is because law, unlike economics, is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. And that fact means that courts will often bring their own administrative judgment to bear, sometimes applying rules of *per se* unlawfulness to business practices even when those practices sometimes produce benefits. See, *e.g.*, F. Scherer & D. Ross, Industrial Market Structure and Economic Performance 335-339 (3d ed. 1990) (hereinafter Scherer & Ross) (describing some circumstances under which price-fixing agreements could be more beneficial than "unfettered competition," but also noting potential costs of moving from a *per se* ban to a rule of reasonableness assessment of such agreements).

I have already described studies and analyses that suggest **[****68]** (though they cannot prove) that resale price maintenance can cause harms with some regularity--and certainly when dealers are the driving force. But what about benefits? How often, for example, will the benefits to which the Court points occur in practice? I can find no economic consensus on this point. There is a consensus in the literature that "free riding" takes place. But "free riding" often takes place in the economy without any legal effort to stop it. Many visitors to California take free rides on the Pacific Coast Highway. We all benefit freely from ideas, such as that of creating the first supermarket. Dealers often take a "free ride" on investments that others have made in building a product's name and reputation. The question is how often the "free riding" problem is serious enough significantly to deter dealer investment.

[2730]** To be more specific, one can easily *imagine* a dealer who refuses to provide important presale services, say, a detailed explanation of how a product works (or who fails to provide a proper atmosphere in which to sell expensive perfume or alligator billfolds), lest customers use that "free" service (or **[*916]** enjoy the psychological benefit arising when **[****69]** a high-priced retailer stocks a particular brand of billfold or handbag) and then buy from another dealer at a lower price. Sometimes this must happen in reality. But does **[***653]** it happen often? We do, after all, live in an economy where firms, despite *Dr. Miles*' *per se* rule, still sell complex technical equipment (as well as expensive perfume and alligator billfolds) to consumers.

All this is to say that the ultimate question is not whether, but *how much,* "free riding" of this sort takes place. And, after reading the briefs, I must answer that question with an uncertain "sometimes." See, *e.g.*, Brief for William S. Comanor et al. as *Amici Curiae* 6-7 (noting "skepticism in the economic literature about how often [free riding] actually occurs"); Scherer & Ross 551-555 (explaining the "severe limitations" of the free-rider justification for resale price maintenance); Pitofsky, Why *Dr. Miles* Was Right, 8 Regulation, No. 1, pp 27, 29-30 (Jan./Feb. 1984) (similar analysis).

How easily can courts identify instances in which the benefits are likely to outweigh potential harms? My own answer is, *not very easily.* For one thing, it is often difficult to **[****70]** identify *who*--producer or dealer--is the moving force behind any given resale price maintenance agreement. Suppose, for example, several large multibrand retailers all sell resale-price-maintained products. Suppose further that small producers set retail prices because they fear that, otherwise, the large retailers will favor (say, by allocating better shelf space) the goods of other producers who practice resale price maintenance. Who "initiated" this practice, the retailers hoping for considerable insulation from retail competition, or the producers, who simply seek to deal best with the circumstances they find? For another thing, as I just said, it is difficult to determine just when, and where, the "free riding" problem is serious enough to warrant legal protection.

[*917] I recognize that scholars have sought to develop checklists and sets of questions that will help courts separate instances where anticompetitive harms are more likely from instances where only benefits are likely to be found. See, *e.g.*, 8 Areeda & Hovenkamp PP 1633c-1633e, at 330-339. See also Brief for William S. Comanor et al. as *Amici Curiae* 8-10. But applying these criteria in court **[****71]** is often easier said than done. The Court's invitation to consider the existence of "market power," for example, *ante*, at 898, 168 L. Ed. 2d, at 641, invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets. And resale price maintenance cases, unlike a major merger or monopoly case, are likely to prove numerous and involve only private parties. One cannot fairly expect judges and juries in such cases to apply complex economic criteria without making a considerable number of mistakes, which themselves may impose serious costs. See, *e.g.*, H. Hovenkamp, The Antitrust Enterprise 105 (2005) (litigating a rule of reason case is "one of the most costly procedures in antitrust practice"). See also Bok, *Section 7* of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 238-247 (1960) (describing lengthy FTC efforts to apply complex criteria in a merger case).

[2731]** Are there special advantages to a bright-line rule? Without such a rule, it is often unfair, and consequently impractical, for enforcement officials to bring criminal proceedings. And since enforcement resources are limited, **[****72]** that loss may tempt some producers **[***654]** or dealers to enter into agreements that are, on balance, anticompetitive.

Given the uncertainties that surround key items in the overall balance sheet, particularly in respect to the "administrative" questions, I can concede to the majority that the problem is difficult. And, if forced to decide now, at most I might agree that the *per se* rule should be slightly modified to allow an exception for the more easily identifiable **[*918]** and temporary condition of "new entry." See Pitofsky 1495. But I am not now forced to decide this question. The question before us is not what should be the rule, starting from scratch. We here must decide whether to change a clear and simple price-related antitrust rule that the courts have applied for nearly a century.

II

We write, not on a blank slate, but on a slate that begins with *Dr. Miles* and goes on to list a century's worth of similar cases, massive amounts of advice that lawyers have provided their clients, and untold numbers of business decisions those clients have taken in reliance upon that advice. See, *e.g.,* *United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 721, 64 S. Ct. 805, 88 L. Ed. 1024 (1944)*; **[****73]** *Sylvania, 433 U.S., at 51, n. 18, 97 S. Ct. 2549, 53 L. Ed. 2d 568* ("The *per se* illegality of [vertical] price restrictions has been established firmly for many years . . ."). Indeed, a Westlaw search shows that *Dr. Miles* itself has been cited dozens of times in this Court and hundreds of times in lower courts. Those who wish this Court to change so well-established a legal precedent bear a heavy burden of proof. See *Illinois Brick Co. v. Illinois, 431 U.S. 720, 736, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)* (noting, in declining to overrule an earlier case interpreting *§ 4* of the Clayton Act, that "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation"). I am not aware of any case in which this Court has overturned so well-established a statutory precedent. Regardless, I do not see how the Court can claim that ordinary criteria for overruling an earlier case have been met. See, *e.g.,* *Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854-855, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)*. See also *Federal Election Comm'n v. Wisconsin Right to Life, Inc., ante, at 500-503, 127 S. Ct. 2652, 168 L. Ed. 2d 329, 2007 U.S. LEXIS 8515* (Scalia, J., concurring **[****74]** in part and concurring in judgment).

[*919] A

I can find no change in circumstances in the past several decades that helps the majority's position. In fact, there has been one important change that argues strongly to the contrary. In 1975, Congress repealed the McGuire and Miller-Tydings Acts. See Consumer Goods Pricing Act of 1975, 89 Stat. 801. And it thereby consciously *extended* *Dr. Miles*' *per se* rule. Indeed, at that time the Department of Justice and the FTC, then urging application of the *per se* rule, discussed virtually every argument presented now to this Court as well as others not here presented. And they explained to Congress why Congress should reject them. See Hearings on S. 408, at 176-177 (statement of Thomas E. Kauper, Assistant Attorney General, Antitrust Division); *id.*, at 170-172 (testimony of Lewis A. Engman, Chairman of the FTC); Hearings on H. R. 2384, at 113-114 (testimony **[***655]** **[**2732]** of Keith I. Clearwaters, Deputy Assistant Attorney General, Antitrust Division). Congress fully understood, and consequently intended, that the result of its repeal of McGuire and Miller-Tydings would be to make minimum resale price maintenance *per se* unlawful. See, *e.g.*, S. **[****75]** Rep. No. 94-466, pp 1-3 (1975) ("Without [the exemptions authorized by the Miller-Tydings and McGuire Acts,] the agreements they authorize would violate the antitrust laws . . . . [R]epeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices"). See also *Sylvania, supra, at 51, n 18, 97 S. Ct. 2549, 53 L. Ed. 2d 568* ("Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair-trade pricing at the option of the individual States").

Congress did not prohibit this Court from reconsidering the *per se* rule. But enacting major legislation premised upon the existence of that rule constitutes important public **[*920]** reliance upon that rule. And doing so aware of the relevant arguments constitutes even stronger reliance upon the Court's keeping the rule, at least in the absence of some significant change in respect to those arguments.

Have there been any such changes? There have been a few economic studies, described in some of the briefs, that argue, contrary to the testimony of the Justice Department and the FTC to Congress in 1975, that resale price **[****76]** maintenance is not harmful. One study, relying on an analysis of litigated resale price maintenance cases from 1975 to 1982, concludes that resale price maintenance does not ordinarily involve producer or dealer collusion. See Ippolito, Resale Price Maintenance: Empirical Evidence from Litigation, 34 J. Law & Econ. 263, 281-282, 292 (1991). But this study equates the failure of plaintiffs to *allege* collusion with the *absence* of collusion--an equation that overlooks the superfluous nature of allegations of horizontal collusion in a resale price maintenance case and the tacit form that such collusion might take. See H. Hovenkamp, Federal Antitrust Policy § 11.3c, p 464, n 19 (3d ed. 2005); *supra*, at 911, 168 L. Ed. 2d, at 649-650.

The other study provides a theoretical basis for concluding that resale price maintenance "need not lead to higher retail prices." Marvel & McCafferty, The Political Economy of Resale Price Maintenance, 94 J. Pol. Econ. 1074, 1075 (1986). But this study develops a theoretical model "under the assumption that [resale price maintenance] is efficiency-enhancing." *Ibid.* Its only empirical support is a 1940 study that the authors acknowledge is much criticized. **[****77]** See *id.*, at 1091. And many other economists take a different view. See Brief for William S. Comanor et al. as *Amici Curiae* 4.

Regardless, taken together, these studies at most may offer some mild support for the majority's position. But they cannot constitute a major change in circumstances.

Petitioner and some *amici* have also presented us with newer studies that show that resale price maintenance sometimes **[*921]** brings consumer benefits. Overstreet 119-129 (describing numerous case studies). But the proponents of a *per se* rule have always conceded as much. What is remarkable about the majority's arguments is that *nothing* in this respect **[***656]** *is new.* See *supra*, at 910, 919, 168 L. Ed. 2d, at 649, 654 (citing articles and congressional testimony going back several decades). The only new feature of these arguments lies in the fact that the most current advocates of overruling *Dr. Miles* have abandoned a host of **[**2733]** other not-very-persuasive arguments upon which prior resale price maintenance proponents used to rely. See, *e.g.*, 8 Areeda P 1631a, at 350-352 (listing "'[t]raditional' justifications" for resale price maintenance).

The one arguable exception consists of the majority's **[****78]** claim that "even absent free riding," resale price maintenance "may be the most efficient way to expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services." *Ante*, at 892, 168 L. Ed. 2d, at 637-638. I cannot count this as an exception, however, because I do not understand how, in the absence of free riding (and assuming competitiveness), an established producer would need resale price maintenance. Why, on these assumptions, would a dealer not "expand" its "market share" as best that dealer sees fit, obtaining appropriate payment from consumers in the process? There may be an answer to this question. But I have not seen it. And I do not think that we should place significant weight upon justifications that the parties do not explain with sufficient clarity for a generalist judge to understand.

No one claims that the American economy has changed in ways that might support the majority. Concentration in retailing has increased. See, *e.g.*, Brief for Respondent 18 (since minimum resale price maintenance was banned nationwide in 1975, the total number of retailers has dropped while the growth in sales **[****79]** per store has risen); Brief for American Antitrust Institute as *Amicus Curiae* 17, n 20 (citing private study reporting that the combined sales of the 10 largest **[*922]** retailers worldwide has grown to nearly 30% of total retail sales of top 250 retailers;

also quoting 1999 Organisation for Economic Co-operation and Development report stating that the "'last twenty years have seen momentous changes in retail distribution including significant increases in concentration'"); Mamen, Facing Goliath: Challenging the Impacts of Supermarket Consolidation on our Local Economies, Communities, and Food Security, The Oakland Institute, 1 Policy Brief, No. 3, pp 1, 2 (Spring 2007), http://www.oaklandinstitute.org/pdfs/facing_goliath.pdf (as visited June 25, 2007, and available in Clerk of Court's case file) (noting that "[f]or many decades, the top five food retail firms in the U. S. controlled less than 20 percent of the market"; from 1997 to 2000, "the top five firms increased their market share from 24 to 42 percent of all retail sales"; and "[b]y 2003, they controlled over half of all grocery sales"). That change, other things being equal, may enable (and motivate) more retailers, accounting for **[****80]** a greater percentage of total retail sales volume, to seek resale price maintenance, thereby making it more difficult for price-cutting competitors (perhaps internet retailers) to obtain market share.

Nor has anyone argued that concentration among manufacturers that might use resale price maintenance has diminished significantly. And as far as I can tell, it has not. Consider household electrical appliances, which a study from the late 1950's **[***657]** suggests constituted a significant portion of those products subject to resale price maintenance at that time. See Hollander, United States of America, in Resale Price Maintenance 67, 80-81 (B. Yamey ed. 1966). Although it is somewhat difficult to compare census data from 2002 with that from several decades ago (because of changes in the classification system), it is clear that at least some subsets of the household electrical appliance industry are *more* concentrated, in terms of manufacturer market power, now than they were then. For instance, the top eight domestic manufacturers of household cooking appliances accounted for 68% **[**2734]** **[*923]** of the domestic market (measured by value of shipments) in 1963 (the earliest date for which I was able to find **[****81]** data), compared with 77% in 2002. See Dept. of Commerce, Bureau of Census, 1972 Census of Manufactures, Special Report Series, Concentration Ratios in Manufacturing, No. MC72(SR)-2, p SR2-38 (1975) (hereinafter 1972 Census); Dept. of Commerce, Bureau of Census, 2002 Economic Census, Concentration Ratios: 2002, No. EC02-31SR-1, p 55 (2006) (hereinafter 2002 Census). The top eight domestic manufacturers of household laundry equipment accounted for 95% of the domestic market in 1963 (90% in 1958), compared with 99% in 2002. 1972 Census, at SR2-38; 2002 Census, at 55. And the top eight domestic manufacturers of household refrigerators and freezers accounted for 91% of the domestic market in 1963, compared with 95% in 2002. 1972 Census, at SR2-38; 2002 Census, at 55. Increased concentration among manufacturers increases the likelihood that producer-originated resale price maintenance will prove more prevalent today than in years past, and more harmful. At the very least, the majority has not explained how these, or other changes in the economy, could help support its position.

In sum, there is no relevant change. And without some such change, there is no ground for abandoning a well-established **[****82]** antitrust rule.

B

With the preceding discussion in mind, I would consult the list of factors that our case law indicates are relevant when we consider overruling an earlier case. Justice Scalia, writing separately in another of our cases this Term, well summarizes that law. See *Wisconsin Right to Life, Inc., ante, at 500-503, 127 S. Ct. 2652, 168 L. Ed. 2d 329, 2007 U.S. LEXIS 8515* (opinion concurring in part and concurring in judgment). And every relevant factor he mentions argues against overruling *Dr. Miles* here.

First, the Court applies *stare decisis* more "rigidly" in statutory than in constitutional cases. See *Glidden Co. v.* ***[*924]*** *Zdanok, 370 U.S. 530, 543, 82 S. Ct. 1459, 8 L. Ed. 2d 671 (1962)*; *Illinois Brick Co., 431 U.S., at 736, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. This is a statutory case.

Second, the Court does sometimes overrule cases that it decided wrongly only a reasonably short time ago. As Justice Scalia put it, "[o]verruling a *constitutional* case decided just a few years earlier is far from unprecedented." *Wisconsin Right to Life, ante, at 501, 127 S. Ct. 2652, 168 L. Ed. 2d 329, 2007 U.S. LEXIS 8515* (emphasis added). We here overrule one *statutory* case, *Dr. Miles*, decided 100 years ago, and we overrule the cases that reaffirmed its *per se* rule in the intervening years. See, *e.g.,* **[****83]** *Trenton Potteries, 273 U.S.,* ***[***658]*** *at 399-401, 47 S. Ct. 377, 71 L. Ed. 700*; *Bausch & Lomb, 321 U.S., at 721, 64 S. Ct. 805, 88 L. Ed. 2d 1024*; *United States v. Parke,* Davis & Co., 362 U.S. 29, 45-47, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960); Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 16-17, 84 S. Ct. 1051, 12 L. Ed. 2d 98 (1964).

Third, the fact that a decision creates an "unworkable" legal regime argues in favor of overruling. See Payne v. Tennessee, 501 U.S. 808, 827-828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991); Swift & Co. v. Wickham, 382 U.S. 111, 116, 86 S. Ct. 258, 15 L. Ed. 2d 194 (1965). Implementation of the *per se* rule, even with the complications attendant the exception allowed for in United States v. Colgate & Co., 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919), has proved practical over the course of the last century, particularly when compared with the many complexities of litigating a case under the "rule of reason" regime. No one has shown how moving from the *Dr. Miles* regime to "rule of reason" analysis **[**2735]** would make the legal regime governing minimum resale price maintenance more "administrable," Wisconsin Right to Life, ante, at 501, 127 S. Ct. 2652, 168 L. Ed. 2d 329, 2007 U.S. LEXIS 8515 (opinion of Scalia, J.), particularly since *Colgate* would remain good law with respect to *unreasonable* **[****84]** price maintenance.

Fourth, the fact that a decision "unsettles" the law may argue in favor of overruling. See Sylvania, 433 U.S., at 47, 97 S. Ct. 2549, 53 L. Ed. 568; Wisconsin Right to Life, ante, at 502, 127 S. Ct. 2652, 168 L. Ed. 2d 3291, 2007 U.S. LEXIS 8515 (opinion of Scalia, J.). The *per se* rule is well-settled law, as the Court itself has previously recognized. Sylvania, supra, at 51, n. 18, 97 S. Ct. 2549, 53 L. Ed. 568. It is the majority's change here that will unsettle the law.

[*925] Fifth, the fact that a case involves property rights or contract rights, where reliance interests are involved, argues against overruling. Payne, supra, at 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 . This case involves contract rights and perhaps property rights (consider shopping malls). And there has been considerable reliance upon the *per se* rule. As I have said, Congress relied upon the continued vitality of *Dr. Miles* when it repealed Miller-Tydings and McGuire. *Supra*, at 919-920, 168 L. Ed. 2d, at 654-655. The Executive Branch argued for repeal on the assumption that *Dr. Miles* stated the law. *Supra,* at 919-920. Moreover, whole sectors of the economy have come to rely upon the *per se* rule. A factory outlet store tells us that the rule "form[s] an essential part of the regulatory background against which **[****85]** [that firm] and many other discount retailers have financed, structured, and operated their businesses." Brief for Burlington Coat Factory Warehouse Corp. as *Amicus Curiae* 5. The Consumer Federation of America tells us that large low-price retailers would not exist without *Dr. Miles*; minimum resale price maintenance, "by stabilizing price levels and preventing low-price competition, erects a potentially insurmountable barrier to entry for such low-price innovators." Brief for Consumer Federation of America as *Amicus Curiae* 5, 7-9 (discussing, *inter alia*, comments by Wal-Mart's founder 25 years ago that relaxation of the *per se* ban on minimum resale price maintenance would be a "'great danger'" to Wal-Mart's then-relatively-nascent business). See also Brief for American Antitrust Institute as *Amicus Curiae* 14-15, and sources **[***659]** cited therein (making the same point). New distributors, including internet distributors, have similarly invested time, money, and labor in an effort to bring yet lower cost goods to Americans.

This Court's overruling of the *per se* rule jeopardizes this reliance, and more. What about malls built on the assumption that a discount distributor **[****86]** will remain an anchor tenant? What about home buyers who have taken a home's distance **[*926]** from such a mall into account? What about Americans, producers, distributors, and consumers, who have understandably assumed, at least for the last 30 years, that price competition is a legally guaranteed way of life? The majority denies none of this. It simply says that these "reliance interests . . ., like the reliance interests in State Oil Co. v. Khan, 522 U.S. 3, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997), cannot justify an inefficient rule." *Ante*, at 906, 168 L. Ed. 2d, at 647.

The Court minimizes the importance of this reliance, adding that it "is also of note" that at the time resale price maintenance contracts were lawful "'no more than a tiny fraction of manufacturers ever employed'" the practice. *Ante*, at 907 (quoting Overstreet 6). By "tiny" the Court means manufacturers that accounted for up to "'ten percent of consumer goods purchases'" annually. *Ante*, at 907. That figure in today's economy equals just over $300 billion. **[**2736]** See Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2007, p 649 (126th ed.) (over $3 trillion in U. S. retail sales in 2002). Putting the Court's estimate together with the Justice Department's early 1970's study translates a **[****87]** legal regime that permits all resale price maintenance into retail bills that are higher by an average of roughly $750 to $1,000 annually for an American family of four. Just how much higher retail bills will be after the Court's decision today, of course, depends upon what is now unknown, namely, how courts will decide future cases under a "rule of reason." But these figures indicate that the amounts involved are important to American families and cannot be dismissed as "tiny."

Sixth, the fact that a rule of law has become "embedded" in our "national culture" argues strongly against overruling. *Dickerson v. United States, 530 U.S. 428, 443-444, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000)*. The *per se* rule forbidding minimum resale price maintenance agreements has long been "embedded" in the law of antitrust. It involves price, the economy's "'central nervous system.'" *National Soc. of Professional Engineers, 435 U.S., at 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637* **[*927]** (quoting *Socony-Vacuum Oil, 310 U.S., at 226, n. 59, 60 S. Ct. 811, 84 L. Ed. 2d 1129*). It reflects a basic antitrust assumption (that consumers often prefer lower prices to more service). It embodies a basic antitrust objective (providing consumers with a free choice about **[****88]** such matters). And it creates an easily administered and enforceable bright line, "Do not agree about price," that businesses as well as lawyers have long understood.

The only contrary *stare decisis* factor that the majority mentions consists of its claim that this Court has "[f]rom the beginning . . . treated the Sherman Act as a common-law statute," and has previously overruled antitrust precedent. *Ante*, at 899, 900-902, 168 L. Ed. 2d, at 642, 643-644. It points in support to *State Oil Co. v. Khan, 522 U.S. 3, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*, overruling *Albrecht v. Herald Co., 390 U.S. 145, 88 S. Ct. 869, 19 L.* **[***660]** *Ed. 2d 998 (1968)*, in which this Court had held that *maximum* resale price agreements were unlawful *per se*, and to *Sylvania*, overruling *United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967)*, in which this Court had held that producer-imposed territorial limits were unlawful *per se.*

The Court decided *Khan,* however, 29 years after *Albrecht*--still a significant period, but nowhere close to the century *Dr. Miles* has stood. The Court specifically noted the *lack* of any significant reliance upon *Albrecht*, *522 U.S., at 18-19, 118 S. Ct. 275, 139 L. Ed. 2d 199* (*Albrecht* has had "little **[****89]** or no relevance to ongoing enforcement of the Sherman Act"). *Albrecht* had far less support in traditional antitrust principles than did *Dr. Miles.* Compare, *e.g.*, 8 Areeda & Hovenkamp P 1632, at 316-328 (analyzing potential harms of minimum resale price maintenance), with *id.,* P 1637, at 352-361 (analyzing potential harms of maximum resale price maintenance). See also, *e.g.*, Pitofsky 1490, n 17. And Congress had nowhere expressed support for *Albrecht*'s rule. *Khan, supra, at 19, 118 S. Ct. 275, 139 L. Ed. 2d 199*.

In *Sylvania*, the Court, in overruling *Schwinn*, explicitly distinguished *Dr. Miles* on the ground that while Congress had "recently . . . expressed its approval of a *per se* analysis of vertical price restrictions" by repealing the Miller-Tydings **[*928]** and McGuire Acts, "[n]o similar expression of congressional intent exists for nonprice restrictions." *433 U.S., at 51, n. 18, 97 S. Ct. 2549, 53 L. Ed. 2d 568*. Moreover, the Court decided *Sylvania* only a decade after *Schwinn.* And it based its overruling on a generally perceived need to avoid "confusion" in the law, **[**2737]** *433 U.S., at 47-49, 97 S. Ct. 2549, 53 L. Ed. 2d 568*, a factor totally absent here.

The Court suggests that it is following "the common-law **[****90]** tradition." *Ante*, at 905, 168 L. Ed. 2d, at 646. But the common law would not have permitted overruling *Dr. Miles* in these circumstances. Common-law courts rarely overruled well-established earlier rules outright. Rather, they would over time issue decisions that gradually eroded the scope and effect of the rule in question, which might eventually lead the courts to put the rule to rest. One can argue that modifying the *per se* rule to make an exception, say, for new entry, see Pitofsky 1495, could prove consistent with this approach. To swallow up a century-old precedent, potentially affecting many billions of dollars of sales, is not. The reader should compare today's "common-law" decision with Justice Cardozo's decision in *Allegheny College v. National Chautauqua Cty. Bank of Jamestown, 246 N. Y. 369, 159 N. E. 173 (1927)*, and note a gradualism that does not characterize today's decision.

Moreover, a Court that rests its decision upon economists' views of the economic merits should also take account of legal scholars' views about common-law overruling. Professors Hart and Sacks list 12 factors (similar to those I have mentioned) that support judicial "adherence to prior **[****91]** holdings." They all support adherence to *Dr. Miles* here. See H. Hart & A. Sacks, The Legal Process 568-569 (W. Eskridge & P. Frickey eds. 1994). Karl Llewellyn has written that the common-law judge's "conscious reshaping" of prior law "must so move as to hold the degree of movement down to the degree to which need truly presses." The Bramble Bush 156 (1960). Where here is the pressing **[***661]** need? The Court notes that the FTC argues here in favor of a rule of reason. See *ante*, at 900, 168 L. Ed. 2d, at 642-643. But both Congress and the FTC, **[*929]** unlike courts, are well equipped to gather empirical evidence outside the context of a single case. As neither has done so, we cannot conclude with confidence that the gains from eliminating the *per se* rule will outweigh the costs.

In sum, every *stare decisis* concern this Court has ever mentioned counsels against overruling here. It is difficult for me to understand how one can believe both that (1) satisfying a set of *stare decisis* concerns justifies overruling a recent constitutional decision, *Wisconsin Right to Life, Inc., ante, at 500-503, 127 S. Ct. 2652, 168 L. Ed. 2d 3291, 2007 U.S. LEXIS 8515* (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in part and concurring in judgment), but (2) failing **[****92]** to satisfy any of those same concerns nonetheless permits overruling a longstanding statutory decision. Either those concerns are relevant or they are not.

* * *

The only safe predictions to make about today's decision are that it will likely raise the price of goods at retail and that it will create considerable legal turbulence as lower courts seek to develop workable principles. I do not believe that the majority has shown new or changed conditions sufficient to warrant overruling a decision of such long standing. All ordinary *stare decisis* considerations indicate the contrary. For these reasons, with respect, I dissent.

References

15 U.S.C.S. § 1

Antitrust Laws and Trade Regulation §§ 18.02, 18.03 (Matthew Bender)

Antitrust Laws and Trade Regulation: Desk Edition § 2.04 (Matthew Bender)

Federal ***Antitrust Law*** §§ 12.1-12.8, 48.16, 48.18 (Matthew Bender)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices § 41

L Ed Index, Dealers; Price Control or Discrimination

Supreme Courts views as to what constitutes per se illegal "price fixing" under the Sherman Act (*15 U.S.C.S. § 1 et seq.*). *64 L. Ed. 2d 997*.

Jabo's Pharm., Inc. v. Becton Dickinson & Co. (In re Hypodermic Prods. Antitrust Litig.)

United States District Court for the District of New Jersey

June 29, 2007, Decided; June 29, 2007, Filed

MDL No.: 1730, Master Docket No.: 05-CV-1602 (JLL/CCC)

Reporter
2007 U.S. Dist. LEXIS 47438 *

IN RE HYPODERMIC PRODUCTS ANTITRUST LITIGATION; This Document Relates To: Jabo's Pharmacy, Inc. v. Becton Dickinson & Co., Civil Action No.: 05-CV-5892, and Drug Mart Tallman, Inc. v. Becton Dickinson & Co., Civil Action No. 06-CV-0174.

Notice: NOT FOR PUBLICATION

Subsequent History: Motion denied by *Medstar Health, Inc. v. Becton Dickinson & Co. (In re Hypodermic Prods. Antitrust Litig.), 2007 U.S. Dist. LEXIS 47439 (D.N.J., June 29, 2007)*

Prior History: *Louisiana Wholesale Drug Co. v. Becton Dickinson & Co. (In re Hypodermic Prods. Antitrust Litig.), 2007 U.S. Dist. LEXIS 47437 (D.N.J., June 29, 2007)*

Core Terms

products, Disposable, alleges, Hypodermic, antitrust, purchaser, markets, manufacturer, competitor, exclusionary, antitrust claim, bundle, Plaintiffs', Indirect, anti-competitive, relevant market, class member, Collection, contracts, Catheters, Blood, motion to dismiss, unjust enrichment, prices, Tube, distributors, syringes, needles, sole-source, Clayton Act

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

In deciding motions to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, courts generally consider only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.

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

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

The applicable inquiry under *Fed. R. Civ. P. 12(b)(6)* is well-settled. Courts must accept all well-pleaded allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party. In doing so, a court may look only to the facts alleged in the complaint and any accompanying attachments, and may not look at the record. However, courts are not required to credit bald assertions or legal conclusions improperly alleged in the complaint.

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

HN3[] **Motions to Dismiss, Failure to State Claim**

While a complaint attacked by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true. Ultimately, however, the question is not whether the plaintiffs will prevail at trial, but whether they should be given an opportunity to offer evidence in support of their claims.

Antitrust & Trade Law > Sherman Act > Claims

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

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN4[] **Sherman Act, Claims**

Antitrust complaints, in particular, should be liberally construed. Although there is no heightened pleading standard in antitrust cases, antitrust complaints are not exempt from the Federal Rules of Civil Procedure. The pleading standard for claims under *15 U.S.C.S. § 1* of the Sherman Act is the short and concise statement standard of *Fed. R. Civ. P. 8(a)*. The "short and concise statement" standard of *Rule 8(a)*, generally applicable to antitrust claims, is distinguished from the heightened "particularity" standard of *Fed. R. Civ. P. 9(b)*, applicable to antitrust claims sounding in fraud. Regarding the *Fed. R. Civ. P. 8(a)* pleading standard in the context of antitrust cases, while a complaint attacked by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, it must plead enough facts to state a claim to relief that is plausible on its face.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN5[] **Complaints, Requirements for Complaint**

See *Fed. R. Civ. P. 8(a)*.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN6[] **Complaints, Requirements for Complaint**

A district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.

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

Civil Procedure > ... > Pleadings > Complaints > General Overview

HN7[] Regulated Practices, Private Actions

Antitrust complaints are liberally construed in the Third Circuit.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN8[] Complaints, Requirements for Complaint

A formulaic recitation of a cause of action's elements alone will not sustain plaintiffs' obligation to provide the grounds of their entitlement to relief.

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] Antitrust & Trade Law, Sherman Act

See 15 U.S.C.S. § 1.

Antitrust & Trade Law > Sherman Act > Claims

HN10[] Sherman Act, Claims

There are four essential elements of a violation of 15 U.S.C.S. § 1 of the Sherman Act: (1) concerted action by the defendants; (2) that produced anticompetitive effects within the relevant product and geographic markets; (3) that the concerted action was illegal; and (4) that the plaintiff was injured as a proximate result of the concerted action. Moreover, because § 1 of the Sherman Act does not prohibit all unreasonable restraints of trade but only restraints effected by a contract, combination, or conspiracy, the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express. As a result, stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.

Antitrust & Trade Law > Clayton Act > General Overview

HN11[] Antitrust & Trade Law, Clayton Act

See 15 U.S.C.S. § 14.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

HN12[] Tying Arrangements, Clayton Act

Section 3 of the Clayton Act, *15 U.S.C.S. § 14*, was technically written to cover exclusive dealing contracts (contracts requiring the purchaser not to deal in the goods of a competitor of the seller) but Congress also intended to cover tying arrangements.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

HN13[] Clayton Act, Claims

Recovery under § 3 of the Clayton Act, *15 U.S.C.S. § 14*, generally requires: (1) an "exclusive dealing" arrangement, and (2) the probable effect of the exclusion must be to substantially lessen competition in the market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

HN14[] Exclusive & Reciprocal Dealing, Exclusive Dealing

The granting of exclusive selling rights or acceptance of such exclusive selling rights, acts which are not prohibited by law unless there is a resulting foreclosure of market alternatives, cannot, without proof of such foreclosure, form the basis for a jury verdict that the defendants had entered into a conspiracy to restrain trade.

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

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

HN15[] Private Actions, Remedies

An antitrust plaintiff must allege facts establishing an "antitrust injury." The existence of antitrust injury is not typically resolved through motions to dismiss.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN16[] Regulated Practices, Monopolies & Monopolization

See *15 U.S.C.S. § 2*.

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

HN17[] Actual Monopolization, Claims

A violation of *15 U.S.C.S. § 2* of the Sherman Act generally consists of two elements: (1) possession of monopoly power in the relevant product market and (2) maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

HN18[] **Attempts to Monopolize, Elements**

To state a claim for attempted monopolization, a plaintiff must allege (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

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

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

Evidence > Burdens of Proof > Allocation

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

HN19[] **Relevant Market, Product Market Definition**

Antitrust plaintiffs have the burden of defining the relevant market, and the outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in the plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.

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

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

HN20[] **Relevant Market, Product Market Definition**

The determination of a relevant product market or submarket in an antitrust case is a highly factual one best allocated to the trier of fact.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN21[] **Complaints, Requirements for Complaint**

Fed. R. Civ. P. 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests.

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

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

HN22[] **Regulated Practices, Private Actions**

In antitrust cases, where the proof is largely in the hands of the alleged conspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.

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

HN23[] **Motions to Dismiss, Failure to State Claim**

A complaint attacked by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, only enough facts to state a claim to relief that is plausible on its face.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

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

HN24[] **Regulated Practices, Monopolies & Monopolization**

Prohibitively high consumer prices resulting from allegedly monopolistic behavior is the type of injury the antitrust laws are designed to redress.

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

HN25[] **Private Actions, Remedies**

An antitrust injury can be suffered by a plaintiff, even if the plaintiff is not a competitor of the conspirators, where the injury she suffers is inextricably intertwined with the injury the conspirators seek to inflict.

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

HN26[] **Private Actions, Remedies**

The second Brunswick requirement for an antitrust claim is generally met if a plaintiff is a competitor or a consumer in the relevant market. Alternatively, this requirement is fulfilled if there exists a significant causal connection such that the harm to the plaintiff can be said to be inextricably intertwined with the antitrust conspiracy. Neither the United States Supreme Court nor the United States Court of Appeals for the Third Circuit has foreclosed a finding of antitrust injury simply because the plaintiff was not a participant in the relevant market.

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN27[] **Regulated Practices, Private Actions**

In an antitrust case, asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

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

HN28[] **Motions to Dismiss, Failure to State Claim**

In conducting a *Fed. R. Civ. P. 12(b)(6)* analysis, the question is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether they should be given an opportunity to offer evidence in support of their claims.

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

HN29[] **Pleading & Practice, Motion Practice**

D.N.J., Civ. R. 7.2(b) imposes a 15-page limit for reply briefs when using a 14-point Times New Roman font. Moreover, Rule 7.2(b) specifically provides that briefs of greater length will only be accepted if special permission of the judge or magistrate judge is obtained prior to submission of the brief.

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

Constitutional Law > The Judiciary > Jurisdiction > General Overview

HN30[] **Class Actions, Certification of Classes**

While a U.S. Const. art. III court ordinarily must be sure of its own jurisdiction before getting to the merits, a *Fed. R. Civ. P. 23* question should be treated first because class certification issues are logically antecedent to U.S. Const. art. III concerns.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN31[] **Equitable Relief, Quantum Meruit**

Generally, in order to state a claim for unjust enrichment, a plaintiff must allege (1) at plaintiff's expense, (2) defendant received benefit, (3) under circumstances that would make it unjust for defendant to retain benefit without paying for it.

Civil Procedure > ... > Pleadings > Complaints > General Overview

HN32[] **Pleadings, Complaints**

Plaintiffs are permitted to plead alternative theories of recovery.

Counsel: [*1] For AMERICAN SALES COMPANY INC., Movant: THOMAS M. SOBOL, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, HAGENS BERMAN SOBOL SHAPIRO LLP, CAMBRIDGE, MA; PETER S. PEARLMAN, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, SADDLE BROOK, NJ.

For SAJ DISTRIBUTORS, INC., Movant: DIANNE M. NAST, LEAD ATTORNEY, RODA & NAST, PC, LANCASTER, PA; PETER S. PEARLMAN, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, SADDLE BROOK, NJ.

For LOUISIANA WHOLESALE DRUG COMPANY, INC., on behalf of itself and all others similarly situated, Plaintiff: PETER S. PEARLMAN, LEAD ATTORNEY, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, SADDLE BROOK, NJ; REBEKAH R. CONROY, LEAD ATTORNEY, WALDER HAYDEN & BROGAN, ROSELAND, NJ.

For ROCHESTER DRUG CO-OPERATIVE, INC., JM SMITH CORPORATION, d/b/a Smith Drug Company, on behalf of themselves and all others similarly situated, Plaintiffs: PETER S. PEARLMAN, LEAD ATTORNEY, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, SADDLE BROOK, NJ.

For JABO'S PHARMACY INC, Plaintiff: GORDON BALL, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, BALL & SCOTT, KNOXVILLE, TN; R. LAURENCE MACON, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, AKIN, GUMP, STRAUSS, HAUER & FELD, LLP, **[*2]** SAN ANTONIO, TX.

For JM SMITH CORPORATION, Plaintiff: PETER S. PEARLMAN, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, SADDLE BROOK, NJ.

For DRUG MART TALLMAN, INC., Plaintiff: R. LAURENCE MACON, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, AKIN, GUMP, STRAUSS, HAUER & FELD, LLP, SAN ANTONIO, TX.

For MEDSTAR HEALTH, INC., MEDSTAR HEALTH INC, MEDSTAR-GEORGETOWN MEDICAL CENTER INC (Also a Party in Civil No. 06-3258), WASHINGTON HOSPITAL CENTER CORPORATION (Party in Civil No. 06-3258), NATIONAL REHABILITATION HOSPITAL INC (Party in Civil No. 06-3258), Plaintiffs: RICHARD LESLIE WYATT, LEAD ATTORNEY, AKIN GUMP, WASHINGTON, DC.

For DIK DRUG COMPANY, Consol Plaintiff: BRUCE E. GERSTEIN, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, GARWIN, BRONZAFT, GERSTEIN & FISHER, LLP, NEW YORK, NY; DANIEL BERGER, LEAD ATTORNEY, BERGER & MONTAGUE, PC, PHILADEPHIA, PA; PETER S. PEARLMAN, LEAD ATTORNEY, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, SADDLE BROOK, NJ.

For BECTON DICKINSON & COMPANY, INC., Defendant: GREGORY B. REILLY, LEAD ATTORNEY, LOWENSTEIN SANDLER PC, ROSELAND, NJ; R. DALE GRIMES, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, BASS, BERRY & SIMS, PLC, NASHVILLE, TN; **[*3]** ROBERT A. ATKINS, LEAD ATTORNEY, HANNAH SUZANNE SHOLL, COUNSEL NOT ADMITTED TO USDC-NJ BAR, PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP, NEW YORK, NY; RAMSEY C. ONG, LOWENSTEIN SANDLER, ROSELAND, NJ.

Judges: JOSE L. LINARES, UNITED STATES DISTRICT JUDGE.

Opinion by: JOSE L. LINARES

Opinion

LINARES, District Judge.

This matter comes before the Court on the motion of Defendant, Becton Dickinson & Company, to dismiss Plaintiffs' [1] Consolidated Class Action Complaint, [2] pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. For the reasons set forth in this Opinion, Defendant's motion is DENIED. [3]

---

[1] For purposes of the instant motion, Plaintiffs include Jabo's Pharmacy, Inc. and Drug Mart Tallman, Inc. (hereinafter collectively "Plaintiffs").

BACKGROUND

[4]

This matter arises from actions brought by healthcare providers and distributors in the pharmaceutical and medical device industry, against Defendant, a medical device manufacturer, which allegedly controls a dominant share of the relevant market for the hypodermic products at issue in this case. The Judicial Panel on Multidistrict Litigation has transferred several related actions to this Court for consolidated pretrial proceedings, pursuant to *28 U.S.C. § 1407*. [5]

I. Historical Facts

Plaintiffs are pharmacies in Tennessee and New York which purchased various disposable hypodermic products manufactured by Becton through a distributor or wholesaler. (Compl., PP 1, 13-14). Becton, a New Jersey corporation founded in 1897, is a large healthcare product manufacturer, which has been the dominant manufacturer of syringes and other disposable hypodermic products in the United States for decades. (*Id.,* PP 3, 15, 46). "By the 1950s, Becton had become the leading U.S. hypodermic syringe manufacturer." (*Id.,* P 46). The disposable hypodermic products at issue include relevant markets for: (1) disposable syringes and associated needles, (2) disposable blood collection tubes, (3) disposable blood collection tube holders, and (4) intravenous **[*6]** ("IV") catheter devices and their associated needles. (*Id.,* P 2). Said products are referred to collectively in the Complaint as "Disposable Hypodermic Products." (*Id.*). Disposable Hypodermic Products come in safety and non-safety forms. (*Id.,* P 48). The relevant geographic market for each of the Disposable Hypodermic Products is the entire United States. (*Id.,* PP 27, 34, 39, 44).

By way of background, the Complaint explains that, at all relevant times, Plaintiffs purchased Disposable Hypodermic Products from Becton through authorized distributors who do not set the prices for those products. (*Id.,* P 49). In particular, the Complaint explains that a pharmacy negotiates a price for Disposable Hypodermic Products with Defendant, either directly or through a Group Purchasing Organization (hereinafter "GPO"). (*Id.,* P 50). The authorized dealer then takes possession of Defendant's products and holds them in inventory until the pharmacy becomes in need of said products, at which time the authorized dealer delivers same. (*Id.*). The pharmacy then pays the authorized dealer the price it had negotiated with Becton, as well as a delivery or administrative fee. (*Id.*). The authorized dealer then **[*7]** pays Defendant the amount it collected from the pharmacy, which was "the amount

---

[2] The operative complaint is the Consolidated Class Action Complaint, filed on May 10, 2006, hereinafter referred to as "Complaint." In the instant Opinion, the Court addresses *only* Defendant's motion to dismiss the Complaint filed by Jabo's Pharmacy, Inc. and Drug Mart Tallman, Inc. Defendant has filed separate motions to dismiss the complaints of other parties to this multidistrict litigation, which have been decided by the Court by way of separate opinions.

[3] The Court decides this **[*4]** matter without oral argument. *Fed. R. Civ. P. 78*. Jurisdiction is premised on *28 U.S.C. §§ 1331*, *1337*, and *15 U.S.C. § 15(a)*.

[4] For purposes of the instant motion to dismiss, the Court accepts Plaintiffs' factual allegations as true, and relies only on the Complaint. *See, e.g., Lum v. Bank of Am., 361 F.3d 217, 222 n.3 (3d Cir. 2004)* (***HN1***[] "In deciding motions to dismiss pursuant to *Rule 12(b)(6)*, courts generally consider only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.").

[5] Defendant has also moved to dismiss (1) the Second Consolidated Amended Class Action Complaint filed by Louisiana Wholesale Drug Company, Inc., Rochester **[*5]** Drug Co-Operative, Inc., JM Smith d/b/a Smith Drug Company, Dik Drug Company, American Sales Company, Inc., Park Surgical Co. Inc. and SAJ Distributors, Inc., and (2) the Class Action Amended Complaint filed by Medstar Health, Inc., Medstar-Georgetown Medical Center, Inc., Washington Hospital Center Corporation and National Rehabilitation Hospital, Inc. As previously indicated, the foregoing motions will not be addressed herein.

already agreed to between Becton and the [pharmacy] under applicable GPO agreements or otherwise directly with Becton." (*Id.*).

The Complaint goes on to allege that "as a result of this purchasing process, there is effectively only one sale: the [pharmacy] purchases Becton Disposable Hypodermic Products at prices negotiated with Becton and then receives these Products from authorized distributors." (*Id.*). Because authorized distributors have no control over the pricing of Becton's products, they, therefore, act solely as a distribution agent, "temporarily holding inventory and then delivering the product purchased" by the pharmacy. (*Id.,* P 51). Thus, the only price which the authorized distributors negotiate with Becton and/or the healthcare provider is the amount of the delivery and/or administrative fee associated with same. (*Id.*). "The fixed percentage the authorized distributor charges for distribution services is the same no matter the price the Class Member negotiates and then pays Becton, and the price a Class Member pays for Becton Disposable Hypodermic Products will be the same from all authorized **[*8]** distributors." (*Id.*). The Complaint also explains that upon information and belief, Becton sells a portion of its Disposable Hypodermic Products to wholesalers, who then resell these products to indirect class members. (*Id.,* P 55).

II. Becton's Alleged Anti-Competitive Conduct

Beginning in the early 1980s, rival manufacturers began posing a threat to Becton's dominance in the Disposable Hypodermic Products markets. (*Id.,* P 47). As a result, Becton began engaging in certain anti-competitive and illegal practices, which served to foreclose competition in the relevant markets by suppressing competition from current competitors and/or product innovators, such as Terumo and Retractable (*Id.,* P 6).

The specific anti-competitive practices set forth in the Complaint include: (1) Becton's imposition of market share purchase requirements on persons purchasing Disposable Hypodermic Products, (2) Becton's bundling of its goods for exclusionary and predatory purposes, (3) Becton's exclusionary contracts with certain GPOs, and (4) Becton's bundling of its goods with the goods of other manufacturers for exclusionary purposes. (*Id.,* P 4). Such practices were specifically designed to "eliminate or lessen **[*9]** competition and unlawfully acquire and maintain monopoly and/or market power" in the four relevant markets mentioned above, namely: (1) disposable syringes and their associated needles, (2) disposable blood collection tubes, (3) disposable blood collection tube holders, and (4) IV catheters and their associated needles. (*Id.,* P 2). Erecting such artificial barriers in the form of anti-competitive conduct has "discouraged potential rivals from even attempting to invest the resources necessary to challenge Becton's dominance in the markets for Disposable Hypodermic Products." (*Id.,* P 47). Moreover, the Complaint alleges that there are no pro-competitive efficiencies created through such predatory and exclusionary conduct. (*Id.,* P 70).

A. *Market Share Purchase Requirements and Bundling*

The Complaint also alleges that Becton uses exclusionary contracts in order to "bundle together for sale different types of products to protect and exploit its market power." (*Id.,* P 64). For example, Becton responded to bid requests from GPOs, by offering proposals to sell its Disposable Hypodermic Products along with unrelated products, thereby providing substantial financial incentives to customers which **[*10]** agreed to purchase all of the products included in the bundle. (*Id.*).

Pursuant to one such purchasing program, in order "to receive the purported benefit" of the bundle, "purchasers had to agree to fill at least 95% of their Disposable Hypodermic Product needs from Becton." (*Id.,* P 65). On the other hand, customers who purchased less than Becton's suggested "compliance" levels of their Disposable Hypodermic Products needs from Becton were penalized by (1) having to pay higher prices for Disposable Hypodermic Products, (2) losing certain post-purchase rebates, and (3) having to re-pay past rebates received by Becton. (*Id.*).

Becton has also offered certain customers "conversion" bonuses and rebates, which served as an additional incentive to accept the bundle of Becton products. (*Id.,* P 66). One such conversion program offered customers with one month's worth of Disposable Hypodermic Products as an inducement to choose Becton as their "primary"

Disposable Hypodermic Product supplier. (*Id.*). Under this program, customers became eligible for certain "premium" discounts on Becton products only if they agreed to use a "minimum of three of four Becton Dickinson safety product categories that **[*11]** include needles and syringes, IV catheters, surgical blades and blood collection." (*Id.*). Because many of Becton's competitors in the Disposable Hypodermic Product markets are smaller companies which sell much fewer products, "these competitors cannot profitably match Becton's structured offers across product lines (because the combined discounts on all of the products in Becton's bundle is in many cases greater than the entire price of a single product made by another manufacturer)." (*Id.,* P 67). As a result of such "deliberately designed" programs, a substantial portion of the Disposable Hypodermic Product markets has been foreclosed. (*Id.,* P 68).

B. *Exclusionary Contracts*

Finally, the Complaint alleges that anywhere between 68% to 98% of hospitals in this country currently belong to at least one GPO, which serves as a negotiating agent for healthcare providers. (*Id.,* P 56). GPOs were originally designed as a way for hospitals to save money by pooling their purchasing power in order to negotiate lower prices for medical products and/or goods. (*Id.,* P 57). Prior to 1986, any payments made by manufacturers to a GPO were considered an illegal "kickback," which violated the Social Security **[*12]** Act's "anti-kickback" provisions. (*Id.*). However, Congress amended the Social Security Act's "anti-kickback" provisions in 1986 to create certain limited exceptions for amounts paid by vendors to a GPO. (*Id.*). Thus, according to the Complaint, in order to influence GPOs, such as Premier, Becton has rewarded them not only with substantial cash payments, but also with high administrative fees, and equity positions. (*Id.,* P 58).

Becton also secured "commitment contracts" with certain GPOs -- including Novation and Premier -- which essentially required that they deal exclusively with Becton for all their Hypodermic Product needs. (*Id.,* PP 59-61). For example, in 1998, one such GPO, Premier, awarded Becton with a 7.5 year "sole-source" contract. (*Id.,* P 59). Similarly, in 1999, Becton awarded another GPO, Novation, with a $ 1 million payment -- in addition to certain administrative fees -- for a 4-year "sole-source" contract, whereby "Becton would be the only vendor approved by Novation to sell Disposable Hypodermic Products to Novation members." (*Id.*). Such commitment or "sole-source" contracts were implemented to prevent healthcare providers from buying Disposable Hypodermic Products made **[*13]** by other manufacturers. (*Id.,* P 60). In fact, "[i]f a Class member desired to purchase Disposable Hypodermic Products from a manufacturer that was not the chosen sole-source contractor for the GPO, the Class member risked losing numerous financial incentives." (*Id.*).

Finally, Plaintiffs allege that Becton used exclusionary practices to unfairly and unlawfully limit competition from competing manufacturers of Disposable Hypodermic Products. (*Id.,* P 71). For example, the Complaint alleges that in response to a growing threat to its monopoly power in the Disposable Hypodermic Product markets by a Japanese corporation by the name of Terumo, Becton engaged in a program called "Block Terumo" in the late 1980s, "which entailed the use of an aggressive strategy that included the bundled pricing and contracting strategies described above and other similar exclusionary and predatory tactics." (*Id.,* P 72). Similar strategies were utilized by Becton to limit competition from another competitor -- Retractable Technologies -- in the late 1990s. (*Id.,* PP 73-74).

III. Market Effects of Becton's Alleged Anti-Competitive Conduct

The Complaint alleges that the combined market effect of the foregoing anti-competitive **[*14]** actions have resulted in foreclosed competition and, thus, higher prices for all purchasers of Becton's Disposable Hypodermic Products. (*Id.,* P 69). Thus, according to the Complaint, Becton's customers have paid more than they would have paid in the absence of such unlawful conduct, "contrary to Becton's representations that hospitals and other customers who purchased Becton's bundle would receive a financial benefit." (*Id.,* PP 69, 77). Thus, not only were healthcare providers deprived of the opportunity to purchase competing Disposable Hypodermic Products, but they were also forced to pay Becton artificially inflated prices for same. (*Id.,* P 77).

IV. The Consolidated Class Action Complaint

In light of the foregoing, Plaintiffs brought this action, pursuant to Sections 4 and 16 of the Clayton Act, *15 U.S.C. §§ 15(a)* and *26*, to recover treble damages, equitable relief, and reasonable attorneys' fees for Defendant's alleged violation of *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1-2*, as well as Section 3 of the Clayton Act, *15 U.S.C. § 14*. Plaintiffs filed the instant class action complaint on May 10, 2006, pursuant to *Federal Rule of Civil Procedure 23(a)*, *(b)(2)* and *(b)(3)*, on **[*15]** their behalf, and as representatives of the following class (hereinafter referred to as the "Class"):

> All persons in the United States who purchased Disposable Hypodermic Products manufactured by Becton through Becton's authorized distributors, at any time during the period 1988 through the present (the "Class Period"). The Class excludes Becton, Becton's parents, subsidiaries and affiliates, as well as Becton's authorized distributors.

(Compl., P 16). In the alternative, or in addition, Plaintiffs seek to bring this action on their own behalf and as representatives of the following class of persons and entities (hereinafter referred to as the "Indirect Class"):

> All persons in Alabama, Arizona, California, District of Columbia, Florida, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin (the "Class Jurisdictions"), who purchased Disposable Hypodermic Products manufactured by Becton through a distributor or wholesaler at any time during the period 1988 through the present (the "Class Period"). The Class excludes Becton, **[*16]** Becton's parents, subsidiaries and affiliates, and all distributors or wholesalers.

(*Id.,* P 17).

Count One of the Complaint alleges unreasonable restraint of trade, in violation of *Section 1* of the Sherman Act and *Section 3* of the Clayton Act. Count Two of the Complaint alleges monopoly maintenance, in violation of *Section 2* of the Sherman Act, and Count Three alleges attempted monopolization also in violation of *Section 2* of the Sherman Act. Count Four alleges state ***antitrust law*** violations, brought only by the Indirect Class. Count Five alleges unjust enrichment, brought by the Indirect Class members in Arizona, District of Columbia, Florida, Hawaii, Iowa, Maine, Massachusetts, Montana, Nebraska, South Dakota, Tennessee, Utah, and Vermont. Count Six alleges also alleges unjust enrichment, brought by the Indirect Class members in Alabama, California, Michigan, Minnesota, Mississippi, Nevada, New Mexico, New York, North Carolina, North Dakota, West Virginia, and Wisconsin.

Defendant Becton now moves to dismiss the Complaint pursuant to *Federal Rule of Civil Procedure 12(b)(6)*.

LEGAL STANDARD

HN2[] The applicable inquiry under *Federal Rule of Civil Procedure 12(b)(6)* is well-settled. Courts must **[*17]** accept all well-pleaded allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party. [6] *See Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), abrogated on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)*; *Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429, 434-35 (3d Cir. 2000)*. However, courts are not required to credit bald assertions or legal conclusions improperly alleged in the complaint. *See In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429 (3d Cir.1997)*. Similarly, legal conclusions draped in the guise of factual allegations may not benefit from the presumption of truthfulness. *See In re Nice Sys., Ltd. Secs. Litig., 135 F. Supp.2d 551, 565 (D.N.J. 2001)*.

---

[6] In doing so, a court may look only to the facts alleged in the complaint and any accompanying attachments, and may not look at the record. *See Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994)*.

HN3[] "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and **[*18]** a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." Bell Atl. Corp. v. Twombly, 127 S.Ct. 1955, 1959, 167 L. Ed. 2d 929 (2007). [7] Ultimately, however, the question is not whether plaintiffs will prevail at trial, but whether they should be given an opportunity to offer evidence in support of their claims. Scheuer, 416 U.S. at 236.

Additionally, the Third Circuit has explained that HN4[] antitrust complaints, in particular, should be liberally **[*19]** construed. Pennsylvania ex rel. Zimmerman v. Pepsico, Inc., 836 F.2d 173, 179 (3d Cir. 1988). Although there is no heightened pleading standard in antitrust cases, [8] antitrust complaints are not exempt from the Federal Rules of Civil Procedure. *See, e.g.,* Zimmerman, 836 F.2d at 179-80. In this vein, the Third Circuit has indicated that the pleading standard for "Section 1 claims is the short and concise statement standard of Rule 8(a)." [9] Lum v. Bank of Am., 361 F.3d 217, 228 (3d Cir. 2004) (distinguishing the "short and concise statement" standard of Rule 8(a), generally applicable to antitrust claims, from the heightened "particularity" standard of Rule 9(b), applicable to antitrust claims sounding in fraud). In assessing the Rule 8(a) pleading standard in the context of antitrust cases, the United States Supreme Court has explained that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," it must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp., 127 S.Ct. at 1964, 1974. [10] With this framework in mind, the Court turns now to the issues raised by Defendant in support of **[*20]** the instant motion.

DISCUSSION

Becton argues that the Complaint should be dismissed for failure to state claims upon which relief can be granted based on the following: (1) Plaintiffs have not adequately alleged the essential elements or necessary facts of any of its federal antitrust claims, (2) Plaintiffs have not adequately alleged the essential elements of any state-law antitrust claims, (3) Plaintiffs lack standing to assert the Clayton Act claim, (4) Plaintiffs lack standing to assert certain state law claims, and (5) certain state claims fail as a matter **[*21]** of law.

I. Federal Antitrust Claims

A. Elements of Claims

---

[7] In so holding, the United States Supreme Court rejected the language previously used by the Court in *Conley v. Gibson,* providing that "[i]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). *See* Bell Atl. Corp., 127 S.Ct. at 1964, 1974 (holding that the *Conley* "no set of facts" language "has earned its retirement" and "is best forgotten.").

[8] *See, e.g.,* In re K-Dur Antitrust Litig., 338 F. Supp. 2d 517 (D.N.J. 2004); In re Mercedes-Benz Antitrust Litig., 157 F.Supp.2d 355, 359 (D.N.J. 2001).

[9] Federal Rule of Civil Procedure 8(a) provides that HN5[] "[a] pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief."

[10] *See also* Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528 n. 17, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983) (stating that HN6[] "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.").

Defendant argues that Plaintiffs have failed to allege any of the required elements of an antitrust claim. (Def. Br. at 12). In particular, Defendant claims that the Complaint is deficient in alleging (1) a relevant market, (2) anti-competitive effects, (3) antitrust injury, (4) standing, and (5) unlawful "exclusive dealing" or "exclusionary conduct." Because Defendant has presented the Court with such global pleading arguments, which allegedly relate to Counts One, Two *and* Three, it is not entirely clear to the Court which arguments relate to which claims, and therefore, the specific basis on which Defendant believes that Plaintiffs have failed to plead particular elements of any claim. As a result, the Court will begin its analysis by assessing, generally, whether the Complaint alleges the requisite elements of the federal antitrust claims, [11] and will then turn to Defendant's broader pleading arguments, keeping in mind that ***HN7***[] antitrust complaints are liberally construed in this Circuit. *See PepsiCo, Inc., 836 F.2d at 179*.

Count One

Count One of the Complaint alleges unreasonable restraint of trade, in violation of *Section 1* of the Sherman Act and *Section 3* of the Clayton Act. *Section 1* of the Sherman Act provides that:

> ***HN9***[] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 100,000,000 if a corporation, or, if any other person, $ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1.

The Third Circuit has explained that ***HN10***[] there are four essential elements of a *§ 1* violation:

> (1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic **[*23]** markets; (3) that the concerted action was illegal; and (4) that the plaintiff was injured as a proximate result of the concerted action.

Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 442 (3d Cir. 1997). Moreover, "[b]ecause *§ 1* of the Sherman Act 'does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy,' '[t]he crucial question' is whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express.'" *Bell Atl. Corp., 127 S.Ct. at 1964*. As a result, "stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Id. at 1965*.

Section 3 of the Clayton Act, in turn, provides that:

> ***HN11***[] It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, **[*24]** where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14. *See Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 473 n. 2 (3d Cir. 1992)* (explaining that ***HN12***[] *Section 3* of the Clayton Act was technically written to "cover exclusive dealing

---

[11] In doing so, the Court is cognizant of the fact that ***HN8***[] "a **[*22]** formulaic recitation of a cause of action's elements" alone will not sustain Plaintiffs' obligation to provide the grounds of their entitlement to relief. *Bell Atl. Corp., 127 S.Ct. at 1959*.

contracts (contracts requiring the purchaser not to deal in the goods of a competitor of the seller) but Congress also intended to cover tying arrangements.").

HN13[] Recovery under *Section 3* of the Clayton Act generally requires: (1) an "exclusive dealing" arrangement, and (2) "the probable effect of the exclusion must be to substantially lessen competition in the market." *Barr Labs., Inc. v. Abbott Labs., No. 87-4764, 1989 U.S. Dist. LEXIS 6051, 1989 WL 60320, *4 (D.N.J. June 1, 1989)* (citing *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961))*.

Here, the Complaint alleges that Becton entered into anti-competitive arrangements with GPOs, such as Premier, whereby it would pay the GPOs "millions of dollars in cash payments," as well as "equity positions," with the expectation and/or understanding **[*25]** that said GPOs would then "favor Becton's products, regardless of price, over those of Becton's competitors." (Compl., P 58). The Complaint cites to an article from February 1997, which states that as a result of a recent deal between Becton and Premier, whereby Premier would "receive a portion of administrative fees in the form of warrants to buy Becton stock. If Becton Dickinson's fortunes rise, buoyed in part by Premier purchases, so will the value of the stock held by Premier." (*Id.*).

The Complaint also alleges that Becton entered into agreements with GPOs, certain hospitals and other customers which included "bundled financial incentives" and "exclusive dealing commitments." (Compl., P 81). For example, during 1999, it is alleged that Becton provided Novation, another GPO, with a $ 1 million payment, on top of the 3% administrative fees, in exchange for a four-year "sole-source contract under which Becton would be the only vendor approved by Novation to sell Disposable Hypodermic Products to Novation members." (*Id.,* P 59). [12] The Complaint further alleges that the object of such an arrangement was to prevent Class members from purchasing Disposable Hypodermic Products made by other **[*26]** manufacturers, because "[i]f a Class member desired to purchase Disposable Hypodermic Products from a manufacturer that was not the chosen sole-source contractor for the GPO, the Class member risked losing numerous financial incentives." (*Id.,* P 60). Accordingly, such arrangements served to significantly "impede and prevent competing Disposable Hypodermic Product manufacturers from selling significant (if any) Disposable Hypodermic Products to healthcare providers that used those GPOs." (*Id.,* P 61).

Moreover, ***HN15***[] a plaintiff must allege facts establishing an "antitrust **[*27]** injury." *See Schuykill Energy Res., Inc. v. Pa. Power & Light, 113 F.3d 405, 413, 417 (3d Cir. 1997)* (recognizing that the existence of antitrust injury is not typically resolved through motions to dismiss). In this regard, the Complaint alleges that Plaintiffs were injured by Becton's exclusionary practices, including its "sole-source" arrangements with certain GPOs, to the extent that they were forced to pay higher prices for Disposable Hypodermic Products than they would have paid in the absence of such practices and/or arrangements. (Compl., PP 62, 84, 92, 98).

Count Two

Count Two of the Complaint alleges monopoly maintenance in violation of *Section 2* of the Sherman Act. *Section 2* of the Sherman Act provides that:

> ***HN16***[] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 100,000,000 if a corporation, or, if any other person, $ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion **[*28]** of the court.

---

[12] Given the foregoing allegations, the Court finds "plausible grounds to infer an agreement" between Defendant and certain GPOs and/or manufactures. *Bell Atl. Corp., 127 S.Ct. at 1965*. *See generally* *Elder--Beerman Stores Corp. v. Federated Dep't Stores, Inc., 459 F.2d 138, 146 (6th Cir. 1972)* (***HN14***[] "The granting of exclusive selling rights or acceptance of such exclusive selling rights, acts which are not prohibited by law unless there is a resulting foreclosure of market alternatives cannot, without proof of such foreclosure, form the basis for a jury verdict that the defendants had entered into a conspiracy to restrain trade.").

15 U.S.C. § 2.

The Third Circuit has indicated that **HN17**[] a § 2 violation generally consists of two elements: "(1) possession of monopoly power [in the relevant product market] and (2) '. . . maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" United States v. Dentsply Int'l, 399 F.3d 181, 186 (3d Cir. 2005) (citing Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 480, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)). The Complaint alleges that Becton possesses monopoly power in the Disposable Syringe and Blood Collection Tube and Blood Collection Tube Holder markets, in the United States. (Compl., P 86). The Complaint also alleges that in order to maintain such monopoly power, "Becton has willfully and unlawfully used exclusionary and predatory conduct, including but not limited to, bundled pricing with the intent to foreclose competition, and exclusionary agreements." (*Id.,* P 88). The Complaint likewise alleges that Becton's monopoly power in the Disposable Syringe, Blood Collection Tube and Blood Collection Tube Holder markets is not the result of "superior product offerings, good faith business acumen, **[*29]** or historical accident." (*Id.,* PP 90). Rather, it is the result of certain "deliberately designed" programs and/or arrangements with GPOs and healthcare providers, including but not limited to, commitment contracts, bundling contracts, and conversion bonuses. (*Id.,* PP 58, 59, 65-68). [13]

Count Three

Count Three of the Complaint alleges attempted monopolization, in violation of Section 2 of the Sherman Act. **HN18**[] "To state a claim for attempted monopolization, a plaintiff must allege '(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize **[*30]** and (3) a dangerous probability of achieving monopoly power.'" Schuylkill Energy Res., Inc. v. Pa. Power & Light Co., 113 F.3d 405, 413 (3d Cir. 1997) (citation omitted). The Complaint alleges that, "to the extent that Becton does not possess monopoly power in the Disposable Syringe, Blood Collection Tube and/or Blood Collection Tube Holder markets in the United States, it has unlawfully attempted to monopolize the markets for Disposable Syringes, Blood Collection Tubes and/or Blood Collection Tubes." (Compl., P 94). In particular, the Complaint alleges that Becton engaged in exclusionary and predatory conduct, including bundled pricing and exclusionary agreements, with the "specific intent" of achieving its goal of obtaining a monopoly in the foregoing markets. (*Id.,* PP 95, 96). For example, the Complaint explains that Becton engaged in a program called "Block Terumo," as a result of "the growing threat" posed by the price reductions of a competitor, Terumo. (*Id.,* P 72). The Complaint goes on to allege that, as a result of the implementation of the "exclusionary and predatory sales tactics" (i.e., the "Block Terumo" program) "Terumo's market share in the United States for the Disposable **[*31]** Hypodermic Products went from approximately 12% to approximately 1%." (*Id.*). By 1992, "Terumo announced that it would no longer focus on selling hypodermic products to hospitals in the United States," thus illustrating that "there is a dangerous probability that if left unchecked, Becton will achieve its goals of obtaining monopoly power in said markets. (*Id.,* PP 72, 97). [14]

B. Generally

---

[13] *See, e.g.,* SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1065 (3d Cir. 1978) (finding that "the act of willful acquisition and maintenance of monopoly power was brought about by linking products on which Lilly faced no competition Keflin and Keflex with a competitive product, Kefzol. The result was to sell all three products on a non-competitive basis in what would have otherwise been a competitive market for Ancef and Kefzol. The effect of the Revised CSP was to force SmithKline to pay rebates on one product, Ancef, equal to rebates paid by Lilly based on volume sales of three products.").

[14] *See generally* Schuylkill Energy Res., Inc., 113 F.3d at 415 ("Thus, SER must allege that PP & L unlawfully acquired monopoly power or had a dangerous probability of unlawfully achieving monopoly power in its service area. To do this, SER must allege that PP & L in some way acted to exclude SER as a competitor in the delivery of electricity to customers in PP & L's service area.").

Relevant Market

Turning now to Defendant's arguments, Defendant claims that Plaintiffs have failed to set forth the requisite relevant market. (Def. Br. at 12). In particular, Defendant claims that (1) Plaintiffs improperly combine "safety and conventional products without any allegations of the reasonable interchangeability and cross-elasticity of demand," and (2) Plaintiffs' definition of the "IV" catheter market," which **[*32]** includes winged IV catheters does not allege whether these products "can be interchanged, used to perform the same clinical functions or substituted for each other in medical practice." (*Id.* at 13).

The Third Circuit has explained that ***HN19***[] Plaintiffs have the burden of defining the relevant market, and that the "outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)* (internal citations omitted). In *Queen City Pizza,* the Court went on to explain that:

> Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.

Id.

The Complaint alleges four relevant product markets: (1) disposable syringes and associated needles, (2) disposable blood collection **[*33]** tubes, (3) disposable blood collection tube holders, and (4) intravenous catheter devices and their associated needles. (Compl., P 2). The Complaint likewise alleges that there is no product "that can reasonably be substituted for" any of the products comprising the relevant product markets. (*Id.,* PP 28, 33, 38, 43). Defendant is correct in noting that the Complaint alleges that each of the four products at issue come in safety and non-safety forms. (*Id.,* PP 26, 37, 48). To the extent that Defendant urges the Court to conclude, based on the foregoing allegations, (1) that the two versions of each product, therefore, comprise separate product markets, and (2) that "folding these two separate markets into one general market creates an implausible product market," [15] the Court determines that any such determination would be improper at this juncture. [16] *See, e.g., Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 199 (3d Cir. 1992)* (***HN20***[] "the determination of a relevant product market or submarket ("market") is a highly factual one best allocated to the trier of fact."); *Weiss v. York Hosp., 745 F.2d 786, 825 (3d Cir. 1984)* ("Market definition is a question of fact.").

Defendant also makes the cursory argument that Plaintiffs' definition of the "IV catheter market," which includes winged IV catheters does not allege whether these products "can **[*35]** be interchanged, used to perform the same clinical functions or substituted for each other in medical practice," without citing to the relevant portion of the Complaint which allegedly defines the "IV catheter market" as such. (Def. Br. at 13). Although the Complaint does allege that Becton *manufactures* IV Catheters "including Winged IV Catheters," the Complaint does not expressly allege that the "Winged IV Catheters" necessarily fall within the relevant product market of "IV Catheters and their Associated Needles." (Compl., PP 42, 43). Moreover, the Complaint *does* allege that "[a] relevant product market exists for the sale of IV Catheters and their associated needles and the market segments thereunder," and that "*no*

---

[15] In particular, **[*34]** Defendant argues that "as a matter of federal law, safety and conventional devices are not interchangeable" and thus cannot be part of the same relevant market. (Def. Br. at 8). Even if Defendant is ultimately correct, the Court declines to engage in any such analysis at this time. *See, e.g., Ansell, Inc. v. Schmid Labs, Inc., 757 F. Supp. 467 (D.N.J. 1991)* (defining relevant product market after multi-day hearing, including expert testimony).

[16] Moreover, Defendant's reliance on *E. & G. Gabriel v. Gabriel Bros., Inc.,* -- a case which is not binding on this Court and distinguishable on a number of levels -- is misplaced. *No. 93-0894, 1994 U.S. Dist. LEXIS 9455, 1994 WL 369147, at *3 (S.D.N.Y. July 13, 1994)* (finding plaintiff's proposed market, comprised of "products as varied as household hardwares and children's sleepwear," to be implausible, and reasoning that "[h]ammers are obviously not reasonable substitutes for children's pajamas, they are not used for similar purposes, nor will the price of hammers affect the price of pajamas.").

product . . . can be substituted for IV Catheters and their associated needles to fill this medical need." (*Id.,* P 43) (emphasis added).

Anti-Competitive Effects

Defendant claims that the Complaint "contains no particularized allegations about competition in any specific market. Plaintiffs never once identify any specific product as the subject of an exclusive contract or a bundled discount. Nor do they ever allege that any specific contract or agreement impacted any specific **[*36]** product market or any specific competitor within that market." (Def. Br. at 15). Additionally, Defendant argues that the Complaint "is silent about the competitive dynamics or prices in any specific product market. Nor does the . . . Complaint allege what specific competitors (or would-be competitors) participated in, and were supposedly excluded from, which of the specific product markets." (*Id.* at 16). However, Defendant cites to no legal authority indicating that such particularized allegations are a pleading requirement. [17] To the contrary, the Supreme Court has reiterated that ***HN21***[] "*Federal Rule of Civil Procedure 8(a)(2)* requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atlantic Corp., 127 S.Ct. at 1964* (quoting *Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*. [18] The Court recognizes that the Third Circuit has applied a heightened pleading standard in antitrust cases sounding in fraud. *See, e.g., Lum, 361 F.3d at 228* (distinguishing the "short and concise statement" standard of *Rule 8(a)*, generally applicable to antitrust claims, **[*37]** from the heightened "particularity" standard of *Rule 9(b)*, applicable to antitrust claims sounding in fraud). However, Defendant does not suggest that the antitrust claims alleged in the Complaint sound in fraud. [19] Therefore, the Court sees no reason why it should apply the more rigorous pleading standard contemplated by Defendant to the case at hand. [20]

In any event, the Complaint does provide examples of the types of exclusionary practices allegedly utilized by Becton, and the purported effects of same. For example, the Complaint alleges that from 1998 through 1999, Becton engaged in securing commitment or "sole-source" contracts with certain GPOs, including Premier and

---

[17] Throughout its papers, Defendant relies on a number of cases, which are *not* binding on this Court, for the proposition that Plaintiffs' have failed to plead with the requisite "particularity" or "specificity." The Court has reviewed these decisions and finds that such cases do not warrant dismissal of Plaintiffs' claims on such a basis at this time. *See, e.g., JM Computer Servs. v. Schlumberger Techs., 1996 U.S. Dist. LEXIS 21885, 1996 WL 241607, at *4 (N.D. Cal. May 3, 1996)* (granting defendant's motion to dismiss a *§ 2* claim where plaintiff (1) failed to "identify the specific products or services in product markets for which Plaintiff claims there is no price elasticity," (2) failed to "identify an agreement with a specific person or entity," and (3) "does not identify the parts, services, or contracts involved in the alleged exclusive dealing").

Defendant **[*38]** also relies heavily on the Third Circuit's decision in *Garshman v. Universal Res. Holding Inc., 824 F.2d 223, 230-31 (3d Cir. 1987)*. The Court has reviewed the *Garshman* decision and finds that the deficiencies alleged by Defendant in this case do not rise to the level of those contemplated by the Third Circuit in *Garshman,* where the complaint, itself, failed to allege *any* "adverse effect on competition in any relevant market." *Id. at 231* (stating that "[t]he allegation of unspecified contracts with unnamed other entities to achieve unidentified anticompetitive effects does not meet the minimum standards for pleading a conspiracy in violation of the Sherman Act.").

[18] While the Supreme Court indicated that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions," for the reasons stated herein, the Court finds that Plaintiffs have met this burden. *Bell Atl. Corp., 127 S.Ct. at 1959*.

[19] *See also In re Ins. Brokerage Antitrust Litig., No. 04-5184, 2007 U.S. Dist. LEXIS 25632, 2007 WL 1100449, at *8 (D.N.J. April 5, 2007)* (utilizing heightened pleading standard of *Federal Rule of Civil Procedure 9(b)* where the plaintiffs' antitrust conspiracy claims **[*39]** were predicated on fraud).

[20] Defendant reasserts this argument repeatedly throughout its papers. For purposes of efficiency, the Court will not revisit this issue herein.

Novation, which required that they deal exclusively with Becton for any hypodermic product needs, in return for a substantial monetary payment. (*Id.,* P 59). The Complaint also alleges that pursuant to Becton's purchasing programs, unrelated products from different product lines were "bundled" together for sale to hospitals and other healthcare providers whereby in order "to receive the purported benefit offered under the bundle, purchasers had to agree to fill at least 95% of their Disposable Hypodermic Product needs from Becton." (*Id.,* PP 64, 65). As an additional incentive, Plaintiffs also allege that Becton offered "conversion" programs. The Complaint goes on to list two examples of such programs, **[*40]** one of which provided a particular Class member with the ability to purchase Becton products at a premium discount only if it agreed to utilize a "minimum of three of four Becton Dickinson safety product categories that include needles and syringes, IV catheters, surgical blades and blood collection." (*Id.,* P 66).

In addressing the anti-competitive effects of such programs, the Complaint alleges the following:

> Many of Becton's competitors in the Disposable Hypodermic Product markets are smaller, specialized companies that sell fewer products, and in some instances only a single product. As a result, these competitors cannot profitably match Becton's structured offers across product lines (because the combined discounts on all of the products in Becton's bundle is in many cases greater than the entire price of a single product made by another manufacturer). In certain cases, even if the competitor offered substantial discounts on Disposable Hypodermic Products (or indeed gave them away for free), it could not 'replace' all the discounts and rebates that the buyer would 'lose' as a penalty for rejecting Becton's bundle.

(*Id.,* P 67). For instance, the Complaint alleges that beginning in **[*41]** the 1970s, one particular competitor, Terumo, "which manufactures certain disposable medical products, including disposable syringes and associated needles" -- one of the relevant product markets at issue -- began gaining approximately 12% of the United States market for various hypodermic products. (Compl., P 71). However, by 1992 -- as a direct result of certain exclusionary initiatives undertaken by Becton -- Terumo's market share dropped to approximately 1%, and it ultimately ceased focusing on selling any hypodermic products to hospitals in the United States. (*Id.,* P 72). This, the Complaint alleges, demonstrates that Becton's actions effectively foreclosed competition in the relevant product markets, forcing Plaintiffs to pay higher prices for Disposable Hypodermic Products than they would have paid in the absence of Becton's exclusionary practices. (*Id.,* PP 67, 68, 69).

The Court finds such allegations of anti-competitive conduct set forth in the Complaint to be in sharp contrast with the allegations found to be insufficient in *Bell Atl. Corp., 127 S.Ct. at 1962-63*. [21] In particular, the complaint at issue in *Bell Atl. Corp.* sought to demonstrate anti-competitive agreements based **[*42]** on parallel conduct through *inference. Id. at 1962*. To the contrary, the instant Complaint sets forth allegations of specific anti-competitive agreements -- between Becton and certain GPOs, and between Becton and certain manufacturers -- which the Court deems as providing Defendant with adequate notice of the particular grounds upon which Plaintiffs' claims rest, particularly given the fact that Plaintiffs have not yet had the benefit of discovery. [22] *See, e.g., Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 746-747, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)* (explaining that ***HN22***[] "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly") (quotation omitted).

Antitrust Injury

---

[21] In *Bell Atl. Corp.,* the plaintiffs alleged that the Incumbent Local Exchange Carriers "have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another." *Id. at 1963*.

[22] The Court recognizes that "[t]he allegation of unspecified **[*43]** contracts with unnamed other entities to achieve unidentified anticompetitive effects does not meet the minimum standards for pleading a conspiracy in violation of the Sherman Act." *Garshman v. Universal Res. Holding Inc., 824 F.2d 223, 230-31 (3d Cir. 1987)*. Nevertheless, the Court does not find that the deficiencies alleged by Defendant in this case rise to the level of those contemplated by the Third Circuit in *Garshman,* where the complaint, itself, failed to allege *any* "adverse effect on competition in any relevant market." *Id. at 231*.

Defendant argues that Plaintiffs cannot state a claim because the "vague" allegations of antitrust injury set forth in the Complaint lack the requisite specificity. (Def. Br. at 25-26). Defendant also argues that "[s]ince a plaintiff ordinarily must be a participant in the relevant market to suffer antitrust injury, MedStar cannot state a claim without alleging the specific market in which it buys or sells products." (*Id.* at 26).

In support of its argument that the allegations of antitrust injury contained in the Complaint are overly vague, Defendant presents the following hypothetical questions for the Court's consideration -- "Plaintiffs **[*44]** claim that they 'incurred overcharges' for some unspecified products. What were those products? In what markets are plaintiffs consumers?" (Def. Br. at 16). Even assuming, *arguendo,* that the Complaint does not specifically answer those questions, once again, Defendant cites to no legal authority indicating that antitrust injury must be plead with such specificity, [23] or that the antitrust injury alleged by Plaintiffs is somehow implausible. The Complaint alleges that "[b]y unlawfully excluding and impairing competition [in the four relevant product markets], Becton's conduct has caused Plaintiffs and the other Class members to pay more for Disposable Hypodermic Products than they otherwise would have paid absent Becton's illegal, exclusionary conduct." (Compl., P 62). Defendant has given the Court no specific basis on which to find such a pleading of antitrust injury to be insufficient. [24]

In the alternative, Defendant cites to *Schuykill Energy Res., Inc. v. Pa. Power & Light, 113 F.3d 405, 415 (3d Cir. 1997)*, for the proposition that "[a] plaintiff who is neither a competitor nor a consumer in the relevant market does not suffer antitrust injury." (Def. Br. at 16). To the extent that Defendant moves to dismiss the Complaint on such a basis, any such request is denied. The United States Supreme Court *has* recognized that ***HN25***[] an antitrust injury can be suffered by a plaintiff, even if the plaintiff "was not a competitor of the conspirators, [where] the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." *Blue Shield of Va. v. McCready, 457 U.S. 465, 484, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982))*. There, the **[*46]** Court went on to explain that "[i]n light of the conspiracy here alleged we think that McCready's injury 'flows from that which makes defendants' acts unlawful' within the meaning of *Brunswick,* and falls squarely within the area of congressional concern." *Id.*

The Third Circuit has likewise found that a terminal operator plaintiff lacked standing to assert antitrust injury in the soda ash market -- in which it was neither a consumer nor a competitor -- because the plaintiff had "made no showing of a connection between the alleged international soda ash conspiracy and the level of competition within the terminalling market." *Int'l Raw Materials, Ltd., 978 F.2d at 1327-29*. There, the Court explained "[b]ecause IRM is neither a competitor nor a consumer in the relevant market, it must allege a significant causal connection between the alleged soda ash conspiracy and the alleged anticompetitive effects in the terminalling market such that the harm to the terminalling market can be said to be 'inextricably intertwined' with the alleged soda ash cartel." *Id. at 1327* (quoting *McCready, 457 U.S. at 484*). *See also* *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 429 (3d Cir. 1993)* **[*47]** (***HN26***[] "The second [*Brunswick*] requirement is generally met if the plaintiff is a 'competitor []or a consumer in the relevant market.' Alternatively, this requirement is fulfilled if there exists a 'significant causal connection' such that the harm to the plaintiff can be said to be 'inextricably intertwined' with the antitrust conspiracy.") (quoting *McCready, 457 U.S. at 484*). Thus, neither the Supreme Court nor the Third Circuit has foreclosed a finding of antitrust injury simply because the plaintiff was not a participant in the relevant

[23] *See, e.g.,* *Bell Atl. Corp., 127 S.Ct. at 1960, 1964* (***HN23***[] "A complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations," only "enough facts to state a claim to relief that is plausible on its face.").

[24] *See generally* *Harrison Aire, Inc. v. Aerostar Intern., Inc., 423 F.3d 374, 385 (3d Cir. 2005)* **[*45]** ("Here, Harrison Aire is a consumer of balloon fabric, and it claims antitrust injury in the form of business losses caused by high fabric prices, which in turn allegedly were caused by Raven/Aerostar's exclusionary conduct in the relevant fabric market. This type of injury-***HN24***[] prohibitively high consumer prices resulting from allegedly monopolistic behavior-is the type the antitrust laws are designed to redress.").

market. [25] As a result, to the extent that Defendant moves to dismiss the Complaint on the basis that Plaintiffs cannot suffer antitrust injury in a relevant market in which it is not a participant, Defendant's motion is denied. [26]

Standing

Defendant also makes the argument that Plaintiffs lack standing under *Section 3* of the Clayton Act because "neither Drug Mart nor Jabo has alleged that they are parties to any contract with Becton, exclusionary or otherwise, prohibiting them from buying products from Becton's competitors." (Def. Br. at 19).

Pursuant to this Court's March 23, 2007 Order, all parties were advised that the issue of Clayton Act standing would by addressed by way of separate motion. *See* CM/ECF Docket Entry Nos. 144, 146. As a result, the Court will not address the issues raised regarding same herein. [27]

Exclusive Dealing Allegations

Defendant makes the global argument that the "heart of plaintiffs' monopolization, attempted monopolization and restraint of trade claims are the allegations of Becton's alleged 'exclusionary' contracts, 'predatory sales tactics' and 'bundling' practices. There are many paragraphs and pages making vague allegations about how Becton sought to 'unfairly restrain and limit competition' in the non-existent 'Disposable Hypodermic Products' market, but there are no specific allegations about what specific contracts, with what specific parties, affected competition in which specific market." (Def Br. at 14). The crux of Defendant's argument is that, "plaintiffs allege no facts about which contracts are exclusive, **[*50]** which products they relate to, or who the parties are that are involved in those contracts." (*Id.* at 15).

The Complaint alleges that "Becton used 'commitment contracts' . . . [which] essentially required GPO members to deal exclusively with Becton for its Hypodermic Product needs." (Compl., P 59). The Complaint goes on to provide two examples of such "commitment contracts," (1) "in or around 1998 Premier awarded Becton a 7.5 year sole-source contract," and (2) "[i]n or around 1999, Becton provided another GPO, Novation, a $ 1 million payment (in addition to the 3% administrative fees that it pays Novation) for a 4-year sole-source contract under which Becton would be the only vendor approved by Novation to sell Disposable Hypodermic Products to Novation members." (*Id.*). Moreover, the Complaint alleges that "[i]f a Class member desired to purchase Disposable Hypodermic Products from a manufacturer that was not the chosen sole-source contractor for the GPO, the Class member risked losing numerous financial incentives," as a result, a "substantial portion of the markets for Disposable Hypodermic Products have been foreclosed." (*Id.,* PP 60, 68).

---

[25] Because Defendant does not argue that Plaintiffs' alleged injuries are not "inextricably intertwined" with Defendant's alleged actions in the relevant markets, the Court need not consider same.

[26] Defendant also makes the related argument that Plaintiffs lack antitrust standing *generally* because they "have not alleged the facts that would give *them* standing to complain -- *e.g.,* that they actually buy conventional IV catheters, **[*48]** that the conduct alleged actually affected the price of conventional IV catheters, or that plaintiffs actually were injured by that conduct." (Def. Br. at 17, 20) (emphasis in original). To the extent that the Court should construe such an argument as based on the theory that Plaintiffs cannot suffer antitrust injury in a relevant market in which it is not a participant, such an argument is, therefore, rejected.

[27] To the extent that Defendant argues that Plaintiffs lack antitrust standing *generally* based on the theory that Plaintiffs have not alleged that they are direct purchasers of the Disposable **[*49]** Hypodermic Products at issue, the Court will, therefore, defer its consideration of this argument. *See* Def. Br. at 17, 20 (arguing that Plaintiffs lack standing because they "have not alleged the facts that would *them* standing to complain -- *e.g.,* that they actually buy conventional IV catheters, that the conduct alleged actually affected the price of conventional IV catheters, or that plaintiffs actually were injured by that conduct.") (emphasis in original).

In light of the foregoing allegations, the **[*51]** Court finds that Defendant's argument that "there are no specific allegations about what specific contracts, with what specific parties, affected competition in which specific market" to be unpersuasive. [28] *See, e.g., Bell Atl. Corp., 127 S.Ct. at 1965* (***HN27***[] "Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.").

II. Indirect Purchaser Claims

A. Generally

In the alternative, Plaintiffs assert indirect purchaser claims under the laws of the District of Columbia and twenty-five other jurisdictions. Defendant moves to dismiss such "indirect" purchaser claims on the same basis on which it argues that Plaintiffs' federal antitrust claims are deficient. (Def. Br. at 22). As discussed above, Plaintiffs' claims will not be dismissed on these grounds.

Defendant also claims that "[t]here is an additional, and independent, reason for dismissing plaintiffs' 'indirect' purchaser claims under state law: the Complaint fails to allege what portion, if any, of Becton's alleged 'overcharge' was passed on to them." (Def. Br. at 22). In particular, Defendant argues that, as indirect purchasers, Plaintiffs must prove that Becton charged monopoly prices and that Becton's "overcharge" was passed on to Plaintiffs.

As a preliminary matter, the Court notes that **[*53]** Defendant cites to no legal authority indicating that Plaintiffs must plead the *amount* of "overcharge" which was passed on to them. Furthermore, although Defendant claims that "an indirect purchaser must allege and prove: (1) that a 'direct' purchaser (*e.g.,* a wholesaler) was overcharged by Becton, (2) that the direct purchaser then passed on the overcharge, or some portion of it, to the 'indirect' purchaser, and (3) that the indirect purchaser did not turn around and pass on all of the overcharge to its customers," [29] the cases relied upon by Defendant in support of same -- which are not binding on this Court, and none of which were decided at the motion to dismiss stage -- do not dictate that the foregoing factors are a pleading requirement. [30] Therefore, the Court concludes that Defendant has not met its burden in demonstrating that Plaintiffs' indirect purchaser claims should be dismissed on such a basis at this time.

---

[28] Furthermore, the Court has reviewed the unpublished decisions cited to by Defendant and finds that the types of deficiencies alleged by Defendant in this case do not rise to the level of the deficiencies found by the respective courts in those cases. *See, e.g., McPherson's, Ltd. v. Never Dull, Inc., 1990 U.S. Dist. LEXIS 17442, 1990 WL 238812, *4 (D.N.J. 1990)* (dismissing antitrust claims where the complaint contained merely a "boilerplate allegation of price discrimination without providing supporting facts."); *JM Computer Servs. v. Schlumberger Techs., 1996 U.S. Dist. LEXIS 21885, 1996 WL 241607, at *4 (N.D. Cal. May 3, 1996)* (granting defendant's motion to dismiss a *§ 2* claim where plaintiff (1) failed to "identify the specific products **[*52]** or services in product markets for which Plaintiff claims there is no price elasticity," (2) failed to "identify an agreement with a specific person or entity," and (3) "does not identify the parts, services, or contracts involved in the alleged exclusive dealing").

[29] *See* Silidor Decl., Ex. 4 at 23.

[30] *See In re Methionine Antitrust Litig., 204 F.R.D. 161, 164 (N.D. Cal. 2001)*; *A&M Supply Co. v. Microsoft Corp., 252 Mich. App. 580, 654 N.W. 2d 572, 575 (Mich. Ct. App. 2002)*; *Melnick v. Microsoft Corp.,* No. 99-709, 2001 WL 1012261, at *6 (Me. Super. Ct. Aug. 24, 2001).

Moreover, **[*54]** to the extent that Defendant cites to *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, for the proposition that "[a]n indirect purchaser plaintiff must prove that Becton charged monopoly prices and that all or some of Becton's 'overcharge' was passed through the distribution chain from the first purchaser to the indirect purchaser plaintiff" (Def. Br. at 23), Defendant fails to indicate how Plaintiffs' ultimate burden of proof is relevant at this stage of the litigation. *See, e.g., Scheuer, 416 U.S. at 236* (explaining that, ***HN28***[] in conducting a 12(b)(6) analysis, the question is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether they should be given an opportunity to offer evidence in support of their claims).

B. Standing [31]

Defendant makes the argument that Count IV of the Complaint (asserting various state ***antitrust law*** violations) should be dismissed because the named plaintiffs lack standing to bring claims in those states in which the named plaintiffs do not reside or engage in business. (Def. Br. at 24, 27). In particular, Defendant argues that Plaintiffs cannot acquire standing by asserting claims on behalf of "un-named, un-identified absent class members." [32] (*Id.* at 25). The Court has considered Defendant's argument in this regard, but, for the reasons that follow, declines to rule on the issue prior to addressing the issue of class certification. [33]

The Supreme Court has explained that ***HN30***[] "[w]hile an Article III court ordinarily must be sure of its own jurisdiction before getting to the merits, a *Rule 23* **[*57]** question should be treated first because class certification issues are 'logically antecedent' to Article III concerns . . . ." *Ortiz v. Fibreboard Corp., 527 U.S. 815, 816, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)*. Here, Defendant's argument that Plaintiffs do not enjoy standing to raise state antitrust claims in jurisdictions in which they do not reside or do business is an issue that would not arise unless class certification is granted. To be clear, the state antitrust claims alleged in Count IV of the Complaint are brought "*only* by the Indirect Class." *See* Compl. at 24 (emphasis added). It follows that if the Court determines that Plaintiffs' Indirect Class should *not* be certified, then Defendant's concerns regarding the state antitrust claims -- brought "*only* by the Indirect Class" -- may prove to be moot. *Id.* Therefore, in accordance with *Ortiz*, [34] the Court will defer its consideration of this argument until after class certification issues have been resolved. *See, e.g., In re K-Dur Antitrust Litig., 338 F. Supp. 2d at 544* (declining to address defendant's argument that plaintiffs lack Article III standing to assert claims in jurisdictions in which plaintiffs do not allege to have been purchasers prior to determining **[*58]** class certification); *Clark v. McDonald's Corp., 213 F.R.D. 198, 205 (2003)* (declining to address defendant's argument that plaintiff has no standing to assert claims on behalf of class members regarding restaurants in states that plaintiff, himself, has not visited, and reasoning that such an issue "would not arise but for Clark's capacity as a putative class representative."); *In re Buspirone Patent Litig., 185 F. Supp. 2d 363, 377 (S.D.N.Y. 2002)* (deferring on issue of Article III standing on a motion to dismiss, and explaining that "it is appropriate to decide class certification before resolving alleged Article III challenges of the present kind."). As

[31] ***HN29***[] *L. Civ. R. 7.2(b)* imposes a 15 page limit for reply briefs when using a 14-point Times New Roman font, as was done in this case. Moreover, *L. Civ. R. 7.2(b)* specifically provides that "[b]riefs of greater length will only be accepted if special permission of the Judge or Magistrate Judge is obtained prior to submission of the brief." Defendant's reply brief totals 15 pages. However, Defendant's reply brief also refers the Court **[*55]** to pages 8-14 of the reply brief it submitted in connection with its motion to dismiss the Second Consolidated Amended Class Action Complaint filed by Louisiana Wholesale Drug Company, Inc., Rochester Drug Co-Operative, Inc., JM Smith d/b/a Smith Drug Company, Dik Drug Company, American Sales Company, Inc., Park Surgical Co. Inc. and SAJ Distributors, Inc. *See* Def. Reply Br. at 2. Not only does this put Defendant well over the allotted 15 page limit, but such cross-referencing is both confusing and frustrating to the Court, and should therefore be avoided in all future filings. In any event, Defendant does not indicate that it sought, or was given, permission, to file an over-length reply brief in this instance. As a result, to the extent that pages 8-14 of the reply brief submitted in connection with Defendant's motion to dismiss the Second Consolidated Amended Class Action Complaint filed by Louisiana Wholesale Drug Company, Inc., Rochester Drug Co-Operative, Inc., JM Smith d/b/a Smith Drug Company, Dik Drug Company, American Sales Company, Inc., Park Surgical Co. Inc. and SAJ Distributors, Inc. raise arguments not raised herein, the Court will not consider such arguments in connection **[*56]** with the instant motion to dismiss.

[32] The Court notes that the cases cited to by Defendant in support of this argument are either not binding on this Court, or were decided before *Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)*. *See* Def. Br. at 25.

[33] Magistrate Judge Ronald J. Hedges' March 28, 2007 Order indicates that motions for class certification will be forthcoming. *See* CM/ECF Docket Entry No. 146.

[34] The Court is unpersuaded by Defendant's contention that the *Ortiz* "logically antecedent" exception does not apply to the circumstances at hand. *527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)*. (Def. Reply Br. at 3). As previously indicated, the state antitrust claims alleged in Count IV of the Complaint are brought "*only* by the Indirect Class." *See* Compl. at 24 (emphasis added). Should the Court decide not **[*59]** to certify the Indirect Class, then Defendant's concerns regarding claims "brought *only* by the Indirect Class" may be moot. *Id.*

such, to the extent that Defendant moves to dismiss Plaintiffs' state antitrust claims on such a basis, Defendant's motion is denied, without prejudice.

C. Unjust Enrichment Claims

Plaintiffs assert claims for unjust enrichment under the laws of the District of Columbia and twenty-five other jurisdictions. (Compl. at 27-28). ***HN31***[] Generally, "in order to state a claim for unjust enrichment, a plaintiff must allege (1) at plaintiff's expense, (2) defendant received benefit, (3) under circumstances that would make it unjust for defendant to retain benefit without paying for it." *In re K-Dur Antitrust Litig., 338 F. Supp. 2d at 544* (citing *Restatement of Restitution § 1* (1937)). Here, the Complaint alleges that "[a]s a result of Becton's anticompetitive scheme alleged herein, Plaintiffs and the Class members paid too much for Becton Disposable Hypodermic Products. The payment of these 'overcharges' represents an unjust benefit Plaintiffs and Class members conferred upon Becton. Becton was unjustly enriched by these illegal overcharges and equity requires disgorgement to prevent Becton from benefitting from its illegal acts." (Compl., PP 108, 112).

Defendant moves to dismiss Plaintiffs' claims for unjust enrichment on **[*60]** the basis that such claims are redundant to the extent that they are "based on the same alleged facts and same alleged damages as their antitrust claims: that they 'paid too much' for Becton products and that the 'overcharge' was an 'unjust benefit' plaintiffs conferred on Becton." (Def. Br. at 36). While Defendant may ultimately be correct, ***HN32***[] Plaintiffs are permitted to plead alternative theories of recovery. *See, e.g., In re K-Dur Antitrust Litig., 338 F. Supp. 2d at 544* (denying motion to dismiss claims of unjust enrichment on the basis that equitable remedies such as unjust enrichment should not be granted where there exists an adequate remedy at law, and noting that plaintiffs "are clearly permitted to plead alternative theories of recovery."); *United States v. Kensington Hosp., 760 F. Supp. 1120, 1135 (E.D. Pa. 1991)* (recognizing that under Pennsylvania law an underlying contract precludes a claim of unjust enrichment, but allowing both claims to proceed, and explaining that the "Federal rules allow pleading in the alternative."). Therefore, the Court finds that it would be premature to dismiss Plaintiffs' unjust enrichment claims on such a basis at this stage of the litigation.

To **[*61]** the extent that Defendant moves to dismiss Plaintiffs' claims of unjust enrichment on the basis that certain individual states impose additional requirements, such as privity and exhaustion of remedies, the Court likewise determines that it is premature to consider these requirements on a state by state basis, at this time. Because neither the "Indirect Class," nor the "D.C. Indirect Class" has yet to be certified, the Court will not predict which state law(s) would be applicable in the event that said Classes are certified, "particularly given the fact that the anticipated complexity of a choice-of-law analysis may itself be a factor in determining the certifiability of the class." *In re K-Dur Antitrust Litig., 338 F. Supp. 2d at 541*. Therefore, Defendant's motion to dismiss Plaintiffs' unjust enrichment claims is denied, without prejudice.

D. State Antitrust Claims

Finally, Defendant argues that certain state antitrust claims asserted by Plaintiffs are deficient for various reasons, including, but not limited to (1) Plaintiffs' inability to pursue claims under state antitrust laws which regulate only *intrastate* commerce, and (2) Plaintiffs' inability to meet particular pleading and/or **[*62]** procedural requirements set forth by certain states. For the same reasons why the Court deems it inappropriate to determine under which state laws Plaintiffs have viable unjust enrichment claims, the Court likewise determines that it would be inefficient to assess (1) which state antitrust laws would be applicable, and (2) the viability of Plaintiffs' state antitrust claims under such laws, *prior* to a determination on the issue of class certification. [35] Accordingly, to the extent that

[35] *See, e.g., In re K-Dur Antitrust Litig., 338 F. Supp. 2d at 542* (declining to address similar arguments regarding the deficiency of plaintiffs' state antitrust claims, and explaining that it would be "inefficient to determine under which state laws the Indirect Purchasers have viable claims before first deciding the class certification and choice of law issues.").

Defendant moves to dismiss Plaintiffs' state antitrust claims on such a basis, Defendant's motion is denied, without prejudice.

CONCLUSION

For the reasons stated herein, the Court denies Defendant's motion to dismiss the Consolidated Class Action Complaint. An appropriate Order accompanies this Opinion.

DATE: June 29, 2007

/s/ Jose L. Linares

UNITED **[*63]** STATES DISTRICT JUDGE

Medstar Health, Inc. v. Becton Dickinson & Co. (In re Hypodermic Prods. Antitrust Litig.)

United States District Court for the District of New Jersey

June 29, 2007, Decided; June 29, 2007, Filed

MDL No.: 1730, Master Docket No.: 05-CV-1602 (JLL/CCC)

Reporter
2007 U.S. Dist. LEXIS 47439 *

IN RE HYPODERMIC PRODUCTS ANTITRUST LITIGATION. This Document Relates To: Medstar Health, Inc. Medstar-Georgetown Medical Center, Inc., Washington Hospital Center Corp. and National Rehabilitation Hospital, Inc. v. Becton Dickinson & Co., Civil Action No.: 06-CV-3258.

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by *Medstar Health, Inc. v. Becton Dickinson & Co. (In re Hypodermic Prods. Antitrust Litig.), 2009 U.S. Dist. LEXIS 126196 (W.D.N.Y., Oct. 5, 2009)*

Prior History: *Jabo's Pharm., Inc. v. Becton Dickinson & Co. (In re Hypodermic Prods. Antitrust Litig.), 2007 U.S. Dist. LEXIS 47438 (D.N.J., June 29, 2007)*

Core Terms

products, Disposable, Hypodermic, alleges, antitrust, purchaser, manufacturers, markets, competitor, healthcare provider, exclusionary, bundle, relevant market, anti-competitive, Collection, antitrust claim, Plaintiffs', Catheters, indirect, Blood, contracts, prices, Tube, unjust enrichment, class member, distributors, motion to dismiss, Clayton Act, Sherman Act, needles

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

In deciding motions to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, courts generally consider only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.

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

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

The applicable inquiry under *Fed. R. Civ. P. 12(b)(6)* is well-settled. Courts must accept all well-pleaded allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party. In doing so, a court may look only to the facts alleged in the complaint and any accompanying attachments, and may not look at the record. However, courts are not required to credit bald assertions or legal conclusions improperly alleged in the complaint. Similarly, legal conclusions draped in the guise of factual allegations may not benefit from the presumption of truthfulness.

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

HN3[] **Motions to Dismiss, Failure to State Claim**

While a complaint attacked by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true. Ultimately, however, the question is not whether the plaintiffs will prevail at trial, but whether they should be given an opportunity to offer evidence in support of their claims.

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

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN4[] **Regulated Practices, Private Actions**

Antitrust complaints, in particular, should be liberally construed. Although there is no heightened pleading standard in antitrust cases, antitrust complaints are not exempt from the Federal Rules of Civil Procedure. The pleading standard for claims under *15 U.S.C.S. § 1* of the Sherman Act is the short and concise statement standard of *Fed. R. Civ. P. 8(a)*. The "short and concise statement" standard of *Rule 8(a)*, generally applicable to antitrust claims, is distinguished from the heightened "particularity" standard of *Fed. R. Civ. P. 9(b)*, applicable to antitrust claims sounding in fraud. Regarding the *Fed. R. Civ. P. 8(a)* pleading standard in the context of antitrust cases, while a complaint attacked by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, it must plead enough facts to state a claim to relief that is plausible on its face.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN5[] **Complaints, Requirements for Complaint**

See *Fed. R. Civ. P. 8(a)*.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN6[] **Complaints, Requirements for Complaint**

A district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.

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

Civil Procedure > ... > Pleadings > Complaints > General Overview

HN7[] Regulated Practices, Private Actions

Antitrust complaints are liberally construed in the Third Circuit.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN8[] Complaints, Requirements for Complaint

A formulaic recitation of a cause of action's elements alone will not sustain plaintiffs' obligation to provide the grounds of their entitlement to relief.

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] Antitrust & Trade Law, Sherman Act

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN10[] Sherman Act, Claims

There are four essential elements of a violation of *15 U.S.C.S. § 1* of the Sherman Act: (1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted action was illegal; and (4) that the plaintiff was injured as a proximate result of the concerted action. Moreover, because *§ 1* of the Sherman Act does not prohibit all unreasonable restraints of trade, but only restraints effected by a contract, combination, or conspiracy, the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express. As a result, stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.

Antitrust & Trade Law > Clayton Act > General Overview

HN11[] Antitrust & Trade Law, Clayton Act

See *15 U.S.C.S. § 14*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

HN12[] Tying Arrangements, Clayton Act

Section 3 of the Clayton Act, 15 U.S.C.S. § 14, was technically written to cover exclusive dealing contracts (contracts requiring the purchaser not to deal in the goods of a competitor of the seller), but Congress also intended to cover tying arrangements.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

HN13[] Clayton Act, Claims

Recovery under § 3 of the Clayton Act, 15 U.S.C.S. § 14, generally requires: (1) an "exclusive dealing" arrangement, and (2) the probable effect of the exclusion must be to substantially lessen competition in the market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

HN14[] Exclusive & Reciprocal Dealing, Exclusive Dealing

The granting of exclusive selling rights or acceptance of such exclusive selling rights, acts which are not prohibited by law unless there is a resulting foreclosure of market alternatives, cannot, without proof of such foreclosure, form the basis for a jury verdict that the defendants had entered into a conspiracy to restrain trade.

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

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

HN15[] Private Actions, Remedies

An antitrust plaintiff must allege facts establishing an "antitrust injury." The existence of antitrust injury is not typically resolved through motions to dismiss.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN16[] Regulated Practices, Monopolies & Monopolization

See 15 U.S.C.S. § 2.

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

Antitrust & Trade Law > Sherman Act > Claims

HN17[] Actual Monopolization, Claims

A violation of 15 U.S.C.S. § 2 of the Sherman Act generally consists of two elements: (1) possession of monopoly power in the relevant product market and (2) maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

HN18[] Attempts to Monopolize, Elements

To state a claim for attempted monopolization, a plaintiff must allege (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

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

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

HN19[] Relevant Market, Product Market Definition

Antitrust plaintiffs have the burden of defining the relevant market, and the outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in the plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.

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

HN20[] Relevant Market, Product Market Definition

In an antitrust case, the determination of a relevant product market or submarket is a highly factual one best allocated to the trier of fact.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN21[] Complaints, Requirements for Complaint

Fed. R. Civ. P. 8(a)(2) requires only a short and plain statement of a claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests.

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

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

HN22[] **Regulated Practices, Private Actions**

In antitrust cases, where the proof is largely in the hands of the alleged conspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

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

HN23[] **Regulated Practices, Monopolies & Monopolization**

Prohibitively high consumer prices resulting from allegedly monopolistic behavior is the type of injury the antitrust laws are designed to redress.

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

HN24[] **Private Actions, Remedies**

An antitrust injury can be suffered by a plaintiff, even if the plaintiff was not a competitor of the conspirators, where the injury the plaintiff suffered was inextricably intertwined with the injury the conspirators sought to inflict.

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

HN25[] **Private Actions, Remedies**

The second Brunswick requirement for showing antitrust injury is generally met if the plaintiff is a competitor or a consumer in the relevant market. Alternatively, this requirement is fulfilled if there exists a significant causal connection such that the harm to the plaintiff can be said to be inextricably intertwined with the antitrust conspiracy. Neither the United States Supreme Court nor the United States Court of Appeals for the Third Circuit has foreclosed a finding of antitrust injury simply because the plaintiff was not a participant in the relevant market.

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN26[] **Regulated Practices, Private Actions**

In an antitrust case, asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

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

HN27[] **Motions to Dismiss, Failure to State Claim**

In conducting a *Fed. R. Civ. P. 12(b)(6)* analysis, the question is not whether the plaintiffs will ultimately prevail in a trial on the merits, but whether they should be given an opportunity to offer evidence in support of their claims.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN28[] **Equitable Relief, Quantum Meruit**

Generally, in order to state a claim for unjust enrichment, a plaintiff must allege (1) at plaintiff's expense, (2) defendant received benefit, (3) under circumstances that would make it unjust for defendant to retain benefit without paying for it.

Civil Procedure > ... > Pleadings > Complaints > General Overview

HN29[] **Pleadings, Complaints**

Plaintiffs are permitted to plead alternative theories of recovery.

Civil Procedure > Pleading & Practice > Motion Practice > Opposing Memoranda

Civil Procedure > Pleading & Practice > Motion Practice > Supporting Memoranda

HN30[] **Motion Practice, Opposing Memoranda**

D.N.J., Civ. R. 7.2(b) imposes a 40-page limit on briefs when using a 14-point Times New Roman font. Moreover, Rule 7.2(b) specifically provides that briefs of greater length will only be accepted if special permission of the judge or magistrate judge is obtained prior to submission of the brief.

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

Constitutional Law > The Judiciary > Jurisdiction > General Overview

HN31[] **Class Actions, Certification of Classes**

While a U.S. Const. art. III court ordinarily must be sure of its own jurisdiction before getting to the merits, a *Fed. R. Civ. P. 23* question should be treated first because class certification issues are logically antecedent to U.S. Const. art. III concerns.

Counsel: [*1] For AMERICAN SALES COMPANY INC., Movant: THOMAS M. SOBOL, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, HAGENS BERMAN SOBOL SHAPIRO LLP, CAMBRIDGE, MA; PETER S. PEARLMAN, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, SADDLE BROOK, NJ.

For SAJ DISTRIBUTORS, INC., Movant: DIANNE M. NAST, LEAD ATTORNEY, RODA & NAST, PC, LANCASTER, PA; PETER S. PEARLMAN, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, SADDLE BROOK, NJ.

For LOUISIANA WHOLESALE DRUG COMPANY, INC., on behalf of itself and all others similarly situated, Plaintiff: PETER S. PEARLMAN, LEAD ATTORNEY, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, SADDLE BROOK, NJ; REBEKAH R. CONROY, LEAD ATTORNEY, WALDER HAYDEN & BROGAN, ROSELAND, NJ.

For ROCHESTER DRUG CO-OPERATIVE, INC., JM SMITH CORPORATION, d/b/a Smith Drug Company, on behalf of themselves and all others similarly situated, Plaintiffs: PETER S. PEARLMAN, LEAD ATTORNEY, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, SADDLE BROOK, NJ.

For JABO'S PHARMACY INC, Plaintiff: GORDON BALL, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, BALL & SCOTT, KNOXVILLE, TN; R. LAURENCE MACON, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, AKIN, GUMP, STRAUSS, HAUER & FELD, LLP, **[*2]** SAN ANTONIO, TX.

For JM SMITH CORPORATION, Plaintiff: PETER S. PEARLMAN, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, SADDLE BROOK, NJ.

For DRUG MART TALLMAN, INC., Plaintiff: R. LAURENCE MACON, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, AKIN, GUMP, STRAUSS, HAUER & FELD, LLP, SAN ANTONIO, TX.

For MEDSTAR HEALTH, INC. MEDSTAR HEALTH INC, MEDSTAR-GEORGETOWN MEDICAL CENTER INC, (Also a Party in Civil No. 06-3258), WASHINGTON HOSPITAL CENTER CORPORATION, (Party in Civil No. 06-3258), NATIONAL REHABILITATION HOSPITAL INC, (Party in Civil No. 06-3258), Plaintiffs: RICHARD LESLIE WYATT, LEAD ATTORNEY, AKIN GUMP, WASHINGTON, DC.

For DIK DRUG COMPANY, Consol Plaintiff: BRUCE E. GERSTEIN, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, GARWIN, BRONZAFT, GERSTEIN & FISHER, LLP, NEW YORK, NY; DANIEL BERGER, LEAD ATTORNEY, BERGER & MONTAGUE, PC, PHILADEPHIA, PA; PETER S. PEARLMAN, LEAD ATTORNEY, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, SADDLE BROOK, NJ.

For BECTON DICKINSON & COMPANY, INC., Defendant: GREGORY B. REILLY, LEAD ATTORNEY, LOWENSTEIN SANDLER PC, ROSELAND, NJ; R. DALE GRIMES, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, BASS, BERRY & SIMS, PLC, NASHVILLE, TN; **[*3]** ROBERT A. ATKINS, LEAD ATTORNEY, HANNAH SUZANNE SHOLL, COUNSEL NOT ADMITTED TO USDC-NJ BAR, PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP, NEW YORK, NY; RAMSEY C. ONG, LOWENSTEIN SANDLER, ROSELAND, NJ.

Judges: JOSE L. LINARES, UNITED STATES DISTRICT JUDGE.

Opinion by: JOSE L. LINARES

Opinion

OPINION

LINARES, District Judge.

This matter comes before the Court on the motion of Defendant, Becton Dickinson & Company, to dismiss Plaintiffs' [1] Class Action Amended Complaint, [2] pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. For the reasons set forth in this Opinion, Defendant's motion is DENIED. [3]

---

[1] For purposes of the instant motion, Plaintiffs include Medstar Health, Inc., Medstar-Georgetown Medical Center, Inc., Washington Hospital Center Corporation and National Rehabilitation Hospital, Inc. (hereinafter collectively "Plaintiffs").

[2] The operative complaint is the Class Action Amended Complaint filed on July 28, 2006, hereinafter referred to as "Complaint." In the instant Opinion, the Court addresses *only* Defendant's motion to dismiss the Complaint filed by Medstar Health, Inc., Medstar-Georgetown Medical Center, Inc., Washington Hospital Center Corporation and National Rehabilitation Hospital, Inc. Defendant has **[*4]** filed separate motions to dismiss the complaints of other parties to this multidistrict litigation, which have been decided by the Court by way of separate opinions.

BACKGROUND

[4]

This matter arises from actions brought by healthcare providers and distributors in the pharmaceutical and medical device industry, against Defendant, a medical device manufacturer, which allegedly controls a dominant share of the relevant market for the hypodermic products at issue in this case. The Judicial Panel on Multidistrict Litigation transferred this case to this Court for consolidated pretrial proceedings, pursuant to *28 U.S.C. § 1407*. [5]

I. Historical Facts

Plaintiffs, a Maryland non-profit healthcare corporation, and its Washington, D.C. subsidiaries, operate a community-based network **[*6]** of hospitals which purchased various disposable hypodermic products manufactured by Becton for use in its hospitals, doctor's offices, surgery centers, nursing homes and other healthcare settings. (Compl., PP 1, 13). Becton, a New Jersey corporation, was founded in 1897, and by the 1950s, had become the leading hypodermic syringe manufacturer in the United States. (*Id.,* P 47). The disposable hypodermic products at issue include relevant markets for: (1) disposable syringes and associated needles, (2) disposable blood collection tubes, (3) disposable blood collection tube holders, and (4) intravenous ("IV") catheter devices and their associated needles. (*Id.,* P 2). Said products are referred to collectively in the Complaint as "Disposable Hypodermic Products." (*Id.*). Disposable Hypodermic Products are each sold in both a safety and non-safety form to hospitals and/or other healthcare providers. (*Id.,* PP 27, 38, 49). The relevant geographic market for each of the Disposable Hypodermic Products is the entire United States. (*Id.,* PP 30, 35, 40, 45).

By way of background, the Complaint explains that hospitals and other healthcare providers purchased Disposable Hypodermic Products from Defendant **[*7]** through certain authorized distributors "who do not independently set prices for those products." (*Id.,* P 50). In particular, the Complaint explains that a hospital negotiates a price for Disposable Hypodermic Products with Defendant, either directly or through a Group Purchasing Organization (hereinafter "GPO"). (*Id.,* PP 51, 57). The authorized dealer then takes possession of Defendant's products and holds them in inventory until the hospital needs said products, at which time the authorized dealer delivers same. (*Id.*). The hospital then pays the authorized dealer the price it had negotiated with Becton, as well as a delivery or administrative fee. (*Id.*). The authorized dealer then pays Defendant the amount it collected from the hospital, which was "the amount already agreed to between Becton and the [healthcare provider] under applicable GPO agreements or otherwise directly with Becton." (*Id.*).

---

[3] The Court decides this matter without oral argument. *Fed. R. Civ. P. 78*. Jurisdiction is premised on *28 U.S.C. §§ 1331* and *1337*.

[4] For purposes of the instant motion to dismiss, the Court accepts Plaintiffs' factual allegations as true, and relies only on the Complaint. *See, e.g., Lum v. Bank of Am., 361 F.3d 217, 222 n.3 (3d Cir. 2004)* (***HN1***[] "In deciding motions to dismiss pursuant to *Rule 12(b)(6)*, courts generally consider only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim."). Defendant attaches certain documents to its motion to dismiss, including a copy of the Supplier Agreement between Becton Dickinson & Company and Novation, L.L.C., dated October 12, 1999, and urges the Court to consider same on the basis that said documents are "integral" to the Complaint. (Def. Br. at 9, n. 4; Silodor Decl., Ex. 2). While Plaintiffs do not appear to oppose the Court's consideration of such documents (Pl. Opp'n Br. at 17-18), the **[*5]** Court determines that it is unnecessary to consider same for purposes of the instant motion to dismiss.

[5] Defendant has also moved to dismiss (1) the Second Consolidated Amended Class Action Complaint filed by Louisiana Wholesale Drug Company, Inc., Rochester Drug Co-Operative, Inc., JM Smith d/b/a Smith Drug Company, Dik Drug Company, American Sales Company, Inc., Park Surgical Co. Inc. and SAJ Distributors, Inc., and (2) the Consolidated Class Action Complaint filed by Jabo's Pharmacy, Inc. and Drug Mart Tallman, Inc. As previously indicated, the foregoing motions will not be addressed herein.

The Complaint goes on to allege that "as a result of this purchasing process, there is effectively only one sale: the [healthcare provider] purchases Becton Disposable Hypodermic Products at prices negotiated with Becton and then receives these Products from authorized distributors." (*Id.*). **[*8]** Because authorized distributors have no control over the pricing of Becton's products, they, therefore, act solely as a distribution agent, "temporarily holding inventory and then delivering the product purchased" by the hospital. (*Id.,* P 52). Thus, the only price which the authorized distributors negotiate with Becton and/or the healthcare provider is the amount of the delivery and/or administrative fee associated with same. (*Id.*). "The fixed percentage the authorized distributor charges for distribution services is the same no matter the price the Class Member negotiates and then pays Becton, and the price a Class Member pays for Becton Disposable Hypodermic Products will be the same from all authorized distributors." (*Id.*). The Complaint also explains that upon information and belief, Becton sells a portion of its Disposable Hypodermic Products to wholesalers, who then resell these products to indirect class members. (*Id.,* P 56).

II. Becton's Alleged Anti-Competitive Conduct

Beginning in the early 1980s, rival manufacturers began posing a threat to Becton's dominance in the Disposable Hypodermic Products markets. (*Id.,* P 48). As a result, Becton began engaging in certain anti-competitive **[*9]** and illegal practices, which served to foreclose competition in the relevant markets by suppressing competition from current competitors and/or product innovators, such as Terumo and Retractable (*Id.,* P 6).

The specific anti-competitive practices set forth in the Complaint include: (1) Becton's imposition of market share purchase requirements on healthcare providers, (2) Becton's bundling of its goods for exclusionary and predatory purposes, (3) Becton's exclusionary contracts with certain GPOs, and (4) Becton's bundling of its goods with the goods of other manufacturers for exclusionary purposes. (*Id.,* P 4). Such practices were specifically designed to "eliminate or lessen competition and unlawfully acquire and maintain monopoly and/or market power" in the four relevant markets mentioned above, namely: (1) disposable syringes and their associated needles, (2) blood collection tubes, (3) blood collection tube holders, and (4) IV catheters and their associated needles. (*Id.,* P 25). Erecting such artificial barriers in the form of anti-competitive conduct has "discouraged potential rivals from even attempting to invest the resources necessary to challenge Becton's dominance in the markets **[*10]** for Disposable Hypodermic Products." (*Id.,* P 48). Moreover, the Complaint alleges that there are no pro-competitive efficiencies created through such predatory and exclusionary conduct. (*Id.,* P 71).

A. *Market Share Purchase Requirements and Bundling*

The Complaint also alleges that Becton uses exclusionary contracts in order to "bundle together for sale different types of products to protect and exploit its market power." (*Id.,* P 65). For example, Becton responded to bid requests from GPOs, by offering proposals to sell its Disposable Hypodermic Products along with unrelated products, thereby providing substantial financial incentives to hospitals which agreed to purchase all of the products included in the bundle. (*Id.*).

Becton offered one such purchasing program to MedStar, whereby in order "to receive the purported benefit offered under the bundle, purchasers had to agree to fill at least 95% of their Disposable Hypodermic Product needs from Becton." (*Id.,* P 66). On the other hand, health care providers who purchased less than Becton's suggested "compliance" levels of their Disposable Hypodermic Products needs from Becton were penalized by (1) having to pay higher prices for Disposable **[*11]** Hypodermic Products, (2) losing certain post-purchase rebates, and (3) having to re-pay past rebates received by Becton. (*Id.*).

Becton has also offered certain healthcare providers with "conversion" bonuses and rebates, which served as an additional incentive to accept the bundle of Becton products. (*Id.,* P 67). One such conversion program offered healthcare providers with one month's worth of Disposable Hypodermic Products as an inducement to choose Becton as their "primary" Disposable Hypodermic Product supplier. (*Id.*). Under this program, healthcare providers became eligible for certain "premium" discounts on Becton products only if they agreed to use a "minimum of three of four Becton Dickinson safety product categories that include needles and syringes, IV catheters, surgical blades and blood collection." (*Id.*). Because many of Becton's competitors in the Disposable Hypodermic Product markets are smaller companies which sell much fewer products, "these competitors cannot profitably match Becton's structured offers across product lines (because the combined discounts on all of the products in Becton's bundle is in many cases greater than the entire price of a single product made **[*12]** by another manufacturer)." (*Id.,* P 68). As a result of such "deliberately designed" programs, a substantial portion of the Disposable Hypodermic Product markets has been foreclosed. (*Id.*).

B. *Exclusionary Contracts*

The Complaint explains that anywhere between 68% to 98% of hospitals in this country currently belong to at least one GPO, which serves as a negotiating agent for healthcare providers. (*Id.,* P 57). GPOs were originally designed as a way for hospitals to save money by pooling their purchasing power in order to negotiate lower prices for medical products and/or goods. (*Id.,* P 58). Prior to 1986, any payments made by manufacturers to a GPO were considered an illegal "kickback," which violated the Social Security Act's "anti-kickback" provisions. (*Id.*). However, Congress amended the Social Security Act's "anti-kickback" provisions in 1986 to create certain limited exceptions for amounts paid by vendors to a GPO. (*Id.*). Thus, according to the Complaint, in order to influence GPOs, such as Premier, Becton has rewarded them not only with substantial cash payments, but also with high administrative fees, and equity positions. (*Id.,* P 59).

Becton also secured "commitment contracts" **[*13]** with certain GPOs -- including Novation and Premier -- which essentially required that they deal exclusively with Becton for all their Hypodermic Product needs. (*Id.,* PP 60, 62). For example, in 1998, one such GPO, Premier, awarded Becton with a 7.5 year "sole-source" contract. (*Id.,* P 60). Similarly, in 1999, Becton awarded another GPO, Novation, with a $ 1 million payment -- in addition to certain administrative fees -- for a 4-year "sole-source" contract, whereby "Becton would be the only vendor approved by Novation to sell Disposable Hypodermic Products to Novation members." (*Id.*). Such commitment or "sole-source" contracts were implemented to prevent healthcare providers from buying Disposable Hypodermic Products made by other manufacturers. (*Id.,* P 61). In fact, "[i]f a Class member desired to purchase Disposable Hypodermic Products from a manufacturer that was not the chosen sole-source contractor for the GPO, the Class member risked losing numerous financial incentives." (*Id.*).

Finally, Plaintiffs allege that Becton used exclusionary practices to unfairly and unlawfully limit competition from competing manufacturers of Disposable Hypodermic Products. (*Id.,* P 72). For example, **[*14]** the Complaint alleges that in response to a growing threat to its monopoly power in the Disposable Hypodermic Product markets by a Japanese corporation by the name of Terumo, Becton engaged in a program called "Block Terumo" in the late 1980s, "which entailed the use of an aggressive strategy that included the bundled pricing and contracting strategies described above and other similar exclusionary and predatory tactics." (*Id.,* P 73). Similar strategies were utilized by Becton to limit competition from another competitor -- Retractable Technologies -- in the late 1990s. (*Id.,* P 75).

III. Market Effects of Becton's Alleged Anti-Competitive Conduct

The Complaint alleges that the combined market effect of the foregoing anti-competitive actions have resulted in foreclosed competition and, thus, higher prices for all purchasers of Becton's Disposable Hypodermic Products. (*Id.,* P 70). Thus, according to the Complaint, Becton's customers have paid more than they would have paid in the absence of such unlawful conduct, "contrary to Becton's representations that hospitals and other customers who purchased Becton's bundle would receive a financial benefit." (*Id.,* PP 70, 78). Thus, not only were **[*15]** healthcare providers deprived of the opportunity to purchase competing Disposable Hypodermic Products, but they were also forced to pay Becton artificially inflated prices for same. (*Id.,* P 78).

IV. The Class Action Amended Complaint

In light of the foregoing, Plaintiffs brought this action, pursuant to *Sections 4* and *16* of the Clayton Act, *15 U.S.C. §§ 15(a)* and *26*, to recover treble damages, equitable relief, and reasonable attorneys' fees for Defendant's alleged violation of *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1-2*, as well as *Section 3* of the Clayton Act, *15 U.S.C. § 14*. Plaintiffs filed the instant class action complaint on July 28, 2006, pursuant to *Federal Rule of Civil Procedure 23(a)*, *(b)(2)* and *(b)(3)*, on their behalf, and as representatives of the following class (hereinafter referred to as the "Class"):

> All hospitals and healthcare providers in the United States who purchased Disposable Hypodermic Products manufactured by Becton through Becton's authorized distributors, at any time during the period 1988 through the present (the "Class Period"). The Class excludes Becton, Becton's parents, subsidiaries and affiliates, as well as all Becton's authorized distributors **[*16]** [sic].

(Compl., P 16). In the alternative, or in addition, Plaintiffs seek to bring this action on their own behalf and as representatives of the following class of persons and entities (hereinafter referred to as the "Indirect Class"):

> All hospitals and healthcare providers in Alabama, Arizona, California, District of Columbia, Florida, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin (the "Class Jurisdictions"), who purchased Disposable Hypodermic Products manufactured by Becton through a distributor or wholesaler at any time during the period 1988 through the present (the "Class Period"). The Class excludes Becton, Becton's parents, subsidiaries and affiliates, and all distributors or wholesalers.

(*Id.,* P 17). Plaintiffs present a third alternative class (hereinafter referred to as the "D.C. Indirect Class"):

> All hospitals and healthcare providers in the District of Columbia who purchased Disposable Hypodermic Products manufactured by Becton through a distributor or wholesaler at any time during the period 1988 **[*17]** through the present (the "Class Period"). The Class excludes Becton, Becton's parents, subsidiaries and affiliates, and all distributors or wholesalers.

(*Id.,* P 18).

Count One of the Complaint alleges unreasonable restraint of trade, in violation of *Section 1* of the Sherman Act and *Section 3* of the Clayton Act. Count Two of the Complaint alleges monopoly maintenance, in violation of *Section 2* of the Sherman Act, and Count Three alleges attempted monopolization also in violation of *Section 2* of the Sherman Act. Count Four alleges state ***antitrust law*** violations, brought only by the Indirect Class. Count Five alleges violation of the District of Columbia's ***Antitrust Law***, brought only by the D.C. Indirect Class, and Count Six of the Complaint alleges unjust enrichment.

Defendant Becton now moves to dismiss the Complaint pursuant to *Federal Rule of Civil Procedure 12(b)(6)*.

LEGAL STANDARD

HN2[] The applicable inquiry under *Federal Rule of Civil Procedure 12(b)(6)* is well-settled. Courts must accept all well-pleaded allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party. [6] *See Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*, *abrogated on other grounds by* ***[*18]*** *Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)*; *Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429, 434-35 (3d Cir. 2000)*. However, courts are not required to credit bald assertions or legal conclusions improperly alleged in the complaint. *See In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429 (3d Cir. 1997)*. Similarly, legal conclusions draped in the guise of factual allegations may not

---

[6] In doing so, a court may look only to the facts alleged in the complaint and any accompanying attachments, and may not look at the record. *See Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994)*.

benefit from the presumption of truthfulness. *See* In re Nice Sys., Ltd. Secs. Litig., 135 F. Supp.2d 551, 565 (D.N.J. 2001).

HN3[] "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations **[*19]** are true." Bell Atl. Corp. v. Twombly, 127 S.Ct. 1955, 1959, 167 L. Ed. 2d 929 (2007). [7] Ultimately, however, the question is not whether plaintiffs will prevail at trial, but whether they should be given an opportunity to offer evidence in support of their claims. Scheuer, 416 U.S. at 236.

Additionally, the Third Circuit has explained that **HN4**[] antitrust complaints, in particular, should be liberally construed. Pennsylvania ex rel. Zimmerman v. Pepsico, Inc., 836 F.2d 173, 179 (3d Cir. 1988). Although there is no heightened pleading standard in antitrust cases, [8] antitrust complaints are not exempt from **[*20]** the Federal Rules of Civil Procedure. *See, e.g.,* Zimmerman, 836 F.2d at 179-80. In this vein, the Third Circuit has indicated that the pleading standard for "Section 1 claims is the short and concise statement standard of Rule 8(a)." [9] Lum v. Bank of Am., 361 F.3d 217, 228 (3d Cir. 2004) (distinguishing the "short and concise statement" standard of Rule 8(a), generally applicable to antitrust claims, from the heightened "particularity" standard of Rule 9(b), applicable to antitrust claims sounding in fraud). In assessing the Rule 8(a) pleading standard in the context of antitrust cases, the United States Supreme Court has explained that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," it must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp., 127 S.Ct. at 1964, 1974. [10] With this framework in mind, the Court turns now to the issues raised by Defendant in support of the instant motion.

DISCUSSION

Becton argues that the Complaint should be dismissed for failure to state claims upon which relief can be granted based on the following: (1) Plaintiffs have not adequately alleged the essential elements or necessary facts of any of its antitrust claims, (2) Plaintiffs have not adequately alleged the essential elements of any state-law antitrust claims, (3) Plaintiffs lack standing to assert certain claims, and (4) certain state claims fail as a matter of law.

I. ***Federal Antitrust Claims***

A. Elements of Claims

---

[7] In so holding, the United States Supreme Court rejected the language previously used by the Court in *Conley v. Gibson,* providing that "[i]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). *See* Bell Atl. Corp., 127 S.Ct. at 1964, 1974 (holding that the *Conley* "no set of facts" language "has earned its retirement" and "is best forgotten.").

[8] *See, e.g.,* In re K-Dur Antitrust Litig., 338 F. Supp. 2d 517 (D.N.J. 2004); In re Mercedes-Benz Antitrust Litig., 157 F.Supp.2d 355, 359 (D.N.J. 2001).

[9] Federal Rule of Civil Procedure 8(a) provides **[*21]** that **HN5**[] "[a] pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief."

[10] *See also* Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528 n. 17, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983) (stating that **HN6**[] "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.").

