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# [***Trendsettah USA, Inc. v. Swisher Int'l, Inc.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N1K-V261-F04C-T233-00000-00&context=)

United States District Court for the Central District of California

January 21, 2016, Decided; January 21, 2016, Filed

Case No. SACV14-01664 JVS (DFMx)

**Reporter**

2016 U.S. Dist. LEXIS 184758 \*

Trendsettah USA, Inc., et al. v. Swisher International Inc.

**Core Terms**

cigarillo, genuine issue of material fact, products, summary judgment, distributors, wholesalers, email, relevant market, disparaging, tortious interference, monopoly power, monopolization, ***antitrust***, discovery, barriers, Label, partial summary judgment, expert report, orders, anticompetitive conduct, ***anti trust*** law, trade libel, admissible, parties, market share, competitors, monopolist, documents, damages, output

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

Attorneys for Defendants: Not Present

**Judges:** James V. Selna.

**Opinion by:** James V. Selna

**Opinion**

**CIVIL MINUTES — GENERAL**

**Proceedings: (IN CHAMBERS) Order DENYING Plaintiff's Motion to Exclude Evidence and Impose Evidentiary Inference; and GRANTING IN PART and DENYING IN PART Defendant's Motion for Partial Summary Judgment**

Before the Court are two motions:

First, Plaintiffs Trendsettah USA, Inc. and Trend Settah Inc. (collectively, "Trendsettah") have filed a motion to exclude evidence and permit adverse evidentiary inferences against Defendant Swisher International, Inc. ("Swisher"). Docket No. 63. Swisher has filed an opposition. Docket No. 89. Trendsettah has filed a reply. Docket No. 90.

Second, Swisher has filed a motion for partial summary judgment on Trendsettah's claims for violation of the Sherman Act, *15 U.S.C. § 2*, violation of Florida ***Antitrust*** Law, [*Fl. Stat. § 542.19*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C24-MHT1-6SKW-D104-00000-00&context=), trade libel, tortious interference with contract, and intentional interference with prospective economic relations. Docket No. 67. Trendsettah has filed an opposition. Docket No. 80. Swisher has filed a reply. Docket No. 93.

For the following reasons, the Court **denies** Trendsettah's motion to exclude evidence and **grants** in part and **denies [\*2]** in part Swisher's motion for partial summary judgment.

**1. Background**

Swisher is a cigar manufacturer with its principal place of business in Florida. Docket No. 67-10 at 90. In January 2011, Trendsettah, another cigar manufacturer, entered into a supply agreement (the "First Private Label Agreement") with Swisher to manufacture cigarillos for Trendsettah under its "Splitarillos" brand name. Docket No. 67-5 at 2-14. In turn, Trendsettah would sell its Splitarillo-branded products to tobacco wholesalers and distributors.

In early December 2011, Swisher notified Trendsettah that it was terminating the First Private Label Agreement because Trendsettah failed to meet certain minimum order requirements as specified in the agreement. Id. at 35. After discussions between the parties, the First Private Label Agreement was then amended to terminate on October 31, 2012. Id. at 16-17. In February 2013, after the First Private Label Agreement expired, Swisher and Trendsettah entered into a second supply agreement (the "Second Private Label Agreement") that was scheduled to terminate on February 1, 2014. Id. at 20-32. The parties did not renew the Second Private Label Agreement when it ultimately expired in February 2014.

In October**[\*3]** 2014, several months after the Second Private Label Agreement expired, Trendsettah filed a complaint with this Court against Swisher, alleging (1) violation of the Sherman Act, *15 U.S.C. § 2*; (2) violation of Florida ***Antitrust*** Law, [*Fl. Stat. § 542.19*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C24-MHT1-6SKW-D104-00000-00&context=); (3) breach of contract; (4) breach of the implied covenant of good faith and fair dealing; (5) trade libel; (6) tortious interference with contract; (7) intentional interference with prospective economic relations; (8) negligent interference with prospective economic relations; and (9) violation of California's Unfair Competition Law, [*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=) Docket No. 1. In May 2015, the Court granted judgment on the pleadings on Trendsettah's claims for negligent interference with prospective economic relations and violation of California's Unfair Competition Law. Docket No. 40.

After discovery, Swisher now brings a motion for partial summary judgment under [*Federal Rule of Civil Procedure 56*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=) on Trendsettah's claims for violation of the Sherman Act, *15 U.S.C. § 2*, violation of Florida ***Antitrust*** Law, [*Fl. Stat. § 542.19*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C24-MHT1-6SKW-D104-00000-00&context=), trade libel, tortious interference with contract, and intentional interference with prospective economic relations. Docket No. 67.

Trendsettah's ***antitrust*** claims under the Sherman Act, *15 U.S.C. § 2*, and Florida ***Antitrust*** Law, [*Fl. Stat. § 542.19*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C24-MHT1-6SKW-D104-00000-00&context=), allege that, throughout**[\*4]** both the First Private Label Agreement and the Second Private Label Agreement, Swisher, in an effort to maintain its monopoly over the cigarillo industry, engaged in anticompetitive conduct that inhibited the economic growth of Trendsettah. E.g., Docket No. 1 ¶ 44. Swisher's anticompetitive conduct included failing to timely fulfill Trendsettah's product orders, refusing to deal with Trendsettah by failing to renew the Second Private Label Agreement, disparaging Trendsettah's products to Swisher's actual and potential customers, and physically removing Trendsettah products, advertising, and marketing materials from the wholesalers and distributors' shelves. Id. at 5-8. Trendsettah's claims for trade libel, tortious interference with contract, and intentional interference with prospective economic relations alleged that Swisher committed business torts by disparaging Trendsettah's products to wholesalers and distributors and interfering with Trendsettah's actual and prospective business relationships with wholesalers and distributors by failing to timely fulfill Trendsettah's orders. Id. at 13-14. As a result of Swisher's anticompetitive conduct and business torts, Trendsettah suffered both lost profits**[\*5]** (from reduced or lost orders) and diminution of value (from being unable to increase its market growth).

**2. Legal Standard on** [***Rule 56***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=) **Motion for Summary Judgment**

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [*Fed. R. Civ. P. 56(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=). Material facts are those necessary to the proof or defense of a claim, and are determined by the underlying substantive law. [*Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6H80-0039-N37M-00000-00&context=).

