Date and Time: Thursday, December 14, 2023 12:05:00 PM CST

Job Number: 212633998

Documents (30)

1. *In re Coordination Proceeding Special Title (Rule 1550(b)), 2003 Cal. Super. LEXIS 1365*

   Client/Matter: -None-

   Search Terms: "antitrust law"

   Search Type: Natural Language

   Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

2. *In re Coordination Proceeding Special Title Rule 1550b, 2003 Cal. Super. LEXIS 1366*

   Client/Matter: -None-

   Search Terms: "antitrust law"

   Search Type: Natural Language

   Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

3. *In re Coordination Proceeding Special Title (Rule 1550(b)): Wholesale Elec. Antitrust Cases I & II., 2006 Cal. Super. LEXIS 1354*

   Client/Matter: -None-

   Search Terms: "antitrust law"

   Search Type: Natural Language

   Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

4. *Coordination Proceeding Special Title Rule 1550b, 2006 Cal. Super. LEXIS 891*

   Client/Matter: -None-

   Search Terms: "antitrust law"

   Search Type: Natural Language

   Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

5. *Coordination Proceeding Special Title (Rule 1550(b)), 2009 Cal. Super. LEXIS 2507*

   Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

6. [Microsoft Corp. v. Franchise Tax Bd., 2010 Cal. Super. LEXIS 2977]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

7. [Jamaly v. PNC Bank, N.A., 2012 Cal. Super. LEXIS 14229]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

8. [Go Computer, Inc. v. Microsoft Corp., 2014 Cal. Super. LEXIS 6371]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

9. [SCRANTON v. E, 2014 Cal. Super. LEXIS 556]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

10. [Go Computer v. Microsoft Corp., 2015 Cal. Super. LEXIS 10947]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

11. Rutledge v. Hewlett-Packard, Co., 2016 Cal. Super. LEXIS 489

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

12. Kossen v. Nestle USA, Inc., 2016 Cal. Super. LEXIS 14487

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

13. Vaughan v. Kulda, 2016 Cal. Super. LEXIS 9319

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

14. Vukov v. Glendale Adventist Med. Ctr., 2016 Cal. Super. LEXIS 46610

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

15. Cal. Physicians Serv. v. Johnson, 2016 Cal. Super. LEXIS 38698

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by

Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

16. [Angeles v. Wells Fargo Bank, N.A., 2017 Cal. Super. LEXIS 6466]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

17. [San Francisco Print Media Co. v. Hearst Corp., 2017 Cal. Super. LEXIS 5757]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

18. [Imhoff v. Goin, 2018 Cal. Super. LEXIS 4]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

19. [LBM Props. LLC v. DirecTV Inc., 2018 Cal. Super. LEXIS 4046]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

20. [Reibstein v. Rmd Group Llc E-File, 2018 Cal. Super. LEXIS 54760]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

21. *Greenkraft, Inc. v. Gemayels, 2019 Cal. Super. LEXIS 57491*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

22. *Shandong Lihong Tech. Ltd. Crop v. Masimo Corp., 2019 Cal. Super. LEXIS 18904*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

23. *UFCW & Employers Benefit Trust v. Sutter Health, 2019 Cal. Super. LEXIS 342*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

24. *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc., 2019 Cal. Super. LEXIS 92933*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

25. *Shandong Lihong Tech. v. Masimo Corp., 2019 Cal. Super. LEXIS 42196*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

26. *MD Synergy Sols., LLC v. Xavient Info. Sys., 2019 Cal. Super. LEXIS 6838*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

27. *Biofrontera Inc. v. Dusa Pharms., 2020 Cal. Super. LEXIS 37309*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

28. *Wun- Ling Chang v. Blue Cross of Cal., 2020 Cal. Super. LEXIS 1475*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

29. *Tonti v. Capo by the Sea, 2020 Cal. Super. LEXIS 5277*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

30. *Mission Hosp. Reg'l Med. Ctr. v. Heritage Provider Network, 2020 Cal. Super. LEXIS 20763*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Superior Court

In re Coordination Proceeding Special Title (Rule 1550(b))

Superior Court of California, County of San Diego

April 9, 2003, Decided; April 9, 2003, Filed

Judicial Council Coordination Proceeding Nos. 4154 and 4220

Reporter
2003 Cal. Super. LEXIS 1365 *

Coordination Proceeding Special Title (Rule 1550(b)): This Document Relates To: ALL ACTIONS

Prior History: *In re Coordination Proceeding Special Title (Rule 1550(b)) Cipro Cases I & II, 2003 Cal. Super. LEXIS 445 (Cal. Super. Ct., Feb. 19, 2003)*

Core Terms

patent, Cartwright Act, Sherman Act, settlement, generic, antitrust, effects, anticompetitive, infringement, ciprofloxacin, baseless, settlement agreement, courts, antitrust violation, inequitable conduct, cases, rule of reason, exclusionary, marketing, summary judgment motion, allegations, restraint of trade, cause of action, anti trust law, parties, material fact, restrained, patent holder, The Cartwright Act, pernicious

Judges: **[*1]** The Honorable Richard E.L. Strauss, Coordination Trial Judge.

Opinion by: Richard E.L. Strauss

Opinion

[PROPOSEDI FINAL JUDGMENT

On August 21, 2009, the Court, having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, granted the motion for summary judgment filed by defendant Bayer Corporation, the motion for summary judgment filed by defendants Hoechst Marion Roussel, Inc., The Rugby Group, Inc., and Barr Laboratories, Inc., and the motion for summary judgment filed by Watson Pharmaceuticals, Inc. (collectively, "Defendants"). A true and correct copy of the Court's August 21, 2009 Order granting those motions is attached to this judgment as Exhibit 1. In accordance with that Order,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Named plaintiffs Karyn McGaughey, Barbara Hymes Cohen, Deborah Patane, Donna Moore, Senior Action Network, IUOE Stationary Engineers Local 39 Health and Welfare Plan, and Sheet Metal Workers Health Plan of Southern California ("Named Plaintiffs"), and the plaintiff class defined as,

> [a]ll natural persons, sole proprietorships, partnerships, limited partnerships, corporations, and other entities, in the State of California who indirectly **[*2]** purchased, paid and/or reimbursed for Cipro intended for consumption by themselves, their families, or their members, participants, employees or insureds (the "Class")

> during the period from January 8, 1997 through such time in the future as the effects of Defendants' illegal conduct, as alleged herein, have ceased (the "Class Period"),[1]

take nothing from Defendants, and that the Named Plaintiffs and Class receive none of the relief that they have requested through their complaints.

2. Judgment is hereby entered in favor of Defendants and against Named Plaintiffs and the Class.

3. The Clerk of the Court is directed to enter this **[*3]** Judgment, without delay, as a final judgment.

Dated: &&&

/s/ Richard E.L. Strauss

Hon. Richard E.L. Strauss, Judge of the San Diego Superior Court

Exhibit 1

Appearances:

For Appearances, please see sign in sheet, attached hereto and incorporated herein.

The court's tentative ruling is published but not read on the record. Court hears oral argument and confirms its modified tentative ruling, per agreement of both sides, as follows:

Defendant Bayer Corporation's Motion for Summary Judgment

Defendant Bayer Corporation's Motion for Summary Judgment is GRANTED. Under *CCP § 437c*, if the parties' papers show there is no triable issue of material fact and the "'moving party is entitled to a judgment as a matter of law'" (*CCP § 437c(c)*), the court must grant the motion for summary judgment. (*Aguilar v. Atlantic Richfield (2001) 25 Cal.4th 826, 843, 107 Cal. Rptr. 2d 841, 24 P.3d 493*.) Subdivision (p)(2) states: "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause oraction ... cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or crass-complainant to show a triable issue of one **[*4]** or more material facts exists as to that cause of action or a defense thereto."

The Consolidated Second Amended Complaint (SAC) alleges three causes of action for (1) antitrust in violation of the Cartwright Act, under *California Business and Professions Code Sections 16720, et. seq.*; (2) unfair competition in violation of *California Business and Professions Code Sections 17200 et. seq.*; and (3) common law monopolization. Essentially, Plaintiffs allege Defendant Bayer entered into unlawful and anti-competitive agreements with its horizontal competitors. Defendants Barr Laboratories; Hoechst Marion Roussel, Inc. (HMR) and HMR's then subsidiary, Defendant Rugby Group, Inc. (Rugby). Plaintiffs allege these agreements, referred to as reverse payment settlements, (hereinafter the "agreement") effectively allowed Bayer to maintain an exclusive right to manufacture and market Cipro in California without competition to bring a generic form of ciprofloxacin to the market place. The result to consumers and Plaintiffs was increased costs of the prescription drug Cipro and increased profits to Bayer. In addition, the other parties to the agreement received large payments for not producing a generic form of Cipro.

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[1] Excluded from the class are all persons who obtained Cipro through the MediCal Prescription Drug Program; governmental entities; the Defendants, their co-conspirators, along with all of their respective parents, subsidiaries and/or affiliates; all persons or entities that purchased Cipro for purposes of resale; any purchaser of Cipro who paid a flat co-payment and who would have paid the same co-payment for a generic substitute under the terms of their health insurance coverage, and any and all judges and justices assigned to hear any aspect of this litigation.

As discussed more fully herein, the Court finds that the agreement does not violate the Cartwright Act. The undisputed **[*5]** evidence establishes that no triable issue of material fact exists that the agreement did not fall outside the exclusionary scope of the patent; there is no evidence that the patent suit by Bayer against Barr was objectively baseless; and Plaintiff cannot establish that the settlement was otherwise unlawful.

The Cartwright Act (§§ 16700-16758) was designed primarily to prevent organization of trusts for control of markets for merchandise, but its definition of trust may, not unreasonably, include any contract "to carry out restrictions in trade or commerce," and to prevent competition in "manufacturing, sale or purchase of merchandise" etc. (*California Kitchens v United Brotherhood of Carpenters & Joiners (1956) 139 Cal App 2d 597, 294 P.2d 468*)California courts interpreting the Cartwright act recognize the persuasive authority of federal decisions under the Sherman Act and have liberally applied the federal Sherman Act doctrine in interpreting the Cartwright Act. (See, e.g., *Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 542, 30 Cal. Rptr. 2d 706*; *Cellular Plus, Inc. v. Superior Court (1993) 14 Cal. App. 4th 1224, 1242, 18 Cal. Rptr. 2d 308*; Bert G. Gianelli Distributing Co. v. Beck & Co. (1985J *172 Cal. App. 3d 1020, 1042, 219 Cal. Rptr. 203*, overturned on other grounds.by Dore v. Arnold Worldwide, inc. *(2006) 39 Cal.4th 384, 46 Cal. Rptr. 3d 668, 139 P.3d 56*.) The Cartwright Act, like its federal counterpart, "has not been interpreted to penalize natural monopolies," (*Freeman v. San Diego Ass'n of Realtors, 77 Cal.App.4th 171,200*.)

The Cartwright Act and the federal antitrust laws are interpreted to permit **[*6]** restraints of trade as long as those restraints are reasonable under the circumstances. Following federal law, the Cartwright Act recognizes two distinct categories of offenses: "Per Se" violations, and other potentially harmful conduct that is treated under the so-called "Rule of Reason." Under the per se illegal theory, conduct is conclusively presumed to be unlawful because of its pernicious effects on competition and lack of any redeeming virtue. In other words, it is illegal regardless of any alleged business justification or pro-competitive effects. (*Marin County Bd. Of Realtors, Inc. v. Palsson, (1976) 16 Cal.3d 920, 930-31, 130 Cal. Rptr. 1, 549 P.2d 833*.) Under the Ruie of Reason analysis, conduct violates the Cartwright Act if the plaintiff shows that the conduct is an unreasonable restraint of trade, meaning conduct that unreasonably impairs competition and harms consumers. The Rule of Reason prohibits only those actions that cause an "unreasonable restraint of trade" (*Standard Oil Co. v. United States (1911) 221 US 1, 87, 31 S. Ct. 502, 55 L. Ed. 619*; see also *People v. Building Maint. Contractors' Ass'n, Inc. (1953) 41 Cal.2d 719, 727, 264 P.2d 31*.) If an alleged restraint of trade is not per se illegal, the Ruie-of-Reason analysis should be applied (see *Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal.3d 842, 855, 94 Cal. Rptr. 785, 484 P.2d 953*-ftnding the rule of reason to be a factual inquiry into whether a particular action is an unreasonable restraint on trade)].

Plaintiffs allege that the agreement at issue here was a per se violation **[*7]** of the Cartwright Act. (SAC 1J140.) Plaintiffs argue that the agreement at issue is a horizontal agreement between competitors to allocate markets, which have been held to be per se illegal under the Cartwright Act. Plaintiffs urge this Court to find that under California law, "a naked payment from a patent holder to a non-patent holder to abandon its challenge to the patent's validity and stay out of the market for the patented product-thus ensuring supra-competitive pnces-must be scrutinized under the rule that agreements not to compete are per se illegal."(Plaintiffs' Opposition, p. 31.)

However, the Court declines to find the agreement is illegal per se, as the per se label is reserved for, "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they nave caused or the business excuse for their use." (*Marin County Bd. Of Realtors, Inc. v. Palsson, (1976) 16 Cal.3d 920, 930-31, 130 Cal. Rptr. 1, 549 P.2d 833*.) Plaintiffs have cited no California case, nor is there one, supporting that a per se illegal analysis Is applicable to the specific agreement at issue here, a reverse payment settlement agreement under the Hatch **[*8]** Waxman Act concerning a patent. The California Supreme Court has instructed that "before acceding to the demand for sucn a formidable rule," "applicable case law" must condemn the conduct. (*Marin County, 16 Cal.3d at 931*.) Given that this appears to be a case of first impression, there is simply no legal basis to support that the Cartwright Act be Interpreted in such a manner so as render the agreement per se illegal, as there has been no authority provided by Plaintiffs demonstrating that California courts have historically found that these agreements have a "pernicious effect" on competition which lacks "any redeeming virtue." Moreover, it is well settled that the law favors settlements ana this would extend to patent infringement suits as well.

Plaintiffs' reliance on Vulcan Powder Co. v. Hercules Powder Co. (1892) 95 Cat 510, to support that an agreement like this should be determined to be illegal per se because it constitutes an agreement not to compete is unpersuasive. The Court in Vulcan found an antitrust violation because the agreement exceeded the scope of the patent. The contract at issue in that case, unlike here, was not confined to the product (dynamite) produced under the patents, and involved a **[*9]** collaboration among many industry members including some that did not have patent rights to establish a commitment to fix prices. As will be discussed in greater detail below, the agreement here was confined to the product produced under the patent and did not exceed the scope of the patent's right to exclude all infringers from marketing a generic version of Cipro.

Nor is there any basis to support that the agreement is per se illegal under federal law. The federal cases under the Sherman Act nave found thaf these types of agreements are not illegal per se violations of federal ***antitrust law***. Under the Sherman Act, the courts have held that a reverse payment settlement agreement like the one at issue here, (See *Schering-Plough Corp. v. FTC (11th Cir.2005) 402 F.3d 1056*; *Valley Drug Co. v. Geneva Pharms., Inc., (11th Cir. 20O3) 344 F.3d 1294*; In Re Tamoxifen Citrate Antitrust Litig, (2d Cir. 2006) 466 F.3d at 190) and specifically this very agreement (See In Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro II") *(E.D.N.Y. 2005) 363 F Supp. 2d 514, 541*; and In Re Ciprofloxacin Hydrochloride Antitrustlltig. ("Cipro fll") *(Fed. Cir. 2008) 544 F.3d 1323,1341)* are not illegal per se. The Federal Circuit Court in Cipro III held that, "only agreements that have a predictable and pernicious anticompetitive effect and limited potential for procompetitive effect are deemed to be per se unlawful under **[*10]** the Sherman Act A finding of per se unlawfulness is appropriate once experience with a particular type of restraint enables the Court to predict with confidence that the rule of reason will condemn it." The court found that this specific agreement was not per se illegal under the Sherman Act as it did not restrict more competition than allowed under the scope of the patent. (Cipro III, at 1332.)

Although Plaintiffs argue that the Court should not follow the federal court decisions, arguing that the Cartwright Act is broader (i.e. prohibits more conduct) than the Sherman Act, the Court is not persuaded that it is broader in any way pertinent to the issues before the Court. The Cartwright Act and the federal Sherman Act share similar language and objectives, and California courts often look to federal . precedents under the Sherman Act for guidance. (*Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 369, 113 Cal. Rptr. 2d 175*.) Although not identical, "judicial interpretations of the Sherman Act are, nevertheless, often helpful because of the similarity in language and_purpose between the federal and state statutes," (*Morrison v. Viacom, Inc., (1998) 66 Cal.App.4th 534, 541, 78 Cal. Rptr. 2d 133*.) "Because the Cartwright Act is patterned after the federal Sherman Act and both have their roots in the common law, federal cases interpreting **[*11]** the Sherman Act are applicable in construing the Cartwright Act." (Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Constr. Co., (197T1 *4 Cal. 3d 354, 362 fn 3, 93 Cal. Rptr. 602, 482 P.2d 226*, citing to *Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 315, 70 Cal. Rptr. 849, 444 P.2d 481]*.) "Although we have referred to federal decisions under the Sherman Act, it is well settled that such cases are authoritative in cases under the Cartwright Act." (*Shasta Douglas Oil Co. v. Work (1963) 212 Cal. App. 2d 618, 625, 28 Cal. Rptr. 190*. citing to *Milton v. Hudson Sales Corp. (1957) 152 Cal.App.2d 418, 440, 313 P.2d 936*.) The Cartwright Act prohibits every trust, defined as "a combination of capital, skill or acts by two or more persons" for specified anticompetitive purposes. The federal Sherman Act prohibits every contract, combination ... or conspiracy, in restraint of trade." The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwrioht Act and the federal Sherman Act share similar language and objectives. California courts often look fo federal precedents under the Sherman Act for guidance. (*Chavez v. Whirlpool Corp. (2001)93 Cal. App. 4th 363, 369, 113 Cal. Rptr. 2d 175*.)

While the Court recognizes that the federal decisional law is not binding on this Court (unless otherwise indicated herein) the Court considers the federal case law concerning this agreement as persuasive authority, especially in light of the lack of controlling California authority on point, Further, the rule enunciated **[*12]** under the Sherman Act in Cipro III mirrors the law in California that it is only those agreements that have a "historical and pernicious" effect which should be found per se illegal. Although Plaintiffs cite to In re Cardizem CD Antitrust Litigation, as federal authority finding a reverse payment settlement per se illegal, the agreement at issue in that case exceeded the exclusionary scope of the gatent involved and restrained non-infringing drugs, and thus does not aid Plaintiffs here. (In re ardizem *CD Antitrust Litigation (6th Cir. 2003) 332 F.3d 896*.)

As discussed more fully below, the agreement here does not restrict more competition than allowed under the scope of the patent. To adopt Plaintiffs' argument that horizontal agreements between competitors to allocate markets are traditionally subject to per se illegal treatment wholly ignores that this agreement concerns a patent which gives the patent holder the legal right to exclude infringing competition. Therefore, the Court does not find the agreement to be illegal per se under the Cartwngnt Act, as there is no legal basis under California law to do so. Nor is there any basis to support a per se illegal determination under federal decisional law.

This Court also finds that the **[*13]** agreement does not violate the Cartwright Act under the Rule of Reason. To state a Cartwright Act antitrust claim, Plaintiffs must show that: 1) an agreement exists between independent entities; 2) the agreement is in restraint of trade; and 3) the resfraint is unreasonable. To prove an unreasonable restrain, Plaintiffs must show the agreement had a "substantially adverse effect on competition in the relevant market.1' (*Exxon Corp. v. Superior Court (1997) 51 Cal. App. 4th 1672, 1681, 60 Cal. Rptr. 2d 195*.) Plaintiff must show: (1) that an alleged restraint on trade has anticompetitive effects, and (2) that the anticompetitive effects outweigh any pro-competitive benefits. (See *Bert G. Gianelli Distrib. Co, v. Beck & Co. (1985) 172 Cal.App.3d 1020, 1048, 219 Cal. Rptr. 203*, overturned on other grounds by *Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384, 46 Cal. Rptr. 3d 668, 139 P.3d 56*.) The focus is on the actual effects That the challenged restraint has had on competition in a relevant market.

As previously discussed, there Is no California authority evaluating whether a Hatch Waxman reverse payment settlement agreement violates state antitrust iaw (Cartwright Act or otherwise). Thus, the Court turns to federal decisions concerning the Sherman Act as persuasive authority to guide its decision. Federal case law is not only instructive in this regard, it is dispositive.

The federal court cases dealing generally with Hatch Waxman settlements, **[*14]** and specifically with this agreement, have uniformly heldihat settlements within the scope of the patent do not violate antitrust aws. The federal courts nave held that in order to determine whether there is an antitrust violation under the federal antitrust Sherman Act) the Court must first analyze whether the agreement at issue alls within the exclusionary scope of the patent. If it does, there is no anti-trust violation because the settlement agreement did not cause anticompetitive effects beyond those inherent in the patent. As stated in Tamoxifen and quoted in Cipro If, "Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing ***antitrust law***, as long as the competition is restrained only within the scope of the patent." (Id. at 213 (quoting Cipro II at 53B.) Additionally, the district and appellate court in Cipro II and III have already determined that the settlement at issue here did not exceed the scope of the patent and did not have anti-competitive effects beyond the patent. In Cipro 111, the Federal Circuit affirmed the district court's **[*15]** holding that there was no antitrust violation because the settlement agreement fell within the "exclusionary zone" of the patent. The Federal Circuit Court found that because patents are presumed valid and provide the patentee with the right to exclude others (infringers) from the market, the challenged anticompetitive effects of the agreemenfat issue here were directly attributable to the patent, and therefore, no antitrust remedy was available. (*In re Ciprofloxacin Hydrochloride Antitrust Litig. (Cipro III) (Fed. Cir. 2008) 544 F.3d 1323, 1332-1336*.)

The Court finds the result should be no different under the Cartwright Act, as we are dealing with the exact same settlement agreement, involving the same type of Plaintiffs (indirect purchasers), and the same theories of liability. Additionally, the standard articulated in the federal cases comports with California law and is consistent with regard to the antitrust liability concerning patents. The district court in Cipro II, affirmed by the Circuit Court in Cipro ill, utilized the same framework, i.e. a rule of reason, in its analysis which differs in no significant respect and is not unlike the rule of reason articulated by the courts for purposes of a state antitrust analysis under the Cartwright Act. Although Plaintiffs argue that **[*16]** the Cartwright Act is more restrictive than the Sherman Act, such argument is unavailing as previously discussed above. Further, while the cases cited by Plaintiffs in this regard recognize that the scope of the Cartwright Act may in some situations be broader than or differ from the Sherman Act, there is no authority or support which persuades this Court to conclude that the Cartwright Act was intended to be broader than the Sherman Act on the question of reverse payment settlements.

California cases involving antitrust violations and patents likewise hold that conduct falling within the scope of a patent is not an antitrust violation. The grant of a patent is the grant of a statutory monopoly and is an express exception to laws prohibiting monopolies. (*Sears, Roebuck & Co. v. Stiffer Co. (1964) 376 U.S. 225, 229*; *Aetna Casualty & Sur. Co. v. Superior Court (1993)19 Cal. App. 4th 320, 328, 23 Cal. Rptr. 2d 442*.) In *Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748, 258 P.2d 852*, the California Court of Appeal ruled that in cases in which the exercise of patent rights is involved, a patent holder "brings himself within the proscription of the antitrust laws only when the patentee or his assignee acts beyond that which was necessary or incidental to the scope of this patent." (*Fruit Machinery, (1953) 118 Cal.App.2d 748, 258 P.2d 852*.) In Fruit Machinery, the defendant was a sublicensee of a patented peach-pitting machine who challenged the sublicense agreement **[*17]** on the ground that the plaintiff "created a monopoly" through the sublicense, (*id. at 761*.) The Court rejected the argument, noting that, "Defendant has not shown that the parties, in executing and carrying out the sublicense agreement in suit, exercise rights or powers not accorded them by the patent law or abused any rights or powers accorded them by that law." (*Id. at 762*.) Thus, California law also supports that unless the agreement goes, "beyond the scope of the patent rights there is no antitrust violation. (Id.)

The undisputed evidence shows that the agreement here was clearly within the scope of the patent. A

Batent is presumed valid. (*35 U.S.C. 282*) The 444 patent issued on June 2, 1987, and expired 'ecember 9, 2003 (UMF No. 3, and evidence cited therein). The FDA granted pediatric exclusivity to Bayer's Cipro until June 9, 2004. (UMF No. 4, and evidence cited therein.) Under the federal food and drug laws, no generic Cipro could lawfully enter the market until June 9, 2004. (*21 U.S.C. §355a(b)(2)(A)(ii)*0 The 444 patent is a compound patent and covers the molecule/compound ciprofloxacin hydrochloride, which is the only active ingredient in all ciprofloxacin products however formulated. (UMF No. 2, and evidence cited Therein) Claim 12 **[*18]** did not change in reexamination. (UMF Nos. 26-28, and evidence cited therein.) Because the patent covers the ciprofloxacin molecule, Bayer had the right to exclude infringing competition from all forms of generic Cipro. (In Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro I") *(E.D.N.Y. 2003) 261 F. Supp. 2d 188, 249*.) In 1991 Barr filed an ANDA with a Paragraph 4 certification, alleging the patent was invalid. Barr stipulated that its ANDA product infringed on the 444 patent. (UMF Nos. 5-8, 19, and evidence cited therein.) Thus, the Cipro gatent precluded all generic competition, including Barr's admitted infringement. On January 16, 1992, ayer sued Barr alleging that the ANDA infringed on the patent. Barr answered with claims of invalidity and unenforceability. The parties settled. (UMF Nos. 9-17, and evidence cited therein.) Pursuant to the Cipro Settlement, the Generic Defendants agreed not to infringe Bayer's patent with a competing ciprofloxacin product until six months before Bayer's '444 Patent expired, with settlement payments from Bayer as consideration for the resolution of the Generic Defendants' disputed patent challenge. (UMF Nos. 15-24, and evidence cited therein.) As such, the agreement precluded no more competition **[*19]** than was already precluded under the patent, as under the patent, Bayer had the right to exclude all infringers from marketing a generic version of Cipro prior to the expiration of the patent. As the court in Cipro II found, "this is well within Bayer's rights as the patentee. (Cipro II at 524.) California law compels no different conclusion. Thus, Defendants have established that the settlement agreement fell within the exclusionary scope of the patent.

Therefore, there is no antitrust violation under California law (*Fruit Machinery Co. v. F.M. Bali & Co. (1953) 118 Cal.App.2d 748*) nor under federal law, "Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing [federal] ***antitrust law***, as long as competition is restrained only within the scope of the patent." (Tamoxifen, 466 F.3d at 213; *In re Ciprofloxacin Hydrochloride Antitrust Litig. (Cipro III) (Fed. Cir. 2008) 544 F.3d 1323*.) Whether the underlying infringement lawsuit was "objectively baseless" requires a finding that the suit is so baseless, "that no reasonable litigant could realistically expect success on the ments." (*In re Tamoxifen Citrate Antitrust Litig.) (2d Cir. N.Y. 2006) 466 F.3d 187, 213* citing *Profl Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., (1993) 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611*.)

However, Plaintiffs failed to allege that Bayer's infringement suit was objectively baseless, was sham litigation, or that there was fraud on **[*20]** the PTO in their SAC, and Plaintiffs cannot defeat the motion for summary judgment by doing so now. A plaintiff cannot defeat a motion for summary judgment by bringing new, unpleaded issues in the opposing papers. (Oakland Raiders v. National Football League (20O5) *131 Cal.App.4th 621, 648, 32 Cal. Rptr. 3d*

266.) Even if such allegations were included in the SAC, there is no evidence or legal support that the suit was objectively baseless or was a sham. "Bayer's success in its litigations against Schein, Mylan, and Carlsbad forecloses any argument that its lawsuits were shams." (UMF Nos. 29-32, and evidence cited therein; Cipro II, 363 F.Supp.2d at 547.)

Similarly, Plaintiffs cannot meet the objectively baseless standard by resorting to allegations of inequitable conduct since the SAC does not allege inequitable conduct, much less that Bayer's infringement suit against Barr was objectively baseless or a sham. Even if there were such allegations, inequitable conduct is only an equitable defense to a patent infringement suit which, if proven, can render the entire patent unenforceable. (See e.g. *Hoffmann-La Roche, Inc. v. Promega Corp. (Fed. Cir. 2003) 323 F.3d 1354, 1372*.) As such, Bayer's alleged inequitable conduct in procuring the patent is not relevant to the case at hand as it pertains to Plaintiffs' antitrust claims. The Federal **[*21]** Circuit has held that inequitable conduct is a defense to a patent infringement claim, not an affirmative antitrust claim. (*Nobelpharma AB v. Implant Innovations, Inc., (Fed. Cir. 1998) 141 F.3d 1059, 1070*.) Moreover, the Court finds that the determination of fraud and inequitable conduct would involve substantial questions of patent law, which this Court does not have jurisdiction to decide. (See *Lockwood v. Sheppard, 173 Cal.App.4th 675, 93 Cal. Rptr. 3d 220 (2009)* (holding that the court lacked jurisdiction to make a determination regarding PTO procedures.)

Concerning Plaintiffs' arguments that the settlement had anticompetitive effects outside of, or expanding, the scope of the patent (manipulation of the 180-day exclusivity period; preventing other generic challengers from challenging the 444 patent; that the settlement prevented other generic defendants from marketing non-infringing products; or that but for the settlement, Barr "could have won" its case against Bayer and generic Cipro could have come to market earlier(SAC 117, 122. 145(ii), all courts analyzing this specific agreement and considering these very same argumen s found that the agreement extended no further than the scope of what the patent protects. (Ciprol, 261 F. Supp. 2d at 257; *Cipro III 544 F.3d at 1338-1339*.) Moreover, the FDA did not award Barr the 180-day exclusivity period, there was no evidence of an actual adverse **[*22]** effect on competition due to that provision (*Cipro III, 544 F.3d at 1340, n. 14*), and it is undisputed that four other generic manufactures challenged the validity of the patent which supports the settlement did not prevent others from challenging the patent. (UMF Nos. 20, 29-33, and evidence cited therein.) Further, since the patent covered the molecule ciprofloxacin, a settlement which precluded only a generic version of Cipro would not restrain or prevent a generic from marketing a non-infringing product (In Re Tamoxifen Citrate Antitrust Litig. (2d Cir. 2006) *466 F.3d at 190, 2*l4.) Additionally, Plaintiffs' allegations that Barr would have won the patent challenge are speculative, and are dismissed as, "little more than dubious expectations or desires." (Cipro I, 261 F.Supp.2d at 202.)

Thus, to the extent Plaintiffs attack the presumption of patent validity to argue that the infringement suit was objectively baseless, or other inequitable conduct which would remove the protection ofthe patent, Plaintiffs have not included such claims in the SAC. The SAC is silent as to allegations non-infringement, invalidity, inequitable conduct, or fraud on the PTO. Therefore, Plaintiffs cannot rely on such claims which fall outside of their pleadings to defeat summary judgment. **[*23]** Further, this Court lacks jurisdiction to make such determinations.

Addressing Plaintiffs' argument that this Court should employ a "traditional rule of reason analysis" applied in state trade cases rather than the "objectively baseless" standard, the outcome would be no different as the Court would still need to evaluate at the outset whether the agreement fell within the scope of the patent, because if it does, there is no antitrust violation. [*Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748, 258 P.2d 852*.) Thus, under California law, like federal law, there is only antitrust liability for conduct which goes beyond the exclusionary scope granted by the patent, a salient point Plaintiffs conveniently ignore. Instead, Plaintiffs urge this Court to analyze the agreement and its effects without taking into account that Bayer had a patent and the legal rights which are granted by the patent. Further, the Court believes that the objectively baseless standard is applicable given the unique nature of the agreement at issue (a pharmaceutical reverse payment settlement that does not arise under state law) which results from a patent infringement action (arising under federal law), and considering that federal courts have utilized this standard in adjudicating **[*24]** such agreements for purposes of determining antitrust liability, Further, even considering the two "key facts" (size of payment/price hike)upon which Plaintiffs rely to demonstrate the alleged anticompetitive effects on trade under their traditional rule of reason analysis, they either fall within the rights of the patent holder (e.g. the price of the patented product) or are not relevant to the antitrust analysis. Plaintiffs argue that that the size of the payment is a key indicator of the patent's strength and supports a reasonable inference that the patent would have been struck down as invalid. Patent validity is not relevant in the determination of whether the settlement agreements violate antitrust laws. ("The Valley Drug court thus took the position that an antitrust court need not consider the potential invalidity of the patent in an exclusion-payment settlement, except in those extreme cases involving fraud on the Patent Office or assertion of a patent known to be invalid, i.e., in circumstances giving nse to an allegation of Walker Process fraud or sham litigation." (*Cipro II (E.D.N.Y. 2005)363 F. Supp. 2d 514, 525)* As previously discussed, no such claims were alleged in the SAC. Plaintiffs also assert that since the price **[*25]** increased after the settlement, this also demonstrates the anticompetitive effects of the agreement. However, Bayer had the right to control the price of its product under the patent, and thus, if the settlement was within the scope of the patent, then any price increase is also within the scope of the patent. (*Cipro II, (2005) 363 F. Supp. 2d at 540*; *Fruit Machinery (1953)118 Cal.App.2d at 759*; *United States v. Masonife Corp. (1942) 16 U.S. 265, 279*.)