Defendant argues that Plaintiffs (1) have failed to allege any of the required elements of an antitrust claim -- such as relevant market, anti-competitive effects, antitrust injury, and standing -- and (2) have failed to specify any unlawful **[*22]** "exclusive dealing" or "exclusionary conduct." Because Defendant has presented the Court with such global pleading arguments, which allegedly relate to Counts One, Two *and* Three, it is not entirely clear to the Court which arguments relate to which claims, and therefore, the specific basis on which Defendant believes that Plaintiffs have failed to plead particular elements of any claim. As a result, the Court will begin its analysis by assessing, generally, whether the Complaint alleges the requisite elements of the federal antitrust claims, [11] and will then turn to Defendant's broader pleading arguments, keeping in mind that ***HN7***[] antitrust complaints are liberally construed in this Circuit. *See* *PepsiCo, Inc., 836 F.2d at 179*.

Count One

Count One of the Complaint alleges unreasonable restraint of trade, in violation of *Section 1* of the Sherman Act and *Section 3* of the Clayton Act. *Section 1* of the Sherman Act provides that:

> ***HN9***[] Every contract, combination **[*23]** in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 100,000,000 if a corporation, or, if any other person, $ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1.

The Third Circuit has explained that ***HN10***[] there are four essential elements of a *§ 1* violation:

> (1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted action was illegal; and (4) that the plaintiff was injured as a proximate result of the concerted action.

Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 442 (3d Cir. 1997). Moreover, "[b]ecause *§ 1* of the Sherman Act 'does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy,' '[t]he crucial question' **[*24]** is whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express.'" *Bell Atl. Corp., 127 S.Ct. at 1964*. As a result, "stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Id. at 1965*.

Section 3 of the Clayton Act, in turn, provides that:

> ***HN11***[] It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14. *See* *Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 473 n. 2 (3d Cir. 1992)* (explaining that ***HN12***[] *Section 3* of the Clayton Act was technically written to "cover exclusive dealing

[11] In doing so, the Court is cognizant of the fact that ***HN8***[] "a formulaic recitation of a cause of action's elements" alone will not sustain Plaintiffs' obligation to provide the grounds of their entitlement to relief. *Bell Atl. Corp., 127 S.Ct. at 1959*.

contracts **[*25]** (contracts requiring the purchaser not to deal in the goods of a competitor of the seller) but Congress also intended to cover tying arrangements.").

HN13[] Recovery under *Section 3* of the Clayton Act generally requires: (1) an "exclusive dealing" arrangement, and (2) "the probable effect of the exclusion must be to substantially lessen competition in the market." *Barr Laboratories, Inc. v. Abbott Laboratories, No. 87-4764, 1989 U.S. Dist. LEXIS 6051, 1989 WL 60320, *4 (D.N.J. June 1, 1989)* (citing *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961))*.

Here, the Complaint alleges that Becton entered into arrangements with GPOs, such as Premier, whereby it would pay the GPOs "millions of dollars in cash payments," as well as "equity positions," with the expectation said GPOs would "favor Becton's products, regardless of price, over those of Becton's competitors." (Compl., P 59). The Complaint cites to an article from February 1997, which states that as a result of a recent deal between Becton and Premier, whereby Premier would "receive a portion of administrative fees in the form of warrants to buy Becton stock. If Becton Dickinson's fortunes rise, buoyed in part by Premier purchases, so will the value of the stock held by **[*26]** Premier." (*Id.*).

The Complaint also alleges that Becton entered into agreements with GPOs, certain hospitals and other customers which included "bundled financial incentives" and "exclusive dealing commitments." (Compl., P 82). For example, during 1999, it is alleged that Becton provided Novation, another GPO, with a $ 1 million payment, on top of the 3% administrative fees, in exchange for a four-year "sole-source contract under which Becton would be the only vendor approved by Novation to sell Disposable Hypodermic Products to Novation members." (*Id.,* P 60). [12] The Complaint further alleges that the object of such an arrangement was to prevent Class members from purchasing Disposable Hypodermic Products made by other manufacturers, because "[i]f a Class member desired to purchase Disposable Hypodermic Products from a manufacturer that was not the chosen sole-source contractor for the GPO, the Class member risked losing numerous financial incentives." (*Id.,* P 61). Accordingly, such arrangements served to significantly "impede and prevent competing Disposable Hypodermic Product manufacturers from selling significant (if any) Disposable Hypodermic Products to healthcare providers that **[*27]** used those GPOs." (*Id.,* P 62).

Moreover, ***HN15***[] a plaintiff must allege facts establishing an "antitrust injury." *See Schuykill Energy Res., Inc. v. Pa. Power & Light, 113 F.3d 405, 413, 417 (3d Cir. 1997)* (recognizing that the existence of antitrust injury is not typically resolved through motions to dismiss). In this regard, the Complaint alleges that Plaintiffs were injured by Becton's exclusionary practices, including its "sole-source" arrangements with certain GPOs, to the extent that they were forced to pay higher prices for Disposable Hypodermic Products than they **[*28]** would have paid in the absence of such practices and/or arrangements. (Compl., PP 63, 85, 93, 99).

Count Two

Count Two of the Complaint alleges monopoly maintenance in violation of *Section 2* of the Sherman Act. *Section 2* of the Sherman Act provides that:

> ***HN16***[] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding

[12] Given the foregoing allegations, the Court finds "plausible grounds to infer an agreement" between Defendant and certain GPOs and/or manufactures. *Bell Atl. Corp., 127 S.Ct. at 1965*. *See generally Elder--Beerman Stores Corp. v. Federated Dep't Stores, Inc., 459 F.2d 138, 146 (6th Cir. 1972)* (***HN14***[] "The granting of exclusive selling rights or acceptance of such exclusive selling rights, acts which are not prohibited by law unless there is a resulting foreclosure of market alternatives cannot, without proof of such foreclosure, form the basis for a jury verdict that the defendants had entered into a conspiracy to restrain trade.").

$ 100,000,000 if a corporation, or, if any other person, $ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2.

The Third Circuit has indicated that **HN17**[] a § 2 violation generally consists of two elements: "(1) possession of monopoly power [in the relevant product market] and (2) '. . . maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" United States v. Dentsply Int'l, 399 F.3d 181, 186 (3d Cir. 2005) (citing Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 480, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)). **[*29]** The Complaint alleges that Becton possesses monopoly power in the Disposable Syringe and Blood Collection Tube and Blood Collection Tube Holder markets, in the United States. (Compl., P 87). The Complaint also alleges that in order to maintain such monopoly power, "Becton has willfully and unlawfully used exclusionary and predatory conduct, including but not limited to, bundled pricing with the intent to foreclose competition, and exclusionary agreements." (*Id.,* P 89). The Complaint likewise alleges that Becton's monopoly power in the Disposable Syringe, Blood Collection Tube and Blood Collection Tube Holder markets is not the result of "superior product offerings, good faith business acumen, or historical accident." (*Id.,* PP 91, 92). Rather, it is the result of certain "deliberately designed" programs and/or arrangements with GPOs and healthcare providers, including but not limited to, commitment contracts, bundling contracts, and conversion bonuses. (*Id.,* PP 59, 60, 66-69). [13]

Count Three

Count Three of the Complaint alleges attempted monopolization, in violation of Section 2 of the Sherman Act. **HN18**[] "To state a claim for attempted monopolization, a plaintiff must allege '(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.'" Schuylkill Energy Res., Inc. v. Pa. Power & Light Co., 113 F.3d 405, 413 (3d Cir. 1997) (citation omitted). The Complaint alleges that, "to the extent that Becton does not possess monopoly power in the Disposable Syringe, Blood Collection Tube and/or Blood Collection Tube Holder markets in the United States, it has unlawfully attempted to monopolize the markets for Disposable Syringes, Blood Collection Tubes and/or Blood Collection **[*31]** Tubes." (Compl., P 95). In particular, the Complaint alleges that Becton engaged in exclusionary and predatory conduct, including bundled pricing and exclusionary agreements, with the "specific intent" of achieving its goal of obtaining a monopoly in the foregoing markets. (*Id.,* PP 96, 97). For example, the Complaint explains that Becton engaged in a program called "Block Terumo," as a result of "the growing threat" posed by the price reductions of a competitor, Terumo. (*Id., P 73*). The Complaint goes on to allege that, as a result of the implementation of the "exclusionary and predatory sales tactics" (i.e., the "Block Terumo" program) "Terumo's market share in the United States for the Disposable Hypodermic Products went from approximately 12% to approximately 1%." (*Id.*). By 1992, "Terumo announced that it would no longer focus on selling hypodermic products to hospitals in the United States," thus indicating that "there is a dangerous probability that if left unchecked, Becton will achieve its goals of obtaining monopoly power in said markets. (*Id.,* PP 73, 98). [14]

---

[13] *See, e.g.,* SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1065 (3d Cir. 1978) (finding that "the act of willful acquisition and maintenance of monopoly power was brought about by linking products on which **[*30]** Lilly faced no competition Keflin and Keflex with a competitive product, Kefzol. The result was to sell all three products on a non-competitive basis in what would have otherwise been a competitive market for Ancef and Kefzol. The effect of the Revised CSP was to force SmithKline to pay rebates on one product, Ancef, equal to rebates paid by Lilly based on volume sales of three products.").

[14] *See generally* Schuylkill Energy Res., Inc., 113 F.3d at 415 ("Thus, SER must allege that PP & L unlawfully acquired **[*32]** monopoly power or had a dangerous probability of unlawfully achieving monopoly power in its service area. To do this, SER must allege that PP & L in some way acted to exclude SER as a competitor in the delivery of electricity to customers in PP & L's service area.").

B. Generally

Relevant Market

Turning now to Defendant's arguments, Defendant claims that Plaintiffs have failed to set forth the requisite relevant market. In particular, Defendant claims that (1) Plaintiffs improperly combine "safety and conventional products without any allegations of the reasonable interchangeability and cross-elasticity of demand," and (2) Plaintiffs' definition of the "IV" catheter market," which includes winged IV catheters does not allege whether these products "can be interchanged, used to perform the same clinical functions or substituted for each other in medical practice." (Def. Br. at 24).

The Third Circuit has explained that ***HN19***[] Plaintiffs have the burden of defining the relevant market, and that the "outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)* **[*33]** (internal citations omitted). In *Queen City Pizza,* the Court went on to explain that:

> Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.

Id.

The Complaint alleges four relevant product markets: (1) disposable syringes and associated needles, (2) disposable blood collection tubes, (3) disposable blood collection tube holders, and (4) intravenous catheter devices and their associated needles. (Compl., P 2). The Complaint likewise alleges that there is no product "that can reasonably be substituted for" any of the products comprising the relevant product markets. (*Id.,* PP 29, 34, 39, 44). Defendant is correct in noting that the Complaint alleges that each of the four products at issue come in safety and non-safety forms. (*Id.,* PP 27, 38, 49). To the extent that Defendant urges the Court to conclude, based on the foregoing allegations, **[*34]** (1) that the two versions of each product, therefore, comprise separate product markets, and (2) that "folding these two separate markets into one general market creates an implausible product market," [15] the Court determines that any such determination would be improper at this juncture. [16] *See, e.g., Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 199 (3d Cir. 1992)* (***HN20***[] "the determination of a relevant product market or submarket ("market") is a highly factual one best allocated to the trier of fact."); *Weiss v. York Hosp., 745 F.2d 786, 825 (3d Cir. 1984)* ("Market definition is a question of fact.").

Defendant also makes the cursory argument that Plaintiffs' definition of the "IV catheter market," which includes winged IV catheters does not allege whether these products "can be interchanged, used to perform the same clinical functions or substituted for each other in medical practice," without citing to the relevant portion of the Complaint which allegedly defines the "IV catheter market" as such. (Def. Br. at 24). Although the Complaint does

---

[15] In particular, Defendant argues that "as a matter of law, safety and conventional devices are not interchangeable and cannot be part of the same relevant market." Even if Defendant is ultimately correct, the Court declines to engage in any such analysis at this time. *See, e.g., Ansell, Inc. v. Schmid Labs, Inc., 757 F. Supp. 467 (D.N.J. 1991)* (defining relevant product market after multi-day hearing, including expert testimony).

[16] Moreover, Defendant's reliance on *E. & G. Gabriel v. Gabriel Bros., Inc.,* -- a case which is not binding on this Court and distinguishable on a number **[*35]** of levels -- is misplaced. *No. 93-0894, 1994 U.S. Dist. LEXIS 9455, 1994 WL 369147, at *3 (S.D.N.Y. July 13, 1994)* (finding plaintiff's proposed market, comprised of "products as varied as household hardwares and children's sleepwear," to be implausible, and reasoning that "[h]ammers are obviously not reasonable substitutes for children's pajamas, they are not used for similar purposes, nor will the price of hammers affect the price of pajamas.").

allege that Becton *manufactures* IV Catheters "including Winged IV Catheters," the Complaint does not expressly allege that the "Winged IV Catheters" necessarily fall within the relevant product market of "IV Catheters and their Associated Needles." (Compl., PP 43, 44). Moreover, the Complaint *does* allege that "[a] relevant product **[*36]** market exists for the sale of IV Catheters and their associated needles and the market segments thereunder," and that "*no product* . . . *can be substituted for IV Catheters and their associated needles to fill this medical need.*" (*Id., P 44*) (emphasis added).

Anti-Competitive Effects

Defendant also argues that the Complaint "contains no particularized allegations about competition in any specific market. . . Medstar never specifies what specific products were supposedly bundled and to whom the proposals were made." (Def. Br. at 25). Additionally, Defendant argues that the Complaint "is silent about the competitive dynamics or prices in any specific product market. Nor does the . . . Complaint allege what specific competitors (or would-be competitors) participated in, and were supposedly excluded from, which of the specific product markets." However, Defendant cites to no legal authority indicating that such particularized allegations are a pleading requirement. [17] To the contrary, the Supreme Court has reiterated that ***HN21***[] "*Federal Rule of Civil Procedure 8(a)(2)* requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant **[*37]** fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp., 127 S.Ct. at 1964* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*. [18] The Court recognizes that the Third Circuit has applied a heightened pleading standard in antitrust cases sounding in fraud. *See, e.g., Lum, 361 F.3d at 228* (distinguishing the "short and concise statement" standard of *Rule 8(a)*, generally applicable to antitrust claims, from the heightened "particularity" standard of *Rule 9(b)*, applicable to antitrust claims sounding in fraud). However, Defendant does not suggest that the antitrust claims alleged in the Complaint sound in

[17] Throughout its papers, Defendant relies on a number of cases, which are *not* binding on this Court, for the proposition that Plaintiffs' have failed to plead with the requisite "particularity" or "specificity." The Court has reviewed these decisions and finds that such cases do not warrant dismissal of Plaintiffs' claims on such a basis at this time. *See, e.g., Broadcom Corp. v. Qualcomm Inc., No. 05-3350, 2006 U.S. Dist. LEXIS 62090, 2006 WL 2528545, at *7-9 (D.N.J. Aug. 31, 2006)* **[*38]** (dismissing antitrust claims where defendant had a "legal monopoly over the technology claimed in its patents," and expressing concern "that reviewing and supervising the terms upon which Qualcomm licenses its patents, and offers to sell its UMTS chipsets may be beyond the effective control of the Court under the antitrust laws."); *Glaberson v. Comcast Corp., No. 03-6604, 2006 U.S. Dist. LEXIS 62672, 2006 WL 2559479, at *15 (D.N.J. Aug. 31, 2006)* (denying motion to dismiss and finding that "Comcast has not demonstrated that Plaintiffs cannot prove any set of facts, consistent with the Third Amended Complaint, which would entitle them to relief."); *JM Computer Servs. v. Schlumberger Techs., 1996 U.S. Dist. LEXIS 21885, 1996 WL 241607, at *4 (N.D. Cal. May 3, 1996)* (granting defendant's motion to dismiss a *§ 2* claim where plaintiff (1) failed to "identify the specific products or services in product markets for which Plaintiff claims there is no price elasticity," (2) failed to "identify an agreement with a specific person or entity," and (3) "does not identify the parts, services, or contracts involved in the alleged exclusive dealing").

Defendant also relies heavily on the Third Circuit's decision in *Garshman v. Universal Res. Holding Inc., 824 F.2d 223, 230-31 (3d Cir. 1987)*. **[*39]** The Court has reviewed the *Garshman* decision and finds that the deficiencies alleged by Defendant in this case do not rise to the level of those contemplated by the Third Circuit in *Garshman,* where the complaint, itself, failed to allege *any* "adverse effect on competition in any relevant market." *Id. at 230-31* (stating that "[t]he allegation of unspecified contracts with unnamed other entities to achieve unidentified anticompetitive effects does not meet the minimum standards for pleading a conspiracy in violation of the Sherman Act.").

[18] While the Supreme Court indicated that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions," for the reasons stated herein, the Court finds that Plaintiffs have met this burden. *Bell Atl. Corp., 127 S.Ct. at 1959*.

fraud. [19] Therefore, the Court sees no reason why it should apply the more rigorous pleading standard contemplated by Defendant to the case at hand. [20]

In any event, the Complaint does provide certain examples of the types of exclusionary practices utilized by Becton, and the purported effects of same. For example, the Complaint alleges that from 1998 through 1999, Becton engaged in securing commitment or "sole-source" contracts with certain GPOs, including Premier and Novation, which required that they deal exclusively with Becton for any hypodermic product needs, in return for a substantial monetary payment. (*Id.,* P 60). The Complaint also alleges that pursuant to Becton's purchasing programs, unrelated products from different product lines were "bundled" together for sale to hospitals and other healthcare providers -- including Medstar -- whereby in order "to receive the purported benefit offered under the bundle, purchasers had to agree to fill at least 95% of their Disposable Hypodermic Product needs from Becton." (*Id.,* PP 66, 68). As an additional incentive, Plaintiffs also allege that Becton offered "conversion" programs. The Complaint goes on to list two examples of such programs, one of which provided a particular Class member with the ability to purchase Becton products at a premium discount **[*41]** only if it agreed to utilize a "minimum of three of four Becton Dickinson safety product categories that include needles and syringes, IV catheters, surgical blades and blood collection." (*Id.,* P 67).

In addressing the anti-competitive effects of such programs, the Complaint explains the following:

> Many of Becton's competitors in the Disposable Hypodermic Product markets are smaller, specialized companies that sell fewer products, and in some instances only a single product. As a result, these competitors cannot profitably match Becton's structured offers across product lines (because the combined discounts on all of the products in Becton's bundle is in many cases greater than the entire price of a single product made by another manufacturer). In certain cases, even if the competitor offered substantial discounts on Disposable Hypodermic Products (or indeed gave them away for free), it could not 'replace' all the discounts and rebates that the buyer would 'lose' as a penalty for rejecting Becton's bundle.

(*Id.,* P 68). For instance, the Complaint alleges that beginning in the 1970s, one particular competitor, Terumo, "which manufactures certain disposable medical products, including disposable **[*42]** syringes and associated needles" -- one of the relevant product markets at issue -- began gaining approximately 12% of the United States market for various hypodermic products. (Compl., P 72). However, by 1992 -- as a direct result of certain exclusionary initiatives undertaken by Becton -- Terumo's market share dropped to approximately 1%, and it ultimately ceased focusing on selling any hypodermic products to hospitals in the United States. (*Id.,* P 73). This, the Complaint alleges, demonstrates that Becton's actions effectively foreclosed competition in the relevant product markets, forcing Plaintiffs to pay higher prices for Disposable Hypodermic Products than they would have paid in the absence of Becton's exclusionary practices. (*Id.,* PP 68, 69, 70).

The Court finds such allegations of anti-competitive conduct set forth in the Complaint to be in sharp contrast with the allegations found to be insufficient in *Bell Atl. Corp., 127 S.Ct. at 1962-63*. [21] In particular, the complaint at issue in *Bell Atl. Corp.* sought to demonstrate anti-competitive agreements based on parallel conduct through *inference. Id. at 1962*. To the contrary, the instant Complaint sets forth allegations of specific **[*43]** anti-competitive agreements -- between Becton and certain GPOs, and between Becton and certain manufacturers -- which the Court deems as providing Defendant with adequate notice of the particular grounds upon which Plaintiffs' claims

---

[19] *See also In re Ins. Brokerage Antitrust Litig., No. 04-5184, 2007 U.S. Dist. LEXIS 25632, 2007 WL 1100449, at *8 (D.N.J. April 5, 2007)* (utilizing heightened pleading standard of *Federal Rule of Civil Procedure 9(b)* where the plaintiffs' antitrust conspiracy claims were predicated on fraud).

[20] Defendant reasserts this argument repeatedly throughout its papers. For purposes of efficiency, the Court **[*40]** will not revisit this issue herein.

[21] In *Bell Atl. Corp.,* the plaintiffs alleged that the Incumbent Local Exchange Carriers "have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another." *Id. at 1963*.

rest, particularly given the fact that Plaintiffs have not yet had the benefit of discovery. [22] *See, e.g., Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 746-747, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)* (explaining that ***HN22***[] "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly") (quotation omitted).

Antitrust Injury

Defendant argues that Plaintiffs cannot state a claim because the "vague" allegations of antitrust injury set forth in the Complaint lack the requisite specificity. (Def. Br. at 25-26). Defendant also argues that "[s]ince a plaintiff ordinarily must be a participant in the relevant market to suffer antitrust injury, MedStar cannot state a claim without alleging the specific market in which it buys or sells products." (*Id.* at 26).

In support of its argument that the allegations of antitrust injury contained in the Complaint are overly "vague," Defendant presents the following hypothetical questions for the Court's consideration -- "did MedStar pay overcharges for Becton's products? If so, what were those products?" (Def. Br. at 26). Even assuming, *arguendo,* **[*45]** that the Complaint does not specifically answer those questions, once again, Defendant cites to no legal authority indicating that antitrust injury must be plead with such specificity, or that the antitrust injury alleged by Plaintiffs is somehow implausible. (Def. Br. at 25-26). The Complaint alleges that "[b]y unlawfully excluding and impairing competition [in the four relevant product markets], Becton's conduct has caused Plaintiffs and the other Class members to pay more for Disposable Hypodermic Products than they otherwise would have paid absent Becton's illegal, exclusionary conduct." (Compl., P 63). Defendant has given the Court no specific basis on which to find such a pleading of antitrust injury to be insufficient. [23]

In the alternative, Defendant cites to *Schuylkill Energy Res., Inc. v. Pa. Power & Light, 113 F.3d 405, 415 (3d Cir. 1997)*, for the proposition that "[a] plaintiff who is neither a competitor nor a consumer in the relevant market does not suffer antitrust injury." (Def. Br. at 26). To the extent that Defendant moves to dismiss the Complaint on such a basis, any such request is denied. The United States Supreme Court *has* recognized that ***HN24***[] an antitrust injury can be suffered by a plaintiff, even if the plaintiff "was not a competitor of the conspirators, [where] the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." *Blue Shield of Va. v. McCready, 457 U.S. 465, 484, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*. There, the Court went on to explain that "[i]n light of the conspiracy here alleged we think that McCready's injury 'flows from that which makes defendants' acts unlawful' within the meaning of *Brunswick,* and falls squarely within the area of congressional concern." *Id.*

The Third Circuit has likewise found that a terminal operator plaintiff lacked standing to assert antitrust injury **[*47]** in the soda ash market -- in which it was neither a consumer nor a competitor -- because the plaintiff had "made no showing of a connection between the alleged international soda ash conspiracy and the level of competition within the terminalling market." *Int'l Raw Materials, Ltd., 978 F.2d at 1327-29*. There, the Court explained "[b]ecause IRM is neither a competitor nor a consumer in the relevant market, it must allege a significant causal connection between the alleged soda ash conspiracy and the alleged anticompetitive effects in the

---

[22] The Court recognizes that "[t]he allegation of unspecified contracts with unnamed other entities to achieve unidentified anticompetitive effects does not meet the minimum standards **[*44]** for pleading a conspiracy in violation of the Sherman Act." *Garshman v. Universal Res. Holding Inc., 824 F.2d 223, 230-31 (3d Cir. 1987)*. Nevertheless, the Court does not find that the deficiencies alleged by Defendant in this case rise to the level of those contemplated by the Third Circuit in *Garshman,* where the complaint, itself, failed to allege *any* "adverse effect on competition in any relevant market." *Id. at 231*.

[23] *See generally Harrison Aire, Inc. v. Aerostar Intern., Inc., 423 F.3d 374, 385 (3d Cir. 2005)* ("Here, Harrison Aire is a consumer of balloon fabric, and it claims antitrust injury in the form of business losses caused by high fabric prices, which in turn allegedly were caused by Raven/Aerostar's exclusionary conduct in the relevant fabric market. This type of injury-***HN23***[] prohibitively high consumer prices resulting from allegedly monopolistic behavior-is the type **[*46]** the antitrust laws are designed to redress.").

terminalling market such that the harm to the terminalling market can be said to be 'inextricably intertwined' with the alleged soda ash cartel." *Id. at 1327* (quoting *McCready, 457 U.S. at 484*). *See also* Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 429 (3d Cir. 1993) (***HN25***[] "The second [*Brunswick*] requirement is generally met if the plaintiff is a 'competitor []or a consumer in the relevant market.' Alternatively, this requirement is fulfilled if there exists a 'significant causal connection' such that the harm to the plaintiff can be said to be 'inextricably intertwined' with the antitrust conspiracy.") (quoting *McCready, 457 U.S. at 484*). **[*48]** Thus, neither the Supreme Court nor the Third Circuit has foreclosed a finding of antitrust injury simply because the plaintiff was not a participant in the relevant market. [24] As a result, to the extent that Defendant moves to dismiss the Complaint on the basis that Plaintiffs cannot suffer antitrust injury in a relevant market in which it is not a participant, Defendant's motion is denied. [25]

Standing

Defendant makes the argument that Plaintiffs lack standing under *Section 3* of the Clayton Act because "MedStar has not alleged specific facts showing any contracts that it is a party to that are exclusive. That pleading defect is particularly fatal to MedStar's exclusive dealing claim under Section 3 of the Clayton Act. Only competitors and 'restricted purchasers' -- purchasers who are parties to the allegedly restrictive contract -- can sue for damages under *Section 3* of Clayton Act." (Def. Br. at 28).

Pursuant to this Court's March 23, 2007 Order, all parties were advised that the issue of Clayton Act standing would by addressed by way of a separate motion. *See* CM/ECF Docket Entry Nos. 144, 146. As a result, the Court will not address the issues raised regarding same herein. [26]

Exclusive Dealing Allegations

Defendant makes the global argument that "[w]hether fashioned as unlawful 'exclusive dealing' under *Section 1* of the Sherman Act and *Section 3* of the Clayton Act (Count I), or as a form of monopolization under *Section 2* of the Sherman Act (Counts II and III), MedStar has failed to plead the facts necessary to state any viable claim: that there are exclusive agreements and that those agreements resulted in the foreclosure of competition in a substantial portion of the market." (Def Br. at 14). The crux of Defendant's argument is that, despite the fact that the Complaint contains the jargon of exclusive dealing, it contains "no specific facts to support MedStar's conclusion that some unidentified and unexplained contracts 'were designed to **[*51]** prevent' hospitals from buying from other manufacturers." (*Id.* at 16).

---

[24] Because Defendant does not argue that Plaintiffs' alleged injuries are not "inextricably intertwined" with Defendant's alleged actions in the relevant markets, the Court need not consider same.

[25] Defendant also makes the related argument that Plaintiffs lack antitrust standing *generally* because they have "not alleged the facts that would give *it* standing to complain -- *e.g.,* that it actually buys those products from Becton, that it did so pursuant to an 'exclusive' contract, that the contract prevented MedStar from buying such products from Becton's rivals, and that such conduct actually affected the price of such products." (Def. Br. at 27) (emphasis in original). To the extent that the Court should construe such an argument as based on the theory that Plaintiffs cannot suffer antitrust injury **[*49]** in a relevant market in which it is not a participant, such an argument is, therefore, rejected.

[26] To the extent that Defendant argues that Plaintiffs lack antitrust standing *generally* based on the theory that Plaintiffs have not alleged that they are direct purchasers of the Disposable Hypodermic Products at issue, the Court will, therefore, defer its consideration of this argument. *See* Def. Br. at 27 **[*50]** (arguing that Plaintiffs lack antitrust standing because Plaintiffs have "not alleged the facts that would give *it* standing to complain -- *e.g.,* that it actually buys those products from Becton, that it did so pursuant to an 'exclusive' contract, that the contract prevented MedStar from buying such products from Becton's rivals, and that such conduct actually affected the price of such products.") (emphasis in original).

The Complaint alleges that "Becton used 'commitment contracts' . . . [which] essentially required GPO members to deal exclusively with Becton for its Hypodermic Product needs." (Compl., P 60). The Complaint goes on to provide two examples of such "commitment contracts," (1) "in or around 1998 Premier awarded Becton a 7.5 year sole-source contract," and (2) "[i]n or around 1999, Becton provided another GPO, Novation, a $ 1 million payment (in addition to the 3% administrative fees that it pays Novation) for a 4-year sole-source contract under which Becton would be the only vendor approved by Novation to sell Disposable Hypodermic Products to Novation members." (*Id.*). Moreover, the Complaint alleges that "[i]f a Class member desired to purchase Disposable Hypodermic Products from a manufacturer that was not the chosen sole-source contractor for the GPO, the Class member risked losing numerous financial incentives," as a result, a "substantial portion of the markets for Disposable Hypodermic Products have been foreclosed." (*Id.,* PP 61, 69).

In light of the foregoing allegations, the Court finds that Defendant's argument **[*52]** that "MedStar has not pled any particular facts to establish either the existence of exclusive dealing arrangements or the substantial foreclosure of competition by those contracts" to be unpersuasive. [27] *See, e.g., Bell Atl. Corp., 127 S.Ct. at 1965* (***HN26***[]] "Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.").

II. Indirect Purchaser Claims

A. Generally

In the alternative, Plaintiffs assert indirect purchaser **[*53]** claims under the laws of the District of Columbia and twenty-five other jurisdictions. Defendant moves to dismiss such "indirect" purchaser claims on the same basis on which it argues that Plaintiffs' federal antitrust claims are deficient. As discussed above, Plaintiffs' claims will not be dismissed on these grounds.

Defendant also claims that "[t]here is an additional, and independent, reason for dismissing plaintiffs' 'indirect' purchaser claims under state law: the Complaint fails to allege what portion, if any, of Becton's alleged 'overcharge' was passed on to them." (Def. Br. at 30). [28] In particular, Defendant argues that, as indirect purchasers, Plaintiffs must prove that Becton charged monopoly prices and that Becton's "overcharge" was passed on to Plaintiffs.

As a preliminary matter, the Court notes that Defendant cites to no legal authority indicating that Plaintiffs must plead the *amount* of "overcharge" **[*54]** which was passed on to them. Furthermore, although Defendant claims that "an indirect purchaser must allege and prove: (1) that a 'direct' purchaser (*e.g.,* a wholesaler) was overcharged by Becton, (2) that the direct purchaser then passed on the overcharge, or some portion of it, to the 'indirect' purchaser, and (3) that the indirect purchaser did not turn around and pass on all of the overcharge to its customers," [29] the cases relied upon by Defendant in support of same -- which are not binding on this Court, and none of which were decided at the motion to dismiss stage -- do not dictate that the foregoing factors are a pleading

---

[27] Furthermore, Defendant cites to no legal authority indicating that such allegations have been insufficiently plead. In fact, the majority of the cases relied upon by Defendant in this regard are either not binding on this Court, or were not decided at the motion to dismiss level, therefore providing little or no guidance to the Court as to whether Plaintiffs' exclusive dealing allegations were properly or improperly pled. *See, e.g., Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*; *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*; *LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003)*.

[28] Defendant incorporates by reference its arguments at pages 22-23 and 36-38 of its Memorandum in Support of its Motion to Dismiss the Consolidated Complaint of Jabo's Pharmacy and Drug Mart Tallman, attached as Exhibit 4 to the Silodor Declaration. *See* Silodor Decl., Ex. 4 at 22-23.

[29] *See* Silidor Decl., Ex. 4 at 23.

requirement. [30] Therefore, the Court concludes that Defendant has not met its burden in demonstrating that Plaintiffs' indirect purchaser claims should be dismissed on such a basis at this time.

B. Unjust Enrichment Claims

Plaintiffs assert claims for unjust enrichment under the laws of the District of Columbia and twenty-five other jurisdictions. (Compl. at 28). ***HN28***[] Generally, "in order to state a claim for unjust enrichment, a plaintiff must allege (1) at plaintiff's expense, (2) defendant received benefit, (3) under circumstances that would make it unjust for defendant to retain benefit without paying for it." *In re K-Dur Antitrust Litig., 338 F. Supp. 2d at 544* (citing *Restatement of Restitution § 1* (1937)). Here, **[*56]** the Complaint alleges that "[a]s a result of Becton's anticompetitive scheme alleged herein, Plaintiffs and the Class members paid too much for Becton Disposable Hypodermic Products. The payment of these 'overcharges' represents an unjust benefit Plaintiffs and Class members conferred upon Becton. Becton was unjustly enriched by these illegal overcharges and equity requires disgorgement to prevent Becton from benefitting from its illegal acts." (Compl., P 116).

Defendant moves to dismiss Plaintiffs' claims for unjust enrichment on the basis that such claims are redundant to the extent that they are "based on the same alleged facts and same alleged damages as their antitrust claims: that they 'paid too much' for Becton products and that the 'overcharge' was an 'unjust benefit' plaintiffs conferred on Becton." (Def. Br. at 30). [31] While Defendant may ultimately be correct, ***HN29***[] Plaintiffs are permitted to plead alternative theories of recovery. *See, e.g., In re K-Dur Antitrust Litig., 338 F. Supp. 2d at 544* (denying motion to dismiss claims of unjust enrichment on the basis that equitable remedies such as unjust enrichment should not be granted where there exists an adequate remedy at law, **[*57]** and noting that plaintiffs "are clearly permitted to plead alternative theories of recovery."); *United States v. Kensington Hosp., 760 F. Supp. 1120, 1135 (E.D. Pa. 1991)* (recognizing that under Pennsylvania law an underlying contract precludes a claim of unjust enrichment, but allowing both claims to proceed, and explaining that the "Federal rules allow pleading in the alternative."). Therefore, the Court finds that it would be premature to dismiss Plaintiffs' unjust enrichment claims on such a basis at this stage of the litigation.

To the extent that Defendant moves to dismiss Plaintiffs' claims of unjust enrichment on the basis that certain individual states impose additional requirements, such as privity and exhaustion of remedies, the Court likewise determines that it is premature to consider these requirements on a state by state basis, at this time. [32] Because

---

[30] *See In re Methionine Antitrust Litig., 204 F.R.D. 161, 164 (N.D. Cal. 2001)*; *A&M Supply Co. v. Microsoft Corp., 252 Mich. App. 580, 654 N.W. 2d 572, 575 (Mich. Ct. App. 2002)*; *Melnick v. Microsoft Corp.,* No. 99-709, 2001 WL 1012261, at *6 (Me. Super. Ct. Aug. 24, 2001).

Moreover, to the extent that Defendant cites to *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, **[*55]** for the proposition that "[a]n indirect purchaser plaintiff must prove that Becton charged monopoly prices and that all or some of Becton's 'overcharge' was passed through the distribution chain from the first purchaser to the indirect purchaser plaintiff," (Silidor Decl., Ex. 4 at 23) Defendant fails to indicate how Plaintiffs' ultimate burden of proof is relevant at this stage of the litigation. *See, e.g., Scheuer, 416 U.S. at 236* (explaining that, ***HN27***[] in conducting a 12(b)(6) analysis, the question is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether they should be given an opportunity to offer evidence in support of their claims).

[31] Defendant's brief incorporates by reference pages 36-38 of its motion to dismiss the Consolidated Complaint of Jabo's Pharmacy, Inc. and Drug Mart Tallman, Inc. attached as Exhibit 4 to the Silodor Declaration. *See* Silodor Decl., Ex. 4 at 36-38.

[32] In Section V of its motion to dismiss the Consolidated Complaint of Jabo's Pharmacy, Inc. and Drug Mart Tallman, Inc., Defendant makes the argument that certain state law claims should be dismissed because the named plaintiffs lack standing to bring claims in those states in which the named plaintiffs do not engage in business. *See* Silodor Decl., Ex. 4 at 24. The Court notes that this argument is not raised in connection with the instant motion to dismiss, nor is it expressly incorporated by reference. *See* Def. Br. at 30. However, page 38 of the motion to dismiss the Consolidated Complaint of Jabo's Pharmacy, Inc. and Drug Mart Tallman, Inc. -- which Defendant *does* incorporate by reference -- then refers the Court to Section V of same. *See*

neither the "Indirect Class," nor the "D.C. Indirect Class" has yet to be **[*58]** certified, the Court will not predict which state law(s) would be applicable in the event that said Classes are certified, "particularly given the fact that the anticipated complexity of a choice-of-law analysis may itself be a factor in determining the certifiability of the class." *In re K-Dur Antitrust Litig., 338 F. Supp. 2d at 541*. Therefore, Defendant's motion to dismiss Plaintiffs' unjust enrichment claims is denied, without prejudice.

C. State Antitrust Claims

Finally, Defendant argues that certain state antitrust claims asserted by Plaintiffs are deficient for various reasons, including, but not limited to (1) Plaintiffs' inability to pursue claims under state antitrust laws which regulate only *intrastate* commerce, and (2) Plaintiffs' inability to meet particular pleading and/or procedural requirements set forth by certain states. (Def. Br. at 30). [33] For the same reasons why the Court deems it inappropriate **[*62]** to determine under which state laws Plaintiffs have viable unjust enrichment claims, the Court likewise determines that it would be inefficient to assess (1) which state antitrust laws would be applicable, and (2) the viability of Plaintiffs' state antitrust claims under such laws, *prior* to a determination on the issue of class certification. [34] Accordingly, to the extent that Defendant moves to dismiss Plaintiffs' state antitrust claims on such a basis, Defendant's motion is denied, without prejudice.

Silodor **[*59]** Decl., Ex. 4 at 38, 24. Defendant's maneuvering in this regard is both confusing and frustrating to the Court, and should be avoided in all future filings. Moreover, as a result of such maneuvering, it is unclear to the Court whether Defendant intends to incorporate this argument into its motion to dismiss the instant Complaint.

HN30[] *L. Civ. R. 7.2(b)* imposes a 40 page limit when using a 14-point Times New Roman font, as was done in this case. Moreover, *L. Civ. R. 7.2(b)* specifically provides that "[b]riefs of greater length will only be accepted if special permission of the Judge or Magistrate Judge is obtained prior to submission of the brief." Defendant's brief totals 30 pages. Defendant also incorporates by reference pages 22-23, 36-38, and 27-36 of its motion to dismiss the Consolidated Complaint of Jabo's Pharmacy, Inc. and Drug Mart Tallman, Inc. *See* Def. Br. at 30. This puts Defendant's brief at 5 pages over the 40 page limit. While the Court has considered the arguments contained therein, as a courtesy to Defendant, to the extent that Defendant also seeks to *indirectly* incorporate by reference the arguments raised in Section V of its motion to dismiss the Consolidated Complaint **[*60]** of Jabo's Pharmacy, Inc. and Drug Mart Tallman, Inc., the arguments contained therein will *not* be considered by the Court. Defendant does not indicate that it sought, or was given, permission, to file an over-length brief in this instance.

Even if the Court were to consider same, the Court would decline to entertain such an argument prior to addressing the issue of class certification. *See* *Ortiz v. Fibreboard Corp., 527 U.S. 815, 816, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)* (***HN31***[] "[w]hile an Article III court ordinarily must be sure of its own jurisdiction before getting to the merits, a *Rule 23* question should be treated first because class certification issues are 'logically antecedent' to Article III concerns . . . .") (citation omitted). The state antitrust claims alleged in Count IV of the Complaint are brought "*only* by the Indirect Class." *See* Compl. at 25. (emphasis added). Should the Court decide not to certify the Indirect Class, then Defendant's concerns regarding claims "brought *only* by the Indirect Class" may be moot. *See, e.g., In re K-Dur Antitrust Litig., 338 F. Supp. 2d at 544* (declining to address defendant's argument that plaintiffs lack Article III standing to assert claims in jurisdictions in which plaintiffs **[*61]** do not allege to have been purchasers prior to determining class certification); *Clark v. McDonald's Corp., 213 F.R.D. 198, 205 (2003)* (declining to address defendant's argument that plaintiff has no standing to assert claims on behalf of class members regarding restaurants in states that plaintiff, himself, has not visited, and reasoning that such an issue "would not arise but for Clark's capacity as a putative class representative."); *In re Buspirone Patent Litig., 185 F. Supp. 2d 363, 377 (S.D.N.Y. 2002)* (deferring on issue of Article III standing on a motion to dismiss, and explaining that "it is appropriate to decide class certification before resolving alleged Article III challenges of the present kind.").

[33] Defendant's brief incorporates by reference pages 27-36 of its motion to dismiss the Consolidated Complaint of Jabo's Pharmacy, Inc. and Drug Mart Tallman, Inc. attached as Exhibit 4 to the Silodor Declaration. *See* Silodor Decl., Ex. 4 at 27-36.

[34] *See, e.g., In re K-Dur Antitrust Litig., 338 F. Supp. 2d at 542* (declining to address similar arguments regarding the deficiency of plaintiffs' state antitrust claims, and explaining that it would be "inefficient to determine under which state laws the Indirect Purchasers have viable claims before first deciding the class certification and choice of law issues.").

CONCLUSION

For the reasons stated herein, the Court denies Defendant's motion to **[*63]** dismiss the Class Action Amended Complaint. An appropriate Order accompanies this Opinion.

DATE: June 29, 2007

/s/ Jose L. Linares

UNITED STATES DISTRICT JUDGE

[Nat'l Recycling v. Waste Mgmt. of Mass., Inc.]

United States District Court for the District of Massachusetts

July 2, 2007, Decided; July 2, 2007, Filed

Civil Action No. 03-12174-NMG

Reporter

2007 U.S. Dist. LEXIS 107664 *; 2007 WL 9797531

NATIONAL RECYCLING, INC., Plaintiff, v. WASTE MANAGEMENT of MASSACHUSETTS, INC., et al., Defendants.

Core Terms

hauling, disposal, market power, prices, disposal site, haulers, summary judgment, market share, anticompetitive, municipal, landfill, southeastern, tipping, matter of law, solid waste, antitrust, defendants', incinerator, contends, clauses, waste disposal, material fact, effects, genuine, cases, costs, adverse effect, non-moving, customers

Counsel: **[*1]** For National Recycling Inc., Plaintiff: Michael C. Gilleran, LEAD ATTORNEY, FisherBroyles, LLP, Boston, MA; Daniel Gordon Cromack, Attorney General's Office, Boston, MA.

For Browning-Ferris Industries, Inc., Defendant: Brian K. Grube, LEAD ATTORNEY, Jones Day, Cleveland, OH; John M. Bradley, John M. Majoras, Michael L. Kolis, LEAD ATTORNEYS, Jones Day, Washington, DC; Anthony Bolzan, Dechert LLP, Boston, MA; Mark W. Batten, Proskauer Rose LLP, Boston, MA.

For SEMass Partnership LP, Defendant: Eben A. Krim, LEAD ATTORNEY, Proskauer Rose, LLP, Boston, MA; Mark W. Batten, LEAD ATTORNEY, Proskauer Rose LLP, Boston, MA; John M. Majoras, Jones Day, Washington, DC.

For Waste Management of Massachusetts, Inc., Defendant: Christopher T. Holding, Gary S. Cooper, Gregory J. Comeau, J. Anthony Downs, LEAD ATTORNEYS, Goodwin Procter, LLP, Boston, MA.

For National Recycling Inc., National Recycling Inc., Counter Defendants: Mark W. Batten, LEAD ATTORNEY, Proskauer Rose LLP, Boston, MA; Daniel Gordon Cromack, Attorney General's Office, Boston, MA.

Judges: Nathaniel M. Gorton, United States District Judge.

Opinion by: Nathaniel M. Gorton

Opinion

MEMORANDUM & ORDER

GORTON, J.

This civil case involves allegations by the plaintiff, National **[*2]** Recycling, Inc. ("National Recycling") that the defendants, SEMass Partnership L.P. ("SEMass"), Browning-Ferris Industries, Inc. ("BFI") and Waste Management of Massachusetts, Inc. ("WMMA") have suppressed competition in the commercial waste industry in southeastern Massachusetts through the control and manipulation of prices at solid waste disposal sites in violation of 1) the

Consumer Protection Act, *Mass. Gen. Laws ch. 93A, §§ 2* and *11*, 2) the Sherman Act, *15 U.S.C. § 1* and 3) the Massachusetts Antitrust Act, *Mass. Gen. Laws ch. 93, § 4*. Currently pending before the Court is a joint motion of the defendants for summary judgment on all counts.

I. Background

The commercial waste industry consists of two segments: hauling and disposing. Hauling is, as it sounds, the pickup and removal of municipal solid waste from commercial customers. The waste is then delivered to various local disposal sites (landfill or incinerator) or to a transfer station. Transfer stations are used primarily by high volume haulers to collect several loads of waste before they are ultimately taken by transfer trailer to either a landfill or an incinerator for final disposal.

The economics of the industry are driven by two factors: 1) transportation costs and 2) "tipping fees" charged **[*3]** by the ultimate disposal site. In order to minimize costs, waste haulers seek to dispose of waste at the disposal site closest to the collection point. The tipping fees, the disposal price charged by the incinerator or landfill, are more variable and make up a significant percentage of the hauler's costs and, therefore, the price charged to the customer. At issue in this case are the tipping fees charged by the disposal sites.

In the southeastern Massachusetts waste disposal market, there are four sizable disposal sites which account for nearly all of the commercial municipal solid waste in the area, three of which are owned or operated by the defendants: 1) SEMass's incinerator plant, 2) BFI's Fall River Landfill, 3) WMMA's Taunton Landfill and 4) Crapo Hill Landfill. Defendant SEMass receives the greatest share of the market, disposing nearly 70% of the southeastern Massachusetts commercial municipal solid waste. Crapo Hill is owned by the City of New Bedford and takes only municipal solid waste collected in New Bedford and Dartmouth. The limited number of disposal sites is the result, at least in part, of requirements adopted by the Massachusetts Department of Environmental Protection **[*4]** in the 1990s to close all unlined landfills and to declare a moratorium on all new incinerator plants.

The plaintiff, National Recycling, is an independent waste hauler which operated in the southeastern Massachusetts area until February, 2005. Until that time, National Recycling hauled municipal solid waste for commercial customers and delivered it to waste disposal sites, mainly to the SEMass incinerator plant. As an independent hauler, National Recycling hauled all of its municipal waste to the disposal site using direct haul trucks; it neither owned a transfer station nor had access to delivery by transfer trailer. National Recycling remained profitable until 2002 at which point it began to lose customers rapidly, allegedly as the result of the high disposal prices charged by SEMass for direct haul disposal. In February, 2005, National Recycling stopped operating hauling trucks in the southeastern Massachusetts market and sold off its last truck in June, 2005.

Defendants BFI and WMMA are national waste disposal and hauling companies. Prior to 1999, BFI owned a 50% interest in the SEMass incinerator plant and was the country's third largest hauling and disposal company. In addition **[*5]** to the SEMass disposal site, BFI also owned other disposal locations in southeastern Massachusetts, including the Fall River Landfill. In 1999, BFI merged with Allied Waste Service, the country's second largest hauling and disposal company.[1] As a pre-condition for merger approval, BFI sold its interest in SEMass to the American Ref-Fuel Company in August, 1999. Defendant WMMA, owned by Waste Management, Inc., the country's largest waste disposal and hauling company, also operates as a hauler in the southeastern Massachusetts area and owns the Taunton landfill, which opened for municipal waste disposal in 2001.

In November 5, 2003, National Recycling filed an initial complaint in this Court alleging that the defendants had engaged in anticompetitive behavior by controlling the prices at solid waste disposal sites. On December 18, 2003, the plaintiff filed an amended complaint dismissing Waste Management, Inc. as a defendant and adding Waste Management of Massachusetts, Inc. The case was transferred to this Session on July 8, 2004. On December 29, 2006, the Court denied the plaintiff's motion for leave to file a second amended complaint to add a claim for

---

[1] Following the merger, Allied Waste Service continued to use the corporate name BFI in the southeastern Massachusetts hauling market.

exclusionary dealing but allowed **[*6]** its motion for leave to file a third amended complaint for lost profits. On January 17, 2007, the plaintiff filed an amended complaint in accordance with that order.

In the complaint, National Recycling alleges that the defendants entered into various agreements which resulted in anticompetitive restraints on the market. Generally, the complaint alleges that: 1) SEMass agreed to provide defendants WMMA and BFI with the lowest direct haul disposal prices, 2) SEMass made other side agreements with WMMA and BFI for rebates and discounts for trailer transfers which disproportionately benefited them and 3) the defendants agreed to raise and fix direct haul disposal prices at their facilities which would drive up the costs for their competitors while maximizing their own profit margins.

II. Joint Motion for Summary Judgment

The defendants contend that National Recycling cannot prove that 1) the defendants engaged in any agreements that unreasonably restrained trade and 2) even if such agreements existed, they did not adversely affect competition or cause injury to the plaintiff.

A. Legal Standard

Summary judgment is appropriate where the moving party has shown, based upon the pleadings, discovery **[*7]** and affidavits, "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". *Fed. R. Civ. P. 56(c)*.

A fact is material if it "might affect the outcome of the suit under the governing law". *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. "Factual disputes that are irrelevant or unnecessary will not be counted." Id. A *genuine* issue of material fact exists where the evidence with respect to the material fact in dispute "is such that a reasonable jury could return a verdict for the nonmoving party". Id.

Once the moving party has satisfied its burden, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine, triable issue. *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The Court must view the entire record in the light most hospitable to the non-moving party and indulge all reasonable inferences in that party's favor. *O'Connor v. Steeves, 994 F.2d 905, 907 (1st Cir. 1993)*. If, after viewing the record in the non-movant's favor, the Court determines that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate.

B. Federal Antitrust Claim

The federal claim is the linchpin of this case. The Court begins, therefore, with the operative language in *§ 1* of the Sherman Act **[*8]** which states:

> [e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal.

15 U.S.C. § 1. Despite the statute's broad language with respect to "restraint of trade", Congress intended to outlaw only unreasonable restraints. Those restraints are broken down generally into two categories: 1) per se unreasonable restraints in which a "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output" and 2) those which are "designed to increase economic efficiency and render markets more, rather than less, competitive". *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*(citation omitted). The first category, which includes such restraints as horizontal price-fixing, are illegal without regard to a defendant's market power, illicit purpose or an agreement's anticompetitive effects. *U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 593 (1st Cir. 1993)*. The second requires a "rule of reason analysis" in which a plaintiff has the burden of demonstrating, inter alia, "that the anticompetitive effects of the agreements outweigh their legitimate business justifications." *Monahan's Marine, Inc. v. Boston Whaler, Inc., 866 F.2d 525, 526-27 (1st Cir. 1989)*.

1. Most Favored Nation Agreements

In both SEMass's service agreements with WMMA and BFI, **[*9]** there are "Most Favored Nation" ("MFN") clauses which state that, except in cases of spot waste deliveries or waste collected under municipal or other government contracts, SEMass will provide the defendants with the lowest per ton rate paid by any company for the disposal of municipal solid waste. National Recycling contends that the MFN agreements exerted anticompetitive effects on the industry. The defendants disagree and respond that the agreements are: 1) pro-competitive as a matter of law, 2) without adverse effect on competition and 3) based on legitimate business justifications which outweigh any alleged anticompetitive claims. National Recycling rejects each of those arguments and contends that the MFN agreements in this case exerted an unreasonable restraint of trade by unfairly raising disposal prices and imposing a price floor for the defendants' competitors.

a. Pro-Competitive as a Matter of Law

First, the defendants cite two First Circuit cases, *Kartell v. Blue Shield of Massachusetts, Inc., 749 F.2d 922 (1st Cir. 1984)*, cert. denied, *471 U.S. 1029, 105 S. Ct. 2040, 105 S. Ct. 2049, 85 L. Ed. 2d 322 (1985)* and *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island, 883 F.2d 1101 (1st Cir. 1989)*, cert. denied, *494 U.S. 1027, 110 S. Ct. 1473, 108 L. Ed. 2d 610 (1990)*, in support of their argument that MFN clauses, in the absence of evidence that pricing was predatory or below incremental cost, are pro-competitive as a matter of law. The first, Kartell, did **[*10]** not involve a MFN clause but rather allegations that the price bargaining scheme violated *§ 1* of the Sherman Act. Ocean State involved a challenge to a MFN agreement but was brought pursuant to *§ 2* of the Sherman Act, rather than *§ 1*. The defendants contend that the two cases when read together support the claim that MFN clauses are pro-competitive.

Plaintiff National Recycling vigorously disagrees and criticizes the defendants' interpretation of the caselaw as overly broad. It directs the Court's attention to a 1996 decision from the District Court of Rhode Island, *United States v. Delta Dental of Rhode Island, 943 F. Supp. 172 (D. R.I. 1996)*, which considered Kartell and Ocean State extensively and concluded that they did not establish a rule that MFN clauses are competitive as a matter of law:

> Despite Kartell and Ocean State's broad language, these decisions, properly construed, fail to establish a per se validation of the MFN clauses in all cases where pricing is not predatory or below incremental costs. Such a blanket condonation of MFN clauses would ignore the context Kartell and Ocean State were decided in, run counter to the Sherman Act's preference for fact-specific inquires, implausibly reject the premise that MFN clauses produce substantial anticompetitive effects **[*11]** in particular circumstances and contradict the Sherman Act's animating concern for low consumer prices.

Id. at 176. This Court agrees. Neither Ocean State nor Kartell stand for the proposition that the effect of a MFN clause on a market is always de minimus in the absence of predatory or below costs pricing.

b. Rule of Reason

Second, the defendants contend that even if the MFN agreements are subject to judicial scrutiny, National Recycling cannot demonstrate that they unreasonably restrained trade. In this case, the defendants assert that the MFN agreements are "vertical agreements" because they are between buyers of waste disposal services (WMMA and BFI) and the seller of those services (SEMass) and, therefore, are subject to the rule of reason analysis. See *State Oil Co. v. Khan, 522 U.S. 3, 10-19, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. Under that analysis, a plaintiff bears the burden of showing that the arrangement had an anticompetitive effect which outweighed the legitimate economic advantages which it might provide. *U.S. Healthcare, Inc., 986 F.2d at 595*. Anticompetitive effect can be demonstrated either directly with evidence of an actual adverse effect or indirectly by establishing that the arrangement created or enhanced market power which resulted in the ability either to control prices or to exclude **[*12]** competition. See *Eastern Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n Inc., 357 F.3d 1, 5 (1st Cir. 2004)*.

The existence of market power can be proven through direct evidence of such efforts to control or indirect evidence based on market share in a relevant market combined with other factors such as evidence of high entry barriers. *Top Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 99 (2d Cir. 1998)*. Proof of market share is fundamental to a showing of anticompetitive effects; "absent market power there is ordinarily no detriment". *Eastern Food Servs., 357 F.3d at 5*. The defendants contend that National Recycling has failed to produce any evidence demonstrating that either WMMA or BFI had sufficient market power to control disposal pricing at SEMass.

As an initial matter, the parties dispute the appropriate methodology for calculating market share. The defendants contend that, even using the plaintiff's market share numbers, neither BFI nor WMMA has a sufficiently high percentage of the commercial hauling market to establish control over disposal site tipping fees.[2] In response, National Recycling contends that in this case, market share should be based on the collective shares of the two defendants: a share of over 80% of the hauling market.

The question of whether it is appropriate to aggregate the market shares of defendants BFI and WMMA is significant. When added together, **[*13]** whether it is 75% or 80%, the market share percentage is sufficient evidence of market power, especially when considered in conjunction with the nature of the waste disposal industry. Although the defendants vigorously challenge the validity of the aggregated calculus, the plaintiff defends it on the basis that: 1) the rate-differential agreements indicate that SEMass considered the economic impact of BFI and WMMA as a unit, 2) BFI and WMMA were aware of each other's MFN agreements and 3) the original MFN agreement between WMMA and SEMass was negotiated and agreed when SEMass was still owned by BFI in 1998. The Court finds none of those arguments persuasive.

As discussed in the next section, there is no credible evidence to support the existence of the rate-differential agreements. With respect to the MFN agreements, the Court finds that the contracts between WMMA and SEMass and between BFI and SEMass are vertical agreements, which the parties entered into separately. While the ability to obtain a contract with a MFN provision is evidence of some degree of market strength, the existence of the agreement itself is not conclusive evidence of market power. Furthermore, while the plaintiff **[*14]** urges that there is a triable issue with respect to the pre-merger relationship between BFI and SEMass, the record clearly indicates that by 1999, the two were independent entities. Although WMMA entered into its first MFN agreement with SEMass in 1998, the evidence clearly demonstrates that WMMA engaged in separate negotiations and contracts with SEMass subsequent to BFI's divestment.[3] There is no reason to infer that WMMA's MFN agreement with SEMass was actually an agreement with BFI.

Considering only the defendant's individual market shares, there is no evidence on the record that WMMA has a waste haul market share greater than 25%. In fact, in the plaintiff's statement of facts, WMMA's market share is alleged to be no higher than 20.5%. As a matter of law, that percentage is insufficient evidence of market power because "firms with market shares of less than 30% are presumptively incapable of exercising market power." See *Union Carbide Corp. v. Montell N.V., 27 F. Supp. 2d 414, 417 (S.D.N.Y. 1998)*(collecting cases). National Recycling provides no evidence to overcome that presumption. The Court concludes, therefore, that as a matter of law, National Recycling's claim that WMMA's MFN agreement unreasonably restrained the waste hauling market fails.

---

[2] According to the plaintiff's expert, some sources estimate the market shares of WMMA and BFI in the waste hauling market as 20-25% and 45-50%, respectively.

[3] Plaintiff's argument that BFI and SEMass should be treated as a single entity prior to the 1999 divestiture, citing *Nobody in Particular Presents, Inc. v. Clear Channel Commc'n, 311 F. Supp. 2d 1048 (D. Colo. 2004)*, is unavailing.

BFI, on **[*15]** the other hand, has a much higher percentage of market power in the waste hauling market although the exact percentage is in dispute. National Recycling contends that it is as high as 61%, while the defendants argue that it is much lower. National Recycling asserts that BFI's market power is also underscored by the high barriers to entry in the hauling and disposal market.

Market power, while critical to a showing of indirect adverse effect, is, alone, insufficient. *Top Markets, Inc., 142 F.3d at 97*. The defendants contend that, even if they had market power, National Recycling cannot show harm to competition. The defendants correctly assert that it is harm to competition, not to competitors, that is the hallmark of an antitrust claim. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. National Recycling responds that the agreements between the defendants resulted in sustained price increases in the industry and a reasonable jury could find that the defendants' actions exerted an adverse effect on competition as a whole. The Court agrees.

Specifically, the plaintiff contends that prior to the MFN agreements in 1998, the tipping fees for commercial haulers were between $35 and $40 per ton. In 1999 and 2000, the tipping fees increased to about $80 per ton and by **[*16]** 2001, SEMass was charging a tipping fee of $85-86 per ton for independent haulers delivering municipal waste by direct haul vehicles. Two of the three largest landfill disposal sites, owned by defendants BFI and WMMA, had equivalent tipping fees. National Recycling maintains that those increased tipping fees resulted in increased prices to commercial waste customers in the southeastern Massachusetts markets and forced independent waste haulers out of business. Moreover, the record includes evidence of purported communications between SEMass and BFI regarding price increases and profitability calculations. Such evidence is not only indicative of BFI's market power in southeastern Massachusetts but also that they acted in a concerted manner to increase prices and harm competition. The Court concludes, therefore, that there are genuine issues of material fact with respect to BFI's market power and the adverse effect resulting from the defendants' behavior.

With respect to the defendants' argument that there are legitimate business reasons for those increased prices which outweigh the alleged anticompetitive effects, the Court concludes that there are genuine issues of material fact. Sufficient **[*17]** for the purpose of surviving a motion for summary judgment, the plaintiff's complaint, combined with the various documents and deposition transcripts submitted by the parties, support an inference that the defendants embarked upon a course of conduct that was intended to control the direct haul disposal market in such a manner as to have a negative impact on competition.

2. Rate-Differential Agreements

The defendants also contend that National Recycling has failed to produce any credible evidence of a "Rate Differential Agreement" between the parties. According to the plaintiff, both BFI and WMMA had an oral understanding with SEMass that if SEMass lowered the price for any independent hauler (even if it was higher than the MFN price), it would lower the price charged to BFI and WMMA, dollar for dollar. As a result, SEMass had a strong incentive to resist granting discounts to other commercial haulers because that would force corresponding discounts for BFI and WMMA.

The defendants assert that the only evidence provided by National Recycling is the inconsistent testimony of its President, Michael O'Keefe ("O'Keefe") about conversations he allegedly had with SEMass employees. Defendants **[*18]** contend that in the absence of any corroborating evidence, the self-serving statements, alone, are insufficient proof of Rate Differential Agreements. In their depositions, the SEMass personnel who allegedly discussed those agreements with O'Keefe deny that the agreements exist. Furthermore, the defendants offer evidence that, contrary to the plaintiff's claim that it was impossible, SEMass did provide discounts to other independent haulers who were able to deliver an increased volume of municipal waste.

In response, the plaintiff relies primarily on the argument that credibility cannot be contested on summary judgment. The Court is not persuaded. While the credibility of a witness is the province of the trier of fact, the defendants are correct that in cases such as this where the claim at issue "makes no economic sense", the plaintiff has the burden of providing some evidence to support that claim. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,* *587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Based on evidence on the record, the rate differential agreement alleged by the plaintiff would be contrary to SEMass's economic self-interest and plaintiff has failed to satisfy its burden to come forward with the required additional evidence. O'Keefe's testimony alone is insufficient **[*19]** to prove the existence of the alleged rate-differential agreements. See *Perez v. Volvo Car Corp., 247 F.3d 303, 318 (1st Cir. 2001)*("Where, as here, the nonmovant has the burden of proof on a critical issue, and the evidence that she proffers in opposition to summary judgment is so vague that she could not prevail at trial, the motion must be granted."). The Court concludes that National Recycling has failed to present a triable issue regarding the rate differential agreements.

C. State Law Claims

The defendants also seek summary judgment on plaintiff's state law claims on the same basis as the federal claims. Given the Court's denial of summary judgment on the federal antitrust claims with respect to defendants SEMass and BFI, summary judgment on the state law claims is inappropriate.

Defendant WMMA (in the joint motion) contends that the state law claims, pursuant to the Massachusetts Antitrust Act and the Consumer Protection Act, also fail because National Recycling cannot demonstrate an antitrust violation. National Recycling does not challenge dismissal of the state ***antitrust law*** but contends that the Chapter 93A claim is not co-extensive with the antitrust violation. The Court disagrees and will, therefore, dismiss the 93A claim.

ORDER

For **[*20]** the foregoing reasons, the defendants' joint motion for summary judgment on all claims (Docket No. 83) is, with respect to defendant Waste Management of Massachusetts, Inc., **ALLOWED**; but is, with respect to defendants Browning-Ferris Industries, Inc. and SEMass Partnership L.P., **DENIED**.

So ordered.

/s/ Nathaniel M. Gorton

Nathaniel M. Gorton

United States District Judge

Dated: July 2, 2007

Am. Needle, Inc. v. New Orleans La. Saints

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

July 12, 2007, Decided; July 12, 2007, Filed

No. 04 C 7806

Reporter

496 F. Supp. 2d 941 *; 2007 U.S. Dist. LEXIS 51156 **; 2007-2 Trade Cas. (CCH) P75,813

AMERICAN NEEDLE, INC., Plaintiff, vs. NEW ORLEANS LOUISIANA SAINTS, et al., Defendants.

Subsequent History: Summary judgment granted by *Am. Needle, Inc. v. New Orleans La. Saints, 2007 U.S. Dist. LEXIS 96440 (N.D. Ill., Nov. 19, 2007)*

Prior History: *Am. Needle, Inc. v. New Orleans La. Saints, 2005 U.S. Dist. LEXIS 22967 (N.D. Ill., Oct. 5, 2005)*

Core Terms

teams, Properties, license, single entity, League, rights

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

HN1[] **Ownership & Transfer of Rights, Licenses**

The owner or licensor of intellectual property can grant a license to one or to many.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN2[] **Conspiracy to Monopolize, Elements**

The determination, in the jargon of ***antitrust law***, of whether several actors are acting as a single entity for a specific purpose is essentially a conclusion as to whether in that facet of their operations they have so integrated their operations that they should be deemed to be a single entity rather than joint venturers cooperating for a common purpose.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

HN3[] **Ownership & Transfer of Rights, Licenses**

The holder of intellectual property rights can issue an exclusive license, and whether or not the licensee urged, solicited, or vigorously argued for a change in licensees is irrelevant.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > Single Business Enterprise

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN4[] **Scope, Monopolization Offenses**

In Copperweld, the United States Supreme Court has rejected the concept of intra-enterprise conspiracy and has ruled that a corporation and its wholly-owned subsidiary are incapable of conspiring with each other for purposes of the Sherman Act. In doing so, it has emphasized that function, not form, controls and that concerted behavior deprives the marketplace of the independent centers of decisionmaking that competition assumes and denies. The Supreme Court has concluded that coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests. Copperweld casts considerable doubt upon prior lower court decisions broadly rejecting the single entity concept, and the United States District Court for the Northern District of Illinois, Eastern Division, believes it is imprudent to rely upon those cases.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Business & Corporate Law > Distributorships & Franchises > Trademark Licensing

HN5[] **Causes of Action, Restraints of Trade**

Perhaps a proper reading of Copperweld leads to the conclusion that in most national sports league contexts for league-wide policy, other than labor disputes, the leagues are single entities. While such a position has considerable appeal, the United States Court of Appeals for the Seventh Circuit has not gone that far. It has recognized that, antitrust issues aside, how much a professional sports league charges for national telecasts is for the league to resolve under its internal governance procedures. It is no different in principle from the question how the clubs divide revenue from merchandise bearing their logos and trademarks.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN6[] **Scope, Monopolization Offenses**

Delegated decisionmaking does not deprive the marketplace of independent centers of decisionmaking where there is no sudden joining of independent sources of economic power previously pursuing separate interests.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Business & Corporate Law > Distributorships & Franchises > Trademark Licensing

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN7[] Scope, Monopolization Offenses

In answering Copperweld's functional question, the United States District Court for the Northern District of Illinois, Eastern Division, believes that cooperative marketing by national professional football teams serves to promote professional football and falls on the "unilateral" action side of the line. The court reaches this conclusion while recognizing that others might well disagree.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN8[] Conspiracy to Monopolize, Elements

Ownership (and, thus, ultimate control) of intellectual property rights does not necessarily defeat the single entity concept for antitrust purposes. Indeed, that common ownership and the absence of conflicts are not determinative standards adds to the conceptual difficulties in where to draw the line between what should be deemed a single entity and what should not. The United States District Court for the Northern District of Illinois, Eastern Division, recognizes, as well, that supposed efficiencies in economic arrangements are more the stuff of the rule of reason than of distinguishing between single entities and joint ventures.

Counsel: [1]** For American Needle, Inc, Plaintiff: Jeffrey M. Carey, LEAD ATTORNEY, Law Office of Jeffrey M. Carey, Northfield, IL.

For New Orleans Louisiana Saints, Seattle Seahawks Inc, Oakland Raiders A.K. Football, Inc., Richardson Sports Limited Partnership, Detroit Lions Inc, Minnesota Vikings Football Club, LLC Ltd., Houston NFL Holdings L.P., - Houston NFL Holdings G.P. LLC, Pro-Football Inc, Jacksonville Jaguars, Ltd., Five Smiths, Inc., Tenessee Football L.P., Pittsburgh Steelers Sports, Inc., Buffalo Bills Inc, Indianapolis Colts, Inc., San Francisco Forth Niners, Inc., Chargers Football Company LLC Ltd., PDB Sports Ltd, New England Patriots L.P., B & B Holdings Inc, Cincinnati Bengals, Inc., St Louis Rams Partnership, - St Louis Rams Football Company, Inc., The Green Bay Packers, Inc., Miami Dolphins Ltd, New York Jets LLC, Dallas Cowboys Football Cclub, Ltd., Kansas City Chiefs Football Club, Inc., Tampa Bay Area NFL Football, Inc., Cleveland Browns Football Company LLC, Seattle Seahawks Inc, New York Football Giants, Inc., Philabelphia Eagles Football Club, Inc., Defendants: Derek Ludwin, Covington & Burling, Washington, DC.

For National Football League, Defendant: Gregg Levy, LEAD ATTORNEY, **[**2]** Derek Ludwin, Covington & Burling, Washington, DC; Earl Edward Farkas, Eugene E. Gozdecki, Gozdecki and DelGiudice, Chicago, IL.

For Reebok International Ltd., Defendant: Timothy Bunker Hardwicke, LEAD ATTORNEY, Latham & Watkins LLP (IL), Chicago, IL.

Judges: JAMES B. MORAN, Senior Judge.

Opinion by: JAMES B. MORAN

Opinion

[*942]

MEMORANDUM OPINION AND ORDER

Since 1963 the merchandising of the NFL and constituent team paraphernalia has been through a jointly-owned affiliate, NFL Properties. The 32 teams may own the intellectual property involved, but the exploitation of that property has been delegated to NFL Properties. Over the years, the details of the arrangement have changed, *e.g.,* a trust now acts as a conduit for the transfer of rights from teams to NFL Properties, but the substance of the arrangement is essentially unchanged. The 32 teams each has an equal interest in the enterprise. Thus, although much (perhaps all) of the profits may go to charity, any distribution that may be made after payment of expenses and distribution to charity is equally shared. [1]

It is the responsibility of NFL Properties to assist in the **[**3]** development and protection of the various marks and to implement marketing strategies. Therefore, it coordinates the development of intellectual property rights, promotes consistent branding and quality, and engages in nationwide promotion. That means, for example, that the Green Bay Packers need not find and monitor suppliers for apparel bearing its logos, need not locate outlets in Chicago, Tampa or Seattle, need not unilaterally pursue infringers, and need not coordinate marketing strategies with 31 other teams and the NFL. Further, a supplier need not negotiate separate licenses with 32 different teams and the NFL.

For over twenty years NFL Properties granted licenses to plaintiff American Needle, Inc., to use trademarks of the NFL and the (now) 32 teams on headware it manufactured. In 2000, NFL Properties was authorized to enter into an exclusive license with Reebok International Ltd. (Reebok), and it did so. That prompted plaintiff, which lost its license rights, to sue. It does not claim that the NFL and its 32 teams previously acted improperly by delegating to NFL Properties the authority to grant licenses. That was permissible, it contends, so long as the licenses were spread **[**4]** around a number of competitors. It only became an antitrust violation, an illegal conspiracy in restraint of trade violation of *Section 1 of the Sherman Act*, when NFL Properties granted an exclusive license to Reebok.

We reject the distinction plaintiff urges us to make. ***HN1***[] The owner or licensor of intellectual property can grant a license to one or to many. *See* *Cook, Inc. v. Boston Scientific Corp., 333 F.3d 737, 740-41 (7th Cir. 2003)*. Even were plaintiff right in its claim that there is a Section 1 antitrust violation (which we reject), and each team had to do its own licensing, each could choose to license many, or just one. The issue, rather, is whether or not the 32 teams can agree on designating a common actor to exploit their various intellectual **[*943]** property rights, and on being bound by the decisions of that common actor. And the answer to that depends upon whether, with regard to the facet of their operations respecting exploitation of intellectual property rights, the NFL and its 32 teams are, in the jargon of ***antitrust law***, acting as a single entity. We conclude that they clearly are, and, accordingly, enter summary judgment for defendants on Counts II and V. ***HN2***[] That determination **[**5]** is essentially a conclusion that in that facet of their operations they have so integrated their operations that they should be deemed to be a single entity rather than joint venturers cooperating for a common purpose. *See* *Texaco, Inc. v. Dagher, 547 U.S. 1, 6, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*. [2]

The two cases most relevant to the decision are *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*, and *Chicago Professional Sports Limited Partnership v. National Basketball Association, 95 F.3d 593 (7th Cir. 1996)* ("Bulls II"). ***HN4***[] In Copperweld, the Supreme Court rejected the concept of intra-enterprise conspiracy and ruled that a corporation and its wholly-owned subsidiary are incapable of conspiring with each other for purposes of the Sherman Act. In doing so, it emphasized that function, not form, controlled. It noted that concerted behavior "deprives the marketplace of the independent centers of decision-making **[**6]** that competition assumes and denies" *467 U.S. at 769*. It also concluded that "[C]oordination between

---

[1] Some minor revenue from sales from local team pro shops may adhere to the benefit of the local team.

[2] Plaintiff also contends that Reebok, also a defendant and supposedly an ardent suitor, itself creates the plurality necessary for Section 1 claims. But if NFL Properties ***HN3***[] can issue an exclusive license, then whether or not the licensee urged, solicited or vigorously argued for the change is irrelevant.

a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests" (*id. at 770*). Copperweld casts considerable doubt upon prior lower court decisions broadly rejecting the single entity concept and, we believe, made it imprudent to rely upon those cases. ***HN5***[] Perhaps a proper reading of Copperweld leads to the conclusion that in the NFL and most other sports league contexts for league-wide policy other than labor disputes, the leagues are single entities. That is the position taken in Grow, Note: "There is No 'I' in 'League': Professional Sports League and the Single Entity Defense," *105 Mich.L.Rev. 183 (2006)*. That Note provides a helpful discussion of the status of the defense over time. While Grow's position has considerable appeal, the Seventh Circuit did not go that far in Bulls II, and we therefore turn to Bulls II.

Bulls II recognizes that, antitrust issues aside, how much the NBA charges for national telecasts is for the league to resolve under its internal governance procedures. It is no different **[**7]** in principle from the question how the clubs divide revenue from merchandise bearing their logos and trademarks. *Id., at 597*.

HN6[] Delegated decision-making does not deprive the marketplace of independent centers of decision-making. There is no sudden joining of independent sources of economic power previously pursuing separate interests. NFL Properties has been making the decisions unilaterally or jointly since 1963. Why the NFL should opt for that structure is obvious. To require that 32 teams each take total responsibility for the protection and marketing of its own logos and trademarks in a nationwide market would cause each to be at a competitive disadvantage with other leagues with integrated marketing. Sharing the revenues (or tax deductions), despite some teams being in much larger **[*944]** markets, serves the interest in having the teams relatively competitive. For this facet, ***HN7***[] in answering Copperweld's functional question, we believe cooperative marketing does serve to promote NFL football and falls on the "unilateral" action side of the line. *Dagher, 547 U.S. 1, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*.

We reach that conclusion while recognizing that others might well disagree, *see, e.g., Sullivan v. National Football League, 34 F.3d 1091, 1099 (1st Cir. 1994)*, **[**8]** that it "is a tough question …," and that the "cases do not yield a clear principle about the proper characterization of sports leagues …," *Bulls II at 599-600*. Plaintiff here emphasizes that the teams, not NFL Properties, own the respective property rights. ***HN8***[] Ownership (and, thus, ultimate control) does not necessarily defeat the single entity concept. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products, 370 U.S. 19, 29, 82 S. Ct. 1130, 8 L. Ed. 2d 305 (1962)*; *City of Mt. Pleasant, Iowa v. Associated Electric Cooperative, Inc., 838 F.2d 268, 275 (8th Cir. 1988)*. Indeed, that common ownership and the absence of conflicts are not determinative standards adds to the conceptual difficulties in where to draw the line between what should be deemed a single entity and what should not. *See Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 58 (1st Cir. 2002)*. We recognize, as well, that supposed efficiencies in economic arrangements are more the stuff of the rule of reason than of distinguishing between single entities and joint ventures.

The obvious advantages of one-stop exploitation of the intellectual properties of the 32 teams and of those common to the league in a national market do, however, explain in part why **[**9]** the National Football League teams proceeded as they did. The need for competitive balance is obvious as well. The teams agreed to share equally in that market, and they have done so since 1963. They have, through the various forms of NFL Properties, acted as an economic unit. *Freeman v. San Diego Association of Realtors, 322 F.3d 1133, 1147-48 (9th Cir 2003)*. The economic reality is that the separate ownerships had no economic significance in and of itself, and American Needle, Inc. does not suggest that it ever dealt with any of the teams as independent organizations. *See City of Mt. Pleasant, Iowa v. Associated Electric Cooperative, Inc., 838 F.2d at 275*.

Plaintiff has urged that it needs a great amount of discovery and that any consideration of the single entity concept is premature. We disagree. We believe that the facts that materially bear upon the decisions are undisputed and that they lead undeniedly to the conclusion that the NFL and the teams act as a single entity in licensing their intellectual property. Accordingly, we grant defendants' motion for summary judgment on Counts II and V.

JAMES B. MORAN

Senior Judge, U. S. District Court

July 12, 2007.

Paul v. Intel Corp. (In re Intel Corp. Microprocessor Antitrust Litig.)

United States District Court for the District of Delaware

July 12, 2007, Decided

MDL Docket No. 05-1717-JJF, Civil Action No. 05-485-JJF

Reporter

496 F. Supp. 2d 404 *; 2007 U.S. Dist. LEXIS 50654 **; 2007-2 Trade Cas. (CCH) P75,856

IN RE: INTEL CORP. MICROPROCESSOR ANTITRUST LITIGATION; PHIL PAUL, on behalf of himself and all others similarly situated, Plaintiffs, v. INTEL CORPORATION, Defendant.

Subsequent History: Magistrate's recommendation at *Paul v. Intel Corp. (In re Intel Corp. Microprocessor Antitrust Litig.), 2007 U.S. Dist. LEXIS 103978 (D. Del., Sept. 6, 2007)*

Prior History: *Intel Corp. Microprocessor Antitrust Litig. v. Intel Corp., 2007 U.S. Dist. LEXIS 43193 (D. Del., June 14, 2007)*

Core Terms

Plaintiffs', monopolization, antitrust, contends, class action, motion to dismiss, state law, allegations, unjust enrichment, microprocessors, anti trust law, common law, consumer protection, prices, purchasers, monopoly, federal court, cases, consumers, factors, anticompetitive conduct, antitrust claim, choice of law, conspiracy, class member, deceptive, damages, restraint of trade, high prices, unconscionable

LexisNexis® Headnotes

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

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

HN1[] **Private Actions, Standing**

Pursuant to *Fed. R. Civ. P. 12(b)(6)*, a court may dismiss a complaint for failure to state a claim upon which relief may be granted. *Fed. R. Civ. P. 12(b)(6)*. *Rule 12(b)(6)* is also invoked for questions of antitrust standing.

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

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

The purpose of a motion to dismiss is to test the sufficiency of a complaint, not to resolve disputed facts or decide the merits of the case. While the court must accept as true all allegations in the complaint and must draw all reasonable factual inferences in the light most favorable to the plaintiff, the factual allegations must be enough to raise a right to relief above the speculative level. Heightened fact pleading is not required, but enough facts must be alleged to state a claim to relief that is plausible on its face. The court is not required to accept legal conclusions alleged or inferred from the pleaded facts. Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. The burden of demonstrating that dismissal is appropriate rests on the movant.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN3[] **Standing, Requirements**

To demonstrate standing for the purposes of pursuing an antitrust claim, plaintiffs must demonstrate the Constitutional standing requirements of *U.S. Const. art. III, § 2*, namely a "case" or "controversy." However, the Constitutional standing requirements are augmented by consideration of prudential limitations. Specifically, plaintiffs must demonstrate that they have antitrust standing and are the proper parties to bring a private antitrust action. The United States Supreme Court outlined five factors that courts should consider when determining whether a party has standing to bring a private action under the antitrust laws. These factors include: (1) whether plaintiff's alleged injury is the type of injury that the antitrust laws were intended to redress (i.e., the antitrust injury requirement); (2) the causal connection between the antitrust violation and the harm to the plaintiff, including the defendant's intent to cause that harm; (3) whether the injury is a direct injury or a speculative injury; (4) whether there are more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN4[] **Standing, Sherman Act**

Plaintiffs bringing claims under §16 of the Sherman Act need only demonstrate a threat of loss for injunctive relief; however, § 16 plaintiffs are still required to demonstrate that the threatened injury is the type of injury the antitrust laws were designed to prevent.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN5[] **Standing, Requirements**

To establish an antitrust injury, a plaintiff must allege a type of injury that the antitrust laws were designed to prevent and which flows from the conduct that makes the defendant's actions unlawful.

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

HN6[] **Private Actions, Standing**

In the context of antitrust standing, injury in the form of higher prices to consumers is within the type of injury that the antitrust laws are designed to prevent.

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

HN7[] **Private Actions, Standing**

In the context of antitrust standing, the concept of antitrust injury overlaps with the causation factor in the balancing test because the injury must be causally related to the defendant's allegedly anticompetitive activity.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN8[] **Regulated Practices, Monopolies & Monopolization**

See *D.C. Code § 28-4503*.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN9[] **Regulated Practices, Monopolies & Monopolization**

Mississippi's antitrust laws prohibit agreements to "restrain trade," increase the price of a commodity, or hinder competition in the production, importation, sale or purchase of a commodity. *Miss. Code Ann. § 75-21-1*.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN10[] **Regulated Practices, Monopolies & Monopolization**

In the context of *Miss. Code Ann. § 75-21-1*, the Mississippi Supreme Court has characterized sales and distribution within Mississippi as intrastate in character when made after the products have been received in this state and incorporated into the general mass of property therein.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN11[] **Conspiracy to Monopolize, State Regulation**

To be punishable under state laws, a conspiracy to monopolize trade must have as one of its objects a monopoly in the intrastate trade to be accomplished in part at least by transactions which are also wholly intrastate.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN12[] **Regulated Practices, Monopolies & Monopolization**

Nevada's antitrust statute, the Nevada Unfair Trade Practices Act, delineates certain anticompetitive conduct and states that it is unlawful to conduct any part of such activity in this state. *Nev. Rev. Stat. § 598A.060*.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN13[] Regulated Practices, Monopolies & Monopolization

South Dakota's ***antitrust law*** provides that a contract, combination or conspiracy between two or more persons in restraint of trade or commerce any part of which is within this state is unlawful. *S.D. Codified Laws § 37-1-3.1*.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN14[] Regulated Practices, Monopolies & Monopolization

The State of South Dakota intended its antitrust coverage to be as broad as possible, and therefore, allegations that part of the trade or commerce occurred within South Dakota were sufficient to bring the related conspiracy into the reach of South Dakota law.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN15[] Regulated Practices, Monopolies & Monopolization

West Virginia's antitrust statute provides that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in this State shall be unlawful. *W. Va. Code § 47-18-3*. Further, the portion of the West Virginia Code dealing with monopoly provides that the establishment, maintenance or use of a monopoly or an attempt to establish a monopoly of trade or commerce, any part of which is within this State, by any persons for the purpose of excluding competition or controlling, fixing or maintaining prices is unlawful. *W. Va. Code § 47-18-4*.

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

HN16[] Class Actions, Certification of Classes

See *N.Y. C.P.L.R. § 901(b)*.

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

HN17[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23 does not conflict with *N.Y. C.P.L.R. § 901(b)*.

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

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN18[] Class Actions, Certification of Classes

A majority of courts have concluded that *N.Y. C.P.L.R. § 901* is a substantive rule and not a procedural rule. Therefore, under Erie principles, *§ 901* applies in federal court diversity actions.

Governments > Legislation > Interpretation

Governments > Courts > Judicial Precedent

HN19[] **Legislation, Interpretation**

In interpreting state statutes, decisions of the state's highest court are binding upon federal district courts.

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

HN20[] **Class Actions, Certification of Classes**

State statutes prohibiting class certification do not directly conflict with *Fed. R. Civ. P. 23*, which governs the manner in which a court should determine if class certification is appropriate.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN21[] **Federal & State Interrelationships, Erie Doctrine**

Under Erie, a federal court with diversity jurisdiction must apply state substantive law and federal procedural law. The application of the substantive/procedural dichotomy is applied with an outcome determinative goal so that in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court will be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The outcome determinative focus serves the "twin aims" of discouraging forum shopping and avoiding inequitable administration of the laws. Thus, application of the outcome determinative test should not favor the use of state law unless one of these aims is furthered.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN22[] **Federal & State Interrelationships, Erie Doctrine**

Erie and its progeny make clear that when a federal court sitting in a diversity case is faced with a question of whether or not to apply state law, the importance of a state rule is indeed relevant, but only in the context of asking whether application of the rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN23[] **Federal & State Interrelationships, Erie Doctrine**

Even if state law affects the outcome of the litigation, however, it will not be applied if a strong countervailing federal interest dictates recourse to the federal rules, or if the Erie rule is used to void a Federal Rule of Civil Procedure.

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

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN24[] **Class Actions, Certification of Classes**

A specific state policy denying class action enforcement of a particular state-created right should be honored by a federal court.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN25[] **Regulated Practices, Monopolies & Monopolization**

A civil claim for damages for monopolization was not recognized under the common law.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN26[] **Equitable Relief, Quantum Meruit**

Generally, a claim for unjust enrichment requires a plaintiff to demonstrate that (1) the plaintiff conferred a benefit on the defendant; (2) the defendant knew of the benefit; and (3) the defendant accepted or retained the benefit under such circumstances as to make non-payment inequitable. Unjust enrichment only applies in circumstances in which the parties have not entered into an express contract. A person of full capacity who, pursuant to a contract with another, has performed services or transferred property to the other or otherwise conferred a benefit upon him, is not entitled to compensation therefor other than in accordance with the terms of such bargain, unless the transaction is rescinded for fraud, mistake, duress, undue influence or illegality, or unless the other has failed to perform his part of the bargain.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN27[] **Equitable Relief, Quantum Meruit**

Unjust enrichment ordinarily does not furnish a basis for liability where parties voluntarily have negotiated, entered into and fully performed their bargain, as consumers do in buying vehicles.

Counsel: [1]** Michael D. Hausfeld, Esquire; Daniel A. Small, Esquire; Brent W. Landau, Esquire and Allyson B. Baker, Esquire of COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C., Washington, D.C.; Michael P. Lehmann, Esquire; Thomas P. Dove, Esquire and Alex C. Turan, Esquire of FURTH LEHMANN & GRANT LLP, San Francisco, California; James L. Holzman, Esquire; J. Clayton Athey, Esquire and Laina M. Herbert, Esquire of PRICKETT JONES & ELLIOTT, P.A., Wilmington, Delaware., Interim Liaison Counsel for the Class Plaintiffs.

David M. Balabanian, Esquire; James L. Hunt, Esquire; Christopher B. Hockett, Esquire and Nora C. Cregan, Esquire of BINGHAM McCUTCHEN LLP, San Francisco, California; Richard A. Ripley, Esquire of BINGHAM McCUTCHEN LLP, Washington, D.C.; Richard L. Horwitz, Esquire and W. Harding Drane, Jr., Esquire of POTTER ANDERSON & CORROON LLP, Wilmington, Delaware., Attorneys for Defendant Intel Corporation.

Judges: Joseph J. Farnan, Jr., UNITED STATES DISTRICT JUDGE.

Opinion by: Joseph J. Farnan, Jr.

Opinion

[*406] CONSOLIDATED ACTION

MEMORANDUM OPINION

July 12, 2007

Wilmington, Delaware

Farnan, District Judge.

Pending before the Court is Defendant Intel Corporation's Motion To Dismiss The First Amended Consolidated Complaint (D.I. 217 in Civil **[**2]** Action No. 05-485 and D.I. 307 in MDL Docket No. 05-1717). [1] For the reasons discussed the Court will grant-in-part and deny-in-part Defendant's Motion.

BACKGROUND

The background related to this action has been set forth by the Court in its previous decision (D.I. 299) addressing the Motion To Dismiss Class Plaintiffs Foreign Conduct Claims filed by Defendant Intel Corporation ("Intel"). *Paul v. Intel Corp. (In re Intel Corp. Microprocessor Antitrust Litig.), 476 F. Supp. 2d 452, 2007 WL 685564, *1-2 (D. Del. 2007)*. By **[*407]** way of brief summary, Class Plaintiffs filed multiple class action lawsuits against Intel after it was sued by Advanced Micro Devices, Inc. and AMD International Sales & Service, Ltd. (collectively, "AMD"). Those lawsuits have been consolidated here.

Class Plaintiffs represent United States consumers who purchased computers containing Intel x86 microprocessors. The allegations of Class Plaintiffs' First Amended Consolidated Complaint (the "Complaint") are similar to, and at times, identical to the allegations of AMD's Complaint. Class Plaintiffs allege seven causes **[**3]** of action, including: (1) *Section 2* of the Sherman Act, *15 U.S.C. § 2* (Count I); (2) *Section 16720 of the California Business and Professional Code* for unlawful trust in restraint of trade and commerce (Count II); (3) the prohibition against monopolies under California state tort law (Count III); (4) *Section 17000 et seq. of the California Business and Professional Code* for unfair competition (Count IV); (5) antitrust and restraint of trade violations under the laws of nineteen states and the District of Columbia (Count V); (6) consumer protection and/or unfair competition violations under the laws of twenty-two states and the District of Columbia (Count VI); and (7) unjust enrichment and disgorgement of profits under the common law of California, or alternatively the common law of the other States at issue and the District of Columbia (Count VII). Class Plaintiffs seek a variety of relief, including punitive damages, treble damages, disgorgement of profits, the establishment of a constructive trust from which the Class Plaintiffs can seek restitution based on the disgorgement of profits, the costs of bringing this lawsuit, and reasonable attorneys' fees.

---

[1] In citing to additional documents throughout this Memorandum Opinion, the Court will refer to the docket item numbers used in Civil Action No. 05-485-JJF.

By the instant Motion, Intel **[**4]** requests the Court to dismiss the Complaint pursuant to *Rule 12(b)(6)* for failure to state a claim and lack of standing. The parties have fully briefed Intel's Motion, and therefore, this matter is ready for the Court's review.

STANDARD OF REVIEW

HN1[] Pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, the Court may dismiss a complaint for failure to state a claim upon which relief may be granted. *Fed. R. Civ. P. 12(b)(6)*. *Rule 12(b)(6)* is also invoked for questions of antitrust standing. *Maio v. Aetna, Inc., 221 F.3d 472, 481 n. 7 (3d Cir. 2000)*.

HN2[] The purpose of a motion to dismiss is to test the sufficiency of a complaint, not to resolve disputed facts or decide the merits of the case. *Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993)*. While the Court must accept as true all allegations in the complaint and must draw all reasonable factual inferences in the light most favorable to the plaintiff, the "[f]actual allegations must be enough to raise a right to relief above the speculative level . . ." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007)*. [2] Heightened fact pleading is not **[*408]** required, but enough facts must be alleged to state a claim to relief that is plausible on its **[**5]** face. *Id. at 1974*. The Court is not required to accept legal conclusions alleged or inferred from the pleaded facts. "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly, 127 S. Ct. at 1969*. The burden of demonstrating that dismissal is appropriate rests on the movant.

DISCUSSION

I. Whether Class Plaintiffs Have Stated A Claim Under Federal Or State Antitrust Laws

A. *Antitrust Standing*

HN3[] To demonstrate standing for the purposes of pursuing an antitrust claim, Class Plaintiffs must demonstrate the Constitutional standing requirements of Article III, § 2, namely a "case" or "controversy." However, the Constitutional standing requirements are "augmented by consideration of prudential limitations." *City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 264 (3d Cir. 1998)*. Specifically, Class Plaintiffs must demonstrate that they have antitrust standing and are the proper parties to bring a private antitrust action. *Id.* In *Associated General Contractors of California v. California State Council of Carpenters, 459 U.S. 519, 537-545, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, **[**7]** the Supreme Court outlined five factors that courts should consider when determining whether a party has standing to bring a private action under the antitrust laws. These factors include: (1) whether plaintiff's alleged injury is the type of injury that the antitrust laws were intended to redress (i.e., the antitrust injury

---

[2] Intel filed a Supplemental Brief addressing the *Twombly* decision. Class Plaintiffs have also filed a response. The Second Circuit recently identified and discussed the "conflicting signals" from *Twombly* in determining how that decision impacts the standard for reviewing a motion to dismiss. *Iqbal v. Hasty, 490 F.3d 143, 2007 U.S. App. LEXIS 13911, 2007 WL 1717803, *8-*11 (2d Cir. June 14, 2007)*. While the Second Circuit acknowledged that *Twombly* dealt with antitrust claims under *Section 1* of the Sherman Act, the Second Circuit also acknowledged that the Supreme Court likely intended some change in the dismissal standard extending beyond antitrust conspiracy cases.

The Court understands *Twombly* to primarily be a decision aimed at bringing the standard of dismissal back to its "roots" by undoing the literal reading of *Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*, engaged in **[**6]** by some courts and emphasizing that *Conley* "described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival." *127 S. Ct. at 1969*. For purposes of Intel's motion here, the Court will apply, where applicable, what the Second Circuit has coined the "flexible plausibility standard" of *Twombly* to Class Plaintiffs' claims as outlined by the Court in its recitation of the standard of review governing Intel's Motion.

requirement); (2) the causal connection between the antitrust violation and the harm to the plaintiff, including the defendant's intent to cause that harm; (3) whether the injury is a direct injury or a speculative injury; (4) whether there are more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages. *West Penn, 147 F.3d at 264* (restating the *Associated General Contractors* ("*AGC*") factors).

Intel contends that Class Plaintiffs cannot demonstrate antitrust injury because they received the benefit of Intel's alleged price cuts and rebates. According to Intel, Class Plaintiffs cannot allege antitrust injury, because low prices benefit consumers, regardless of how those prices are set. Intel further contends that Class Plaintiffs cannot demonstrate that the remaining *AGC* factors support **[**8]** their assertion that they have antitrust standing.

In response, Class Plaintiffs contend that the heightened prudential standing requirements represented by the *AGC* five-factor test are not relevant to Class Plaintiffs' antitrust claims. Class Plaintiffs point out that their only federal claim is a claim for injunctive relief under *Section 16* of the Clayton Act, *15 U.S.C. § 26*, and Class Plaintiffs contend that *Section 16* is not as demanding as *Section 4*. Under *Section 16*, Class Plaintiffs contend that they need only establish a threat of antitrust injury.

Although Class Plaintiffs seek damages under state antitrust laws, Class Plaintiffs contend that the *AGC* factors do not apply to those claims. Rather, Class Plaintiffs **[*409]** contend that the appropriate standing analysis for these claims must look to state law, not federal law, because state law permits indirect purchasers to bring antitrust claims. In the alternative, Class Plaintiffs contend that the *AGC* factors weigh in favor of Class Plaintiffs' standing, and in any event, standing is a fact-intensive inquiry best left to later stages of the proceedings when the parties have the benefit of a more fully developed factual record.

The Court **[**9]** begins its analysis by determining whether it is appropriate to apply the *AGC* five-factor test to all of Class Plaintiffs' claims. The Court has reviewed the parties' arguments concerning this issue and concludes that it is appropriate to apply the *AGC* factors if not directly, at least as a guide, in evaluating Class Plaintiffs' state law antitrust claims. Relying on *D.R. Ward Construction Co. v. Rohm & Haas Co., 470 F. Supp. 2d 485, 2006 U.S. Dist. LEXIS 61828 (E.D. Pa. May 31, 2006)*, Class Plaintiffs contend that the *AGC* factors are inapplicable to state law claims, even where the applicable state law has a "permissive" harmonization statute that allows federal courts to use federal law as a guide in interpreting them. However, the Court finds *D.R. Ward* to be inconsistent with the prevailing approach to this question by courts applying the laws of states that have rejected the *Illinois Brick* prohibition on indirect purchaser suits. *Lorix v. Crompton Corp., 720 N.W.2d 15, 18-19 (Minn. 2006)*; *Kanne v. Visa U.S.A., Inc., 272 Neb. 489, 723 N.W.2d 293, 301 (Neb. 2006)*; *Strang v. Visa U.S.A., Inc.,* 2005 WL 1403769, *3-5 (Wis. Cir. Ct. Feb. 8, 2005); *Peterson v. Visa U.S.A., Inc.,* 2005 WL 1403761, *3-6 (D.C. Super Ct. Apr. 22, 2005); **[**10]** *Southard v. Visa U.S.A., Inc.,* 2004 WL 3030028, *3-4 (Iowa Dist. Ct. Nov. 17, 2004).

The Court further agrees with Intel, that Class Plaintiffs' argument against the use of federal law as a guideline blurs the distinction between the question of standing and the question of whether indirect purchasers may sue for antitrust injury. That numerous state courts have declined to apply the indirect purchaser bar announced by the Supreme Court in *Illinois Brick* does not equate with the question of whether standing under those states' laws should be informed by federal law.

As for Class Plaintiffs' federal law claim, the Court notes that Class Plaintiffs are correct that ***HN4***[] plaintiffs bringing claims under *Section 16* of the Sherman Act need only demonstrate a threat of loss for injunctive relief; however, Section 16 plaintiffs are still required to demonstrate that the threatened injury is the type of injury the antitrust laws were designed to prevent. Accordingly, in light of the foregoing, the Court will loosely apply the *AGC* factors as a guide in analyzing the standing issues relevant to Class Plaintiffs' federal and state law claims.

HN5[] To establish an antitrust injury, a plaintiff must allege **[**11]** a type of injury that the antitrust laws were designed to prevent and which flows from the conduct that makes the defendant's actions unlawful. [3] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Reviewing the Complaint in the light most favorable to Class Plaintiffs as the Court must on a motion to dismiss, the Court concludes that Class Plaintiffs have sufficiently alleged antitrust injury at this juncture. Class Plaintiffs have alleged that Intel engaged in a variety of anticompetitive actions

> with the goal of keeping competitors small and keeping Intel's customers dependent **[*410]** on Intel for very substantial amounts of product. In this way, OEMs remain vulnerable to continual threats of Intel retaliation, Intel's competitors remain capacity-constrained, the OEMs remain Intel-dependent, and Intel thereby perpetuates its economic hold over them, allowing it to continue to demand that customers curtail their dealings with Intel's competitors.

Complaint at P 141. According to Class Plaintiffs this anticompetitive conduct allowed Intel to garner a higher market share, which allowed Intel to charge higher prices to consumers. *Id.* at 1, 2, 5. By keeping their rivals small, **[**12]** Class Plaintiffs contend that Intel prevents them from offering lower-priced or higher quality products. If its rivals were able to offer such products, Intel would then be forced in turn to lower its own prices. Stated another way, Class Plaintiffs have alleged that "but for" Intel's anticompetitive conduct, Intel's prices would have been lower. HN6[] Injury in the form of higher prices to consumers is within the type of injury that the antitrust laws are designed to prevent. *See e.g., Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429, 439 (3d Cir. 2000)*.

Intel contends that Class Plaintiffs cannot state an antitrust injury because their arguments are based on Intel's average prices overall, and Plaintiffs have not alleged (and cannot allege) how industry-wide average prices of Intel chips affect the transaction prices of the products they actually purchased. (D.I. 293 at 10.) However, the cases Intel cites to support its argument **[**13]** are in the context of class certification disputes.

Intel also contends that Class Plaintiffs' argument involves too speculative a chain of events, and therefore, any alleged injury is too remote and speculative to establish that the alleged injury flowed from Intel's alleged anticompetitive conduct. HN7[] "The concept of antitrust injury overlaps with the [causation] factor in the balancing test because the injury must be causally related to the defendant's allegedly anticompetitive activity." *West Penn, 147 F.3d at 265*. At this early stage of the proceedings, the Court concludes that Class Plaintiffs have sufficiently alleged "but for" causation. However, the Court acknowledges that the parties' arguments are complex and intensely factual, and therefore, the Court concludes that a more fully developed factual record is necessary to address them.

As for the remaining three *AGC* factors, the Court concludes that they carry less weight in the standing analysis in jurisdictions rejecting *Illinois Brick.* For example, in applying the fourth *AGC* factor, the Court must determine whether there are more direct victims of the alleged antitrust violations. However, under the state statutes asserted by **[**14]** Class Plaintiffs, indirect purchasers are permitted to bring claims, and therefore, the existence of more direct victims would not necessarily undercut Class Plaintiffs' standing. Accordingly, the Court concludes that the allegation of the Complaint are sufficient to withstand dismissal, and therefore, the Court will deny Intel's Motion To Dismiss based on the failure to allege antitrust standing.

B. *Choice Of Law*

Intel next requests the Court to dismiss Class Plaintiffs' claims for violation of California law as alleged in Count II (violation of the Cartwright Act); Count III (California tort law against monopolization) and Count IV (violation of the California Unfair Competition Law), as those Counts pertain to non-California Plaintiffs. Intel's request for dismissal implicates a choice of law analysis. Specifically, Intel contends that it is inappropriate to apply California law on a nation-wide basis, because such **[*411]** application would frustrate the laws of other states who also have an

---

[3] Class Plaintiffs agree with Intel that this element of *AGC* applies to both their federal and state claims; however, Class Plaintiffs contend that the antitrust injury under *Section 16* is less demanding than *Section 4* and broader for their state law claims.

interest in this litigation. In conducting this choice of law analysis, Intel contends that the Court must apply the choice of law rules of the transferor forum states, namely Delaware, California, Florida **[**15]** and Tennessee.

Class Plaintiffs agree that a choice of law analysis is necessary in this case; however, they believe it should be reserved until class certification proceedings. In any event, Class Plaintiffs contend that the appropriate choice of law analysis is for this Court to apply California choice of law principles because the majority of the transferred cases came from California, with only two cases coming from Tennessee and only one case from Florida.

The Court agrees with Class Plaintiffs that analysis of the choice of law questions presented in this litigation should be deferred. This litigation is still in its infancy, and the Court concludes that these complex and sometimes dispositive choice of law questions should be made with the benefit of a more complete context for this litigation. Accordingly, the Court declines to engage in a choice of law analysis at this time, and therefore, the Court will deny Intel's Motion to the extent that it seeks dismissal of claims under California law asserted by Class Plaintiffs who do not live in California.

C. *Antitrust Claims Asserted Under The Laws Of The States Of Mississippi, Nevada, South Dakota, West Virginia And The District* ***[**16]*** *Of Columbia*

Intel next contends that Class Plaintiffs have failed to state claims under the antitrust laws of Mississippi, Nevada, South Dakota, West Virginia and the District of Columbia. [4] Intel contends that these jurisdictions limit the reach of their antitrust laws to intrastate conduct. According to Intel, Class Plaintiffs' Complaint alleges the monopolization of a world-wide market. Thus, Intel contends that Class Plaintiffs have failed to allege that Intel engaged in any state-specific conduct or that Intel directed its alleged anticompetitive conduct toward any particular state.

Directing the Court to case law applying the laws of the four states at issue and the District of Columbia, Class Plaintiffs respond that Intel's alleged conduct has both an intrastate and interstate component. Class Plaintiffs contend that the sales of computers **[**17]** containing Intel x86 microprocessors occurred wholly within the four states and the District of Columbia, and therefore, any intrastate component required by these laws is satisfied. Class Plaintiffs also point out that they have alleged injury throughout the United States and the District of Columbia. Specifically, Class Plaintiffs direct the Court to the following allegations contained in the Complaint:

> 248. Intel's contracts, trusts or conspiracies were entered into, carried out, effectuated and perfected mainly within the State of California, and Intel's conduct within California injured all Class members throughout the United States. Therefore, this claim for relief under California law is brought on behalf of all Class members, whether or not they are California residents.
>
> 251. The contracts, trusts or conspiracies alleged herein have had, inter alia, the following effects:
>
>> a. price competition in the sale of microprocessors has been restrained, **[*412]** suppressed and/or eliminated in the State of California and throughout the United States;
>>
>> b. prices for microprocessors sold by Intel and its co-conspirators have been fixed, raised, maintained and stabilized at artificially high, non-competitive **[**18]** levels in the State of California and throughout the United States; and
>>
>> c. those who purchased microprocessors from Intel have been deprived of the benefit of free and open competition.
>
> 252. Plaintiffs and the Class members paid and continue to pay supra-competitive, artificially inflated prices for microprocessors.
>
> 253. As a direct and proximate result of Intel's unlawful conduct, Plaintiffs and the Class members have been injured in their business and property in that they paid more for Intel's x86 microprocessors (or for products containing such microprocessors) than they would have paid absent Intel's unlawful conduct. As a result of

[4] Defendants have included the State of New York in their argument as the fifth state at issue. However, Plaintiffs' claims under New York law fail for reasons apart from the intrastate pleading requirement, and therefore, the Court will not discuss New York law here. *See infra* Section I.D. of the Discussion portion of this Memorandum Opinion.

> Intel's violation of *Section 16720*, Plaintiffs and the Class members seek treble damages and the costs of suit, including reasonable attorneys' fees, pursuant to *Section 16750(a) of the California Business and Professions Code*.

The Court will address the parties' arguments in the context of the law of each of the challenged jurisdictions.

1. District of Columbia

In full, the District of Columbia's antitrust legislation provides:

> ***HN8***[] It shall be unlawful for any person to monopolize, attempt to monopolize, or combine or conspire with any other person or persons **[**19]** to monopolize any part of trade or commerce, *all or any part of which is within the District of Columbia.*

D.C. Code § 28-4503 (emphasis added). In *GTE New Media Servs, Inc. v. Ameritech Corp., 21 F. Supp. 2d 27, 45 (D.D.C. 1998)*, the United States District Court for the District of Columbia applied this statute in the context of addressing the defendants' motion to dismiss the plaintiff's antitrust claims. Specifically, the plaintiff alleged that the defendants illegally combined to restrain trade and monopolize the Internet Yellow pages market by controlling Internet access points through which competing Internet Yellow Pages providers offered their services. In this way, users who sought Yellow Pages information were directed by web browsers exclusively to the defendants' companies. Recognizing that *D.C. Code § 28-4503* requires the plaintiff to allege a "connection with this jurisdiction," the court found that "the plaintiff ha[d] satisfied this separate requirement by alleging the defendants' anti-competitive activity impacts upon Internet users and businesses purchasing Internet Yellow Pages advertisements in the District of Columbia." *Id. at 45*.

Construing the allegations of the **[**20]** Complaint in the light most favorable to Class Plaintiffs and drawing all reasonable inferences in favor of Class Plaintiffs as the Court must on a Motion To Dismiss, the Court concludes that Class Plaintiffs have alleged an impact upon consumers in the District of Columbia through their allegations that the putative class members were injured by Intel's alleged conduct throughout the United States and in the District of Columbia. Accordingly, at this juncture, the Court will deny Intel's Motion To Dismiss Class Plaintiffs' claims under the antitrust laws of the District of Columbia.

2. Mississippi

HN9[] Mississippi's antitrust laws prohibit agreements to "restrain trade," "increase **[*413]** . . . the price of a commodity," or "hinder competition in the production, importation, . . . sale or purchase of a commodity." *Miss. Code Ann. § 75-21-1*. In *In re New Motor Vehicles Canadian Export Antitrust Litig. ("NMV"), 350 F. Supp. 2d 160, 171 (D. Me. 2004)*, the defendants raised the same argument that Intel raises here, that Mississippi's antitrust laws are limited to intrastate conduct and the plaintiffs' failure to allege state specific activity required dismissal of their complaint. However, the *NMV* court **[**21]** recognized that ***HN10***[] the Mississippi Supreme Court has characterized sales and distribution within Mississippi as intrastate in character when made "'after the . . . products [have] been received . . . in this state and . . . incorporated into the general mass of property therein.'" *Id.* (quoting *Standard Oil Co. of Kentucky v. State, 107 Miss. 377, 65 So. 468, 471 (1914))*. In *Standard Oil,* the Mississippi Supreme Court went on to conclude that ***HN11***[] "to be punishable under state laws, [a conspiracy to monopolize trade] must have as one of its objects a monopoly in the intrastate trade . . . to be accomplished in part at least by transactions which are also wholly intrastate." *65 So. at 471*. Extrapolating from this line of reasoning, the *NMV* court found it reasonable to infer from the complaint that the defendants wanted Mississippi car dealerships, like the dealerships in all states, to charge Mississippi consumers higher prices as a result of the lack of competition from Canadian imports. The court concluded that some of these sales "would occur wholly within the State of Mississippi, after the vehicle had been 'incorporated into the general mass of property' in the state, thereby falling within the compass **[**22]** of the Mississippi antitrust statute." *NMV, 350 F. Supp. 2d at 171*. In the Court's view, Class Plaintiffs' Complaint satisfies this requirement. [5] Accordingly, the Court will deny Intel's Motion To Dismiss Class Plaintiffs' claims under Mississippi's antitrust laws.

3. Nevada

HN12[] Nevada's antitrust statute, the Nevada Unfair Trade Practices Act ("NUTPA"), delineates certain anticompetitive conduct and states that it is "unlawful to conduct any part of such activity in this state." *Nev. Rev. Stat. § 598A.060*. In *NMV,* the court also examined this statute and concluded that it was reasonable to construe the plaintiffs' complaint as alleging a conspiracy among car manufacturers and **[**23]** Nevada dealers which "contemplated vehicle sales in Nevada at higher prices because of the exclusion of Canadian vehicles." *350 F. Supp. 2d at 171-172*. This approach is also consistent with the approach taken by the United States District Court for the District of Nevada in *Pooler v. R.J. Reynolds Tobacco Co.,* 2001 WL 403167, *2 (Nev. Dist. Ct. Apr. 4, 2001) (concluding that allegations of anticompetitive conduct in domestic and foreign markets included the marketing and sale of tobacco products in Nevada and denying motion to dismiss complaint for failure to allege acts committed in the state which were part of the alleged illegal activity).

In this case, the sale of computers containing the x86 microprocessor is at least part of the anticompetitive conduct alleged by Class Plaintiffs, and the Court concludes that it is reasonable to infer **[*414]** from Class Plaintiffs' allegations of indirect purchaser injury throughout the United States that Class Plaintiffs' allegations of anticompetitive conduct by Intel include the sale of the x86 microprocessor in Nevada markets. Accordingly, the Court will deny Defendants' Motion To Dismiss Class Plaintiffs' claims under the NUTPA.

4. South Dakota

HN13[] South **[**24]** Dakota's ***antitrust law*** provides that "[a] contract, combination or conspiracy between two or more persons in restraint of trade or commerce *any part of which is within this state* is unlawful." *S.D. Rev. Code § 37-1-3.1* (emphasis added). As the court in *NMV* recognized, this statute is ambiguous regarding whether part of the conspiracy or part of the trade or commerce must be within the state. The *NMV* court went on to assume that***HN14***[] the State of South Dakota intended its antitrust coverage to be as broad as possible, and therefore, allegations that part of the trade or commerce occurred within South Dakota were sufficient to bring the related conspiracy into the reach of South Dakota law. Intel has not persuaded the Court that this construction of South Dakota law is erroneous, and Class Plaintiffs have, at least by reasonable inference, alleged the sale of computers containing Intel x86 microprocessors in South Dakota. Accordingly, the Court will deny Intel's Motion To Dismiss Class Plaintiffs' claims under South Dakota's antitrust laws.

5. West Virginia

HN15[] West Virginia's antitrust statute provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint **[**25]** of trade or commerce *in this State* shall be unlawful." *W. Va. Code § 47-18-3* (emphasis added). Further, the portion of the West Virginia Code dealing with monopoly provides that "[t]he establishment, maintenance or use of a monopoly or an attempt to establish a monopoly of trade or commerce, *any part of which is within this State,* by any persons for the purpose of excluding competition or controlling, fixing or maintaining prices is unlawful." *W. Va. Code § 47-18-4* (emphasis added). Because Class Plaintiffs have, at least by reasonable inference, alleged the sale of computers containing Intel x86 microprocessors in West Virginia, the Court concludes at this juncture, that Class Plaintiffs' claims under West Virginia law withstand dismissal. Accordingly, the Court will deny Intel's Motion To Dismiss Class Plaintiffs' West Virginia antitrust claims.

D. *Class Plaintiff's Class Action Claim For Violation Of New York's* ***Antitrust Law***

---

[5] Intel argues that no part of Intel's conduct can be considered "wholly intrastate" in character, because Intel is a component maker and Class Plaintiffs are indirect purchasers of downstream products who are several links down the manufacturing and distribution chain from Intel's alleged conduct. However, the component part argument does not appear to be relevant to the Mississippi Supreme Court's approach to when sales and distributions within the state assume an intrastate character. *Standard Oil, 65 So. at 471*.

In their Complaint, Class Plaintiffs allege a claim under *New York Gen. Bus. Law § 30 et seq.* (the "Donnelly Act") for antitrust violations. By its Motion, Intel contends that Class Plaintiffs cannot maintain this claim, because New York's class action statute, **[**26]** *CPLR § 901(b)* [6], prohibits class actions under statutes like the Donnelly Act that provide for a treble damages remedy, but do not specifically authorize class action recovery.

In response, Class Plaintiffs contend that this Court need not apply *CPLR § 901(b)*, because it is a procedural rule whose application is usurped by *Federal Rule of Civil Procedure 23*. Because *Rule 23* does not prohibit class recovery on treble damages claims, Class Plaintiffs **[*415]** maintain that class certification is not precluded, and therefore, dismissal of their Donnelly Act claim is not warranted.

This Court has previously concluded that ***HN17***[] *Federal Rule of Civil Procedure 23* does not conflict with *§ 901(b)*, and that under the principles set forth in *Erie R.R. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)*, application of *CPLR § 901(b)* is appropriate. *United States v. Dentsply Int'l, Inc., 2001 U.S. Dist. LEXIS 9057, 2001 WL 624807, 15-16 (D. Del. Mar. 30, 2001)* **[**27]** (Robinson, C.J.). The Court finds no reason to depart from the rationale in *Dentsply.* [7]

As Class Plaintiffs recognize, if *Section 901(b)* applies, this Court is bound by the interpretation of New York law provided by the Court of Appeals of New York. *See* *Gruber v. Owens-Illinois, Inc., 899 F.2d 1366, 1369 (3d Cir. 1990)* (***HN19***[] "In interpreting state statutes, decisions of the state's highest court are binding upon us.") In *Sperry v. Crompton Corp., 8 N.Y.3d 204, 863 N.E.2d 1012, 831 N.Y.S.2d 760, 2007 WL 527726 (N.Y. 2007)*, the Court of Appeals of New York concluded that a class action for treble damages cannot be maintained under the Donnelly Act. Accordingly, the Court will grant Intel's Motion To Dismiss Class Plaintiffs' antitrust claim for treble damages under the Donnelly Act.

II. [**28] Whether Class Plaintiffs Have Stated A Claim Under State Consumer Protection Statutes

In arguing that Class Plaintiffs' claims under state consumer protection statutes should be dismissed, Intel first reiterates its argument that Class Plaintiffs have not suffered any injury, and therefore, they lack standing to pursue claims under state consumer protection laws. For the reasons discussed in the context of Plaintiffs' antitrust claims, the Court concludes that Intel is not entitled to dismissal on this ground.

Intel's remaining arguments raise two points. First, Intel contends that the consumer protection statues of Alaska, Georgia, Louisiana and Montana prohibit class actions, and therefore, Class Plaintiffs' claims under these statutes should be dismissed. Intel's second argument is directed to the consumer protection laws of Arkansas, Idaho, Kansas, Maine, New Mexico, New York and Utah. Intel contends that the consumer protection laws of these states prohibit only fraudulent, deceptive or unconscionable conduct, and Class Plaintiffs' allegations are insufficient to meet these pleading requirements. The Court will address each of Intel's arguments in turn.

A. *Class Plaintiffs' Class **[**29]** Action Claims For Violation Of The Consumer Protection Laws of Alaska, Georgia, Louisiana And Montana*

---

[6] *CPLR § 901(b)* provides:

> ***HN16***[] Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

[7] Further, ***HN18***[] a majority of courts have concluded that *§ 901* is a substantive rule and not a procedural rule. Therefore, under *Erie* principles, *§ 901* applies in federal court diversity actions. *See* *Holster v. Gatco, Inc., 485 F. Supp. 2d 179, 2007 U.S. Dist. LEXIS 20953, 2007 WL 923086, *4-6 (E.D.N.Y. 2007)*. For additional discussion of *Erie* principles in the context of Class Plaintiffs' class action consumer protection claims see *infra* Section II of the Discussion portion of this Memorandum Opinion.

Intel contends that Class Plaintiffs' claims under the laws of Alaska, Georgia, Louisiana and Montana for consumer protection violations should be dismissed because each state expressly prohibits class actions. In response, Class Plaintiffs contend that the limits on class actions imposed by these states' laws are procedural rules which directly conflict with *Federal Rule of Civil Procedure 23*, and therefore, *Rule 23* should prevail over the conflicting states' procedural laws.

[*416] As this Court explained in addressing New York's Donnelly Act, ***HN20***[] state statutes prohibiting class certification do not directly conflict with *Rule 23*, which governs the manner in which a court should determine if class certification is appropriate. Because no direct conflict exists, the Court must apply *Erie* principles to determine if state law should apply.

HN21[] Under *Erie*, a federal court with diversity jurisdiction must apply state substantive law and federal procedural law. The application of the substantive/procedural dichotomy is applied with an outcome determinative goal so that "'in all cases where a federal court **[**30]** is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court [will] be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.'" *Chamberlain v. Giampapa, 210 F.3d 154, 158-159 (3d Cir. 2000)* (quoting *Guaranty Trust Co. v. York, 326 U.S. 99, 109, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945))*. The outcome determinative focus serves the "twin aims" of discouraging forum shopping and avoiding inequitable administration of the laws. *Id.* (citing *Hanna v. Plumer, 380 U.S. 460, 468, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965))*. Thus, application of the outcome determinative test should not favor the use of state law unless one of these aims is furthered. *Id.* As the Supreme Court explained in *Hanna:*

> ***HN22***[] *Erie* and its progeny make clear that when a federal court sitting in a diversity case is faced with a question of whether or not to apply state law, the importance of a state rule is indeed relevant, but only in the context of asking whether application of the rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the **[**31]** forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court.

380 U.S. at 468. ***HN23***[] Even if state law affects the outcome of the litigation, however, it will not be applied if a strong countervailing federal interest dictates recourse to the federal rules, or if the *Erie* rule is used to void a Federal Rule of Civil Procedure. *Giampapa, 210 F.3d at 159* (citations omitted).

In this case, the Court concludes that application of the *Erie* principles favors application of the state laws prohibiting class actions. 19 Charles Alan Wright, et al., *Federal Practice & Procedure: Jurisdiction 2d* § 4513 at 442 n. 63 (2d ed. 1996) ("[***HN24***[] A] specific state policy denying class action enforcement of a particular state-created right should be honored by a federal court."). In the Court's view, a contrary result would alter the character of this litigation and provide a result that is at odds with the result that would be reached by the respective state courts had this action been brought in those jurisdictions. Further, the Court is persuaded that application **[**32]** of the respective state bans on class actions will discourage forum shopping.

Class Plaintiffs direct the Court to three cases taking a contrary approach, *O'Keefe v. Mercedes Benz USA, LLC, 214 F.R.D. 266, 285-286 (E.D. Pa. 2003)*; *In re Bridgestone/Firestone Inc., 205 F.R.D. 503 (S.D. Ind. 2001)*, *rev'd in part on other grounds, 288 F.3d 1012 (7th Cir. 2002)*; and *Kristiansen v. John Mullins & Sons, Inc., 59 F.R.D. 99, 109-110 n.13 (E.D.N.Y. 1973)*. In these cases, the respective courts found that limitations **[*417]** on class actions were procedural rules which directly conflicted with *Federal Rule of Civil Procedure 23*, and therefore, *Rule 23* should apply to allow class certification. However, the Court finds these decisions to be distinguishable from the circumstances here. Notably, none of the cases identified by Class Plaintiffs address the laws of the particular states at issue here. In *O'Keefe*, the court determined that an Alabama ban on class actions was a procedural rule; however, it did so in the face of an Alabama Supreme Court case expressly referring to the rule as a procedural rule. By way of further example, *Bridgestone/Firestone* addressed Tennessee **[**33]** law and Michigan law; however, neither of these states banned class actions outright. In fact, the Tennessee law was silent on the questions of class actions and the Michigan law under consideration allowed class actions, but with certain requirements that were additional to those set forth in Rule 23.

In contrast, federal courts considering the laws of the states at issue here have concluded that class actions were precluded in federal courts based on the respective state law bans. *See e.g.,* In re Pharm. Indus. Average Wholesale Price Litig., 230 F.R.D. 61, 84 (D. Mass. 2005) (excluding consumers from Alaska, Georgia and Montana from class because consumer protection statutes in those state prohibit class actions); O'Quin v. Verizon Wireless, 256 F. Supp. 2d 512, 519 (M.D. La. 2003) (recognizing Louisiana's ban on class actions and expressing view that plaintiffs "could not get a class certified under that particular law in either state or federal court"). Accordingly, the Court will grant Defendants' Motion To Dismiss Class Plaintiffs' consumer protection claims based on the laws of the States of Alaska, Georgia, Louisiana and Montana.

B. *Whether Class Plaintiffs Have Sufficiently* ***[**34]*** *Alleged Deceptive Or Unconscionable Conduct To State Claims Under The Consumer Protection Laws Of Arkansas, Idaho, Kansas, Maine, New Mexico, New York and Utah*

Intel contends that Class Plaintiffs' claims under the consumer protection laws of Arkansas, Idaho, Kansas, Maine, New Mexico, New York and Utah should be dismissed, because these laws require fraudulent or deceptive conduct and/or unconscionable trade practices, and Plaintiffs' allegations do not rise to that level. Specifically, Intel contends that Class Plaintiffs' allegations of "fraudulent practices" are conclusory and insufficient to satisfy the fraudulent or deceptive component of these state laws. Intel also contends that, to the extent Class Plaintiffs are alleging unconscionable trade practices, as opposed to and separate from fraudulent practices, Class Plaintiffs fail to state a cause of action. Because Class Plaintiffs are indirect purchasers who had no direct contact with Intel, Intel contends that they cannot allege that Intel took grossly unfair advantage of them. Intel also contends that Class Plaintiffs stood to benefit from the discounts on Intel's microprocessors and that the reduction in the prices of microprocessors **[**35]** cannot be said to be conduct which is an "affront to justice," "conscience-shocking" or "grossly disparate."

In response, Class Plaintiffs contend that the allegations concerning Intel's discriminatory rebates and discounts, its below-cost pricing, its threats toward customers who were considering making deals with AMD, and its retaliation against customers who did make such deals are inherently deceptive and self-concealing actions, of which Class Plaintiffs could not have been aware. Class Plaintiffs also contend that Intel acted fraudulently when it used **[*418]** compiler programs to secretly degrade computer performance when a program is run on an AMD platform.

The Court concludes that Class Plaintiffs have sufficiently alleged deceptive or unconscionable trade practices so as to withstand dismissal for purposes of Rule 12(b)(6) under the laws of the States of Arkansas, Idaho, Kansas, Maine, New Mexico, New York and Utah. Intel contends that Class Plaintiffs have failed to allege that any of Intel's alleged conduct was directed towards Class Plaintiffs personally. Instead, Intel contends that all of Class Plaintiffs' allegations are directed toward its actions vis-a-vis AMD and others. In **[**36]** the Court's view, Intel's arguments are in the nature of the causation arguments that it raised in the context of antitrust injury. As the Court noted there, these arguments are fact-driven and better left to a later stage of the proceedings.

At this juncture, the Court concludes that Class Plaintiffs have alleged a scheme involving discriminatory rebates and discounts, threats and intimidation of direct purchasers and retaliation against direct purchasers, all of which ultimately impacted consumers like Class Plaintiffs. Intel contends that Class Plaintiffs acknowledge that some of their alleged conduct resulted in below-cost pricing, and therefore, their conduct cannot be unconscionable. While Class Plaintiffs acknowledge that Intel's conduct may "in some cases" have resulted in below-cost pricing on incremental sales, Class Plaintiffs have also alleged that the suppression of competition that has resulted from Intel's conduct has ultimately led to higher prices for consumers. Specifically, Class Plaintiffs allege:

> 234. Intel's exclusionary and restrictive practices described herein have suppressed competition in the x86 Microprocessor Market, resulting in higher prices for Intel x86 **[**37]** microprocessors, even after discounts or rebates attributable to microprocessor purchases. The overcharges imposed by Intel have been passed on to Plaintiffs and the Class members in the form of higher prices for personal computers, workstations, and servers containing Intel x86 microprocessors.

Further, the Court concludes that Class Plaintiffs' allegations concerning Intel's use of compiler programs to degrade computer performances of programs run on an AMD platform are in the nature of deceptive trade practices for purposes of the various state statutes. Accordingly, on the face of the Class Complaint at this early stage of the proceedings, the Court cannot conclude that Class Plaintiffs allegations fail, as a matter of law, to state a claim for fraudulent, deceptive or unconscionable trade practices under the various state consumer protection laws. Therefore, the Court will deny Intel's Motion To Dismiss these claims.

C. *Whether Class Plaintiffs Have Sufficiently Pled A Claim Under California's Unfair Competition Law*

Intel separately challenges Class Plaintiffs' ability to state a claim under California's Unfair Competition Law ("UCL"). Intel's argument is based upon its argument **[**38]** that Class Plaintiffs lack standing to assert violations of either the Sherman Act or the Cartwright Act. Because the Court has concluded that a determination of whether Class Plaintiffs have alleged antitrust injury is best left to a later stage of the proceedings, the Court will deny Intel's Motion To Dismiss Class Plaintiffs' claim under the California UCL.

[*419] V. Whether Class Plaintiffs Have Stated Common Law Claims For Monopolization And Unjust Enrichment

A. *Monopolization*

Intel contends that Class Plaintiffs cannot state a claim for the tort of monopolization under California's common law. In support of its argument, Intel points out that there are no definitive California Appellate Court or Supreme Court cases recognizing a damages claim based upon the common law tort of actual or attempted monopolization, and therefore, Intel contends that this Court should not "create" such a tort here. In response, Class Plaintiffs direct the Court to several California Superior Court cases and one California Court of Appeals case which Class Plaintiffs contend demonstrate that California recognizes a common law tort of monopolization.

The Court has reviewed the cases cited by the parties and finds **[**39]** that there is no direct precedent from the California Supreme Court or the California Courts of Appeals on the question of whether California recognizes a common law claim for damages based upon monopolization. Class Plaintiffs direct the Court to *In re Cipro Cases I & II, 121 Cal. App. 4th 402, 17 Cal. Rptr. 3d 1 (Cal. Ct. App. 2004)* for the proposition that California courts recognize the common law tort of monopolization. However, in *Cipro,* the Court did not analyze this question specifically and only addressed whether a class alleging a claim for common law monopolization was properly certified. Class Plaintiffs also direct the Court to *Natural Gas Anti-Trust Cases I, II, III and IV,* 2002 WL 31570296 (Cal. Super. Ct. Oct. 16, 2002). In *Natural Gas,* the California Superior Court of San Diego County refused to strike a claim alleging the common law tort of monopolization stating:

> Additionally, the monopolization cause of action is not stricken because California courts have recognized that monopolization and attempted monopolization are against public policy and prohibited at common law. *Burdell v. Grandi, 152 Cal. 376, 92 P. 1022 (1907)*. California also recognizes the existence of the common law "business tort" **[**40]** of monopolization, separate and apart from statutory claims arising under the Cartright Act. *Exxon Corp. v. Superior Court, . . . 51 Cal. App. 4th 1672, 60 Cal. Rptr. 2d 195 (1997)*.

*2002 WL 31570296 at * 3*. As Intel points out, however, neither case cited by the *Natural Gas* court actually analyzes whether a monopolization claim is available under California law in the first instance. In *Burdell,* the California Supreme Court found that a restrictive covenant in a lease that was intended to create a monopoly was void, but it did not address the availability of damages for a monopoly claim. Similarly in *Exxon,* the court concluded that the plaintiffs' monopoly claim could not survive summary judgment, but did not actually address whether such a claim was cognizable under California law because no such challenge was made to the claim.

More recently, another California Superior Court, the Superior Court of Santa Clara County, has taken the opposite view of the *Natural Gas* court. In *Branning v. Apple Computer, Inc,* the court concluded that "there is no cause of action for common law monopoly under California law." No. 1-05-CV-045719 at 3 (Cal. Super. Ct. May 9, 2006). In support of its conclusion, the *Branning* court **[**41]** pointed to legislative history concerning the 2002 attempt to amend the Cartwright Act. In arguing that California should adopt a clause similar to *Section 2* of the Sherman Act, the Attorney General of the State of California reported to the Senate that "[a]ccording to Attorney General's Office, the remedies for **[*420]** illegal monopolization are limited under current law to relief in a federal court." Assembly Comm. On Bus. & Profs., 2001-2002 Reg. Session, analysis of Senate Bill 1814, at 3 (June 25, 2002). The *Branning* court went on to cite to *State of California ex rel. Van de Kamp v. Texaco, Inc., 46 Cal. 3d 1147, 1167, 252 Cal. Rptr. 221, 762 P.2d 385 (1988)* and Phillip E. Areeda, ***Antitrust Law****: An Analysis of Antitrust Principles and their Application,* for the proposition that***HN25***[] a civil claim for damages for monopolization was not recognized under the common law. As these sources point out, under the common law, the remedy for illegal agreements resulting in monopolies was the voiding of the offending agreements and not the awarding of civil damages as provided for under statutory law. *See also* Joseph D. Zamore, *Business Torts* Vol. 2, ch. 20 § 20.01 ("The primary difference between common law trade regulation and the Sherman **[**42]** Act is that the Sherman Act penalizes anticompetitive conduct whereas the common law merely held that contracts that unreasonably restrained trade were unenforceable.")

