Felder's Collision Parts, Inc. v. All Star Adver. Agency, Inc.

United States Court of Appeals for the Fifth Circuit

January 27, 2015, Filed

No. 14-30410

Reporter
777 F.3d 756 *; 2015 U.S. App. LEXIS 1253 **; 2015 Trade Cas. (CCH) P79,043; 2015 WL 390177

FELDER'S COLLISION PARTS, INCORPORATED, Plaintiff - Appellant v. ALL STAR ADVERTISING AGENCY, INCORPORATED; ALL STAR CHEVROLET NORTH, L.L.C.; ALL STAR CHEVROLET, INCORPORATED; GENERAL MOTORS, L.L.C., Defendants - Appellees

Subsequent History: US Supreme Court certiorari denied by *Felder's Collision Parts v. All Star Adver., 2015 U.S. LEXIS 5580 (U.S., Oct. 5, 2015)*

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

Felder's Collision Parts, Inc. v. GM Co., 2014 U.S. Dist. LEXIS 56349 (M.D. La., Apr. 23, 2014)

Core Terms

pricing, rebate, predatory, dealer, aftermarket, collision, variable, selling, antitrust, consumer, costs, district court, anti trust law, below-cost, competitor, lower price, manufacturer, discount, purchaser

LexisNexis® Headnotes

Antitrust & Trade Law > General Overview

HN1[] **Antitrust & Trade Law**

The antitrust laws were designed for the protection of competition, not competitors.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

HN2[] **Sherman Act, Claims**

Predatory pricing occurs when a defendant sacrifices present revenues for the purpose of driving a competitor out of the market with the hope of recouping the losses through subsequent higher prices. Most courts analyze

predatory pricing claims as an attempt by the defendant to preserve or extend its monopoly power under § 2 of the Sherman Act.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

HN3[] **Anticompetitive & Predatory Practices, Predatory Pricing**

Although there is no heightened pleading standard in an antitrust case, courts are wary of predatory pricing allegations as mistaken inferences in predatory pricing cases are especially costly, because they chill the very conduct the antitrust laws are designed to protect. To ensure that antitrust liability is not imposed for conduct resulting in lower prices today but carrying no viable risk of supra-competitive pricing in the future, a plaintiff must prove two things. First, it must show that the prices complained of are below an appropriate measure of its rival's costs. Second, it must show that the defendant has a dangerous probability of recouping its investment in below-cost prices.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

HN4[] **Anticompetitive & Predatory Practices, Predatory Pricing**

Low prices benefit consumers and are usually the product of the competitive marketplace that the antitrust laws are aimed at promoting. Thus, a predatory pricing claim should go forward only when the defendant is pricing below its costs because the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting.

Judges: Before KING, JOLLY, and COSTA, Circuit Judges.

Opinion by: GREGG COSTA

Opinion

[*757] GREGG COSTA, Circuit Judge:

It would not be an antitrust opinion without the line that ***HN1***[] the antitrust laws were designed for "the protection of competition, not competitors." *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. Though often included by rote, the axiom is particularly apt in this case.

The competitors are Felder's Collision Parts, Inc., a Louisiana dealer of aftermarket auto body parts that are compatible with General Motors vehicles but not manufactured by GM, and All Star, a dealer of GM-manufactured parts. Felder's filed this antitrust suit against All Star and GM alleging that GM's "Bump the Competition" program is an unlawful predatory pricing scheme. The program lowers the consumer price for GM-manufactured parts below the prices of equivalent "generic" auto parts manufactured by others. It does so by providing rebates to dealers like All Star that sell GM-manufactured parts for the reduced prices. The rebates ensure that the dealers still make a profit on these sales despite the lower price charged consumers.

The primary issue in this appeal from a dismissal of the antitrust claims **[**2]** is whether we consider the effect of this rebate in deciding whether Felder's can meet one of the essential elements of a predatory pricing claim: that the defendant is selling its product at a price below average variable cost. *See Brooke Grp. Ltd. v. Brown &*

Williamson Tobacco Corp., 509 U.S. 209, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993); *Stearns Airport Equip. Co., Inc. v. FMC Corp., 170 F.3d 518, 532 (5th Cir. 1999)*.

I.

There are two types of automobile parts.[1] Original equipment manufacturer (OEM) parts are produced by the same manufacturer that created the vehicle, in this case GM, or by a submanufacturer; **[*758]** these parts are considered "name brand." Aftermarket equivalent parts are non-name brand and are produced by a supplier other than the vehicle manufacturer. OEM parts and their aftermarket equivalents are interchangeable. But not all parts have an aftermarket counterpart; for certain parts, the only option is to purchase an OEM part. For the collision parts that are the subject of this case, OEM parts make up about 80% of the market. As is typical for generic products, aftermarket equivalents historically have enjoyed a significant price advantage over their brand-name counterparts. Prior to the pricing program at issue in this case, OEM collision parts were often priced 25% to 50% higher than aftermarket equivalents.

Motivated by the cost-conscious insurance companies that are the primary purchasers of auto body parts, GM instituted a program in 2009 to eliminate its historic price disadvantage and offer "highly competitive pricing" with aftermarket equivalents. The program, transparently named "Bump the Competition," is available only for GM parts that have an aftermarket equivalent; prices remain the same for parts with no aftermarket equivalents. A "GM Collision Conquest Calculator" determines prices. The calculator provides a dealer of OEM parts with the "bottom line price" at which they should sell the part. This price is 33% less than the prevailing market price for an aftermarket equivalent. That "bottom line price" is also below GM's list price—the price All Star and other dealers pay GM for the part on the front end. But after a dealer sells a highly discounted part under the program, it is entitled to a rebate from GM. The rebate compensates the dealer for the difference between the sale price and the price it paid GM for the part. On top of making up for that loss, **[**4]** GM also pays the dealer a 14% profit based on the part's original price.

An example from the complaint illustrates how the program works.[2] Prior to Bump the Competition, a dealer would have purchased a part from GM for $135.01. It would have then sold the part to a customer—usually a collision center or body shop—for $228.83, which is more than 30% above the $179 price for an aftermarket equivalent part.

Under Bump the Competition, a dealer like All Star would still pay an initial purchase price of $135.01 from GM. It would then sell the part for $119.93, 33% less than the market price for an aftermarket equivalent ($179 * .67). This sale price would also be about $15 less than the $135.01 the dealer had initially paid GM for the part. By submitting the rebate, however, the dealer would get back this $15 "loss" and would also receive a 14% profit, which for this part would be about $18.90 ($135.01 * .14).

Felder's filed this suit alleging that Bump the Competition is a predatory pricing scheme that violates federal and Louisiana antitrust **[**5]** laws as well as other Louisiana laws.[3] Established in 1993, Felder's is a seller of aftermarket equivalent collision parts based in Louisiana. It sells the parts to various customers including collision centers and body shops. The suit names All Star, GM, and 25 unnamed dealers of OEM parts as defendants. All Star's OEM parts distribution center opened in 2003 and is now the largest **[*759]** parts distribution center in

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[1] This section comes from the First Amended Complaint, **[**3]** which details the challenged GM plan and also includes attached exhibits obtained from GM and All Star through discovery.

[2] Although Bump the Competition has been in existence since 2009, the examples Felder's provides in the complaint are not based on actual sales or transactions.

[3] The state claims are for violations of the Louisiana antitrust laws, the Louisiana Unfair Trade Practices Act, as well as a conspiracy claim for joint and solidary liability pursuant to *Louisiana Civil Code article 2324*.

Louisiana. It has $5 million in inventory and more than 50,000 square feet of space. All Star and John Doe Defendants 1-25[4] compete with Felder's to sell GM-compatible collision parts.