To determine whether summary judgment is appropriate, federal district courts must engage in a two-step process. First, the party moving for summary judgment bears the initial burden to show 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)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6HC0-0039-N37R-00000-00&context=). This burden may be satisfied by either (1) presenting evidence that negates an element of the non-moving party's case or (2) showing that the non-moving party has failed to establish an element of the non-moving party's case. [*Id. at 322-23*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6HC0-0039-N37R-00000-00&context=). If the party moving for summary judgment does not bear the burden of proof at trial, it may show the absence of a genuine issue of material fact by showing that "there is an absence of evidence to support the non-moving party's case." [*Id. at 325*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6HC0-0039-N37R-00000-00&context=). Second, if the moving party has met its initial burden, the burden then**[\*6]** shifts to the party opposing summary judgment to designate "specific facts showing there is a genuine issue for trial." Id. In determining whether there is a genuine issue as to material fact, the court draws all reasonable factual inferences in favor of the non-movant. [*Scott v. Harris, 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NM5-XWV0-004C-002K-00000-00&context=).

**3. Discussion**

3.1. Evidentiary Record

When resolving a motion for summary judgment, the court may only consider admissible evidence. See [*Fed. R. Civ. P. 56(e)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=). At the summary judgment stage, a court must focus on the admissibility of the evidence's content, not its form. [*Fraser v. Goodale, 342 F.3d 1032, 1036 (9th Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:49GM-GDM0-0038-X1F6-00000-00&context=). Accordingly, the court may consider evidence on summary judgment that is inadmissible in form so long as its contents can be presented in admissible form at trial. [*Id. at 1037*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:49GM-GDM0-0038-X1F6-00000-00&context=). If the opposing party objects to the proposed evidence as inadmissible, the party seeking admission must direct the court to "authenticating documents, deposition testimony bearing on attribution, hearsay exceptions and exemptions, or other evidentiary principles under which the evidence in question could be deemed admissible . . . ." [*In re Oracle Corp. Sec. Litig., 627 F.3d 376, 385-86 (9th Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51GK-6T91-652R-8000-00000-00&context=).

Trendsettah objects to various evidence submitted in support of Swisher's motion for partial summary judgment. Docket No. 79 at 2. Trendsettah also requests the Court to exclude**[\*7]** evidence regarding Swisher's profits from manufacturing Trendsettah's cigarillos and to permit adverse inferences that Swisher's profit margins on its cigarillo products were consistent with those of a monopoly. Docket No. 63 at 2. As the Court discusses below, all of these objections fail, and the Court declines to exclude evidence or permit adverse inferences regarding Swisher's profit margins.

3.1.1. Documents produced by Swisher during discovery.

Trendsettah objects to the admissibility of certain documents produced by Swisher on the grounds that Swisher's counsel lacked personal knowledge to authenticate the documents when submitting them in support of Swisher's motion for partial summary judgment. These documents include: (1) October 6, 2012 email from T. Hilmoe to C. Casey, Docket No. 67-5 at 37-38; (2) September 27, 2013 letter from C. Casey to T. Hilmore, Docket No. 67-6 at 40-41; (3) August 23, 2012 email from J. Green to B. Schoep, Docket No. 67-5 at 43-44; (4) January 15, 2013 email from J. Green, Docket No. 67-6 at 6; (5) January 30, 2014 email from J. Green, Docket No. 67-6 at 8-11; (6) November 19, 2010 letter from A. Alrahib to B. Schoep, Docket No. 67-6 at 16-17; (7)**[\*8]** June 23, 2011 email from A. Alrahib to B. Schoep, Docket No. 67-6 at 19-24; (8) September 4, 2012 email from A. Alrahib to P. Arvia, Docket No. 67-6 at 26-27; (9) document entitled "Git N Go Planogram," Docket No. 67-7 at 6-8; (10) document entitled "K & G Stores -2 FT. SET," Docket No. 67-7 at 10-11; (11) document entitled "Schnucks 49" Kiosk POG," Docket No. 67-7 at 13-15; (12) document entitled "J&H Oil 24" Tadisfloor Display," Docket No. 67-7 at 17-19; (13) document entitled "BETA 4ft 6 shelves OTP Q2 2014," Docket No. 67-7 at 21-24; (14) document entitled "West Coast POG Main Line Items," Docket No. 67-7 at 26-28; (15) document entitled "G&M 2014 Extra Mile Planogram," Docket No. 67-7 at 30-33; (16) document entitled "Circle K West -8 x 94 -New 8' Set," Docket No. 67-7 at 40-45; (17) document entitled "Circle K West -9 x 94 -New 9' Set," Docket No. 67-8 at 2-7; (18) document entitled "Circle K West -10 x 94 -New 10' Set," Docket No. 67-8 at 9-14; (19) document entitled, "Circle K West -11 x 94 -New 11' Set," Docket No. 67-8 at 16-22; and (20) document entitled, "Circle K West -12 x 94 -New 12' Set," Docket No. 67-8 at 24-30. At trial, Swisher employees could either authenticate**[\*9]** each document based on their personal knowledge, see [*Fed. R. Evid. 901(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-121S-00000-00&context=), or testify to the contents of each document from their personal knowledge, see [*Fed. R. Evid. 602*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-11YM-00000-00&context=). Accordingly, the documents are admissible at summary judgment. [*Fraser, 342 F.3d at 1037*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:49GM-GDM0-0038-X1F6-00000-00&context=).