This rationale is in accord with the approach taken by the Court of Appeals for the Ninth Circuit in *Dimidowich v. Bell & Howell, 803 F.2d 1473, 1478 (9th Cir. 1986)*. Construing California law, the Ninth Circuit recognized that California's Cartwright Act does not contain a provision addressing unilateral conduct that results in a monopoly, but only combinations or conspiracies. As a result, the Ninth Circuit affirmed the district court's dismissal of the plaintiff's monopolization and attempted monopolization claims concluding that the plaintiff's monopoly claims challenging only the unilateral conduct of the defendant "fail[ed] to state a cognizable claim under California law . . ." *Id.*

In the absence of California Supreme Court law to the contrary, the Court is persuaded by the rationale of the *Branning* court and finds it to be consistent with the state of the common law as described by leading commentators. Accordingly, the Court concludes that Class Plaintiffs' claim for damages based upon the common law tort of **[**43]** monopolization is not cognizable under California law, and therefore, the Court will dismiss Class Plaintiffs' common law monopolization claim.

B. *Unjust Enrichment*

In the Complaint, Class Plaintiffs allege that Intel has been unjustly enriched through the overpayments of Class Plaintiffs and the resulting profits such overpayments yielded to Intel. Class Plaintiffs raise this claim under California law on behalf of all Class Members, but alternatively allege that if California law is not applied on a nation-wide basis that this claim is brought under the laws of the individual States and the District of Columbia.

By its Motion, Intel contends that Class Plaintiffs' unjust enrichment claim should be dismissed, because California does not recognize a cause of action for unjust enrichment. Intel also contends that Class Plaintiffs cannot maintain a claim for unjust enrichment under the laws of the individual States because (1) Class Plaintiffs have no antitrust standing and therefore cannot maintain an unjust enrichment claim on the same facts; (2) a successful unjust enrichment claim would expose Intel to the risk of multiple liability, an outcome prohibited by states following the Supreme **[**44]** Court's decision in *Illinois Brick;* and (3) Class Plaintiffs cannot establish a claim for unjust enrichment on the merits.

HN26[] Generally, a claim for unjust enrichment requires a plaintiff to demonstrate that (1) the plaintiff conferred a benefit on the defendant; (2) the defendant knew of the benefit; and (3) the **[*421]** defendant accepted or retained the benefit under such circumstances as to make non-payment inequitable. Unjust enrichment only applies in circumstances in which the parties have not entered into an express contract. As *Section 107(1) of the Restatement (First) of Restitution* provides:

> A person of full capacity who, pursuant to a contract with another, has performed services or transferred property to the other or otherwise conferred a benefit upon him, is not entitled to compensation therefor other than in accordance with the terms of such bargain, unless the transaction is rescinded for fraud, mistake, duress, undue influence or illegality, or unless the other has failed to perform his part of the bargain.

In *NMV,* the court recognized this principle and dismissed the unjust enrichment claims of the plaintiffs who claimed that automobile manufacturers and dealers conspired to keep **[**45]** Canadian built cars out of the United States thereby causing overcharges for cars built in the United States that the plaintiffs purchased. 350 F. Supp. 2d at 210. The *NMV* court stated that **HN27**[] "unjust enrichment ordinarily does not furnish a basis for liability where parties voluntarily have negotiated, entered into and fully performed their bargain, as consumers do in buying vehicles." According to the *NMV* court:

> The automobile purchasers here paid their purchase prices and obtained their vehicles. The Second Amended Complaint does not seek to rescind these sales, and it does not assert that purchasers failed to receive the benefit for which they bargained in buying the vehicles.

Id. at 120. The Court concludes that the circumstances in *NMV* are analogous to the circumstances here. The Class Plaintiffs paid the purchase price for their computers and received their computers. Class Plaintiffs have not sought to rescind their purchases, none of which involved Intel as a direct manufacturer or seller, and Class Plaintiffs have not alleged that they did not receive the benefit of their bargain.

Class Plaintiffs direct the Court to a contrary holding in *In re K-Dur Antitrust Litig., 338 F. Supp. 2d 517 (D.N.J. 2004)*. **[**46]** In *K-Dur,* the court rejected the defendants' argument that "'*any* consideration' given for a benefit conferred necessarily defeats unjust enrichment claims." *Id. at 545-546* (emphasis added). The court went on to conclude that the determination of the value of the benefit received compared with the amount paid were fact sensitive questions not suitable for adjudication in the context of a motion to dismiss. In this case, Class Plaintiffs do not allege that they failed to receive the benefit of their bargain, and therefore, the Court is not persuaded that *K-Dur* is applicable here. Further, to the extent that *K-Dur* can be read to adopt a general rule contrary to the rule discussed in *NMV,* the Court declines to adopt *K-Dur* and instead concludes that *NMV* and its adherence to the principles outlined in the Restatement (First) of Restitution is the better reasoned approach. Accordingly, the Court will grant Defendants' Motion to the extent it seeks dismissal of Class Plaintiffs' common law unjust enrichment claims.

CONCLUSION

For the reasons discussed, the Court will grant Intel's Motion To Dismiss the following claims asserted by Class Plaintiffs: (1) claims for antitrust violations under New **[**47]** York law; (2) class action consumer protection claims under the laws of the States of Alaska, Georgia, Louisiana and Montana; (3) claims under the common law for monopoly; and (4) claims under the common law for unjust enrichment. **[*422]** Intel's Motion To Dismiss will be denied in all other respects.

An appropriate Order will be entered.

CONSOLIDATED ACTION

ORDER

At Wilmington, this 12 day of July 2007, for the reasons set forth in the Memorandum Opinion this date;

IT IS HEREBY ORDERED that Intel Corporation's Motion To Dismiss The First Amended Consolidated Complaint (D.I. 217 in Civil Action No. 05-485 and D.I. 307 in MDL Docket No. 05-1717) is ***GRANTED*** with respect to the following claims: (1) claims for antitrust violations under New York law; (2) class action consumer protection claims under the laws of the States of Alaska, Georgia, Louisiana and Montana; (3) claims under the common law for monopoly; and (4) claims under the common law for unjust enrichment, and ***DENIED*** in all other respects.

Joseph J. Farnan, Jr.

UNITED STATES DISTRICT JUDGE

Meyers v. Bayer AG

Supreme Court of Wisconsin

December 12, 2006, Submitted on Briefs ; July 13, 2007, Decided; July 13, 2007, Filed

No. 2003AP2840

Reporter

2007 WI 99 *; 303 Wis. 2d 295 **; 735 N.W.2d 448 ***; 2007 Wisc. LEXIS 428 ****; 2007-2 Trade Cas. (CCH) P75,774

Barbara A. Meyers, Lynn Stucker, Loyal Berg and Eugene Browning, individually and on behalf of all others similarly situated, Plaintiffs-Appellants, v. Bayer AG, Bayer Corporation, Barr Laboratories, Inc., Rugby Group, Inc., Watson Pharmaceuticals, Inc. and Hoeschst Marion Roussel, Inc., Defendants-Respondents-Petitioners.

Prior History: [**1]** COURT: Circuit. COUNTY: Milwaukee. JUDGE: Michael Guolee. REVIEW of a decision of the Court of Appeals. (L.C. No. 2000CV9347).

Meyers v. Bayer AG, 2006 WI App 102, 293 Wis. 2d 770, 718 N.W.2d 251, 2006 Wisc. App. LEXIS 405 (2006).

Disposition: Affirmed and remanded for further proceedings.

Core Terms

patent, Antitrust, impacts, monopoly, allegations, generic, anti trust law, interstate commerce, conspiracy, manufacturers, cases, effects, commerce, prices, price-fixing, challenged conduct, motion to dismiss, purchasers, courts, rights, circuit court, indirect, illegal conduct, consumers, complaint alleges, circumstances, monopolistic, patent infringement, actionable conduct, ciprofloxacin

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN1[] **Regulated Practices, Price Fixing & Restraints of Trade**

A plaintiff filing an action under Wisconsin's Antitrust Act must allege price fixing as a result of the formation of a combination or conspiracy that "substantially affects" the people of Wisconsin and has impacts in the State when the challenged conduct occurs predominately or exclusively outside the State.

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

Civil Procedure > Appeals > Standards of Review > General Overview

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

When reviewing the dismissal of a complaint for failure to state a claim, an appellate court accepts as true the facts alleged in the complaint.

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

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

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN3[] **Standards of Review, De Novo Review**

The matter of whether a complaint states a claim upon which relief can be granted is a question of law subject to independent review.

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

HN4[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss a complaint for failure to state a claim upon which relief can be granted tests the legal sufficiency of the complaint. For the limited purposes of assessing a complaint's legal sufficiency, a court accepts as true all facts as set forth in the complaint, and reasonable inferences that may be drawn from such facts. A complaint in a civil action should not be dismissed as legally insufficient unless it is clear that there are no circumstances under which the plaintiff can recover.

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

Governments > Legislation > Interpretation

HN5[] **Standards of Review, De Novo Review**

Interpretation and application of statutes and case law to a set of facts are matters of law that an appellate court decides de novo.

Governments > Legislation > Interpretation

HN6[] **Legislation, Interpretation**

Statutory interpretation begins with the language of the statute. A court applies the language of a statute as written, giving the words their commonly accepted meanings. Statutory context is relevant to the plain meaning of a statute. Previous cases construing a statute also become a part of the understanding of a statute's plain meaning.

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

HN7[] **Trade Practices & Unfair Competition, State Regulation**

The Wisconsin Antitrust Act, *Wis. Stat. § 133.03* (2005-06), may reach interstate commerce if (1) actionable conduct, such as the formation of a combination or conspiracy, occurred within the State of Wisconsin, even if its effects are felt primarily outside Wisconsin; or (2) the conduct complained of "substantially affects" the people of Wisconsin and has impacts in the State, even if the illegal activity resulting in those impacts occurred predominantly or exclusively outside the State.

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

HN8[] **Trade Practices & Unfair Competition, State Regulation**

A civil plaintiff filing an action under the Wisconsin Antitrust Act must allege either that actionable conduct occurred within the State of Wisconsin, or that the conduct complained of "substantially affects" the people of Wisconsin and has impacts in the State.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > State Regulation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN9[] **Regulated Practices, Price Fixing & Restraints of Trade**

See *Wis. Stat. § 133.03* (2005-06).

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

HN10[] **Private Actions, State Regulation**

Wis. Stat. § 133.18 (2005-06) provides treble damages to any person injured, directly or indirectly.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN11[] **Regulated Practices, Price Fixing & Restraints of Trade**

When challenged conduct does not occur within the State of Wisconsin and impacts interstate commerce, the Wisconsin Antitrust Act applies if the conduct "substantially affects" the people of Wisconsin and has "impacts" in the State. The public interest and welfare of the people of Wisconsin are substantially affected if prices of a product are fixed or supplies thereof are restricted as the result of an illegal combination or conspiracy.

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

HN12[] **Trade Practices & Unfair Competition, State Regulation**

An antitrust plaintiff must allege that the conduct complained of has impacts in Wisconsin, and not merely nationwide impacts.

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

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN13[] Trade Practices & Unfair Competition, State Regulation

When determining on a motion to dismiss whether a complaint under the Wisconsin Antitrust Act alleges that the challenged conduct "substantially affected" the people of Wisconsin, courts apply, as on any motion to dismiss, Wisconsin's notice pleading statute, *Wis. Stat. § 802.02(1)(a)* (2005-06).

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN14[] Pleadings, Rule Application & Interpretation

Pleadings shall be liberally construed with a view to substantial justice between the parties.

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

HN15[] Motions to Dismiss, Failure to State Claim

A complaint in a civil action should not be dismissed as legally insufficient unless it is clear that there are no circumstances under which the plaintiff can recover.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN16[] Regulated Practices, Price Fixing & Restraints of Trade

A complaint under the Wisconsin Antitrust Act, where the circumstances involve interstate commerce and the challenged conduct occurred outside of the State of Wisconsin, is sufficient if it alleges price fixing as a result of the formation of a combination or conspiracy that substantially affected the people of Wisconsin and had impacts in the State.

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN17[] Trade Practices & Unfair Competition, State Regulation

Under Olstad, an antitrust complaint must simply allege that the challenged conduct "substantially affects" the people of Wisconsin and has impacts in the State of Wisconsin, not that the impacts be disproportionately felt in Wisconsin.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

HN18[] **Purchasers, Indirect Purchasers**

The Wisconsin Antitrust Act specifically provides a remedy for indirect purchasers who suffer harm as a result of conduct that violates Wis. Stat. ch. 133 (2005-006). *Wis. Stat. § 133.18* provides that a person injured, directly or indirectly, by reason of anything prohibited by this chapter may sue and shall recover damages.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN19[] **Regulated Practices, Price Fixing & Restraints of Trade**

Price-fixing is a monopolistic practice that, by its very nature, substantially affects the public. The public interest and welfare of the people of Wisconsin are substantially affected if prices of a product are fixed or supplies thereof are restricted as the result of an illegal combination or conspiracy.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN20[] **Regulated Practices, Price Fixing & Restraints of Trade**

The standard set forth in Olstad for determining when Wis. Stat. ch. 133 (2005-06) reaches interstate commerce is: A plaintiff filing an action under Wisconsin's Antitrust Act must allege price fixing as a result of the formation of a combination or conspiracy that substantially affects the people of Wisconsin and has impacts in the State of Wisconsin when the challenged conduct occurs predominately or exclusively outside the State.

Counsel: For the defendants-respondents-petitioners there were briefs by Phillip A. Proger, Kevin D. McDonald, Lawrence D. Rosenberg, and Jones Day, Washington, D.C.; Gerardo H. Gonzalez, Richard J. Krill, and Gonzalez, Saggio & Harlan, LLP, Milwaukee; Fred H. Bartlit, Jr., Peter B. Bensinger, Jr., Michael J. Valaik, Paul J. Skiermont, and Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL; William J. Mulligan, Kathy L. Nusslock, and Davis & Kuelthau, S.C., Milwaukee; Thomas D. Yannucci, P.C., Karen N. Walker, Edwin John U, and Kirkland & Ellis LLP, Washington, D.C.; Stephen P. Hurley, Kristine A. Long, Andrew W. Erlandson, and Hurley, Burish & Milliken, S.C., Madison; David E. Everson, Heather S. Woodson, Victoria L. Smith, and Stinson Morrison Hecker LLP, Kansas City, MO, and oral argument by Fred H. Bartlit, Jr.

For the plaintiffs-appellants there was a brief by John C. Cabaniss, Thomas Armstrong, and von Briesen & Roper, s.c., Milwaukee, and oral argument by Thomas Armstrong, Jr.

An amicus curiae brief was filed by **[****2]** Stephen E. Meili and Consumer Law Litigation Clinic, Madison; Peter C. Carstensen, David Dudley, and University of Wisconsin Law School, Madison; on behalf of the University of Wisconsin Law School Consumer Law Litigation Clinic, Professor Peter C Carstensen of the University of Wisconsin Law School, and David Dudley of the University of Wisconsin Law School.

An amicus curiae brief was filed by Eric J. Wilson and Gwendolyn J. Cooley, assistant attorneys general, with whom on the brief was Peggy A. Lautenschlager, attorney general, on behalf of the state of Wisconsin, and there was oral argument by Eric J. Wilson.

An amicus curiae brief was filed by Paul E. Benson, Grant C. Killoran, and Michael Best & Friedrich, LLP, Milwaukee, on behalf of the Milwaukee Metropolitan Chamber of Commerce and the Wisconsin Manufacturers and Commerce, Inc.

Judges: LOUIS B. BUTLER, JR., J. DISSENTED: PROSSER, J., dissents (opinion filed). ROGGENSACK, J., dissents (opinion filed). WILCOX and PROSSER, JJ., join the dissent.

Opinion by: LOUIS B. BUTLER, JR.

Opinion

[*P1] [299] [***450]** LOUIS B. BUTLER, JR., J. The defendants, Bayer AG, et al. (collectively "Bayer"), seek review of a published court of appeals' decision [1] reversing a circuit court order that **[****3]** dismissed all claims brought under Wisconsin's Antitrust Act, Chapter 133 of the Wisconsin Statutes, by Barbara Meyers, Lynn Stucker, Loyal Berg, and Eugene Browning (collectively "Meyers"), representing a putative class of Wisconsin residents who purchased the antibiotic ciprofloxacin hydrochloride from Bayer under the brand name Cipro. Meyers' complaint [2] alleges that Wisconsin consumers paid inflated prices for Cipro as a result of an unlawful agreement between Bayer and three manufacturers of generic drugs, Barr Laboratories, Inc. ("Barr"), Hoechst Marion Roussel, Inc. ("HMR") and The Rugby Group ("Rugby"), which precluded Barr, HMR and Rugby from selling or marketing generic ciprofloxacin hydrochloride to compete with Cipro.

[*P2] The circuit court, Honorable Michael D. Guolee, dismissed Meyers' claims **[***451]** against Bayer, concluding that Wisconsin's Antitrust Act, *Wis. Stat. § 133.03* (2005-06), [3] applied only to intrastate commerce. Meyers appealed, and the court of **[****4]** appeals held the case in abeyance pending our decision in *Olstad v. Microsoft Corp., 2005 WI 121, 284 Wis. 2d 224, 700 N.W.2d 139*. Subsequently, we concluded in Olstad that Wisconsin's Antitrust Act applies to cases involving interstate conduct if

> **[**300]** (1) the actionable conduct, such as the formation of a combination or conspiracy, occurred within this state, even if its effects are felt primarily outside of Wisconsin; or (2) the conduct complained of "substantially affects" the people of Wisconsin and has impacts in this state, even if the illegal activity resulting in those impacts occurred predominantly or exclusively outside this state.

Olstad, 2005 WI 121, P1, 284 Wis. 2d 224, 700 N.W.2d 139. Applying Olstad, the court of appeals reversed the circuit court on grounds that the Wisconsin Antitrust Act reaches interstate commerce, and Meyers' complaint alleged facts of illegal conduct that, if true, "substantially affected" the people of Wisconsin and had impacts in this state. *Meyers v. Bayer AG, 2006 WI App 102, PP1, 10-11, 293 Wis. 2d 770, 718 N.W.2d 251*.

[*P3] We follow our precedent set forth in Olstad for determining **[****5]** when Chapter 133 reaches interstate commerce: ***HN1***[] A plaintiff filing an action under Wisconsin's Antitrust Act must allege price fixing as a result of the formation of a combination or conspiracy that "'substantially affects' the people of Wisconsin and has impacts in this state" when the challenged conduct occurs predominately or exclusively outside this state. *Olstad, 2005 WI 121, P85, 284 Wis. 2d 224, 700 N.W.2d 139*. We conclude that additional limitations Bayer and amici Milwaukee

[1] *Meyers v. Bayer AG, 2006 WI App 102, 293 Wis. 2d 770, 718 N.W.2d 251*.

[2] Except where otherwise noted, the complaint we refer to throughout this opinion is the second amended complaint filed by the plaintiffs in this action.

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise indicated.

Metropolitan Chamber of Commerce and Wisconsin Manufacturers and Commerce seek to read into the "substantially affects" standard are unsupported by our precedents and are contrary to the policy choices of the legislature.

[*P4] Meyers' 35-page, 106-paragraph complaint alleges a broad price-fixing scheme affecting "at a minimum, thousands . . . in Wisconsin" who purchased the best-selling antibiotic Cipro "at any time since **[**301]** January 6, 1995." We conclude Meyers' complaint alleges illegal conduct that, if true, substantially affected the people of Wisconsin and had impacts in this state. [4] We therefore affirm the court of appeals' decision reversing the circuit court's order dismissing Meyers' claims, and remand for further proceedings consistent **[****6]** with this opinion.

I

[*P5] This review of a decision of the court of appeals arises on a motion to dismiss for **[***452]** failure to state a claim. ***HN2***[] For purposes of this review, we accept as **[****7]** true the facts alleged in Meyers' complaint. *Tietsworth v. Harley-Davidson, Inc., 2004 WI 32, P5, 270 Wis. 2d 146, 677 N.W.2d 233*. The facts as set forth below are taken from Meyers' complaint except where otherwise noted.

[*P6] Bayer filed U.S. Patent No. 4,670,444 ("'444 patent") on May 29, 1984, a compound patent for the **[**302]** drug ciprofloxacin hydrochloride. In October 1987, a subsidiary of Bayer obtained approval from the Food and Drug Administration ("FDA") to market ciprofloxacin hydrochloride. The drug was marketed under the name Cipro, a broad spectrum antibiotic approved to treat sinusitis, lower respiratory infections, and fifteen other ailments. Cipro quickly became one of the most prescribed drugs of its kind. [5] Meyers' complaint states that within one year of its introduction, Cipro was adopted in the formulary of every hospital in the United States.

[*P7] In October 1991 Barr filed an Abbreviated **[****8]** New Drug Application ("application") with the FDA, pursuant to certain provisions of *21 U.S.C. § 355*, a/k/a the Hatch-Waxman Act, requesting approval to market and sell generic ciprofloxacin hydrochloride ("generic Cipro"). Pursuant to the Hatch-Waxman Act, Barr notified Bayer of its application, and asserted that Bayer's '444 patent was invalid and unenforceable. In response, Bayer filed a patent infringement lawsuit against Barr on January 16, 1992, challenging Barr's application to market and sell generic Cipro. As a result of the infringement lawsuit, FDA approval of Barr's application was automatically postponed by operation of statute, *21 U.S.C. § 355(j)(5)(B)(iii) (1991)*, pending resolution of the patent infringement lawsuit.

[*P8] On January 6, 1995, with the patent case as yet unresolved, the FDA gave tentative approval to Barr's application for generic Cipro. Meyers' complaint states that, following the FDA's action, a Barr official **[**303]** reportedly stated that Barr would bring to market its generic Cipro "immediately" if Barr prevailed in the patent infringement suit.

---

[4] At oral argument, the issue arose of whether the agreement between Bayer and the generic manufacturers constituted actionable conduct under Chapter 133. We note that a federal district court dismissed an action under the Sherman Antitrust Act against Bayer on grounds that the Agreement between Bayer and the generic manufacturers did not violate federal ***antitrust law***. See *In re Ciproflaxacin Hydrochloride Antitrust Litigation, 363 F. Supp. 2d 514 (E.D.N.Y. 2005)*. In a complex opinion discussing a number of different issues, the federal district court addressed whether the consumer plaintiffs could attack the validity of the Cipro patent post hoc, and the effect of the possible invalidity of the patent on the legality of the Agreements, among other questions. Because these issues have not been briefed by the parties, have not been developed in the record in this motion to dismiss, and are not properly before this court, we do not address them further. These matters may be addressed by the circuit court on remand.

[5] Meyers' complaint indicates that, as of January 2002, Cipro was the best-selling antibiotic in the world, a position it had maintained for eight consecutive years. Meyers cites a March 2000 Bayer press release indicating that in 1999 Cipro posted $ 1 billion in sales in the United States.

[*P9] On March 29, 1996, Barr entered into an agreement with Rugby, a rival generic drug manufacturer, in which Barr agreed **[****9]** to share equally with Rugby any rights and profits from the eventual marketing and distribution of generic Cipro in exchange for Rugby's assistance in funding the patent litigation with Bayer.

[*P10] Bayer moved for summary judgment in the patent suit with Barr and Rugby in January 1996. On June 5, 1996, the court presiding over the patent litigation denied Bayer's motion for summary judgment, and denied a motion for reconsideration on September 5, 1996.

[*P11] On January 8, 1997, Bayer, Barr, HMR, and Rugby entered into four agreements (collectively, the "Agreement") which allocated the entire United States market for Cipro for at least six years, and required Bayer to make large monetary payments to Barr and HMR. [6] According to the complaint, Bayer made an initial payment to Barr and HMR of $ 49.1 million. **[***453]** The complaint asserts that the Agreement granted Bayer an unlawful monopoly in the market for Cipro and generic Cipro. As a part of the Agreement, Bayer and Barr agreed to resolve the patent litigation by entering into a consent judgment that acknowledged the validity and enforceability of the '444 patent. Bayer states it is undisputed that the discussions relating to the Agreement occurred **[****10]** in New York and Germany.

[*P12] [304]** The Agreement further provided that Bayer could either (a) license and supply Bayer-manufactured Cipro to Barr and HMR for resale under a generic label; or (b) pay quarterly amounts to Barr from 1998 through at least 2003. [7] The former of these options established the price Barr and HMR would pay to Bayer for Cipro, and required Barr and HMR to share its profits with Bayer. The Agreement also required Barr to amend its application to the FDA, ending its challenge to the validity of the '444 patent. The Agreement required that the parties not disclose the terms of the Agreement. The consent judgment ending the patent litigation in federal court contained no information about the terms of the Agreement and made no mention of any payments from Bayer to Barr.

[*P13] Meyers' complaint asserts that, as a result of the Agreement, Bayer maintained its monopoly of the United States market for Cipro and generic equivalents of Cipro. Published reports cited in the complaint show that from January 1997 to December 1998, Bayer increased the price of Cipro by 16.7%, one of the largest increases for any prescription drug in the United States. Bayer's internal sales documents show that its revenues and profits increased substantially after the execution of the Agreement, according to the complaint. From 1998 to 1999, Bayer's United States revenues from Cipro went up from $ 834,620,400 to $ 1,042,473,100, an increase of 25%, while its net profits jumped from $ 756,265,800 to $ 921,631,900, an increase of 22%.

[*P14] [305]** The complaint asserts that were it not for the conduct of the defendants, generic manufacturers, including Barr, would have begun marketing and selling generic Cipro in the United States no later than January 1995. The complaint asserts that, "[a]s **[****12]** a result of the illegal conduct of Defendants, Plaintiffs and members of the Class were compelled to pay, and did pay, supracompetitive prices for Cipro which were substantially higher than the prices that Plaintiffs and members of the Class would have paid absent the unlawful agreements and conspiracy alleged herein."

[*P15] In November 2000, Meyers, [8] both individually and on behalf of all others similarly situated, filed suit against Bayer, Barr, Rugby, Watson and HMR in Milwaukee County Circuit Court. The complaint states that the named plaintiffs and members of the putative class are Wisconsin residents who purchased Cipro indirectly from

---

[6] The complaint states that Rugby was a subsidiary of HMR until February 1998, at which time Rugby was acquired by Watson. The complaint states that Rugby retained the exclusive right to distribute generic Cipro following the sale of Rugby to Watson Pharmaceuticals, Inc. ("Watson").

[7] Meyers' brief states that Bayer has chosen to make quarterly payments to Barr and HMR. It states that, including the $ 49.1 **[****11]** million initial payment, Bayer agreed to pay Barr and HMR through December 2003 a total of $ 398 million not to compete in the United States with Bayer in the market for Cipro and generic equivalents to Cipro.

[8] Plaintiffs Stucker, Berg and Browning were later added to the complaint by amendment.

Bayer at any time since January 6, 1995. The complaint alleges violations of the Wisconsin Unfair Competition statute, *Wis. Stat. § 100.20(1)*, and the Wisconsin Antitrust Act, *Wis. Stat. § 133.03(1)*.

[*P16] The case was removed to the United States District Court for the Eastern **[***454]** District of Wisconsin and subsequently transferred to a New York federal district court. On October 1, 2001, the case was remanded back to the state court where it was originally filed. See *In re Ciproflaxacin Hydrochloride Antitrust Litig., 166 F. Supp. 2d 740, 742-43 (E.D.N.Y. 2001)*.

[*P17] **[****13]** On remand of the matter back to the Milwaukee Circuit Court, Bayer moved to dismiss Meyers' complaint. In an order dated September 19, 2003, the Milwaukee County Circuit Court, Honorable Michael D. **[**306]** Guolee, granted Bayer's motion, concluding that the complaint failed to state a claim on which relief could be granted. The circuit court's decision relied on *Conley Publishing Group, Ltd. v. Journal Communications, Inc., 2003 WI 119, P16, 265 Wis. 2d 128, 665 N.W.2d 879*, which stated that "the scope of Chapter 133 is limited to intrastate transactions."

[*P18] Meyers appealed from the order of dismissal. The court of appeals stayed the appeal pending the outcome of the Olstad case, which was on certification to this court to resolve an apparent conflict between a line of cases including Conley Publishing, which held that Chapter 133 did not reach interstate commerce, and a divergent line of cases, including *State v. Allied Chemical and Dye Corp., 9 Wis. 2d 290, 295, 101 N.W.2d 133 (1960)*, which suggested that Chapter 133 provided a remedy in at least some cases involving interstate conduct. In a 5-0 decision, with Chief Justice Abrahamson and Justice Bradley not participating, we wrote that Chapter **[****14]** 133 "applies to interstate commerce, at least in some circumstances." *Olstad, 2005 WI 121, P74, 284 Wis. 2d 224, 700 N.W.2d 139*. We explained that Wisconsin's Antitrust Act provides a remedy whenever: (1) the actionable conduct occurs within the state; or (2) the actionable conduct "substantially affects" the people of Wisconsin and has impacts in the state, even if the conduct resulting in these impacts occurred outside of Wisconsin. *Id., P85*.

[*P19] In view of Olstad, the court of appeals reversed the circuit court, concluding that the circuit court's interpretation of the scope of the Wisconsin Antitrust Act was erroneous. *Meyers, 2006 WI App 102, P9, 293 Wis. 2d 770, 718 N.W.2d 251*. The court of appeals noted that while Olstad did not define "substantially affects," this court stated in *Allied Chemical, 9 Wis. 2d at 295*, that " [t]he public interest **[**307]** and welfare of the people of Wisconsin are substantially affected if prices of a product are fixed or supplies thereof are restricted as the result of an illegal combination or conspiracy." The court of appeals examined Meyers' complaint and concluded that it set forth the necessary facts and allegations to withstand a motion to dismiss. *Meyers, 2006 WI App 102, 293 Wis. 2d 770, P13, 718 N.W.2d 251*.

[*P20] Bayer filed a petition seeking review **[****15]** of the court of appeals' decision, stating that the issue presented for review was whether the allegations of the complaint satisfied the "substantially affects" test articulated in Olstad. We granted Bayer's petition to address this particular issue, and we affirm.

II

[*P21] ***HN3***[] The matter of whether a complaint states a claim upon which relief can be granted is a question of law subject to our independent review. *Beloit Liquidating Trust v. Grade, 2004 WI 39, P17, 270 Wis. 2d 356, 677 N.W.2d 298* (citation omitted). ***HN4***[] "A motion to dismiss a complaint for failure to state a claim upon which relief can be granted tests the legal sufficiency of the complaint." Id. For the limited purposes of assessing the complaint's legal sufficiency, we accept as true all facts as set forth in the complaint, and reasonable inferences that may be drawn **[***455]** from such facts. Id. "[A] complaint in a civil action should not be dismissed as legally insufficient unless it is clear that there are no circumstances under which the plaintiff can recover." *Lewis v. Sullivan, 188 Wis. 2d 157, 164, 524 N.W.2d 630 (1994)*.

[*P22] Whether the complaint is legally sufficient in this case depends upon application of the Wisconsin Antitrust Act, **[****16]** Chapter 133, and the cases construing it, **[**308]** to the facts as pled. ***HN5***[] Interpretation and application of statutes and case law to a set of facts are matters of law that we decide de novo. *Welin v. American Family Mut. Ins. Co., 2006 WI 81, P16, 292 Wis.2d 73, 717 N.W.2d 690* .

[*P23] ***HN6***[] Statutory interpretation begins with the language of the statute. We apply the language of the statute as written, giving the words their commonly accepted meanings. Statutory context is relevant to the plain meaning of a statute. Previous cases construing a statute also become a part of our understanding of a statute's plain meaning. See *Olstad, 2005 WI 121, P21, 284 Wis. 2d 224, 700 N.W.2d 139* (quoting *Zimmerman v. Wisconsin Elec. Power Co., 38 Wis. 2d 626, 633-34, 157 N.W.2d 648 (1968)* ("'It has often been said that once a construction has been given to a statute, the construction becomes a part of the statute.'")).

III

[*P24] Two years ago, we concluded in *Olstad, 2005 WI 121, P1, 284 Wis. 2d 224, 700 N.W.2d 139*, that ***HN7***[] the Wisconsin Antitrust Act, *Wis. Stat. § 133.03*,

> may reach interstate commerce if (1) actionable conduct, such as the formation of a combination or conspiracy, occurred within this state, even if its effects are felt primarily outside Wisconsin; or (2) the conduct **[****17]** complained of "substantially affects" the people of Wisconsin and has impacts in this state, even if the illegal activity resulting in those impacts occurred predominantly or exclusively outside this state.

HN8[] A civil plaintiff filing an action under the act must allege either that actionable conduct occurred within the state, or that the conduct complained of "substantially **[**309]** affects" the people of Wisconsin and has impacts in this state. *Id., P85*. Because the issue in Olstad arose on a certified question, we did not apply the "substantially affects" test to the facts of the case, a class action against the software manufacturer Microsoft alleging monopolistic practices. See id. We explicitly declined to elaborate on the meaning of "substantially affects," except to state the following: "Operating with lesser standards would jeopardize the action, undermine the validity of our antitrust statute, and create the spectacle of Lilliputian harassment in Wisconsin courts." Id.

[*P25] Bayer contends that the cases upon which Olstad relied establish that the "substantially affects" test requires that plaintiffs allege specific and particularized effects on Wisconsin consumers, not merely generalized **[****18]** allegations of nationwide effects. It further asserts that plaintiffs must allege that the impacts on this state are more than that indirect purchasers in Wisconsin may have paid higher prices because of the challenged conduct. Meyers contends that requiring allegations of specific and particularized effects would amount to a heightened pleading standard for claims brought under the Wisconsin Antitrust Act, and be contrary to the purposes of the statute. To consider these arguments, we examine the language of the Wisconsin Antitrust Act and those cases interpreting it.

[*456]** A

[*P26] *Wisconsin Stat. § 133.03* provides as follows, in relevant part:

> (1) ***HN9***[] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal. Every person who makes any contract **[**310]** or engages in any combination or conspiracy in restraint of trade or commerce is guilty of a Class H felony, except that, notwithstanding the maximum fine specified in s. 939.50(3)(h), the person may be fined not more than $ 100,000 if a corporation, or, if any other person, may be fined not more than $ 50,000.
>
> (2) Every person who monopolizes, or attempts to monopolize, or combines or conspires **[****19]** with any other person or persons to monopolize any part of trade or commerce is guilty of a Class H felony, except that, notwithstanding the maximum fine specified in s. 939.50(3)(h), the person may be fined not more than $ 100,000 if a corporation, or, if any other person, may be fined not more than $ 50,000.

Chapter 133 contains a statement of legislative intent, which provides as follows:

> The intent of this chapter is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory business practices which destroy or

> hamper competition. It is the intent of the legislature that this chapter be interpreted in a manner which gives the most liberal construction to achieve the aim of competition. It is the intent of the legislature to make competition the fundamental economic policy of this state and, to that end, state regulatory agencies shall regard the public interest as requiring the preservation and promotion of the maximum level of competition in any regulated industry consistent with the other public interest goals established by the legislature.

Wis. Stat. § 133.01. ***HN10***[] *Wisconsin Stat. § 133.18* **[****20]** provides treble damages to "any person injured, directly or indirectly." As we noted in *Olstad, 2005 WI 121, P61, 284 Wis. 2d 224, 700 N.W.2d 139*, language providing recovery to those harmed indirectly was adopted in response to the United States **[**311]** Supreme Court's decision in *Illinois Brick Co. v. State of Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, which limited recovery under the federal antitrust statute to direct purchasers.

[*P27] We thoroughly examined the language of the Wisconsin Antitrust Act, its legislative history and historical context in Olstad to determine whether the Wisconsin Antitrust Act applies to conduct that reaches interstate commerce. There, we noted that the Wisconsin Antitrust Act was adopted in 1893, three years after passage of the Sherman Antitrust Act. *Olstad, 2005 WI 121, P41, 284 Wis. 2d 224, 700 N.W.2d 139*. At that time, there was little doubt that state ***antitrust law*** was limited in scope to conduct impacting intrastate commerce; the Supreme Court saw only a narrow role for state government in commercial regulation. *Id., P30*. Courts then treated state and federal governments as "'separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.'" *Id., P33* (quoting *The Collector v. Day, 78 U.S. 113, 124, 20 L. Ed. 122 (1870))*.

[*P28] **[****21]** Our early cases interpreting the reach of the Wisconsin Antitrust Act were consistent with this narrow view of state regulatory authority, holding that the statute applied only to intrastate commerce. See, e.g., *State v. Lewis & Leidersdorf Co., 201 Wis. 543, 549, 230 N.W. 692 (1930)*; *Pulp Wood v. Green Bay Paper & Fiber Co., 157 Wis. 604, 625, 147 N.W. 1058* ***[***457]*** *(1914)*. While the Supreme Court later adopted a much less rigid view of the role of state government in regulation, some of this court's decisions continued to adhere to the view that the Wisconsin Antitrust Act was limited in scope to intrastate commerce. See, e.g., *Conley Publishing, 265 Wis. 2d 128, 2003 WI 119, 665 N.W.2d 879*; *Grams v. Boss, 97 Wis. 2d 332, 346, 294 N.W.2d 473 (1980)*. However, as we discussed in *Olstad, 2005 WI 121, PP24-27, 284 Wis. 2d 224, 700 N.W.2d 139*, other cases held that the Wisconsin Antitrust Act reached interstate commerce **[**312]** in some circumstances. See *State v. Milwaukee Braves, 31 Wis. 2d 699, 144 N.W.2d 1 (1966)*; *Allied Chemical, 9 Wis. 2d 290, 101 N.W.2d 133*. Based on the apparent conflict between these lines of cases, we concluded in *Olstad, 2005 WI 121, P28, 284 Wis. 2d 224, 700 N.W.2d 139*, that Chapter 133 had been interpreted inconsistently, and, as a result, the statute was ambiguous. [9] We therefore **[****22]** examined the legislative history of the Wisconsin Antitrust Act, and in particular a 1980 overhaul of the statute. See *id., PP55-73*.

[*P29] The 1980 revision, Olstad explained, included language that permitted indirect purchasers harmed by antitrust violations to recover under the Wisconsin Antitrust Act. *Id., P61-63* (discussing language now contained in *Wis. Stat. § 133.18* providing that "any person injured, directly or indirectly, by reason of anything prohibited by this chapter may sue"). A letter from Attorney General Bronson La Follette to the bill's Assembly author, Representative **[****23]** Marjorie Miller, indicated that this change

> would reverse the effect of the U.S. Supreme Court's ruling in the Illinois Brick case on Wisconsin law. The Court, in that case, ruled that only direct purchasers may recover damages for illegally-priced goods. Thus, indirect purchasers--such as state and local governments which purchase most of their supplies through wholesalers, retailers or other middlemen--are left out **[**313]** in the cold when it comes to recovering for the illegally inflated prices they and their constituents must pay.

---

[9] The conclusion in *Olstad v. Microsoft Corp., 2005 WI 121, P28, 284 Wis. 2d 224, 700 N.W.2d 139*, that the statute was ambiguous was not based on a reading of the text of the statute itself, but on the inconsistency in prior case law construing the statute. In determining the statute to be ambiguous, Olstad observed that while "[t]he language [of *Wis. Stat. § 133.03*] itself provides no express limit to the statute's scope," this court had ascribed such a limit to the statute only two years earlier in *Conley Publishing Group, Ltd. v. Journal Communications, Inc., 2003 WI 119, P16, 265 Wis. 2d 128, 665 N.W.2d 879*.

Id., P62 (quoting Letter to Representative Marjorie Miller from Attorney General Bronson La Follette dated October 3, 1979, located in Legislative Council files, Madison, Wisconsin). We note that Meyers and the putative class were indirect purchasers of Cipro, and that without this change they would not have had a cause of action under the Wisconsin Antitrust Act.

[*P30] Moreover, we noted in Olstad that the 1980 revision created a new section, *Wis. Stat. § 133.01*, that included a broad statement of legislative intent. *Id., P68*. This section provided, in part: "It is the intent of the legislature that this chapter be interpreted in a manner which gives the most liberal **[****24]** construction to achieve the aim of competition." Id.

[*P31] We concluded in Olstad that these changes (along with other legislative history material) "le[ft] little doubt of the legislature's intent to apply the Wisconsin antitrust statute to interstate commerce." *Id., P55*. We then held that ***HN11***[] when the challenged conduct does not occur within the state of Wisconsin and impacts interstate commerce, the Wisconsin Antitrust Act applies if the conduct "substantially affects" **[***458]** the people of Wisconsin and has "impacts" [10] in this state. *Id., P85*. The "substantially affects" standard **[**314]** comes from the following language in the Allied Chemical decision: "The public interest and welfare of the people of Wisconsin are substantially affected if prices of a product are fixed or supplies thereof are restricted as the result of an illegal combination or conspiracy." *Allied Chemical, 9 Wis. 2d at 295*.

[*P32] Bayer contends that the cases upon which Olstad relied establish two limiting principles that should govern the application of the "substantially affects" test. First, Bayer argues plaintiffs must allege specific and particularized effects on Wisconsin consumers, not merely generalized allegations of nationwide effects, citing *Emergency One, Inc. v. Waterous Co., 23 F. Supp. 2d 959 (E.D. Wis. 1998)*, and *State v. Milwaukee Braves, Inc., 31 Wis. 2d 699, 144 N.W.2d 1 (1966)*. Second, Bayer argues plaintiffs must put forth allegations more specific than merely that some Wisconsin downstream consumers may have generally paid higher prices because of the challenged conduct, citing Emergency One. We examine the cases on which we relied in Olstad -- Allied **[****26]** Chemical, Milwaukee Braves and Emergency One -- to determine whether they support Bayer's argument.

B

[*P33] The Allied Chemical case arose out of an action alleging monopolistic practices in violation of the Wisconsin Antitrust Act brought by the attorney general against manufacturers and sellers of the chemical calcium chloride. At the time of the state suit, the **[**315]** Federal Trade Commission (FTC) was already investigating allegations of price-fixing against the calcium chloride companies, and the trial court dismissed the complaint on grounds that the federal regulatory agency had taken exclusive jurisdiction over the matter. *Allied Chemical, 9 Wis. 2d at 293*.

[*P34] This court reversed the trial court's dismissal, concluding that federal ***antitrust law*** did not preempt state efforts to enact and enforce effective legislation against monopolistic practices. *Id. at 295*. The court further concluded that there was no conflict between the federal and state statutes, that the Wisconsin statutes made no attempt to regulate or burden interstate commerce, and that the FTC was not established to enforce the federal antimonopoly statutes but to regulate certain trade practices instead. Moreover, the court cited **[****27]** letters in the record from FTC officials and the Department of Justice that indicated that the attitude of the federal government was to cooperate with the state in its efforts to enforce state statutes dealing with conspiracies and

[10] The term "impacts" was not defined or described in detail by the court in Olstad. See *2005 WI 121, P85, 284 Wis. 2d 224, 700 N.W.2d 139*. The Olstad decision cites as its authority for the use of this term the "substantially affects" standard discussed in *State v. Allied Chemical and Dye Corp., 9 Wis. 2d 290, 295, 101 N.W.2d 133 (1960)*. We **[****25]** construe this language in Olstad (that the Wisconsin Antitrust Act applies if the "conduct complained of 'substantially affects' the people of Wisconsin and has impacts in this state, even if the illegal activity resulting in those impacts occurred predominantly or exclusively outside this state") as merely providing further clarification of the "substantially affects" test discussed in Allied Chemical, as opposed to altering that test.

monopolies. *Id. at 295-96*. Importantly, the Allied Chemical court held that the Wisconsin antitrust statute was enacted to protect state consumers from the effects of monopolistic practices. Id.

[*P35] In Milwaukee Braves, the State brought an action under the Wisconsin Antitrust Act in response to the departure **[***459]** from Wisconsin of the Milwaukee Braves professional baseball club. Although the Milwaukee Braves court declined to enforce Chapter 133, in part because of major league baseball's well-settled exemption from antitrust regulation, all seven members of the court asserted that the Wisconsin Antitrust Act could be applied to interstate commerce. *Olstad, 2005 WI 121, P27, 284 Wis. 2d 224, 700 N.W.2d 139* (discussing *Milwaukee Braves, 31 Wis. 2d at 725*). **[**316]** The Milwaukee Braves court noted that the exercise of the defendants' monopoly power caused "substantial injury to business activity within Wisconsin" such that the court would "assume, at this point, that a violation of Wisconsin law has **[****28]** occurred if our law can be applied." *Milwaukee Braves, 31 Wis. 2d at 719*. Nevertheless, the court recognized that while "[t]he state may, ordinarily, protect the interests of its people by enforcing its antitrust act against persons doing business in interstate commerce," the state policy must yield when a conflict exists between state and federal policy. *Id. at 721*.

[*P36] In Emergency One, a Wisconsin federal district court considered the issue of whether the Wisconsin Antitrust Act reaches interstate commerce several years before our decision in Olstad. Emergency One, a Florida-based manufacturer of fire trucks, sued a Wisconsin truck manufacturer and two manufacturers of fire pump hoses, alleging the three companies conspired to choke competition in the United States market for fire pumps, in violation of Wisconsin's Antitrust Act. The Emergency One court carefully examined our precedents and the legislative history of *Wis. Stat. § 133.03* and concluded that the Wisconsin Antitrust Act reaches interstate commerce to some degree. *Emergency One, 23 F. Supp. 2d at 966*.

[*P37] To determine when the statute would apply in cases involving interstate commerce, the Emergency One court relied on an "adverse **[****29]** effects" standard that is, in essence, the test we adopted in Olstad. *Emergency One, 23 F. Supp. 2d at 969-970*. The Emergency One court explained that the "adverse effects" test "extend[s] the jurisdictional scope of Wisconsin ***antitrust law*** to unlawful activity which has significantly and adversely affected trade and economic competition within this **[**317]** state." *Id. at 969*. In examining and ultimately rejecting other approaches to determine when the antitrust act applies in cases involving interstate commerce, [11] the Emergency One court concluded that "an **[***460]** adverse effects standard is the only standard that remains faithful to the purpose of Chapter 133--to protect and encourage competition in this state, by penalizing interstate activities that adversely affect it." *Id. at 970*.

[*P38] Applying this effects-based standard, the Emergency One court concluded that the complaint "d[id] not **[****31]** allege significant and adverse effects on economic competition in Wisconsin." *Id. at 971*.

> Based on the amended complaint . . . the connection between plaintiff's injury and Wisconsin commerce is **[**318]** tenuous at best. E-One identifies three Wisconsin dealerships of a number allegedly maintained by plaintiff over the years. The specific dates of operation suggest that only one dealership in Wisconsin was

---

[11] The Emergency One court considered two alternate tests for determining whether state ***antitrust law*** applies in cases involving interstate commerce: (1) A "contacts-based" standard that emphasizes "the nature and degree of defendant's contacts with Wisconsin" bearing similarities to the *International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945)*, test in the law of personal jurisdiction, and the "aggregation of contacts" **[****30]** standard set forth in *Allstate Ins. Co. v. Hague, 449 U.S. 302, 308, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981)*, to resolve "choice of law" disputes; and (2) A "predominance" standard, which would apply state ***antitrust law*** only to transactions and commerce that is predominantly intrastate in nature. *Emergency One v. Waterous Co., Inc., 23 F. Supp. 2d 959, 967-969 (E.D. Wis. 1998)*. The federal district court rejected the "contacts-based" standard because, in cases involving nationwide sales, application of a "contacts-based" standard might result in application of state ***antitrust law*** when no significant injury to trade and economic competition occurred in the state. The court rejected the "predominance" standard on grounds that it would essentially reintroduce federal preemption of state anti-trust law (commerce cannot be both predominantly interstate and predominantly intrastate in nature) "a result consistently rejected by the Supreme Court." See *Emergency One, 23 F. Supp. 2d at 967* (citing *California v. ARC America Corp., 490 U.S. 93, 102, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*).

> maintained by E-One at any given time, however. Plaintiff does not estimate the amount of sales at such dealerships in a certain time frame or suggest what proportion of those sales were affected by defendants' conduct. Plaintiff does not indicate how many fire trucks are sold in Wisconsin per year, how many by plaintiff, or how many by plaintiff's competitors. Indeed, plaintiff does not identify a single fire truck contract in Wisconsin from which E-One was precluded from bidding based on the unavailability of Waterous pumps. Without this type of information, the amended complaint does not suggest that injury to E-One also constituted significant injury to trade and commerce related to fire truck sales in Wisconsin.

Id. The court concluded: "[T]he only significant and adverse effect alleged **[****32]** by plaintiff is to plaintiff itself." Id.

[*P39] Relying on the above cases, Bayer makes essentially three arguments. First, Bayer asserts that all of these cases stand for the proposition that plaintiffs bringing suit under the Wisconsin Antitrust Act must specifically allege the challenged conduct had Wisconsin impacts. Second, citing language from Milwaukee Braves noting that the departure of the Braves from the state "terminated very substantial business activity in Wisconsin," Bayer suggests that the plaintiffs must also allege that these Wisconsin impacts were disproportionate to nationwide impacts. Third, Bayer asserts that the analysis of the Emergency One court demonstrates that "bare allegations" that indirect purchasers in Wisconsin paid higher prices as a result of **[**319]** the challenged conduct is not sufficient to meet the "substantially affects" standard. We consider each of these arguments in turn.

[*P40] Bayer is correct that ***HN12***[] a plaintiff must allege that the conduct complained of has impacts in Wisconsin, and not merely nationwide impacts. *Olstad, 2005 WI 121, P85, 284 Wis. 2d 224, 700 N.W.2d 139*. The cases demonstrate that the focus of the "substantially affects" standard is properly on Wisconsin, and the sufficiency **[****33]** of the plaintiff's claim depends on whether the complaint alleges that the conduct "substantially affects" the people of Wisconsin. However, ***HN13***[] when determining on a motion to dismiss whether a complaint under the Wisconsin Antitrust Act alleges that the challenged conduct "substantially affected" the people of Wisconsin, courts apply, as on any motion to dismiss, Wisconsin's notice pleading statute, *Wis. Stat. § 802.02(1)(a)*.

[*P41] "For well over 100 years, this court has consistently held that ***HN14***[] pleadings shall be liberally construed with a view to substantial justice between the parties." *J.L. Phillips & Assoc. v. E&H Plastic Corp., 217 Wis. 2d 348, 365, 577 N.W.2d 13 (1998)* (citation omitted). ***HN15***[] "[A] complaint in a civil action should not be dismissed as legally insufficient unless it is clear that there are no circumstances under which the plaintiff **[***461]** can recover." *Lewis, 188 Wis. 2d at 164*.

[*P42] There is no exception to this rule for actions under the Wisconsin Antitrust Act. In *Grams, 97 Wis. 2d 332, 294 N.W.2d 473*, an insurance agency brought suit against another insurance company and a hospital service corporation, alleging antitrust violations. Writing for the majority, Justice Abrahamson concluded that while **[****34]** the plaintiffs' complaint was "barebone . . . conclusory in part, and may have failed to state sufficient facts" under **[**320]** prior pleading rules, it was sufficient to state a claim under the notice pleading statute. *Id. at 352*.

[*P43] In light of our liberal pleadings standard, ***HN16***[] a complaint under the Wisconsin Antitrust Act, where the circumstances involve interstate commerce and the challenged conduct occurred outside of Wisconsin, is sufficient if it alleges price fixing as a result of the formation of a combination or conspiracy that substantially affected the people of Wisconsin and had impacts in this state. As Meyers asserts, requiring greater specificity than the notice pleading statute demands would create a heightened pleading standard for Chapter 133 actions that would bar otherwise legitimate suits, thus undermining the Act's purposes of fostering competition and prohibiting unfair and discriminatory business practices. See *Wis. Stat. § 133.01*.

[*P44] We decline to follow Bayer's suggestion that the impacts of the challenged conduct on Wisconsin must be distinguishable from or disproportionate to its impacts on other states. ***HN17***[] Under Olstad, the complaint must simply allege that the challenged **[****35]** conduct "'substantially affects' the people of Wisconsin and has impacts in this state," not that these impacts be disproportionately felt in Wisconsin. *Olstad, 2005 WI 121, P85, 284 Wis. 2d 224, 700 N.W.2d 139*.

[*P45] Bayer apparently takes the fact that the Emergency One and Milwaukee Braves courts focused (properly) on the impacts felt in Wisconsin to mean that plaintiffs filing an action under Chapter 133 must assert allegations of disproportionate impacts on Wisconsin. As the Department of Justice asserts in its amicus brief, this approach would subject a defendant that targets the effects of its illegal conduct on Wisconsin to treble damages under Chapter 133, while another **[**321]** defendant that causes equal or greater harm in Wisconsin would be immune from suit simply because the latter defendant's harms were evenly spread across the country. Neither the statute nor our case law requires that plaintiffs allege that the challenged conduct caused disproportionate injury to Wisconsin consumers. Plaintiffs need only allege that the conduct substantially affected the people of Wisconsin and had impacts in this state. *Olstad, 2005 WI 121, P85, 284 Wis. 2d 224, 700 N.W.2d 139*.

[*P46] Turning to Bayer's contention that the "substantially affects" standard requires **[****36]** more than "bare allegations" that indirect purchasers in Wisconsin paid higher prices as a result of the challenged conduct, we disagree. This argument is based on a misreading of Emergency One and, moreover, is plainly contrary to *Wis. Stat. §§ 133.03* and *133.18*.

[*P47] Bayer contends that the Emergency One court held that the plaintiff's allegations of supracompetitive prices were not sufficient to state a claim under the Wisconsin Antitrust Act. This misstates the holding of Emergency One. The Emergency One court dismissed the plaintiff's claim because it concluded that the plaintiff's complaint "made no . . . allegations" of "any significant adverse effects on trade and economic competition within Wisconsin." *Emergency One, 23 F. Supp. 2d at **[***462]** 970*. The Emergency One court carefully examined the complaint to ascertain whether it alleged "significant adverse effects" to support a claim under state ***antitrust law***. *Id. at 970-71*. Based on this examination, the court concluded that the plaintiff failed to state a claim under the Wisconsin Antitrust Act. Id. It did not dismiss the complaint based on a per se rule that "bare allegations" that indirect purchasers in Wisconsin paid higher prices **[****37]** is insufficient to state a claim under the act.

[*P48] **[**322]** ***HN18***[] The Wisconsin Antitrust Act specifically provides a remedy for indirect purchasers who suffer harm as a result of conduct that violates Chapter 133. See *Wis. Stat. § 133.18* ("[A] person injured, directly or indirectly, by reason of anything prohibited by this chapter may sue . . . and shall recover . . . damages.") (emphasis added). In Olstad, we noted that the 1980 revision of Chapter 133 provided a remedy under the statute to indirect purchasers in response to *Illinois Brick, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707*, which foreclosed recovery to indirect purchasers under the federal statute. An allegation that thousands of Wisconsin consumers paid supracompetitive prices as a result of monopolistic conduct by an interstate seller therefore states a basis for recovery under the statute.

[*P49] The test we crafted in Olstad for determining when, in circumstances involving interstate commerce where the challenged conduct occurred outside of Wisconsin, a complaint states a claim under the Wisconsin Antitrust Act was derived in part from this court's decision in *Allied Chemical, 9 Wis. 2d 290, 101 N.W.2d 133*. Like the present case, Allied Chemical involved allegations of a conspiracy to **[****38]** fix prices to the detriment of Wisconsin consumers. This court held in Allied Chemical that ***HN19***[] price-fixing is a monopolistic practice that, by its very nature, substantially affects the public.

> The public interest and welfare of the people of Wisconsin are substantially affected if prices of a product are fixed or supplies thereof are restricted as the result of an illegal combination or conspiracy. The people of Wisconsin are entitled to the advantages that flow from free competition in the purchase of calcium chloride and other products, and if the state is able to prove the allegations made in its complaint it is apparent that the acts of the defendants deny to them those advantages.

Id. at 295.

[*P50] **[**323]** Amici Wisconsin Manufacturers and Commerce (WMC) and Milwaukee Metropolitan Area Chamber of Commerce (MMAC) point us to *Szukalski v. Crompton Corp., 2006 WI App 195, 296 Wis. 2d 728, 726 N.W.2d 304*. There, the court of appeals affirmed a circuit court dismissal of an antitrust lawsuit brought by a group of tire buyers alleging several companies engaged in the manufacture and sale of chemicals used to process rubber conspired to fix prices. In determining the scope of the "substantially affects" **[****39]** test, the Szukalski court held that plaintiffs must allege "(1) specific effects on Wisconsin commerce, not merely effects that are nationwide, and (2) that these effects on Wisconsin are more than a general nationwide effect on the price," citing *Emergency One, 23 F. Supp. 2d at 971*, and a recent decision of the Tennessee Supreme Court, *Freeman Industries, LLC v. Eastman Chemical Co., 172 S.W.3d 512 (Tenn. 2005)*. *Szukalski, 2006 WI App 195, 296 Wis. 2d 728, 726 N.W.2d 304, P20*. While noting that Szukalski is not before us, we address it to resolve any inconsistencies between it and our decision today.

[*P51] Szukalski correctly states that a complaint must allege effects on **[***463]** Wisconsin, and not merely nationwide effects. [12] However, its conclusion that the "substantially affects" standard requires allegations "that these effects on Wisconsin are more than a general nationwide effect on the price" misstates the Olstad **[**324]** standard, and is inconsistent with our opinion today. See *supra, PP45-46*. As noted, plaintiffs need not allege that the challenged conduct disproportionately affected Wisconsin, only that the challenged conduct substantially affected the people of Wisconsin and had impacts in this state. *Olstad, 2005 WI 121, P85, 284 Wis. 2d 224, 700 N.W.2d 139*. **[****40]**

[*P52] Finally, Bayer and amici WMC and MMAC contend that certain limitations on actions under the Wisconsin Antitrust Act are necessary for judicial economy and preserving a favorable business climate in Wisconsin. They assert that if the court does not adopt their proposed limitations to the "substantially affects" test, Wisconsin courts will be flooded with complex antitrust litigation. They maintain that without these limitations the specter of antitrust litigation would create a hostile atmosphere for businesses in Wisconsin.

[*P53] To adopt on policy grounds the limitations Bayer and amici propose would be to substitute our own judgment for that of the legislature. By establishing a broad antitrust act that provides remedies to consumers not available under federal ***antitrust law***, the legislature has made clear policy choices in **[****41]** the area of antitrust regulation. The "substantially affects" test adopted in *Olstad* is consistent with the legislature's policy choices; requiring more of plaintiffs would close off consumer suits, particularly those by indirect purchasers, contrary to the 1980 revision of the statute. Moreover, it would bar otherwise legitimate actions, thereby undermining the statute's purpose "to foster and encourage competition by prohibiting unfair and discriminatory practices which destroy or hamper competition." See *Wis. Stat. § 133.01*. We decline to substitute our judgment for that of the legislature. See *Flynn v. Dep't of Admin., 216 Wis. 2d 521, 539, 576 N.W.2d 245 (1998)* **[**325]** ("This court has long held that it is the province of the legislature, not the courts, to determine public policy."). [13]

C

[*P54] We turn now to Meyers' complaint to determine if it alleges that the conduct of Bayer and the generic manufacturers substantially affected the people of Wisconsin **[****42]** and had impacts in this state.

[*P55] Meyers' complaint alleges, in the course of 35 pages and 106 paragraphs, a broad price-fixing scheme affecting "at a minimum, thousands . . . in Wisconsin." The complaint states that the named plaintiffs and the putative class are Wisconsin residents who purchased the antibiotic Cipro "at any time since January 6, 1995," the date that Meyers alleges the market for Cipro and generic equivalents would have opened to competition. The complaint states that Cipro was the best-selling antibiotic in the world throughout most of the 1990s. It avers that Bayer posted **[***464]** $ 1 billion in sales of Cipro in the United States in 1999 alone. It states that as a result of the Agreement among Bayer and the generic manufacturers, Bayer maintained its monopoly in the United States market for Cipro; that from January 1997 to December 1998, Bayer increased its price for Cipro by 16.7%; and that from 1998 to 1999, Bayer's United States revenues for Cipro increased 25%, while its net profits increased 22%.

---

[12] Because *Szukalski v. Crompton Corp., 2006 WI App 195, 296 Wis. 2d 728, 726 N.W.2d 304*, no petition for review filed, is not before us, and we have not had an opportunity to review the plaintiff's complaint in Szukalski to determine its sufficiency, we do not address the Szukalski court's conclusion that the plaintiff failed to allege substantial Wisconsin effects.

[13] As to the merits of these policy arguments, we note that Bayer and amici fail to provide empirical support for the proposition that failure to limit the applicability of the Wisconsin Antitrust Act would harm Wisconsin's business climate.

[*P56] While Meyers' complaint alleges harm to "thousands of Wisconsin residents," the Emergency One complaint, by contrast, alleged a conspiracy adversely **[**326]** affecting "only . . . plaintiff **[****43]** itself." *Emergency One, 23 F. Supp. 2d at 971*. The plaintiff in Emergency One was a fire truck manufacturer that apparently maintained only one dealership in Wisconsin. *Id. at 960-61*. The plaintiff's complaint did not state the number of sales it made in Wisconsin per year, although it certainly would have had this information. [14] *Id. at 971*. The plaintiff did not indicate a time frame in which the people of Wisconsin suffered injury as a result of alleged monopolistic practices. Id. And the company itself was a Delaware corporation, with a principal place of business in Florida, and thus, any injury suffered by the company resulting in lay-offs or lost profits would have likely had a negligible effect on Wisconsin workers and investors. *Id. at 970-71*.

[*P57] Here, Meyers alleges "thousands of Wisconsin residents" suffered economic harm as a result of Bayer's alleged monopolistic practices, starting January 6, 1995. An allegation that a group of pharmaceutical companies conspired to maintain monopoly prices on a best-selling prescription **[****44]** drug purchased by thousands of Wisconsin residents over several years meets the "substantially affects" test set forth in *Olstad, 2005 WI 121, P85, 284 Wis. 2d 224, 700 N.W.2d 139*. We conclude that Meyers has sufficiently alleged that the challenged conduct of Bayer and the generic manufacturers substantially affected the people of Wisconsin and had impacts in this state. We therefore affirm the court of appeals' reversal of the circuit court's order dismissing the complaint.

[327]** IV

[*P58] In summary, we reaffirm ***HN20***[] the following standard set forth in Olstad for determining when Chapter 133 reaches interstate commerce: A plaintiff filing an action under Wisconsin's Antitrust Act must allege price fixing as a result of the formation of a combination or conspiracy that "substantially affects the people of Wisconsin and has impacts in this state" when the challenged conduct occurs predominately or exclusively outside this state. *Olstad, 2005 WI 121, P85, 284 Wis. 2d 224, 700 N.W.2d 139*. We conclude that additional limitations Bayer and amici MMAC and WMC seek to read into the "substantially affects" standard are unsupported by our precedents and are contrary to the policy choices of the legislature.

[*P59] Meyers' 35-page, 106-paragraph complaint alleges a broad **[****45]** price-fixing scheme affecting "at a minimum, thousands . . . in Wisconsin" who purchased the best-selling antibiotic Cipro "at any time since January 6, 1995." We conclude Meyers' complaint alleges illegal conduct that, if true, substantially affected the people of Wisconsin and had impacts in this state. [15] We therefore affirm the court of **[***465]** appeals' decision reversing the circuit court's order dismissing Meyers' claims, and remand the matter to the circuit court for further proceedings consistent with this opinion.

[328]** *By the Court.*--The decision of the court of appeals is affirmed, and the cause is remanded to the circuit court for further proceedings consistent with this opinion.

Dissent by: DAVID T. PROSSER

Dissent

[14] The complaint in *Emergency One, 23 F. Supp. 2d 959*, alleged only that 3500 to 4000 fire trucks are purchased by fire departments in the United States annually.

[15] As we previously indicated, *supra, P4 n.4*, issues regarding the validity or invalidity of the Cipro patent, and the effect of the possible invalidity of the patent on the legality of the Agreements have not been briefed by the parties, have not been developed in the record in this motion to dismiss, and are not properly before this court. These matters may be addressed by the circuit court on remand.

[*P60] DAVID T. PROSSER, J. *(dissenting).* Four years ago in *Conley Publishing Group Ltd. v. Journal Communications, Inc., 2003 WI 119, 265 Wis. 2d 128, 665 N.W.2d 879*, **[****46]** this court was confronted with the question whether we should adopt *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*, as the law of Wisconsin governing predatory pricing under *Wis. Stat. § 133.03*. As we answered this question, we noted that "Wisconsin courts have [long] followed federal court interpretations of Sections 1 and *2* of the Sherman Act and have construed Wisconsin antitrust statutes in conformity with these federal court interpretations." *Conley, 2003 WI 119, P17, 265 Wis. 2d 128, 665 N.W.2d 879*.

[*P61] In the course of explaining why Wisconsin should follow federal law, the writer of the opinion observed that "there is presently no Wisconsin case law governing predatory pricing claims under *§ 133.03(2)*." *Id., P16*. "The dearth of state antitrust precedent is not surprising because the scope of Chapter 133 is limited to intrastate transactions. See *Reese v. Associated Hosp. Serv., 45 Wis. 2d 526, 532, 173 N.W.2d 661 (1970)*." Id.

[*P62] Two years later, the same writer was forced to withdraw the phrase "the scope of Chapter 133 is limited to intrastate transactions" because the court unanimously upheld the application of Wisconsin's Little Sherman Act to interstate commerce in some circumstances. **[****47]** *Olstad v. Microsoft Corp., 2005 WI 121, PP13, 74, 284 Wis. 2d 224, 700 N.W.2d 139*.

[*P63] Having opened the door to interstate antitrust enforcement in some circumstances, the court **[**329]** thought it ought to comment briefly on what those "circumstances" were, even though that question had not been briefed.

[*P64] Early in the opinion, the court quoted Professor Herbert Hovenkamp to the effect that "a state ***antitrust law*** of general application can virtually always be applied to a practice having sufficient effects within the state." *Id., P14* (emphasis added) (citation omitted). Then we added, "State law is precluded from regulating interstate commerce only if it 'unduly burden[s]' interstate commerce." Id. (citing Von Kalinowski, Antitrust Laws & Trade Regulation § 100.03 (2d. ed. 2004)).

[*P65] At the end of the opinion, the court said:

> A civil plaintiff filing an action under Wisconsin's antitrust act must allege that (1) actionable conduct, such as the formation of a combination or conspiracy, occurred within this state, even if its effects are felt primarily outside Wisconsin; or (2) the conduct complained of "substantially affects" the people of Wisconsin and has impacts in this state, even if the illegal **[****48]** activity resulting in those impacts occurred predominantly or exclusively outside this state. *[State v.] Allied Chemical [& Dye Corp.], 9 Wis. 2d [290,] 295[, 101 N.W.2d 133 (1960)]*. Operating with lesser standards **[***466]** would jeopardize the action, undermine the validity of our antitrust statute, and create the spectacle of Lilliputian harassment in Wisconsin courts. Questions of provincialism, favoritism, and undue burden on interstate commerce should be determined by resort to contemporary federal commerce clause jurisprudence. To say more is beyond the scope of this opinion.

Id., P85.

[*P66] Four things should be noted about this paragraph. First, the words "substantially affects" were borrowed from Allied Chemical. Second, the words **[**330]** "substantially affects" imply a higher standard than "sufficient effects," quoted earlier in the opinion. Third, the second point is underscored by the following sentence: "Operating with lesser standards would jeopardize the action, undermine the validity of our antitrust statute, and create the spectacle of Lilliputian harassment in Wisconsin courts." Fourth, the paragraph requires "impacts in this state."

[*P67] In interpreting the phrase "jeopardize the action," **[****49]** it should be remembered that the court had recently considered two cases exploring the reach of Wisconsin jurisdiction. See *State v. Derek Anderson, 2005 WI 54, 280 Wis. 2d 104, 695 N.W.2d 731*; and *Tammie J.C. v. Robert T.R., 2003 WI 61, 262 Wis. 2d 217, 663 N.W.2d 734*. The court did not want to encourage litigation that exceeded the jurisdiction of the state. As for the phrase "undermine the validity of our antitrust statute," Olstad discussed such issues as federal preemption and burden on interstate commerce in the opinion, and that context gives the phrase meaning. "Lilliputian harassment" conveys the image of a commercial Gulliver tied down by a multitude of antitrust litigants across the country.

[*P68] Olstad speaks of "actionable conduct, such as the formation of a combination or conspiracy . . . within this state." *Olstad, 2005 WI 121, P85, 284 Wis. 2d 224, 700 N.W.2d 139*. Surely, our statute is most potent when "actionable conduct" is formed within this jurisdiction. Conversely, when "illegal activity" occurs predominantly or exclusively outside this jurisdiction but has impacts in Wisconsin, the impacts in Wisconsin ought to be more substantial than what is "sufficient" for a purely Wisconsin "combination **[****50]** or conspiracy." Olstad did not intend to convert every **[**331]** antitrust violation anywhere into a violation of Wisconsin law simply because the violation affected some people in Wisconsin.

[*P69] Because I am unable to discern from the discussion in the majority opinion any meaningful limitation on antitrust suits against illegal activities outside this state, I respectfully dissent.

[*P70] PATIENCE DRAKE ROGGENSACK, J. *(dissenting).* The majority opinion concludes that the second amended complaint (the complaint) of the plaintiffs sufficiently alleges a violation of Wisconsin's ***antitrust law***, *Wis. Stat. § 133.03* (2005-06), [16] to withstand a motion to dismiss. Majority op., P4. It does so based on the complaint's allegations that an agreement concerning ciprofloxacin hydrochloride between Bayer AG and Barr Laboratories, Inc. (the Bayer-Barr agreement) [17] is a "price-fixing scheme" for ciprofloxacin hydrochloride that controlled the price for the drug "at any time since January 6, 1995." Id. The majority opinion **[***467]** concludes that, if proved, the price-fixing alleged is "illegal conduct" that "substantially affected the people of Wisconsin and had impacts in this state" thereby violating Wisconsin ***antitrust*** **[****51]** ***law***. Id. However, it also recognizes that there are significant questions about the effect that Bayer's patent may have on the plaintiffs' claims. *Id., P4 n.4*. It suggests that those questions be addressed in the circuit court on remand. Id.

[*P71] I dissent because I would resolve the effect of Bayer's patent on the plaintiffs' claims at this time. I would do so because Bayer was granted a federal patent **[**332]** for ciprofloxacin hydrochloride (the Cipro patent) that, in order to have subject matter jurisdiction for this antitrust action, Wisconsin courts must presume is valid. *28 U.S.C. § 1338(a)*. Presuming that Bayer's patent is valid, I conclude that the complaint does not allege facts that, if true, are sufficient to show illegal conduct or conduct that has an illegal effect. *E. Bement & Sons v. Nat'l Harrow Co., 186 U.S. 70, 91, 22 S. Ct. 747, 46 L. Ed. 1058 (1902)*. Only illegal conduct or conduct that has an illegal effect violates Wisconsin's ***antitrust law***. *Prentice v. Title Ins. Co. of Minn., 176 Wis. 2d 714, 725, 500 N.W.2d 658 (1993)*; **[****52]** *State v. Allied Chem. & Dye Corp., 9 Wis. 2d 290, 296, 101 N.W.2d 133 (1960)*. Furthermore, because the conduct alleged in the complaint is not illegal or alleged to have had an illegal effect, it cannot "substantially affect" the people in Wisconsin and have "impacts" in Wisconsin contrary to *Wis. Stat. § 133.03*. *Olstad v. Microsoft Corp., 2005 WI 121, P85, 284 Wis. 2d 224, 700 N.W.2d 139*. Accordingly, I would affirm the circuit court's dismissal of the complaint for failure to state a claim pursuant to *Wis. Stat. § 802.06(2)(a)6*, albeit on different grounds. Therefore, I respectfully dissent.

I. BACKGROUND [18]

[*P72] The gravamen of the complaint is that the agreement between Bayer, who owns the patent for ciprofloxacin hydrochloride that it markets under the trade name, "Cipro," and Barr, who applied to the United States Food and Drug Administration **[****53]** (FDA) for **[**333]** permission to manufacture and market a generic form of Cipro, is a price-fixing agreement that effected a monopoly for Cipro in Wisconsin. The complaint alleges Bayer's monopoly is illegal and violates *Wis. Stat. § 133.03(2)*.

---

[16] All further references to the Wisconsin Statutes are to the 2005-06 version, unless otherwise noted.

[17] The Bayer-Barr agreement, about which the plaintiffs complain, is not in the record before us.

[18] The facts used in the background narration have been taken from the complaint and from the public records of the United States Food and Drug Administration (FDA) and the United States Patent and Trademark Office (PTO). We may take judicial notice of public records of governmental agencies. *Perkins v. State, 61 Wis. 2d 341, 346, 212 N.W.2d 141 (1973)*.

[*P73] As background for this theory, the plaintiffs allege that Bayer held the patent for the active ingredient of Cipro, ciprofloxacin hydrochloride, and that the Cipro patent was granted to Bayer on May 29, 1984, as Patent No. 4,670,444. Bayer also received FDA approval to market Cipro in October of 1987. Bayer's initial patent for Cipro expired in December of 2003. [19]

[*P74] On October 27, 1991, Barr applied to the FDA to manufacture and market a generic form of Cipro. Barr used a shortened form of application for FDA approval that is known as an Abbreviated New Drug Application, or ANDA. As part of the ANDA process, Barr asserted that its generic drug was the bioequivalent of Cipro. This assertion permitted FDA consideration of Barr's generic Cipro without the years of testing that Bayer had to **[***468]** undergo in order to obtain FDA approval for Cipro. Therefore, **[****54]** by piggybacking on Bayer's lengthy FDA new drug testing requirements, Barr's ANDA applied for FDA approval for the same drug to which the FDA had given Bayer approval. In its ANDA, Barr also alleged that Bayer's patent was invalid, which is one of the allegations required in order for the FDA to give preliminary approval to a generic equivalent of a patented drug. See *21 U.S.C. § 355(j)(2)(A)(vii)(IV)*.

[*P75] As is required by federal statute, Barr gave notice of its ANDA to Bayer. See *21 U.S.C. § 355(j)(2)(B)(iii)*. Within the statutory timeline of receiving **[**334]** Barr's notice (45 days), Bayer filed a patent infringement suit against Barr. A patent infringement suit is required by federal statutes as a precursor to maintaining patent priority over a pending ANDA for the generic equivalent of a patented drug. See *21 U.S.C. § 355(j)(5)(B)(iii)*.

[*P76] The filing of Bayer's patent infringement suit stayed Barr's ANDA before the FDA for 30 months or until the conclusion of the patent infringement suit, whichever occurred first. See id. That 30-month stay would have ended on July 16, 1994. However, prior to settling Bayer's suit against Barr for patent infringement, Bayer and Barr executed a stipulation to **[****55]** extend the 30-month stay until a final judgment on the pending patent litigation was entered. The district court approved the stipulation and ordered that final consideration of Barr's ANDA before the FDA was stayed until the patent litigation concluded. Bayer AG v. Barr Labs., No. 92CV391 (S.D.N.Y. Dec. 9, 1992); see also *21 U.S.C. § 355(j)(5)(B)(iii)*.

[*P77] On January 6, 1995, the FDA gave "tentative approval" to Barr to market its drug, which approval was subject to Bayer's patent being held invalid or expiring. FDA's public records show that FDA final approval to manufacture and market a generic form of Cipro was not given to Barr until June 9, 2004. [20]

[*P78] The complaint does not allege that the conduct set out in the Bayer-Barr agreement falls outside of Bayer's rights under the Cipro patent. It also does not allege that Barr, or anyone else, has ever contended that Bayer obtained its Cipro patent through fraud on the United States Patent & Trademark Office (PTO). **[**335]** Rather, the complaint asserts that the Bayer-Barr agreement was entered into on January 8, 1997, and that it allocates "the **[****56]** entire United States market for Cipro to Bayer for at least six years" (January 2003) and that at Bayer's option Bayer could either: (1) supply Cipro for sale as a generic to Barr, who would operate as Bayer's licensee, or (2) supply all of the Cipro to purchasers itself and make specified payments to Barr. [21]

[*P79] The Bayer-Barr agreement, together with a consent judgment, concluded Bayer's federal patent infringement suit. The consent judgment affirmed that Bayer owns the patent for Cipro; that it is valid and enforceable; and that Barr's generic form of Cipro infringed Bayer's patent. Bayer AG v. Barr Labs., No. 92CV391 (S.D.N.Y. Jan. 16, 1997). There has been no appeal or collateral attack on that judgment.

---

[19] The public records of the PTO show that the PTO extended Bayer's patent for Cipro through June 8, 2004.

[20] We may take judicial notice of public records of governmental agencies. *Perkins, 61 Wis. 2d at 346*.

[21] Payments such as these are commonly referred to as "reverse" or "exit" payments. Anne-Marie C. Yvon, Settlements Between Brand and Generic Pharmaceutical Companies: A Reasonable Antitrust Analysis of Reverse Payments, *75 Fordham L. Rev. 1883, 1884 n.9 (2006)*.

[*P80] Subsequent to the conclusion of the patent infringement action, Bayer re-submitted **[***469]** its patent to the PTO for review. Bayer's patent for Cipro was upheld in that proceeding as well.

II. DISCUSSION

A. Standard of Review

[*P81] A motion **[****57]** to dismiss challenges the legal sufficiency of the complaint to state a claim on which relief may be granted. *Kaloti Enters., Inc. v. Kellogg Sales Co., 2005 WI 111, P11, 283 Wis. 2d 555, 699 N.W.2d 205*. For purposes of the motion, we generally **[**336]** accept as true all factual allegations made in the complaint. *Watts v. Watts, 137 Wis. 2d 506, 512, 405 N.W.2d 303 (1987)*. Judicial notice may also be taken of facts from the public records of government agencies, here the PTO and the FDA. See *Perkins v. State, 61 Wis. 2d 341, 346, 212 N.W.2d 141 (1973)* (concluding that a court may take judicial notice of facts easily accessible and capable of immediate and accurate determination); *Wis. Power & Light Co. v. City of Beloit, 215 Wis. 439, 444, 254 N.W. 119 (1934)* (taking judicial notice of the files of the public service commission); *Hillier v. Lake View Mem'l Park, Inc., 208 Wis. 614, 622, 243 N.W. 406 (1932)* (taking judicial notice of incorporation records in the office of secretary of state). [22] However, on a motion to dismiss, courts do not accept "facts which the court will take judicial notice are not true, nor does the rule [of accepting facts pled in the complaint] apply to legally impossible **[****58]** facts." *Cohen v. United States, 129 F.2d 733, 736 (8th Cir. 1942)*. We also are not required to accept factual statements that are not credible. See *Ferraro v. Koelsch, 119 Wis. 2d 407, 410-11, 350 N.W.2d 735 (Ct. App. 1984)*. Furthermore, we are not required to accept legal conclusions pled in the complaint. *John BBB Doe v. Archdiocese of Milwaukee, 211 Wis. 2d 312, 331, 565 N.W.2d 94 (1997)*.

[*P82] We interpret the application of statutes independently of the court of appeals and the circuit court, but benefiting from the analyses of both prior decisions. *Spiegelberg v. State, 2006 WI 75, P8, 291 Wis. 2d 601, 717 N.W.2d 641*. And finally, whether a legal doctrine can shield defendants from liability under **[**337]** Wisconsin's ***antitrust law*** that would otherwise be accorded to the complained of conduct is a question of law. *Prentice, 176 Wis. 2d at 721*.

B. Wisconsin Antitrust Claim

[*P83] There have been approximately 30 cases filed throughout the United States, in state and **[****59]** federal courts, that make antitrust claims against Bayer and Barr based on the same Bayer-Barr agreement that is at issue here. *Meyers v. Bayer AG, 143 F. Supp. 2d 1044, 1046 (E.D. Wis. 2001)*. Many of those cases have been consolidated in the Eastern District of New York under the scholarly attention of District Court Judge David Trager. See *In re Ciprofloxacin Hydrochloride Antitrust Litig., 363 F. Supp. 2d 514 (E.D.N.Y. 2005)*.

[*P84] The case now before us was filed in state court, removed to federal court and remanded to state court because the federal district court determined that mounting a patent defense to a state antitrust claim did not cause the matter "to arise under" federal law. *Meyers, 143 F. Supp. 2d at 1051*. The federal district court did not analyze whether a state claim had been stated without plaintiffs alleging that Bayer's Cipro patent was invalid. In addition, the district court did not address whether the conduct alleged in the complaint exceeded **[***470]** Bayer's rights under its Cipro patent.

1. General patent law principles

[*P85] In order to adequately address the defendants' motion to dismiss the complaint, there are certain general principles of federal patent law that must be **[****60]** recognized. That recognition is necessary before a court can evaluate a complaint wherein a patent owner is sued, in order to sort out which allegations are factual **[**338]** allegations of a type that must be accepted for purposes of a motion to dismiss, which allegations contain facts not accepted as true, and which allegations are actually legal conclusions.

---

[22] For a detailed exposition of judicial notice of facts by appellate courts see George R. Currie, Appellate Courts Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation, 1960 Wis. L. Rev. 39 (1960).

[*P86] A civil state court claim against a patent owner, such as Bayer, that alleges conduct relating to the patented invention and requests damages, must assume that the patent is valid and it must allege conduct that falls outside of the rights accorded under the patent. This is so because if the complaint were to allege that the patent is invalid, there would be no subject matter jurisdiction in Wisconsin state courts to hear the claim. *28 U.S.C. § 1338(a)*; [23] *Schecher v. Purdue Pharma L.P., 317 F. Supp. 2d 1253, 1257 (D. Kan. 2004)*; [24] see also *Vill. of Trempealeau v. Mikrut, 2004 WI 79, P8 n.2, 273 Wis. 2d 76, 681 N.W.2d 190*. [25] And, if all the conduct that is alleged falls within the rights granted by the federal government to the patentee, the conduct is not illegal nor is its effect illegal. *United States v. General Elec. Co., 272 U.S. 476, 489-90, 47 S. Ct. 192, 71 L. Ed. 362 (1926)*. **[****61]** **[**339]** It is important to continue to note that only illegal conduct or conduct that has an illegal effect violates *Wis. Stat. § 133.03*. *Olstad, 2005 WI 121, P85, 284 Wis. 2d 224, 700 N.W.2d 139*; *Prentice, 176 Wis. 2d at 721*.

[*P87] ***Antitrust law*** generally forbids agreements that restrict output and raise prices above that which would be achieved in normal **[****62]** market competition. See Phillip Areeda & Herbert Hovenkamp, Vol. X ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application, P1780a (2d ed. 2004). However, if a patent owner acts solely within the rights granted under the patent, the patent owner has a lawful monopoly and is "freed from competition of price, service, quality or otherwise." *United States v. Line Material Co., 333 U.S. 287, 300, 68 S. Ct. 550, 92 L. Ed. 701 (1948)*.

[*P88] As the United States Supreme Court has explained:

> "A patent by its very nature is affected with a public interest . . . [It] is an exception to the general rule against monopolies and to the right to access to a free and open market."

Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 816, 65 S. Ct. 993,* ***[***471]*** *89 L. Ed. 1381, 1945 Dec. Comm'r Pat. 582 (1945))*. It is black letter law that a patent "is an exception to the general rule against monopolies." *Ciprofloxacin, 363 F. Supp. 2d at 523* (quoting *Precision, 324 U.S. at 816*).

[*P89] Therefore, agreeing to operate as a monopoly that fixes price for a patented invention is not illegal because monopoly rights exercised within the confines of the patent are granted by the federal government **[****63]** with the patent. As the United States Supreme Court has explained:

> **[**340]** [T]he general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.

Bement, 186 U.S. at 91 (emphasis added). In support of this monopoly, the federal law grants to a patent owner "the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States." *35 U.S.C. § 154(a)(1)*. The "essence of a patent grant is the right to exclude others from profiting by the patented invention." *Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176, 215, 100 S. Ct. 2601, 65 L. Ed. 2d 696 (1980)*. The rationale for granting such monopolies to patent

---

[23] *28 U.S.C. § 1338(a)* provides, "The districts courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents . . . . Such jurisdiction shall be exclusive of the courts of the states."

[24] [D]istrict courts have exclusive original jurisdiction over actions "arising under" federal patent laws, i.e., in an action challenging the validity or enforceability of the patent. *Schecher v. Purdue Pharma L.P., 317 F. Supp. 2d 1253, 1257 (D. Kan. 2004)*.

[25] *Village of Trempealeau v. Mikrut, 2004 WI 79, 273 Wis. 2d 76, 681 N.W.2d 190*, explains that as a general proposition, circuit courts have broad subject matter jurisdiction; however, "[f]ederal law may confer exclusive jurisdiction over certain subject matters to the federal courts, precluding state court jurisdiction in those areas by operation of the *Supremacy Clause*." *Id., P8 n.2*.

owners is to encourage inventions. Brenner v. Manson, 383 U.S. 519, 534, 86 S. Ct. 1033, 16 L. Ed. 2d 69, 1966 Dec. Comm'r Pat. 74 (1966). **[****64]** [26]

[*P90] The monopoly rights accorded to a patent owner also include the right to control the price charged for the patented invention by a licensee of the patent owner. General Elec., 272 U.S. at 489-90. In General **[**341]** Electric, the government alleged that General Electric was engaged in illegal price-fixing of lamps through an agreement with Westinghouse. Id. at 478. General Electric owned the patents necessary for the construction of certain tungsten filament lamps. Id. at 480-81. Westinghouse was one of General Electric's licensees to sell the lamps as part of a nationwide sales and distribution plan. Id. at 481-82. **[****65]** In considering the government's allegation that General Electric imposed a price-fixing condition on Westinghouse's sales, the Court concluded price-fixing on sales by a licensee was permissible so long as the price-fixing stopped with the licensee and did not continue to fix the prices charged by those who purchased from the licensee for subsequent sale. Id. at 485. The court explained:

> [U]nder the patent law the patentee is given by statute a monopoly of making, using and selling the patented article. The extent of his monopoly in the articles sold and in the territory of the United States where sold is not limited in the grant of his patent, and the comprehensiveness of his control of the business **[***472]** in the sale of the patented article is not necessarily an indication of illegality of his method. As long as he makes no effort to fasten upon ownership of the articles he sells control of the prices at which his purchaser shall sell, it makes no difference how widespread his monopoly. It is only when he adopts a combination with others, by which he steps out of the scope of his patent rights and seeks to control and restrain those to whom he has sold his patented articles in their subsequent **[****66]** disposition of what is theirs, that he comes within the operation of the Anti-Trust Act.

Id.

[*P91] Therefore, as we examine the complaint, we must: (1) presume Bayer's Cipro patent is valid because the plaintiffs claims are before a Wisconsin state **[**342]** court; and (2) assess whether any factual allegation relating to the Bayer-Barr agreement falls outside Bayer's right to maintain a monopoly on the price Bayer or its licensee charges for Cipro. With these general principles of patent law in mind, I turn to Wisconsin ***antitrust law***.

2. State antitrust principles

[*P92] Wisconsin's ***antitrust law*** is set out in ch. 133 of the Wisconsin Statutes. The operative provision at issue in the case before us is Wis. Stat. § 133.03. It provides in relevant part:

> Unlawful contracts; conspiracies. (1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal. . . .
> (2) Every person who monopolizes, or attempts to monopolize, or combines or conspires with any other person or persons to monopolize any part of trade or commerce is guilty.

[*P93] Wisconsin ***antitrust law*** follows federal ***antitrust law*** in most respects. State v. Waste Mgmt. of Wis., Inc., 81 Wis. 2d 555, 568-69, 261 N.W.2d 147 (1978). **[****67]** For example, both federal and state laws prohibit conspiracies to restrain trade and monopolies of the market. 15 U.S.C. §§ 1, 4, 15; Wis. Stat. § 133.03. However, Wisconsin ***antitrust law*** differs from federal ***antitrust law*** in that Wisconsin law may permit the recovery of damages by "indirect purchasers" [27] alleging **[**343]** unlawful anticompetitive conduct, Olstad, 2005 WI 121, P63,

---

[26] The freedom to take actions within the rights granted to a patent owner that would otherwise be unlawful has a limitation. If the patent was obtained "by knowing and willful fraud practiced by the defendant on the Patent Office or, if the defendant was not the original patent applicant, [but] he had been enforcing the patent with knowledge of the fraudulent manner in which it was obtained," the patent will provide no shield to claims of unlawful anticompetitive conduct. Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 179, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965) (Harlan, J., concurring).

284 Wis. 2d 224, 700 N.W.2d 139, but federal law does not. *Ill. Brick Co. v. Illinois, 431 U.S. 720, 730-31, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (Ill. 1977)*.

[*P94] The most recent Wisconsin Supreme Court decision interpreting *Wis. Stat. § 133.03* is Olstad. There we addressed the certified question: "Does Wisconsin's antitrust act, *Wis. Stat. § 133.03*, apply to interstate commerce affecting Wisconsin commerce?" *Olstad, 2005 WI 121, P10, 284 Wis. 2d 224, 700 N.W.2d 139*. Olstad claimed that Microsoft's share of the market for personal computer operating systems was so large that it prevented others from entering the market. *Id., PP2-3*. Olstad alleged that Microsoft's anticompetitive conduct caused Wisconsin consumers **[****68]** to pay higher prices. *Id., P7*. The circuit court dismissed the action after concluding that *§ 133.03* did not apply to interstate conduct. *Id., P9*.

[*P95] We concluded that "at least in some circumstances" *Wis. Stat. § 133.03* does apply to interstate conduct. *Id., P74*. Our limited conclusion was based in large part on our prior holding in Allied Chemical & Dye, where we addressed whether **[***473]** Wisconsin could apply its ***antitrust law*** to the sales of calcium chloride made in Wisconsin through interstate commerce when those sales were subject to the federal ***antitrust law***. *Allied Chem. & Dye, 9 Wis. 2d at 292*. We concluded that Wisconsin law could be applied in some circumstances, in part because there was no conflict between federal and state antitrust laws. *Id. at 295*.

[*P96] In Olstad, we also set out a test to assist courts and the public ascertain when *Wis. Stat. § 133.03* may reach interstate actions. As a very general framework, we explained that either: (1) "actionable conduct, such as the formation of a combination or conspiracy," must have occurred within Wisconsin, or (2) if the actionable conduct occurred predominantly or exclusively **[**344]** outside of Wisconsin, the "illegal activity" must "substantially **[****69]** affect" the people of Wisconsin and have "impacts" in Wisconsin. *Olstad, 2005 WI 121, P85, 284 Wis. 2d 224, 700 N.W.2d 139*. We advised that the test was to be interpreted in a restrictive fashion so that Wisconsin's ***antitrust law*** would be available on only a limited basis with regard to interstate conduct:

> Operating with lesser standards would jeopardize the action, undermine the validity of our antitrust statute, and create the spectacle of Lilliputian harassment in Wisconsin courts. Questions of provincialism, favoritism, and undue burden on interstate commerce should be determined by resort to contemporary federal commerce clause jurisprudence.

Id.

[*P97] It is important to note that Olstad does not address any issue that may arise in the application of state ***antitrust law*** in the context of a federal patentee's actions, where federal law may effect whether state law will be applied. Furthermore, in Olstad, we also did not address whether an indirect purchaser's claim based on conduct that occurred solely outside of Wisconsin should be subject to Wisconsin's ***antitrust law*** because that question was not brought to us for decision.

[*P98] However, we have in past decisions shown that Wisconsin ***antitrust law*** will not be applied **[****70]** to each and every occasion where the claim of a state law violation is made. In *State v. Milwaukee Braves, Inc., 31 Wis. 2d 699, 144 N.W.2d 1 (1966)*, we carefully considered the lack of federal prosecution of interstate conduct and what impact that should have on our decision about the prosecution of an antitrust claim under Wisconsin law.

[*P99] Milwaukee Braves involved a state antitrust action brought against the Braves and others by the **[**345]** State, due to major league baseball's decision to move the club to Atlanta, while refusing to permit another major league baseball team to locate in Milwaukee. *Id. at 703-04*. We acknowledged that a "substantial injury to business activity within Wisconsin" was caused by the exercise of major league baseball's monopoly power. *Id. at 719*. We explained that "organized baseball is interstate commerce and Congress may therefore regulate it." *Id. at 720*.

---

[27] The plaintiffs in the case before us are all "indirect purchasers" of Cipro because they did not purchase Cipro directly from Bayer or Barr. *Ill. Brick Co. v. Illinois, 431 U.S. 720, 726, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (Ill. 1977)*.

However, we noted that major league baseball had not been subjected to prosecution under federal ***antitrust law***. *Id. at 721*.

[*P100] When considering how to determine whether that de facto exemption from federal ***antitrust law*** could cause a conflict with the application of state ***antitrust law*** in regard to the decision **[****71]** to move the Braves, we framed the question as: "whether there is a conflict between state and federal policy, so that the state policy must yield." Id. We concluded that federal choice must control and Wisconsin could not enforce its ***antitrust law*** based on the **[***474]** "concerted action" of moving the Braves from Milwaukee and refusing Milwaukee another major league baseball franchise. *Id. at 732*.

[*P101] In Prentice, we once again addressed whether prosecution of alleged conduct, which if proved true, appeared to violate Wisconsin ***antitrust law***, should proceed. Prentice was brought as a class action against "twelve title insurance companies and several of their employees." *Prentice, 176 Wis. 2d at 720*. It was claimed that the defendants engaged in a conspiracy to restrain trade, causing the consumer "plaintiffs to pay substantially higher prices for title insurance and related services than they would have had to pay in the absence of the alleged conspiracy." Id. At issue was **[**346]** "whether the filed rate doctrine shield[ed] the defendants from liability" under Wisconsin's ***antitrust law***. *Id. at 721*.

[*P102] In Prentice, we explained how a regulatory agency's approval of a rate "established the lawfulness" of a **[****72]** rate; and therefore, the "legal rights of the parties were measured solely by the filed rate." *Id. at 722*. We concluded that because the insurance companies filed the rates they would charge pursuant to the provisions of *Wis. Stat. § 625.15(2)* (1977-78) and the agency had approved those rates under the filed rate doctrine, the rates charged were lawful rates. *Id. at 725*. Therefore, the title insurance companies and their employees were not subject to prosecution under Wisconsin ***antitrust law***. Id. This discussion demonstrates that while Wisconsin's ***antitrust law*** may initially appear to be applicable, there are occasions when it will not be applied because to do so would interfere with other federal or state laws or doctrines.

3. Plaintiffs' claims

[*P103] I now turn to the plaintiffs' claims in the suit before us. The complaint acknowledges that Bayer is the holder of the patent for Cipro. It alleges that Barr's generic drug is the "bioequivalence" of Cipro.

[*P104] Plaintiffs' allegation of the existence of Bayer's Cipro patent is significant because all patents are presumed to be valid. *35 U.S.C. § 282*. Furthermore, Bayer's patent for Cipro has been adjudged valid and enforceable. Bayer AG v. Barr Labs., No. 92CV391 (S.D.N.Y. Jan. 16, 1997). **[****73]** And finally, if the plaintiffs were attacking the validity or enforceability of the patent through the allegations that are made in the complaint, there would be no subject matter jurisdiction **[**347]** in Wisconsin courts to hear their claims. *Schecher, 317 F. Supp. 2d at 1257*.

[*P105] Plaintiffs nonetheless allege that in the absence of the Bayer-Barr agreement, Barr would have begun marketing generic Cipro January 6, 1995. [28] This can be true under only one condition for a claim made in state court--the monopoly set out in the Bayer-Barr agreement must fall outside of Bayer's right to maintain a monopoly for Cipro throughout the term of the patent. *Ciprofloxacin, 363 F. Supp. 2d at 524*. Stated otherwise, "the conduct at issue is illegal if it threatens competition in areas other than those protected by the patent and [if not, it] is otherwise legal." Id. (quoting *United States v. Studiengesellschaft Kohle, m.b.H., 670 F.2d 1122, 1127, 216 U.S. App. D.C. 303 (D.C. Cir. 1981))*. Therefore, while not every monopoly that an owner of a patent **[***475]** maintains is lawful, in order to withstand a motion to dismiss, a complaint against a patent owner must allege some conduct, which if proved **[****74]** true, falls outside of the conduct protected under the patent during the entire term of the patent. [29]

---

[28] This date predates FDA final approval to Barr, which according to the FDA's public records occurred on June 9, 2004.

[29] For example, while one who owns a patent can price-fix for the patented invention to those to whom it or its licensees sell, it cannot lawfully fix the price for the patented invention that will be charged by those to whom the patent owner or its licensees

[*P106] [348]** I accept the following allegations of plaintiffs as true for purposes of this motion: (1) The Bayer-Barr agreement consented to "fix, raise, maintain, and stabilize the price of Cipro." (2) The Bayer-Barr agreement "provides that Bayer has the option to either: **[****75]** (a) license and supply Bayer-manufactured Cipro to Barr [] for resale under a generic label; or (b) pay quarterly amounts to Barr from 1998 through at least 2003." (3) The Bayer-Barr agreement "set forth the prices that Bayer may charge to Barr [], if Bayer chooses to supply its Cipro to Barr [] for resale [and] requires Barr [] to share with Bayer in profits from the resale of generically labeled Cipro manufactured by Bayer [and] [] limits the ability of Barr [] to price Cipro licensed from Bayer independently."

[*P107] None of these allegations is sufficient to state a claim under *Wis. Stat. § 133.03* because none of the alleged conduct is illegal and the monopolistic effect of the conduct is not illegal. The price-fixing conduct and the monopoly that is alleged to have resulted come within the rights granted to Bayer by the federal government when it issued the Cipro patent. *General Elec., 272 U.S. at 485*; *Bement, 186 U.S. at 91*.

[*P108] There are other allegations in the complaint that appear factual, but are either legal conclusions that I do not accept for purposes of a motion to dismiss, *John BBB Doe, 211 Wis. 2d at 331*, or they are facts for which I take judicial notice that they are not true **[****76]** or are not legally possible. *Cohen, 129 F.2d at 736*. For example, we need not accept the allegation, repeated in many forms in the complaint, that were it not for the Bayer-Barr agreement, Barr would have begun to manufacture and market generic Cipro in January of 1995.

[*P109] [349]** According to the public records of the PTO, Bayer's original patent for Cipro did not expire until December 2003 and was extended through June 8, 2004. Furthermore, Barr had received only "tentative" FDA approval in January of 1995. The public records of the FDA show Barr did not have FDA approval to market generic Cipro until June 9, 2004. Therefore, unless Bayer's Cipro patent is invalid--a position that the plaintiffs cannot maintain in this lawsuit in state court--it would have been a violation of federal law for Barr to market generic Cipro before June 9, 2004. Therefore, in the context of a motion to dismiss, plaintiffs' repeated allegation in this regard does not cause their complaint to state a claim.

[*P110] The majority permits plaintiffs' claims to proceed because plaintiffs allege:

> a broad price-fixing scheme affecting "at minimum, thousands . . . in Wisconsin" who purchased the best-selling antibiotic **[***476]** Cipro "at **[****77]** any time since January 6, 1995." We conclude Meyers' complaint alleges illegal conduct that, if true, substantially affected the people of Wisconsin and had impacts in this state.

Majority op., P4. The quote above shows that the majority opinion errs because it does not consider the context in which the complaint is made, i.e., it is made against the lawful owner of the federal patent for Cipro. Bayer AG v. Barr Labs., No. 92CV391 (S.D.N.Y. Jan. 16, 1997) (concluding that Bayer owns the Cipro patent, which is valid and enforceable). [30]

[*P111] [350]** The majority opinion gives credence to the complaint's assertion that "as a result of the Agreement, Bayer maintained its monopoly of the United States market for Cipro and generic equivalents of Cipro." Majority op., **[****78]** P13. The quoted phrase, "as a result of the Agreement" from the majority opinion incorporates a conclusion of law. It does not recite a fact because the Bayer-Barr agreement could have caused Bayer to have a monopoly for Cipro only if Bayer's Cipro patent were invalid. *General Elec., 272 U.S. at 485*; *Bement, 186 U.S. at 91*. Otherwise, the monopoly is a result of the patent. Throughout the majority opinion it assumes the alleged conduct is illegal. This is a conclusion of law inappropriate for a motion to dismiss, unless there are facts alleged,

---

have sold. *General Elec., 272 U.S. at 485*. In addition, a licensee who has rights under a former provision in the Hatch-Waxman Act to act as the first generic producer for 180 days on the expiration of the patent (*21 U.S.C. § 355(j)(5)(B)(iv)*) cannot lawfully agree to delay the commencement of the 180-day period and in so doing, extend the patent beyond the term granted by the PTO. *In re Cardizem CK Antitrust Litig., 332 F.3d 896, 907-08 (6th Cir. 2003)*.

[30] That the plaintiffs' claim is made against the patent owner for Cipro was argued to the circuit court. It was not briefed for us because the circuit court dismissed the complaint on other grounds and the court of appeals reviewed only the grounds employed by the circuit court. However, many questions about the effect of Bayer's Cipro patent on the plaintiffs' claims were asked of counsel for all parties at the oral argument before us.

which if true, were sufficient to support that conclusion. No such facts have been alleged in the complaint. And, as I explained above, price-fixing and monopolies within the rights granted with the Cipro patent are legal. *Bement, 186 U.S. at 91* (explaining that "[t]he fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal").

[*P112] Only illegal conduct or conduct that has an illegal effect violates Wisconsin's ***antitrust law***. *Prentice, 176 Wis. 2d at 721*; *Allied Chem., 9 Wis. 2d at 296*. Therefore, it is not just that price-fixing occurred and that it had a monopolistic effect, the price-fixing to attain **[****79]** a monopoly for Cipro must be illegal or the effect of the conduct must be illegal. The allegations of both the conduct and its effect set out in the complaint are not illegal under controlling federal law. *General Elec., 272 U.S. at 485*.

[*P113] **[**351]** Furthermore, under *Wis. Stat. § 133.03*, only illegal conduct or conduct that has an illegal effect can "substantially affect" the people of Wisconsin and have "impacts" that violate Wisconsin ***antitrust law***. *Olstad, 2005 WI 121, P85, 284 Wis. 2d 224, 700 N.W.2d 139*; *Allied Chem., 9 Wis. 2d at 295*. It is beyond question that not all price-fixing or monopolies are illegal. In the case before us, given the presumption that Bayer's Cipro patent is valid and enforceable, none of the conduct alleged is illegal, nor is the monopolistic effect of the conduct illegal. *General Elec., 272 U.S. at 485*; *Bement, 186 U.S. at 91*. Therefore, because of the nature of a patent, any adverse effects on the market that were caused by actions that fall within the scope of a patent owner's rights under the patent cannot be addressed by ***antitrust law***. *Ciprofloxacin, 363 F. Supp. 2d at 524*; see also *Prentice, 176 Wis. 2d at 721*. Only conduct that threatens competition in areas other than those that are **[****80]** **[***477]** protected by the rights under a patent can be illegal under federal ***antitrust law***. *Ciprofloxacin, 363 F. Supp. 2d at 524*. No such conduct has been alleged in the complaint before us. Therefore, defendant's motion to dismiss should be granted.

III. CONCLUSION

[*P114] Because the conduct alleged in the complaint is not illegal or alleged to have had an illegal effect, it cannot "substantially affect" the people in Wisconsin and have "impacts" in Wisconsin contrary to *Wis. Stat. § 133.03*. *Olstad, 2005 WI 121, P85, 284 Wis. 2d 224, 700 N.W.2d 139*. Therefore, I would affirm the circuit court's dismissal of the complaint for failure to state a claim pursuant to *Wis. Stat. § 802.06(2)(a)6*, albeit on different grounds. Accordingly, I respectfully dissent.

[*P115] **[**352]** I am authorized to state that Justices JON P. WILCOX and DAVID T. PROSSER join this dissent.

End of Document

Austrian v. United Health Grp., Inc.

Superior Court of Connecticut, Judicial District of Waterbury, Complex Litigation Docket At Waterbury

July 16, 2007, Decided; July 17, 2007, Filed

X06CV054010357S

Reporter

2007 Conn. Super. LEXIS 1949 *

Donald J. Austrian, M.D. et al. v. United Health Group, Inc. et al.

Notice: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Subsequent History: Related proceeding at *Brook v. UnitedHealth Group, Inc., 2007 U.S. Dist. LEXIS 73640 (S.D.N.Y., Sept. 27, 2007)*

Core Terms

motion to strike, provider, subsidiaries, Antitrust, counts, products, patients, plaintiffs', participating, allegations, terminated, parent corporation, contracts, boycott, judicial district, fair dealing, unfair, insurance company, bad faith, defendants', Sherman Act, conspire, private right of action, tying arrangement, fee schedule, entities, insureds, covenant of good faith, concerted action, health plan

LexisNexis® Headnotes

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

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

Civil Procedure > ... > Pleadings > Complaints > General Overview

HN1[] **Motions to Dismiss, Failure to State Claim**

Conn. Gen. Prac. Book § 10-29(a) permits a plaintiff to make any document a part of the complaint as fully as if it had been set out at length, and the court can consider such document(s) as part of the complaint on a motion to strike.

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

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

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

A motion to strike tests the legal sufficiency of a pleading. Conn. Gen. Prac. Book § 10-39. The purpose of a motion to strike is to contest the legal sufficiency of the allegations of any complaint to state a claim upon which relief can be granted. In ruling on a motion to strike, the court is limited to the facts alleged in the complaint. The court must construe the facts in the complaint most favorably to the plaintiff. The trial court deciding a motion to strike must consider as true the well-pleaded facts, but not the legal conclusions, set forth in the complaint. The court should view the facts in a broad fashion, on one hand, to include facts that are necessarily implied by and fairly provable by the allegations, but on the other hand, to avoid enlarging the allegations of the complaint by assuming facts that are clearly not alleged.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Corporate Formalities

HN3[] **Alter Ego, Corporate Formalities**

A corporate veil may be pierced when facts show that the corporation is a mere shell and operates without corporate formalities for the benefit of the controlling shareholder.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Corporate Formalities

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

HN4[] **Alter Ego, Corporate Formalities**

A fundamental principle of corporate law is that the parent corporation and its subsidiary are treated as separate and distinct legal persons even though the parent owns all the shares of the subsidiary and the two enterprises have identical directors and officers. Such control, is no more than a normal consequence of controlling share ownership. Absent direct participation by the parent corporation, or facts that would meet common law standards for piercing the corporate veil, the parent is not liable for the alleged deeds if it has not actually operated or participated in the operation of its subsidiary's facility.

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

HN5[] **Regulated Practices, Private Actions**

It is the intent of the Connecticut General Assembly that in construing the Connecticut Antitrust Act, Conn. Gen. Stat. §§ 35-24 to 35-46, inclusive, the courts of the State of Connecticut shall be guided by interpretations given by the federal courts to federal antitrust statutes.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN6[] **Practices Governed by Per Se Rule, Boycotts**

The anti-boycott provision of Conn. Gen. Stat. § 35-28(d) is essentially a codification of what has been labeled a per se violation of § 1 of the Sherman Act. Section 1 of the Sherman Act reaches unreasonable restraints of trade effected by a contract, combination, or conspiracy between separate entities. It does not reach conduct that is wholly unilateral. A plaintiff claiming a *§ 1* violation must first establish a combination or some form of concerted action between at least two legally distinct economic entities. Unilateral conduct on the part of a single person or enterprise falls outside the purview of that provision in the ***antitrust law***.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN7[] **Per Se Rule & Rule of Reason, Sherman Act**

Whether affiliated companies owned or controlled by another should be viewed as a single economic entity for antitrust purposes turns less on the particular nature of the corporate structure, and more on whether the parent company's control over the subsidiaries or affiliates is such that the conglomerate must be viewed as an enterprise operating with singular, business interests or goals.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

HN8[] **Per Se Rule & Rule of Reason, Sherman Act**

Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary. A corporation has complete power to maintain a wholly owned subsidiary in either form. The economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition. A corporation may adopt the subsidiary form of organization for valid management and related purposes. Separate incorporation may improve management, avoid special tax problems arising from multi-state operations, or serve other legitimate interests. Especially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability. Conduct that deprives the marketplace of the independent centers of decision making that competition assumes, without the efficiencies that come with integration inside a firm, go on the concerted side of the line.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

HN9[] **Per Se Rule & Rule of Reason, Sherman Act**

Two subsidiaries of the same parent corporation are legally incapable of conspiring with one another for purposes of *§ 1* of the Sherman Act. Because unilateral action is not prohibited by *§ 1* of the Sherman Act, the actions of a parent corporation, its subsidiaries or sister corporations, and its employees cannot be considered concerted action. Interpreting *Conn. Gen. Stat. § 35-28* in a manner consistent with the weight of federal authority, a Connecticut trial court holds that the concerted action of legally distinct entities operating without unified business interests is insufficient for the application of the anti-boycott provision of *§ 35-28(d)*.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN10[] **Sherman Act, Claims**

Any anti-competitive activities of corporations and their wholly owned subsidiaries meriting antitrust remedies may be policed adequately without resort to an intra-enterprise conspiracy doctrine. A corporation's initial acquisition of control will always be subject to scrutiny under *§ 1* of the Sherman Act and *§ 7* of the Clayton Act, *15 U.S.C.S. § 18*. The enterprise is fully subject to *§ 2* of the Sherman Act and *§ 5* of the Federal Trade Commission act, *15 U.S.C.S. § 45*.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN11[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Conn. Gen. Stat. § 35-27 is patterned after *§ 2* of the Sherman Act. The conduct of a single firm is governed by *§ 2* of the Sherman Act alone and is unlawful only when it threatens actual monopolization.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN12[] **Tying Arrangements, Clayton Act**

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different, or tied, product, or at least agrees that he will not purchase that product from any other supplier. The practice is made illegal by *§ 3* of the Clayton Act, *15 U.S.C.S. § 14* and *Conn. Gen. Stat. § 35-29*, if the product is a commodity, otherwise, it is a violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1* and *Conn. Gen. Stat. § 35-26*. There is nothing inherently anticompetitive about packaged sales. Only when consumers are forced to purchase a tied product with a tying product, due to a defendant's substantial market power in the tying product market, are the protections of the antitrust laws triggered.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

HN13[] **Tying Arrangements, Clayton Act**

Conn. Gen. Stat. § 35-26 provides that every contract, combination, or conspiracy in restraint of any part of trade or commerce is unlawful. Conn. Gen. Stat. § 35-29 is patterned after § 3 of the Clayton Act, 15 U.S.C.S. § 14.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN14[] Tying Arrangements, Per Se Rule

Similar to Conn. Gen. Stat. § 35-28(d), Conn. Gen. Stat. § 35-26 is patterned after and is to be construed consistent with § 1 of the Sherman Act, and therefore, § 35-26 requires the concerted action of two or more persons.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN15[] Tying Arrangements, Clayton Act

The elements of a tying violation are described as follows: First, there must be in fact a tying arrangement. Second, the seller must possess sufficient economic power with respect to the tying product to restrain free competition appreciably for the tied product. Third, a substantial amount of commerce in the tied product must be restrained. In less demanding Clayton Act, 15 U.S.C.S. § 14, cases, a plaintiff must only demonstrate the existence of a tying arrangement and either of the second or third elements to make out a violation. To establish a violation under the more stringent non-commodity Sherman Act, all three elements must be present.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Evidence > Burdens of Proof > Allocation

HN16[] Tying Arrangements, Per Se Rule

The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant tying product, resulting in economic harm to competition in the tied market. Consequently, no cognizable cause of action under the antitrust laws for tying can be established in the absence of allegations demonstrating that the defendants have foreclosed competition on the merits in a product market distinct from the market for the tying item. A tying arrangement cannot exist unless two separate product markets have been linked.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Civil Procedure > ... > Justiciability > Standing > Personal Stake

HN17[] Standing, Injury in Fact

Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the cause of action.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN18[] **Deceptive & Unfair Trade Practices, State Regulation**

A person may file suit under the Connecticut Unfair Trade Practices Act, *Conn. Gen. Stat. § 42-110a et seq.*, upon suffering any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by *Conn. Gen. Stat. § 42-110b*. *Section 42-110b* states that no person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN19[] **Deceptive & Unfair Trade Practices, State Regulation**

See *Conn. Gen. Stat. § 42-110a*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN20[] **Deceptive & Unfair Trade Practices, State Regulation**

A plaintiff asserting a cause of action under the Connecticut Unfair Trade Practices Act (CUTPA), *Conn. Gen. Stat. § 42-110a et seq.*, must have some consumer or business relationship with the defendant. In describing the business relationship necessary for a plaintiff to have standing to assert a CUTPA claim, the cases indicate that a business person must have a direct commercial relationship with the defendant, or some other relationship with the defendant in a commercial marketplace, so that a nexus exists between this relationship and an ascertainable loss caused by the defendant's unfair or deceptive practices. At the very least, other business people, who are not direct competitors, must have some type of commercial relationship with the alleged wrongdoer, commercial relationship not being so much a business-to-business relationship but some kind of relationship in the marketplace, so that the particular acts of wrongdoing alleged will interfere with fair and open competition in that particular marketplace.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Evidence > Burdens of Proof > Allocation

Business & Corporate Compliance > ... > Industry Practices > Unfair Business Practices > Unfair Trade Practices Acts

HN21[] **Deceptive & Unfair Trade Practices, State Regulation**

Conduct which does not violate the Connecticut Unfair Insurance Practices Act (CUIPA), *Conn. Gen. Stat. § 38a-815 et seq.*, does not constitute an unfair act or practice under the Connecticut Unfair Trade Practices Act (CUTPA), *Conn. Gen. Stat. § 42-110a et seq.* In order to sustain a CUIPA cause of action under CUTPA, a plaintiff must allege conduct that is proscribed by CUIPA.

Business & Corporate Compliance > ... > Industry Practices > Unfair Business Practices > Unfair Trade Practices Acts

HN22[] **Unfair Business Practices, Unfair Trade Practices Acts**

Conn. Gen. Stat. § 38a-816(4) prohibits any agreement or concerted action monopolizing or unreasonably restraining the insurance business through boycott, coercion or intimidation.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Business & Corporate Compliance > ... > Industry Practices > Unfair Business Practices > Unfair Trade Practices Acts

HN23[] **Deceptive & Unfair Trade Practices, State Regulation**

Under the Connecticut Unfair Insurance Practices Act (CUIPA), *Conn. Gen. Stat. § 38a-815 et seq.*, the insurance commissioner is authorized to investigate CUIPA violations and institute administrative enforcement proceedings whenever the commissioner has reason to believe that any such person has been engaged in or is engaging in any unfair method of competition or any unfair or deceptive act or practice. *Conn. Gen. Stat. § 38a-817(a)*. No private right of action is provided under the statute. An action under the Connecticut Unfair Trade Practices Act (CUTPA), *Conn. Gen. Stat. § 42-110a et seq.*, may be asserted for a CUIPA violation, and CUTPA allows recovery of actual damages, as well as attorney fees and punitive damages. Any relief provided by an implied cause of action under CUIPA would be redundant, and most likely, less extensive.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN24[] **Complaints, Requirements for Complaint**

A complaint must allege facts sufficient to satisfy all the elements of the purported cause of action.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN25[] **Breach of Contract Actions, Elements of Contract Claims**

A breach of contract claim for which no injury is alleged fails to state a legally compensable claim. The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages.

Contracts Law > Defenses > Unconscionability > Adhesion Contracts

HN26[] **Unconscionability, Adhesion Contracts**

There is no per se prohibition against adhesion contracts.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN27[] **Breach of Contract Actions, Elements of Contract Claims**

The duty of good faith and fair dealing is a covenant implied into a contract or a contractual relationship. Every contract carries an implied duty requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement. The covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed upon by the parties and that what is in dispute is a party's discretionary application or interpretation of a contract term. To constitute a breach of the implied covenant of good faith and fair dealing, the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith. Bad faith has been defined in our jurisprudence in various ways. Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Bad faith means more than mere negligence; it involves a dishonest purpose. Bad faith may be overt or may consist of inaction, and it may include evasion of the spirit of the bargain.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

Evidence > Burdens of Proof > Allocation

HN28[] **Breach of Contract Actions, Elements of Contract Claims**

An action for breach of the covenant of good faith and fair dealing requires proof of three essential elements, which the plaintiff must duly plead: first, that the plaintiff and the defendant were parties to a contract under which the plaintiff reasonably expected to receive certain benefits; second, that the defendant engaged in conduct that injured the plaintiff's right to receive some or all of those benefits; and third, that when committing the acts by which it injured the plaintiff's right to receive benefits it reasonably expected to receive under the contract, the defendant was acting in bad faith.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN29[] **Contract Interpretation, Good Faith & Fair Dealing**

The breach of the implied covenant of good faith is a principle that cannot be applied to achieve a result contrary to the clearly expressed terms of a contract.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Grounds for Relief

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Scope of Declaratory Judgments

HN30[] **State Declaratory Judgments, Grounds for Relief**

The conditions for a declaratory judgment under *Conn. Gen. Prac. Book § 17-55* are that the plaintiffs: (1) have an interest by reason of danger of loss or of uncertainty as to their rights; (2) there is an actual bona fide and substantial issue in dispute and substantial uncertainty of legal relations requiring settlement between the parties; and (3) there is not another proceeding that provides them with immediate redress.

Judges: [*1] Barry K. Stevens, Judge.

Opinion by: Barry K. Stevens

Opinion

MEMORANDUM OF DECISION ON DEFENDANTS' MOTION TO STRIKE THE REVISED FIRST AMENDED CLASS ACTION COMPLAINT (# 121)

SUMMARY OF DECISION

This is an action instituted by four doctors, Dr. Donald Austrian, Dr. Francis Garofalo, Dr. Kenneth Miller and Dr. Evangelos Xistris. The four defendants are: United HealthCare Insurance Company, UnitedHealth Group, Inc., Oxford Health Plans (CT), Inc., and Oxford Health Insurance, Inc. The plaintiffs assert claims against all the defendants under the Connecticut Unfair Trade Practices Act, *General Statutes § 42-110a et seq.*, ("CUTPA"); the Connecticut Unfair Insurance Practices Act, *§ 38a-815* and *§ 38a-816(4)*; tying in violation of Connecticut Antitrust Act, General Statutes § 36-26; and boycott in violation of the Connecticut Antitrust Act, *General Statutes § 35-28(d)*. Against the defendant United HealthCare Insurance Company, the plaintiffs also claim breach of contract and violation of the implied duty of good faith and fair dealing. The plaintiffs also seek a declaratory judgment that United HealthCare Insurance Company, Oxford Health Plans (CT), Inc., and Oxford Health Insurance, Inc. are required to keep their **[*2]** approval offices open 24 hours a day, seven days a week, and that these defendants must endeavor to reduce hold times on their approval lines to a maximum of ten minutes.

On the defendants' motion to strike all the counts of the complaint, the court rules as follows:

The motion to strike is denied as to plaintiffs' claims against the defendants United HealthCare Insurance Company, Oxford Health Plans (CT), Inc., and Oxford Health Insurance, Inc., for violation of CUTPA (Second Count and Third Count).

The motion to strike is denied as to plaintiffs' claims against the defendant United HealthCare Insurance Company for breach of the implied duty of good faith and fair dealing (Fifteenth Count).

The motion to strike is granted as to counts one and counts four though fourteen.

STATEMENT OF THE CASE

The named plaintiffs in this proposed class action are four doctors [1] who are licensed to practice medicine in Connecticut and who contract as participating providers with the defendant United HealthCare Insurance Company (UHC), a Connecticut corporation with its principal place of business in Hartford, Connecticut. Under the contract, UHC reimburses the plaintiffs for services rendered in accordance **[*3]** with a contracted fee schedule. The other defendants are as follows: UnitedHealth Group, Inc. ("UHG"), a corporation established under the laws of Minnesota, with its principal place of business in Minnetonka, Minnesota; Oxford Health Plans (CT), Inc., a Connecticut corporation with its principal place of business in Trumbull, Connecticut; and Oxford Health Insurance, Inc., a New York corporation also with its principal place of business in Trumbull, Connecticut. (In this opinion, as in the complaint, Oxford Health Plans (CT), Inc. and Oxford Health Insurance, Inc. will be referred to jointly as "Oxford"). The gravamen of the plaintiffs' fifteen-count complaint is that in order to continue their participation in UHC's provider network, UHC also is requiring the plaintiffs to participate in Oxford's health plans.

According to the complaint and its attachments, [2] UHG is the ultimate parent corporation of UHC. In July 2004, UHG acquired control of Oxford through "merger, acquisition and/or affiliation," and thereafter, UHC and Oxford existed as subsidiaries of the same parent company. Complaint P16. [3] Generally, UHC and Oxford have continued to operate as separate insurance companies, maintaining their own branded health plans, claims processing procedures and fee schedules. In 2005, providers for UHC and Oxford were informed by either UHC or Oxford that despite the fact UHC and Oxford would continue to operate as separate companies, their provider contracts would be amended so that physicians would now have to become an Oxford provider if they were solely a UHC provider and vice versa. Complaint P24. According to the amendment, its purpose was that "United and Oxford now wish to integrate their physician networks."

According to the complaint, this requirement being imposed on the plaintiffs is known in the health care industry as an "all products" clause, whereby an insurer requires that a physician accept all of its offered coverage plans, not just the preferred plan. This clause was imposed upon the providers in a nonnegotiable, "take-it or leave-it" fashion, and evidences the "uneven playing field in bargaining power between individual physicians and the large insurance companies, which every day deteriorates more of the doctor-patient **[*6]** relationship." Complaint P25. [4]

The complaint describes the named plaintiffs' history with Oxford. Plaintiff Austrian was an Oxford provider for approximately four years before he terminated his contract with Oxford due to the related high administrative costs

---

[1] Dr. Donald Austrian specializes in internal medicine and is affiliated with Bridgeport Hospital; Dr. Francis Garofalo is a urologist who, at the time the complaint was initiated in 2005, was affiliated with Norwalk Hospital, but has since moved out-of-state; Dr. Kenneth Miller is a rheumatologist affiliated with Danbury, New Milford and Putnam Hospitals; and Dr. Evangelos Xistris **[*4]** is a neurologist affiliated with Stamford Hospital.

[2] *Practice Book § 10-29(a)* ***HN1***[] permits the plaintiff to make any document a part of the complaint as fully as if it had been set out at length, and the court can consider such document(s) as part of the complaint on a motion to strike. *Tracy v. New Milford Public Schools, 101 Conn.App. 560, 566, 922 A.2d 280 (2007)*.

[3] The **[*5]** exact corporate relationships of the defendants are actually more involved. According to the complaint, the defendant UHC is a subsidiary of UHIC Holdings, Inc. UHIC Holdings, Inc. is a subsidiary of United HealthCare Services, Inc., which in turn is a subsidiary of the defendant UHG.

The defendant Oxford Health Plans (CT), Inc., is a subsidiary of Oxford Health Plans, LLC, which in turn is a subsidiary of the defendant UHG. The defendant Oxford Health Insurance, Inc., is a subsidiary of Oxford Health Plans (NY), Inc., which in turn is a subsidiary of Oxford Health Plans, LLC. As previously stated, Oxford Health Plans, LLC is a subsidiary of the defendant UHG.

[4] The complaint alleges the following about the "all products" clause: "Requiring physicians to accept inferior plans imposing inadequate reimbursement rates, unreasonable risk, limited coverage, burdensome administrative requirements, limited drug formularies and other inappropriate incentives forces those physicians into a situation where they cannot opt-out of the plans for financial reasons, and places them in a position where they cannot provide a reasonable level of care due to the restrictions of the inferior plan. Moreover, when the physician's agreement with one plan is cancelled solely due to his or her refusal to participate in other plans, that physician incurs a great financial burden and is prevented from continuing to furnish medical care to his or her current patients, who are thus deprived of access to and continuity of medical care." Complaint P26.

and low fee schedule. He has been a UHC participating provider **[*7]** for more than five years, and approximately 26% of his practice is composed of UHC insureds. He informed UHC in June 2005 that he would not agree to become a provider for both Oxford and UHC. According to the complaint, UHC responded that it would terminate his participating provider agreement effective July 6, 2005. [5] The complaint further alleges that UHC sent notice of his termination to plaintiff Austrian's patients, "giving them less than one month to find a new participating provider and failing to inform them that they could continue to receive treatment from Dr. Austrian on an out-of-network basis." [6] Complaint, P31. The plaintiff Austrian claims that due to the all products clause, he "stands to lose more than one quarter of his patient base." Complaint, P32.

Plaintiff Garofalo also participated in the Oxford plan until 2003, when he terminated his contract with Oxford due to the related high administrative costs and low fee schedule. Prior to his moving to Utah, 12% of **[*8]** his practice involved treating UHC insureds. The complaint alleges that when plaintiff Garofalo received Oxford's letter informing him of the all products clause, and he learned that the acceptance of the all products clause was not negotiable, and considering his expectation that "as a direct result of being coerced to rejoin Oxford, he would devote less time to individual patients, making less money and working harder … he decided to stop practicing medicine in … Connecticut and to relocate to Utah …" Complaint, P36.

The complaint states that approximately 11% of plaintiff Miller's practice is comprised of UHC insureds; that he was an Oxford participating provider until "in or around" 2002, when he terminated his contract with Oxford as a result of the high administrative costs and low fee schedule; and upon receiving notification of the all products clause at issue, he attempted to negotiate with UHC, and was informed that he would have to agree to accept a decrease in his reimbursements from UHC if he expected Oxford to increase its fee schedule. Plaintiff Miller claims that he could not agree to such a condition and consequently rejoined Oxford "at the lower fee schedule." The **[*9]** complaint alleges that plaintiff Miller will be directly affected by his coerced acceptance of the all products clause by the threat of losing 11% of his patient base comprising UHC insureds, increased patient load and administrative burdens, less time with individual patients, working harder for less money, and not being able to afford additional staff as a result of Oxford's lower fee schedule.

Plaintiff Xistris is both a UHC participating provider (33% of his practice) and a participating provider with Oxford (10% of his practice). Prior to receiving notification of the provider agreement amendment at issue, plaintiff Xistris intended to terminate his contract with Oxford because of the related high administrative costs and low fee schedule. Plaintiff Xistris alleges that Oxford's fee schedule reimburses him in amounts lower than Medicare, "to the point where it often costs [him] more to bill Oxford than the payments he ultimately receives." Complaint, P42. He further alleges that Oxford's approvals office is closed on weekends, and so weekend emergency procedures are performed without approval, and this plaintiff often is denied reimbursement by Oxford for emergency procedures performed **[*10]** on weekends. As a result of his coerced acceptance of the all products clause, plaintiff Xistris claims that he will have to work harder for less money, and his patients will be deprived of continuity of care.

The plaintiffs assert the following claims against UHG: violation of the Connecticut Unfair Trade Practices Act, *General Statutes § 42-110a et seq.* (CUTPA) (first count); violation of the Connecticut Unfair Insurance Practices Act (CUIPA), *General Statutes § 38a-815* and *§ 38a-816(4)* (fourth count); and violation of the Connecticut Antitrust Act based on tying, *General Statutes § 35-26* (seventh count) and on boycott, *General Statutes § 35-28(d)* (tenth count). The plaintiffs assert claims against UHC for violation of CUTPA (second count) and CUIPA (fifth count), tying (eighth count) and boycott (eleventh count), breach of contract (fourteenth count) and breach of implied contract of good faith and fair dealing (fifteenth count). They assert claims against Oxford for violation of CUTPA (third count) and CUIPA (sixth count), tying (ninth count) and boycott (twelfth count). The plaintiffs also seek a declaratory judgment ordering that UHC and Oxford be required to keep their approvals **[*11]** offices open 24 hours a day, seven days a week, and that UHC and Oxford endeavor to reduce hold times on their approval lines to a maximum of ten minutes (thirteenth count).

---

[5] The language of the complaint makes it unclear whether Austrian's contract with UHC continued or was actually terminated.

[6] A copy of a letter such as described here is attached to the complaint at Exhibit E.

The defendants move to strike the complaint in its entirety. The plaintiffs oppose the motion to strike.

DISCUSSION

I

HN2[] A motion to strike tests the legal sufficiency of a pleading. *Practice Book § 10-39*; *Ferryman v. Groton, 212 Conn. 138, 142, 561 A.2d 432 (1989)*; *Mingachos v. CBS, Inc., 196 Conn. 91, 108, 491 A.2d 368 (1985)*. "The purpose of a motion to strike is to contest the legal sufficiency of the allegations of any complaint to state a claim upon which relief can be granted. In ruling on a motion to strike, the court is limited to the facts alleged in the complaint. The court must construe the facts in the complaint most favorably to the plaintiff." (Citations and internal quotation marks omitted.) *Novametrix Medical Systems v. BOC Group, Inc., 224 Conn. 210, 214, 618 A.2d 25 (1992)*. The trial court deciding a motion to strike must consider as true the well-pleaded facts, but not the legal conclusions, set forth in the complaint. *Liljedahl Bros., Inc. v. Grigsby, 215 Conn. 345, 348, 576 A.2d 149 (1990)*; *Blancato v. Feldspar Corp., 203 Conn. 34, 36, 522 A.2d 1235 (1987)*. **[*12]** The court should view the facts in a broad fashion, on one hand, to include facts that are necessarily implied by and fairly provable by the allegations, but on the other hand, to avoid enlarging the allegations of the complaint by assuming facts that are clearly not alleged. See *Faulkner v. United Technologies Corp., 240 Conn. 576, 580, 693 A.2d 293 (1997)*; *Dennison v. Klotz, 12 Conn.App. 570, 577, 532 A.2d 1311 (1987)*.

II

Motion to Strike All Counts Against UHG

As previously stated, four statutory claims are asserted against UHG based on CUTPA, CUIPA, and antitrust tying and boycott. UHG has moved to strike all of these claims on the ground that the claims are unsupported by any facts. UHG contends that the plaintiffs have alleged a corporate relationship between it and the other corporate defendants, UHC and Oxford, but the plaintiffs have failed to allege any relationship between themselves and UHG that would support holding UHG independently liable for any of the statutory actions asserted against it. UHG insists that linking it to its subsidiaries' alleged activities on the basis of nothing more than general assertions arising from its parental status is insufficient as a matter **[*13]** of law. In response, the plaintiffs contend that they have sufficiently alleged that UHG is a participant in the challenged scheme, together with UHC and Oxford, and is accountable as an actor. The court agrees with UHG.