The district court denied Defendants' first motion to dismiss but raised a number of concerns with Felder's complaint that the **[**6]** court instructed Felder's to address in its amended complaint. On the issue of below-cost pricing, the district court found that Felder's failure to incorporate the rebate into All Star's price improperly dissected the transaction into pieces rather than treating it as a whole. In hopes that more information would help cure these defects, the district court also compelled Defendants to turn over documents relevant to their costs and profits. With this information, Felder's amended its complaint. Defendants again moved to dismiss for failure to state a claim, asserting that the complaint lacked facts to support the alleged geographic market, below-cost pricing, and recoupment. The district court dismissed the federal antitrust claims, citing Felder's failure to adequately define the relevant geographic market and its earlier finding that Felder's did not allege below-cost pricing. The resolution of the federal claims also warranted dismissal of the state law antitrust claims, which depend on a finding of federal antitrust liability. *See* S. Tool & Supply, Inc. v. Beerman Precision, Inc., 862 So.2d 271, 278 (La. App. 4 Cir. 11/26/03) ("Because [the Louisiana antitrust statutes] track almost verbatim Sections 1 and 2 of the Sherman Act, Louisiana courts have turned to the federal jurisprudence **[**7]** analyzing those parallel federal provisions for guidance.").[5] We therefore need analyze only whether Felder's has stated a claim for predatory pricing under the Sherman Act.

II.

HN2[↑] Predatory pricing occurs when a defendant "sacrifice[s] present revenues for the purpose of driving [a competitor] out of the market with the hope of recouping the losses through subsequent higher prices." Int'l Air Indus., Inc. v. Am. Excelsior Co., 517 F.2d 714, 723 (5th Cir. 1975). Most courts analyze predatory pricing claims as "an attempt by the defendant to preserve or extend its monopoly power" under section 2 of the Sherman Act. IIIA PHILLIP E. AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW*** ¶ 724, at 36 (3d ed. 2008). That points to an unusual feature of this case. It is unclear which defendant is alleged to be the attempted monopolist or if they both are.[6] The typical **[*760]** predatory pricing case is brought solely against the plaintiff's competitor who is allegedly selling at low prices in order to increase market share by driving the plaintiff out of the market. *See, e.g.,* Stearns, 170 F.3d 518 (suit brought by manufacturer of airplane jet bridges against competitor alleging exclusionary manipulation **[**8]** of municipal bids and predatory pricing); Stitt Spark Plug Co. v. Champion Spark Plug Co., 840 F.2d 1253 (5th Cir. 1988) (suit brought by spark plug company against other spark plug company alleging anticompetitive practices including predatory pricing); Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc., 735 F.2d 884 (5th Cir. 1984) (suit by rental car company accusing competitor of employing predatory pricing in two

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[4] Felder's sued General Motors; All Star Automotive Group, which includes All Star Advertising Agency, Inc., All Star Chevrolet, Inc., and All Star Chevrolet North, L.L.C.; and 25 John Doe Defendants. For clarity, the All Star and John Doe Defendants are collectively referred to as All Star.

[5] And failure to plead a state or federal antitrust conspiracy required dismissal of the remaining solidary liability claim under Louisiana law.

[6] The Automotive Body Parts Association filed an amicus curiae raising the issue of monopoly leveraging in which a monopolist—in this case, GM—is able to leverage profits from goods on which it holds a monopoly to cover losses arising from the below-cost sale of another good for which it does not have a monopoly. The amicus argues primarily that the use of average variable cost as the "appropriate measure" may be erroneous, stating that "where a monopolistic leverage is used to decrease a predator's overall costs, courts ought to consider those fixed costs which are being covered by the illegal leverage." Amicus Br. at 7 (quoting David M. Magness, Comment, *Getting Past Summary Judgment in Predatory Pricing Cases After* American Airlines: *Will Post-Chicago Analysis Ever Prevail*?, 5 Hous. Bus. & Tax L.J. 421, 449 (2005)). The amicus, however, is "limited to the issue of pricing and costs and the effect that timing and monopoly leveraging may have on whether costs are classified as fixed or variable in the determination of appropriate measure of cost and variable cost." *Id.* at 13. It does not characterize Felder's claims as one for monopoly leveraging, and Felder's does not raise this claim and **[**10]** its complaint does not allege that GM prices below any measure of costs.

cities in attempt to monopolize). All Star is Felder's competitor in the sale of collision parts at the dealer level in the supply chain. But Felder's also sued All Star's supplier, GM, and pursues conspiracy claims. GM is the moving force behind the challenged conduct, as Bump the Competition is its program. And the only specific allegations of market share in the complaint also target GM, mentioning its 80% share of the market for certain types of replacement parts for GM vehicles. Indeed, it would seem that a successful predatory pricing scheme of this nature would primarily benefit GM by driving aftermarket equivalent parts from the market. But Felder's has never alleged that GM is selling parts below its costs, focusing instead on allegations that GM dealer All Star is selling parts at prices below its costs. The viability of Felder's claims thus turns on whether it can show that All Star is engaged in predatory pricing **[**9]** at the dealer level.

HN3[↑] Although there is no heightened pleading standard in an antitrust case, *see* *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, we are wary of predatory pricing allegations as "mistaken inferences in [predatory pricing] cases . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 594, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *see also* *Stearns, 170 F.3d at 527* ("The Supreme Court has expressed extreme skepticism of predatory pricing claims."). To ensure that antitrust liability is not imposed for conduct resulting in lower prices today but carrying no viable risk of supracompetitive pricing in the future, a plaintiff must prove two things. First, it must show that "the prices complained of are below an appropriate measure of its rival's costs." *Brooke Grp., 509 U.S. at 222 (1993)*. Second, it must show that the defendant has "a dangerous probability[] of recouping its investment in below-cost prices." *Id. at 224*; *see also* *Am. Academic Suppliers, Inc. v. Beckley-Cardy Inc., 922 F.2d 1317, 1319 (7th Cir. 1991)* ("Consumers like lower prices. The plaintiff must therefore show that the defendant's lower prices today presage higher, monopolistic prices tomorrow."). We focus our analysis on the first requirement, given that it was one of the grounds on which the district court dismissed the case.

HN4[↑] Low prices benefit **[**11]** consumers and are usually the product of the competitive **[*761]** marketplace that the antitrust laws are aimed at promoting. *Brooke Grp., 509 U.S. at 223* ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." (quoting *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*). The Supreme Court has thus emphasized that a predatory pricing claim should go forward only when the defendant is pricing below its costs because "the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting." *Brooke Grp., 509 U.S. at 223* (citing AREEDA & HOVENKAMP ¶¶ 714.2, 714.3).

The "appropriate measure" of cost has been the subject of much scholarly and judicial debate. *See* *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 117 n.12, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)* (citing cases and articles discussing various measures of cost). The debate is settled in our court, however, as we use average variable cost. *Stearns, 170 F.3d at 532*. Our practice follows the landmark 1975 article *Predatory Pricing and Related Practices under* *Section 2 of the Sherman Act*, in which Professors Phillip Areeda and Donald **[**12]** F. Turner explained why "marginal-cost pricing is the economically sound division between acceptable, competitive behavior and 'below-cost' predation."[7] 88 HARV. L. REV. 697, 716. Although marginal cost should theoretically serve as the dividing line, the article also notes that businesses rarely account for marginal cost on their books. *Id.* at 716. Average variable

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[7] They provided the following explanation for why marginal cost is the best measure: "Under conditions of perfect competition, a firm always maximizes profits (or minimizes losses) by producing that output at which its marginal cost equals the market price." 88 HARV. L. REV. at 702. Because rational firms attempt to maximize profits or minimize losses, a firm selling at a "shortrun profit-maximizing (or loss-minimizing) price is clearly not a predator." *Id.* at 703. On the other hand, "a firm producing at an output where marginal cost exceeds price is selling at least part of that output at an out-of-pocket loss." *Id.* at 712. "A monopolist pricing below marginal cost should be presumed to have engaged in a predatory or exclusionary practice" because "[t]he monopolist is not only incurring private **[**13]** losses but wasting social resources when marginal costs exceed the value of what is produced. And pricing below marginal cost greatly increases the possibility that rivalry will be extinguished or prevented for reasons unrelated to the efficiency of the monopolist." *Id.*

cost, which is more commonly accounted for, is thus a suitable "surrogate." *Id.* at 716-18; *accord* AREEDA & HOVENKAMP, *supra* ¶ 724, at 39.

