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# [***Curtin Mar. Corp. v. Santa Catalina Island Co.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5S35-MF51-JJYN-B3JD-00000-00&context=)

United States District Court for the Central District of California, Western Division

June 23, 2017, Decided; June 23, 2017, Filed

CV 16-03290 TJH (AGRx)

**Reporter**

2017 U.S. Dist. LEXIS 220048 \*

CURTIN MARITIME CORPORATION, Plaintiff, v. SANTA CATALINA ISLAND COMPANY, et al., Defendants.

**Core Terms**

alleges, lease, ***antitrust***, inter alia, motion to dismiss, freight, companies, anti-competitive, Island, fails, ripeness, shipping, freight service, ***anti trust*** law, state action, capabilities, ***regulation***, entities, terms, sham, relevant market, proposals, monopoly, requires, asserts, amend

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**Judges:** Terry J. Hatter, Jr., Senior United States District Judge.

**Opinion by:** Terry J. Hatter, Jr.

**Opinion**

**Order**

[30, 31]

The Court has considered Santa Catalina Island Company's ["SCICo"] motion to dismiss or, in the alternative, to strike the First Amended Complaint ["FAC"];**[\*2]** Avalon Freight Services, LLC's ["AFS"] motion to dismiss the FAC; and SCICo and AFS's joinder in each other's motions, together with the moving and opposing papers.

This ***antitrust*** action relates to a ten-year exclusive lease to use the only port to which freight can be shipped on Santa Catalina Island — referred to as the "Pebbly Beach facility" — granted by SCICo, the owner of the Pebbly Beach facility, to AFS, a freight shipping company. Plaintiff Curtain Maritime Corporation ["Curtin"] alleges that the lease violated ***antitrust*** laws because the manner in which AFS won the lease, and the terms of the lease, were unlawfully anti-competitive. On February 17, 2017, the Court dismissed the Complaint [the "February 17, 2017, Order"] without prejudice because it failed to sufficiently allege ***antitrust*** injury under [*Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1232 (9th Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SC3-GJB0-0038-X33G-00000-00&context=). Further, the Court held that the original Complaint failed to allege an ***antitrust*** injury, based on an allegedly anti-competitive agreement between AFS and SCICo, under [*Glen Holly Entm't, Inc. v. Tektronix, Inc., 343 F.3d 1000 (9th Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:49GV-G100-0038-X1HG-00000-00&context=) because the Complaint merely alleged that AFS and SCICo "started discussions" — as opposed to, for example, entering into an actual unlawful agreement — before SCICo requested proposals from potential freight**[\*3]** shipping companies.

**Factual Allegations in the FAC**

When ruling on a motion to dismiss, the Court accepts as true the factual allegations in the operative complaint. *See* [*Hemi Grp., LLC v. City of N.Y., N.Y., 559 U.S. 1, 5, 130 S. Ct. 983, 175 L. Ed. 2d 943 (2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XMP-8RB0-YB0V-912G-00000-00&context=). Thus, for the purposes of this Order, the Court accepts the following facts alleged in the FAC as true.

For decades prior to March, 2016, Catalina Freight Line ["CFL"] held an exclusive lease to the Pebbly Beach facility. In 2012, SCICo issued a Request for Proposals ["RFP"] to select the next company to lease Pebbly Beach upon the expiration of CFL's lease. The FAC alleges that the submitted proposals were to be evaluated in light of each competing company's "(1) management, organization and personnel; (2) equipment capabilities; (3) operational capabilities; and (4) maintenance capabilities."

Of the eight proposals submitted, AFS, CFL, and Curtin were selected as the finalists. In January, 2014, SCICo announced AFS as the winner. As a result, SCICo entered into an exclusive lease agreement with AFS, under which, *inter alia*, AFS obtained exclusive access to the Pebbly Beach facility for ten years [the "Exclusive Lease"]. The Exclusive Lease contained a revenue sharing provision which provided that AFS "shall pay separate**[\*4]** and additional rent . . . calculated as a percentage of gross revenues attributable to" AFS's freight services to Catalina Island [the "Revenue Sharing Provision"].