The law is established that **HN3**[] the corporate veil may be pierced when facts show that the corporation is a mere shell and operates without corporate formalities for the benefit of the controlling shareholder. See, e.g., *Toshiba America Med. Sys. v. Mobile Med. Sys., 53 Conn.App. 484, 730 A.2d 1219 (1999)*. However, the plaintiffs admit that they are not seeking to impose liability on UHG by piercing the corporate veil or through any form of "vicarious liability." Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Strike, 6 and 10. Additionally, the plaintiffs have not sued UHG for breach of any express or implied contract. The plaintiffs admitted during oral argument that they have no breach of contract claim against UHG. Furthermore, the plaintiffs deny that they are alleging any "intracorporate" conspiracy. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Strike, 11; cf. *Harp v. King, 266 Conn. 747, 835 A.2d 953 (2003)* (under the **[*14]** intra-corporate conspiracy doctrine, employees of a corporation cannot conspire with the corporation itself).

The complaint alleges that UHG is the ultimate parent company of UHC and Oxford, acquiring control of Oxford in a corporate acquisition/merger. UHG has an economic interest in the products that UHC and Oxford sell; and UHG is the corporate link between UHC and Oxford, providing the business relationship between UHC and Oxford. Complaint, PP19-20. On the basis of these allegations, the plaintiffs generally aver that UHG "materially aids and assists in the scheme, combination, conspiracy and agreement" that the plaintiffs are challenging. Complaint, P20. However, this statement that UHG "materially" assists the alleged wrongful conduct is nothing more than an unspecific, conclusory assertion. The complaint fails to describe any facts indicating how UHG is materially assisting any scheme and how such acts provide the elements to support any cause of action against UHG. Reading these allegations broadly in favor of the plaintiffs, it appears that this "material" aid that UHG is providing simply emanates from its status as being the parent or "corporate link" between UHC and Oxford. **[*15]** This "link" gives UHG an "economic interest" in the products of its subsidiaries and generates "revenue" flowing to UHG. Complaint, PP18-21. These allegations, in effect, merely describe the nature of the parent-subsidiary relationship that UHG has with its subsidiaries, UHC and Oxford.

As a matter of established corporate law, such allegations alone are insufficient to assert a cause of action against a parent corporation for the acts of its subsidiaries. The Connecticut Supreme Court recognizes ***HN4***[] the "fundamental principle of corporate law that the parent corporation and its subsidiary are treated as separate and distinct legal persons even though the parent owns all the shares of the subsidiary and the two enterprises have identical directors and officers. Such control, after all, is no more than a normal consequence of controlling share ownership." (Citations omitted; internal quotation marks omitted.) *SFA Folio Collections, Inc. v. Bannon, 217 Conn. 220, 232, 585 A.2d 666*, cert. denied, *501 U.S. 1223, 111 S. Ct. 2839, 115 L. Ed. 2d 1008 (1991)*. Similarly, the United States Supreme Court expressed this principle in *United States v. Bestfoods, 524 U.S. 51, 61, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998)*. **[*16]** In *Bestfoods,* the plaintiff sought to impose liability on the parent company for pollution by the subsidiary. The court ruled that absent direct participation by the parent corporation in the pollution, or facts that would meet common law standards for piercing the corporate veil, the parent is not liable for the alleged deeds if it has not actually operated or participated in the operation of its subsidiary's facility.

In short, the plaintiffs have neither articulated any specific acts committed against them by UHG itself nor described in any particularized way how UHG participated in the contested conduct. The plaintiffs have alleged the interests that UHG, as a parent corporation, may have in the business activities of its subsidiaries or the control that this parent corporation may legitimately exercise over its subsidiaries. However, such allegations alone are insufficient to state a legally cognizable claim against UHG. As a matter of law, the existence of the control that a parent corporation may exercise over a subsidiary is insufficient to impose liability upon the parent for the acts of the subsidiary absent any other evidence to support the piercing of the corporate veil.

Therefore, **[*17]** for these reasons, the motion to strike counts one, four, seven and ten against UHG is granted. Alternatively, UHG also argues that these counts should be stricken because on their substantive merits they fail to state claims upon which relief may be granted. As discussed below, the court agrees with UHG's alternative arguments, except as to the CUTPA claim asserted in Count One.

III

Motion to Strike Antitrust Counts

A

Antitrust Boycott Claims

In counts seven through twelve, the plaintiffs claim damages for violation of the Connecticut Antitrust Act, *General Statutes §§ 35-26*, *35-28*. The legislative history of the Connecticut Antitrust Act establishes that it was intentionally patterned after the ***antitrust law*** of the federal government. *Vacco v. Microsoft Corp., 260 Conn. 59, 72, 793 A.2d 1048 (2002)*. In fact, the General Assembly amended the Connecticut Antitrust Act in 1992 to express its intent that the judiciary shall interpret the Connecticut Antitrust Act in accordance with the federal courts' interpretation of federal ***antitrust law***. *General Statutes § 35-44b* ("[I]t ***HN5***[] is the intent of the General Assembly that in construing *sections 35-24 to 35-46*, inclusive, the courts of this state **[*18]** shall be guided by interpretations given by the federal courts to federal antitrust statutes.").

The tenth through twelfth counts of the complaint claim that UHG, UHC, and Oxford respectively engaged in a boycott in violation of the Connecticut Antitrust Act, *General Statutes § 35-28*. ***HN6***[] The anti-boycott provision of *Section 35-28(d)* is essentially a codification of what has been labeled a per se violation of *§ 1* of the Sherman Act. See *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959)*. "*Section 1* of the Sherman Act … reaches unreasonable restraints of trade effected by a 'contract, combination … or conspiracy' between separate entities. It does not reach conduct that is 'wholly unilateral.'" *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S.Ct. 2731, 81 L. Ed. 2d 628 (1984)*. "[A] plaintiff claiming a *§ 1* violation must first establish a combination or some form of concerted action between at least two legally distinct economic entities. Unilateral conduct on the part of a single person or enterprise falls outside the purview of this provision in the ***antitrust law***." (Citation omitted.) *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., 996 F.2d 537, 542 (2nd Cir. 1993)*, **[*19]** cert denied, *510 U.S. 947, 114 S. Ct. 388, 126 L. Ed. 2d 337 (1993)*.

The complaint alleges in pertinent part that the all products clause has exerted pressure on the plaintiffs and other physicians to accept Oxford through the threat of losing UHC patients, causing an unreasonable restraint of the freedom of physicians to choose which insurance plans they will participate in on the open market; and UHC and Oxford as affiliates and United as their parent have entered into a contract, combination, conspiracy or agreement to refuse to deal with UHC participating providers who do not agree to also become Oxford participating providers. The defendants move to strike the boycott claims on the grounds that a boycott violation requires that at least two, separate, unaffiliated corporations conspire and agree not to deal with a third, and the defendants, as affiliated companies, are legally incapable of conspiring with one another because under the antitrust laws they must be viewed as sharing unified business interests.

The plaintiffs, on the other hand, argue that UHC and Oxford attempted to merge their networks of participating provider physicians, not merge their businesses. Although the plaintiffs **[*20]** concede that UHG is the ultimate parent corporation of the defendants UHC and Oxford, this relationship is not accomplished directly, but is accomplished through UHG's control over intervening subsidiaries. See n.3. As a result of this corporate structure, the plaintiffs contend that the affiliations of UHG, UHC, and Oxford are so distant and distinct that these companies must be viewed as being separate business entities, without having the unity of interest necessary to be treated as a single economic unit under ***antitrust law***. The court is unpersuaded.

As previously indicated, in order to assert a boycott in violation of *General Statutes § 35-28(d)*, the plaintiffs must allege concerted action between at least two legally distinct entities; a single entity is incapable of conspiring with itself. In *Copperweld Corp. v. Independence Tube Corp., supra, 467 U.S. 752*, the Supreme Court rejected the intra-enterprise conspiracy doctrine and held that a corporation and its wholly owned subsidiary are legally incapable of conspiring with each other under *§ 1* of the Sherman Act.

The plaintiffs argue that *Copperweld* is distinguishable from the present case because of the corporate remoteness between **[*21]** UHG and its subsidiaries, UHC and Oxford, and because UHC and Oxford are sister corporations. The plaintiffs emphasize that the Supreme Court's decision in *Copperweld* was limited to conduct between a parent corporation and its wholly owned subsidiaries. *Id., 767-68*. The court rejects the plaintiffs' argument and finds that the factual distinction between this case and *Copperweld* relied on by the plaintiffs is without legal significance.

HN7[] Whether affiliated companies owned or controlled by another should be viewed as a single economic entity for antitrust purposes turns less on the particular nature of the corporate structure, and more on whether the parent company's control over the subsidiaries or affiliates is such that the conglomerate must be viewed as an enterprise operating with singular, business interests or goals. [7] Such a relationship is exactly what is alleged in the complaint.

---

[7] See generally, *Copperweld Corp. v. Independence Tube Corp., supra, 467 U.S. 772-73*: "***HN8***[] Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary. A corporation has complete power to maintain a wholly owned subsidiary in either form. The economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition. Rather, a corporation may adopt the subsidiary form of organization for valid management and related purposes. Separate incorporation may improve management, avoid special tax problems arising from multi-state operations, or

The complaint describes how UHG has structured its business operations so as to conduct "its business as a diversified health and well-being company through several operating divisions, including its Health Care Services business segment, of which UHC and Oxford are part." Complaint P18. As previously **[*22]** discussed, the complaint fails to describe any specific, independent acts committed by UHG individually against the plaintiffs, but complains about how UHG's control of UHC and Oxford has resulted in them committing the acts contested by the plaintiffs. [8]

The plaintiffs are correct that *Copperweld* involved actions between a parent and a wholly owned subsidiary, whereas this case involves, in part, the actions of two subsidiaries. Although this precise issue is one of first impression in Connecticut, the federal circuit courts addressing this or analogous issues indicate **[*24]** that *Copperweld* precludes a finding that two subsidiaries, wholly owned or ultimately controlled by a parent corporation, can conspire under *§ 1* of the Sherman Act. *Advanced Health-Care Servs. v. Radford Community Hosp., 910 F.2d 139, 146 (4th Cir. 1990)* ("we conclude that ***HN9***[] two subsidiaries of the same parent corporation are legally incapable of conspiring with one another for purposes of *§ 1* of the Sherman Act"); *Odishelidze v. Aetna Life & Casualty Co., 853 F.2d 21, 23 (1st Cir. 1988)* ("[b]ecause unilateral action is not prohibited by *§ 1* of the Sherman Act … the actions of a parent corporation, its subsidiaries or sister corporations, and its employees cannot be considered concerted action."); *Directory Sales Management Corp. v. Ohio Bell Tel. Co., 833 F.2d 606, 611, (6th Cir. 1987)* ("*Copperweld* precludes a finding that two wholly owned sibling corporations can combine" in violation of *§ 1* of the Sherman Act); *Hood v. Tenneco Texas Life Ins. Co., 739 F.2d 1012, 1015 (5th Cir. 1984)* (if two siblings cannot conspire with their parent in violation of *§ 1*, they cannot conspire with each other); *Century Oil Tool v. Production Specialties, 737 F.2d 1316, 1317 (5th Cir. 1984)* (finding **[*25]** no relevant difference between a corporation wholly owned by another corporation and two corporations wholly owned by a third corporation); but see *Tunis Bros. Co. v. Ford Motor Co., 763 F.2d 1482, 1495, n.20 (3rd Cir. 1985)*, remanded on other grounds, *475 U.S. 1105, 106 S. Ct. 1509, 89 L. Ed. 2d 909 (1986)* (parent corporation could conspire with 79% owned subsidiary.) Interpreting *General Statutes § 35-28* in a manner consistent with the weight of this federal authority, the activities of UHG, UHC, and Oxford as specifically alleged here do not provide the concerted action of legally distinct entities operating without unified business interests sufficient for the application of the anti-boycott provision of *§ 35-28(d)*.

The court appreciates that in today's modern climate of ever expanding corporate conglomerates, any broad unity of interest analysis may create a "gap" in state antitrust protection for anti-competitive, conspiratorial conduct. Two responses address this concern. First, any rigid or formalistic approach to this issue should be eschewed because antitrust liability is not invariably or stringently controlled by the corporate garb or structure of the defendants" realities must **[*26]** dominate the judgment." *Copperweld Corp. v. Independence Tube Corp., supra, 467 U.S. 774*. Moreover, this court, as the Supreme Court did in *Copperweld,* [9] questions the true significance of any enforcement

---

serve other legitimate interests. Especially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, **[*23]** economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability."

[8] See also, *Chicago Prof. Sports v. Natl. Basketball Asso., 95 F.3d 593, 598 (7th Cir. 1996)*: "*Copperweld* does not hold that only conflict-free enterprises may be treated as single entities. Instead it asks why the antitrust laws distinguish between unilateral and concerted action, and then assigns a parent-subsidiary group to the 'unilateral' side in light of those functions. Like a single firm, the parent-subsidiary combination cooperates internally to increase efficiency. Conduct that 'deprives the marketplace of the independent centers of decision making that competition assumes' … without the efficiencies that come with integration inside a firm, go on the 'concerted' side of the line." (Citations omitted; internal quotation marks omitted.)

[9] In regard to *§ 1* of the Sherman Act, the Supreme Court in *Copperweld* expressed the following on this issue: "Although we recognize that any "gap" the Sherman Act leaves [in the antitrust regulation of concerted activity] is the sensible result of a purposeful policy decision by Congress, we also note that the size of any such gap is open to serious question. ***HN10***[] Any anti-competitive activities of corporations and their wholly owned subsidiaries meriting antitrust remedies may be policed adequately without resort to an intra-enterprise conspiracy doctrine. A corporation's initial acquisition of control will always be subject to scrutiny under *§ 1* of the Sherman Act and *§ 7* of the Clayton Act, *15 U.S.C. § 18*. Thereafter, the enterprise is fully

"gap" in light of other remedies under the state's antitrust and tort laws governing the anti-competitive conduct of individual actors. See, e.g., General Statutes § 35-27. [10]

Thus, the motion to strike the tenth through twelfth counts is granted.

B

Antitrust Tying Claims

The seventh, eighth and ninth counts of the complaint are asserted against UHG, UHC, and Oxford, respectively. These counts allege that the defendants are jointly and severally liable for engaging in anti-competitive tying [11] in violation of the Connecticut Antitrust Act, General Statutes § 35-26. [12] "[A] **HN12**[] tying arrangement [is] an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5-6, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). **[*28]** The practice is made illegal by Section 3 of the Clayton Act [15 U.S.C. § 14; Connecticut General Statutes § 35-29] [13] if the product is a commodity, Tire Sales Corp. v. Cities Service Oil Corp., 410 F.Sup. 1222 (N.D.Ill. 1976); otherwise, it is a violation of Section 1 of the Sherman Act [15 U.S.C. § 1; Connecticut General Statutes § 35-26]. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969)." *Bobbins Flooring, Inc. v. Federal Floors, Inc., 445 F. Supp. 4, 10 (E.D.Penn.)*.

HN14[] Similar to General Statutes § 35-28(d), § 35-26 is patterned after and is to be construed consistent with § 1 of the Sherman Act, and therefore, § 35-26 requires the concerted action of two or more persons. Shea v. First Federal Savings & Loan of New Haven, 184 Conn. 285, 305, 439 A.2d 997 (1981). Consequently, the plaintiffs' claims under § 35-26 fail because as previously discussed, the plaintiffs cannot establish concerted action between two legally distinct, economic entities. See generally, Copperweld Corp. v. Independence Tube Corp., supra, 467 U.S. 767; Shea v. First Federal Savings & Loan of New Haven, supra, 184 Conn. 305-6. In addition, the court agrees with the defendants that the plaintiffs **[*30]** have failed to allege facts sufficient to satisfy the basic elements of an illegal tying arrangement.

HN15[] The elements of a tying violation are described as follows: "First, there must be in fact a tying arrangement. Second, the seller must possess sufficient economic power with respect to the tying product to

---

subject to § 2 of the Sherman Act and § 5 of the Federal Trade Commission **[*27]** act, 15 U.S.C. § 45." Copperweld Corp. v. Independence Tube Corp., supra, 467 U.S. 776-77.

[10] General Statutes § 35-27 **HN11**[] is patterned after § 2 of the Sherman Act. Shea v. First Fed. Savings & Loan of New Haven, 184 Conn. 285, 304, 439 A.2d 997 (1981). The settled law is that "[t]he conduct of a single firm is governed by § 2 [of the Sherman Act] alone and is unlawful only when it threatens actual monopolization." Copperweld Corp. v. Independence Tube Corp., supra, 467 U.S. 767. The plaintiffs have not made any claims under General Statutes § 35-27.

[11] "Tying is a form of marketing in which a seller insists on selling two distinct products or services as a package. A supermarket that will sell flour to consumers only if they will also buy sugar is engaged in tying. Flour is referred to as the tying product, sugar as the tied product." Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 33, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984). As the Supreme Court has explained, however, "there is nothing inherently anticompetitive about packaged sales." Id. at 25. "Only when consumers are forced to purchase a tied product with a tying product, due to a defendant's substantial market power in the tying product market, are **[*29]** the protections of the antitrust laws triggered." Michigan Monument Builders of North America v. Michigan Cemetery Assoc., 458 F. Supp. 2d 474 (E.D. Mich. Southern Div. 2006).

[12] Section 35-26 **HN13**[] provides that "Every contract, combination, or conspiracy in restraint of any part of trade or commerce is unlawful.

[13] Section § 35-29 is patterned after section 3 of the Clayton Act. State v. Hossan-Maxwell, Inc., 181 Conn. 655, 661, 436 A.2d 284 (1980).

restrain free competition appreciably for the tied product. Third, a substantial amount of commerce in the tied product must be restrained. In less demanding Clayton Act cases, plaintiff must only demonstrate the existence of a tying arrangement and either of the second or third elements to make out a violation. To establish a violation under the more stringent non-commodity Sherman Act, all three elements must be present." *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 609-10, 73 S. Ct. 872, 881, 97 L. Ed. 1277 (1953)*.

Although the defendants argue that the plaintiffs fail to meet any of the elements necessary for a tying claim, the court limits its consideration to the plaintiffs' failure to assert facts sufficient to satisfy the first element--the existence of an unlawful tying arrangement.

The tying arrangement alleged in this case is "the unlawful effect of conditioning **[*31]** the physicians' purchase of or participation in the 'tying product' (a UHC participating provider agreement) upon their purchase of or participation in the 'tied product' (an Oxford participating provider agreement)." Complaint, P49, p. 29. Although the plaintiffs have alleged a "tying" arrangement in the very general sense that participation in the UHC network is being conditioned on participation in the Oxford network, the type of tying addressed by the antitrust statutes has a more narrow, long established meaning because "[i]t is clear … that not every refusal to sell two products separately can be said to restrain competition." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 11, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984)*.

"***HN16***[] The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market." *Times-Picayune Publishing Co. v. United States, supra, 345 U.S. 614*. Consequently, no cognizable cause of action under the antitrust laws for tying can be established in the absence of allegations demonstrating that the defendants **[*32]** "have foreclosed competition on the merits in a product market distinct from the market for the tying item." *Jefferson Parish Hosp. Dist No. 2 v. Hyde, supra, 466 U.S. 22*. "[A] tying arrangement cannot exist unless two separate product markets have been linked." *Id., 20-21*.

Therefore, the first question which must be addressed in determining whether an unlawful tying claim has been asserted under *§ 35-26* is whether two separate product or service markets are involved in the alleged tying arrangement. The allegations of the complaint clearly indicate that only one market is involved here. UHC and Oxford are both managed care organizations operating in the state of Connecticut market. Complaint P50 (because of the all products clause, the defendants "now maintain a significant portion of the applicable market for managed care organizations in the State of Connecticut); Complaint P51, pp. 30-31 ("[t]here are approximately five (5) other commercial managed care organizations in the State of Connecticut, the small number of which contributes to the appreciable market power that [the defendants] now maintain."). Despite other conclusory, generalized statements in the complaint to the contrary, **[*33]** UHC and Oxford offer contracts in this managed health care market that have different terms, but in this context, the "services" provided by these defendants in this market are legally indistinguishable.

Thus, the motion to strike the seventh through ninth counts is granted.

IV

Motion To Strike CUTPA Counts

The first through third counts of the complaint seek damages under CUTPA against UHG, UHC and Oxford, respectively, alleging that the amendment to the physician provider contracts constitutes an unfair trade practice. The defendants move to strike the CUTPA claims on the grounds that the plaintiffs lack standing to assert them, and even if they do have standing, the plaintiffs have failed to allege any unfair trade practice prohibited by CUTPA.

"***HN17***[] Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the cause of action …"

(Internal quotation marks omitted.) *Ardmare Construction Co. v. Freedman, 191 Conn. 497, 501, 467 A.2d 674 (1983)*. ***HN18***[] A person may file suit under CUTPA upon suffering "any ascertainable loss of money or property, real or **[*34]** personal, as a result of the use or employment of a method, act or practice prohibited by [*General Statutes § 42-110b*.]" *Section 42-110b*, in turn, states that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Finally, *General Statutes § 42-110a* provides the following definitions of essential terms used in the foregoing statutes.

> ***HN19***[] As used in this chapter: (3) "Person" means a natural person, corporation, limited liability company, trust, partnership, incorporated or unincorporated association, and any other legal entity; (4) "Trade" and "commerce" means the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state.

There is no dispute that the plaintiffs have neither a consumer nor competitor relationship with the defendants. Consequently, the defendants argue that the plaintiffs lack standing to assert a CUTPA claim because the plaintiffs do not "operate in the market for defendants' goods and services (i.e., **[*35]** the market for the sale of health insurance and/or health benefit plans) such that defendants' alleged conduct could fairly be alleged to affect competition [in] that marketplace." Memorandum of Law In Support of Defendants' Motion to Strike dated February 16, 2007, p. 18. The court rejects the defendants' argument as too narrowly defining the scope of CUTPA's remedial design.

HN20[] A plaintiff asserting a cause of action under CUTPA must have some consumer or business relationship with the defendant, as "it strains credulity to conclude that CUTPA is so formless as to provide redress to any person, for any ascertainable harm, cause by any person in the conduct of any "trade" or "commerce." *Jackson v. R.G. Whipple, Inc., 225 Conn. 705, 725-26, 627 A.2d 374 (1993)*. In describing the business relationship necessary for a plaintiff to have standing to assert a CUTPA claim, the cases indicate that a business person must have a direct commercial relationship with the defendant, or some other relationship with the defendant in a commercial marketplace, so that a nexus exists between this relationship and an ascertainable loss caused by the defendant's unfair or deceptive practices. **[*36]** See, e.g., *Connecticut Water Co. v. Town of Thomaston,* Superior Court, judicial district of Hartford, Docket No. CV 94 0535590, (Nov. 25, 1996; Corradino, J.); "[A]t the very least, other business people, who are not direct competitors, must have some type of commercial relationship with the alleged wrongdoer--commercial relationship not being so much a business-to-business relationship but some kind of relationship in the marketplace so that the particular acts of wrongdoing alleged will interfere with fair and open competition in that particular marketplace." Accord, *Mar v. WMX Technologies, Inc. et al.,* Superior Court, judicial district of Litchfield, Docket No. CV 96 0071542 (Nov. 6, 1998; Sheldon, J.); *Nolfi v. Melson,* Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV 00 0360876 (June 12, 2000; Moran, J.).

In this case, the plaintiffs have alleged a direct business relationship or involvement with UHC and Oxford and they have alleged injury emanating from this relationship sufficient to assert a claim under CUTPA. All the named plaintiffs explain that they had business contracts with UHC or both UHC and Oxford, and that the gravamen of their CUTPA complaint is that they all **[*37]** were "informed by letter from either UCH or Oxford that despite the fact that UHC and Oxford would continue to operate as separate companies, physicians would now have to become an Oxford provider if they were solely a UHC provider and vice versa. Any physician who did not agree to become a provider for both UHC and Oxford would have their provider agreement terminated." Complaint, P24. According to the complaint, the "all products clause" violates CUTPA because, *inter alia,* it is being imposed upon the plaintiffs in an "uneven playing field [of] bargaining power" and it operates to "deteriorate" the doctor-patient relationship. Complaint, P25. If accepted, the requirement operates to impose unreasonably high administrative fees and unreasonable low fee schedules, and if not accepted, a termination of both UHC and Oxford contracts occurs. On the basis of these claims, the argument by UHC and Oxford that the plaintiffs have not alleged a direct business relationship with them sufficient to establish standing under CUTPA is meritless.

The defendants next argue that the plaintiffs have failed to allege an unfair trade practice cognizable under CUTPA. Because the complaint alleges that **[*38]** the defendants are engaged in the business of insurance and are subject to CUIPA, the cases indicate that the plaintiffs must allege facts sufficient to state a claim under CUIPA in order to maintain a CUTPA claim. The Supreme Court expressed this point in both *Lees v. Middlesex Ins. Co., 229 Conn. 842, 643 A.2d 1282 (1994)* and *Mead v. Burns, 199 Conn. 651, 509 A.2d 11 (1986)*, where the court held that **HN21**[] conduct which does not violate CUIPA does not constitute an unfair act or practice under CUTPA. Specifically in *Lees,* the supreme court held that "[b]ecause the plaintiffs evidence was insufficient to satisfy the requirement under CUIPA that the defendant's alleged unfair claim settlement practices constituted a 'general business practice,' the plaintiff's CUTPA claim could not survive the failure of her CUIPA claim." *Id., 851*. Accord, *Nazami v. Patrons Mutual Insurance Co., 280 Conn. 619, 625, 910 A.2d 209 (2006)* ("[i]n order to sustain a CUIPA cause of action under CUTPA, a plaintiff must allege conduct that is proscribed by CUIPA."); *Anley v. Allstate Ins. Co.,* Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 98 0166413 (Jan. 9, 2002; D'Andrea, J.) **[*39]** ("one cannot maintain a CUTPA claim against an insurer absent an underlying CUIPA claim."); *Delpier v. Connecticut Interlocal Risk Management Agency,* Superior Court, judicial district of Waterbury, Docket No. CV 01 0164366 (Nov. 28, 2001; Pittman, J.) ("defendant correctly asserts that the plaintiff can only maintain a CUTPA count against an insurer if she alleges a violation of the standards of CUIPA"). To support their CUTPA claims, the plaintiffs allege violation of *§ 38a-816(4) of CUIPA*. This provision states that an unfair method of competition and an unfair and deceptive action or practice in the business of insurance include: "[e]ntering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance." *General Statutes § 38a-816(4)*.

This provision **HN22**[] prohibits any agreement or concerted action monopolizing or unreasonably restraining the insurance business through boycott, coercion or intimidation. The defendants contend that because the plaintiffs' antitrust claims fail, this CUIPA claim must fail as well. The defendants, however, **[*40]** have not cited any authority to support this position. Indeed, neither the defendants nor the plaintiffs have cited any case law or even addressed in any specific way how this CUIPA provision should be interpreted or applied viz-a-viz the Connecticut antitrust statutes generally or more particularly viz-a-viz the two antitrust provisions asserted in this case--*General Statutes § 35-26* and *§ 35-28(d)*. The court has not located any cases on these questions, which appear to raise issues of first impression.

The defendants surmise that because the language of the two statutes is identical, the CUIPA and antitrust provisions should be treated alike. However, a close examination reveals that the language of these provisions is similar, but not identical. A reasonable interpretation might be that the legislature intended to provide more expansive rather then mere co-extensive, anti-monopoly protection through this CUIPA provision than that provided by *§ 35-26* and *§ 35-28(d)*, but on this record, and with the parties not fully addressing the matter, the court declines to reach this issue.

Consequently, on the present record, the court cannot conclude that as a matter of law, the plaintiffs have **[*41]** failed to state a CUIPA claim cognizable under CUTPA, and the motion to strike counts two and three against UHC and Oxford is denied.

V

Motion To Strike CUIPA Counts

The fourth, fifth and sixth counts of the complaint are asserted against UHG, UHC, and Oxford, respectively. In each of these counts, the complaint alleges that these defendants individually and jointly committed "acts of boycott, coercion, and intimidation to force physicians to accept the inferior Oxford plan as a condition of continuing as a UHC provider" in violation of CUIPA, *General Statutes § 38a-816(4)*. The defendants move to strike the CUIPA claims on the grounds that the allegations do not state a claim and that CUTPA does not provide for a private right of action. The court agrees with the defendants that CUIPA does not provide for a private right of action.

HN23[] Under CUIPA, the insurance commissioner is authorized to investigate CUIPA violations and institute administrative enforcement proceedings "[w]henever the commissioner has reason to believe that any such person has been engaged in or is engaging in … any unfair method of competition or any unfair or deceptive act or practice

…" *General Statutes § 38a-817(a)*. **[*42]** No private right of action is provided under the statute. Therefore, the precise question at issue is whether such a private right of action should be implied. This question is somewhat academic because as just discussed, an action under CUTPA may be asserted for a CUIPA violation, and CUTPA allows recovery of actual damages, as well as attorney fees and punitive damages. Any relief provided by an implied cause of action under CUIPA would therefore be redundant, and most likely, less extensive.

Our appellate courts have not had the opportunity to squarely address whether a private cause of action exists under CUIPA. In *Carford v. Empire Fire and Marine Insurance Co., 94 Conn.App. 41, 53, 891 A.2d 55 (2006)*, the appellate court decided that with certain exceptions, a right to assert a private cause of action for CUIPA violations through CUTPA does not extend to third parties, but the question whether CUIPA alone allows a private cause of action was not squarely presented, and therefore, was not reached. The court, however, did provide some guidance on this issue by noting that "it is the province of the legislature to create new rights and remedies contained within the highly regulated **[*43]** industry of insurance." The court also explained the following about the legislative history of CUIPA, suggesting that no private right of action should be implied:

> CUIPA is based on a legislative proposal in 1944 by the National Association of Insurance Commissioners (association), which Connecticut enacted in 1955. The model act was amended in 1971 to include a section regulating unfair claim settlement practices, and this state enacted these new provisions in 1973. The specific language of *§ 38a-816(6)* is not enlightening, and the legislative history of the statute is silent as to a third party's right to bring a claim against an insurance company …
> In 1990, the association expressly considered for the first time whether the model act should allow a private cause of action and rejected the idea. The unequivocal rejection was accompanied by a drafting note, stating that a jurisdiction choosing to provide for a private cause of action should consider a different statutory scheme. This [claims settlement practices act] is inherently inconsistent with a private cause of action. This is merely a clarification of original intent and not indicative of any change in position.

(Citations omitted; **[*44]** internal quotation marks omitted.) *Carford v. Empire Fire and Marine Insurance Co., supra, 94 Conn.App. 49-53*.

The superior court decisions considering this question are split, with a majority of these decisions concluding that CUIPA alone does not provide for a private right of action. Compare *Bragg v. New London County Mutual,* Superior Court, judicial district of New London, Docket No. CV 05-4102853 (Oct. 31, 2006; Jones, J.) ; *Starview Ventures, LLC v. Acadia Insurance,* Superior Court, judicial district of New Haven, Docket No. CV 06 5003463 (Oct. 17, 2006; Skolnick, J.); *Carter v. Cambridge Mutual Fire Ins. Co.,* Superior Court, judicial district of Hartford, Docket No. CV 03 0824460 (September 9, 2004; Shapiro, J.); *Lee v. Scottsdale Ins. Co.,* Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV 98 350438 (February 8, 1999; Nadeau, J.) (not recognizing a private right of action); with *Agency Rent A Car v. ITT Hartford,* Superior Court, judicial district of Hartford New Britain at Hartford, Docket No. 93 053053 (Sept. 26, 1994; Corradino, J.); *Polchlopek v. Aetna Life Ins. Co., judicial district of Hartford--New Britain at Hartford, Docket No. 93 0530360, 1994 Conn. Super. LEXIS 1448 (June 3, 1994*; Hennessey, J.) **[*45]** ; *Covino v. Jacovino, Superior Court, judicial district of Waterbury, Docket No. 107889, 1993 Conn. Super. LEXIS 1848 (July 20, 1993; Sullivan, J.) [9 Conn. L. Rptr. 377]*; *Sansone v. Esis, Inc., Superior Court, judicial district of New Haven, Docket No. 92 0327409, 1993 Conn. Super. LEXIS 111 (Jan. 4, 1993; Maiocco, J.) [8 Conn. L. Rptr. 171]*; *Sygiel v. Clifford, Ban & Loos, Insurance Agency, Superior Court, judicial district of New Haven, Docket No. 360149, 1995 Conn. Super. LEXIS 2193 (July 27, 1995; Licari, J.) [14 Conn. L. Rptr. 561]* (recognizing a private right of action.).

The court concludes that on the basis of the specific statutory language and the overall statutory scheme, the cases holding that CUIPA alone does not authorize a private right of action present the more persuasive evaluation of this issue. Therefore, the defendants' motion to strike the fourth, fifth and sixth counts is granted.

VI

Motion To Strike Contract Counts

A

Breach of Express Contract Provisions

In the fourteenth count, the plaintiffs allege that UHC breached its obligations under the participating provider contract which requires, among other things, that UHC "respect and support the physician /patient relationship [while] adhering fairly to the contract for benefits **[*46]** it provides its customers; and to allow the physicians to make independent treatment decisions." Complaint, Fourteenth Count, P50. According to the complaint, the alleged breach of contract has had the effect of curtailing the time that these physicians can spend with their patients; Complaint, Fourteenth Count, P51; and has forced them to deal with Oxford when they otherwise would avoid that insurer because of associated administrative burdens. Complaint, Fourteenth Count, P52.

As noted by UHC, its contracts with the plaintiffs, as evidenced by the agreement attached as Exhibit A to the complaint, provide that UHC has the unilateral right to amend the contract, and if any such amendment creates a "material adverse change" in the agreement that is deemed unacceptable to the plaintiff providers, the plaintiffs have the right to terminate the contracts. [14] This fact is not addressed in the substance of the complaint. In response to the motion to strike, the plaintiffs fail to explain convincingly how UHC's exercise of its unrestricted right to amend the contract to impose the so-called all products clause violates any *express* provision of the contract. For example, the plaintiffs insist **[*47]** that the proposed amendment involving the all products clause conflicts with other provisions of the contract, by violating UHC's obligation "to respect and support the physician/patient relationship … and to allow the physicians to make independent treatment decisions." Complaint P50, p. 40. Nevertheless, to the extent that the proposed amendment imposing the all products clause constitutes a material change to the agreement, or even conflicts with other provisions of the agreement, no express violation of the contract has occurred because under the contract, UHC has the unilateral right to amend the agreement. This authority includes the right to make an amendment representing "a material adverse change to [the] agreement." Complaint, Exhibit A, p. 4; see n.14. In short, as to any express breach of contract claim, the plaintiffs have failed to explain how they can complain about an adverse, material amendment to the agreement when UHC is expressly authorized under the agreement to make such an amendment.

In their objection to the motion to strike, the plaintiffs also make the following argument. The right to terminate the agreements because of an unacceptable amendment belonged to the plaintiffs, not UHC. Consequently, according to the plaintiffs, the breach of contract count states a bona fide claim because UHC wrongly terminated the agreements itself in response to the plaintiffs' unwillingness to accept Oxford. [15] Such a claim must be supported by

---

[14] Exhibit A to the complaint under the heading "How long our agreement lasts; how it gets amended; and how it can end," states the following in pertinent part:

> Upon our execution of **[*48]** this agreement, you will receive a copy from us with the effective date noted on the signature page. It continues until one of us terminates it.
>
> We can amend this agreement or any of the appendices on 90 days' written or electronic notice by sending you a copy of the amendment. Your signature is not required to make the amendment effective. However, if you do not wish to continue your participation with our network as changed by an amendment that is not required by law or regulation but that includes a material adverse change to this agreement, then you may terminate this agreement on 60 days' written or electronic notice to us so long as you send this termination notice within 30 days of your receipt of the amendment.

[15] The court also notes the inaccuracy of the plaintiffs' unqualified statement that only the physicians had the right to terminate the contracts. The terms of the contracts indicate that either party has the right to terminate the agreements upon ninety days prior written notice to the other. See Complaint, Ex. A, p. 4 ("[u]pon our execution of this agreement … [i]t continues until one of us terminates it … In addition, either you or we can terminate this agreement, effective on an anniversary of the date this agreement begins, by providing 90 days written or electronic notice.").

allegations in the **[*49]** complaint before it can be considered on a motion to strike. *Faulkner v. United Technologies Corp., supra, 240 Conn. 580*; accord, *Cayer v. Western Connecticut State University,* Superior Court, judicial district of Hartford, Docket No. CV 04 4001958 (Feb. 16, 2005; Shapiro, J.) (on a motion to strike, trial court may not consider additional allegations by the plaintiff in his response to the motion).

None of the named plaintiffs specifically claim that UHC actually terminated their contracts, except possibly Dr. Austrian (if the complaint is read broadly). See Complaint, P31, p. 10. However, even as to Dr. Austrian, **[*50]** the express terms of the contract require him to *accept* the amendment regarding Oxford *unless* he terminates the agreement. Consequently, as a matter of law, the alleged termination by UHC would have no legal significance (i.e., would not be a proximate cause to any harm to Dr. Austrian) unless he also claims that he would *not* have terminated the contract himself and would have *accepted* Oxford. The complaint makes no such claim. ***HN24***[] A complaint must allege facts sufficient to satisfy all the elements of the purported cause of action, and ***HN25***[] a breach of contract for which no injury is alleged fails to state a legally compensable claim. See generally, *Rosato v. Mascardo, 82 Conn.App. 396, 410-11, 844 A.2d 893 (2004)* ("[t]he elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages."). For similar reasons, the case relied on by the plaintiffs, *Martin v. Kavanewsky, 157 Conn. 514, 255 A.2d 619 (1969)*, involving a quantum meruit claim based on a defendant's anticipatory breach of a contract, is distinguishable and inapposite. The plaintiffs' complaint makes an express breach of contract claim and does **[*51]** not assert a claim based on quantum meruit, an equitable claim applied to avoid unjust enrichment. [16]

B

Breach of Implied Covenant of Good Faith and Fair Dealing

The fifteenth count of the complaint alleges a breach of the implied covenant of good faith and fair dealing against UHC. The doctrine of implied covenant of good faith and fair dealing has been frequently described.

> [I]t is axiomatic that ***HN27***[] the duty of good faith and fair dealing is a covenant implied into a contract or a contractual relationship. In other words, every contract carries an implied duty requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement. **[*52]** The covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed upon by the parties and that what is in dispute is a party's discretionary application or interpretation of a contract term. To constitute a breach of the implied covenant of good faith and fair dealing, the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith. Bad faith has been defined in our jurisprudence in various ways. Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Bad faith means more than mere negligence; it involves a dishonest purpose. Bad faith may be overt or may consist of inaction, and it may include evasion of the spirit of the bargain.

(Citations omitted; internal quotation marks omitted.) *Landry v. Spitz, 102 Conn.App. 34, 42-3, 925 A.2d 334 (2007)*.

"[A]n ***HN28***[] action for breach of the covenant of good faith and **[*53]** fair dealing requires proof of three essential elements, which the plaintiff must duly plead: first, that the plaintiff and the defendant were parties to a contract under which the plaintiff reasonably expected to receive certain benefits; second, that the defendant

---

[16] To further support their claim that UHC breached an express provision of the provider agreements, the plaintiffs also emphasize that the agreements are adhesion contracts. However, ***HN26***[] there is no per se prohibition against adhesion contracts; see generally, *Aetna Casualty & Surety Co. v. Murphy, 206 Conn. 409, 416-18, 538 A.2d 219 (1988)* (observing that insurance policies, generally, are contracts of adhesion); and the "adhesive" nature of a contract, without more, does not render a contract invalid or unenforceable.

engaged in conduct that injured the plaintiff's right to receive some or all of those benefits; and third, that when committing the acts by which it injured the plaintiff's right to receive benefits it reasonably expected to receive under the contract, the defendant was acting in bad faith." *Ruiz v. Dunbar Armored, Inc.,* Superior Court, judicial district of Fairfield, Docket No. CV 03 0404213 (July 19, 2005; Hiller, J.).

UHC moves to strike the fifteenth count alleging breach of the implied covenant of good faith on two grounds. The defendant first argues that the plaintiffs' claim that the all products clause breaches the covenant of good faith is inconsistent with the express provision of the contracts that give UHC the unrestricted, unilateral right to make material amendments to the agreements. See generally, *Southbridge Assocs., L.L.C. v. Garofalo, 53 Conn. App. 11, 17, 728 A.2d 1114 (1999)* (as a general rule, ***HN29***[] the breach of the **[*54]** implied covenant of good faith is a principle that "cannot be applied to achieve a result contrary to the clearly expressed terms of a contract.") UHC's second argument is that the plaintiffs have not sufficiently pleaded that UHC acted in bad faith. Although UHC's motion presents a close question, the court concludes that at this stage of the proceedings and on these pleadings, UHC's motion to strike the fifteenth count must be denied.

Although the court has concluded that the plaintiffs have not stated a cause of action based on an express breach of the agreements, no such finding is necessary to support a claim for breach of the implied covenant of good faith. *Landry v. Spitz, supra, 102 Conn.App. 46-7*. Similarly, contrary to UHC's position, the plaintiffs' implied covenant claim does not find its primary premise on UHC's contractual right to amend the agreements. The focus of the issue concerns the manner in which this right has been exercised. As previously stated, "[t]he covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed upon by the parties and that what is in dispute is a party's discretionary application … of a contract **[*55]** term." *Landry v. Spitz, supra, 102 Conn.App. 42*. As applied here, there is no question that under the terms of the agreement, UHC has the right to amend the contracts, but the dispositive issue is whether this right was exercised in such an unreasonable, oppressive, or onerous way that it represents a bad faith deprivation of the physicians' reasonable expectations under the agreements.

The plaintiffs allege that they expected to receive timely and efficient services, reasonable and prompt reimbursement for medical services provided to patients, respect for the physician/patient relationship, and the right to make independent health decisions; Complaint, Fifteenth Count, P49; and those expectations have been defeated by the coerced acceptance of Oxford insureds by way of the all products clause. They allege that forcing them to accept Oxford and consequently treat patients whom they otherwise would not choose to treat curtails the time they can spend with their other patients, which is contrary to UHC's obligation to respect the physician/patient relationship. Complaint, Fifteenth Count, P51. They further assert that UHC has acted in bad faith by the "take it or leave it" nature of **[*56]** the proposed contract amendment.

Additionally, the reasonableness of UHC's conduct must be considered in the specific context of the alleged circumstances. The plaintiffs were not presented with contracts containing the all products clause in the first instance and faced with a decision whether to accept or reject affiliation with UHC. The plaintiffs were presented with this clause after they had agreed to become UHC providers and after UHC patients comprised a significant percentage of their medical practices. According to the complaint, the plaintiffs' ability to continue to practice medicine effectively and to earn a living was put at stake by the defendant's actions.

Furthermore, as previously stated, the complaint expressly alleges the unilateral, unnegotiable "take it or leave it" nature of UHC's conduct, made under circumstances in which the physicians were without equal bargaining power. Complaint, P25. Thus, in evaluating the reasonableness of UHC's actions, the "adhesive" nature of these contracts is indeed a relevant consideration. An essential feature of an adhesion contract is that it is not subject to negotiation and is imposed on a "take it or leave it" basis upon a party **[*57]** having little or no bargaining power. See *Brown v. Soh, 280 Conn. 494, 504-5, 909 A.2d 43 (2006)*.

Lastly, contrary to the UHC's position, and on this record, the plaintiffs have sufficiently alleged bad faith because "bad faith may include one party's performance or interpretation of the contract in a manner that evades its spirit and is unfaithful to its purpose, resulting in a denial of the justified expectations of the other party." *Landry v. Spitz, supra, 102 Conn.App. 48*.

Therefore, UHC's motion to strike the fifteenth count of the complaint is denied.

VII

Motion To Strike Declaratory Judgment Count

The plaintiffs in the thirteenth count of their complaint seek a judgment against UHC and Oxford pursuant to *Practice Book § 17-55*, declaring that UHC and Oxford be required to keep their approvals offices open for 24 hours a day, seven days a week, and that UHC and Oxford endeavor to reduce hold times on their approval lines to a maximum of ten minutes.

HN30[] The conditions for a declaratory judgment under *Practice Book § 17-55* are that the plaintiffs: (1) have an interest by reason of danger of loss or of uncertainty as to their rights; (2) there is an actual bona fide and substantial issue **[*58]** in dispute and substantial uncertainty of legal relations requiring settlement between the parties; and (3) there is not another proceeding that provides them with immediate redress. UHC and Oxford move to strike the thirteenth count arguing that the subject matter of the plaintiffs' concerns is expressly addressed by statute, and therefore, no judicial "declaration" is required. The court agrees.

General Statutes § 38a-226c(a)(8) addresses the requirement that pre-certification review staff must be available forty hours per week during normal business hours. General Statutes § 38a-226c(e) provides the statutory procedure for an attending physician to transmit an expedited review request upon a covered patient's admission to an acute care hospital. There is no need for the court to "declare" rights that are expressed by statute. In short, the plaintiffs fail to allege facts demonstrating the existence of a substantial controversy or uncertainty of legal relations requiring settlement between the parties.

Moreover, any ruling by the court that the defendants should "endeavor" to limit to ten minutes the amount of time that they place the plaintiffs on hold would be too ephemeral, commenting **[*59]** more on the defendants' telephone etiquette than providing substantive relief, and as such it would be an advisory opinion, adjudicating nothing and binding on no one.

For these reasons, the motion to strike the thirteenth count is granted.

CONCLUSION

For the foregoing reasons, the defendants' motion to strike the plaintiffs' revised first amended class action complaint is *denied* as to the Second Count and the Third Count against the defendants United HealthCare Insurance Company, Oxford Health Plans (CT), Inc., and Oxford Health Insurance, Inc., alleging violation of the Connecticut Unfair Trade Practices Act.

The motion to strike is further *denied* as to the Fifteenth Count against the defendant United HealthCare Insurance Company, alleging breach of the implied duty of good faith and fair dealing.

The motion to strike is *granted* as to counts one and counts four through fourteen.

Within *twenty (20*) days, the plaintiffs may file a new pleading, and in the absence of such a filing, the defendants shall move, *within twenty (20*) days thereafter, for judgment in accordance with this decision. See *Practice Book § 10-44*.

A status conference is hereby scheduled in this case for Monday, September **[*60]** 10, 2007, at 10:00 a.m.

So ordered this 16th day of July 2007.

Barry K. Stevens, Judge

Invacare Corp. v. Respironics, Inc.

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

July 18, 2007, Decided; July 19, 2007, Filed

Case No.: 1:04 CV 1580

Reporter

2007 U.S. Dist. LEXIS 52321 *; 2007-2 Trade Cas. (CCH) P75,784

INVACARE CORPORATION, Plaintiff v. RESPIRONICS, INC., Defendant

Subsequent History: Summary judgment granted by *Invacare Corp. v. Respironics, Inc., 2008 U.S. Dist. LEXIS 27237 (N.D. Ohio, Mar. 31, 2008)*

Prior History: *Invacare Corp. v. Respironics, Inc., 2006 U.S. Dist. LEXIS 77312 (N.D. Ohio, Oct. 23, 2006)*

Core Terms

pricing, reconsideration motion, relevant market, monopolization, predatory, price discrimination, status conference, summary judgment, reconsideration

Counsel: **[*1]** For Invacare Corporation, Plaintiff: John J. Eklund, LEAD ATTORNEY, David A. Ruiz, Maura L. Hughes, William J. Michael, Calfee, Halter & Griswold - Cleveland, Cleveland, OH; Brendon P. Friesen, Mansour, Gavin, Gerlack & Manos, Cleveland, OH; Gregory J. Phillips, Ulmer & Berne - Cleveland, Cleveland, OH; Sharon A. Luarde, Electrolux, Cleveland, OH.

For Respironics, Inc., Defendant: Donald S. Scherzer, LEAD ATTORNEY George W. Rooney, Jr., Rachael L. Russo, Roetzel & Andress - Cleveland, Cleveland, OH; Michael E. Lowenstein, Natalie C. Moritz, Reed Smith - Pittsburgh, Pittsburgh, PA.

Judges: SOLOMON OLIVER, JR., UNITED STATES DISTRICT JUDGE.

Opinion by: SOLOMON OLIVER, JR.

Opinion

ORDER

On October 23, 2006, the court granted partial summary judgment in favor of Defendant Respironics, Inc. ("Defendant" or "Respironics"). [1] (Order, ECF No. 80.) Now pending before the court are Plaintiff Invacare Corporation's ("Plaintiff" or "Invacare") Motion for Reconsideration (ECF No. 82) and the parties' Joint Motion for Scheduling a Status Conference (ECF No. 103). Specifically, Plaintiff seeks reconsideration of the court's grant of summary judgment for Defendant on Plaintiff's monopolization, attempted monopolization, and price **[*2]** discrimination claims. For the reasons stated below, Plaintiff's Motion for Reconsideration (ECF No. 82) is denied and the parties' request for a status conference (ECF No. 103) is denied as moot.

[1] The pertinent facts are fully detailed in the court's Order dated October 23, 2006. (Order, ECF No. 80.)

I. RECONSIDERATION STANDARD

The court notes that it has the authority to reconsider its Order. Motions to reconsider may be treated as motions to alter/amend judgment under *59(e) of the Federal Rules of Civil Procedure*. *Huff v. Metro. Life Ins. Co., 675 F.2d 119, 122 (6th Cir. 1982)*. *Rule 59(e)* motions may be granted if there is: (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) to prevent manifest injustice. *E.g., Gencorp, Inc. v. American Int'l Underwriters, 178 F.3d 804, 834 (6th Cir. 1999)*.

Although it has authority to do so, a court will only reconsider its prior ruling in rare and unusual circumstances:

> Although 'motions to reconsider are not ill-founded step-children of the federal court's procedural arsenal,' they are 'extraordinary in nature and, because they run contrary to notions of finality and repose, should be discouraged.' **[*3]** *In re August, 1993 Regular Grand Jury, 854 F. Supp. 1403, 1406 (S.D. Ind. 1994)*. To be sure, 'a court can always take a second look at a prior decision; but 'it need not and should not do so in the vast majority of instances,' especially where such motions 'merely restyle or re-hash the initial issues.' *Id. at 1407*. It is not the function of a motion to reconsider either to renew arguments already considered and rejected by a court or 'to proffer a new legal theory or new evidence to support a prior argument when the legal theory or argument could, with due diligence, have been discovered and offered during the initial consideration of the issue.' *Id. at 1408*. Where, as is the case with much of the instant motion, 'defendant views the law in a light contrary to that of this Court,' its 'proper recourse' is not by way of a motion for reconsideration 'but appeal to the Sixth Circuit.' *Dana Corp. v. United States, 764 F. Supp. 482, 489 (N.D. Ohio 1991)*.

McConocha v. Blue Cross and Blue Shield Mut. of Ohio, 930 F. Supp. 1182, 1184 (N.D. Ohio 1996). Motions to reconsider are "not designed to give an unhappy litigant an opportunity to relitigate matters already decided, nor is it a substitute **[*4]** for an appeal." *Sherwood v. Royal Ins. Co. of Am., 290 F. Supp. 2d 856, 858 (N.D. Ohio 2003)*.

III. LAW AND ANALYSIS

In its Motion for Reconsideration, Plaintiff argues only that the court has made a clear error in its current holding -- not that any controlling law has changed, or that any new evidence has been discovered, or that the holding creates a manifest injustice.

As stated in the court's previous Order, claims of monopolization, attempted monopolization, and price discrimination "each require some proof of anticompetitive conduct within a relevant market." (Order, ECF No. 80, at 7.) In the instant case, the court defined the relevant product market as all masks sold to both sleep labs and DMEs in the United States, despite Plaintiff's attempt to narrow the relevant mask market to masks sold to sleep labs. (*Id.* at 8-13.) Next, the court analyzed the two types of anticompetitive conduct that Plaintiff alleged in its Complaint: predatory pricing and product bundling. In its Motion, Plaintiff seeks reconsideration in regard to predatory pricing only. (Pl.'s Mot. for Recons. at 1, n.1.)

There are two requirements for a predatory pricing claim: (1) "that the prices complained of are **[*5]** below an appropriate measure of its rival's costs;" and (2) "a demonstration that the competitor has a reasonable prospect, or . . . a dangerous probability, of recouping its investment in below-cost prices." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*. In its previous Order, the court found that Plaintiff's claims failed to satisfy the first element, so the court did not reach the second element. (Order, ECF No. 80, at 18); *see United States v. AMR Corp., 335 F.3d 1109, 1121 (10th Cir. 2003)*.

It is undisputed that Plaintiff's monopolization, attempted monopolization, and price discrimination claims are based on Defendant's "below-cost sales to sleep labs." (Pl.'s Mot. for Recons. at 8; Pl.'s Opp'n to Def.'s Mot. for Summ. J. 21, ECF No. 63.) Plaintiff argued at the summary judgment stage, and continues to argue on reconsideration, that it need only prove that certain isolated prices ("the prices complained of"), rather than Defendant's overall costs in the relevant market, are below cost. The court disagrees, finding that Plaintiff has submitted no authority that has employed this interpretation and, further, that Plaintiff's reading would abrogate **[*6]** the well-settled importance of defining a relevant market.

The court finds that Plaintiff's position ignores the well-settled principle that defining a relevant market is a prerequisite to succeeding on a monopolization, attempted monopolization, or price discrimination claim. *E.g., Spectrum Sports v. McQuillan, 506 U.S. 447, 455, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)* ("[T]he plaintiff charging attempted monopolization must prove a dangerous probability of actual monopolization, which has generally required a definition of the relevant market and examination of market power."); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)* ("Without a definition of [the] market there is no way to measure [the defendant's] ability to lessen or destroy competition."); *Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S. Ct. 1502, 8 L. Ed. 2d 510 & n.41 (1962)* (citing *United States v. E.I. Du Pont de Nemours & Co., 353 U.S. 586, 593, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957)*). If the anticompetitive conduct need not relate to the relevant market, then there would arguably be no need to determine a relevant market. Thus, Plaintiff's position flies in the face of settled ***antitrust law*** principles.

Plaintiff relies on the precise phrasing "prices complained **[*7]** of" in *Brooke Group* and "different purchasers" in the Robinson-Patman Act, as well as similar language in other case and statutory law, to support its argument that a predatory pricing claim can be based on an injury that occurred in an area less than the relevant market. However, none of the authority that Plaintiff cites employs an analysis favorable to Plaintiff. First, although *Brooke Group* used the "prices complained of" phrase, it also characterized the "essence" of a predatory price claim or price discrimination claim [2] as where "[a] business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices *in the relevant market." Brooke Group, 509 U.S. at 222* (emphasis added). The Sixth Circuit has stated, in a case admittedly prior to *Brooke Group,* that "to demonstrate predatory pricing [plaintiff] would have to show that the Defendants' *overall* charges . . . are priced below cost." *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co., 833 F.2d 606, 614 (6th Cir. 1987)* (emphasis added). The Sixth Circuit recently affirmed this position by stating:

> We adopt the principle of *Brooke Group* that where **[*8]** reasonable economic proof justifies a relevant market, the appropriate measure of costs for a predatory pricing claim is for the particular good or service *in that market* . . . .
>
> Other Circuits have determined the appropriate measure of cost for predatory pricing claims to be the average variable cost of the product or service *in the relevant market.*

Spirit Airlines, Inc. v. Northwest Airlines, Inc., 431 F.3d 917, 946 (6th Cir. 2005) (emphasis added) (rejecting idea of including *all* products or services that the defendant provides). As such, the principle that a predatory pricing claim requires analysis of the pricing in the entire relevant market appears quite clear.

Furthermore, the cases cited by Plaintiff for the contrary position are distinguishable. Some were decided on other grounds, without analyzing the price discrimination test, thereby rendering the quoted language dicta. *E.g., Mathias v. Daily News, L.P., 152 F. Supp. 2d 465 (S.D.N.Y. 2001)* **[*9]** (dismissing primary-line price discrimination claim because plaintiff failed to plead the required elements); *Bailey v. Allgas, Inc., 148 F. Supp. 2d 1222 (D. Ala. 2000)* (granting summary judgment for defendants because plaintiffs failed to establish the relevant geographic market). In fact, even *Brooke Group* was decided on the second element of the predatory price test, recoupment, and did not discuss the first element at issue here. Other cases involved secondary-line price discrimination claims, in which a seller's *customer* alleges that the seller is discriminating among purchasers, unlike the instant case, in which the seller's *competitor* alleges discrimination. *E.g., Hoover Color Corp. v. Bayer Corp., 199 F.3d 160 (4th Cir. 1999)*; *Lewis v. Philip Morris, Inc., 355 F.3d 515, 520 (6th Cir. 2004)*.

---

[2] As the court noted in its Order dated October 23, 2006, the Supreme Court has held that a price discrimination claim under the Clayton Act should be treated the same as a predatory pricing claim under the Sherman Act. *Brooke Group, 509 U.S. at 221-22*; (Order, ECF No. 80, at 14 n.3.)

The court also notes that, as support for its opposition to the reconsideration motion, Defendant submitted supplemental authority in the form of a recent Supreme Court case, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007)*. (*See* Def.'s Mot. for Leave to File Not. of Supplemental Authority, ECF No. 92.) However, as the issue before the *Weyerhaeuser* Court was "whether **[*10]** the standard governing predatory pricing claims also governs predatory bidding claims," and as the Court's discussion centered on "relevant input markets" and "relevant output markets," which are not present here, the court finds that *Weyerhaeuser* does not clearly and unequivocally address the issue before the court in the instant case.

Therefore, the court finds that Plaintiff has failed to show clear error on the part of the court with regard to its prior decision granting summary judgment for Defendant on Plaintiff's monopolization, attempted monopolization, and price discrimination claims. As such, the court hereby denies Plaintiff's Motion for Reconsideration (ECF No. 82).

IV. REQUEST FOR STATUS CONFERENCE

On June 14, 2007, the parties jointly requested a status conference to receive guidance on whether to stay discovery on any remaining issues and to schedule pre-trial dates. (ECF No. 103.) As the court has now denied Plaintiff's Motion for Reconsideration, only Plaintiff's claims under *Section 1* of the Sherman Act and Ohio's Valentine Act remain. (*See* Order, ECF No. 80, at 29; Order, ECF No. 90.) As indicated in their request for a status conference, the parties have completed **[*11]** discovery on these issues. (ECF No. 103, P 1.) Consequently, no more discovery shall be conducted.

In light of the within ruling regarding reconsideration, the parties' request for a status conference is denied as moot.

V. CONCLUSION

For the reasons stated above, Plaintiff's Motion for Reconsideration (ECF No. 82) is hereby denied and the parties' Joint Motion for Scheduling a Status Conference (ECF No. 103) is denied as moot. The court further notes that Defendant's Motion for Summary Judgment (ECF No. 94) remains under consideration.

IT IS SO ORDERED.

/s/ *SOLOMON OLIVER, JR.*

UNITED STATES DISTRICT JUDGE

July 18, 2007

In re Polyester Staple Antitrust Litig.

United States District Court for the Western District of North Carolina, Charlotte Division

July 19, 2007, Decided; July 19, 2007, Filed

MDL DOCKET NO: 3:03CV1516 ALL CASES

Reporter

2007 U.S. Dist. LEXIS 52525 *; 2007-2 Trade Cas. (CCH) P75,809

IN RE POLYESTER STAPLE ANTITRUST LITIGATION

Subsequent History: Motion to strike denied by, Motion denied by *In re Polyester Staple Antitrust Litig., 2008 U.S. Dist. LEXIS 43865 (W.D.N.C., Apr. 1, 2008)*

Prior History: *In re Polyester Staple Antitrust Litig., 2007 U.S. Dist. LEXIS 31042 (W.D.N.C., Apr. 25, 2007)*

Core Terms

polyester, staple, prices, customers, purchasers, fiber, products, manufacturers, increased price, conspiracy, announcements, damages, nonwoven, Plaintiffs', certification, fiberfill, antitrust, textile, commodity, negotiations, class member, denier, fine, class action, predominance, class representative, putative class, class period, parties, class-wide

Counsel: **[*1]** For Carolina Mills, Incorporated, Plaintiff: George Franklin Sanderson, III, Ellis & Winters, LLP, Raleigh, NC.

For American Fiber and Finishing Inc., Wellington Leisure Products, Inc., SHAW INDUSTRIES GROUP, INC., Plaintiffs: G. Patrick Watson, LEAD ATTORNEY, Powell Goldstein LLP, Atlanta, GA.

For Avondale Mills, Inc., CMI Industries, Inc., Hampton Capital Partners, LLC, Mount Vernon Mills Inc., Plaintiffs: David C. Eddy, LEAD ATTORNEY, Nexsen Pruet Adams Kleemeier, LLC, Columbia, SC.

For Carolina Mills Inc., Plaintiff: David C. Eddy, LEAD ATTORNEY, Nexsen Pruet Adams Kleemeier, LLC, Columbia, SC; Matthew W. Sawchak, LEAD ATTORNEY, Ellis & Winters, LLP, Raleigh, NC.

For Dan River Inc., National Textiles LLC, Plaintiffs: Jeffrey S. Cashdan, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA.

For Russell Corporation, Plaintiff: Blake Warren Thomas, LEAD ATTORNEY, Robinson, Bradshaw & Hinson, P. A., Charlotte, NC; Jeffrey S. Cashdan, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA.

For Parkdale Mills Inc., Magnolia Manufacturing Co. Inc., Parkdale America LLC, Plaintiffs: Stephen P. Murphy, LEAD ATTORNEY, Reed Smith LLP, Washington, DC.

WestPoint Stevens Inc., Plaintiff, Pro se.

For Delta Clothing **[*2]** Inc., Plaintiff: James F. Wyatt, III, LEAD ATTORNEY, Wyatt & Blake, LLP, Charlotte, NC.

For Class Plaintiffs, Plaintiff: David C. Eddy, LEAD ATTORNEY, Nexsen Pruet Adams Kleemeier, LLC, Columbia, SC; Gregory M. Martin, LEAD ATTORNEY, Jones, Martin, Parris & Tessener, Raleigh, NC; Larry Stephen McDevitt, LEAD ATTORNEY, Van Winkle, Buck, Wall, Starnes and Davis, P. A., Asheville, NC; Michael D. Hausfeld, LEAD ATTORNEY, Cohen Milstein Hausfeld & Toll, PLLC, Washington, DC; Paul Frederick Bennett, LEAD ATTORNEY, Gold Bennett Cera & Sidener LLP, San Francisco, CA; Samuel D. Heins, LEAD ATTORNEY, Heins, Mills & Olson, Minneapolis, MN; Steven A. Asher, LEAD ATTORNEY, Weinstein Kitchenoff & Asher, LLC, Philadelphia, PA.

For Non-Class Plaintiffs, Plaintiff: David C. Eddy, LEAD ATTORNEY, Nexsen Pruet Adams Kleemeier, LLC, Columbia, SC; Everett J. Bowman, LEAD ATTORNEY, Robinson, Bradshaw & Hinson, P. A., Charlotte, NC; G. Patrick Watson, LEAD ATTORNEY, Powell Goldstein LLP, Atlanta, GA; Tushar Vipin Chikhliker, Nexsen, Pruet, Jacobs & Pollard, LLC, Nexsen Pruet LLC, Columbia, SC.

For Doran Mills, Plaintiff: Larry Stephen McDevitt, LEAD ATTORNEY, Van Winkle, Buck, Wall, Starnes and Davis, P. A., **[*3]** Asheville, NC.

For Springs Industries, Inc., SPRINGS GLOBAL US, INC., Fruit of the Loom, Plaintiffs: Blake Warren Thomas, LEAD ATTORNEY, Robinson, Bradshaw & Hinson, P. A., Charlotte, NC.

For Alpek S.A. De C.V., Defendant: Scott Martin, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP, New York, NY.

For DuPont E. I. De Nemours & Co., DAK Americas LLC, DAK Fibers, LLC, Defendants: Kent A. Gardiner, LEAD ATTORNEY, Crowell & Moring, LLP, Washington, DC; R. Bruce Holcomb, LEAD ATTORNEY, Dickstein Shapiro Morin & Oshinsky, Washington, DC; Robert B. Cordle, LEAD ATTORNEY, Mayer, Brown, Rowe & Maw, LLP, Charlotte, NC.

For Hoechst Celenese Corporation, Defendant: Carl N. Patterson, Jr., LEAD ATTORNEY, Smith Anderson, Raleigh, NC; Hector Torres, LEAD ATTORNEY, Kasowitz, Benson, Torres & Friedman, LLP, New York, NY.

For Hoechst Aktiengesellschaft, Celanese A.G., Defendants: Carl N. Patterson, Jr., LEAD ATTORNEY, Smith Anderson, Raleigh, NC; Constantine Z. Pamphilis, LEAD ATTORNEY, Kasowitz, Benson, Torres & Friedman LLP, Houston, TX; Harold G. Levison, Hector Torres, LEAD ATTORNEYS, Kasowitz, Benson, Torres & Friedman, LLP, New York, NY.

For CNA Holdings, Inc., Celanese Amer Corp, Defendants: Carl N. Patterson, **[*4]** Jr., LEAD ATTORNEY, Smith Anderson, Raleigh, NC; Constantine Z. Pamphilis, LEAD ATTORNEY, Kasowitz, Benson, Torres & Friedman LLP, Houston, TX; Harold G. Levison, Hector Torres, LEAD ATTORNEYS, Kasowitz, Benson, Torres & Friedman, LLP, New York, NY; Paul J. Zoeller, Todd H. Colvard, LEAD ATTORNEYS, Kasowitz, Benson, Torres & Friedman, Houston, TX.

For Nan Ya Plastics Corporation, David Lin, Robert Bradley Dutton, Defendants: Alan M. Unger, LEAD ATTORNEY, Sidley, Austin, Brown & Wood, LLP, New York, NY.

For Troy F. Stanley, Sr., Defendant: Stephen T Smith, LEAD ATTORNEY, McMillan, Smith & Plyler, Raleigh, NC.

For Frank Trammell, Defendant: David W. Long, LEAD ATTORNEY, Poyner & Spruill, Raleigh, NC.

For Wellman Inc., Defendant, Movant: Jon R Fetterolf, LEAD ATTORNEY, Williams & Connolly, Williams and Connolly, LLP, Washington, DC.

For Arteva Specialities, S.a.R.L., Defendant: Catherine E. Palmer, Kenneth Conboy, LEAD ATTORNEYS, Latham & Watkins, LLP, New York, NY; Daniel M. Wall, LEAD ATTORNEY, Latham & Watkins, LLP, San Francisco, CA; Edward B. Davis, LEAD ATTORNEY, Bell, Davis & Pitt PA, Charlotte, NC; Michael G. Egge, LEAD ATTORNEY, Latham & Watkins, LLP, Washington, DC; William K. Davis, **[*5]** LEAD ATTORNEY, Bell, Davis & Pitt, P.A., Winston-Salem, NC.

For Grover Smith, Defendant: Stephen W. Petersen, LEAD ATTORNEY, Bradley M. Risinger, Mark A. Finkelstein, Smith Moore LLP, Raleigh, NC; Lisa Frye Garrison, Smith Moore LLP, Greensboro, NC.

For David Whitley, Jim Casey, Movants: Jon R Fetterolf, LEAD ATTORNEY, Williams & Connolly, Williams and Connolly, LLP, Washington, DC.

For Tom Nixon, Movant: Jeffrey A. Long, James, McElroy & Diehl, Charlotte, NC.

Judges: Richard L. Voorhees, United States District Judge.

Opinion by: Richard L. Voorhees

Opinion

Order Granting Class Plaintiffs' Motion For Class Certification Pursuant To FED. R. CIV. P. 23

THIS MATTER comes before the Court on: 1) Class Plaintiffs' Motion To Certify Class pursuant to *Rule 23 of the Federal Rules of Civil Procedure* and all related memoranda and exhibits submitted in support and in opposition thereto. (Documents ## 219, 264-75, 281, 314, 325, 369-371, 383, 395, 415, 422, 428, 434-36, 492, 494-95)

I. Background & Procedural History

This action arises out of allegations by Plaintiffs [1] that between April 1999, and continuing through July 31, 2001, Defendants and their co-conspirators agreed, combined and conspired with each other to fix, raise, **[*6]** maintain and / or stabilize the price of polyester staple and to allocate markets and / or customers for the sale of polyester staple in the United States. (Consol. Am. Cl. Action Compl. at 2.) [2] Plaintiffs collectively allege that as a result of Defendants' unlawful conduct and conspiracy, Plaintiffs paid artificially inflated prices for polyester staple. Plaintiffs assert that Defendants violated Sections 4 and 16 of the Clayton Act, *15 U.S.C. §§ 15* and *26*, and Section 1 of the Sherman Act, *15 U.S.C. §1*. Plaintiffs seek injunctive relief and recovery of treble damages and the costs of this suit, including reasonable attorneys' fees.

Plaintiffs seek to proceed as a class pursuant to *Rule 23(a)* and *(b)(3) of the Federal Rules of Civil Procedure*. **[*7]** The plaintiff class proposed for certification is:

> "All individuals or entities (excluding governmental entities, Defendants, and their parents, predecessors, subsidiaries, affiliates, and their co-conspirators) who purchased Polyester Staple in the United States directly from any of the Defendants or their co-conspirators or any predecessor, subsidiary or affiliate of each, at any time during the period from April 1, 1999 to July 31, 2001."

(Class Compl., P37)

With the exception of Arteva Specialties, S.a r.l, d/b/a KoSa, now named INVISTA S.a.r.l. and Arteva Services, S.a r.l, (hereinafter "Arteva" or "Arteva / KoSa"), all of the Defendants originally named within the Consolidated Amended Class Action Complaint entered into settlement agreements with the Plaintiffs and obtained court approval of the agreements pursuant to *Rule 23(e)*. [3] During 2005 Arteva settled with the various entities (approximately 37) that either prosecuted individual actions against Arteva or hired independent counsel to represent their interests related to this litigation. (Egge Decl., PP5-7) Most of these Non-Class Plaintiffs were relatively large textile (also called fine denier) customers who purchased polyester **[*8]** staple fiber for use in woven textile products, although there were also some carpet manufacturers and nonwoven purchasers within this group.

---

[1] For purposes of this Memorandum and Order, "Plaintiffs" refers to the named class representatives and the putative members of the proposed class as opposed to any individual or non-class plaintiff that elected to pursue its own lawsuit within these consolidated proceedings.

[2] Plaintiffs' complaint is entitled, "Consolidated Amended Class Action Complaint." For convenience, the Court will refer to the pleading as "Class Compl." within the instant Memorandum and Order.

[3] The original Defendants included: the Nan Ya Defendants -- Nan Ya Plastics Corporation ("Nan Ya Taiwan"), Nan Ya Plastics Corporation, America a/k/a Nan Ya Plastics Corporation USA ("Nan Ya America"), and Robert Bradley Dutton; Wellman, Inc. ("Wellman"); the Arteva or Arteva / Kosa Defendants -- Arteva Specialties, S.a.r.l. d/b/a KoSa ("KoSa"), Arteva Specialties LLC ("Arteva"), Arteva Services S.a.r.l. ("Arteva Services"), Arteva Services LLC, Koch Industries, Inc. ("Koch"), IMASAB S.A. de C.V. ("IMSAB"), and Troy F. Stanley; and the DAK Defendants -- E.I. DuPont de Nemours and Co., ("DuPont"), DAK Americas LLC ("DAK"), DAK Fibers LLC, f/k/a DuPont-Akra Polyester ("DuPont-Akra"), and Alpek S.A. de C.V. ("Alpek").

(Beyer Dep. at 77; Egge Decl., Exh. A) According to Plaintiffs, there are hundreds of customers that have not been compensated and remain a part of the putative class. (2-15-06 Hr'g Tr. at 192-93.) [4]

The Court heard oral argument from **[*9]** counsel for the parties on February 15, 2006. Since the 2006 hearing, the parties have submitted voluminous supplemental filings related to certification (as recently as December 2006), including expert reports, rebuttal, and trial reports. The parties have also submitted cross-motions for partial summary judgment. [5] This matter is now ripe for disposition by the Court.

II. Factual Findings

A. The Polyester Staple Fiber ("PSF") Industry

[6]

Polyester Fiber is defined as a "man-made, synthetic polymer fiber derived from polyethylene terephthalate and composed of linear macromolecules having **[*10]** in the chain at least 85% by mass of an ester of diol and terephthalic acid." (Class Compl., P43) For purposes of these consolidated actions, polyester staple is defined as "[A]ny Polyester Fiber cut to specific and relatively limited but spinnable lengths (generally 0.5 to 4-6 inches)." (Class Compl., P44)

Within the polyester staple fiber ("PSF") industry, there are different types of polyester staple fiber customers and an even greater number of products manufactured using PSF. (Class Compl., P48) PSF is used 1) as fiberfill in pillows, mattresses, furniture cushions, comforters, jackets, and sleeping bags; 2) as spinnable fiber for use in both woven and nonwoven applications; [7] and 3) in the manufacture of carpets. [8] Between 1998 and 2001, 53.6% of polyester staple fiber was used in the manufacture of textiles, 21.7% was used in the manufacture of fiberfill, 13.2% in the manufacture of nonwovens, and 11.5% in the manufacture of carpets. (Beyer's Trial Rpt., P10) (explaining that these figures are based upon the average annual U.S. consumption of domestic-made polyester staple fiber).

The characteristics of PSF determine the end use to which it is put. Some of the characteristics of PSF include denier (thickness and weight of the fiber), cut length, cross-sectional shape, tenacity (strength), dyeability, pilling performance (the tendency of fibers to accumulate on a fabric's surface), elongation, shrinkage, and spinning compatibility. (Latten Decl., P5 n. 1, **[*12]** Rust Trial Rpt., P32) Arteva suggests the following general categories: "fine denier staple, nonwoven / industrial staple (including fiberfill), and floor coverings." [9] (Latten Decl., P6) It is

---

[4] All other references to the February 15, 2006 hearing transcript will be cited as "Hr'g Tr. at **.")

[5] Arteva moves for summary judgment against all of the class representatives except Thomaston Mills. Both sides move for summary judgment based upon their theories regarding the scope of the conspiracy. Except for the issues addressed herein, the Court's decision on summary judgment will be issued in a separate Order following notice to the putative class and expiration of the "opt-out" period.

[6] The Court begins with a description of the product and industry at the heart of the litigation. *See* DeLoach, 206 F.R.D. at 553 ("The debate over class certification centers on the nature of the tobacco industry.")

[7] A woven fiber is used in textile applications to manufacture sheets, apparel, home furnishings, **[*11]** towels, industrial fabric. A nonwoven fiber is a "fabric-like" fiber that does not have interlocking continuous fiber strands. A nonwoven may be used to manufacture home furnishings, fabrics used in medical and personal care applications, and automotive and industrial fabrics. Knits also fall into the category of spinnable fiber. Knits are used to manufacture apparel used in sweats, tees, turtlenecks, jerseys and golf shirts.

[8] PSF of 3 denier and above (primarily in the 6 to 8 and 14 to 16 denier ranges) and measuring 1 to 5 inches in length are used as fiber-fill and insulating material. Fiber that is less than 3 denier is spun into yarns and then knit or woven into manufactured textile and apparel products. Fiber of 10 to 18 denier and 6 to 8 inches in length is generally used in the manufacture of carpets.

undisputed that "PSF products designed for end use in one of these customer categories generally are not suitable for use in other categories." (Latten Decl., P6; Rust Trial Rpt., P54) For example, a highloft product (e.g., fiberfill) would not be interchangeable with a fine denier staple product. (White Dep., at 64-65, 358-361.)

Polyester staple fiber is discussed in terms of being "commodity" or "specialty." Most PSF is considered commodity-like, which means **[*13]** that the price is *one of the most important criteria* for a purchaser in choosing between producers of PSF. [10] (Beyer Aff., PP31, 34; Hollander Dep. at 53; Habasit Dep. at 68-69; Thomaston Dep. at 124-125; Tex Tech. Dep. at 101; Fiber Dynamics Dep. at 62-63, 65.) That is not to say that price is the only criteria considered by purchasers. In some instances, the performance of the product for its intended use, or the specific characteristics of the fiber, may be more important than the price. (Habasit Dep. at 103; Hollander Dep. at 145-49, 161-162; Fiber Dynamics Dep. at 22-23; HDK Industries Dep. at 31-32; Carpenter Dep. at 131-132, 143-144; Quality Felt Dep. at 69-70.) Occasionally, a brand name PSF is selected even though the brand carries a higher price. (Carpenter Dep. at 74-76 ("[p]robably close to 100 percent" of its PSF purchases from DuPont were dictated by customer requests that DuPont-branded PSF be used even though the same product type was available at a less expensive price from KoSa); Quality Felt Dep. at 74-75.) [11]

"Specialty" fibers are those which are "not so easily duplicated" and not typically produced on a large scale by commodity PSF manufacturers. (Rust Trial Rpt., P43; Beyer Aff, P37) According to Dr. Rust, true specialty PSF products are rare because many alleged specialty products eventually become commodity products. (Rust Trial Rpt, PP43, 45) (*citing* Arteva and Wellman internal documents commenting on the fact that "specialties" have or will become "commodities"). During the class period, there was a movement on the part of alleged co-conspirators to "redefine" **[*15]** their respective commodity PSF products as "specialty" PSF products so that a premium price could be charged. (Beyer Aff., PP36, 37)

Regardless of the end use, both commodity and specialty PSF begin with the same raw materials, namely, at least 85% polyethyleneterephthalate. [12] (Rust Trial Rpt., PP12a-c, 17) Similarly, most categories of polyester staple fiber are produced on the same basic type of production line. [13] (Rust Trial Rpt., P19) For example, Arteva manufactured

---

9 Referring to PSF categories in this manner can be misleading. According to Jeffrey Hollander, who purchases 100% of the polyester staple for fill, fiberfill is made by "taking polyester staple fiber, processing it so that way it's opened up, carded out, combed out, to become as fluffy as possible . . . ." (Hollander Dep. at 67.) Thus, a nonwoven PSF such as a PSF purchased for fill is processed or prepared for that purpose by the direct purchaser - not the PSF manufacturer. The same is true with respect to the other end use PSF categories.

10 Arteva concedes, "There are particular kinds of textile fibers, carpet fibers, and nonwovens[sic] fibers than[sic] can fairly be considered commodities." **[*14]** (Def.'s Mem. In Opp'n at 48.) Counsel for Arteva describes the "Individually Represented Putative Class Members" as "purchasers of commodity textile PSF products." (Egge Decl., PP5, 6) The characterization of PSF as a commodity is also utilized by other polyester staple manufacturers, Defendants' customers, and trade publications. (Class Pl.s' Exhs. 49, 52)

11 The Carpenter representative testified later that other branded programs were generally unsuccessful. (Carpenter Dep. at 87.) This testimony is consistent with Dr. Beyer's opinion that brand names in the PSF industry *generally* did not affect purchasing. (Beyer Aff., P32)

12 In 2000, Richard Osman, Director of Arteva's New Business Development for Fibers, testified under oath that "Polyester fiber can be made from a variety of inputs with one very important qualification. These inputs are all ultimately derived from the same raw materials, teraphalic acid and ethylene glycol, no matter what their life history might have been . . . The end use product is not distinguished by the end user based on the inputs used in its production." (*See* ITC March 28, 2000 Hr'g / Decision, at 18-20.)

13 Within the nonwoven category, Fiber Dynamics uses the same raw materials and same production line to manufacture different nonwoven PSF products such as drylaid chemically bonded and drylaid point (or thermally) bonded PSF products. (Fiber Dynamics Dep. at 55-56.) One exception to the use of the same production line within the nonwoven category is fiber designed for an airlaid manufacturing process versus fiber designed for a wetlaid manufacturing process. (Latten Decl., PP28-34)

its range of fine denier products during most of the relevant period only at its Spartanburg plant on a modern production line called "CPS3," and made other polyester staple products such as fiberfill on an older line at the same plant. [14] (Def.'s Mem. In Opp'n at 45; Latten Decl., P50) In some cases, it is necessary to use (or add via modification of the line) specific hardware depending on the desired characteristics and properties of the PSF. (Rust Trial Rpt., PP29, 31, 36, 40) Finishes or additives may be applied later in the production process. (Rust Trial Rpt., PP24, 34, 35) Regardless, all PSF products go through a similar manufacturing process: polymerization, extrusion, application of finish, drawing, imparting **[*16]** crimp and heat setting, and cutting. (Rust Trial Rpt., PP19-30)

Within the different categories of PSF described herein, PSF produced by the defendant manufacturers **with the same characteristics and physical properties** may be used interchangeably. (Rust Trial Rpt., PP33, 54; Beyer Aff., PP14 - 20; Beyer Trial Rpt. Reply, P10; Hr'g Tr. at 172-173; Carpenter Dep. at 126-127; Kidd Decl., PP6, 7; Hollander Dep. at 53; Habasit Dep. at 74; Hough Dep. at 180-181.) [15] Arteva contends the "market reality" demonstrates otherwise - i.e., that within the various categories, substitution did not occur as a general rule given compatibility and performance concerns of the direct purchaser, as well as customer-specific requirements of the indirect purchaser. (Carpenter Dep. at 74-76; Fiber Dynamics Dep. at 67.) Indeed, before switching PSF suppliers, purchasers typically perform trials to optimize performance of a new PSF product. (Rust Trial Rpt., P54) There is also evidence that certain direct purchasers were contractually limited in their ability to substitute raw materials without notice to and approval of the indirect purchaser. (HDK Industries Dep. at 20-21.) Similarly, when a particular manufacturer **[*18]** is the only producer of a specialty type PSF (e.g., bicomponent fibers [16] produced in the U.S. only by Arteva), or when a manufacturer has a proprietary interest in a unique finish or other differentiating application, the PSF is not immediately interchangeable. (Rust Trial Rpt., PP43, 44) Even in those instances, if the market supports the action, *theoretically,* other manufacturers could follow suit and begin to produce a comparable PSF product. (Rust Trial Rpt., PP44-45, 48) Shifting production from one PSF category or type to another, particularly between heavy and fine denier products, is rarely done given the costs of reconfiguration. (Latten Decl., PP51, 52)

Generally speaking, PSF does not have any close substitutes. (Rust Trial Rpt., P58) Cotton is probably the closest natural fiber that is a substitute. [17] (Beyer Trial Rpt., P14) In the manufacture of textiles, cotton is used along with PSF in the manufacture of blended fabrics. (Rust Trial Rpt., PP50-51; Beyer Trial Rpt., P14) Within the nonwoven category, other polymer products such as polypropylene compete with PSF but are not considered true substitutes. (Latten Decl., P34; Rust Trial Rpt., P52) Within the fiberfill market, goose and duck down substitutes are more expensive, and polyurethane foam is of lower quality. (U.S. ITC's April 13, 2000, "*Certain Polyester Staple Fiber from Korea and Taiwan,*" Pre-hearing Report to the Commission on Investigation Nos. 731-TA-825-826 (Final) [18], page 23; Hollander Dep. at 33, 37.) Within the carpeting or floor coverings category, nylon is actually preferred over PSF for many products. (Rust Trial Rpt., **[*20]** P53) In each, PSF is usually the most important input in the application for which it is used. (Beyer Trial Rpt, PP17, 21) In 1994, four producers (Arteva, Wellman, DuPont, Nan Ya America) accounted for 87% of the North American market. In 2000, the same four producers accounted for

---

[14] It is not clear whether both production lines had the capability to manufacture PSF across these categories or whether production was **[*17]** structured this way deliberately for efficiency purposes.

[15] Frank Hurst, Carpenter's corporate representative, explained with reference to fiberfill: "I would look at 6 and 15 denier from all of these suppliers as being an **almost generic product.** We can bring product from any one of those suppliers, run it in our plants, and our customers will never tell the difference." (Carpenter Dep. at 126-127.) (*emphasis added*).

[16] A bicomponent staple or "low-melt" product is made with two different components and combines a polyester (or polypropylene) core (to provide strength and resilience) **[*19]** surrounded by a lower melting temperature polymer (or polyethylene or modified co-polyester) sheath. (Rapp Decl., at 12 n. 22, 23; Kimberly Clark Dep. at 63.) When exposed to heat, the fiber forms a strong, cohesive bond with other fibers. Id.

[17] Dr. Rust disagrees with Dr. Beyer regarding cotton being a direct substitute for PSF. (Rust Trial Rpt., PP50, 58)

[18] For convenience, remaining cites to ITC proceedings will be abbreviated as: "U.S. ITC Determination, month / year, at page #."

81% of the North American market. Arteva is the largest producer of polyester staple fiber in the United States. Wellman is the second largest PSF producer, followed by the DAK entities, and then Nan Ya.

PSF manufacturers do not generally publish price lists. (Stanley Decl., P26) However, at least one of the PSF manufacturers, alleged co-conspirator DuPont-Akra, had a list price for each market segment. (Walker Dep. at 32.) Sonny Walker, Dupont-Akra Vice President, testified that "barring some competitive issue, a customer would pay that price." (Id.) The pricing methods for PSF sales vary from customer-to-customer (and sometimes product-by-product) depending upon a **[*21]** number of factors, including the volume being purchased and the prior dealings / nature of business relationship between the manufacturer and purchaser. (Stanley Dep. at 258-260; Walker Dep. at 21-22, 32, 256.) Notwithstanding Dupont-Akra's list prices, different customers paid different prices for the same product. (Id. at 32-33.) PSF manufacturers utilized short and long-term contracts to govern the terms of sale, some of which were broken in order to effect a price increase. [19] (Lambert Dep. Tr. at 213-214.) Some manufacturers offered rebates. (Quality Felt Dep. at 76-77.) Individual price negotiations were common practice between PSF manufacturers and PSF purchasers, particularly the larger customers. (Stanley Decl., PP21, 26-27; Carpenter Dep. at 98 National Textiles Dep. at 78-79; Tex. Tech. Dep. at 106; Habasit Dep. at 115.)

The price of PSF began to fall in 1996, and continued to decline into 1999. (Beyer Aff., P19) Beginning in 1999, and persisting during the class period, the PSF industry experienced "substantial excess capacity." **[*22]** (Beyer Trial Rpt., P18; Trial Reply Rpt., P13; Stanley Dep. at 40.) The industry was described as "sick" due to the "textile industry as a whole [] being bombarded by goods from China." (Dutton Tr. at 290; Stanley Dep. Tr. at 40.) According to Arteva / KoSa Executive, Troy Stanley, customers were routinely filing for bankruptcy and customer plants were shutting down, lessening the demand for PSF. (Id.) Despite an oversupply of PSF during this time period, PSF prices started to rise in mid-1999 and continued to rise through mid-2001. [20] (Beyer Aff., P19)

B. Class Representatives & Composition Of Putative Class

All of the original ten class representatives are (or were during the class period) direct purchasers of PSF. [21] The representatives collectively purchased PSF from each of the Defendants during the class period and used PSF in a variety of products **[*23]** including furniture, pillows, mattress pads, comforters, sheets, pillowcases and industrial products. [22] The class representatives vary in size and are geographically dispersed throughout the United States. (Class Compl., PP7-16) Eight of the nine remaining class representative entities use PSF for the production of nonwoven goods (including fiberfill). (Carpenter Dep. at 22-23; Habasit Dep. at 49; J.H.N.Y. Dep. at 28; Tex Tech Dep. at 34, 180; Southern Fiber Dep. at 24; Quality Felt Dep. At 137-138; Fiber Dynamics Dep. at 48; Hollander

---

[19] Arteva's contracts included the ability to increase prices or increase transportation terms as long as the customer had 30 days notice. (Exh. 19, P6)

[20] Plaintiff's expert, Dr. Beyer, explains that, "[i]n the absence of coordinated actions, economists would expect prices to remain unchanged or decline, and with an undifferentiated product and supply substitution in the PSF industry, all purchasers would have benefitted from unchanged or lower PSF prices." (Beyer Trial Reply Rpt., P13)

[21] There are only nine class representatives now because Doran Mills and Arteva settled Doran Mills' claim against it on February 9, 2007. (Document # 521)

[22] Class representatives who were **nonwoven fiberfill customers** include: Quality Felt (manufactures mattress and furniture stuffing); Carpenter (mattress and furniture stuffing); Southern Fiber (mattress and furniture stuffing); and Hollander Home Fashions (home furnishings such as pillows, comforters). **[*24]** Class representatives who were **industrial nonwoven customers** include: Habasit Belting (manufactures lightweight conveyor belts); Tex Tech, Inc. (filtration products, mattress products, fire-blocking material); JHNY, Inc. (automotive applications such as gaskets); and Fiber Dynamics, Inc. (filtration and insulation).

Dep. at 22.) One of the class representatives, Thomaston Mills, uses PSF to produce textiles. (Thomaston Dep. at 38.) There is no class representative that purchased carpet fiber. [23] (Hr'g Tr. at 174.)

Counsel for Arteva represents **[*25]** that based on its textile fiber sales, "only 13 percent of its sales of [sic] or customers accounting for 13 percent of its sales are even potentially within the class." (Hr'g Tr. at 102.) Plaintiffs take issue with the 13 percent figure but agree that the known "opt-outs" (37 out of 1115 putative class members noticed) thus far comprise approximately 70 to 75% of the putative class in terms of its sales volume. (Hr'g Tr. at 189, 192; *See also* Egge Decl., P2) Plaintiffs also contend that during the class period, class representatives' sales represent as much as 69.4% of Arteva's PSF sales, and more than $ 730 million worth (1.293 billion pounds) of first quality polyester staple fiber from all Defendants. Plaintiffs claim to have purchased $ 280 million worth (462 million pounds) from Arteva alone. (Hr'g Tr. at 189; Pl.s' 3-3-06 Letter at 5.) Arteva is also subject to joint and several liability based upon the sales of its alleged co-conspirators, minus settlement figures. (Id.)

C. Arteva's Polyester Staple Fiber Business

24

In December 1998, Arteva purchased all of Hoechst Celanese' s PSF manufacturing assets. [25] (Stanley Decl., P12) During the class period, Arteva had two plants in the United States that produced PSF (Salisbury, NC and Spartanburg, SC), two in Mexico, and one plant in Canada. During the relevant time period, Arteva produced as many as 196 PSF products for use in apparel and home fashions, insulation, personal hygiene, filtration, automotive, and other specialized customer needs. [26] (Latten Decl., P5) Arteva was the sole supplier of certain types of PSF. [27] (Rapp Decl. P24; Latten Decl. PP9, 16; Tex Tech. Dep. at 33, 58, 72-73 (flame retardant PSF for use in bus seat and mattress fire blocking); Kimberly Clark Dep. at 28-29 (diapers)). Sales to fiberfill customers accounted for approximately 20% of Arteva's sales of PSF during the class period. (Latten, **[*27]** P30)

In1999, Arteva's website characterized its PSF division as a "mostly commodity-oriented" business. (Class Pls.' Exh. 1 to 3-3-06 Letter) In one of its internal documents from the Fall of 2000 regarding pricing, Arteva noted its two

---

[23] Based upon the descriptions of carpet fiber (10 to 18 denier and 6-8 inches in length) adopted by Plaintiffs' expert, Dr .Beyer, PSF for the manufacturing of carpets is not necessarily included within Plaintiffs' definition of polyester staple. (*Compare* Class Compl., P44 - "generally 0.5 to 4-6 inches" in length) with Beyer's Trial Rpt, P12). Later within Dr. Beyer's report he states that "[t]he class products include all the products covered by the U.S. ITC proceedings plus products both below and above the U.S. ITC denier range." (Beyer's Trial Rpt, n. 18) The length of the PSF is not mentioned.

According to counsel for Arteva, Arteva settled with all but about 3 percent of its carpet fiber purchasers through direct or individual action. (Hr'g Tr. at 103.) Neither side paid much attention to this PSF category in its filings or in oral arguments.

[24] The Court provides a brief description of the relevant facts that pertain to Arteva / KoSa since it is the only remaining Defendant. If Plaintiffs are successful **[*26]** in proving the conspiracy as alleged in the Amended Consolidated Class Action Complaint, Arteva, as an alleged co-conspirator, will be jointly and severally liable for the damages sustained by all class members' PSF purchases that are encompassed within the conspiracy. *See* *In re Vitamins Antitrust Litig., 209 F.R.D. 251, 262 (D.D.C.2002)*.

[25] In 2003, a related civil action was commenced in the Southern District of New York by Arteva entities including its parent, Koch Industries, Inc., against the Hoechst Celanese entities. *See* SDNY Civil Docket No.: 1:03CV8679. Koch Industries seeks to recover from Hoechst based upon the alleged fraudulent sale of Hoechst's PSF business. Essentially, Koch Industries alleges that it purchased a price-fixing conspiracy from Hoechst. The SDNY case is still pending but a review of the docket shows little activity since the filing of initial disclosures in August 2004.

[26] Arteva does not produce PSF for floor coverings at present. (Latten, P6 n.2)

[27] The fact that Arteva was the sole supplier of certain types of PSF is one of Arteva's defenses to the action. Arteva's argument is that the alleged conspiracy could not have affected the PSF purchasing decisions of these entities and, therefore, the fact of injury cannot be shown.

different types of polyester staple **[*28]** fiber business - commodity and specialty. (Class Pl.s' Exh. 22) The document belies Arteva's present claim in that according to the document, Arteva's commodity polyester staple business was comprised of fine denier woven and knits as well as heavy denier (needle punch, nonwovens, and carpet backing). (Id.) Commodity PSF was at a lower price point than specialty PSF. (Id.) Arteva's commodity business covered 30 to 40 markets. (Id.) Arteva had approximately 50 fine denier woven and knit customers and approximately 400 heavy denier customers. (Id.)

Paul Latten, Vice President of Nonwoven and Textile Fibers for Arteva, has worked with Arteva for over twenty years and currently oversees Arteva's PSF business. (Latten Decl., PP2, 4) Latten previously managed Arteva's nonwoven (including fiberfill) business. (Id., P3) Latten asserts that Arteva had separate business divisions and pricing mechanisms based upon end use. (Id., PP14, 53, 54) In fact, in one of its documents (contemporaneous to the conspiracy) Arteva speaks of the "well established markets and sub-markets" within the PSF industry. (Beyer Aff., P27 (*citing* KOSA049642))

Troy F. Stanley, Sr. ("Stanley") was employed by Hoechst Celanese **[*29]** Corporation prior to Hoechst's sale to Arteva - from 1989 through 1998. (Stanley Decl., P6) In April 1999, Stanley was named by Arteva as Business Director for Textile Staples for United States and Canada. (Stanley Decl., P12) Stanley has not been actively employed by Arteva since 2001. (Stanley Decl., P12) Stanley is assisting Arteva in its defense of the lawsuit and remains on the payroll. (Stanley Decl., P3; Hr'g Tr. at 184.)

D. Price Increase Announcements Issued By Defendant Manufacturers Of Polyester Staple Fiber

Between June 28, 1999 and June 30, 1999, all four major manufacturers of polyester staple in the United States announced price increases ranging from 10 to 15% effective by early August. (Class Pl.s' Exh. B) Each of the manufacturers recognized in their respective announcements that increases in raw materials were driving the price increase announcements. Many of the price increase announcements also expressly referred to the depressed prices in the recent past as well as the effect of Asian imports.

On June 29, 1999, Arteva / KoSa made the following announcement:

> "KoSa, one of the world's largest polyester producers, is increasing the prices of its **polyester staple products** **[*30]** by 10 to 15 percent, effective with August orders. . .
> * * *
> KoSa produces commodity and specialty polyester products . . ."

(Pl.s' Exh. B) Wellman's price increase announcement, issued the next day on June 30, 1999, specified that it intended to "raise the price of **Fortrel(R) brand polyester staple** by 10 - 12 %." (Id.) Later in its announcement, Wellman described its Fortrel(R) brand polyester as a **"textile fiber."** (Id.) DAK issued a similar announcement. (Id.) Nan Ya expressly stated in its June 28, 1999 price increase announcement it would be "increasing the selling price of **all Polyester Staple Fiber** 10 -12%, effective August 1, 1999."

A few months later, between October 1, 1999, and October 5, 1999, Arteva, Dupont and Nan Ya announced price increases ranging from 10 to 15 % effective November 1, 1999. In its October 1, 1999, announcement, Arteva stated its intention to raise the prices of its **polyester staple products** by 10 to 15 percent, effective with November 1, 1999 orders. (Pl.s' Exh. C) DuPont-Akra followed KoSa and on October 5, 1999, announced its increase of 10-12% of "**global polyester staple prices,**" effective October 30, 1999. (Id.) Nan Ya issued a similar price increase **[*31]** announcement on the same day, stating that it would be increasing the selling price of **all Polyester Staple Fiber** 13 - 15%, effective November 1, 1999. (Id.)

Between January 10, 2000, and January 14, 2000, DuPont, Arteva, Nan Ya and Wellman announced price increases ranging from 10 to 15%, effective in mid-February. (Pl.s' Exh. D) Arteva's press release advised that KoSa would be "increasing the prices of its **polyester staple products** by 10 to 15 percent, effective with February 15, 2000 orders." (Id.) Like its June 1999 announcement, KoSa mentioned its production of both "commodity and special polyester products" but did not limit the price increase announcement in any way. (Id.) Wellman's January 13, 2000 price increase announcement expressly expanded its price increase to cover **"all polyester staple"** and stated that its **price increase would "affect the apparel, home furnishings, industrial, non-wovens, fiberfill and carpet markets."** (Id.) DuPont's January 10, 2000 announcement refers to increased imports of Asian fabrics and garments but repeats that "**global polyester staple** prices are being increased . . ." (Id.)

E. Related Criminal Proceedings Against Arteva & Troy Stanley

The sole **[*32]** remaining Defendant named by the putative class is the single corporate entity that was prosecuted criminally. [28] Defendant Arteva / KoSa pled guilty to conspiring to violate the Sherman Antitrust Act, *15 U.S.C. §1*. (*See* WDNC Criminal Docket No.: 3:02CR229-V) Arteva was required to pay a monetary fine in the amount of $ 28,500,000.00. On December 18, 2002, Troy Stanley also pled guilty to conspiring, in restraint of trade, to fix certain polyester staple fiber prices and allocate certain polyester staple customers for the time period September 1999 through January 2001, in violation of the Sherman Act, *15 U.S.C. §1*. (*See* WDNC Criminal Docket No.: 3:02CR230-V) Stanley was sentenced to one year probation and a $ 5,000 fine. [29]

For purposes of the criminal prosecution, the charging instruments and plea agreements included identical descriptions of polyester staple as well as the following language explaining the types of products that are made with polyester staple:

> "Polyester staple is a man-made, petroleum-based fiber that is manufactured in varying thicknesses and cut into short lengths. It is sold to textile manufacturers who incorporate it into fabrics for sheets, shirts, and other wearing apparel. Other forms of polyester staple have applications in items such as sleeping bags, pillows, and comforters." [30]

(Indictment, P5; Plea Agreement, P4(a))

Arteva's Plea Agreement included a proffer **[*34]** of the facts that the Government's evidence tended to establish. The factual basis agreed to by Arteva and the United States follows:

> During the relevant period, the defendant, through its officers, directors, managers, or employees, participated in a conspiracy with other persons and entities engaged in the manufacture and sale of polyester staple, the primary purpose of which was to fix, increase and maintain prices, coordinate price increases, and allocate customers for **first-quality polyester staple** sold in North America. In furtherance of the conspiracy, the defendant, through its officers, directors, managers, or employees, engaged in **bilateral discussions** and attended **bilateral meetings** with representatives of other polyester staple producing firms. During these discussions and meetings, agreements were reached as to the **first-quality polyester staple customers** to which the conspirators would sell and the prices at which they would sell **first-quality polyester staple** in North America.

(Arteva Plea Agreement, P4(b)) Stanley's Plea Agreement contained an almost identical statement of the factual basis. (Stanley Plea Agreement, P4(b))

---

[28] In 2001, DuPont admitted participation in a conspiracy to fix prices and allocate customers in the PSF industry. DuPont and the other DAK Defendants participated in the U.S. Department of Justice's Corporate Leniency Program in order to avoid criminal prosecution. (Class Compl., P64) After months of ongoing grand jury investigation that delayed the progress of the instant civil action, the DOJ ultimately elected not to pursue criminal charges against Wellman or **[*33]** any of the other alleged co-conspirators.

[29] Stanley's Plea Agreement was modified on November 10, 2004, several days prior to the actual sentencing hearing, in view of an agreement between the United States and the Defendant that an active term of imprisonment was unnecessary in this case. (3:02CR230-V, Document # 9)

[30] In support of its motion for partial summary judgment, Arteva contends that this provision reflects a "basic industry distinction between woven and nonwoven fibers." (Arteva's Mem. In Supp. Summ. J. at 19.)

At sentencing, federal prosecutor Mitch Chitwood **[*35]** ("Chitwood"), U.S. Department of Justice, Antitrust Division, described the conspiracy in similar terms. Chitwood stated that "bilateral" discussions and meetings were employed and that the conspiracy targeted "primarily" textile customers. (Sentencing Hr'g Tr. at 6.) When asked about victim notification, Chitwood stated that "given the number of potential victims in this case, which are extraordinary, essentially any company or any individual who bought polyester staple throughout the United States, I think such notice would be impractical." (Sentencing Hr'g Tr. at 24-25.)

F. Canadian Criminal Proceedings

The Canadian Attorney General also initiated criminal proceedings against the alleged co-conspirators. (Canadian Case No.: T-1527-03) On August 6, 2003, Arteva was formally charged by the Canadian Government with unlawfully conspiring "to prevent or lessen, unduly, competition in the production, manufacture, purchase, sale, storage, transportation or supply of a product, namely, polyester staple fibre, in Canada, contrary to paragraph 45(1)(c) of the *Competition Act.*" (Pl.s' Exh. A) (*italics in original*) Arteva admitted much of what was alleged in the Canadian proceedings, including **[*36]** "announc[ing] price increases for the product at agreed ranges that differed for each competitor but, through individual negotiations with individual customers, aimed to achieve increased price levels." (Pl.s' Exh. A / Statement of Admissions, P17(c))

G. Related March 2006 U.S. International Trade Commission ("ITC") Rulings

[31]

On April 2, 1999, DuPont, Nan Ya America, Arteva and Wellman ("ITC Petitioners") jointly filed an "Antidumping Duty Petition on Certain Polyester Staple Fiber from South Korea and Taiwan" in the United States International Trade Commission ("ITC"). (U.S. ITC Determination, April 2000) The initial proceedings consisted of an investigation of fiberfill being imported from Korea and Taiwan. [32] Spinnable PSF and PSF for carpeting were excluded from the investigation. (Class Compl., P52; Beyer Aff., P16 n. 10) The anti-dumping proceedings were initiated due to ITC Petitioners' allegation that low cost fiberfill from Taiwanese, Chinese and other Asian importers was being "dumped" in the United States at very low prices and having a negative impact on the United States fiber fill industry and other PSF markets. (Beyer Trial Reply Rpt., P12) In May 2000, the original ITC proceeding resulted in imposition of various restrictions and duties up to fourteen percent on Korean and Taiwanese imports. [33] (Beyer Aff., P18)

---

[31] The findings of the U.S. International Trade Commission are of limited value, but probative of the certification issue nonetheless. Arteva implies that the ITC rulings provide conclusive evidence in support of Arteva's theory of the case, i.e., the conspiracy was much narrower than alleged by Plaintiffs. At the same time, Arteva criticizes Dr. Beyer for relying extensively on the proceedings. Dr. Beyer, like the undersigned, considers the ITC proceedings, along with other sources of information, in his study of the PSF industry. (Beyer Trial Reply Rpt., P12) That said, inclusion of the ITC proceedings and determinations in the context of evaluating whether certification of a class is appropriate does not mean the Court would necessarily deem this evidence admissible at trial. In addition to addressing any other evidentiary objections the parties may raise, the **[*37]** Court would carefully evaluate this evidence under *Rule 403 of the Federal Rules of Evidence.*

[32] Defendant ITC Petitioners defined the market for purposes of the anti-dumping investigation **[*38]** as: "synthetic staple fibers, not carded, combed or otherwise processed for spinning, of polyesters measuring 3.3 decitex (3 denier inclusive) or more in diameter. This merchandise is cut to lengths varying from one inch (25 mm) to five inches (127 mm). Merchandise subject to the investigation may be coated, usually with silicon or other finish or not coated. This Polyester Staple is referred to in the Petition as "certain polyester staple fiber."" (Compl., P51)

[33] Plaintiffs' expert contends that the anti-dumping duties constitute a barrier to entry of the PSF market that aided the implementation of the price-fixing conspiracy.

In 2006 the ITC commenced proceedings for the purpose of reconsidering its earlier ruling. (*See* U.S. ITC's March 2006, "*Certain Polyester Staple Fiber from Korea and Taiwan,*" Investigation Nos. 731-TA-825-826 (Review)). In March 2006, the ITC found that "the record does not substantiate the theory that the conspiracy in question covered products other than fine denier PSF for textile applications, a product not subject to these reviews, and that the antitrust conspiracy did not impact the record of these reviews such that the pricing data or other information **[*39]** on the record [related to fiber fill] should be discounted." (U.S. ITC Determination, March 2006, page 18.) The ITC expressly acknowledged its limitations by observing that "ascertaining antitrust violations *based upon conflicting or ambiguous evidence* submitted in civil antitrust proceedings is outside the Commission's expertise." (Id., page 21 n. 146, pages 22-23, n. 158) (*emphasis added*). The ITC did not revoke the anti-dumping duty orders previously imposed for fear that revocation might lead to a continuance or recurrence of material injury to domestic producers.

The ITC also noted the industry practice: "domestic producers of PSF generally followed pricing announcements covering all PSF products with negotiations with specific customers over the price of specific types of PSF." (U.S. ITC Determination, March 2006, page 23.) The ITC stated that the price increase announcements were "typically spurred by increased costs for inputs common to all PSF products. . . ." (Id., page 21.)

III. *Rule 23(a)* Considerations / Amenability To Class Treatment

"The class action device, which allows a representative party to prosecute his own claims and the claims of those who present similar issues, **[*40]** is an exception to the general rule that a party in federal court may vindicate only his own interests." *Thorn v. Jefferson-Pilot Life Ins., 445 F.3d 311, 318 (4th Cir. 2006)* (*citing* *Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 156, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982))*. "Chief among the justifications for this device is its efficiency: adjudication of a properly-constituted class action generally has res judicata effect and "saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion."" *Thorn, 445 F.3d at 318* (*quoting* *Califano v. Yamasaki, 442 U.S. 682, 701, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979))*. Another benefit of the class action device is to "afford aggrieved persons a remedy if it is not economically feasible to obtain relief through the traditional framework of multiple individual damage actions." *Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 424 (4th Cir.2003))* (*citing* 5 James Wm. Moore, et al., *Moore's Federal Practice, §23.02* (3d ed. 1999)).

A court may certify a class only "after a rigorous analysis that the prerequisites of *Rule 23(a)* have been satisfied." *Falcon, 457 U.S. at 161*. A "rigorous analysis" ensures that both the **[*41]** rights of the absent plaintiffs to present claims that are different from those common to the class, and the right of the defendant to present facts or raise defenses that are particular to individual class members, are protected. *Thorn, 445 F.3d at 318* (*citing* *Falcon, 457 U.S. at 161*.)

In order for a class to be certified, "a proposed class must satisfy *Rule 23(a)* and one of the three sub-parts of *Rule 23(b)*." *Thorn, 445 F.3d at 318* (*citing* *Gunnells, 348 F.3d at 423*.) *Rule 23(a)* requires that 1) the class be so numerous that joinder of all members is impracticable; 2) there are questions of law or fact common to the class; 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and 4) the representative parties will fairly and adequately protect the interests of the class. *FED. R. CIV. P. 23(a)*; *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. It is Plaintiffs' burden to demonstrate satisfaction of the *Rule 23* requirements. *Thorn, 445 F.3d at 321* (*citing* *Windham v. Am. Brands, Inc., 565 F.2d 59, 65 n. 6 (4th Cir.1977)* (*en banc*)). The *Rule 23(a)* criteria are discussed first.

Here, the numerosity requirement is not at issue given **[*42]** Plaintiffs' unchallenged representation that hundreds of putative class members remain. In addition, members of the putative class are geographically dispersed which presents a potential obstacle to joinder. *See* *In re Vitamins Antitrust Litig., 209 F.R.D. 251, 259 (D.D.C. 2002)* ("[C]ourts often take the geographical location of the proposed class members into consideration when deciding whether or not certification is appropriate.")

Before discovery was complete, the Court found in the context of Rule 23(e) that the commonality requirement of Rule 23(a) [34] was easily met. [35] *See generally,* Ballard v. Blue Shield, 543 F.2d 1075, 1080 (4th Cir. 1976); Brown v. Cameron Brown Co., 92 F.R.D. 32, 38 (E.D.Va. 1981) (allegation of conspiracy to violate the antitrust laws involves questions common to the class). While the Court might frame the common issues slightly differently now, the result is the same. Commonality of both factual and legal issues exists.

The typicality of claims requirement is also satisfied. To be given the trust responsibility imposed by Rule 23, "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." Deiter v. Microsoft Corp., 436 F.3d 461, 466 (4th Cir.2006). In determining whether the claims of the class representatives are typical of the class, the Court looks to the nature of the claims asserted (i.e., the legal theory) rather than any specific factual differences amongst class members. *See* Brown, 92 F.R.D. at 38; Woodard v. Online Info. Servs., 191 F.R.D. 502, 505 (E.D.N.C. 2000) (*citing* Holsey v. Armour & Co., 743 F.2d 199, 216-217 (4th Cir.1984)). While Plaintiffs' claims should be "squarely aligned," Plaintiffs' claims and the claims of class members need not "be perfectly identical or perfectly aligned." Deiter, 436 F.3d at 467. Here, Plaintiffs' **[*44]** claims are typical of each other because each alleges injury via an illegal overcharge as a result of an industry-wide price-fixing and customer allocation conspiracy in violation of the Clayton Act.

Adequacy of representation is also met. The fourth criteria under Rule 23(a) requires the representative parties to "fairly and adequately protect the interest of the class." FED. R. CIV. P. 23(a). Fair and adequate representation depends upon the qualifications and experience of Plaintiffs' counsel as well as whether the class representatives have any interests antagonistic to the class. In re Vitamins, 209 F.R.D. at 261. Stated differently, the adequacy of representation inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." [36] Amchem, 521 U.S. at 625 (*citing* Falcon, 457 U.S. at 157-158.) Determining whether any conflict exists is critical because the absent class members who do not elect to "opt-out" are ultimately bound by the class action. Gunnells, 348 F.3d at 427.

As an initial matter, the competency of Plaintiffs' **[*45]** counsel, as well as counsel's ability to handle a complex class action is evident. Class Counsel, who have appeared before the Court on numerous occasions during the course of the litigation, have been exceptionally well-prepared on each occasion and demonstrated a mastery of both antitrust and class action jurisprudence. Plaintiffs' counsel have vigorously prosecuted this action and will undoubtedly continue to do so upon certification.

Regarding the alignment of interests, Arteva contends that the legal strategies of PSF textile customers like Thomaston and Spartan Mills (putative class member) and that of nonwoven purchasers differ and create intra-class conflict. Arteva further contends that its respective defenses to each individual class representative, create intra-class conflicts. [37] Under Arteva's theory, a lawyer representing Thomaston or Spartan Mills would embrace Troy Stanley's testimony whereas a lawyer representing a nonwoven purchaser like Quality Felt would seek to discredit Stanley. (Mem. In Opp. at 25; Hr'g Tr. at 146-147.) However, one class member's emphasis on particular evidence does not defeat certification. Plaintiffs also correctly point out that Thomaston **[*46]** and other putative

---

[34] FRCP 23(a)(2) does not require that the common factual and legal issues predominate whereas (b)(3) does.

[35] At that time, the common questions were identified as:

> 1) Whether the prices of Polyester Staple were raised, fixed, maintained or **[*43]** stabilized at artificial and non-competitive levels;
>
> 2) Whether the conspiracy had the effect of fixing, maintaining and stabilizing prices of Polyester Staple in the US; and
>
> 3) Whether prices paid by plaintiffs and putative class members were higher than they would have been absent the conspiracy.

[36] The adequacy of representation inquiry tends to merge with the question of typicality. Falcon, 457 U.S. at 158 n.13.

[37] The effect of Arteva's defenses is analyzed in greater detail in conjunction with the Rule 23(b)(3) discussion.

class members who purchased fine denier PSF will recover the same monetary award under either theory, regardless of the ultimate finding regarding the scope of the conspiracy. (Pl.s' 3-3-06 Letter at 14.)

In Gunnells, the Fourth Circuit stated that in order for a conflict to defeat class certification, the conflict must be "fundamental" and "go to the heart of the litigation." [38] *Gunnells, 348 F.3d at 430-431*; *Brown, 92 F.R.D. at 41 n.9* (*internal citations omitted*). The plaintiff class in Gunnells was comprised of both purchasers (employers) and beneficiaries (employees) of a multi-employer health care plan. Plaintiffs' lawsuit sought class-wide recovery for both employers' and employees' claims precipitated by the plan's collapse. The defendant claimed that class conflicts existed based upon the potential for the employee members to seek additional redress from the employer members for unpaid medical bills resulting from the collapse of the plan. The Fourth Circuit panel discounted the purported conflict as not bearing on "the heart of the litigation." *Gunnells, 348 F.3d at 431*. **[*47]** The appellate court reasoned that both the employers and employees "share common objectives and the same factual and legal positions," and thus "have the same interest in establishing the liability of [the defendant]." (*Id.*) Such is the case here.

Arteva also makes much of the fact that the *Rule 23(e)* settlement between Plaintiffs and the DAK Defendants excluded fiberfill from the definition of polyester staple. (*See* Class Plaintiffs' & DAK Defendants' Settlement Agreement, P8) (defining Polyester Staple as: "[A]ny Polyester Fiber, **other than Fiberfill,** cut to specific and relatively limited lengths (generally 0.5 to 4-6 inches).") Arteva implies that the DAK Defendants, like Arteva, successfully challenged the Plaintiffs on their inclusion of fiberfill customers within the putative class. Arteva suggests that the parties both recognized that fiberfill was not affected due to substantial competition from foreign producers. In support, Arteva alleges that *DuPont* manufactured fiberfill during the class period. (Penrice Aff., P5, P20-21) According to Jon Penrice, former Global Business Manager for DuPont's PSF specialty branded division, DuPont sold approx 190 million pounds of branded and unbranded fiberfill between April 1999 and **[*49]** July 2001. (Penrice Aff., PP4, 5) However, Sonny Walker testified that during the fall of 1999, *Dupont-Akra,* also a DAK entity later known as DAK Fibers, LLC, did not sell fiberfill in the United States. (Walker Dep. at 59.) Co-Lead Class Counsel, Paul Bennett, represented to the Court that "DAK itself did not sell fiber fill and therefore it would not have been proper to either include fiber fill purchasers or to give a release to the DAK defendants for fiber fill purchases." [39] (1-8-04 Hr'g Tr. at 55.) Based upon these facts, the Court dismisses Arteva's suspect view of the Plaintiffs' agreement with the DAK Defendants.

In sum, the Court finds that no fundamental conflict exists between the class representatives and members of the putative class. Despite the differences between the various types of PSF purchasers, and the possibility that Plaintiffs may have sustained different degrees of injury, the Court finds Plaintiffs' litigation **[*50]** interests are sufficiently aligned to proceed as a class.

IV. *Rule 23(b)(3)* Predominance Of Common Issues

---

[38] There are few examples of "fundamental" conflicts identified by the Fourth Circuit. In Broussard v. Meineke, the Fourth Circuit held that conflicts of interest existed between different groups of franchisees that precluded certification. *Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 338-339 (4th Cir.1998)* (securities case). The plaintiff class of franchisees was subject to the following categorization: 1) former franchisees with an interest in maximizing damages; 2) current franchisees not entitled to any monetary damages given contractual limitations; and 3) current franchisees entitled to monetary damages. *Broussard, 155 F.3d at 338*. Of the current franchisees, several sought only restitution and expressed concern about the long-term financial health of Meineke in the event defendant was subject to a large damages award. Within the current franchisee group, the putative class members were unable to resolve their differences. **[*48]** Based on plaintiffs' adverse ultimate objectives, the Fourth Circuit determined that "the remedial interests of those within the single class [were] not aligned." Id. (*citing* *Amchem, 521 U.S. at 627*.)

[39] The Court's February 5, 2004 Order was amended in order to clarify precisely what Class Counsel said in relation to certain entities' failure to produce fiberfill, namely, that DuPont - as opposed to the other DAK Defendants - did not manufacture fiberfill.

The Court now turns to the question of predominance. Under *Rule 23(b)(3)*, the Court contemplates whether a class action trial will present common proof that predominates over any individualized proof such that certification of the proposed class serves the objectives of *Rule 23*.

Although the analyses under *Rule 23(a)* and *(b)(3)* are similar, satisfaction of the predominance requirement articulated within *Rule 23(b)(3)* is "more stringent" than satisfaction of *Rule 23(a)*. *Thorn, 445 F.3d at 319* (*quoting Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 146 n. 4 (4th Cir. 2001))*. "The *Rule 23(b)(3)* predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem, 521 U.S. at 623*. *Rule 23(b)(3)* requires that:

> 1) the questions of law and fact common to the members of the class **predominate** over any questions affecting only individual members; and
> 2) a class action is superior to the other available methods for the fair and efficient administration of the controversy.

FED. R. CIV. P. 23(b)(3). The predominance of common issues and superiority **[*51]** of the class action proceeding are to be considered in tandem. *Windham, 565 F.2d at 65 n.7* (*internal citations omitted*). *Rule 23(b)(3)* identifies a non-exhaustive list of factors to consider when evaluating the predominance and superiority criteria:

> 1) the interest of members in the class in individually controlling the prosecution or defense of separate actions;
> 2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> 3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> 4) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(b)(3); *Amchem, 521 U.S. at 615-616*.

The purpose of *Rule 23(b)(3)* is to address cases "in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem, 521 U.S. at 615* (*citing* Adv. Comm. Notes, 28 U.S.C.App., p. 697.) Because *Rule 23(b)(3)*'s focus is on the practical question of manageability, the trial court must "be granted **[*52]** a wide range of discretion." *Windham, 565 F.2d at 65*. [40]

The *Rule 23(b)(3)* analysis is fact-intensive. *Windham, 565 F.2d at 65*. "The district court must take a 'close look' at the facts relevant to class certification and, if necessary, make specific findings on the propriety of certification." *Thorn, 445 F.3d at 319* (*citing Gariety v. Grant Thornton, LLP, 368 F.3d 356, 365 (4th Cir.2004))*. Findings may be necessary even if the issues related to certification overlap with the merits of the underlying case. Id. (*citing Falcon, 457 U.S. at 160*; *Gariety, 368 F.3d at 366*.) "Nonetheless, such disputes may be resolved only insofar as resolution is necessary to determine the nature of the evidence that would be sufficient, if the plaintiff's general allegations were true, to make out a prima facie case for the class." *Blades v. Monsanto Co., 400 F.3d 562, 567 (8th Cir.2005)* ("The closer any dispute at **[*53]** the class certification stage comes to the heart of the claim, the more cautious the court should be in ensuring that [factual disputes] . . . [are] resolved in order to determine the nature of the evidence the plaintiff would require.") (*citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-178, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974))*. "The likelihood of the plaintiffs' success on the merits, however, is not relevant to the issue of whether certification is proper." *Thorn, 445 F.3d at 319* (*citing Eisen, 417 U.S. at 177-78*; *Gariety, 368 F.3d at 366*.)

To successfully prosecute a private antitrust action, Plaintiffs must prove: 1) a violation of the ***antitrust law***; 2) direct injury to the Plaintiffs from such violations; and 3) damages sustained by the Plaintiffs. *Windham, 565 F.2d at 65* (district court must have in mind the essential elements of the private antitrust action and the proof that may be

---

[40] The Windham opinion is instructive but is distinguishable on its facts. The proposed class action in Windham was deemed unmanageable due to the number and variety of claims brought by the plaintiffs as well as plaintiffs' different impact and damages theories. *Windham, 565 F.2d at 66-67, 70*.

required to establish these elements). Together, proof of a violation and the fact of antitrust injury establish liability. *Windham, 565 F.2d at 65-66* (right of action extends only to one injured in his business or property by reason of a violation of the antitrust laws.); *In re S. Cent. States Bakery Prod. Antitrust Litig., 86 F.R.D. 407, 419 (M.D.La 1980)* **[*54]** (*citing* *Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 20 (5th Cir.1974))*.

"Damages always require individual proofs and the crucial element in a court's analysis will be whether the "liability" issues are so closely linked to the "damage" issue that severability is not practicable." *Brown, 92 F.R.D. at 42* (*citing* 3B Moore's Federal Practice, P 23.45(2) at 23-336 n. 33.) Accordingly, the parties' liability evidence - evidence probative of the conspiracy's scope and the fact of injury - is the focus of the Court's *Rule 23(b)(3)* analysis. *Windham, 565 F.2d at 66*; *Brown, 92 F.R.D. at 42*; *Blades, 400 F.3d at 566* (*citing* *In re Visa Check / Master Money Antitrust Litig., 280 F.3d 124, 135-140 (2nd Cir.2001))*.

Plaintiffs contend the majority of the evidence they intend to present at trial is common to each member of the putative class. Arteva claims that even if there is common proof presented by Plaintiffs regarding the alleged conspiracy, its members, and its scope, its defenses to liability require highly individualized proof. With *Rule 23(b)(3)* and the record evidence in mind, the Court evaluates the nature of the evidence likely to be presented by both sides. [41]

1. Liability

A. Violation Of The Antitrust Laws

In the Court's view, the exact nature of the antitrust violation, particularly the scope of the alleged conspiracy, is the predominant common issue for trial. *See* 7AA Wright, Miller & Kane, *Federal Practice & Procedure* §1781 at 228 (3d ed.2005); 6 *Newberg on Class Actions,* §18.28 at 102 (4 ed. 2002) ("As a rule, the allegation of a price-fixing conspiracy is sufficient to establish predominance of common questions.") Plaintiffs contend they will offer common proof establishing a nationwide, industry-wide conspiracy by focusing on the conduct of the alleged co-conspirators. (Pl.s' Mem. In Supp. at 15-22.) Plaintiffs intend to offer testimony of Defendants' corporate representatives as well as documentary evidence implicating all of the PSF producers originally **[*56]** named as Defendants in the Consolidated Amended Class Action Complaint. Plaintiffs predict the evidence at trial will show that the Defendants' sales forces used the price increase announcements to negotiate price increases for all PSF products. Arteva asserts its proof will demonstrate that the conspiracy targeted only about twelve customers and four SKU line products, all fine denier textile staple.

As discussed below, there is conflicting evidence on this issue which creates a question of fact common to all members of the putative class.

i. Common Proof - General Price Increase Announcements

Plaintiffs' presentation of evidence on liability may begin with common evidence of the general price increase announcements issued by all of the four PSF manufacturers (alleged co-conspirators). (*See* Section "II, D") Like the parties, different PSF purchasers hold different views regarding the effect of the price increase announcements. The customers' views are captured in the testimony of their respective corporate representatives. The larger PSF customers tended to have more bargaining power whereas the smaller PSF purchasers had little ability to negotiate a more favorable price. (*Compare* Carpenter **[*57]** Dep. at 105-106 (price increase announcements were "meaningless"); *and* Fiber Dynamics Dep. at 126-127 ("The supplier pretty much names their price to us. We're a

---

[41] The Court has **[*55]** thoroughly evaluated the evidence presented by both sides regarding the motion for class certification. In addition, the Court has evaluated enough of the evidence presented in support and in opposition to the cross-motions for summary judgment to rule on certain summary judgment issues. The Court's analysis, however, does not include a complete recitation of all the record evidence.

small company. We don't - we're not able to make those demands.")) In fact, some purchasers simply refused to accept a price increase notwithstanding the price increase announcements. (Walker Dep. at 64; Stanley Decl., PP27-28) Further, the amount of the price increase announced within the press release did not always correspond with the actual price increase for those businesses whose prices were affected. (Fiber Dynamics Dep. at 183 ("What happens with Fiber Dynamics could be different.")) For example, following a price increase announcement alerting customers to the possibility of a ten to twelve percent price increase, DuPont-Akra began its price increase negotiations with customers for all "core products" at five cents per pound, expecting that the final agreed upon price would be somewhere in between a five cent per pound increase and the current price. (Walker Dep. at 59-60.) The timing of implementation of price increases also varied. (Id.)

The general price increase announcements did not, standing alone, automatically **[*58]** result in increased prices or alter existing PSF prices. (*See* DAK Dep. at 158; Hollander Dep. at 213-215; Habasit Belting Dep. at 133-34.) According to the evidence, the work of the conspiracy took place after the price increase announcements when the manufacturers negotiated their contracts with purchasers and "policed" said negotiations. [42] Nonetheless, the price increase announcements themselves, as well as the timing and surrounding circumstances, provide common evidence of the coordination amongst the Defendant manufacturers, as well as the intended scope of the conspiracy.

ii. Common Proof- Related Criminal Proceedings

Plaintiffs' direct case may continue with common evidence related to the guilty pleas of Arteva / KoSa and Troy Stanley. Relying on the language within the Plea Agreements, Arteva **[*59]** contends that its liability extends only to the large textile manufacturers that purchased "first-quality polyester staple." The parties vigorously debate the meaning and significance of this phrase, as well as the overall effect of Arteva's guilty plea in the instant civil action. Because this question bears upon the nature of the evidence to be presented at trial (i.e., whether any evidence on this issue will be necessary at all), the Court considers application of collateral estoppel principles, an issue raised by the parties in their summary judgment motions. [43]

"Collateral estoppel or issue preclusion is premised on the notion that a judgment in a prior suit 'precludes relitigation of issues actually litigated and necessary to the outcome of the first action.'" *United States v. Wight, 839 F.2d 193, 196 (4th Cir. 1987)* **[*60]** (*quoting* *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n. 5, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)*; and 1B J. Moore, *Moore's Federal Practice,* P0.405(1), at 622-24 (2d ed. 1974)). "When determination of an issue in a prior action [is] necessary and essential to the judgment, the parties to a second action are precluded from later raising that issue." *Wight, 839 F.2d at 196* (*internal citations omitted*). "The doctrine of collateral estoppel may apply to issues litigated in a criminal case which a party seeks to relitigate in a subsequent civil proceeding." (Id.) (*citing* *Emich Motors Corp. v. Gen. Motors Corp., 340 U.S. 558, 568, 71 S. Ct. 408, 95 L. Ed. 534 (1951))* (question raised after jury trial in criminal case - "estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution.")) Where the criminal conviction stems from a plea agreement, the "defendant is precluded from retrying issues necessary to his plea agreement in a later civil suit." (Id.)

A determination as to the breadth of the price-fixing conspiracy was not necessary to Arteva's plea agreement. In other words, the Court finds the phrase "first-quality polyester staple" reasonably susceptible to more than one interpretation. Paul **[*61]** Latten, Arteva Vice President, testified that "first-quality polyester staple" "means that the

---

[42] Stanley testified during the Dutton trial that he and Dutton discussed and agreed about the amount of the second price increase, the timing of said increase, as well as the "need to be religious in [their] approach to policing of the agreement." (9/24/03 Dutton Trial Tr. at 285.) Stanley further admitted to having similar conversations with other alleged co-conspirators. (Id. at 286-287.)

[43] The parties' summary judgment motions are fully briefed and ripe for disposition. (*See* Documents 503, 509) Plaintiffs urged the Court to not consider the summary judgment motions until resolving the motion for class certification. Given the posture of the case, it makes sense to proceed with the summary judgment issues that bear upon the presentation of Plaintiffs' direct case.

product met specification as manufactured the first time through the process." (Latten Dep. Tr. at 45-46.) Latten also testified that first-quality polyester staple *could* include a whole range of fibers. (Latten Dep. at 47-48.) Similarly, Grover Smith ("Smith"), former Hoechst executive and Latten predecessor, testified that first quality polyester staple means that "the polyester you produce meets the standard set by your specifications." (Smith Dep. Tr. at 293-94; Trial Tr. at 205-206.) Smith and Latten agree that nonwoven polyester staple (including fiberfill) could be included within the first-quality polyester staple category. (Id.; *See also,* Rust Trial Rpt., P18) Therefore, based in part on the testimony of Arteva's own witness, the Court finds that reference to "first-quality polyester staple" is not necessarily limited to fine denier or polyester staple purchased for textile applications as Arteva suggests in its cross motion. [44] However, the converse is also true. Reference to "first-quality polyester staple" within Arteva's Plea Agreement does not necessarily and conclusively establish **[*62]** that Arteva's antitrust violation encompassed all types of PSF meeting specifications as suggested by Plaintiffs in their summary judgment motion. Therefore, Arteva is not estopped from litigating in this civil action the significance of its guilty plea in the criminal case, and the weight to attribute it, as this specific issue was neither adjudicated nor necessary in the criminal proceedings. *See Emich Motors Corp., 340 U.S. at 568-569* (explaining difficulties associated with discerning issues actually adjudicated in antecedent criminal trial).

Arteva contends that it only intended to tender a guilty plea with respect to commodity textile polyester staple. George Gregory, Arteva's CEO at the time the guilty plea was tendered, testified that "KoSa pled guilty to price-fixing in the **commodity textile polyester staple business** based on the actions of Troy Stanley." (Gregory Dep. Tr. at 93.) **[*63]** (*emphasis added*) However, the full extent of Stanley's actions are yet to be determined. [45] Further, as discussed, *supra,* some commodity textile PSF products fall within the nonwoven category (e.g., knit apparel, home furnishings). The question of the parties' intent with respect to Arteva's Plea Agreement cannot be determined as a matter of law.

iii. Common Proof- Troy Stanley's Admissions & Evidence Of Collusion

As of May 10, 1999, Stanley's official title was "Director of Sales and Marketing for U.S. / Canada Commodity Polyester Staple." [46] (Class Pl.s' 3-6-06 Letter Exh. 6) In that position, Stanley's responsibilities were identified as follows: "Develop and implement plan to sell out the production of the commodity machine groups in N.A. serving the Apparel, Home Fashions, Floor Coverings, and Highloft markets." [47] (Id.)

Plaintiffs contend **[*64]** that every class member would seek to introduce the trial testimony of Troy Stanley from the criminal prosecution of Nan Ya's former sales manager, Robert Bradley Dutton ("Dutton"), which was heard before the undersigned. Portions of Stanley's testimony relate to various price-fixing conversations with his competitors at Wellman, DuPont, and Nan Ya. (Dutton Trial Tr. at 285-287, 293-295.) [48] In addition, Stanley explains the efforts that were made by these entities and their respective representatives to stabilize and maintain the price increases. (Id. at 246, 263, 275-287.)