Even calculating average variable cost can be time-consuming and challenging in many cases. *See* Stearns, 170 F.3d at 532-35 & 533 n.14 (discounting the plaintiff's expert because he "relied on an erroneous interpretation of the law regarding predatory pricing" by failing to mention average variable cost and did not "explain what [general and administrative expenses] represented or state that it was a variable cost"). Variable costs include "inputs like hourly labor, the cost of materials, transport, and electrical consumption at a plant." *Id. at 532*. But that complicated inquiry of defining the proper inputs does not arise here because Felder's acknowledges that its ability to show pricing below average variable cost turns on a single issue that the district court termed the "temporal debate": should the calculation **[*762]** account for the rebate that All Star receives from GM?

If the rebate were irrelevant as Felder's contends, then Felder's complaint would be sufficient **[**14]** on this issue because it alleges that "at the point of sale to body shops and collision centers, the All Star Defendants and the John Doe Defendants 1-25 sell collision parts lower than their average variable cost" and that "at the time of sale, the price of the good sold was less than the cost to All Star Defendants or the John Doe Defendants plus the costs of selling that part." The example it gives, which was described above, illustrates the basis for this contention: "At the point of sale"—that is, without taking into account the rebate it later receives—All Star would sell a part for $119.93 that it purchased from GM for $135.01.

The calculus is quite different if the rebate is considered. After the rebate, that $15 loss turns into a $19 profit.[8] The district court thought it appropriate to consider the rebate because to "find that the relevant sales by All Star are below-cost ignores the commercial realities of the transaction—specifically the fact that All Star probably would not sell at the suggested 'bottom-line' price absent GM's claim system, which allows for collection of the difference between the sales price and dealer cost, plus a 14 percent profit." *Felder's Collision Parts, Inc. v. Gen. Motors Co., 960 F. Supp. 2d 617, 635-36 (M.D. La. 2013)*.

Felder's main challenge to the district court's analysis is to argue that it improperly added the rebate amount to the price at which All Star sold the parts to its customers. In predatory pricing cases, Felder's contends, what matters for the "price" side of the equation is the price at which a product is sold in the relevant market. This argument misses the mark. For starters, we do not read the district court opinion as adding the rebate amount to All Star's sales price. Instead, it concluded that "the cost and revenue associated with a particular sale should not be dissected into pieces, but rather treated as a whole, regardless of the time associated with any discount or rebate programs."[9] *Id. at 635* (citing **[**16]** *Stearns, 170 F.3d at 533 n.15* ("[T]he fact that [the defendant] may have chosen for internal reasons or salesmanship purposes to shift costs in this manner is not objectionable without a showing that the project as a whole was not priced above its variable cost.")). We turn then to that fundamental question: not the side of the ledger on which the rebate should be placed, but whether it should be considered at all.

We agree with the district court that the rebate should be considered in the predatory pricing analysis. The price versus cost comparison focuses on whether the money flowing in for a particular transaction **[*763]** exceeds the

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[8] Felder's allegations **[**15]** seem to limit All Star's costs to the purchase price of the parts from GM, without including other potentially variable costs for each unit of sale. Notably, however, Felder's assumes that All Star is making a profit on each sale after the rebate is included. And at the Rule 12 stage, we review only the allegations that a plaintiff makes; we cannot speculate about costs it may have missed. There is no allegation that All Star is pricing below average variable cost if the rebate is considered.

[9] Felder's may have gotten this impression from the district court's discussion of rebate cases, which the district court read for the proposition that "price is measured after considering any discounts or rebates." *Id. at 635* (citing *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1407 (7th Cir. 1989)*. As discussed below, All Star is receiving the rebate as a purchaser of parts from GM, so it makes the most sense to read the district court's opinion as viewing the rebate as a reduction in the cost of acquiring the parts.

money flowing out. The rebate undoubtedly affects that bottom line for All Star by guaranteeing that it makes a profit on any Bump the Competition sale. **[**17]** That undisputed fact resolves the case, as a "firm that is selling at a shortrun profit-maximizing (or loss-minimizing) price is clearly not a predator." Areeda & Turner, 88 HARV. L. REV at 703.

Felder's "freeze frame" approach of comparing price and cost as they exist only on the day of the sale ignores the economic realities that govern antitrust analysis. *See* United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199, 209, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968) ("In interpreting the antitrust laws, . . . [w]e must look at the economic reality of the relevant transactions."); Sec. Tire & Rubber Co. v. Gates Rubber Co., 598 F.2d 962, 965-66 (5th Cir. 1979) ("There usually is no substitute for a careful analysis of the economic realities presented by the facts of a given case in light of the underlying purpose of the relevant antitrust statute."). Although All Star's profitability is what ultimately matters, it makes sense conceptually to view the rebate as a reduction in All Star's cost of purchasing the parts from GM. In purchasing the parts from GM, All Star is a consumer. As it does for any consumer, a rebate reduces All Star's cost of acquiring the parts. So although All Star would initially pay $135.01 for the example part, the rebate would reduce the price to $101.03.

Felder's conceded at oral argument that if GM had sold the part to All Star at this lower price up front, then Felder's **[**18]** would have no case. The concession was an obvious one because in that scenario, All Star would be selling the part for more than the $101.13 it would have paid GM (and recall that there is no allegation that GM's price is below its average variable cost). Different timing does not change that analysis. A firm's costs related to a transaction are not set in stone on the day of the sale. *See* Fruitvale Canning Co., 52 F.T.C. 1504, 1520 (1956) ("It is the actual amount paid by the purchaser to the seller after taking into consideration all discounts, rebates, or other allowances with which we are concerned here."), *cited in* A.A. Poultry, 881 F.2d at 1407.

Any consumer would consider a rebate as a reduction in cost, even if the consumer were "refunded" months after the actual sale for the higher price. Just ask the purchaser of a new "$600" cellphone for which a $300 rebate were available. Perhaps Felder's position in this case stems from the extra step in the transaction; All Star gets a rebate from GM on a product that All Star passes on to its consumers. But any confusion resulting from that extra step is eliminated by considering an example involving a different cost input: If All Star received a rebate on the costs of shipping the collision parts, is there any **[**19]** doubt that rebate would reduce its shipping costs even though the discount would not be realized the day the shipping would take place? An analogy used in a prior predatory pricing case also supports rejecting Felder's isolated view of the transaction. We have noted that when "a company has a 'buy one, get one free' promotion, it would be incorrect to look at the nominal price of the 'free' product—zero—and infer predation from this fact." Stearns, 170 F.3d at 533 n.15. The economic reality in that situation is that the two products are both being sold at a 50% discount. The undisputed reality in this case is that All Star is making money on its sale of parts after it receives the GM rebate. And with respect to GM, Felder's does not allege that it is selling its parts below average variable cost, whether the rebate is considered or not.

[*764] Although it has remained in business during the five years in which Bump the Competition has been in effect,[10] Felder's no doubt is having a tougher time selling aftermarket equivalent parts for GM vehicles in light of GM's decision to reduce the price of its parts at the dealer level by large percentages (almost a 50% reduction from $228.33 to $119.93 for the example part). But ***antitrust*** **[**20]** ***law*** welcomes those lower prices for consumers of collision parts so long as neither GM nor its dealers is selling parts at below-cost levels. *See* Matsushita, 475 U.S. at 594 ("[C]utting prices in order to increase business often is the very essence of competition."). Because the district court properly concluded that the rebate GM provides its dealers should be considered in making that determination, its judgment is AFFIRMED.