3.1.2. Documents produced by Trendsettah during discovery.

Trendsettah objects to the admissibility of certain documents that it produced during discovery on the grounds that Swisher's counsel lacked personal knowledge to authenticate the documents when submitting them in support of Swisher's motion for partial summary judgment. These documents include: (1) December 5, 2011 email from C. Casey to T. Hilmoe, Docket No. 67-4 at 34-35; (2) Amendment to First PLA, Docket No. 92-1 at 48-53; (3) July 26, 2012 email from R. Rahib to A. Alrahib, Docket No. 67-5 at 46; (4) August 15, 2012 email from B. Schoep to R. Rahib, Docket No. 67-5 at 48-50; (5) August 15, 2012 email from B. Schoep to R. Rahib, Docket No. 67-5 at 52-54; (6) June 18, 2013 email from R. Rahib to J. Miller, Docket No. 67-6 at 2-4; (7) January 30, 2014 email from A. Alrahib to J. Miller, Docket No. 67-6 at 13-14; (8) November 30, 2012 email from A. Alrahib to J. Green, Docket No. 67-6 at 29, (9) October 4, 2012 email from A. Alrahib**[\*10]** to P. Arvia, Docket No. 67-6 at 33; (10) document entitled "OTP Competition vs. TSI," Docket Nos. 67-7 at 2, 92-1 at 102; (11) January 15, 2013 email from A. Alrahib to J. Miller, Docket No. 67-8 at 35; (12) August 24, 2012 email from A. Alrahib to J. Green, Docket No. 67-8 at 37; (13) March 9, 2015 email from A. Alrahib to B. Schoep, Docket No. 67-8 at 40-41; and (14) February 11, 2013 email from T. Hilmoe to C. Casey, Docket No. 67-8 at 43-44. Because these documents were produced by Trendsettah in response to Swisher's discovery requests, the documents are admissible at summary judgment. [*Anand v. BP West Coast Products LLC, 484 F. Supp. 2d 1086, 1092 n.11 (C.D. Cal. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NP4-RNS0-TVSH-32DB-00000-00&context=) ("Documents produced in response to discovery requests are admissible on a motion for summary judgment since they are self-authenticating and constitute the admissions of a party opponent.").

3.1.3. Unsworn expert reports.

Trendsettah objects to excerpts from the expert report of Swisher's expert witness Alan Cox, Docket No. 67-10 at 69-84, the expert report of Trendsettah's expert witness DeForest McDuff, Docket No. 67-10 at 56-61, and the supplemental expert report of McDuff, Docket No. 67-10 at 63-66, because the expert reports were not sworn under penalty of perjury when first filed with Swisher's**[\*11]** motion for partial summary judgment. Docket No. 79 at 7, 12, 21. All three reports have since been adopted by sworn affidavit. See Docket No. 92-1 at 95 (swearing Cox's report by affidavit); Docket No. 84 at 3 (swearing McDuff's expert report and supplemental expert report by affidavit). Accordingly, the reports are admissible at summary judgment. [*Volterra Semiconductor Corp. v. Primarion, Inc., 796 F. Supp. 2d 1025, 1039 (N.D. Cal. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:52T0-F4Y1-F04C-T1H0-00000-00&context=) ("Volterra has now remedied any deficiency by providing a sworn declaration by Dr. Szepesi with all of the challenged reports attached."); [*Maytag Corp. v. Electrolux Home Products, Inc., 448 F. Supp. 2d 1034, 1064 (N.D. Iowa 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4KVY-SYJ0-TVTR-T2DR-00000-00&context=) (holding that "subsequent verification or reaffirmation of an unsworn expert's report, either by affidavit or deposition, allows the court to consider the unsworn expert's report on a motion for summary judgment").

3.1.4. Motion to Exclude Evidence and Permit Adverse Inference.

In its motion to exclude, Trendsettah requests the Court to permit an adverse inference that Swisher's profit margins on its cigarillo products were consistent with those of a monopoly on the grounds that Swisher employees improperly failed to answer questions concerning Swisher's profits in depositions on Swisher's financial information. Docket No. 63 at 9. Federal district courts have the inherent power "to manage their own affairs**[\*12]** so as to achieve the orderly and expeditious disposition of cases." [*Chambers v. NASCO, Inc., 501 U.S. 32, 43, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KS90-003B-R0W9-00000-00&context=). As part of its inherent powers, the courts have "broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial." [*Campbell Indus. v. M/V Gemini, 619 F.2d 24, 27 (9th Cir. 1980)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FMB0-0039-W1PS-00000-00&context=) (citations omitted). This includes sanctioning parties for breaching their discovery obligations, for example, by granting an adverse inference instruction after the defendant fails to produce evidence. [*Residential Funding Corp. v. DeGeorge Fin'l Corp., 306 F.3d 99, 107 (2d. Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:46VM-M2T0-0038-X0T7-00000-00&context=) (citing [*Reilly v. Natwest Markets Group Inc., 181 F.3d 253, 267 (2d. Cir. 1999))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WRR-PVH0-0038-X2FW-00000-00&context=). Here, the Court declines to exercise its discretion to permit adverse inferences on Swisher's profit margins.

The appropriate way to remedy the opposing party's failure to answer deposition questions is to file a motion to compel under [*Federal Rule of Civil Procedure 37(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8JDD-11V2-8T6X-7291-00000-00&context=). See [*Fed. R. Civ. P. 37(a)(3)(B)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8JDD-11V2-8T6X-7291-00000-00&context=) (permitting motion to compel discovery response when deponent fails to answer a question asked in oral deposition). Trendsettah did not file a [*Rule 37(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8JDD-11V2-8T6X-7291-00000-00&context=) motion to compel discovery on Swisher's profit margins by the November 26, 2015 deadline for discovery motions. Trendsettah attempts to justify its failure to file a timely motion to compel by explaining that it forgot to file on time, and that it did not want to file a late motion pursuant to an informal scheduling agreement between Swisher and Trendsettah and risk**[\*13]** violating the Court's standing order governing stipulations to modify scheduling deadlines. Docket No. 90 at 23-24; see Docket No. 10 at 12-14 ("No stipulations extending scheduling requirements or modifying applicable rules are effective until and unless the Court approves them.") (emphasis added). But Trendsettah did not need to file a joint stipulation extending the discovery motion deadline in order to file its motion to compel: instead, Trendsettah could have independently sought leave of court by filing an appropriate motion or ex parte application. Trendsettah did neither. Because Trendsettah failed to diligently pursue filing a motion to compel, Trendsettah should not now be allowed to seek adverse inference sanctions against Swisher as a substitute. Accordingly, the Court declines to exercise its discretionary inherent powers to permit adverse inferences on Swisher's profit margins.

In its motion to exclude, Trendsettah also requests that the Court preclude Swisher from offering evidence about (1) Swisher's production capacity constraints, (2) Trendsettah's failure to make monthly minimum orders or provide proper forecasting, or (3) Swisher's internal investigation of Trendsettah's**[\*14]** trade libel allegations. Docket No. 63 at 8-9. None of these facts is relevant in determining whether there is a genuine issue of material fact as to Trendsettah's ***antitrust*** or tort claims. Accordingly, the Court **denies** these requests on summary judgment without prejudice to a properly filed pre-trial motion in limine. See Docket No. 63 at 10 ("[Trendsettah] recognizes that this Court typically hears motions to preclude evidence in conjunction with pre-trial motions in limine.").