This "win" was a sham. The outcome was rigged by virtue of a pre-existing agreement between SCICo and AFS. In reality, in 2012 — prior to SCICo's issuance of the RFP — Gregory Bombard, the co-owner and co-manager of AFS, made an agreement with SCICo that AFS would win the RFP and, in exchange, AFS agreed to share its revenue from the freight hauling business with SCICo [the "Pre-RFP Agreement"]. Moreover, SCICo and AFS are otherwise linked through a web of common and interrelated business interests. Together, AFS and SCICo, allegedly, have exclusive control of passenger service and shipping to Catalina Island and control of all access points and utility facilities on the island. Thus, the whole RFP process was merely a ruse to give SCICo's award of the exclusive lease an aura of legitimacy.

The relevant market in this action is the shipment of freight by sea between Avalon, Santa Catalina Island, and the Southern California mainland ["Relevant Market"]. One of the ***regulatory*** requirements for operating a freight operation**[\*5]** to Pebbly Beach is the receipt of a Certificate of Public Convenience and Necessity ["CPCN"] from the California Public Utilities Commission ["CPUC"]. The CPUC ***regulates***, *inter alia*, the maximum rate charged for freight operations to Catalina Island. The CPUC, however, does not ***regulate*** the terms of use of the Pebbly Beach Facility used for freight shipping.

In October, 2014, AFS applied for a CPCN, and Curtin filed protests of the application with the CPUC. On February 25, 2016, the CPUC — rejecting a proposed decision by an administrative law judge, *inter alia*, denying AFS's application — granted AFS's application for a CPCN [the "February 25, 2016, Decision"]. In the February 25, 2016, Decision the CPUC noted that it lacked the authority to "review . . . a private owner's dock and/or warehouse facilities." Further, the February 25, 2016, Decision noted that "SCICo [was] . . . an applicant before this Commission" and "it is not ***regulated*** by this Commission." The February 25, 2016, Decision observed that compelling SCICo to allow access to the Pebbly Beach Facility was "beyond the scope of [the CPUC's] . . . authority in [its] . . . ***regulation*** of vessel service." On April 28, 2017,**[\*6]** the CPUC granted Curtin's application for rehearing of the February 25, 2016, Decision [the "April 28, 2017, Decision"].

Thus, the FAC asserts three claims, ultimately, based on two broad categories of conduct. First, the FAC asserts all three claims based on the Exclusive Lease. Second, the FAC asserts two claims — the second and third claims — based on anticompetitive conduct outside of the plain terms of the Exclusive Lease, including the Pre-RFP Agreement and the rigging of the RFP process. The claims are: (1) Monopolization in violation of *§ 2* of the Sherman Act, *15 U.S.C. § 2*; (2) Unlawful exclusive dealing arrangements in violation of *§ 1* of the Sherman Act, *15 U.S.C. § 1*; and (3) Unlawful and unfair practices in violation of [*Cal. Bus. Prof. Code § 17200, et seq.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5JFB-2YX1-DYB7-W1SB-00000-00&context=)).

AFS moves to dismiss or, in the alternative, stay the FAC for lack of ripeness. AFS, also, moves to dismiss the FAC under the state action doctrine, the primary jurisdiction doctrine, and for Curtin's alleged failure to exhaust administrative remedies. SCICo moves to dismiss the FAC for failure to sufficiently allege ***antitrust*** injury, and failure to sufficiently plead the three claims. In the alternative, SCICo moves to strike the FAC to the extent that Curtin was required to seek leave**[\*7]** to amend prior to filing the FAC.