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[10] Felder's makes no mention of whether it sells parts other than GM-equivalent parts, which is relevant to whether Felder's can stay in business in spite of All Star's lower prices.

GSI Tech., Inc. v. Cypress Semiconductor Corp.

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

January 27, 2015, Decided; January 27, 2015, Filed

Case No.: 5:11-CV-03613-EJD

Reporter
2015 U.S. Dist. LEXIS 9378 *; 2015 Trade Cas. (CCH) P79,041; 2015 WL 365491

GSI TECHNOLOGY, INC., Plaintiff, v. CYPRESS SEMICONDUCTOR CORPORATION, Defendant.

Prior History: *GSI Tech., Inc. v. Cypress Semiconductor Corp., 2012 U.S. Dist. LEXIS 93888 (N.D. Cal., July 6, 2012)*

Core Terms

argues, conspiracy, summary judgment, market power, barriers, Hearsay, antitrust, relevant market, customers, products, summary judgment motion, statute of limitations, anti trust law, competitors, consumers, asserts, circumstantial evidence, Sherman Act, innovation, prices, market share, anticompetitive, Technology, triable, conversation, vaporware, alleges

Counsel: [*1] For GSI Technology, Inc., a Delaware Corporation, Plaintiff: Arthur Joel Shartsis, LEAD ATTORNEY, James Patrick Martin, Mary Jo Shartsis, Robert E. Schaberg, Roey Rahmil, Shartsis Friese LLP, San Francisco, CA.

For Cypress Semiconductor Corporation, a Delaware corporation, Defendant: Lee H. Rubin, LEAD ATTORNEY, Christopher John Kelly, Mayer Brown LLP, Palo Alto, CA; Lori Elaine Lightfoot, Mayer Brown LLP, Chicago, IL; Philip J. Wang, Wang & Chang, San Francisco, CA.

For Renesas Electronics America Inc., Interested Party: Matthew J. Jacobs, LEAD ATTORNEY, Vinson & Elkins LLP, San Francisco, CA.

For Cisco Systems, Inc., Witness: Seth Andrew Weisburst, Winston & Strawn LLP, SF, CA.

Judges: EDWARD J. DAVILA, United States District Judge.

Opinion by: EDWARD J. DAVILA

Opinion

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

[Re: Docket No. 86]

Plaintiff GSI Technology Inc. ("GSI" or "Plaintiff") brings the instant action against Defendant Cypress Semiconductor Corporation ("Cypress" or "Defendant") asserting unfair competition and violations of federal and state antitrust laws. Presently before the Court is Cypress' Motion for Summary Judgment. Dkt. No. 86. GSI opposes that motion. Having carefully reviewed the parties' **[*2]** briefing and considered the parties' arguments

from the hearing on October 21, 2014, the Court DENIES Cypress' Motion for Summary Judgment for the reasons explained below.

I. FACTUAL AND PROCEDURAL BACKGROUND

GSI and Cypress are developers of Static Random Access Memory ("SRAM") products. Since the SRAM market consists of a small number of customers, early market entry is critical to a vendor's success. Customers in the SRAM market demand standardized products, and it is therefore critical for manufacturers to comply with recognized standards. The Institute of Electrical and Electronics Engineers ("IEEE") and the JEDEC Solid State Technology Associations ("JEDEC") are two recognized standard-setting organizations for memory components. These organizations provide an open and public standard setting process, in which all competitors in the market have equal access to the same information at the same time allowing for competitive products and competitive product introduction schedules.

In 1999, Cypress and two of its competitors, Integrated Device Technology, Inc. ("IDT") and Micron Technology, Inc. ("Micron"), entered into a combination which they named the "QDR[1] Consortium" (the "Consortium"). **[*3]** The purported purpose of the Consortium was to develop standards for higher performance networking SRAM products outside of IEEE and JEDEC. The Consortium members shared information and combined their market power to define and promote a family of SRAMs that would address the new market demand. [TEXT REDACTED]

[TEXT REDACTED] GSI, IBM, Samsung, and Motorola started a separate group known as "SigmaRAM" in order to facilitate the design and development of an open SRAM standard. [TEXT REDACTED] the members in SigmaRAM opened participation to any company and compiled with JEDEC's standard setting process.

On February 16, 2000, the Consortium announced that it had completed the specifications of its initial QDR and DDR[2] SRAM architectural design. Even though the Consortium announced that it would publish the data sheets for QDR and DDR SRAM, it only did so after a time delay. With that delay, GSI alleges the Consortium members obtained a "time-to-market" competitive advantage over all SRAM vendors outside of the group. GSI further alleges that the Consortium, with its combined **[*4]** market power and limited membership, created exclusive but de facto product standards which allowed it to lock in customers and impede entry into the SRAM market, thereby harming competition and consumers.

After establishing the industry standard with first and second generation devices and taking control of the SRAM market, [TEXT REDACTED]

According to GSI, the Consortium and its members have [TEXT REDACTED] As a direct result of the Consortium's [TEXT REDACTED] It is further alleged that with each new product released, the Consortium [TEXT REDACTED]

In addition, Consortium members also required SRAM customers [TEXT REDACTED] By its conduct, the Consortium allegedly harmed consumers by denying them the benefits of innovation in product development and lower prices.

GSI filed its original Complaint in this case on July 22, 2011 against Cypress for: (1) violation of *section 1 of the Sherman Act*, *15 U.S.C. § 1*, (2) violation of California's Cartwright Act, *Business and Professions Code §§ 16720* and *16726*, and (3) violation of California's Unfair Competition Law ("UCL"), *Business and Professions Code § 17200 et. seq.* Dkt. No. 1. **[*5]** Cypress filed a motion to dismiss the Complaint on September 14, 2011. Dkt. No. 14. The Court denied Cypress' motion to dismiss on July 6, 2012. Dkt. No. 26. On August 3, 2012, Cypress filed an Answer to the Complaint, and on August 24, 2012, filed an Amended Answer. Dkt. Nos. 34, 36. On June 20, 2014, Cypress filed a Motion for Summary Judgment and Daubert Motions ("Cypress Mot."). Dkt. Nos. 86, 88. On July 28,

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[1] QDR stands for Quad Data Rate and is a type of memory that can transfer up to four words of data in each clock cycle.

[2] DDR stands for Double Date Rate and is a type of memory that can transfer up to two words of data in each clock cycle.

2014, GSI filed an Opposition to Cypress' Motion for Summary Judgment and Daubert Motions ("Opposition"). Dkt. No. 121. In support of its Opposition, GSI also filed multiple Declarations of Robert B. Haig ("Haig Decl."), Patrick T. Chuang ("Chuang Decl."), Lee Lean Shu ("Shu Decl."), David Chapman ("Chapman Decl."), Robert Murphy ("Murphy Decl."), Robert G. Harris ("Harris Decl."), D. Paul Regan ("Regan Decl."). Dkt. Nos. 128-134.

On August 25, 2014, Cypress filed (under seal) a Reply in Support of Motion for Summary Judgment ("Cypress Reply"). Dkt. No. 173. In support of its Reply, Cypress also filed a Declaration of Dominique-Chantale Alepin and Exhibits A-Q under seal ("Alepin Decl."). Dkt. No. 174. The parties appeared for a hearing on October 21, 2014.