**3.2. The Court denies summary judgment on Trendsettah's *antitrust* claims**.

Trendsettah's first and second causes of action for violation of the Sherman Act, *15 U.S.C. § 2*, and Florida ***Antitrust*** Law, [*Fl. Stat. § 542.19*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C24-MHT1-6SKW-D104-00000-00&context=), allege that Swisher engaged in widespread anticompetitive activity against Swisher in the cigarillo market. Docket No. 1 ¶¶ 46-59. Trendsettah raises genuine issues of material fact as to both causes of action.

3.2.1. Monopolization

The Sherman Act and the Florida ***Antitrust*** Law make it unlawful to engage in a monopoly or attempt to engage in a monopoly. See *15 U.S.C. § 2*; [*Fla. Stat. § 542.19*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C24-MHT1-6SKW-D104-00000-00&context=). To state a claim for monopolization under federal or Florida law,[[1]](#footnote-0)1 a plaintiff must show: (1) possession of monopoly power in the relevant market; (2) willful acquisition**[\*15]** or maintenance of that power; and (3) causal ***antitrust*** injury. [*SmileCare Dental Grp. v. Delta Dental Plan of California, Inc., 88 F.3d 780, 783 (9th Cir. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1V90-006F-M04T-00000-00&context=). Swisher argues that it is entitled to summary judgment on Trendsettah's monopolization claims because there is no genuine issue of material fact as to any of these three elements. Docket No. 67-1 at 11-21. The Court disagrees.

3.2.1.1. Monopoly power

Monopoly power is the "power to control prices or exclude competition." [*Rebel Oil Co., Inc. v. Atlantic Richfield, Co., 51 F.3d 1421, 1434 (9th Cir. 1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FT10-001T-D3HS-00000-00&context=). Monopoly power can be proven through direct or circumstantial evidence. Id. To show monopoly power by direct evidence, the plaintiff must show (1) restricted output and (2) supracompetitive prices. Id. To show monopoly power by circumstantial evidence, the plaintiff must "(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." Id. Here, Trendsettah has provided sufficient circumstantial evidence to raise a genuine issue of material fact as to Swisher's monopoly power.[[2]](#footnote-1)2

*Relevant market*. To define the "relevant market," the plaintiff must identify both the relevant geographic market and the relevant product market. [*Am. Ad Mgmt., Inc. v. GTE Corp., 92 F.3d 781, 790 (9th Cir. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1J70-006F-M2VG-00000-00&context=). "The relevant product market identifies the products or services that compete with**[\*16]** each other, and the relevant geographic market identifies the area where the competition in the relevant product market takes place." [*Sidibe v. Health, 51 F. Supp. 3d 870, 883 (N.D. Cal. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CGG-6581-F04C-T3BB-00000-00&context=) (citing [*Los Angeles Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1392 (9th Cir. 1984))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XHN0-003B-G393-00000-00&context=). The definition of the relevant market is generally a question of fact for the jury. [*Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1489 (9th Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GN40-008H-V4CX-00000-00&context=) ("Ordinarily, the relevant market is a question of fact for the jury").

The parties disagree on both the geographic and product market. Swisher defines the geographic market as the entire United States, Docket No. 67-1 at 19-20, and Trendsettah defines the geographic market as 15 regional markets within the United States, Docket No. 80 at 18. Swisher defines the product market to include "non-tipped cigarillos," "tipped cigarillos," and large cigars, Docket No. 67-1 at 18-19, and Trendsettah argues that the product market is only non-tipped cigarillos, Docket No. 80 at 15-16.

To support its definition for geographic market, Trendsettah provides evidence from Swisher's vice president of sales that Swisher planned competitive strategies around regional markets, Docket No. 83-4 at 17-21, the tobacco industry uses regional-level data to assess market shares and trends, Docket No. 83-10 at 6-7, and distributors consider where manufacturers are located (and related**[\*17]** transportation and shipping costs) when determining which manufacturer to purchase cigarillos from, Docket No. 86 at 2. This evidence raises genuine issues of material fact regarding the geographic areas in which the relevant market takes place.

To support its definition for product market, Trendsettah provides an expert report that conducted a "small but significant nontransitory increase in price" ("SSNIP") analysis[[3]](#footnote-2)3 finding that the product market includes only non-tipped cigarillos. Docket No. 84 at 14-21 (describing and reporting results of expert report's SSNIP analysis).[[4]](#footnote-3)4 In contrast, Swisher's expert report conducted a conflicting SSNID analysis to find that the product market, at minimum, also includes large cigars. Docket No. 93-1 at 80-81. Construing this conflicting expert testimony in the light most favorable to Trendsettah, the Court finds that there is a genuine dispute of material fact that precludes summary judgment on the relevant product market.

*Market share*. "A plaintiff relying on circumstantial evidence to establish a *§ 2* monopolization claim must show that the defendant owned a 'dominant share' of the market." [*Image Tech., 125 F.3d at 1206*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RYC-0B80-00B1-D00T-00000-00&context=). "Courts generally require a 65% market share to establish**[\*18]** a prima facie case of market power." Id.

A determination as to whether Swisher has a dominant share of the market depends on the definition of the relevant market. For example, if the relevant market is defined as the regional non-tipped cigarillo market, Trendsettah has made a prima facie case of Swisher's market share in the regions roughly corresponding to the Pacific Northwest, the Mountain States, the Southwestern United States, and the Great Plains. See Docket No. 84 at 6 (Trendsettah's expert report). In contrast, if the relevant market is defined as the national non-tipped cigarillo market, Trendsettah has not established a prima facie case of Swisher's market share: Swisher's market share in non-tipped cigarillos is currently around 55%. See Docket No. 67-10 at 64 (Trendsettah's supplemental expert report). This is less than the 65% threshold required to establish a prima facie case of market share. [*Image Tech., 125 F.3d at 1206*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RYC-0B80-00B1-D00T-00000-00&context=). Because the Court concludes that Trendsettah has raised a genuine issue of material fact regarding the proposed relevant market, the Court also concludes that Trendsettah has raised a genuine issue of material fact regarding market share.[[5]](#footnote-4)5

*Barriers to entry*. Barriers to**[\*19]** entry are "additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants," or "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." [*Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422, 1427 (9th Cir. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-C6W0-003B-P05P-00000-00&context=). Such barriers include: (1) legal licenses; (2) control of essential or superior resources; (3) entrenched buyer preferences; (4) high capital entry costs; and (5) economies of scale. [*Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1208 (9th Cir. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RYC-0B80-00B1-D00T-00000-00&context=) (citing [*Rebel Oil, 51 F.3d at 1439*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FT10-001T-D3HS-00000-00&context=)). "Whether barriers to entry exist is usually a fact-intensive question." [*IGT v. Alliance Gaming Corp., 2008 U.S. Dist. LEXIS 111773, 2008 WL 7071468, at \*14 (D. Nev. Oct. 21, 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7X56-FHK0-YB0N-T00N-00000-00&context=).