---

[44] Compare the language of the price increase announcements during the class period with Arteva's later price increase announcement issued after the class period, which expressly states that the increase in price applies only to its "commodity fine denier polyester staple products." (Hr'g Tr. at 35.)

[45] The Department of Justice did not identify specific victims or any group of victims for purposes of requiring Arteva / KoSa to make restitution.

[46] In Stanley's own words, his title was "Business Director for Textile Staples for United States and Canada." (Stanley Decl., P12)

[47] The word "highloft" is another term for nonwovens. (Stanley Dep. at 88.)

[48] Within the instant order, all references to the trial transcript of related criminal proceedings against Robert Bradley Dutton will be cited as "Dutton Trial Tr. at **."

In addition to Stanley's trial testimony, Arteva relies heavily on the deposition testimony and declaration of Troy Stanley. [49] (Hr'g Tr. at 187.) According to Stanley, the object of the conspiracy was to make profitable the commodity textile PSF industry. (Stanley Decl., PP17-20) Stanley explains that his coordination with competitors corresponded and "focused on certain specific large commodity textile customers." (Stanley Decl., PP3, 21) Stanley **[*65]** avers that he "communicated with employees of certain other polyester staple manufacturers regarding efforts to coordinate pricing to certain specific polyester staple customers, *primarily* [not exclusively] in the commodity textile business." (Stanley Decl., P2) (*emphasis added*)

With respect to nonwovens and floor coverings, Stanley states:

> "[D]uring the period for which I entered my guilty plea, I was just getting up to speed on Arteva's non-wovens and floor coverings business. I was fairly unfamiliar with the customers in these product lines, their pricing, and the products that they purchased from Arteva. Unlike Arteva's large textile mill customers with whom I was either directly involved or for which I personally approved pricing negotiations, others at Arteva were largely responsible for the customer relationships and pricing negotiations at non-wovens and floor **[*66]** covering accounts, with little to no input from me. My unfamiliarity with and nonparticipation in these businesses was one of the reasons that the **non-wovens and floor coverings product lines were *generally not the focus* of my conversations with my competitors.** Those few exceptional discussions we had regarding the floor coverings and non-wovens business lines involved pieces of business particularly important to Arteva. . ."

(Stanley Decl., P39) (*emphasis added*) Although Stanley claims he was not as intimately involved in these areas of the business, Stanley admits that certain nonwoven and carpet PSF purchasers were discussed with competitors and thereby targeted. For example, Stanley admits he let Brad Dutton of Nan Ya know that Arteva would no longer be pursuing the Shaw Industries account (carpets) because the account was no longer profitable for Arteva. (Id.) Stanley concedes he made an effort to coordinate this account with Brad Dutton of Nan Ya but states that this was the *only* attempt he made to coordinate any floor covering account with a competitor. [50] (Id.) Stanley's declaration that he focused on the floor covering and non-woven business lines deemed most important to Arteva **[*67]** is consistent with what is already known about the co-conspirators' strategy regarding allocating fine denier PSF customers.

Stanley's deposition testimony regarding customers purchasing PSF for nonwovens (beyond what is admitted within his declaration) is best described as sketchy. There are numerous occasions where Stanley testified either that he did not know the answer or simply couldn't recall. (Stanley Dep. at 34-35, 42-46, 55-57, 102-104, 113-114, 116.)

Plaintiffs present evidence of a broader, industry-wide conspiracy. In addition to the admissions of Troy Stanley, the testimony of other Arteva employees tends to show not only that the price increase announcements were utilized as a tool to raise prices beyond the fine denier PSF segment, but that PSF prices rose within the nonwoven category as well. Brenda Hough testified that KoSa provided a copy of the price increase announcements **[*68]** to its employees who were "to go and notify all of [their] existing customers." (Hough Dep. at 39.) Achim Heyer, Business Director for Nonwovens, testified that as the prices of fine denier PSF rose, the price for nonwovens also rose. (Heyer Dep. Tr. at 237-238; 284.) Alice White, then a PSF sales person in the nonwoven division, testified that the prices for her customers increased in conjunction with all three price increases. (White Dep. at 155, 316, 189, 195, 204.)

---

[49] Plaintiffs argue that Stanley's declaration was "bought and paid for" by Arteva. Without weighing the credibility of the witness, the Court notes that a jury would not have to discredit Stanley's testimony in order to find that the actual impact (of what has already been admitted) exceeded what was originally intended.

[50] According to Stanley, he did not discuss the following floor covering and nonwoven customers (all class representatives except Gulistan) with his competitors: Gulistan, Tex Tech, Carpenter, Fiber Dynamics, Habasit Belting, J.H.N.Y., Inc., Quality Felt, Co., and Southern Fiber, Inc. (Stanley Decl., P40)

In addition to the deposition testimony of Arteva's own sales force, Jim Netzel of DAK testified that DuPont Akra "used price increase announcements to raise all products to all customers." (Netzel Dep. at 128-129.) Sonny Walker, DAK's Vice President, testified that industry-wide prices at DAK rose approximately 22% during the class period. (Walker Dep. at 211-214.) Likewise, David Lambert of Wellman testified that all three price increase announcements applied to all PSF products and were implemented "as broadly as possible." (Lambert Dep. at 212-214; 216-217.)

Documentary evidence also exists to support Plaintiffs' theory that a broader conspiracy existed. Stanley's 2000 corporate performance review, which is written **[*69]** in the first person, boasts that Stanley "orchestrated price increase[sic] in all market segments." [51] (Pl.s' 3-6-06 Letter; Stanley Dep. Exh. 12) Arteva also proposed at least one meeting with DAK for the purpose of initiating "across the board" discussions on polyester. (Class Pl.s' Exh. H / 2-2-99 Letter) Email correspondence between Sonny Walker and other DAK employees referring to the second price increase directs the recipients to "contact all of your customers." (Pl.s' 3-6-06 Letter, Exh. 16) DAK email correspondence dated June 29, 1999, also indicates that DAK is "leading the price increase in nonwovens." (Pl.s' 3-6-06 Letter, Exh. 15) In October 1999, Walker prepared a "talking points" memo for DAK's sales staff to better prepare them for discussions with customers following the announcements. (Walker Dep. at 55.) The memo responds directly to a hypothetical question about the application of the price increase to all end-users -- "Yes, **most staple products are included.** A very few exceptions are being made for higher priced specialty products." (Id.)

Plaintiffs **[*70]** also intend to offer common evidence probative of the alleged collusion amongst the PSF manufacturers. According to Plaintiffs, Defendants met face-to-face as well as communicated via telephone. Stanley testified that the purpose of these communications were to coordinate the price increase announcements, to verify customers' positions during negotiations, and to enforce the agreement. (Dutton Trial Tr. at 293-295.) As detailed in Plaintiffs' memoranda in support, there are phone records documenting hundreds of calls between alleged co-conspirators (*e.g.,* between Stanley and Dutton, between Sonny Walker of DuPont and Dutton, and between Dutton and John Hobson of Wellman, etc.) (Id. at 285-287; Stanley Dep. Tr. at 80-83.) Plaintiffs identify and describe a "whirlwind" of calls amongst the alleged co-conspirators before and after price increase announcements. (Dutton Trial Exh. 3) Defendants' own internal documents also tend to show that the PSF manufacturers were participating in ongoing price discussions with each other. (Pl.s' Exhs. H - L)

iv. Common Proof -- Customer Allocation

Plaintiffs intend to offer evidence establishing that Defendants allocated customers in an effort to guarantee **[*71]** that each PSF manufacturer maintained a certain market share during the relevant time period. (Dutton Trial Tr. at 246, 263-264, 275, 279, 294.) According to Stanley, the Defendants worked together in order to "co-exist" in the market. (Id. at 263, 275.)

v. Conspiracy's Scope -- Common Question Of Fact

In sum, because there is conflicting evidence upon which a reasonable fact finder could rely, the breadth of the conspiracy, a common question of fact, cannot be decided as a matter of law - no matter how zealously counsel present their respective arguments. [52] *FED. R. CIV. P. 56*; *See* *Rossignol v. Voorhaar, 316 F.3d 516 (4th Cir. 2003)* (When considering each individual motion, the court must take care to "resolve all factual disputes and any competing, rational inferences in the light most favorable" to the party opposing the motion.) (*internal citations omitted*)

---

[51] Orchestration of price increases is included within a list of ten (10) purported "Value Added Contributions" by Stanley.

[52] This case may be unique in that the Court did not reach the certification question before discovery was complete. Because the Court is essentially reviewing the same record in evaluating both motions, the Court, applying the appropriate standard of review for resolving cross-motions, finds that Plaintiffs present sufficient evidence **[*72]** of an industry-wide conspiracy to overcome Arteva's motion for summary judgment on this particular issue, i.e., scope of the alleged conspiracy. As mentioned, *supra,* the remaining summary judgment rulings will be addressed in a separate Memorandum and Order.

B. Injury In Fact / Impact

In order for a direct purchaser to establish injury in an antitrust conspiracy case alleging price fixing and customer allocation, Plaintiffs need only demonstrate they paid a higher price for polyester staple purchased from Defendants than they would have absent the existence of a conspiracy. *Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481, 489, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*. The burden of proving antitrust injury (fact of damage or "impact") under the Clayton Act requires "proof of some damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling its burden of proving compensable injury. . ." *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n. 9, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*; *In re S. Cent. States Bakery Prod. Antitrust Litig., 86 F.R.D. 407, 419 (M.D.La 1980)* **[*73]** (plaintiffs must establish a causal link between the conspiracy and the alleged injury). In this circuit, courts are to construe the gravamen of an antitrust action to be "the injury to the plaintiff as an individual, rather than issues relating to an overall conspiracy." *See* *Windham, 565 F.2d at 59*. The fact of injury must also be subject to a *formulaic proof* rather than individualized proof. (*Id., 565 F.2d at 68-69*.)

"The operative question here is not whether Plaintiffs can establish class-wide impact, but whether class-wide impact may be proven by evidence common to all class members." *In re Bulk [Extruded] Graphite Prods. Antitrust Litig., 2006 U.S. Dist. LEXIS 16619, 2006 WL 891362, * 10 (D.N.J. April 4, 2006)* (*citing* *In re Mercedes-Benz Antitrust Litig., 213 F.R.D. 180, 190 (D.N.J.2003))*.

i. The *"Bogosian* Short-Cut" & The "Paradigm" Horizontal Price-Fixing Case

The Court's analysis with respect to injury or impact begins with determining whether impact may be presumed or inferred under these facts and what effect, if any, a presumption has on the presentation of evidence. There is persuasive authority holding that "an illegal price fixing scheme presumptively impacts upon all purchasers of a price fixed product **[*74]** in a conspiratorially affected market." [53] *See, e.g.,* *In re Folding Carton Antitrust Litig., 75 F.R.D. 727, 734 (N.D. Ill. 1977)*; *In re Catfish Antitrust Litig., 826 F.Supp. 1019 (N.D.Miss.1993)*; Tech. Learning Collective, Inc. and Lad Mills, Inc. v. Daimler-Benz Aktiengesellschaft and Mercedez-Benz of North Am., Inc., 1979 WL 1718 (D.Md. August 8, 1979); *In re Plywood Antitrust Litig., 76 F.R.D. 570, 584 (E.D.La. 1976)* (proof of purchase during relevant period plus proof that defendants conspiratorially increased or stabilized prices allows trier of fact to conclude that the requisite fact of injury occurred.) This presumption is sometimes referred to as the "*Bogosian* short-cut." *See* *In re Linerboard Antitrust Litig., 305 F.3d 145, 151 (3rd Cir.2002)* (*citing* *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 448 (3d Cir.1977))*.

In Bogosian v. Gulf Oil Corp., the Third Circuit Court of Appeals explained:

> [W]hen an antitrust violation impacts upon a class of persons who do have standing, **there is no reason in doctrine why proof of the impact cannot be made on a common basis so long as the common proof adequately demonstrates some damage to each individual.** Whether or not fact of damage can be proven on a common basis therefore depends upon the circumstances of each case . . . **If, in this case, a nationwide conspiracy is proven, the result of which was to increase prices to a class of plaintiffs beyond which would obtain in a competitive regime, an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price.** If the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in regions, was higher in

[53] In an earlier ruling denying Defendants' motion to compel "downstream discovery," the Court cited Hanover Shoe in support of the rule of law that impact may be presumed in price-fixing or customer allocation conspiracy cases. At that time, the production of "downstream data" by direct and indirect purchasers of PSF was at issue and the burden associated with Defendants' **[*75]** request was compared to the probative value of evidence not directly related to the transaction between the PSF manufacturer (alleged co-conspirator) and the direct purchaser.

> all regions than **[*76]** the range which would have existed in all regions under competitive conditions, it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations among all dealers as to the extent of their damage.

Bogosian, 561 F.2d at 454-455 (*emphasis added*); *accord* In re Fine Paper Antitrust Litig., 82 F.R.D. 143, 153-154 (E.D.Pa. 1979). The effect of the inference is explained nicely within Technical Learning:

> "[T]he inference of impact does not establish an irrebutable presumption of injury to individual class members. Rather, . . . it merely allows the class member entrance into the damages phase, as a purchaser during the period of the conspiracy. At the damages stage, then, the individual member must show that it paid a price for [the product] that actually was higher than the "competitive, non-conspiratorial price line established by the finder of fact."

Tech. Learning Collective, Inc., 1979 WL 1718, *11. Thus, the inference merely provides those purchasers an opportunity to prove their damages as a result of the alleged injury. [54] Tech. Learning, 1979 WL 1718, *11-12 (*citing* In re E. Sugar Indus. Antitrust Litig., 73 F.R.D. 322, 347 (N.D.Cal. 1976)); **[*77]** In re Folding Carton, 75 F.R.D. at 734 (liability determination not contingent upon a carton-by-carton analysis of every sale made under the alleged conspiracy to fix prices - for damages determination). In this line of cases, "the inference of impact raised by proof of the conspiracy is deemed a question common to the class and a permissible form of common proof which satisfies the antitrust class action analysis." [55] (Id.)

Arteva argues that the Fourth Circuit's opinion in Windham prohibits Plaintiffs' reliance on any such presumption. [56] Presumably, Arteva contends that the circuit court's emphasis on the individual nature of antitrust injury within Windham is inconsistent with application of the *Bogosian* principle and reliance on an inference of general class-wide injury. Although Windham discussed the individual nature of the injury and damages inquiries, Windham did not expressly hold impact can never be presumed or inferred in a horizontal price-fixing case. Tech. Learning Collective, 1979 WL 1718, *10 (Windham court implicitly accepted the proposition that proof of an illegal price-fixing conspiracy raises an inference of general injury to the class); Brown, 92 F.R.D. at 46 ("Windham only proscribes the use of generalized or common class **[*79]** proofs as to the issue of damages, . . . [but] did not deny that the fact of injury or impact might be the same for each individual plaintiff.")

As the parties suggest, courts applying the *Bogosian* short-cut rely upon the economics of the industry to justify application (*e.g.,* a limited number of manufacturers control the market, price structure is conducive to demonstration of overall impact, etc.) (Beyer Trial Rpt. P8; Rapp Decl., P2) *See also* In re Linerboard., 305 F.3d at 152 (*Bogosian* concept of presumed impact properly applied where defendants' deliberate cut in supply gave rise to price increases); Windham, 565 F.2d at 68 n. 22 (*citing* with approval cases applying *Bogosian* principle where process of computing individual damages is "virtually a mechanical task.") A discussion of the requisite market conditions and underlying economic principles leads to Arteva's argument that this case does not "fit the mold."

---

[54] The undersigned questions whether, as a practical matter, the proof as to these two issues can be severed without reliance on the *Bogosian* principle. It seems that the inference recognizes that the antitrust injury and damages inquiries overlap (if not embody each other). As a result, the *Bogosian* shortcut establishes a more manageable framework for analysis. *See,* In re Bulk [Extruded] Graphite Prods. Antitrust Litig., 2006 U.S. Dist. LEXIS 16619, 2006 WL 891362, *11 ("[T]he Third Circuit created the "*Bogosian* short-cut" to deal with the question of impact when there are multiple variables affecting the price paid by the plaintiffs.")

[55] Critics refer to this approach - finding that the fact of conspiracy predominates and relying on the *Bogosian* shortcut to demonstrate common impact - as "drive-by **[*78]** certification." *See* Morrison, Todd A., *Economic Issues in Class Certification,* Economics and Private Antitrust Litigation Committees ABA Section of ***Antitrust Law*** Spring 2004 Meeting. At the time of the 2004 ABA Spring Meeting, Morrison was Vice President of Dr. Rapp's economic consulting firm, National Economic Research Associates Inc. ("NERA"). (Rapp Decl. at 2.)

[56] Plaintiffs do not rely solely on a presumption of injury or impact. Instead, Plaintiff's contend that Arteva's and Troy Stanley's guilty pleas give rise to an inference of injury.

Within the parties' filings, there is much debate about whether the facts here bear comparison **[*80]** to the "paradigm" horizontal price-fixing case. Plaintiffs contend there is no such thing. [57] According to Arteva, a "paradigm" case is one "where there exists a market-wide conspiracy to raise all prices in a single market for an undifferentiated commodity product." (Def.'s Mem. In Opp'n at 42.) Secondly, Arteva argues that in a "paradigm" case, the illegal agreement effects "some general determinant of everyone's price," (e.g., a specific market price, a floor price, a list price, or some kind of benchmark from which negotiations might start). (Def.'s Mem. In Opp'n at 54.)

Although the undersigned is not persuaded by Arteva's contention [58], the criteria allegedly characteristic of the elusive "paradigm" case are discussed below.

a. Market-Wide Conspiracy

Without delving too deeply into the merits of the action, the Court presumes, for purposes of this *Rule 23* motion only, that Plaintiffs will be able to demonstrate the broader, market-wide conspiracy they allege. *In re Vitamins, 209 F.R.D. at 267-268* ("The Court must accept the substantive allegations contained in the plaintiffs' complaints as true, but will consider matters beyond the pleadings to ascertain whether the asserted claims or defenses are susceptible of resolution on a class-wide basis."); *Bogosian, 561 F.2d at 455* (explaining economic principles that apply *if plaintiffs prove that a nationwide conspiracy existed*); *Monsanto, 400 F.3d at 567* (relevant inquiry is nature of evidence *if plaintiffs prove what they allege*). If the jury later finds facts consistent with Plaintiffs' allegations, reliance on the *Bogosian* principle or inference will be sufficient to establish common impact.

b. Undifferentiated Commodity

According to Dr. Beyer, the term **[*82]** "undifferentiated" is an economic term which "means purchasers do not choose a source of supply based on the identity of the supplier. Price, therefore, is the principal determinant for a purchaser (some economists refer to this as being commodity-like)." (Beyer Trial Reply Rpt., P9) The rationale, as explained by the parties' experts, is that with undifferentiated commodities, a rise in prices to one set of customers necessarily implies a price increase to all customers generally. (Beyer Aff., P12; Rapp Decl., PP8-9 ("if products are undifferentiated commodities, they are perfect substitutes - identical in the eyes of the consumers."))

Here, the majority of PSF can fairly be described as an undifferentiated commodity for purposes of the instant economic analysis. While there is evidence indicating that, on occasion, price is not the primary consideration in PSF purchasing decisions, there is a significant amount of evidence tending to show that price was, in fact, one of the most important factors in purchasing decisions. In addition, the PSF market as a whole is relatively homogeneous in that any given PSF product (a product with certain characteristics and physical properties) produced **[*83]** by one manufacturer is identical to the same PSF product produced by a different manufacturer. [59] The fact that PSF (once manufactured for the direct purchaser) is not interchangeable across all product types does not warrant a different finding. *See* *In re Flat Glass Antitrust Litig., 191 F.R.D. 472, 485 (W.D.Pa. 1999)* (where a *Section 1* conspiracy is alleged, "it is appropriate to look beyond surface distinctions between the products because

[57] Plaintiffs argue that few of the antitrust cases where plaintiff classes are eventually certified evolved out of non-diverse industries or met all of the criteria Arteva contends are necessary for class action treatment. After reading its fair share of *Rule 23(b)(3)* "impact" cases, the Court might reasonably conclude that the typical approach is anything but typical. *See* "Antitrust Class Actions: Chaos In The Courts," *11 Stan. J.L. Bus. & Fin. 1 (2005)*.

[58] As **[*81]** Plaintiffs aptly point out, Arteva fails to cite a single price-fixing or customer allocation case that satisfies *all* of the criteria discussed herein with reference to a "paradigm" horizontal price-fixing case.

[59] A homogeneous product is "one identical to the product sold by others in the industry." (Beyer Trial Reply Rpt., 9 n. 10) (*citing* Samuelson, Paul A. And Nordhaus, Williams D. *Economics* (Eighteenth Edition), p. 148 (2005)).

identical products, uniform prices and unitary distribution patterns are not indispensable for class certification in this context.") *(internal citations omitted*). Thus, PSF may be described as an undifferentiated commodity. [60]

c. Single PSF Product Market

According to Dr. Rapp, there is no single *product* market for all PSF. (Rapp Decl. at 3, 9) The Court disagrees. The Court is persuaded by the opinion of Dr. Rust that regardless of the different physical properties and characteristics that distinguish the PSF products, there is a single market for PSF products - diverse as they are. Arteva's argument on this question is undermined by the price increase announcements that speak in terms of "polyester staple fiber" as **[*85]** opposed to specific, differentiated PSF products or categories of products. The record evidence cited herein tends to show that the actual participants in the PSF industry, including the alleged co-conspirator manufacturers, perceive the PSF market as a single market (possibly encompassing smaller sub-markets) notwithstanding the different PSF categories.

d. General Determinant Of Price

The Court next considers whether there exists some general determinant of price within the PSF industry notwithstanding the co-conspirators' practice of conducting individual price negotiations with their customers. In evaluating price, the Court first looks to a case described by Plaintiffs as at least as complicated factually as the instant case. In South Central States Bakery, the court evaluated the propriety of certification in an industry where there were varied pricing arrangements and different types of customers with different purchasing methods. In South Central States Bakery, hundreds of different private and secondary label bakery products ranging from cakes to whole breads to individual pastries sold at both the retail and wholesale level were involved. The proposed plaintiff class consisted **[*86]** of multiple and diverse categories of customers (*e.g.,* retailers, restaurants, institutional purchasers) with different pricing and purchasing arrangements including discounts, etc. There was no market-wide wholesale price list. Instead, the bakeries maintained separate price lists for each market area. In certifying the class pursuant to *Rule 23(b)(3)*, the district court followed the rationale of the Fifth Circuit - that if there is "some uniformity in the quality and price" of the product, demonstration of impact through common proof is more likely. *S. Cent. Bakery, 86 F.R.D. at 421* (*quoting* *Alabama v. Blue Bird Body Co., Inc., 573 F.2d 309, 312 (5th Cir. 1978))*; *See also* Tech. Learning, 1979 WL 1718, *12 (product at issue found to be " uniform in quality and price" because parts were standardized and dealer's pricing policy was influenced by recommended wholesale price). The district court determined that the bakery products were fungible, substitutable, and homogeneous, thereby providing uniformity of quality. (*Id. at 421*.) The court noted the complex and varied pricing but stated that "non-uniformity of price . . . does not by itself defeat class certification." (Id.) The court **[*87]** relied in part on the *Bogosian* principle to simplify the impact analysis. (Id.) In addition to putative class members' proof of purchase during the class period, Plaintiffs also represented they would rely on the following to establish impact: 1) testimony of present and former officers and employees of the bakery companies; 2) the bakery companies' pricing records; and 3) economic testimony from plaintiffs' expert that the conspiracy "would have the effect of fixing, raising, or stabilizing the prices of bakery products at artificially high levels where two or more of the defendants sold bakery products." (*Id., at 422*.) The class was certified despite the many purported obstacles to certification.

The Court likewise considers whether individual price negotiations preclude Plaintiffs from ably demonstrating common impact. Plaintiffs refer the Court to a district court opinion that certified a class despite the potential for individual proofs as a result of individual negotiations between plaintiffs and defendants. *See* *In re Flat Glass, 191 F.R.D. 472 (W.D.Pa. 1999)*. Not unlike PSF, the product at the heart of the Flat Glass litigation was sometimes sold as a component for use in other **[*88]** products. [61] *In re Flat Glass, 191 F.R.D. at 475-476 n.6*. Thus, different types

---

[60] At least one court expressly refused to decide whether the product at the heart of the antitrust litigation was an undifferentiated commodity product. *See* *In re Bulk [Extruded] Graphite Prods., 2006 U.S. Dist. LEXIS 16619, 2006 WL 891362, *14* ("Whether the market for bulk extruded graphite products is homogeneous and whether prices **[*84]** varied widely are substantive issues that go to the merits of the case, and are to be resolved by the fact finder.") However, a failure by the Court to resolve this underlying factual dispute for purposes of determining whether certification is proper, would fall short of the requisite thorough study of the industry. *See* *DeLoach, 206 F.R.D. at 553*.

of flat glass purchasers had different relationships with the manufacturers and pricing arrangements varied for the different purchaser groups. Defendants, whose legal argument mirrors the position advanced by Arteva, opposed certification in part based upon the individually negotiated prices for products within the proposed subclasses and the fact that actual prices paid by putative class members varied. In Flat Glass, the court explained:

> "[E]ven though some plaintiffs negotiated prices, **if plaintiffs can establish that the base price from which these negotiations occurred was inflated,** this would establish at least the fact of damage, even if the extent of the damage by each plaintiff varied."

In re Flat Glass, 191 F.R.D. at 486 (*emphasis added*). The district court certified the class and rejected the defense argument that individual price negotiations and actual differences in prices charged precluded class treatment.

In this case, while there is no published price list, the market price for the raw materials used as the primary ingredient for PSF provides some uniformity of price. As mentioned, *supra,* PSF is defined as being comprised of at least 85% polyethyleneterephthalate (otherwise referred to as "EG" and "PTA"). Dr. Beyer explains in his discussion of supply factors that "[t]he main driver of prices of polyester staple fiber is the cost of the primary inputs, EG and PTA." (Beyer Trial Rpt., P46 n. 70) (*citing* EDUP008630 - "The cost of PTA and EG is a primary determinant of polyester prices.") Dr. Rapp similarly notes that the cost of raw materials should contribute to the similar movement of PSF prices, at least to a degree. (Rapp Decl. at 21-22.) In other words, the cost of raw materials influenced Defendants' PSF pricing for all PSF products in the same manner a suggested wholesale price would. [62] *See* Tech. Learning, 1979 WL 1718, *12 (uniformity of price found where dealer's pricing policy was influenced by recommended wholesale price).

The price increase announcements that identified the manufacturers' intended increase in percentages likewise support Plaintiffs' position regarding the market-wide uniformity of price. It is true that following the price increase announcements, Arteva and at least one other manufacturer began customer negotiations with "the last agreed prices for the products that were the subject of the negotiation." (Stanley Decl., P26;Walker Dep. at 31-32.) Nevertheless, to the extent Defendants' new "asking price" was artificially inflated, all PSF customers entering renegotiations were at a disadvantage. *See also* *In re Commercial Tissue Prods., 183 F.R.D. 589, 595 (N.D.Fla. 1998)* ("even **[*91]** if there is considerable individual variety in pricing because of individual price negotiations, class plaintiffs may succeed in proving classwide impact by showing that the minimum baseline for beginning negotiations, or the range of prices which resulted from negotiation, was artificially raised (or slowed in its descent) by the collusive actions of the defendants.")

Arteva contrasts the facts here with those in DeLoach. *See* *DeLoach v. Philip Morris, 206 F.R.D. 551 (M.D.N.C. 2002)*. In DeLoach, Judge Osteen certified the proposed class where the prices of the products at issue (tobacco) were all determined at auction, without reference to any individual customer relationship or specification. *DeLoach, 206 F.R.D. at 563*. Arteva contends that the absence of individual negotiations enabled the court to find that proof of the alleged antitrust conspiracy would have resulted in some damage to each individual plaintiff. (*Id. at 561*.) Plaintiffs argue that certification of a class in DeLoach was entirely consistent with Fourth Circuit law - that certification is proper despite complexity within the industry (*e.g.,* hundreds of grades of tobacco) or some individual issues. (Pl.s' Mem. In Supp. at 3-4.) **[*92]** While there may be uniformity of quality, [63] price is not entirely uniform as was the case in DeLoach. Arteva suggests that the lack of uniformity in price is troublesome from a proof

---

[61] The fabricated flat glass products were primarily used for architectural (glass windows and doors for both residential and commercial structures) and automotive (windshields, side and rear **[*89]** windows) purposes but were also used as a component in the manufacturing of mirrors, doors, appliances and furniture. (*Id. at 476*.)

[62] With the exception **[*90]** of Dupont-Akra's "list" prices based upon market segment, there is no evidence that the different PSF market categories had wholly separate price lists.

[63] Customers' preferences with respect to a particular PSF supplier or product do not compel a finding that uniformity in quality is lacking. (Carpenter Dep. at 126-127.) In many cases, customers' preferences had to do more with equipment compatibility and overall performance for the intended use than with quality.

standpoint because even within the PSF categories, prices varied per customer and per product depending on the customer's purchasing volume (bargaining power), the relationship between the manufacturer and the purchaser, and occasionally, the end user's preferences. Many courts find, however, that demonstrating antitrust injury or impact does not require a purchase-by-purchase analysis. [64] *See, e.g., In re Folding Carton, 75 F.R.D. at 734* ("liability determination is not contingent upon a carton-by-carton analysis of every sale made under the alleged conspiracy to fix prices . . ."); *In re Sugar Industry, 73 F.R.D. at 346* (distinguishing general impact on purchasers from each class member's specific dollar damages); *In re Plywood, 76 F.R.D. at 583-584* (same). Rather, Plaintiffs need only establish "some damage" to each individual class member in order to satisfy its burden of proving impact. *Zenith Radio Corp., 395 U.S. at 114 n. 9* ("inquiry beyond this minimum point goes only to the amount and not the **[*93]** fact of damage.")

For all of these reasons, the Court finds that an inference of antitrust injury is permissible at least to the extent Arteva expressly admits it violated the federal antitrust laws. Liability is conceded with respect to putative class members who purchased fine denier PSF for textile applications. Within the category of fine denier PSF, there is uniformity of both quality and price. [65] (Beyer Trial Rpt., P32) Subject to Plaintiffs' proof regarding the conspiracy's scope, an inference of antitrust injury may, in fact, benefit the entire putative class and eliminate the need for any individual inquiry regarding injury or impact. [66]

It is in this context that the Court turns to the parties' expert evidence regarding the efficacy of demonstrating class-wide impact via common proof without the benefit of the *Bogosian* shortcut. [67]

ii. Common [*95] Impact - Plaintiffs' Expert Testimony

Plaintiffs may also present expert testimony from Dr. John C. Beyer [68] as a means of establishing impact. As a preliminary matter, the Court notes the split of authority with respect to the level of scrutiny a Court should apply to the parties' proffered expert economic testimony. *See generally,* Klonoff, *Antitrust Class Actions: Chaos In The Courts,11 Stan. J.L. Bus. & Fin. 1, at 14-21*. Numerous courts find that at the certification stage, the court need only determine whether plaintiffs advance a "plausible" or "valid" methodology for demonstrating that antitrust injury can be proven on a class-wide basis. *See, e.g., In re Vitamins, 209 F.R.D. at 267*; *In re Bulk [Extruded] Graphite, 2006 U.S. Dist. LEXIS 16619, 2006 WL 891362, *14*; *In re Currency Conversion Fee Antitrust Litig., 224 F.R.D. 555, 565 (S.D.N.Y.2004)* (*citing In re Visa Check, 280 F.3d at 135*.) Other courts scrutinize the expert evidence more thoroughly. *See, e.g., In re Polypropylene Carpet Antitrust Litig., 996 F.Supp. 18, 25 (N.D.Ga.1997)* (predominance requirement only met as to products on price lists); *In re Indus. Diamonds Antitrust Litig., 167 F.R.D. 374, 383 (S.D.N.Y. 1996)* (same). As noted previously, **[*96]** the instant case is distinguishable from most because discovery is complete and dispositive motions are ripe. Therefore, the merits of Plaintiffs' legal arguments are properly before the Court in addition to the question of class certification. Further, because Plaintiffs' expert testimony must ultimately be deemed reliable and helpful to the jury before it can be admitted, the Court carefully considers both

---

[64] To the extent individual proof is necessary to demonstrate impact, this element of proof could be litigated in conjunction with an individualized damages inquiry.

[65] In his trial report, Dr. Beyer attempts to reflect the differences **[*94]** in price, if any, for PSF purchases depending on the size of the customer. If this could be accomplished, there would be an even stronger argument for uniformity of price.

[66] Like Plaintiffs, the Court does not consider the presumption or inference determinative of any issue given that the undersigned now has a complete factual record to rely upon in reaching its decision.

[67] Despite Defendants' argument to the contrary, accepting Plaintiffs' allegations as true for this limited purpose is entirely consistent with the rigorous analysis requirement. In Gariety, the district court erred in accepting at face value Plaintiff's characterization of the efficiency of the industry for purposes of a presumption of reliance under a "fraud-on-the-market theory" (*i.e.,* plaintiffs' assertion that the market is efficient "is enough at the certification stage to find the market is efficient") - not Plaintiffs' conspiracy theory or allegations as a whole. *See Gariety, 368 F.3d at 364* (securities case).

[68] Dr. Beyer also provided the expert economic / econometric evidence relied upon in the Vitamins, Flat Glass, Linerboard, Corrugated Container, Carbon Dioxide, Domestic Air, and Mercedes-Benz cases. (Beyer Aff., P3)

the factual bases and the analyses underlying Dr. Beyer's opinions. *FED. R. EVID. 702*. The Court will not, however, weigh Plaintiffs' expert evidence against the expert evidence submitted by the defense as the weighing of evidence, like evaluating credibility, is a function for the jury. [69] *In re Vitamins, 209 F.R.D. at 267-268*.

Dr. Beyer explains in his Trial Report that "common impact" implies:

> "the effect of the collusion would **[*97]** have been widespread and pervasive so as to adversely affect all or nearly all members of the class. This does not, however, imply that every transaction between the defendants and every class member would have been affected by the collusion, but rather all or nearly all of the class members would have been affected by the collusion to fix prices at some point during the class period and they would have paid a price above the competitive price for polyester staple fiber."

(Beyer Trial Rpt., P26)

According to Dr. Beyer, the "[s]alient economic characteristics of the polyester staple fiber market make it likely that collusive anti-competitive behavior such as price-fixing would be successful and have a generalized widespread impact." (Beyer Trial Rpt., P8) In a series of affidavits and reports, Dr. Beyer consistently opines that if Plaintiffs are successful in proving the conspiracy as alleged, the conspiracy "would have impacted all [or nearly all] purchasers of polyester staple fiber, and that all of these purchasers paid higher prices than they would have absent the conspiracy." (Beyer Aff., P12; Beyer Trial Rpt., P8) According to Dr. Beyer, the prices charged by Defendants for their **[*98]** PSF products "move similarly over time, **across products, customers and end use.**" (Beyer Aff., PP38, 42; Charts 8, 8a / Beyer Trial Rpt., P30; Charts 4a-4d, 5a, 5b)

In considering impact, Dr. Beyer also addressed customer size based on economic theory and experience suggesting that "prices charged by suppliers vary according to the size of the purchaser, i.e., volume purchased by the purchaser." (Beyer Trial Rpt., P32) Dr. Beyer explained that "[s]uppliers give discounts to larger purchasers and charge higher prices for the same product to purchasers who buy small quantities and who buy infrequently." (Id.) Dr. Beyer found that prices for PSF products move similarly over time notwithstanding customer size. (Id.; Charts 6a-6d)

a. Price Structure Analysis

Dr. Beyer's opinion regarding Plaintiffs' ability to demonstrate class-wide impact through common proof is based primarily upon the PSF industry's price structure. (Beyer Aff., PP42-46; Beyer Trial Rpt., P30) If an industry's price structure is such that prices respond similarly to basic market supply and demand forces, then prices would also respond similarly to coordinated pricing activity. (Beyer Aff., P42)

A price structure analysis **[*99]** considers a number of market conditions that bear on price. Examples of relevant market conditions include: the number of manufacturers and the degree to which the manufacturers control the relevant market; barriers to entry of the market such as the high cost of set up and operations as well as duties levied on imports; overlap in the geographic markets, channels of distribution, and products supplied; the commodity-like nature of the product at issue; and actual transaction data. There is no disagreement with respect to certain of these market conditions. Arteva takes issue with Dr. Beyer's model on common impact (and class-wide damages) being premised in large part on the following conclusions regarding the PSF industry: 1) PSF is an undifferentiated commodity product; and 2) supply substitution occurs among defendant suppliers. [70] (Beyer's Trial Reply Rpt., PP7-13, 37)

Dr. Beyer explains the concept of supply side substitution: "suppliers can choose which type of fibers to manufacture and change their mix of PSF fibers as profit opportunities improve and diminish." (Beyer Trial Reply **[*100]** Rpt., P11) Supply side substitution is premised upon similarities in price. (Id.) According to Dr. Beyer, all

---

[69] Many courts recite familiar language to the effect that class certification does not require the court to resolve a "battle of the experts."

[70] The undersigned has already addressed the characterization of PSF as an undifferentiated commodity.

producers of PSF have the ability to produce and sell a broad range of PSF [71] but concedes that to do so may not always be profitable. (Beyer Aff., P24; Beyer Dep. at 107.) Dr. Beyer reasons that: 1) the production technology used to produce different polyester staple fiber products is the same; and 2) the cost and effort required to switch from the production of one fiber to another is minimal. (Beyer Aff., P24)

For purposes of the instant motion, the Court credits Dr. Beyer's price structure analysis.

b. Benchmark & Regression Analyses

Dr. Beyer also discusses common impact in conjunction with his proposed methodologies for proving damages on a class-wide basis. [72] (*See* Section "IV, B, 2") According to Dr. Beyer's forecast model for calculating damages, by October 1999, after the second price increase announcement, impact of the conspiracy is evident. (Beyer Dep.at 229-31; Beyer Trial Rpt., P41; Beyer Trial Reply Rpt., P22) **[*101]** Pursuant to the same model, the impact period continued through December 2001. (Beyer Trial Rpt., P46) Arteva, in its summary judgment motion, misinterprets Dr. Beyer's statement by attempting to construe the comment as a concession that the only purchasers impacted by the alleged conspiracy are those who experienced actual price increases. (Def.'s Mem. In Supp. at 24-26.) Dr. Beyer's affidavits and reports make clear, however, that the *price increase trend* begins in or around October 1999. (Beyer Trial Rpt., P41) (prices show "upward trend" starting October 1999). Instead of opining that PSF purchasers who experienced price increases during the class period are the only plaintiffs impacted, Dr. Beyer finds that "the price of polyester staple fiber was greater than it would have been, but for the behavior of the co-defendants" and "Class members would have paid higher prices than they would have absent the alleged collusion." (Beyer Trial Reply Rpt., P57-58) In other words, in some instances, impact might be shown by demonstrating that the "but for" price absent a conspiracy would have been lower than the price actually paid. *Hanover Shoe, 392 U.S. at 489*; *In re Commercial Tissue, 183 F.R.D. at 595* **[*102]** (recognizing that price may be artificially inflated due to price-fixing even though the actual price did not increase during conspiracy period). Under this rationale, the fact that certain class representatives' prices may have decreased or stayed the same during the class period is irrelevant. [73]

iii. Defense Evidence Regarding Liability

Because the Court must consider the case as a whole, the Court next considers the nature of Arteva's evidence with respect to **[*103]** liability. *Windham, 565 F.2d at 66*; *Thorn, 445 F.3d at 318*; *In re Visa Check, 280 F.3d at 138* (court must consider both the claims and defenses in determining whether a putative class meets the requirements of *Rule 23(b)(3)*). Arteva plans to challenge liability with respect to the direct purchasers of PSF for use in nonwoven products. [74] In response to Plaintiffs' theory of overall or class-wide impact, Arteva contends there is no evidence that any entities other than the fine denier (textile) PSF purchasers were impacted by the alleged conspiracy. Arteva's conclusory statement does not square with the evidence. (*See* Section "IV, 1A") The Court has already determined that the nature of the evidence regarding impact is dependent upon the jury's findings of violation. Moreover, Plaintiffs do not have to rule out all possible alternative causes to demonstrate compensable injury. *Zenith Radio Corp., 395 U.S. at 114 n. 9*.

---

[71] According to Plaintiffs, "supply substitutability doesn't mean that every product must be able to be produced on every production line." (Hr'g Tr. at 87.)

[72] Plaintiffs contend that any one of Dr. Beyer's three independent analyses is sufficient and may be relied on by the Court as an available method for demonstrating common impact.

[73] Arteva posits that 191 of 395 total PSF customers, equal to 48.4%, did not experience any price increase on any polyester staple fiber product during the Class Period. (Warren Decl., PP1, 2) According to Arteva, putative class representatives Hollander Home Fashions, J.H.N.Y., and Habasit Belting fall within this category. Arteva also represents that for customers that purchased PSF both before and after the June 1999 price increase announcement, 84 of the 288 customers (equal to 29.2%) did not experience any price increase. (Warren Decl., PP1, 3)

[74] Arteva advances the same argument with respect to damages. However, many class actions still require individual damages determinations. Thus, courts consider the presentation of individual proof as to damages less troublesome (from a trial management standpoint) than **[*104]** individual proof of injury or impact.

Other defenses Arteva claims it will assert at trial are: 1) a mitigation defense with respect to fiberfill purchasers; 2) an indirect purchaser / improper party to assert damages defense depending upon the agreement between the purchaser and end use customer; and 3) lack of injury / impact where the putative class member purchased only from a single PSF manufacturer. (Def.'s Mem. In Opp'n, at 32-35.) To the extent Arteva's defenses are consistent with the applicable law, [75] the defenses will apply differently to various class representatives. However, the fact that a defense "may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones." *In re Visa Check, 280 F.3d at 138* (affirming certification of class despite potential for individual issues regarding mitigation of damages) (*quoting* *Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 296 (1st Cir.2000))*.

It bears repeating that predominance under *Rule 23(b)(3)* requires that **[*105]** common issues predominate, but does not require all issues to be common. *See* *In re Se. Hotel Properties Ltd. P'ship Inv. Litig., 151 F.R.D. 597, 603 (W.D.N.C. 1993)* (*Rule 23(b)(3)* "does not require that each issue in the case be common to all members, but only that there are substantial common issues which predominate over the individual ones.") (*citing* *S. Carolina Nat'l Bank v. Stone, 139 F.R.D. 325 (D.S.C.1991))*; *In re Visa Check, 280 F.3d at 140*. As explained herein, the Court finds that questions regarding the scope of the conspiracy present the predominant common factual issue for trial. Although the potential for individual liability issues exists (depending on the jury's findings), Plaintiffs may also be entitled to rely upon the *Bogosian* principle and Dr. Beyer's current analyses for proof of common impact. In any event, any individual issues regarding the existence of antitrust injury could be decided in conjunction with the damages phase of the trial and eliminate the greatest obstacle to class certification.

2. Damages

Class representatives must establish that each individual putative class member has sustained actual antitrust injury as a result of the alleged conspiracy. **[*106]** *Zenith Radio, 395 U.S. at 114 n. 9*; *Windham, 565 F.2d at 59*. The inquiry as to damages necessarily requires individual proof.

In Windham, the Fourth Circuit cited Professor Handler's antitrust publication with approval in speaking about the treble damage remedy provided by the Clayton Act:

> "The treble-damage remedy is . . . limited by its (own) terms . . . The language that Congress used . . . leaves no room for awarding damages to some amorphous "fluid class" rather than, or in addition, to one or more actually injured persons. It likewise does not permit any person to recover damages sustained not by him, but by someone else who happens to be a member of such class."

Windham, 565 F.2d at 66 (*quoting* Handler, Twenty-fourth Annual Antitrust Review, 72 Col. L. Rev. 1, 37 (1972)).

The necessity of individualized proof as to damages does not defeat the instant motion. "*Rule 23* contains no suggestion that the necessity for individual damage determinations destroys commonality, typicality, or predominance, or otherwise forecloses certification." *See* *Gunnells, 348 F.3d at 428-29* (rejecting defense argument that individual proof of damages for class members precludes certification). "In fact, *Rule 23* **[*107]** explicitly envisions class actions with such individualized damage determinations." (Id.) (noting that *Rule 23(c)(4)* permits courts to certify a class with respect to particular issues and contemplates possible class adjudication of liability issues with class members individually proving the amounts of their respective claims). The Gunnells panel stated that when money damages are being sought, courts "usually" require individual proof of the amount of damages. (Id.,) (*citing* 5 *Moore's Federal Practice § 23.46[2][a]* (1997)). Other Fourth Circuit cases have likewise consistently rejected this argument. *See* *Cent. Wesleyan, 6 F.3d at 189*; *Hill v. W. Elec. Co., Inc., 672 F.2d 381, 387 (4th Cir.1982)* ("Bifurcation of . . . class actions proceedings for hearings on . . . damages is now commonplace.")

[75] The Court questions whether Arteva can pursue an "indirect purchaser / improper party" defense against a direct purchaser putative class member.

According to Dr. Beyer, there are two steps to determining the amount of Plaintiffs' damages: 1) to determine the percentage of the illegal overcharge (i.e., elevation in price attributable to the alleged collusion); and 2) to apply the percentage overcharge to the dollar value of purchases by class members (from the defendants) to calculate the actual dollar amount of damages. (Beyer Trial Rpt., **[*108]** P33)

Dr. Beyer presents two options for determining class-wide damages: 1) benchmark analysis; and 2) regression analysis. Both methods have been successfully utilized in numerous class proceedings and are generally accepted methodologies for determining class-wide impact and damages in the antitrust context. *In re Vitamins, 209 F.R.D. at 267-268*; *In re Flat Glass, 191 F.R.D. at 486* ("There is no dispute that when used properly multiple regression analysis is one of the mainstream tools in economic study and it is an accepted method of determining damages in antitrust litigation.");*In re Linerboard, 305 F.3d at 153-154* (multiple regression analysis approved as a potential method of demonstrating common impact); Rubinfield, Daniel L. "Reference Guide on Multiple Regression," REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, 2<nd> ed., Federal Judicial Center, 2000 pp. 179-227.

The benchmark approach to assessing damages on a class-wide basis involves two steps. (Beyer Aff., P48) The first step is to determine the extent to which prices during the conspiracy period were higher than they would have been absent the conspiracy. (Id.) This disparity is generally referred to as the percentage overcharge. **[*109]** (Id.) The second step is to apply the percentage overcharge to the unit or dollar volume of each class member's purchases from the Defendants during the class period. (Id.) Dr. Beyer proposes two different benchmarks for purposes of arriving at the percentage overcharge. (Id., PP50, 51) The "before and after" benchmark compares the Defendants' actual prices for PSF during the class period with competitive prices before the class period. (Id., P50) The second benchmark identified by Dr. Beyer compares the prices during the conspiracy with prices after the conspiracy. (Id., P51)

Regression analysis is also used to estimate the percentage of overcharge resulting from the alleged collusion. (Beyer Trial Rpt., P34) Regression analysis may be used in conjunction with, or as an alternative to, a benchmark methodology. (Beyer Aff., P53) Regression analysis is a statistical technique that quantifies the relationship between a variable and one or more other variables. "[T]he purpose of the regression analysis is to estimate what the price would be during a period that the alleged conspiracy would not take place . . . ." (Beyer Dep. at 58.) In estimating the "but for" price, the regression analysis **[*110]** attempts to control for ordinary market factors so that the effect of a conspiracy, if any, on price can be isolated. . . ." (Id. at 58-59; Beyer Aff., P53) Dr. Beyer uses two different regression analyses in trying to estimate the overcharge - the forecast model and the binary variable model. (Id., P43) According to Dr. Beyer, each of these individual analyses supports his findings regarding overcharge in the other model. (Id.) Dr. Beyer uses the same techniques to arrive at his estimate regarding the actual amount of monetary damages. (Id., P51)

For purposes of calculating damages, Dr. Beyer considers the relevant period to begin December 1999 and continue through July 2001. [76] (Beyer Trial Rpt., P41 n. 63, 64) In his calculations, Dr. Beyer attempts to account for various demand and supply factors as well as the passage of time. Arteva's experts, Drs. Johnson and Rapp, criticize Dr. Beyer's "single-equation" damages analyses based on the failure to account for different supply and demand conditions for the different types of PSF. (Def.'s Exh. 6 / Johnson & Rapp Decl., P18) Johnson and Rapp contend that the PSF customers are "diverse in their buying power and in the nature of their **[*111]** demands for different types of staple products." (Id., P30) As a result, Defendants' experts propose to utilize both product and customer "fixed effects."

Although the Court rejects many of the criticisms launched by Arteva, the Court has some concern that Dr. Beyer's economic damages analyses do not adequately address the differences between the various PSF market segments upon which his analyses are based - fiberfill, knits, wovens, nonwovens, carpets. Of these, the nonwoven category

[76] The relevant time period for calculation of damages does not correspond with the alleged period of impact described by Dr. Beyer (December 1999 through September 2001) because the class period, as alleged by Plaintiffs' Class Complaint, ends in July 2001. (Beyer Trial Rpt., PP41, 46)

(or PSF purchased for manufacturing nonwovens) is the most diverse. (Walker Dep. at 191, 131 (nonwovens are "pretty specialized")).

Within the nonwoven category, the fiberfill market seems to be the most readily distinguishable from the other PSF markets. Arteva's Paul Latten describes the fiberfill market as a more competitive PSF market category as a result of imports from South Korea and Taiwan. (Latten, P31) Achim Heyer, **[*112]** who oversaw Arteva's nonwovens, also testified about the competitive market conditions for fiberfill PSF due to Asian imports. (Heyer Dep. Tr. at 238.) Class representatives, Carpenter, Tex Tech and Fiber Dynamics each purchased fiberfill from foreign PSF producers during the relevant time period. (Carpenter Dep. at 50-58; Tex Tech Dep. at 61-62, 123-124, 126; Fiber Dynamics Dep. at 99-100.) The ability to purchase PSF from foreign suppliers, presumably at a lower price, was not an option in the other PSF markets. (Beyer Aff., P23) (defendants' control of domestic PSF market leaves purchasers no practical alternative to purchasing PSF at an artificially inflated price). Non-Class Plaintiff Carolina Mills' corporate representative explains that fiberfill is "used in an entirely different market than we participate in." (Groce Dep. at 50-51.) Moreover, the differentiations that exist within the other PSF categories do not exist with respect to the PSF fiberfill category. The parties agree that PSF purchased for use as fiberfill is a "pure commodity." (Hollander Dep. at 53; Carpenter Dep. at 126-127; Hr'g Tr. at 165.)

In Linerboard, one of the more recent cases applying the *Bogosian* principle **[*113]** cited by Plaintiffs, the Third Circuit explained:

> "**if variation in price dynamics among . . . marketing areas** were such that in certain areas the free market price would be no lower than the conspiratorially affected price, **it might be possible to designate subclasses** to conform with these variations."

Linerboard, 305 F.3d at 151 (*citing* *Bogosian, 561 F.2d at 455*.) Because the fiberfill sub-market is arguably subject to different economic conditions than the other sub-markets within the PSF industry, it may be proper to create a subclass solely for fiberfill purchasers during the damages phase of the trial.

Both sides proffer their respective experts' proposed modifications to the opposing party's damages calculations. (See Johnson & Rapp Decl., PP47-54; Beyer's Trial Reply Rpt., PP52-57) To the extent Dr. Beyer erred in failing to exclude the sales of the "opt-outs" or Non-Class Plaintiffs, in his damages models, Dr. Beyer concedes the mistake and represents that his models can be revised. (Beyer Dep. at 76, 80, 83-84.) Regardless of the exact approach, the parties' submissions demonstrate that calculation of damages for each individual class member is susceptible to one or more formulaic **[*114]** applications that can be presented along with individual evidence as is necessary.

3. Superiority

In deciding whether certification of a class is superior to other trial methods, the Court considers "whether the resolution of common issues advances the litigation as a whole, as opposed to leaving a large number of issues for case-by-case adjudication." Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges,* Federal Judicial Center, §2C (2005). Based upon the number of common issues of fact identified herein, and the effect each of these common issues has upon the remaining aspects of the litigation, the Court finds that certification is superior to any other trial method.

i. Rule 23 Factors

The Court begins its superiority analysis with a discussion of the factors identified within *Rule 23*. As for the first criterion, the interest of members in the class in individually controlling the prosecution or defense of separate actions, a number of class members (approximately 37 large textile / fine denier PSF customers) have already effectively "opted out" via prosecution of their own individual actions. Arteva contends that the number of opt-outs **[*115]** is indicative of the market forces. On the other hand, the class representatives appear to be content to proceed as a class and rely upon appointed co-lead counsel. The fact that a substantial putative class remains weighs in favor of certification. Although Plaintiffs' "death knell" argument [77] is not particularly persuasive, the fact that many of the smaller PSF purchasers remain in the putative class favors certification. [78] Similarly, the fact that many of the class members facing potentially the most difficult obstacles to establishing liability (PSF customers in the nonwoven category), remain in the putative class likewise favors certification.

The second factor, the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, overlaps with the first factor **[*116]** and allows the Court to consider the "opt-outs'" choices to pursue their own individual actions. Rather than read any purported conflict into the decision of the large textile mills to "opt-out," common sense teaches that the fine denier PSF customers didn't need to rely on Rule 23 and engage in protracted class litigation because, relative to some other putative class members, they already had "slam dunk" cases.

Next, it is desirable to concentrate litigation of the claims in this particular forum given that the locus of the action lies within North and South Carolina, and particularly within the Western District of North Carolina. Desirability of the forum is likewise demonstrated by the consolidation of these pretrial proceedings and subsequent assignment to this Court pursuant to 28 U.S.C. § 1407 by the Judicial Panel on Multidistrict Litigation.

In light of the posture of this case, the final consideration - the difficulties in the management of a class action - only applies now to resolution of the remaining issues raised within the parties' cross-motions for summary judgment, final pretrial preparation, trial, and post-trial motions practice - the logistics of a class action trial **[*117]** being the most complicated of these final phases. Given the demonstrated assistance of able counsel on both sides, any management issues that may arise can be overcome.

ii. Alternatives To Certification Of Proposed Class

The Court has also considered several alternatives to certification of the class as proposed by Class Plaintiffs. [79] The most appealing of the alternatives to wholesale certification lies within Rule 23 itself. Rule 23(c)(4)(A) permits a class to be certified for specific issues or elements of claims. In Gunnells, the Fourth Circuit panel mentioned the admonition in A.H. Robbins, 880 F.2d at 740, to take full advantage of this provision. Gunnells, 348 F.3d at 426. The Court would utilize Rule 23(c)(4)(A) and limit certification to the issue of liability if it were clear that the *Bogosian* principle applied to the entire putative class, eliminating the need for any significant evidence on the question of antitrust injury. However, without the benefit of the inference, the questions of impact and damages are too closely intertwined to sever or bifurcate. Brown, 92 F.R.D. at 42.

Another alternative to certification as suggested is the creation of subclasses. The creation of subclasses is required where the differences amongst putative class members warrant separate class representatives and separate counsel. Because the Court does not find any fundamental conflicts amongst the putative class members, the creation of subclasses is not required. [80]

---

[77] A death-knell argument is one that failure to certify the class would be a death knell to (or put an end to) most remaining plaintiffs' ability to prosecute their cases individually.

[78] In fact, Dr. Beyer's charts indicate that the smaller PSF purchasers are also the putative class members subject to the greatest percentage price increases. (Beyer Trial Rpt., Charts 6a-6d)

[79] Arteva does not address any of these possibilities, nor did Arteva suggest an alternative to certification **[*118]** of the proposed class.

[80] Subclasses may also be created to accommodate individual proof or address factual differences amongst class members. In re Gen. Motors Corp. Engine Interchange Litig., 594 F.2d 1106 (7th Cir.1979); Campus Cleaners, Inc. v. Dallas Tailor & Laundry Supply, 1977 U.S. Dist. LEXIS 14186, 1977WL1490 (S.D.Tex. 1977); Brown, 92 F.R.D. at 41 (if factual differences between plaintiffs are uncovered, division of the class into subclasses might be an option). Arguably, division of the putative class into one or more smaller, separate subclasses (in a manner consistent with one of the several categorizations of PSF products proposed by the litigants or to distinguish the PSF fiberfill purchasers) might render any given phase of the trial more manageable. In certifying the class, the Court does not rule out the possibility of creating **[*119]** subclasses to aid in the proper allocation of

Another creative mechanism would be to employ a test case approach (*i.e.,* a "bellwether" trial). Since there is no question regarding liability as to Thomaston Mills and the other fine denier PSF purchasers, the Court could suggest the parties agree to proceed to trial with one of its other class representatives that purchase PSF for use in nonwoven goods. In light of Arteva's arguments opposing certification, it is doubtful Arteva would agree to this trial method.

Other management tools available to the court not already discussed are: appointing a magistrate judge or special master to preside over individual damages proceedings; decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; and altering or amending the class. To date, the undersigned has not referred any of the motions in this case to a magistrate judge or special master. **[*120]** For efficiency's sake, it makes more sense for this district judge to preside over any remaining aspects of the litigation. Decertification after a trial resolving liability does not appear to be necessary or efficient. The undersigned is uncomfortable with altering or amending the class beyond what has already been suggested regarding the possible use of subclasses.

For all of these reasons, certification of a direct purchaser class as proposed by Plaintiffs provides an efficient and superior mechanism for the hundreds of putative class members to prosecute their claims against Arteva. Certification will also promote consistency and protect the Defendant from inconsistent adjudications. *Gunnells, 348 F.3d at 426*; *FED. R. CIV. P. 23(c)(2)(B)*.

V. Order

IT IS HEREBY ORDERED THAT:

1) Class Plaintiffs' Motion For Class Certification is **GRANTED;**

2) Co-Lead Class Counsel and Liaison Counsel identified and appointed at the outset of the litigation as interim appointees are hereby formally appointed as Class Counsel pursuant to *Rule 23(g)*;

3) In the event Arteva elects not to seek an appeal pursuant to *Rule 23(f)*, upon the expiration of the time period for seeking an appeal of the Court's decision, **[*121]** [81] Class Plaintiffs shall propose the method and form of individual notice to class members consistent with *Rule 23(c)(2)(B)*;

4) Arteva's Motion For Partial Summary Judgment on the issue of scope of the alleged conspiracy is **DENIED;** and

5) Class Plaintiffs' Motion For Partial Summary Judgment on the issue of scope of the alleged conspiracy is **DENIED.**

Signed: July 19, 2007

Richard L. Voorhees

United States District Judge

End of Document

---

damages. *See* *Herbst v. Int'l Tel. & Tel. Corp., 65 F.R.D. 13 (D.Conn. 1973)*. To the extent there are issues unique to one or more putative class members, the Court also contemplates submitting special interrogatories to the jury.

[81] Arteva has ten days from entry of the Court's Memorandum and Order granting Plaintiffs' Motion For Class Certification to request an interlocutory appeal pursuant to *Rule 23(f)*. *FED. R. CIV. P. 23(f)*.

Linzer Prods. Corp. v. Sekar

United States District Court for the Southern District of New York

July 23, 2007, Decided; July 23, 2007, Filed

06 Civ. 13218 (SAS)

Reporter

499 F. Supp. 2d 540 *; 2007 U.S. Dist. LEXIS 55095 **; 2007-2 Trade Cas. (CCH) P75,971

LINZER PRODUCTS CORPORATION, Plaintiff, - against - CHANDRA SEKAR, Defendant.

Core Terms

rollers, patent, two-ply, declaratory judgment, license, manufacturing, alleges, royalties, termination, motion to dismiss, patent misuse, one-ply, paint, argues, Sherman Act, rights, patents-in-suit, products, parties, relevant market, invalid, fails, unenforceable, infringement, Counts, invented, reformation, processes, amended complaint, anti trust law

LexisNexis® Headnotes

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

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

HN1[] **Jurisdiction, Subject Matter Jurisdiction**

Fed. R. Civ. P. 12(b)(1) provides for the dismissal of a claim when the federal court lacks jurisdiction over the subject matter.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

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

HN2[] **Jurisdiction, Subject Matter Jurisdiction**

The burden of demonstrating that the court has subject matter jurisdiction over the case falls on the plaintiff as it is the plaintiff who seeks to invoke the court's jurisdiction.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

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

HN3[] Jurisdiction, Subject Matter Jurisdiction

In considering a motion to dismiss for lack of subject matter jurisdiction, the court must assume the truth of the material factual allegations contained in a complaint. However, jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it. In fact, where jurisdictional facts are placed in dispute, the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings, such as affidavits.

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN4[] Motions to Dismiss, Failure to State Claim

Fed. R. Civ. P. 8(a)(2) requires a short and plain statement of the claim showing that the pleader is entitled to relief. When a complaint is attacked by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, the plaintiff need not provide detailed factual allegations. When deciding a defendant's motion to dismiss under *Rule 12(b)(6)*, a judge must accept as true all of the factual allegations contained in the complaint and draw all reasonable inferences in plaintiff's favor.

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

HN5[] Motions to Dismiss, Failure to State Claim

To survive a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, the allegations in the complaint must meet the standard of "plausibility." A complaint must amplify a claim with some factual allegations to render the claim plausible. In other words, it must provide the grounds upon which the plaintiff's claim rests through factual allegations sufficient to raise a right to relief above the speculative level. Moreover, although the court must take the plaintiff's allegations as true, the claim may still fail as a matter of law if the claim is not legally feasible.

Contracts Law > Remedies > Reformation

HN6[] Remedies, Reformation

Reformation of a contract should be allowed only where mutual mistake or fraud is clearly established, particularly when the negotiations were conducted by sophisticated, counseled business people.

Contracts Law > Remedies > Reformation

HN7[] Remedies, Reformation

The complaint in a suit for the reformation of a written instrument must set forth (1) an agreement other than that expressed in the instrument; (2) the written instrument sought to be reformed; and (3) mutual mistake of the parties, or the mistake of one party and the fraud of the other.

Contracts Law > Remedies > Reformation

HN8[] **Remedies, Reformation**

To prevail on a claim for reformation, a petitioning party has to show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties.

Contracts Law > Remedies > Reformation

HN9[] **Remedies, Reformation**

A bare claim of unilateral mistake by the plaintiff, unsupported by legally sufficient allegations of fraud on the part of defendants, does not state a cause of action for reformation.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

HN10[] **Misuse of Rights, Patent Misuse Defense**

Patent misuse is an equitable defense to patent infringement. It arose to restrain practices that did not in themselves violate any law, but that drew anticompetitive strength from the patent right, and thus were deemed to be contrary to public policy. The purpose of the patent misuse defense was to prevent a patentee from using the patent to obtain market benefit beyond that which inheres in the statutory patent right. As the U.S. Supreme Court has explained, the doctrine of patent misuse bars a patentee from using the "patent's leverage" to extend the monopoly of his patent to derive a benefit not attributable to the use of the patent's teachings, such as requiring a licensee to pay a royalty on products that do not use the teaching of the patent. The key inquiry is whether, by imposing conditions that derive their force from the patent, the patentee has impermissibly broadened the scope of the patent grant with anticompetitive effect.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

HN11[] **Misuse of Rights, Patent Misuse Defense**

Patent misuse, which developed long before the advent of ***antitrust law***, has largely merged with ***antitrust law***. Misuse is closely intertwined with ***antitrust law***, and most findings of misuse are conditioned on conduct that would also violate the antitrust laws.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

HN12[] **Misuse of Rights, Patent Misuse Defense**

Since the enactment of the Patent Misuse Reform Act of 1988, imposing conditions on a patent license is not patent misuse unless the patentee has power in the relevant market. No patent owner otherwise entitled to relief for infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having sought to enforce his patent rights against infringement, or refused to license or use any rights to the patent; or conditioned the license of any rights to the patent or the sale of the patented product on the acquisition of a license to rights in another patent or purchase of a separate product, unless, in view of the circumstances, the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

HN13[] Misuse of Rights, Patent Misuse Defense

A patentee's market power is necessary, but not sufficient, for a finding of patent misuse based on conditional licensing. Historically, courts have acknowledged a presumption of monopoly power from the mere possession of a patent, but more recently, courts have expressly rejected such a presumption, holding that in both patent misuse and antitrust cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

HN14[] Misuse of Rights, Patent Misuse Defense

Because the statute, *35 U.S.C.S. § 271(d)*, is phrased in the negative, it does not require that patent misuse be found in the case of all such conditional licenses in which the patent owner has market power; instead, the statute simply excludes such conditional licenses in which the patent owner lacks market power from the category of arrangements that may be found to constitute patent misuse.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

HN15[] Misuse of Rights, Patent Misuse Defense

The U.S. Court of Appeals for the Federal Circuit held in B. Braun that while patent misuse may satisfy an element of a plaintiff's antitrust claim, a plaintiff may not recover damages when seeking a declaratory judgment of patent misuse. B. Braun did not proscribe claims seeking a declaratory judgment of patent misuse. Indeed, the Federal Circuit has allowed such claims.

Antitrust & Trade Law > Sherman Act > Claims

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

HN16[] Sherman Act, Claims

In order to survive a motion to dismiss, a claim under § 1 and § 2 of the Sherman Act must allege a relevant geographic and product market in which trade was unreasonably restrained or monopolized. A relevant product market consists of products that have reasonable interchangeability for the purposes for which they are produced--price, use and qualities considered. Products will be considered to be reasonably interchangeable if consumers treat them as acceptable substitutes.

Antitrust & Trade Law > Sherman Act > Claims

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

HN17[] Sherman Act, Claims

Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN18[] **Conveyances, Licenses**

A patentee is entitled to impose conditions on licenses or refuse to grant licenses entirely.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN19[] **Conveyances, Licenses**

A patent holder has a legal monopoly and significant freedom to license or refuse to license the use of the patented invention, including to exact royalties as high as he can negotiate with the leverage of that monopoly.

Antitrust & Trade Law > General Overview

HN20[] **Antitrust & Trade Law**

The antitrust laws were enacted for the protection of competition, not competitors.

Antitrust & Trade Law > Clayton Act > Scope

HN21[] **Antitrust & Trade Law, Clayton Act**

Section 3 of the Clayton Act is limited to leases or sales of commodities.

Antitrust & Trade Law > Clayton Act > Scope

HN22[] **Antitrust & Trade Law, Clayton Act**

With respect to § 3 of the Clayton Act, it is not dispositive that a contract merely includes a sale of goods.

Antitrust & Trade Law > Clayton Act > Scope

HN23[] **Antitrust & Trade Law, Clayton Act**

When the subject of a contract is a combination of both tangible goods and intangible rights or services, the contract is covered by the Clayton Act, as modified by the Robinson-Patman Act, if its "dominant nature" or purpose is the sale of tangible products rather than the transfer of intangible rights or services.

Antitrust & Trade Law > Clayton Act > Scope

HN24[] **Antitrust & Trade Law, Clayton Act**

Courts have strictly construed the term "commodities," holding that it denotes only "tangible products of trade."

Antitrust & Trade Law > Clayton Act > Scope

HN25[] **Antitrust & Trade Law, Clayton Act**

Contracts that explicitly grant a license to exploit the intellectual property contained in a commodity have been viewed as primarily concerned with intangible rights, and are therefore not covered by the Clayton Act.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN26[] **Scope, Monopolization Offenses**

In order to state a claim for monopolization under § 2 of the Sherman Act, a plaintiff must establish (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. To state an attempted monopolization claim, a plaintiff must establish (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

Antitrust & Trade Law > Sherman Act > General Overview

HN27[] **Antitrust & Trade Law, Sherman Act**

The Donnelly Act was modeled after the Sherman Act, and the courts generally apply federal antitrust precedent in construing it. The Donnelly Act requires all of the elements of a Sherman Act claim.

Business & Corporate Compliance > ... > Contracts Law > Breach > Material Breach

HN28[] **Breach, Material Breach**

In determining whether a failure to render or to offer performance is material, the following circumstances are significant: the extent to which the injured party will be deprived of the benefit which he reasonably expected; the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

HN29[] **Declaratory Judgments, Federal Declaratory Judgments**

See *28 U.S.C.S. § 2201(a)*.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Constitutional Law > The Judiciary > Case or Controversy > General Overview

HN30[] **Declaratory Judgments, Federal Declaratory Judgments**

The phrase "case of actual controversy" in the Declaratory Judgment Act refers to the types of "Cases" and "Controversies" that are justiciable under Article III.

Patent Law > Ownership > General Overview

Patent Law > Infringement Actions > General Overview

HN31[] **Patent Law, Ownership**

An action for infringement must join as plaintiffs all co-owners.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

HN32[] **Declaratory Judgments, Federal Declaratory Judgments**

Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Counsel: [1]** For Plaintiff Linzer Products Corporation: Keith A. Walter, Esq., Ratner Prestia P.C., Wilmington, Delaware; Donald L. Rhoads, Esq., Vito J. DeBari, Esq., Kramer Levin Naftalis & Frankel LLP, New York, New York.

For Defendant Chandra Sekar: Adam B. Landa, Esq., Rachel L. Izower, Esq., Greenberg Traurig LLP, New York, New York.

Judges: Shira A. Scheindlin, U.S.D.J.

Opinion by: Shira A. Scheindlin

Opinion

[*542] OPINION AND ORDER

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

Chandra Sekar ("Sekar") invented an inexpensive industrial process for manufacturing plastic paint rollers. In 1996, Sekar was awarded a patent (the "'790 Patent") for this invention, giving him the right to exclude others from using his process (the "'790 process") to manufacture paint rollers. [1] In 1998, Sekar entered into a license agreement (the "Agreement" or "1998 Agreement") with Linzer Products Corporation ("Linzer"), a manufacturer of paint rollers, permitting Linzer to use his '790 process in exchange for royalties. [2] Shortly thereafter, Linzer began using the '790 process to manufacture one-ply paint rollers, paying royalties to Sekar for each roller.

In 2000, Sekar was awarded a second patent (the "'134 Patent") for another invention, a process for manufacturing plastic paint rollers having two or more layers (the "'134 process"). [3] With Sekar's knowledge and assistance, Linzer began manufacturing *two-ply* paint rollers (in addition to its one-ply roller production). Accordingly, Linzer also began paying royalties for its two-ply roller production at the same rate it had paid for its one-ply rollers.

The parties operated amicably on these terms until 2006, when they began to disagree about the amount of royalties owed. Linzer clamed that it had no obligation to pay *any* royalties for its use of the two-ply process because this process was not covered by the '790 Patent. As explained below, the relationship deteriorated, and Sekar eventually threatened to sue Linzer if Linzer refused to negotiate new royalty terms for its use of the two-ply process.

Instead **[**3]** of waiting for Sekar to sue, Linzer filed this lawsuit, bringing a number of state and federal claims against Sekar, **[*543]** including: (1) breach of the covenant of good faith and fair dealing; (2) breach of warranty; (3) breach of contract; (4) unjust enrichment; and (5) various antitrust violations under both federal and state law. Linzer also asks the Court for several declaratory judgments relating to (1) the parties' rights with respect to the Agreement; (2) the alleged unenforceability of certain provisions of the Agreement in light of principles of patent law and federal and state ***antitrust law***; and (3) the alleged invalidity of the patents-in-suit.

Pursuant to *Federal Rule of Civil Procedure 12(b)(1)* and *12(b)(6)*, Sekar moves to dismiss most, but not all, of these claims. [4] For the following reasons, Sekar's motion to dismiss is granted in part and denied in part.

II. BACKGROUND

A. Sekar Invents the '790 Process

Linzer is a New York corporation in the business of manufacturing paint application products, including paint rollers. Sekar is an individual residing in New York. Sekar invented a process for manufacturing paint rollers from a thermoplastic called polypropylene and received the '790 Patent for that process in 1996. Sekar is a joint owner of the '790 Patent with Newell Operating Company ("Newell"). [5] Newell manufactures plastic products and competes with Linzer in the paint-roller market. [6]

---

[1] *See* U.S. Patent No. 5,572,790; *35 U.S.C. § 271(a)* ("whoever without authority makes, uses, offers **[**2]** to sell, or sells any patented invention . . . during the term of the patent therefor, infringes the patent").

[2] *See* License Agreement between Sekar and Linzer, dated April 25, 1998, Ex. C to First Amended Complaint, dated December 14, 2006 ("Compl.").

[3] *See* U.S. Patent No. 6,159,134.

[4] *See* Memorandum of Law in Support of Defendant Chandra Sekar's Motion to Dismiss ("Def. Mem.") at 2. Sekar does not move to dismiss Linzer's claims for breach of contract or unjust enrichment. Nor does he move to dismiss Linzer's requests (1) for a declaratory judgment that Sekar is estopped from terminating the Agreement **[**4]** or (2) for a declaratory judgment that part of the Agreement is an unenforceable unlawful restrictive covenant under New York law.

[5] *See* Agreement at 1 ("Sekar is the owner of an undivided one-half interest in and to United States Patent No. 5,572,790 relating to methods for the manufacture of paint rollers"). *See also* Reply Memorandum of Law in Further Support of Defendant

B. Linzer and Sekar Execute the 1998 Licensing Agreement

In April 1998, Linzer and Sekar executed the Agreement, **[**5]** granting Linzer a royalty-bearing license to use the '790 Patent to manufacture "Licensed Products." [7] It also grants Linzer *royalty-free* licenses to use Sekar's related knowledge and trade secrets, [8] and any of Sekar's future inventions relating to polypropylene paint roller **[*544]** manufacturing. [9] The Agreement also included a sale of two machines for manufacturing paint rollers to be delivered and installed by Sekar at Linzer's facilities. [10] In addition, each party made express warranties to the other. Sekar warranted that "[a]s of the Agreement Date . . . he [was] not aware of anything that would effect [sic] the validity of the Patent Rights . . . ." [11] Linzer warranted "that during the Term of this Agreement it shall not manufacture or sell any Polypropylene Paint Roller unless it is a Licensed Product." [12] Finally, the Agreement provides that certain rights and obligations will survive termination of the Agreement, including Linzer's royalty-free licenses to Sekar's knowledge, trade secrets, and future inventions. [13]

Pursuant to the Agreement, Sekar delivered and installed two machines at Linzer facilities, which Linzer used to manufacture one-ply rollers. The process that these machines employed (the "Linzer one-ply process") was similar, though not identical, to Sekar's '790 process.

C. Sekar Invents the Multi-Ply '134 Process

Chandra Sekar's Motion to Dismiss ("Def. Rep.") at 12; 5/2/07 Letter from Keith A. Walter, counsel for Linzer, to the Court ("5/2/07 Walter Letter"), at 1.

[6] *See* Def. Rep. at 12.

[7] *See* Agreement § 2.1 ("During the Term of this Agreement . . . Sekar hereby grants to Linzer, under the Patent Rights, a royalty-bearing, non-exclusive right and license **[**6]** to make, use, and/or sell Licensed Products in the Territory."). For purposes of this dispute, the Agreement defines "Licensed Products" as "length[s] of Polypropylene Paint Roller . . . manufactured using a process or apparatus claimed in" "a claim of the Patent Rights which has not been withdrawn, canceled, disclaimed, abandoned, or held invalid, unpatentable, or unenforceable by a tribunal of competent jurisdiction . . . ." *Id.* §§ 1.4-1.7. "Patent Rights means Sekar's joint interest in and to United States Letters Patent No. 5,572,790 . . . ." *Id.* § 1.2. The Agreement also sets out a quarterly schedule by which Linzer must pay royalties to Sekar based on the number of Licensed Products manufactured by Linzer. *See id.* §§ 3.2-3.3.

[8] *See id.* § 6.2 ("Sekar grants and agrees to grant to Linzer a royalty free, fully paid up, perpetual right and license to use the Sekar Know-how in connection with the manufacture of Polypropylene Paint Rollers.").

[9] *See id.* § 8.1 ("In the event that Sekar invents an invention related to the Technology . . . Sekar hereby grants and agrees to grant to Linzer during the Term of this Agreement a fully paid-up, royalty-free right and license to practice the invention **[**7]** throughout the world.").

[10] *See id.* § 11.1 (Sekar to deliver and install two machines at Linzer's facilities; Linzer to pay $ 75,000 for each machine upon delivery and before installation).

[11] *Id.* § 14.1.

[12] *Id.* § 14.4.

[13] "Upon the expiration of the Term of this Agreement, or earlier termination as permitted herein, all rights and obligations hereunder shall terminate, except for such rights and/or obligations in Sections 6.2, 6.4, 7.3, 8.1, 8.2, 9.2, 9.3, 9.4, 9.5, 10.5 and this Section 16, which rights and/or obligations shall survive termination of this Agreement." *Id.* § 16.2 (underline in original).

Sekar later invented another process for manufacturing paint rollers, for which he received the '134 Patent in December 2000. [14] This process is used to produce multi-layer or multi-ply paint rollers. In 2002, with Sekar's assistance, Linzer implemented a two-ply roller production **[**8]** process (covered by the '134 Patent) and began producing two-ply rollers. [15] Linzer paid royalties for its two-ply roller production at the same royalty rate that the Agreement set for Linzer's use of the one-ply process. [16]

D. Linzer and Sekar Dispute Their Obligations Under the Agreement

Linzer and Sekar performed the Agreement to the satisfaction of both parties until February 2006, when Sekar began an audit of Linzer's royalty payments. [17] Responding to the audit, Linzer instituted its own review of the terms of the Agreement to verify which of Linzer's processes were covered by the '790 and '134 Patents. After this review, Linzer took the position that its royalty payments for its two-ply process had been paid mistakenly. Linzer's position was -- and is -- that its two-ply process was within the scope of the '134 Patent (which it had a *royalty-free* license to use), and not within the scope of the '790 Patent (which it had a *royalty-bearing* **[*545]** license to use). Sekar disagreed, responding that Linzer's two-ply **[**9]** process was covered by both the '134 *and* '790 Patents, and therefore royalties were owed. [18] The parties began a series of discussions to resolve their differences. At the same time, Linzer obtained an opinion of counsel that the '790 Patent was invalid and another opinion that Linzer's two-ply process did not infringe the '790 Patent. Linzer provided these opinions of counsel to Sekar in August and September 2006 under a written agreement pursuant to *Rule 408 of the Federal Rules of Evidence* regarding inadmissibility of communications made in settlement negotiations. [19]

Sekar responded to these opinions in a letter to Linzer's general counsel. As to the invalidity opinion, Sekar responded that he "is not persuaded that there is any serious likelihood that the '790 Patent would be held to be invalidated in the event of a challenge." [20] Regarding non-infringement, **[**10]** Sekar noted that if Linzer's opinion was correct (*i.e.,* Linzer's two-ply process was outside the scope of the '790 Patent) then Linzer was in breach of its warranty that it would not manufacture paint rollers other than Licensed Products (*i.e.,* rollers made by the process of the '790 Patent). [21] Sekar also cautioned that while Linzer's prior breach of its warranty may have been inadvertent, Linzer was now on notice, therefore any continued use of its two-ply process would be willful. [22] Sekar also gave a 40-day notice of termination pursuant to the termination provisions of the Agreement, stating that the notice was "a mere formality since Linzer's breach of warranty is non-curable[,]" implying that such notice was unnecessary, and adding that "[n]evertheless, at present, Mr. Sekar does no[t] intend to terminate the agreement before expiration of the 40-day notice period." [23] Sekar suggested terms under which Linzer would pay breach

---

[14] Unlike the '790 Patent, which is jointly owned by Newell and Sekar, the '134 Patent is owned solely by Sekar. *See* Compl. at P 258.

[15] *See id.* at PP 49-51, 253.

[16] *See id.* at P 59.

[17] *See id.* at PP 54, 56.

[18] *See* Compl. at P 64; 6/5/06 Letter from Frederick H. Mandel, counsel for Sekar, to Alden Myers, general counsel for Linzer ("6/5/06 Mandel Letter"), Ex. F to Compl., at 2 ("paint rollers produced using the ['134] process fall within the scope of the ['790] patent claims as well").

[19] *See* Compl. at PP 67-68.

[20] 9/14/06 Letter from Mandel to Myers ("9/14/06 Mandel Letter"), Ex. E to Compl., at 1.

[21] *See id.* at 2 (referring to Linzer's warranty at section 14.4 of the Agreement).

[22] *See id.* at 3.

damages and proposed that the parties renegotiate the Agreement to include explicit terms licensing Linzer's two-ply roller production under the '134 Patent (at a much higher royalty rate than Linzer had been paying). In a November 2006 letter, Sekar also **[**11]** stated that he would be "happy to meet with Linzer to discuss renegotiation of the License Agreement[,]" but that Sekar "want[s] it to be clear that if we [Linzer and Sekar] cannot reach agreement, Mr. Sekar intends to let a Court decide the legal issues." [24]

E. Linzer's Lawsuit

Linzer chose not to wait for Sekar to sue for breach and/or patent infringement. Linzer sued in November 2006, and filed its Amended Complaint in December. The Amended Complaint contains eighteen claims, fourteen of which Sekar now moves to dismiss. Many of the claims in Linzer's Amended Complaint seek a declaratory judgment of the parties' rights under their **[*546]** License Agreement, a common feature of suits brought against patent holders and their licensees. [25]

The claims in the Amended Complaint are arranged, with no apparent organizing principle, into Counts numbered I through XIII (including Counts VII(A)-(F)). Each of the parties' briefs adds to this confusion by addressing the claims in a seemingly random order that corresponds neither to the Amended Complaint nor to the preceding briefs. To make sense of the issues raised by the briefs, this Opinion will group the claims as follows: (1) claims that arise under contract law, (2) claims **[**13]** that seek a declaratory judgment of the parties' rights under the 1998 Agreement (including some such claims that are based on ***antitrust law***), and (3) claims that arise under patent law.

III. LEGAL STANDARDS

A. *Rule 12(b)(1)* Motion to Dismiss

HN1[] *Rule 12(b)(1)* provides for the dismissal of a claim when the federal court "lack[s] . . . jurisdiction over the subject matter." Plaintiff bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. [26]

HN3[] In considering a motion to dismiss for lack of subject matter jurisdiction, the court must assume the truth of the material factual allegations contained in a complaint. [27] However, "jurisdiction must be shown affirmatively, and

---

[23] *Id.* Sekar has since issued additional notices of termination under various provisions of the Agreement.

[24] 11/2/06 Letter from Mandel to Myers ("11/2/06 Mandel Letter"), Ex. O to Compl., at 1-2.

[25] *See MedImmune, Inc. v. Genentech, Inc., 127 S. Ct. 764, 166 L. Ed. 2d 604 (Jan. 9, 2007)*. In the context **[**12]** of a patent license dispute, declaratory judgment claims serve to relieve a licensee from the threat of an infringement suit and the injunction or damages that might result. In such suits, the declaratory judgment plaintiff often takes legal positions similar to those adopted by patent infringement defendants. For example, a licensee who is sued as a patent infringement defendant might raise the defense that the patent is invalid. If that same licensee had sufficient reason to believe such a suit would be filed, the licensee might file a declaratory judgment suit as a plaintiff, raising the same substantive argument - the patent's invalidity - in the form of a declaratory judgment that the patent is invalid.

[26] *See Luckett v. Bure, 290 F.3d 493, 496-97 (2d Cir. 2002)*. *See also Goonewardena v. New York, 475 F. Supp. 2d 310, 2007 WL 510097, at *6 (S.D.N.Y. Feb. 14, 2007)* (***HN2***[] "[T]he burden of demonstrating that the court has subject matter jurisdiction over the case falls on the plaintiff as it is the plaintiff who seeks to invoke the court's jurisdiction.").

[27] *See Triestman v. Federal Bureau of Prisons, 470 F.3d 471, 474 (2d Cir. 2006)* (citing *J.S. ex rel. N.S. v. Attica Cent. Schs., 386 F.3d 107, 110 (2d Cir. 2004))*.

that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." [28] In fact, "where jurisdictional facts are **[**14]** placed in dispute, the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings, such as affidavits." [29]

B. *Rule 12(b)(6)* Motion to Dismiss

HN4[] "*Federal Rule of Civil Procedure 8(a)(2)* requires . . . 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" [30] When a complaint is attacked by a *Rule 12(b)(6)* motion to dismiss, the plaintiff need not provide "detailed factual allegations." [31] When deciding **[*547]** a defendant's motion to dismiss under *Rule 12(b)(6)*, a judge must "accept as true all of the factual allegations contained in the complaint" [32] and "draw all reasonable inferences in plaintiff's favor." [33]

Nevertheless, ***HN5***[] to survive a 12(b)(6) motion to dismiss, the allegations in the complaint must meet the standard of "plausibility." [34] A complaint must "amplify a claim with some factual allegations . . . to render the claim *plausible* [italics in original]." [35] In other words, it must provide "the grounds upon which [the plaintiff's] claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" [36] Moreover, although the court must take the plaintiff's allegations as true, "the claim may still fail as a matter of law . . . if the claim is not legally feasible." [37]

IV. DISCUSSION

A. Contract Claims (Counts I, II, VIII)

1. Linzer's Allegations State a Claim for Breach of the Covenant of Good Faith and Fair Dealing (Count I)

---

[28] *Shipping Fin. Servs. Corp. v. Drakos, 140 F.3d 129, 131 (2d Cir. 1998)* (citing *Norton v. Larney, 266 U.S. 511, 515, 45 S. Ct. 145, 69 L. Ed. 413 (1925))*.

[29] ***LeBlanc v. Cleveland, 198 F.3d 353, 356 (2d Cir. 1999)***.

[30] *Erickson v. Pardus, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007)* (quoting *Fed. R. Civ. P. 8(a)(2)*).

[31] *Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007)*.

[32] *Id. at 1975* (citation **[**15]** omitted).

[33] *Ofori-Tenkorang v. American Int'l Group, Inc., 460 F.3d 296, 298 (2d Cir. 2006)*.

[34] *See Bell Atlantic, 127 S. Ct. at 1970*.

[35] *Iqbal v. Hasty, No. 05 Civ. 5768, 490 F.3d 143, 2007 U.S. App. LEXIS 13911, 2007 WL 1717803, at *11 (2d Cir. June 14, 2007)* (holding that the plaintiff's complaint adequately alleged the personal involvement of the Attorney General because it was plausible that officials of the Department of Justice would be aware of policies concerning individuals arrested after 9/11).

[36] *ATSI Commc'ns v. Shaar Fund, Ltd., No. 05 Civ. 5132, 493 F.3d 87, 2007 U.S. App. LEXIS 16382, 2007 WL 1989336, at *5 (2d Cir. July 11, 2007)* (quoting *Bell Atlantic, 127 S.Ct. at 1965*).

[37] *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 457 F. Supp. 2d 455, 459 (S.D.N.Y. 2006)* **[**16]** (citing *Allaire Corp. v. Okumus, 433 F.3d 248, 250 (2d Cir. 2006))*.

In Count I, Linzer alleges a breach of the covenant of good faith and fair dealing and seeks an injunction prohibiting Sekar from, *inter alia,* terminating the 1998 Agreement. [38] Sekar argues that Count I should be dismissed because Linzer failed to allege that Sekar has threatened termination, and should also be dismissed because Linzer has failed to allege that Sekar acted in bad faith.

Linzer has sufficiently alleged that Sekar threatened to terminate the Agreement. Sekar issued a notice to Linzer under section 10.2.2, a termination provision of the Agreement, noting that Sekar "does no[t] intend to terminate the agreement before expiration of the 40-day notice period [of section 10.2.2]." [39] Also, in response to legal actions taken by Linzer, Sekar has agreed to forbear from exercising "any right he may have" to terminate the Agreement. [40] Under Sekar's interpretation of the Agreement, he does have a termination right, triggered by Linzer's **[**17]** failure to pay royalties owed and/or its material breach of section 14.4. And Sekar's words suggest he would exercise this right -- in accordance with the termination provisions of the Agreement -- if he found Linzer's conduct to be deficient. Moreover, in his Memorandum of Law in Opposition, Sekar argues that he has not threatened to terminate the Agreement, but he does not promise to *abstain* from terminating **[*548]** the Agreement nor does he state that he is *unable* to terminate.

Linzer also sufficiently alleges that Sekar's threats of termination were made in bad faith. Taking Linzer's allegations as true, Sekar used Linzer's opinions of counsel to threaten termination of the Agreement, though the opinions were tendered pursuant to an agreement that they would be used only for settlement purposes. [41] Sekar allegedly threatened termination in the absence of a material breach, and did so with the intent to force Linzer to agree to higher royalty rates on its **[**18]** two-ply process. [42]

In further support of its claims **[**19]** of bad faith, Linzer notes that Sekar assisted Linzer in implementing the two-ply process that Sekar now identifies as his grounds for termination. Linzer employees visited Sekar's facility to learn how to implement the two-ply process. Linzer alleges that without Sekar's help, Linzer would have been unable to implement that process. Linzer also alleges that Sekar has known the details of Linzer's manufacturing processes at all relevant times, and has personally observed them in action at Linzer's New York facility. [43] If, as Linzer alleges (and Sekar denies), Sekar accepted royalties for Linzer's two-ply production, *knowing* that such royalties were not owed, such conduct would support a claim of bad faith.

Count I adequately pleads both threats of termination and bad faith on Sekar's part. Accordingly, Sekar's motion to dismiss Count I is denied.

---

[38] *See id.* at P 101.

[39] 9/14/06 Mandel Letter at 3. *See also* Compl. at P 72. Sections 10.2.1 and 10.2.2 respectively give Sekar a right to terminate if Linzer fails to pay monies owed or otherwise materially breaches the Agreement.

[40] *See* Compl. at PP 80, 100.

[41] When Linzer asserted that no royalties were owing for its two-ply process, Sekar requested an explanation of the theories underlying Linzer's position. *See id.* at PP 64-65. In response, Linzer provided Sekar with two opinions of Linzer's counsel, subject to an agreement between the parties that the opinions would be used for settlement purposes only. *See id.* at PP 66-68. Taking Linzer's allegations as true, Sekar relied on these opinions of counsel in bad faith, not for settlement purposes, but to assert that Linzer was in breach of the Agreement. *See id.* at PP 69-72; 9/14/06 Mandel Letter at 2-3; 9/25/06 Letter from Mandel to Linzer, Ex. I to Compl., at 2 ("Based upon advice received by you from you[r] attorneys, and based upon your acceptance and adoption of that advice, you [are] now on notice that you have been in material breach of the License Agreement from the time you began manufacturing two-ply rollers. Moreover, you have continued to breach the warranty knowingly and willfully from at least the time you first received legal advice to the effect that the two-ply rollers are not Licensed Products.").

[42] *See* Compl. at PP 71, 96.

[43] *See id.* at PP 51-52, 253.

2. Linzer's Allegations State a Claim for Breach of Warranty (Count II)

In Count II, Linzer alleges that Sekar breached his warranty to Linzer that he was "not aware of anything that would [affect] the validity of the Patent Rights" because Sekar knew his invention to be inoperable as described in the application that **[**20]** eventually became the '790 Patent. [44] Sekar argues that Count II should be dismissed because "the only way [Linzer] can succeed on Count II is to succeed on Count XI (which [Linzer] cannot)." [45] Count XI alleges that the '790 Patent is invalid. In order to prevail on its breach of warranty claim, Linzer must show that Sekar withheld information that affected the validity of the '790 Patent. Sekar argues that because Linzer lacks standing to challenge the validity of the '790 Patent, it cannot make the necessary showing to **[*549]** succeed on its breach of warranty claim, *i.e.,* that the information Sekar allegedly withheld indeed affected the '790 Patent's validity. Sekar's argument fails because Linzer has standing to challenge the validity of the patents-in-suit, [46] and will thus have the opportunity to prove up its breach of warranty claim. Sekar's motion to dismiss Count II is denied.

3. Linzer's Allegations Do Not State a Claim for Reformation (Count VIII)

Sekar argues that Count VIII, in which Linzer **[**21]** seeks reformation of the 1998 Agreement, fails to state a claim because Linzer fails to allege a mistake, fraud, and that the Agreement does not reflect the parties' intent. ***HN6***[] "[R]eformation of a contract should be allowed only where mutual mistake or fraud is clearly established, particularly when the negotiations were conducted by sophisticated, counseled business people." [47]

> [T]he complaint ***HN7***[] in a suit for the reformation of a written instrument must set forth (1) an agreement other than that expressed in the instrument; (2) the written instrument sought to be reformed; and (3) mutual mistake of the parties, or the mistake of one party and the fraud of the other. [48]

HN8[] To prevail on a claim for reformation, "a petitioning party has to show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties." [49]

Linzer **[**22]** alleges that "Sekar lead [sic] Linzer to believe that (i) it had the right to practice the two-ply process under the agreement, and (ii) Linzer was required to pay Mr. Sekar royalties for the two-ply process," when Sekar knew "that Linzer was not required to pay royalties for the two-ply process and Linzer is purportedly not permitted to practice the two-ply process under Mr. Sekar's construction of § 8.1 of the 1998 Agreement." [50] Sekar's allegedly fraudulent conduct might suffice to establish bad faith in the *performance* of the Agreement, but it cannot support a reformation claim because the conduct happened well after the Agreement was executed. The alleged conduct regarding the two-ply process occurred after 2000, and could not have affected Linzer's understanding of the terms of the Agreement at the time of execution in 1998. Thus, Linzer fails to sufficiently allege unilateral mistake and

---

[44] Agreement § 14.1. For present purposes, the Agreement defines "Patent Rights" as Sekar's interest in the '790 Patent. *See id.* § 1.2.

[45] Def. Mem. at 24 (emphases omitted).

[46] *See infra* Part IV.C.

[47] *Briand Parenteau Assocs. Inc. v. HMC Assocs., 225 A.D.2d 874, 638 N.Y.S.2d 817, 819 (3d Dep't 1996)* (citing *Chimart Assocs. v. Paul, 66 N.Y.2d 570, 573-74, 489 N.E.2d 231, 498 N.Y.S.2d 344 (1986)*; *Seebold v. Halmar Constr. Corp., 146 A.D.2d 886, 536 N.Y.S.2d 871 (3d Dep't 1989))*.

[48] 16 N.Y. Jur. 2d *Cancellation of Instruments* § 86 (2007) (citations omitted).

[49] *George Backer Mgmt. Corp. v. Acme Quilting Co., Inc., 46 N.Y.2d 211, 217, 385 N.E.2d 1062, 413 N.Y.S.2d 135 (1978)*.

[50] Compl. at P 232.

fraud. ***HN9***[] "A bare claim of unilateral mistake by the *plaintiff,* unsupported by legally sufficient allegations of fraud on the part of *defendants,* does not state a cause of action for reformation." [51]

Moreover, even assuming that Linzer had sufficiently alleged unilateral mistake and fraud, its reformation claim would still fail because Linzer does not allege what the parties' true agreement was. Accordingly, Linzer fails to state a claim for **[*550]** reformation and Sekar's motion to dismiss Count VIII is granted.

B. Claims Seeking a Declaratory Judgment of the Parties' Rights Under the 1998 Agreement (Counts IV, V, VII(A)-(E), X, XIII)

1. The Parties' Dispute Over the License of the '134 Patent Is Ripe for Adjudication (Count IV)

In Count IV, Linzer seeks a declaratory judgment that the 1998 Agreement grants Linzer a royalty-free license to practice the methods of the '134 Patent and that this license survives the termination of the 1998 Agreement. [52] Sekar argues that Count IV should be dismissed as unripe because Sekar has neither threatened to terminate the Agreement nor to bring an infringement suit. [53] Absent such a threat, Sekar reasons, Count IV requests an impermissible advisory opinion. [54]

Sekar's argument is without merit. Count IV seeks a remedy for an actual conflict which poses a threat of imminent harm **[**24]** to Linzer. As discussed above, the Amended Complaint does allege that Sekar has threatened to terminate the Agreement. [55] Moreover, the parties have been involved in this contract dispute for more than a year. The judgment sought in Count IV would relieve Linzer of its ongoing royalty payments to Sekar for its two-ply process, royalties Linzer asserts were never owed and have been mistakenly paid for years. The judgment sought in Count IV would also determine whether, under the terms of the 1998 Agreement, Linzer's license to the '134 Patent survives termination of that Agreement. If it does not, Linzer will have to develop an alternate method for producing two-ply rollers, negotiate a new license with Sekar, or abandon the market for two-ply rollers. Despite Sekar's arguments to the contrary, these are not theoretical harms, but rather the realities of a business in which Linzer has a great deal at stake. Thus, Sekar's motion to dismiss Count IV is denied.

2. Linzer's Request for a Declaratory Judgment that Its Two-Ply Process Is Not Covered by the '790 Patent Is Not Futile (Count V)

In Count V, Linzer seeks a declaratory judgment that its two-ply process is **[**25]** not covered by the '790 Patent. [56] If this is so, then two-ply rollers manufactured by that process are not Licensed Products under the 1998 Agreement [57] and Linzer does not owe Sekar royalties for the manufacture of these rollers. [58]

---

[51] 16 N.Y. Jur. 2d *Cancellation of Instruments* § 86 (2007) (citations omitted) **[**23]** (emphasis added).

[52] *See* Compl. at P 134.

[53] *See* Def. Mem. at 33.

[54] *See id.* at 35.

[55] *See supra* Part IV.A.1.

[56] Compl. at P 149 (seeking "a declaratory judgment . . . that [Linzer] owes no royalties to Mr. Sekar under the 1998 Agreement based on roller covers made in accordance with [Linzer's] two-ply process . . . and that [Linzer's] two-ply process does not fall within the claims of the '790 Patent.").

[57] *See* Agreement §§ 1.2, 1.3, 1.5, 1.6, 1.7 (defining Licensed Products as polypropylene paint rollers that are covered by a valid claim of the '790 Patent).

Sekar argues, however, that if it is determined that Linzer's two-ply process is not covered by the '790 Patent, then it necessarily follows that Linzer is in breach of section 14.4 of the Agreement. [59] Thus, **[*551]** according to Sekar, a declaratory judgment that Linzer's two-ply process is not covered by the '790 Patent would not end the dispute between the parties.

Nonetheless, Count V cannot be dismissed as futile. Resolution of this claim would determine whether Linzer's two-ply rollers are Licensed Products. Although this determination would not resolve every issue raised in this dispute, it does address a major question: the scope of the '790 Patent. As a result, the claim is not futile and Sekar's motion to dismiss Count V is denied.

3. Claims Seeking a Declaratory Judgment that Section 14.4 of the 1998 Agreement Is Unenforceable (Counts VII(A)-(E))

In Count VII, Linzer seeks a declaratory judgment that section 14.4 of the Agreement is unenforceable because it conflicts with various federal and state laws prohibiting anticompetitive conduct. Count VII is divided into six sub-counts, VII(A)-(F), [60] each of which (1) seeks a declaratory judgment that section 14.4 of the 1998 Agreement is unenforceable and (2) names a federal or state law or doctrine that, according to Linzer, would be violated if section 14.4 was enforced, including the doctrine of patent misuse and federal and state antitrust laws. In addition, some of the sub-counts also seek damages and injunctive relief. In light **[**27]** of this complexity each sub-count will be addressed as a separate Count.

a. Linzer's Allegations Do Not State a Claim for Declaratory Judgment of Patent Misuse (Count VII(A))

In Count VII(A), Linzer seeks a declaratory judgment that section 14.4 of the Agreement is unenforceable because in imposing that condition, Sekar committed patent misuse, which is the unlawful extension of a patent monopoly.

> ***HN10***[] Patent misuse is an equitable defense to patent infringement. It "arose to restrain practices that did not in themselves violate any law, but that drew anticompetitive strength from the patent right, and thus were deemed to be contrary to public policy." The purpose of the patent misuse defense "was to prevent a patentee from using the patent to obtain market benefit beyond that which inheres in the statutory patent right." As the Supreme Court has explained, the doctrine of patent misuse bars a patentee from using the "patent's leverage" to "extend the monopoly of his patent to derive a benefit not attributable to the use of the patent's teachings," such as requiring a licensee to pay a royalty on products that do not use the teaching **[**28]** of the patent. The "key inquiry is whether, by imposing conditions that derive their force from the patent, the patentee has impermissibly broadened the scope of the patent grant with anticompetitive effect." [61]

Linzer alleges that Sekar "has monopolized, attempted to monopolize and restrain trade unreasonably in the relevant market through the exclusionary acts set forth below" [62] and that Sekar "has developed **[*552]** and enforced throughout the United States a policy, pattern, practice, of exclusionary dealing, pursuant to which Mr. Sekar will license only to manufacture[r]s and distributors that agree not to manufacture polypropylene paint rollers using any other technologies." [63] Not surprisingly, these allegations and others in Count VII(A) sound like antitrust

---

[58] *See id.* § 3.2 (requiring Linzer to pay royalties for Licensed Products it manufactures).

[59] *See id.* § 14.4 (Linzer warrants that it will not manufacture **[**26]** Polypropylene Paint Rollers that are not Licensed Products).

[60] Sekar's motion to dismiss challenges only Counts VII(A)-(E).

[61] *U.S. Philips Corp. v. International Trade Comm'n, 424 F.3d 1179, 1184-85 (Fed. Cir. 2005)* (quoting *Mallinckrodt, Inc. v. Medipart, Inc., 976 F.2d 700, 704 (Fed. Cir. 1992)*; *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 135-36, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*; and *C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1372 (Fed. Cir. 1998))*.

[62] Compl. at P 173.

claims. ***HN11***[] Patent misuse, which developed long before the advent of ***antitrust law***, has largely merged with **[**29]** ***antitrust law***. "Misuse is closely intertwined with ***antitrust law***, and most findings of misuse are conditioned on conduct that would also violate the antitrust laws." [64] The particular form of misuse alleged in Count VII(A) is Sekar's refusal to license the '790 Patent unless Linzer agreed to an exclusive dealing arrangement. ***HN12***[] Since the enactment of the Patent Misuse Reform Act of 1988, imposing conditions on a patent license is not patent misuse unless the patentee has power in the relevant market.

> (d) No patent owner otherwise entitled to relief for infringement . . . of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having . . . (3) sought to enforce his patent rights against infringement . . . (4) refused to license or use any rights to the patent; or (5) conditioned the license of any rights to the patent or the sale of the patented product on the acquisition of a license to rights in another patent or purchase of a separate product, unless, in view of the circumstances, the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned. [65]

HN13[] A patentee's **[**30]** market power is necessary, but not sufficient, for a finding of patent misuse based on conditional licensing. [66] Historically, courts have acknowledged a presumption of monopoly power from the mere possession of a patent, but more recently, courts have expressly rejected such a presumption, holding that "in [both patent misuse and antitrust] cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product." [67]

Sekar **[**31]** argues that Count VII(A) should be dismissed because Linzer improperly invokes the doctrine of patent misuse as an independent cause of action. [68] This argument is without merit. In *B. Braun Medical, Inc. v. Abbott Labs.*, the ***HN15***[] Federal Circuit held that while patent misuse may satisfy an element of a plaintiff's antitrust claim, a plaintiff may not recover *damages* when seeking a declaratory judgment of patent misuse. [69] *B. Braun* did not proscribe **[*553]** claims seeking a declaratory judgment of patent misuse. Indeed, in later actions, the Federal Circuit has allowed such claims without comment. [70] Linzer's patent misuse claims -- in Counts VII(A) and XII -- seek a declaratory judgment, not damages.

However, Sekar also argues -- correctly -- that Linzer fails to allege a relevant market in which Sekar has monopoly power. As explained below with respect to Linzer's antitrust claims, Linzer's allegations do not allow even an

---

[63] *Id.* at P 174.

[64] Herbert Hovenkamp, Mark D. Janis & Mark A. Lemley, *IP and Antitrust* § 3.1 (2002 & 2007 Supp.).

[65] *35 U.S.C. § 271(d)* (including the Patent Misuse Reform Act of 1988, codified at *35 U.S.C. § 271(d)(4)-(5)*).

[66] *See* U.S. Philips Corp., 424 F.3d at 1186 (***HN14***[] "Because the statute [*35 U.S.C. § 271(d)*] is phrased in the negative, it does not require that patent misuse be found in the case of all such conditional licenses in which the patent owner has market power; instead, the statute simply excludes such conditional licenses in which the patent owner lacks market power from the category of arrangements that may be found to constitute patent misuse.").

[67] *Illinois Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 1293, 164 L. Ed. 2d 26 (2006)*.

[68] *See* Def. Mem. at 26 (citing *Illinois Tool Works, 126 S. Ct. at 1288*); Def. Rep. at 10.

[69] *See* *124 F.3d 1419, 1428 & n.5 (Fed. Cir. 1997)* ("[patent misuse] may not be converted to an affirmative claim *for damages* simply by restyling it as a declaratory judgment counterclaim" (emphasis added)).

[70] *See, e.g.,* *Inamed v. Kuzmak, 249 F.3d 1356, 1362 (Fed. Cir. 2001)* (reversing district court's dismissal of plaintiff's "[patent] misuse cause of action" in a declaratory judgment action); *Competitive Techs., Inc. v. Fujitsu Ltd., 374 F.3d 1098, 1101 (Fed. Cir. 2004)* **[**32]** ("The district court dismissed Counterclaim 5 (for a declaratory judgment of unenforceability of the '349 and '400 patents) for failure to state a claim upon which relief could be granted, but only 'to the extent that Fujitsu seeks a broader remedy' than a declaration of unenforceability of the patent based on the University's alleged patent misuse.").

inference of a relevant market in which Sekar has monopoly power. [71] This failure is fatal to Linzer's patent misuse claim in Count VII(A). Sekar's motion to dismiss Count VII(A) is granted.

b. Linzer's Allegations Do Not State a Claim Under Section 1 of the Sherman Act (Count VII(B))

In Count VII(B), Linzer seeks a declaratory judgment that section 14.4 of the Agreement is unenforceable on the grounds that this section, as interpreted by Sekar, is an unreasonable restraint on competition in violation of *section 1* of the Sherman Act. [72] Linzer alleges that enforcement of section 14.4 of **[**33]** the Agreement would result in an injury to competition. "Sekar has admitted that the tie-out covenant imposed on Linzer which compels Linzer to manufacture only polypropylene paint rollers made allegedly under [Sekar's] '790 Patent process is a restriction on competition by Linzer." [73] According to Linzer, section 14.4 chills innovation by preventing Linzer from using competing manufacturing technologies, thus reducing the demand for superior one-ply manufacturing processes, which processes could reduce prices for consumers. [74] That is, without section 14.4, Linzer (and others who could sell Linzer such a process) would have greater incentive to compete by creating improved manufacturing processes. Sekar argues that Count VII(B) should be dismissed because Linzer fails to properly define a relevant market and fails to allege harm to competition within that (allegedly improperly-defined) market.

HN16[] "In order to survive a motion to dismiss, a claim under *Sections 1* and *2* of the Sherman Act must allege a relevant geographic and product market in which trade was unreasonably restrained or monopolized." [75] "A relevant product market consists of 'products that have reasonable interchangeability for the purposes for which they are produced - price, use and qualities considered.' Products will be considered to be reasonably interchangeable **[*554]** if consumers treat them as 'acceptable substitutes.'" [76]

> ***HN17***[] Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted. [77]

Linzer's definition of its relevant market is unclear - the Amended Complaint states that the relevant market is "the market for one-ply rollers made pursuant to *the one-ply process[.]*" [78] In the context of Linzer's other allegations, this phrase could be read to mean the market for one-ply rollers manufactured according to (a) *Linzer's* one-ply process, (b) the '790 process, or (c) *any* one-ply process (*i.e.,* all one-ply rollers). Under any of these three definitions, Linzer's Sherman Act claims fail.

---

[71] *See infra* Part IV.B.3.b.

[72] *See* *15 U.S.C. § 1*.

[73] Compl. at P 190. *See also id.* at P 179 ("the sole purpose of the restrictive covenant of § 14.4 of the Agreement is to require Linzer not to deal in products that compete with the process allegedly covered by the '790 Patent").

[74] *See id.* at P 191; Linzer's Memorandum of Law **[**34]** in Opposition to Sekar's Motion to Dismiss ("Pl. Opp.") at 28-29.

[75] *Global Disc. Travel Servs. LLC v. Trans World Airlines, Inc., 960 F.Supp. 701, 704 (S.D.N.Y. 1997)*.

[76] *Pepsico, Inc. v. Coca-Cola Co., 315 F.3d 101, 105 (2d Cir. 2002)* (quoting *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)* **[**35]** and *FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 46 (D.D.C. 1998))*. *Accord* *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)* ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.").

[77] *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)* (citations omitted).

[78] Compl. at PP 186, 205 (emphasis added).

First, it would strain credulity to narrow the relevant product market to rollers produced by *Linzer's* one-ply process. Linzer offers no support for the proposition that there are no substitutes for *its* one-ply rollers. Indeed, **[**36]** for a product as uncomplicated as a paint roller, Linzer's allegation that its competitors are also using the '790 process implies that Linzer's one-ply rollers would be interchangeable with those of the competitors in the consumer's eyes. Such a market definition would be inadequate because it fails to distinguish the included products from the excluded products. [79] Without a properly-defined market, Linzer cannot state a claim for a violation of the Sherman Act.

Second, if the relevant product market is the market for '790-process rollers, and assuming that Sekar has power in that market, Linzer's claim fails because the exclusive dealing arrangement of section 14.4 cannot be an unreasonable restraint. It gives Sekar nothing more than his due as an owner of the '790 Patent. Vertical exclusive dealing arrangements such as section 14.4 of the Agreement are presumptively lawful, [80] and ***HN18***[] a patentee is entitled to impose conditions on licenses or refuse to grant licenses entirely. [81] Linzer **[*555]** argues that the only effect of section 14.4 is anticompetitive, allowing Sekar to achieve or maintain a monopoly. But this view overlooks the pro-competitive effects of **[**37]** the patent right, to wit, the incentive for Sekar and others like him to innovate. During the term of the '790 Patent, any power Sekar might have in the '790-process roller market is a legitimate result of Sekar's monopoly right as owner of that patent. Thus, Linzer's Sherman Act claims fail for lack of an *unreasonable* restraint on competition.

Third, if the relevant product market is the market for one-ply rollers in general, then Linzer fails to allege facts that allow an inference of the required anticompetitive effect. At most, two of the four major competitors in the one-ply roller market are licensed by Sekar. [82] Thus, efforts by Sekar to exert monopoly power -- assuming, again, that he had such power [83] -- by raising license fees might raise costs of production for Sekar's licensees, but would not raise costs for the other two competitors, who would simply undercut Sekar's licensees on price. The licensees would doubtless be injured -- and could perhaps seek redress through other means -- but there would be no harm to competition in the one-ply roller market or to the consumers of that product. ***HN20***[] "The antitrust laws were enacted for 'the protection of *competition,* not *competitors.*'" [84] "Other allegations in the amended complaint, as well as common knowledge, make it clear that other large competitors . . . compete **[**39]** in the [one-ply paint-roller]

---

[79] *See* Pepsico, 315 F.3d at 105.

[80] *See* id. at 110. Linzer's arguments appear to conflate the vertical dealing arrangement presented in this case with their more-suspect cousins, horizontal dealing arrangements. The arrangement here is vertical because Sekar is a vendor, selling Linzer an input (a manufacturing process) into Linzer's end product (paint rollers). Sekar *is not* a competitor of Linzer in the market for paint rollers, thus their relationship cannot be characterized as horizontal.

[81] *See, e.g.,* 35 U.S.C. § 271(d)(4)-(5); Applera Corp. v. MJ Research, Inc., 349 F. Supp. 2d 321, 328 (D. Conn. 2004) (***HN19***[] "A patent holder . . . has a legal monopoly and significant freedom to license or refuse to license the use of the patented invention, including 'to exact royalties as high as he can negotiate with the leverage of that monopoly.'" (quoting Brulotte v. Thys Co., 379 U.S. 29, 33, 85 S. Ct. 176, 13 L. Ed. 2d 99 (1964))). **[**38]** A patentee's right to refuse or impose conditions on a license may be diminished where the patentee refuses to license a *horizontal* competitor. Here, however, the relationship between the parties is vertical.

[82] Compl. at P 169 ("three of the four major manufacture[r]s and distributors of polypropylene paint rollers in the United States make one-ply rollers pursuant to the [one]-ply process, which Mr. Sekar alleges falls within his '790 Patent"). One of the three manufacturers that use the '790 process is Newell, Sekar's co-owner of the '790 Patent. Thus, Sekar licenses only two of the four major competitors in the one-ply roller market.

[83] Sekar has limited control of the competitors in this market. Only two of the four competitors are licensees of the '790 Patent and there is no allegation that Sekar has an exclusive dealing arrangement with any manufacturer other than Linzer.

[84] *Atlantic Richfield Co. v. USA Petroleum Corp., 495 U.S. 328, 338, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (quoting *Brown Shoe, 370 U.S. at 320*).

market. Without any allegation as to how market-wide competition will be affected, the complaint fails to allege a claim on which relief may be granted." [85]

Further, Sekar's exclusive dealing arrangement with Linzer does not alone establish -- nor do Linzer's allegations support **[**40]** the inference of -- a "pattern and practice" of monopolistic conduct, as Linzer alleges. Sekar is entitled to his patent right. Linzer's allegation -- that Sekar's imposition of an exclusive dealing arrangement on Linzer tends to inhibit innovation of new manufacturing techniques -- is negated by Sekar's patent right to impose such conditions. After all, Sekar's innovation of the '790 process was motivated by the incentive of the patent right. Linzer cannot argue that the legitimate rewards of past innovation inhibit future innovation. Accordingly, Linzer fails to state a claim under the Sherman Act, and Sekar's motion to dismiss Count VII(B) is granted.

c. Linzer's Allegations Do Not State a Claim for a Violation of Section 3 of the Clayton Act (Count VII(C))

In Count VII(C), Linzer seeks a declaratory judgment that section 14.4 of the **[*556]** Agreement is unenforceable because enforcement would violate *section 3* of the Clayton Act, and also seeks treble damages, injunctive relief, and fees and costs under the Act. [86] Sekar moves to dismiss Count VII(C) for failure to state a claim because ***HN21***[] *section 3* of the Clayton Act, which is limited to leases or sales of commodities, is inapplicable to the **[**41]** parties' 1998 Agreement, which is principally a patent licensing agreement (rather than a sale or lease of tangible goods). [87] Linzer does not dispute that *section 3* of the Clayton Act governs sales of tangible goods, but rather argues that *section 3* governs the 1998 Agreement because the Agreement *includes* a sale of goods. Indeed, Sekar promised to -- and actually did -- deliver and install two roller-manufacturing machines at Linzer's facilities. [88] However, ***HN22***[] it is not dispositive that a contract merely *includes* a sale of goods.

> ***HN23***[] When the subject of a contract is a combination of both tangible goods and intangible rights or services, the contract is covered by the [Clayton Act, as modified by the Robinson-Patman Act] if its "dominant nature" or purpose is the sale of tangible products rather than the transfer of intangible rights or services. [89]

It is beyond cavil that the dominant purpose of the 1998 Agreement was to license Sekar's intellectual property rights to Linzer to allow it to manufacture paint rollers pursuant to these rights. The bulk of the Agreement (entitled "License Agreement") is concerned with specifying and licensing Sekar's patent rights, trade secrets, and know-how in exchange for cash and royalties to be paid. Linzer has paid Sekar "nearly $ 11 million in royalty payments" pursuant to the licensing provisions of the Agreement, while the purchase-and-sale provisions set a price of $ 150,000 for the two machines Sekar delivered. [90] Moreover, ***HN25***[] "contracts that explicitly grant a license to exploit the intellectual property contained in a commodity have been viewed as primarily concerned with intangible rights, and are therefore not covered by the Act." [91] Accordingly, Sekar's motion to dismiss Count VII(C) is granted.

---

[85] *Electronics Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc., 129 F.3d 240, 245 (2d Cir. 1997)*.

[86] *See* *15 U.S.C. § 14*.

[87] *See* *Innomed Labs, LLC v. ALZA Corp., 368 F.3d 148, 155 (2d Cir. 2004)* (***HN24***[] "Courts have strictly construed this term ["commodities"], holding that it denotes only 'tangible products of trade.'").

[88] *See* Agreement §§ 11.1-11.2.

[89] *Innomed, 368 F.3d at 156* (citing *Tri-State Broad. Co., Inc. v. United Press Int'l, Inc., 369 F.2d 268, 270 (5th Cir. 1966)* **[**42]** and *Ambook Enters. v. Time Inc., 612 F.2d 604, 609 n.6 (2d Cir. 1979))*.

[90] Compl. at P 25. *See also* Agreement § 11.1.

[91] *Innomed, 368 F.3d at 161 n.4* (citing *La Salle Street Press, Inc. v. McCormick & Henderson, Inc., 293 F. Supp. 1004, 1006 (N.D. Ill. 1968))*.

d. Linzer's Allegations Do Not State a [43] Claim for Violation of *Section 2* of the Sherman Act (Count VII(D))**

In Count VII(D), Linzer alleges that Sekar's actions constitute a monopolization and attempted monopolization in violation of *section 2* of the Sherman Act, and accordingly seeks treble damages, injunctive relief, and a declaratory judgment that section 14.4 of the Agreement is unenforceable. [92]

> [I]n order ***HN26***[] to state a claim for monopolization under *Section 2* of the Sherman Act, a plaintiff must establish "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition **[*557]** or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." To state an attempted monopolization claim, a plaintiff must establish "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." [93]

As discussed **[**44]** earlier with respect to Linzer's claims under *section 1* of the Sherman Act, Linzer fails to allege a relevant market in which Sekar possesses or could possess monopoly power for purposes of its Sherman Act claims. Accordingly, Sekar's motion to dismiss Count VII(D) is granted.

e. Linzer's Allegations Do Not State a Claim for Violation of the Donnelly Act (Count VII(E))

In Count VII(E), Linzer seeks a declaratory judgment that section 14.4 of the Agreement is unenforceable because it violates New York's Donnelly Act, an analog of the Sherman Act intended for cases in which the interstate commerce requirement is not met. ***HN27***[] "The Donnelly Act was modeled after the Sherman Act, and the courts generally apply federal antitrust precedent in construing it." [94] Neither party argues that the Donnelly Act should be applied differently in this case. Sekar correctly notes that "the Donnelly Act requires all of the elements of a Sherman Act claim." [95] Thus, Sekar argues, because these two Acts have the same elements and are applied similarly, and because Linzer's Sherman Act claims must be dismissed, the Donnelly Act claims must be dismissed as well. Indeed, Linzer's Donnelly Act claims succeed or fail **[**45]** with its Sherman Act claims, and as discussed above, Linzer failed to adequately plead its Sherman Act claims. Thus, Linzer's Donnelly Act claims are also insufficiently pled, and Sekar's motion to dismiss Count VII(E) is granted.

4. Linzer's Allegations State a Claim for a Declaratory Judgment that Sekar May Not Terminate the Agreement (Count X)

In Count X, Linzer seeks a declaratory judgment, on the grounds of unclean hands, that Sekar may not terminate or act contrary to the Agreement. [96] Sekar argues that Count X, like Count I, should be dismissed because Linzer fails

---

[92] *See* *15 U.S.C. § 2*; Compl. at PP 204-212.

[93] *Pepsico, 315 F.3d at 105* (citations omitted) (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)* and *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993))*.

[94] *Intellective, Inc. v. Massachusetts Mut. Life Ins. Co., 190 F. Supp. 2d 600, 617 (S.D.N.Y. 2002)*.

[95] Def. Mem. at 19. *See* *Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc., 34 A.D.3d 91, 94, 823 N.Y.S.2d 79 (2d Dep't 2006)* ("The Sherman Act (*15 USC § 1*) and the Donnelly Act require identical basic elements of proof . . . .").

[96] *See id.* at P 255. Ordinarily, such a claim would be brought as a defense **[**46]** to an infringement suit, but, as discussed above, Linzer need not wait until Sekar terminates the Agreement. Termination of the license agreement would leave Linzer with the rock-and-a-hard-place choice to cease manufacturing operations or facing an infringement suit. The Declaratory Judgment Act was designed to prevent such situations.

to allege that Sekar has threatened termination. As discussed above with respect to Count I, [97] Linzer does sufficiently allege that Sekar threatened termination. Therefore, Sekar's motion to dismiss Count X is denied.

[*558] 5. Linzer's Allegations State a Claim for a Declaratory Judgment that a Breach of Section 14.4 Is Not Material (Count XIII)

Sekar argues that Linzer has not alleged facts sufficient to sustain its claim for a declaratory judgment that Linzer's breaches of section 14.4 of the Agreement, if any, were not material. If Linzer's two-ply process is found to fall within the claims of the '790 Patent, Linzer would not be in breach of section 14.4. However, if Linzer's allegation that its two-ply process falls outside the '790 Patent is correct, then Linzer would be in breach of section 14.4, raising the question of whether such breach is material.

> ***HN28***[] In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
>
> (a) the extent to which the injured party will be deprived of the benefit **[**47]** which he reasonably expected;
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> * * *
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. [98]

Sekar's acceptance of royalties for Linzer's use of its two-ply process suggests that even if such use was a breach of section 14.4, Sekar was not deprived of the benefit he expected under the Agreement. Further, Sekar's acceptance of royalties and his offer to "revise" the Agreement to explicitly permit Linzer to use its two-ply process (at a higher royalty rate) demonstrate that Sekar *can* be compensated for such a breach. [99] Linzer's payment of two-ply royalties with reservations, along with its investment in Sekar's processes, indicate that if Linzer is found in breach of section 14.4, such breach is likely to be cured by Linzer's payment of royalties. **[**48]** [100] Finally, Linzer's payment of the disputed royalties with reservation and explanations of its reasons for reservation (rather than a total refusal to pay disputed royalties) evince good faith and fair dealing on its part. Accordingly, Linzer alleges facts sufficient to state a claim for a declaratory judgment that its breaches, if any, of section 14.4 of the Agreement were not material breaches of the Agreement as a whole.

C. Patent Claims (Counts XI, XII)

In Counts XI and XII, Linzer seeks declaratory judgments that both patents-in-suit are invalid (Count XI) and unenforceable (Count XII). [101] Sekar argues that both counts must be dismissed because Linzer, "a licensee without a reasonable apprehension of suit, cannot challenge the validity of" the patents-in-suit for want of a case or controversy, as is required to invoke the Declaratory Judgment Act. [102] **[*559]** According to Sekar, Linzer cannot

---

[97] *See supra* Part IV.A.1.

[98] ***Restatement (Second) of Contracts § 241*** (1979).

[99] *See* Compl. at PP 59, 71.

[100] *See id.* at PP 53, 77, 79.

[101] For convenience, the concepts of "invalidity and unenforceability will be referred **[**49]** to simply as invalidity[.]" *MedImmune, 127 S. Ct. at 768 n.1*.

have a reasonable apprehension of an infringement suit because Sekar is incapable of bringing such a suit without Newell, the co-owner of the '790 Patent. [103]

Sekar's argument relies on the Federal Circuit's "reasonable apprehension of suit" test for evaluating the existence of a case or controversy in a suit for declaratory judgment of invalidity of a patent -- a test which the Supreme Court rejected in *MedImmune v. Genentech.* [104] The *MedImmune* Court wrote:

> *Aetna* and the cases following it do not draw the brightest of lines between those declaratory-judgment actions that satisfy the case-or-controversy requirement and those that do not. Our decisions have required that the dispute be "definite and concrete, touching the legal relations of parties having adverse legal interests"; and that it be "real and substantial" and "admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." In *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* we summarized as follows: ***HN32***[] "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, **[**51]** between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." [105]

The Federal Circuit has acknowledged the rejection of its standard and has decided subsequent cases in accordance with *MedImmune.* [106]

[*560] The instant dispute satisfies the case or controversy standard as explained in *MedImmune* for several reasons. *First,* Linzer and Sekar are undoubtedly parties with adverse interests in their legal relations with respect to the Agreement and the patents-in-suit. The interpretation of the Agreement and the validity and possible infringement of the patents-in-suit will determine whether Linzer must pay royalties or breach damages to Sekar, or may be enjoined from manufacturing infringing rollers.

---

[102] Def. Mem. at 20. *See* *28 U.S.C. § 2201(a)* (***HN29***[] "In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration . . . ."). The Supreme Court has "explained that ***HN30***[] the phrase 'case of actual controversy' in the [Declaratory Judgment] Act refers to the types of 'Cases' and 'Controversies' that are justiciable under Article III." *MedImmune, 127 S. Ct. at 771* (citing *Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240, 57 S. Ct. 461, 81 L. Ed. 617 (1937))*.

[103] *See* *Ethicon, Inc. v. United States Surgical Corp., 135 F.3d 1456, 1467 (Fed. Cir. 1998)* (***HN31***[] "An action for infringement must join as plaintiffs all co-owners.") (citing *Waterman v. Mackenzie, 138 U.S. 252, 255, 11 S. Ct. 334, 34 L. Ed. 923, 1891 Dec. Comm'r Pat. 320 (1891))*. Linzer denies that Newell is a necessary party to this dispute, but nonetheless requests permission to join Newell as a declaratory judgment defendant. *See* 5/2/07 Walter Letter at 1-2. Though Newell may not be a necessary party, *see infra* note 104, this action could result in the invalidation of the '790 Patent, thus Newell should **[**50]** be notified of the action and invited to join as a defendant. Accordingly, Linzer's request for permission to add Newell as a party is granted.

[104] *See* *MedImmune, 127 S. Ct. at 774 n.11* (noting that the Federal Circuit's "reasonable apprehension of suit" test conflicted with *Altvater v. Freeman, 319 U.S. 359, 365, 63 S. Ct. 1115, 87 L. Ed. 1450, 1943 Dec. Comm'r Pat. 833 (1943)*, *Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239, 57 S. Ct. 461, 81 L. Ed. 617 (1937)*, and *Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826 (1941)*, and was in tension with *Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 98, 113 S. Ct. 1967, 124 L. Ed. 2d 1 (1993))*. Though the "reasonable apprehension of suit" standard is no longer the law, Sekar's argument would fail even under that test. As discussed below, Linzer's apprehension of suit is not extinguished simply because the potential exists for Newell to exercise its "right to impede the other co-owner's [Sekar's] ability to sue infringers by refusing to voluntarily join in such a suit." *Ethicon, 135 F.3d at 1468*. Newell, Linzer's direct competitor, has sued Linzer in the past for infringement of another patent in this field. *See* **[**52]** Pl. Opp. at 15. Moreover, Sekar is the *sole* owner of the '134 Patent, and is thus immediately capable of suing for infringement of that patent.

[105] *MedImmune, 127 S. Ct. at 771* (citations omitted; alteration in original) (quoting *Aetna, 300 U.S. at 240-41*).

[106] *See, e.g.,* *Sandisk Corp. v. STMicroelectronics, Inc., 480 F.3d 1372, 1380-81 (Fed. Cir. 2007)* ("In finding declaratory judgment jurisdiction in *MedImmune,* the Court specifically addressed and rejected our reasonable apprehension test[.]").

Second, the controversy between Linzer and Sekar is "real and substantial." Their dispute -- over royalties, breach, and patent validity and infringement -- has been festering for over a year now. The parties **[**53]** remain at an impasse after substantial negotiation and renegotiation.

Third, this case does not require suppositions about "a hypothetical state of facts" because the facts are amply developed. The 1998 Agreement is a signed, operative document, under which the parties have been performing for eight years. Linzer's potentially-infringing activities are real and known: during the performance of the Agreement, Linzer has been manufacturing rollers using its one- and two-ply processes -- processes which Sekar claims infringe the patents-in-suit. Sekar filed several patent applications, including those applications which matured into the patents-in-suit. The prosecution histories of those applications contain evidence that bears on the alleged invalidity of those patents and of Sekar's knowledge of such invalidity (and thus his alleged breach of warranty).

Finally, the controversy would be resolved by the declaratory judgments Linzer seeks. Such judgments would provide Linzer with relief by clarifying whether royalties are owed, whether its processes infringe either or both of the patents-in-suit, whether those patents are valid, and what rights the parties have under the Agreement. Indeed, **[**54]** Sekar invited such a judgment by stating that he would be "happy to meet with Linzer to discuss renegotiation of the License Agreement[,]" but that he "want[ed] it to be clear that if we [Linzer and Sekar] cannot reach agreement, Mr. Sekar intends to let a Court decide the legal issues." [107] "The Declaratory Judgment Act was designed to relieve potential defendants from the Damoclean threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure or never." [108] In sum, this case presents a case or controversy sufficient for plaintiff to invoke the Declaratory Judgment Act, and this Court has jurisdiction to issue the declaratory judgments sought in the Complaint. Accordingly, Sekar's motion to dismiss is denied as to Count XI.

Sekar further argues with respect to Count XII that patent misuse is not a cause of action. This argument fails for the same reasons discussed above regarding Count II. [109] However, Count XII must be dismissed for a different reason: it is superfluous. Count XII seeks a declaratory **[**55]** judgment that the patents-in-suit are unenforceable on the grounds of patent misuse. The patent misuse alleged in Count XII is that Sekar attempted to enforce invalid patents (the patents-in-suit). [110] **[*561]** For Linzer to prevail on this claim, then, the patents-in-suit must be shown to be invalid. Thus, Count XII is duplicative of Count XI. Count XI seeks a declaratory judgment that the patents-in-suit are invalid, and if it succeeds -- *i.e.,* if the patents-in-suit are invalidated -- then the patents will be unenforceable, which is the very relief sought by Count XII. Therefore, Sekar's motion to dismiss is granted as to Count XII.

V. CONCLUSION

For the reasons discussed above, defendant's motion to dismiss is granted with respect to Counts VIII, VII(A)-(E), and XII; it is denied with respect to Counts I-II, IV-V, X-XI, and XIII. The Clerk of the Court is directed to close this motion (document # 24). A conference is scheduled for August 9, 2007, at 4:30 p.m. in Courtroom 15C.

SO ORDERED:

Shira A. Scheindlin

---

[107] 11/2/06 Mandel Letter at 1-2.

[108] *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1243 (9th Cir. 2006)*.