**Motion to Dismiss for Lack of Ripeness**

"Because standing and ripeness pertain to federal courts' subject matter jurisdiction, they are properly raised in a [*Rule 12(b)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion to dismiss." [*Chandler v. State Farm Mut. Auto. Ins. Co., 598 F.3d 1115, 1122 (9th Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7Y1K-91P0-YB0V-P06K-00000-00&context=). Ripeness "contains both a constitutional and a prudential component." [*Coons v. Lew, 762 F.3d 891, 897 (9th Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CVK-D221-F04K-V42Y-00000-00&context=) (quotations omitted). When a complaint alleges potential future harms, the analysis of ripeness' constitutional component is the same as an analysis of Article III standing. *See* [*Coons, 762 F.3d at 897*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CVK-D221-F04K-V42Y-00000-00&context=). Thus, the alleged "injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *See* [*Coons, 762 F.3d at 897*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CVK-D221-F04K-V42Y-00000-00&context=). Further, "[i]n the context of administrative actions, the prudential aspect of the ripeness doctrine . . . requires the court to evaluate (1) the fitness of the issues for judicial decision; and (2) the hardship to the parties of withholding court consideration." [*Principal Life Ins. Co. v. Robinson, 394 F.3d 665, 670 (9th Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4F68-CVR0-0038-X35H-00000-00&context=).

Here, both constitutional and prudential aspects are satisfied. SCICo awarded AFS the alleged exclusive lease to use Pebbly Beach in January, 2014. Curtin alleges, *inter alia*, that this lease unlawfully shut it out of the Relevant Market, and resulted in, *inter alia*, damages relating to revenue Curtin**[\*8]** could realize by operating in the Relevant Market. This states a claim that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *See* [*Coons, 762 F.3d at 897*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CVK-D221-F04K-V42Y-00000-00&context=).

Further, this Court, and not CPUC, has jurisdiction over federal ***antitrust*** questions, as discussed below. Moreover, as the CPUC itself noted in the February 25, 2016, Decision and the April 28, 2017, Decision, it lacks jurisdiction over the Pebbly Beach Facility. Thus, the prudential aspect is satisfied. *See* [*Robinson, 394 F.3d at 670*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4F68-CVR0-0038-X35H-00000-00&context=).

**Motion to Dismiss Under** [***Fed. R. Civ. P. 12(b)(6)***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=)

Dismissal under [*Fed. R. Civ. P. 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) is proper when a complaint exhibits either a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." [*Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YJ40-001B-K35G-00000-00&context=). To sufficiently state a claim, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face," [*Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=), so that the defendant receives "fair notice of what the . . . claim is and the grounds upon which it rests." [*Twombly, 550 U.S. at 555*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=). Further, all inferences must be drawn in favor of the plaintiff. [*Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=),

**The State Action Exemption, the Primary Jurisdiction Doctrine, and Failure to Exhaust Administrative Remedies**

The state action exemption recognizes that "the Sherman**[\*9]** Act [is] . . . primarily concerned with *individual* anti-competitive action, not states acting in their sovereign capacity." [*Shames v. California Travel & Tourism Comm'n, 626 F.3d 1079, 1082 (9th Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51J9-08V1-652R-8003-00000-00&context=) (emphasis in original). The state action exemption attaches when, *inter alia*, the challenged conduct is "clearly articulated and affirmatively expressed as state policy." [*Shames, 626 F.3d at 1082*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51J9-08V1-652R-8003-00000-00&context=). The specific anti-competitive acts need not be expressly authorized. [*Shames, 626 F.3d at 1083*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51J9-08V1-652R-8003-00000-00&context=). Instead, courts apply "state action immunity when the actions were a foreseeable result of a broader statutory authorization" provided that there is "a clear and affirmative state policy to displace pure competition with ***regulation*** or monopoly." *See* [*Shames, 626 F.3d at 1083-84*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51J9-08V1-652R-8003-00000-00&context=). "The state-action immunity doctrine is disfavored, and is to be interpreted narrowly, as a broad interpretation of the doctrine may inadvertently extend immunity to anticompetitive activity which the states did not intend to sanction." [*Shames, 626 F.3d at 1084*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51J9-08V1-652R-8003-00000-00&context=) (quotations omitted).