II. LEGAL STANDARD [*6]

A motion for summary judgment should be granted if "there is no genuine dispute to any material fact and the movant is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*; *Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000)*. The moving party bears the initial burden of informing the court of the basis for the motion and identifying the portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

If the moving party meets this initial burden, the burden then shifts to the non-moving party to go beyond the pleadings and designate specific materials in the record to show that there is a genuinely disputed fact. *Fed. R. Civ. P. 56(c)*; *Celotex, 477 U.S. at 324*. The court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

However, the mere suggestion that facts are in controversy, as well as conclusory or speculative testimony in affidavits and moving papers, is not sufficient to defeat summary judgment. See *Thornhill Publ'g Co. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979)*. Instead, the non-moving party must come forward with admissible evidence to satisfy the burden. *Fed. R. Civ. P. 56(c)*; see also *Hal Roach Studios, Inc. v. Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1990)*.

A genuine issue for trial exists if the non-moving party presents evidence from which a reasonable jury, viewing **[*7]** the evidence in the light most favorable to that party, could resolve the material issue in his or her favor. See *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; see also *Barlow v. Ground, 943 F.2d 1132, 1134-36 (9th Cir. 1991)*. Conversely, summary judgment must be granted where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, on which that party will bear the burden of proof at trial." *Celotex, 477 U.S. at 322*.

III. DISCUSSION

A. Statute of Limitations

Before proceeding to the merits of Cypress' motion, the Court will address its assertion that GSI's Sherman Act claims fail due to the expiration of the statute of limitations. Cypress argues that GSI's claims are barred by the statute of limitations because [TEXT REDACTED] See Dkt. No. 101-6 at 13:5-18. The Court disagrees.

Under both federal and state law, an antitrust and unfair competition suit must commence within four years after the cause of action has accrued. *15 U.S.C. § 15b* (Sherman Act); *Cal. Bus. & Prof. Code § 16750.1* (Cartwright Act); *Cal. Bus. & Prof. Code § 17208* (UCL). While private antitrust claims are subject to four-year statute of limitations, a new cause of action arises "each time the plaintiff's interest is invaded to his damage, and the statute of limitations begins to run at that time." *Hennegan v. Pacifico Creative Serv., 787 F.2d 1299, 1300 (9th Cir. 1986)* (citing *In re*

Multidistrict Vehicle Air Pollution Litig., 591 F.2d 68, 70 (9th Cir. 1979). If a plaintiff "alleges a continuing violation, an overt **[*8]** act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act." *Pace Indus., Inc. v. Three Phoneix Co., 813 F.2d 234, 237 (9th Cir. 1987)*. An overt act will restart the statute of limitations if: (1) it is a new and independent act that is not merely a reaffirmation of a previous act; and (2) it inflicts new and accumulating injury on the plaintiff. *Id. at 238*.

Here, GSI commenced this lawsuit on July 22, 2011. See Dkt. No. 1. Thus, the limitation period begins on July 22, 2007. [TEXT REDACTED] See Exs. 103-06; see also Chapman Decl., ¶¶ 3, 9, 11. [TEXT REDACTED][3][4][5].[6]

GSI also alleges that, after [TEXT REDACTED][7] Moreover, and most importantly, [TEXT REDACTED].[8] Cypress explains these statements by stating then announcements were honest disclosures of market data. But for this motion, the Court must draw all reasonable inferences in GSI's favor where matters are disputed. See *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. Thus, at the very least, Cypress' public statements create a triable issue of fact as to whether Cypress, [TEXT REDACTED]. See *Celotex, 477 U.S. at 324*.

Therefore, the Court must deny **[*9]** Cypress' motion to the extent it relies on the statute of limitations because a genuine issue for trial exists. GSI presented sufficient evidence from which a reasonable jury, viewing the evidence in the light most favorable to GSI, could resolve this issue in its favor.

B. Section 1 of the Sherman Act

The Court now addresses the Sherman Act claim. Cypress argues there is insufficient evidence to establish a claim under *§ 1 of the Sherman Act* because GSI failed to do the following: (1) identify evidence showing an agreement intended to harm or restrain trade; (2) prove a relevant product market encompassing all reasonably interchangeable products, show that it had market power, and prove an anticompetitive effect on competition in a relevant product market, and (3) present competent evidence to establish injury in fact. Having reviewed the evidence, the Court disagrees.

Section 1 of the Sherman Act, *15 U.S.C. § 1*, prohibits "[e]very contract, combination . . . or conspiracy [] in restraint of trade or commerce among several States." Despite this broad language, the Supreme Court has recognized that Congress intended only to "outlaw . . . unreasonable restraints." *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*; see also *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1373 (9th Cir. 1989)*. Thus, to establish a claim under *Section 1*, a plaintiff must **[*10]** show (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade; and (3) that the restraint affected interstate commerce. See *Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1410 (9th Cir. 1991)*; see also *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008)*.

Not all trade agreements can constitute antitrust violations; an agreement constitutes a violation of *§ 1* of the Sherman Act only if it evidences a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*. Since it is often difficult to show direct evidence of a combination or conspiracy, concerted action may be inferred

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[3] See Chapman Decl., ¶ 6

[4] See Ex. 11

[5] See Ex. 77

[6] See Shu Decl., ¶ 6

[7] Compare, e.g., Ex. 60 at 388 [TEXT REDACTED].

[8] Shu Decl., ¶ 17-8; Chapman Decl., ¶ 8, 11, 13; see also Dkt. No. 147-4 at 11:3-5.

from circumstantial evidence of the defendant's conduct and course of dealings. See *Blair Foods, Inc. v. Ranchers Cotton Oil, 610 F.2d 665, 671 (9th Cir. 1980)*; see also *United States v. Gen. Motors Corp., 384 U.S. 127, 142-43, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*.

Antitrust law, however, limits the range of permissible inferences from ambiguous evidence in a § 1 case. In that regard, "although plaintiffs are to be given the benefit of the doubt, they 'must do more than simply show that there is some metaphysical doubt as to the material facts.'" *In re Citric Acid Litig., 191 F.3d 1090, 1094 (9th Cir. 1999)* (quoting *Matsushita Elec. Indus., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*). "[A]n inference of conspiracy is sustainable only if 'reasonable in light of the competing inferences of independent action,' and 'to survive a motion for summary judgment . . . , a plaintiff seeking damages for a violation of *§ 1* must present evidence that tends to exclude **[*11]** the possibility that the alleged conspirators acted independently." Id. (quoting *Matsushita, 475 U.S. at 588* (internal quotations omitted)). Put another way, summary judgment should be granted for the defendant unless the evidence as a whole would allow a reasonable fact finder to conclude not just that the evidence is consistent with a conspiracy but that the alleged conspiracy is more probable than not because "[m]ere circumstantial evidence of conspiracy cannot defeat summary judgment unless it would allow an inference that conspiracy is more probable than an inference of independent action." II Philip E. Areeda et al., ***Antitrust Law*** ¶ 308c (2d ed. 2000) (emphasis added).

1. Contract, Combination, or Conspiracy

Cypress offers several explanations for why there is no direct evidence or an inference of an agreement or conspiracy by the Consortium members to stifle innovation in the market. First, Cypress argues that GSI is unable to produce any evidence to support its contention [TEXT REDACTED] See Dkt. No. 175-3 at 7. In support of that point, Cypress indicates GSI's only evidence [TEXT REDACTED] See id. Second, Cypress argues that the Consortium [TEXT REDACTED] See Dkt. No. 101-6 at 16:8-19. Third, [TEXT REDACTED] **[*12]** See id. at 16-17. Finally, Cypress argues that the [TEXT REDACTED] See id. at 14:3-7. In sum, Cypress' position is that the evidence does not support either an inference of a conspiracy or an agreement to stifle innovation in the market through "vaporware."