[109] *See supra* Part IV.A.2.

[110] *See* Compl. at P 265 ("Sekar has attempted to enforce the [patents-in-suit] against Linzer . . . knowing that [they] were invalid").

U.S.D.J.

Dated: New York, New **[**56]** York

July 23, 2007

LexisNexis®

Jennings v. Auto Meter Prods.

United States Court of Appeals for the Seventh Circuit

November 27, 2006, Argued; July 25, 2007, Decided

No. 06-2466

Reporter

495 F.3d 466 *; 2007 U.S. App. LEXIS 17618 **; 83 U.S.P.Q.2D (BNA) 1577 ***

DOUGLAS M. JENNINGS, Plaintiff-Appellant, v. AUTO METER PRODUCTS, INC., GAUGE WORKS, LLC, AND GREGORY DAY, Defendants-Appellees.

Prior History: [1]** Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 04-CV-1862. William T. Lawrence, Magistrate Judge.

Jennings v. Auto Meter Prods., 2006 U.S. Dist. LEXIS 96833 (S.D. Ind., Mar. 28, 2006)

Core Terms

bezel, patent, patent application, allegations, Gauge, continuity, fraudulent, flyer, dashboard, mail, predicate act, criminal activity, district court, aftermarket, wire fraud, utility patent, duration, pattern of racketeering activity, mail fraud, racketeering, contacted, believes, injuries, inventor, asserts, argues

LexisNexis® Headnotes

Patent Law > Statutory Bars > Public Use Bar > General Overview

Patent Law > US Patent & Trademark Office Proceedings > Filing Requirements > General Overview

HN1[] **Statutory Bars, Public Use Bar**

The date of first public use matters, as inventors have only one year after that date in which to file a patent application. *35 U.S.C.S. § 102(b)*.

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

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

While a complaint attacked by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN3[] **Racketeer Influenced & Corrupt Organizations, Claims**

In the context of *Fed. R. Civ. P. 12(b)(6)*, for a plaintiff seeking to pursue a claim asserting that an antitrust conspiracy existed, the court requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

HN4[] **Claims, Fraud**

Congress passed the Racketeer Influenced and Corrupt Organizations Act (RICO) in an effort to combat organized, long-term criminal activity. Although *18 U.S.C.S. § 1964(c)* provides a private civil action to recover treble damages for violations of RICO's substantive provisions, the statute was never intended to allow plaintiffs to turn garden-variety state law fraud claims into federal RICO actions. In order to establish a violation of *§ 1962(c)*, a plaintiff must show the following four elements by a preponderance of the evidence: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. A pattern of racketeering activity consists, at the very least, of two predicate acts of racketeering committed within a ten-year period. *18 U.S.C.S. § 1961(5)*. In order to curb widespread attempts to turn routine commercial disputes into civil RICO actions, courts carefully scrutinize the pattern requirement to forestall RICO's use against isolated or sporadic criminal activity, and to prevent RICO from becoming a surrogate for garden-variety fraud actions properly brought under state law. To fulfill the pattern requirement, plaintiffs must satisfy the so-called "continuity plus relationship" test: the predicate acts must be related to one another (the relationship prong) and pose a threat of continued criminal activity (the continuity prong).

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

HN5[] **Claims, Fraud**

In the context of the Racketeer Influenced and Corrupt Organizations Act (RICO), the continuity requirement exists to give effect to Congress's clear intention that RICO target long-term criminal behavior, as opposed to more discrete acts of fraud. Continuity can be both a closed-and open-ended concept. Closed-ended continuity, which is all that is even arguably present in this case, refers to criminal behavior that has come to a close but endured for such a substantial period of time that the duration and repetition of the criminal activity carries with it an implicit threat of continued criminal activity in the future. A RICO plaintiff may satisfy the open-ended continuity requirement by showing past conduct which by its nature projects into the future with a threat of repetition.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

HN6[] **Claims, Fraud**

In the context of the Racketeer Influenced and Corrupt Organizations Act, in determining whether there is continuity, relevant factors include the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries. The mere fact that the predicate acts relate to the same overall scheme or involve the same victim does not mean that the acts automatically fail to satisfy the pattern requirement. The requirement of a pattern of racketeering activity is a standard, not a rule, and thus its determination depends on the facts and circumstances of the particular case, with no one factor being necessarily determinative. Courts evaluate the allegations with the goal of achieving a natural and commonsense result, consistent with Congress's concern with long-term criminal conduct.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

HN7[] **Claims, Fraud**

The duration of the alleged racketeering activity is perhaps the most important element of Racketeer Influenced and Corrupt Organizations Act continuity.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

HN8[] **Claims, Fraud**

In the context of the Racketeer Influenced and Corrupt Organizations Act, actions, even if themselves illegal, taken in an effort to cover up a criminal scheme do nothing to extend the duration of the underlying scheme.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

HN9[] **Claims, Fraud**

In the context of the Racketeer Influenced and Corrupt Organizations Act, mail and wire fraud allegations are unique among predicate acts because the multiplicity of such acts may be no indication of the requisite continuity of the underlying fraudulent activity. Consequently, courts do not look favorably on many instances of mail and wire fraud to form a pattern.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

HN10[] **Claims, Fraud**

The Indiana Racketeer Influenced and Corrupt Organizations Act (RICO) statute is modeled after federal RICO, and also requires proof of conduct of an enterprise through a pattern of racketeering activity. As with federal RICO, a plaintiff must satisfy the continuity plus relationship requirement with respect to the predicate acts alleged.

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

Civil Procedure > ... > Justiciability > Ripeness > General Overview

HN11[] **Standards of Review, De Novo Review**

An appellate court reviews the district court's decision to dismiss a complaint on ripeness grounds de novo.

Civil Procedure > ... > Justiciability > Ripeness > Rationale for Ripeness

HN12[] **Ripeness, Rationale for Ripeness**

The ripeness doctrine exists to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Counsel: For DOUGLAS M. JENNINGS, Plaintiff - Appellant: David M. Lockman, MAGINOT, MOORE & BOWMAN, Indianapolis, IN, USA.

For AUTO METER PRODUCTS, INCORPORATED, Defendant - Appellee: Daniel D. Trachtman, WOODEN & MCLAUGHLIN, Indianapolis, IN, USA; Kenneth W. Brothers, DICKSTEIN SHAPIRO, Washington, DC, USA.

For GAUGE WORKS LLC, Defendant - Appellee: Bryan D. Wright, WILLIAMS MULLEN, Charlottesville, VA.

For GREGORY DAY, Defendant - Appellee: Bryan D. Wright, WILLIAMS MULLEN, Charlottesville, VA.

Judges: Before WOOD, EVANS, and WILLIAMS, Circuit Judges.

Opinion by: WOOD

Opinion

[*469]

[*1578]** WOOD, *Circuit Judge.* Plaintiff Douglas M. Jennings designed an aftermarket dashboard bezel--that is, a molded shape that fits over an automobile's instrument panel. Hoping to make money from his design through manufacturing and selling his bezels in the auto parts aftermarket and to forestall copycats, Jennings applied to the U.S. Patent and Trademark Office ("PTO") for a patent. As part of her review of Jennings's application, the patent Examiner contacted defendants Auto Meter Products, Inc. **[**2]** ("Auto Meter"), Gauge Works, LLC ("Gauge Works"), and Gregory Day to inquire whether the bezel they were selling was on sale or publicly available before Jennings applied for his patent. Jennings believes that the defendants, in response to the Examiner's inquiries, fraudulently misled her into believing that Jennings was not in fact the inventor of the bezel.

In addition to continuing to pursue his patent application, Jennings filed this action against the defendants under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. §§ 1962(a)-(d)*, as well as its Indiana counterpart, *Ind. Code §§ 35-45-6-2*. RICO fit the bill, in Jennings's opinion, because the defendants were engaged in "the type of unfair competition that one would expect from a Mafia family or narcotics cartel." His complaint alleged that the defendants had commandeered the PTO through a pattern of racketeering activity by flooding it (via mail and wire transmissions) with false information in order to deny Jennings a patent and thereby "exploit the market for the bezel without compensating Jennings for use of his invention." In addition to his federal and state RICO theories, Jennings asserted various **[**3]** grounds for recovery under Indiana state law, such as unauthorized control of his property, conversion, and fraud.

The defendants moved to dismiss on various grounds. They argued that the RICO counts failed to state a claim upon which relief could be granted, see FED. R. CIV. P. 12(b)(6), because Jennings had not adequately alleged a pattern of racketeering activity. They also maintained that the state-law claims were unripe, because Jennings's patent application was still pending before the Board of Patent Appeals and Interferences ("BPAI") at the time. Defendants also moved to disqualify Jennings's attorney, claiming that he was a necessary fact witness under Indiana Rule of Professional Conduct 3.7. A magistrate judge granted the defendants' Rule 12(b)(6) motion, stayed the state-law claims, and granted the motion to disqualify Jennings's attorney. After a joint motion by the parties, the court issued a final judgment dismissing all claims. For the following reasons, we affirm the dismissal of all claims. Because we have resolved Jennings's appeal this way, we have no need to reach the attorney-disqualification issue.

I

Briefly, a dashboard bezel is the structure that surrounds the **[**4]** instrument gauges **[*470]** on a car's dashboard and holds the gauges in place. Jennings's bezel replaces a car's original dashboard bezel. More than that, it improves the bezel, because it has room for more automotive gauges than were included in the original design of the car and it still allows the driver to see the entire panel of instruments. **[***1579]** In early 2000, Jennings advertised and sold his product on the Internet at www.clubsi.com. He alleges that sometime in January 2000--about nine months before he applied for his patent--Day, the president and sole owner of Gauge Works, noticed the bezel for the first time on www.clubsi.com and decided to manufacture and sell a nearly identical one of his own. Day and his company partnered with Auto Meter, a wholesaler of aftermarket auto parts, to distribute an aftermarket dashboard bezel that Jennings claims was simply a replica of his bezel. Auto Meter, Day and Gauge Works first displayed their bezel at a trade show known as the SEMA International Auto Salon, which was held at the end of March 2000 in Pomona, California. Seven months later, on October 25, 2000, Jennings filed an application for a utility patent on his bezel.

According to Jennings, **[**5]** the defendants then began engaging in a series of fraudulent acts aimed at "corrupting" his patent application and sabotaging his ability to establish himself as the inventor of his aftermarket dashboard bezel. In the course of reviewing Jennings's patent application, the patent Examiner contacted Auto Meter requesting evidence that the aftermarket dashboard bezel was on sale or publicly available before October 25, 2000. Auto Meter referred the Examiner to Day, who told the Examiner on October 21, 2002, that he, not Jennings, was the inventor of the bezel that was the subject of Jennings's patent application. Because Jennings believes that Day was lying, and the conversation occurred on the telephone, Jennings asserts that the communication was an act of wire fraud. Jennings also claims that Day subsequently contacted Auto Meter, and the two parties conspired to fabricate a product flyer purportedly for the 2000 SEMA show, to demonstrate that the bezel was indeed publicly available before the date on which Jennings filed his application. (***HN1***[] The date of first public use matters, as inventors have only one year after that date in which to file a patent application. See 35 U.S.C. § 102(b).) **[**6]** The allegedly fraudulent flyer identified Auto Meter's bezel and displayed a date of October 24, 2000. On October 31, 2002, Auto Meter faxed the contested document to the Examiner. Jennings asserts that this too was an act of wire fraud. The Examiner relied on the product flyer in concluding that the aftermarket dashboard bezel was "prior art" under 35 U.S.C. § 102(a), and on that ground she rejected Jennings's patent claims in an Office Action issued on November 13, 2002.

In response to the Office Action, Jennings furnished the Patent Office with evidence that he had invented his bezel before January 2000. Following up on this information, the Examiner again contacted Auto Meter seeking additional evidence that its bezel was publicly available before June 1999. Auto Meter in turn contacted Day and Gauge Works and relayed to them its recent conversation with the Examiner. Jennings claims that the group of defendants then agreed to fabricate a second false product flyer, which showed that Day's bezel was in fact available to the public prior to June 1999, even though they knew that it was not until at least early 2000 that they first began manufacturing the bezel. The second flyer was **[**7]** mailed to the PTO sometime between April 15, 2003, and August 13, 2003, another purported act of mail fraud. The Examiner **[*471]** issued a second non-final Office Action, mailed on August 13, 2003, once again rejecting Jennings's patent claims, this time relying on the later-filed flyer, which established (fraudulently according to Jennings) that Day's bezel was available in June 1999.

On September 11, 2003, Jennings's attorney, Paul Maginot, attempted to convince the examiner in an interview that she had relied on false information in rejecting Jennings's claims. The Examiner was not persuaded; she issued a final Office Action on February 9, 2004, rejecting Jennings's application and again referring to Auto Meter's second product flyer as her basis for concluding that the product was previously available to the public. Jennings appealed the ruling to the BPAI. Since this case was argued, the court has been informed that the BPAI has reversed the Examiner's decision, finding both substantive and procedural problems with the flyer submitted by Auto Meter. We are not aware, however, of any further developments in the PTO, and in particular, the record does not reflect that Jennings's application **[**8]** has either been granted or denied. (Nor has Jennings withdrawn his appeal, even though it appears that the procedures that the PTO furnishes for contesting adverse decisions may be working perfectly well for him.) Nothing that has happened renders the present case moot, however, and so we proceed with our decision.

In an effort, Jennings says, "to address the delay in the examination and issuance of his patent," he filed a request for voluntary publication of his patent application in order to obtain provisional rights in his application under **[***1580]** *35 U.S.C. § 154(d)*. While the request was ultimately accepted by the PTO, the wheels did not turn quickly enough to satisfy Jennings. He claims that a number of companies nonetheless "declined the invitation to consider a reasonable royalty for Jennings's intellectual property because the claims of the Bezel Patent Application currently stand rejected in the PTO."

After filing his request for voluntary publication, Jennings, through his lawyer, sent a letter to Gauge Works expressing his doubts about the product flyer that Gauge Works had submitted to the Examiner showing that the bezel was available before June 1999. Gauge Works responded on September **[**9]** 23, 2004, with its own letter stating that it believed that the flyer, which stated that the bezel would be "Available in June" without specifying the year, was intended to indicate that the bezel would be available to the public in June 2000, contrary to the Examiner's interpretation that the flyer showed the bezel would become available in June 1999. Additionally, to bolster its contention that Jennings did not himself invent the bezel, Gauge Works included with its letter a discussion about and photographs of a bezel manufactured by Mitsubishi and made available in the spring of 1999, which Gauge Works claimed constituted prior art to Jennings's bezel. Jennings counters that Mitsubishi's bezel is substantially different from his bezel, that it therefore does not constitute prior art, and that by knowingly misrepresenting it as such in its mailing, Gauge Works was perpetuating its mail-fraud schemes. Indeed, Jennings characterizes Auto Meter's letter of October 20, 2004, to him stating that Auto Meter agreed with Gauge Works's position as yet another fraudulent mailing.

While the parties quarreled over the validity of Jennings's application, Day filed his own *design* patent application **[**10]** regarding the same bezel in the PTO on November 1, 2002, 11 days after he had spoken with the Examiner regarding Jennings's *utility* patent application. Jennings alleges **[*472]** that Day and Gauge Works fraudulently conspired to name Day as the inventor in an effort to "cover up the misrepresentations made to the Examiner during the telephone conversation of October 21, 2002." According to Jennings, the fraud continued throughout the PTO's evaluation of Day's design patent. The Examiner was never given evidence that Day had seen Jennings's bezel on the Internet in January 2000 or that the bezel was displayed at the 2000 SEMA trade show. Allegedly, the Examiner knew nothing about the product flyer that Auto Meter submitted during Jennings's patent application process. Jennings asserts that filing the design patent application without disclosing all of this relevant evidence constituted another act of mail fraud. On October 7, 2003, Day was issued a design patent on the bezel; Day's patent remains in effect.

II

As we noted at the outset, Jennings decided to bring this suit under RICO and related theories, believing that he was one of many victims of a conspiracy by the defendants to defraud the **[**11]** public by manipulating PTO proceedings. The district court, however, found that Jennings had "failed to plead the requisite acts and continued criminal activity as required by RICO," and it therefore dismissed the federal and state RICO claims under *FED. R.*

CIV. P. 12(b)(6). In the closely-related area of ***antitrust law***, the Supreme Court recently summarized a plaintiff's pleading obligations as follows:

> ***HN2***[] While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, . . . a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief " requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . . Factual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact) . . . .

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007). ***HN3***[] For a plaintiff seeking to pursue a claim asserting that an antitrust conspiracy existed, the Court requires "a complaint with enough factual matter (taken as true) to suggest that an agreement was made." **[**12]** *Id. at 1965*.

HN4[] Congress passed RICO in an effort to combat organized, long-term criminal activity. *Midwest Grinding Co., Inc. v. Spitz, 976 F.2d 1016, 1019 (7th Cir. 1992)*. Although *§ 1964(c)* provides a private civil action to recover treble damages for violations of RICO's substantive provisions, *Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 481, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*, the statute was never intended to allow plaintiffs to turn garden-variety state law fraud claims into federal RICO actions. *Midwest Grinding, 976 F.2d at 1022*. In order to establish a violation of *§ 1962(c)*, on which Jennings relies in part, a plaintiff must show the following **[***1581]** four elements by a preponderance of the evidence: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, 473 U.S. at 496*. A pattern of racketeering activity consists, at the very least, of two predicate acts of racketeering committed within a ten-year period. *18 U.S.C. § 1961(5)*; *Midwest Grinding, 976 F.2d at 1019*. In order to curb "widespread attempts to turn routine commercial disputes into civil RICO actions," *id. at 1022*, courts carefully scrutinize the pattern requirement to "forestall RICO's use against isolated **[**13]** or sporadic criminal activity, and to prevent RICO from becoming a surrogate for garden-variety **[*473]** fraud actions properly brought under state law." *Id.* To fulfill the pattern requirement, plaintiffs must satisfy "the so-called 'continuity plus relationship' test: the predicate acts must be related to one another (the relationship prong) and pose a threat of continued criminal activity (the continuity prong)." *Id.* (citing *H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989))*.

We can assume that the acts here are related; the question is whether Jennings can show continuity. As the Supreme Court explained in *H.J. Inc.*, ***HN5***[] the continuity requirement exists to give effect to Congress's clear intention that RICO target long-term criminal behavior, *492 U.S. at 242*, as opposed to more discrete acts of fraud. Continuity can be "both a closed-and open-ended concept." *Midwest Grinding, 976 F.2d at 1022* (quoting *H.J., Inc., 492 U.S. at 241*). Closed-ended continuity, which is all that is even arguably present in this case, refers to criminal behavior that has come to a close but endured for such a substantial period of time "that the duration and repetition of the criminal activity **[**14]** carries with it an implicit threat of continued criminal activity in the future." *Midwest Grinding, 976 F.2d at 1022-23*. (An open-ended period, in contrast, is "a course of criminal activity which lacks the duration and repetition to establish continuity." *Midwest Grinding, 976 F.2d at 1023*. A RICO plaintiff may satisfy the open-ended continuity requirement by showing past conduct which "by its nature projects into the future with a threat of repetition." *Id*. (quoting *H.J. Inc., 492 U.S. at 242*).)

In *Morgan v. Bank of Waukegan, 804 F.2d 970, 976 (7th Cir. 1986)*, this court held that***HN6***[] in determining whether there is continuity, "[r]elevant factors include the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries." *Id. at 975*. The court cautioned that "the mere fact that the predicate acts relate to the same overall scheme or involve the same victim does not mean that the acts automatically fail to satisfy the pattern requirement." *Id. at 976*. The requirement of a pattern of racketeering activity is "a standard, not a rule, and thus its determination depends **[**15]** on the facts and circumstances of the particular case, with no one factor being necessarily determinative." *Id*. We evaluate the allegations with the goal of "achieving a natural and commonsense result, consistent with Congress's concern with long-term criminal conduct." *Roger Whitmore's Auto. Servs., Inc. v. Lake County, Illinois, 424 F.3d 659, 673 (7th Cir. 2005)*.

Evaluating this complaint as *Twombly* instructs and paying attention to the way in which the factual allegations correspond to the legal requirements we have outlined, we have no trouble concluding that Jennings has not presented a RICO case. Although Jennings alleges a slew of predicate racketeering acts that he claims were aimed at corrupting PTO proceedings (in his words, "an assault on the Patent Office"), at root this is a dispute over who invented an aftermarket dashboard bezel. Even if the defendants may have used misleading tactics in their various efforts to obtain the rights to the product (a point on which we take no position), the case lacks any of the hallmarks of a RICO violation. There is no pattern of fraudulent or racketeering behavior. The state courts and the PTO itself have ample tools to correct any individual **[**16]** instances of fraud or other misconduct.

Consideration of the *Morgan* factors shows why this is so. ***HN7***[] The duration of the **[*474]** alleged racketeering activity is "perhaps the most important element of RICO continuity." *Roger Whitmore's, 424 F.3d at 673*. Here, the defendants' conduct spanned an insubstantial amount of time. Their alleged fraudulent behavior began on October 21, 2002, when Day first accepted the telephone call from the Examiner. According to the complaint, the last communication with the PTO occurred as late as August 13, 2003, fewer than ten months after the alleged racketeering activity began.

Implicitly conceding that ten months is potentially too short, Jennings urges us to take a broader look at the defendants' conduct. He argues that the appropriate time span is two years, and that we must consider two particular sets of allegations that he thinks the district court improperly ignored. First, Jennings argues that we must account for the allegations **[***1582]** associated with Day's design patent application, which the district court held were irrelevant to the analysis. Even if we were inclined to do so, however, we do not see how it makes a difference. Day's design patent application, **[**17]** which Jennings argues was an act of mail fraud, was filed on November 1, 2002, 11 days after the alleged criminal activity began. While Jennings strenuously urges that Day should never have received the patent eleven months later, and he implies that the fraud was an ongoing act that continued until the application was granted, there was nothing ongoing about any fraudulent act. The alleged misrepresentation was a singular predicate act that occurred right at the beginning of the ten-month window. Second, Jennings argues that the district court should have considered the September and October 2004 letters from the defendants to Jennings as further acts of mail fraud that extended the duration of the scheme. We disagree. These were letters sent to Jennings, not the PTO, essentially explaining to him why the defendants believed that his utility patent application in the PTO should be rejected. If fraudulent at all, the letters were, in Jennings's own words, "intended to cover up the fraudulent scheme being perpetrated at the [PTO]." But ***HN8***[] actions, even if themselves illegal, taken in an effort to cover up a criminal scheme "do **[**18]** nothing to extend the duration of the underlying . . . scheme." *Midwest Grinding, 976 F.2d at 1024*; see also *Pyramid Sec. Ltd. v. IB Resolution Inc., 288 U.S. App. D.C. 157, 924 F.2d 1114, 1117 (D.C. Cir. 1991)* (holding scheme to conceal underlying criminal activity by giving false deposition testimony does not extend the length of a closed-ended RICO scheme); *Aldridge v. Lily-Tulip, Inc., 953 F.2d 587, 593-94 (11th Cir. 1992)* (noting that acts to conceal underlying wrongdoing in a RICO suit do not carry with them the threat of future harm).

In short, Jennings's allegations, even construed generously in his favor, cannot support a time period longer than ten months. That time period, during which only a few allegedly fraudulent acts took place, is too short to show the necessary continuity for a "pattern" of racketeering. See *Midwest Grinding, 976 F.2d at 1024* (finding a nine-month scheme insubstantial); *Olive Can Co. v. Martin, 906 F.2d 1147, 1151* (finding six months to be a "short period of time"); *Uni*Uni*Quality, Inc. v. Infotronx, Inc., 974 F.2d 918, 922 (7th Cir. 1992)* (holding that a scheme that lasted at most seven to eight months was "precisely the type of short-term, closed-ended fraud that, subsequent **[**19]** to *H.J., Inc.*, this circuit consistently has held does not constitute a pattern."); see also *Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594, 611 (3d Cir. 1991)* ("We hold that twelve months is not a substantial period of time."); *Primary Care Inv. v. PHP Healthcare Corp., 986 F.2d 1208, 1215 (8th* **[*475]** *Cir. 1993)* (stating that "the activity lasted between ten and eleven months and . . . we deem this period insubstantial").

The short duration alone might be enough to dispose of this case. See *Vicom, Inc. v. Harbridge Merchant Servs., Inc., 20 F.3d 771, 782 (7th Cir. 1994)*. The other factors identified in *Morgan* also favor dismissal, however, and so we address them briefly. Jennings has not alleged a sufficient number and variety of predicate acts to show a RICO violation. While the complaint actually alleges very few criminal acts, Jennings attempts to demonstrate a wide variety of predicate acts by alleging that individual acts violate multiple statutes. The act of mailing the purportedly false product flyer to the PTO, for example, metamorphoses in his hands into both tampering with evidence and mail fraud. What emerges from a careful reading of his complaint is something akin to what **[**20]** the court found in *Vicom*, where we said, "Although Vicom's prolixity makes it seem as though Vicom alleges innumerable predicate acts to support its causes of action . . . [w]hen all the verbiage is weeded out, Vicom manages to allege a very few acts of mail or wire fraud in each count." *20 F.3d at 781*. Jennings's complaint also lacks the requisite variety. Other than the evidence-tampering allegations, which, as we noted above, generally stem from acts that are also alleged to be mail or wire fraud, all we have here is a few instances of mail and wire fraud. We have repeatedly rejected RICO claims that rely so heavily on mail and wire fraud allegations to establish a pattern. See *Midwest Grinding, 976 F.2d at 1024-25* ("***HN9***[] [M]ail and wire fraud allegations are unique among predicate acts because the multiplicity of such acts may be no indication of the requisite continuity of the underlying fraudulent activity. Consequently, we do not look favorably on many instances of mail and wire fraud to form a pattern." (internal quotations omitted)); *Vicom, 20 F.3d at 781* (same).

Additionally, notwithstanding Jennings's efforts to allege a vast array of victims and injuries, he is the only identifiable **[**21]** victim. He alleges that "the [PTO], the payers of users fees, taxpayers, and participants in the relevant automotive accessory market" are also **[***1583]** victims of the defendants' alleged crimes, but such unspecific assertions are inadequate. In *SK Hand Tool Corp. v. Dresser Indus. Inc., 852 F.2d 936, 942 (7th Cir. 1988)*, for example, the court considered a RICO claim that the defendant "defrauded investors generally." The court rejected this claim of "fraud on the public" because the complaint "contains no well-pleaded facts permitting us to conclude that some [other] investors may have been hurt by the alleged fraud." See also *Cross v. Simons, 729 F. Supp. 588, 595 (N.D.Ill. 1989)* (Williams, J.) (holding that an allegation that victims were "U.S. Citizens" was insufficient). Jennings is the only identifiable individual who has suffered any potential injury. For similar reasons, we reject Jennings's characterization of the number of injuries suffered. He claims to have "allege[d] a myriad of distinct injuries. Among the injuries alleged are the loss of honest governmental services from officials of the [PTO], . . . the slander of Mr. Jennings's provisional patent rights and the hampering of **[**22]** his licensing program, . . . the loss of patent term and the corresponding loss of license fees arising from the denial of a patent to Mr. Jennings, . . . and the loss of the honest services of the defendants to perform their duty of truthfully responding to quasi-judicial officers on [sic] the U.S. Government." Each one of these so-called injuries, however, even if cognizable (which many are **[*476]** not), is simply a different way to characterize the damage Jennings has suffered from his inability (thus far) to get his utility patent.

Finally, Day's filing of the design patent application does not create a separate "scheme" sufficient to save Jennings's RICO claims. It is not even clear that Jennings is entitled to assert any injury from the Day design patent application, since it is unclear whether, without the utility patent Jennings is seeking, he has any legal right in any property in the first place. Regardless, the existence of a design patent application for the same product does not change what this case is really about: a dispute over various patent rights to an aftermarket dashboard bezel. As we discussed at oral argument, Jennings has a number of remedies he might pursue in order **[**23]** to rectify the injustice he perceives regarding these patents. But those remedies do not include a private right of action under RICO, which was never intended to apply to such brief, closed-ended, instances of fraud, where there is only one identifiable victim, and that victim suffered one articulable injury. The district court was correct to dismiss these claims.

For the same reasons, the district court properly dismissed Jennings's state RICO claim. ***HN10***[] "The Indiana RICO statute is modeled after federal RICO, and also requires proof of conduct of an enterprise through a pattern of racketeering activity. As with federal RICO, a Plaintiff must satisfy the continuity plus relationship requirement with respect to the predicate acts alleged." *Directv v. Edwards, 293 F. Supp. 2d 873, 879 (N.D. Ind. 2003)* (citing *Yoder Grain, Inc. v. Antalis, 722 N.E.2d 840 (Ind. Ct. App. 2000))*. Thus, Jennings's state RICO claims fail as well.

III

We turn now to the remaining state law claims. At the time this case was argued, the Examiner's decision to reject Jennings's patent application was on appeal in the BPAI. The district court, after dismissing the RICO claims, dismissed the remaining state law claims **[**24]** pending the BPAI's decision, finding that the case was not ripe for judicial review. Jennings contends he has suffered various harms under Indiana law whether or not he ever receives his patent, which makes it unnecessary to wait for the result of his patent application. ***HN11***[] We review the district court's decision to dismiss the complaint on ripeness grounds *de novo*, see *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County, 325 F.3d 879, 881 (7th Cir. 2003)*, and we affirm that conclusion as well.

Since oral argument, the BPAI has reversed the Examiner's decision. That does not mean, however, that the issue of Jennings's patent application has finally been resolved. As far as we are aware, the PTO has not yet conclusively determined whether Jennings will receive a utility patent on the dashboard bezel. Unless and until that happens, any damages he has are entirely speculative. Should Jennings ultimately receive his patent, any potential damages he claims to have suffered from the inability to get a patent disappear. Moreover, it remains a possibility that his application might be denied on grounds other than the existence of prior art, such as obviousness. See *KSR Internat'l Co. v. Teleflex, 550 U.S. 398, 127 S. Ct. 1727, 1741-42, 167 L. Ed. 2d 705 (2007)* **[**25]** (invalidating a patent as obvious and rejecting, as too lenient, the approach that the Federal Circuit has been taking to that issue). We recognize that Jennings believes that he has been damaged in ways that Indiana law recognizes, whether or not he ultimately receives **[***1584]** his patent. Nonetheless, even those **[*477]** claims will be affected by the outcome of the patent proceeding. ***HN12***[] The ripeness doctrine exists "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Sprint Spectrum L.P. v. City of Carmel, 361 F.3d 998, 1002 (7th Cir. 2004)* (quoting *Abbott Labs. v. Gardner, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967))* (internal quotation marks omitted). Although Jennings is not asking this court to review the PTO's actions (undoubtedly because he knows that we have no jurisdiction to do so), the ultimate outcome of the agency proceedings will shed meaningful light on the nature and degree of harm Jennings may have suffered. The district court **[**26]** did not err by concluding it was premature to consider the state law claims.

IV

Finally, Jennings argues that the district court erred by disqualifying his attorney from this litigation. Jennings does not claim that he has been prejudiced thus far in any way by his attorney's disqualification, and we do not see how he could have been. His only remedy at this point would be for us to reinstate his attorney for future litigation in this matter. Since, in the exercise of *de novo* review, we have affirmed the dismissal of all claims in this case, we need not consider whether the attorney disqualification was appropriate.

The district court's decision is AFFIRMED.

Champagne Metals v. Ken-Mac Metals, Inc.

United States District Court for the Western District of Oklahoma

July 27, 2007, Decided; July 27, 2007, Filed

NO. CIV-02-0528-HE

Reporter

2007 U.S. Dist. LEXIS 88773 *; 2008-1 Trade Cas. (CCH) P76,024

CHAMPAGNE METALS, Plaintiff, vs. KEN-MAC METALS, INC., ET AL., Defendants.

Subsequent History: Motion granted by, Motion denied by, Summary judgment denied by Champagne Metals v. Ken-Mac Metals, Inc., 2008 U.S. Dist. LEXIS 100216 (W.D. Okla., Dec. 12, 2008)

Prior History: Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073, 2006 U.S. App. LEXIS 20139 (10th Cir. Okla., 2006)

Core Terms

market power, anticompetitive, defendants', antitrust, quotation, damages, marks, per se rule, conspiracy, effects, restraint of trade, summary judgment, group boycott, competitor, aluminum, parties, tortious interference, antitrust claim, service center, Distributors, horizontal, Wholesale, fails

Counsel: **[*1]** For Champagne Metals, an Oklahoma Limited Liability Company, Plaintiff: Carissa K Leonard, Clyde A Muchmore, D Kent Meyers, Mack J Morgan, III, Mark S Grossman, Crowe & Dunlevy-OKC, Oklahoma City, OK; Jennifer A Dutton, Crowe & Dunlevy-NORMAN, Norman, OK; Michael Burrage, Burrage Law Firm, Durant, OK.

For Ken-Mac Metals Inc, an Ohio corporation, Defendant: Charles E Geister, III, Hartzog Conger Cason & Neville, Oklahoma City, OK; David A Ettinger, Honigman Miller Schwartz & Cohn-DETROIT, Detroit, MI; Laurence M Huffman, M Richard Mullins, McAfee & Taft, Oklahoma City, OK; Murray E Abowitz, Abowitz Timberlake & Dahnke PC, Oklahoma City, OK.

For Samuel Son & Co Ltd, an Ontario, Canada corporation, Samuel Specialty Metals Inc, a New Jersey corporation, Defendants: Charles E Geister, III, Hartzog Conger Cason & Neville, Oklahoma City, OK; George W Dahnke, Mary B Scott, Murray E Abowitz, Abowitz Timberlake & Dahnke PC, Oklahoma City, OK; William J O'Shaughnessy, McCarter & English LLP, Newark, NJ.

For Metalwest LLC, an Alabama limited liability company, Defendant: Charles E Geister, III, Hartzog Conger Cason & Neville, Oklahoma City, OK; Mark J Mathews, Timothy R Beyer, Brownstein Hyatt Farber **[*2]** Schreck PC, Denver, CO; Michael A Rubenstein, Rubenstein Bryan McCormick & Pitts PLLC, Edmond, OK; Richard B Benenson, Brownstein Hyatt & Farber PC, Denver, CO.

For Integris Metals Inc, a New York corporation, Defendant: Charles E Geister, III, Hartzog Conger Cason & Neville, Oklahoma City, OK; David L Hashmall, Felhaber Law Firm, Minneapolis, MN; Glen D Huff, Steven J Johnson, Foliart Huff Ottaway & Bottom, Oklahoma City, OK.

For Earle M Jorgensen Company, a Delaware corporation, Defendant: Allan B Goldman, Katten Muchin Zavis Rosenman-LOS ANGELES, Los Angeles, CA; Charles E Geister, III, Hartzog Conger Cason & Neville, Oklahoma City, OK; Fred A Leibrock, Jennifer L Miller, Phillips McFall McCaffrey McVay Murrah, Oklahoma City, OK; Jennifer M Kirkpatrick, Phillips McFall McCaffrey McVay Murrah-OKC, Oklahoma City, OK.

For Ryerson Tull Inc, an Illinois corporation, Defendant: Bernard J Rothbaum, Jr, Charles E Geister, III, Drew Neville, Jr, Hartzog Conger Cason & Neville, Oklahoma City, OK; Mark McLaughlin, Mayer Brown Rowe & Maw LLP-CHICAGO, Chicago, IL.

Judges: JOE HEATON, UNITED STATES DISTRICT JUDGE.

Opinion by: JOE HEATON

Opinion

ORDER

Plaintiff Champagne Metals ("Champagne"), an aluminum distributor or "service **[*3]** center" sued seven other service centers -- Ken-Mac Metals, Inc. ("Ken-Mac"), Samuel, Son & Co., Ltd., Samuel Specialty Metals, Inc. (collectively "Samuel"), Metalwest, LLC, Integris Metals, Inc. ("Integris"), Earle M. Jorgensen Co. ("EMG"), and Ryerson Tull, Inc. ("Ryerson") [1] (collectively the "Established Distributors"). The plaintiff claims the defendants violated Section 1 of the Sherman Antitrust Act, *15 U.S.C. § 1*, by engaging in a horizontal group boycott, violated the Oklahoma Antitrust Reform Act, *79 Okla. Stat. § 203*, by unreasonably restraining trade, and tortiously interfered with its business and contractual relationships. Summary judgment was previously entered in the defendants' favor on all claims, but that decision was reversed in part on appeal. [2] Renewed motions for summary judgment have been filed by the defendants, which must be considered, together with the parties' evidence, under the guidelines set forth by the Tenth Circuit in *Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073 (10th Cir. 2006)*. [3] As the facts have been stated in detail in the Tenth Circuit's opinion, the court will not repeat them, except as necessary to explain its conclusions. [4]

1. The Sherman Act Claim [5]

Agreement

The defendants contend the **[*5]** plaintiff's Sherman Act claim fails because the plaintiff cannot demonstrate the existence of an agreement among the defendants that unreasonably restrained trade. As "[t]he essence of a claim of violation of Section 1 of the Sherman Act is the agreement itself," *Champagne Metals, 458 F.3d at 1082*, the court initially must decide "whether the circumstantial evidence, viewed through the lens of a highly plausible economic theory, and combined with Champagne's direct evidence, creates a genuine issue of material fact as to

[1] *Ryerson **[*4]** Tull and Integris, which has been acquired by Ryerson, are now known as Ryerson Inc.*

[2] *The decision was affirmed with respect to the plaintiff's claim that the defendants had unilaterally violated the Oklahoma Antitrust Act, its state law claim of tortious interference with its relationship with Ormet Corporation, one of the mills, and its tortious interference claim against EMJ. The appellate court also affirmed the exclusion of the report and testimony of one of Champagne's expert witnesses.*

[3] *The court allowed the parties to file their briefs and the record under seal. To the extent this opinion cites to sealed portions of the briefs and record, those portions are unsealed.*

[4] *Briefly summarized, the plaintiff claims the Established Distributors conspired "to attempt to keep a new, aggressive entrant out of the market," Champagne Metals, 458 F.3d at 1086, by threatening to move their business from the mills that sold them aluminum, if those mills dealt with Champagne.*

[5] *The parties stipulated at the Oct. 5, 2006, status conference that if the federal antitrust claim survives summary judgment, so will the state antitrust claim.*

the existence of a conspiracy." Id. at 1087. The crux of the issue is whether the plaintiff has presented evidence "that tends to exclude the possibility that the alleged conspirators acted independently." Id. at 1085. The defendants claim Champagne has only cited instances of purely unilateral, parallel conduct on their part, in addition to what the Tenth Circuit termed as "weak direct evidence" of a conspiracy. Id. at 1084. This, they argue, is insufficient to show they entered into an illegal agreement. [6] The court concludes otherwise.

"[U]nilateral conduct, regardless of its anti-competitive effects, is not prohibited by § 1 of the Sherman Act." Abraham v. Intermountain Health Care Inc., 461 F.3d 1249, 1256 (10th Cir. 2006) (internal quotation marks omitted). Concerted action also cannot "be inferred merely from the existence of complaints." Id. at 1259. However, because the alleged conspiracy is economically rational, "restrictions on the inferences drawn from Champagne's circumstantial evidence are not warranted." Champagne Metals, 458 F.3d at 1085. *See* Abraham, 461 F.3d at 1257 ("'[I]f the claim is one that simply makes no economic sense --[a plaintiff] must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary.'") (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). [7] The evidence of an agreement is not overwhelming, [8] but, "constru[ing] all facts and reasonable inferences in a light most favorable to the nonmoving party," Champagne Metals, 458 F.3d at 1078 **[*7]** (internal quotation marks omitted), and considering the testimony and exhibits before it cumulatively, [9] the court finds sufficient evidence from which a reasonable jury might infer the defendants acted in concert to pressure the mills not to supply aluminum to Champagne or designate it a "recognized distributor."

This evidence includes the quick succession of events that occurred after Champagne Metals was formed -- EMJ's refusal to sell the plaintiff its cut-to-length line, after its initial agreement to do so; [10] Commonwealth's refusal to fill the plaintiff's orders, despite its initial agreement to do so; [11] the pressure Commonwealth's major service center

---

[6] *The defendants also claim there is no evidence of any communication among defendants, yet discuss Bill Thomas' alleged statement* ***[*6]*** *that Debbie Veale had told him that she "had been in contact with her counterparts, who were part of the National Association of Aluminum Distributors group." Defendants' renewed motion, p. 17.*

[7] *Here, unlike the situation in Abraham, the plaintiff is not relying "solely on circumstantial evidence to prove concerted action." Abraham, 461 F.3d at 1257.*

[8] *There is considerable evidence that controverts the plaintiff's conspiracy claim, e.g. plaintiff's Exhibit 68 demonstrating that "Commonwealth's increased sales to Champagne were accompanied by increased purchases from Commonwealth by Integris, VMG and Rasco." Integris' reply brief, p. 2.*

[9] *In reaching its decision, the court has heeded the Tenth Circuit's statement:*

> *[W]e emphasize the Supreme Court's admonition in Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), that individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.... [A] piece of evidence, unreliable* ***[*8]*** *in isolation, may become quite probative when corroborated by other evidence.*

Champagne Metals, 458 F.3d at 1081 at n.6 (quoting Bourjaily, 483 U.S. at 179-80).

[10] *In its reply brief, EMJ denies an agreement to sell existed, citing deposition testimony of Mike Champagne, which is included in an appendix submitted with its reply. It is improper for a party to submit new evidence in a reply brief. (Apparently the evidence was included with EMJ's original summary judgment motion, but not its renewed motion. See reply, p. 4). Nonetheless, the court has considered the* ***[*10]*** *testimony and finds the evidence does not negate the existence of an agreement to sell Champagne the line.*

[11] *Bill Thomas, a former Commonwealth employee who now works for Champagne, testified that he "assumed that Jorgensen would not object to Commonwealth Aluminum or other mills selling to Champagne, and that other established distributors would have little or no objection because of their previous lack of interest in serving the horse trailer industry. I talked to my manager at Commonwealth, Terry Wirta, and we agreed that selling mill finish and painted aluminum coil to Champagne should workout for*

customers put on the mill to refuse to recognize or sell to Champagne; [12] Ravensworth Aluminum and Kaiser Aluminum's refusal to sell aluminum to Champagne, and Samuel's offer to buy the company. Additional evidence consists of the circumstances surrounding the plaintiff's attempt to gain recognition by Ormet Corporation in late 2001; the evidence of contact among defendants (Phil Wiley and Debbie Veale's statements), the repeated anti-competitive statements/actions taken by the defendants; a strong motive for the defendants to conspire; [13] and the testimony from the defendants' industry expert, John Campbell, that he could not point to a new service center other than Champagne that **[*9]** had achieved mill recognition within the last ten years. [14] *See Rossi v. Standard Roofing, Inc., 156 F.3d 452, 456 (3rd Cir. 1998)*. *See generally Mitchael v. Intracorp, Inc., 179 F.3d 847, 859 (10th Cir. 1999)* ("While consciously parallel behavior may contribute to a finding of antitrust conspiracy, it is insufficient, standing alone, to prove conspiracy. Such parallel behavior may, however, support the existence of an illegal agreement when augmented by additional evidence from which an understanding among the parties may be inferred. Such evidence may include a showing that the parties are acting against their own individual business interests, [15] or that there is motivation to enter into an agreement requiring parallel behavior.") (citation and internal quotation marks omitted). [16]

Viewing all the evidence cumulatively and in the light most favorable to the plaintiff, the court finds Champagne has shown the existence of a genuine issue of fact as to whether the Established Distributors entered into a conspiracy.

Unreasonable restraint of trade

As the plaintiff has established, for summary judgment purposes, the existence of an agreement, the court must now determine whether the alleged restraint of trade is unreasonable. *Diaz v. Farley, 215 F.3d 1175, 1182 (10th Cir. 2000)* **[*12]** (The Sherman Act "generally precludes only restraints [of trade] that are unreasonable."). Two main analytical approaches are used to determine whether a defendant's conduct unreasonably restrains trade -- the *per se* rule and the rule of reason. [17] *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 457-58, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*("a restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be *'per se'* unreasonable, or because it violates what has come to be known as the 'Rule of Reason'"); *Rossi v. Standard Roofing, Inc., 156 F.3d 452, 461 (3rd Cir. 1998)*. While the *per se* rule treats certain categories of restraints as necessarily illegal, under the rule of reason "'the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an

---

Commonwealth because it did not appear we would be taking business from established distributorships." Plaintiff's response brief Exhibit D, P14.

[12] *The parties agreed at the October 5, 2006, status conference that the non-deposition statements of mill representatives were admissible for summary judgment purposes, eliminating the need for the court to determine whether they are admissible as co-conspirator hearsay. See Champagne Metals, 458 F.3d at 1080-81 & n.6.*

[13] *"Champagne introduced evidence that the Established Distributors saw Champagne as a price-cutting competitor who threatened their* ***[*11]*** *market share and profit margins." Champagne Metals, 458 F.3d at 1086.*

[14] *The court has carefully considered the record submitted to insure that sufficient evidence of each defendant's participation in the alleged conspiracy exists to allow the plaintiff's Sherman Act claim against them to proceed to a jury.*

[15] *See plaintiff's Exhibit A, P 31.*

[16] *Defendant EMJ argues that the plaintiff's antitrust claim against it is barred because of the lack of evidence that it engaged in any act in furtherance of the conspiracy within the limitations period. However, as there is evidence of anticompetitive actions committed by EMJ's alleged coconspirators within the statutory period that suffices to bind it, regardless of its own conduct.*

[17] *The Tenth Circuit did not determine whether the plaintiff's antitrust claim should be analyzed under the rule or reason or treated as a per se claim as the district* ***[*14]*** *court did not rule on the issue and the appellate record was insufficient to permit the court to address it. Champagne Metals, 458 F. 3d at 1090 n. 17 & 1092 ("However, even assuming Champagne's collective action claim merits per se treatment …. ").*

unreasonable restraint on competition.'" *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 127 S.Ct. 2705, 2712, 168 L. Ed. 2d 623 (2007)* (quoting *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. "*Per se* analysis is reserved for 'agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively **[*13]** presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.'" *Diaz, 215 F.3d at 1182* (quoting *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)*. *Accord* Leegin, 127 S.Ct. at 2713 ("Resort to *per se* rules is confined to restraints that would always or almost always tend to restrict competition and decrease output.") (internal quotation marks omitted). "Classic group boycotts involving conspirators whose market position are horizontal to each other and who 'cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete,' are generally *per se* illegal under § 1." *Full Draw Productions v. Easton Sports, Inc., 182 F.3d 745, 750 (10th Cir. 1999)* (quoting *Northwest Wholesale, 472 U.S. at 294*). *See* *Leegin, 127 S.Ct. at 2713* (included among the restraints that are *per se* unlawful are horizontal agreements among competitors to fix prices or to divide markets).

Not all group boycotts or horizontal restraints of trade are judged, however, under a *per se* standard. *Diaz, 215 F.3d at 1182*. "The decision to apply the *per se* rule turns on whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output or instead one designed to increase economic efficiency and render markets more, rather than less, competitive." *Northwest Wholesale, 472 U.S. at 289-90* (internal quotation marks omitted).

The defendants contend that the *per se* rule does not apply as the plaintiff cannot show either that they possess dominant [18] market power or cut off access to a supply necessary to enable the plaintiff to compete. The defendants argue that dominant position in the relevant market and exclusive control are essential elements of a *per se* violation. The plaintiff responds that what the defendants refer to as requirements for *per se* consideration are merely **[*15]** traits often possessed by typical *per se* cases. These traits become relevant, the plaintiff contends, when the challenged conduct involves legitimate cooperative activity. The plaintiff asserts that cases requiring a showing of market power, like Northwest Wholesale, all involve organizations with "obvious pro-competitive aspects," such as professional associations, industry self-regulating entities, trade associations, sports leagues, health care facilities and joint ventures.

There is authority to support the plaintiff's position, *see* *Rossi, 156 F.3d at 463-64*, and in *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)* the Supreme Court applied the *per se* standard to a group boycott despite the absence of any claim of market power. [19] However, "[i]n Northwest Wholesale, the Supreme Court clarified its earlier language from Klor's." *Diaz, 215 F.3d at 1182*. "There, the court stated that unless the defendants in a group boycott situation 'possess[ ] market **[*16]** power or exclusive access to an element essential to effective competition, the conclusion that expulsion [of the plaintiff] is virtually always likely to have an anticompetitive effect [thereby invoking a *per se* analysis] is not warranted.'" *Id. at 1182-83* (quoting *Northwest Wholesale, 472 U.S. at 296*.

Northwest Wholesale did involve a wholesale purchasing cooperative which was "not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects." *Northwest Wholesale, 472 U.S. at 295*. Similarly, Diaz, a Tenth Circuit decision in which the three factors discussed in Northwest Wholesale were applied to determine whether the challenged agreements "merited *per se* condemnation under the antitrust laws," involved a health care **[*17]** facility. *Diaz, 215 F.3d at 1180*. However, the Tenth Circuit did not apply the factors in Diaz

[18] *Although the plaintiff challenges the defendants reference to "dominant" market power, the Tenth Circuit has required a showing that a defendant "hold a dominant position in a relevant market."* *Diaz, 215 F.3d at 1183*.

[19] *The court accords less significance to* *Full Draw, 182 F. 3d at 745*, *a case relied on by the plaintiff, as the Tenth Circuit was considering the sufficiency of the complaint, not the evidence required to permit the case to proceed to trial. The same distinction applies to the recent decision of the Supreme Court in* *Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 167 L. Ed. 2d 929 (2007)*, *referenced in the supplemental submissions of the parties.*

because of the type of organization being sued, but rather found that to be an additional consideration -- "the fact that the conduct at issue in this case concerns decisions relating to health care presents a further reason why we should be caution in applying a *per se* test." *Id. at 1184*. [20] The court will, therefore, proceed to consider the *Northwest Wholesale* factors in determining the applicable analysis. *See Indiana Fed'n of Dentists, 476 U.S. at 458* ("As we observed last Term … the category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor ….").

The defendants claim they lack market power because they compete with "a wide variety of sources," including both service centers and mills, which make 60% of sales to end-users. They also point to Judge Cauthron's finding that the barriers to entry in their industry are low, as additional support for their claimed lack of substantial market power. [21] Their lack of control over an element essential to the plaintiff's ability to compete is evidenced, they assert, by Champagne's success -- a doubling of revenues from 1997-2002. [22]

Again, the court is confronted with a difficult issue. [23] Nonetheless, it concludes the record includes sufficient evidence to create a justiciable question as to whether the defendants collectively possess market power or a "dominant position in the relevant market." *Northwest Wholesale, 472 U.S. at 294*. *E.g.,* Plaintiff's Exhibit 30, pp. 32-33; Exhibit 35, p. 13-14; Exhibit 61; Exhibit 71. *See Toys "R" Us v. FTC, 221 F.3d 928, 936 (7th Cir. 2000)* (term "dominant," as used in phrase "dominant position in the market" is "an undefined term, but plainly chosen to stand for something different from antitrust's term of art "monopoly"). [24] *See generally Indiana Fed'n of Dentists, 476 U.S. at 460-61* ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse **[*20]** effects on competition, proof of actual detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.) (internal quotation marks omitted). That market power, [25] when combined with the lack of a plausible argument justifying the alleged boycott, merits *per se* review of the plaintiff Section 1 claim. [26] *See id. at*

---

[20] *The Tenth Circuit cited Diaz in Champagne Metals, stating in the case parenthetical that the case explained that the determination of whether a group boycott claim is to be judged under a per se or rule of reason standard requires examination of the market power and exclusive access factors, plus whether plausible arguments* ***[*18]*** *exist that justify the challenged conduct. Champagne Metals, 485 F.3d at 1090 n. 17.*

[21] *Contrary to the defendants' assertion, defendants' renewed motion, p. 39, the Tenth Circuit did not make that finding. See infra pp. 13-14.*

[22] *The fact that the plaintiff has been able to compete at some level does not preclude its antitrust claim or its analysis under a per se standard. See generally Northwest Wholesale, 472 U.S. at 294 ("Cases to which this Court has applied the per se approach have generally involved joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships* ***[*19]*** *the competitors need in the competitive struggle. "(emphasis added) (internal quotation marks omitted)); Klor's, 359 U.S. at 210 (court considered whether Sherman Act prohibited "a group of powerful business men "from acting "in concert to deprive a single merchant, like Klor, of the goods he needs to compete effectively. ") (emphasis added).*

[23] *The Supreme Court has observed that '"there is more confusion about the scope and operation of the per se rule against group boycotts than in reference to any other aspect of the per se doctrine.'" Northwest Wholesale, 472 U.S. at 294 (quoting Lawrence A. Sullivan, Handbook of the Law of Antitrust 229-30 (1977).*

[24] *Citing Shoppin' Bag of Pueblo, Inc. v. Dillon Cos., Inc., 783 F.2d 159, 161-62 (10th Cir. 1986), the defendants assert in their reply brief that the plaintiff has failed to address most of the factors relevant to market power. However, that case was evaluating the evidence necessary to show the market power required to establish a Section 2 violation of the Sherman Act, 15 U.S.C. § 2, not a per se violation of Section 1, as was Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 893 (10th Cir. 1991), also cited by the defendants.*

[25] *Here, unlike* ***[*22]*** *the situation in Diaz, the plaintiff has provided the court with some basis for determining how significantly the alleged agreement has affected its ability to compete in the relevant market.*

458 ("the per se approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor"); Rossi, 156 F.3d at 464; I ABA Section of ***Antitrust Law***, ***Antitrust Law*** Developments 48 (5th ed. 2002) *(per se* rule is appropriate if the alleged conduct "on balance, would always or almost always result in anticompetitive effects"). [27] *See generally* Leegin, 127 S.Ct. at 2717 ("A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, per se unlawful."). [28] As the court has concluded that the plaintiff's "collective action merits per se treatment," [29] Champagne Metals, 458 F.3d at 1092, **[*21]** the alleged restraint is conclusively presumed to be unreasonable. *See* I ABA Section of ***Antitrust Law***, ***Antitrust Law*** Developments 50 (5th ed. 2002) ("Under the per se rule, a restraint is conclusively presumed unreasonable without elaborate inquiry as to the precise harm [it has] caused ....") (internal quotation marks omitted).

Antitrust injury and Damages

Even if the plaintiff can establish an illegal agreement, its antitrust claim nonetheless fails, the defendants assert, because Champagne cannot prove an antitrust injury -- a necessary component of a Sherman Act claim. *See* *Medical Supply Chain, Inc. v. General Elec. Co., 144 F.App'x 708, 714 (10th Cir. 2005)* [30] ("[E]ven where a per se violation of 15 U.S.C. § 1 is involved, a plaintiff must still show that it suffered an antitrust injury."). The defendants argue that the plaintiff has not suffered an antitrust injury because the Tenth Circuit "has already ruled that Champagne failed to demonstrate an adverse effect on overall competition." Defendants' renewed motion, p. 42.

In the context of discussing whether the plaintiff had shown the unilateral harm to competition required to establish its state unilateral antitrust claim, the Tenth Circuit stated that the plaintiff had not pointed to "evidence of an actual barrier to entry created by the Established Distributors' unilateral conduct." *Id. at 1093*. [31] However, the court proceeded **[*24]** to state: "We do not mean to imply that there might not be other evidence of injury to competition to be found in this case's voluminous record; we note only that Champagne fails to point to any such evidence on appeal." *Id. at 1093 n.21*. [32]

---

[26] *The defendants offer no justification for their alleged conduct -- no "'plausible arguments that they were intended to enhance overall efficiency and make markets more competitive.'"* Diaz, 215 F.3d at 1183 *(quoting* Northwest Wholesale, 472 U.S. at 294*). Instead, they attempt to discount the significance of this factor.*

[27] *The plaintiff also has submitted evidence showing that the defendants deprived the plaintiff of access to multiple mills, which it needed to compete successfully. See* Klor's, 359 U.S. at 209-10; Rossi, 156 F. 3d at 464 *("Rossi has adduced evidence that GAF product was, if not unique, then at least necessary for him to compete in the marketplace. ").*

[28] *See supra note 13.*

[29] *Ken-Mac argues that it could not have been part of any per se conspiracy because it does not compete in the same market with Champagne Metals. However, the court finds the plaintiff has proffered sufficient evidence that the two were competitors to preclude entry of summary judgment in Ken-Mac's favor. E.g., plaintiff's* ***[*23]*** *Exhibit 23, p.29.*

[30] Medical Supply Chain, Inc. *is an unpublished decision cited for persuasive value only under* 10th Cir. R. 36.3(B).

[31] *While the plaintiff's expert had testified that the defendants' threats deterred other investors from entering the service center business in the relevant market, his testimony was not a part of the record, the appellate court having upheld its exclusion by the trial court.*

[32] *The defendants also argue that, even if the plaintiff was able to demonstrate a barrier to entry, that would negate its antitrust injury, as it would benefit from decreased competition. The flaw in that argument is the plaintiff claims that because of the alleged barrier, it is, and has been since it started, at a competitive disadvantage and is not an "existing competitor[] in the market." Defendants' renewed motion, p. 43 n.10.*

Because "the antitrust laws were enacted for the protection of competition not competitors," Full Draw, 182 F.3d at 754 (internal quotation marks omitted), the question is whether "the instant case is … one in which it is alleged that competition fell **[*25]** prey to a competitor," rather than "one in which it is alleged that a competitor fell prey to competition." *Id.* The court finds the plaintiff has met its burden of producing evidence, including the deposition testimony of Krausse and his affidavit, [33] demonstrating that, as a result of the defendants' anticompetitive acts, there were significant barriers to entry in the aluminum service center industry, which caused the plaintiff damage. [34]

The defendants also contend that the plaintiff lacks admissible evidence showing that it sustained damages resulting from the defendants' conduct. They challenge the plaintiff's proof of loss, **[*26]** asserting that critical defects in its damages model requires its exclusion, along with the testimony of the plaintiff's expert, Mr. Wilsey, who prepared it. The defendants assert that the model includes damages that allegedly were incurred outside the four year limitations period and that the estimated loss is speculative and unreliable. The plaintiff responds that it advised the court at the status conference that its damages report would have to be revised and the court indicated that it would determine whether the damages calculations could be changed after the summary judgment motions were decided.

The plaintiff has accurately reported part of the court's statements at the status conference. However, the court also advised the defendants that they could submit a summary judgment motion on damages if it was dispositive. As the court has not determined if the plaintiff will be allowed to revise the expert report on which the defendants' motion is based, it is premature to consider the defendants' contention that the plaintiff's antitrust claim fails for lack of admissible evidence of loss. The defendants may reurge that aspect of their motion once the court decides if the plaintiff **[*27]** is bound by its expert's initial submissions.

As the court has concluded the plaintiff has demonstrated that material questions of fact exist as to whether the defendants conspired to engage in an unreasonable restraint of trade, the defendants are not entitled at this time to summary judgment on the plaintiff's state or federal antitrust claims. [35]

2. The Tortious Interference Claim

The defendants also seek summary judgment on the plaintiff's tortious interference with contract claim, which is asserted against all defendants but EMJ. In their joint brief they allot little space to address this claim, simply stating that it fails because Champagne lacks sufficient evidence of anticompetitive conduct. Integris argues in its individual motion that the plaintiff has no evidence that it or its predecessors unlawfully interfered with the plaintiff's relationship with third persons and that the claim is deficient because "throughout the limitations period Commonwealth sold 'as much **[*28]** as it could' to Champagne," Integris' reply, p. 8. Ken-Mac asserts that the plaintiff has failed to identify a single incident of its alleged interference with the plaintiff's relationship with Commonwealth and does not mention it in the section of its response brief discussing that claim. Finally, Metalwest argues that there is no evidence that it engaged in any "independently wrongful means to interfere with Champagne's relationships with Commonwealth." Metalwest's motion, p. 23.

The Tenth Circuit stated in Champagne Metals that if the plaintiff "can show evidence of anticompetitive conduct, it can, by definition, show wrongful conduct in support of its interference with business relations claim." Champagne

---

[33] *As is discussed subsequently, the court did not consider what the defendants identify in their motion to strike as new information contained in the Krausse affidavit.*

[34] *See* Champagne Metals, 458 F. 3d at 1088 n.15 *("These injuries stemmed from the denial of recognition of Champagne by the mills-denials that Champagne alleges were prompted by the pressure put on the mills by the Established Distributors …. Thus, the Established Distributors are incorrect to say that Champagne's evidence shows it suffered no injury from acts within the limitations period. ").*

[35] *As mentioned, the defendants are not precluded from reurging their motion insofar as it pertains to the proof of loss issue, if appropriate, after the court decides if the plaintiff may revise its expert's report.*

Metals, 458 F.3d at 1095. The plaintiff's evidence of a conspiracy and anticompetitive conduct suffices to demonstrate all elements of the plaintiff's tortious interference claim against all the defendants except for the element of damages. Because of uncertainty regarding the plaintiff's expert's report - Champagne's proof of loss - the court has yet to decide if the plaintiff has demonstrated that its profitability and growth were affected by the defendants' alleged anticompetitive **[*29]** conduct. As that aspect of the plaintiff's case will be addressed subsequently, the defendants' motions, insofar as they pertain to the plaintiff's tortious interference claim, will be denied at this time.

Motion to Strike

The defendants also filed a motion to strike the affidavits attached to the plaintiff's response brief. The court completely disregarded the affidavit of Alvin Wyatt and disregarded the portions of the remaining affidavits that contained new information that was not part of the original summary judgment record. Therefore, the motion to strike is moot.

Accordingly, having found the plaintiff's evidence suffices to create material questions of fact as to Champagne's federal and state antitrust claims and its tortious interference with contract claim, the defendants' renewed motions for summary judgment [Doc. Nos. 420, 425, 427, 428, 430, 431, 432] are **DENIED.** Their motion to strike [Doc. # 458] is **DENIED** as being **MOOT.**

On or before, **August 27, 2007,** the parties are directed to have an in person meeting of (at least) counsel to discuss (a) an agreed resolution of this case, including, if agreement is not reached initially, whether some type of ADR might be beneficial in **[*30]** resolving the case and (b) any legal, scheduling or other issues remaining. On or before **September 4, 2007,** the parties are directed to file a joint status report which shall include (a) a report as to the in person conference, including when and where it was held, who attended for each party, and any agreements reached, (b) identification of any remaining legal or other issues necessary to be resolved prior to trial, and (c) a proposed (jointly, if possible) scheduling plan for the balance of the case. If, after diligent effort, a joint proposal cannot be achieved, the respective positions of the parties on the scheduling or other issues should be set forth in the report.

This case is set for a pretrial conference on **Thursday, September 6, 2007, at 1:30 p.m.,** in Courtroom No. 304, Oklahoma City, Oklahoma. The parties should be prepared to address, in addition to scheduling concerns, any remaining legal or other issues appropriate for pretrial resolution.

IT IS SO ORDERED.

Dated this 27<th> day of July, 2007.

/s/ Joe Heaton

JOE HEATON

UNITED STATES DISTRICT JUDGE

P&G Co. v. Stone Container Corp. (In re Linerboard Antitrust Litig.)

United States District Court for the Eastern District of Pennsylvania

July 30, 2007, Decided; July 30, 2007, Filed

MDL No. 1261, Case No. 03C-3944 (N.D. Ill.), Case No. 03C-6977 (N.D. Ill.), Case No. 03-CV-1702 (D. Md.)

Reporter

497 F. Supp. 2d 666 *; 2007 U.S. Dist. LEXIS 55330 **; 2007-2 Trade Cas. (CCH) P75,816; 73 Fed. R. Evid. Serv. (Callaghan) 1236

IN RE LINERBOARD ANTITRUST LITIGATION; THIS DOCUMENT RELATES TO: Procter & Gamble Company, et al. v. Stone Container Corporation, et al.; Mars, Inc., et al. v. Stone Container Corporation, et al.; Perdue Farms, Inc. v. Stone Container Corporation, et al.

Subsequent History: Summary judgment granted, in part, summary judgment denied, in part by, Summary judgment granted by, Claim dismissed by *P&G Co. v. Stone Container Corp.(In re Linerboard Antitrust Litig.), 504 F. Supp. 2d 38, 2007 U.S. Dist. LEXIS 64604 (E.D. Pa., Aug. 30, 2007)*

Prior History: *In re Linerboard Antitrust Litig., 2007 U.S. Dist. LEXIS 40465 (E.D. Pa., May 31, 2007)*

Core Terms

variables, defendants', factors, prices, damages, prediction, corrugated, benchmark, estimate, but-for, regression, antitrust, inventories, reliability, unlawful conduct, equation, conspiracy, causation, models, alleged conspiracy, expert testimony, overcharge, downtime, plaintiffs', linerboard, alleged conduct, collusion, econometric, exogenous, isolate

LexisNexis® Headnotes

Evidence > Admissibility > Expert Witnesses

HN1[] **Admissibility, Expert Witnesses**

See *Fed. R. Evid. 702*.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses

HN2[] **Expert Witnesses, Daubert Standard**

Faced with a proffer of expert scientific testimony the trial judge must determine whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This gatekeeping function extends beyond scientific testimony to testimony based on "technical" and "other specialized" knowledge.

Evidence > Admissibility > Expert Witnesses

Evidence > Burdens of Proof > Preponderance of Evidence

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN3[] Admissibility, Expert Witnesses

Fed. R. Evid. 702 embodies three distinct substantive restrictions on the admission of expert testimony: qualifications, reliability, and fit. The party offering the expert must prove each of these requirements by a preponderance of the evidence.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses

HN4[] Expert Witnesses, Daubert Standard

For expert testimony to meet the "fit" requirement, it must assist the trier of fact to understand the evidence or to determine a fact in issue. Fed. R. Evid. 702. This condition goes primarily to relevance. Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful. "Fit" is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Evidence > Relevance > Relevant Evidence

Evidence > Admissibility > Expert Witnesses

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN5[] Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time

The United States Supreme Court recognized that the "fit" requirement goes primarily to relevance, but it obviously did not intend the second prong of Fed. R. Evid. 702 to be merely a reiteration of the general relevancy requirement of Fed. R. Evid. 402. In elucidating the "fit" requirement, the Supreme Court noted that scientific expert testimony carries special dangers to the fact-finding process because it can be both powerful and quite misleading because of the difficulty in evaluating it. Federal judges must therefore exclude proffered scientific evidence under Fed. R. Evid. 702 and 403 unless they are convinced that it speaks clearly and directly to an issue in dispute in the case, and that it will not mislead the jury.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses

HN6[] **Expert Witnesses, Daubert Standard**

District courts should tread carefully when evaluating proffered expert testimony, paying special attention to the relevance prong of Daubert.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses

HN7[] **Expert Witnesses, Daubert Standard**

The standard for analyzing the fit of an expert's analysis to the case at hand is "not that high," but is "higher than bare relevance." That statement remains sound law inasmuch as it requires that experts who purport to apply their principles and methods to the facts of the case do so in a reliable manner.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses

HN8[] **Expert Witnesses, Daubert Standard**

Under the liberal Daubert standard, the plaintiffs do not have to prove to the judge by a preponderance of the evidence that their expert's testimony is correct, they must only show that it is reliable. The requirement of reliability is lower than the standard of correctness. The judge does not have to determine that these methods are necessarily the best grounds to ascertain certain facts, but only that the evidence presented will help the trier of fact.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses

HN9[] **Expert Witnesses, Daubert Standard**

Once the foundation for admissibility required by Daubert has been established, concerns about the validity of an expert's conclusions should not result in the exclusion of the expert's testimony. Rather, such concerns should be presented to the jury through cross examination, presentation of contrary evidence and careful instruction on the burden of proof.

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

HN10[] **Private Actions, Remedies**

A consumer alleging antitrust violations cannot obtain damages without showing that he actually paid more than he would have paid in the absence of the violation. Thus, one pursuing antitrust recovery must establish that the damages suffered were caused by the defendant's participation in a scheme repugnant to the antitrust laws.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN11[] Regulated Practices, Price Fixing & Restraints of Trade

In price-fixing cases, causation of injury may be found as a matter of just and reasonable inference from proof of defendants' wrongful acts and their tendency to injure plaintiffs, and from evidence of change in prices not shown to be attributable to other causes.

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

HN12[] Private Actions, Remedies

In an action alleging antitrust violations, once causation is determined, the actual amount of damages may result from a reasonable estimate, as long as the jury verdict is not the product of speculation or guess work. The relaxed measure of proof is afforded to the amount, not the causation of loss--the nexus between the defendant's illegal activity and the injuries suffered must be reasonably proven. However, a plaintiff's burden of proving the fact of damage is satisfied by its proof of some damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury .

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

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Burdens of Proof > Preponderance of Evidence

HN13[] Private Actions, Remedies

Daubert does not require a plaintiff to prove causation of damages twice-they do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable and fit the facts of the case. Plaintiffs must be free to select their own antitrust damages theories as long as they are supported by a reasonable foundation.

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

Evidence > Admissibility > Expert Witnesses

HN14[] Private Actions, Remedies

The United States Court of Appeals for the Third Circuit has made clear that the standard for admitting expert testimony on antitrust damages is lower than a plaintiff's burden of proof in establishing antitrust damages.

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

HN15[] Private Actions, Remedies

With respect to accounting for exogenous factors, the United States Court of Appeals for the Third Circuit has specifically addressed the potential problems of "but for" econometric models in proving causation of antitrust damages, albeit not in the context of price-fixing conspiracies. As explained, "but for" models do not attempt to measure the particularized effects of any specific alleged illegal practices, but rather rely on an aggregation of injury from all factors. Second, their hypothetical "but for" calculations usually rely upon unrealistic ex ante assumptions about the business environment, such as assumptions of perfect knowledge of future demand, future prices, and future costs that tend to overstate the plaintiff's damage claim. Thus, using a "but for" damage model arguably makes it impossible for the trier of fact to determine what, if any, injury derived from the defendant's antitrust violations as opposed to other factors, and courts sometimes reject such models as the basis of either causation or amount of injury.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN16[] **Regulated Practices, Price Fixing & Restraints of Trade**

In the context of price-fixing cases, several courts have recognized that merely pointing to economic conditions that may affect the dependant variable is not enough to call into question the reliability of an econometric model.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN17[] **Regulated Practices, Price Fixing & Restraints of Trade**

While the omission of variables from a regression analysis may render the analysis less probative, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors must be considered unacceptable. Normally, failure to include variables will affect the analysis' probativeness, not its admissibility. There may, of course, be some regressions so incomplete as to be inadmissible as irrelevant.

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

HN18[] **Private Actions, Remedies**

Quantifying the particular effect of any single factor is not essential to prove causation of damages in antitrust cases.

Counsel: **[**1]** For IN RE: LINERBOARD ANTITRUST LITIGATION, IN RE: RICHARD J. LEVERIDGE, DICKSTEIN SHAPIRO LLP, WASHINGTON, DC.

Judges: Honorable Jan E. DuBois, J.

Opinion by: Jan E. DuBois

Opinion

[*667] MEMORANDUM

In this multidistrict litigation brought under *Section 1* of the Sherman Act, *15 U.S.C. § 1*, plaintiffs allege that several U.S. linerboard manufacturers conspired to restrict linerboard output in order to increase the price of corrugated sheets and corrugated boxes. [1] Currently before the Court is Defendants' Motion to Exclude the Testimony of Prof. Halbert L. White, Jr. ("Motion to Exclude"), the direct-action plaintiffs' damages expert.

Defendants **[**2]** contend that Professor White's predictive econometric damages model does not address the issue of causation - whether defendants' alleged unlawful conduct caused the alleged overcharge **[*668]** for corrugated sheets and corrugated boxes. Although defendants affirmatively challenge only the "fit" of Professor White's testimony, defendants' arguments also implicate the reliability of Professor White's methodology in the context of establishing antitrust damages. In contrast, defendants do not challenge Professors White's qualifications as an economist or the reliability of predictive modeling in other contexts. [2]

After conducting oral argument and a Daubert hearing [3] on June 14, 2007 and July 2, 2007, the Court concludes that Professor White's damages model fits the facts of this case and is a reliable method of establishing causation of damages in price-fixing cases. [4] Accordingly, his testimony is admissible and defendants' Motion to Exclude is denied. The Court need not and does not address whether Professor White's testimony, standing alone, would be sufficient to support a finding of causation of damages so as to survive a motion for summary judgment. [5]

1

> Linerboard includes any grade of paperboard suitable for use in the production of corrugated sheets, which are in turn used in the manufacture of corrugated boxes and for a variety of industrial and commercial applications. Corrugated sheets are made by gluing a fluted sheet which is not made of linerboard, known as the corrugating medium, between facing sheets of linerboard; corrugated sheets are also referred to as containerboard. The defendants named in the instant lawsuits are major integrated manufacturers and sellers of linerboard, corrugated sheets, and corrugated boxes.

In re Linerboard Antitrust Litig., 203 F.R.D. 197, 202 (E.D. Pa. 2001).

2 Although the Court does not address in detail Professor White's qualifications or the general reliability of predictive modeling, the Court concludes as follows:

First, Professor White is well qualified to testify on damages in antitrust cases. He holds a Ph.D. in economics from the Massachusetts Institute of Technology, is a Professor of Economics at the University of California, San Diego, and is a Founder of Bates White, LLC, a consulting firm. He has published in peer-reviewed academic journals on topics in econometrics and statistics. His book, Asymptotic Theory for Econometricians, **[**3]** is a standard graduate level text in econometrics. Finally, he has testified as an expert and directed economic and statistical analysis of damages in several other multidistrict antitrust cases. White Rpt. at 17.

Second, predictive modeling is a reliable methodology in other contexts. "Articles published in respected peer-reviewed scientific journals report [the use of predictive econometric models] to predict real estate prices, financial earnings, credit risk, marketing and advertising outcomes, payroll expenses, . . . and crop yields." Opp. at 30.

3 Under *Daubert v. Merrell Dow Pharms., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, this Court must act as a gatekeeper **[**4]** to ensure that Professor White is qualified, that his testimony is reliable, and that his testimony fits the facts of the case.

4 In ruling upon the Motion to Exclude, the Court did not consider any issues presented by Defendants' Motion for Summary Judgment With Respect to Statutes of Limitations, which asks the Court to dismiss plaintiffs' claims as to a portion of the damages period.

5 See *Callahan v. A.E.V., Inc., 182 F.3d 237, 256 (3d Cir. 1999)* (Becker, J.) (The "expert's testimony, although admissible evidence, was insufficient by itself to prove that the antitrust violations had in fact caused [the] losses.") (summarizing ***Stelwagon Mfg. Co. v. Tarmac Roofing Systems, Inc., 63 F.3d 1267 (3d Cir. 1995))***.

I. BACKGROUND

The factual background of this case is described in detail in this Court's previous opinions. See, e.g., *In re Linerboard Antitrust Litig., 2000 U.S. Dist. LEXIS 14433, 2000 WL 1475559, *1 (E.D. Pa. Oct. 4, 2000)* (denying motion to dismiss); *In re Linerboard Antitrust Litig., 203 F.R.D. 197, 201-04 (E.D. Pa. 2001)*, aff'd, *305 F.3d 145 (3d Cir. 2002)*, cert. denied, *538 U.S. 977, 123 S. Ct. 1786, 155 L. Ed. 2d 666 (2003)* (certifying classes of direct purchasers of corrugated boxes and corrugated sheets); *In re Linerboard Antitrust Litig., 296 F. Supp. 2d 568 (E.D. Pa. 2003)* **[**5]** (approving final class settlement); *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10533, 2004 WL 1221350, *1 (E.D. Pa. Jun. 2, 2004)* (awarding class counsel attorney's fees); *In re Linerboard Antitrust Litig., 223 F.R.D. 335, 337 (E.D. Pa. 2004)* (denying motion to dismiss state claims based on statute of limitations); *In re Linerboard Antitrust Litig., 223 F.R.D. 357 (E.D. Pa. 2004)* (denying motion under *Rule 60* and motion for **[*669]** expedited discovery); *Farmland Nat'l Beef Packing Co. v. Stone Container Corp. (In re Linerboard Antitrust Litig.), 2005 U.S. Dist. LEXIS 13760, 2005 WL 1625040, *1 (E.D. Pa. July 11, 2005)* (granting motion to remand for lack of subject matter jurisdiction); *In re Linerboard Antitrust Litig., 443 F. Supp. 2d 703 (E.D. Pa. 2006)* (granting motion for summary judgment against one direct action plaintiff). Accordingly, the Court sets forth only those facts necessary to resolve defendants' Motion to Exclude.

A. Overview

Plaintiffs in this case purchased corrugated products from defendants. [6] According to plaintiffs, defendants "conspired to raise the price of corrugated containers and corrugated sheets throughout the United States by restricting production and/or curtailing inventories in violation of federal antitrust laws." *In re Linerboard Antitrust Litig., 223 F.R.D. 357, 359 (E.D. Pa. 2004)*. **[**6]** Specifically, plaintiffs allege that defendant Stone Container Corporation ("Stone")

> devised a strategy to invite its competitors to increase the price of linerboard. As part of this strategy, Stone planned to take downtime at its plants to reduce its production and inventory of linerboard substantially, and contemporaneously to purchase substantial amounts of linerboard from competitors--actions which, plaintiffs allege, were extraordinary, and not in the regular course of business.
>
> * * *
>
> The concerted actions of the defendants in taking downtime at the mills producing linerboard, and then increasing the price of linerboard, resulting in price increases for corrugated sheets and corrugated boxes, forms the basis of the conspiracy at issue in this case.

In re Linerboard Antitrust Litig., 203 F.R.D. 197, 204 (E.D. Pa. 2001).

In its Memorandum addressing class certification, the Court explained that the conspiracy alleged in this case is tantamount to a price-fixing agreement. "An agreement on output also equates to a price-fixing agreement. If firms raise prices, the market's demand for their product will fall, so the amount supplied will fall too--in other words, output will be restricted. If instead firms restrict output directly, price will as mentioned rise in order to limit demand to the reduced supply." *Id. at 216* (citing *216 Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 226 (7th Cir. 1978)*).

B. Discussion of Impact at the Class Certification Stage

---

[6] The class action components of MDL 1261 have been settled. *In re Linerboard Antitrust Litig., 292 F. Supp. 2d 631 (E.D. Pa. 2003)*. One-hundred and forty entities opted out of the classes. Thirteen groups of opt-outs subsequently filed direct actions against defendants. *In re Linerboard Antitrust Litigation, 443 F. Supp. 2d 703, 707 (E.D. Pa. 2006)*. The claims against **[**7]** all defendants other than defendants Temple-Inland, Inc. ("Temple-Inland") and Gaylord Container Corp. ("Gaylord") have either been settled or withdrawn. Id. This Memorandum pertains to the remaining direct action plaintiffs and defendants Temple-Inland and Gaylord.

To demonstrate that the questions of law and fact common to the members of the class predominated over any questions affecting only individual members, the Court applied a presumption of impact known as the "Bogosian short-cut":

> If, in this case, a nationwide conspiracy is proven, the **[**8]** result of which was to increase prices . . . beyond the prices which would obtain in a competitive regime, an individual plaintiff could prove fact of damage [7] simply by proving that **[*670]** the free market prices would be lower than the prices paid and that he made some purchases at the higher price."

Id. (citing *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 454 (3d Cir. 1977)*).

The Court also briefly addressed plaintiffs' "econometric models to be used to establish impact." *Id. at 218*. Specifically, the Court examined the affidavit of Dr. John C. Beyer, plaintiffs' economic expert. As the Third Circuit explained in affirming the Court's class certification,

> In discussing . . . feasible approaches[] which could be used to provide quantitative methods for corroborating his opinion on impact and for estimating damages, [Dr. Beyer] suggested as a potential benchmark[] the potential prices charged for linerboard during a competitive period when there would be no effects of the conspiracy. **[**9]** He explained that the necessary data was available to do the analysis and described the types of data he would use. He discussed also a multiple regression model [8] to isolate the effects of various influences on corrugated container prices, thereby allowing a determination of the impact of any one of the variables, including, in this case, the impact of the conspiracy.

In re Linerboard Antitrust Litig., 305 F.3d 145, 154 (3d Cir. 2002).

II. PROFESSOR WHITE'S ECONOMETRIC MODEL

Direct-action plaintiffs retained Professor White to opine on the extent to which the alleged conspiracy **[**10]** caused them to pay higher prices for corrugated containers. [9] White Rpt. P 1. The objective of Professor White's analysis was "to estimate 'but-for' prices of corrugated containers and sheets, that is, the prices that would have prevailed but for the existence of the alleged conduct, covering every affected purchase for each plaintiff in this matter." Id. P 120. In other words, Professor White estimated "but-for prices consistent with the level of competition and interaction of market forces that prevailed when the alleged conduct was not in effect." Id. To accomplish this, Professor White developed an "econometric model that relates product prices to the underlying costs and demand shifters in the industry using data that exclude the period of the alleged conduct. [He] then appl[ied] this relationship to estimate what prices would have been during the period of the alleged conduct, had they followed the relationship estimated outside the alleged conduct period." Id.

---

[7] The "fact of damage" is the impact of the unlawful activity. See *In re Linerboard Antitrust Litigation, 203 F.R.D. 197, 214 (E.D. Pa. 2001)* (citing *Lumco Indus., Inc. v. Jeld-Wen, Inc., 171 F.R.D. 168, 172 (E.D. Pa.1997)*).

[8]

> Multiple regression analysis is a statistical tool for understanding the relationship between two or more variables . . . . [It] is sometimes well suited to the analysis of data about competing theories in which there are several possible explanations for the relationship among a number of explanatory variables . . . . [It] may also be useful (1) in determining whether a particular effect is present; (2) in measuring the magnitude of a particular effect; and (3) in forecasting what a particular effect would be, but for an intervening event.

In re Linerboard Antitrust Litig., 203 F.R.D. 197, 219 (E.D. Pa. 2001).

[9] Specifically, Professor White's "charge [was] to determine the extent to which direct action plaintiffs were overcharged . . . *as a result of* an alleged price fixing conspiracy to restrict the supply of linerboard and **[**11]** corrugated medium and to elevate the prices of linerboard, corrugating medium, and corrugated product in the United States." White Rpt. P 1 (emphasis added).

The econometric model that Professor White developed and applied was a "prediction model." "A prediction model captures the statistical relationship between **[*671]** prices and cost, demand, and other potentially predictive factors." Id. P 126.

> Prediction models . . . . are fundamentally different than causal models (also known as "structural" models). Whereas causal models are intended to measure the ceteris paribus effects of specific economic factors, the purpose of a prediction models is to accurately predict outcomes that would be observed during a period of interest. Prediction models account for unobservable causal factors by the use of suitable proxies.

Id. P 130. "By constructing the prediction model using data that exclude the alleged conduct period, [Professor White] obtain[ed] a model that reflects the predictive relationship between prices and predictive factors in the absence of the alleged conduct." Id. P 126.

To select the relevant predictive factors for his regression equation, [10] Professor White first "identified a set of **[**12]** candidate predictor variables using economic theory and an understanding of the relevant market." Id. P 127. He then "used a statistical criterion, cross-validation, to select from these candidate variables a subset of predictors that delivers superior accuracy. This method involves repeatedly holding out part of the data to measure the predictive ability of a given set of predictors." Id.

"Among the predictive factors [Professor White] did not include are economic variables subject to the control of the defendants such as inventory levels or downtime that was taken for market purposes. Nor did [Professor White] include other variables whose values would be affected by the alleged coordinated action of the defendants, such as the price of recycled corrugated containers." Id. P 129. Specifically, Professor White excluded inventories, capacity, capacity utilization, **[**13]** non-incident downtime, [11] number of suppliers, and the cost of recycled corrugated containers ("OCC"). July 2, 2007 Tr. at 27-28. According to Professor White, "use of actual values of such variables [could] have [had] the effect of absorbing part or all of the effect of the alleged conduct and is therefore clearly inappropriate." White Rpt. P 129. Instead, Professor White utilized "predictors that drive the values of the potentially affected variable but that are not themselves affected by the alleged coordinated action of the defendants." Id.

After Professor White estimated but-for prices, he calculated overcharges by subtracting the but-for price from the allegedly elevated prices paid by plaintiffs for corrugated products during "the damages period, i.e. from December 1993 through May 1997." Id. P 182. Professor White concluded that the "overcharges from Temple-Inland and Gaylord for all purchases for the plaintiffs were $ 109.4 million during the damage period." Id. P 183. Applying the U.S. bank prime loan rate **[*672]** (averaging seven percent from 1993 to August 2006), Professor White further calculated that "the present value of plaintiffs' damages . . . . associated with purchases from Temple-Inland and Gaylord total $ 228.1 million during the damage period." Id. P 185. According to Professor White, this figure "represents the total payments required to restore the plaintiffs to the same financial position that they would have enjoyed but for the defendants' alleged illegal cartel." Id.

---

[10] Professor White "estimated the prediction model using standard ridge regression methods," which "has a long history of use in statistics and econometrics." Id. P 134. A regression equation consists of "a set of coefficients that are associated with each of the variables" selected for the equation. July 2, 2007 Tr. at 50.

[11] Incident downtime is involuntary downtime taken by the defendants that is caused, for example, by mill accidents or regulatory shutdowns. See July 2, 2007 Tr. at 28-28, 91-92. Professor White "was careful to distinguish between incident downtime . . . and non-incident downtime." Id. at 98.

> By including the incident downtime in [his] model, [he] was able to build a prediction that took into account, using the underlying drivers of cost and demand, what the presumably lawful and more competitive behavior with regard to other types of downtime, market downtime, maintenance downtime, would be during the benchmark period, and that's what's relevant **[**14]** for the purpose of constructing the but-for line.

Id.

III. STANDARD OF REVIEW

Federal Rule of Evidence 702 governs the admissibility of expert testimony. The rule provides as follows:

> **HN1**[] If scientific, technical, or other specialized knowledge will **[**15]** assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

HN2[] "Faced with a proffer of expert scientific testimony . . . the trial judge must determine . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert v. Merrell Dow Pharms., 509 U.S. 579, 592, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. This gatekeeping function extends beyond scientific testimony to testimony based on "technical" and "other specialized" knowledge. *Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*.

HN3[] "*Rule 702* embodies three distinct substantive restrictions on the admission of expert testimony: qualifications, reliability, and fit." *Elcock v. Kmart Corp., 233 F. 3d 734, 741 (3d Cir. 2000)* (citing *In re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994)*). **[**16]** The party offering the expert must prove each of these requirements by a preponderance of the evidence. *In re TMI Litig., 193 F.3d 613, 663 (3d Cir. 1999)*.

Defendants affirmatively challenge only the "fit" of Professor White's testimony. [12] **HN4**[] For expert testimony to meet the "fit" requirement, it must "assist the trier of fact to understand the evidence or to determine a fact in issue." *Fed. R. Evid. 702*. "This condition goes primarily to relevance. Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert, 509 U.S. at 591* (citing *United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985)* (quotations omitted). "'Fit' is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." *Daubert, 509 U.S. at 591*.

In its reconsideration of Daubert on remand from the Supreme Court, the Ninth Circuit explained as follows:

> **HN5**[] The Supreme Court recognized that the "fit" requirement "goes primarily to relevance," but it obviously did not intend the second prong of *Rule 702* to be merely a reiteration of the general relevancy requirement of *Rule 402*. In elucidating **[*673]** the "fit" requirement, the Supreme Court noted that scientific expert testimony carries special dangers to the fact-finding process because it "can be both powerful and quite misleading because of the difficulty in evaluating it." Federal judges must therefore exclude proffered scientific evidence under *Rules 702* and *403* unless they are convinced that it speaks clearly and directly to an issue in dispute in the case, and that it will not mislead the jury.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F. 3d 1311, 1321 (9th Cir. 1995).

As the Third Circuit recently stated, "[a]lthough we do not adopt the apparent presumption of exclusion enunciated by the Ninth Circuit, we agree with the spirit of our sister court's exhortation. In particular, **HN6**[] district courts **[**18]** should tread carefully when evaluating proffered expert testimony, paying special attention to the relevance prong of Daubert." *United States v. Ford, 481 F.3d 215, 220 n.6 (3d Cir. 2007)*. The Third Circuit further explained that

---

[12] Defendants state as follows in their motion: "Defendants do not question Prof. White's qualifications as an economist or the application of his methodology in *other* contexts. Rather Defendants question whether the methodology Professor White chose 'fits' the facts in *this* case and Plaintiffs' theory of *this* case." Def.'s Mot. at 11. Defense counsel repeatedly **[**17]** stressed during the Daubert hearing that defendants were only making a "fit" challenge.

> The discussion of "fit" in Paoli indicated that *HN7*[] the standard for analyzing the fit of an expert's analysis to the case at hand is "not that high," but is "higher than bare relevance."
>
> That statement remains sound law inasmuch as it requires that experts who purport to apply their principles and methods to the facts of the case do so in a reliable manner. The Paoli Court's discussion of fit requires that expert opinions that apply principles or methods to the facts of the case and produce conclusions that have a debatable connection to the question in issue be predicated on a reliable methodology. This is the critical import of Paoli's discussion of fit within the context of reliability. Outside of this relatively narrow setting, "fit" is a relevance concern.

Id. (citing *Paoli, 35 F.3d at 745*).

As in Paoli, defendants' fit arguments in fact implicate the reliability of Professor White's methodology in certain respects. For example, defendants argue that it was **[**19]** inappropriate for Professor White to apply a cross-validated root mean squared error method [13] in selecting variables for his regression equation, and that Professor White incorrectly assumed that his benchmark period was free of collusion. July 2, 2007 Tr. at 115.

HN8[] "Under the liberal Daubert standard, the plaintiffs do not have to prove to the judge by a preponderance of the evidence that their expert's testimony is correct, they must only show that it is reliable. The requirement of reliability is lower than the standard of correctness." *United States v. Williams, 235 Fed. Appx. 925, 2007 U.S. App. LEXIS 13429, 2007 WL 1643197, *3 (3d Cir. Jun. 7, 2007)* (citing *Daubert, 509 U.S. at 590*). "The judge does not have to determine that these methods are necessarily the best grounds to ascertain **[**20]** certain facts, but only that the evidence presented will help the trier of fact." Id.

HN9[] "Once the foundation for admissibility required by Daubert has been established, concerns about the validity of an expert's conclusions should not result in the exclusion of the expert's testimony. Rather, such concerns should be presented to the jury through cross examination, presentation **[*674]** of contrary evidence and careful instruction on the burden of proof." Id.

V. DISCUSSION

A. Overview

According to defendants, Professor White's model "is simply not helpful, because he has not done the analysis and rendered an opinion as to how that difference in price is connected to the specific conspiracy in this case." Reply at 7. Defendants' Motion to Exclude focuses on the following three arguments:

> (1) Professor White fails "to link the alleged price increase . . . to the allegedly wrongful conduct . . . and to exclude the possibility that legitimate factors, such as costs, capacity constraints, or increase in demand caused that increase in price." Mot. at 1.
>
> (2) Professor White "removed *all* variables that could be affected by Defendants' conduct - lawful or unlawful" such that there is "no way to isolate the pricing **[**21]** effect of *lawful* conduct from that of unlawful conduct." Reply at 11-12.

---

[13] Professor White explained that the cross-validated root mean squared error is

> a measure of the squared error which is a measure of how well or poorly you're doing. The bigger the squared error, the worse you're doing, the smaller the better, on average the word "mean" conveys that. So it's the average squared error that is achieved when you apply the prediction equation to data that haven't been seen for purposes of estimation.

July 2, 2007 Tr. at 45.

(3) Professor White "fails to quantify the degree to which any economic factor-downtime, restricted production, or other-affected prices during the relevant period" and "ignores the timing and quantity of downtime taken . . . ." Mot. at 3.

These arguments are distinct but present interrelated issues. The first argument pertains to controlling for exogenous economic factors (factors outside of defendants' control, such as demand), while the second argument pertains to disaggregation of defendants' lawful and allegedly unlawful conduct (factors within defendants' control). [14] The third argument pertains to disaggregation of specific acts alleged to be unlawful, and relating damages to those specific unlawful acts. [15]

Based on these arguments, defendants contend that Professor "White is unable to opine as to how (or even whether) the alleged unlawful conduct affected prices . . . ." Mot. at 3. The Court disagrees. First, Professor White's econometric damages model properly controls for exogenous factors by incorporating all relevant **[**23]** "aspects of the economic reality of the [linerboard] market . . . ." *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1057 (8th Cir. 2000)*. Second, Professor White's econometric damages model "separate[s] lawful from unlawful conduct." Id. Third, it was unnecessary for Professor White to particularize the effect that any one variable, such as downtime or inventories, had upon prices. *LePage's Inc. v. **[*675]** 3M, 324 F.3d 141 (3d Cir. 2003)*. The Court need not and does not address whether Professor White's testimony, standing alone, would be sufficient to support a finding of causation of damages so as to survive a motion for summary judgment.

During the Daubert Hearing, defense counsel also argued that Professor White incorrectly assumed that his benchmark period was free of collusion. July 2, 2007 Tr. at 87. This argument is unavailing because, assuming that the benchmark period was not perfectly competitive, Professor White's damages calculation actually becomes a more conservative estimate. That is, if there was in fact collusion during the benchmark period, Professor White's but-for price estimate would be too high, causing his estimate of the overcharge (the difference between actual **[**24]** prices and but-for prices) to be too low.

B. Legal Standard: Causation of Damages in Antitrust Cases

HN10[] "A consumer alleging antitrust violations cannot obtain damages without showing that he actually paid more than he would have paid in the absence of the violation.'" *City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 265 (3d Cir. 1998)* (citing Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law**, at 200 (1995)* (noting that "determining whether antitrust injury is present necessarily involves examining whether there is a causal connection between the violation alleged and the injury")). Thus, "one pursuing antitrust recovery must establish that the damages suffered were caused by the defendant's participation in a scheme repugnant to the antitrust

---

14

> Suppose that an antitrust defendant has engaged in multiple activities that have imposed some injury on the plaintiff. If some of the defendant's conduct is lawful and some is lawful, the damage claim will have to be disaggregated. The reason for this is clear: . . . a plaintiff may recover a damage award that will return him to the financial position that he would have enjoyed but for the unlawful conduct. **[**22]** . . . *The disaggregation requirement is distinct from the requirement that the plaintiff's damage calculations must control for exogenous factors that also have an adverse impact on the plaintiff's economic condition.*

Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law**: An Anaylsis of Antitrust Principles and Their Application* P 391g (2d ed. 2000) (emphasis added).

15 Defendants distinguish between their arguments in a manner different from the approach taken by the Court. They state that Professor White's method: "(1) ignores the timing and quantity of downtime taken; (2) ignores other lawful factors that affected prices during the relevant period; and (3) fails to quantify the degree to which any economic factor - downtime, restricted production, or other - affected prices during the relevant period." Mot. at 3. The Court addresses each of these arguments in its analysis.

laws." *In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1176 (3d Cir. 1993)* (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*).

HN11[] In price-fixing cases, "causation of injury may be found as a matter of just and reasonable inference from proof of defendants' wrongful acts and their tendency to injure plaintiffs, and from evidence of change in prices not shown to be attributable to other causes." *In re Industrial Silicon Antitrust Litig., 1998 U.S. Dist. LEXIS 20459, 1998 WL 1031507, *4 (W.D. Pa. Oct. 13, 1998)* **[**25]** (citing *In re Aluminum Phosphide Antitrust Litig., 893 F. Supp. 1497, 1499 (D. Kan. 1995)* (citing *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 262-64, 66 S. Ct. 574, 90 L. Ed. 652 (1946)*)) (emphasis added).

HN12[] "Once causation is determined, . . . the actual amount of damages may result from a 'reasonable estimate, as long as the jury verdict is not the product of speculation or guess work.'" *Lower Lake Erie, 998 F.2d at 1176* (citing *MCI Communications Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1161 (7th Cir. 1983)*). "The relaxed measure of proof is afforded to the amount, not the causation of loss--the nexus between the defendant's illegal activity and the injuries suffered must be reasonably proven." Id. However, a plaintiff's "burden of proving the fact of damage . . . is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury . . . ." *Danny Kresky Enter. Corp. v. Magid, 716 F.2d 206, 209-10 (3d Cir. 1983)*.

Importantly, ***HN13***[] Daubert does not require a plaintiff **[**26]** to prove causation of damages "twice-they do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are *correct,* they only have to demonstrate by a preponderance of evidence that their opinions are reliable" and fit the facts of the case. *Paoli, 35 F.3d at 744*. **[*676]** "[P]laintiffs must be free to select their own [antitrust] damages theories as long as they are supported by a reasonable foundation." *Danny Kresky, 716 F.2d at 213*.

Indeed, ***HN14***[] the Third Circuit has made clear that the standard for admitting expert testimony on antitrust damages is lower than a plaintiff's burden of proof in establishing antitrust damages. That dichotomy presents the same issues as are argued by the defendants in this case. They were explained by the Third Circuit in *Stelwagon Mfg. Co. v. Tarmac Roofing Systems, Inc., 63 F.3d 1267 (3d Cir. 1995)*, which criticized the damages expert in much the same way that defendants criticize Professor White:

> Significantly, Dr. Perry's analysis failed to sufficiently link any decline in Stelwagon's MAPs sales to price discrimination. The sales may have been lost for reasons apart from the price discrimination-reasons that Dr. **[**27]** Perry's analysis apparently did not take into account. For example, the evidence showed that Stelwagon had higher overhead costs than its competitors. In addition, there was undisputed evidence that Stelwagon experienced other business complications during the relevant time period. In 1988, for example, Stelwagon terminated a vice-president, two territorial managers and three key employees for their part in an embezzlement scheme.

Id. at 1275. Nevertheless, the Third Circuit clearly stated that the expert's damages testimony was admissible:

> Although we do not agree with [defendant's] contention that the district court erred in admitting [the expert] testimony, or in failing to strike the testimony in response to a motion by [defendant] at the conclusion of the direct examination, we do agree that, standing alone, the expert's opinions, as reflected in his testimony and report, are insufficient to support the finding of actual damage.

Id.; see also *Callahan v. A.E.V., Inc., 182 F.3d 237, 256 (3d Cir. 1999)* (Becker, J.) (summarizing *Stelwagon, 63 F.3d at 1275*) (The "expert's testimony, although admissible evidence, was insufficient by itself to prove that the antitrust violations had in **[**28]** fact caused [the] losses.")

C. Analysis of Defendants' Arguments

1. Incorporation of Exogenous Factors (Factors Beyond Defendants' Control)

Defendants argue that Professor White fails "to link the alleged price increase . . . to the allegedly wrongful conduct . . . and to exclude the possibility that legitimate factors, such as costs, capacity constraints, or increase in demand caused that increase in price." Mot. at 1. In other words, defendants argue that Professor White's "damage calculations [do not] control for exogenous factors that [could] have an adverse impact on the plaintiff's economic condition[,]" a question related to but distinct from the question whether Professor White's model disaggregates the effects of defendants' lawful conduct from defendants' unlawful conduct. Areeda & Hovenkamp, ***Antitrust Law*** P 391g. The Court rejects this argument because Professor White's model properly accounted for exogenous factors such as cost, capacity constraints, and demand. In short, Professor White explained that it did not matter what specific demand, cost, or capacity variables were included or excluded from his regression equation, as long as tainted variables were excluded and the **[**29]** regression equation closely predicted actual prices during the benchmark period.

a. Problems With "But-For" Models

HN15[] With respect to accounting for exogenous factors, the Third Circuit has specifically addressed the potential problems of "but for" econometric models in proving **[*677]** causation of antitrust damages, albeit not in the context of price-fixing conspiracies. As explained in *Rossi v. Standard Roofing, Inc., 156 F.3d 452 (3d Cir. 1998)* (Becker, J.), "but for" models

> do not attempt to measure the particularized effects of any specific alleged illegal practices, but rather rely on an aggregation of injury from all factors. Second, their hypothetical "but for" calculations usually rely upon unrealistic *ex ante* assumptions about the business environment, such as assumptions of perfect knowledge of future demand, future prices, and future costs that tend to overstate the plaintiff's damage claim. Thus, using a "but for" damage model arguably makes it impossible for the trier of fact to determine what, if any, injury derived from the defendant's antitrust violations as opposed to other factors, and courts sometimes reject such models as the basis of either causation or amount of injury.

Id. at 485 **[**30]** (citations omitted). In that case, noting that the expert's damages model was "much less speculative" than other "but for" damages models, the Third Circuit found it inappropriate to exclude the model even though it did "not deal with the particularized effects of specific injuries, but rather aggregate[d] all . . . damages into one figure." *Id. at 485-86*. The Court further found that various extrinsic factors, not incorporated into plaintiff's model, were insufficient to warrant exclusion of plaintiff's model. [16] See id.

The Third Circuit again "considered **[**31]** the sufficiency of expert evidence offered as proof of causation in antitrust cases" in *Callahan, 182 F.3d at 256*. In that case, "defendants criticize[d] [plaintiffs' expert] report for failing to take into account potential alternative causes for the plaintiffs' losses *not attributable to the defendants' actions." Id. at 258* (emphasis added). Specifically, "defendants contend[ed] that . . . the expert's report was inadequate because it failed to consider alternative causes, so we must find [the] report inadequate because he failed to consider certain specific factors that might have affected the plaintiffs' business success, such as general economic conditions, changes in their operations during the relevant time period, or changes in costs." Id. The Third Circuit rejected this argument, noting that plaintiffs did "discuss some of these factors the defendants suggest he should

---

[16] Although the Rossi court did not explicitly state that the expert report was admissible, it considered the expert report and stated as follows:

> We do not agree with the defendants' reading of these cases (and, at all events, are not bound by them), which we conclude only stand for the proposition that some, not all, "but for" models are too speculative and must be precluded as a matter of law. The Rockhill Report, as we shall see, is much less speculative and does not suffer from many of the flaws in the damage models discussed in Van Dyk Research and Southern Pacific, and thus it is not comparable with them.

Rossi, 156 F.3d at 485-86.

have--including general economic conditions--albeit not to the degree the defendants might prefer." Id. The Court "found the export's [sic] report acceptable in spite of certain gaps," and stated that the factors "involve factual disputes that need to be resolved by the trier of fact, not by this court . . . **[**32]** ." Id. (quoting *Rossi, 156 F.3d at 487*). [17]

[*678] ***HN16***[] In the context of price-fixing cases, several other courts have recognized that "[m]erely pointing to economic conditions that may affect the dependant variable is not enough to call into **[**33]** question the reliability of an econometric model." *In re Polypropylene Carpet Antitrust Litig., 93 F. Supp. 2d 1348 (N.D. Ga. 2000)* (citing *In re Indus. Silicon Antitrust Litig., 1998 U.S. Dist. LEXIS 20459 , [WL] at *3 (W.D. Pa. Oct. 13, 1998)*). In that case, the court explained that

> Unless the party challenging a regression model proffers evidence that an omitted variable "is correlated with the dependant variable and is likely to affect the result of the regression analysis," the Court will not find that omission of the variable implicates the reliability of the model.

Id. at 1365 (citation omitted). "It is only the rare case where the 'regressions are so incomplete as to be irrelevant' and the expert's decisions regarding control variables are the basis to exclude the analysis." *Gutierrez v. Johnson & Johnson, 2006 U.S. Dist. LEXIS 80834, 2006 WL 3246605, *5 (D.N.J. Nov. 6, 2006)* ("The Court is unpersuaded that [the expert's] choice of variables renders her analysis so fatally flawed that it should be stricken as a matter of law.").

These decisions are based on *Bazemore v. Friday, 478 U.S. 385, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986)*, in which the Supreme Court addressed omission of variables from regression analyses proffered to establish discrimination. The **[**34]** Fourth Circuit concluded that a regression analysis was "unacceptable as evidence of discrimination, because they did not include "'all measurable variables thought to have an effect on salary level." Id. (quotations omitted). Finding this "view of the evidentiary value of the regression analyses . . . plainly incorrect[,]" the Supreme Court explained,

> ***HN17***[] While the omission of variables from a regression analysis may render the analysis less probative . . ., it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors must be considered unacceptable . . . . Normally, failure to include variables will affect the analysis' probativeness, not its admissibility.

Id. at 400 (quotation omitted). "There may, of course, be some regressions so incomplete as to be inadmissible as irrelevant . . . ." [18] *Id. at 400 n.10*.

---

[17] Also instructive on this point is *J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1540 (3d Cir. 1990)*, a Third Circuit case that discusses the Supreme Court's decision in *Texaco Inc. v. Hasbrouck, 496 U.S. 543, 572, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990)*:

> To estimate its lost sales at trial, Hasbrouck's expert presented a market analysis comparing Hasbrouck's actual prices, volumes and profits to its estimated amount absent the discrimination. The expert utilized economic projections based upon various assumptions such as assuming Texaco did not offer a favored price to its competitors and assuming that Texaco lowered its price to Hasbrouck.

On appeal, the Supreme Court decided that:

> *[e]ven if some portion of some of the respondent's injuries may be attributable to the conduct of independent retailers, the expert testimony nevertheless provided a sufficient basis for an acceptable estimate of the amount of damages.*

J.F. Feeser, 909 F.2d at 1540 n. 16 (citing *Texaco, 496 U.S. at 572*).

[18] Other circuits interpret Bazemore to require a defendant to introduce "evidence to support the contention that the missing factor would explain the existing disparities" revealed by the regression analysis. *Palmer v. Shultz, 259 U.S. App. D.C. 246, 815 F.2d 84, 101 (D.C. Cir. 1987)*; *Sobel v. Yeshiva Univ., 839 F.2d 18, 33-34 (2d. Cir. 1988)*. Several courts in **[**35]** the Third Circuit have taken this approach. *Churchill v. Int'l Bus. Machines, Inc., Nat'l Serv. Div. U, 759 F. Supp. 1089, 1099 (D.N.J. 1991)*;

Defendants apparently concede that "conflicts between parties or experts over which variables are the proper variables to include in a model or which variables should be given more weight are simply issues of fact to be considered by juries." Reply at 16. According to defendants, they are "not quibbling with the variables, **[*679]** . . . that wouldn't be an appropriate Daubert challenge and we've never done that." July 2, 2007 Tr. at 178. This is directly at odds with defendants' argument that Professor White's model did not account for legitimate factors affecting price such as costs, capacity constraints, or increase in demand.

b. Incorporation of Exogenous Factors into Professor White's Model

In this case, Professor White testified that he did incorporate all appropriate cost and demand factors. On the cost side, Professor White's regression equation included the following variables: woodchips, labor, coal, electric **[**36]** power, natural gas, oil railroad transportation, diesel fuel, caustic soda, sulfuric acid, sodium carbonate/sulfate, 3-month treasury bill, 10-year treasury note, and incident downtime. On the demand side, Professor White's regression equation included the following variables: U.S. durable and non-durable industrial production indices, foreign industrial production indices and exchange rates, and the price index for plastic packaging products (a substitute for packaging products made from corrugated cardboard).

In contrast, Professor White excluded from his equation inventories, capacity, capacity utilization, non-incident downtime, number of suppliers, cost of recycled corrugated containers ("OCC"), and the paper component of the U.S. nondurable industrial production index. July 2, 2007 Tr. at 27-28. As evinced by Professor White's testimony during the Daubert hearing, it was appropriate for him to exclude these variables, because they were either tainted or duplicative. See *Gutierrez, 2006 U.S. Dist. LEXIS 80834, [WL] at *6* (holding that an expert "exercised professional judgment in deciding what control variables to include in her analysis"). Moreover, he testified that the excluded variables were **[**37]** accounted for in his model indirectly, through proxy variables. The Court sets forth a small portion of Professor White's lengthy testimony on this issue:

> Q. Does the fact that only some variables were selected mean that your prediction equation, your multiple regression equation, takes no account of the variables that were not selected?
>
> A. Not at all. . . . [A]s I explained earlier, the purpose of the ensemble is to give the best prediction that includes not too many variables and not too few. The variables that are included act on their own together with the other variables that are included but they also act as proxies for other variables that don't make the grade. The reason those other variables don't make the grade is that the information that they contain is already included in the ensemble that I select.
>
> * * *
>
> Q. Does the fact that the durable production variable [which accounted for roughly 23 percent of demand] was not selected [mean] that your model has nothing to do with reality?
>
> A. Absolutely not. . . . [A]s I've just explained, the variables that are included act for themselves but also as proxies for other variables that are not included. And if a variable isn't included **[**38]** it's because its information is already contained in the ensemble. So, in essence, it's redundant to put it in again.

Id. at 47-48; see also id. at 41-42.

Professor White testified similarly with respect to his rationale for excluding capacity from his prediction equation. Although Professor White did not include capacity "in the model as an explicit variable" **[*680]** because it was tainted by the conspiracy,

> it is included indirectly through the process by which I modeled the but-for price during the benchmark period. So that even though capacity as a tainted variable isn't taken account of, the benchmark behavior of capacity, which is presumably lawful and more competitive, is taken into account, and I also described the exercise earlier this morning where I included that capacity and found that it didn't have much of an impact, if any, on the ultimate but-for prices.

July 2, 2007 Tr. at 80-82.

---

*Lanning v. Southeastern PA Transp. Auth., 1998 U.S. Dist. LEXIS 9388, 1998 WL 341605, *66 (E.D. Pa. Jun. 25, 1998)*, rev'd on other grounds, *181 F.3d 478 (3d Cir. 1999)*.

Moreover, in response to defendants' arguments, Professor White reran a number of variables in his model that defendants claim were overlooked. In doing so, he included containerboard capacity, containerboard inventories at mills, containerboard inventories at box plaints, total containerboard inventories, **[**39]** and OCC prices. White Rebuttal Rpt. at 15. "The damage estimates resulting from this exercise [were] very similar to those resulting from [Professor White's] final prediction equation." July 2, 2007 Tr. at 38. Professor White explained that this "means that the variables that I included in my final prediction equation essentially captured all of the information that otherwise would have been present in those capacity or inventory series." [19] Id.

The Court notes that Professor White's analysis bears no similarity to the expert analysis excluded in *In re Aluminum Phosphide Antitrust Litig., 893 F. Supp. 1497 (D. Kan. 1995)*, a case upon which defendants rely. In that case, the expert "did not perform a regression analysis to address such obvious points as . . . the effect **[**40]** of supply, demand, competition or other factors that might impact price levels during both normative periods." *Id. at 1504*. The court held that, because the expert's testimony on antitrust damages was "based on unjustified assumptions and does not account for changes in other relevant market conditions, it would not assist a trier of fact to determine the fact or amount of plaintiffs' damages." *Id. at 1507*. In contrast, in this case, Professor White applied regression analysis to calculate a but-for price that reflected all salient exogenous factors, such as costs and demand, either directly or indirectly. See *Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic, 152 F.3d 588, 593 (7th Cir. 1998)* (Posner, J.) ("Statistical studies that fail to correct for salient factors, not attributable to the defendant's misconduct, that may have caused the harm of which the plaintiff is complaining do not provide a rational basis for a judgment.").

Accordingly, the Court rejects defendants' argument that Professor White's model does not exclude the possibility that exogenous factors such as costs, capacity restraints, or increase in demand caused the alleged overcharge. In this case, **[**41]** that is an issue for the jury to resolve.

2. Disaggregation of Lawful and Unlawful Conduct

According to defendants, there is "no way to isolate the pricing effect of *lawful* conduct from that of unlawful conduct" because Professor White "removed *all* variables that could be affected by Defendants' conduct - lawful or unlawful." **[*681]** Reply at 11-12. Defendants argue that Bazemore and its progeny are inapposite to this case because Professor Whites "excludes the most important variables in this case -- production and inventory. These variables are at the heart of Plaintiff's claims. Prof. White's model does not provide any direct way to connect a change in inventory or production to a change in price." Memorandum Regarding Authorities Identified by the Court at 2. The Court rejects this argument because, although Professor White's model does not isolate how any specific change in inventory or production led to a change of price, it isolates defendants' alleged collusive behavior as the cause of the alleged overcharge.

First, it was appropriate for Professor White to remove all variables that could be affected by defendants' conduct, lawful or unlawful. As Professor White explained in his rebuttal **[**42]** report,

> To correctly estimate the impact of a treatment (the alleged conspiracy) the researcher must be careful to identify factors that affect the outcome of the concern (in our case corrugated container prices) but are not themselves affected by the treatment. Factors such as interest rates and electricity prices are examples of factors that are not themselves influenced by the alleged conspiracy. The researcher must also identify factors that affect the outcome of concern but *are* affected by the treatment. Inventory levels, market downtime, capacity and capacity utilization are all examples of the latter category. It is well established in the treatment

[19] Defendants stressed during the Daubert hearing that Professor White did not rerun his model using capacity utilization, but offered nothing to support that doing so would significantly affect Professor White's results. July 2, 2007 Tr. at 182-83; see *Bazemore 478 U.S. at 385*. The absence of this variable is discussed further in the Court's discussion of the disaggregation of defendants' lawful and unlawful conduct, *supra.*

> effects literature that the inclusion of variables in this second category introduces bias into the estimation of the effect of interest.

White Rebuttal Rept at 14. See also *Gutierrez, 2006 U.S. Dist. LEXIS 80834, [WL] at *6* (noting that the expert "specifically chose *not* to include performance in her analyses because performance reviews were under the control of [defendant] and may incorporate discrimination rather than providing a neutral measure of productivity").

Second, defendants are incorrect in their assertion that, because Professor White's **[**43]** model was a predictive model rather than a structural model, Professor White cannot isolate defendants' unlawful behavior as the cause of the alleged overcharge. Professor White testified at length on this issue at the Daubert hearing:

> The important distinction here is that the but-for price . . . is constructed as a prediction model. I am not using a structural model for obtaining the but-for price. Nevertheless, there is a crucial and indeed focal structural element to my analysis, and that is the estimation of the effect of the alleged conspiracy by comparing the actual price to this prediction.
>
> * * *
>
> [A] structural model is one that permits the data analysis to reveal the effect of a cause . . . . [M]y model is structural in that it permits me to reveal the effect of a specific cause, that is, the cause of the alleged conspiracy.
>
> * * *
>
> [I]t's an important distinction to understand where the causality is being measured, that is, the effect of the alleged conduct in the conspiracy period, and where I am not attempting to measure cause and effect, which is in creating the but-for price. . . . [I]t suffices there to make a prediction . . . . [because] I'm being asked to make a prediction **[**44]** under the identical market circumstances during the alleged conduct period, not some set of hypothetical market conditions that might occur . . . . If I were attempting to do that, then I would be concerned **[*682]** about understanding structural elements of the cost-and-demand factors, but that's not my goal. Because I am making predictions under the identical market conditions except for the presence of the alleged conspiracy, there's no need to have a structural analysis of the causal effect of each and every cost-and-demand shifter . . . .
>
> * * *
>
> Even though I'm not saying what the effect of each and every cost-and-demand shifter was, I am taking them into account and then I am comparing that to the actual prices that occurred during the alleged conspiracy.

July 2, 2007 Tr. at 107-09.

Finally, the fact that Professor White excluded all variables within the defendants' control, rather than only those variables representing defendants' unlawful conduct, does not imply that Professor White's estimated overcharge may be attributable to non-collusive, lawful behavior on the part of defendants. Professor White testified that he could "rule out all [causal factors underling the alleged overcharge] **[**45]** but the alleged conspiracy by a process of elimination." Id. at 40. As Professor White elaborated,

> The principle of creating a but-for price requires that that prediction not be tainted by conduct associated with the alleged conspiracy. So in order to isolate that conduct that's not impacted by the alleged conspiracy, it's possible to reach back, in other words, go back through the decisions that are under the defendants' control and represent their behavior by the ultimate drivers, the cost and demand factors, that are not under their control or influence. So the cost and demand factors operating in the benchmark period then drive whatever those defendant decisions are as to inventories, downtime, et cetera, the aspects of those that are not contaminated by the alleged conspiracy because it's the benchmark period, as well as driving prices and quantities directly. The net result of that is this total relationship between the cost and demand factors driving prices and quantities. . . . So by being able to use the benchmark period to understand how prices respond to the underlying cost and demand factors I'm able to incorporate, albeit indirectly but also inherently, how decisions as **[**46]** to defendants' choice of inventories or down time or other variables ultimately impact prices and quantities.

Id. at 33-34. Thus, the model inherently accounts for defendants' "[l]awful choices with respect to inventory and down time." Id.

What Professor White is saying is this: It matters not that defendants' lawful conduct was not directly included in the variables that he selected for his regression equation. What matters is that the selected variables resulted in a predicted price during the benchmark period that was almost identical to the actual price in the benchmark period. Defendants' lawful conduct in the benchmark period was indirectly included through the selection of underlying variables; hence, it was indirectly included in the predicted but-for price in the damages period. That enabled Professor White to opine that the price difference in the damages period was attributable to the collusive conduct of the defendants and not attributable to lawful conduct on the part of defendants.

Accordingly, the Court rejects defendants' argument that there is "no way to isolate the pricing effect of *lawful* conduct from that of unlawful conduct" because Professor White "removed *all* variables **[**47]** that could be affected by Defendants' conduct - lawful or unlawful." Reply at 11-12.

[*683] 3. Segregation of Causal Factors

Relatedly, defendants argue that Professor White "fails to quantify the degree to which any economic factor-downtime, restricted production, or other-affected prices during the relevant period" and "ignores the timing and quantity of downtime taken . . . ." Mot. at 2. This argument pertains to disaggregation of specific acts alleged to be unlawful, beyond mere disaggregation of defendants' lawful and allegedly unlawful conduct.

The Third Circuit's decision in *LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003)*, which recognizes that these arguments are interrelated, elucidates that ***HN18***[] quantifying the particular effect of any single factor is not essential to prove causation of damages in antitrust cases. As in this case, the defendant in LePage's "argue[d] that [plaintiff's expert] improperly failed to disaggregate damages, thereby providing the jury with no mechanism to discern damages arising from [defendant's] lawful conduct or other facts from damages arising from [defendant's] unlawful conduct." *Id. at 166*. The Third Circuit "noted that it would be extremely difficult, **[**48]** if not impossible, to segregate and attribute a fixed amount of damages to any one act as the theory was not that any one act in itself was unlawful, but that all the acts taken together showed [an antitrust] violation." Id. (citing *Bonjorno v. Kaiser Aluminum & Chemical Corp., 752 F.2d 802, 812 (3d Cir. 1984)*). Accordingly, the Third Circuit ruled that the antitrust defendant's "actions, taken as a whole, were found to violate [the antitrust laws], thus making the disaggregation that [defendant] speaks of to be unnecessary, if not impossible." *Id. at 166*.

Professor White reliably isolated defendants' alleged collusive behavior "taken together" as the cause of the alleged overcharge; he need not have "segregate[d] and attribute[d] a fixed amount of damages to any one act" or factor in the alleged conspiracy in order to separate defendants' "lawful conduct . . . from [defendant's] unlawful conduct." Id.; see also *Rossi, 156 F.3d at 485* (finding it inappropriate to preclude the model even though it did "not deal with the particularized effects of specific injuries, but rather aggregate[d] all . . . damages into one figure").

Accordingly, the Court rejects defendants' argument that Professor **[**49]** White "fails to quantify the degree to which any economic factor-downtime, restricted production, or other-affected prices during the relevant period" and "ignores the timing and quantity of downtime taken . . . ." Mot. at 2.

4. Collusion in the Benchmark Period

During the Daubert hearing, defense counsel argued that Professor White's testimony should be excluded because he incorrectly assumed that his benchmark period was free of collusion. July 2, 2007 Tr. at 187. The Court rejects this argument.

Professor White explained that "[t]he benchmark period has been taken as a period that represents the presumably lawful, more competitive conduct, which was the basis on which I constructed my but-for price prediction equation."

Id. at 87. The Court approved of this technique in its class certification opinion. *In re Linerboard Antitrust Litig., 203 F.R.D. 197, 218-19 (E.D. Pa. 2001)* ("Dr. Beyer stated that he would estimate linerboard prices that would have existed absent the conspiracy based on an analysis of linerboard pricing behavior during a *more competitive* period of time, either before or after the conspiracy." (emphasis added)). Professor White elaborated that the benchmark period **[**50]** is "a more competitive **[*684]** period, presumably free of unlawful conduct, but . . . that if it were indeed a period that contained unlawful conduct my but-for price would be higher than would otherwise be the case. . . . [I]f there were some unlawful activity, my but-for price is higher than it would otherwise be and my damage estimate is conservative." Id. at 87-88. In other words, if there was in fact collusion during the benchmark period, Professor White's but-for price estimate would be too high, causing his estimate of the overcharge (the difference between actual prices and but-for prices) to be too low.

Accordingly, the Court rejects defendants' argument that Professor White incorrectly assumed that his benchmark period was free of collusion.

V. CONCLUSION

The Court concludes that Professor White reliably estimated the alleged overcharge caused by the defendants' alleged price-fixing conspiracy, and that his methodology fits the facts of this case. "[S]hould the jury find that defendants conspired to fix prices, [Professor White's] proffered testimony will assist the jury in determining the amount of damages, if any, that plaintiffs incurred as a result of that conspiracy." *In re Indus. Silicon Antitrust Litig., 1998 U.S. Dist. LEXIS 20459, [WL] at *4*. **[**51]** Accordingly, defendants' Motion to Exclude is denied.

An appropriate order follows.

AND NOW, this 30th day of July, 2007, upon consideration of Defendants' Motion to Exclude The Testimony of Prof. Halbert L. White, Jr. (Document No. 893, filed March 23, 2007); Plaintiffs' Opposition to Defendants' Motion to Exclude the Testimony of Professor Halbert L. White, Jr. (Document No. 897, filed April 27, 2007); Defendants' Reply Brief in Support of Motion to Exclude the Testimony of Prof. Halbert L. White, Jr. (Document No. 902, filed May 14, 2007); Defendants' Reply Brief in Support of Motion to Exclude the Testimony of Prof. Halbert L. White, Jr. (Document No. 902, filed May 14, 2007); Plaintiffs' Surreply in Opposition to Defendants' Motion to Exclude the Testimony of Professor Halbert L. White, Jr. (Document No. 908, filed May 24, 2007); Defendants' Letter re Plaintiffs' Surreply in Opposition to Defendants' Motion to Exclude the Testimony of Professor Halbert L. White, Jr. (Document No. 916, filed June 4, 2007); and Defendants' Memorandum Regarding Authorities Cited by the Court (Document No. 938, filed July 2, 2007), following oral arguments and a Daubert hearing on June 14, 2007 and **[**52]** July 2, 2007, for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that Defendants' Motion to Exclude The Testimony of Prof. Halbert L. White, Jr. (Document No. 893, filed March 23, 2007) is **DENIED.**

BY THE COURT:

/s/ Honorable Jan E. DuBois, J.

End of Document

Been v. O.K. Indus.

United States Court of Appeals for the Tenth Circuit

July 31, 2007, Filed

No. 05-7079

Reporter

495 F.3d 1217 *; 2007 U.S. App. LEXIS 18189 **; 2007-2 Trade Cas. (CCH) P75,802

CHARLES BEEN, individually and d/b/a Creekside Farm, Inc.; DONALD FROST; EDWIN JOHNSTON; BOB FIELDS, individually and dba Okie Blue Sky Farm, Inc.; GENE BLACKWELL, Class Representatives, Plaintiffs-Appellants, v. O.K. INDUSTRIES, INC.; O.K. FOODS, INC.; O.K. FARMS, INC., all Arkansas corporations, individually and as administrators of health and benefit plans; O.K. BROILER FARMS LIMITED PARTNERSHIP, an Arkansas limited partnership, individually and as administrator of health and benefit plans; COLLIER WENDEROTH, JR.; RANDALL GOINS; TOM WEBB, individually and as trustees of health and benefit plans; OK INDUSTRIES, INC. EMPLOYEE BENEFIT PLAN; OK INDUSTRIES, INC. EMPLOYEE FUNDED GROUP HEALTH CARE PLAN; OK INDUSTRIES, INC. AND ITS SUBSIDIARIES EMPLOYEE FUNDED HEALTH CARE PLAN; OK INDUSTRIES, INC. AND AFFILIATES FLEXIBLE BENEFITS/HEALTH CARE PLAN; OK INDUSTRIES, INC. AND AFFILIATES FLEXIBLE BENEFITS PLAN; RETIREMENT SAVINGS PLAN OF OK INDUSTRIES, INC. AND SUBSIDIARIES; RETIREMENT SAVINGS PLAN OF OK INDUSTRIES, INC.; GROUP LONG TERM DISABILITY PLAN; GROUP LIFE HEALTH INSURANCE PLAN; GROUP VOLUNTARY TERM LIFE INSURANCE PLAN; KEN PRIMM, Defendants-Appellees.

Subsequent History: Summary judgment denied by *Been v. O.K. Indus., 2008 U.S. Dist. LEXIS 136667 (E.D. Okla., Feb. 22, 2008)*

On remand at *Been v. O.K. Indus., 2008 U.S. Dist. LEXIS 123480 (E.D. Okla., Feb. 28, 2008)*

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA. (D. Ct. No. 02-CV-285-W).

Core Terms

Growers, practices, prices, unfair, district court, packers, competitive injury, unconscionability, contracts, injure, commerce, poultry, stockyards, deference, monopoly, quotation, flock, unfair practice, monopsony, summary judgment, consumers, broiler, dealers, discovery, producers, circumstances, livestock, buying, chicks, competitors

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Evidence > Inferences & Presumptions > Presumptions

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

HN1[] **Appellate Jurisdiction, Interlocutory Orders**

Generally, the "law of the case" doctrine dictates that prior judicial decisions on rules of law govern the same issues in subsequent phases of the same case. The U.S. Court of Appeals for the Tenth Circuit has acknowledged, however, that the rule is a flexible one that allows courts to depart from erroneous prior rulings, as the underlying policy of the rule is one of efficiency, not restraint of judicial power. That is, the doctrine is merely a presumption, one whose strength varies with the circumstances. It is discretionary, rather than mandatory. If the original ruling was issued by a higher court, a district court should depart from the ruling only in exceptionally narrow circumstances. The Tenth Circuit has recognized three "exceptionally narrow" grounds supporting a district court's departure from an appellate court's earlier ruling: (1) when the evidence in a subsequent trial is substantially different; (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or (3) when the decision was clearly erroneous and would work a manifest injustice. On the other hand, district courts generally remain free to reconsider their earlier interlocutory orders.

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

HN2[] **Standards of Review, Abuse of Discretion**

The U.S. Court of Appeals for the Tenth Circuit reviews a federal district court's reconsideration of a prior interlocutory order for abuse of discretion.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Packers & Stockyards Act

HN3[] **Agriculture & Food, Packers & Stockyards Act**

See 7 U.S.C.S. § 192.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Governments > Legislation > Interpretation

Administrative Law > Agency Adjudication > General Overview

Administrative Law > Agency Rulemaking > General Overview

HN4[] **Standards of Review, Deference to Agency Statutory Interpretation**

Although the U.S. Court of Appeals for the Tenth Circuit generally defers to an agency's interpretation of an ambiguous statute that it implements, different types of agency pronouncements are entitled to different degrees of deference. As the U.S. Supreme Court has explained, administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that the U.S. Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rule-making, or by some other indication of a comparable congressional intent. Regulations promulgated by an agency exercising its congressionally granted rule-making authority are clearly entitled to Chevron deference. So too is an agency's adjudication of matters over which it has the authority to adjudicate, as such decisions carry the force of law.

Administrative Law > Agency Adjudication > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Packers & Stockyards Act

HN5[] **Administrative Law, Agency Adjudication**

The U.S. Department of Agriculture has no authority to adjudicate alleged violations of *§ 202* of the Packers and Stockyards Act, *7 U.S.C.S. § 192*, which is codified in full at *7 U.S.C.S. § 181 et seq.*, by live poultry dealers.

Civil Procedure > Appeals > Amicus Curiae

HN6[] **Appeals, Amicus Curiae**

Amicus briefs do not reflect the deliberate exercise of interpretive authority that regulations and guidelines demonstrate. An agency's views so stated may be accepted by a court only as they have power to persuade.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Packers & Stockyards Act

HN7[] **Agriculture & Food, Packers & Stockyards Act**

Under *7 U.S.C.S. § 209*, any person subject to the Packers and Stockyards Act (PSA), *7 U.S.C.S. § 181 et seq.*, pursuant to *7 U.S.C.S. § 192*, may be held liable for damages. Liability may be enforced either by complaint to the U.S. Secretary of Agriculture as provided in 7 U.S.C.S. § 210 or through proceedings instituted in federal district court. *7 U.S.C.S. § 209(b)*. Under *7 U.S.C.S. § 210*, however, only stockyard owners, market agencies, and dealers (not including live poultry dealers) may be found liable in proceedings before the Secretary of Agriculture. In addition, the Secretary may issue cease and desist orders and assess civil penalties against packers and swine contractors, but not poultry dealers, under *7 U.S.C.S. § 193*. In other words, the Secretary has no adjudicative authority over live poultry dealers. Hence, the only way to enforce *§ 202* of the PSA, 7 U.S.C.S. § 192, against a live poultry dealer is to file suit in federal district court under *7 U.S.C.S. § 209*.

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

Governments > Legislation > Interpretation

HN8[] **Standards of Review, De Novo Review**

The U.S. Court of Appeals for the Tenth Circuit reviews issues of statutory construction de novo, interpreting the words of the statute in light of the purposes the U.S. Congress sought to serve. In so doing, it begins with the language employed by Congress, and it reads the words of the statute in their context and with a view to their place in the overall statutory scheme.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Packers & Stockyards Act

Governments > Legislation > Interpretation

HN9[] **Agriculture & Food, Packers & Stockyards Act**

Unlike 7 U.S.C.S. § 192(c), (d), and (e), which list specific acts that are unlawful only when they have the tendency or effect of restraining commerce or creating a monopoly, *§ 192(a)* is a general prohibition on unfair, unjustly discriminatory, or deceptive practices, and it provides no further guidance on what type of act falls within its parameters. Not to require a showing of competitive injury or the likelihood thereof would make a federal case out of every breach of contract. Nothing in the Packers and Stockyards Act, *7 U.S.C.S. § 181 et seq.*, suggests that the U.S. Congress intended this result.