To show that the cigarillo market has significant barriers to entry, Trendsettah's expert report enumerates various factors imposing significant barriers to entry in the cigarillo market, including high capital investments; limited access to inputs (e.g., tobacco, wrapper paper, and flavorings/additives); economies of scale; strict limits on advertising; strict ***regulations*** on tobacco retailer licensing, tobacco flavors, and tobacco pricing; entrenched distributor relationships; and entrenched customer preferences. Docket No. 84 at 27-35. This evidence is sufficient to raise a genuine issue of material fact, apart from the hearsay statement of Trendsettah's founder to which Swisher objected both in its**[\*20]** reply and at the hearing. See Docket No. 93 at 8. In response, Swisher argues that there can be no genuine issue of material fact as to whether these barriers are significant because there were many entrants into the cigarillo market from 2011 to 2013, and there are now over 30 competitors in the cigarillo market. Docket No. 93 at 21-22. The Court agrees that the number of market entrants suggests that the barriers to entry to the cigarillo market are not insurmountably high. But the number of new competitors alone does not necessarily indicate whether these barriers are significant. [*Rebel Oil, 51 F.3d at 1440*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FT10-001T-D3HS-00000-00&context=) ("The fact that entry has occurred does not necessarily preclude the existence of 'significant' entry barriers."). In the absence of additional countervailing evidence that the barriers to entry are insignificant, and construing all evidence in the light most favorable to Trendsettah, the Court determines that Trendsettah has raised a genuine issue of material fact as to whether there are significant barriers of entry.

3.2.1.2. Willful acquisition or maintenance of monopoly power

In addition to monopoly power, the plaintiff must also show that defendant engaged in anticompetitive conduct. Anticompetitive**[\*21]** conduct is the use of monopoly power "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." [*United States v. Griffith, 334 U.S. 100, 107, 68 S. Ct. 941, 92 L. Ed. 1236 (1948)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JSJ0-003B-S41J-00000-00&context=). The parties dispute that there is a genuine issue of material fact as to whether Swisher's alleged failure to timely fulfill Trendsettah's orders or its refusal to renew the Second Private Label Agreement constituted anticompetitive conduct.[[6]](#footnote-5)6

"As a general rule, a monopolist has no duty to deal with its competitors." [*High Tech., 996 F.2d 987*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FM30-003B-P2ST-00000-00&context=) (citing [*Eastman Kodak, 504 U.S. 451, 483 n.32, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RV9-X170-003B-R185-00000-00&context=). This rule is not absolute, however. A monopolist can refuse to deal with its competitors only if there are legitimate business reasons for its refusal. [*Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602-605, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B390-0039-N4JD-00000-00&context=). Accordingly, "[w]hen a legitimate business justification supports a monopolist's exclusionary conduct, that conduct does not violate *§ 2* of the Sherman Act." [*Image Tech. Servs., 125 F.3d at 1212*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RYC-0B80-00B1-D00T-00000-00&context=). "Whether valid business reasons motivated a monopolist's conduct is a question of fact." [*High Technology Careers v. San Jose News, 996 F.2d 987, 990 (9th Cir. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FM30-003B-P2ST-00000-00&context=).

Here, there is a genuine dispute of material fact as to whether valid business reasons motivated Swisher's alleged failure to fulfill orders and refusal to renew the Second Private Label Agreement. Swisher provides evidence that it attempted to fill Trendsettah's orders as they were received, and any failure to fulfill orders was caused by issues**[\*22]** with Trendsettah's faulty ordering, forecasting, and credit practices. See Docket No. 67-6 at 2-3 ("Although [the fulfillment rate is] not 100%, we are trying to balance an extensive Swisher portfolio with the Splitarillo products."). In turn, Trendsettah disputes Swisher's characterization of its ordering, forecasting, and credit practices, see Docket No. 85 at 7, and provides deposition testimony from Swisher's vice president of sales stating that Swisher's decision not to renew the Second Private Label Agreement was motivated in part by its concern about the market growth of Splitarillo products, see Docket No. 83-4 at 11. Construing all evidence in the light most favorable to Trendsettah, the Court determines that Trendsettah has raised a genuine issue of material fact as to whether there were legitimate business reasons for Swisher's refusal to deal with Trendsettah.

3.2.1.3. Causal ***antitrust*** injury

Lastly, to recover under federal or Florida ***antitrust*** law, the plaintiff must demonstrate "***antitrust*** injury." [*Rebel Oil, 51 F.3d at 1433*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FT10-001T-D3HS-00000-00&context=). The Ninth Circuit has identified four requirements for ***antitrust*** injury: "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes**[\*23]** the conduct unlawful, and (4) that is of the type the ***antitrust*** laws were intended to prevent." [*Am. Ad Mgm't, Inc., 190 F.3d at 1055*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XCF-BR60-0038-X263-00000-00&context=). Under this standard, conduct results in an "***antitrust*** injury" when the conduct harms competition. [*Glen Holly Entm't, Inc. v. Tektronix Inc., 343 F.3d 1000, 1007-08 (9th Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:49GV-G100-0038-X1HG-00000-00&context=). Accordingly, "[i]f the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition, there is no ***antitrust*** injury . . . ." [*Rebel Oil, 51 F.3d at 1433*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FT10-001T-D3HS-00000-00&context=).