Therefore, the Court finds that as a matter of law, Plaintiffs cannot establish the agreement unreasonably restrains trade because no triable issue of material fact exists that there are no anticompetitive effects on competition beyond the exclusionary scope ofthe patent itself. Thus, the Court finds that the agreement does not violate the Cartwright Act. This finding also precludes Plaintiffs' UCL claim and common law monopoly claim as they are based on the same factual allegations that support the Cartwright Act claim. Thus, the Court's determination that the agreement does not violate the Cartwright Act is fatal to both the UCL claim (Belton v. Comcast Cable "*Holdings, LLC, (2007) 151 Cal. App. 4th 1224, 1240, 60 Cal. Rptr. 3d 631*-quoting *Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 375, 113 Cal. Rptr. 2d 175*; see also *RLH Industries, Inc. v. SBC Communications, Inc. (2005) 133 Cal.App.4th 1277, 1286, 35 Cal. Rptr. 3d 469)* and the common law monopolization claim. (*Eastman Kodak v. Image Tech. Servs, Inc. (1992) 504 U.S. 451, 481-83, 112 S. Ct. 2072, 119 L. Ed. 2d 265*.) Conduct by a patent holder acting within the scope of the patent is likewise immune from antitrust scrutiny even in the monopolization context. **[*26]** (*Fruit Machinery 118 Cal.App.2d 762-63*.)

Accordingly, summary judgment is granted.

Defendant's motion to dismiss is denied.

Plaintiffs' evidentiary objections are overruled. Further, to the extent that the objections failed to quote or set forth the objectionable material, they fail to conform to *California Rule of Court Rule 3.1354(b)(3)*.

All requests for judicial notice are granted as to the existence but not truth of the items requested.

Parties wishing to argue before the Court must appear on the date and at the time noticed for the hearing. If none of the parties appears on the date and at the time noticed for the hearing, the tentative ruling shall be adopted as the final ruling of the Court.

Defendants Hoechst Marion Roussel, Inc; The Rugby Group, Inc. and Barr Laboratories, Inc.'s Motion for Summary Judgment

Defendants Hoechst Marion Roussel, Inc; The Rugby Group, Inc.; and Barr Laboratories, Inc.'s Motion for Summary Judgment is GRANTED. Under *CCP § 437c*, if the parties' papers show there is no triable issue of material fact and the "'moving party is entitled to a judgment as a matter of law'" (*CCP § 437c(c)*), the court must grant the motion for summary judgment. (*Aguilar v. Atlantic Richfield (2001) 25 Cal.4th 826, 843, 107 Cal. Rptr. 2d 841, 24 P.3d 493*.) Subdivision (p)(2) states: "A defendant or cross-defendant has met his or her burden of showing that a cause of action **[*27]** has no merit if that party has shown that one or more elements of the cause of action ... cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-compiainant to show a triable issue of one or more material facts exists as to that cause of action or a defense thereto."

The Consolidated Second Amended Complaint (SAC) alleges three causes of action for (1) antitrust in violation of the Cartwright Act, under California Business and Professions Code Sections 16720, et, seq.; (2) unfair competition in violation of California Business and Professions Code Sections 17200 et. seq.; and (3) common law monopolization. Essentially, Plaintiffs allege Defendant Bayer entered into unlawful and anti-competitive agreements with its horizontal competitors, Defendants Barr Laboratories; Hoechst Marion Roussel, Inc. (HMR) and HMR's then subsidiary, Defendant Rugby Group, Inc. (Rugby). Plaintiffs allege these agreements, referred to as reverse payment settlements, (hereinafter the "agreement") effectively allowed Bayer to maintain an exclusive right to manufacture and market Cipro in California without competition to bnng a generic form of ciprofloxacin to the market place. The result to consumers and **[*28]** Plaintiffs was increased costs of the prescription drug Cipro and increased profits to Bayer. In addition, the other parties to the agreement received large payments for not producing a generic form of Cipro.

As discussed more fully herein, the Court finds that the agreement does not violate the Cartwright Act. The undisputed evidence establishes that no triable issue of material fact exists that the agreement did not fall outside the exclusionary scope of the patent; there is no evidence that the patent suit by Bayer against Barr was objectively baseless; and Plaintiff cannot establish that the settlement was otherwise unlawful.

The Cartwright Act (6§ 16700-16758) was designed primarily to prevent organization of trusts for control of markets for merchandise, but its definition of trust may, not unreasonably, include any contract "to carry out restrictions in trade or commerce," and to prevent competition in "manufacturing, sale or purchase of merchandise," etc. (California Kitchens v United Brotherhood of Carpenters & Joiners (1956) 139 Cal App 2d 597, 294 P.2d 468)California courts interpreting the Cartwright act recognize the persuasive authority of federal decisions under the Sherman Act andnave liberally applied the Tederal Sherman Act doctrine in interpreting the Cartwright Act. **[*29]** (See, e.g., Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 542, 30 Cal. Rptr. 2d 706;

Cellular Plus, Inc. v. Superior Court (1993) 14 Cal. App. 4th 1224, 1242, 18 Cal. Rptr. 2d 308; Bert G. Gianelli Distributing Co. v. Beck & Co, (1985) 172 Cal. App. 3d 1020, 1042, 219 Cal. Rptr. 203, overturned on other grounds by Dore v. Arnold Worldwide, inc. (2006) 39 Cal.4th 384, 46 Cal. Rptr. 3d 668, 139 P.3d 56.) The Cartwright Act, like its federal counterpart, "has not been interpreted to penalize natural monopolies." (Freeman v. San Diego Ass'n of Realtors, 77 Cal.App.4th 171,200.)

The Cartwright Act and the federal antitrust Jaws are interpreted to permit restraints of trade as long as those restraints are reasonable under the circumstances. Following federal lawf the Cartwright Act recognizes two distinct categories of offenses: "Per Se" violations, and other potentially harmful conduct that is treated under the so-called "Rule of Reason." Under the per se illegal theory, conduct is conclusively presumed to be unlawful because of its pernicious effects on competition and lack of any redeeming virtue. In other words, it is illegal regardless of any alleged business justification or pro-competitive effects. (Marin County Bd. Of Realtors, Inc. v. Palsson, (1976) 16 Cal.3d 920, 930-31, 130 Cal. Rptr. 1, 549 P.2d 833.) Under the Rule of Reason analysis, conduct violates the Cartwright Act if the plaintiff shows that the conduct is an unreasonable restraint of trade, meaning conduct that unreasonably impairs competition and harms consumers. The Rule of Reason prohibits only those actions that cause an "unreasonable restraint of trade" (Standard Oil Co. v. United States (1911) 221 US 1, 87, 31 S. Ct. 502, 55 L. Ed. 619; see also People v. Building Maint. Contractors Ass'n, Inc. (1953) 41 Cal.2d 719, 727, 264 P.2d 31.) If an alleged restraint of trade **[*30]** is not per se illegal, the Rule-of-Reason analysis should be applied (see Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal.3d 842, 855, 94 Cal. Rptr. 785, 484 P.2d 953-finding the rule of reason to be a factual inquiry into whether a particular action is an unreasonable restraint on trade)].

Plaintiffs allege that the agreement at issue here was a per se violation of the Cartwright Act. (SAC 1J140.) Plaintiffs argue that the agreement at issue is a horizontal agreement between competitors to allocate markets, which have been held to be per se illegal under the Cartwright Act. Plaintiffs urge this Court to find that under California law, "a naked payment from a patent holder to a non-patent holder to abandon its challenge to the patent's validity and stay out of the market for the patented product-thus ensuring supra-competitive prices-must be scrutinized under the rule that agreements not to compete are per se illegal."(Piaintiffs' Opposition, p. 31.)

However, the Court declines to find the agreement is illegal per se, as the per se label is reserved for, "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise **[*31]** harm they have caused or the business excuse for their use." (*Marin County Bd. Of Realtors, Inc. v. Palsson, (1976) 16 Cal.3d 920, 930-31, 130 Cal. Rptr. 1, 549 P.2d 833*.) Plaintiffs have cited no California case, nor is there one, supporting that a per se illegal analysis is applicable to the specific agreement at issue here, a reverse payment settlement agreement under the Hatch Waxman Act concerning a patent. The California Supreme Court has instructed that "before acceding to the demand for such a formidable rule," "applicable case law" must condemn the conduct. (*Marin County, 16 Cal.3d at 931*.) Given that this appears to be a case of first impression, there is simply no legal basis to support that the Cartwright Act be interpreted in such a manner so as render the agreement per se illegal, as there has been no authority provided by Plaintiffs demonstrating that California courts have historically found that these agreements have a "pernicious effect" on competition which lacks "any redeeming virtue." Moreover, it is well settled that the law favors settlements ana this would extend to patent infringement suits as well. Plaintiffs' reliance on Vulcan Powder Co. v. Hercules Powder Co. (1892) 95 Cat 510, to support that an agreement like this should be determined to be illegal per se because it constitutes an agreement **[*32]** not to compete is unpersuasive. The Court in Vulcan found an antitrust violation because the agreement exceeded the scope of the patent. The contract at issue in that case, unlike here, was not confined to the product (dynamite) produced under the patents, and involved a collaboration among many industry members including some that did not have patent rights to establish a commitment to fix prices. As will be discussed in greater detail below, the agreement here was confined to the product produced under the patent and did not exceed the scope of the patent's right to exclude all infringers from marketing a generic version of Cipro.

Nor is there any basis to support that the agreement is per se illegal under federal law. The federal cases under the Sherman Act nave found thafthese types of agreements are not illegal per se violations of federal ***antitrust law***. Under the Sherman Act, the courts have held that a reverse payment settlement agreement like the one at issue here, (See *Schering-Plough Corp. v. FTC (11th Cir.2005) 402 F.3d 1056*; *Valley Drug Co. v, Geneva Pharms., Inc., (11th Cir. 2003) 344 F.3d 1294*; in Re Tamoxifen Citrate Antitrust Litig. (2d Cir. 2006) *466 F.3d at 190*) and specifically this very agreement (See In Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro II") *[E.D.N.Y. 2005) 363 F. Supp. 2d 514*. 541; and In Re Ciprofloxacin Hydrochloride **[*33]** Antttrustlitig. ("Cipro hi") *(Fed. Cir. 2008) 544 F.3d 1323, 1341)* are not illegal per se. The Federal Circuit Court in Cipro III held that, "only agreements that have a predictable and pernicious anticompetitive effect and limited potential for procompetitive effect are deemed to be per se unlawful under the Sherman Act. A finding of per se unlawfulness is appropriate once experience with a particular type of restraint enables the Court to predict with confidence that the rule of reason will condemn it." The court found that this specific agreement was not per se illegal under the Sherman Act as it did not restrict more competition than allowed under the scope of the patent. (Cipro 111, at 1332.)

Although Plaintiffs argue that the Court should not follow the federal court decisions, arguing that the Cartwright Act is broader (i.e. prohibits more conduct) than the Sherman Act, the Court is not persuaded that it is broader in any way pertinent to the issues before the Court. The Cartwright Act and the federal Sherman Act share similar language and objectives, and California courts often look to federal precedents under the Sherman Act for guidance. (*Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 113 Cal. Rptr. 2d 175*. 369.) Although not identical, "judicial interpretations of the Sherman **[*34]** Act are, nevertheless, often helpful because of the similarity in language and purpose between the federal and state statutes. (*Morrison v. Viacom. Inc., (1998) 66 Cal.App.4th 534, 541, 78 Cal. Rptr. 2d 133*.) "Because the Cartwright Act is patterned after the federal Sherman Act and both have their roots in the common law federal cases interpretingthe Sherman Act are applicable in construing the Cartwright Act." (Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Constr. Co., (197T) *4 Cal. 3d 354, 362, 93 Cal. Rptr. 602, 482 P.2d 226* fh 3, citing to Chicago Title Ins. Co. v. Great Western Financial Corp. (1968; 69 cal.2d 305, 315].) "Although we have referred to federal decisions under the Sherman Act, it is well settled that such cases are authoritative in cases under the Cartwright Act." (*Shasta Douglas Oil Co. v. Work (1963) 212 Cal. App. 2d 618, 625, 28 Cal. Rptr. 190*. citing to *Milton v. Hudson Sales Corp. (1957) 152 Cal.App.2d 418, 440, 313 P.2d 936*.) "The Cartwright Act prohibits every trust, defined as "a combination of capital, skill or acts by two or more persons" for specified anticompetitive purposes. The federal Sherman Act prohibits every contract, combination ... or conspiracy, in restraint of trade." The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act.share similar language and objectives. California courts often look to federal precedents **[*35]** under the Sherman Act for guidance. (*Chavez v. Whirlpool Corp. (2001)93 Cal. App. 4th 363, 369, 113 Cal. Rptr. 2d 175*.)

While the Court recognizes that the federal decisional law is not binding on this Court (unless otherwise indicated herein) the Court considers the federal case law concerning this agreement as persuasive authority, especially in light of the lack of controlling California authority on point. Further, the rule enunciated under the Sherman Act in Cipro III mirrors the law in California that it is only those agreements that have a "historical and pernicious" effect which should be found per se illegal. Although Plaintiffs cite to In re Cardizem CD Antitrust Litigation, as federal authority finding a reverse payment settlement per se illegal, the agreement at issue in that case exceeded the exclusionary scope of the patent involved and restrained non-infringing drugs, and thus does not aid Plaintiffs here. (*In re Cardizem CD Antitrust Litigation (6th Cir. 2003) 332 F.3d 896*.)

As discussed more fully below, the agreement here does not restrict more competition than allowed under the scope of the patent. To adopt Plaintiffs' argument that horizontal agreements between competitors to allocate markets are traditionally subject to per se illegal treatment wholly ignores that this agreement concerns a patent which gives **[*36]** the patent holder the legal right to exclude infringing competition. Therefore, the Court does not find the agreement to be illegal per se under the Cartwnght Act, as there is no legal basis under California law to do so. Nor is there any basis to support a per se illegal determination under federal decisional law.

This Court also finds that the agreement does not violate the Cartwright Act under the Rule of Reason. To state a Cartwright Act antitrust claim, Plaintiffs must show that: 1) an agreement exists between independent entities; 2) the agreement is in restraint of trade; and 3) the restraint is unreasonable. To prove an unreasonable restrain, Plaintiffs must show the agreement had a "substantially adverse effect on competition in the relevant market." (*Exxon Corp. v. Superior Court (1997) 51 Cal. App. 4th 1672, 1681, 60 Cal. Rptr. 2d 195*.) Plaintiff must show: (1) that an alleged restraint on trade has anticompetitive effects, and (2) that the anticompetitive effects outweigh any pro-competitive benefits. (See Bert G. Gianelli Distrib. Co. v. Beck & Co. (1985) 172 Cal.App.3d T020, 1048, overturned on other grounds by *Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384, 46 Cal. Rptr. 3d 668, 139 P.3d 56*.) The focus is on the actual effects that the challenged restraint has had on competition in a relevant market.

As previously discussed, there is **[*37]** no California authority evaluating whether a Hatch Waxman reverse payment settlement agreement violates state ***antitrust law*** (Cartwright Act or otherwise). Thus, the Court turns to federal decisions concerning the Sherman Act as persuasive authority to guide its decision. Federal case law is not only instructive in this regard, it is dispositive.

The federal court cases dealing generally with Hatch Waxman settlements, and specifically with this agreement, have uniformly held that settlements within the scope ofthe patent do not violate antitrust laws. The federal courts nave held that in order to determine whether there is an antitrust violation (under the federal antitrust Sherman Act) the Court must first analyze whether the agreement at issue falls within the exclusionary scope of the patent. If it does, there Is no anti-trust violation because the settlement agreement did not cause anticompetitive effects beyond those inherent in the patent. As stated in Tamoxifen and quoted in Cipro II, "Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing **[*38]** ***antitrust law***, as long as the competition is restrained only within the scope of the patent." (*Id. at 213* (quoting *Cipro II at 535*.) Additionally, the district and appellate court in Cipro II and III have already determined that the settlement at issue here did not exceed the scope of the patent and did not have anti-competitive effects beyond the patent. In Cipro III, the Federal Circuit affirmed the district court's holding that there was no antitrust violation because the settlement agreement fell within the "exclusionary zone" of the patent. The Federal Circuit Court found that because patents are presumed valid and provide the patentee with the right to exclude others (infringers) from the market, the challenged anticompetitive effects of the agreement at issue here were d rectly attributable to the patent, and therefore, no antitrust remedy was available. (*In re Ciprofloxacin Hydrochloride Antitrust Litig. (Cipro III) (Fed. Cir. 2008) 544 F.3d 1323,1332-1336*.)

The Court finds the result should be no different under the Cartwright Act, as we are dealing with the exact same settlement agreement, involving the same type of Plaintiffs (indirect purchasers), and the same theories of liability. Additionally, the standard articulated in the federal cases comports with California law and is consistent with regard **[*39]** to the antitrust liability concerning patents. The district court in Cipro II, affirmed by the Circuit Courfin Cipro III, utilized the same framework, i.e. a rule of reason, in its analysis which differs in no significant respect and is not unlike the rule of reason articulated by the courts for purposes of a state antitrust analysis under the Cartwright Act. Although Plaintiffs argue that the Cartwright Act is more restrictive than the Sherman Act, such argument is unavailing as previously discussed above. Further, while the cases cited by Plaintiffs in this regard recognize that the scope of the Cartwright Act may in some situations be broader than or differ from the Sherman Act, there is no authority or support which persuades this Court to conclude that the Cartwright Act was intended to be broader than the Sherman Act on the question of reverse payment settlements.

California cases involving antitrust violations and patents likewise hold that conduct falling within the scope of a patent is not an antitrust violation. The grant of a patent is the grant of a statutory monopoly and is an express exception to laws prohibiting monopolies. (*Sears, Roebuck & Co. v. StitTef Co. (1964) 376 U.S. 225, 229*; *Aetna Casualty & Sur. Co. v. Superior Court (1993)19 Cal. App. 4th 320, 328, 23 Cal. Rptr. 2d 442*.) In Fruit Machinery Co. v. F.M. Ball & **[*40]** Co. (1953) 118 Caf.App.2d 748, the California Court of Appeal ruled that in cases in which the exercise of patent rights is involved, a patent holder "brings himself within the proscription of the antitrust laws only when the patentee or his assignee acts beyond that which was necessary or incidental to the scope of this patent." (*Fruit Machinery, (1953) 118 Cal.App.2d 748, 258 P.2d 852*.) In Fruit Machinery, the defendant was a sublicensee of a patented peach-pitting machine wno challenged the sublicense agreement on the ground that the plaintiff "created a monopoly" through the sublicense. (*Id. at 761*) The Court rejected the argument, noting that, "Defendant has not shown that the parties, in executing and carrying out the sublicense agreement in suit, exercise rights or powers not accorded them by the patent law or abused any rights or powers accorded them by that law." (*Id, at 762*.) Thus, California law also supports that unless the agreement goes, "beyond the scope of the patent rights there is no antitrust violation. (Id.)

The undisputed evidence shows that the agreement here was clearly within the scope of the patent. A Batent is presumed valid. (*35 U.S.C. 282*) The 444 patent issued on June 2, 1987, and expired "ecember 9, 2003: The FDA granted pediatric exclusivity **[*41]** to Bayer's Cipro until June 9, 2004. (UMF No. 17, and evidence cited therein.) Under the federal food and drug laws, no generic Cipro could lawfully enter the market until June 9, 2004. (*21 U.S.C. §355a(b)(2)(A)(ii)*.) The 444 patent is a compound patent and covers the molecule/compound ciprofloxacin hydrochloride, which is the only active ingredient in all ciprofloxacin products however formulated. (UMF No. 1, and evidence cited therein) Claim 12 did not change in reexamination. (UMF Nos. 21-22 and evidence cited therein.) Because the patent covers the ciprofloxacin molecule, Bayer had the right to exclude infringing competition from all forms of generic Cipro. (In Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro f) *(E.D.N.Y. 2003) 261 F. Supp. 2d 188, 249*.) Barr stipulated that its ANDA product infringed on the 444 patent. (UMF Nos. 2-5, and evidence cited therein.) Thus, the Cipro patent precluded all generic competition, including Barr"s admitted Infringement. Bayer initiated patent litigation against Defendant Barr. (UMF No. 6.) The parties entered into a settlement in 1997. Pursuant to the Cipro Settlement Agreement, Defendants agreed not to infringe Bayer's patent with a competing ciprofloxacin product until six months before Bayer's r444 **[*42]** Patent expired, with settlement payments from Bayer as consideration for the resolution of the Generic Defendants' disputed patent challenge. (UMF Nos. 7-15, and evidence cited therein.) As such, the agreement precluded no more competition than was already precluded under the patent, as under the patent, Bayer had the right to exclude all infringers from marketing a generic version of Cipro prior to the expiration of the patent. As the court in Cipro IT found, "this is welTwtrrin Bayer's rights as the patentee." (*Cipro II at 524*.) California law compels no different conclusion. Thus, Defendantsliave established that the settlement agreement fell within the exclusionary scope of the patent.

Therefore, there is no antitrust violation under California law (Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 CalApp.2d 748) nor under federal law, "Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing [federal] ***antitrust law***, as long as competition is restrained only within the scope of the patent." (*Tamoxifen, 466 F.3d at 213*; *In re Ciprofloxacin Hydrochloride Antitrust Litig. (Cipro III) (Fed. Cir. 2008) 544 F.3d*

1323.) Whether the underlying infringement lawsuit was "objectively baseless" **[*43]** requires a finding that the suit is so baseless, "that no reasonable litigant could realistically expect success on the merits." (*In re Tamoxifen Citrate Antitrust Litig.) (2d Cir. N.Y. 2006) 466 F.3d 187, 213* citing Prof I Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 1993) *508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611*.)

However, Plaintiffs failed to allege that Bayer's infringement suit was objectively baseless, was sham litigation, or that there was fraud on the PTO in their SAC, and Plaintiffs cannot defeat the motion for summary judgment by doing so now. A plaintiff cannot defeat a motion for summary judgment by bringing new, unpleaded issues in the opposing papers. (*Oakland Raiders v. National Football League (2005) 131 Cal.App.4th 621, 648, 32 Cal. Rptr. 3d 266*.) Even if such allegations were included in the SAC, there is no evidence or legal support that the suit was objectively baseless or was a sham. "Bayer's success in its litigations against Schein, Mylan, and Carlsbad forecloses any argument that its lawsuits were shams." (UMF Nos. 29-32 and evidence cited therein; *Cipro II, 363 F.Supp.2d at 547*.)

Similarly, Plaintiffs cannot meet the objectively baseless standard by resorting to allegations of inequitable conduct since the SAC does not allege inequitable conduct, much less that Bayer's infringement suit against Barr was objectively baseless or a sham. Even if there were such allegations, inequitable **[*44]** conduct is only an equitable defense to a patent infringement suit which, if proven, can render the entire patent unenforceable. (See e.g. *Hoffmann-La Roche, Inc. v. Promega Corp. (Fed. Cir. 2003) 323 F.3d 1354, 1372*.) As such, Bayer's alleged inequitable conduct in procuring the patent is not relevant to the case at hand as it pertains to Plaintiffs' antitrust claims. The Federal Circuit has held that inequitable conduct is a defense to a patent infringement claim, not an affirmative antitrust claim. (*Nobelpharma AB v. Implant Innovations, Inc., (Fed. Cir. 1998) 141 F.3d 1059, 1070*.) Moreover, the Court finds that the determination of fraud and inequitable conduct would involve substantial questions of patent law, which this Court does not have jurisdiction to decide. (See *Lockwood v. Sheppard, 173 Cal.App.4th 675, 93 Cal. Rptr. 3d 220 (2009)* (holding that the court lacked jurisdiction to make a determination regarding PTO procedures.)

Concerning Plaintiffs' arguments that the settlement had anticompetitive effects outside of, or expanding, the scope of the patent (manipulation of the 180-day exclusivity period; preventing other genenc challengers from challenging the 444 patent; that the settlement prevented other generic defendants from marketing non-infringing products; or that but for the settlement, Barr "could nave won" its case against Bayer and generic Cipro could have come to market earlier(SAC W17, **[*45]** 122, 145(ii), all courts analyzing this specific agreement and considering these very same arguments found that the agreement extended no further than the scope of what the patent protects. (Cipro I, 261 F. Supp. 2d at 257; *Cipro III 544 F.3d at 1338-1339*.) Moreover, the FDA did not award Barr the 180-day exclusivity period, there was no evidence of an actual adverse effect on competition due to that provision (*Cipro III, 544 F.3d at 1340, n. 14*), and it is undisputed that four other generic manufactures challenged the validity of the patent which supports the settlement did not prevent others from challenging the patent. (UMF Nos. 23-26, and evidence cited therein.) Further, since the patent covered the molecule ciprofloxacin, a settlement which precluded only a generic version of Cipro would not restrain or prevent a generic from marketing a non-infringing product. (In Re Tamoxifen Citrate Antitrust Litig. (2d Cir. 2006) *466 F.3d at 190, 2T4*.) Additionally, Plaintiffs' allegations that Barr would have won the patent challenge are speculative, and are dismissed as, "little more than dubious expectations or desires." (Cipro I, 261T.Supp.2d at 202.)

Thus, to the extent Plaintiffs attack the presumption of patent validity to argue that the infringement suit was objectively baseless, or other inequitable **[*46]** conduct which would remove the protection ofthe patent, Plaintiffs have not included such claims in the SAC. The SAC is silent as to allegations non-infringement, invalidity inequitable conduct, or fraud on the PTO. Therefore, Plaintiffs cannot rely on such claims which fail outside of their pleadings to defeat summary judgment. Further, this Court lacks jurisdiction to make such determinations.

Addressing Plaintiffs' argument that this Court should employ a "traditional rule of reason analysis" applied in state trade cases rather than the "objectively baseless" standard, the outcome would be no different as the Court would still need to evaluate at the outset whether the agreement fell within the scope of the patent, because if it does, there is no antitrust violation. (*Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748, 258 P.2d 852*.)

Thus, under California law, like federal law, there is only antitrust liability for conduct which goes beyond the exclusionary scope granted by the patent, a salient point Plaintiffs conveniently ignore. Instead, Plaintiffs urge this Court to analyze the agreement and its effects without taking into account that Bayer had a patent and the legal rights which are granted by the patent. Further, the Court believes that **[*47]** the objectively baseless standard is applicable given the unique nature of the agreement at issue (a pharmaceutical reverse payment settlement that does not arise under state law) which results from a patent infringement action (arising under federal law), and considering that federal courts have utilized this standard in adjudicating sucn agreements for purposes of determining antitrust liability.

Further, even considering the two "key facts" (size of payment/price hike)upon which Plaintiffs rely to demonstrate the alleged anticompetitive effects on trade under their traditional rule of reason analysis, they either fall within the rights of the patent holder (e.g. the price of the patented product) or are not relevant to the antitrust analysis. Plaintiffs argue that thafthe size ofthe payment is a key indicator ofthe patent's strength and supports a reasonable inference that the patent would have been struck down as invalid. Patent validity is not relevant in the determination of whether the settlement agreements violate antitrust laws. ("The valley Drug court thus took the position that an antitrust court need not consider the potential invalidity of the patent in an exclusion-payment **[*48]** settlement, except in those extreme cases involving fraud on the Patent Office or assertion of a patent known to be invalid, i.e., in circumstances giving rise to an allegation of Walker Process fraud or sham litigation." (*Cipro II (E.D.N.Y. 2005)363 F. Supp. 2d 514, 525)* As previously discussed, no such claims were alleged in the SAC. Plaintiffs also assert that since the pnce increased after the settlement, this also demonstrates the anticompetitive effects of the agreement. However, Bayer had the right to control the price of its product under the patent, and thus, if the settlement was within the scope of the patent, then any price increase is also within the scope of the patent. (Cipro II, (2005) 363 F, Supp. 2d at 540; *Fruit Machinery (1953)118 Cal.App.2d at 759*; *United States v. Masonife Corp. (1942) 16 U.S. 265, 279*.)

Therefore, the Court finds that as a matter of law, Plaintiffs cannot establish the agreement unreasonably restrains trade because no triable issue of material fact exists that there are no anticompetitive effects on competition beyond the exclusionary scope of the patent itself. Thus, the Court finds that the agreement does not violate the Cartwright Act. This finding also precludes Plaintiffs' UCL claim and common law monopoly claim as they are based on the same factual allegations that support the Cartwright **[*49]** Act claim. Thus, the Court's determination that the agreement does not violate the Cartwright Act is fatal to both the UCL claim (*Belton v. Comcast Cable Holdings, LLC, (2007) 151 Cal. App. 4th 1224,1240, 60 Cal. Rptr. 3d 631*-quoting *Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 375, 113 Cal. Rptr. 2d 175*; see also RLH Industries, Inc. v. SBC Communications, Inc. (2005) 133 Ca!.App.4th 1277, 1286) and the common law monopolization claim. (*Eastman Kodak v. Image Tech. Servs, Inc. (1992) 504 U.S. 451, 481-83, 112 S. Ct. 2072, 119 L. Ed. 2d 265*.) Conduct by a patent holder acting within the scope of the patent is likewise immune from antitrust scrutiny even In the monopolization context. (*Fruit Machinery 118 Cal.App.2d 762-63*.)

Accordingly, summary judgment is granted.

Plaintiffs' evidentiary objections are overruled. Further, to the extent that the objections failed to quote or set forth the objectionable material, they fail to conform to *California Rule of Court Rule 3.1354(b)(3)*.

All requests for judicial notice are granted as to the existence but not truth of the items requested.

Parties wishing to argue before the Court must appear on the date and at the time noticed for the hearing, if none of the parties appears on the date and at the time noticed for the hearing, the tentative ruling shall be adopted as the final ruling of the Court.

Defendant Watson Pharmaceutical Inc.'s Motion for Summary Judgment

Defendant Watson Pharmaceutical Inc.'s Motion for Summary Judgment is GRANTED. Under *CCP §437c*, if the parties' papers show there is no triable **[*50]** issue of material fact and the ""moving party is entitled to a judgment as a matter of law'" (*CCP § 437c(c)*)(the court must grant the motion for summary judgment. (*Aguilar v. Atlantic*

Richfield (2001) 25 Cal.4th 826, 843, 107 Cal. Rptr. 2d 841, 24 P.3d 493.) Subdivision (p)(2) states: "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action ... cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show a triable issue of one or more material facts exists as to that cause of action or a defense thereto."

The Court's ruling on Bayer and the Generic Defendants' Motions for Summary Judgment, finding as a matter of law that the Cipro Settlement Agreement does not unreasonably restrain trade because there are no anticompetitive effects on competition beyond the exclusionary scope of the patent itself, is dispositive as to Defendant Watson's Motion for Summary Judgment. As Defendant Watson's liability is premised on its alleged participation in the agreement, a finding that the agreement does not unreasonably restrain trade defeats **[*51]** Plaintiffs' claims against Defendant Watson. Therefore, the motion can be granted on this basis alone.

However, the undisputed facts and evidence also establish that no triable issue of material fact exists that no agreement or conduct of Defendant Watson restrained trade as to generic ciprofloxacin or caused the injuries claimed by Plaintiffs. Defendant Watson was not involved in the Cipro settlement agreements and had no relationship to HMR or Rugby when those agreements were made. (UMF Nos. 5, 8, 9, and evidence cited therein.) Defendant Watson's relationship with Rugby cannot support Plaintiffs' claims because that purchase caused no restraint on the availability of a generic ciprofloxacin and did not delay the introduction of the generic ciprofloxacin, the only injury alleged by Plaintiffs. (UMF Nos. 6,-7, 9, 10, 13, and evidence cited therein.) Nor can Defendant Watson's relationship with Schein support Plaintiffs' claims that the Cipro agreement prevented Schein from marketing a generic ciprofloxacin. Bayer's patent was upheld in the litigation brought by Bayer over the Schein ANDA. Thus, Defendant Watson's acquisition of Schein in no way restrained the availability of generic **[*52]** ciprofloxacin. (UMF Nos. 17-27, and evidence cited therein) Further, the court in Cipro I held that Defendant Watson never undertook any conduct that changed the obligations of the parties to the agreements as they existed at the time of Defendant Watsons1 acquisition of Rugby or that had any effect on when or if a generic version would be available to Plaintiffs. It concluded that it was Bayer's patent that kept Schein generic ciprofloxacin off of the market, rather than any conduct of Watson. (Cipro 1. *261 F. Supp.2d at 216-217*.)

Accordingly, summary judgment is granted.

Plaintiffs' evidentiary objections are overruled. Further, to the extent that the objections failed to quote or set forth the objectionable material, they fail to conform to *California Rule of Court Rule 3.1354(b)(3)*.