Governments > Legislation > Interpretation

HN10[] **Legislation, Interpretation**

One of the cardinal principles of statutory construction is to give effect, if possible, to every clause and word of a statute.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Packers & Stockyards Act

HN11[] **Agriculture & Food, Packers & Stockyards Act**

New techniques and tools utilized by covered entities can violate the Packers and Stockyards Act, *7 U.S.C.S. § 181 et seq.*, even if the U.S. Department of Agriculture has not previously declared them unlawful. While the other subsections make certain acts explicitly unlawful, Congress acknowledged with *§ 202(a)*, *7 U.S.C.S. § 192(a)*, that it could not list the full panoply of unfair, unjustly discriminatory, or deceptive practices or devices that a covered entity might utilize.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Packers & Stockyards Act

HN12[] **Agriculture & Food, Packers & Stockyards Act**

The U.S. Court of Appeals for the Tenth Circuit joins the those circuits requiring a plaintiff who challenges a practice under *§ 202(a)*, *7 U.S.C.S. § 192(a)*, of the Packers and Stockyards Act, *7 U.S.C.S. § 181 et seq.*, to show that the practice injures or is likely to injure competition.

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

Evidence > Inferences & Presumptions > Inferences

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

HN13[] **Standards of Review, De Novo Review**

The U.S. Court of Appeals for the Tenth Circuit reviews a federal district court's grant of summary judgment de novo, and it will affirm its decision only if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. In reviewing the record, the

Tenth Circuit must view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Packers & Stockyards Act

HN14[] **Regulated Practices, Monopolies & Monopolization**

The U.S. Congress intended the Packers and Stockyards Act (PSA), *7 U.S.C.S. § 181 et seq.*, to have a broader scope than the antitrust laws. The antitrust requirement that monopoly power be acquired willfully and include the power to exclude competitors does not apply in the context of the PSA. By holding that *§ 202(a), 7 U.S.C.S.* § 192(a), requires proof that a practice has injured or is likely to injury competition, the U.S. Court of Appeals for the Tenth Circuit has not required a showing that the defendant engaged in an unfair practice with the intent to cause the injury or other unlawful effect. Indeed, it has recognized that *§ 202(a)* focuses on conduct and does not require proof of wrongful intent. Instead, plaintiffs need only prove that specific practices have the effect of injuring competition or are likely to do so. Moreover, when analyzing whether a buyer's "monopsony" power injures competition, the inquiry is somewhat different from the inquiry into whether a seller's monopoly power injures competition.

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

HN15[] **Regulated Practices, Private Actions**

A monopsony is a market condition in which there is but one buyer for a particular commodity. The U.S. Court of Appeals for the Tenth Circuit has acknowledged that a monopsony may exist when sellers are unable to find alternative buyers and must sell to a single purchaser. Furthermore, it has acknowledged that, like a monopoly, a monopsony can threaten competition. According to economists, without competition from other buyers, a monopsonist will lower prices paid to sellers, which over time results in higher consumer prices. Depression of prices potentially injures both producers and consumers. By manipulating prices to suppliers, a monopsonist threatens to injure the end-users. Thus, monopsonies fall under antitrust purview because monopsonistic practices will eventually adversely affect consumers. Hence, to establish that the practices of a monopsonist have injured or are likely to injure competition, a plaintiff does not have to be a competitor of the buyer or demonstrate that the buyer has improperly excluded other competitors. Instead, the plaintiff must show that the monopsonist's practices have caused or are likely to cause the anticompetitive effect associated with monopsonies, namely the arbitrary manipulation of market prices by unilaterally depressing seller prices on the input market with the effect (or likely effect) of increasing prices on the output market.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Packers & Stockyards Act

HN16[] **Agriculture & Food, Packers & Stockyards Act**

To demonstrate that a monopsonist has engaged in "unfair practices" under *§ 202(a)*, *7 U.S.C.S. § 192(a)*, of the Packers and Stockyards Act, *7 U.S.C.S. § 181 et seq.*, a seller must show that the buyer's practices threaten to injure competition by arbitrarily decreasing prices paid to sellers with the likely effect of increasing resale prices.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

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

HN17[] **Regulated Practices, Monopolies & Monopolization**

Courts have routinely noted that, short of predatory pricing, a monopolist's uncompetitive prices do not violate antitrust laws. But if a monopsonist's uncompetitive prices are a result not solely of its market power, but also of practices that result in complete control of the input (supply) market, the effect of the monopsonist's practices may be an injury to competition.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Packers & Stockyards Act

HN18[] **Agriculture & Food, Packers & Stockyards Act**

The U.S. Court of Appeals for the Tenth Circuit holds that *§ 202(a), 7 U.S.C.S.* § 192(a), of the Packers and Stockyards Act (PSA), *7 U.S.C.S. § 181 et seq.*, is violated when a monopsonist engages in specific practices that result in, or are likely to result in, the anticompetitive effects that the PSA was designed to prevent. To prove a violation, plaintiffs may not rely on the sum total of various practices that individually are not likely to injure competition, but must instead prove that specific practices have caused, or are likely to cause, injury.

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

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

Civil Procedure > ... > Summary Judgment > Opposing Materials > Motions for Additional Discovery

HN19[] **Standards of Review, Abuse of Discretion**

The U.S. Court of Appeals for the Tenth Circuit reviews a district court's denial of a motion to reopen discovery during summary judgment proceedings for an abuse of discretion. Under this standard, a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Motions for Additional Discovery

HN20[] **Opposing Materials, Motions for Additional Discovery**

The U.S. Supreme Court has held that, under *Fed. R. Civ. P. 56(f)*, summary judgment should be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. *Rule 56(f)*'s protection is not absolute, however, as its protection arises only if the nonmoving party files an affidavit explaining why he or she cannot present facts to oppose the motion. To benefit from the rule, a party, at a minimum, must ask the court to refrain from acting on the summary judgment request until additional discovery can be conducted. A party ordinarily may not attempt to meet a summary judgment challenge head-on but fall back on *Rule 56(f)* if its first effort is unsuccessful.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Forum & Place

HN21[] **Contract Conditions & Provisions, Forum Selection Clauses**

To decide the effect of a contractual choice-of-law clause, the U.S. Court of Appeals for the Tenth Circuit looks to the forum state's choice-of-law rules.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Forum & Place

HN22[] **Choice of Law, Forum & Place**

Under Oklahoma law, a contract will be governed by the laws of the state where the contract was entered into unless otherwise agreed and unless contrary to the law or public policy of the state where enforcement of the contract is sought.

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

Governments > Legislation > Interpretation

HN23[] **Standards of Review, De Novo Review**

The U.S. Court of Appeals for the Tenth Circuit reviews a federal district court's interpretation of state law de novo.

Contracts Law > Defenses > Unconscionability > General Overview

HN24[] **Defenses, Unconscionability**

Under Oklahoma law, an unconscionable contract is one in which, at the time of making of the contract, and in light of the general commercial background and commercial needs of a particular case, clauses are so one-sided as to oppress or unfairly surprise one of the parties. Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties, together with contractual terms which are unreasonably favorable to the other party. Whether a party lacked any meaningful choice is determined by all the circumstances surrounding the transaction. Relevant factors include whether the aggrieved party had a reasonable opportunity to understand the terms of the contract and whether the important terms were hidden in a maze of fine print or were minimized by deceptive sales practices. Generally, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. On the other hand, if there is a gross inequality of bargaining power and the aggrieved party signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Contracts Law > Defenses > Unconscionability > General Overview

HN25[] **Jury Trials, Province of Court & Jury**

In assessing whether a contract or a particular provision is unconscionable under Arkansas law, a trial court must review the totality of the circumstances surrounding the negotiation and execution of the contract, taking into consideration whether there is a gross inequality of bargaining power between the parties and whether the aggrieved party was made aware of and comprehended the provision in question. Importantly, however, it is generally not the province of the courts to scrutinize all contracts with a paternalistic attitude and summarily conclude that they are partially or totally unenforceable merely because an aggrieved party believes that the contract has subsequently proved to be unfair or less beneficial than anticipated. Indeed, in Arkansas, parties are free to make contracts based on whatever terms and conditions they agree upon, provided it is not illegal or tainted with some infirmity such as fraud, overreaching, or the like.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Contracts Law > Defenses > Unconscionability > General Overview

HN26[] **Jury Trials, Province of Court & Jury**

Generally, the fairness or unfairness, folly or wisdom, or inequality of contracts are questions that are exclusively within the rights of the parties to adjust at the time that the contract is made.

Counsel: Charles B. Goodwin and Harry A. Woods, Jr. (Mack J. Morgan, III, Christopher B. Woods, and Amanda L. Maxfield, with them on the briefs), Crowe & Dunlevy, P.C., Oklahoma City, Oklahoma, appearing for the Appellants.

Matthew Horan, Smith, Maurras, Cohen, Redd & Horan, PLC, Fort Smith, Arkansas (James M. Sturdivan and Ronald N. Ricketts, Gable & Gotwals, P.C., Tulsa, Oklahoma, and Don A. Smith, Smith, Maurras, Cohen, Redd & Horan, PLC, Fort Smith, Arkansas, with him on the briefs), appearing for the Appellees.

Judges: Before TACHA, Chief Circuit Judge, BRISCOE, and HARTZ, Circuit Judges. HARTZ, Circuit Judge, concurring/dissenting.

Opinion by: TACHA

Opinion

[*1222] TACHA, Chief Circuit Judge.

This appeal presents a matter of first impression for this Circuit, namely whether *§ 202(a)* of the Packers and Stockyards Act ("PSA"), *7 U.S.C. § 181 et seq.*, requires a plaintiff to prove that an allegedly "unfair practice" injures or is likely to injure competition. The District Court held that such proof is required and, finding that the Plaintiffs had failed to present any evidence of a competitive injury, granted summary judgment **[**2]** in favor of the Defendants. The court also granted the Defendants' motion for summary judgment on the Plaintiffs' state law claim of unconscionability. We take jurisdiction under *28 U.S.C. § 1291*, and for the reasons that follow, we affirm in part and reverse in part, remanding to the District Court for further proceedings consistent with this opinion.

I. BACKGROUND

Defendants-Appellants OK Industries, OK Farms, Inc., and OK Foods, Inc. (collectively "OK") constitute a vertically integrated poultry producer operating in Arkansas and Oklahoma. OK is involved in almost every stage of the production and wholesale of poultry and poultry products: it breeds, hatches, provides feed for, transports, slaughters, and processes poultry. One aspect of poultry production OK does not handle is the raising of broiler chickens to slaughtering age. OK enters into contracts with various "growers" who handle that part of the production process.

The Plaintiffs-Appellants ("Growers") are a class of growers operating in Oklahoma under contract with OK. In addition to alleging that the process by which OK and its growers enter into contracts is unconscionable under

Arkansas law, the Growers argue that the **[**3]** terms of the contracts, as well as OK's performance under the contracts, violate the Packers and Stockyards Act, *7 U.S.C. § 181 et seq.* Their claims hinge on the following undisputed facts.

OK is the largest poultry integrator in Oklahoma. With limited exceptions, no other integrators operate in the geographic markets in which OK operates. At the time of this lawsuit, OK had a waiting list of over 130 persons desiring to become growers for OK or to expand their existing operations. When OK needs to expand its production, it contacts persons on the waiting list to determine whether they are still interested, and if so, whether they will be suitable growers. Prior to entering into a contract with a grower, OK requires the grower to first obtain financing and build chicken houses to specifications set by OK. In exchange for a grower's expenditure of money to build the requisite chicken houses, OK signs a letter of intent, agreeing to enter into a broiler contract with the grower upon satisfactory completion of the chicken houses. One chicken house can cost a grower nearly $ 160,000, not including the cost of land and equipment.

All the broiler contracts are materially identical; they are **[**4]** standard contracts drafted by OK and are not subject to negotiation. Under the standard contract, a grower agrees to use only chicks, feed, and medicine supplied by OK. OK is not **[*1223]** liable, however, for any loss a grower incurs as a result of OK's failure to provide feed and supplies; nor is OK liable for birds condemned due to certain diseases. The contract also provides that a grower may not sell its chickens to poultry integrators other than OK and may not transfer its broiler contract to other potential growers without OK's prior approval. Under the terms of the contract, OK agrees to provide the grower with only one flock of chicks, which typically takes a grower seven weeks to raise. [1] Thereafter, OK may provide the grower with replacement flocks "from time to time." In addition to deciding when to deliver replacement flocks, OK determines the breed of chicken, the number of chicks per flock, and the number of flocks. Furthermore, at the end of each growing cycle, OK may require that a grower update its houses to meet OK's most recent specifications before it will place another flock of chicks with the grower. These required changes result in significant costs to growers.

The contract also details the method OK uses to calculate a grower's pay. OK uses a "competitive ranking" system to reward growers who produce chickens at the least cost to OK. Under OK's system of payment, OK first calculates the production cost per pound [2] of each grower's flock and labels this production cost the grower's "flock prime cost." It then lists the flock prime cost of each grower in order from lowest to highest. The flock prime cost of the grower that is numerically in the middle of the list is designated as the "average prime cost." If any individual grower's flock prime cost is less than the average prime cost, then OK pays that grower a higher rate per pound than those whose flock prime cost is higher than the average prime cost. In other words, a grower's pay is based on how growers in a group rank against each other, not on the individual grower's production.

The Growers in this case filed suit in the United States District Court for the Eastern District of Oklahoma. They obtained class certification to challenge the following conduct: (1) OK deducts from the Growers' pay certain charges for medicine and supplies; (2) OK sometimes delivers dead chicks to the Growers and causes the Growers to pay for them because OK counts chicks to be delivered at the hatchery, rather than at the Growers' premises; and (3) OK has reduced the number of birds placed per year with the Growers, causing a substantial decrease in the Growers' income. The Growers also challenged OK's competitive ranking system, arguing it is unfair and unconscionable because (1) OK uses the median flock prime cost as the average prime cost, which alters the rankings in a way that benefits OK to the detriment of the Growers; (2) OK exercises control over factors affecting the Growers' performance; and (3) OK calculates the weight of condemned birds, for which OK will not pay Growers, based on the weight of healthy birds, even though condemned birds can weigh up to 50% less than healthy birds. The Growers alleged that OK's conduct constitutes a breach of contract and violates **[**7]** § 202(a) of

---

[1] Because **[**5]** of the large capital commitments needed to become a grower for OK, growers must typically raise chickens for fifteen to twenty-five years to recover their initial investment.

[2] The production cost per pound takes into account the weight of the chickens raised by growers, as well as the cost for chicks, medicine, **[**6]** and feed.

the PSA, *7 U.S.C. § 192(a)*. They also alleged that the broiler contract is unconscionable and therefore unenforceable under state law.

OK moved for judgment on the pleadings, arguing, *inter alia*, that proof of an **[*1224]** injury to competition is a required element of a claim brought under § 202(a) of the PSA. The district court judge denied OK's motion, holding that § 202(a) does not require proof of an injury to competition. Approximately eighteen months later, in a motion for summary judgment before a different district court judge, OK re-raised the issue. The Growers argued that the doctrine of the law of the case bound the District Court to its prior ruling and that § 202(a) did not require proof of an injury to competition. In the alternative, they argued that they had presented sufficient evidence of an injury to competition to withstand summary judgment. The court disagreed with all three arguments. After concluding that the law of the case did not bind the court to the prior ruling, the District Court held that § 202(a) requires proof that a practice injures or is likely to injure competition and that the Growers had failed to establish a genuine issue of material fact concerning **[**8]** competitive injury. Consequently, the court entered summary judgment in favor of OK on the Growers' PSA claim. The Growers then moved to reopen discovery for the purpose of determining whether OK's conduct injured or was likely to injure competition. The District Court denied the motion.

Subsequently, in response to a motion filed by the Growers for an interlocutory appeal, the District Court supplemented its summary judgment ruling disposing of the PSA claim. It held that, even if § 202(a) does not require a competitive injury, whether particular conduct is "unfair" within the meaning of § 202(a) is a question of law, and OK's conduct in this case was not "unfair" as a matter of law.

In yet another order, the District Court entered summary judgment in favor of OK on the Growers' unconscionability claim. With respect to the broiler contracts governed by Oklahoma law, [3] the court concluded that Oklahoma would not recognize an affirmative claim for damages based on unconscionability. With respect to the broiler contracts governed by Arkansas law, the court concluded that, although Arkansas recognizes an affirmative cause of action for unconscionability, the Arkansas courts have not specifically **[**9]** addressed an affirmative claim for damages, and in any event, these contracts were not unconscionable under Arkansas law.

Following these rulings, the parties settled the pending class claims for breach of contract. The Growers now appeal the District Court's rulings on their PSA and unconscionability claims.

II. DISCUSSION

A. The Packers and Stockyards Act § 202(a)

1. Law of the Case

The Growers first contend that the District Court's initial ruling that § 202(a) does not require proof of an injury to competition represents the law of the case, which should not be disturbed except in very narrow circumstances not present here. We disagree. ***HN1***[] Generally, the "law of the case" doctrine dictates that prior judicial decisions on rules of law govern the same issues in subsequent phases of the same case. *See* *Homans v. City of Albuquerque, 366 F.3d 900, 904 (10th Cir. 2004)*. We have acknowledged, however, that "the rule is a flexible one that allows **[**10]** courts to depart from erroneous prior rulings, as the underlying policy of the rule is one of efficiency, not restraint of judicial power." *Prairie Band Potawatomi Nation v. Wagnon, 476 F.3d 818, 823 (10th* ***[*1225]*** *Cir. 2007)* (internal citation omitted). That is, the doctrine is merely a "presumption, one whose strength varies with the circumstances." *Avitia v. Metro. Club of Chicago, Inc., 49 F.3d 1219, 1227 (7th Cir. 1995)*; *see also* *Homans, 366 F.3d at 904* ("[T]he doctrine is discretionary rather than mandatory."). If the original ruling was issued by a higher court, a district court should depart from the ruling only in exceptionally narrow circumstances. *See* *McIlravy v. Kerr-*

[3] Beginning in 1997, OK's broiler contracts included a choice-of-law provision designating the law of Arkansas as the governing law. The District Court therefore applied Arkansas law to those contracts and Oklahoma law to the contracts pre-dating 1997.

McGee Coal Corp., 204 F.3d 1031, 1035 (10th Cir. 2000). [4] On the other hand, district courts generally remain free to reconsider their earlier interlocutory orders. *Harlow v. Children's Hosp., 432 F.3d 50, 55 (1st Cir. 2005)*; *see also* *United States v. Smith, 389 F.3d 944, 949 (9th Cir. 2004)* (explaining that a district court may review its prior rulings so long as it retains jurisdiction over the case).

Finding no Supreme Court or Tenth Circuit authority interpreting § 202(a) to require proof of a competitive injury, the first district court judge denied OK's motion for judgment on the pleadings. In reviewing OK's motion for summary judgment eighteen months later, however, the second judge found persuasive authority from other circuits holding that such proof is required. In light of these circumstances and the interlocutory nature of the initial ruling, the District Court did not abuse its discretion in reconsidering the prior ruling. *See* *Harlow, 432 F.3d at 55-56* (***HN2***[]] reviewing a district court's reconsideration of a prior interlocutory order for abuse of discretion).

2. Interpretation of "Unfair Practices" under § 202(a)

Section *202* of the PSA ***HN3***[] makes it unlawful for a "live poultry dealer" [5] to

> (a) Engage in or use any unfair, unjustly discriminatory, **[**12]** or deceptive practice or device; or
> (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or
> (c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or
> (d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or
>
> (e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling **[*1226]** prices, or of creating a monopoly in the acquisition **[**13]** of, buying, selling, or dealing in, any article, or of restraining commerce; or
> (f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or
>
> (g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by *subdivisions (a)*, *(b)*, *(c)*, *(d)*, or *(e)* of this section.

7 U.S.C. § 192.

At issue in this case is only what constitutes an "unfair" practice within the meaning of § 202(a). The District Court held that an "unfair" practice is one that "injures or is likely to injure competition." The Growers contend that this interpretation of the statute is belied by the United States Department of Agriculture's ("USDA") interpretation, as well as the statute's plain language and purpose.

---

[4] This Court had recognized three "exceptionally narrow" grounds supporting a district court's departure from an appellate **[**11]** court's earlier ruling: "(1) when the evidence in a subsequent trial is substantially different; (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or (3) when the decision was clearly erroneous and would work a manifest injustice." *McIlravy, 204 F.3d at 1035* (quotation omitted).

[5] It is undisputed that OK is a "live poultry dealer," defined as "any person engaged in the business of obtaining live poultry by purchase or under a poultry growing arrangement for the purpose of either slaughtering it or selling it for slaughter by another." *7 U.S.C. § 182(10)*.

We first address the Growers' **[**14]** suggestion that we must defer to the USDA's reasonable interpretation of the statute because the agency is authorized to make rules and regulations necessary to carry out the PSA. *See* *Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)* (holding that when Congress has implicitly delegated legislative authority to an agency, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency"). To that end, the Growers claim that the USDA "has consistently taken the position that in order to prove that any practice is 'unfair' under [§] 202(a) . . . of the Act, it is not necessary to prove predatory intent, competitive injury, or likelihood of injury; and that it is the Department's duty to stop unlawful practices in their incipiency prior to actual injury." *In re Ozark County Cattle Co., Inc., 49 Agric. Dec. 335, 365 (1990), 1990 WL 320312*. They also note that the USDA filed an amicus brief before the Eleventh Circuit in *London v. Fieldale Farms Corp., 410 F.3d 1295 (11th Cir. 2005)*, *cert. denied*, *546 U.S. 1034, 126 S. Ct. 752, 163 L. Ed. 2d 574 (2005)*, stating that the Secretary of Agriculture's position is **[**15]** that the PSA prohibits all unfair practices, regardless of whether a practice causes a competitive injury.

HN4[] Although we generally defer to an agency's interpretation of an ambiguous statute that it implements, "[d]ifferent types of agency pronouncements are entitled to different degrees of deference." *Newton v. FAA, 457 F.3d 1133, 1136 (10th Cir. 2006)*. As the Supreme Court has explained:

> [A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

United States v. Mead Corp., 533 U.S. 218, 226-27, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001).

Regulations promulgated by an agency exercising its congressionally granted rule-making authority are clearly entitled to *Chevron* deference. *Newton, 457 F.3d at 1137*. So too is an agency's adjudication of matters over which **[**16]** it has the authority to adjudicate, as such decisions carry the force of law. *See id.*; **[*1227]** *Southern Ute Indian Tribe v. Amoco Prod. Co., 119 F.3d 816, 832 (10th Cir. 1997)* (recognizing the rule that an agency "may establish binding policy either through rule-making procedures or through adjudications that create binding precedents" (quotation omitted)), *rev'd on other grounds*, *Amoco Prod. Co. v. Southern Ute Indian Tribe, 526 U.S. 865, 119 S. Ct. 1719, 144 L. Ed. 2d 22 (1999)*. Here, however, the Secretary has not promulgated a regulation applicable to the practices the Growers allege violate § 202(a), and the USDA ***HN5***[] has no authority to adjudicate alleged violations of *§ 202* by live poultry dealers. *See* *London, 410 F.3d at 1304* (citing administrative complaint procedures under *7 U.S.C. § 193(a)*); *Jackson v. Swift Eckrich, Inc., 53 F.3d 1452, 1456-57 (8th Cir. 1995)* (holding that the only means of enforcing *§ 202* against live poultry dealers is to file suit in federal district court under *§ 308*, *7 U.S.C. § 209(a)*). [6] Moreover, we afford the USDA's position as stated in its amicus brief before the Eleventh Circuit little to no deference. *See* *Shikles v. Sprint/United Mgmt. Co., 426 F.3d 1304, 1315 (10th Cir. 2005)* (***HN6***[] "[A]micus **[**17]** briefs . . . do not reflect the deliberate exercise of interpretive authority that regulations and guidelines demonstrate." (quotation omitted)). The agency's views so stated "may be accepted by a court only as they have power to persuade." *First Am. Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.,*

[6] ***HN7***[] Under *7 U.S.C. § 209*, any person subject to the PSA may be held liable for damages. Liability may be enforced either by complaint to the Secretary of Agriculture "as provided in *section 210* of this title," or through proceedings instituted in federal district court. *7 U.S.C. § 209(b)*. Under *7 U.S.C. § 210*, however, only stockyard owners, market agencies, and dealers (not including live poultry dealers) may be found liable in proceedings before the Secretary of Agriculture. In addition, the Secretary may issue cease and desist orders and assess civil penalties against packers and swine contractors, but not poultry dealers, under *7 U.S.C. § 193*. In other words, the Secretary has no adjudicative authority over **[**18]** live poultry dealers. Hence, the only way to enforce *§ 202* of the PSA against a live poultry dealer is to file suit in federal district court under *7 U.S.C. § 209*.

412 F.3d 1166, 1174 (10th Cir. 2005) (citing Skidmore v. Swift, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944)). As we explain below, we are not persuaded by the USDA's interpretation of the statute. [7]

Having concluded that we need not defer to the agency's interpretation of the statute, we turn to the District Court's construction of § 202(a). **[**19]** ***HN8***[] We review issues of statutory construction de novo, "interpret[ing] the words of the statute in light of the purposes Congress sought to serve." *Wright v. Fed. Bureau of Prisons, 451 F.3d 1231, 1233-34 (10th Cir. 2006)* (quotation omitted). In so doing, we begin with "the language employed by Congress," and we "read the words of the statute in their context and with a view to their place in the overall statutory scheme." *Id. at 1234* (quotation omitted).

[*1228] As the Growers note, nothing in the plain language of § 202(a) indicates that a practice is unfair only if it adversely affects competition or is likely to do so. But neither does the statute otherwise define an unfair practice. Enacted in 1921, the "primary purpose of [the PSA] is to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry" and "to safeguard farmers . . . against receiving less than the true market value of their livestock." H.R. Rep. No. 85-1048, at 1 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5213, 5213. The "chief evil" Congress feared was the monopolistic practices of the packers, "enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly **[**20]** and arbitrarily to increase the price to the consumer, who buys." *Stafford v. Wallace, 258 U.S. 495, 514-15, 42 S. Ct. 397, 66 L. Ed. 735 (1922)*. Although intended to be broader than antecedent antitrust legislation, *§ 202* "nonetheless incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation." *De Jong Packing Co. v. USDA, 618 F.2d 1329, 1335 n.7 (9th Cir. 1980)*.

Against this backdrop, other circuits have concluded that "unfair[ness]" under § 202(a) requires evidence that the challenged practice will likely lead to a competitive injury. The issue is most thoroughly treated in *Armour & Co. v. United States, 402 F.2d 712 (7th Cir. 1968)*. *Armour* involved a meat packer's coupon promotion, which allegedly had the effect of diverting sales from competitors to the defendant. After recognizing the PSA's ancestry in ***antitrust law***, where Congress has expressed a "basic public policy distinguishing between fair and vigorous competition on the one hand and predatory or controlled competition on the other," *id. at 717*, the court reasoned that the "fact that a given provision does not expressly specify the degree of injury or the type of intent required, does not imply that these **[**21]** basic indicators of the line between free competition and predation are to be ignored," *id*. Even though the test of unfairness under § 202(a) is "less stringent than under some of the anti-trust laws," the court still concluded that the coupon program at issue could not violate § 202(a) "absent some predatory intent or some likelihood of competitive injury." *Armour, 402 F.2d at 717*; [8] *see also IBP, Inc. v. Glickman, 187 F.3d 974, 977 (8th Cir. 1999))* (concluding that the challenged conduct did not "potentially suppress or reduce competition sufficient to be proscribed by the [PSA]"); *Parchman v. USDA, 852 F.2d 858, 864 (6th Cir. 1988)* ("[The PSA] does not require that the Secretary prove actual injury before a practice may be found unfair. The Secretary need only establish the likelihood that an arrangement will result in competitive injury to establish a violation." (alterations, internal quotation marks, and citation omitted)); *DeJong, 618 F.2d at 1337* (holding that "unfair practices under *§ 202* are not confined to those where competitive injury has already resulted, but includes those where there is a reasonable likelihood that the purpose will be achieved and that the result will **[**22]** be an undue restraint of competition").

---

[7] In addition, we emphasize that we are interpreting the meaning of unfairness solely in the context of the PSA. Consequently, the Supreme Court's decision in *FTC v. Sperry and Hutchinson Co., 405 U.S. 233, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972)*, which addresses similar language in § 5 of the Federal Trade Commission Act, *15 U.S.C. § 45(a)(1)*, does not dictate a particular interpretation in this case. Unlike the case before us, the question in *Sperry and Hutchinson* was one of agency jurisdiction, namely whether § 5 empowered the FTC to define "unfair practices" to include practices without anticompetitive effects and of a noncompetitive nature. *Id. at 239*. Conversely, as we note above, the present case does not involve the USDA's interpretive or enforcement authority under the statute. Instead, we are faced with the task of construing a statute that only the federal courts may enforce against live poultry dealers.

[8] We are not concerned here with predatory intent on the part of OK. That issue was not raised by the parties, and we therefore express no opinion on whether evidence of predatory intent can make an act "unfair" when there is no concomitant showing of a likelihood of competitive injury.

In a more recent case, based on facts similar to those at issue here, the Eleventh Circuit similarly held that a claim brought under § 202(a) required some showing of a competitive injury or the likelihood of competitive injury. London, 410 F.3d at 1303. Like the case before us, *London* involved a **[*1229]** vertically integrated poultry company that entered into contracts with growers to raise broiler chickens. Id. at 1298-99. One grower filed suit against the company, arguing that the company violated the PSA when it terminated his broiler contract. Id. at 1299. After a jury returned a verdict in favor of the grower, the district court set aside the verdict and granted the defendant's motion for judgment as a matter of law. Id. at 1300. Relying in part on *Armour*, the Eleventh Circuit held that to prevail under § 202(a), a plaintiff must show that the defendant's practice "adversely **[**23]** affects competition or is likely to adversely affect competition." Id. at 1304. In reaching this decision, the court identified the policy implications of a contrary holding: "Eliminating the competitive impact requirement would ignore the long-time antitrust policies which formed the backbone of the PSA's creation. Failure to require a competitive impact showing would subject dealers to liability under the PSA for simple breach of contract . . . ." *Id.*

The Growers argue, however, that because § 202's other subsections contain language prohibiting acts that tend to restrain commerce or create monopolies, *see, e.g.*, 7 U.S.C. § 192(c), (d), (e), the absence of similar language in § 202(a) conclusively means that proof of a competitive injury is not required. We disagree. **HN9**[] Unlike subsections (c), (d), and (e), which list specific acts that are unlawful only when they have the tendency or effect of restraining commerce or creating a monopoly, subsection (a) is a general prohibition on "unfair, unjustly discriminatory, or deceptive practice[s]" and provides no further guidance on what type of act falls within its parameters. Not to require a showing of competitive injury or the likelihood **[**24]** thereof would make a federal case out of every breach of contract. Nothing in the PSA suggests that Congress intended this result.

The Growers also argue that because other subsections require proof of a competitive injury, limiting subsection (a) to anticompetitive acts would render it superfluous and would therefore violate **HN10**[] one of the "cardinal principle[s] of statutory construction" to "give effect, if possible, to every clause and word of a statute." Williams v. Taylor, 529 U.S. 362, 404, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (quotation omitted). To the contrary, such an interpretation is far from rendering subsection (a) superfluous because it serves as a catchall for acts that Congress could not, at the time of enactment, have foreseen and specified. *Cf.* Excel Corp. v. USDA, 397 F.3d 1285, 1293 (10th Cir. 2005) (recognizing that **HN11**[] new techniques and tools utilized by covered entities can violate the PSA even if the USDA has not previously declared them unlawful). While the other subsections make certain acts explicitly unlawful, Congress acknowledged with subsection (a) **[**25]** that it could not list the full panoply of unfair, unjustly discriminatory, or deceptive practices or devices that a covered entity might utilize.

Although we have never expressly held that unfairness under § 202(a) requires a likelihood of injury to competition, our circuit precedent is not to the contrary. In resolving unfairness cases, we have often suggested that a showing of competitive injury can be determinative. In Capitol Packing Co. v. United States, 350 F.2d 67 (10th Cir. 1965), for example, we reviewed a decision issued by the USDA's Judicial Officer that various practices engaged in by the defendants violated § 312(a) of the PSA, 7 U.S.C. § 213(a), "which makes it unlawful for any market agency to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with the marketing or selling of livestock." Capitol Packing Co., 350 F.2d at 73 (quotation omitted). The Judicial Officer found that a practice called "order **[*1230]** buying" (i.e., the sale of livestock before it arrives at the stockyards) violated the PSA because the livestock had the misleading appearance of being for sale to the highest bidder by virtue of its presence in the market. **[**26]** Id. at 74. But this Court concluded, as a matter of law, that "order buying" was not a violation of § 312(a) in part because the record lacked "evidence . . . tending to show [order buying] *lessens competition*." *Id.* (emphasis added).

In Excel Corp. v. USDA, 397 F.3d 1285 (10th Cir. 2005), we reviewed the USDA's determination that Excel violated § 202(a) and one of the PSA's implementing regulations, 9 C.F.R. § 201.99(a), by failing to disclose to hog producers a change in its formula for computing the weight of carcasses. Although it admitted that it had changed the formula, the meat packer argued that it had not violated the act because, *inter alia*, "practices are not violative where they are required by the exigencies of the business." Excel Corp., 397 F.3d at 1293. We rejected this claim, stating that "Congress and the USDA are the arbiters of what practices will *impede competition*." *Id.* (emphasis added). Hence, "the fact that a particular act is 'required by the exigencies of the business' . . . has no impact on whether that act is violative of the [PSA] and the implementing regulations." *Id.* By failing to notify hog producers of the changed formula, Excel prevented the producers **[**27]** from shopping their hogs to other packers to determine if they could obtain a better price. In light of these facts, we upheld the Judicial Officer's conclusion that Excel's practice "impeded competition." *Id. at 1294*.

In *Hays Livestock Commission Co. v. Maly Livestock Commission Co., 498 F.2d 925, 929 (10th Cir. 1974)*, we reviewed the Secretary of Agriculture's determination that a dealer's refusal to honor a draft to pay for livestock was "unjust and unreasonable" under *7 U.S.C. § 208*. In upholding the Secretary's decision, we did not discuss what a plaintiff must show to establish that a practice is unjust or unreasonable, but we did note that "dishonoring of drafts in this context . . . placed an inordinate burden on the barns, contrary to the purpose of the Packers and Stockyards Act *to secure the free and unburdened flow of livestock*." *Hays Livestock Comm'n, 498 F.2d at 932* (emphasis added) (quotation omitted). Like our decisions in *Capitol Packing Co.* and *Excel Corp.*, our opinion in *Hays Livestock Commission* indicates that an impediment to competition, though never expressly required, was implicit in our prior decisions.

The Growers note, however, that we have also resolved **[**28]** cases under § 202(a) without any mention that the relevant practice injures competition. They direct our attention to *Peterman v. USDA, 770 F.2d 888 (10th Cir. 1985)*, in which we upheld the Secretary's determination that a meat packer was guilty of deceptive trade practices, including its "bait and switch" tactic, whereby the packer would advertise one product and then convince customers seeking the product to buy a more expensive one instead. *Id. at 890*. To the extent our silence on the competitive injury requirement is relevant, this case is distinguishable because it involved an act alleged to be deceptive, as opposed to unfair. We are concerned here only with whether unfairness requires a showing of a likely injury to competition, not whether deceptive practices require such a showing. ***HN12***[] We therefore join the those circuits requiring a plaintiff who challenges a practice under § 202(a) to show that the practice injures or is likely to injure competition.

3. OK's Alleged Violations of § 202(a)

After determining that § 202(a) requires proof of an injury or likely injury to competition, **[*1231]** the District Court concluded that the Growers had failed to raise a genuine issue of material fact **[**29]** regarding competitive injury. ***HN13***[] We review the District Court's grant of summary judgment de novo, *Bryant v. Farmers Ins. Exch., 432 F.3d 1114, 1124 (10th Cir. 2005)*, and will affirm its decision only if the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. In reviewing the record, "we must view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Bryant, 432 F.3d at 1124*.

In granting summary judgment in OK's favor, the District Court held:

> To prove monopoly power typically requires the wilful acquisition or maintenance of such power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Monopoly power includes power to exclude competition. Plaintiffs have not presented evidence demonstrating entry barriers or other circumstances which improperly preclude other integrators from competing in this market with defendants. The mere fact that the defendants are the sole integrator does not demonstrate an illegal monopsony. Moreover, the plaintiffs are not competitors **[**30]** of defendants. Thus, injury to them by the allegedly "unfair" contract does not demonstrate injury to competition.

(internal citations omitted). The Growers argue that the District Court erred because it implied that (1) an injury to competition only arises in the context of unlawful monopolization; and (2) an injury to competition only arises when a competitor is injured.

We agree that the District Court erred in its legal analysis of what constitutes a competitive injury under § 202(a). As we noted above, ***HN14***[] Congress intended the PSA to have a broader scope than the antitrust laws. The antitrust requirement that monopoly power be acquired willfully and include the power to exclude competitors does not apply in the context of the PSA. By holding that § 202(a) requires proof that a practice has injured or is likely to injury competition, we have not required a showing that the defendant engaged in the unfair practice with the intent to cause the injury or other unlawful effect. [9] Instead, the Growers need only prove that specific practices have the *effect* of injuring competition or are likely to do so. Moreover, as we explain below, when analyzing whether a buyer's "monopsony" power injures **[**31]** competition, as in this case, the inquiry is somewhat different from the inquiry into whether a seller's monopoly power injures competition.

The record contains evidence that supports the Growers' contention that OK is a monopsony in the relevant regional market. ***HN15***[] A monopsony is "a condition of the market in which there is but one buyer for a particular commodity." *Telecor Communs., Inc. v. Southwestern Bell Tel. Co., 305 F.3d 1124, 1133 n.4 (10th Cir. 2002)* (quotation omitted). Because the poultry market is vertically integrated, if OK is the only integrator in the area, as the Growers suggest, it may constitute a monopsony. The District Court's characterization of this logic as a "non sequitur" is therefore incorrect. We have previously acknowledged **[*1232]** that a monopsony may exist when sellers are unable to find alternative buyers and must sell to a single purchaser. *Id. at 1135-36*.

Furthermore, we have acknowledged **[**32]** that, like a monopoly, a monopsony can threaten competition. *Id. at 1135* ("Economists . . . have long recognized that market inefficiencies created by anticompetitive restraints on input markets can be as destructive of a free market economy (and therefore ultimately damaging to consumers) as restraints on output markets."). According to economists, without competition from other buyers, a monopsonist will lower prices paid to sellers, which over time results in higher consumer prices. [10] In other words, a poultry processor with monopsony power can fix and manipulate prices resulting in injury to both poultry producers (i.e., growers) and end-users (i.e., consumers). We explained why depression of prices potentially injures both producers and consumers in *Telecor*: "Some producers will either produce less or cease production altogether, resulting in less-than-optimal output of the product or service, and over the long run higher consumer prices, reduced product quality, or substitution of less efficient alternative products." *Id. at 1136*.

In addition, in the vertically integrated poultry market, a processor with a monopsony need not wait for poultry growers to produce less to increase prices on the wholesale market because the processor also controls the growers' supply. It may simply deliver fewer chicks to the growers, pay them the same low prices, and resell at the same or a higher price. When this happens, both the growers and the end-users are adversely affected. That is, by manipulating prices to suppliers, a monopsonist threatens to injure the end-users. *Id. at 1136* ("[M]onopsonies fall under antitrust purview because monopsonistic practices will eventually adversely affect consumers."); *id. at 1134* ("Tenth Circuit case law . . . reject[s] the notion that a monopsony plaintiff must prove end-user impact."); *see also* *Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219, 235, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)* (holding that sugar beet growers had stated a valid monopsony claim under the Sherman Act even though they did not allege end-user impact). Hence, to establish that the practices of a monopsonist have injured or are likely **[**34]** to injure competition, a plaintiff does not have to be a competitor of the buyer or demonstrate that the buyer has improperly excluded other competitors. Instead, the plaintiff must show that the monopsonist's practices have caused or are likely to cause the anticompetitive effect associated with monopsonies, namely the arbitrary manipulation of market prices by unilaterally depressing seller prices on the input market with the effect (or likely effect) of increasing prices on the output market.

As we noted above, shortly after the PSA's passage, the Supreme Court identified these very harms as the reason Congress passed the Act: the "'chief evil'" Congress sought to prevent was "'the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys.'" *Mahon v. Stowers, 416 U.S. 100, 106, 94 S. Ct. 1626, 40 L. Ed. 2d 79 (1974)* (quoting *Stafford v. Wallace, 258 U.S. 495, 514-15, 42 S. Ct. 397, 66 L. Ed. 735 (1922))*; *see also* *Swift & Co. v. United*

---

[9] Indeed, we have recognized that § 202(a) focuses on conduct and does not require proof of wrongful intent: "Nothing in the language of [§ 202(a)] . . . requires a showing of wrongful intent. To the contrary, the focus is solely on the acts committed or omitted." *Excel Corp., 397 F.3d at 1294*.

[10] The danger of increased consumer prices is especially acute when the monopsonist resells in a monopolized market. *See* PHILLIP E. AREEDA & HERBERT **[**33]** HOVENKAMP, 3 ***ANTITRUST LAW***: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 720a n.1 (2005).

States, 393 F.2d 247, 254 (7th Cir. 1968) ("The lack of competition between buyers, **[*1233]** with the attendant possible depression of producers' prices, was one of the evils at which the Packers and Stockyards **[**35]** Act was directed."); *Bruhn's Freezer Meats of Chicago, Inc. v. USDA, 438 F.2d 1332, 1337 (8th Cir. 1971)* (noting one of the purposes of the PSA was "to assure fair trade practices in the livestock marketing and meat-packing industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock"). Although Congress did not intend to "'upset the traditional principles of freedom of contract,'" *see Pickett v. Tyson Fresh Meats, Inc., 420 F.3d 1272, 1280 (11th Cir. 2005)* (quoting *Jackson, 53 F.3d at 1458*), it did intend to prevent those practices that facilitate the packers' arbitrary manipulation of prices and complete subversion of normal market forces.

Although other circuits have noted that supply contracts between producers and processors of livestock can increase efficiency, they tend to focus on the benefits to the processor, rather than the market as a whole. *See Pickett, 420 F.3d at 1283* ("[B]eing able to keep its processing plants operating at capacity has increased [the processor's] efficiency."); *IBP, Inc., 187 F.3d at 978* (concluding that the terms of the contracts allowed the processor "to have a more reliable and efficient **[**36]** method of obtaining a supply of cattle"). But even if supply contracts increase a processor's efficiency, they may threaten the efficiency of the relevant market when a monopsony is able to manipulate the market by depressing producers' prices and increasing resale prices. [11] Hence, ***HN16***[] to demonstrate that a monopsonist has engaged in "unfair practices" under § 202(a), a seller must show that the buyer's practices threaten to injure competition by arbitrarily decreasing prices paid to sellers with the likely effect of increasing resale prices.

After reviewing the record in the case before us, we find that a genuine issue of material fact exists as to whether OK engaged in unfair practices in violation of § 202(a). In particular, we note that the record contains evidence of the classic monopsony injury, namely that OK is depressing the prices it pays the Growers and reselling at inflated prices. If OK does not compete with other buyers and completely controls the supply to its growers, it may be able to manipulate prices by controlling supply and demand. The record contains expert testimony identifying specific practices that are likely to injure competition in this way. For example, when wholesale prices are weak, OK delays delivery of chicks to growers, thereby decreasing the production of broilers by growers and causing prices to rise on the wholesale market (which eventually adversely affects consumers). Growers are also adversely affected because they produce (and therefore sell) fewer chickens. Furthermore, the record contains evidence that the Growers are paid the same under OK's pricing system during periods of reduced production as they are **[**38]** during periods of average and above average production. In other words, OK can decide to reduce production (to reap the benefits of higher prices on the wholesale market), **[*1234]** but it does not have to pay its growers the higher prices that a reduction in supply would demand in a competitive market. We are not suggesting that uncompetitive prices alone are unlawful. ***HN17***[] Courts have routinely noted that, short of predatory pricing, a monopolist's uncompetitive prices do not violate antitrust laws. *See, e.g.*, *Kartell v. Blue Shield of Mass., Inc., 749 F.2d 922, 927 (1st Cir. 1984)* ("Ordinarily . . . even a monopolist is free to exploit whatever market power it may possess when that exploitation takes the form of charging uncompetitive prices."). [12] But if a monopsonist's uncompetitive prices are a result not solely of its market power, but also of practices that result in complete control

---

[11] Although this case does not involve horizontal price-fixing by a group of buyers, OK's alleged practices manipulate the market in a similar fashion: "[M]arket manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone." *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)* (explaining price-fixing as a form of market manipulation). Like illegal price-fixing agreements, a monopsonist's use of supply contracts to manipulate the market poses the risk **[**37]** that prices will be determined by artificial, rather than market, forces.

[12] In acknowledging that an insurer could use its market power to "keep prices down," the court in *Kartell* noted that the lower prices the insurer paid doctors for their services did not result in higher consumer prices, *749 F.2d at 930-31*, and that both parties "sit on opposite sides of the bargaining table," *id. at 929* **[**40]** (quotation omitted). We are confronted with a potentially different arrangement in the case before us. The record contains evidence that OK's practices are likely to increase end-user prices. Moreover, the supply contracts with the Growers give OK complete control over the input market (i.e., the chickens available to OK for purchase), leaving the growers with little, if any, ability to bargain.

of the input (supply) market, the effect of the monopsonist's practices may be an injury to competition. Moreover, although PSA claims against processors for practices associated with supply contracts have not enjoyed much success, these cases are factually different from the one before us. *See* Pickett, 420 F.3d 1272; **[**39]** *IBP, Inc., 187 F.3d 974*. For example, the producers in these cases did not allege the existence of a monopsony. In addition, the supply contracts guaranteed producers a price tied to market prices, and overall, the arrangements created incentives and efficiencies that benefitted consumers. *Pickett, 420 F.3d at 1284* ("[I]t was undisputed . . . that marketing agreements are a more efficient means for both meat packers and cattle producers to operate in the market."); *IBP, Inc., 187 F.3d at 978* (explaining that the marketing agreements "essentially ensure[] that the potential for undue or arbitrary lowering of prices is eliminated"); *see also* Griffin v. Smithfield Foods, Inc., 183 F. Supp. 2d 824, 827 (E.D. Va. 2002) (granting summary judgment in favor of a defendant packer because the plaintiff producers had not identified any specific practices that violated the PSA).

We therefore conclude that, if the Growers prove that OK engaged in the arbitrary price manipulation described above with the effect or likely effect of depressing prices to the growers and reselling at increased prices, they may establish that OK engaged in unfair practices in violation of § 202(a). We are by no means suggesting that vertically integrated markets will always violate the PSA. Rather, ***HN18***[] we hold that § 202(a) is violated when a monopsonist engages in specific practices that result in or are likely to result in the anticompetitive effects the PSA was designed to prevent. To prove a violation, the Growers may not rely on the sum total of various practices that individually are not likely to injure competition, but must instead prove that specific practices have caused or are likely **[**41]** to cause injury. *Capitol Packing Co., 350 F.2d at 76-77* ("[S]pecified methods of dealing which are not themselves violations of the [PSA] cannot, when added together, become a violation."). Because the record contains evidence that OK may engage in specific practices that are likely to injure competition, we reverse the District Court's grant of summary judgment in favor of OK and **[*1235]** remand for further consideration in light of this opinion.

4. Discovery Ruling

Following the District Court's adverse ruling on their PSA claim, the Growers moved the court to reopen discovery for the limited purpose of discovering information regarding the likelihood of an injury to competition. The District Court denied the motion. The Growers argue that, because of the first judge's ruling that such proof is not required and because discovery had closed in the interim, the District Court erred in refusing to reopen discovery.

HN19[] We review a district court's denial of a motion to reopen discovery for an abuse of discretion. *SIL-FLO, Inc. v. SFHC, Inc., 917 F.2d 1507, 1514 (10th Cir. 1990)*. "Under this standard, a trial court's decision will not be disturbed unless the appellate court has a definite and firm **[**42]** conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Id.* (quotation omitted).

When OK moved for summary judgment on the Growers' PSA claim, it explicitly re-raised the issue in dispute. [13] The Growers therefore had fair warning that the issue was back on the table for resolution. In fact, they addressed the argument in their response to OK's motion. They argued that the law of the case bound the court to the prior ruling, but that in any event they had presented sufficient evidence of an injury to competition to withstand summary judgment. Only when the District Court disagreed with both propositions did the Growers seek to reopen discovery, arguing that they did not have an opportunity to discover the relevant information.

HN20[] "[T]he Supreme Court has held that, under *Fed. R. Civ. P. 56(f)*, 'summary judgment [should] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition.'" *Dreiling v. Peugeot Motors of Am., Inc., 850 F.2d 1373, 1376 (10th Cir. 1988)* (alteration in original) (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.5, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))*. *Rule 56(f)*'s

[13] At this juncture, we would like to note that both parties flouted their duty under this Circuit's rules to include in the record the relevant motion for summary judgment, supporting brief, and response. *See* *10th Cir. R. 10.3(D)(2)*. Though we are not required to do so, we have obtained copies of the documents. But we advise that in the future the parties diligently adhere to the rules of **[**43]** the Circuit if they wish to avoid unwittingly waiving arguments.

protection is not absolute, however, as its protection "arises only if the nonmoving party files an affidavit explaining why he or she cannot present facts to oppose the motion." *Id.* To benefit from the rule, a party "at a minimum must ask the court to refrain from acting on the summary judgment request until additional discovery can be conducted." *C.B. Trucking, Inc. v. Waste Mgmt., Inc., 137 F.3d 41, 44 (1st Cir. 1998)*; *see also* *Allen v. Sybase, Inc., 468 F.3d 642, 662 (10th Cir. 2006)* (concluding that a party's "footnote request in its [response] brief for additional discovery time does not pass muster under *rule 56(f)*"). "[A] party ordinarily may not attempt to meet a summary judgment challenge head-on but fall back **[**44]** on *Rule 56(f)* if its first effort is unsuccessful." *C.B. Trucking, Inc., 137 F.3d at 44*. The Growers, with full knowledge that the District Court would be re-evaluating the competitive injury requirement under § 202(a), took no steps to request time for additional discovery; nor did they take steps to fulfill the requirements of *Rule 56(f)*. In such a case, we are not left with a "definite and firm conviction that the **[*1236]** lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *SIL-FLO, Inc., 917 F.2d at 1514 (10th Cir. 1990)*. We note, however, that on remand the parties may seek to reopen discovery, and the District Court may, in its discretion, grant such requests.

B. The Growers' Unconscionability Claim

The Growers claim that the broiler contract is unconscionable because of the gross imbalance of obligation borne by growers. For example, they point to the fact that the contract guarantees only a single flock of chicks although a grower must raise broilers for at least fifteen years to recoup its investment. They also note that OK is not obligated to place a minimum number of chicks or flocks with each grower, and growers are obligated **[**45]** to make improvements to chicken houses before OK will place additional flocks with them.

We must first address a threshold choice-of-law question. Beginning in 1997, OK's broiler contracts included a choice-of-law provision, designating the law of Arkansas as the governing law. Consequently, in its order granting summary judgment, the District Court held that Oklahoma law governed the pre-1997 contracts and Arkansas law governed the contracts entered into thereafter.

HN21[] To decide the effect of the contractual choice-of-law clause, we look to the forum state's choice-of-law rules. *See* *Dang v. UNUM Life Ins. Co. of Am., 175 F.3d 1186, 1190 (10th Cir. 1999)* ("A federal court adjudicating state law claims must apply the forum state's choice of law principles."). ***HN22***[] Under Oklahoma law, "a contract will be governed by the laws of the state where the contract was entered into unless otherwise agreed and unless contrary to the law or public policy of the state where enforcement of the contract is sought." *Williams v. Shearson Lehman Bros., Inc., 1995 OK CIV APP 154, 917 P.2d 998, 1002 (Okla. Civ. App. 1995)*. Because we conclude that the Growers' unconscionability claim fails under both Oklahoma and Arkansas law, we **[**46]** need not decide whether the application of Arkansas law would be contrary to Oklahoma's law or public policy. In reaching this decision, ***HN23***[] we review the District Court's interpretation of state law de novo. *Steiner Corp. v. Johnson & Higgins of Cal., 135 F.3d 684, 690 (10th Cir. 1998)* (citing *Salve Regina College v. Russell, 499 U.S. 225, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991))*.

As an initial matter, the Oklahoma Supreme Court has never addressed whether Oklahoma common law would recognize an affirmative cause of action seeking damages for unconscionability in contract. Nevertheless, Oklahoma's unconscionability standard is so onerous that the Growers cannot meet that standard here. ***HN24***[] An unconscionable contract is one in which, "at the time of making of the contract, and in light of the general commercial background and commercial needs of a particular case, clauses are so one-sided as to oppress or unfairly surprise one of the parties." *Barnes v. Helfenbein, 1976 OK 33, 548 P.2d 1014, 1020 (Okla. 1976)*. "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties, together with contractual terms which are unreasonably favorable to the other party." *Id.*

Whether the **[**47]** Growers lacked any meaningful choice is determined by "'all the circumstances surrounding the transaction.'" *Id. at 1020 n.12* (quoting *Williams v. Walker-Thomas Furniture Co., 121 U.S. App. D.C. 315, 350 F.2d 445, 449-50 (D.C. Cir. 1965))*. Relevant factors include whether the aggrieved party had a reasonable opportunity to understand the terms of the contract and whether the important terms were **[*1237]** hidden "in a maze of fine print" or were "minimized by deceptive sales practices." *Id.* (quotation omitted). Generally, "one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain." *Id.* (quotation omitted). On the other hand, if there is a gross inequality of bargaining power and the aggrieved party signs a "commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms." *Id.* (quotation omitted).

Similar principles apply in Arkansas. ***HN25***[] In assessing whether a contract or a particular provision is unconscionable, the court must "review the totality of the circumstances surrounding the negotiation and execution of **[**48]** the contract," taking into consideration "whether there is a gross inequality of bargaining power between the parties and whether the aggrieved party was made aware of and comprehended the provision in question." *Jordan, 207 S.W.3d at 535*. Importantly, however, "it is [generally] not the province of the courts to scrutinize all contracts with a paternalistic attitude and summarily conclude that they are partially or totally unenforceable merely because an aggrieved party believes that the contract has subsequently proved to be unfair or less beneficial than anticipated." *Assoc. Press v. S. Ark. Radio Co., 34 Ark. App. 211, 809 S.W.2d 695, 697 (Ark. Ct. App. 1991)* (quotation and alteration omitted). Indeed, in Arkansas, "parties are free to make contracts based on whatever terms and conditions they agree upon, provided it is not illegal or tainted with some infirmity such as fraud, overreaching, or the like." *Hancock v. Tri-State Ins. Co., 43 Ark. App. 47, 858 S.W.2d 152, 154 (Ark. Ct. App. 1993)* (en banc).

None of these circumstances are present here. Although the District Court recognized the potential for some inequality of bargaining power, it was not a "gross inequality of bargaining power." The court noted that **[**49]** the availability of the broiler contracts is well-known in the region and has produced a waiting list of people who wish to become growers under the contract--a contract which is available for review prior to engaging in the capital investment needed to become a grower.

The Growers argue that the inequality of bargaining power should not be determined by reference to the availability of contracts and the fact that many people want to become a grower for OK. Rather, they suggest that the court consider whether they lacked any meaningful choice as to the terms of the contract and whether they had an alternative source for obtaining the desired service or product. Although Arkansas case law does suggest that these are relevant considerations, *see* *Nat'l Union Fire Ins. Co. of Pittsburgh v. Guardtronic, Inc., 76 Ark. App. 313, 64 S.W.3d 779, 783-84 (Ark. Ct. App. 2002)*, the Growers are incorrect in dismissing the fact that they initiated the contracting process with OK (i.e., OK did not solicit their business) as irrelevant to the analysis.

In *Jordan*, the plaintiff was a landscaper who rented large equipment from the defendant. *207 S.W.3d at 528*. The rental agreement contained a boilerplate provision excusing **[**50]** the defendant from liability for the consequences of its own negligence in connection with the rental of the equipment. *Id. at 531-32*. After the plaintiff was injured by the equipment, he sued, arguing that the exculpatory clause was unconscionable and therefore unenforceable. The Arkansas Supreme Court disagreed. The court found no evidence of a "gross inequality of bargaining power" when the plaintiff "sought out the services" of the defendant and "paid for the rental equipment after being shown how to **[*1238]** operate it." *Id. at 536*; *see also* Barnes, 548 P.2d at 1021 (applying Oklahoma law, court held that defendant did not behave unconscionably when the plaintiff's representative sought out the defendant to enter into a contract).

Furthermore, the Growers do not suggest that they are unsophisticated parties unable to evaluate the risks of the contract prior to entering into it. And they do not suggest that they failed to read and understand the terms of the contract prior to entering into it or even prior to building the chicken houses. Also worthy of note is that some of the named plaintiffs have been operating under this allegedly "unconscionable" contract for nearly twenty years. ***HN26***[] Generally, **[**51]** "[t]he fairness or unfairness, folly or wisdom, or inequality of contracts are questions exclusively within the rights of the parties to adjust at the time the contract is made." *Id*. We therefore affirm the District Court's grant of summary judgment in favor of OK on the Growers' unconscionability claim.

III. CONCLUSION

Section 202(a) of the Packers and Stockyards Act requires a plaintiff who claims that a defendant's conduct was "unfair" to show that such conduct results in or is likely to result in an injury to competition. Because the record contains evidence that raises a genuine issue of material fact concerning the Growers' § 202(a) claim, we REVERSE the District Court's order granting OK summary judgment on this claim and REMAND for further proceedings consistent with this opinion. The Growers have, however, failed to show that the contracts at issue are unconscionable under state law. Accordingly, we AFFIRM the decision of the District Court granting summary judgment in OK's favor on the Growers' unconscionability claim. In addition, we AFFIRM the District Court's denial of the Growers' motion to reopen discovery, but do so without prejudice to subsequent requests to reopen discovery **[**52]** on remand. We also deny the Growers' motion to file a second supplemental appendix because the document they seek to add was not part of the record before the District Court.

Concur by: HARTZ

Dissent by: HARTZ

Dissent

HARTZ, Circuit Judge, concurring/dissenting

I join Chief Judge Tacha's thorough and scholarly opinion for the panel except for Part II.A.2, entitled "Interpretation of 'Unfair Practices' under § 202(a)" and Part II.A.3, entitled, "OK's Alleged Violations of § 202(a)." I arrive at almost the same destination regarding statutory interpretation, but through a rather different route. In my view a practice may be "unfair" under § 202(a) of the Packers and Stockyards Act (PSA) even though it causes no competitive injury. In interpreting that provision we owe respect to the longstanding view of the United States Department of Agriculture (USDA), although I would reach the same interpretation even without reference to that view. On the other hand, the majority opinion's conception of *competitive injury*, which I do not share, appears to be broad enough that many, perhaps all, of the practices that could properly be labeled *unfair* would satisfy its competitive-injury requirement. Finally, I would affirm the district **[**53]** court's decision that the Growers failed to provide evidence showing that the practices challenged on appeal were unfair.

I. DEFERENCE TO THE USDA

The deference issue in this case is a very interesting one. The majority opinion appears to acknowledge that we would need to grant *Chevron* deference to the USDA's interpretation of PSA § 202(a), *7 U.S.C. § 192(a)*, if the USDA had "authority to **[*1239]** adjudicate alleged violations of *§ 202* by live poultry dealers." Op. at 13. *See Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)* (court should defer in certain circumstances to agency's reasonable interpretation of ambiguous statutory language). Certainly such deference would appear to be required by the Supreme Court's gloss on *Chevron in United States v. Mead Corp., 533 U.S. 218, 226-27, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001)*:

> [A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as **[**54]** by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

As the majority opinion correctly notes, the USDA does not have adjudicatory authority over § 202(a) violations by live-poultry dealers. The USDA does, however, have authority to adjudicate § 202(a) violations by packers. *See 7 U.S.C. § 193*. Most of the judicial decisions cited by the majority opinion involved packers, *see, e.g.*, *Armour & Co. v. United States, 402 F.2d 712 (7th Cir. 1968)*; *IBP, Inc. v. Glickman, 187 F.3d 974, 977 (8th Cir. 1999)*, so we have the peculiar situation of not granting *Chevron* deference to the USDA in this case but relying on cases in which *Chevron* deference would have been proper.

I confess to having no idea how the Supreme Court would resolve this conundrum. Perhaps it would avoid the issue as I do, by agreeing with the USDA's interpretation. But at the least I would think that we owe respect to the experience and expertise of the USDA regarding the PSA. *See* *Skidmore v. Swift & Co., 323 U.S. 134, 139-40, 65 S. Ct. 161, 89 L. Ed. 124 (1944)*. In that regard it is worth noting that 26 years ago a treatise could report that the USDA "has consistently **[**55]** taken the position that in order to prove that a practice violates the broad prohibitions in §§ 202(a) and *(b)* . . . of the [PSA], it is not necessary to prove predatory intent, competitive injury, or likelihood of injury." 1 John H. Davidson et al., Agricultural Law § 3.47, at 244 (1981). Such a longstanding view of an agency is entitled to more respect than an ad hoc litigating position. *Cf*. *INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987)* ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." (internal quotation marks omitted)).

In any event, even if the USDA had never addressed the matter, I would interpret the term *unfair practices* as not requiring competitive injury. I am persuaded by the Supreme Court's interpretation of the term *unfair practices* in the Federal Trade Commission Act (FTCA), the relationship between the PSA and that Act, and an early Supreme Court decision explaining the purpose of the PSA.

In *Federal Trade Commission v. Sperry & Hutchinson Co., 405 U.S. 233, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972)*, the Supreme Court construed § 5(a)(6) of the FTCA, *15 U.S.C. § 45(a)(6)*, **[**56]** which stated in pertinent part:

> The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

[*1240] (amended and now recodified as *15 U.S.C. § 45(a)(2)*). The Federal Trade Commission (FTC) had held that Sperry & Hutchinson (S&H) had violated the FTCA by attempting "to suppress the operation of trading stamp exchanges and other 'free and open' redemption of stamps." *Sperry & Hutchinson, 405 U.S. at 234*. S&H challenged the resulting cease-and-desist order, and the Fifth Circuit agreed, holding that the FTC could halt only conduct that "violated either the letter or the spirit of the antitrust laws." *Id. at 235*. Before the Supreme Court the FTC did not dispute that S&H's conduct violated neither the letter nor spirit of the antitrust laws; rather, it contended that its authority was not limited to such conduct. *Id. at 239*. The Court held that the FTCA "empower[s] the [FTC] to proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition." *Id*.

The prior **[**57]** history of the Court's interpretations of § 5(a)(6) and *Sperry & Hutchinson*'s comments on that history have, as we shall see, particular implications for interpreting the PSA. The original version of the FTCA, enacted in 1914, did not include the language empowering the FTC to prevent "unfair or deceptive acts or practices in commerce"; the Act provided power only to prevent "unfair methods *of competition* in commerce." Federal Trade Commission Act, *Pub. L. No. 63-203, § 5, 38 Stat. 717, 719 (1914)* (emphasis added). In 1920 (the year before enactment of the PSA) the Supreme Court, over the dissent of Justice Brandeis, one of the FTCA's drafters, adopted a limiting interpretation of "unfair methods of competition," restricting the covered practices to those "heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." *FTC v. Gratz, 253 U.S. 421, 427, 40 S. Ct. 572, 64 L. Ed. 993, 2 F.T.C. 564 (1920)*; *see* *Sperry & Hutchinson, 405 U.S. at 241*. Later, in *Federal Trade Commission v. Raladam Co., 283 U.S. 643, 649, 51 S. Ct. 587, 75 L. Ed. 1324, 15 F.T.C. 598 (1931)*, the Court made clear that an unfair method must **[**58]** be unfair to competitors. It said:

> [T]he word 'competition' imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors--that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be, lessened or otherwise injured.

Three years later, however, the Supreme Court changed course in *Federal Trade Commission v. R.F. Keppel & Bro., Inc., 291 U.S. 304, 54 S. Ct. 423, 78 L. Ed. 814, 18 F.T.C. 684 (1934)*. As explained in *Sperry & Hutchinson, 405 U.S. at 242-43*, the Court in *Keppel* upheld an FTC cease-and-desist order against a candy marketing scheme on the ground that it "contravened public policy insofar as it tempted children to gamble and compelled those who would successfully compete with Keppel to abandon their scruples by similarly tempting children." The marketing scheme "was 'unfair,' though any competitor could maintain his position simply by adopting the challenged practice." *Id. at 243*. *Sperry & Hutchinson* concluded its summary of *Keppel* as follows: "Thenceforth, unfair competitive practices were not limited to those likely **[**59]** to have anticompetitive consequences after the manner of the ***antitrust law***; nor were unfair practices in commerce confined to purely competitive behavior." *Id. at 244*. The Court then noted that the *Keppel* decision's "perspective" of the **[*1241]** FTCA "was legislatively confirmed" in 1938 when Congress amended the Act by adding the phrase "unfair or deceptive acts or practices" to the original ban on "unfair methods of competition." *Id. at 244* (internal quotation marks omitted). The Court thought that the language *unfair or deceptive acts or practices* clearly did not require anticompetitive conduct. *See id*.

To return to the PSA, the original 1921 language of § 202(a) made it unlawful to "Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce." *Pub. L. No. 67-51, § 202, 42 Stat. 161*. The language "unfair . . . practice . . . in commerce" is the very language construed by *Sperry & Hutchinson* as not requiring an "effect on competition." *405 U.S. at 239*. Moreover, the language is part of the same language in the 1938 amendments to the FTCA that *Sperry & Hutchinson* described as "confirm[ing]" the *Keppel* view that unfair practices under the FTCA were not "confined **[**60]** to purely competitive behavior." *Id. at 244*.

Particularly noteworthy is that the language of PSA § 202(a) more clearly omits a competitive-effect requirement than does the FTCA language construed in *Keppel*. Section 202(a) does not include the phrase "restraining commerce" that appears in other subsections of *§ 202*. *See § 202(c)* ("if such apportionment has the tendency or effect of restraining commerce"); *§ 202(d)* (transferring or reviewing an article "for the purpose or with the effect of . . . restraining commerce"); *§ 202(e)* (doing "any act for the purpose or with the effect of . . . restraining commerce"). And perhaps more striking, § 202(a) does not use the FTCA's language "unfair methods of competition" construed in *Keppel*. Perhaps this failure to adopt the language of the FTCA, enacted seven years earlier, was to avoid the narrow construction of the FTCA by the Supreme Court in *Grata*, decided shortly before enactment of the PSA.

Comparison of the PSA to the FTCA is sensible because the PSA is an offspring of the FTCA. In 1917 President Wilson ordered an FTC investigation of the food industry. *See* Davidson et al., *supra*, § 3.02, at 187. The FTC's report condemned the practices **[**61]** of the meat-packing industry. *See id*. The five largest packers entered into a consent decree under the Sherman Act in 1920, but the PSA was enacted in 1921, presumably because the antitrust laws and the FTCA were deemed inadequate to the task of dealing with the problem. *See id*. at 187-88. In that light it would be somewhat surprising if "unfair practices" under the PSA had a narrower meaning than "unfair methods of competition" in the FTCA.

Supporting this view is the discussion of the recently enacted PSA in *Stafford v. Wallace, 258 U.S. 495, 42 S. Ct. 397, 66 L. Ed. 735 (1922)*, which upheld the PSA's constitutionality. Some courts have relied on the Supreme Court's statement in that opinion that "[t]he chief evil feared is the monopoly of the packers." *Id. at 514*. But the purpose of the PSA was not just to end the packers' monopoly. The 1920 consent decree should have accomplished that task. The PSA's purpose was to end the sort of practices engaged in by the monopoly, practices that could certainly be characterized as unfair but could not easily be characterized as restricting competition. This point is made clear by quoting at length from Chief Justice Taft's opinion for the Court:

> The object to be secured by **[**62]** the act is the free and unburdened flow of live stock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and **[*1242]** thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still, as live stock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market.
>
> The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer, who buys. Congress

> thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil which it sought to provide against by the act, was exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of the live stock through the stockyards, all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers on the other. Expenses incurred in the passage through the stockyards necessarily reduce the price received by **[**63]** the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. Any unjust or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce. The shipper, whose live stock are being cared for and sold in the stockyards market is ordinarily not present at the sale, but is far away in the West. He is wholly dependent on the commission men. The packers and their agents and the dealers who are the buyers, are at the elbow of the commission men, and their relations are constant and close. The control that the packers have had in the stockyards by reason of ownership and constant use, the relation of landlord and tenant between the stockyards owner, on the one hand, and the commission men and the dealers on the other, the power of assignment of pens and other facilities by that owner to commission men and dealers, all create a situation full of opportunity and temptation to the prejudice of the absent shipper and owner in the neglect of the live stock, in the *mala fides* of the sale, in the exorbitant prices obtained, **[**64]** in the unreasonableness of the charges for services rendered.

The scope of the PSA is further reflected in the accompanying House Report, which states:

> A careful study of the bill, will, I am sure, convince one that it, and existing laws, give the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards and all activities connected therewith; that it is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.

H.R. Rep. No. 67-77, at 2 (1924).

It appears to me that the condemned practices described by Chief Justice Taft are of the same ilk as those that the majority opinion holds are covered by the PSA. Where I differ from the majority opinion in this regard is that I would not describe the injuries caused by those practices as competitive injuries. The majority opinion does not explain how the alleged practices hurt OK's competitors or even how they injure competition among the Growers. The alleged injuries may be caused by the existence of a monopoly. But it is unclear to me how the practices (such as unilaterally **[**65]** decreasing production by delivering fewer chicks to growers) reduce competition among either growers or dealers. If competitive injury were required **[*1243]** by § 202(a), I would agree with the district court that the Growers had not presented sufficient evidence of such injury.

Turning to the specific allegations of this case, I depart from the majority opinion in that I would affirm the decision below because the Growers have not presented sufficient evidence to support their claims that the practices at issue on appeal are unfair. My reasons are essentially the same as the majority opinion's reasons for rejecting the Growers' unconscionability claims. The Growers are not existing producers who sought a market for their product and were confronted with OK's take-it-or-leave-it contracts. Rather, they entered into their businesses only after approaching OK and seeking approval to become its suppliers. The terms of the contract were known. The Growers made an informed decision to enter the industry. To the extent that the Growers claim that the contract misrepresents OK's actual practice, those are deceptive-practice claims; and it is my understanding that such claims are not before us. Perhaps **[**66]** OK's exercise of its authority under the contract to reduce the number of birds placed with the Growers could be an unfair practice if it were the result of an effort by OK to drive up prices for its products. But the Growers' briefs on appeal do not allege that any reduction in placement has occurred.

In re Endosurgical Prods. Direct Purchaser Antitrust Litig.

United States District Court for the Central District of California

August 2, 2007, Decided

Case No. CV 05-8809-JVS(MLGx); CV 05-8900 and CV 06-3118

Reporter

2007 U.S. Dist. LEXIS 103725 *

In re Endosurgical Products Direct Purchaser Antitrust Litigation

Subsequent History: Affirmed by, En banc *Del. Valley Surgical Supply, Inc. v. Johnson & Johnson, 523 F.3d 1116, 2008 U.S. App. LEXIS 9308 (9th Cir. Cal., 2008)*

Core Terms

purchaser, Endosurgical, indirect, overcharge, summary judgment, antitrust, products, supplies, damages, distributors, non-moving, violator, volume

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

Attorneys Present for Defendants: Not Present.

Judges: James V. Selna.

Opinion by: James V. Selna

Opinion

CIVIL MINUTES - GENERAL

Proceedings: (In Chambers) ORDER

DENYING Plaintiff Bamberg County Memorial Hospital's Motion to Determine that Bamberg is a "Direct Purchaser" Under Section 4 of the Clayton Act (Fld 6-4-07)

DENYING Defendants' Motion to Determine that Bamberg is a "Direct Purchaser" (Fld 7-2-07)

GRANTING Plaintiff Delaware Valley Surgical Supply Co., Inc.'s Motion for Partial Summary Judgment Related to Issue of Clayton Act Standing (Fld 7-2-07)

I. BACKGROUND

The instant motions arise out of actions brought against Ethicon Inc., Ethicon Endo Surgery, Inc., Johnson & Johnson Health Care Systems, Inc., and Johnson & Johnson (collectively, "the Endosurgical Defendants"), alleging antitrust violations in the sale of endosurgical products. Three separate actions were filed, brought by plaintiffs Delaware Valley Surgical Supply Company, Inc. ("Delaware"), Niagara Memorial Medical Center ("Niagara"), and Bamberg County Memorial Hospital and Nursing Center ("Bamberg"). Each original complaint proposed to represent a class of direct purchasers of endosurgical products. (Delaware **[*2]** Compl. ¶¶ 14, 20; Niagara Compl. ¶¶ 12, 22; Bamberg Compl. ¶¶ 12,22). By stipulation of the parties, the Court consolidated the three separate cases in its June 12, 2006 Consolidation Order.

Delaware and Niagara subsequently brought a motion to sever their actions from the one brought by Bamberg, claiming that an "irreconcilable conflict" existed because they were direct purchasers of endosurgical products but Bamberg had only purchased the relevant products indirectly. Delaware and Niagara asserted that, as an indirect purchaser, Bamberg lacked standing to bring federal antitrust claims for overcharge damages and no exception to the direct purchaser rule applied. Although the Court denied the motion to sever, it made no determination on the issue of Bamberg's standing to sue for federal antitrust damages.

Delaware now moves for partial summary judgment on the issue of Bamberg's standing to seek damages under Section 4 of the Clayton Act. Bamberg and the Endosurgical Defendants bring their own motions for summary judgment on the issue.[1]

II. LEGAL **[*3]** STANDARD

Summary judgment is appropriate only where the record, read in the light most favorable to the non-moving party, indicates that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*; see also *Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Material facts are those necessary to the proof or defense of a claims, and are determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A fact issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." (*Id. at 248*.) In deciding a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." (*Id. at 255*.)

The burden initially is on the moving party to demonstrate an absence of a genuine issue of material fact. *Celotex, 477 U.S. at 323*. If, and only if, the moving party meets its burden, then the non-moving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. (See *id. at 322-23*.) If the non-moving party meets this burden, then the motion will be defied. *Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc., 210 F.3d 1099, 1103 (9th Cir. 2000)*.

Where the parties have made cross-motions for summary judgment, the Court must consider each motion on its own merits. *Fair Hous. Council v. Riverside Two, 249 F.3d 1132, 1136 (9th Cir. 2001)*. The Court will **[*4]** consider each party's evidentiary showing, regardless of which motion the evidence was tendered under. See *id. at 1137*.

III. DISCUSSION

In *Illinois Brick v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, the Supreme Court held that, because a direct purchaser is allowed to recover the full overcharge under *Hanover Shoe v. United Shoe Machinery, 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*, indirect consume are generally precluded from receiving overcharge damages. *Illinois Brick, 431 U.S. at 733-36*. The Illinois Brick bar to recovering damages does not preclude an indirect purchaser's suit for an injunction. See, e.g., *Campos v. Ticketmaster, 140 F.3d 1166, 1172 (8th Cir. 1998)*, cert. denied, *525 U.S. 1102, 119 S. Ct. 865, 142 L. Ed. 2d 768 (1999)*.

Bamberg does not purchase endosurgical supplies directly from the Endosurgical Defendants. Instead, Bamberg orders endosurgical supplies from a distributor, Owens & Minor ("O&M"), which maintains its own inventory of endosurgical supplies purchased from the Endosurgical Defendants. The price that Bamberg pays for those supplies is set, in part, by a contract negotiated on behalf of hospitals like Bamberg by Premier, a Group Purchasing Organization ("GPO"), with the Endosurgical Defendants.[2] Bamberg pays O&M the GPO contract price plus a percentage mark-up, which is separately negotiated with or established by O&M.

---

[1] Although styled as "motions to determine," the Court treats Bamberg's and the Endosurgical Defendants' motions as motions for partial summary judgment.

[2] At oral argument, counsel for the Endosurgical Defendants noted that Bamberg also had a contract directly with the Endosurgical **[*5]** Defendants which committed it to a specific pricing plan under the Premier GPO agreement.

In opposing the motion to sever, Bamberg contended that it falls within one or both of the two exceptions to the bar announced in Illinois Brick. First, Bamberg argued that it purchased the endosurgical products though a pre-existing fixed-markup contract. Second, Bamberg argued that the GPO through which it purchases the endosurgical products is owned and controlled by hospitals, including Bamberg, such that Bamberg is, in effect, a direct purchaser.

Bamberg now appears to concede that neither of the two exceptions applies. (See Bamberg's Opp'n at 14 ("[T]his case is not so much about the exceptions to Illinois Brick as about the definition of 'indirect purchaser' in light of modern systems of product distribution and the policies underlying Illinois Brick."); see also Endosurgical Defendants' Opp'n at 1 ("[Delaware] devotes most of its brief to arguing that Bamberg does not satisfy either of the Illinois Brick exceptions that allow *indirect* purchasers to bring overcharge claims. But that is not [the Endosurgical Defendants] argument. The issue to be decided here is whether Bamberg is a direct purchaser, **[*6]** not whether, as an indirect purchaser, it qualifies for standing under one of the exceptions articulated by the Supreme Court.").)

A. Pre-Existing Cost-Plus Contract

Under a pre-existing, cost-plus contract, the direct purchaser 's unit profit and volume are fixed. In the event of overcharge by the supplier, the direct purchaser suffers no injury because it passes on the increased cost to the indirect purchaser. In such a case, the indirect purchaser is allowed to recover the full overcharge from the upstream violator. *Arizona v. Shamrock Foods Co., 729 F.2d 1208, 1213 (9th Cir. 1984)* (recognizing the exception); *Illinois v. Borg, 548 F.Supp. 972, 975 (N.D. Ill. 1982)* ("What is significant is not the tyranny of labels—direct vs. indirect purchaser, cost-plus v. fixed-price contracts—but who has been directly damaged by the overcharge.").

Bamberg is not a party to any contract under which it is obligated to purchase a fixed volume of endosurgical products, regardless of price or demand. (Nelson Decl., Exh A at 9, RFA No. 17.) As the Supreme Court made clear in *Kansas & Missouri v. Utilicorp United, 497 U.S. 199, 218, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)*, the exception requires that the contract specifies the quantity such that the alleged overcharges cannot affect the volume of products purchased. See also P. Areeda & H. Hovenkamp, ***Antitrust Law*** § 346e (2d ed. 2000). Since there was never **[*7]** a fixed-volume contract, whether it pre-dated the alleged antitrust behavior is a non-issue. Because there no such contract, the Court cannot "know what might have happened in the absence of an overcharge." *Utilicorp, 497 U.S. at 218*. Accordingly, the Court concludes that Bamberg does not have standing under the pre-existing cost-plus contract exception.

B. Ownership or Control of the Direct Purchaser

A second possible exception exists in cases where the direct purchaser is owned or controlled by the indirect purchaser. See *Illinois Brick, 431 U.S. at 736 n.16*. In such cases, the indirect and direct purchases are, in effect, a single entity that bears the entire overcharge. See Areeda & Hovenkamp, ***Antitrust Law*** § 346f. To fit within the exception, Bamberg must demonstrate a relationship between itself and the direct purchaser "involving such functional economic or other unity . . . that there effectively has been only one sale." *Jewish Hospital Ass'n v. Stewart Mechanical Enters., Inc., 628 F.2d 971, 975 (6th Cir. 1980)*; see also *Shamrock Foods, 729 F.2d at 1212 n.2* ("Courts analyzing this exception have held that it also applies where the direct purchaser is owned or controlled by its supplier." (citing cases)).

The distributors such as Delaware and O&M are not subsidiaries of the Endosurgical Defendants. Neither Bamberg nor the Endosurgical defendants present any evidence that **[*8]** the Endosurgical Defendants own or control the distributors through which Bamberg purchased endosurgical supplies. Similarly, Bamberg is not a subsidiary or corporate affiliate of O&M or other distributors. Neither Bamberg nor the Endosurgical defendants present any evidence that Bamberg owned or controlled the distributors through which it purchased endosurgical supplies. Accordingly, the Court concludes that Bamberg does not have standing under the ownership and control exception.

C. Alternative Theories.

Supreme Court jurisprudence makes clear that the Court intended to create a bright line in identifying the proper plaintiff when an antitrust violator sells through a multi-tiered distribution system. The rationales advanced by Bamberg and the Endosurgical Defendants may be reflective of conditions in a peculiar market, but they also cloud the analysis. An antitrust violator should only be required to pay once, and for the benefit of both the antitrust violator and the Court, the determination of the quantum of liability and the appropriate recipient should not be a labored. That is in full accord with *Illinois Brick* and its progeny.

The Court declines to look through, or ignore, O&M **[*9]** on the theory that it plays an economically irrelevant role in the distribution scheme. In theory, there is a demand curve for the bundle of goods and services which O&M sells. If the price of the goods is artificially inflated by the anti-competitive practices of the party from whom O&M purchases that portion of its offering, that will affect the attractiveness of its bundle in the market place. O&M can reduce its markup and keep volume, or it can forego volume by not responding. There is no reason to believe, and no evidence in the record to support a finding, that the market forces do not work on O&M and its offerings. The Court does not find, therefore, that the contract between the Endosurgical Defendants and Bamberg supersedes the market forces. See *Illinois Brick, 431 U.S. at 736 & n.16*. The fact that Bamberg may have a contract with the Endosurgical Defendants does not change the fact that O&M is the direct purchaser here.

The arguments for conferring direct purchaser status on the most economically efficient market participant or the most motivated market participant are attractive ones and philosophically interesting, but represent a diversion into amorphous, albeit fact-specific, inquiry. Part of the virtue **[*10]** of a bright-line test is to provide rules which can be easily applied. This is not a case where the Court should grapple with the complexities of a particular market place, lest there be no plaintiff to enforce the antitrust laws. Clearly, there are other motivated plaintiffs who unquestionably meet the standing requirements of Illinois Brick to serve the role of private attorney general contemplated by Section 4 of the Clayton Act. *15 U.S.C. § 15*.

The Court acknowledges that other courts and commentators have reached a different conclusion in similar if not identical circumstances. E.g., *In re Lorazepam & Clorazepate Antitrust Litigation, 202 F. Supp. 2d 12, 25 (D.DC. 2001)*; *In re NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493, 501-02, 504-05 (S.D. N.Y. 1996)*; Areeda & Hovenkamp, ***Antitrust Law*** § 346j, at p. 377. The Court simply parts company with those authorities in the belief that the present result is truer to *Illinois Brick*.

IV. CONCLUSION

For the foregoing reasons, Delaware's motion for partial summary judgment is granted. Bamberg and the Endosurgical Defendants' motions for partial summary judgment are denied.

Resolution of the standing issue has some significant consequences. Accordingly, the Court would entertain an application to certify the question to the Ninth Circuit on an interlocutory appeal, *28 U.S.C. § 1292(b)*.

End of Document

Lorix v. Crompton Corp.

Supreme Court of Minnesota

August 2, 2007, Filed

A05-2148

Reporter

736 N.W.2d 619 *; 2007 Minn. LEXIS 444 **; 2007-2 Trade Cas. (CCH) P75,815

Diane Lorix, individually and on behalf of all others similarly situated, Appellant, vs. Crompton Corporation, et al., Respondents, Flexsys NV, et al., Defendants, Bayer Corporation, Defendant.

Prior History: **[**1]** Court of Appeals.

Lorix v. Crompton Corp., 720 N.W.2d 15, 2006 Minn. App. LEXIS 122 (2006).

Disposition: Reversed and remanded.

Core Terms

antitrust, purchasers, anti trust law, indirect, consumer, manufactured, overcharge, damages, factors, antitrust violation, courts, chemicals, price-fixed, suits, tires, district court, speculative, restrained, defendants', remote, court of appeals, price fixing, duplicative, limits, cases, motion to dismiss, competitor, standing to sue, federal court, alleges

LexisNexis® Headnotes

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

HN1[] **Private Actions, Standing**

See *Minn. Stat. § 325D.57* (2006).

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

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN2[] **Standards of Review, De Novo Review**

The Supreme Court of Minnesota reviews an appeal from a dismissal on the pleadings de novo.

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN3[] **Pretrial Judgments, Judgment on Pleadings**

When considering a motion for judgment on the pleadings, the court must accept the allegations contained in the pleading under attack as true, and assumptions made and inferences drawn must favor the non-moving party. It is immaterial at the pleadings stage whether the plaintiff can prove the facts alleged.

Governments > Legislation > Interpretation

HN4[] **Legislation, Interpretation**

The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. *Minn. Stat. § 645.16* (2006). When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

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

HN5[] **Regulated Practices, Private Actions**

Antitrust laws should be broadly construed to effectuate their purpose. The primary purpose of antitrust laws is to protect interbrand competition. The private causes of action created by Minnesota ***antitrust law*** reflect a clear legislative policy encouraging aggressive prosecution of statutory violations.

Civil Procedure > ... > Justiciability > Standing > General Overview

HN6[] **Justiciability, Standing**

Standing is a legal requirement that a party have a sufficient stake in a justiciable controversy to seek relief from a court. The primary goal of the standing requirement is to ensure that the factual and legal issues before the courts will be vigorously and adequately presented. Standing is acquired in two ways: either the plaintiff has suffered some injury-in-fact or the plaintiff is the beneficiary of some legislative enactment granting standing. An injury-in-fact is a concrete and particularized invasion of a legally protected interest.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN7[] **Standing, Clayton Act**

Federal ***antitrust law*** does not provide a remedy for every injury flowing from an antitrust violation. Standing under federal ***antitrust law***, rather, has prudential limits based on remoteness of injury and complexity of proof. An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but despite the broad wording of § 4, *15 U.S.C.S. § 15*, of the Clayton Act, there is a point beyond which the wrongdoer should not be held liable. It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN8[] Standing, Clayton Act

An antitrust defendant can not argue that a plaintiff was not injured because the plaintiff had "passed on" any illegal overcharges to downstream consumers.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN9[] Standing, Clayton Act

An indirect purchaser of price-fixed goods is not a party injured in his business or property within the meaning of § 4, *15 U.S.C.S. § 15*, of the Clayton Act.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN10[] Standing, Clayton Act

With respect to federal antitrust standing, federal case law undertakes to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them. The factors addressed by the case law include: (1) whether the plaintiff is a consumer or competitor in the allegedly restrained market; (2) whether the injury alleged is direct or indirect; (3) whether there are more directly injured plaintiffs with motivation to sue; (4) whether the damages claims are speculative; and (5) whether the plaintiff's claims risk duplicative recoveries and would require a complex apportionment of damages. Case law counsels against across-the-board rules, suggesting that courts should analyze each situation in light of the factors set forth in the case law.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

HN11[] Trade Practices & Unfair Competition, State Regulation

Minnesota ***antitrust law*** is generally interpreted consistently with federal ***antitrust law***. As the purposes of Minnesota and federal ***antitrust law*** are the same, it is sensible to interpret them consistently. Minnesota is not required, however, to abide by federal antitrust standing limitations. The desire for harmony between federal and state ***antitrust law*** relates more to prohibited conduct than to who can bring a lawsuit. The purpose behind both state and federal ***antitrust law*** is to apply a uniform standard of conduct so that businesses will know what is acceptable conduct, but to achieve this uniformity or predictability, Minnesota courts are not required to define who may sue in the state courts in the same way federal courts have defined who may maintain an action in federal court.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN12[] Standing, Requirements

In 1984, the Minnesota Legislature added the words "directly or indirectly" to *Minn. Stat. § 325D.57* (2006) to make clear that, contrary to federal case law, Minnesota ***antitrust law*** permits indirect purchasers to recover.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN13[] Standing, Clayton Act

None of the factors identified by the United States Supreme Court in Associated General Contractors of California, Inc. v. California State Council of Carpenters was intended to be determinative, even under the more restrictive boundaries of federal antitrust standing.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN14[] Standing, Requirements

Even viewed as guideposts rather than requirements, the factors established by the United States Supreme Court for determining federal antitrust standing are not harmonious with Minnesota's ***antitrust law***.

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

HN15[] Regulated Practices, Private Actions

Minn. Stat. § 325D.57 (2006) allows a court to take any steps necessary to avoid duplicative recovery against a defendant in a subsequent action arising from the same conduct. To the extent that Minnesota courts cannot ameliorate the risk of duplicative recovery, as where parallel proceedings in federal courts or courts in other states may result in later awards based on the same injuries, this risk is inherent in the dual system of private antitrust enforcement created by federal case law. While this risk is a legitimate and important consideration, it is not a risk that the Supreme Court of Minnesota may remedy by restricting Minnesota ***antitrust law*** in ways that the Minnesota Legislature has not.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN16[] Standing, Requirements

Federal case law does not make a plaintiff's status as a consumer or competitor in the restrained market a sine qua non of antitrust standing. Rather, federal case law uses that status as a tool to compare the plaintiff's alleged injury to the goals of ***antitrust law***. While Minnesota courts should analyze an alleged injury's relation to the goals of ***antitrust law*** by identifying the markets involved, the market analysis is not the focus of the standing inquiry.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN17[] Standing, Requirements

The federal case law factor that looks at whether the damages claims are speculative is relevant to standing under the Minnesota ***antitrust law***.

Governments > Courts > Judicial Precedent

HN18[] Courts, Judicial Precedent

The Supreme Court of Minnesota will often look to case law from other states for guidance when its own jurisprudence is undefined.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN19[] **Standing, Requirements**

The Supreme Court of Minnesota believes that application of the federal antitrust standing factors in Minnesota would contravene the plain language of *Minn. Stat. § 325D.57* (2006) and in some cases thwart the intent of the legislature by barring indirect purchaser suits for the reasons articulated in federal case law.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN20[] **Standing, Requirements**

Case law from the United States Court of Appeals for the Eighth Circuit, whatever its precedential value to the Supreme Court of Minnesota, cannot be read to foreclose antitrust claims in Minnesota by indirect purchasers of goods manufactured with price-fixed components.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN21[] **Standing, Requirements**

Analysis of the markets involved in an antitrust claim helps assess the relation of the alleged injury to the goals of ***antitrust law***, but the lack of a principled way to define the market restrained by the antitrust violation means that this analysis alone cannot determine whether a plaintiff has antitrust standing under Minnesota law.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN22[] **Standing, Requirements**

Any person injured by an antitrust violation may sue under Minnesota's ***antitrust law***. *Minn. Stat. § 325D.57* (2006). The Supreme Court of Minnesota has recognized and applied the broad effect of the words "any person."

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN23[] **Standing, Requirements**

In spite of the apparently limitless language of *Minn. Stat. § 325D.57* (2006), there are injuries so remotely related to antitrust violations that courts simply cannot provide relief. Standing under Minnesota ***antitrust law*** must be defined by some prudential limits informed by foreseeability, proximate cause, remoteness, and relation of the injury to the purposes of the ***antitrust law***.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN24[] **Standing, Requirements**

Whatever the precise prudential limits on Minnesota antitrust standing, the Supreme Court of Minnesota does not believe that the legislature intended to create consumer standing by allowing every person in the state to sue for an antitrust violation simply by virtue of his or her status as a consumer.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN25[] **Regulated Practices, Price Fixing & Restraints of Trade**

Antitrust laws, federal and state, provide a remedy for consumers who have purchased goods manufactured with price-fixed components.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN26[] **Regulated Practices, Price Fixing & Restraints of Trade**

An antitrust injury occurs when a purchaser is overcharged as a result of anticompetitive conduct, not when she physically acquires a price-fixed good. An antitrust violator should not escape liability simply because, by happy accident, its price-fixed goods are consumed in the manufacturing process.

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

Evidence > Burdens of Proof > Allocation

HN27[] **Private Actions, State Regulation**

The antitrust plaintiffs bear the burden of proving the damages caused by a defendant's wrongful conduct. If the plaintiffs cannot present admissible and convincing proof, they cannot recover.

Syllabus

1. The factors articulated in *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, are not the benchmark of standing under Minnesota ***antitrust law***.

2. Plaintiff has standing to sue for price-fixing under *Minn. Stat. § 325D.57* (2006).

Counsel: ATTORNEY FOR APPELLANTS: Garrett D. Blanchfield, Jr., St. Paul, MN.

ATTORNEYS FOR RESPONDENTS: Michael A. Lindsay, James S. Simonson, Minneapolis, MN. J. Andrew Read, Jones Day, Benjamin G. Bradshaw, Washington, D.C.

ATTORNEYS FOR AMICUS CURIAE AMERICAN ANTITRUST INSTITUTE: Richard A. Lockridge, Minneapolis, MN.

ATTORNEYS FOR AMICUS CURIAE STATE OF MINNESOTA: Brian Dillon, St. Paul, MN.

Judges: ANDERSON, G. BARRY, Justice.

Opinion by: ANDERSON, G. BARRY

Opinion

[*622] Heard, considered, and decided by the court en banc.

ANDERSON, G. BARRY, Justice.

Plaintiff, a consumer, brought a class action lawsuit under Minnesota ***antitrust law*** alleging that she paid more for tires as a result of defendants' conspiracy to fix the prices of rubber-processing chemicals. The district court granted defendants' motion to dismiss on the pleadings for lack of standing, and the court of appeals affirmed. We reverse and hold that the plaintiff has standing to sue under *Minn. Stat. § 325D.57* (2006).

In this antitrust class action, Plaintiff Diane Lorix alleges that defendants Crompton Corporation, Uniroyal Chemical Company, Inc., Uniroyal Chemical Company, Limited, Flexsys NV, Flexsys America LP, Bayer AG, Bayer Corporation, Rhein Chemie Rheinau GmbH, and Rhein Chemie Corporation (collectively "Crompton"), **[**2]** manufacturers of rubber-processing chemicals, agreed to fix the prices of chemicals sold to tire manufacturers. Price fixing is a violation of Minnesota ***antitrust law***. *Minn. Stat. § 325D.53, subd. 1(1)(a)* (2006). Lorix alleges that she, along with the rest of the putative class, purchased tires manufactured using the price-fixed chemicals and that she paid more for the tires than she would have in the absence of the anticompetitive agreement. Lorix's complaint asserts that she purchased tires "manufactured using rubber processing materials sold by Defendants." Lorix stated at oral argument that she does not know whether the chemicals are present in the tires she purchased or were consumed in the manufacturing **[*623]** process, and that discovery would provide an answer to that question.

This lawsuit is one of several filed in state courts across the country against manufacturers of rubber-processing chemicals, sparked by government investigations into price fixing in Europe and the United States. Some of the defendants pleaded guilty in criminal cases and paid criminal fines. *See* *Moniz v. Bayer Corp., 484 F. Supp. 2d 228, 229 (D. Mass. 2007)*; *Crouch v. Crompton Corp., Nos. 02 CVS 4375, 03 CVS 2514, 2004 NCBC 7, 2004 NCBC LEXIS 6, 2004 WL 2414027, at *20 (N.C. Super. Oct. 28, 2004)*. **[**3]** Direct purchasers of rubber processing chemicals have also filed a nationwide class action suit against manufacturers of rubber-processing chemicals. *See* *In re Rubber Chems. Antitrust Litig., 232 F.R.D. 346, 355 (N.D. Cal. 2005)* (granting plaintiffs' motion for class certification).

In this case, the district court applied the factors in *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (hereinafter "*AGC*"), and granted Crompton's motion to dismiss on the pleadings, concluding that to sue in antitrust in Minnesota, a plaintiff must be "either a consumer or a customer in the particular industry and there must be neither speculative damages nor risk of duplicative recoveries." The court of appeals affirmed, holding that Minnesota ***antitrust law*** requires that an antitrust plaintiff "be a participant or competitor in the market restrained by the alleged antitrust violation." *Lorix v. Crompton Corp., 720 N.W.2d 15, 19 (Minn. App. 2006)*. Noting that Lorix did not allege that she purchased the chemicals manufactured by the defendants, the court held that she lacked standing. *Id at 18-19*. **[**4]** We granted Lorix's petition for review.

I.

Lorix argues that the plain language of *Minn. Stat. § 325D.57* affords her standing. The statute provides:

> ***HN1***[] Any person * * * injured directly or indirectly by a violation of sections 325D.49 to 325D.66, shall recover three times the actual damages sustained, together with costs and disbursements, including reasonable attorneys' fees. In any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant.

Crompton argues that, despite the broad language of *section 325D.57*, antitrust standing has well-established boundaries, and that one such boundary prevents suit by a plaintiff who never purchased the product that was the subject of the alleged price fixing. Crompton argues that "any person" cannot be read literally and that the "direct or indirect" language only removes federal ***antitrust law***'s per se bar to indirect purchaser suits. According to Crompton, the district court and court of appeals correctly applied "common-sense principles of remoteness and proximate cause."

HN2[] We review an appeal from a dismissal on the pleadings de novo. *See Barton v. Moore, 558 N.W.2d 746, 749 (Minn. 1997)*. **[**5]** ***HN3***[] When considering a motion for judgment on the pleadings, the court must accept the allegations contained in the pleading under attack as true, and assumptions made and inferences drawn must favor the non-moving party. *State ex rel. City of Minneapolis v. Minneapolis St. Ry. Co., 238 Minn. 218, 223, 56 N.W.2d 564, 567 (Minn. 1952)*. It is immaterial at the pleadings stage whether the plaintiff can prove the facts alleged. *Martens v. Minn. Mining & Mfg. Co., 616 N.W.2d 732, 739 (2000)*. ***HN4***[] "The object of all interpretation and construction of laws is to **[*624]** ascertain and effectuate the intention of the legislature." *Minn. Stat. § 645.16* (2006). "When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit." *Id.*

HN5[] Antitrust laws should be broadly construed to effectuate their purpose. *Minnesota-Iowa Television Co. v. Watonwan T.V. Imp. Ass'n, 294 N.W.2d 297, 305 (Minn. 1980)*. The primary purpose of antitrust laws is to protect interbrand competition. *State Oil Co. v. Khan, 522 U.S. 3, 14, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. The private causes of action created by Minnesota ***antitrust law*** "reflect **[**6]** a clear legislative policy encouraging aggressive prosecution of statutory violations." *State by Humphrey v. Philip Morris Inc., 551 N.W.2d 490, 495 (Minn. 1996)*.

HN6[] Standing is a legal requirement that a party have a sufficient stake in a justiciable controversy to seek relief from a court. *Sierra Club v. Morton, 405 U.S. 727, 731-32, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972)*. The primary goal of the standing requirement is to ensure that the factual and legal issues before the courts will be vigorously and adequately presented. *Channel 10, Inc. v. Ind. Sch. Dist. No. 709, St. Louis County, 298 Minn. 306, 314, 215 N.W.2d 814, 821 (1974)*. Standing is acquired in two ways: either the plaintiff has suffered some "injury-in-fact" or the plaintiff is the beneficiary of some legislative enactment granting standing. *Philip Morris Inc., 551 N.W.2d at 493*; *Snyder's Drug Stores, Inc. v. Minn. State Bd. of Pharmacy, 301 Minn. 28, 31-32, 221 N.W.2d 162, 165 (1974)*. An injury-in-fact is a concrete and particularized invasion of a legally protected interest. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*.

To determine whether Lorix has standing, we first review several key points of federal and Minnesota ***antitrust law***, including **[**7]** the Supreme Court's decisions in *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*, *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, and *AGC*; the 1984 amendment to *Minn. Stat. § 325D.57*; and our own decision in *Philip Morris Inc*.

A. Federal ***Antitrust Law***

HN7[] Federal ***antitrust law*** does not provide a remedy for every injury flowing from an antitrust violation. Standing under federal ***antitrust law***, rather, has prudential limits based on remoteness of injury and complexity of proof. "'An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but 'despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable.'" *AGC, 459 U.S. at 534* (quoting *Blue Shield of Va. v. McCready, 457 U.S. 465, 476-77, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*). "'It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.'" *Id. at 535* (quoting *Blue Shield, 457 U.S. at 477*). The Supreme Court explored the scope of federal ***antitrust law*** injury and standing in *Hanover Shoe*, *Illinois Brick*, **[**8]** and *AGC*.

In *Hanover Shoe*, the Court held that ***HN8***[] an antitrust defendant could not argue that a plaintiff was not injured because the plaintiff had "passed on" any illegal overcharges to downstream consumers. *392 U.S. at 491-92*. The case involved a treble damages action by a shoe **[*625]** manufacturer against a manufacturer of shoe machinery. *Id. at 483*. The Court rejected the defendant's pass-on defense as a matter of law (with limited exceptions not relevant here) for two reasons. *Id. at 492-94*. First, the defense would burden courts with attempts to trace the effects of an overcharge through the entire chain of purchase and apportion the damages among direct and indirect purchasers. *Id. at 492-93*. Second, direct purchasers are better situated to sue for antitrust violations, because any individual indirect purchaser would have an insufficient stake in the lawsuit to prompt her to pursue relief. *Id. at 494*.

In *Illinois Brick*, the Court held that ***HN9***[] an indirect purchaser of price-fixed goods was not a party "injured in his business or property" within the meaning of section 4 of the Clayton Act, *15 U.S.C. § 15 (2000)*. *431 U.S. at 728-29*. The plaintiffs, various state and local government entities, **[**9]** alleged a price-fixing conspiracy among manufacturers of concrete blocks. *431 U.S. at 726*. The plaintiffs did not purchase concrete blocks directly, but did purchase buildings made with the blocks. *Id.* The plaintiffs alleged that overcharges from the manufacturers were passed to them through masonry contractors and general contractors. *Id. at 726-27*. The Court refused to recognize this "offensive pass-on" theory for two policy reasons. *Id. at 730*. First, "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants" because a direct purchaser could recover an overcharge that had been passed on to an indirect purchaser, who could also recover it. *Id.* Second, the "evidentiary complexities and uncertainties" that precluded a pass-on defense in *Hanover Shoe* were "multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of distribution." *Illinois Brick, 431 U.S. at 732*. Faced with the choice of overturning *Hanover Shoe* or barring federal indirect purchaser suits, the Court chose the latter. *Illinois Brick, 431 U.S. at 736-37*. The Court noted that "the question of which persons **[**10]** have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4." *Id. at 728, n.7*. *Illinois Brick* thus did not address federal antitrust standing. *Id.*

Justice Brennan, joined by Justices Marshall and Blackmun, dissented in *Illinois Brick. Id. at 748*. Justice Brennan argued that the majority's bar to indirect purchaser suits "flouts Congress' purpose and severely undermines the effectiveness of the private treble-damages action as an instrument of antitrust enforcement" by precluding injured consumers from recovering damages while leaving middlemen, who may pass on any illegal overcharges, with little incentive to sue. *Id. at 749* (Brennan, J., dissenting). Conceding that "despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable," Justice Brennan concluded that "if the broad language of § 4 means anything, surely it must render the defendant liable to those within the defendant's chain of distribution. It would indeed be 'paradoxical to deny recover[y] to the ultimate consumer while permitting the **[**11]** middlemen a windfall recovery.'" *Id. at 760-61* (Brennan, J., dissenting) (quoting P. Areeda, *Antitrust Analysis: Problems, Text, Cases* 75 (2d ed. 1974)).

The Supreme Court provided its most comprehensive statement on federal antitrust standing in *AGC*. The Court held **[*626]** that a labor union lacked standing to sue a contractors' association under the Sherman Act for an alleged conspiracy to restrain the union's business activities. *AGC, 459 U.S. at 520-21*. The Court noted that when Congress enacted the Sherman Act, it intended established common-law limits on liability to shape the scope of antitrust liability. *AGC, 459 U.S. at 532*. ***HN10***[] The *AGC* Court, accordingly, undertook to "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Id. at 535*. The factors addressed by the Court included: (1) whether the plaintiff is a consumer or competitor in the allegedly restrained market; (2) whether the injury alleged is direct or indirect; (3) whether there are more directly injured plaintiffs with motivation to sue; (4) whether the damages claims are speculative; and (5) whether the plaintiff's claims risk duplicative recoveries and would require a complex **[**12]** apportionment of damages. [1] *Id. at 538-45*. The Court counseled against across-the-board rules, suggesting that courts should "analyze each situation in light of the factors set forth" in the opinion. *Id. at 536 n.33*. Applying all the factors, the Court concluded that the labor union had not suffered an injury compensable under federal ***antitrust law***. *Id. at 545*. Many state courts, including a Minnesota state district court, have since applied the *AGC* factors to determine if an antitrust plaintiff has standing. *See, e.g.*, *Gutzwiller v. Visa U.S.A., Inc., No. C4-04-58, 2004 WL 2114991, at *5-6 (Minn. Dist. Ct. Sept. 15, 2004)*.

---

[1] The Court's wide-ranging discussion did not include a comprehensive list of the factors relied on, but courts and commentators have generally recognized these five. *See, e.g.*, *Am. Ad Mgmt., Inc. v. Gen. Tel. Co., 190 F.3d 1051, 1054-55 (9th Cir. 1999)*; *see also, e.g.*, *McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 850 (3d Cir. 1996)* (identifying different factors).

B. Minnesota ***Antitrust Law***

HN11[] Minnesota ***antitrust law*** is generally interpreted consistently with federal ***antitrust law***. *Minn. Twins P'ship v. State by Hatch, 592 N.W.2d 847, 851 (Minn. 1999)*. As the purposes **[**13]** of Minnesota and federal ***antitrust law*** are the same, it is sensible to interpret them consistently. Minnesota is not required, however, to abide by federal antitrust standing limitations. *See Snyder's Drug Stores, 301 Minn. at 31-32, 221 N.W.2d at 165*. The desire for harmony between federal and state ***antitrust law*** relates more to prohibited conduct than to who can bring a lawsuit. "'The purpose behind both state and federal ***antitrust law*** is to apply a uniform standard of conduct so that businesses will know what is acceptable conduct,'" but "'to achieve this uniformity or predictability, we are not required to define who may sue in our state courts in the same way federal courts have defined who may maintain an action in federal court.'" *Bunkers Glass Co. v. Pilkington, PLC, 75 P.3d 99, 106, 206 Ariz. 9 (Ariz. 2003)* (quoting *Comes v. Microsoft Corp., 646 N.W.2d 440, 446 (Iowa 2002))*; *see Comes, 646 N.W.2d at 446* (noting that the purpose of Iowa's antitrust harmonization statute was to "achieve uniform application of the state and federal laws prohibiting monopolistic practices," not to define who can sue under state ***antitrust law***); *see also* 13A Charles Alan Wright, Arthur R. Miller & Edward H. **[**14]** Cooper, *Federal Practice and Procedure* § 3531.14 (2d ed. 1984) ("Federal courts have stated that state law of standing should be applied as to state rights * * *.").

HN12[] In 1984, our legislature added the words "directly or indirectly" to *Minn. Stat. § 325D.57* to make clear that, contrary to **[*627]** *Illinois Brick*, Minnesota ***antitrust law*** permits indirect purchasers to recover. *Philip Morris Inc., 551 N.W.2d at 497*; Hearing on Sen. F. 1807, Sen. Jud. Comm., 73rd Minn. Leg., Mar. 19, 1984 (minutes) (Statement of Steve Kilgriff, Assistant Attorney Gen.) ("All we're saying is that under Minnesota law we recognize that indirect purchasers should have his or her [sic] rights to determine damages as well as the direct purchaser."). Minnesota is one of 25 states to enact such "*Illinois Brick* repealer" statutes. Daniel R. Karon, *"Your Honor, Tear Down that* Illinois Brick *Wall!" The National Movement Toward Indirect Purchaser Antitrust Standing and Consumer Justice*, *30 Wm. Mitchell L. Rev. 1351, 1361 (2004)*. Eight other "non-repealer" states permit indirect purchasers to sue under state consumer protection statutes or under judicial construction of state antitrust acts. *Id.* Altogether, 33 states and the **[**15]** District of Columbia allow claims by indirect purchasers. *Id.*

This court's only substantive discussion of antitrust standing since the 1984 amendment to *section 325D.57* occurred in *Philip Morris Inc.*, where we noted that Minnesota ***antitrust law*** contains an "expansive grant of standing" designed to protect Minnesota citizens from "sharp commercial practices." *551 N.W.2d at 496-97*. We held that Blue Cross, a nonprofit health services organization, had standing to sue tobacco companies under Minnesota ***antitrust law*** for increased health care costs due to the tobacco companies' conspiracy to suppress research on the deleterious effects of smoking and to manipulate nicotine levels in cigarettes in order to induce addiction in smokers. *Id. at 491-92*. We based our holding on the plain language of *section 325D.57*, stating that "[i]t is clear that this expansive grant of standing reaches the injuries suffered by Blue Cross." *Philip Morris Inc., 551 N.W.2d at 496*.

II.

The district court and court of appeals relied on *AGC* and other federal case law to hold that an antitrust plaintiff must be a consumer or competitor in the market restrained by the antitrust violation. We conclude that both courts **[**16]** misinterpreted Minnesota ***antitrust law*** and that the *AGC* factors do not provide the benchmark for antitrust standing in Minnesota.

A. *AGC*

The district court correctly recognized that *AGC* factors (2) (whether the injury alleged is direct or indirect) and (3) (whether there are more directly injured plaintiffs with motivation to sue) cannot apply in Minnesota because indirect purchasers are explicitly vested with a cause of action under *Minn. Stat. § 325D.57*. The district court's application of *AGC* factors (1) (whether the plaintiff is a consumer or competitor in the allegedly restrained market) and (5) (whether the plaintiff's claims risk duplicative recoveries and would require a complex apportionment of damages), however, was misplaced. For one thing, ***HN13***[] none of the *AGC* factors was intended to be determinative, even under the more restrictive boundaries of federal antitrust standing. The district court, nevertheless, turned *AGC* factors (1) and (5) into absolute requirements for standing under Minnesota ***antitrust law*** by stating that an antitrust plaintiff must be "either a consumer or a customer in the particular industry and there must be neither speculative damages nor risk of duplicative **[**17]** recoveries." The rule espoused by the district court is contrary to the Supreme Court's acknowledgement that "'it is simply not possible to fashion an across-the-board and easily applied standing rule which can serve as a tool of decision for every case,'" *AGC, 459 U.S. at 536 n.33* **[*628]** (quoting Sherman, *Antitrust Standing: From* Loeb *to* Malamud, 51 N.Y.U. L. Rev. 374, 407 (1976), and makes Minnesota antitrust standing *more* restrictive than federal antitrust standing, in contravention of the 1984 amendment to *Minn. Stat. § 325D.57*.

HN14[] Even viewed as guideposts rather than requirements, the *AGC* factors are not harmonious with our ***antitrust law***. For example the first part of *AGC* factor (5) (complexity of apportionment and risk of duplicative recoveries) was at the heart of *Illinois Brick*'s bar to indirect purchaser suits. *Illinois Brick* explained that an indirect purchaser suit is, by nature, complicated and uncertain: "[t]he demonstration of how much of the overcharge was passed on by the first purchaser must be repeated at each point at which the price-fixed goods changed hands before they reached the plaintiff." *431 U.S. at 732-33*. By expressly permitting indirect purchaser suits, our legislature **[**18]** has rejected the notion that Minnesota courts are not to be burdened with the complex apportionment inherent in those suits.

With regard to the risk of duplicative recoveries under *AGC* factor (5), ***HN15***[] *section 325D.57* allows a court to "take any steps necessary to avoid duplicative recovery against a defendant" in a subsequent action arising from the same conduct. To the extent that our courts cannot ameliorate the risk of duplicative recovery, as where parallel proceedings in federal courts or courts in other states may result in later awards based on the same injuries, this risk is inherent in the dual system of private antitrust enforcement created by *Illinois Brick* and *California v. ARC America Corp., 490 U.S. 93, 101, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)* (holding that federal ***antitrust law***'s bar to indirect purchaser suits does not preempt state courts from entertaining such suits). *See Report of the Indirect Purchaser Task Force*, 63 Antitrust L.J. 993, 994 (Spring 1995) (concluding that the current system of antitrust enforcement creates the risk that the full amount of an anticompetitive overcharge, trebled, will be recovered by direct purchasers under federal law and indirect purchasers at every successive stage **[**19]** of distribution under state law). While this risk is a legitimate and important consideration, it is not a risk that our court may remedy by restricting Minnesota ***antitrust law*** in ways that our legislature has not.

As for *AGC* factor (1), the *AGC* Court noted that the plaintiff labor union was "neither a consumer nor a competitor in the market in which trade was restrained" only to highlight that the union may have suffered no injury at all-because it was not clear "whether the Union's interests would be served or disserved by enhanced competition in the market," *459 U.S. at 539*-and to highlight that any injury suffered was not related to the Sherman Act's "central interest in protecting the economic freedom of participants in the relevant market." *Id. at 538*. ***HN16***[] *AGC* did not make a plaintiff's status as a consumer or competitor in the restrained market a sine qua non of antitrust standing. Rather, *AGC* **[**20]** used that status as a tool to compare the plaintiff's alleged injury to the goals of ***antitrust law***. While Minnesota courts should analyze an alleged injury's relation to the goals of ***antitrust law*** by identifying the markets involved, the market analysis is not the focus of the standing inquiry.

HN17[] *AGC* factor (4), whether the damages claims are speculative, is relevant to standing under the Minnesota ***antitrust law***. As we explain below, we conclude that at this stage of litigation Lorix's damage claims are not so speculative as to place her outside the protection of Minnesota ***antitrust law***.

[*629] It is true, as Crompton notes, that "the question of which persons have been injured by an illegal overcharge * * * is analytically distinct from the question of which persons have sustained injuries too remote to give them standing" and that *Illinois Brick* addressed the scope of antitrust injury, not standing, under the Clayton Act. *Illinois Brick, 431 U.S. at 728 n.7*. Crompton urges, therefore, that the 1984 amendment to *Minn. Stat. § 325D.57*, as a response to *Illinois Brick*, has no effect on our standing analysis and that we must apply *AGC*. We do not agree. *AGC* was informed by *Illinois Brick* and repeated, **[**21]** as antitrust standing guidelines, *Illinois Brick*'s reservations about indirect purchaser suits. "In *Illinois Brick* * * * we held that treble damages could not be recovered by indirect purchasers * * * . *The same concerns* should guide us in determining whether the Union is a proper plaintiff under § 4 of the Clayton Act." AGC, 459 U.S. at 544 (emphasis added). We do not believe that the legislature repudiated *Illinois Brick* and invited indirect purchaser suits only for courts to dismiss those suits on the pleadings based on the very concerns that motivated *Illinois Brick.*

We recognize that some state courts have applied the *AGC* factors to state antitrust claims. *See, e.g.*, *Kanne v. Visa U.S.A., Inc., 272 Neb. 489, 723 N.W.2d 293, 297-301 (Neb. 2006)* (holding that the Nebraska Antitrust Act required the court to follow federal courts' construction of the Clayton Act); *Fucile v. Visa U.S.A., Inc., No. 51560-03 CNC, 2004 WL 3030037, at *2 (Vt. Super. Ct. Dec. 27, 2004)* (applying *AGC* factors). Other courts do not apply the *AGC* factors. *See, e.g.*, *Moniz, 484 F. Supp. 2d at 231* (denying defendants' motion to dismiss in a state indirect purchasers class action and stating that defendants' reliance on *AGC* **[**22]** was inapposite). ***HN18***[] We will often look to case law from other states for guidance when our own jurisprudence is undefined. *Gordon v. Microsoft Corp., 645 N.W.2d 393, 402 n.9 (Minn. 2002)*. But we conclude that our jurisprudence in this area is sufficient and, with due respect to courts that have chosen to apply *AGC*, ***HN19***[] we believe application of the *AGC* factors in Minnesota would contravene the plain language of the statute and in some cases thwart the intent of the legislature by barring indirect purchaser suits for the reasons articulated in *Illinois Brick*.

B. Market participant requirement

In upholding the district court, the court of appeals did not rely on the *AGC* factors but stated that "[f]ederal courts have consistently held that an antitrust plaintiff must be a consumer or competitor in the market restrained by alleged antitrust violations." *Lorix, 720 N.W.2d at 18*. The two federal appellate decisions cited by the court of appeals do not compel us to impose a market-participant requirement. The court of appeals quoted *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*, for the proposition that to recover, a plaintiff must suffer "an injury of the type the antitrust **[**23]** laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Lorix, 720 N.W.2d at 18-19*. It does not follow from this proposition that Minnesota ***antitrust law*** provides a remedy only to participants in the immediately restrained market, and *Brunswick* itself mentioned no such restriction. The court of appeals also cited *S.D. Collectibles, Inc. v. Plough, Inc., 952 F.2d 211 (8th Cir. 1991)*. *Lorix, 720 N.W.2d at 19*. In *S.D. Collectibles*, Collectibles was the sole representative in a five-state territory for the manufacturer of Zinca, a zinc oxide sun care product. *952 F.2d at 212*. When Plough obtained the **[*630]** exclusive right to market Zinca in the territory and Collectibles' agreement was terminated, Collectibles sued Plough, alleging antitrust injury. *Id. at 212-13*. The court noted that "[t]he antitrust laws were designed to protect competition and therefore standing is generally limited to actual market participants," *id. at 213*, and held that Collectibles lacked standing because it was neither a consumer of Zinca nor a competitor of Plough, *id. at 214*. Collectibles did not enjoy antitrust protection because it was not a consumer of *any* product related to **[**24]** the antitrust violation. ***HN20***[] *S.D. Collectibles*, whatever its precedential value to this court, cannot be read to foreclose antitrust claims in Minnesota by indirect purchasers of goods manufactured with price-fixed components.

Our decision in *Philip Morris Inc.* further counsels against a rigid market-participant requirement. In *Philip Morris Inc.*, tobacco companies conspired to "suppress research on the deleterious effects of smoking," *551 N.W.2d at 492*, and we held with little discussion that Blue Cross had standing to sue in antitrust based on the increased amounts it paid for healthcare, *id. at 496*. But Blue Cross was a participant in neither the cigarette market (the market in which the tobacco companies participated) nor the healthcare research market (the market restrained by the conspiracy). It is no answer to assert, as Crompton does, that Blue Cross participated in, and the tobacco companies manipulated, the "healthcare market." The patient services market, in which Blue Cross participated, is distinct from the healthcare research market, which the tobacco companies manipulated. [2] Applying Crompton's expansive method of defining markets, we might find standing by noting that Lorix **[**25]** was injured in the "market for rubber-related products," the same market in which Crompton fixed prices. ***HN21***[] Analysis of the markets

---

[2] The complaint in *Philip Morris Inc.* alleged, inter alia, that tobacco companies restrained and suppressed research on the harmful effects of smoking and restrained and suppressed the dissemination of information on the harmful effects of smoking. *551 N.W.2d at 492*. It did not allege that the tobacco companies interfered with or manipulated delivery of patient care.

involved in an antitrust claim helps assess the relation of the alleged injury to the goals of ***antitrust law***, but the lack of a principled way to define the "market restrained by the antitrust violation" means that this analysis alone cannot determine whether a plaintiff has antitrust standing.

III.

The fact that the district court and court of appeals erred in applying *AGC* and imposing a market-participant requirement does not necessarily mean that Lorix has standing. The real difficulty lies in defining the outer limits of indirect purchaser standing in Minnesota. ***HN22***[] "Any person" injured by an antitrust violation may sue under our ***antitrust law***. *Minn. Stat. § 325D.57*. We have recognized and applied **[**26]** the broad effect of the words "any person." *See* *Hyatt v. Anoka Police Dep't, 691 N.W.2d 824, 826 (Minn. 2005)* ("The word 'any' is given broad application in statutes, regardless of whether we consider the result reasonable."); *Group Health Plan, Inc. v. Philip Morris Inc., 621 N.W.2d 2, 8-9 (Minn. 2001)* (stating that "any person" is plain and unambiguous); *Philip Morris Inc., 551 N.W.2d at 496* (applying the plain meaning of *Minn. Stat. § 325D.57* to hold that "[i]t is clear that this expansive grant of standing reaches the injuries suffered by Blue Cross").

HN23[] In spite of the apparently limitless language of *section 325D.57*, however, **[*631]** there are injuries so remotely related to antitrust violations that courts simply cannot provide relief. *Group Health Plan, 621 N.W.2d at 11 n.7* ("[W]e do not hold that the scope of those enforcement statutes is entirely without limit."). Standing under Minnesota ***antitrust law*** must be defined by some prudential limits informed by foreseeability, proximate cause, remoteness, and relation of the injury to the purposes of the ***antitrust law***; otherwise, almost any antitrust violation would provide almost any citizen with a cause of action arising from the resulting **[**27]** ripples of harm throughout the state's economy.

We find it unnecessary today to define the outer limits of antitrust standing in Minnesota, because whatever those limits may be, Lorix falls well within them. Lorix alleges that she is an end user of a consumer good whose price was inflated by anticompetitive conduct earlier in the chain of manufacture. [3] The violation complained of-price fixing-is a per se violation of the law that strikes at the heart of ***antitrust law***'s purpose of protecting competition. *See* *Minn. Stat. § 325D.53, subd. 1(1)(a)* (2006). The injury alleged-overcharge-is exactly the sort that would be expected to flow from the violation.

Furthermore, as an end user, Lorix is the party most likely to be injured by an anticompetitive overcharge because she is the only party in the chain of purchase **[**28]** who cannot pass on part or all of that overcharge. *See* *Illinois Brick, 431 U.S. at 764* (Brennan, J., dissenting) (noting that direct purchasers ordinarily "pass on the bulk of their increased costs to consumers"); *Freeman Industs. v. Eastman Chem. Co., 172 S.W.3d 512, 520 (Tenn. 2005)* (noting that indirect purchasers are frequently the "real victims of the antitrust violations"); Cynthia Urda Kassis, Comment, *The Indirect Purchaser's Right to Sue Under Section 4 of the Clayton Act: Another Congressional Response to* Illinois Brick, *32 Am. U. L. Rev. 1087, 1087 (1983)* ("Price fixing and other antitrust violations most frequently injure * * * those who purchased goods through retailers and other middlemen rather than directly from the antitrust violator."). To find that an end user such as Lorix lacks standing would be to deny an injured party the opportunity to recover while allowing a windfall to middlemen who passed on the overcharge or, more likely, allowing the violator to escape liability entirely when the middlemen decline to pursue relief. We recognize that Crompton's direct purchasers have chosen to pursue relief in federal court, *see* *In re Rubber Chems. Antitrust Litig., 232 F.R.D. at 348*, **[**29]** but this appears to be the exception, not the rule. *See* *Illinois Brick, 431 U.S. at 764* (Brennan, J., dissenting) (noting that middlemen are ordinarily reluctant to sue their suppliers); *Comes, 646 N.W.2d at 450* ("[D]irect purchasers likely will not enforce antitrust laws out of fear of retaliation by their suppliers * * * ."); *Hyde v. Abbott Labs., Inc., 473 S.E.2d 680, 687, 123 N.C. App. 572 (N.C. Ct. App. 1996)* ("[T]here are few, if any, reported instances of a defendant paying treble damages to two different classes of purchasers based on a single

---

[3] We note that the Supreme Court recently opined on the minimum factual allegations that must be pleaded to support a claim of restraint of trade under *section 1* of the Sherman Act. *Bell Atl. Corp. v. Twombly, __ U.S. __, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Because the price-fixing conspiracy at issue here is, in the present posture of the case, undisputed, *Twombly* is not helpful to our decision.

antitrust violation.") (citing Thomas Greene, *Should Congress Preempt State Indirect Purchaser Laws? Counterpoint: State Indirect Purchaser Remedies Should* ***[*632]*** *be Preserved*, 5 Antitrust 25, 26-27 (1990)).

Crompton advances several reasons why Lorix lacks standing to sue. Crompton's primary argument is that the task of tracing the alleged overcharge from the chemical manufacturers to the end user will be extraordinarily complex and result in overly speculative damage calculations. Crompton directs our attention to various cases in the Visa/Mastercard litigation that Crompton asserts are analagous, including that of our own district court in *Gutzwiller, 2004 WL 2114991*. **[**30]** In these cases, consumers alleged that they paid more for consumer goods due to Visa and Mastercard's illegal tying of debit card services with credit card services. These cases, for the most part, have applied the *AGC* factors to hold that the consumers' injuries are too remote and speculative to afford antitrust standing. *See, e.g.*, *Gutzwiller, 2004 WL 2114991, at *9*; *Beckler v. Visa U.S.A. Inc., No. Civ. 09-04-C-00030, 2004 WL 2475100, at *4 (N.D. Dist. Ct. Sept. 21, 2004)*; *Fucile, 2004 WL 3030037, at *3-4*.

The *AGC* factors, as we have explained, do not provide the benchmark for standing under Minnesota ***antitrust law***. *Gutzwiller*, however, does provide an example of an injury that is most likely too remote and speculative to afford standing. The plaintiffs in *Gutzwiller* did not purchase, directly or indirectly, any product or service provided by or manufactured with components from Visa or Mastercard. *2004 WL 2114991, at *6*. Rather, they alleged that the overcharges forced upon merchants by Visa and Mastercard were passed on to consumers in the form of higher prices on essentially every good sold in the state of Minnesota, even those purchased with cash. *Id. at *2*. Thus, the market **[**31]** affected by the anticompetitive conduct was in essence the market for all goods bought and sold in Minnesota. ***HN24***[] Whatever the precise prudential limits on Minnesota antitrust standing, we do not believe that the legislature intended to create "consumer standing" by allowing every person in the state to sue for an antitrust violation simply by virtue of his or her status as a consumer.

Lorix's claim, in contrast, is relatively focused: it is limited to purchasers of tires manufactured with price-fixed chemicals. According to Crompton's characterization of Lorix's allegations, Lorix will need to trace overcharges from chemical manufacturers to tire companies, then to tire wholesalers and distributors, then to tire retailers, and finally to consumers. [4] In principle and in practice, this is a far cry from the situation in *Gutzwiller*, where overcharges from Visa and Mastercard would need to be traced through every merchant to every good purchased by every consumer in the state of Minnesota. Lorix, furthermore, alleges price fixing, which at least in theory provides a sounder basis for calculation of damages than the illegal tying arrangement alleged in *Gutzwiller*. Tying cases present unique **[**32]** damages issues because the plaintiff must not only demonstrate that the tying product possesses monopolistic leverage in the market, but also prove the cost or value of **[*633]** the tied products free from the unlawful arrangement. *See generally* *Will v. Comprehensive Accounting Corp., 776 F.2d 665, 670-73 (7th Cir. 1985)* (describing the process of proving damages in a tying case); *Kypta v. McDonald's Corp., 671 F.2d 1282, 1284-85 (11th Cir. 1982)* (same).

Nor can we accept, in the context of a motion to dismiss, Crompton's assertion that Lorix's damages are so speculative **[**33]** as to render proof impossible. Drawing all assumptions and inferences in favor of Lorix, as we must, it is possible that the discovery process will reveal the amount of overcharge from Crompton, the chain of distribution through which the overcharge flowed to Lorix, the degree to which the overcharge may have been absorbed by more direct purchasers, and the impact of other market factors on the price of tires manufactured with price-fixed chemicals. *See* *Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1171 (9th Cir. 2002)* (refusing to find damages too speculative at motion to dismiss stage because antitrust plaintiffs must be afforded an opportunity to present evidence to support their allegations); *D.R. Ward Const. Co. v. Rohm & Haas Co., 470 F. Supp. 2d 485, 504 (E.D. Pa. 2006)* ("Nor is this Court able to conclude as a matter of law at the motion to dismiss stage that a determination of the existence and amount of any overcharge suffered by the instant plaintiffs requires

---

[4] Lorix indicated at oral argument that her proposed class did not include purchasers of tires attached to used cars, and that any suggestion to the contrary in her complaint was a "drafting error." We find this limitation sensible and are confident the district court can craft other sensible limits on the proposed class. We also note that Lorix has apparently abandoned her earlier position, espoused at the court of appeals, that any Minnesota citizen could sue Crompton because the price-fixing raised the price of tires, which raised the price of transportation, which raised the price of all goods transported by truck within the state.

inappropriate guesswork or unmanageably complex analyses, particularly without the benefit of any discovery or expert testimony.").

Ultimately, Crompton's argument that Lorix's alleged damages are too complex and remote **[**34]** to be remedied simply repeats the concerns that motivated *Illinois Brick* and that our legislature, along with many others, has rejected by permitting indirect purchaser litigation. Crompton distinguishes this from other indirect purchaser actions by noting that there are more stages of distribution through which to trace the alleged overcharge. This difference is one of degree, not kind, and Crompton has not persuaded us that the alleged injuries are so far removed from the alleged price fixing as to be unreasonably remote.

Crompton also attempts to wash its hands of the effects of the alleged price fixing by stating that it does not make, market, distribute, or sell the product (tires) that Lorix purchased. We ascribe little meaning to this formality. ***HN25***[] Antitrust laws, federal and state, provide a remedy for consumers who have purchased goods manufactured with price-fixed components. *See, e.g.*, *D.R. Ward Const. Co., 470 F. Supp. 2d at 490-91, 505, 509* (denying defendants' motion to dismiss, for lack of standing, claims under the Arizona, Tennessee, and Vermont antitrust acts by consumers who purchased products containing price-fixed plastic additives); *Fed. Trade Comm'n v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 49 (D.D.C. 1999)* **[**35]** (allowing, under Minnesota state ***antitrust law***, claims for civil penalties and damages by the state of Minnesota on behalf of the state and indirect purchasers against suppliers of pharmaceutical ingredients); *Carnivale Bag Co., Inc. v. Slide-Rite Mfg. Corp., 395 F. Supp. 287, 288-89, 294 (S.D.N.Y. 1975)* (holding that purchasers of zippers manufactured with price-fixed "slider" components had standing to sue slider manufacturer). We find it beside the point that, in this case, the price-fixed component may or may not be present in the finished product. ***HN26***[] An antitrust injury occurs when a purchaser is overcharged as a result of anticompetitive conduct, not when she physically acquires a price-fixed good. An antitrust violator should not escape liability simply because, by happy accident, its price-fixed goods **[*634]** are consumed in the manufacturing process.