Here, Trendsettah raises a genuine issue of material fact as to whether it suffered causal ***antitrust*** injury. For example, Trendsettah provided evidence that it suffered lost revenue and inhibited economic growth because Swisher failed to timely deliver approximately 200 million cigarillo sticks. See Docket 83-9 at 24-25. This standing alone is not ***antitrust*** injury. However, this conduct harmed competition because it ultimately reduced the total market output for Trendsettah's cigarillo sticks; harm to competition resulting from restricted output constitutes a viable ***antitrust*** injury. [*Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc., 2013 U.S. Dist. LEXIS 151128, 2013 WL 5694452, at \*15 (N.D. Cal. Oct. 18, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59MW-FSK1-F04C-T08R-00000-00&context=) ("Market power can be shown by actual harm to competition inflicted by the defendant, such as restricted output or supra-competitive prices, or by the defendant's dominant market share and barriers to entry in the relevant market.") (emphasis added); [*Stearns v. Select Comfort Retail Corp., 2009 WL 1635931, at \*13 (N.D. Cal. June 5, 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4WGW-2CD0-TXFP-C2GH-00000-00&context=)**[\*24]** ("The ***antitrust*** laws are intended to prevent harm to competition manifested as higher prices, lower output, or decreased quality in the products within a defined market.") (emphasis added).

In response, Swisher argues that its failure to deliver 200 million cigarillo sticks to Trendsettah did not reduce overall market output for cigarillos because sales within the entire cigarillo industry increased during this period. Docket No. 67-1 at 15-16. But increased sales by itself does not show that the overall market output was unaffected by Swisher's failure to timely deliver cigarillo sticks to Trendsettah: it could still be the case that, had Swisher timely delivered cigarillo sticks to Trendsettah, Trendsettah would have sold these sticks to distributors and wholesalers. To show that there is no genuine issue of fact as to causal ***antitrust*** injury, Swisher needs to instead establish that, even if Swisher timely delivered the cigarillo sticks to Trendsettah, the total market output for cigarillos would have remained the same. To that end, Swisher argues that its failure to deliver the cigarillo sticks did not reduce market output because Trendsettah's customers (i.e., wholesalers and distributors) ultimately**[\*25]** purchased substitute sticks from Trendsettah's competitors. Docket No. 93 at 10. To support this argument, Swisher cites to various emails from Trendsettah showing that wholesalers and distributors threatened to purchase cigarillos from competitors because Trendsettah failed to timely fulfill their orders for Splitarillo-branded products. E.g., Docket No. 67-6 at 29 ("[Wholesalers] are threatening and telling us that they are forced to go back to working with [Good Times USA, LLC] because of our lack in product and lack in timing of products."). But these emails only show that some wholesalers and distributors sometimes threatened to purchase cigarillos from competitors, and not that they actually did purchase substitute cigarillos. Construing the evidence in the light most favorable to Trendsettah, the Court cannot find that threats to purchase substitute goods from Trendsettah's competitors show that there is no genuine issue of material fact as to Trendsettah's alleged causal ***antitrust*** injury.

3.2.2. Attempted monopolization

To show attempted monopolization under federal or Florida law, a plaintiff must show: (1) the defendant engaged in predatory or anticompetitive conduct; (2) the**[\*26]** defendant had a specific intent to monopolize; (3) a dangerous probability of achieving monopoly power; and (4) causal ***antitrust*** injury. [*SmileCare, 88 F.3d at 783*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1V90-006F-M04T-00000-00&context=); [*Lockheed Martin Corp. v. Boeing Co., 314 F. Supp. 2d 1198, 1224 (M.D. Fla. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4C87-G5C0-0038-Y26X-00000-00&context=) ("In order to state a claim for attempted monopolization under either the Sherman Act or the Florida ***Antitrust*** Law, a plaintiff must allege facts that, if proven, would satisfy his burden at trial to prove that: (1) the defendant has engaged in predatory or anticompetitive conduct (2) with a specific intent to monopolize and (3) that there is a dangerous probability that defendant will achieve monopoly power."). The requirements for attempted monopolization are similar to the requirements for a monopolization claim, "differing primarily in the requisite intent and the necessary level of monopoly power." [*Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202 (9th Cir. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RYC-0B80-00B1-D00T-00000-00&context=).

In its motion, Swisher argues only that there is no genuine issue of material fact on Trendsettah's attempted monopolization claim because Trendsettah and its expert defined the wrong relevant market when determining whether there was a dangerous probability of achieving monopoly power. Docket No. 67-1 at 21. But, as discussed above, the Court has denied summary judgment on Trendsettah's monopolization claims because there are genuine issues of**[\*27]** material fact about how to define the relevant market. Accordingly, as with the monopolization claims, the Court also denies summary judgment on Trendsettah's attempted monopolization claims.

3.3. The Court grants summary judgment on Trendsettah's trade libel claim.

Trendsettah's fifth cause of action for trade libel alleges that Swisher representatives orally disparaged the Splitarillo brand to wholesalers and distributors that purchased Splitarrillos. Docket No. 1 ¶¶ 71-77. To show trade libel under Florida law, the plaintiff must show: (1) a falsehood (2) has been published to a third person, (3) defendant knew or had reason to know that the falsehood will likely cause others not to deal with the plaintiff, (4) the falsehood induced others not to deal with the plaintiff, and (5) the published falsehood caused plaintiff to suffer special damages. [*Border Collie Rescue, Inc. v. Ryan, 418 F. Supp. 2d 1330, 1348 (M.D. Fla. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4JH0-MRJ0-TVTD-01R9-00000-00&context=) (citing [*Stewart Title Guar. Co. v. Title Dynamics, Inc., 2005 U.S. Dist. LEXIS 48191, 2005 WL 2548419 (M.D. Fla. 2005))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5786-Y9W1-F04D-136F-00000-00&context=).

In support of its trade libel claim, Trendsettah provided a declaration from an officer at SM Brothers, Inc., a wholesale distributor of Splitarillo products, stating only that unidentified Swisher representatives made disparaging comments about Splitarillos in his presence.[[7]](#footnote-6)7 Docket No. 88 at 2-3. Trendsettah also provided a declaration**[\*28]** from Trendsettah's Chief Financial Officer stating that, "after [he] first started hearing these rumors [that Swisher representatives made disparaging remarks about Splitarillos]," Trendsettah experienced a reduction in net sales of Splitarillos to Colonial Grocers, Core-Mark and Import Warehouse. Docket No. 87 at 2-3. These declarations provide no specific facts that the Swisher's disparaging comments in fact caused SM Brothers, Inc., Colonial Grocers, Core-Mark, Import Warehouse, or any other wholesaler or distributor not to deal with Trendsettah.[[8]](#footnote-7)8 For example, the SM Brothers, Inc. officer nowhere declared that he chose not to deal with Trendsettah because of Swisher's disparaging comments.[[9]](#footnote-8)9 Similarly, Trendsettah's Chief Financial Officer nowhere declares that the decrease in net sales to Colonial Grocers, Core-Mark and Import Warehouse was in fact caused by Swisher's disparaging comments. In the absence of specific facts establishing causation and damages, the Court grants summary judgment to Swisher on Trendsettah's trade libel claim.