In response, GSI provides circumstantial evidence that the Consortium members intended to create significant barriers to entry, destroy competition, capture a dominant market share and stifle innovation.[9] Specifically, GSI offers evidence from which a conspiracy could be inferred, including: [TEXT REDACTED][10][11][12][13].[14]

Although Cypress faults GSI for failing to produce any direct or circumstantial evidence revealing anything more than economically rational decision to develop, produce and sell QDR-III products the court finds that GSI has submitted circumstantial evidence tending to show that a conspiracy between Cypress and **[*13]** the Consortium members is more probable than an inference of independent action. Indeed, as the relevant authorities reveal, that Cypress has not entered into an express agreement to engage in an antitrust conspiracy does not insulate it from liability under the Sherman Act. So long as the parties, in a meeting of the minds, coordinated horizontal behavior with the purpose of committing a violation, they remain exposed. See *General Motors Corp., 384 U.S. 127, 142-43, 86 S. Ct. 1321, 16 L. Ed. 2d 415* (finding that "explicit agreement is not a necessary part of a Sherman Act

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[9] Ex. 7 at 39-42; Exs. 15-17; Ex. 18 at 28-9; Ex. 19 at 118-120; Exs. 20-24; Exs. 27-33; Exs. 34-38

[10] Exs. 1, 12, 60 and 110-112

[11] See Ex. 107; see also Murphy Decl., Ex. A at ¶ 26; Ex. 80 at 249-251; see also Ex. 79 at 982; Ex. 81; Ex. 18 at 100-101; Ex. 82 at 44-47, 162-164; Ex. 108 at 44-46

[12] Ex. 77 at 503; Ex. 78

[13] See Exs. 110-112

[14] Exs. 10-11

conspiracy, certainly not where . . . joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan.").

As Cypress accurately states, none of the evidence necessarily excludes the possibility that Cypress arrived at decisions on its own. However, all that is necessary to avoid summary judgment is evidence that reasonably tends to exclude that possibility. GSI's evidence cumulatively accomplishes this. See In re High Fructose Corn Syrup Antitrust Litig., *295 F.3d 651, 661 (9th Cir. 2002)* (holding that no single piece of the evidence is sufficient in itself to prove a conspiracy, the question is whether this evidence, considered as a whole and in combination with the economic evidence, is sufficient to defeat summary judgment). Therefore, **[*14]** summary judgment is unwarranted on this point because GSI's evidence, while not conclusive, creates a triable issue for the existence of a conspiracy to act on these motives.

2. Unreasonably Restrain Trade or Competition

As to the second element, Cypress argues that GSI failed to prove: [TEXT REDACTED][15][16].[17]

Section 1 of the Sherman Act prohibits "[o]nly unreasonable or undue restraints" of trade. *OSC Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1467 (9th Cir. 1986)* (citing *Standard Oil v. United States, 221 U.S. 1, 58-60, 31 S. Ct. 502, 55 L. Ed. 619 (1911))*. Courts generally identify restraints as unreasonable if they raise price, reduce output, lower quality, eliminate customer choice, or create or enhance market power. See *California ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1133 (9th Cir. 2011)*; see also *Augusta News Co. v. Hudson News Co., 269 F.3d 41, 47 (1st Cir. 2001)*. "To demonstrate market power circumstantially, a plaintiff must: (i) define the relevant market, (ii) show that the defendant owns a dominant share of that market, and (iii) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run." *Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995)*.

i. Relevant Market

Cypress asserts that there is no triable issue of fact as to the relevant product market.[18] "A relevant market, for antitrust purposes, can be broadly characterized in terms of the cross-elasticity of demand for or reasonable interchangeability **[*15]** of a given set of products or services." *Coal. for ICANN Transparency, Inc. v. VeriSign, Inc., 611 F.3d 495, 507 (9th Cir. 2010)* (citations and internal quotations marks omitted). Courts "consider whether the product and its substitutes are reasonably interchangeable by consumers for the same purpose, as well as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." Id. (citations omitted).

Here, GSI's expert, Dr. Harris, opined that the [TEXT REDACTED][19][20][21][22][23] See Harris Decl., Ex. A at 33-41. However, Cypress argues that the [TEXT REDACTED] and as such should be included in the relevant product

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[15] See Dkt. No. 101-6 at 19:7-23

[16] See id. at 21:3-7

[17] See id. at 23-25

[18] Cypress also moved to exclude GSI's expert economist, Dr. Robert Harris, pursuant to *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. That motion is denied by separate order.

[19] [TEXT REDACTED]

[20] [TEXT REDACTED]

market. See Dkt. No. 86 at 9:24-10:22. Additionally, Cypress argues that Dr. Harris, has failed to use a reliable scientific method (mathematical test of cross-elasticity) to prove a relevant product market encompassing all reasonably interchangeable products. See Dkt. No. 80 at 5:17-8:11. GSI, however, relied on identifying the existence of a product market by distinct **[*16]** prices, the product's peculiar characteristics and uses, industry or public recognition of the submarket as a separate economic entity, and sensitivity to price changes. See *Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*; see also *Knutson v. The Daily Review, Inc., 548 F.2d 795, 804 (9th Cir. 1976)*.

Since Harris will not be excluded, the disagreement between GSI and Cypress is at best a conflict between experts. The Ninth Circuit has held that a dispute over the definition of the relevant product market is a "factual inquiry for the jury." See *Thurman Indus., 875 F.2d at 1374*. Because resolution of this factual question will require a number of conclusions to be drawn from the evidence, summary judgment would be improper.

ii. Market Power

Cypress asserts that whatever the collective market share of the Consortium's members, GSI does not contend that Cypress alone had market power in any relevant product market. See Dkt. No. 101-6 at 21:8-21. As a result, Cypress argues that there is no basis for a finding that the Consortium members had market power in any relevant market. See id.

Market power is "the power to control prices or exclude competition." *Forsyth v. Humana, Inc., 114 F.3d 1467, 1475 (9th Cir. 1997)*. A high market share raises an inference of market power. See *Oahu Gas Service, Inc., v. Pacific Resources, Inc., 838 F.2d 360, 366 (9th Cir. 1988)* (citing *United States v. Grinnell Corp., 384 U.S. 563, 570, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*. "A mere showing of substantial or **[*17]** even dominant market share alone cannot establish market power sufficient to carry out a predatory scheme." *Rebel Oil, 51 F.3d at 1439*. Conversely, a "declining market share may reflect an absence of market power, but it does not foreclose a finding of such power." *Oahu Gas, 838 F.2d at 366* (citation omitted).

Here, Professor Harris opined that [TEXT REDACTED] Harris Decl., Ex. A at 42-45. Cypress does not dispute that the Consortium commanded an overwhelming share of the SRAM market. Nor does it dispute that GSI's expert shows that it held a substantial share of the market. Instead, Cypress argues that it alone did not have market power in any relevant market and challenges the method by which GSI's expert measures its market share. See Dkt. No. 101-6 at 21. However, Professor Harris provides [TEXT REDACTED] See Harris Decl., Ex. A at 42.[24] Again, the disagreement here between GSI and Cypress regarding the method used by the GSI's expert is a conflict between experts that can only be resolved by the jury.

Cypress's additional argument on this issue fares no better. Cypress asserts that GSI must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand **[*18]** their output. See Dkt. No. 101-6 at 21. Cypress argues that there were no barriers to entry and expansion because [TEXT REDACTED] See Dkt. No. 175-3 at 10.

"A high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors." *Oahu Gas, 838 F.2d at 366*. Barriers to entry include "(1) legal license requirements; (2) control of an essential or superior resource; (3) entrenched buyer preferences for established brands; (4) capital market evaluations imposing higher capital costs on new entrants; and, in some situations, (5) economies of scale." *Rebel Oil, 51 F.3d at 1439*.

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[21] [TEXT REDACTED]

[22] [TEXT REDACTED]

[23] [TEXT REDACTED]

[24] [TEXT REDACTED] See Ex. 11.

Here, contrary to Cypress' contention that GSI did not incur any costs constituting barriers to entry and expansion GSI provides evidence of significant barriers, including: [TEXT REDACTED][252627]

Further, Cypress does not dispute that it controls the supply of QDR and DDR DRAM SRAM devices and their specifications, which can be understood **[*19]** to be [TEXT REDACTED][28] Therefore, [TEXT REDACTED], the Consortium greatly increased the market barrier. See Dkt. No. 147-4 at 21.