We find it instructive that the 1984 amendment to *Minn. Stat. § 325D.57* was intended to restore Minnesota ***antitrust law*** to its pre-*Illinois Brick* contours. *See* Hearing on Sen. F. 1807, Sen. Jud. Comm., 73rd Minn. Leg., Mar. 19, 1984 (minutes) ("We don't want to be creating causes of action where they wouldn't have existed prior to the *Illinois* ***[**36]*** *Brick* case."). Claims of overcharge due to price fixing of components several steps removed from the ultimate consumer proceeded past motions to dismiss and for summary judgment in federal courts prior to *Illinois Brick*. *See, e.g.*, *Illinois v. Ampress Brick Co., Inc., 536 F.2d 1163, 1167 (7th Cir. 1976)* (holding that various governmental entities who allegedly purchased buildings at prices inflated due to defendants' fixing of prices of concrete blocks had standing to sue under the Sherman Act), *rev'd sub nom* *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*; *In re W. Liquid Asphalt Cases, 487 F.2d 191, 194-95, 200 (9th Cir. 1973)* (holding that plaintiffs, states that accepted bids for road construction projects including liquid asphalt supplied to contractors at inflated prices, had standing to sue asphalt suppliers); *In re Master Key Antitrust Litig., No. 45, 1973 U.S. Dist. LEXIS 12175, 1973 WL 855, at *1, 6 (D. Conn. 1973)* (denying defendants' motion for summary judgment in an action by plaintiffs who alleged that they paid higher prices for buildings as a result of overcharges due to defendants' conspiracy to fix prices of locks, keys, and latches); *Armco Steel Corp. v. North Dakota, 376 F.2d 206, 207-08 (8th Cir. 1967)* **[**37]** (allowing action by a state against a steel company for overcharges in bids submitted for highway construction projects involving price-fixed metal products).

Lorix's claims also satisfy the "target area" test commonly employed in federal courts prior to *Illinois Brick*. Under the "target area" test, a plaintiff must prove "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. * * * It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'" *Brunswick Corp., 429 U.S. at 489* (internal citations omitted) (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969))*; *see also, e.g.*, *GAF Corp. v. Circle Floor Co., Inc., 463 F.2d 752, 757-58 (2d Cir. 1972)* ("Whether viewed in terms of 'lack of standing' or the absence of *antitrust* damages, the courts, in denying recovery to various kinds of plaintiffs, have sought to confine recovery to those who have been injured by restraints on competitive forces in the economy."); *Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073, 1076 (9th Cir. 1970)* (noting that the right to sue under section 4 of the Clayton Act was **[**38]** restricted to those persons "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry") (internal quotations omitted). Justice Brennan, dissenting in *Illinois Brick*, noted that "the more liberal, and more widely accepted [test for antitrust standing focused] on whether the plaintiff is within the 'target area' of the defendant's violation." *431 U.S. at 760* (Brennan, J., dissenting). While we decline to adopt the target area test, we find it noteworthy that Lorix's injury-artificially inflated price of a consumer good-is precisely one which Crompton's price fixing would foreseeably have caused and which ***antitrust law*** is intended to prevent and remedy.

We do not mean to minimize the formidable complexities of proof posed by Lorix's claim. Complexity, however, is **[*635]** hardly foreign to antitrust litigation. "Complex antitrust cases * * * invariably involve complicated questions of causation and damages." *Forsyth v. Humana, Inc., 114 F.3d 1467, 1478 (9th Cir. 1997)*. We have confidence in the ability of our district courts to manage difficult cases. "The complexity of proving damages through multiple levels of sales is a daunting task, **[**39]** but one to which our courts are equal." *Bunker's Glass Co., 75 P.3d at 108*.

Our decision does not mean that Lorix will recover, nor do we intimate any view regarding the outcome of this litigation. [5] It is entirely possible that she cannot prove her damages, or that they are minimal. [6] If her claims are purely speculative or unmanageably complex, they will be barred at the summary judgment stage. ***HN27***[] "The plaintiffs bear the burden of proving the damages caused by a defendant's wrongful conduct. If the plaintiffs cannot present admissible and convincing proof, they cannot recover." *Bunker's Glass Co., 75 P.3d at 108*. We also expect, in light of the variety of tires available from different manufacturers through different retail outlets, that Lorix faces a challenge meeting the class certification requirements of *Minn. R. Civ. P. 23.01*. *See* William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of* Illinois Brick, 67 Antitrust L.J. 1, 3 (1999) ("[T]rial courts in a number of the jurisdictions have effectively terminated indirect purchaser class actions by refusing to certify them [as class actions]."). We decide today only that our ***antitrust law*** affords **[**40]** her an opportunity to try. We hold that Lorix has standing under *Minn. Stat. § 325D.57* to pursue her claim.

Reversed and remanded.

End of Document

---

[5] We recognize that the cost and difficulty of settlement administration, combined with attorneys' fees, mean that indirect purchaser suits sometimes result in no meaningful recovery for consumers. *See* *Crouch, 2004 NCBC LEXIS 6, 2004 WL 2414027, at *12* ("[T]he complexities and administrative costs and difficulties [in administering settlements] result in settlements that are something less than sterling from the consumer's point of view."); William M. Landes and Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. Chi. L.Rev. 602, 634 (1979) ("In a class action, much of even the compensatory portion of the judgment may end up in the pockets of lawyers or in state treasuries, rather than in the pockets of the people who were actually harmed by the antitrust violation."). We also recognize that indirect purchasers suits sometimes use the threat of unmanageable and complex litigation to compel settlement. *See* Milton Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits--The Twenty-Third* ***[**41]*** *Annual Antitrust Review*, 71 Colum. L. Rev. 1, 9 (1971). Whatever benefits or detriments indirect purchaser litigation confers on society, it is not the place of this court to restrict remedies that the legislature has made available.

[6] The court in *Crouch* summarized the difficulties:

> First, the price-fixed item is a product consumed or altered in the manufacturing process. Accordingly, its use will vary with the type of rubber product being made. It may also vary with the nature of the product (chemical) being used and how it is used in the manufacturing process. Different direct purchasers (here, tire manufacturers) might use the various chemicals in various ways in differing products.

*2004 NCBC LEXIS 6, 2004 WL 2414027, at *21*. The *Crouch* court also estimated, based on the price of tires, amount of rubber processing chemicals present, and capacity for price inflation in the industry, that an individual purchaser may have been damaged by $ 0.01 to $ 0.11 per tire. *Id.* While we take note of the *Crouch* court's thorough, thoughtful opinion, it includes facts that are not part of the record before us.

U.S. Info. Sys. v. IBEW Local Union No. 3

United States District Court for the Southern District of New York

August 3, 2007, Decided

00 Civ. 4763 (RMB) (JCF)

Reporter

2007 U.S. Dist. LEXIS 56229 *; 2010-1 Trade Cas. (CCH) P76,916; 2007 WL 2219513

U.S. INFORMATION SYSTEMS, INC., ODYSSEY GROUP, INC. and BLUE DIAMOND FIBER OPTIC NETWORKS, INC., Plaintiffs, - against - INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NUMBER 3, AFL-CIO, A R COMMUNICATION CONTRACTORS INC., ADCO ELECTRICAL CORPORATION, FIVE STAR ELECTRIC CORPORATION, FOREST ELECTRIC CORPORATION, HUGH O'KANE ELECTRIC COMPANY LLC, IPC COMMUNICATIONS, INC. and NEAD INFORMATION SYSTEMS, Defendants.

Subsequent History: Adopted by, Summary judgment granted by *United States Info. Sys. v. IBEW Local Union No. 3, 2007 U.S. Dist. LEXIS 69760 (S.D.N.Y., Sept. 18, 2007)*

Prior History: *U.S. Info. Sys. v. IBEW Local Union No. 3, 2006 U.S. Dist. LEXIS 65689 (S.D.N.Y., Sept. 5, 2006)*

Core Terms

contractors, telecommunications, Electric, installation, antitrust, conspiracy, general contractor, employees, customers, exemption, bid, work overtime, hire, electrical contractor, defendants', summary judgment, plaintiffs', contracts, landlord, tel-data, low-voltage, projects, collective bargaining agreement, bargaining, overtime, alleged conspiracy, project manager, building owner, job site, non-statutory

Counsel: **[*1]** For U.S. Information Systems, Inc., Plaintiff: John Ely Andrews, LEAD ATTORNEY, Maxwell M. Blecher, Blecher & Collins, P.C, Los Angeles, CA; Laura G. Weiss, LEAD ATTORNEY, Law Offices of Laura G. Weiss, Pearl River, NY.

For Odyssey Group, Inc., Plaintiff: Gerald Padian, LEAD ATTORNEY, Tashjian & Padian, New York, NY; John Ely Andrews, LEAD ATTORNEY, Maxwell M. Blecher, Blecher & Collins, P.C, Los Angeles, CA; Laura G. Weiss, LEAD ATTORNEY, Law Offices of Laura G. Weiss, P.C., Pearl River, NY.

For Blue Diamond Fiber Optic Networks, Inc., Plaintiff: John Ely Andrews, LEAD ATTORNEY, Maxwell M. Blecher, Blecher & Collins, P.C, Los Angeles, CA.

For International Brotherhood of Electrical Workers Local Union Number 3, AFL-CIO, Defendant: Barry J. Brett, Stephen F. Harmon, LEAD ATTORNEYS, Jenkens & Gilchrist Parker Chapin, LLP, New York, NY; Daniel N. Anziska, LEAD ATTORNEY, Troutman Sanders LLP, New York, NY.

For Adco Electrical Corporation, Defendant: Edward T. Byrnes, LEAD ATTORNEY, Murtagh, Cohen & Byrne, Rockville Centre, NY.

For Five Star Electric Corporation, Defendant: Steven I. Levin, LEAD ATTORNEY, Levin and Glasser, P.C., New York, NY.

For Forest Electric Corporation, Defendant: Kevin **[*2]** J. Toner, LEAD ATTORNEY, Heller, Ehrman LLP, New York, NY.

For IPC Communications, Inc., Defendant: James P. Bonner, Jill M. Levy, LEAD ATTORNEYS, Shalov, Stone & Bonner LLP, New York, NY.

For Nead Information Systems, Defendant: Jeffrey Morton Eilender, Richard Henry Dolan, LEAD ATTORNEYS, Schlam, Stone & Dolan, LLP, New York, NY.

For A R Communication Contractors Inc., Hugh O'Kane Electric Company LLC, Defendants: Brian Patrick Craig, LEAD ATTORNEY, Goldberg & Connolly, Rockville Centre, NY; Thomas P. Mohen, LEAD ATTORNEY, Mohen, Craig & Treacy LLP, Locust Valley, NY.

For A R Communication Contractors Inc., Counter Claimant: Brian Patrick Craig, LEAD ATTORNEY, Goldberg & Connolly, Rockville Centre, NY; Thomas P. Mohen, LEAD ATTORNEY, Mohen, Craig & Treacy LLP, Locust Valley, NY.

For U.S. Information Systems, Inc., Odyssey Group, Inc., Counter Defendants: Laura G. Weiss, LEAD ATTORNEY, Law Offices of Laura G. Weiss, Pearl River, NY.

Judges: JAMES C. FRANCIS IV, UNITED STATES MAGISTRATE JUDGE.

Opinion by: JAMES C. FRANCIS IV

Opinion

REPORT AND RECOMMENDATION

TO THE HONORABLE RICHARD M. BERMAN, U.S.D.J.:

The plaintiffs in this action are contractors that employ members of the Communication Workers of America, AFL-CIO (the **[*3]** "CWA") to install low-voltage telecommunications and data ("tel-data") wiring for commercial customers in the New York City metropolitan area. The defendants are Local Union Number 3 ("Local 3") of the International Brotherhood of Electrical Workers, AFL-CIO (the "IBEW") and several electrical contractors that employ Local 3 members. [1] The plaintiffs seek damages and injunctive relief, alleging that the defendants conspired to exclude CWA contractors from the tel-data installation market in violation of § 1 of the Sherman Antitrust Act, [2] *15 U.S.C. § 1*, and New York State's Donnelly Act, *N.Y. Gen. Bus. Law § 340*. The plaintiffs have also brought common law claims for tortious interference with contract and prospective business advantage. The defendants have moved for summary judgment on each of the plaintiffs' claims. [3] For the reasons set forth below, the defendants' motion should be granted.

Background

A. *Tel-Data and Electrical Installation Markets*

---

[1] I will refer to contractors that use Local 3 labor as "Local 3 contractors," and to contractors that use CWA labor as "CWA contractors."

[2] The plaintiffs initially asserted claims under both *§ 1* and *§ 2 of the Sherman Antitrust Act* but have since withdrawn their *§ 2* claims. *U.S. Info. Sys. v. IBEW Local Union No. 3, No. 00 Civ. 4763, 2006 U.S. Dist. LEXIS 52870, 2006 WL 2136249, at *1 n.1 (S.D.N.Y. Aug. 1, 2006)*.

[3] All **[*4]** claims against defendants IPC Communications, Inc. ("IPC") and Forest Electric Corporation have been dismissed by stipulation.

Commercial construction projects in New York City are usually overseen by a general contractor or construction manager, who is hired by the owner to coordinate the process of construction. (Defendants' Joint Statement of Facts About Which There is No Genuine Dispute ("Def. 56.1 Stmt."), P 4; Plaintiffs' Rule 56.1 Counterstatement in Response to Defendants' Rule 56.1 Statement ("Pl. 56.1 Stmt."), P 4). The general contractor then subcontracts specific parts of the job to trade contractors that perform services such as electrical, plumbing, and dry wall installation. Electrical contractors such as the defendants generally employ trained electricians who are members of Local 3 to install high-voltage wiring and equipment. (Def. 56.1 Stmt., P 7; Pl. 56.1 Stmt., P 7).

Commercial construction projects often also require the installation of low-voltage electrical systems, including tel-data, fire alarm, and security systems. (Def. 56.1 Stmt., P 9; Pl. 56.1 Stmt., P 9). Some electrical contractors, including defendants **[*5]** Hugh O'Kane Electric Company LLC ("Hugh O'Kane"), Five Star Electric Corporation ("Five Star"), and ADCO Electrical Corporation ("ADCO"), also hire members of Local 3 to perform low-voltage installation. (Def. 56.1 Stmt., PP 13, 174, 215, 349; Pl. 56.1 Stmt., PP 13, 174, 215, 349). Local 3 electricians who perform low-voltage work are paid the same wage that they make when performing high-voltage work. Low-voltage systems can also be installed by members of the CWA who typically receive lower hourly wages than Local 3 members. (Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ("Pl. Memo.") at 6, 8-9). According to the plaintiffs, this is because

> [t]raditional electrical installation, with its emphasis on high voltage work, requires a variety of skills obtained through many years of training and apprenticeship. Because of training and the safety risks associated with high voltage, Local 3 journeymen electricians command a premium wage. . . . [L]ow voltage workers do not have the same skill levels or face the risks associated with high voltage and accordingly, their compensation is lower. This enables CWA contractors who are not bound by the wage strictures of **[*6]** Local 3 to significantly underbid Local 3 contractors[.]

(Pl. Memo. at 8-9).

There is a long history of jurisdictional disputes between the CWA and the IBEW, of which Local 3 is a chapter. (Def. 56.1 Stmt., PP 146-147; Pl. 56.1 Stmt., PP 146-147). According to Local 3, low-voltage electrical work has historically been the province of the IBEW. Local 3 claims that in recent years the CWA has "challenge[d] the IBEW for this work, often succeeding in obtaining it, ousting the IBEW electricians and performing the work at pay rates that were, and still are, substandard by any relevant criteria." [4] (Affidavit of Thomas Van Arsdale dated Aug. 23, 2005 ("Van Arsdale Aff."), P 19). Although the IBEW and the CWA signed a treaty designed to resolve the dispute between the two unions (Affidavit of Morton Bahr dated March 27, 2007 ("Bahr Aff."), attached as Exh. 33 to Declaration of John E. Andrews dated April 2, 2007 ("Andrews Decl."), P 13; Van Arsdale Aff., P 21), the plaintiffs claim that Local 3 has tried to "exclude non-Local 3 labor" from the industry. (Pl. Memo. at 34-40). This case involves the plaintiffs' claim that Local 3 has enlisted the aid of electrical contractors in an attempt to **[*7]** force CWA contractors out of the telecommunications installation market.

B. *Plaintiffs' Claims*

The plaintiffs contend that Local 3 has conspired with the defendant contractors "to coerce and induce building owners and tenants, building managers, general contractors, information technology consultants, and others in the construction industry to exclude the plaintiffs from the market for telecommunications installation work." (Second Complaint dated Feb. 22, 2002 ("Sec. Compl."), P 36). According to the plaintiffs, CWA contractors have been able to capture a substantial portion of the New York low-voltage installation market in recent years by submitting lower bids than Local 3 contractors, in part because, as explained above, their labor costs are lower. (Pl. Memo. at 9). The plaintiffs contend that the defendants, afraid that they would lose tel-data work to lower-priced CWA contractors,

> have resorted to measures that allow them to win bids for low voltage projects without lowering their price, specifically, **[*8]** their tried and true tactic of creating fear among owners, consultants and general contractors

---

[4] The plaintiffs, by contrast, contend that "[i]n the early days of telecommunications, installations were done only by the telephone company monopolies utilizing CWA labor." (Pl. Memo. at 8).

> that completion deadlines will be missed, sabotage and vandalism will occur and significant costs [will be] incurred if a CWA contractor is awarded the job.

(Pl. Memo. at 7). They assert that the defendants' "key tactic" consists of "threats communicated to potential customers or their agents that Local 3 workers employed by the defendant contractors to do the high voltage electric work would take measures to cause scheduling delays resulting in cost overruns if a non-Local 3 contractor was chosen to perform the telecommunications work on a particular project." (Pl. Memo. at 1). The plaintiffs also contend that, in some instances, Local 3 members disrupted work when tel-data contracts were awarded to CWA contractors and that, as a result, those contracts were rescinded and awarded to Local 3 contractors instead. (Pl. Memo. at 2).

C. *Plaintiffs' Evidence*

1. *A R Communication Contractors Inc.*

Defendant A R Communication Contractors Inc. ("A R") performs only low-voltage telecommunications work. (Def. 56.1 Stmt., P 166; Pl. 56.1 Stmt., P 166). However, it uses Local 3 labor. The plaintiffs have **[*9]** submitted an affidavit from Terence McDonough, the president of plaintiff Odyssey Group, Inc. ("Odyssey"), in which he states that Odyssey bid on "turret installation work" on the "ABN Amro project" at 1290 Avenue of the Americas. (Affidavit of Terence McDonough dated Dec. 8, 2000 ("McDonough Aff."), attached as Exh. 64 to Andrews Decl., P 5). Odyssey submitted the bid to Syntegra, another contractor that had been "awarded the contract for the sale of turret equipment." (McDonough Aff., P 5). Mr. McDonough states that "a Syntegra official informed [him] that a business agent of IBEW Local No. 3 had threatened ABN Amro that the project would not be completed on time unless IBEW Local No. 3 labor was used for all of the telecommunications installation work on the project." (McDonough Aff., P 5). The turret installation work was then awarded to A R allegedly "because of the 'Local 3 issue.'" (McDonough Aff., P 5).

2. *ADCO*

The only evidence related to defendant ADCO involves the NBC Experience project at 30 Rockefeller Plaza. (Def. 56.1 Stmt., PP 196-197; Pl. 56.1 Stmt., PP 196-197). NBC hired plaintiff U.S. Information Systems ("USIS") to do the telecommunications installation work. (Affidavit **[*10]** of Stan Walczak dated April 15, 1999 ("Walczak Aff."), attached as Exh. 56 to Andrews Decl., P 7). USIS began work in February 1999. (Walczak Aff., P 8). At that time, ADCO had already been working on the NBC project for four or five months. (Excerpts of Deposition of Stanley Walczak dated Aug. 2, 2002 ("Walczak Dep."), attached as Exh. 30 to Andrews Decl. and Exh. 47 to Declaration of Kevin J. Toner dated Feb. 16, 2007 ("Toner Decl."), at 32; Walczak Aff., P 4). During those months, ADCO electricians regularly worked overtime as needed to "[s]upport other trades and stay on schedule." [5] (Walczak Dep. at 32; Walczak Aff., P 4).

On February 1, when CWA members arrived on the job site, an ADCO foreman complained to ADCO project manager Tom Conte and to Stan Walczak, a Senior Project Manager in the NBC Facilities Department, that "USIS' employees were performing work that was not within the jurisdiction of the CWA, but rather, within the jurisdiction of Local 3 employees." (Walczak Aff., **[*11]** P 9; Excerpts of Deposition of Thomas Conte, attached as Exh. 20 to Toner Decl., at 95). The foreman allegedly informed Mr. Walczak that "Local 3 employees . . . would not work overtime and would engage in work slowdowns as long as USIS' employees continued performing the telecommunications work in question." (Walczak Aff., P 9). On that day, ADCO electricians worked half an hour before and after the standard workday in order to supply power and light for other tradespeople working at the site, but performed no additional overtime. (Def. 56.1 Stmt., P 198; Pl. 56.1 Stmt., P 198).

On February 2, 1999, ADCO transferred six of the electricians who had refused to perform overtime to another project. (Def. 56.1 Stmt., P 199; Pl. 56.1 Stmt., P 199). Despite this measure, ADCO workers continued to refuse to work overtime; according to the plaintiffs, all of the ADCO electricians left the job site at approximately 3:15 p.m. for the next week to ten days. (Walczak Dep. at 42, 75; Walczak Aff., P 11; Affidavit of Thomas Yuen dated April 9,

---

[5] In many cases, construction projects are placed on an accelerated schedule, and contractors must use overtime labor in order to complete the project on time. (Def. 56.1 Stmt., P 8; Pl. 56.1 Stmt., P 8).

1999 ("Yuen Aff."), attached as Exh. 53 to Andrews Decl., P 9). NBC replaced USIS with ADCO for the telecommunications work, and the work slowdowns ceased. **[*12]** (Walczak Aff., PP 12, 14; Letter of Frank Lazzaro dated Feb. 18, 1999, attached as Exh. 57 to Andrews Decl.). ADCO did not directly request that NBC terminate the USIS contract; NBC did so because ADCO employees' refusal to work overtime jeopardized the construction schedule. (Walczak Dep. at 79, 99, 100). ADCO agreed to "do the balance of the work for the same price as USIS." (Walczak Dep. at 45-46, 82; E-mail of Stan Walczak dated Feb. 8, 1999, attached as Exh. 55 to Andrews Decl.).

3. *Five Star*

The evidence against Five Star involves the Hotel Sofitel project. After USIS was awarded the telecommunications installation contract on the project, Five Star employees allegedly shut down elevators and refused to supply power to the construction site on a number of occasions, apparently at the direction of Howie Tensor, the Five Star foreman. (Excerpts of Deposition of Fred Lott ("Lott Dep."), attached as Exh. 15 to Andrews Decl., at 105, 109-11, 117-19, 171). In addition, Five Star's electricians refused to work overtime. [6] (Lott Dep. at 139). Fred Lott, construction manager for the building owner, testified that Mr. Tensor told him that Robert King, the Five Star project manager, had directed **[*13]** him not to supply power or bring workers to the job site until the issue with USIS had been resolved. (Lott Dep. at 104-08). However, Mr. Lott also testified that other representatives of Five Star told him that the problem was that Local 3 had refused to provide the company with overtime labor because the telecommunications work had been given to USIS. (Lott Dep. at 108, 151-53, 326-27). [7]

Mr. King met with Mr. Tensor and Rodney Graves, the assistant superintendent, and asked them to speak to the electricians who were refusing to work overtime to see if they could "do something about it." (Excerpts of Deposition of Robert King ("King Dep."), attached as Exh. 11 to Andrews Decl., at 118). The electricians indicated to Mr. Tensor and Mr. Graves that they would not work "as long as CWA is present." (King Dep. at 120; Meeting Notes dated Nov. 29, 1999, attached as Exh. 57 to Andrews Decl.; Excerpts of Deposition of John Lagana ("Lagana Dep."), attached as Exh. 12 to Andrews Decl., at 1142). At a meeting held to discuss the issue, Mr. Graves "assured [Mr. Lott and others] that Local 3 would be sure that the project was not completed if the work was not taken away from USIS," and he made references to elevator cables being cut, things going missing, and people refusing to work. (Lott Dep. at 139-40). Mr. Lott interpreted this as a threat and also felt that Mr. Graves was threatening him personally. (Lott Dep. at 139-42, 160-61, 187). According to Mr. Lott, Mr. King "tried to quiet Mr. Graves down" **[*15]** during this meeting. (Lott Dep. at 142). Eventually, after discussing the matter with Thomas Van Arsdale, business manager of Local 3, Mr. King removed Mr. Graves from the project because "that was not the way that [Mr. King] chose to do business." (Lott Dep. at 155, 332).

At a meeting with representatives of the building owner, LMB indicated that if USIS and Five Star were to continue working on the project together, "concessions would have to be made to [Local 3]." (Lott Dep. at 180). The parties at that meeting discussed the possibility of making a contribution to the Local 3 retirement fund and giving the "wire pull" portion of the telecommunications contract to Five Star and the "terminations" portion to USIS. (Lott Dep. at 180-83, 281). An e-mail from Keith Fordsman, a project manager for Constructa, states that Local 3 believed that a specific task that had been assigned to USIS was a "Local 3 work task" and that he had "negotiated a middle ground with Local 3." (E-mail of Keith Fordsman dated June 13, 2000, attached as Exh. 58 to Andrews Decl.). It is not clear what that "middle ground" entailed, but it appears that Five Star did ultimately perform some part of the telecommunications **[*16]** installation work on the project. (Lott Dep. at 294, 312-13).

4. *Hugh O'Kane*

---

[6] During the same time period, telecommunications cables, light fixtures, and "bathroom speakers" disappeared from the job site. (Lott Dep. at 133-36).

[7] After these problems began, the vice-president of Lehrer McGovern Bovis ("LMB"), the general contractor on the project, wrote to Arthur Blee of Constructa, Inc. ("Constructa"), a representative of the building owner, stating that "LMB verbally advised Constructa . . . on numerous occasions that it would not be wise to award this contract to a non-Local 3 contractor." The letter lists a number of problems encountered as a result of the decision to use CWA labor, including the refusal of Local 3 electricians to perform overtime when asked, and states that "there is no way that LMB can force the men to work if they don't want to." (Letter of Harold Lyons **[*14]** dated Nov. 29, 1999 ("Lyons Letter"), attached as Exh. 58 to Andrews Decl.).

The evidence against defenant Hugh O'Kane involves a project for Qwest Communications International, Inc. ("Qwest") at 32 Avenue of the Americas. Although Hugh O'Kane was initially hired as the telecommunications contractor on that project, Qwest replaced the company with plaintiff Blue Diamond Fiber Optic Networks, Inc. ("Blue Diamond") because of problems with Hugh O'Kane's performance. (Declaration of Patrick Marshall dated Aug. 20, 2002 ("Marshall Decl."), attached as Exh. 40 to Andrews Decl., P 5). After the change, Patrick Marshall, the Northeast Region Splice Coordinator for Qwest, did a "walk-through" of the building with several Blue Diamond employees and sub-contractors. During this walk-through, he was informed by the Qwest project manager that the Local 3 shop steward employed by Hugh O'Kane had "threatened that there would be trouble in the building if Blue Diamond were permitted to perform any work at this location." (Marshall Decl., PP 6-7). Before Blue Diamond started working on the project, "Local 3 members began slowing work down at 32 Avenue of the Americas and at other Qwest projects all **[*17]** over Manhattan" by calling in sick or refusing to work overtime. (Marshall Decl., P 8; Excerpts of Deposition of Richard Mullarkey ("Mullarkey Dep."), attached as Exh. 36 to Toner Decl., at 185). As a result, the telecommunications work on the Qwest project was reassigned to Hugh O'Kane. (Marshall Decl., P 11). After that, the problems with Local 3 members promptly ceased. (Marshall Decl., P 12).

5. *Nead Information Systems, Inc.*

Nead Information Systems ("NIS") is a telecommunications contractor, while Nead Electric is an electrical contractor, and both employ Local 3 members. Only NIS is a defendant in this case. The parties dispute whether NIS can be held liable with respect to projects that involved only Nead Electric. (Def. 56.1 Stmt., PP 356-365; Pl. 56.1 Stmt., PP 356-365; Joint Memorandum of Law in Support of Defendants' Motion for Summary Judgment ("Joint Def. Memo.") at 19).

a. *Agency.com*

Both NIS and Nead Electric may have bid on a project for Agency.com (Excerpts of Deposition of Liz Pastore ("Pastore Dep."), attached as Exh. 21 to Andrews Decl. and as Exh. 38 to Toner Decl., at 46), but only Nead Electric actually performed work on the project. (Def. 56.1 Stmt., PP 371-372). **[*18]** At some point, Structure Tone, the general contractor, told Liz Pastore, facilities manager for Agency.com, that she should "use Local 3 for cabling," but did not specifically reference Nead. (Pastore Dep. at 39, 190). Agency.com nevertheless awarded the telecommunications contract to USIS. (Lagana Dep. at 944; Pastore Dep. at 86). After USIS workers arrived on the job, almost all of the Nead electricians already working on the project refused to work overtime, causing the project to run behind schedule. [8] (Lagana Dep. at 944-45; Pastore Dep. at 63, 65-68, 169). Nead put more men on the project during the day to make up for the lack of workers willing to work overtime. (Pastore Dep. at 194). Structure Tone told Ms. Pastore that these problems were a result of the fact that she had hired a non-Local 3 contractor. (Pastore Dep. at 121, 134, 218).

b. *Random House (280 Park Avenue)*

The only evidence that relates to the project for Random House is the testimony of Peter Babigian of Walsh-Lowe, an IT consulting firm, that at a meeting with Random House representatives, the general **[*19]** contractor directed Walsh-Lowe to limit bidding for the telecommunications installation at 299 Park Avenue and 280 Park Avenue to Local 3 contractors. (Excerpts of Deposition of Peter Babigian, attached as Exh. 1 to Andrews Decl., at 248-49, 411). It does not appear that NIS received the telecommunications contract, although Nead Electric performed the electrical installation. (Declaration of Robert Eccles dated Aug. 26, 2005, attached as Exh. 123 to Toner Decl., P 19; Declaration of Dana Reed dated Aug. 26, 2005, attached as Exh. 128 to Toner Decl., P 17).

c. *Shearman & Sterling (850 Third Avenue)*

On a project for the law firm of Shearman & Sterling, Nead Electric performed the electrical contracting work and NIS performed the tel-data work. (Def. 56.1 Stmt., P 382; Pl. 56.1 Stmt., P 382). Michael Yee, director of New York operations for Shearman & Sterling, testified that the firm's landlord at 850 Third Avenue had a list of preferred

---

[8] Telecommunications cables at the construction site were also cut on several occasions. (Pastore Dep. at 42, 47-48).

vendors. Nead Electric was the landlord's favored electrical contractor. (Excerpts of Deposition of Michael Yee ("Yee Dep."), attached as Exh. 48 to Toner Decl. and as Exh. 31 to Andrews Decl., at 25-26). Although the landlord required tenants to allow **[*20]** preferred contractors to bid on projects, it did not require tenants to hire those contractors if their bids were not the lowest. (Yee Dep. at 32). While the landlord did not have a preferred telecommunications vendor, it did require the firm to hire a Local 3 contractor for the telecommunications work in order to "avoid labor issues." (Yee Dep. at 22-23, 32, 35). Shearman & Sterling was prepared to "try to talk the landlord out of this requirement" if the lowest bid from a Local 3 contractor was significantly higher than the lowest bid from a non-Local 3 contractor. (Yee Dep. at 36-37).

At some point after the bids came in, the landlord asked Mr. Yee to award both the electrical and the telecommunications contracts to Nead. (Yee Dep. at 43). The landlord's representative indicated that the landlord preferred that Nead do the telecommunications work because, as the house vendor, "they were familiar with the building systems." (Yee Dep. at 44). He did not mention possible labor unrest or delays. (Yee Dep. at 45). Shearman & Sterling then gave Nead an opportunity to match the lowest bids for both electrical and telecommunications installation, and the firm subsequently chose to hire both **[*21]** Nead Electric and NIS. (Yee Dep. at 58, 63-64, 186).

Russell Ramey, a Shearman & Sterling employee involved in supervising the project, testified that Mark Kanyuk, a technical specialist for the firm, told him that Shearman & Sterling "wouldn't be able to use the freight elevator unless Local 3 was doing the data work." (Excerpts of Deposition of Russell W. Ramey ("Ramey Dep."), attached as Exh. 23 to Andrews Decl., at 99). It is unclear where Mr. Kanyuk got this information. Mr. Ramey also testified that he felt pressure from "the building" (presumably meaning the landlord) and from the general contractor to hire Nead although it was not the lowest qualified bidder. (Ramey Dep. at 102-03, 107-08, 199-200). He testified that Mr. Kanyuk and another Shearman & Sterling employee informed him that the general contractor made statements indicating that "he had been pressured to behave in certain ways, or to give contracts to certain people," but could not say who had put pressure on the general contractor. (Ramey Dep. at 200).

Discussion

A. *Summary Judgment Standard*

Pursuant to *Rule 56 of the Federal Rules of Civil Procedure*, summary judgment is appropriate where the evidence offered demonstrates **[*22]** "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*; *see also* *Tocker v. Philip Morris Companies, Inc., 470 F.3d 481, 486-87 (2d Cir. 2006)*; *Andy Warhol Foundation for the Visual Arts, Inc. v. Federal Insurance Co., 189 F.3d 208, 214 (2d Cir. 1999)*. The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Where the moving party meets that burden, the opposing party must come forward with "specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. 56(e)*. "[A]ll inferences must be drawn in favor of the non-moving party." *Apex Oil Co. v. DiMauro, 822 F.2d 246, 252 (2d Cir. 1987)* (internal citations and quotation marks omitted).

However, "to defeat a motion for summary judgment [the non-moving party] cannot rely on conjecture or surmise, and must do more than simply show that there is some metaphysical doubt as to the material facts." *Heilweil v. Mount Sinai Hospital, 32 F.3d 718, 723 (2d Cir. 1994)* (internal quotation marks and citations omitted). If the court determines **[*23]** that "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (citing *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968))* (internal quotation marks omitted).

B. *Non-Statutory Labor Exemption*

The defendants contend that, even assuming that there was an agreement between the defendant contractors and Local 3 as alleged by the plaintiffs, that agreement is beyond the reach of the federal antitrust laws because it is subject to the non-statutory labor exemption. The Second Circuit has found that the "classic formulation" of the non-statutory labor exemption is as follows:

> agreements between a union and an employer are exempt from antitrust scrutiny if they are "so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and therefore **[*24]** is exempt from the Sherman Act."

Local 210, Laborers' International Union v. Labor Relations Division Associated General Contracting, 844 F.2d 69, 79 (2d Cir. 1988) (quoting *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689-90, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965)* (plurality opinion)); *accord* *Clarett v. NFL, 369 F.3d 124, 132 n.12 (2d Cir. 2004)*; *Berman Enterprises Inc. v. Local 333, United Marine Division, International Longshoremen's Association, 644 F.2d 930, 935 n.8 (2d Cir. 1981)*. [9]

The Supreme Court has noted that, "[a]s a matter of logic, it would be difficult, **[*25]** if not impossible, to require . . . employers and employees to bargain together, but at the same time forbid them to make . . . *any* of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable." *Brown v. Pro Football, Inc., 518 U.S. 231, 237, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996)*.

> Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. . . . Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members. Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, . . . the nonstatutory exemption offers no similar protection when a union and nonlabor party agree to restrain competition in a business market.

Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 622-23, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975) (internal citations omitted); *see also* *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, 325 U.S. 797, 808, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945)* **[*26]** ("Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services.").

The purpose of the non-statutory exemption is "to prevent intrusion upon the collective bargaining process." *U.S. Info. Sys., 2002 U.S. Dist. LEXIS 1038, 2002 WL 91625, at *3*. However, the exemption does not apply only "to understandings embodied in a collective-bargaining agreement -- for the collective-bargaining process may take place before the making of any agreement or after an agreement has expired." *Brown, 518 U.S. at 243*. Rather, the exemption applies "where needed to make the collective-bargaining process work." *Id. at 234*.

The defendants contend that, even assuming there was an agreement between Local 3 and the defendant contractors, such an agreement is exempt from antitrust scrutiny because it arose "in the context of collective bargaining." (Joint Def. Memo. at 42). The Court rejected this claim when it denied the defendants' motion to dismiss. *See* *U.S. Info. Sys., 2002 U.S. Dist. LEXIS 1038, 2002 WL 91625, at *3*. In the present motion, the defendants assert that the collective bargaining agreement between Local 3 and the contractors' **[*27]** associations to which the defendant contractors belong, which the Court may consider on summary judgment, makes it clear that the exemption is applicable here. (Joint Def. Memo. at 42). The defendants maintain that Article III of the collective bargaining agreement gives members of Local 3 the right to refuse overtime, [10] while Article VIII forbids members

---

[9] The statutory labor exemptions contained in the Clayton Act, *see* *15 U.S.C. § 17*; *29 U.S.C. § 52*, and the Norris-LaGuardia Act, *see* *29 U.S.C. §§ 104*, *105*, *113*, "exempt certain union activities from antitrust scrutiny." *Local 210, 844 F.2d at 79*. The statutory labor exemptions "do not . . . reach concerted activity between a union and a nonlabor party, such as an employer." *Id.* (citations omitted). Accordingly, they are inapplicable here. *See* *U.S. Info. Sys. v. IBEW Local Union No. 3, No. 00 Civ. 4763, 2002 U.S. Dist. LEXIS 1038, 2002 WL 91625, at *2 (S.D.N.Y. Jan. 23, 2002)*.

to disrupt work when there are jurisdictional disputes with other unions. [11] (Memorandum of Law on Behalf of Defendant Local 3 in Support of the Motion for Summary Judgment ("Local 3 Memo.") at 15-16). The defendants claim that because the collective bargaining agreement contains these provisions, any "communications" between Local 3 and the defendant contractors regarding job site vandalism or workers' refusal to work overtime are protected by the non-statutory labor exemption. (Local 3 Memo. at 16-17). This argument is utterly lacking in merit. The agreement alleged by the plaintiffs is not one reached by an employer and a union in the course of collective bargaining. The fact that the collective bargaining agreement addresses work stoppages and overtime does not mean that a conspiracy between Local 3 and the defendant contractors **[*28]** to use or threaten to use such tactics in order to exclude CWA contractors from the tel-data installation market is somehow embodied in the collective bargaining agreement. Nor is the alleged agreement in any way "needed to make the collective bargaining process work." *Brown, 518 U.S. at 234*. Consequently, subjecting the defendants' actions to antitrust scrutiny does not risk intruding upon the collective bargaining process. [12]

D. *Sherman Act*

1. *Elements of § 1 Claim*

Section 1 of the Sherman Act provides that "every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *15 U.S.C. § 1*. To establish a *§ 1* violation, the plaintiffs must produce evidence sufficient to show: (1) a combination or some form of concerted action between **[*31]** at least two legally distinct economic entities; and (2) that such combination or conduct constituted an unreasonable restraint of trade either *per se* or under the "rule of reason." [13] *U.S. Info. Sys., 2002 U.S. Dist. LEXIS 1038, 2002 WL 91625, at *4* (citing *Tops Mkts., Inc. v. Quality*

---

[10] Article III, Rule 3(m) states that the foreman must call the union to ask for permission for the electricians to work overtime. (Agreement and Working Rules between New York Electrical Contractors Association, Inc., Association of Electrical Contractors, Inc., and Local 3 ("CBA"), attached as Exh. 114 to Toner Decl. and as Exh. 50 to Andrews Decl., Art. III, Rule 3(m)). Rule 5 states that overtime is not permitted except in emergencies and that members may not work overtime without permission from the Local 3 Business Manager's Office. (CBA, Rule 5). The defendants note that "[t]here is no clause in the CBA which obliges an individual worker to work any overtime at all." (Affidavit of Joseph D'Angelo dated Aug. 24, 2005, attached as Exh. 122 to Toner Decl., **[*29]** P 4). However, Thomas Carino, Sr. formerly the Chief Operating Officer of IPC, testified that under the collective bargaining agreement, workers do not have the right to refuse to work overtime if the contractor requests it. (Excerpts of Deposition of Thomas Carino, Sr., attached as Exh. 3 to Andrews Decl., at 195-97).

[11] Article VII states in part that "[t]here will be no strikes, no work stoppages or slow down[s] or other interferences with the work because of jurisdictional disputes." (CBA, Art. VIII).

[12] The defendants also claim that the alleged agreement between the defendants would be subject to the "construction industry proviso" of § 8(e) of the National Labor Relations Act (the "NLRA"), *29 U.S.C. § 158(e)*. That provision exempts certain aspects of the construction industry from the NLRA's ban on so-called "hot cargo clauses" in collective bargaining agreements. *Local 210, 844 F.2d at 72-73*. A "hot cargo clause" is an agreement by an employer, at the union's behest, "to boycott the goods or services of other employers that did not comply with union standards or recognize a union." *Id. at 72* (citations omitted). The alleged conspiracy at issue here does not involve such an agreement, **[*30]** and therefore does not appear to fall within the scope of the proviso. However, even assuming that it does, the proviso protects employers and unions within the construction industry only from scrutiny under *§ 8(e) of the NLRA*. In order to be exempt from antitrust scrutiny, an agreement that is subject to the construction industry proviso must also fall within the scope of "'one of two recognized labor law exemptions from antitrust scrutiny -- the statutory and non-statutory exemptions.'" *Drywall Tapers & Pointers, Local Union Local 1974 v. Bovis Lend Lease Interiors, Inc., No. 05 Civ. 2746, 2005 U.S. Dist. LEXIS 19632, 2005 WL 2205836, at *15 (E.D.N.Y. Sept. 9, 2005)* (quoting *Local 210, 844 F.2d at 79*). As explained above, neither of these exemptions applies here.

[13] "Conduct considered illegal *per se* is invoked only in a limited class of cases where a defendant's actions are so plainly harmful to competition and so obviously lacking in any redeeming pro-competitive values that they are 'conclusively presumed illegal without further examination.'" *Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc., 996 F.2d 537, 542 (2d Cir. 1993)* (quoting *Broadcast Music, Inc. v. CBS, 441 U.S. 1, 8, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979))*; *see also* *Leegin Creative Leather Prods. v. PSKS, Inc., U.S. , , 127 S. Ct. 2705, 2713, 168 L. Ed. 2d 623 (2007)* (explaining **[*32]** that *per se* rule is limited to restraints "that would always or almost always tend to restrict competition and decrease output" (quoting

Mkts., Inc., 142 F.3d 90, 95-96 (2d Cir. 1998)). In addition, the plaintiffs must establish that they have "antitrust standing" and that they have suffered "antitrust injury." [14] Atlantic Richfield, 495 U.S. at 334; National Camp Ass'n v. American Camping Ass'n, No. 99 Civ. 11853, 2000 U.S. Dist. LEXIS 18194, 2000 WL 1844764, at *3 (S.D.N.Y. Dec. 15, 2000).

2. *Conspiracy*

a. *Legal Standard*

"Independent actions taken by an entity fall outside the purview of § 1." Virgin Atlantic Airways Ltd. v. British Airways PLC, 257 F.3d 256, 263 (2d Cir. 2001); *accord* Capital Imaging Associates, 996 F.2d at 542. **[*33]** To prevail on their § 1 claim, therefore, the plaintiffs must demonstrate that the defendants conspired together, meaning that they "were consciously committed 'to a common scheme designed to achieve an unlawful objective.'" Virgin Atlantic, 257 F.3d at 263 (quoting Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 768, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)); *see also* Bell Atl. Corp. v. Twombly, __ U.S. __, __, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) ("[T]he crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express." (internal quotation marks and citation omitted)). In order to survive a motion for summary judgment, it is "critical" that the plaintiff make a threshold showing that "a reasonable jury could find that the defendants' actions were concerted rather than independent." AD/SAT, Division of Skylight, Inc. v. Associated Press, 181 F.3d 216, 233 (2d Cir. 1999).

A threshold showing may be made using circumstantial evidence alone, since "direct proof of an illegal agreement is rarely available." *Building Indus. Fund v. Local Union No. 3, IBEW, 992 F. Supp. 162, 181 (E.D.N.Y. 1996)*; *see* ***[*34]*** *also* Venture Technology, Inc. v. National Fuel Gas Co., 685 F.2d 41, 45 (2d Cir. 1982) ("Illegal conspiracies, of course, can rarely be proved through evidence of explicit agreement, but must generally be proved through inferences from the conduct of the alleged conspirators." (citing Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036, 1043 (2d Cir. 1976))). However, "***antitrust law*** limits the range of permissible inferences from ambiguous evidence." Matsushita, 475 U.S. at 588. "[C]onduct as consistent with permissible conduct as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* (citing Monsanto, 465 U.S. at 764). In order to prevail on a motion for summary judgment, a plaintiff must therefore "present evidence that 'tends to exclude the possibility that the alleged conspirators acted independently.'" Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC, No. 03 Civ. 1895, 2007 U.S. Dist. LEXIS 504, 2007 WL 39301, at *7 (S.D.N.Y. Jan. 8, 2007) (quoting Matsushita, 475 U.S. at 588).

> [T]he Second Circuit has . . . stressed that where competing versions of the facts are equally plausible, the case should not be decided by a jury: "[w]e have overturned **[*35]** jury verdicts where, taken as a whole, the evidence point[ed] with at least as much force toward unilateral actions by [the defendants] as toward conspiracy, and a jury would have to engage in impermissible speculation to reach the latter conclusion."

Building Indus. Fund, 992 F. Supp. at 181 (quoting International Distribution Centers, Inc. v. Walsh Trucking Co., 812 F.2d 786, 794 (2d Cir. 1987) (alterations in original).

b. *Evidence of Conspiracy*

Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)). "Most antitrust claims . . . are analyzed under a 'rule of reason' analysis which seeks to determine if the alleged restraint is unreasonable because its 'anti[-]competitive effects outweigh its pro[-]competitive effects.'" E & L Consulting, Ltd. v. Doman Industries Ltd., 472 F.3d 23, 29 (2d Cir. 2006) (quoting Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)).

[14] The plaintiffs must also "adequately . . . define the relevant product market." Rock TV Entertainment, Inc. v. Time Warner, Inc., No. 97 Civ. 0161, 1998 U.S. Dist. LEXIS 799, 1998 WL 37498, at *2 (S.D.N.Y. Jan. 30, 1998) (quotations and citation omitted). However, the defendants have stated that they "are not challenging the 'relevant market' for purposes of this motion." (Joint Def. Memo. at 4 n.4).

The plaintiffs first contend that while circumstantial evidence is sufficient to prove a conspiracy, in this case "the defendant[] contractors have . . . actually agreed in writing to 'continually endeavor' to shill for Local 3 workers." (Pl. Memo. at 3). The plaintiffs maintain that Article III, Rule 2(f) of the collective bargaining agreement between the defendant contractors and Local 3 is direct proof of a conspiracy. That provision reads as follows:

> Every individual Employer agrees in addition to his regular work to solicit and perform residential, industrial and small types of work. The Employer will continually endeavor to make available and increase the volume of employment for electrical workers through salesmanship, enterprising **[*36]** business methods, being properly equipped to render efficient electrical services to the community, by promoting and encouraging modern installations and aiding the industry to educate the public of the need for improved electrical installations and expansion.

(CBA, Art. III, Rule 2(f)). The plaintiffs interpret this provision as an agreement by the contractors to use improper means, such as threats of work stoppages and vandalism, to force telecommunications contracts to be awarded to Local 3 contractors, thereby ensuring employment for Local 3 workers. The plaintiffs claim that this provision, when considered in conjunction with the other evidence they have submitted, "could readily be found by a jury as furthering a common purpose, and is certainly consistent with the classic conspiracy paradigm of an agreement coupled with overt acts in furtherance of an agreement." (Pl. Memo. at 3). However, there is no reason to believe that, in this context, "enterprising business methods" means anything sinister. The remainder of the plaintiffs' evidence does not justify an inference that Article III, Rule 2(f) is anything other than what it appears to be: a promise to use whatever lawful means **[*37]** are available to increase the demand for Local 3 labor.

The plaintiffs also make much of a meeting between representatives of Local 3 and various electrical contractors that apparently took place in 1996 or 1997. (Pl. Memo. at 9-10). Robert Eccles, Executive Vice President of defendant Nead Information Systems, testified that he put together a list of topics for Robert Marziotto, who is affiliated with both Nead Information Systems and Nead Electric, to bring up at the meeting. [15] (Excerpts of Deposition of Robert Eccles ("Eccles Dep."), attached as Exh. 8 to Andrews Decl., at 122-23). The first topic on the list reads: "CWA problem with respect to comp[et]ition s[c]enario, procedure when threatened by CWA and future of telecommunications with Local 3?" ("Topics for Meeting w/ Local Three," attached as Exh. 54 to Andrews Decl.). Mr. Eccles testified that he was referring to the possibility of implementing a different wage scale for workers who performed tel-data work, as opposed to high voltage work, so that Local 3 contractors would be better able to compete for telecommunications contracts:

> A. Can I go back and give this candidate labor rates, are they going to offer H rates again. **[*38]** . . . What do I do. What's my procedure. Since you don't have a dialogue with them and you --
> Q. With Local 3?
> A. -- there's no open communication. Is there something they can tell me to do to try and go and compete. Give me some direction that's real, that I can go to the client and say, I'll offer a great proposal, this wonderful proposal at a great number, and we can go win the work.

(Eccles Dep. at 125-26, 139). [16]

---

[15] The plaintiffs contend that the meeting was held specifically to discuss the issue of jobs lost to CWA contractors, but there is no evidence to that effect. Nor is there any direct evidence that any of the defendant contractors besides NIS attended the meeting. (*See* Eccles Dep. at 122-26, 132, 139; Excerpts of Deposition of Raymond A. Melville, attached as Exh. 20 to Andrews Decl., at 164-65).

[16] In September 1998, Mr. Eccles himself met with a representative of Local 3 to discuss the fact that Nead was losing telecommunications bids to CWA contractors. (Eccles Dep. at 108). In a letter to Mark Hansen, a business agent for Local 3, Mr. Eccles stated, "We are losing as much work to CWA as we are winning now and [it is] getting worse." (Letter of Robert Eccles dated Sept. **[*39]** 1, 1998 ("Eccles Letter"), attached as Exh. 54 to Andrews Decl.). Mr. Eccles sought a meeting with Mr. Hansen "to discuss this problem and review any recommendations you may have to competing in this marketplace [sic]." (Eccles Letter). Mr. Eccles eventually met with Howard Cohen of Local 3, but according to Mr. Eccles, Mr. Cohen "listened intently and nothing happened." (Eccles Dep. at 108).

The plaintiffs offer no evidence that representatives of Local 3 and the defendant contractors discussed the possibility of winning contracts by threatening to engage in vandalism or withhold overtime at that meeting or at any other time. [17] The plaintiffs themselves assert that Local 3 contractors were regularly losing telecommunications bids to CWA contractors during this time period because the higher wages commanded by Local 3 electricians made it difficult to compete. (Pl. Memo. at 8-9). It is hardly surprising that contractors employing Local 3 electricians would discuss the issue with union representatives. The evidence submitted by the plaintiffs, even when taken as a whole, does not justify an inference that the list of topics for discussion drafted by Mr. Eccles was anything other than **[*40]** an attempt to start a discussion with Local 3 regarding the possibility of wage concessions or other legitimate ways to increase the competitiveness of Local 3 contractors in the telecommunications market.

The plaintiffs also rely heavily on evidence of the perceptions of customers and general contractors, asserting that their "proof consists not only of evidence of specific situations where CWA's presence on the job site has led to disruptive acts by Local 3 . . . but more importantly, evidence of the state of mind fostered by the perception of the 'Local 3 problem' among those in the industry." (Pl. Memo. at 7). But even were this evidence sufficient to prove intimidation, the plaintiffs have offered little to support an inference that this "state of mind" arose as a result of the actions of anyone other than Local 3. An antitrust plaintiff cannot "rest on his allegations of a conspiracy to get to a jury without 'any significant probative evidence **[*41]** tending to support the complaint.'" *Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (quoting *First National, 391 U.S. at 290*). It is therefore necessary to examine the available evidence against each defendant contractor to determine whether the plaintiffs have put forward sufficient circumstantial evidence to permit an inference of conspiracy.

The plaintiffs have offered no evidence to support their claims that A R and NIS were part of a conspiracy. In the case of A R, there is evidence only that a business agent of Local 3 threatened an employee of a general contractor (Syntegra), as a result of which the work was awarded to A R. This does not support an inference that A R was part of the alleged conspiracy. Nor does the evidence implicate NIS in such a conspiracy, even assuming that NIS may be held responsible for actions taken by Nead Electric. On the Agency.com project, a general contractor (Structure Tone) told the owner's representative that she should hire a Local 3 telecommunications contractor. When she hired USIS, Nead Electric employees refused to work overtime. The plaintiffs have put forward no evidence to support an inference that Local 3 acted in concert with Nead **[*42]** Electric to force the owner to rescind its contract with USIS. Indeed, it appears that by putting more electricians to work during the regular work day, Nead Electric sought to ensure that its electricians' refusal to work overtime did not inconvenience the customer.

With respect to the Random House and Shearman & Sterling projects, the evidence reveals only that third parties (two general contractors and a building owner) required customers to use Local 3 contractors for telecommunications work. There is no evidence that they did so because they had been threatened by NIS, Nead Electric, or any other defendant contractor. [18]

With respect to the remaining defendants, there is some evidence that their employees told customers that hiring a CWA contractor would result in problems for the customer. In the case of Hugh O'Kane, there is evidence that a Local 3 shop steward stated that "there would be trouble in the building" if plaintiff **[*43]** Blue Diamond was awarded the contract. There is also evidence that employees of ADCO and Five Star told representatives of the building owners on two projects that electricians would not work overtime because the telecommunications work had been given to USIS. However, these incidents are insufficient to permit the plaintiffs to avoid summary judgment. As explained above, an antitrust plaintiff must "present evidence that 'tends to exclude the possibility that the alleged conspirators acted independently.'" *Reading Int'l, Inc., 2007 U.S. Dist. LEXIS 504, 2007 WL 39301, at *7* (quoting *Matsushita, 475 U.S. at 588*). In this case, the plaintiffs have not met their burden.

---

[17] Indeed, there is no evidence that the representatives at the meeting discussed Nead's list of concerns at all; Mr. Eccles testified that he did not think that Mr. Marziotto "ever got a chance to speak" at the meeting. (Eccles Dep. at 126).

[18] Although Shearman & Sterling's landlord did specifically ask the firm to hire NIS, its stated reason for doing so was it would make the work more efficient because Nead Electric was the "house vendor" and therefore the company was familiar with the building.

To begin with, it is not clear that the employees who made the statements at issue acted with the knowledge or approval of their employers. Each of the employees was a member of Local 3, and the Hugh O'Kane employee is identified as a union shop steward. According to the construction manager, Mr. Lott, when Mr. Graves, the Five Star assistant superintendent, threatened him at a meeting, he appeared to speak on behalf of Local 3, stating that the union "would be sure that the project was not completed if the work was not taken away from USIS." **[*44]** (Lott Dep. at 139). Indeed, Mr. Lott testified that the Five Star project manager removed Mr. Graves from the project after his outburst. [19]

Even assuming that the defendant contractors endorsed or condoned the statements at issue, however, it is entirely plausible that they did so in the absence of any agreement with Local 3 or with one another. Given Local 3's past actions and longstanding history of hostility toward CWA, the defendant contractors might well have been concerned that the presence of a CWA contractor on the job site would result in construction delays. Accordingly, they had an incentive to preserve their reputation by warning

> the general contractor or the customer of a possible Local 3 "problem" beyond [their] control. Suppose that the contractor using Local 3 labor had been aware of the potential **[*45]** for disruption and delay but did not warn the general contractor or the customer. If the disruption or delay occurred and the general contractor or customer believed that the contractor using Local 3 labor was or should have been aware of this potential, the reputation of that contractor would be diminished.

(Declaration of John R. Woodbury dated Feb. 16, 2007 ("Woodbury Decl."), P 15). Furthermore, the contractor stood to benefit directly because such "warnings" increased the chances that it would be awarded telecommunications contracts. [20] (Woodbury Decl., P 16). However unfair it might seem to the plaintiffs for the defendant contractors to benefit from the misbehavior of their employees, such a benefit does not violate the antitrust laws unless it was a result of concerted, rather than independent, action.

The plaintiffs insist that "[i]n a normal business setting," a contractor that told customers that its employees were going to cause scheduling delays and raise construction costs would suffer damage to its reputation and would be fired or would lose future business. (Pl. Memo. at 4-5; Sec. Compl., P 40). They maintain that such behavior would only be rational in the context of the alleged conspiracy. According to the plaintiffs, the defendant contractors could afford to let customers know that they could not control their employees because they knew that "all other Local 3 contractors would deliver the same message" and that the customer therefore had no real choice. (Pl. Memo. at 4).

However, such behavior would also **[*47]** be rational in the absence of a conspiracy if each defendant contractor was aware, based upon the jurisdictional dispute between CWA and Local 3, that Local 3 members would cause problems, regardless of which electrical contractor they worked for, when a CWA contractor was on site. No other electrical contractor would have a competitive advantage, since they would encounter the same difficulties with their own employees. [21] Each electrical contractor would "deliver the same message" not because they had conspired

---

[19] Nor do the plaintiffs dispute that ADCO, in an apparent attempt to avoid delays, reassigned six workers who had refused to work overtime. This kind of behavior indicates that Five Star and ADCO sought to mitigate the damage caused by their workers' actions, rather than use it as a bargaining tool to force customers to give the telecommunications contract to a Local 3 contractor.

[20] Of course, the customer might be able to avoid conflict with Local 3 electricians by hiring a *different* Local 3 contractor for the telecommunications work. But the defendant contractors could reasonably assume that since they were already on the job and could begin right away, the customer would be reasonably likely to choose them as the replacement telecommunications contractor. **[*46]** Indeed, Five Star, ADCO, and Hugh O'Kane were each awarded telecommunications work on the projects in question after their employees began to cause construction delays. Although the Complaint refers to "numerous instances" in which electrical contractors whose employees stopped working overtime or committed vandalism "did not seek or obtain the telecommunications installation work" (Sec. Compl., P 40), the plaintiffs have put forward no admissible evidence to that effect.

[21] "Virtually all large commercial construction sites in the New York metropolitan area utilize only union labor" (Pl. Memo. at 6), and the vast majority of, if not all, union electricians in the New York City area are members of Local 3. (Sec. Compl., P 20).

together to do so but because none of them could control Local 3's actions. In this context, the defendant contractors would run very little risk of reputational harm or loss of business by telling customers that their employees were likely to cause problems. [22]

The plaintiffs claim that the defendant contractors' conduct is "too consistent to be coincidental rather than coordinated among themselves and through [Local 3]." (Sec. Compl., P 40). But it is equally plausible that the defendants acted in their own self-interest independent of Local 3 and of one another. In another type of case, the finder of fact might well be permitted to infer a conspiracy based upon the evidence put forward by the plaintiffs. However, "the *factual and legal context* within which each party presents its evidence . . . determines what are the *reasonable* inferences to be drawn **[*49]** from that evidence." *R.B. Ventures, Ltd. v. Shane, 112 F.3d 54, 58 (2d Cir. 1997)* (emphasis in original). On summary judgment, "although the court must draw the inferences in favor of the non-moving party, the permissible inferences are ultimately limited by the relevant substantive law." *Id.* Under the standard set forth by the Supreme Court in *Matsushita,* this Court cannot permit an antitrust case to go to trial where the evidence is "as consistent with permissible conduct as with illegal conspiracy." *475 U.S. at 588* (citing *Monsanto, 465 U.S. at 764*). Accordingly, summary judgment should be granted to the defendant contractors.

As explained above, unilateral conduct is outside the scope of *§ 1 of the Sherman Act*. If Local 3 did in fact threaten building owners and general contractors and encourage its members to engage in workplace misconduct, it might well be liable for extortion. Its actions might also violate the collective bargaining agreement or constitute an unfair labor practice under the NLRA. However, Local 3's actions cannot constitute an antitrust violation under *§ 1* unless the union acted in concert with others. Because the plaintiffs have not put forward sufficient evidence **[*50]** that the defendant contractors conspired with Local 3 to exclude them from the telecommunications installation market, their claims against Local 3 should likewise be dismissed. [23]

E. *State Law Claims*

Generally, when all federal claims are dismissed, the remaining state claims should be dismissed **[*51]** without prejudice. *Kolari v. New York-Presbyterian Hospital, 455 F.3d 118, 122 (2d Cir. 2006)*; *In re Merrill Lynch Ltd. P'ships Litig., 154 F.3d 56, 61 (2d Cir. 1998)*. "Although this is not a mandatory rule, the Supreme Court has stated that 'in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine -- judicial economy, convenience, fairness and comity -- will point toward declining jurisdiction over the remaining state-law claims.'" *Merrill Lynch, 154 F.3d at 61* (quoting *Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350 n.7, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)*); *see also Kolari, 455 F3d at 122*.

Here, the plaintiffs allege that the defendants' conduct violated *§ 340 of the New York General Business Law*, known as the Donnelly Act. That statute renders illegal any contract, arrangement, or agreement that restrains competition in any business. *Great Atlantic & Pacific Tea Co. v. Town of East Hampton, 997 F. Supp. 340, 352*

Although a general contractor or building owner might be able to hire a non-unionized electrical contractor, that decision would hardly be a practical one, since **[*48]** it would invite protests by Local 3 and other building trades workers on the job site.

[22] The plaintiffs also contend that in the absence of a conspiracy, the defendant contractors would have disciplined those workers who refused to work overtime. (Pl. Memo. at 28, 30-31). However, the defendant contractors' decision not to enforce any remedy they may have had under the collective bargaining agreement could be a rational one even in the absence of a conspiracy. For example, the contractors may have chosen not to enforce the collective bargaining agreement in order to maintain peace with Local 3.

[23] It is therefore unnecessary to address the plaintiffs' request that I reconsider my August 1, 2006 decision insofar as it barred the plaintiffs from relying on a series of judicial and administrative decisions that document Local 3's "total job policy" of using work stoppages, violence, and vandalism to obtain tel-data installation work. (Pl. Memo. at 5 n.6, 33-43). Even assuming that the total job policy remains in effect, unilateral action by Local 3 to keep CWA out of the tel-data installation trade does not violate the Sherman Act. It is also unnecessary to address the defendants' contention that, under § 6 of the Norris-LaGuardia Act, *29 U.S.C. § 106*, in order to hold Local 3 responsible for any acts by its members or officers, the plaintiffs must present "clear proof" that the union participated in, authorized, or ratified the alleged act. (Joint Def. Memo. at 12-13; Local 3 Memo. at 8-9).

(E.D.N.Y. 1998). It "is patterned after the Sherman Anti-Trust Act . . . and is generally construed in light of federal precedent." *Id.; accord* *Re-Alco Industries, Inc. v. National Center for Health Education, Inc., 812 F. Supp. 387, 393 (S.D.N.Y. 1993)*. **[*52]** Thus, "[l]ike *§ 1 of the Sherman Act*, *§ 340* prohibits only concerted action." *Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc., 408 F. Supp. 1251, 1283 (S.D.N.Y. 1976)*; *see also* *Reading International, 317 F. Supp. 2d at 332-33* ("Under New York law, the state and federal antitrust statutes require identical basic elements of proof." (internal quotation marks and citation omitted)).

However, it is not clear that the heightened standard for demonstrating an antitrust conspiracy that governs claims under *§ 1 of the Sherman Act* also applies to the Donnelly Act. The parties have not identified a case from the New York state courts that establishes such a principle, and I have found none. [24] It is therefore prudent to dismiss the Donnelly claims without prejudice. *See* *Gonzalez v. St. Margaret's House Housing Development Fund Corp., 880 F.2d 1514, 1520 (2d Cir. 1989)* (if federal antitrust claims dismissed, court has discretion to decline jurisdiction over Donnelly Act claim); *Omega Homes, Inc. v. City of Buffalo, 4 F. Supp. 2d 187, 194-95 (W.D.N.Y. 1998)* (declining jurisdiction over Donnelly Act claims after dismissing federal antitrust claims).

Similarly, the Court should decline jurisdiction over the plaintiffs' claims of tortious interference against the defendant contractors. The analogous claims against Local 3 were previously dismissed. *U.S. Infor. Sys., 2002 U.S. Dist. LEXIS 1038, 2002 WL 91625, at *13*. *Conclusion*

For the reasons set forth above, I recommend that summary judgment be granted to the defendants, and that the plaintiffs' claims under *§ 1 of the Sherman Act* be dismissed. I further recommend that the plaintiffs' remaining state law claims be dismissed without prejudice. Pursuant to *28 U.S.C. § 636(b)(1)* and *Rules 72*, *6(a)*, and *6(e) of the Federal Rules of Civil Procedure*, the parties shall have ten (10) days from this date to file written objections to this Report and Recommendation. **[*54]** Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Richard M. Berman, U.S.D.J., Room 650, and to the chambers of the undersigned, Room 1960, 500 Pearl Street, New York, New York 10007. Failure to file timely objections will preclude appellate review.

Respectfully submitted,

JAMES C. FRANCIS IV

UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York

August 3, 2007

End of Document

---

[24] One federal district **[*53]** court opinion rejected claims under both *§ 1 of the Sherman Act* and the Donnelly Act because, based on the evidence, an inference of conspiracy was no more plausible than a finding that the defendants had acted unilaterally. *Tokarz v. LOT Polish Airlines, No. 96 CV 3154, 2006 U.S. Dist. LEXIS 72118, 2006 WL 2850611, at *4-*5 (E.D.N.Y. Oct. 3, 2006)*. The court relied, however, only on the general proposition that the Donnelly Act is construed consistently with the Sherman Act. *2006 U.S. Dist. LEXIS 72118, [WL] at *3*.

Klickads, Inc. v. Real Estate Bd. of N.Y.

United States District Court for the Southern District of New York

August 6, 2007, Decided; August 6, 2007, Filed

04 Civ. 8042 (LBS)

Reporter
2007 U.S. Dist. LEXIS 57305 *; 2007-2 Trade Cas. (CCH) P75,832

KLICKADS, INC., D/B/A BROKERSNYC, Plaintiff, v. REAL ESTATE BOARD OF NEW YORK, INC., BROWN HARRIS STEVENS RESIDENTIAL SALES, LLC, TERRA HOLDINGS, LLC, HALSTEAD PROPERTY, LLC, WILLIAM B. MAY, CO., INC., HERON PROPERTIES REALTY LTD., FOX RESIDENTIAL GROUP, INC., PRUDENTIAL REAL ESTATE AFFILIATES, INC., STRIBLING & ASSOCIATES LTD., STEVEN SPINOLA, HALL S. WILKIE, BARBARA FOX, BELLMARC REALTY, ON-LINE RESIDENTIAL, INC., REALPLUS, LLC, SOUTHEBY'S INTERNATIONAL REALTY, INC. and THE CORCORAN GROUP, INC., Defendants.

Subsequent History: Adhered to, On reconsideration by *Klickads, Inc. v. Real Estate Bd. of N.Y., 2007 U.S. Dist. LEXIS 75768 (S.D.N.Y., Oct. 9, 2007)*

Core Terms

listings, interface, relevant market, monopolization, brokerage, brokers, vendors, competitors, brokerage firm, residential, firms, defendants', conspiracy, database, products, argues, concerted action, antitrust, monopoly, customers, plaintiff's claim, rule of reason, real time, Sherman Act, transmission, entities, management system, trade association, market power, procompetitive

Counsel: **[*1]** For Plaintiff: Andrew D. Friedman, Glancy Binkow & Goldberg LLP, New York, NY.

For Defendants: Bruce H. Schneider, Claude G. Szyfer, Sandra Rampersaud, Michael Fox, Stroock & Stroock & Lavan LLP, New York, NY.

Judges: LEONARD B. SAND, J.

Opinion by: LEONARD B. SAND

Opinion

SAND, J.

Plaintiff, Klickads, Inc., d/b/a BrokersNYC (BrokersNYC), a listings information technology (IT) firm that sells listings databases and other IT products to real estate brokerage firms in New York, brought this antitrust action against the Real Estate Board of New York, Inc. (REBNY), a real estate industry trade association, several brokerage firms that are members of REBNY and their employees, and two of its competitors, RealPlus LLC and On-Line Residential, Inc. (OLR), alleging violations of *section 1* and *section 2* of the Sherman Act, *15 U.S.C. §§ 1-2 (2000)*, violation of New York's Donnelly Act, *N.Y. Gen. Bus. Law § 340*, and tortious interference with economic relations. Before the Court is defendants' motion for summary judgment on all claims.

I

Unless otherwise noted, the following facts are not disputed in any material way:

Prior to 2002, residential real estate brokers in Manhattan did not necessarily share their exclusive sales or **[*2]** rental listings with other brokers. In order to capture the entire commission on a transaction, many listing brokers tried to find a buyer themselves rather than offer the listing to other brokers who would then share in the commission if they found a buyer. Brokers who did share listings, did so on a voluntary ad-hoc basis. Unlike many localities throughout the country, the majority of brokers in Manhattan do not subscribe to a centralized multiple listing service (MLS) through which they would be required to share exclusive listings with other subscribers through a centralized database. Sharing listings through some sort of mandatory co-brokerage agreement, like an MLS, helps property sellers by placing their listing in front of a wider audience of buyers and helps buyers by increasing the pool of properties available through a single broker. In short, an MLS has many procompetitive virtues. See, e.g., *Pomanowski v. Monmouth County Bd. of Realtors, 89 N.J. 306, 318, 446 A.2d 83 (1982)*.

Because Manhattan has no centralized MLS database that all subscribing brokers can access, each brokerage firm must maintain its own database of listings. Some firms do this in-house with their own listings management **[*3]** systems, which allow them to electronically store, access, and search listings. These firms must therefore purchase computer systems from a listings IT vendor and employ listings staffs to compile listings, enter them into the database, and remove old listings. Other firms (especially smaller firms) outsource their listings management to companies, like plaintiff and defendant OLR, that employ a listings staff to maintain a listings database and then sell subscriptions to brokerage firms to access that database. By outsourcing to vendors like plaintiff, brokerage firms can avoid the high upfront cost of acquiring an in-house listings management system.

In 2002, REBNY, a trade association whose members make up the bulk of residential real estate brokers in Manhattan, implemented mandatory co-brokerage rules requiring its members to share their exclusive residential listings with other REBNY members within 72 hours. Initially, REBNY members were permitted to share their listings by fax, by email, or, if they were RealPlus customers, electronically through RealPlus's R.O.L.E.X. data transmission system. When listings were shared by fax or email, each firm had to manually input the shared **[*4]** listings into their own listings database.

Defendant RealPlus, a listings management IT vendor owned by Eric Gordon and Terra Holdings (the parent company of brokerage defendants Brown Harris Stevens and Halstead), developed a data transmission system called R.O.L.E.X., which allows listings data to be shared seamlessly between different in-house listings management systems, thus eliminating the need for listings staff to manually input listings transmitted by R.O.L.E.X. from one RealPlus system to another. RealPlus also created interfaces with the in-house listings management systems at four large brokerage firms-defendants Prudential Douglas Elliman, Corcoran, Stribling, and Bellmarc--allowing them to use R.O.L.E.X. to share listings with each other and with RealPlus systems.

In April 2003, REBNY changed the co-brokerage rules to no longer allow listings to be shared by fax. Around that time, at the request of several REBNY members who used defendant OLR's service as their listings database, REBNY created a universal email address for OLR allowing listings to be shared by email directly with OLR. Although plaintiff requested that REBNY create a similar email address for BrokersNYC **[*5]** and later forwarded requests from several REBNY members who used BrokersNYC's services, REBNY did not create a universal email address for BrokersNYC. In an internal memo dated April 29, 2003, REBNY outlined a "twenty-five firm policy" for listings IT vendors seeking a universal email address. In sum, REBNY would only provide a universal email address if the vendor could show that it had at least twenty-five clients who were currently members in good standing of REBNY's co-brokerage program. (Mem. from Deborah Beck, Friedman Decl. Ex. 82.) The memo also noted that only OLR and RealPlus had over twenty-five clients who were REBNY members. (Id.

In June 2004, REBNY announced that as of January 2005 all listings would have to be exchanged over the R.O.L.E.X. data transmission system. Around the same time, REBNY was engaged in discussions with Eric Gordon and Terra Holdings, the owners of RealPlus, about purchasing either the R.O.L.E.X. standard or an equity stake in RealPlus. In these negotiations, RealPlus consistently took the position that other than the four firms that already had a R.O.L.E.X. interface (defendants Prudential Douglas Elliman, Corcoran, Stribling, and Bellmarc) who would **[*6]** be grandfathered in, no additional interfaces would be created and all brokerage firms wishing to use

R.O.L.E.X. would have to use RealPlus as their listings management system. (See, e.g., Friedman Decl. Exs. 99, 101, 105.)

Eventually, however, at REBNY's request, RealPlus agreed to create a R.O.L.E.X. interface for OLR giving OLR customers access to real time seamless listings updates, just like RealPlus customers. In an email to RealPlus owner Eric Gordon, Dianne Ramirez, President of Halstead and Co-Chair of the board of directors of the residential division of REBNY, explained that REBNY wanted RealPlus to create an interface for OLR to appease a "major player" brokerage firm CitiHabitats, an OLR customer, and to avoid a potential antitrust lawsuit by OLR. (Friedman Decl. Ex. 103.) Plaintiff and another listings IT vendor, VLS (which has since gone out of business), made several requests for a data interface with R.O.L.E.X. on the same terms as OLR and offered to pay any costs that would be incurred in creating such an interface. RealPlus, however, did not create an interface and REBNY declined to do anything to encourage RealPlus to create an interface with plaintiff or VLS.

Once **[*7]** REBNY had mandated the use of R.O.L.E.X. to exchange listings, the only way for brokerage firms who did not use RealPlus or OLR to participate in the co-brokerage arrangement, which was renamed the REBNY Listing Service (RLS), was to use a link on the REBNY website to input and access listings data. Although the website link was open to all REBNY members, including plaintiff's clients, it was an inferior alternative to an interface with R.O.L.E.X. While R.O.L.E.X. provided real time and seamless updates to users' listings databases, the data available on the website was only updated periodically and still required listings staff to input manually the listings from the website into an in-house listings database. Thus brokers who did not use RealPlus or OLR had to give up access to crucial real time updates to listings data.

According to plaintiff's expert, in 2002 sales for plaintiff, RealPlus and OLR each represented about a third of the market for listings IT services in Manhattan, which plaintiff contends is the relevant market for antitrust analysis. By 2006, plaintiff claims that RealPlus's market share in Manhattan had grown to over 70% while plaintiff's had fallen to 13%. (Ludwick **[*8]** Decl. P 18.) RealPlus and OLR's shares of the national market for listings IT services, which defendants contend is the relevant market for antitrust analysis, is slight. Plaintiff alleges that the brokerage defendants collectively make up over 80% of the residential real estate brokerage market in Manhattan and control the board of the residential division of REBNY.

II

Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1 (2000)*. "To establish a *§ 1* violation, a plaintiff must produce evidence sufficient to show: (1) a combination or some form of concerted action between at least two legally distinct economic entities; and (2) such combination or conduct constituted an unreasonable restraint of trade either per se or under the rule of reason." *Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 95-96 (2d Cir. 1998)*.

A. Concerted Action

To meet the concerted action requirement of a section 1 claim, plaintiff must show that at least two distinct legal entities formed a "conscious commitment to **[*9]** a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*. Concerted action may be proven by direct evidence of an explicit agreement or by circumstantial evidence of an informal or tacit agreement. See *Apex Oil Co. v. DiMauro, 822 F.2d 246, 252-53 (2d Cir. 1987)*; see also *Reazin v. Blue Cross Blue Shield of Kansas, Inc., 899 F.2d 951, 963 (10th Cir. 1990)*. However, the range of permissible inferences that can be drawn from ambiguous evidence is limited in an antitrust case. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. To survive a motion for summary judgment, a plaintiff must point to evidence "that tends to exclude the possibility that the alleged conspirators acted independently." Id.

Plaintiff points to two types of concerted action that it argues give rise to section 1 liability. First, plaintiff argues that the rules and actions of REBNY as an association of brokers constitute concerted action by its member firms-namely the brokerage defendants. More specifically, plaintiff argues that the member brokerage firms agreed through REBNY that they would use only one type of transmission **[*10]** system (R.O.L.E.X.) provided by only two suppliers on the approved vendors list pursuant to the twenty-five firm rule (RealPlus and OLR) to exchange listings and that this agreement restricted competition between the firms by preventing them from seeking cheaper or more effective transmission systems.

Defendants are correct to note that not every action by a trade association is concerted action by the association's members. *AD/SAT v. Associated Press, 181 F.3d 216, 234 (2d Cir. 1999)*. The Second Circuit has noted that "[t]o the extent that [trade associations] are buying and selling [products or services] in their own right, they can be fairly regarded as single entities whose selling decisions are not 'price fixing conspiracies' and whose buying decisions are not 'boycott conspiracies' of rejected suppliers." Id. (quoting 7 Phillip E. Areeda et al., ***Antitrust Law*** P 1477)(alterations in original). But neither is every action of a trade association immune from antitrust scrutiny. The Second Circuit also noted that there is no conceptual difficulty in treating trade associations as continuing conspiracies when they regulate areas where their members are in competition. Id. (citing 7 **[*11]** Areeda § 1477). Accordingly, "an antitrust plaintiff must present evidence tending to show that association members, in their individual capacities, consciously committed themselves to a common scheme designed to achieve an unlawful objective." Id.

In this case, plaintiff has raised a genuine issue of fact as to whether the brokerage defendants acted in concert to restrain trade through REBNY. Plaintiff points to decisions by REBNY's board of directors, where a majority of the seats are controlled by the brokerage defendants, that affect competition between REBNY members--namely adopting the twenty-five firm policy and designating approved and preferred vendors. These were not the types of purchasing or hiring decisions in the everyday operation of a trade association that Professor Areeda and the Second Circuit in AD/SAT cautioned against construing as concerted action. See *181 F.3d at 234*. Whether these decisions were unreasonable restraints of trade is a separate inquiry from whether the defendants acted in concert. Plaintiff also points to circumstantial evidence that tends to support a motive for establishing policies to exclude plaintiff. Several of the brokerage defendants were **[*12]** owned by the same parent company as RealPlus giving them a direct financial stake in eliminating plaintiff as a competitor. Plaintiff also argues that all of the brokerage defendants, as large brokerage firms in Manhattan, had an incentive to keep plaintiff's subscription services for small brokers off the market to maintain their competitive advantage with pricey in-house listings management systems. In short, whether the brokerage defendants "consciously committed themselves," through REBNY, to exclude plaintiff from participation in the RLS as a preferred or approved vendor, is a question of fact for the jury.

The second type of concerted action that plaintiff alleges is an agreement between RealPlus and REBNY to promote RealPlus's services and to create high barriers of entry for RealPlus's competitors. Plaintiff alleges that REBNY and RealPlus agreed that, beyond the four brokerage firms which were grandfathered in and eventually OLR, no new interfaces to the R.O.L.E.X. transmission system would be created. Thus all new participants in the RLS who wanted real time access to listings would have to use RealPlus or OLR.

Plaintiff offers no direct evidence of an explicit agreement between **[*13]** REBNY and RealPlus on the creation of new interfaces, but points to several pieces of circumstantial evidence. Before REBNY announced its rule that all listings must be exchanged over R.O.L.E.X. and while REBNY was in negotiations with Eric Gordon and Terra to purchase an equity stake in RealPlus or just the R.O.L.E.X. transmission system, Gordon insisted that a condition of any deal would be:

> An agreement with REBNY that, other than the firms already grandfathered in, all firms wishing to utilize R.O.L.E.X. must use RealPlus as the front end for maintaining listings. No additional interfaces would be created. By having firms grand-fathered in, the four firms that have already created a RealPlus interface: Corcoran, Elliman, Stribling, and Bellmarc would be protected. All other firms would be required to use RealPlus.

(Friedman Decl. Ex. 101.) This condition created problems for REBNY because CitiHabitats, a "major player" wanted to continue to use OLR. Eventually RealPlus agreed to create an interface for OLR and REBNY mandated the use of R.O.L.E.X. as the exclusive means to exchange listings in real time on the RLS. Plaintiff has pointed to no evidence of any explicit agreement, but **[*14]** a jury could reasonably infer that an implicit term of this agreement was that REBNY and RealPlus would not create any more R.O.L.E.X. interfaces. Again the common ownership of RealPlus and several brokerage defendants who control a substantial number of REBNY's board seats provides circumstantial evidence of a motive to reduce the competition faced by RealPlus that would tend to exclude the possibility that REBNY and RealPlus acted independently. This is sufficient to raise a question of fact as to whether RealPlus and REBNY agreed to block any further potential competitors from access to R.O.L.E.X.

B. Restraint of Trade

The second element of a section 1 claim is that the agreement constitutes an unreasonable restraint of trade. Some types of agreements are so obviously anticompetitive that they are per se unreasonable restraints of trade. For most agreements, however, the plaintiff must show that the agreement is an unreasonable restraint of trade under the rule of reason. Plaintiff argues that defendants' conduct is an unreasonable restraint of trade under both the per se rule and under the rule of reason.

1. Per Se Rule

Per se treatment is reserved for conduct like price fixing that **[*15]** is "so plainly harmful to competition and so obviously lacking in any redeeming pro-competitive values" that it can be "conclusively presumed illegal without further examination." *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 542 (2d Cir. 1993)*; see also *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2713, 168 L. Ed. 2d 623 (2007)*("Resort to per se rules is confined to restraints…that would always or almost always tend to decrease competition and reduce output."). If a restraint is per se illegal, a court need not inquire into the "reasonableness of an individual restraint in light of the real market forces at work." *Leegin Creative, 127 S. Ct. at 2713*.

Citing the Supreme Court's decision in *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*, plaintiff argues that defendants have engaged in a horizontal group boycott that constitutes a per se violation of *section 1*. In the boycott context, however, the per se rule is limited to cases involving horizontal agreements among direct competitors. *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*. Courts will give per se treatment to group boycotts where firms with a dominant position in the **[*16]** relevant market or unique access to a business element necessary for effective competition cut off access to a supply, facility, or market necessary for the plaintiff to compete without any plausible procompetitive justification. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 294, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)*.

The Court need not now decide whether plaintiff's claims should be treated under the per se rule or the rule of reason. [1] It is enough, at this point, to note that plaintiff cannot sidestep its obligation to identify and prove the relevant antitrust market. Without knowing the relevant market, the Court cannot assess defendants' market power or whether access to a R.O.L.E.X. interface is an essential element for plaintiff to compete in the relevant market. Thus we turn now to the rule of reason and analysis of the relevant market.

2. Rule of Reason

---

[1] Plaintiff also argues that defendants' conduct should be subject to "quick look" analysis, citing *Law v. NCAA, 134 F.3d 1010, 1020 (10th Cir. 1998)*. In Law, the Tenth Circuit applied a truncated rule of reason analysis to an NCAA rule limiting salaries of graduate-assistant basketball coaches to $ 16,000, which it characterized as **[*17]** a horizontal price fix with obvious anticompetitive effect and summarily condemned without an analysis of the defendant's market power. Id. Here, unlike *Law*, plaintiff does not allege any agreement on prices in the market for listings IT services. "Quick look" treatment is inappropriate.

Under the rule of reason, "plaintiff bears the initial burden of showing that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market." *Capital Imaging, 996 F.2d at 543* (emphasis in original). The burden then shifts to the defendants "to offer evidence of the pro-competitive 'redeeming virtues' of their combination." Id. If the defendant comes forward with such proof, the burden shifts back to the plaintiff "to demonstrate that any legitimate collaborative objectives proffered by defendant could have been achieved by less restrictive alternatives, that is those that would be less prejudicial to competition as a whole." Id. It is then up to the factfinder to weigh the harms and benefits of the challenged behavior. Id. A plaintiff can satisfy its initial burden either by pointing to direct evidence of actual detrimental effects on competition, **[*18]** like reduced output or actual control over prices, or by showing that defendants possess sufficient market power in the relevant market that their "arrangement has the potential for genuine adverse effects on competition." *Id. at 546* (quoting *F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986))*.

Plaintiff offers no direct evidence of actual detrimental effects on competition other than a bald assertion that REBNY "exercised actual control over prices when it set a very high price for using the e-mail/website access to send and receive RLS listings once or twice a day, thus compelling brokers to purchase Listings IT Services from [RealPlus] or OLR with real time access to RLS data for only slightly higher prices." (Pl. Mem. in Opp. at 27.) This type of showing is insufficient at the summary judgment stage. We turn therefore to analysis of the relevant market.

Defendants argue that the market for listings IT services is at least national in scope and therefore defendants do not have market power in the relevant market. Plaintiff argues that the Manhattan listings IT services market is a distinct market where RealPlus and OLR have substantial market share. Both sides have submitted **[*19]** expert reports supporting their market definitions and plaintiff argues that at the very least, a triable issue of fact as to the definition of the relevant market exists.

The relevant market "is composed of products that have reasonable interchangeability for the purposes for which they are produced-price, use, and qualities considered." *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. The products or services need not be identical to be part of the same market. See *id. at 394*. A court may define a market as "any grouping of sales whose sellers, if unified by a hypothetical cartel or merger, *could profitably raise prices* significantly above the competitive level. If the sales of other producers substantially constrain the price-increasing ability of the hypothetical cartel, these others are part of the market." *AD/SAT, 181 F.3d at 228* (quoting 2A Areeda P 533)(emphasis in opinion). In analyzing the relevant market, courts consider a number of factors beyond the reasonable interchangeability of product and its claimed substitutes. See *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 496 (2d Cir. 2004)*. These factors include "such practical indicia **[*20]** as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price change, and specialized vendors," *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*, as well as the existence of significant barriers to entry to the relevant market. See *Geneva Pharms., 386 F.3d at 499-500* (finding market for generic drug distinct from market for "therapeutically equivalent" brand name drug because, inter alia, high barriers to entry in generic market prevented potential competitors from offering substitutes).

In this case, genuine issues of fact exist as to the definition of the relevant market. Plaintiff argues that, even if the products are similar, substantial barriers to entry keep national listings IT services vendors from selling to brokerage firms in Manhattan. Plaintiff argues that access to real time listings data from the RLS is essential for brokers to effectively compete in the Manhattan marketplace. Therefore a listings IT services vendor must be able to develop an interface with R.O.L.E.X. and the ability to send and receive RLS **[*21]** listings in real time to be able to compete with RealPlus and OLR to sell listings management systems to brokers in Manhattan. But the only way for a new entrant to obtain an interface with R.O.L.E.X. is for RealPlus to agree to create it. RealPlus has already shown that it is not inclined to create new interfaces by rejecting plaintiff's request and resisting OLR's and it has no rational reason to create interfaces with any new potential competitors. These barriers to entry place RealPlus and OLR in a position where, if they formed a hypothetical cartel, they could profitably raise prices above the competitive level. As long as REBNY continues to mandate exchange of listings through R.O.L.E.X., Manhattan brokers have no substitutes available.

Additional questions of fact exist with respect to the interchangeability of the products offered by Manhattan listings IT services vendors and national vendors. Plaintiff's expert listed eight factors which he claims make Manhattan listings IT products different from the products offered in the national market. Defendants' expert argues that the products share the same core functionality and that all of the differentiating features could be addressed **[*22]** through a small degree of customization making the products offered by national vendors adequate substitutes for the Manhattan market. The experts disagree on the degree of customization that would be required to make the products interchangeable. This is a question of fact for the jury.

Defendants argument that plaintiff cannot show antitrust injury because defendants lack market power depends on the definition of the relevant market. If the jury were to find that the relevant market was the Manhattan listings IT services market, plaintiff has offered evidence that defendants' market share in that market is over 70% and potential competitors face high barriers to entry. Therefore a jury reasonably could find that defendants have market power in the relevant market and from that infer that there was harm to competition.

Under the rule of reason analysis, once plaintiff has met its threshold burden, the burden shifts to the defendants to offer a procompetitive justification for their conduct. Here, defendants argue that promoting the exchange of exclusive listings has substantial procompetitive effects in the residential real estate brokerage market and choosing a single transmission **[*23]** standard makes the exchange more efficient. Plaintiff does not contest this. But a substantial question of fact exists as to whether defendants' purported justification for denying plaintiff and other potential competitors an interface with the R.O.L.E.X. system (that additional interfaces present technological difficulties, reduce efficiency, and increase the chance of errors) outweighed its anticompetitive effects.

Because substantial questions of fact exist with respect to concerted action, market definition, and procompetitive justifications, summary judgment on plaintiff's section 1 claims is inappropriate.

III

Section 2 of the Sherman Act prohibits monopolization, attempted monopolization and conspiracy to monopolize any part of trade or commerce. *15 U.S.C. § 2*. Plaintiff claims that defendants have attempted or conspired to monopolize both the Manhattan listings IT services market and the Manhattan residential brokerage services market.

A. Claims of Monopolization of Manhattan Listings IT Services Market

Defendants argue that plaintiff's monopolization claims, whether for actual monopolization, attempted monopolization or conspiracy to monopolize, fail as a matter of law because **[*24]** liability under *section 2* cannot rest on a theory of shared monopoly.

As the Eastern District explained in Flash Electronics, Inc. v. Universal Music & Video Distribution Corp., with respect to "claims of actual or attempted monopolization, the Second Circuit has specifically indicated that it will not entertain arguments based on a 'shared monopoly' theory of liability." *312 F. Supp. 2d 379, 397 (E.D.N.Y. 2004)*(citing *H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc., 879 F.2d 1005, 1018 (2d Cir. 1989)*.

In the amended complaint, plaintiff alleges that there is a dangerous probability that defendants RealPlus *and* OLR will be able to establish a monopoly position in the Manhattan listings IT services market. (Amended Compl. P 128.) This is a claim for actual or attempted monopolization based on a shared monopoly between RealPlus and OLR; as such, it must fail.

The complaint does not clearly allege a conspiracy to monopolize claim, but even if the Court were to construe it to raise allegations of conspiracy or allow plaintiff to amend the complaint, a claim of conspiracy to monopolize based on a shared monopoly between RealPlus and OLR would also fail as a matter of law. While **[*25]** the Second Circuit has not squarely addressed the question of whether a shared monopoly theory of liability is viable in the context of a conspiracy to monopolize, district courts in this and other circuits have expressed skepticism on the issue, even if they have stopped short of categorically rejecting the possibility of such a claim. See *Flash Electronics, 312 F. Supp. 2d at 397*. In *Sun Dun Inc. of Washington v. Coca-Cola Co., 740 F. Supp. 381, 391-92 (D. Md. 1990)*, the court said that a claim of conspiracy to form a shared monopoly might be viable "if the aim of the conspiracy was to form a single entity to possess illegal market power," but if the goal of the conspiracy was to create a market environment where market power continued to be shared among the coconspirators as otherwise unrelated entities, no claim is stated under *section 2*. The Eastern District in Santana Products v. Sylvester & Associates, Ltd., *121 F. Supp. 2d 729 (E.D.N.Y. 1999)*, took a slightly more expansive view saying that "a **[*26]** claim for conspiracy to monopolize may also be stated where two or more competitors seek to allocate a market and exclude competitors, even if they do not form a single corporate entity," *id. at 740 n.1*, but absent an allegation that competition between the monopolizing parties has diminished, a claim of conspiracy to form a shared monopoly must fail. *Id. at 738*; see also *Flash Electronics, 312 F. Supp. 2d at 397*.

In this case, plaintiff has not pointed to any evidence that RealPlus and OLR seek to form a single entity or that competition between them has diminished or that they have allocated customers. In fact, defendants point to evidence that competition between the two defendants is robust and that RealPlus was forced to lower its prices in response to competition from OLR. Even under the more permissive view in Santana Products, plaintiff cannot make out a claim for conspiracy to form a shared monopoly. Defendants are therefore entitled to summary judgment on plaintiff's claims of actual monopolization, attempted monopolization, and conspiracy to monopolize the Manhattan listings IT services market.

B. Claims of Monopolization of Manhattan Residential Brokerage Services Market

Plaintiff **[*27]** alleges that the brokerage defendants violated *section 2* by monopolizing or attempting to monopolize the Manhattan Residential Brokerage Services Market. Plaintiff lacks standing to prosecute such a claim because it is neither a consumer nor a competitor in the relevant market. See *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 537-44, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*; *Illinois ex rel. Ryan v. Brown, 227 F.3d 1042, 1046 (7th Cir. 2000)*("normally only consumers or competitors have standing"). Plaintiff does not buy or sell residential brokerage services. As vendor of IT services whose customers are competitors in the relevant market, plaintiff is too remote a party to have antitrust standing.

Even if plaintiff did have standing, the claim is one of shared monopoly and would fail for the same reasons plaintiff's claim for monopolization of the Manhattan listings IT services market fails.

IV

Plaintiff also brings two state law claims: (1) violation of New York's Donnelly Act, *N.Y. Gen. Bus. Law § 340*, and *(2)* tortious interference with economic relations.

The Donnelly Act is generally construed in accordance with the federal Sherman Act, see *Yankees Entm't & Sports Network, LLC v. Cablevision Sys. Corp., 224 F. Supp. 2d 657, 677-78 (S.D.N.Y. 2002)*, **[*28]** and the two acts require identical elements of proof for claims of monopolization. See *Int'l Television Prods. Ltd. v. Twentieth Century-Fox Film Corp., 622 F. Supp. 1532, 1540 (S.D.N.Y. 1985)*. Accordingly, to the extent that defendants are entitled to summary judgment under *section 2* of the Sherman Act, they are also entitled to summary judgment for monopolization claims under the Donnelly Act. To the extent that plaintiff's Donnelly Act claims track its claims under *section 1* of the Sherman Act, defendants are not entitled to summary judgment.

An essential element of a claim for tortious interference with economic relations in New York is that the defendant acted solely out of malice and not simply in pursuit of normal economic self interest. See *Carvel Corp. v. Noonan, 3 N.Y.3d 182, 190, 818 N.E.2d 1100, 785 N.Y.S.2d 359 (2004)*. Plaintiff does not even allege that defendants' actions were solely for the purpose of inflicting intentional harm on plaintiff, let alone point to evidence to support such a claim. In its opposition brief, plaintiff acknowledges that defendants were acting in their own economic self interest to advance the business interests of RealPlus. (Pl.'s Mem. in Opp. at 35.) A showing that defendants **[*29]** acted in their competitive self interest does not demonstrate the requisite motive to prove tortious interference. See *Carvel, 3 N.Y.3d at 191*. Accordingly defendants are entitled to summary judgment on the tortious interference claim.

V

Defendants have alerted the Court to the fact that plaintiff named Prudential Real Estate Affiliates, Inc. and William B. May Co., R.E. Inc. as defendants in the amended complaint but never effected service on them. Defendants ask that the court dismiss these two parties from the action pursuant to *Rule 4(m) of the Federal Rules of Civil Procedure*. Plaintiff has not opposed this request. Accordingly Prudential Real Estate Affiliates, Inc. and William B. May Co., R.E. Inc. are dismissed from the action.

Finally, defendants moved to strike portions of the summary judgment record as irrelevant or inadmissible. The Court having relied on none of the material that is the subject of the motion to strike, that motion is denied as moot in light of the disposition of the defendants' summary judgment motion.

VI

For the reasons set forth above, defendants' motion for summary judgment is granted in part and denied in part. Defendants' motion for summary judgment **[*30]** on plaintiff's claims under *section 1* of the Sherman Act is denied. Summary judgment is granted in favor of defendants on plaintiff's *section 2* claims. Summary judgment is granted in favor of defendants on the Donnelly Act claims to the extent that those claims track plaintiff's claims under *section 2* of the Sherman Act. Summary judgment is granted in favor of defendants on plaintiff's state law tort claims. Prudential Real Estate Affiliates, Inc. and William B. May Co., R.E. Inc. are dismissed from the action. Defendants' motion to strike is denied as moot.

The parties are directed to submit a pretrial order by September 4, 2007.

SO ORDERED.

Dated: New York, NY

August 6, 2007

LEONARD B. SAND

U.S.D.J.

Nilavar v. Mercy Health System-Western Ohio

United States Court of Appeals for the Sixth Circuit

August 7, 2007, Filed

File Name: 07a0546n.06

No. 06-3819

Reporter

244 Fed. Appx. 690 *; 2007 U.S. App. LEXIS 19127 **; 2007 FED App. 0546N (6th Cir.); 2007-2 Trade Cas. (CCH) P75,897

SUNDAR V. NILAVAR, M.D., Plaintiff-Appellant, v. MERCY HEALTH SYSTEM-WESTERN OHIO, CATHOLIC HEALTHCARE PARTNERS, MICHAEL J. PETERSON, JEROLD A. MAKI, DR. ROBIN OSBORN, and DIAGNOSTIC IMAGING ON OHIO, INC., Defendants-Appellees.

Notice: CONSULT 6TH CIR. R. 32.1 FOR CITATION OF UNPUBLISHED OPINIONS AND DECISIONS.

Prior History: [1]** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

Nilavar v. Mercy Health Sys., 495 F. Supp. 2d 816, 2006 U.S. Dist. LEXIS 96500 (S.D. Ohio, May 23, 2006)

Core Terms

district court, radiology, exclusive contract, antitrust, geographic, patients, privileges, expert testimony, anticompetitive, restraint of trade, effects, antitrust claim, market power, challenging, defendants', anti trust law, no evidence, consumers, provider, summary judgment motion, state law claim, anesthesiologist, conspiracy, unreliable, genuine, grounds

LexisNexis® Headnotes

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

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

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

The U.S. Court of Appeals for the Sixth Circuit reviews a district court's order granting summary judgment de novo.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN2[] **Summary Judgment, Evidentiary Considerations**

Courts must consider all the facts in the light most favorable to the nonmovant and must give the nonmovant the benefit of every reasonable inference when resolving a summary judgment motion. The moving party's burden is to show "clearly and convincingly" the absence of any genuine issues of material fact.

Antitrust & Trade Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN3[] **Antitrust & Trade Law**

A movant's summary judgment burden is not altered by virtue of the fact that a case involves an antitrust claim.

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

Evidence > Admissibility > Expert Witnesses

HN4[] **Standards of Review, Abuse of Discretion**

The U.S. Court of Appeals for the Sixth Circuit reviews a district court's decision to exclude expert testimony for an abuse of discretion.

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

HN5[] **Sherman Act, Scope**

Every contract, combination, or conspiracy, in restraint of trade or commerce among the several States is declared to be illegal. *15 U.S.C.S. § 1*. Read literally, *§ 1* prohibits every agreement in restraint of trade. However, the U.S. Supreme Court has long recognized that Congress intended to outlaw only "unreasonable" restraints.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN6[] **Antitrust & Trade Law, Sherman Act**

The Valentine Act (Ohio) was modeled after the Sherman Act and federal law applies to its interpretation.

Antitrust & Trade Law > Sherman Act > Claims

HN7[] **Sherman Act, Claims**

To establish a claim under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, a plaintiff must establish that the defendants contracted, combined or conspired among each other, that the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets, that the objects of and conduct pursuant to that contract or conspiracy were illegal, and that the plaintiff was injured as a proximate result of that conspiracy.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN8[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

The rule of reason requires a court to analyze the history of the restraint and the restraint's effect on competition. The rule of reason analysis employs a burden-shifting framework. First, the plaintiff must establish that the restraint produces significant anticompetitive effects within the relevant product and geographic markets. This is usually shown through the use of expert testimony regarding the geographic market and a defendant's market power. If the plaintiff meets this burden, the defendant must come forward with evidence of the restraint's procompetitive effects to establish that the alleged conduct justifies the otherwise anticompetitive injuries. If the defendant is able to demonstrate procompetitive effects, the plaintiff then must show that any legitimate objectives can be achieved in a substantially less restrictive manner. If there is demonstrable evidence that the challenged restraint is unreasonable, then there is significant evidence of competitive harm, and therefore there is no need to resort to tools such as expert testimony to define the geographic market and determination of market power.

Evidence > Admissibility > Expert Witnesses

HN9[] **Admissibility, Expert Witnesses**

See *Fed. R. Evid. 702*.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN10[] **Expert Witnesses, Daubert Standard**

In Daubert, the U.S. Supreme Court provided a nonexhaustive list of factors which may, in any given case, bear on a trial judge's gatekeeping determination. These factors include: (1) whether a theory or technique can be (and has been) tested, (2) whether the theory has been subjected to peer review and publication; (3) whether, with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the theory or technique enjoys general acceptance within a relevant scientific community. The Court has made clear that these same factors apply to all types of expert testimony.

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

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

The Elzinga-Hogarty test analyzes patterns of consumer origin and destination to identify relevant competitors of the contracting entities. In other words, the test measures the extent to which a product comes into (in-flow) and leaves (out-flow) the market. In-flow and out-flow are represented by the two variables of the test, LOFI (little out from inside) and LIFO (little in from outside), which are expressed in percentages. In order to show actions which indicate market power having an adverse effect on competition, a plaintiff would need to show that the in-flow and out-flow are low. Low scores would demonstrate the existence of a cohesive geographic market and show defendants' market power. Courts that have used the Elzinga-Hogarty test in antitrust cases have found that a 10 percent threshold is needed for a strong result. That is, a geographic market is properly defined when 10 percent or less of the consumers leave the area to obtain the product and when 10 percent or less of consumers who obtain the product come in from outside the area.

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

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

When the evidence indicates that a large proportion of consumers within the proposed area in fact turn to alternative sources of supply outside the proposed area, the market boundaries posited by an antitrust plaintiff must be rejected.

Counsel: For SUNDAR V. NILAVAR, Plaintiff - Appellant: Lee C. Falke, Lee C. Falke & Associates, Dayton, OH; Kenneth A. Lazarus, Lazarus & Associates, Washington, DC; Maggi A. Lazarus, Kenneth A. Lazarus & Assoc, Washington, DC USA.

For MERCY HEALTH SYSTEM-WESTERN OHIO, dba Mercy Medical Center, aka Mercy Health Partners, dba Mercy Medical Hospital, CATHOLIC HEALTHCARE, aka Catholic Healthcare Partners, MICHAEL J. PETERSON, JEROLD A. MAKI, Defendants - Appellees: Matthew C. Blickensderfer, Frost, Brown & Todd, Cincinnati, OH; Jeffrey R. Teeters, Frost & Jacobs, Cincinnati, OH USA.

For ROBIN E. OSBORN, aka Robin E. Osborn, D.O., DIAGNOSTIC IMAGING OF OHIO, INC., Defendants - Appellees: John K. Cogan, Jones Day, Columbus, OH; Thomas Demitrack, Jones, Day Reavis & Pogue, Cleveland, OH USA; Ronald E. Laymon, Law Office, Columbus, OH.

Judges: Before: COLE and McKEAGUE, Circuit Judges; and COHN, District Judge. [*]

Opinion by: AVERN COHN

Opinion

[*692] AVERN COHN, District Judge. This is purported to be an antitrust case. Plaintiff-Appellant Dr. **[**2]** Sundar V. Nilavar sued defendant-appellees Mercy Health System-Western Ohio ("MHS"), Catholic Healthcare Partners, Michael J. Peterson, Jerold A. Maki, Dr. Robin Osborn, and Diagnostic Imaging of Ohio, Inc. ("DIA") [1] (collectively, "defendants"), asserting claims under state and federal ***antitrust law*** as well as related state tort claims. Plaintiff appeals from the district court's orders granting defendants' motion for summary judgment and motion to exclude plaintiff's expert's testimony, and from the denial of plaintiff's motion for reconsideration regarding the same. As will be explained, plaintiff challenges only the dismissal of his antitrust claims. For the reasons that follow, we affirm.

I.

Plaintiff, a radiologist who last practiced medicine in 1995, sued defendants, claiming injuries resulting from a decision by MHS to enter into an exclusive contract for radiology services with Dr. Robin Osborn and his medical

[*] The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

[1] Plaintiff's claims against Dr. Osborn and DIA were dismissed and are not at issue on appeal.

corporation, DRI, to provide radiology services at the two hospitals MHS operates in Springfield and Urbana, Ohio (the "Mercy Hospitals"). [2] For some years prior to 1995, plaintiff **[**3]** practiced radiology as part of a member of a practice group, Springfield Radiology, Inc. ("SRI"), of which Dr. Osborn was also a member. SRI served Mercy Hospitals in providing radiology services, although not under a formal exclusive relationship. Dr. Osborn left SRI sometime in early 1995 and formed DIA. In March 1995, MHS issued a Request for Proposal ("RFP") for exclusive physician radiology services at the Mercy Hospitals. Three physician groups responded to the RFP, including DIA. On September 2, 1995, plaintiff learned that DIA would be awarded the contract and that he had not been included in the DIA proposal. By September 22, 1995, plaintiff experienced severe depression which prevented him from working.

[*693] DIA was awarded the contract in December of 1995, effective January 1, 1996. As a result, MHS notified plaintiff that his clinical privileges would be terminated with MHS as of January 1, 1996. Plaintiff, however, retained privileges at Springfield Community Hospital, but declined an offer to work there due to his ongoing **[**4]** depression.

In 1996, plaintiff sued Dr. Osborn and DIA in state court, claiming breach of contract, estoppel, breach of fiduciary duty, and fraud arising out of Dr. Osborn's failure to negotiate the exclusive contract with MHS on his behalf. As part of the state case, plaintiff admitted that he has been unable to practice medicine as of September 22, 1995, because of severe depression resulting from Dr. Osborn's actions. Plaintiff obtained a $ 100,000.00 jury verdict against Dr. Osborn. The Ohio appellate court upheld the judgment, but remanded for a new trial on damages. The case was settled on remand.

On November 19, 1999, plaintiff sued defendants in federal court, making eight claims, as follows: (1) contract in restraint of trade, in violation of *section 1* of the Sherman Act; (2) tying arrangement in restraint of trade, in violation of *section 1* of the Sherman Act; (3) contract and tying arrangement in restraint of trade, in violation of Ohio's Valentine [Antitrust] Act; (4) a state law claim of tortious interference with a business relationship; (5) a state law claim of breach of implied covenant of good faith and fair dealing; (6) a state law claim of civil conspiracy; (7) a state **[**5]** law claim of denial of due process; and (8) a state law claim of breach of contract. Defendants filed a motion to dismiss, which the district court granted in part and denied in part. The district court dismissed Counts Two and Five, and parts of Counts Three and Six. *Nilavar v. Mercy Health Sys.-W. Ohio, 142 F. Supp. 2d 859, 880-90, 894 (S.D. Ohio 2000)*. The district court later entered a stipulation dismissing all remaining claims against Dr. Osborn and DIA. Plaintiff then added a ninth claim for intentional infliction of emotional distress. Defendants then filed a motion for summary judgment based primarily on judicial estoppel as a result of plaintiff's statements in the state court case. The district court denied the motion. *Nilavar v. Mercy Health Sys.-W. Ohio, 254 F. Supp. 2d 897, 911 (S.D. Ohio 2003)*.

Defendants filed a second motion for summary judgment on all of plaintiff's claims except Count Nine, which was added after their motion was filed. On the date of defendants' filing, plaintiff dismissed his state and federal antitrust claims based on illegal tying. Thus, only his state and federal antitrust claims relating to the exclusive contract remained. Defendants also filed **[**6]** a motion to bar the testimony of plaintiff's economics expert, Dr. John Pisarkiewicz.

The district court granted defendants' motions. As to the motion to strike the expert, the district court found that the expert's methodology for determining a relevant "geographic market" was unreliable. As to the motion for summary judgment, the district court found that plaintiff's claims failed as a result of his failure to have expert testimony on the geographic market and on the grounds that he could not show an antitrust injury because the contract at issue was a mere "reshuffling of competitors" and the exclusive contract was of such short duration that it could not restrain trade. The district court also asked the parties to address the viability of Count Nine (intentional infliction of emotional distress).

---

[2] Defendant Catholic Healthcare Partners is the corporate parent of MHS, and the two individual defendants, Michael Peterson and Jerold Maki, are officers of MHS.

Plaintiff filed a motion for reconsideration. Defendants filed a motion for summary judgment on Count Nine. The district court denied plaintiff's motion and granted defendants' motion. A final judgment **[*694]** was entered. Plaintiff appeals, challenging the dismissal of his antitrust claims and exclusion of his expert's testimony.

Plaintiff's antitrust theory is that defendants excluded plaintiff **[**7]** and other radiology providers from the Mercy Hospitals by granting an exclusive contract to DIA to supply radiology services and that DIA complied with MHS's "cost-cutting interests" by utilizing "dangerous and less expensive contrast agents," which resulted in higher prices and reduced quality of radiology services at the Mercy Hospitals that dominated the Springfield-Urbana area of Southwestern Ohio.

II.

A.

HN1[] We review the district court's order granting summary judgment de novo. *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 185 F.3d 606, 619 (6th Cir. 1999)*. ***HN2***[] We "must consider all the facts in the light most favorable to the nonmovant and must give the nonmovant the benefit of every reasonable inference." *Id.* The moving party's burden is to show "clearly and convincingly" the absence of any genuine issues of material fact. *Sims v. Memphis Processors, Inc., 926 F.2d 524, 526 (6th Cir. 1991)* (quoting *Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986))*. Importantly, we have observed that ***HN3***[] a movant's summary judgment burden is not altered by virtue of the fact that the case involves an antitrust claim. *See Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917, 930-31 (6th Cir. 2005)*.

HN4[] We **[**8]** review the district court's decision to exclude expert testimony for an abuse of discretion. *Barnes v. Kerr Corp., 418 F.3d 583, 588 (6th Cir. 2005)*.

B.

Plaintiff argues that the district court misconstrued the facts and misapplied the law regarding antitrust actions. Plaintiff says he presented evidence of actual harm resulting from the exclusive contract and therefore expert testimony on the relevant geographic market was not necessary. Plaintiff alternatively argues that his expert's methodology was reliable and should not have been excluded. He further argues there are genuine issues of material fact as to whether he suffered an antitrust injury and whether the exclusive contract was anticompetitve.

Defendants argue that there is no evidence of an antitrust injury and that exclusive contracts, such as the one at issue, are commonplace in the medical field and do not violate the antitrust laws. Defendants further argue that plaintiff's expert's ever-changing reports demonstrate the flaws in his methodology in determining the relevant market.

C.

Plaintiff claims that defendants' exclusive contract for radiology services with DIA violates *section 1* of the Sherman Act and Ohio's Valentine **[**9]** Act, *chapter 1331 of the Ohio Revised Code*. [3] Section 1 states, in relevant part: ***HN5***[] "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal." *15 U.S.C. § 1*. Read "literally," *section 1* "prohibits *every* agreement in restraint of trade." *Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 342, 102 S. Ct.* ***[*695]*** *2466, 73 L. Ed. 2d 48*

---

[3] ***HN6***[] The Valentine Act was modeled after the Sherman Act and federal law applies to its interpretation. *See C.K. & J.K., Inc. v. Fairview Shopping Ctr. Corp., 63 Ohio St. 2d 201, 204, 407 N.E.2d 507 (1980)*.

(1982) (internal quotation marks omitted). However, the Supreme Court has long recognized that Congress intended to outlaw only "unreasonable" restraints. *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*; *Maricopa County, 457 U.S. at 342-43* (citing *United States v. Joint-Traffic Ass'n, 171 U.S. 505, 572, 19 S. Ct. 25, 43 L. Ed. 259 (1898)*, for the proposition that Congress does not always intend a literal interpretation of the word "every").

We have stated:

> ***HN7***[] to establish a claim under *section 1*, the plaintiff must establish that the defendants contracted, combined or conspired among each other, that the combination or conspiracy produced adverse, anticompetitive effects **[**10]** within relevant product and geographic markets, that the objects of and conduct pursuant to that contract or conspiracy were illegal and that the plaintiff was injured as a proximate result of that conspiracy.

Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 805 (6th Cir. 1988) (internal quotation marks omitted) (quoting *Davis-Watkins Co. v. Serv. Merch., 686 F.2d 1190, 1195-96 (6th Cir. 1982)*, *overruled in part by* *Bailey's, Inc. v. Windsor Am., Inc., 948 F.2d 1018, 1029 n.5 (6th Cir. 1991))*.

As noted above, the district court granted summary judgment to defendants on the grounds that plaintiff (1) failed to show sufficient evidence of anti-competitive conduct, including defining the relevant geographic market, (2) failed to establish a genuine issue of material fact as to antitrust injury, and (3) failed to show that the exclusive contract restrained trade. The first ground overlays the district court's decision regarding the exclusion of plaintiff's proposed expert. Each ground is discussed in turn.

1.

As to whether plaintiff produced sufficient evidence of anticompetitive conduct, "[t]wo analytical approaches are used to determine whether a defendant's conduct unreasonably **[**11]** restrains trade: the *per se* rule and the rule of reason." *Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1016 (10th Cir. 1998)* (citing *S.C.F.C. I.L.C., Inc. v. Visa U.S.A., Inc., 36 F.3d 958, 963 (10th Cir. 1994))*. The district court previously determined that the rule of reason applied. *See* *Nilavar, 142 F. Supp. 2d at 873-74*.

HN8[] "The rule of reason . . . requires a court to analyze the history of the restraint and the restraint's effect on competition." *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 718 (6th Cir. 2003)*. "The rule of reason analysis employs a burden-shifting framework." *Id.* (citing *Cal. Dental Ass'n v. FTC, 526 U.S. 756, 775 n.12, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999))*. First, the plaintiff must establish that the restraint produces significant anticompetitive effects within the relevant product and geographic markets. *See Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)*. This is usually shown through the use of expert testimony regarding the geographic market and a defendant's market power. "If the plaintiff meets this burden, the defendant must come forward with evidence of the restraint's procompetitive effects" to establish that the alleged **[**12]** conduct justifies the otherwise anticompetitive injuries. *Id.; see also* *United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993)*. If the defendant is able to demonstrate procompetitive effects, the plaintiff then must show that any legitimate objectives can be achieved in a substantially less restrictive manner. *Law, 134 F.3d at 1019*.

However, the Supreme Court has found that if there is demonstrable evidence that **[*696]** the challenged restraint is unreasonable, then there is significant evidence of competitive harm, and therefore there is no need to resort to tools such as expert testimony to define the geographic market and determination of market power. The rationale is that market power is simply a surrogate for actual detrimental effects. *See* *FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 458-61, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*.

a.

When faced with the exclusion of his expert, plaintiff argued in his motion for reconsideration that the expert's testimony was not necessary because the record contained significant evidence of competitive harm. The district court rejected this argument. Plaintiff points to the same evidence considered by the district court, contending that it raises a genuine issue of material fact **[**13]** as to whether actual detrimental effects flowed from the exclusive contract between MHS and DIA. We agree with the district court that none of plaintiff's evidence rises to the level of significant competitive harm.

First, plaintiff points to the fact that under the exclusive contract, defendants were able to use less expensive ionic contrast agents in radiology procedures, a practice which plaintiff has long opposed. While plaintiff says the use of ionic, instead of non-ionic, contrast agents is dangerous, there is no evidence that any patient at MHS suffered as a result of the use of ionic contrast agents. Plaintiff also admitted at deposition that the ionic debate was a non-issue by February 1995. Thus, this is not evidence of an actual detrimental effect on competition or consumers.

Plaintiff also points to the fact that the contract permits the use of temporary or part-time physicians and that Dr. Osborn doubled his income under the contract. However, plaintiff has no evidence that any patients suffered as a result. There is also no evidence that any of the temporary or part-time physicians were unqualified.

In short, the record does not contain sufficient evidence of detrimental **[**14]** effects that would obviate the need for plaintiff to identify the relevant geographic market and market power in order to determine whether the exclusive contract violates *section 1* of the Sherman Act.

b.

(1)

Whether plaintiff established sufficient evidence of a geographic market so as to show an antitrust violation centers on whether the district court erred in excluding plaintiff's proposed expert's testimony.

Federal Rule of Evidence 702 provides:

> ***HN9***[] If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. This rule reflects the Supreme Court's decisions in *Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)* and *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*. In *Daubert,* ***HN10***[] the Supreme Court provided a nonexhaustive **[**15]** list of factors which may, in any given case, bear on a trial judge's gatekeeping determination. *509 U.S. at 592-94*. These factors include: (1) whether a "theory or **[*697]** technique . . . can be (and has been) tested," (2) whether the theory "has been subjected to peer review and publication;" (3) whether, with respect to a particular technique, there is a high "known or potential rate of error" and whether there are "standards controlling the technique's operation"; and (4) whether the theory or technique enjoys "general acceptance" within a "relevant scientific community." *Id.* Six years after issuing *Daubert,* the Court made clear in *Kumho* that these same factors apply to all types of expert testimony. *526 U.S. at 148-49*.

(2)

The district court determined that although plaintiff's proposed expert, John Pisarkiewicz, Ph.D., could opine as to the relevant product market, his proffered testimony with respect to the proposed geographic market was inadmissible under *Rule 702*. The district court found two flaws in the expert's analysis: (1) adjustments made by the expert to his analysis contradicted his proposed product market definition, which resulted in his opinion being based on unreliable methods; **[**16]** and (2) the adjustments made were incorrect as a matter of law.

Plaintiff offered the following definition of the relevant geographic market: "the physician component of diagnostic radiology services provided in [a] . . . hospital setting" with a relevant submarket consisting of "the physician component of diagnostic radiology services provided to inpatients." As to the locale, plaintiff defined it as "essentially comprising Clark and Champaign Counties," consisting of an area encompassed by nineteen ZIP codes. The expert explained that his primary tools for opining that defendants exercise market power in that geographic area were the Elzinga-Hogarty test and the critical loss test. Defendants argued, as they do here, that the expert's opinion is unreliable because he manipulated those tests to arrive at a conclusion favorable to plaintiff. The district court agreed. We also agree.

(3)

HN11[] The Elzinga-Hogarty test analyzes patterns of consumer origin and destination to identify relevant competitors of the contracting entities. *See* *FTC v. Freeman Hosp., 69 F.3d 260, 264 (8th Cir. 1995)*. In other words, the test measures the extent to which a product comes into (in-flow) and leaves (out-flow) **[**17]** the market. In-flow and out-flow are represented by the two variables of the test, LOFI (little out from inside) and LIFO (little in from outside), which are expressed in percentages. In order to show actions which indicate market power having an adverse effect on competition, a plaintiff would need to show that the in-flow and out-flow are low. Here, plaintiff would have to show that few residents of his geographic market leave the area to obtain hospital-based radiological services (LOFI) and that few patients residing outside of the geographic market come to the area to obtain hospital based radiological services (LIFO). Low scores would demonstrate the existence of a cohesive geographic market and show defendants' market power. Courts that have used the Elzinga-Hogarty test in antitrust cases have found that a 10% threshold is needed for a strong result. *See* *Gordon v. Lewistown Hosp., 272 F. Supp. 2d 393, 426 (M.D. Pa. 2003)*. That is, a geographic market is properly defined when 10% or less of the consumers leave the area to obtain the product and when 10% or less of consumers who obtain the product come in from outside the area. *Id.*

In the expert's initial report, he found a LIFO **[**18]** ratio of 4.8% and a LOFI of 25.0%. While the test says that 25% is a weak result, the expert described it as "good." He also suggested that the results could **[*698]** be strengthened by using individual ZIP codes rather than county borders. Indeed, at his deposition, the expert supplemented his report by removing from consideration ZIP codes in the southwest corner of Clark County and the northeast corner of Champaign County. This caused his out-flow to drop to 16% and in-flow to increase to 11%. Following his deposition, the expert further refined his analysis under the Elzinga-Hogarty test in an affidavit. In the affidavit, he states that after further refinement, the average LOFI and LIFO ratios are 8.7%, or within the 10% generally called for by the test.

As explained by the district court, these refinements fundamentally altered the results of the test, rendering them unreliable. The first problem is that the expert excluded patients from the geographic market who required a procedure for which more than 90% of them left the market. The district court found that such exclusion was improper as a matter of law. We agree. This Circuit has held that ***HN12***[] "when the evidence indicates that a large **[**19]** proportion of consumers within the proposed area in fact turn to alternative sources of supply outside the proposed area, the market boundaries posited by the plaintiff must be rejected." *Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1017 (6th Cir. 1999)* (citing *Bathke v. Casey's Gen. Stores, Inc., 64 F.3d 340, 346 (8th Cir. 1995))*.

The district court further noted that the expert's admission that some of the patients who left the area for services, whom he specifically excluded, did so not because the services they required were not available at one of the three hospitals, but because the services were perceived to be better elsewhere. This fact alone shows the presence of competition in the market. The expert also excluded patients who left the area to visit specialty hospitals or out-of-state hospitals or who required obstetrics and newborn care services. There is simply no proper justification for all of these exclusions. These exclusions also indicate the presence of competition, as patients are able to leave the geographic market to obtain services, which presumably are available in the market, where they desire. At best, the exclusion show an improper application of the **[**20]** Elzinga-Hogarty test. At worst, they show an effort to manipulate the test. The district court was correct in excluding the expert's report on this ground.

(4)

The expert also justified his conclusions using the critical loss test. This test is from the Federal Trade Commission's Horizontal Merger Guidelines. It assesses whether a market participant would be able to raise prices without causing a "critical loss" of consumers that would make the price increase ultimately unprofitable. *See* *Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 198 (1st Cir. 1996)* ("The touchstone of market definition is whether a hypothetical monopolist could raise prices."). The price increase recommended by the Merger Guidelines is 5%. As applied to this case, the test would ask how many patients would have to leave the market in order to defeat a price increase by defendants of 5% and whether those patients actually would leave the market. Defendants argue that the expert erred in using "gross charges" for inpatient and outpatient radiological services when calculating the critical loss figure, rather than actual charges. The district court bypassed this criticism, noting a more fundamental **[**21]** flaw with utilization of the critical loss test--the fact that patients were leaving the geographic area in the absence of any price increase. As noted above, the expert's initial conclusion was that 25% of patients within the geographic **[*699]** market were leaving the area to obtain radiology services elsewhere. Because some patients were already leaving, it makes no logical sense that these same patients would not also leave if prices increased. In an attempt to rationalize this fact, the expert claimed that the patients who were leaving were obtaining radiology services that were unavailable in the geographic market. This statement, if true, contradicts the defined product market, which is "all diagnostic radiology services provided in a hospital setting." This definition does not distinguish between the type of services (other than inpatient or outpatient) provided. Thus, the district court did not err in finding the expert's report inadmissible on this ground.

(5)

Overall, the expert's opinion, whether based on the Elzinga-Hogarty test or the critical loss test, is flawed to the point of unreliability. While the tests themselves are appropriate and within the parameters of *Daubert*, the **[**22]** way in which the expert applied the tests undercuts his opinion to the point that it is inadmissible under *Rule 702*.

2.

The district court also determined, alternatively, that plaintiff's antitrust claim failed because he did not establish an antitrust injury. A private antitrust plaintiff, in addition to having to show injury-in-fact and proximate cause, must allege, and eventually prove, "antitrust injury." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. "Antitrust injury" is (1) "injury of the type the antitrust laws were intended to prevent" and (2) injury "that flows from that which makes defendants' acts unlawful." *Id.* As explained by the Supreme Court in *Brunswick,* the antitrust injury doctrine is designed to ensure that "[t]he injury . . . reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Id.* The Supreme Court has further explained the requirement as "ensur[ing] that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place," and, more specifically, it "ensures that a plaintiff can recover only if the loss stems from **[**23]** a competition-reducing aspect or effect of the defendant's behavior." *Atl. Richfield Co. v. U.S.A. Petroleum Co., 495 U.S. 328, 342-44, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*.

The district court, relying on *Balaklaw v. Lovell, 14 F.3d 793 (2d Cir. 1994)*, held that plaintiff failed to establish an antitrust injury because the exclusive contract between defendants and DIA was the result of competition between radiology providers. The facts in *Balaklaw* are similar to the instant case. In *Balaklaw,* a physician who was president of a group of anesthesiologists that had been the de facto provider of anesthesiology services at a hospital in Cortland, New York, sued claiming an antitrust violation after his group lost in the competition to be granted an exclusive-provider contract at that hospital. The Court of Appeals for the Second Circuit held that plaintiff had not suffered an antitrust injury under the circumstances. The Second Circuit explained:

> "[I]t is the nature of competition that at some point there are winners and losers, and the losers are excluded." *Konik v. Champlain Valley Physicians Hosp. Med. Ctr., 733 F.2d 1007, 1015 (2d Cir.)*, *cert. denied, 469 U.S. 884, 105 S. Ct. 253, 83 L. Ed. 2d 190 (1984)*. Here, Dr. Balaklaw entered the competition **[**24]** for an exclusive contract, he interviewed for it, and he lost. He was therefore excluded from further practice at CMH

> during the term of the contract. Especially in **[*700]** light of the Supreme Court's recognition that a hospital has the "unquestioned right to exercise some control over the identity and the number of doctors to whom it accords staff privileges," *Jefferson Parish, 466 U.S. at 30*, and the frequently expressed judicial approval of exclusive contracts for medical services, . . . such exclusion is not enough to constitute an antitrust injury. As we said in *Konik,* "the Hospital is not required to open its operating rooms to any and all anesthesiologists who wish to practice there." *733 F.2d at 1015*. By closing it doors to Dr. Balaklaw in favor of one of his competitors, CMH did nothing to inflict an injury of the type the antitrust laws were intended to prevent.

Balaklaw, 14 F.3d at 801-02 (internal citations omitted).

A careful examination of the evidence shows that the exclusive contract was truly the result of a competitive process. Although plaintiff says that the process was not competitive because Dr. Osborn "duped" the members of SRI into believing that he was submitting a **[**25]** proposal on behalf of SRI and colluded with members of Mercy to assure that DIA was awarded the contract, plaintiff admits that there were other bidders for the contract. Plaintiff offers no evidence to support his allegations, which are based solely on speculation. The facts show that SRI was the de facto exclusive provider of radiology services to Mercy for a number of years. Mercy and SRI negotiated, unsuccessfully, to establish an exclusive contractual relationship. Mercy thereafter decided to solicit proposals for an exclusive contract. RFPs were sent to seven radiology groups, including SRI. Three groups submitted proposals. MHS appointed a committee to review the proposals, and the committee recommended DIA. One marketplace participant replaced another; that does not establish an antitrust violation. The fact that an Ohio state court jury found that Dr. Osborn breached an agreement with plaintiff by not including his name in the DIA proposal, of which there is no evidence MHS had knowledge, does not mean that the overall process was anticompetitive.

Plaintiff also says that the process was anticompetitive in that the exclusive contract resulted in a significant reduction in physician **[**26]** radiology services because physicians, including plaintiff, lost their privileges after the contract was adopted. However, a loss of staff privileges at a facility does not ispo facto establish an antitrust injury. *See* *Oksanen v. Page Mem'l. Hosp., 945 F.2d 696, 708 (4th Cir. 1991)* ("If the law were otherwise, many a physician's workplace grievance with a hospital would be elevated to the status of an antitrust action.").

Moreover, it cannot be ignored that this case involves a staffing decision by MHS regarding the provider of radiology services. There is extensive circuit precedent, including our own, that has upheld hospital-based exclusive provider agreements as not violative of the antitrust laws. Although the reasons vary for the decisions, they offer support for the finding that a hospital's decision regarding staffing, including privileges, is not anticompetitive. *See, e.g.,* *Flegel v. Christian Hosp., Ne.-Nw., 4 F.3d 682 (8th Cir. 1993)* (osteopaths denied privileges because they lacked certification from a particular organization); *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537 (2d Cir. 1993)* (radiologists challenging exclusive contract); *Lie v. St. Joseph Hosp., 964 F.2d 567 (6th Cir. 1992)* **[**27]** (physician's surgical privileges were suspended); *Tarabishi v. McAlester Reg'l Hosp., 951 F.2d 1558 (10th Cir. 1991)* (physician opened up a treatment center and **[*701]** hospital greatly reduced his privileges); *Oksanen, 945 F.2d at 696* (physician suspended, put on probation and then terminated); *Bhan v. N.M.E. Hosp., 929 F.2d 1404 (9th Cir. 1991)* (anesthetist was excluded by policy of allowing only physicians to perform anesthesia services); *Todorov v. D.C.H. Healthcare Auth., 921 F.2d 1438 (11th Cir. 1991)* (physician denied radiology privileges); *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484 (9th Cir. 1991)* (radiologists challenging exclusive contract); *Nurse Midwifery Assocs. v. Hibbett, 918 F.2d 605 (6th Cir. 1990)* (midwives and obstetrician allege they were prevented from operating a maternity practice or offering midwifery services at hospitals); *Beard v. Parkview Hosp., 912 F.2d 138 (6th Cir. 1990)* (radiologist challenging exclusive contract); *Ezpeleta v. Sisters of Mercy Health Corp., 800 F.2d 119 (7th Cir. 1986)* (anesthesiologist's privileges terminated); *Goss v. Mem. Hosp. Sys., 789 F.2d 353 (5th Cir. 1986)* (physician's privileges terminated); *Konik v. Champlain Valley Physicians Hosp., 733 F.2d 1007 (2d Cir. 1984)* **[**28]** (anesthesiologist challenging contract); *Dos Santos v. Columbus-Cuneo-Cabrini Med. Ctr., 684 F.2d 1346 (7th Cir. 1982)* (vacating preliminary injunction that was decided in favor of anesthesiologist who was challenging exclusive contract).

3.

Finally, plaintiff contends that whether the contract restrained trade is a factual dispute over which there are genuine issues. We disagree. The contract was entered into in 1995 and nominally effective for only two years. The district court initially declined to dismiss plaintiff's antitrust claim on these grounds, noting that plaintiff alleged the evidence may show that the opportunity to compete in two years was illusory. After having the benefit of discovery, plaintiff's allegation as to the contract's illusory nature simply did not come to pass.

4.

Defendants also argue that the district court may be affirmed on other grounds, including the statute of limitations and lack of antitrust standing. Both arguments were presented to and rejected by the district court. *See Nilavar, 142 F. Supp. 2d at 859*. Defendants did not cross appeal from these rulings; we therefore need not address them. Defendants also offer additional grounds for excluding the **[**29]** opinion of plaintiff's expert. We decline to address them.

III.

For the reasons stated above, the district court is AFFIRMED.