3.4. The Court grants summary judgment on Trendsettah's tortious interference with contract claim.

To show tortious interference with contract under**[\*29]** Florida law, the plaintiff must show: (1) the existence of a contract between plaintiff and a third-party; (2) the defendant knew of the contract; (3) breach of contract; (4) the defendant caused or induced the breach; (5) the defendant specifically intended to procure a breach of contract; (6) the defendant had no justification or privilege for his conduct; and (7) the plaintiff suffered damages as a result of the breach. See *Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290, 1321 (11th Cir. 1998)*; *Chicago Title Ins. Co. v. Alday-Donalson Title Co. of Florida, 832 So. 2d 810, 814 (Fla. Dist. Ct. App. 2002)*.[[10]](#footnote-9)10

In its motion for partial summary judgment, Swisher argues that there is no genuine issue of material fact as to whether Swisher caused Trendsettah to breach its contracts with wholesalers or distributors, or whether Trendsettah suffered any damages as a result of breach. Docket No. 67-1 at 28-29.[[11]](#footnote-10)11 Swisher is correct. Although Trendsettah has provided evidence of oral contracts between Trendsettah and certain distributors and wholesalers, see Docket No. 85 at 8, Trendsettah provides no specific evidence that Trendsettah, its distributors, or its wholesalers breached one such contract, or, if there was a breach, that the breach was caused by Swisher's anticompetitive conduct. Accordingly, the Court grants summary judgment on Trendsettah's tortious**[\*30]** interference with contract claim.

3.5. The Court grants summary judgment on Trendsettah's tortious interference with prospective business relationships claim.

To show tortious interference with prospective business relationships under Florida law, the plaintiff must show: (1) the existence of a business relationship; (2) the defendant knew about the relationship; (3) the defendant intentionally and unjustifiably interfered with the relationship; and (4) plaintiff suffered damages as a result of the breach. [*Tamiami Trail Tours, Inc. v. Cotton, 463 So. 2d 1126, 1127 (Fla. 1985)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-2960-003C-X1NJ-00000-00&context=). "An action for tortious interference with a prospective business relationship requires a business relationship evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered." [*ISS Cleaning Servs. Grp., Inc. v. Cosby, 745 So. 2d 460, 462 (Fla. Dist. Ct. App. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XX3-BVV0-0039-4114-00000-00&context=).

Trendsettah's claim for tortious interference with prospective business relationships alleges that Swisher interfered with Trendsettah's prospective business relationships in two ways. First, Swisher disparaged Splitarillo-branded products to wholesalers and distributors. Docket No. 1 ¶ 89. Second, Swisher limited its production of Splitarillos-branded cigarillos so that Trendsettah could not fulfill potential orders**[\*31]** to wholesalers and distributors. Id. ¶ 88. Trendsettah has not raised a genuine issue of material fact on either theory. First, as to disparagement, Trendsettah provides no specific facts showing that Swisher's disparaging remarks materially affected Trendsettah's business relationships (contractual, prospective, or otherwise) with its wholesalers or distributors. See Section 3.3, supra. Accordingly, the Court grants summary judgment on Trendsettah's tortious interference claim to the extent it relies on Swisher's alleged disparagement. Second, as to limiting production, Trendsettah fails to provide specific evidence of even one prospective business relationship that would have been completed but for Trendsettah's anticompetitive conduct. See also Section 3.4 (failure to provide evidence of breach, causation, and resulting damages). Accordingly, the Court also grants summary judgment on Trendsettah's tortious interference to the extent it relies on Swisher's limited production of Splitarillo-branded products.

**4. Conclusion**

For the reasons stated above, the Court **denies** Trendsettah's motion to exclude evidence and **grants** in part and **denies** in part Swisher's motion for partial summary judgment.

As a result of**[\*32]** the hearing, the Court allows limited discovery motions practice. Trendsettah shall file with this Court any ex parte applications relating to Swisher's profit data within seven days after issuance of this Order. Swisher shall have seven days to file its respective reply, if any. Swisher raised at oral argument possible motions practice related to third-party discovery. Any such motion shall be presented to the magistrate judge on a similarly expedited basis. The Scheduling Order is deemed amended to permit this limited motions practice.

IT IS SO ORDERED.