Cypress also claims that GSI's entry with the SigmaQuad IIIe reflects a lack of meaningful barriers to entry. See Dkt. No. 101-6 at 21. However, "[t]he fact that entry has occurred does not necessarily preclude the existence of significant entry barriers." *Rebel Oil, 51 F.3d at 1440*. GSI argues that its delayed entry was the result of significant expertise, overcoming lack of technical specifications, taking of risk, and great expenditure. See Dkt. No. 147-4 at 22.

Finally, Cypress argues that because GSI was able to enter with SigmaQuad IIIe, it shows that there are no barriers to expansion. This claim ignores the realities of GSI's position in the market. See Dkt. No. 101-6 at 21-22. GSI argues that making substantial additional units of the product takes months even if a company like GSI already has designed and sampled a particular variant of QDR or DDR SRAM. See Shu Decl. ¶¶ 12-13. In addition, response times only get longer if **[*20]** the competitor does not have timely access to Consortium designs and data. See Dkt. No. 147-4 at 22. Further, the customer qualification process restricted GSI's ability to increase output in the short run.[29] Therefore, GSI has provided sufficient evidence that barriers to entry and expansion existed in the relevant market.

Accordingly, through circumstantial evidence, GSI creates a triable issue of fact as to whether the Consortium had market power and whether significant barriers to entry and expansion existed in the relevant market. Therefore, summary judgment is not warranted on the ground that the Consortium lacked market power.

iii. Anticompetitive Effect

Cypress asserts that "the development of SigmaQuad IIIe as an alternative to QDR-III amply demonstrated the absence of any anticompetitive effect from the alleged 'anti-innovation' to supress QDR-III." See Dkt. No. 101-6 at 23. The Court disagrees.

"It can't be said often enough that the antitrust laws protect competition, not competitors." *United States v. Syufy Enters., 903 F.2d 659, 668 (9th Cir. 1990)*. Consequently, "[t]o succeed on a rule of reason claim, an antitrust plaintiff must prove that the restraint in question injures competition in the **[*21]** relevant market." *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc.., 732 F.2d 1403, 1408 (9th Cir. 1984)* (citing *Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1979)*). With a horizontal agreement, the harm to one market competitor can be considered an injury to competition "when the relevant market is both narrow and discrete and the market participants are few." *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d at 508-509 (9th Cir. 1989)*.

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[25] See Murphy Decl., Ex. A at ¶¶ 26, 79; Shu Decl., ¶¶ 3, 12. See also Ex. 18 at 120-121 [TEXT REDACTED]; Ex. 114 [TEXT REDACTED]

[26] See Ex. 18 at 65-68; Ex. 19 at 37 [TEXT REDACTED].

[27] See Ex. 115 at 264-265.

[28] See Dkt. No. 147-4 at 21; see also Ex. 42 at 138 [TEXT REDACTED] Ex. 18 at 18 [TEXT REDACTED] Ex. 43 at 59-62; Ex. 1 [TEXT REDACTED]; Chapman Decl., ¶¶ 4-5, 7.

[29] See Ex. 42 at 25-31; Ex. 43 at 100-101, 105-106.

Here, GSI offers evidence that the Consortium's conduct stymied innovation in the relevant market and causally links vaporware announcements to the alleged harm. See Dkt. No. 147-4 at 24-28. First, GSI believed that QDR-III would be the industry standard because the first and second generation Consortium devices represented the industry standard for QDR and DDR SRAM.[30] [TEXT REDACTED].[31] Second, GSI provides evidence that Cypress [TEXT REDACTED][32] However, since GSI was [TEXT REDACTED] See Shu Decl., ¶¶ 7-8; Chapman Decl., ¶¶ 8-9, 11. Third, GSI argues that [TEXT REDACTED] See Dkt. No. 147-4 at 24-25. Therefore, [TEXT REDACTED].[33] Finally, the harm to GSI can be considered an injury to competition because the Consortium collectively had a dominant share of the VHPS market - a market that was "both narrow and discrete" with few market participants - over the period of interest.[34]

Cypress also asserts that the evidence does not show any unmet demand as a result of the failure to develop QDR-III. See Dkt. No. 101-6 at 23-25. Moreover, Cypress argues that the evidence shows that there was no anticompetitive effect because [TEXT REDACTED] See id. As such, Cypress argues that any harm hinges on the implausible theory [TEXT REDACTED] See id.

However, GSI argues that the vaporware's anticompetitive effect is not the Consortium's failure to develop QDR-III, but the Consortium's behavior causing delay in the development of SigmaQuad-IIIe (and the delay in successive generation of products). See Dkt. No. 147-4 at 27. An anticompetitive horizontal agreement requires exclusivity; for example, it may be a group of firms that are committed to a particular existing technology or method of doing business and make horizontal agreements designed either to prevent their members from developing or switching to alternative technologies or methods or else to exclude from the **[*23]** market other firms threatening to employ such alternatives.[35] GSI argues that the Consortium's actions hindered innovation by [TEXT REDACTED] See Chapman Decl., ¶¶ 8-9. For example, [TEXT REDACTED] See Haig Decl., ¶¶ 10-12. Therefore, [TEXT REDACTED] See *Hartford Fire, 509 U.S. 764, 113 S. Ct. 2891, 125 L. Ed. 2d 612*.

GSI also argues that customers [TEXT REDACTED] Dkt. No. 147-4 at 24:18-20. Therefore, GSI claims that Cypress' [TEXT REDACTED] *Free Freehand Corp. v. Adobe Systems, Inc., 852 F. Supp. 2d 1171, 1185 (N.D. Cal. 2012)*. Therefore, summary judgment on this point is inappropriate.

In sum, the Court concludes that GSI has come forward with sufficient evidence by way of the expert testimony and the circumstantial evidence to create a triable issue of fact as to whether Cypress along with the Consortium members intended to harm competition.

C. Injury-in-Fact

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[30] See Ex. 13 at 51; Ex. 18 at 18, 19, 26; Ex. 39 at 198-200.

[31] Shu Decl., ¶¶ 5-7; Chapman Decl., **[*22]** ¶¶ 7-9.

[32] See Exs. 59, 60; Ex. 120 [TEXT REDACTED]; Shu Decl., ¶¶ 7-8; Chapman Decl., ¶¶ 8-9, 11.

[33] Shu Decl., ¶ 7-8; Chapman Decl., ¶ 8, 11, 13; see also Dkt. No. 147-4 at 11:3-5, 26-27.

[34] Harris Decl., Ex. A at 42-45.

[35] See *Hartford Fire Ins. Co. v. California, 509 U.S. 764, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993)* (defendant insurers allegedly agreed to deny risk data and reinsurance to competing insurers wishing to write broader coverage that the defendants wished to remove from the market); see also *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)* (cartel of steel conduit makers conspire to keep plastic conduit off the market); see also *American Medical Asso. v. United States, 317 U.S. 519, 63 S. Ct. 326, 87 L. Ed. 434 (1943)* (agreement preventing members and excluding other physicians from working for prepaid health plans).

Cypress' final argument in favor of summary judgment is that GSI failed to show any causal **[*24]** link between GSI's alleged injury and the "vaporware" conduct that it alleges against Cypress and the other members of the Consortium. See Dkt. No. 101-6 at 26:10-18. Specifically, Cypress contends that GSI cannot establish injury-in-fact because: (1) there is no evidence that the Consortium's "vaporware" delayed SigmaQuad-IIIe's development, and (2) there is no evidence that, if SigmaQuad-IIIe were developed one year earlier, there would have been any customer demand for the device. See id. at 25-30.