All requests for judicial notice are granted as to the existence but not truth of the Items requested.

LexisNexis

In re Coordination Proceeding Special Title Rule 1550b

Superior Court of California, County of San Diego

April 9, 2003, Decided; April 9, 2003, Filed

Judicial Council Coordination Proceeding Nos.4154 and 4220

Reporter
2003 Cal. Super. LEXIS 1366 *

Coordination Proceeding Special Title (Rule 1550(b)), CIPRO CASES I & II, This Document Relates To: ALL ACTIONS

Prior History: *In re Coordination Proceeding Special Title (Rule 1550(b)) Cipro Cases I & II, 2003 Cal. Super. LEXIS 445 (Cal. Super. Ct., Feb. 19, 2003)*

Core Terms

patent, Cartwright Act, Sherman Act, settlement, generic, antitrust, effects, anticompetitive, ciprofloxacin, infringement, baseless, settlement agreement, courts, antitrust violation, inequitable conduct, anti trust law, rule of reason, cases, exclusionary, marketing, summary judgment motion, cause of action, allegations, restraint of trade, parties, material fact, restrained, patent holder, federal law, The Cartwright Act

Judges: [*1] The Honorable Richard E.L. Strauss, Coordination Trial Judge.

Opinion by: Richard E.L. Strauss

Opinion

[PROPOSED] FINAL JUDGMENT

On August 21, 2009, the Court, having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, granted the motion for summary judgment filed by defendant Bayer Corporation, the motion for summary judgment filed by defendants Hoechst Marion Roussel, Inc., The Rugby Group, Inc., and Barr Laboratories, Inc., and the motion for summary judgment filed by Watson Pharmaceuticals, Inc. (collectively, "Defendants"). A true and correct copy of the Court's August 21, 2009 Order granting those motions is attached to this judgment as Exhibit 1. In accordance with that Order,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Named plaintiffs Karyn McGaughey, Barbara Hymes Cohen, Deborah Patane, Donna Moore, Senior Action Network, IUOE Stationary Engineers Local 39 Health and Welfare Plan, and Sheet Metal Workers Health Plan of Southern California ("Named Plaintiffs"), and the plaintiff class defined as,

> [a]ll natural persons, sole proprietorships, partnerships, limited partnerships, corporations, and other entities, in the State of California who indirectly **[*2]** purchased, paid and/or reimbursed for Cipro intended for consumption by themselves, their families, or their members, participants, employees or insureds (the "Class")

> during the period from January 8, 1997 through such time in the future as the effects of Defendants' illegal conduct, as alleged herein, have ceased (the "Class Period"), [1]

take nothing from Defendants, and that the Named Plaintiffs and Class receive none of the relief that they have requested through their complaints.

2. Judgment is hereby entered in favor of Defendants and against Named Plaintiffs and the Class.

3. Defendants Bayer Corporation, Hoechst Marion Roussel, **[*3]** Inc., The Rugby Group, Barr Laboratories, Inc., and Watson Pharmaceuticals, Inc. are entitled to their costs pursuant to *C.C.P. section 1032*, following the procedures set forth in *Rule 3.1700 of the California Rules of Court*.

4. The Clerk of the Court is directed to enter this Judgment, without delay, as a final judgment.

Dated: &&&

/s/ Richard E.L. Strauss

Hon. Richard E.L. Strauss, Judge of the San Diego Superior Court

Exhibit 1

Appearances:

For Appearances, please see sign in sheet, attached hereto and incorporated herein.

The court's tentative ruling is published but not read on the record. Court hears oral argument and confirms its modified tentative ruling, per agreement of both sides, as follows:

Defendant Bayer Corporation's Motion for Summary Judgment

Defendant Bayer Corporation's Motion for Summary Judgment is GRANTED. Under *CCP § 437c*, if the parties' papers show there is no triable issue of material fact and the "'moving party is entitled to a judgment as a matter of law'" (*CCP § 437c(c)*), the court must grant the motion for summary judgment. (*Aguilar v. Atlantic Richfield (2001) 25 Cal.4th 826, 843, 107 Cal. Rptr. 2d 841, 24 P.3d 493*.) Subdivision (p)(2) states: "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action ... cannot be established, **[*4]** or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show a triable issue of one or more material facts exists as to that cause of action or a defense thereto."

The Consolidated Second Amended Complaint (SAC) alleges three causes of action for (1) antitrust in violation of the Cartwright Act, under *California Business and Professions Code Sections 16720, et. seq.*; (2) unfair competition in violation of *California Business and Professions Code Sections 17200 et. seq.*; and (3) common law monopolization. Essentially, Plaintiffs allege Defendant Bayer entered into unlawful and anti-competitive agreements with its horizontal competitors, Defendants Barr Laboratories; Hoechst Marion Roussel, Inc. (HMR) and HMR's then subsidiary, Defendant Rugby Group, Inc. (Rugby). Plaintiffs allege these agreements, referred to as reverse payment settlements, (hereinafter the "agreement") effectively allowed Bayer to maintain an exclusive right to manufacture and market Cipro in California without competition to bring a generic form of ciprofloxacin to the

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[1] Excluded from the class are all persons who obtained Cipro through the MediCal Prescription Drug Program; governmental entities; the Defendants, their co-conspirators, along with all of their respective parents, subsidiaries and/or affiliates; all persons or entities that purchased Cipro for purposes of resale; any purchaser of Cipro who paid a flat co-payment and who would have paid the same co-payment for a generic substitute under the terms of their health insurance coverage, and any and all judges and justices assigned to hear any aspect of this litigation.

market place. The result to consumers and Plaintiffs was increased costs of the prescription drug Cipro and increased profits to Bayer. In addition, the **[*5]** other parties to the agreement received large payments for not producing a generic form of Cipro.

As discussed more fully herein, the Court finds that the agreement does not violate the Cartwright Act. The undisputed evidence establishes that no triable issue of material fact exists that the agreement did not fall outside the exclusionary scope of the patent; there is no evidence that the patent suit by Bayer against Barr was objectively baseless; and Plaintiff cannot establish that the settlement was otherwise unlawful.

The Cartwright Act (§§ 16700-16758) was designed primarily to prevent organization of trusts for control of markets for merchandise, but its definition of trust may, not unreasonably, include any contract "to carry out restrictions in trade or commerce," and to prevent competition in "manufacturing, sale or purchase of merchandise," etc. (*California Kitchens v United Brotherhood of Carpenters & Joiners (1956) 139 Cal App 2d 597, 294 P.2d 468*) California courts interpreting the Cartwright act recognize the persuasive authority of federal decisions under the Sherman Act and have liberally applied the federal Sherman Act doctrine in interpreting the Cartwright Act. (See, e.g., *Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 542, 30 Cal. Rptr. 2d 706*; *Cellular Plus, Inc. v. Superior Court (1993) 14 Cal. App. 4th 1224, 1242, 18 Cal. Rptr. 2d 308*; *Bert G. Gianelli Distributing Co. v. Beck & Co. (1985) 172 Cal. App. 3d 1020, 1042, 219 Cal. Rptr. 203*, overturned on other grounds by *Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384, 46 Cal. Rptr. 3d 668, 139 P.3d 56*.) The Cartwright Act, like its federal counterpart, "has not **[*6]** been interpreted to penalize natural monopolies." (*Freeman v. San Diego Ass'n of Realtors, 77 Cal.App.4th 171,200*.)

The Cartwright Act and the federal antitrust laws are interpreted to permit restraints of trade as long as those restraints are reasonable under the circumstances. Following federal law, the Cartwright Act recognizes two distinct categories of offenses: "Per Se" violations, and other potentially harmful conduct that is treated under the so-called "Rule of Reason." Under the per se illegal theory, conduct is conclusively presumed to be unlawful because of its pernicious effects on competition and lack of any redeeming virtue. In other words, it is illegal regardless of any alleged business justification or pro-competitive effects. (Marin County Bd. Of Realtors, Inc. v. Palsson, (T976) 16 Cal.3d920, 930-31.) Under the Rule of Reason analysis, conduct violates the Cartwright Act if the plaintiff shows that the conduct is an unreasonable restraint of trade, meaning conduct that unreasonably impairs competition and harms consumers. The Rule of Reason prohibits only those actions that cause an "unreasonable restraint of trade" (*Standard Oil Co. v. United States (1911) 221 US 1, 87, 31 S. Ct. 502, 55 L. Ed. 619*; see also *People v. Building Maint. Contractors Ass'n, Inc. (1953) 41 Cal.2d 719, 727, 264 P.2d 31*.) if an alleged restraint of trade is not per se illegal, the Rule-of-Reason analysis should be applied **[*7]** (see *Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal.3d 842, 855, 94 Cal. Rptr. 785, 484 P.2d 953*-finding the rule of reason to be a factual inquiry into whether a particular action is an unreasonable restraint on trade)].

Plaintiffs allege that the agreement at issue here was a per se violation of the Cartwright Act. (SAC (140.) Plaintiffs argue that the agreement at issue is a horizontal agreement between competitors to allocate markets, which have been held to be per se illegal under the Cartwright Act. Plaintiffs urge this Court to find that under California law, "a naked payment from a patent holder to a non-patent holder to abandon its challenge to the patent's validity and stay out of the market for the patented product-thus ensuring supra-competitive prices-must be scrutinized under the rule that agreements not to compete are per se illegal."(Plaintiffs' Opposition, p. 31.)

However, the Court declines to find the agreement is illegal per se, as the per se label is reserved for, "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." (*Marin County Bd. Of Realtors, Inc. v. Palsson, (1976) 16 Cal.3d 920, 930-31, 130 Cal. Rptr. 1, 549 P.2d 833*.) Plaintiffs **[*8]** have cited no California case, nor is there one, supporting that a per se illegal analysis is applicable to the specific agreement at issue here, a reverse payment settlement agreement under the Hatch Waxman Act concerning a patent. The California Supreme Court has instructed that "before acceding to the demand for sucn a formidable rule," "applicable case law" must condemn the conduct. (*Marin County, 16 Cal.3d at 931*.) Given that this appears to be a case of first impression, there is simply no legal basis to support that the Cartwright Act be interpreted in such a manner so as render the agreement per se illegal, as there has been no authority provided by Plaintiffs demonstrating that California courts have historically found that these agreements have a pernicious effect" on competition which lacks "any redeeming virtue." Moreover, it is well settled that the law favors settlements and this would extend to patent infringement suits as well.

Plaintiffs' reliance on Vulcan Powder Co. v. Hercules Powder Co. (1892) 95 CaT. 510, to support that an agreement like this should be determined to be illegal per se because it constitutes an agreement not to compete is unpersuasive. The Court in Vulcan found an antitrust **[*9]** violation because the agreement exceeded the scope of the patent. The contract at issue in that case, unlike here, was not confined to the product (dynamite) produced under the patents, and involved a collaboration among many industry members including some that did not have patent rights to establish a commitment to fix prices. As will be discussed in greater detail below, the agreement here was confined to the product produced under the patent and did not exceed the scope of the patent's right to exclude all infringers from marketing a generic version of Cipro.

Nor is there any basis to support that the agreement is per se illegal under federal law. The federal cases under the Sherman Act nave found that these types of agreements are not illegal per se violations of federal ***antitrust law***. Under the Sherman Act, the courts have held that a reverse payment settlement agreement like the one at issue here, (See *Schering-Plough Corp. v. FTC (11th Cir.2005) 402 F.3d 1056*; *Valley Drug Co. v. Geneva Pharms., Inc., [11th Cir. 2003) 344 F.3d 1294*; In Re Tamoxifen Citrate Antitrust Litig. (2d Cir. 2006) 466 F.3d at 190) and specifically this very agreement (See In Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro II") (*E.D.N.Y. 2005 363 F. Supp. 2d 514, 541*; and In Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro III") *(Fed. Cir. 2008) 544 F.3d 1323, 1341)* are not illegal per se. The Federal **[*10]** Circuit Court in Cipro III held that, "only agreements that have a predictable and pernicious anticompetitive effect and limited potential for procompetitive effect are deemed to be per se unlawful under the Sherman Act. A finding of per se unlawfulness is appropriate once experience with a particular type of restraint enables the Court to predict with confidence that the rule of reason will condemn it." The court found that this specific agreement was not per se illegal under the Sherman Act as it did not restrict more competition than allowed under the scope of the patent. (Cipro III, at 1332.)

Although Plaintiffs argue that the Court should not follow the federal court decisions, arguing that the Cartwright Act is broader (i.e. prohibits more conduct) than the Sherman Act, the Court is not persuaded that it is broader in any way pertinent to the issues before the Court. The Cartwright Act and the federal Sherman Act share similar language and objectives, and California courts often look to federal precedents under the Sherman Act for guidance. (*Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 369, 113 Cal. Rptr. 2d 175*.) Although not identical, "judicial interpretations of the Sherman Act are, nevertheless, often helpful because of the similarity in language **[*11]** and purpose between the federal and state statutes." (*Morrison v. Viacom, Inc., (1998) 66 Cal.App.4th 534, 541, 78 Cal. Rptr. 2d 133*.) "Because the Cartwright Act is patterned after the federal Sherman Act and both have their roots in the common law, federal cases interpreting the Sherman Act are applicable in construing the Cartwright Act." (Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Constr. Co., (197f) *4 Cal. 3d 354, 362 fn 3, 93 Cal. Rptr. 602, 482 P.2d 226*, citing to *Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 315, 70 Cal. Rptr. 849, 444 P.2d 481]*.) "Although we have referred to federal decisions under the Sherman Act, it is well settled that such cases are authoritative in cases under the Cartwright Act." (*Shasta Douglas Oil Co. v. Work (1963) 212 Cal. App. 2d 618, 625, 28 Cal. Rptr. 190*, citing to *Milton v. Hudson Sales Corp. (1957) 152 Cal.App.2d 418, 440, 313 P.2d 936*.) "The Cartwright Act prohibits every trust, defined as "a combination of capital, skill or acts by two or more persons" for specified anticompetitive purposes. The federal Sherman Act prohibits every contract, combination ... or conspiracy, in restraint of trade." The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance. (*Chavez v. Whirlpool Corp. (2001)93 Cal. App. 4th 363, 369, 113 Cal. Rptr. 2d 175*.)

While the Court recognizes that the federal decisional law is not binding on this Court (unless otherwise indicated **[*12]** herein) the Court considers the federal case law concerning this agreement as persuasive authority, especially in light of the lack of controlling California authority on point. Further, the rule enunciated under the Sherman Act in Cipro III mirrors the law in California that it is only those agreements that have a "historical and pernicious" effect which should be found per se illegal. Although Plaintiffs cite to In re Cardizem CD Antitrust Litigation, as federal authority finding a reverse payment settlement per se illegal, the agreement at issue in that case exceeded the exclusionary scope of the patent involved and restrained non-infringing drugs, and thus does not aid Plaintiffs here. (*In re Cardizem CD Antitrust Litigation (6th Cir. 2003) 332 F.3d 896*.)

As discussed more fully below, the agreement here does not restrict more competition than allowed under the scope of the patent. To adopt Plaintiffs' argument that horizontal agreements between competitors to allocate markets are traditionally subject to per se illegal treatment wholly ignores that this agreement concerns a patent which gives the patent holder the legal right to exclude infringing competition. Therefore, the Court does not find the agreement to be illegal per se under the Cartwright **[*13]** Act, as there is no legal basis under California law to do so. Nor is there any basis to support a per se illegal determination under federal decisional law.

This Court also finds that the agreement does not violate the Cartwright Act under the Rule of Reason. To state a Cartwright Act antitrust claim, Plaintiffs must show that: 1) an agreement exists between independent entities; 2) the agreement is in restraint of trade; and 3) the restraint is unreasonable. To prove an unreasonable restrain, Plaintiffs must show the agreement had a "substantially adverse effect on competition in the relevant market." (*Exxon Corp. v. Superior Court (1997) 51 Cal. App. 4th 1672, 1681, 60 Cal. Rptr. 2d 195*.) Plaintiff must show: (1) that an alleged restraint on trade has anticompetitive effects, and (2) that the anticompetitive effects outweigh any pro-competitive benefits. (See *Bert G. Gianelli Distrib. Co. v. Beck & Co. (1985) 172 Cal.App.3d 1020, 1048, 219 Cal. Rptr. 203*, overturned on other grounds by *Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384, 46 Cal. Rptr. 3d 668, 139 P.3d 56*.) The focus is on the actual effects that the challenged restraint has had on competition in a relevant market.

As previously discussed, there is no California authority evaluating whether a Hatch Waxman reverse payment settlement agreement violates state ***antitrust law*** (Cartwright Act or otherwise). Thus, the Court turns to federal decisions concerning the Sherman Act as persuasive **[*14]** authority to guide its decision. Federal case law is not only instructive in this regard, it is dispositive.

The federal court cases dealing generally with Hatch Waxman settlements, and specifically with this agreement, have uniformly held that settlements within the scope of the patent do not violate antitrust laws. The federal courts nave held that in order to determine whether there is an antitrust violation (under the federal antitrust Sherman Act) the Court must first analyze whether the agreement at issue falls within the exclusionary scope of the patent. If it does, there is no anti-trust violation because the settlement agreement did not cause anticompetitive effects beyond those inherent in the patent. As stated in Tamoxifen and quoted in Cipro II, "Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing ***antitrust law***, as long as the competition is restrained only within the scope of the patent." (Id. at 213 (quoting Cipro II at 535.) Additionally, the district and appellate court in Cipro II and III have already determined that the settlement **[*15]** at issue here did not exceed the scope of the patent and did not have anti-competitive effects beyond the patent. In Cipro III, the Federal Circuit affirmed the district court's holding that there was no antitrust violation because the settlement agreement fell within the "exclusionary zone" of the patent. The Federal Circuit Court found that because patents are presumed valid and provide the patentee with the right to exclude others (infringers) from the market, the challenged anticompetitive effects of the agreement at issue here were directly attributable to the patent, and therefore, no antitrust remedy was available. (*In re Ciprofloxacin Hydrochloride Antitrust Litig. (Cipro III) (Fed. Cir. 2008) 544 F.3d 1323, 1332-1336*.)

The Court finds the result should be no different under the Cartwright Act, as we are dealing with the exact same settlement agreement, involving the same type of Plaintiffs (indirect purchasers), and the same theories of liability. Additionally, the standard articulated in the federal cases comports with California law and is consistent with regard to the antitrust liability concerning patents. The district court in Cipro II, affirmed by the Circuit Court in Cipro III, utilized the same framework, i.e. a rule of reason, in its analysis which differs in no significant **[*16]** respect and is not unlike the rule of reason articulated by the courts for purposes of a state antitrust analysis under the Cartwright Act. Although Plaintiffs argue that the Cartwright Act is more restrictive than the Sherman Act, such argument is unavailing as previously discussed above. Further, while the cases cited by Plaintiffs in this regard recognize that the scope of the Cartwright Act may in some situations be broader than or differ from the Sherman Act, there is no authority or support which persuades this Court to conclude that the Cartwright Act was intended to be broader than the Sherman Act on the question of reverse payment settlements.

California cases involving antitrust violations and patents likewise hold that conduct falling within the scope of a patent is not an antitrust violation. The grant of a patent is the grant of a statutory monopoly and is an express exception to laws prohibiting monopolies. (*Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 229, 84 S. Ct. 784, 11 L. Ed. 2d 661, 1964 Dec. Comm'r Pat. 425*; *Aetna Casualty & Sur. Co. v. Superior Court (1993)19 Cal. App. 4th 320, 328, 23 Cal. Rptr. 2d 442*.) In *Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748, 258 P.2d 852*, the California Court of Appeal ruled that in cases in which the exercise of patent rights is involved, a patent holder "brings himself within the proscription of the antitrust laws only when the patentee or his assignee acts beyond that which was necessary **[*17]** or incidental to the scope of this patent." (*Fruit Machinery, (1953) 118 Cal.App.2d 748, 258 P.2d 852*.) In Fruit Machinery, the defendant was a sublicensee of a patented peach-pitting machine who challenged the sublicense agreement on the ground that the plaintiff "created a monopoly" through the sublicense. (*Id. at 761*.) The Court rejected the argument, noting that, "Defendant has not shown that the parties, in executing and carrying out the sublicense agreement in suit, exercise rights or powers not accorded them by the patent law or abused any rights or powers accorded them by that law." (*Id. at 762*.) Thus, California law also supports that unless the agreement goes, "beyond the scope of the patent rights" there is no antitrust violation. (Id.)

The undisputed evidence shows that the agreement here was clearly within the scope of the patent. A patent is presumed valid. (*35 U.S.C. 282*) The 444 patent issued on June 2, 1987, and expired December 9, 2003 (UMF No. 3, and evidence cited therein). The FDA granted pediatric exclusivity to Bayer's Cipro until June 9, 2004. (UMF No. 4, and evidence cited therein.) Under the federal food and drug laws, no generic Cipro could lawfully enter the market until June 9, 2004. (*21 U.S.C. §355a(b)(2)(A)(ii)*.) The 444 patent is a compound patent and covers the molecule/compound **[*18]** ciprofloxacin hydrochloride, which is the only active ingredient in all ciprofloxacin products however formulated. (UMF No. 2, and evidence cited therein) Claim 12 did not change in reexamination. (UMF Nos. 26-28, and evidence cited therein.) Because the patent covers the ciprofloxacin molecule, Bayer had the right to exclude infringing competition from all forms of generic Cipro, (in Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro I") *(E.D.N.Y. 2003) 261 F. Supp. 2d 188, 249*.) In 1991 Barr filed an ANDA with a Paragraph 4 certification, alleging the patent was invalid. Barr stipulated that its ANDA product infringed on the 444 patent. (UMF Nos. 5-8, 19, and evidence cited therein.) Thus, the Cipro patent precluded all generic competition, including Barr's admitted infringement. On January 16, 1992, Bayer sued Barr alleging that the ANDA infringed on the patent. Barr answered with claims of invalidity and unenforceability. The parties settled. (UMF Nos. 9-17, and evidence cited therein.) Pursuant to the Cipro Settlement, the Generic Defendants agreed not to infringe Bayer's patent with a competing ciprofloxacin product until six months before Bayer's '444 Patent expired, with settlement payments from Bayer as consideration **[*19]** for the resolution of the Generic Defendants' disputed patent challenge. (UMF Nos. 15-24, and evidence cited therein.) As such, the agreement precluded no more competition than was already precluded under the patent, as under the patent, Bayer had the right to exclude all infringers from marketing a generic version of Cipro prior to the expiration of the patent. As the court in Cipro II found, "this is welf within Bayer's rights as the patentee. (Cipro II at 524.) California law compels no different conclusion. Thus, Defendants have established that the settlement agreement fell within the exclusionary scope of the patent.

Therefore, there is no antitrust violation under California law (*Fruit Machinery Co. v. F.M. Bali & Co. (1953) 118 Cal App.2d 748*) nor under federal law, "Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing [federal] ***antitrust law***, as long as competition is restrained only within the scope of the patent." [Tamoxifen, 466 F.3d at 213; *In re Ciprofloxacin Hydrochloride Antitrust Litig. (Cipro III) (Fed. Cir. 2008) 544 F.3d 1323*.) Whether the underlying infringement lawsuit was "objectively baseless" requires a finding that the suit is so baseless, "that no reasonable litigant could realistically expect success **[*20]** on the merits." (*In re Tamoxifen Citrate Antitrust Litig.) (2d Cir. N.Y. 2006) 466 F.3d 187, 213* citing Prof'l Real Estate investors. *Inc. v. Columbia Pictures Indus., Inc., (1993) 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611*.)

However, Plaintiffs failed to allege that Bayer's infringement suit was objectively baseless, was sham litigation, or that there was fraud on the PTO in their SAC, and Plaintiffs cannot defeat the motion for summary judgment by doing so now. A plaintiff cannot defeat a motion for summary judgment by bringing new, unpleaded issues in the opposing papers. (*Oakland Raiders v. National Football League (2005) 131 Cal.App.4th 621, 648, 32 Cal. Rptr. 3d 266*.) Even if such allegations were included in the SAC, there is no evidence or legal support that the suit was objectively baseless or was a sham. "Bayer's success in its litigations against Schein, Mylan, and Carlsbad forecloses any argument that its lawsuits were shams." (UMF Nos. 29-32, and evidence cited therein; Cipro II, 363 F.Supp.2d at 547.)

Similarly, Plaintiffs cannot meet the objectively baseless standard by resorting to allegations of inequitable conduct since the SAC does not allege inequitable conduct, much less that Bayer's infringement suit against Barr was objectively baseless or a sham. Even if there were such allegations, inequitable conduct is only an equitable defense to a patent infringement suit which, if proven can render the entire patent unenforceable. (See e.g. *Hoffmann-La Roche, Inc. v. Promega Corp. (Fed. Cir. 2003) 323 F.3d 1354, 1372*.) As such, Bayer's **[*21]** alleged inequitable conduct in procuring the patent is not relevant to the case at hand as it pertains to Plaintiffs' antitrust claims. The Federal Circuit has held that inequitable conduct is a defense to a patent infringement claim, not an affirmative antitrust claim. (*Nobelpharma AB v. Implant Innovations, Inc., (Fed. Cir. 1998) 141 F.3d 1059, 1070*.) Moreover, the Court finds that the determination of fraud and inequitable conduct would involve substantial questions of patent law, which this Court does not have jurisdiction to decide. (See *Lockwood v. Sheppard, 173 Cal.App.4th 675, 93 Cal. Rptr. 3d 220 (2009)* (holding that the court lacked jurisdiction to make a determination regarding PTO procedures.)

Concerning Plaintiffs' arguments that the settlement had anticompetitive effects outside of, or expanding, the scope of the patent (manipulation of the 180-day exclusivity period; preventing other generic challengers from challenging the 444 patent; that the settlement prevented other generic defendants from marketing non-infringing products; or that but for the settlement, Barr "could have won" its case against Bayer and generic Cipro could have come to market earlier(SAC 117, 122, 145(ii), all courts analyzing this specific agreement and considering these very same arguments found that the agreement extended no further than the **[*22]** scope of what the patent protects. (Ciprol, 261 F. Supp. 2d at 257; Cipro Ill 544 F.3d at 1338-1339.) Moreover, the FDA-dia not award Barr the 180-day exclusivity period, there was no evidence of an actual adverse effect on competition due to that provision (*Cipro III, 544 F.3d at 1340, n. 14*), and it is undisputed that four other generic manufactures challenged the validity of the patent which supports the settlement did not prevent others from challenging the patent. (UMF Nos. 20, 29-33, and evidence cited therein.) Further, since the patent covered the molecule ciprofloxacin, a settlement which precluded only a generic version of Cipro would not restrain or prevent a generic from marketing a non-infringing product, (In Re Tamoxifen Citrate Antitrust Litig. (2d Cir. 2006) *466 F.3d at 190, 214*.) Additionally, Plaintiffs' allegations that Barr would have won the patent challenge are speculative, and are dismissed as, "little more than dubious expectations or desires." (Cipro I, 261 F.Supp.2d at 202.)

Thus, to the extent Plaintiffs attack the presumption of patent validity to argue that the infringement suit was objectively baseless, or other inequitable conduct which would remove the protection of the patent, Plaintiffs have not included such claims in the SAC. The SAC is silent as to allegations non-infringement, invalidity, **[*23]** inequitable conduct, or fraud on the PTO. Therefore, Plaintiffs cannot rely on such claims which fall outside of their pleadings to defeat summary judgment. Further, this Court lacks jurisdiction to make such determinations.

Addressing Plaintiffs' argument that this Court should employ a "traditional rule of reason analysis" applied in state trade cases rather than the "objectively baseless" standard, the outcome would be no different as the Court would still need to evaluate at the outset whether the agreement fell within the scope of the patent, because if it does, there is no antitrust violation. (*Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748, 258 P.2d 852*.) Thus, under California law, like federal law, there is only antitrust liability for conduct which goes beyond the exclusionary scope granted by the patent, a salient point Plaintiffs conveniently ignore. Instead, Plaintiffs urge this Court to analyze the agreement and its effects without taking into account that Bayer had a patent and the legal rights which are granted by the patent. Further, the Court believes that the objectively baseless standard is applicable given the unique nature of the agreement at issue (a pharmaceutical reverse payment settlement that does not arise under state **[*24]** law) which results from a patent infringement action (arising under federal law), and considering that federal courts have utilized this standard in adjudicating such agreements for purposes of determining antitrust liability.

Further, even considering the two "key facts" (size of payment/price hike)upon which Plaintiffs rely to demonstrate the alleged anticompetitive effects on trade under their traditional rule of reason analysis, they either fall within the rights of the patent holder (e.g. the price of the patented product) or are not relevant to the antitrust analysis. Plaintiffs argue that that the size of the payment is a key indicator of the patent's strength and supports a reasonable inference that the patent would have been struck down as invalid. Patent validity is not relevant in the determination of whether the settlement agreements violate antitrust laws. ("The Valley Drug court thus took the position that an antitrust court need not consider the potential invalidity of the patent in an exclusion-payment settlement, except in those extreme cases involving fraud on the Patent Office or assertion of a patent known to be invalid, i.e., in circumstances giving rise to an allegation **[*25]** of Walker Process fraud or sham litigation." (Cipro ll *(E.D.N.Y. 2005)363 F. Supp. 2d 514, 525)* As previously discussed, no such claims were alleged in the SAC. Plaintiffs also assert that since the price increased after the settlement, this also demonstrates the anticompetitive effects of the agreement. However, Bayer had the right to control the price of its product under the patent, and thus, if the settlement was within the scope of the patent, then any price increase is also within the scope of the patent. (Cipro II, (2005) 363 F. Supp. 2d at 540; *Fruit Machinery (1953)118 Cal.App.2d at 759*; *United States v. Masonite Corp. (1942) 16 U.S. 265, 279*.)

Therefore, the Court finds that as a matter of law, Plaintiffs cannot establish the agreement unreasonably restrains trade because no triable issue of material fact exists that there are no anticompetitive effects on competition beyond the exclusionary scope of the patent itself. Thus, the Court finds that the agreement does not violate the Cartwright Act. This finding also precludes Plaintiffs' UCL claim and common law monopoly claim as they are based on the same factual allegations that support the Cartwright Act claim. Thus, the Court's determination that the agreement does not violate the Cartwright Act is fatal to both the UCL claim (*Belton v. Comcast Cable Holdings, LLC, (2007) 151 Cal. App. 4th 1224, 1240, 60 Cal. Rptr. 3d 631*-quoting *Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 375, 113 Cal. Rptr. 2d 175*; see also *RLH Industries, Inc. v. SBC Communications, Inc. (2005) 133 Cal.App.4th 1277, 1286, 35 Cal. Rptr. 3d 469)* and the common law monopolization claim. (*Eastman Kodak v. Image Tech. Servs, Inc. (1992) 504 U.S. 451, 481-83, 112 S. Ct. 2072, 119 L. Ed. 2d 265*.) Conduct **[*26]** by a patent holder acting within the scope of the patent is likewise immune from antitrust scrutiny even in the monopolization context. (*Fruit Machinery 118 Cal.App.2d 762-63*.)

Accordingly, summary judgment is granted.

Defendant's motion to dismiss is denied.

Plaintiffs' evidentiary objections are overruled. Further, to the extent that the objections failed to quote or set forth the objectionable material, they fail to conform to *California Rule of Court Rule 3.1354(b)(3)*.

All requests for judicial notice are granted as to the existence but not truth of the items requested.

Parties wishing to argue before the Court must appear on the date and at the time noticed for the hearing. If none of the parties appears on the date and at the time noticed for the hearing, the tentative ruling shall be adopted as the final ruling of the Court.

Defendants Hoechst Marion Roussel, Inc; The Rugby Group, Inc. and Barr Laboratories, Inc.'s Motion for Summary Judgment

Defendants Hoechst Marion Roussel, Inc; The Rugby Group, Inc.; and Barr Laboratories, Inc.'s Motion for Summary Judgment is GRANTED. Under *CCP § 437c*, if the parties' papers show there is no triable issue of material fact and the "'moving party is entitled to a judgment as a matter of law'" (*CCP § 437c(c)*), the court must grant the motion for **[*27]** summary judgment. (*Aguilar v. Atlantic Richfield (2001) 25 Cal.4th 826, 843, 107 Cal. Rptr. 2d 841, 24 P.3d 493*.) Subdivision (p)(2) states: "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action ... cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show a triable issue of one or more material facts exists as to that cause of action or a defense thereto."

The Consolidated Second Amended Complaint (SAC) alleges three causes of action for (1) antitrust in violation of the Cartwright Act, under *California Business and Professions Code Sections 16720, et. seq.*; (2) unfair competition in violation of *California Business and Professions Code Sections 17200 et. seq.*; and (3) common law monopolization. Essentially, Plaintiffs allege Defendant Bayer entered into unlawful and anti-competitive agreements with its horizontal competitors. Defendants Barr Laboratories; Hoechst Marion Roussel, Inc. (HMR) and HMR's then subsidiary, Defendant Rugby Group, Inc. (Rugby). Plaintiffs allege these agreements, referred to as reverse payment settlements, (hereinafter the "agreement") effectively allowed Bayer to maintain an exclusive right to manufacture **[*28]** and market Cipro in California without competition to bring a generic form of ciprofloxacin to the market place. The result to consumers and Plaintiffs was increased costs of the prescription drug Cipro and increased profits to Bayer. In addition, the other parties to the agreement received large payments for not producing a generic form of Cipro.