California previously provided common carriers with immunity from federal ***antitrust*** laws under [*Cal. Pub. Util. Code § 496*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5J6S-62C1-66B9-80JV-00000-00&context=). *See* [*Re* ***Regulation*** *of Gen. Freight Transp. by Truck, 35 CPUC 2d 307, 353 (Feb. 7, 1990)*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:3T47-37S0-0004-W3DC-00000-00&context=). [*Section 496*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5J6S-62C1-66B9-80JV-00000-00&context=), however, was repealed. Public Utilities - General Amendments, 1999 Cal. Legis. Serv. Ch. 1005 § 25 (A.B. 1658). The parties have not pointed to a — and the Court finds no — similar affirmative state policy. Accordingly,**[\*10]** AFS and SCICo's conduct is not shielded by the state action exception.

AFS points to [*California Constitution Article XII, §§ 3*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5JBS-1481-DXC8-22NR-00000-00&context=)-4 and [*Cal. Pub. Util. Code § 1007*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5J6S-62D1-66B9-80CC-00000-00&context=) — which, *inter alia*, authorize the CPUC to ***regulate*** rates charged by freight shipping companies and issue CPCNs — as California's policy to displace pure competition with ***regulation*** or monopoly; however, these provisions do not expressly ***regulate*** the conduct alleged in the FAC because the FAC does not allege unlawful pricing practices, and the CPUC does not have the authority, as noted in the February 25, 2016, Decision, to ***regulate*** the Pebbly Beach Facility.

For the same reasons, this action will not be dismissed pursuant to the primary jurisdiction doctrine — under which courts may stay or dismiss complaints presenting issues within the special competence of an administrative agency, [*Reiter v. Cooper, 507 U.S. 258, 268-69 (1993) —, 113 S. Ct. 1213, 122 L. Ed. 2d 604*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S70-NFD0-003B-R50Y-00000-00&context=) or for failure to exhaust administrative remedies. Accordingly, dismissal is not proper under the state action exemption, the primary jurisdiction doctrine, or for failure to exhaust administrative remedies.

***Antitrust* Standing**

In ***antitrust*** cases, the plaintiff must have ***antitrust*** standing to establish its ability to recover. *See* [*Gerlinger v. Amazon.com Inc., 526 F.3d 1253, 1256 (9th Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SM1-XPX0-TXFX-D1RF-00000-00&context=). ***Antitrust*** standing requires, *inter alia*, ***antitrust*** injury. [*Lucas Auto. Eng'g, Inc., 140 F.3d at 1232*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SC3-GJB0-0038-X33G-00000-00&context=). ***Antitrust*** injury, in**[\*11]** turn, requires, *inter alia*, that the alleged injury be "of the type the ***antitrust*** laws were intended to prevent." [*Glen Holly, 343 F.3d at 1007-08*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:49GV-G100-0038-X1HG-00000-00&context=).

In the February 17, 2017, Order, the Court dismissed the original complaint, *inter alia*, because Curtin's alleged injury — that it has been foreclosed from serving as an exclusive freight services provider to SCICo — failed to establish ***antitrust*** injury under *Lucas Auto* because Curtin, *inter alia*, "would have suffered the same alleged injury if the lease were awarded to multiple other companies." With respect to the Exclusive Lease awarded to AFS, nothing in the FAC changes that conclusion. The FAC alleges, *inter alia*, that "AFS's shipping monopoly is facilitated and created by defendant SCICo's ownership of the Pebbly Beach facility which it has leased to defendant AFS on an exclusive basis for a ten-year period . . . ." As the Court concluded in the February 17, 2017, Order, this fails to sufficiently allege ***antitrust*** injury because Curtin would have suffered the same alleged injury if the exclusive lease were awarded to another company. *See* [*Lucas Auto. Eng'g, Inc., 140 F.3d at 1233*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SC3-GJB0-0038-X33G-00000-00&context=).