**End of Document**

1. 1"Federal and Florida ***antitrust*** laws are analyzed under the same rules and case law." [*All Care Nursing Service, Inc. v. High Tech Staffing Services, Inc., 135 F.3d 740, 745 n.11 (9th Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S5H-F240-0038-X469-00000-00&context=); see also [*Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp., 849 F.2d 1336, 1340 (11th Cir. 1987)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7R90-001B-K47J-00000-00&context=) ("[T]he Florida courts held that the Florida legislature has, in effect, adopted as the law of Florida the body of ***anti-trust*** law developed by the federal courts under the Sherman Act. . . . Thus, in analyzing this case, we may, and indeed must, apply the federal precedent developed under ***Section 2*** of the Sherman Act."). Accordingly, the Court's analysis on Trendsettah's federal ***antitrust*** claims also applies to its Florida ***antitrust*** claims. [↑](#footnote-ref-0)
2. 2Because the Court finds that Trendsettah provided sufficient circumstantial evidence to raise a genuine issue of material fact as to Swisher's monopoly power, the Court need not consider whether Trendsettah has provided direct evidence to raise a genuine issue of material fact as to Swisher's monopoly power, particularly the requirement to show supracompetitive prices. [↑](#footnote-ref-1)
3. 3The Ninth Circuit regularly uses SSNIP analysis to determine the relevant market in ***antitrust*** cases. [*Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 784 (9th Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F8G-4121-F04K-V01B-00000-00&context=) ("A common method to determine the relevant geographic market, and the one used by the district court, is to find whether a hypothetical monopolist could impose a 'small but significant nontransitory increase in price' ("SSNIP") in the proposed market."); [*Vesta Corp. v. Amdocs Mgmt. Ltd., 129 F. Supp. 3d 1012, 2015 WL 5178073, at \*8 (D. Or. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GVD-CJ71-F04F-3001-00000-00&context=) (observing that courts "often employ" SSNIP analysis to determine the relevant market in ***antitrust*** claims related to horizontal mergers). SSNIP analysis determines the relevant market by testing whether a monopolist "could profitably impose a small but significant and nontransitory price increase." ***Theme Productions, Inc. v. News Amer. Mkt'g FSI, 546 F.3d 991, 1002 (9th Cir. 2008)***. "If a significant number of customers would respond to a SSNIP by purchasing substitute products, the SSNIP would not be profitable for the hypothetical monopolist. If a monopolist could not profitably impose a SSNIP, the market definition should be expanded to include those substitute products that constrain the monopolist's pricing." Id. (citations omitted). [↑](#footnote-ref-2)
4. 4Swisher's assertion at oral argument that Trendsettah's expert performed no SSNIP analysis is simply mistaken. [↑](#footnote-ref-3)
5. 5At the hearing on Swisher's motion for partial summary judgment, Swisher argued for the first time that it is entitled to summary judgment on Trendsettah's Florida ***antitrust*** claim because there is no genuine issue of material fact as to whether Swisher has made a prima facie case of market power: the relevant market for Trendsettah's Florida ***antitrust*** claim is Florida, see [*Fl. Stat. § 542.19*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C24-MHT1-6SKW-D104-00000-00&context=) (prohibiting monopolies only "in this state"), and Swisher's market share for Florida is less than 65%. See Docket No. 67-10 at 23 (stating that Swisher's share of non-tipped cigarillos for the region consisting of Mississippi, Alabama, western Tennessee, and Northwest Florida is between 53-62%, and Swisher's share for the region consisting of Georgia, Puerto Rico, the Caribbean Islands, and the rest of Florida is 35-41%). Swisher did not raise this argument in its moving papers, however. Docket No. 67-1 at 20-21. Accordingly, this argument is waived for present purposes. See [*Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NWP-S540-0038-X2BK-00000-00&context=) ("The district court need not consider arguments raised for the first time in a reply brief."). [↑](#footnote-ref-4)
6. 6In its complaint, Trendsettah also alleged that Swish's anticompetitive conduct included charging Trendsettah prices above those designated in the private label agreements, disparaging Trendsettah in the market, and removing Splitarillo products and advertisements from wholesaler and distributors' shelves. Docket No. 1 ¶¶ 31 (overcharging), 36-40 (disparagement and removal). Trendsettah provided no evidence of overcharging at summary judgment. Docket No. 81 at 58 ("undisputed" that "Swisher never charged [Trendsettah] higher prices for Splitarillos than those set forth in the parties agreements"). Moreover, as discussed in Section 3.3 below, Trendsettah has failed to provide any evidence that Trendsettah suffered injury as a result of Swisher's alleged disparagement or its removal of Splitarillo products and advertisements. E.g., Id. at 61 ("Undisputed that [Trendsettah] lacks knowledge that any of its customers stopped doing business as a result of the specific acts of Swisher removing Splitarillos products or advertising and marketing materials from stores."). [↑](#footnote-ref-5)
7. 7As relevant to Trendsettah's trade libel claim, the declarant also stated that part of the following statement is not true: "No Swisher representative has made statements to, or engaged in any conduct at, SM Brothers, Inc., that disparaged Splitarrillos brand cigarillos, Trendsettah USA, Inc., or Trend Settah, Inc., that had the purpose of reducing or stopping Splitarillos brand cigarillos purchases or sales, or that had the purpose of undermining Splitarillos brand cigarillos, Trendsettah USA, Inc. or Trend Settah, Inc. in any way." Docket No. 88 at 3. The declarant does not identify what part of that statement is false, however. Id. [↑](#footnote-ref-6)
8. 8In response to a question whether any company "reduce[d] the volume of their business with Trendsettah as a result of Swisher's alleged disparagement of Trendsettah," Akrum Alrahib, founder of Trendsettah, stated that "[he] wouldn't know what the individual wholesaler did or --intended to do after they heard that." Docket No. 83-1 at 13. [↑](#footnote-ref-7)
9. 9The parties do not dispute that SM Brothers, Inc. has continued doing business with Trendsettah. Docket No. 81 at 65. [↑](#footnote-ref-8)
10. 10The Court is skeptical that a plaintiff can maintain a claim for tortious interference with a third-party contract against a defendant when, as here, the tortious interference arises wholly from conduct that constitutes breach of a separate, unrelated contract between the plaintiff and the defendant. Said another way, there must be some evidence of breach of the third-party contract, typically by showing that the third party has been induced to breach. See, e.g., [*Law Offices of David J. Stern, P.A. v. SCOR Reinsurance Corp., 354 F. Supp. 2d 1338, 1341 (S.D. Fla. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FDD-YYK0-TVTD-02YT-00000-00&context=); ***Chicago Title, 832 So. 2d at 814*** ("Chicago Title offered no evidence and raised no issue of material fact as to whether Stewart Title intended to procure the breach of the contracts between Chicago Title and the Alday Agencies."). To allow such a claim would, in effect, convert an ordinary breach of contract claim to an additional tort claim when the defendant's breach of its contract with the plaintiff also affects the plaintiff's third-party contracts. Under such circumstances, the plaintiff should instead seek consequential damages for the ensuing breach of its third-party contract, see Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. Ch. 1854), and not bring a separate tort claim. The Court nevertheless declines to grant summary judgment on Trendsettah's tortious interference with contract claim on this basis because, in any event, there is no genuine issue of material fact as to either breach, causation, or resulting damages. [↑](#footnote-ref-9)
11. 11Trendsettah's assertion at oral argument that Swisher did not argue lack of breach, causation, or damages in its motion for partial summary judgment is mistaken. See Docket No. 67-1 at 28 ("Plaintiffs also fail to show that they lost any business as a result of the alleged interference."), 29 ("There is no record evidence to show that Swisher's alleged actions influenced, induced, or coerced even one company to breach its contract or avoid doing business with [Trendsettah].") (internal quotations and alterations removed). [↑](#footnote-ref-10)