As discussed more fully herein, the Court finds that the agreement does not violate the Cartwright Act. The undisputed evidence establishes that no triable issue of material fact exists that the agreement did not fall outside the exclusionary scope of the patent; there is no evidence that the patent suit by Bayer against Barr was objectively baseless; and Plaintiff cannot establish that the settlement was otherwise unlawful.

The Cartwright Act (§§ 16700-16758) was designed primarily to prevent organization of trusts for control of markets for merchandise, but its definition of trust may, not unreasonably, include any contract "to carry out restrictions in trade or commerce," and to prevent competition in "manufacturing, sale or purchase of merchandise," etc. (*California Kitchens v United Brotherhood of Carpenters & Joiners (1956) 139 Cal App 2d 597, 294 P.2d 468*)California courts interpreting the Cartwright act recognize the persuasive authority **[*29]** of federal decisions under the Sherman Act and have liberally applied the federal Sherman Act doctrine in interpreting the Cartwright Act. (See, e.g., *Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 542, 30 Cal. Rptr. 2d 706*;

Cellular Plus, Inc. v. Superior Court (1993) 14 Cal. App. 4th 1224, 1242, 18 Cal. Rptr. 2d 308; *Bert G. Gianelli Distributing Co. v. Beck & Co. (1985) 172 Cal. App. 3d 1020, 1042, 219 Cal. Rptr. 203*, overturned on other grounds by *Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384, 46 Cal. Rptr. 3d 668, 139 P.3d 56*.) The Cartwright Act, like its federal counterpart, "has not been interpreted to penalize natural monopolies." (*Freeman v. San Diego Ass'n of Realtors, 77 Cal.App.4th 171,200*.)

The Cartwright Act and the federal antitrust laws are interpreted to permit restraints of trade as long as those restraints are reasonable under the circumstances. Following federal law, the Cartwright Act recognizes two distinct categories of offenses: "Per Se" violations, and other potentially harmful conduct that is treated under the so-called "Rule of Reason." Under the per se illegal theory, conduct is conclusively presumed to be unlawful because of its pernicious effects on competition and lack of any redeeming virtue. In other words, it is illegal regardless of any alleged business justification or pro-competitive effects. (*Marin County Bd. Of Realtors, Inc. v. Palsson, (1976) 16 Cal.3d 920, 930-31, 130 Cal. Rptr. 1, 549 P.2d 833*.) Under the Rule of Reason analysis, conduct violates the Cartwright Act if the plaintiff shows that the conduct is an unreasonable restraint of trade, meaning conduct that unreasonably impairs competition and harms consumers. The Rule of Reason prohibits only **[*30]** those actions that cause an "unreasonable restraint of trade" (*Standard Oil Co. v. United States (1911) 221 US 1, 87, 31 S. Ct. 502, 55 L. Ed. 619*; see also *People v. Building Maint. Contractors Ass'n, Inc. (1953) 41 Cal.2d 719, 727, 264 P.2d 31*.) If an alleged restraint of trade is not per se illegal, the Rule-of-Reason analysis should be applied (see *Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal.3d 842, 855, 94 Cal. Rptr. 785, 484 P.2d 953*-finding the rule of reason to be a factual inquiry into whether a particular action is an unreasonable restraint on trade)].

Plaintiffs allege that the agreement at issue here was a per se violation of the Cartwright Act. (SAC (140.) Plaintiffs argue that the agreement at issue is a horizontal agreement between competitors to allocate markets, which have been held to be per se illegal under the Cartwright Act. Plaintiffs urge this Court to find that under California law, "a naked payment from a patent holder to a non-patent holder to abandon its challenge to the patent's validity and stay out of the market for the patented product-thus ensuring supra-competitive prices-must be scrutinized under the rule that agreements not to compete are per se illegal."(Plaintiffs' Opposition, p. 31.)

However, the Court declines to find the agreement is illegal per se, as the per se label is reserved for, "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue **[*31]** are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." (*Marin County Bd. Of Realtors, Inc. v. Palsson, (1976) 16 Cal.3d 920, 930-31, 130 Cal. Rptr. 1, 549 P.2d 833*.) Plaintiffs have cited no California case, nor is there one, supporting that a per se illegal analysis is applicable to the specific agreement at issue here, a reverse payment settlement agreement under the Hatch Waxman Act concerning a patent. The California Supreme Court has instructed that "before acceding to the demand for such a formidable rule," "applicable case law" must condemn the conduct. (*Marin County, 16 Cal.3d at 931*.) Given that this appears to be a case of first impression, there is simply no legal basis to support that the Cartwright Act be interpreted in such a manner so as render the agreement per se illegal, as there has been no authority provided by Plaintiffs demonstrating that California courts have historically found that these agreements have a pernicious effect" on competition which lacks "any redeeming virtue." Moreover, it is well settled that the law favors settlements ana this would extend to patent infringement suits as well. Plaintiffs' reliance on Vulcan Powder Co. v. Hercules Powder Co. (1892) 95 Cat 510, to **[*32]** support that an agreement like this should be determined to be illegal per se because it constitutes an agreement not to compete is unpersuasive. The Court in Vulcan found an antitrust violation because the agreement exceeded the scope of the patent. The contract at issue in that case, unlike here, was not confined to the product (dynamite) produced under the patents, and involved a collaboration among many industry members including some that did not have patent rights to establish a commitment to fix prices. As will be discussed in greater detail below, the agreement here was confined to the product produced under the patent and did not exceed the scope of the patent's right to exclude all infringers from marketing a generic version of Cipro.

Nor is there any basis to support that the agreement is per se illegal under federal law. The federal cases under the Sherman ACT have found thaf these types of agreements are not illegal per se violations of federal ***antitrust law***. Under the Sherman Act, the courts have held that a reverse payment settlement agreement like the one at issue here, (See *Schering-Plough Corp. v. FTC (11th Cir.2005) 402 F.3d 1056*; Valley Drug Co. v. Geneva Pharms., lnc., *(11th Cir. 2003) 344 F.3d 1294*; In Re Tamoxifen Citrate Antitrust Litig. (2d Cir. **[*33]** 2006) *466 F.3d at 190*) and specifically this very agreement (See In Re

Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro II") *(E.D.N.Y. 2005) 363 F. Supp. 2d 514, 541*; and In Re Ciprofloxacin Hydrochloride AntitrustT-Litig. ("Cipro III") *(Fed. Cir. 2008) 544 F.3d 1323, 1341)* are not illegal per se. The Federal Circuit Court in Cipro 111 held that, "only agreements that have a predictable and pernicious anticompetitive effect and limited potential for procompetitive effect are deemed to be per se unlawful under the Sherman Act. A finding of per se unlawfulness is appropriate once experience with a particular type of restraint enables the Court to predict with confidence that the rule of reason will condemn it." The court found that this specific agreement was not per se illegal under the Sherman Act as it did not restrict more competition than allowed under the scope of the patent. (Cipro ill, at 1332.)

Although Plaintiffs argue that the Court should not follow the federal court decisions, arguing that the Cartwright Act is broader (i.e. prohibits more conduct) than the Sherman Act, the Court is not persuaded that it is broader in any way pertinent to the issues before the Court. The Cartwright Act and the federal Sherman Act share similar language and objectives, and California **[*34]** courts often look to federal precedents under the Sherman Act for guidance. (*Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363 369, 113 Cal. Rptr. 2d 175*.) Although not identical, "judicial interpretations of the Sherman Act are, nevertheless, often helpful because of the similarity in language and purpose between the federal and state statutes." (*Morrison v. Viacom, Inc., (1998) 66 Cal.App.4th 534, 541, 78 Cal. Rptr. 2d 133*.) "Because the Cartwright Act is patterned after the federal Sherman Act and both have their roots in the common law, federal cases interpreting the Sherman Act are applicable in construing the Cartwright Act." (*Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Constr. Co., (1971) 4 Cal. 3d 354,* 362 fn 3, 93 Cal. Rptr. 602, 482 P.2d 226, citing to Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 315, 70 Cal. Rptr. 849, 444 P.2d 481].) "Although we have referred to federal decisions under the Sherman Act, it is well settled that such cases are authoritative in cases under the Cartwright Act." (Shasta Douglas Oil Co. v. Work (1963) 212 Cal. App. 2d 618, 625, 28 Cal. Rptr. 190, citing to Milton v. Hudson Sales Corp. (1957) 152 Cal.App.2d 418, 440, 313 P.2d 936.) "The Cartwright Act prohibits every trust, defined as "a combination of capital, skill or acts by two or more persons" for specified anticompetitive purposes. The federal Sherman Act prohibits every contract, combination ... or conspiracy, in restraint of trade." The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act.share similar language and objectives, California courts often look to federal precedents under the **[*35]** Sherman Act for guidance (Chavez v. Whirlpool Corp. (2001)93 Cal. App. 4th 363, 369, 113 Cal. Rptr. 2d 175.)

While the Court recognizes that the federal decisional law is not binding on this Court (unless otherwise indicated herein) the Court considers the federal case law concerning this agreement as persuasive authority, especially in light of the lack of controlling California authority on point. Further, the rule enunciated under the Sherman Act in Cipro III mirrors the law in California that it is only those agreements that have a "historical and pernicious" effect which should be found per se illegal. Although Plaintiffs cite to In re Cardizem CD Antitrust Litigation, as federal authority finding a reverse payment settlement per se illegal, the agreement at issue in that case exceeded the exclusionary scope of the patent involved and restrained non-infringing drugs, and thus does not aid Plaintiffs here. (In re Cardizem CD Antitrust Litigation (6th Cir. 2003) 332 F.3d 896.)

As discussed more fully below, the agreement here does not restrict more competition than allowed under the scope of the patent. To adopt Plaintiffs' argument that horizontal agreements between competitors to allocate markets are traditionally subject to per se illegal treatment wholly ignores that this agreement concerns a patent which gives the patent **[*36]** holder the legal right to exclude infringing competition. Therefore, the Court does not find the agreement to be illegal per se under the Cartwright Act, as there is no legal basis under California law to do so. Nor is there any basis to support a per se illegal determination under federal decisional law.

This Court also finds that the agreement does not violate the Cartwright Act under the Rule of Reason. To state a Cartwright Act antitrust claim, Plaintiffs must show that: 1) an agreement exists between independent entities; 2) the agreement is in restraint of trade; and 3) the restraint is unreasonable. To prove an unreasonable restrain, Plaintiffs must show the agreement had a "substantially adverse effect on competition in the relevant market." (Exxon Corp. v. Superior Court (1997) 51 Cal. App. 4th 1672, 1681, 60 Cal. Rptr. 2d 195.) Plaintiff must show: (1) that an alleged restraint on trade has anticompetitive effects, and (2) that the anticompetitive effects outweigh any pro-competitive benefits. (See Bert G. Gianelli Distrib. Co. v. Beck & Co. (1985) 172 Cal.App.3d T020, 1048, overturned on other grounds by Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384, 46 Cal. Rptr. 3d 668, 139 P.3d 56.) The focus is on the actual effects that the challenged restraint has had on competition in a relevant market.

As previously discussed, there is no California **[*37]** authority evaluating whether a Hatch Waxman reverse payment settlement agreement violates state ***antitrust law*** (Cartwright Act or otherwise). Thus, the Court turns to federal decisions concerning the Sherman Act as persuasive authority to guide its decision. Federal case law is not only instructive in this regard, it is dispositive.

The federal court cases dealing generally with Hatch Waxman settlements, and specifically with this agreement, have uniformly held that settlements within the scope of the patent do not violate antitrust laws. The federal courts nave held that in order to determine whether there is an antitrust violation (under the federal antitrust Sherman Act) the Court must first analyze whether the agreement at issue falls within the exclusionary scope of the patent. If it does, there is no anti-trust violation because the settlement agreement did not cause anticompetitive effects beyond those inherent in the patent. As stated in Tamoxifen and quoted in Cipro II, "Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing ***antitrust law***, **[*38]** as long as the competition is restrained only within the scope of the patent." (Id. at 213 (quoting Cipro II at 535.) Additionally, the district and appellate court in Cipro II and III have already determined that the settlement at issue here did not exceed the scope of the patent and did not have anti-competitive effects beyond the patent. In Cipro III, the Federal Circuit affirmed the district court's holding that there was no antitrust violation because the settlement agreement fell within the "exclusionary zone" of the patent. The Federal Circuit Court found that because patents are presumed valid and provide the patentee with the right to exclude others [infringers) from the market, the challenged anticompetitive effects of the agreement at issue here were directly attributable to the patent, and therefore, no antitrust remedy was available. (*In re Ciprofloxacin Hydrochloride Antitrust Litig. (Cipro III) (Fed. Cir. 2008) 544 F.3d 1323, 1332-1336*.)

The Court finds the result should be no different under the Cartwright Act, as we are dealing with the exact same settlement agreement, involving the same type of Plaintiffs (indirect purchasers), and the same theories of liability. Additionally, the standard articulated in the federal cases comports with California law and is consistent with regard **[*39]** to the antitrust liability concerning patents. The district court in Cipro II, affirmed by the Circuit Courfin Cipro III, utilized the same framework, i.e. a rule of reason, in its analysis which differs in no significant respect and is not unlike the rule of reason articulated by the courts for purposes of a state antitrust analysis under the Cartwright Act. Although Plaintiffs argue that the Cartwright Act is more restrictive than the Sherman Act, such argument is unavailing as previously discussed above. Further, while the cases cited by Plaintiffs in this regard recognize that the scope of the Cartwright Act may in some situations be broader than or differ from the Sherman Act, there is no authority or support which persuades this Court to conclude that the Cartwright Act was intended to be broader than the Sherman Act on the question of reverse payment settlements.

California cases involving antitrust violations and patents likewise hold that conduct falling within the scope of a patent is not an antitrust violation. The grant of a patent is the grant of a statutory monopoly and is an express exception to laws prohibiting monopolies. (*Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 229, 84 S. Ct. 784, 11 L. Ed. 2d 661, 1964 Dec. Comm'r Pat. 425*; *Aetna Casualty &: Sur. Co. v. Superior Court (1993)19 Cal. App. 4th 320, 328, 23 Cal. Rptr. 2d 442*.) In Fruit Machinery Co. v. F.M. Ball & **[*40]** Co. (1953) 118 Cal.App.2d 748, the California Court of Appeal ruled that in cases in which the exercise of patent rights is involved, a patent holder "brings himself within the proscription of the antitrust laws only when the patentee or his assignee acts beyond that which was necessary or incidental to the scope of this patent." (*Fruit Machinery, (1953) 118 Cal.App.2d 748, 258 P.2d 852*.) In Fruit Machinery, the defendant was a sublicensee of a patented peach-pitting machine who challenged the sublicense agreement on the ground that the plaintiff "created a monopoly" through the sublicense. (*Id. at 761*.) The Court rejected the argument, noting that, "Defendant has not shown that the parties, in executing and carrying out the sublicense agreement in suit, exercise rights or powers not accorded them by the patent law or abused any rights or powers accorded them by that law." (*Id. at 762*.) Thus, California law also supports that unless the agreement goes, "beyond the scope of the patent rights" there is no antitrust violation. (Id.)

The undisputed evidence shows that the agreement here was clearly within the scope of the patent. A patent is presumed valid. (*35 U.S.C. 282*) The 444 patent issued on June 2, 1987, and expired december 9, 2003: The FDA granted pediatric exclusivity **[*41]** to Bayer's Cipro until June 9, 2004. (UMF No. 17, and evidence cited therein.) Under the federal food and drug laws, no generic Cipro could lawfully enter the market until June 9, 2004. (*21 U.S.C. §355a(b)(2)(A)(ii)*.) The 444 patent is a compound patent and covers the molecule/compound ciprofloxacin hydrochloride, which is the only active ingredient in all ciprofloxacin products however formulated. (UMF No. 1, and evidence cited therein) Claim 12 did not change in reexamination. (UMF Nos. 21-22 and evidence cited therein.) Because the patent covers the ciprofloxacin molecule, Bayer had the right to exclude infringing competition from all forms of generic Cipro. (In Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro I") *(E.D.N.Y. 2003) 261 F. Supp. 2d 188, 249*.) Barr stipulated that its ANDA product infringed on the 444 patent. (UMF Nos. 2-5, and evidence cited therein.) Thus, the Cipro patent precluded all generic competition, including Barr's admitted infringement. Bayer initiated batent litigation against Defendant Barr. (UMF No. 6.) The parties entered into a settlement in 1997. Pursuant to the Cipro Settlement Agreement, Defendants agreed not to infringe Bayer's patent with a competing ciprofloxacin product until six months before Bayer's **[*42]** '444 Patent expired, with settlement payments from Bayer as consideration for the resolution of the Generic Defendants' disputed patent challenge. (UMF Nos. 7-15, and evidence cited therein.) As such, the agreement precluded no more competition than was already precluded under the patent, as under the patent, Bayer had the right to exclude all infringers from marketing a generic version of Cipro prior to the expiration of the patent. As the court in Cipro It found, "this is well within Bayer's rights as the patentee." (Cipro II at 524.) California law compels no different conclusion. Thus, Defendants have established that the settlement agreement fell within the exclusionary scope of the patent.

Therefore, there is no antitrust violation under California law (*Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748, 258 P.2d 852*) nor under federal law, "Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing [federal] ***antitrust law***, as long as competition is restrained only within the scope of the patent." (*Tamoxifen, 466 F.3d at 213*; In re Ciprofloxacin Hydrochloride Antitrust Litig. (Cipro ill) *(Fed. Cir. 2008) 544 F.3d 1323*.) Whether the underlying infringement lawsuit was "objectively **[*43]** baseless" requires a finding that the suit is so baseless, "that no reasonable litigant could realistically expect success on the merits." (*In re Tamoxifen Citrate Antitrust Litig.) (2d Cir. N.Y. 2006) 466 F.3d 187, 213* citing *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., (1993) 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611*.)

However, Plaintiffs failed to allege that Bayer's infringement suit was objectively baseless, was sham litigation, or that there was fraud on the PTO in their SAC, and Plaintiffs cannot defeat the motion for summary judgment by doing so now. A plaintiff cannot defeat a motion for summary judgment by bringing new, unpleaded issues in the opposing papers. (*Oakland Raiders v. National Football League (2005) 131 Cal.App.4th 621, 648, 32 Cal. Rptr. 3d 266*.) Even if such allegations were included in the SAC, there is no evidence or legal support that the suit was objectively baseless or was a sham. "Bayer's success in its litigations against Schein, Mylan, and Carlsbad forecloses any argument that its lawsuits were shams." (UMF Nos. 29-32, and evidence cited therein; Cipro II, 363 F.Supp.2d at 547.)

Similarly, Plaintiffs cannot meet the objectively baseless standard by resorting to allegations of inequitable conduct since the SAC does not allege inequitable conduct, much less that Bayer's infringement suit against Barr was objectively baseless or a sham. Even if there were such allegations, inequitable conduct is only an equitable defense to a patent infringement suit **[*44]** which, if proven, can render the entire patent unenforceable. (See e.g. *Hoffmann-La Roche, Inc. v. Promega Corp. (Fed. Cir. 2003) 323 F.3d 1354, 1372*.) As such, Bayer's alleged inequitable conduct in procuring the patent is not relevant to the case at hand as it pertains to Plaintiffs' antitrust claims. The Federal Circuit has held that inequitable conduct is a defense to a patent infringement claim, not an affirmative antitrust claim. (*Nobelpharma AB v. Implant Innovations, Inc., (Fed. Cir. 1998) 141 F.3d 1059, 1070*.) Moreover, the Court finds that the determination of fraud and inequitable conduct would involve substantial questions of patent law, which this Court does not have jurisdiction to decide. (See *Lockwood v. Sheppard, 173 Cal.App.4th 675, 93 Cal. Rptr. 3d 220 (2009)* (holding that the court lacked jurisdiction to make a determination regarding PTO procedures.)

Concerning Plaintiffs' arguments that the settlement had anticompetitive effects outside of, or expanding, the scope of the patent (manipulation of the 180-day exclusivity period; preventing other genenc challengers from challenging the 444 patent; that the settlement prevented other generic defendants from marketing non-infringing products; or that but for the settlement, Barr "could nave won" its case against Bayer and generic Cipro could have come to market earlier(SAC 117, 122, 145(H), all courts analyzing this specific agreement and considering **[*45]** these very same arguments found that the agreement extended no further than the scope of what the patent protects. (Cipro I, 261 F. Supp. 2d at 257 Cipro III 544 F.3d at 1338-1339.) Moreover, the FDA did not award Barr the 180-day exclusivity period, there was no evidence of an actual adverse effect on competition due to that provision (*Cipro III, 544 F.3d at 1340, n. 14*), and it is undisputed that four other generic manufactures challenged the validity of the patent which supports the settlement did not prevent others from challenging the patent. (UMF Nos. 23-26, and evidence cited therein.) Further, since the patent covered the molecule ciprofloxacin, a settlement which precluded only a generic version of Cipro would not restrain or prevent a generic from marketing a non-infringing product. (In Re Tamoxifen Citrate Antitrust Litig. (2d Cir. 2006) *466 F.3d at 190, 214*.) Additionally, Plaintiffs' allegations that Barr would have won the patent challenge are speculative, and are dismissed as, "little more than dubious expectations or desires." (Cipro I, 261 T.Supp.2d at 202.)

Thus, to the extent Plaintiffs attack the presumption of patent validity to argue that the infringement suit was objectively baseless, or other inequitable conduct **[*46]** which would remove the protection of the patent, Plaintiffs have not included such claims in the SAC. The SAC is silent as to allegations non-infringement, invalidity, inequitable conduct, or fraud on the PTO. Therefore, Plaintiffs cannot rely on such claims which fall outside of their pleadings to defeat summary judgment. Further, this Court lacks jurisdiction to make such determinations.

Addressing Plaintiffs' argument that this Court should employ a "traditional rule of reason analysis" applied in state trade cases rather than the "objectively baseless" standard, the outcome would be no different as the Court would still need to evaluate at the outset whether the agreement fell within the scope of the patent, because if it does, there is no antitrust violation. (*Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748, 258 P.2d 852*.) Thus, under California law, like federal law, there is only antitrust liability for conduct which goes beyond the exclusionary scope granted by the patent, a salient point Plaintiffs conveniently ignore. Instead, Plaintiffs urge this Court to analyze the agreement and its effects without taking into account that Bayer had a patent and the legal rights which are granted by the patent. Further, the Court believes that the **[*47]** objectively baseless standard is applicable given the unique nature of the agreement at issue (a pharmaceutical reverse payment settlement that does not arise under state law) which results from a patent infringement action (arising under federal law), and considering that federal courts have utilized this standard in adjudicating such agreements for purposes of determining antitrust liability.

Further, even considering the two "key facts" (size of payment/price hike)upon which Plaintiffs rely to demonstrate the alleged anticompetitive effects on trade under their traditional rule of reason analysis, they either fall within the rights of the patent holder (e.g. the price of the patented product) or are not relevant to the antitrust analysis. Plaintiffs argue that that the size of the payment is a key indicator of the patent's strength and supports a reasonable inference that the patent would have been struck down as invalid. Patent validity is not relevant in the determination of whether the settlement agreements violate antitrust laws. ("The valley Drug court thus took the position that an antitrust court need not consider the potential invalidity of the patent in an exclusion-payment **[*48]** settlement, except in those extreme cases involving fraud on the Patent Office or assertion of a patent known to be invalid, i.e., in circumstances giving rise to an allegation of Walker Process fraud or sham litigation." (*Cipro II (E.D.N.Y. 2005)363 F. Supp. 2d 514, 525)* As previously discussed, no such claims were alleged in the SAC. Plaintiffs also assert that since the price increased after the settlement, this also demonstrates the anticompetitive effects of the agreement. However, Bayer had the right to control the price of its product under the patent, and thus, if the settlement was within the scope of the patent, then any price increase is also within the scope of the patent. (*Cipro II, (2005) 363 F. Supp. 2d at 540*; *Fruit Machinery (1953)118 Cal.App.2d at 759*; *United States v. Masonite Corp. (1942) 16 U.S. 265, 279*.)

Therefore, the Court finds that as a matter of law, Plaintiffs cannot establish the agreement unreasonably restrains trade because no triable issue of material fact exists that there are no anticompetitive effects on competition beyond the exclusionary scope of the patent itself. Thus, the Court finds that the agreement does not violate the Cartwright Act. This finding also precludes Plaintiffs' UCL claim and common law monopoly claim as they are based on the same factual allegations that support the Cartwright Act claim. Thus, the Court's determination **[*49]** that the agreement does not violate the Cartwright Act is fatal to both the UCL claim (*Belton v. Comcast Cable Holdings, LLC, (2007) 151 Cal. App. 4th 1224, 1240, 60 Cal. Rptr. 3d 631*-quoting *Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 375, 113 Cal. Rptr. 2d 175*; see also *RLH Industries, Inc. v. SBC Communications, Inc. (2005) 133 Cal.App.4th 1277, 1286, 35 Cal. Rptr. 3d 469)* and the common law monopolization claim. (*Eastman Kodak v. Image Tech. Servs, Inc. (1992) 504 U.S. 451, 481-83, 112 S. Ct. 2072, 119 L. Ed. 2d 265*.) Conduct by a patent holder acting within the scope of the patent is likewise immune from antitrust scrutiny even in the monopolization context. (*Fruit Machinery 118 Cal.App.2d 762-63*.)

Accordingly, summary judgment is granted.

Plaintiffs' evidentiary objections are overruled. Further, to the extent that the objections failed to quote or set forth the objectionable material, they fail to conform to *California Rule of Court Rule 3.1354(b)(3)*.

All requests for judicial notice are granted as to the existence but not truth of the items requested.

Parties wishing to argue before the Court must appear on the date and at the time noticed for the hearing. If none of the parties appears on the date and at the time noticed for the hearing, the tentative ruling shall be adopted as the final ruling of the Court.

Defendant Watson Pharmaceutical Inc.'s Motion for Summary Judgment

Defendant Watson Pharmaceutical Inc.'s Motion for Summary Judgment is GRANTED. Under *CCP §437c*, if the parties' papers show there is no triable issue of material fact and the "'moving party is entitled to a judgment as a matter of law'" (*CCP § 437c(c)*), the court must grant the **[*50]** motion for summary judgment. (*Aguilar v. Atlantic Richfield (2001) 25 Cal.4th 826, 843, 107 Cal. Rptr. 2d 841, 24 P.3d 493*.) Subdivision (p)(2) states: "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action ... cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show a triable issue of one or more material facts exists as to that cause of action or a defense thereto."

The Court's ruling on Bayer and the Generic Defendants' Motions for Summary Judgment, finding as a matter of law that the Cipro Settlement Agreement does not unreasonably restrain trade because there are no anticompetitive effects on competition beyond the exclusionary scope of the patent itself, is dispositive as to Defendant Watson's Motion for Summary Judgment. As Defendant Watson's liability is premised on its alleged participation in the agreement, a finding that the agreement does not unreasonably restrain trade defeats Plaintiffs' claims against Defendant Watson. Therefore, the motion can be granted on this basis alone.

However, the undisputed **[*51]** facts and evidence also establish that no triable issue of material fact exists that no agreement or conduct of Defendant Watson restrained trade as to generic ciprofloxacin or caused the injuries claimed by Plaintiffs. Defendant Watson was not involved in the Cipro settlement agreements and had no relationship to HMR or Rugby when those agreements were made. (UMF Nos. 5, 8, 9, and evidence cited therein.) Defendant Watson's relationship with Rugby cannot support Plaintiffs' claims because that purchase caused no restraint on the availability of a generic ciprofloxacin and did not delay the introduction of the generic ciprofloxacin, the only injury alleged by Plaintiffs. (UMF Nos. 6, 7, 9, 10, 13, and evidence cited therein.) Nor can Defendant Watson's relationship with Schein support Plaintiffs' claims that the Cipro agreement prevented Schein from marketing a generic ciprofloxacin. Bayer's patent was upheld in the litigation brought by Bayer over the Schein ANDA. Thus, Defendant Watson's acquisition of Schein in no way restrained the availability of generic ciprofloxacin. (UMF Nos. 17-27, and evidence cited therein) Further, the court in Cipro I held that Defendant Watson never undertook **[*52]** any conduct that changed the obligations of the parties to the agreements as they existed at the time of Defendant Watson s' acquisition of Rugby or that had any effect on when or if a generic version would be available to Plaintiffs. It concluded !hat it was Bayer's patent that kept Schein generic ciprofloxacin off of the market, rather than any conduct of Watson. (Cipro I, 261 F. Supp.2d at 216-217.)

Accordingly, summary judgment is granted.

Plaintiffs' evidentiary objections are overruled. Further, to the extent that the objections failed to quote or set forth the objectionable material, they fail to conform to *California Rule of Court Rule 3.1354(b)(3)*.

All requests for judicial notice are granted as to the existence but not truth of the items requested.

I, Renee Evans, declare:

I am, and was at the time of service of the papers herein referred to, over the age of eighteen years, and not a party to the action, and I am employed in the County of San Diego, State of California. My business address is Luce, Forward, Hamilton & Scripps LLP, 600 West Broadway, Suite 2600, San Diego, California 92101; telephone number (619) 236-1414; facsimile number (619) 645-5328.

On September 23, 2009, I served the following document(s): **SEE ATTACHED LIST OF DOCUMENTS SERVED** by JusticeLink **[*53]** Electronic filing on all persons appearing on the Service List.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 23, 2009, in San Diego, California.

Renee Evans /s/

Renee Evans

LIST OF DOCUMENTS SERVED

1. LETTER TO MS. TIPIN JOHNSON, COURT CLERK DATED 9/23/09;

2. [PROPOSED] FINAL JUDGMENT

In re Coordination Proceeding Special Title (Rule 1550(b)): Wholesale Elec. Antitrust Cases I & II.

Superior Court of California, County of San Diego

April 28, 2006, Filed

JCCP 4204 & 4205

Reporter
2006 Cal. Super. LEXIS 1354 *

Coordination Proceeding Special Title (Rule 1550(b)): WHOLESALE ELECTRICITY ANTITRUST CASES I & II. This document relates to: ALL ACTIONS

Core Terms

Parties, Settlement, Refund, Receivables, Escrow, effective date, Settling, Energy, class action, releases, notice, Non-Settling, Proceedings, electricity, Opt-In, Assigned, Distributions, Allowances, amounts, allocated, Matrix, termination, markets, entity, Offset, funds, transactions, provisions, obligations, charges

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For Plaintiffs and the Class:: FRANK J. JANECEK, JR., Dennis Stewart (99152), Christopher M. Burke (214799), MILBERG WEISS BERSHAD HYNES & LERACH LLP, San Diego, CA.; Patricia A. Meyer, Matthew T. Poelstra, PATRICIA A. MEYER & ASSOCIATES APC, San Diego, CA.; Harvey Levine, Richard A. Huver, LEVINE, STEINBERG, MILLER & HUVER, San Diego, CA.

Judges: The Honorable Joan M. Lewis, Coordination Trial Judge, Judge of the Superior Court, County of San Diego.

Opinion by: Joan M. Lewis

Opinion

[PROPOSED] JUDGMENT, FINAL ORDER, AND DECREE GRANTING FINAL APPROVAL TO CLASS ACTION SETTLEMENT

This matter **[*2]** is before the Court on the motion for final approval of a proposed class action settlement (the "Settlement") of the above-captioned cases (the "Class Action")[1] entered into between plaintiffs Pamela R. Gordon,

[1] Specifically, the settled actions are those incorporated in Plaintiffs' Master Complaint filed on March 8, 2002.

Ruth Hendricks, Oscar's Photo Lab, Mary L. Davis, and Sweetwater Authority (collectively, the "Class Representatives"), on behalf of themselves and the Settlement Class, and Reliant,[2] as set forth in the Settlement Agreement made and entered into as of October 12, 2005 (the "Settlement Agreement"). Collectively, Reliant and the Class Representatives are referred to as the "Settling Parties." The "Settlement Class" is defined as "all persons and entities in California who purchased electric power for purposes other than resale or distribution at any time between July 1, 1998 and October 12, 2005."

By its Order Granting Plaintiffs' Application for Preliminary Approval, Conditionally Certifying Settlement Class, and Scheduling Hearing on Final Settlement Approval, dated January 6, 2006 (the "Preliminary Approval Order"), this Court: (a) conditionally certified a settlement class; (b) granted preliminary approval to the Settlement Agreement; and (c) ordered that notice of the Settlement be disseminated to the settlement class, as directed therein, on or before February 12, 2006. In compliance with the Preliminary Approval Order, notice was published to the members of the Settlement Class. See Declaration of Andrew Novak, submitted in connection with this hearing.

On April 28, 2006, the Settling Parties appeared before the Court at the final approval and fairness hearing (the "Fairness Hearing"), represented by their respective attorneys. An opportunity to be heard was given to all persons requesting to be heard. The Court has reviewed and considered all of the pleadings and papers filed in connection therewith, and the argument and evidence presented **[*4]** at the hearing in support of the Settlement.