Curtin argues that *Lucas Automotive* is inapposite for three reasons: "(1) . . . SCICo's RFP had a pre-determined outcome and was**[\*12]** conducted only to give the illusion of healthy competition; (2) . . . SCICo and AFS are not financially independent, vertically situated entities; and (3) the AFS-SCICo lease . . . maintain[s] or preserve[s] a contractual right to limit future competition." Curtin is incorrect. As discussed below, insofar as the FAC alleges that the RFP was a sham and resulted in an arrangement between AFS and SCICo violative of federal ***antitrust*** laws, the FAC sufficiently alleges ***antitrust*** injury; however, that the FAC sufficienty alleges ***antitrust*** injury with respect to the alleged anti-competitive conduct outside of plain terms of the Exclusive Lease does not save the FAC's assertions of liability merely arising out of the Exclusive Lease. Insofar as the FAC asserts liability arising out of the Exclusive Lease, the FAC, just as the original Complaint, fails to sufficiently allege ***antitrust*** injury under *Lucas Automotive* because the injury would have been the same if one or more other companies were awarded the lease to the Pebbly Beach Facility. *See* [*Lucas Auto. Eng'g, Inc., 140 F.3d at 1233*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SC3-GJB0-0038-X33G-00000-00&context=).

With respect to the FAC's allegations that the RFP process was a "sham" and was "rigged by virtue of a" Pre-RFP Agreement, the FAC sufficiently alleges**[\*13]** ***antitrust*** injury under [*Glen Holly. Glen Holly, 343 F.3d at 1005-06*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:49GV-G100-0038-X1HG-00000-00&context=). In *Glen Holly*, the plaintiff alleged that two technology companies that produced the same product entered into an anti-competitive "joint venture" whereby the two companies agreed to end the production of one of the products, and took steps to conceal their anti-competitive agreement from the public. [*Glen Holly, 343 F.3d at 1005-06*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:49GV-G100-0038-X1HG-00000-00&context=). Here, the FAC alleges that "Mr. Bombard agreed AFS would ultimately 'win' the RFP and provide freight services through the Pebbly Beach facility in August 2012, before SCICo initiated the formal RFP process." The Court notes that the only express allegations of the Pre-RFP Agreement are framed as "becoming clear" "[d]uring the CPUC proceedings." This appears to elide the distinction between the Defendants entering into the Pre-RFP Agreement and Curtin forming the *impression* that Defendants entered into the Pre-RFP Agreement during the CPUC proceedings. Nonetheless, taking the inference in favor of Curtin, *see* [*Iqbal, 556 U.S. at 678*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=), the FAC alleges that Defendants entered into the Pre-RFP Agreement.

The FAC, further, alleges that "[i]n exchange for "winning" the tainted RFP process, AFS agreed to share its revenue from the freight hauling business with SCICo" and that SCICo "conducted**[\*14]** the RFP process to give the selection an aura of legitimacy . . . ." While the FAC's allegations regarding the alleged sham RFP and unlawful agreement between AFS and SCICo differs in some respects from the joint venture in *Glen Holly* — for example, *Glen Holly* involved an unlawful horizontal agreement between competitors and, here, the FAC alleges an unlawful vertical agreement between a leasor and leasee — the FAC, nonetheless, as in *Glen Holly*, alleges an agreement violative of federal ***antitrust*** laws that AFS and SCICo actively sought to conceal from the public. *See* [*Glen Holly, 343 F.3d at 1005-06*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:49GV-G100-0038-X1HG-00000-00&context=).