To survive summary judgment, Plaintiff must also show that they suffered a cognizable injury resulting from Defendants alleged conspiracy. See *Matsushita, 475 U.S. at 585-86*. "Antitrust injury is defined not merely as injury caused by an antitrust violation, but more restrictively as 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Glen Holly Entm't, Inc. v. Tektronix, Inc., 352 F.3d 367, 371 (9th Cir. 2002)* (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. The intentions of the antitrust laws are well synthesized in *Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311 (1940)*:

> The end sought [by the Sherman Act's prohibition against unreasonable restraints of trade] was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or *otherwise **[*25]** control the market to the detriment of purchasers or consumers of goods and services*, all of which had come to be regarded as a special form of public injury.

Id. at 493 (emphasis added). Thus, "the central purpose of the antitrust laws, state and federal, is to preserve competition."" *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 988 (9th Cir. 2000)*. "Every precedent in the field makes clear that the interaction of competitive forces . . . is what will benefit consumers." Id. In addition, the Ninth Circuit requires that the injured party be a participant in the same market as the alleged malefactors. *Glen Holly Entm't, 352 F.3d at 372*.

Here, GSI asserts that Cypress' alleged conduct is the type that antitrust laws were intended to prevent because GSI's evidence shows that Cypress denied consumers the benefits of innovation in product development and lower prices. See *Rebel Oil, 51 F.3d at 1433* (holding that consumer welfare is maximized when economic resources are allocated to their best use and when consumers are assured competitive price and quality). [TEXT REDACTED].[36] Moreover, GSI argues that [TEXT REDACTED] Id. Again, the evidence discussed in the section above demonstrates that [TEXT REDACTED]. See Haig Decl., ¶¶ 10-12. Therefore, GSI provides evidence showing that Cypress caused an antitrust injury to GSI under **[*26]** the Ninth Circuit's requirements.

Finally, Cypress argues that GSI's damages expert, D. Paul Regan's ("Regan"), economic model does not provide a reasonable basis to estimate "lost profits" from the alleged delay of the production of SigmaQuad-IIIe. See Dkt. No. 101-6 at 27-28. However, GSI argues that Regan's market and sales analysis is soundly based on GSI's actual sales of SigmaQuad-IIIe and Cypress' own market demand projections. See Regan Decl., ¶¶ 6-7.

Although Cypress argues that GSI cannot prove antitrust injury, the substance of Cypress' arguments target GSI's damages calculations. Cypress asserts that Regan relies on faulty analytical methods or mere guesswork. But the arguable inaccuracy of Regan's damages calculations is not grounds for granting summary judgment. The credibility and persuasiveness of GSI's expert witnesses are issues best left to a factfinder. Until a factfinder is given an opportunity to assess the disputed facts underlying GSI's theory, the issue of antitrust injury is not ripe for summary judgment.

IV. CONCLUSION

At this point, GSI has raised enough issues of contested **[*27]** material fact to preclude summary judgment on the merits for this case. Accordingly, Cypress' motion for summary judgment is DENIED.

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[36] Shu Decl., ¶ 7-8; Chapman Decl., ¶ 8, 11, 13; see also Dkt. No. 147-4 at 11:3-5, 26-27.

IT IS SO ORDERED.

Dated: January 27, 2015

/s/ Edward J. Davila

EDWARD J. DAVILA

United States District Judge

RULINGS RE DEFENDANTS' EVIDENTIARY OBJECTIONS (DKT. NO. 175-3)

Schaberg Ex.	Evidentiary Objections	Ruling
40	Hearsay (*FRE 802*) and lack of foundation/personal knowledge (*FRE 602*) as to what Mr. Raposa was interested in.	Overruled. Fed. R. Evid. *803(3)*.
43	Hearsay (*FRE 802*) and lack of foundation/personal knowledge/speculation (FRE *602*) as to what Cisco told Mr. Stoll and what Cisco's preferences were	Overruled. Fed. R. Evid. *803(3)*.
49	Hearsay (*FRE 802*) and lack of authentication (*FRE 901*)	Overruled. Fed. R. Evid. *803(3)*, *901(b)(4)*.
70-71	Lack of foundation (*FRE 602*) as to two presentations	Overruled.
72	Lack of foundation (*FRE 602*)	Overruled.
73	Lack of foundation (*FRE 602*)	Overruled.
74	Double hearsay (*FRE 802*) as to email and Renesas's website; lack of authentication (FRE *901*); lack of foundation/personal knowledge (*FRE 602*)	Overruled. Fed. R. Evid. *803(3)*
83	Hearsay (*FRE 802*) and lack of	Overruled. Fed. R. Evid.

Schaberg Ex.	Evidentiary Objections	Ruling
	authentication (FRE 901)	803(3), 902(6).
101	Hearsay (FRE 802) and lack of foundation/personal knowledge (FRE 602)	Overruled. Fed. **[*28]** R. Evid. 702, 703.
120	Hearsay (FRE 802) as to what customer said	Overruled. Fed. R. Evid. 803.
121	Double hearsay (FRE 802) as to conversation with Alcatel Lucent	Overruled. Fed. R. Evid. 803(3).
122	Double hearsay (FRE 802) as to conversation with Alcatel Lucent	Overruled. Fed. R. Evid. 803(3).
123	Double hearsay (FRE 802) as to conversation with Alcatel Lucent	Overruled. Fed. R. Evid. 803(3).
Declaration of Robert B. Haig (Dkt. 128)	Lack of foundation/personal knowledge (FRE 602): 2:11-14; 2:17-20; 2:21-23; 2:24-28; 3:3-6; 3:7-12 Hearsay (FRE 802): 2:21-23; 3:1-6	Overruled. Fed. R. Evid. 803(3).
Declaration of Patrick T. Chuang (Dkt. 129)	Lack of foundation/personal knowledge (FRE 602): 2:21-3:3; 3:6-8 Impermissible lay opinion testimony (FRE 701); 2:21-3:3; 3:6-8	Overruled.
Declaration of Lee Shu (Dkt. 130)	Lack of foundation/personal knowledge (FRE 602): 1:22-26; 1:27; 2:19-21; 2:23-27; (Speculation); 3:12-14; 3:27-28;	Overruled. Fed. R. Evid. 803(3)

Schaberg Ex.	Evidentiary Objections	Ruling
	4:2-3	
Declaration of David B. Chapman (Dkt. 131)	Hearsay (FRE 802): 3:12-14 Lack of foundation/personal knowledge (FRE 602): 1:16-17; 1:18-20; 1:21-1:23; 1:25-2:9; 2:12-25; 3:25-4:2; 4:19-21; 4:26-28 Impermissible lay opinion testimony **[*29]** (FRE 701): 1:21-23; 2:9-10; 3:25-28 Hearsay (FRE 802): 3:10-11; 3:18-20; 3:21-24; 4:2-4; 4:4-4-7; 4:13-14; 4:19-21; 4:22-24	Overruled. Fed. R. Evid. 803(3)
Declaration of Didier Lasserre (Dkt. 145)	Lack of foundation/personal knowledge (FRE 602): 1:8-9	Overruled.
Chuang Declaration (Dkt. 129) ¶ 5	Deposition of Patrick Chuang (May 19, 2014) (Alepin Declaration Ex. L) at 184:13-23; 194:1-17; 225:4-9; 298:9-299:24	Overruled. Fed. R. Evid. 702.
Shu Declaration (Dkt. 130) ¶ 7	Deposition of Lee-Lean Shu (June 10, 2014) at: 374:3-14; 378:13-23; 502:22-24; 504:20-506: 11; 508:23-509:9	Overruled.
Chapman Declaration (Dkt. 131) ¶ 11	CX 30 at 603: [TEXT REDACTED]	Overruled.
Chapman Declaration (Dkt. 131) ¶ 7	Shu Declaration at ¶ 9: [TEXT REDACTED]	Overruled.

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