The entire matter of the proposed Settlement having been duly noticed, and having been fully considered by the Court,

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that:

1. This Court has jurisdiction over the claims of the members of the Settlement Class asserted in this proceeding, personal jurisdiction over the Settling Parties (including the members of the Settlement Class), and subject matter jurisdiction to approve the Settlement.

2. Notice given to the members of the Settlement Class was reasonably calculated under the circumstances to apprise the class members of the pendency of the Class Action, all material elements of the proposed Settlement, and their opportunity to exclude themselves from, to object to, or to comment on the Settlement and to appear at the Fairness Hearing. The notice was reasonable and the best notice practicable under the circumstances; was due, adequate and sufficient notice to all class members; and complied fully with the laws of the State of California, the California Code of Civil Procedure, the California Rules of Court, due process, and any other applicable statutes or rules. A full opportunity has been afforded **[*5]** to the members of the Settlement Class to participate in this hearing, and all members of the Settlement Class and other persons wishing to be heard have been heard. The questions posed by the Court with respect to the Egger class notice (which are the subject of supplemental briefing requested by the Court in the Egger case), do not apply to the notice provided to the Settlement Class in this Class Action. The Court finds that the applicable requirements of *California Code of Civil Procedure section 382* and California Rules of Court 1856, 1859 and 1860 have been satisfied with respect to the Settlement Class and the Settlement. Accordingly, the Court determines that all members of the Settlement Class are bound by this Judgment, Final Order, and Decree.

3. Class certification is an appropriate method for protecting the interests of the class members and resolving the common issues of fact and law arising out of the alleged violations of California's antitrust and unfair competition laws.

4. *California Code of Civil Procedure section 382* provides for class certification when there is an ascertainable class and a well-defined community of interest among class members. The Settlement Class meets this standard

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[2] "Reliant" means, collectively, defendants Reliant Energy Services, Inc., Reliant Energy Coolwater, Inc., Reliant Energy Ellwood, Inc., Reliant Energy Etiwanda, Inc., Reliant Energy Mandalay, Inc., and Reliant Energy Ormond Beach, Inc., as well Reliant Energy, Inc., Reliant Energy **[*3]** Power Generation, Inc., Reliant Energy California Holdings, Inc., and each of the affiliates and subsidiaries of Reliant Energy, Inc.

for class certification, so that final certification of the Settlement Class is appropriate. There **[*6]** have been no objections to the propriety of class certification.

5. The Court finds for the purposes of settlement that: (a) the Settlement Class is ascertainable; (b) the members of the Settlement Class are so numerous that joinder would be impractical; (c) there is a community of interest between the members of the Settlement Class; (d) there are questions of law and fact that are common to the claims of the respective members of the Settlement Class and those common questions predominate over individual questions; (e) the claims of the Class Representatives are typical of the claims of absent members of the Settlement Class to which they belong; and (e) the Class Representatives and their counsel ("Class Counsel") have and will fairly and adequately represent the interests of the absent members of the Settlement Class.

6. The Settlement Class meets the predominance and superiority requirements for class certification. Common issues of fact and law predominate in this proceeding, for the claims of members of the Settlement Class hinge on whether a conspiracy existed among Reliant and its competitors and whether Reliant engaged in unlawful and unfair business practices, and whether **[*7]** such alleged misconduct resulted in supra-competitive prices. This Class Action is superior to individual actions because, given the substantial costs associated with litigating an individual action and the relatively small amount of recoverable damages per class member, Reliant would not likely have paid any consideration to the class absent class treatment of the claims of Settlement Class members.

7. Accordingly, pursuant to *California Code of Civil Procedure section 382*, the Court provides final certification of the Settlement Class for settlement purposes only, and appoints the Class Representatives and Class Counsel to represent the Settlement Class.

8. Three persons, Ramona J. Law, and Floyd and Anita Wilson, have timely requested exclusion from the Settlement Class, and they are so excluded.

9. The Court hereby grants final approval to the Settlement and finds that it is fair, reasonable, and adequate, and in the best interests of the Settlement Class as a whole. The Settlement Agreement requires Reliant to provide consideration valued at approximately $512 million. The consideration will benefit members of the Settlement Class by, among other things, reducing the cost of electricity purchased by class members.

10. The Settlement **[*8]** is entitled to a presumption of reasonableness, as it was negotiated at arms'-length over an extended period of time by experienced and well-prepared Class Counsel, and only one objection has been received. See 7-*Eleven Owners for Fair Franchising v. Southland Corp. (2001) 85 Cal. App. 4th 1135, 1151, 102 Cal. Rptr. 2d 777*. The Court also notes that the California Attorney General, the California Public Utilities Commission ("CPUC"), and other state and municipal officers and agencies have all endorsed the Settlement as parties to the Settlement Agreement.

11. The Settlement is also fair, reasonable, and adequate, as measured by the relevant criteria. See *Dunk v. Ford Motor Co. (1996) 48 Cal. App. 4th 1794, 1801, 56 Cal. Rptr. 2d 483* (listing and applying factors). In light of the available estimates of Reliant's liability, and this Court's October 3, 2005 Order Sustaining Demurrer Without Leave to Amend and Dismissing Master Complaint holding that Plaintiffs' claims are barred in their entirety by federal field preemption, federal conflict preemption, and the federal filed-rate doctrine, the likelihood that Plaintiffs could have actually collected a judgment larger than the Settlement is dubious at best.

12. Prior to entering into the proposed Settlement, Class Counsel, who have extensive experience in class action and antitrust litigation, were well-informed about the **[*9]** potential risks and rewards of continued litigation, having conducted extensive discovery and ' investigation, having consulted extensively with experts concerning class members' damages, and having litigated numerous pleading challenges.

13. Finally, the reaction of class members strongly favors settlement approval. While the Settlement Class contains approximately 13 million members, only three of them have chosen to opt-out of the Settlement Class, and only one has objected to the Settlement.

14. The sole objection to the proposed Settlement, by attorney Roger M. Lindmark, is overruled. Mr. Lindmark objects that notice of the proposed Settlement should have been translated into foreign languages and published in foreign language newspapers. The declaration of the Settling Parties' notice expert establishes that the notice was in fact translated into Spanish and numerous Asian languages, and published in 12 Hispanic and 12 Asian language newspapers in California. Mr. Lindmark also objects that the Settlement Agreement and pleadings in the case were not translated into foreign languages. The published notice provided to Settlement Class Members complies with California law, including **[*10]** without limitation, California Rules of Court 1856(d) and 1859(f), and the general requirements of due process. The Court has broad discretion in fashioning an appropriate notice program, and finds that the translated notices were sufficient to apprise non-English speaking Settlement Class members of their rights and options. Finally, Mr. Lindmark objects that a portion of the Settlement consideration should have been diverted to a charity as a *cy pres* award. The Court finds that a *cy pres* award is unnecessary and inappropriate in this case, as there will be no unclaimed funds, because all of the available Settlement consideration will be passed through to Settlement Class members by their respective utilities.

15. Accordingly, the Settlement Agreement, attached hereto as Exhibit A, is approved and made a part of this judgment as if fully set forth herein, and shall have the full force and effect of an order of this Court. The parties shall consummate the Settlement Agreement according to its terms.

16. Under *California Code of Civil Procedure sections 578*, *579*, and *664.6*, the Court, in the interests of justice, there being no just reason for delay, expressly directs the Clerk of the Court to enter this Judgment, Final Order, and Decree, and hereby decrees, that upon entry, it **[*11]** be deemed as a final judgment with respect to all claims by members of the Settlement Class against Reliant, in accordance with the terms of the Settlement Agreement.

17. Nothing in the Settlement Agreement is intended to release any nonsettling defendant, or any other nonsettling entity, other than the Reliant Parties (as defined in the Settlement Agreement) and the persons and entities identified in Paragraph 8.3 of the Settlement Agreement. Each member of each Settlement Class (including their past, present or future agents, legal representatives, trustees, parents, estates, heirs, executors and administrators) shall not, hereafter, assert any claim, demand, action, suit, or cause of action, whether class or individual, against any such releasee based upon any claim released in the Settlement Agreement.

18. Additionally, each member of the Settlement Class hereby expressly waives and releases any and all provisions, rights and benefits conferred by *California Civil Code section 1542*. Each member of the Settlement Class may hereafter discover facts other than or different from those which he, she or it knows or believes to be true with respect to the claims which are the subject matter of the provisions of the Settlement **[*12]** Agreement, but each member of the Settlement Class hereby expressly waives and fully, finally and forever settles and releases, any known or unknown, suspected or unsuspected, contingent or noncontingent claim with respect to the subject matter of the provisions of the Settlement Agreement, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts.

19. Without affecting the finality of this Judgment, Final Order, and Decree, the Settling Parties, including the members of the Settlement Class, have submitted to the exclusive and continuing jurisdiction of this Court, and this Court reserves exclusive and continuing jurisdiction over the Settlement and the Settlement Agreement, including the administration and consummation of the Settlement.

20. The Class Action is dismissed with prejudice, and, except as provided herein or in the Settlement Agreement, without costs.

DATED: May __, 2006

The Honorable Joan M. Lewis

Coordination Trial Judge

Judge of the Superior Court, County of San Diego

Exhibit A

SETTLEMENT AND RELEASE OF CLAIMS AGREEMENT

This Agreement is entered into as of October 12, 2005, by and among each of the Reliant **[*13]** Parties, OMOI, each of the California Parties, each of the Additional Claimants, each of the Class Action Parties, mid each of the Local Governmental Parties. Each of the Reliant Parties, OMOJ, the California Parties, Additional Claimants, Class Action Parties, and Local Governmental Parties is a "Party," and collectively they are "Parties" to this Agreement Unless otherwise expressly provided for herein, each capitalized term used in this Agreement shall have the meaning set forth for such term in Article 1 or as defined elsewhere in this Agreement.

RECITALS

A. *Whereas*, various of the Parties are engaged in or interested in complex and disputed regulatory proceedings, appellate proceedings, litigation, and investigations regarding numerous issues and allegations arising from events in the California and western electricity and natural gas markets;

B. *Whereas*, the Parties have determined that it is preferable to settle the disputes addressed herein, rather than litigate;

C. *Whereas*, the Parties entered into a Memorandum of Understanding on August 12, 2005 ("Memorandum of Understanding"), under which they agreed to resolve their disputes and to further memorialize their settlement through **[*14]** this Agreement which will, when fully executed, and subject to the provisions of Section 8.9, supersede in its entirety the Memorandum of Understanding;

D. *Whereas*, this Agreement contemplates a comprehensive resolution of all disputes and other matters addressed herein (i) through the settlement of the regulatory proceedings, appellate proceedings, litigation, and claims identified herein, and (ii) by effectuating the transactions, granting of rights and benefits, and assumption of obligations specified and provided for herein (such comprehensive resolution and such transactions are referred to herein collectively as the "Settlement"); and

E *Whereas*, CHRS and Reliant concurrently are finalizing a settlement of the claims described in Section 8.7.2, below, as contemplated by the Memorandum of Understanding;

Now, Therefore, in consideration of the mutual covenants and agreements, and other good and valuable consideration provided for herein, and subject to and upon the terms and conditions hereof, the Parties agree as follows:

AGREEMENT

1. DEFINITIONS

The following capitalized terms, which are in addition to other terms with initial capital letters defined in the body of this Agreement, when **[*15]** used in this Agreement, including the Exhibits hereto, shall have the meanings specified in this Article 1.

1.1 **"Additional Claimants"** means the Oregon Attorney General and the Washington Attorney General.

1.2 **"Agreement"** means this Settlement and Release of Claims Agreement, including all Exhibits, as the same may be amended, modified, supplemented, or replaced from time to time.

1.3 **"Assigned Assets"** means, collectively, the refunds and other rights to payment Reliant is assigning to the California Parties, effective as of the Settlement Effective Date, pursuant to Sections 43.1, 4.3.2 and 4.3.3 of this Agreement.

1.4 **"Audit Period"** has the meaning set forth in Section 5.6.1.

1.5 **"Available Operating Capacity"** has the meaning set forth in Section 5.1.

1.6 **"Business Day"** has the same meaning as provided in *California Civil Code Section 9*.

1.7 **"California Attorney General"** means the People of the State of California, *ex rel*. Bill Lockyer, Attorney General.

1.8 **"California Class"** means the plaintiff class representatives in the Wholesale Electricity Antitrust Cases, on behalf of themselves, and a settlement class composed of all persons and entities in the State of California who purchased electric power for purposes other **[*16]** than resale or distribution since July 1, 1998, including all persons and entities within the class definition pled in the Master Complaint filed in Wholesale Electricity Antitrust Cases.

1.9 **"California Litigation Escrow"** has the meaning set forth in Section 6.2.

1.10 **"California Parties"** means, collectively, PG&E, SCE, SDG&E, the California Attorney General, CERS, CEOB and the CPUC.

1.11 **"California Utilities"** means PG&E, SCE and SDG&E.

1.12 **"CEOB"** means the California Electricity Oversight Board.

1.13 **"CERS"** means the California Department of Water Resources acting solely under authority and powers created by California Assembly Bill 1 from the First Extraordinary Session of 2000-2001, codified in *Sections 80000 through 80270 of the California Water Code*. CERS does not include the California Department of Water Resources with respect to the State Water Project.

1.14 **"Class Action Effective Date"** has the meaning set forth in Section 2.5.

1.15 **"Class Action Parties"** means the California Class and the Egger Class.

1.16 **"Commandeering Litigation"** means the litigation arising from the commandeering by Governor Davis of the block forward contracts of PG&E and SCE, including the coordinated proceedings pending before the Superior Court for the State **[*17]** of California for the County of Sacramento known as the Inverse Condemnation Cases, Judicial Council Coordination Proceeding No. 4203.

1.17 **"CPUC"** means the California Public Utilities Commission.

1.18 **"CPUC General Order 167"** means the "General Order Implementing and Enforcing Electric Generator General Duty Standards, Maintenance Standards, and ISO's Outage Coordination Protocol" adopted by the CPUC in its Decision 04-05-018, and reported at *2004 Cal. PUC LEXIS 227 (May 6, 2004)*.

1.19 **"Deemed Distribution"** has the meaning set forth in Section 6.4.2.

1.20 **"Deemed Distribution Participant"** means the Market Participants listed on Exhibit C.

1.21 **"Deposit Fund Account"** has the meaning set forth in Section 4.2.4.

1.22 **"Egger Class"** means the plaintiffs in *Egger, et al. v. Dynegy, Inc., et al.*, Case No. 03 CV 1060 RHW (S.D. Cal.) ("Egger"), on behalf of themselves and all persons and entities in Oregon, Washington, Utah, Nevada, Idaho, New Mexico, Montana and Arizona who purchased electric power for purposes other than resale or distribution since July 1, 1998, including all persons and entities within the class definition pled in *Egger*.

1.23 **"Emissions Offset"** means the claim for recovery of emissions costs incurred by a Market **[*18]** Participant's generating units during the refund period as adopted by FERC. *See, e.g.,* *San Diego Gas & Elec. Co. v. Sellers, et al., 96 FERC ¶ 61,120 at 61,519 (Jul. 25, 2001)* (adopting emissions cost adjustment to seller refund liabilities).

1.24 **"Execution Date"** means the dale this Agreement has been executed by the Reliant Parties, OMOI, each of the California Parties, euch of the Additional Claimants, and each of the Class Action Parties. The Execution Date may occur independently of any execution or non-execution of this Agreement by the Local Governmental Parties.

1.25 **"FERC"** means the Federal Energy Regulatory Commission.

1.26 **"FERC Allowances Determination"** means the FERC order directing the payment of Fuel Cost Allowances in the FERC Refund Proceedings, regardless of whether such order is subject to requests for stay, rehearing or appeal, provided that such order has not been stayed pending such rehearing or appeal.

1.27 **"FERC Interest Determination"** means the FERC order directing the payment of interest on receivables and refunds based on the ISO and PX settlement reruns and refund calculations, regardless of whether such order is subject to requests for stay, rehearing, or appeal, provided that such order has not been stayed pending such rehearing or appeal.

1.28 **[*19]** **"FERC Interest Rate"** shall have the meaning set forth in *18 C.F.R. § 35.19a(a)(2) (2005)* or any successor thereto.

1.29 **"FERC Receivables Determination"** means the FERC order issued in the FERC Refund Proceedings which provides the Parties with sufficient information to establish the final amount of the Reliant Receivables, regardless of whether such order is subject to requests for stay, rehearing or appeal, provided that such order has not been stayed pending such rehearing or appeal.

1.30 **"FERC Refund Allocation Matrix"** means the matrix attached as Exhibit B that sets forth the various allocation percentages with respect to certain portions of the Settlement Amount that are applicable to each Settling Claimant and others that are owed refunds or other amounts in the FERC Refund Proceedings pursuant to this Agreement.

1.31 **"FERC Refund Determination"** means the FERC order establishing the amount of Reliant Refunds owed to Non-Settling Participants, regardless of whether such order is subject to requests for stay, rehearing or appeal, provided that such order has not been stayed pending such rehearing or appeal.

1.32 **"FERC Refund Proceedings"** means the proceedings conducted before FERC in FERC Docket Nos. ELOO-95, **[*20]** *et al.*, EL03-170, EL03-180, *et al.*, PA02-2, IN03-10 and EL03-59 as they relate to sales in the ISO and PX markets and sales to CERS for the period January 1, 2000 - June 20, 2001, and any related appeals and/or petitions for review and any proceedings on remand.

1.33 **"FERC Settlement Order"** means the FERC order granting the Required Approval with respect to FERC, in accordance with Sections 10.1 and 10.1.1 of this Agreement.

1.34 "**Final Staff Report"** means the final report entitled "Final Report On Price Manipulation In Western Markets - - Fact Finding Investigation Of Potential Manipulation Of Electric And Natural Gas Prices" issued by FERC staff on March 26, 2003 in Docket No. PA02-2.

1.35 **"Fuel Cost Allowance"** means the claim for recovery of fuel costs incurred by generating units made pursuant to FERC orders in the FERC Refund Proceedings. *See, e.g., San Diego Gas & Elec. Co., et al., 102 FERC¶ 61,317 at PP 56-63 (Mar. 26. 2003), 103 FERC ¶ 61,078 (Apr. 22, 2003)*, *105 FERC ¶ 61,066 (Oct. 16, 2003)*, *107 FERC ¶ 61,166 (May 12, 2004)*, *108 FERC ¶ 61,219* (Sept. 2, 2004).

1.36 **"GADS Data"** has the meaning set forth in Section 5.6.2.

1.37 **"Governmental Authority"** means any nation or government, any stale or other political subdivision thereof, and any entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to a government.

1.38 **"ISO"** means the California **[*21]** Independent System Operator Corporation, a California public benefit corporation.

1.39 **"Local Governmental Parties"** means those of the following identified entities that have executed this Agreement on or about the Execution Date, subject to obtaining the approvals referenced in Section 10.2: The City and County of San Francisco; the City of Oakland; the County of Santa Clara; the County of Contra Costa; Valley Center Municipal Water District; Padre Dam Municipal Water District; Ramona Municipal Water District; Helix Water District; Vista Irrigation District; Yuima Municipal Water District; Fallbrook Public Utility District; Borrego Water District; Metropolitan Transit Development Board; San Diego Trolley, Inc.; San Diego Transit Corporation; and Sweetwater Authority.

1.40 **"Market Participants"** means, other than the ISO and PX themselves, those entities that were ISO scheduling coordinators or PX participants or otherwise directly sold energy to or purchased energy from the ISO and/or PX during part or all of the Settlement Period.

1.41 **"Memorandum of Understanding"** has the meaning set forth in Paragraph C of the Recitals.

1.42 **"NERC"** means the North American Electric Reliability Council. **[*22]**

1.43 **"Net Refund Recipient"** means a Settling Participant that is owed net refunds after consideration of amounts that the particular Settling Participant may itself owe to the market in the form of refunds.

1.44 **"Net Payers"** has the meaning set forth in Section 6.4.4.

1.45 **"Non-Settling Participants"** means Market Participants other than the Reliant Parties, the California Parties, Additional Claimants, Class Action Parties, Local Governmental Parties, and the Opt-In Participants.

1.46 **"OMOI"** means FERC's Office of Market Oversight and Investigations.

1.47 **"Opt-In Participant"** means a Market Participant that has elected to join this Settlement in accordance with Article 9.

1.48 **"Oregon Attorney General"** means the State of Oregon, Department of Justice, Office of the Attorney General, Hardy Myers, Attorney General.

1.49 **"Partnership/Gaming Proceeding"** means the proceedings in FERC Docket Nos. EL03-137, *et al*. (including Docket No. EL03-170) and EL03-180, *et al.*, and any related appeals and/or petitions for review and any proceedings on remand.

1.50 **"Party"** and "Parties" have the meanings set forth in the preamble to this Agreement.

1.51 **"PG&E"** means Pacific Gas and Electric Company.

1.52 **"PG&E [*23] Plan Escrow"** means the escrow established by PG&E pursuant to PG&E's plan of reorganization and other ancillary agreements for payment of its outstanding debts to the PX and to the ISO.

1.53 **"Post-January 17, 2001 Period"** means the period January 18, 2001 through June 20, 2001, but, with respect to PX transactions, not any period included in the Pre-January 18, 2001 Period.

1.54 **"Pre-January 18, 2001 Period"** means the period October 2, 2000 through January 17, 2001. When applied to PX transactions, the Pre-January 18, 2000 period means the period October 2, 2000 through January 31, 2001.

1.55 **"Pre-October Period"** means the period May 1, 2000 through October 1, 2000.

1.56 **"PX"** means the California Power Exchange Corporation, a California public benefit corporation.

1.57 **"PX Retained Claims Litigation"** means the actions filed by the PX against former governors and officers of the PX for transactions and events that began prior to the effective date of the PX's plan of reorganization on April 1, 2003. These proceedings are identified in Attachment B-1 to the settlement agreement filed with FERC on September 1, 2005, as part of an offer of settlement in FERC Docket Nos. ER05-167, *et al.*

1.58 **[*24] "PX Settlement Clearing Account"** means any and all accounts of the PX or the reorganized PX holding funds in trust pursuant to the terms of the PX Tariff, ISO Tariff, or a court order. The PX Settlement Clearing Account does not include collateral and funds held for payment of chargeback entitlements, which are maintained in segregated accounts, as those terms are defined in the PX's First Amended Chapter 11 Plan.

1.59 **"PX Wind-Up Charges"** means the charges payable under FERC's orders in FERC Docket Nos. ER05-167, ER02-2234, ER03-139, ER03-791, ER04-111 and ER04-785 or such other charges that the PX may seek from its Market Participants and that are put into effect through acceptance by FERC of a PX tariff.

1.60 **"Receivables Excess"** means the amount, if any, by which the actual Reliant Receivables are more than $299,546,045 as determined by FERC in the FERC Receivables Determination.

1.61 **"Receivables Shortfall"** or "Receivables Shortfalls" means the amount, if any, by which the actual Reliant Receivables are less than $299,546,045 as determined in the FERC Receivables Determination.

1.62 **"Refund Period"** means the period October 2, 2000 through June 20, 2001.

1.63 **"Refund Excess"** means the **[*25]** amount, if any, by which the funds deposited in the Reliant Refund Escrow for refunds to Non-Settling Participants based on the FERC Refund Allocation Matrix, exceed the amounts needed to satisfy all refund awards made to Non-Settling Participants for any particular period, *e.g.* the Pre-October Period, the Pre-January 18, 2001 Period, or the Post-January 17, 2001 Period, as determined by FERC.

1.64 **"Refund Shortfall"** means the amount, if any, by which the funds deposited in the Reliant Refund Escrow for refunds to Non-Settling Participants based on the FERC Refund Allocation Matrix, are insufficient to satisfy all refund awards made to Non-Settling Participants for any particular period, *e.g.* the Pre-October Period, the Pre-January 18, 2001 Period, or the Post-January 17, 2001 Period, as determined by FERC.

1.65 **"Reliant"** or the **"Reliant Parties"** means Reliant Energy, Inc., Reliant Energy Services, Inc., a Delaware corporation, Reliant Energy Power Generation, Inc., Reliant Energy California Holdings, Inc., Reliant Energy Coolwater, Inc., Reliant Energy Ellwood, Inc., Reliant Energy Etiwanda, Inc., Reliant Energy Mandalay, Inc., Reliant Energy Ormond Beach, Inc. and each of the affiliates **[*26]** and subsidiaries of Reliant Energy, Inc. listed on Exhibit A, which shall be bound to this Agreement by the execution of this Agreement by Reliant Energy, Inc.

1.66 **"Reliant Gaming Settlement"** means the Agreement and Stipulation filed in FERC Docket No. EL03-170 on August 29, 2003 and approved by FERC on March 4, 2004, *Reliant Resources, Inc.*, 106 FERC ¶61, 207 (2004).

1.67 **"Reliant/OMOI Settlement"** means the Stipulation and Consent Agreement in Docket Nos. EL03-59, IN03-10 and PA02-2, approved by FERC on October 2, 2003, *Reliant Energy Services, Inc., 105 FERC ¶ 61,008 (2003)*, as modified by FERC order issued September 22, 2004, *Reliant Energy Services, Inc., 108 FERC ¶61,278(2004)*.

1.68 **"Reliant Receivables"** means all of Reliant's rights and claims to payment by or from the PX and/or the ISO for sales of energy and ancillary services into the California power markets during the period January 1, 2000 through June 20, 2001 (including the amount of interest on unpaid amounts of Reliant Receivables, the right to which attaches to the Reliant Receivables). As of August 12, 2005, the Parties were informed by the PX and ISO that Reliant has a claim to unpaid receivables, before interest, totaling $299,546,045. The Reliant Receivables include $31,253,850, which reflects a reversal of the PX soft cap (as calculated in accordance with FERC's order **[*27]** of April 26, 2001 in the *FERC Refund Proceedings, San Diego Gas & Elec. Co. v. Sellers, 95 FERC ¶ 61,115 (2001))*. The Reliant Receivables shall not reflect any third party Emissions Offsets or Fuel Cost Allowance costs charged to Reliant.

1.69 **"Reliant Refunds"** means the amounts determined by FERC in the FERC Refund Proceedings that Reliant is required to pay to Market Participants.

1.70 **"Reliant Refund Escrow"** has the meaning set forth in Section 6.2.

1.71 **"Required Approvals"** means the approvals set forth in Article 10.1.

1.72 **"RES"** means Reliant Energy Services, Inc.

1.73 **"SCE"** means Southern California Edison Company.

1.74 **"SDG&E"** means San Diego Gas & Electric Company.

1.75 **"Settlement"** has the meaning set forth in Paragraph D of the Recitals.

1.76 **"Settlement Amount"** has the meaning set forth in Section 4.1.

1.77 **"Settlement Effective Date"** has the meaning set forth in Section 2.4.

1.78 **"Settlement Period"** means the period January 1, 2000 through December 31, 2001.

1.79 **"Settling Claimants"** means the Additional Claimants and the California Parties.

1.80 **"Settling Participants"** means the Settling Claimants and the Opt-In Participants.

1.81 **"Stay Period"** has the meaning set forth in Section 10.3.

1.82 **"Unsettled Participant Refund Amount"** has the meaning set forth in Section 7.2. **[*28]**

1.83 **"Unsettled Reliant Refund Amount"** has the meaning set forth in Section 7.1.3.

1.84 **"Washington Attorney General"** means the Washington State Office of the Attorney General, Rob McKenna, Attorney General.

1.85 **"WECC"** means the Western Electricity Coordinating Council (formerly the Western Systems Coordinating Council).

1.86 **"Wholesale Electricity Antitrust Cases"** means, collectively, *Gordon v. Reliant Energy, Inc, et al.*, Case No. GIC 758487 (San Diego Super. Ct., Nov. 27, 2000); *Hendricks v. Dynegy Power Marketing, Inc., el al.*, Case No. GIC 758565 (San Diego Super. Ct., Nov. 29, 2000); *Sweetwater Authority v. Dynegy Power Marketing, Inc., et al.*, Case No. GTC 760743 (San Diego Super. Ct., Jan. 16, 2001); *State of California, ex rel. City Attorney for the City and Comity of San Francisco, Dennis J. Herrera v. Dynegy Power Marketing, Inc., et* *al.*, Case No. SCV 318189 (San Fran. Super. Ct., Jan. 18, 2001); *Pier 23 Restaurant and Oscar's Photo Lab v. PG&E Energy Trading, Inc., et al.*, Case No. SCV 318343 (San Fran. Super. Ct., Jan. 24, 2001); and *Bustamante v. Dynegy, Inc., et al.*, Case No. BC 249705 (Los Angeles Super. Ct., May 2, 2001), previously coordinated as Wholesale Electricity **[*29]** Antitrust Cases I & II, California Judicial Council Coordination Proceeding Nos. 4204 and 4205.

1.87 **"Williams, Dynegy, Duke, Mirant and Enron Settlements"** means the settlements among certain suppliers involved in the FERC Refund Proceedings the California Parties, OMOI and others, each of which either was approved by FERC in orders reported at *San Diego Gas & Elec. Co. v. Sellers*, 108 FERC ¶61, 002 (Jul. 2, 2004) (Williams); *109 FERC ¶ 61,071 (Oct. 25, 2004)* (Dynegy); *109 FERC ¶ 61,257 (Dec. 7, 2004)* (Duke); and *111 FERC ¶ 61,017(Apr. 13, 2005)* (Mirant), or, in the case of Enron, is pending approval before FERC in Docket No. ELOO-95 (offer of settlement filed Aug. 24, 2005).

2. CONDITIONS TO EFFECTIVENESS; SETTLEMENT EFFECTIVE DATE; TERMINATION

2.1 **Agreement Binding on Execution Date**. Except (i) as provided in Section 2.3, and (ii) as to OMOI, whose obligations under this Agreement shall not be effective until the issuance of the FERC Settlement Order, this Agreement shall be a binding obligation of each Party immediately upon the Execution Date. If any Local Governmental Entity has not yet received its approval (referenced in Section 10.2) by the Execution Date, the obligations as to that Local Governmental Entity shall not be effective until such approval is obtained.

2.2 **Opt-In Participants**. Each Opt-In Participant shall be bound by all of the provisions **[*30]** of this Agreement in accordance with Section 9.1.

2.3 **Conditions Precedent to Certain Obligations**. It is a condition precedent to (i) the obligation of a Party to make payments, assign receivables or other rights to payment, assume liabilities, or release claims hereunder, and (ii) the effectiveness of all releases and the withdrawals of claims, defenses, protests, petitions for rehearing and challenges specified hereunder, that the Settlement Effective Date has occurred.

2.4 **Settlement Effective Date**. The "Settlement Effective Date" shall occur on the date, following the Execution Date, that the Required Approval with respect to FERC (as defined in Section 10.1) has been entered, issued, or otherwise obtained and is in full force and effect and not then stayed, notwithstanding that a request for stay, rehearing, or appeal may then be pending. The Settlement Effective Date is not dependent on the occurrence of the Class Action Effective Date.

2.5 **Class Action Effective Date**. The Class Action Effective Date with respect to the California Class shall be the date on which the order certifying the California Class for settlement purposes and the final judgment of approval as between Reliant **[*31]** and the California Class is final and no longer subject to any further appeal, and, with respect to the Egger Class, shall be that date on which the order certifying the Egger Class for settlement purposes, and the final judgment of approval of the Settlement as between Reliant and the Egger Class, is final and no longer subject to any further appeal.

2.6 **Termination (Other Than As to Class Action Parties)**. Except as provided in Section 2.7, if the Settlement Effective Date has not yet occurred, and unless otherwise agreed to by the Parties (other than the Class Action Parties) in writing, this Agreement shall terminate on the earlier to occur of: (i) the date on which a FERC order rejecting the settlement in whole or in material part (including any refusal on the part of FERC to issue an order directing the PX to release funds from the PX Settlement Clearing Account as required in this Agreement) becomes final and no longer subject to appeal; or (ii) September 1, 2006. Nothing herein shall be construed as obligating any Party to appeal an order that fails to approve this Settlement

2.7 **Effect of Termination**. In the event of termination pursuant to Section 2.6, this Agreement, except **[*32]** for the provisions set forth in this Section 2.7 and in Sections 10.3, 14.1, 14.3, 14.4, 14.5, 14.6, 15.3 and 15.4, shall be null and void and of no further effect, with all rights, duties and obligations of the Parties thereafter restored as if this Agreement had never been executed; provided, however, that the Parties may, in the sole discretion of each Party, agree to attempt to modify the Agreement in a manner that would resolve the grounds for which the Required Approval with respect to FERC was denied, and provided further that the tolling provision set out at Section 8.9 shall survive any such termination.