Although the FAC sufficiently alleges ***antitrust*** injury with respect to the alleged sham RFP process and unlawful agreement between SCICo and AFS, it must, also, sufficiently allege that it is, at minimum, a potential competitor of AFS to establish ***antitrust*** standing. *See* [*Solinger v. A&M Records, Inc., 586 F.2d 1304, 1309 (9th Cir. 1978)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-X290-0039-M1Y8-00000-00&context=). To show that it was a potential competitor, a plaintiff must sufficiently allege that it had the "requisite intention and preparedness" to enter the market. *See* [*Solinger, 586 F.2d at 1309-10*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-X290-0039-M1Y8-00000-00&context=). Courts look to varying combinations of four "typical elements" to assess whether a plaintiff has sufficiently shown its intention and preparation to enter the relevant market. *See* [*Solinger, 586 F.2d at 1309-10*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-X290-0039-M1Y8-00000-00&context=). These**[\*15]** elements are: 1) "The background and experience of plaintiff in his prospective business"; 2) "Affirmative action on the part of plaintiff to engage in the proposed business"; 3) "The ability of plaintiff to finance the business and the purchase of equipment and facilities necessary to engage in the business"; and 4) "The consummation of contracts by plaintiff[.]" *See* [*Solinger, 586 F.2d at 1310*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-X290-0039-M1Y8-00000-00&context=).

Here, at the motion to dismiss stage — at which the Court draws all inferences in favor of the plaintiff, *see* [*Iqbal, 556 U.S. at 678*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=) the FAC's allegation that SCICo selected Curtin as a finalist in the RFP process is sufficient to allege that Curtin was a potential competitor. Indeed, the only other finalists were AFS, the ultimate winner of the RFP, and CFL, the prior leasee of the Pebbly Beach Facility. The FAC alleges that the submitted proposals would be evaluated in light of each competing companys' "(1) management, organization and personnel; (2) equipment capabilities; (3) operational capabilities; and (4) maintenance capabilities." Thus, Curtin's selection as a finalist inferentially supports all four *Solinger* factors. *See* [*Solinger, 586 F.2d at 1309-10*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-X290-0039-M1Y8-00000-00&context=).

Therefore, the FAC fails to sufficiently allege ***antitrust*** standing with respect to the Exclusive Lease SCICo**[\*16]** granted AFS. The FAC, however, sufficiently alleges ***antitrust*** standing with respect to the allegations that the RFP process was a sham and that AFS and SCICo entered into a secret agreement violative of federal ***antitrust*** law.

**The Exclusive Dealing Claim Under *§ 1* of the Sherman Act**

The FAC's second claim — unlawful exclusive dealing under *§ 1* of the Sherman Act — is entirely based on "[t]he long-term exclusive lease between SCICo and AFS for use of the Pebbly Beach facility[.]" Curtin alleges that "Defendants' exclusive dealing arrangements constitute an unreasonable restraint of trade in violation of *Section 1* of the Sherman Act." As discussed above, allegations based solely on the Exclusive Lease are not cognizable because such allegations fail to sufficiently allege ***antitrust*** injury. Accordingly, because Curtin's claim under *§ 1* is based entirely on the Exclusive Lease, the FAC fails to sufficiently state its second claim.

In its opposition, Curtin argued that the *§ 1* claim was sufficiently pled because there is "no rational or legitimate business justification for both the selection of AFS and the exclusivity terms in its lease with AFS." This point is moot, however, because, without more, the FAC's allegations**[\*17]** regarding SCICo's selection of AFS and the exclusivity of the lease terms fail to sufficiently allege ***antitrust*** injury. *See* [*Lucas Auto. Eng'g, Inc., 140 F.3d at 1233*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SC3-GJB0-0038-X33G-00000-00&context=). Curtin's opposition, also, in effect, suggests that the *§ 1* claim is sufficiently plead to the extent that it alleges a conspiracy in which, *inter alia*, "[t]he RFP process . . . served only to give the [Defendants'] . . . arrangement the appearance of legitimacy." However, Curtin's second claim is expressly premised on the plain terms of the Exclusive Lease. While plaintiffs may "disaggregate particular conduct from" an otherwise lawful agreement "and submit that conduct to individual scrutiny[,]" plaintiffs have not done so here. *See* [*In re ATM Fee* ***Antitrust*** *Litig., 554 F. Supp. 2d 1003, 1012 (N.D. Cal. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4S4J-VD00-TXFP-C3BF-00000-00&context=). Thus, the FAC's claim under *§ 1* fails to sufficiently state a claim because the allegations concerning the exclusive dealing arrangement, without more, fail to sufficiently allege ***antitrust*** injury. *See* [*Lucas Auto. Eng'g, Inc., 140 F.3d at 1233*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SC3-GJB0-0038-X33G-00000-00&context=).