2.8 **Termination as Between Reliant and the Class Action Parties**. The reciprocal obligations in this Agreement as between Reliant and each of the Class Action Parties shall terminate on the entry of an order of the pertinent court denying preliminary or final approval of this Agreement as to any such Class Action Party; provided that, if review of any such order is sought, the termination shall not be effective until the order is final. Any such termination as between Reliant and the Class Action Parties has no effect on this Agreement as between Reliant and the Settling Participants. **[*33]**

3. **SETTLEMENT AND ACKNOWLEDGMENT**

3.1 **Settlement and Acknowledgement of Compromise**. The payments and other consideration specified in this Agreement, along with the covenants and obligations set forth in this Agreement, settle and compromise the Parties' and Opt-In Participants' claims in the releases set forth in this Agreement.

4. MONETARY CONSIDERATION PROVIDED BY THE RELIANT PARTIES

4.1 **Settlement Amount**. In consideration of the respective covenants herein, Reliant has provided or shall provide the monetary consideration set forth in Sections 4.1.1, 4.1.2, 4.1.3, 4.1.4 and 4.1.5 (collectively the "Settlement Amount").

4.1.1 **Reliant Receivables (approximately $299,546,045)**. The Reliant Receivables shall be assigned to the California Parties free and clear of all liens, claims, encumbrances, and interests of any kind whatsoever, including any liens or encumbrances related to the borrowings referenced in Section 11.4.

4.1.2 **Prior Settlement Amounts ($64,653,274)**. Certain of Reliant's prior settlements with FERC trial staff and OMOI shall comprise part of the Settlement Amount as follows:

(i) The settlement amount of $836,000.16 previously negotiated by Reliant with respect to the Reliant **[*34]** Gaming Settlement shall comprise part of the Settlement Amount and shall be distributed pursuant to future FERC orders in the gaming proceedings, FERC Docket Nos. EL03-170. The payment of $336,000.16 shall be in addition to the cash payments provided for in Sections 4.1.2(ii), 4.1.2(iii), 4.1.3 and 4.1.4 of this Agreement.

(ii) The settlement amount of $13,817,274 previously negotiated by Refiant and FERC staff and approved by FERC on January 31, 2003, *102 FERC ¶ 61,108 (2003)*, with respect to withholding during the period June 20-21, 2000, for which sums have already been distributed, shall comprise part of the Settlement Amount, and the allocations already ordered by FERC shall not be revised. All Parties and Opt-In Participants shall withdraw their objections to that settlement.

(iii) The settlement amount of $50,000,000 previously negotiated by Reliant and OMOI in the Reliant/OMOI Settlement shall comprise part of the Settlement Amount, with the allocation as to Parties and Opt-In Participants to be established by the Pre-October Period Allocation percentages in the FERC Refund Allocation Matrix, and any allocations to other parties to be determined by further FERC order in the Partnership/Gaming Proceeding. **[*35]** The payment of such $50,000,000 shall be in addition to the payments provided for in Sections 4.1.2(i), 4.1.2(n), 4.1.3 and 4.1.4 of this Agreement.

4.1.3 **Cash to Additional Claimants ($7,000,000)**. Reliant shall pay $3,500,000 in cash to each of the Additional Claimants for a total of $7,000,000.

4.1.4 **Additional Cash Consideration ($131,503,955)**. Reliant shall pay in cash to the California Parties additional consideration of $131,503,955.

4.1.5 **Interest on ISO and PX Transactions (estimated to be 510,000,000 - $25,000,000)**. Reliant shall assign to the California Parties, free and clear of all liens, claims, encumbrances and interests of any kind whatsoever, any and all interest that, absent such assignment, Reliant would have been owed by the ISO and PX in relation to transactions from January 1, 2000 through June 20, 2001, which interest amount is estimated as of the date of this Agreement to be between $10,000,000 and $25,000,000. The assigned interest will in no event be less than zero, and Reliant will be responsible for payment to the ISO and/or PX of any interest it is determined to owe to the ISO or PX in excess of interest owed to Reliant.

4.2 **Settlement Amount Assignment and [*36] Payment Procedures**. The payment by Reliant of the Settlement Amount shall be accomplished as follows:

4.2.1 **Assignment of Reliant Receivables**. As of the Settlement Effective Date (i) the Reliant Parties shall, and do hereby, waive and release their claims against the obligors on the Reliant Receivables and assign, sell, transfer, convey and deliver to the California Parties, free and clear of all claims, liens and encumbrances whatsoever, including any liens or encumbrances related to the borrowings referenced in Section 11.4, and (ii) the California Parties shall, and do hereby, assume, purchase, acquire and accept, without recourse to the Reliant Parties, all of the Reliant Parties' right, title and interest in and to the Reliant Receivables and all claims, rights of action and defenses otherwise available to the Reliant Parties arising from or relating to the Reliant Receivables, as they may be adjusted at any time after August 12, 2005, whether in the preparatory rerun, in the FERC Refund Proceedings, or through any other ISO or PX settlement adjustments permitted under applicable ISO or PX tariffs. The foregoing term "without recourse" shall not, however, limit or be construed **[*37]** as limiting in any way any rights the California Parties have with respect to the Reliant Parties pursuant to the express written provisions, representations and warranties of this Agreement. Each of the Reliant Parties hereby irrevocably authorizes the California Parties, and their respective attorneys, agents, and employees, at any time and from time to time to file in any filing office in any Uniform Commercial Code jurisdiction any initial financing statements and amendments thereto that (i) describe the foregoing transfer, and (ii) provide any other information required by Part 5 of Article 9 of the Uniform Commercial Code of the jurisdiction in which such filing is made necessary for the sufficiency or filing office acceptance of such financing statements or amendments, including whether such Reliant Party is an organization, its type of organization and the charter or organization identification number issued to such Reliant Party. The California Parties agree to provide the Reliant Parties with a reasonable opportunity to review and comment on any such Uniform Commercial Code filings in advance of making such filings. Further, the Parties acknowledge and agree that: (i) the assignment of Reliant Receivables includes **[*38]** the right to interest on such Reliant Receivables pursuant to the FERC Interest Determination; (ii) the assignment of the Reliant Receivables pursuant to this Agreement does not include claims and defenses that arise as a result of the various contractual relationships among the Reliant Parties themselves; (iii) such claims and defenses shall not affect, hinder or impair the Reliant Receivables assigned to the California Parties hereunder; and (iv) the Reliant Receivables shall be used by the California Parties for the payment of refunds and other payments to Settling Participants as provided for under this Agreement or as the California Parties may separately agree upon among themselves as provided in Section 6.2.

4.2.2 **Scope of Assigned Reliant Receivables**. Except as otherwise expressly provided herein, the Reliant Receivables shall include any and all positive or negative allocations of charges or credits that may be made by the ISO or PX that cause an adjustment up or down in the Reliant Receivables as a result of or on account of ISO and PX transactions by or concerning Reliant in the period from January 1, 2000 through June 20, 2001. To the extent that the ISO or PX is determined **[*39]** in any future proceeding or for any reason to owe any additional amounts to Reliant or be owed any additional amounts by Reliant for the period from January 1, 2000 through June 20, 2001, such amounts are assigned to or, subject to the limitations set forth in Sections 6.9 and 8.7, become the responsibility of the California Parties. However, charges or credits that pertain to Reliant transactions in the ISO or PX during periods prior to January 1, 2000 or after June 20, 2001 ore not Reliant Receivables assigned to the California Parties, shall not in any way affect the Reliant Receivables, and shall remain the responsibility of or accrue to the benefit of

Reliant. FERC's approval of this Agreement in the FERC Settlement Order shall constitute direction to the ISO and PX to recognize and implement the assignment of the Reliant Receivables, as provided in Sections 4.1.1, 4.2.1 and this 4.2.2 and the treatment of PX Wind-Up Charges as provided in Sections 7.4 and 8.7.7.

4.2.3 **Transfer of Assigned Reliant Receivables Amount**. The FERC order described in Section 10.1 below shall be deemed to authorize and direct the PX to make the transfer set forth in Section 6.3.2.

4.2.4 **Payment Associated [*40] with the Reliant Gaming Settlement**. Within ten (10) Business Days after the Settlement Effective Date, Reliant shall pay the amount of $836,000.16 to a Deposit Fund Account established by the United States Treasury on behalf of FERC, in accordance with the FERC's orders regarding the Reliant Gaming Settlement and FERC orders in the gaming proceedings, FERC Docket Nos. EL03-137, *et al*. All Parties and Opt-In Participants shall remain free to assert any position they choose concerning the proper allocation by FERC of such settlement amount.

4.2.5 Payments Associated with the Reliant/OMOI Settlement. Within ten (10) Business Days of the Settlement Effective Date, FERC shall cause to be transferred to an account designated by the California Parties any and all amounts paid by Reliant pursuant to the Reliant/OMOI Settlement that are allocable to Parties and Opt-In Participants as established by the allocation percentages for the Pre-October Period in the FERC Refund Allocation Matrix, but not Reliant/OMOI Settlement amounts allocable to Non-Settling Participants which shall be allocated in the Partnership/Gaming Proceeding. Any additional payments owed by Reliant under the Reliant/OMOI Settlement **[*41]** shall be made when due to such account designated by the California Parties rather than the accounts specified in the Reliant/OMOI Settlement. The payment schedule adopted in the Reliant/OMOI Settlement shall not be revised. To ensure the timely performance of its payment obligations under the terms of the Reliant/OMOI Settlement, if, as of January 31, 2006 (or, if later, as of the Settlement Effective Date) the amount remaining to be paid under the Reliant/OMOI Settlement is greater than $10,000,000, then Reliant shall obtain, within ten (10) Business Days thereof, an irrevocable, standby letter of credit in the amount remaining to be paid under the Reliant/OMOI Settlement as of such date. Any such letter of credit shall be, in form and substance, acceptable to the California Parties, and shall be issued by a U.S. commercial bank or foreign bank with a U.S. branch whose non-credit enhanced, senior unsecured long-term debt at all times prior to the expiration of the letter of credit is at least A-from S&P or A3 from Moody's Investor Service.

4.2.6 Additional Cash Payments. No later than ten (10) Business Days after the Settlement Effective Date, Reliant shall pay the cash amounts set **[*42]** forth in sub-sections (i) through (iii) of this Section 4.2.6:

(i) $131,503,955 by wire transfer, from funds other than the Reliant Receivables, into an interest bearing escrow account designated as the Reliant Refund Escrow; and

(ii) $3,500,0000 by wire transfer, from funds other than the Reliant Receivables, to the Oregon Attorney General, which shall be deposited into the Department of Justice Client Trust Account established pursuant to *ORS 180.200*, for distribution from that account by the Oregon Attorney General as provided by law for such funds; and

(iii) $3,500,0000 by wire transfer, from funds other than the Reliant Receivables, to the Washington Attorney General, which shall be used for the direct or indirect benefit of energy consumers in the State of Washington at the sole discretion of the Washington Attorney General. Up to twelve percent (12%) of the total amount transferred to the Washington Attorney General may be used to pay for costs, attorneys' fees and administrative expenses incurred by the Washington Attorney General in its investigation and settlement negotiations, including costs, attorneys' fees, and administrative expenses related to implementation of this Agreement.

4.3 **[*43] Assignment of Rights to Refunds and Other Rights to Payment (Assigned Assets)**.

4.3.1 **Refunds Payable Co Reliant Parties**. In addition to payment of the Settlement Amount, the Reliant Parties, except as provided below in Section 4.3.2, shall, and do hereby waive and release their claims to and assign, sell, transfer, convey and deliver to the California Parties, free and clear of all claims, liens, and encumbrances, effective as of the Settlement Effective Date, all of their right, title and interest in and to any additional refunds and associated interest, surcharges, and other charges that are either directly or indirectly through others allocated to any of the Reliant Parties and to which the Reliant Parties may be found to be entitled in FERC Docket Nos. ELOO-95, *et al.*, and ELOO-98, *et al.*, including any refunds from suppliers payable to Reliant pursuant to a settlement of the type described in Section 8.7.6 of this Agreement.

4.3.2 **Refunds Payable by CERS**. In addition to payment of the Settlement Amount, the Reliant Parties shall, and do hereby waive and release their claims to and assign, sell, transfer, convey and deliver to CERS free and clear of all claims, liens, and encumbrances, **[*44]** effective as of the Settlement Effective Date, all of their right, title and interest in and to any refunds and associated interest resulting from any mitigation of sales by CERS of imbalance energy into the ISO real-time market, as well as surcharges and other charges associated with such sales, that may be payable pursuant to FERC's May 12, 2004 Order on Requests for Rehearing and Clarification in Docket Nos. ELOO-95, *et al.*, and ELOO-98, *et al.*, and subsequent orders, and all of their right, tide and interest in and to any such refunds and associated interest, surcharges, and other charges that are either directly or indirectly through others allocated to any of the Reliant Parties

4.3.3 **Assignment of Retained Claims Litigation, Commandeering** Litigation. The Reliant Parties waive and release and assign to PG&E, SCE and SDG&E (for the benefit of their ratepayers), free and clear of any interests, liens, claims and encumbrances, effective as of the Settlement Effective Date, any claim that Reliant may have had to proceeds of the PX Retained Claims Litigation and proceeds from the Commandeering Litigation.

4.4 This Section intentionally left blank.

4.5 Cooperation. The Parties shall cooperate **[*45]** with each other in providing the data and information necessary to implement this Article 4.

4.6 Failure of Consideration. In the event that (i) the assignment of the Reliant Receivables to the California Parties as provided for under Sections 4.1.1 and 4.2.1 or assignment of the Assigned Assets as provided for under Section 4.3 fails as a result a breach by Reliant of its representations and warranties set forth in Section 11.1 and/or Section 11.2 and/or Section 11.4; (it) the Reliant Receivables or any other rights to payment assigned pursuant hereto fail to transfer to the California Parties, pursuant to Sections 4.2.3, 4.3 and 6.3, free and clear of all liens, claims, encumbrances and interests of any kind whatsoever; (iii) the cash transfers required of Reliant pursuant to Sections 4.1.3, 4.1.4 and 4.2.6 are not timely made, in whole or in part, as required by this Agreement; or (iv) any Reliant Party takes any of the following actions, or any of the following actions are taken against any Reliant Party, and that action is reasonably likely to have a material adverse effect on the ability of the other Reliant Parties to perform fully and timely their obligations under this Agreement: **[*46]** (a) it commences a voluntary case, or an involuntary case is commenced against it and not dismissed within thirty (30) days thereafter, within the meaning of the United States Bankruptcy Code (*11 U.S.C. § 101 et seq.*), (b) it consents to the appointment of a custodian of it or for all or substantially all of its property, or (c) it makes a general assignment for the benefit of its creditors, then the California Parties may at their option, subject to the Reliant Parties' cure rights set forth below, terminate this Agreement in writing in its entirety *ab initio* except as to the tolling provisions of this Agreement and the other provision of this Agreement identified in Section 2.7, *i.e.*, as though the Settlement Effective Date had never occurred. All notices of termination delivered pursuant to this Section 4.6 shall be in writing and addressed to the Reliant Parties in accordance with the notice provisions set forth herein, and clearly state the grounds for termination, the identity of any Reliant Parties as to which clause (iv) above applies (if applicable), and the date on and after which such termination shall be effective. If the grounds for termination include clause (i) and/or (ii) and/or (iii) above **[*47]** and one or more of the Reliant Parties completely cures all defaults under those clauses that are identified in the California Parties' notice of termination within five (5) Business Days after the Reliant Parties' receipt of that notice of termination, including payment of interest at the FERC Interest Rate on any payments past due under this Agreement, then this Agreement shall not terminate *ab initio* and all defaults identified in the California Parties' notice of termination with respect to clause (i) and/or clause (ii) and/or clause (iii) above shall be deemed to have been cured.

5. **RELIANTS NON-MONETARY CONSIDERATION**

5.1 **Extension of Reliant's Must-Offer Obligation**. Upon the termination of Reliant's must-offer obligation pursuant to FERC's Order Approving Stipulation and Consent Agreement, *Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices, 102 FERC ¶ 61,108 at 61,289 (2003)*, Reliant shall continue to abide by a must-offer obligation for two additional years, by which it will submit supplemental energy bids for all uncommitted, Available Operating Capacity, as defined in this Section 5.1, from its generation assets located in California into the ISO imbalance energy market for all hours for which the ISO has issued a 24-Hour Forecast **[*48]** or Alert Notice pursuant to its Operating Protocol E-508 (Sep. 8, 2003). "Available Operating Capacity" is the unloaded and otherwise uncommitted capacity at the time a supplemental energy bid is submitted from a generating unit that is either on-line and synchronized or capable of being on-line and synchronized, calculated at the unit's maximum operating level:

(i) Adjusted for legitimate operating limitations, maintenance outages or reductions in capacity;
(ii) Adjusted for any limitations on operation under applicable law;
(iii) Adjusted for limitations under reliability must run agreements;
(iv) Minus capacity committed to be scheduled under a bilateral agreement;
(v) Minus capacity subject to real-time control by unaffiliated third-parties;
(vi) Minus capacity committed to provide ancillary services to the ISO either through the ISO's Ancillary Services market or through self-provision by a Scheduling Coordinator;
(vii) Minus capacity committed to self-provide station power; and
(viii) Minus the capacity committed to deliver energy or provide operating reserve to an electric distribution utility to serve retail customers.

5.2 **Reliant Compliance with FERC Market Behavior Rules**. Reliant **[*49]** shall comply with FERC's Docket No. EL01-118 market behavior rules, as they may be in force and amended from time to time. Reliant will not challenge, by means of objection, rehearing, appeal or otherwise, the market behavior rules adopted in the November 17, 2003 order, *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ° 61,218 (2003), and the May 19, 2004 order on rehearing, *107 FERC ¶ 61,175 (2004)*, provided that this commitment will not limit or restrict Reliant's right to participate in any future proceeding in the event of a remand to FERC of the market behavior rules by the Court in *Cinergy Marketing & Trading, LP. v. FERC*, Nos. 04-1168, *et al*. (D.C. Cir.), or to defend itself in any FERC investigation or complaint proceeding involving an alleged violation of such market behavior rules or to comment in any future proceeding on the interpretation or application of the market behavior rules.

5.3 **Reliant Compliance with ISO Tariff**. Reliant will comply with applicable ISO tariff provisions; provided, however, that each of the Parties is free to advocate changes in those tariff provisions.

5.4 **Reliant Cooperation with Respect to Claims Against Other Entities [*50]** .

5.4.1 **Cooperation with the California Parties and Class Action Parties**. Reliant will cooperate with the California Parties in pursuing daims and potential claims against suppliers other than Reliant relating to the operation of the California electricity and natural gas markets during the period January 1, 2000 through June 20, 2001, by making available to the California Parties such information and documents as they may specify that are (i) relevant to such claims, (ii) in its possession or control, and (iii) not proprietary or privileged. With respect to issues concerning the California or western electricity markets, Reliant shall make available to the California Parties and the Class Action Parties any current employees or consultants with knowledge of such information as witnesses; provided that, interviews or depositions shall be scheduled at mutually convenient times and the California Parties and Class Action Parties shall coordinate their requests for both documents and witnesses so as to avoid duplication and unnecessary burden on Reliant. With respect to issues concerning natural gas markets, Reliant shall make available to the California Parties any current employees with **[*51]** knowledge of such information as witnesses; provided that, interviews or depositions shall be scheduled at mutually convenient times and the California Parties shall coordinate their requests for both documents and witnesses so as to avoid duplication and unnecessary burden on Reliant. OMOI shall be permitted to attend and ask questions at any interview or deposition conducted pursuant to this Section 5.4.1, and, at its request, shall be provided with copies of any written information provided through such cooperative efforts. With respect to the Class Action Parties, Reliant will accept service by e-mail or fax delivery of document requests concerning matters relevant to the Class Action Parries' claims arising from the operation of the California or western electricity markets during the period from January 1, 2000 through June 20, 2001, provided Reliant is given reasonable time to comply. Such cooperation as set forth in this Section 5.4.1 shall be effective as of the Settlement Effective Date.

5.4.2 **Responsibility for Costs**. Each of the California Parties or Class Action Parties that invokes its rights under the foregoing provisions to obtain Reliant's cooperation shall reimburse **[*52]** Reliant for reasonable out-of-pocket expenses (except for attorneys' fees) incurred by Reliant in connection with providing that Party or Parties the cooperation specified in Section 5.4.1. Only Parties that have made a request for cooperation under Section 5.4.1 shall be responsible to Reliant for such reimbursement of costs associated with the request.

5.5 **Extension of Certain Power Sales Conditions**. Reliant will comply with the following power sales conditions (from Article IV, Section 3 of the Reliant/OMOI Settlement) with respect to its sales of electricity in the WECC through December 31, 2006. RES will sell power (other than any power that may be the subject of the auction described in Section IV, paragraph 4 of the Reliant/OMOI Settlement) at market-based rates subject to the following conditions:

5.5.1 **Reliant to Provide Monthly Reports to OMOI**. RES's sales of electricity in the United States portion of the WECC will be subject to review by FERC. During the period ending December 31, 2006, RES shall provide monthly reports to OMOI, including the information in Section 5.5.2, pursuant to the confidentiality provisions of *18 C.F.R. § 388.112 (2005)*. Such reports shall be provided to OMOI within **[*53]** ten (10) Business Days of the end of each calendar month through December, 2006.

5.5.2 **Reports to Include Data on Electricity Trades**. On a transaction-by-transaction basis, RES shall provide to OMOI data on all its completed electricity trades in the United States portion of the WECC. The data shall include counter-party name and buy-sell indication, and if executed on an electronic trading platform, the name of the electronic trading platform. The reports shall further provide price, quantity, transaction date, start and end date, and delivery point for each transaction. RES shall provide any additional information regarding such trades as OMOI reasonably requests.

5.5.3 **Reliant Communications Subject to OMOI Review**. RES shall provide OMOI upon request, pursuant to the confidentiality provisions of *18 C.F.R. § 388.112 (2005)*, with copies of emails, instant messages (*e.g.*, AOL Instant Messages) and telephone conversations of RES's power traders with market participants for transactions in the United States portion of the WECC that OMOI randomly requests for review by OMOI. To facilitate OMOI's review, RES will retain copies of emails of employees trading electricity in the United States portion of the **[*54]** WECC beginning on the effective date of the Reliant/OMOI Settlement and continuing thereafter on a rolling six-month basis. Beginning with the effective date of the Reliant/OMOI Settlement and continuing for three years thereafter, RES will also retain copies, in audiotape or electronic audio file format, of all telephone conversations of employees trading electricity in the United States. In addition, Reliant's Compliance Director for Trading and Compliance Manager for Trading will be located on the trade floor(s) to monitor trading activity and will also randomly monitor emails, instant messages and telephone conversations and will provide to OMOI monthly reports of this monitoring activity, pursuant to the confidentiality provisions of *18 C.F.R. § 388.112 (2005)*.

5.6 **Generation Outage Audit and Compliance Program**.

5.6.1 **Semi-Annual Outage Audits**. For a period of twelve (12) months following the Settlement Effective Date (the "Audit Period"), Reliant shall, at its expense, retain Washington Group International, or if Washington Group International is unable to perform the audit, another independent consulting or engineering company mutually agreed upon by Reliant and the CPUC, to perform semi-annual **[*55]** audits of outages during the Audit Period at Reliant's generating plants in California. The findings of each audit shall be provided directly by that independent company to OMOI and the CPUC, and shall be provided simultaneously to Reliant, without prior review by Reliant The audits shall review whether plant outages were legitimate and of an appropriate duration under the circumstances relevant to each outage.

5.6.2 **CPUC Review of Reliant GADS Data**. Within 30 days of the Settlement Effective Dale, Reliant shall provide to the CPUC Reliant's operations data for the "Generation Availability Data System" ("GADS Data"), compiled by the North American Electric Reliability Council ("NERC"), for the period January 1998 through November 2004, For a period of thirty-six (36) months from the Settlement Effective Date, Reliant shall submit its GADS Data for Reliant's California plants to NERC, and shall simultaneously authorize NERC to release that data and provide it directly to the CPUC. Reliant may request that the CPUC treat all or part of the GADS Data confidentially, and the CPUC will rule on such requests pursuant to the California Public Records Act (Title 1, Division 7, Chapter 3.5 of **[*56]** the California Government Code).

5.6.3 **Reliant Compliance with CPUC General Order 167**. Reliant shall comply with the requirements set forth in CPUC General Order 167, provided, however, that Reliant is free to advocate changes to such requirements, and to challenge the applicability of such requirements to Reliant.

5.6.4 **Reliant Compliance with CPUC Document Requests**. Reliant shall comply with requests by the CPUC for inspection of non-privileged documents under Reliant's control, to the extent required by applicable state and federal law.

5.7 **Antitrust Compliance Program**. Reliant Energy, Inc. shall institute, within thirty (30) Business Days after the Settlement Effective Date, an antitrust compliance program. The antitrust compliance program shall include not less than the following for directors, officers and employees of Reliant Energy, Inc.'s western commercial operations: (i) mandatory antitrust training, which may be computer based training, for each officer and employee; (ii) written compliance standards to be distributed to each officer and employee; (iii) annual review of the compliance program by the officers and directors of Reliant Energy, Inc. responsible for this program; **[*57]** (iv) appointment of an antitrust compliance officer or an antitrust compliance committee, which may be the Ethics or Compliance Officer and the Office of Ethics and Compliance of Reliant Energy, Inc.; (v) confidential reporting systems; (vi) disciplinary mechanisms to ensure enforcement of standards; and (vii) protocols and procedures for initialing and concluding internal investigations. For purposes of this Section 5.7, with respect to Reliant Energy, Inc., the term "employee" shall mean all U.S. exempt employees at the manager level or above for western commercial operations, and the terms "officers" and "directors" shall mean, respectively, the U.S. officers directing western commercial operations and U.S. directors of Reliant Energy, Inc. Nothing in this Section 5.7 is intended to suggest or reflect that any antitrust compliance program currently maintained by Reliant Energy, Inc. is not fully compliant with the requirements set out herein.

5.8 ISO and PX Information. The Reliant Parties authorize the ISO and PX to provide to the California Parties on or after the Execution Date any additional information, materials, or data that would otherwise be available to one or more of the **[*58]** Reliant Parties and that are otherwise not available to the California Parties and that are related to Reliant's sales and purchases in the ISO and/or PX markets during the Settlement Period; provided, that except as otherwise provided by applicable law, each of the California Parties agrees that it shall maintain such information in confidence and shall not disclose it to third parties other than (i) to its employees, lenders, counsel, accountants, advisors, or consultants who have a need to know such information for purposes of implementing or administering this Agreement (including the determination or allocation of the settlement proceeds) and who have agreed to keep such information confidential, or (ii) to OMOI, which shall treat any such information so provided as privileged pursuant to *18 C.F.R. § 388.112(c) (2005)* and shall place such information in a non-public file, or (iii) to FERC or a court to the extent necessary to implement this

Agreement or to pursue claims against entities other than Reliant relating to the Settlement Period, or (iv) as required by applicable law, rule, or regulation or any administrative, legislative, or judicial order.

6. DISPOSITION AND ALLOCATION OF THE SETTLEMENT [*59] AMOUNT

6.1 **Allocation and Distribution of the Settlement Amount**. The Settlement Amount to be provided pursuant to Section 4.1 shall be allocated and distributed among certain Market Participants and others in the manner set forth in this Article 6. For purposes of this Article 6, the period May 1, 2000 through June 20, 2001 shall be divided into the Pre-October Period, the Pre-January 18, 2001 Period, and the Post-January 17, 2001 Period.

6.2 **Escrow Accounts**. No later than ten (10) Business Days after the Settlement Effective Date, the California Parties shall establish an escrow account (the "Reliant Refund Escrow") for the purpose of receiving, holding and transferring the Reliant Receivables and certain cash payments to the extent provided for herein. The California Parties shall also establish a separate escrow account (the "California Litigation Escrow") for the purpose of receiving, holding and transferring such portion of the Reliant Receivables and cash payments that may be required or permitted herein to be transferred to the California Litigation Escrow as the California Parties may agree upon among themselves. The California Parties may from time to time transfer to the California **[*60]** Litigation Escrow amounts in the Reliant Refund Escrow that are not needed for refunds to others, provided however that no such transfer shall occur before the principal payments described in Section 6.4.7 are effectuated. The costs of creating and maintaining the Reliant Refund Escrow, the California Litigation Escrow, and any ether escrow accounts created in connection with this Agreement shall be the responsibility of the California Parties. In the event that both the Reliant Refund Escrow and the California Litigation Escrow are not available to begin receiving funds ten (10) Business Days after the Settlement Effective Date, then all time periods provided in this Agreement for the payment of fonds that include payments to or from the Reliant Refund Escrow or the California Litigation Escrow shall be extended by the number of days between the tenth (10th) Business Day after the Settlement Effective Date and the date on which both the Reliant Refund Escrow and the California Litigation Escrow are available to begin receiving funds. Upon payment by the Reliant Parties of the cash consideration required pursuant to Section 4.2.6 of this Agreement, except as expressly provided herein, **[*61]** the Reliant Parties shall have no further liability or obligation to make payments into the Reliant Refund Escrow or the California Litigation Escrow.

6.3 **Transfer of Reliant Receivables**.

6.3.1 **Notice to the ISO and the PX**. No later than six (6) Business Days after the Settlement Effective Date, the California Parties shall advise the ISO and the PX that the full amount of the Reliant Receivables has been assigned to me California Parties pursuant to Section 4.2.1, and such assigned Reliant Receivables shall be applied to the funding of the consideration provided for in this Agreement. The California Parties also shall identify for the PX the amounts of any Deemed Distributions, as provided for in Section 6.4.2.

6.3.2 **Transfer of Reliant Receivables to Reliant Refund Escrow**. No later than ten (10) Business Days after the Settlement Effective Date, the PX shall transfer a cash payment from the PX Settlement Clearing Account to the Reliant Refond Escrow, equal to the then current estimated amount of the Reliant Receivables, excluding interest thereon, (i) less an amount equal to the total of all Deemed Distributions pursuant to Section 6.4.2, (ii) less an amount equal to all distributions **[*62]** of funds relating to the period January I, 2000 through June 20, 2001 (including interest thereon) that have been paid by the ISO or the PX to the Reliant Parties after the Execution Date but prior to such cash transfer (such distributions being subject to Section 6.3.4), (iii) plus the amounts owed by Market Participants with negative allocations shown on the FERC Refund Allocation Matrix, provided that, consistent with a settlement among Enron, OMOI, and the California Parties, the amount relating to Enron as shown on the FERC Refund Allocation Matrix shall be transferred without reduction for Fuel Cost Allowance or Emissions Offset (under that agreement Enron is a Net Payer in the amount of $2,370,437). Subject to (he provisions of Section 4.5, the Reliant Parties will comply with their obligations as specified in other provisions of this Agreement, but shall have no additional obligations with respect to the amount referenced in this Section 6.3.2, including with respect to whether such amount is actually transferred by the PX or deposited into the Reliant Refund Escrow.

6.3.3 **Transfer of Retiant Receivables to California Litigation Escrow**. Upon a final determination of the amount **[*63]** of the Reliant Receivables in the FERC Receivables Determination, the PX shall transfer and deposit into the California Litigation Escrow the amount, if any, by which the Reliant Receivables exceeds the sum of the amounts transferred to the Reliant Refund Escrow pursuant to Section 6.3.2 and the amounts credited as Deemed Distributions. The Reliant Parties will comply with their obligations as specified in other provisions of this Agreement, but shall have no additional obligations with respect to the amounts referenced in this Section 6.3.3, including with respect to whether such amounts are actually transferred or deposited into the California Litigation Escrow.

6.3.4 **Early Distribution of Reliant Receivables**. In the event the ISO or PX distributes to Reliant any part of the Reliant Receivables subsequent to August 12, 2005 and prior to the final distribution of funds pursuant to Section 6.3.2 (including distributions occurring prior to the Settlement Effective Date), the Reliant Party receiving such Reliant Receivables shall hold such amounts in trust for the California Parties and within fifteen (15) Business Days (or, in the case of such distributions prior to the Settlement Effective **[*64]** Date, within fifteen (15) Business Days after the Settlement Effective Date) transfer an equal amount, plus associated interest at the annual rate of 3.75%, to the Reliant Refund Escrow or such other escrow as the California Parties may designate.

6.4 **Allocation to Market Participants**.

6.4.1 **FERC Refond Allocation Matrix**. The FERC Refund Allocation Matrix, Exhibit B, shows the allocation, as determined by the California Parties, among the California Parties and those other Market Participants that are owed refunds. The FERC Refund Allocation Matrix contains an allocation to three time periods (the Pre-October Period, the Pre-January 18, 2001 Period and the Post-January 17, 2001 Period) of refunds available for Settling Participants. The amounts shown in the FERC Refund Allocation Matrix reflect, among other things, an allowance for the Fuel Cost Allowance claims previously submitted by the Reliant Parties in the FERC Refund Proceedings in the amount reflected in Section 6.4.4. Subject to the adjustments set forth herein, each Settling Participant shall be allocated the net refund amounts shown for that Settling Participant on the FERC Refund Allocation Matrix. All distributions of funds **[*65]** according to the FERC Refund Allocation Matrix shall be paid in cash or as Deemed Distributions (as described in Section 6.4.2) to those entities entitled to receive funds in accordance with the FERC Refund Allocation Matrix and which are either Parties to this Agreement or which are Opt-In Participants as defined in Section 9.1. Refunds with respect to the Pre-October Period shall be allocated only with respect to purchases during the period May 1, 2000 through October 1, 2000. The additional amount shown on the FERC Refund Allocation Matrix as being payable to the California Parties' account shall be allocated pursuant to a separate agreement among the California Parties.