**The Monopoly Claim Under *§ 2* of the Sherman Act**

*Section 2* of the Sherman Act makes it unlawful to, *inter alia*, "monopolize. . . any part of the trade or commerce among the several States[.]" *15 U.S.C. § 2*. Monopoly claims under *§ 2* can be asserted only against singular entities that can exert their power unilaterally. [*Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1443 (9th Cir. 1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FT10-001T-D3HS-00000-00&context=). Multiple entities, such as AFS and SCICo,**[\*18]** are viewed as singular entities "[w]here there is substantial *common* ownership, a fiduciary obligation to act for another entity's economic benefit or an agreement to divide profits *and* losses[.]" *See* [*Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1148 (9th Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:483T-TCP0-0038-X49T-00000-00&context=) (emphasis added).

Here, while the FAC alleges that Defendants are linked through a web of common and interrelated business interests, it fails to allege that this "web" includes substantial *common* ownership or gives rise to fiduciary relationships. *See* [*Freeman, 322 F.3d at 1148*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:483T-TCP0-0038-X49T-00000-00&context=). Further, although the FAC alleges that AFS agreed to share profits with SCICo, there are no allegations that SCICo agreed to do the same, or that either AFS or SCICo agreed to share *losses* with the other. *See* [*Freeman, 322 F.3d at 1148*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:483T-TCP0-0038-X49T-00000-00&context=). Thus, the FAC fails to allege that Defendants constitute a singular entity. Consequently, the FAC fails to sufficiently allege the *§ 2* claim.

**The Unfair Competition Law ["UCL"] Claim**

The Court declines to exercise supplemental jurisdiction over the remaining state law UCL claim. *See* [*28 U.S.C. § 1367(c)(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSN1-NRF4-44MM-00000-00&context=).

**Leave to Amend**

[*Fed. R. Civ. P. 15(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F103-00000-00&context=) provides that leave to amend should be freely given when justice so requires. Here, Curtin has not sufficiently pled facts that make a plausible claim for relief; however, it has alleged certain facts — *e.g.* the alleged Pre-RFP Agreement**[\*19]** — that, sufficiently allege ***antitrust*** injury. Other facts alleged in the FAC — *i.e.* the Exclusive Lease — neither allege ***antitrust*** injury nor support the claims asserted in the FAC. Accordingly, this case will be dismissed with leave to amend one last time. If Curtin files a Second Amended Complaint with pleading deficiencies, this case will then be dismissed with prejudice. *See* [*McGlinchy v. Shell Chemical Co., 845 F.2d 802, 809-10 (9th Cir. 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1CH0-001B-K0DV-00000-00&context=).

Accordingly,

It is Ordered that Avalon Freight Services, LLC's motion to dismiss or, in the alternative, to stay, for lack of ripeness and jurisdiction be, and hereby is, Denied.

It is Further Ordered that Santa Catalina Island Company's motion to dismiss this action, joined by Avalon Freight Services, LLC's, be, and hereby is, Granted without prejudice as to all Defendants.

It is Further Ordered that if Curtin Maritime Corporation desires to file a Second Amended Complaint, it shall file it within thirty days of this Order.

It is Further Ordered that Santa Catalina Island Company's motion to strike be, and hereby is, Denied as moot.

Date: June 23, 2017

/s/ Terry J. Hatter, Jr.

Terry J. Hatter, Jr.

Senior United States District Judge

**End of Document**