6.4.2 **Deemed Distributions to Deemed Distribution Participants**. Certain Settling Participants, including PG&E, owe pre-refund amounts to the PX or ISO for transactions during the period from January 1, 2000 through June 20, 2001 or owe refunds to the market as calculated in Exhibit Nos. CPX-51 and ISO-30 in the FERC Refund Proceedings for that period and are listed in Exhibit C as Deemed Distribution Participants. Distribution of settlement proceeds to Deemed Distribution Participants under this Agreement will take **[*66]** the form of a reduction (a "Deemed Distribution") against such amounts owed and shall be reflected on the books of the ISO and PX. The Parties agree, and the FERC Settlement Order shall constitute PERCYS determination, that the PG&E Plan Escrow may be reduced in an amount equal to PG&E's Deemed Distributions under this Agreement. Other Settling Participants who do not qualify as Net Refund Recipients shall also receive their allocable refunds in the form of an offset against their outstanding market obligations.

6.4.3 **Net Refund Recipients**. Except as provided for Deemed Distribution Participants, the net refunds to be paid to each Settling Participant as shown on Exhibit B shall be paid from the Reliant Refond Escrow in the form of cash.

6.4.4 **Fuel Cost Allowances and Emissions Offsets**. The Settlement and the FERC Refund Allocation Matrix reflect an agreed upon Emissions Offset of $14,604,291 and an agreed upon Fuel Cost Allowance of $63,250,845. The Reliant Parties shall not seek any additional Fuel Cost Allowance or any additional Emissions Offset as against the Settling Participants for the period beginning January 1, 2000 through June 20, 2001. Settling Participants are responsible **[*67]** for their ultimate allocable share of the agreed upon Fuel Cost Allowance and Emissions Offset, with the allocation based on the FERC Allowances Determination. The Fuel Cost Allowance and Emissions Offset provided for herein shall, as to the total amounts applicable to the market as a whole, remain fixed as to the Parties and the Opt-In Settling Participants. The proposed allocation of charges for such allowance to individual Market Participants, which is currently based on gross load, shall be subject to adjustment and "true-up" to comply with the FERC Allowances Determination. Because the charges for Fuel Cost Allowances and Emissions Offsets can exceed the refunds due to a Market Participant, some Market Participants may be shown as owing money in the FERC Refund Allocation Matrix. Such Market Participants that become Settling Participants ("Net Payers") will not receive or be liable for payment until the date that FERC requires Market Participants to pay such allowances in the FERC Refund Proceedings, at which time the payments owed to or owing from such Net Payers will be adjusted based on the FERC Allowances Determination.

6.4.5 Payment of Interest. No interest on refunds under **[*68]** this Settlement or on Reliant's Receivables shall be released from the PX Settlement Clearing Account or paid to any Party or Opt-In Participant until the FERC Interest Determination has been issued and taken effect without being stayed. At such time, interest shall be paid to each Party or other Market Participant in accordance with the FERC Interest Determination, except that all net interest otherwise due to Reliant for transactions from January 1, 2000 through June 20, 2001, is assigned and shall be paid to the California Parties as provided for in Sections 4.1.5 and 4.2.1. Notwithstanding the foregoing, the amounts allocated as refunds in the FERC Refund Allocation Matrix for the Pre-October Period shall not bear interest except as may be earned in any escrows or accounts separately established under this Settlement and interest accruals shall further be subject to the limitations set forth in Section 7.3.

6.4.6 **Net Payer**. Any amount shown on the FERC Refund Allocation Matrix as owed by a Party other than Reliant, or by an Opt-In Participant, will be reflected on the books of the ISO and PX as an additional amount owed by mat Party or Opt-In Participant, To determine whether an **[*69]** amount is owed for purposes of the foregoing sentence, amounts relating to particular periods, *e.g.* the Pre-October Period, the Pre-January 18, 2001 Period or the Post-January 17, 2001 Period, shall be netted against each other.

6.4.7 **Timing of Payments**. Except as provided in Section 6.4.5, principal payments on refunds reflecting the amount shown in the FERC Refund Allocation Matrix, either in the form of cash from the Reliant Refund Escrow or through the offset of payables provided for in the case of Deemed Distributions, shall be effectuated for Settling Participants, including Opt-In Participants, no later than twenty (20) Business Days after the Settlement Effective Date.

6.4.8 **Distributions to Non-Settling Participants and Disposition of Escrowed Funds**. Amounts specified on the FERC Refund Allocation Matrix as payable to Market Participants who, by not making the election provided in Article 9, become Non-Settling Participants will be retained in the Reliant Refund Escrow until issuance of the FERC Refund Determination. If FERC determines that Reliant owes refunds pursuant to the FERC Refund Determination or interest pursuant to the FERC Interest Determination to any Non-Settling **[*70]** Participant, it shall be paid first from the amounts retained in relation to Non-Settling Participants in the Reliant Refund Escrow, until such funds are exhausted, with any balance to be paid pursuant to Section 6.8. To the extent that amounts set aside for Non-Settling Participants in the Reliant Refund Escrow are in excess of the amount necessary to pay such Non-Settling Participants pursuant to the FERC Refund Determination and the FERC Interest Determination, the remaining amount from the Non-Settling Participant set-aside will be transferred to the California Litigation Escrow.

6.5 **Receivables Shortfalls and Excesses; Refund Shortfalls and Excesses**.

6.5.1 **Pre-October Period**. Subject to Section 6.9, the California Utilities shall be responsible for a share of any Refund Shortfall or Receivables Shortfall allocated to the Pre-October Period. Any such responsibility shall be deemed to be a reversal of amounts allocated to the California Utilities and shall be paid to the ISO and/or the PX, as appropriate, from the amounts allocated to the California Utilities, on a pro rata basis determined with reference to the principal amount of refunds (including Deemed Distributions) allocated **[*71]** to each of the California Utilities in the FERC Refund Allocation Matrix for that period. The California Utilities shall be entitled to payment of any Refund Excess or Receivables Excess allocated to the Pre-October Period. Said amount shall be paid into the California Litigation Escrow and allocated among the California Utilities on a pro rata basis determined with reference to the total principal amount of the refund (including Deemed Distributions) allocated to each of the California Utilities in the FERC Refund Allocation Matrix for that period.

6.5.2 Pre-January IS, 2001 Period. Subject to Section 6.9, the California Utilities shall be responsible for a share of any Refund Shortfall or Receivables Shortfall allocated to the Pre-January 18, 2001 Period. Any such responsibility shall be deemed to be a reversal of amounts allocated to the California Utilities under this Agreement and shall be paid to the ISO and/or the PX, as appropriate, from the amounts allocated to the California Utilities, on a pro rata basis determined with reference to the principal amount of refunds (including Deemed Distributions) allocated to each of the California Utilities in the FERC Refund Allocation **[*72]** Matrix for that period. The California Utilities shall be entitled to payment of any Refund Excess or Receivables Excess allocated to the Pre-January 18, 2001 Period. Said amount shall be paid into the California Litigation Escrow and allocated among the California Utilities on a pro rata basis determined with reference to the total principal amount of the refund (including Deemed Distributions) allocated to each of the California Utilities in the FERC Refund Allocation Matrix for that period.

6.5.3 **Post-January 17, 2001 Period**. Subject to Section 6.9 and in accordance with Section 6.11, CERS shall be responsible for any Refund Shortfall or Receivables Shortfall allocated to the Post-January 17, 2001 Period, and shall be entitled to payment of any Refund Excess or Receivables Excess allocated to the Post-January 17, 2001 Period, except to the extent any refunds paid to CERS for the Post-January 17, 2001 Period pursuant to the FERC Refund Allocation Matrix are subsequently reallocated to the California Utilities by agreement of CERS and the California Utilities.

6.6 **Impact of FERC Allowances Determination**. To the extent Reliant's total Fuel Cost Allowance is determined by FERC in the **[*73]** FERC Allowances Determination to be greater than $63,250,845, Reliant shall be entitled to recover from each Non-Settling Participant that Non-Settling Participant's allocable share of the difference, including, notwithstanding anything to the contrary in Section 4.2, any associated interest on the difference, as determined by FERC. To the extent Reliant's total Fuel Cost Allowance is determined by FERC in the FERC Allowances Determination to be less than $63,250,345, Reliant shall be responsible for paying to each Non-Settling Participant that Non-Settling Participant's allocable share of the difference, including any associated interest on the difference, as determined by FERC. In no case shall the California Parties be responsible for costs, additional refunds, or offsets to refunds associated with Reliant's Fuel Cost Allowance. In particular, the California Parties shall not be responsible to Non-Settling Participants for costs, additional refunds, or offsets to refunds associated with Reliant's Fuel Cost Allowance beyond each Non-Settling Participant's allocated share of the $63,250,845 included in the FERC Refund Allocation Matrix. Reliant shall be responsible for any Emissions **[*74]** Offset and Fuel Cost Allowance amounts or claims allocated to Reliant in connection with Reliant's purchases from other sellers. Reliant shall continue to pursue, at its expense, its Emissions Offset as to Non-Settling Participants, and shall take all reasonable actions as requested by the California Parties to pursue such Emissions Offset.

6.7 **Funds in the California Litigation Escrow; Distributions to Local Governmental Parties**. All funds in the California Litigation Escrow shall be distributed in accordance with a separate agreement among the California Parties which shall provide for the allocation of $3,600,000 among the Local Governmental Parties pursuant to the Local Governmental Allocation Matrix, Exhibit D. If a Local Governmental Party does not execute this Agreement, the consideration that would have been paid to that entity (as identified on the Local Governmental Allocation Matrix) shall be paid to Reliant pursuant to Section 10.2. Distributions from the California Litigation Escrow will accrue interest only from the date the California Litigation Escrow is funded and at the rate of interest earned on the funds held therein.

6.8 **Non-Settling Participants**. Subject to the **[*75]** limitations of Sections 6.9 and 6.10, the California Parties shall pay to the ISO and/or the PX, as appropriate, from the Reliant Refund Escrow, the California Litigation Escrow or otherwise, any refunds due to Non-Settling Participants by the Reliant Parties in connection with transactions in the ISO or the PX markets during the Pre-October Period and Refund Period, as determined by FERC in the FERC Refund Proceedings. Notwithstanding the foregoing, Non-Settling Participants shall not receive any accelerated payment of the Reliant Parties' refunds under the Settlement or this Agreement and shall not be guaranteed any specific level of refunds.

6.9 **Limitations on California Parties' Obligations**. Notwithstanding any other provision of this Agreement, the obligation of any of the California Parties to pay money to Non-Settling Participants (i) shall be limited to payment of claims in the FERC Refund Proceedings arising from Reliant's transactions in the ISO or the PX markets during the Pre-October Period and the Refund Period, and shall not encompass payment of claims arising from other transactions or in any other proceeding, and (ii) shall not, in any event, exceed the total amount **[*76]** of refunds and/or offsets allocated to that California Party pursuant to this Agreement for the applicable period as set forth in the FERC Refund Allocation Matrix. Without limiting the foregoing, nothing in this Agreement shall require the California Parties to bear any liability to any party relating to (i) Reliant sales outside of the ISO and PX for the period January 1, 2000 through June 20, 2001 or (ii) for any Reliant transactions prior to January 1, 2000 or after June 20, 2001.

6.10 **Reliant Settlements with Non-Settling Participants**. The Reliant Parties retain the right to negotiate with and enter into settlements of claims with Non-Settling Participants, and such settlements may, subject to any necessary approvals, establish the amount of refunds payable to such Non-Settling Participants by the Reliant Parties, but, absent written consent of each of the California Parties, acting in their sole discretion, the amount of any such settlement that will be paid from the Reliant Refund Escrow, the California Litigation Escrow, or otherwise by the California Parties may not exceed the amount that would have been allocated to that Non-Settling Participant if it had become an Opt-In **[*77]** Participant.

6.11 **CERS Amount**. From the amount of refunds that otherwise are due to CERS pursuant to Section 6.4.1 (excluding any refunds allocated to short term bilateral sales made to CERS by Reliant), an amount determined solely by CERS shall be withheld in the Reliant Refund Escrow, or other escrow specified by CERS, in order to pay any claims against CERS arising under Section 6.5,3 and any of Sections 6.12.1 through 6.12.5 (amounts held in escrow pursuant to this Section 6.11 are denoted as the "CERS Escrow"). CERS may withdraw funds from the CERS Escrow (i) from time to time with the prior written consent of the California Utilities if CERS can demonstrate to the reasonable satisfaction of the California Utilities that, after giving effect to such withdrawal, the CERS Escrow shall have sufficient funds on deposit to satisfy in full the aforementioned obligations, and (ii) in whole or in part following the later to occur of the following, provided that all claims of CERS arising under Section 6.5.3 or any of Sections 6.12.1 through 6.12.5 have been paid in full: (a) issuance by FERC of the FERC Receivables Determination and the final resolution of any requests for rehearing or **[*78]** any appeals thereof, or, if no such requests for rehearing or appeals are filed, the lapse of any period within which such requests or appeals must be filed; (b) issuance by FERC of the FERC Refund Determination and the final resolution of any requests for rehearing or any appeals thereof, or, if no such requests for rehearing or appeals are filed, the lapse of any period within which such requests or appeals must be filed; (c) issuance by FERC of the FERC Interest Determination and the final resolution of any requests for rehearing or any appeals there&om or, if no such requests for rehearing or appeals are filed, the lapse of any period within with such requests for rehearing or appeals must be filed; or (d) issuance by FERC of the FERC Allowances Determination and the final resolution of any requests for rehearing or appeals therefrom or, if no such requests for rehearing or appeals are filed, the lapse of any period within which such requests for rehearing or appeals must be filed.

6.12 **Effect of Subsequent FERC Orders and Appeals**.

6.12.1 **Changed FERC Interest Determination**. If, as a result of a FERC order on rehearing, reconsideration, or remand, or an order by a court of appeals **[*79]** (in each case that is a final order that is no longer subject to appeal), the FERC Interest Determination is changed in a way that increases or decreases the interest amount paid to Settling Participants associated with refunds and other distributions pursuant to this Agreement, then the amount of such interest paid to Settling Participants shall be trued-up among the Settling Participants or between the Settling Participants and the Reliant Refund Escrow, by way of refund or surcharge, with interest at the FERC Interest Rate or such other rate as FERC may determine to be applicable, to give full effect to the change from the FERC Interest Determination. Reliant shall have no additional obligations with respect to a changed FERC Interest Determination.

6.12.2 **Changed FERC Allowances**. If, as a result of a FERC order on rehearing, reconsideration, or remand, or an order by a court of appeals (in each case that is a final order that is no longer subject to appeal), the FERC Allowances Determination is changed in a way that increases or decreases the allocation of Fuel Cost Allowances and/or the allocation of Emissions Offsets among the Settling Participants, then the amount of Fuel Cost **[*80]** Allowances and/or Emissions Offsets paid to or by each Settling Participant pursuant to this Agreement shall be trued-up among such Settling Participants, by way of refund or surcharge, with interest at the FERC Interest Rate or such other rate as FERC may determine to be applicable, to give full effect to the change from the FERC Allowances Determination.

6.12.3 **Changed FERC Receivables**. If, as a result of a FERC order on rehearing, reconsideration, or remand, or an order by a court of appeals (in each case that is a final order that is no longer subject to appeal), the FF,RC Receivables Determination is changed in a way that increases or decreases the amount of the Reliant Receivables, then the amount of Reliant Receivables paid by the ISO and the PX to the California Parties pursuant to this Agreement shall be trued-up among the ISO, the PX and the California Parties, by way of refund or surcharge, with interest at the FERC Interest Rate or such other rate as FERC may determine to be applicable, to give full effect to the change from the FERC Receivables Determination. Reliant shall have no additional obligations with respect to changed FERC Receivables other than as provided in **[*81]** Section 11.4.

6.12.4 **Changed FERC Refund Determination**. If, as a result of a FERC order on rehearing, reconsideration, or remand, or an order by a court of appeals (in each case that is a final order that is no longer subject to appeal), the FERC Refund Determination is changed in a way that increases or decreases the amount of refunds owed by Reliant to any particular Non-Settling Participant for the Pre-October Period, the Pre January 18 Period or the Post January 17 Period, then the amount paid to or received from such Non-Settling Participant for the Pre-October Period, the Pre January 18 Period and the Post January 17 Period shall be trued up among the California Parties and such Non-Settling Participant, by way of refund or surcharge, with interest at the FERC Interest Rate or such other rate as FERC may determine to be applicable, to give full effect to the change to the FERC Refund Determination. With the exception of the Fuel Cost Allowance, Reliant shall have no additional obligation with respect to changed FERC Refund Determination.

6.12.5 **Payment Procedures**. All payments pursuant to this Section 6.12 shall be made at the time and in the manner specified by FERC or the court **[*82]** of appeals. If neither FERC nor the court of appeals specifies the time and manner for such payments, then such payments shall be made by wire transfer within twenty (20) Business Days after the date that the applicable FERC or court of appeals order changing the FERC Interest Determination, the FERC Allowances Determination, the FERC Receivables Determination, or the FERC Refund Determination has become final and no longer subject to appeal.

6.12.6 **Reliant Refund Escrow Balance**. Any amounts not distributed to Settling Participants pursuant to this Agreement that remain in the Reliant Refund Escrow after ail refunds and associated interest have been paid to Settling Participants and Non-Settling Participants, as provided in this Agreement, shall be transferred to the California Litigation Escrow.

7. ISO AND PX ACCOUNTING AND IMPLEMENTATION

7.1 **FERC-Directed Compliance**. The FERC Settlement Order shall constitute authorization and direction to the ISO and PX to implement the terms of this Agreement. As a result of the FERC's approval of this Agreement in the FERC Settlement Order, the ISO and/or PX shall be required to do the following:

7.1.1 **General Accounting Treatment**. The ISO and PX **[*83]** shall conform their books and records to reflect the distributions, payments, offsets, transfers, deemed resolution of claims, and status of accounts provided for in this Agreement.

7.1.2 **Accounting Treatment of Assigned Reliant Receivables**. The PX and ISO shall reflect on their books and records all distributions from the PX Settlement Clearing Account to the Reliant Refund Escrow that represent payments of amounts owed by the ISO to Reliant for the Reliant Receivables. The ISO shall recognize, as a reduction in the amounts payable by the PX to the ISO, all distributions from the PX Settlement Clearing Account to the Reliant Refund Escrow that represent payments of amounts owed by the ISO to Reliant for the Reliant Receivables.

7.1.3 **Calculation and Accounting Treatment of Distributions to Settling Participants and Non-Settling Participants**. The ISO and PX shall calculate the amount, if any, that Reliant would owe in refunds if the refund pricing methodology in FERC's orders in the FERC Refund Proceedings were applied for each of three time periods: the Pre-October Period, the Pre-January 18, 2001 Period, and the Post-January 17, 2001 Period ("Unsettled Reliant Refund Amount"), and **[*84]** submit those calculations for approval to FERC at the same time that they submit their calculations of refunds for other Market Participants.

7.1.4 **Calculation and Accounting Treatment of Refund? Owed to Reliant**. The ISO and PX shall calculate the amount, if any, that Reliant would be owed in refunds if the refund pricing methodology in FERC's orders in the FERC Refund Proceedings were applied for each of the three time periods: the Pre-October Period, the Pre-January 18, 2001 Period, and the Post-January 17, 2001 Period, and submit those calculations for approval to FERC at the same time that they submit their calculations of refunds owed to other Market Participants. Subject to, and after adjustment on account of, the provisions of Sections 4.3.2 and 8.4.2 of this Agreement, such refunds owed to Reliant for any period shall be reflected on the books of the ISO and PX as payable to the California Parties to implement the assignment provided for in Section 4.3.1 of this Agreement.

7.2 **Calculation of Reliant Refund Amounts For Individual Market Participants**. Following the date of the FERC Refund Determination, but prior to the date on which refunds are to be paid pursuant to the FERC **[*85]** Refund Determination, the ISO and PX shall determine the portion of the Unsettled Reliant Refund Amounts that, absent this Agreement, would be deemed to be owed to each Market Participant that is entitled to receive refunds ("Unsettled Participant Refund Amount"). The ISO and PX shall determine the Unsettled Participant Refund Amount for each Market Participant by multiplying the Unsettled Reliant Refund Amounts for each respective time period (the Pre-October Period (if ordered by FERC), the Pre-January 18, 2001 Period and the Post-January 17, 2001 Period) by each Market Participant's percentage share of total refunds in the combined ISO and PX markets for that time period.

7.2.1 **Accounting Treatment of Distributions to Settling Participants**. The ISO and PX shall reflect on their books and records that Settling Participants have, through this Agreement, been paid in full their share of all Reliant Refunds allocated to them under this Agreement and shall not be entitled to receive the

Unsettled Participant Refund Amount if different from the amount of Reliant Refunds allocated to each respective Settling Participant under this Agreement.

7.2.2 **Accounting Treatment of Deemed Distributions [*86]** . The PX and ISO shall reflect Deemed Distributions on the books and records of the PX and ISO as reductions in the amounts owed to the PX and/or ISO by any Settling Participant that receives a Deemed Distribution.

7.2.3 **Accounting Treatment of Distributions to Non-Settling Participants**, The ISO and PX shall reflect distributions from the Reliant Refund Escrow to Non-Settling Participants pursuant to Section 6.8 as payments to Non-Settling Participants.

7.3 **Termination of Interest Accrual**. The PX and ISO shall reflect in their books and records, with respect to Settling Participants, that the accrual of interest at the FERC-established rate on principal amounts subject to the FERC Interest Determination as provided for in Section 6.12 ceases upon the distribution of funds from the PX and/or the ISO to the Reliant Refund Escrow pursuant to this Agreement, or as may be accomplished through the implementation of Deemed Distributions, and, for purposes of the accounts of the PX and the ISO, no interest on such funds shall accrue after distribution except as may be earned on transferred amounts while on deposit in the Reliant Refund Escrow.

7.4 **Implementation of Agreement**. FERC's approval of **[*87]** this Agreement in the FERC Settlement Order shall constitute its direction (i) to the ISO and the PX to recognize and implement the assignment of the Reliant Receivables and the treatment of PX Wind-Up Charges in accordance with this Agreement, and (ii) to the PX to reverse any offsets previously made to the Reliant Receivables to reflect PX Wind-Up Charges that Reliant is instead obligated to pay in cash pursuant to Section 8.7.7 of this Agreement.

7.5 **Duty of Cooperation**. Each Party shall reasonably and in good faith cooperate and take all reasonable steps to secure (i) the release of funds from the PX Settlement Clearing Account to the Reliant Refund Escrow as contemplated by this Agreement; (ii) the accounting treatment contemplated under this Article 7; and (iii) any other acts of the PX or the ISO necessary to effectuate the terms of this Agreement. This duty of cooperation shall include making individual or joint requests to the PX or the ISO, executing appropriate waivers, providing data and providing other assistance to the PX and the ISO as necessary to implement this Agreement.

7.6 **Tariff Waivers**. FERCs approval of this Agreement in the FERC Settlement Order shall constitute **[*88]** a grant of such waivers of the ISO and the PX tariffs as may be necessary for the ISO and the PX to disburse such funds as required by this Agreement, to account for transfers, allocations and distributions of funds as required by this Agreement, and to otherwise implement this Agreement.

8. SCOPE OF SETTLEMENT AND RELEASES; WITHDRAWALS, RELEASES AND WAIVERS

8.1 **Settlement**.

8.1.1 **Settlement of FERC Refund Proceedings**. In return for the consideration specified elsewhere in this Agreement, and subject to the required regulatory approvals under this Settlement, all claims against Reliant for refunds, disgorgement of profits, billing adjustments, or other monetary or non-monetary remedies in the FERC Refund Proceedings shall be deemed settled, provided that the FERC Refund Proceedings shall not be deemed settled as to Non-Settling Participants, and provided further that nothing herein affects the CERS claim described in Section 8.7.2.

8.1.2 **Impact of Settlement on FERC Refund Proceedings**. Reliant and the California Parties shall not contest the amount of refund liability and/or offsets (exclusive of interest) attributable to Reliant in FERC Docket Nos. ELOO-95, **el al.**. Reliant and the California **[*89]** Parties will not dispute the outcome of Docket Nos. EL03-59, EL03-170, EL03-180, PA02-2, IN03-10, and FERCs physical withholding investigation, as they relate to Reliant, because they are resolved by tills Settlement, and the California Parties will withdraw their petition for rehearing in Docket No EL03-170. Dismissal of objections to the Reliant/OMOI Settlement shall not be deemed an admission by the California Parties that FERC has jurisdiction over the gas issues in the Reliant/OMOI Settlement and approval of this Settlement by FERC shall constitute FERC's acknowledgment that nothing in the orders approving this Settlement or the Reliant/OMOI Settlement shall be deemed to have precedential value against the California Parties in future proceedings concerning FERC's jurisdiction over conduct of participants in natural gas and transportation markets.

8.1.3 **Withdrawal of Certain Protests**. Each California Party (hat filed a protest in Docket Nos. ER99-2079, ER99-2080, ER99-2081, ER99-2082 and ER99-20S3 shall withdraw its protest in those proceedings within twenty (20) Business Days of the Settlement Effective Date.

8.1.4 **Reservation of Claims**. Notwithstanding anything to the contrary **[*90]** in this Agreement, Reliant shall be deemed to retain all claims and defenses it may have against Non-Settling Participants.

8.1.5 **Withdrawal of Certain Outstanding Challenges to FERC Orders**. Except as necessary to assert claims and defenses as provided in Section 8.1.4 above. Reliant and the California Parties shall withdraw all outstanding challenges to the orders in the FERC Refund Proceedings with respect to Reliant and California Parties. The California Parties may continue to assert their respective positions on those issues, and may continue to assert any position on refunds and other relief as related to suppliers other than Reliant.

8.2 **Release of ISO and PX Disputes and PX Chargeback Amounts**. With respect to transactions related to sales of electricity and ancillary services by Reliant or transmission congestion charges applicable to the same, Reliant waives and releases any disputes regarding existing ISO and PX settlements for the period from January 1, 2000 through June 20, 2001 upon the Settlement Effective Date. FERC approval of this Settlement shall constitute an order to release to Reliant the amount of the Reliant chargebacks.

8.3 **Scope of Certain Released**. The releases **[*91]** set forth in Sections 8.4 through 8.6 shall run to, benefit and be enforceable by any individual who, as a past or present officer, director, agent, or employee of a corporate or organizational party that receives the benefits of such releases insofar as s(he) participated as an officer, director, agent or employee in or might be claimed to be liable for any of the actions or events of potential liability for which a party is released by Sections 8.4 through 8.6, and shall run to, benefit and be enforceable as well by CenterPoint Energy Inc., its affiliates and subsidiaries, and by El Dorado Energy, LLC to the extent any such claim is based on, or arises out of, or relates to conduct of Reliant, its directors, officers, employees or agents, which conduct is the subject of this Agreement. Nothing in this Agreement shall limit the rights of the California Parties to seek relief from any entity other than Reliant for sales of power generated by El Dorado Energy, LLC that were made by any entity other than Reliant; provided, however, that the California Parties shall not seek additional relief from Reliant associated with such sales by an entity other than Reliant.

8.4 **FERC and Federal [*92] Power Act Releases**.

8.4.1 **Mutual Releases**. Subject to Section 8.7 below, the California Parties, on the one hand, and Reliant, on the other hand, as of the Settlement Effective Date, hereby release the other from all existing and future claims before FERC and/or under the Federal Power Act arising from or relating to any allegation that, during the Settlement Period:

(i) Reliant or any California Party charged or collected unjust, unreasonable or otherwise unlawful rates, terms or conditions for natural gas, transportation of gas, electric energy, ancillary services, or transmission congestion in the western energy markets; or

(ii) Reliant or any California Party manipulated the western electricity or gas markets in any fashion (including claims of economic or physical withholding, gaming, forms of electricity market manipulation discussed in the Final Staff Report, or any other forms of market manipulation), or otherwise violated any applicable tariff, regulation, law, rule or order relating to the western energy markets.

8.4.2 **Additional Release**. Reliant, as of the Settlement Effective Date, hereby releases each of the California Parties from all existing and future claims before FERC **[*93]** and/or under the Federal Power

Act arising from or relating to any allegation that, during the Settlement Period, any California Party is liable for any additional payments to Reliant not provided for herein for congestion charges or for electric energy or ancillary services.

8.4.3 **Waiver Regarding Assigned Assets to CERS**. Effective as of the Settlement Effective Date, Reliant hereby waives, to the extent not assigned to CERS pursuant to Section 4.3.2 of this Agreement, all rights it has or may claim to have to refunds and associated interest resulting from any mitigation of sales by CERS of imbalance energy into the ISO real-time market, as well as surcharges and other charges associated with such sales, that may be payable pursuant to FERC's May 12, 2004 Order on Requests for Rehearing and Clarification in Docket Nos. ELOO-95 and ELOO-98 and subsequent orders.

8.4.4 **Withdrawal of Claims in PG&E Bankruptcy**. Within ten (10) Business Days following the Settlement Effective Date, Reliant will withdraw with prejudice all claims filed by it in the PG&E bankruptcy.

8.5 **Gas and Civil Claims Releases**.

8.5.1 **Mutual Releases**. Subject to Section 8.7 below, the California Parties and Additional Claimants, **[*94]** on the one hand, and Reliant, on the other hand, as of the Settlement Effective Date, hereby release the other from all past, existing and future claims for civil damages and/or penalties and/or equitable relief, including disgorgement and restitution, or FERC relief concerning, pertaining to, or arising from, or relating to allegations that, for the Settlement Period, Reliant or any California Party or Additional Claimant:

(i) Charged or collected unjust, unreasonable or otherwise unlawful rates, terms or conditions for natural gas, transportation of gas, electric energy, ancillary services, or transmission congestion in the western electricity and natural gas markets;

(ii) Manipulated the western electricity or natural gas markets in any fashion (including claims of economic or physical withholding, gaming, misreporting to price index publishers, forms of market manipulation discussed in the Final Staff Report, or any other forms of market manipulation);

(iii) Was unjustly enriched by the foregoing released claims or otherwise violated any applicable tariff, regulation, law, rule or order relating to transactions in the western electricity or natural gas markets; or

(iv) Violated any **[*95]** ***antitrust law*** or is liable for any monetary or nonmonetary damages or other remedies relating to Reliant's acquisition, operation, or management of facilities for the generation of power in the western United States.

8.5.2 **Additional Release**. Reliant as of the Settlement Effective Date, hereby releases each of the California Parties from all past, existing and future claims for civil damages and/or penalties and/or equitable relief, including disgorgement and restitution, or PERC relief concerning, pertaining to, or arising from, or relating to allegations that any California Party is liable for any additional payments to Reliant not provided for herein for congestion charges or for sales of natural gas, electric energy, or ancillary services during the Settlement Period.

8.6 **Reliant, Class Action Parties and Local Governmental Parties Releases**.

8.6.1 **Mutnal Releases**. The Class Action Parties and the Local Governmental Parties, on the one hand, and Reliant, on the other hand, as of the dates Specified in Section 8.6.2, hereby forever release the other from all past, existing and future claims for civil damages and/or penalties and/or equitable relief, including disgorgement and restitution, **[*96]** concerning, pertaining to, or arising from or relating to Reliant's actions in connection with the provision of electricity at any time prior to the August 12, 2005 date of the Memorandum of Understanding, including any claims:

(i) Tor any excessive, unlawful, or unjust and unreasonable charges, rates or prices in California and western electricity markets;

(ii) Relating to the existence or exercise of market power in California and western electricity markets;

(iii) Relating to any alleged violations of any governing electricity-related tariff, order, resolution or rule applicable to California and western electricity markets, including ISO and PX Market Monitoring and Information Protocols;
(iv) Relating to Reliant's acquisition, operation, or management of facilities for the generation of electric power in California and western electricity markets;
(v) Arising from or relating to Reliant's operations in connection with the purchase, sale, trading, marketing or transmission of electric power, including its bidding, trading or participation in California or western electricity markets, or any economic or physical withholding; or

(vi) Any other claim that was alleged or could have been **[*97]** alleged by the Class Action Parties or Local Governmental Parties, including any claim based on alleged conspiracy to restrain trade or fix prices in California or western electricity markets.

Without limitation, the release in this Section 8.6.1 waives and resolves any and all claims, causes of action, demands or other liability of any nature whatsoever that the California Class and/or Egger Class have made, or could have made, or on behalf of whom was made, a gainst Reliant in or before any federal, state, or local court or agency arising out of or related to the foregoing, under any claim or cause of action, including but not limited to claims under California Business Sc Professions Code *§ 17200*, *California Business & Professions Code § 16720*, *California Code of Civil Procedure § 526a*, any federal antitrust statute, or any similar statute or claim of any other state, or any common law tort theory.

8.6.2 **Release Effective Dates**. As to the Class Action Parties, (he releases provided in Section 8.6.1 above are effective on the Class Action Effective Date as defined in Section 2.5. As to the Local Governmental Parties the releases provided in Section 8.6.1 above are effective on the Settlement Effective Date, or such later date should approval under Section 10.2 occur **[*98]** after the Settlement Effective Date.

8.6.3 **No Impact on California Parties - Reliant Releases**. Nothing in the releases set forth in Section 8.6.1 shall be construed as in any manner expanding or otherwise amending or modifying any of the releases provided in this Agreement to Reliant by the California Parties, nor shall Reliant assert the releases set forth in Section 8.6.1 as a bar to claims that may be brought by any of the California Parties with respect to the period subsequent to December 31, 2001, including claims that the California Parties, or any of them, may bring in their representative capacities on behalf of retail electric or natural gas customers. With the exception of the CPUC (which was not a party to the Memorandum of Understanding) each of the California Parties represents that as of the Execution Date, it was not aware of any claim it may have against Reliant that pertains to the period subsequent to December 31, 2001 (other than any claims that might exist under reliability must run contracts or on-going bilateral contracts) and which would be encompassed within the releases set forth in Section 8.6.1 if the California Parties were providing those same releases. **[*99]**

8.7 **Limitations on Releases**.

8.7.1 **Cooperation with Investigations; Participation in FERC Proceedings**. The California Parties and Additional Claimants may continue to cooperate with all state and federal investigations and to participate in all matters before FERC; provided that, as of the Settlement Effective Date, the California Parties and Additional Claimants shall withdraw from and not prosecute any litigation, administrative proceedings or investigations with respect to Reliant insofar as such prosecution would be inconsistent with the foregoing released claims.

8.7.2 **Reservation of CERS/Rellant Claims.** The releases set forth in Sections 8.1, 8.2, 8.3, 8.4 and 8.5 do not include any claims by CERS against Reliant or by Reliant against CERS arising from or relating to that certain letter agreement by and between Reliant and CERS dated February 16, 2001, short term purchases due to billing or accounting errors, reconciliation of payments reflected on invoices for transactions conducted, imbalance energy (including unpaid ISO purchases) and accounting disputes relating to imbalance energy procured by CERS, or emissions credits taken by Reliant, all of which claims are hereby expressly **[*100]** preserved and will be addressed in a concurrent settlement agreement between Reliant and CERS which settlement shall address any and all such claims for the period prior to the Execution Date of the Memorandum of Understanding.

8.7.3 **No Waiver by Attorneys General as to Criminal and Certain Other Claims**. The releases set forth in Sections 8.2, 8.3 and 8.4 do not constitute a waiver or release of any claims by the California Attorney General or the Additional Claimants for any actions of or omissions either before or subsequent to the Settlement Effective Date which are either (i) willfully fraudulent; provided, however, that this release does extend to such claims (if any) that are based solely upon acts or omissions that (a) occurred prior to the Settlement Effective Date and (b) are currently known by the California Attorney General's Office or the Additional Claimants; or (ii) criminal.

8.7.4 ***PG&E v. FERC***, **Ninth Circuit No. 03-72874**. The releases set forth herein include a release of all claims by the California Parties against Reliant in the petition for review now pending before the Ninth Circuit in *PG&E v. FERC*, Case Nos. 03-72874, *et al*. However, there is no settlement of the **[*101]** proceeding or release as between FERC and the California Parties. The California Parties may attempt to continue to pursue (he proceeding as against FERC. FERC, on the other hand, may seek to have the proceeding dismissed entirely as the result of this Settlement. It is agreed that the outcome of the Ninth Circuit proceeding will have no bearing on amounts owed by or to Reliant, and that Reliant will withdraw from the proceeding.

8.7.5 **Participation in Other Proceedings**. Except as otherwise provided herein, all Parties to this Agreement and those Market Participants that agree to accept the benefits of this Settlement shall remain free to participate, without limitation, in any existing proceeding with respect to parties other than Reliant, or to initiate or participate in any future proceeding to the extent not inconsistent with the releases set forth in Sections 8.2, 8 3, 8.4, 8.5 and 8.6, including proceedings addressing, prospectively, generic issues concerning market structure, scheduling rules, generally applicable market rules, and generally applicable price mitigation.

8.7.6 **California Parties' Settlements**. Reliant agrees not to oppose any settlement between the California Parties **[*102]** and any other supplier that substantially conforms to the terms of this Agreement or with the terms of the Williams, Dynegy, Duke, Mirant and Enron Settlements. If Reliant has a claim to refunds in the FERC Refund Proceedings against any other supplier, then Reliant will seek to join the Williams, Dynegy, Duke, Mirant and Enron Settlements and will join any settlement between the California Parties and such supplier that substantially conforms to the terms of this Agreement or with the terras of the Williams, Dynegy, Duke, Mirant and Enron Settlements and take any and all action reasonably required by the California Parties to implement the terms of the assignments provided for in Section 4.3 of this Agreement, provided that, if such other supplier has a claim to refunds in the FERC Refund Proceedings against Reliant, then such other seller agrees to opt-in to the Settlement, even if the five-day notice period for opt-ins has passed, to the extent it has not already done so.

8.7.7 **Payment of PX Wind-Up Charges**. Reliant will pay in cash to the PX, and not through offsets, any PX Wind Up Charges allocated to Reliant for the period up to the Settlement Effective Date. The California Parties **[*103]** shall be responsible for all PX Wind-Up Charges that Reliant would have been responsible for absent dus Agreement with respect to the PX's activities from and after the Settlement Effective Date. To me extent (hat the PX previously obtained payment from Reliant for PX Wind-Up Charges by set off against the Reliant Receivables, the FERC Settlement Order shall be deemed to direct the PX to reverse such setoff.

8.7.8 **Qualifying Facilities**. Nothing in this Agreement shall prevent the California Parties from taking any position in any proceeding concerning the prices applicable to sales by qualifying facilities, and nothing in this Agreement shall limit the relief that the CPUC may order in any proceeding before it, including the

CPUC's Order Instituting Rulemaking into Implementation of *Public Utilities Code Section 390*, Rulemaking 99-11-02.

8.7.9 **Continuation of CPUC Investigation**. Nothing in this Agreement shall restrict the ability of the CPUC to continue its investigation of the manipulation of natural gas prices or services, generator operation and maintenance, or to carry out its responsibilities under California Senate Bill 39 of the 2001-2002 Second Extraordinary Session.

8.7.10 **CPUC Investigatory Authority**. Nothing **[*104]** in this Agreement shall restrict the ability of the CPUC to collect information or investigate any matter for the purposes of making policy and/or legal arguments for rule changes, market reform, market mitigation, or related matters, or from making such policy arguments in any forum, based on information resulting from such investigation.

8.7.11 **Scope of Certain Limitations**. Nothing in Sections 8.7.8, 8.7.9 or 8.7.10 above is intended or shall be construed to (i) permit any of the California Parties to seek additional compensation or other relief as against Reliant with respect to the transactions, conduct and other matters that are encompassed within the releases set forth in Sections 8.4.1 and 8.5.1 or (ii) limit the ability of Reliant to challenge any actions taken or recommendations made by the CPUC in connection with the proceedings or investigations referred to in Sections 8.7.8, 8.7.9 and 8.7.10.

8.7.12 Nothing in the releases set forth in Section 8.6.1 shall be construed in any manner as releasing any claim specifically asserted in the Master Class Action Complaint dated March 9, 2005 filed against Reliant in the cases denominated as the "Price Indexing Cases," coordinated under **[*105]** Natural Gas Anti-Trust Cases I, II, III and IV, California Judicial Council Coordination Proceeding Nos. 4221, 4224, 4226 and 4228.

8.8 **Effectiveness of Releases**. It is the intention of the Parties that the releases granted pursuant to this Article 8 shall be effective as a bar to all causes of action and demands for monetary relief, including costs, expenses, attorneys' fees, damages, losses and liabilities of every kind, known or unknown, suspected or unsuspected, herein above specified in this Article 8. In furtherance of this intention, Reliant on the one hand and the California Parties, the Class Action Parties, the Local Governmental Parties, the Additional Claimants and OMOT, on the other hand, with respect to the specific matters released herein, each knowingly, voluntarily, intentionally and expressly waive, as against each other, any and all rights and benefits conferred by *California Civil Code Section 1542* and any law of any slate or territory of the United States or principle of common law that is simitar to *Section 1542*. *Section 1542* provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY [*106] AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

In connection with such waiver and relinquishment, the Parties each acknowledge that they are aware that they may hereafter discover facts in addition to or different from those which they now know or believe to be true and with respect to the subject matter of this Agreement, but that it is their intention hereby to fully, finally and forever settle and release all matters, disputes, differences, known or unknown, suspected or unsuspected, that are set forth in this Article 8. This Agreement is intended to include in its effect, without limitation, other than the limitations set forth in Section 8.7, all claims encompassed within the settlement and releases set forth in this Article 8, including those which the Parties may not know or suspect to exist at the time of execution of this Agreement, and this Agreement contemplates the extinguishment of all such claims. The Releases set forth in this Article 8 shall be, and remain in effect as, full and complete releases, notwithstanding the discovery or existence of any such additional or different facts relating to the subject matter of this Agreement. Notwithstanding the waiver of *California Civil Code Section 1542*, the Parties **[*107]** acknowledge and agree that the releases provided for in this Agreement, although intended to be full and complete releases applicable to both known and unknown claims with respect to the matters described, are nonetheless specific to the matters set forth in this Article 8 and are not intended to create general releases as to claims, or potential claims, based on any matters other than those described in this Article 8.

8.9 **Tolling**. Pending the approvals specified in Section 10.1, the Parties agree to continue the currently in place tolling of any statutes of limitations or similar defenses based on the passage of time with respect to the matters released in this Article 8 (and for this purpose the continued tolling provided for in the Memorandum of Understanding shall be deemed to have continued as though provided under this Agreement as well so that no gap shall result from the fact that this Agreement has superseded the Memorandum of Understanding). If this Agreement is terminated pursuant to Sections 2.6 or 4.6 or approval is not obtained as provided in Section 10.1, or if this Agreement is otherwise invalidated, the Parties agree notwithstanding any other provision in this Agreement **[*108]** that the tolling provided for in this provision will remain in effect through the date of such termination, non-approval or invalidation.

8.10 **Compensatory Nature of Settlement**. All payments made by Reliant pursuant to this Settlement represent compensation to Settling Participants for the matters released herein.

9. MARKET PARTICIPANTS' ELECTION TO PARTICIPATE IN SETTLEMENT

9.1 **Election to Participate in Settlement**. Subject to the terms of this Agreement, upon the filing of this Agreement at FERC, any Market Participant that elects to be hound by this Agreement may become an Opt-In Participant and shall be bound by this Agreement by notifying FERC that the Market Participant wishes to become a Settling Participant, using the form of notice attached hereto as Exhibit F. Opt-In Participants shall have rights and obligations provided for them under this Agreement, even though such Opt-In Participants shall not be Parties or Settling Claimants hereto. Electronic copies of the notice required by the first sentence of this Section 9.1 shall be served, in accordance with FERC's rules, on each person designated on (i) the ListServ established for the proceedings in FERC Docket Nos. ELOO-95, **[*109]** *et al.*, and (ii) the ListServ established for the Partnership/Gaming Proceeding. Any Market Participant that has not provided such notice and the required service on or before the date that is five (5) Business Days following the issuance by FERC of the FERC Settlement Order shall have no right to participate in the Settlement contemplated in this Agreement, absent the written agreement of the California Parties and the Reliant Parties, and shall be deemed to be a "Non-Settling Participant" for purposes of this Agreement.

9.2 **Releases**. Subject to the terms of this Agreement, each Market Participant electing to be an Opt-In Participant bound by this Agreement pursuant to Section 9.1 shall be deemed to have provided all of the waivers and releases of claims against the Reliant Parties that are set forth in Article 8, and the Reliant Parties shall be deemed to have provided or received the waivers and releases set forth in Article 8 as they relate to such Opt-In Participant. Non-Settling Participants shall not be deemed to have provided or received any of the waivers, releases, or other benefits set forth in this Agreement. If an Opt-In Participant itself is determined by FERC to owe refunds **[*110]** to the ISO or PX on account of transactions during 2000 and 2001, opting into this Agreement shall not be deemed to reduce or alter the amount of refunds that such Opt-In Participant owes.

10. REQUIRED APPROVALS; OBTAINING LOCAL GOVERNMENTAL APPROVALS; STAYS

10.1 **Required Approvals**. The Settlement made pursuant to this Agreement shall be subject to approval by:

10.1.1 **FERC**. FERC in the FERC Settlement Order, which order shall be deemed to authorize and direct the ISO and PX to implement the terms of this Settlement and, if necessary, to grant waiver of any tariff provisions that may provide for contrary resolution of the matters covered by this Settlement; and

10.1.2 **The CPUC**. The CPUC, which approval shall be implemented by the CPUC entering into this Agreement as a Party. CPUC approval shall constitute permission for SCE to consummate this Settlement. Each of the two approvals provided for above shall include approval of all of the terms and conditions of this Agreement in its entirety without material change or condition unacceptable to any adversely affected Party (collectively, the "Required Approvals" and each a "Required Approval"). If any Required Approval, or, if the Settlement **[*111]** Effective Date has not then occurred, any order resulting from a request for rehearing or an appeal of any of the Required Approvals, includes a material change or condition that adversely affects any Party, then each Party so affected shall communicate its consent or lack of consent to such change or condition in writing to the other Parties within five (5) Business Days after the date on which the decision, order, or ruling constituting the Required Approval, or any order resulting from a request for rehearing or appeal of any Required Approval, was issued. The failure of an affected Party to provide written notice to the other Parties in accordance with the foregoing sentence shall constitute acceptance by such Party of the material change or condition. In such cases where an order includes a material change or condition, the Required Approval will be deemed to have occurred on the date all Parties have indicated consent by providing written notice to the other Parties or by failing to provide timely notice.

10.2 **Approvals for Local Governmental Parties**. This Agreement shall also be subject to approval, with respect to provisions pertaining to Local Governmental Parties, by such **[*112]** Local Governmental Parties' governing boards or councils, if necessary; provided, however, that: (i) the failure of any such Local Governmental Party to obtain the approval of this Agreement by its governing board or council shall not diminish the effectiveness of this Agreement as to all other Parties; (ii) if any Local Government Party has not obtained such approval within ninety (90) days of the Execution Date, Reliant, at its sole and absolute discretion, may elect to terminate the Agreement as to that Local Government Party and, in accordance with Section 6.7, the consideration that would have been paid to that entity (as identified on the Local Governmental Parties' Allocation Matrix, Exhibit D) shall be paid to Reliant.

10.3 **Cooperation Regarding Stay of Lockyer v Reliant**. On August 23, 2005, the court in *State of California, ex rel Bill Lockyer, et al. v. Reliant Energy, et al.*, U.S. District Ct. (N.D. Cal.) Case No. C-02-1788-VRW ("*Lockyer v. Reliant*") entered an order staying the action in its entirety pending orders from the FERC and CPUC either approving or disapproving the Settlement. The parties to *lockyer v. Reliant* shall maintain or seek to extend this stay in full force **[*113]** and effect until the earlier of (i) the Settlement Effective Date or (i) the date this Agreement is terminated (each a "Stay Period"). No collateral estoppel or other prejudice to the rights, claims or defenses of any party to that case shall arise during or on account of the Stay Period and none of the parties to that case shall have any argument based on the doctrine of laches or similar equitable grounds due to inaction during the applicable Stay Period. During the Stay Period, the parties to *Lockyer v. Reliant* shall not initiate any discovery, and shall not seek to enforce any outstanding discovery, including subpoenas to third parties, in that case.

11. REPRESENTATIONS, WARRANTIES AND COVENANTS

11.1 Representations of all Parties and Settling Participants. Each Party (except for the Class Action Parties, as to whom this Agreement is subject to court approval and the Local Governmental Parties, as to which governing board or council approval of this Agreement may be necessary) and each Opt-In Participant makes the following representations and warranties, for itself only, to each other Party and Opt-In Participant, to be effective from and after (i) for the Parties, the Execution **[*114]** Date and (ii) for Opt-In Participants, the date of opt-in pursuant to Section 9.1:

11.1.1 Organizational Status, Power and Authority-Except for any Governmental Authority, it is a corporation or limited liability company duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation. It possesses all necessary power and authority to execute, deliver and perform its obligations under this Agreement.

11.1.2 **Authority to Execute**. If applicable, the execution, delivery, election to participate and performance of this Agreement (i) are within its powers, (ii) have been duly authorized by all necessary action on its behalf and all necessary consents or approvals have been obtained and are in full force and effect, and (iii) do not violate any of the terms and conditions of any applicable law, or materially violate any contracts to which it is a party. In addition, Reliant Energy, Inc. represents and warrants that it has the authority to sign on behalf of, and to bid to the terms and conditions of this Agreement, each of the affiliates and subsidiaries listed on Exhibit A hereto.

11.1.3 **Binding Obligation**. This Agreement constitutes its legal, valid **[*115]** and binding obligation, enforceable against it in accordance with its terms.

11.1.4 **Ownership of Claims**. It is the sole owner of the claims which are being resolved and compromised by it pursuant to this Agreement Except as provided in this Agreement, there has been no sale, assignment, transfer, pledge or hypothecation, or attempted sale, assignment, transfer, pledge or hypothecation, by it of any such rights or claims, whether directly, indirectly, by operation of law or otherwise.

11.2 Representations of the Reliant Parties. The Reliant Parties jointly and severally represent and warrant to the California Parties that the exact legal name of each of the Reliant Parties is accurately set forth in the definition of Reliant Parties and that Reliant Energy Services, Inc. is a Delaware corporation and the sole owner of the Reliant Receivables and the Assigned Assets. The Reliant Panics further jointly and severally warrant and represent that the entities listed in Exhibit A are wholly owned by Reliant Energy, Inc., and, to the best of their knowledge, the organizational charts attached hereto as Exhibit A provide true and correct representations of the Reliant organizational structure **[*116]** during the time periods covered by the releases set forth in Article 8 of this Agreement.

11.3 **Understanding of Terms**. In executing this Agreement, or, with respect to Opt-In Participants, in electing to participate in this Agreement:

11.3.1 **Independent Investigation**. Each Party and Opt-In Participant acknowledges that it has relied on its own independent investigation and conducted its own due diligence with respect to the subject matter of this Agreement and in determining whether or not to enter into this Agreement or accept the benefits of this Settlement, including a review of the underlying contracts, agreements, transactions, instruments and applicable law in connection herewith, or has been afforded an opportunity to review relevant information, ask questions and receive satisfactory answers concerning this Settlement and the terms and conditions of this Agreement;

11.3.2 **Expert Evaluation**. Each Party and each Opt-In Participant acknowledges it is experienced in or had the opportunity to consult with experts who are experienced in wholesale and retail electric and gas commodity, risk management and other transactions and possesses the knowledge, experience and sophistication to **[*117]** allow it to fully evaluate and accept (he merits and risks of entering into the transactions contemplated by this Agreement or accepting the benefits of this Settlement; and

11.3.3 **Information Access**. EachParty acknowledges that the Reliant Parties made available information and analysis to support their valuation regarding refunds and receivables.

11.4 **Warranties Regarding the Reliant Receivables and Assigned Assets**.

11.4.1 **Amount of Reliant Receivables**. Reliant warrants and represents that the amount of the Reliant Receivables as set forth in Sections 1.68 and 4.1.1 is consistent with all information concerning its claimed receivables, of which it has knowledge as of the Execution Date.

11.4.2 **Encumbrances and Reliant Receivables and Assigned Assets**. Reliant further warrants and represents that, except to secure borrowings under its corporate credit and debt agreements (a schedule of which is set forth as Exhibit G), it has not, as of the date of this Agreement, pledged, hypothecated, encumbered, sold, transferred or otherwise assigned, to any third party voluntarily, or involuntarily or by way of set off or offset, any portion of (i) its PX or ISO receivables to be included in the Reliant **[*118]** Receivables, and (ii) the Assigned Assets.

11.5 **Covenants**. The Reliant Parties covenant to the California Parties that

11.5.1 At all times between the Execution Date and the Settlement Effective Date, they will not sell, assign, transfer, pledge, hypothecate, encumber, or otherwise transfer in whole or in part to any third party, whether voluntarily or involuntarily or by way of setoff or offset, any of the Reliant Receivables or Assigned Assets; provided, however, assignments, pledges, or encumbrances on a *part passu* basis with the corporate credit and debt agreements set forth in Exhibit G, hereto, are permitted so long as Reliant Energy Services, Inc. at all times between the Execution Date and the Settlement Effective Date will remain the sole owner of the Reliant Receivables and the Assigned Assets and such assignments, pledges, or encumbrances will not impair Reliant's ability to transfer the Reliant Receivables and the Assigned Assets to the California Parties free and clear of all claims, liens, encumbrances and interests on the Settlement Effective Date as provided herein; and

11.5.2 At all times between the Execution Date and the twentieth (20th) day after the Settlement Effective **[*119]** Date, the Reliant Parties will promptly provide to the California Parties written notice of any change in their legal name or jurisdiction of organization; and

11.5.3 At all times from and after the Settlement Effective Date, the Reliant Parties will, upon the reasonable request and at the sole expense of the California Parties, execute and/or deliver such further documents, agreements, instruments, and account and other books of record, and shall cooperate and do such other and further acts, as may be necessary to effectuate the Reliant Parties' transfer of the Reliant Receivables and the Assigned Assets pursuant to Sections 4.1.1, 4.2.1, 4.2.3, 4.3.1, 4.3.2 and 4.3.3, and enforce the claims, rights of action and defenses of the Reliant Parties acquired in connection therewith.

12. IMPLEMENTATION OF CLASS ACTION SETTLEMENTS

12.1 **Submittal for Notice Order**. California and Egger Class Counsel (collectively "Class Counsel") shall each submit this Agreement to a pertinent court and shall each separately apply for entry of an order (the "Notice Order") in their respective cases to be agreed to by Reliant and Class Counsel. The Egger Class Plaintiffs shall file a separate action in San Diego **[*120]** Superior Court for the purpose of effectuating this Settlement.

12.2 **Notice Order**. The Notice Order in each of the California Class and Egger Class Cases will request, inter alia:

12.2.1 **Class Certification**. Certification of the pertinent Class for settlement purposes only;

12.2.2 **Preliminary Approval**. Preliminary approval of the settlement set forth in this Agreement; and

12.2.3 **Class Notice**. Approval of the form and method of settlement notice or notices, agreed to by Reliant and Class Counsel, which notice shall set forth the general terms of the settlement set forth in this Agreement and the date of the Settlement Hearing as described below. The costs of class notice regarding Reliant's settlement with the Class Action Parties shall be paid 50% by the Class Action Parties and 50% by Reliant.

12.3 **Settlement Hearing**. California and Egger Class Counsel shall each request that after notice is given, the Court(s) hold hearing(s) (the "Settlement Hearings") in which the seulement with the applicable of Classes as set forth herein shall be approved as fair, adequate and reasonable, and enter final judgment of dismissal with prejudice pursuant to the settlement as to Reliant. The judgment **[*121]** of dismissal shall confirm the parties' agreement that the approving Court(s) retain jurisdiction under *California Code of Civil Procedure § 664.6* to enforce the terms of the Agreement that apply to Reliant and the Class Action Parties.

12.4 **Requests for Exclusion**. If prior to the Settlement Hearing in either or both of the California and Egger Class Actions, persons who otherwise would be members of either Class have timely requested exclusion ("Requests for Exclusion") from their respective Class in accordance with the provisions of the applicable Notice Order and the notice given pursuant thereto, and such persons in either Class in the aggregate represent claims in an amount greater than that acceptable to Reliant, then Reliant shall have, in its sole and absolute discretion, the option to terminate this Agreement as to that Class. Copies of all Requests for Exclusion received, together with copies of all written revocations of Requests for Exclusion received shall be delivered to Reliant's counsel within seven (7) Business Days before the applicable Settlement Hearing.

Termination by Reliant under this Section 12.4 shall in no manner affect Reliant settlement with the California Parties, the Additional Claimants Parties **[*122]** and any Opt-In Participant.

12.5 **No Solicitation**. California and Egger Class Counsel will neither solicit nor encourage members of either Class to request exclusion.

12.6 **Settlement Class Certification**. Solely for the purposes of the settlement of the California and Egger Cases, the Reliant Parties and the California and Egger Classes agree to the certification of the California and Egger Classes as defined above; and Class Counsel and Reliant agree to request jointly that the Court in each case enter an order, which, among other things, certifies the applicable Class. In Ute event that this Agreement is not finally approved, or is terminated, canceled, or fails to become effective for any reason, any class certification, solely for the purpose of the settlement of the California and/or Egger Cases, shall be null and void and the plaintiffs in those actions and Reliant shall revert to their respective positions immediately prior to the execution of this Agreement. Under no circumstances shall this Agreement be used as an admission or evidence concerning the appropriateness of class certification should the Agreement be terminated in whole or part. Reliant reserves the right to oppose **[*123]** class certification should this Agreement be terminated in whole or part. Termination by Reliant under this Section 12.6, or any other failure of this agreement to become effective as to the California and/or Egger Classes shall in no manner affect Reliant's settlement with the California Parties, the Other Claimant Parties and any Additional Settling Participant.

12.7 Attorneys' Fees. Reliant shall not oppose separate requests by California Class Counsel and Egger Class Counsel for awards of attorneys' fees and costs not to exceed $3,342,857 and $557,142, respectively, excluding interest The actual amount of each award shall be determined by the California Class and Egger Class courts, respectively, subject to the above-stated limits. Reliant agrees to pay the actual amounts so awarded, not to exceed the above-stated limits, into such accounts as California Class Counsel and Egger Class Counsel may designate within ten (10) Business Days of the entry of the applicable order(s) awarding attorneys' fees and costs; provided that: (i) in the event of a successful appeal by any person or entity that challenges any award of attorneys' fees or costs, or challenges any other part of this Agreement, **[*124]** each law firm for the Class Action Parties agrees to repay the full amount of all attorneys' fees and costs paid to that law firm that are impacted by the successful appeal, with interest at the annual rate of 4% from the date of an initial payment to and including the date of repayment and to provide reasonable security for such repayment to that counsel in the form set forth in Exhibit H hereto; and (ii) if the trial court has not approved either fee application by March 1,2006, with respect to such application, Reliant shall pay interest on the amounts that are actually awarded at the annual rate of 4% from March 1, 2006 to and including the date of the payment.

12.8 **Miscellaneous**. All Parties to this Agreement acknowledge and agree that the Settlement Amount described in Section 4.1 constitutes a direct and substantial benefit to the Class Action Parties and shall constitute a setoff or offset with respect to all claims that are released pursuant to Section 8.6.1. The Settling Participants agite not to oppose court approval of Reliant's settlement of the California Class and Egger Class actions, or Class Counsel's applications for attorneys' fees and costs.

13. DISPUTE RESOLUTION [*125]

13.1 **Resolution by FERC**. If any disputes arise between the Parties and/or the PX or the ISO in connection with the fulfillment of the Parties' obligations under this Agreement, the Parties shall present such disputes to the FERC for resolution pursuant to FERC's rules and regulations, subject to each Parry's rights to seek rehearing and judicial review of FERC's decisions and orders pertaining to the resolution of such disputes. This provision shall not apply, however, to any disputes which may arise with respect to the class action settlement provisions under Sections 12.1 through 12.7.

14. GOVERNING LAW; INTERPRETATION

14.1 **Governing Law**. To the extent not governed by federal law, this Agreement shall be governed by and construed in accordance with the laws of the Slate of California, without regard to its conflict of laws principles.

14.2 **Entire Agreement**. This Agreement contains the entire agreement among the Parties with respect to the subject matter hereof and there are no agreements, understandings, representations, or warranties among the Parties other than those set forth herein. Each of the Parties expressly disclaims any reliance upon any representations or warranties not stated **[*126]** herein.

14.3 **Headings**. The headings or titles of Articles or Sections used in this Agreement (in bold typeface) are for convenience only and shall be disregarded in interpreting this Agreement.

14.4 **Parties Represented by Counsel**. The Parries acknowledge that they have sought the advice of, and have been advised by, legal counsel of their choice in connection with the negotiation of this Agreement, and that the Parties have willingly entered into this Agreement with a full understanding of the legal and financial consequences of this Agreement.

14.5 **Drafting of Agreement**. The Parties acknowledge that (i) this Agreement is the result of negotiations among, and has been reviewed by, each Parry and its respective counsel, and (ii) all Parties contributed to the drafting of this Agreement. Accordingly, this Agreement shall be deemed to be the product of all Parties, and no ambiguity shall be construed in favor of or against any Party on the basis that it drafted the ambiguous provision.

14.6 **Rules of Interpretation**. The following rules of interpretation shall apply to this Agreement, including all Exhibits.

14.6.1 **Singular; Plural**. Unless the context otherwise requires, words used in this Agreement **[*127]** shall include in the singular number the plural and in the plural number the singular.

14.6.2 **Self Reference; Incorporation by Reference; Cross Reference**. Except as otherwise specified herein, all references in this Agreement to an "Article," "Section," or "Exhibit" shall mean an Article, Section, or Exhibit of this Agreement The words "hereof," "herein," and "hereunder," and words of similar import when used in this Agreement, including the Exhibits attached hereto, shall, unless otherwise specified, refer to this Agreement as a whole and not to any particular Article, Section, Exhibit or provision of this Agreement, and all references to Articles, Sections or Exhibits shall be to all subparts of such Articles, Sections or Exhibits. All Exhibits shall be deemed to be incorporated by reference and made a part of this Agreement.

14.6.3 **Inclusive of Permitted Successors**. Unless otherwise stated, any reference in this Agreement to any person or entity shall include its permitted successors and assigns and, in the case of any governmental entity or party, any entity succeeding to its functions and capabilities.

14.6.4 **Inclusive References**. When used herein, the words "include," "includes," **[*128]** and "including" shall not be limiting and shall be deemed in all instances to be followed by the phrase "without limitation."

15. MISCELLANEOUS

15.1 **Notices**. All notices, demands and other communications between or among any of the Parties hereunder shall be in writing and shall be deemed to have been duly given: (i) when personally delivered; (ii) upon actual receipt (as established by confirmation of receipt or otherwise) during normal business hours, otherwise on the first (1st) Business Day thereafter, if transmitted by facsimile or telecopier with confirmation of receipt; (iii) on the date of receipt when mailed by certified mail, return receipt requested, postage prepaid; or (iv) on the date of receipt when sent by overnight courier; in each case, to the individuals and addresses set forth in Exhibit E, or to such other addresses as a Party may from time to time specify by notice to the other Parties given pursuant to this Section 15.1. Email addresses are provided for convenience only and do not constitute notice.

15.2 **Successors and Assigns**. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective permitted successors and assigns **[*129]** and in the case of any governmental parry, any entity succeeding to its functions and capabilities.

15.3 **No Third-Party Beneficiaries; No Admissions**. This Agreement is not intended to confer upon any person or entity that is not a Party or an Opt-In Participant any rights or remedies hereunder, and no one, other than a Party or an Opt-In Participant, is entitled to rely on any representation, warranty, covenant, release, waiver or agreement contained herein. Moreover, except for the purpose of enforcing the terms and conditions of this Agreement as between and among the Parties and the Opt-In Participants, nothing herein shall establish any facts or precedents as between the Parties, the Opt-In Participants, and any third parties as to the resolution of any dispute. Each Settling Participant and Reliant Party expressly denies any wrongdoing or culpability with respect to the claims against it released in this Agreement, or any other matter addressed in this Agreement, and does not, by execution of this Agreement, admit or concede any actual or potential fault, wrongdoing or liability in connection with any facts or claims that have been or could have been alleged against it with respect **[*130]** thereto. Neither this Agreement, nor any act performed or document executed pursuant to or in furtherance of this Agreement: (i) is or may be deemed to be, or may be used by a Settling Participant or a Reliant Party as, an admission of, or evidence of, the validity of any released claim, or of any wrongdoing or liability of any of the Parties or Opt-In Participant; (ii) is or may be deemed to be, or may be used by a Settling Participant or a Reliant Party as, an admission of, or evidence of, any fault or omission of any of the Parties or Opt-In Participant in any civil, criminal, regulatory or administrative proceeding in any court, administrative agency, regulatory authority, or other tribunal; or (iii) shall be offered in evidence or alleged in any pleading by any Settling Participant or any Reliant Party, except to obtain the Required Approval, or to enforce the terms of and obtain the benefits of this Agreement. In no event shall this Agreement, any of its provisions or any negotiations, statements or court proceedings relating to this Agreement or the Settlement in any way be construed as, offered as, received as, used as or deemed to be evidence of any kind in any action, or **[*131]** in any judicial, administrative, regulatory or other proceeding, except in a proceeding to enforce the terms or obtain the benefits of this Agreement or to obtain the Required Approvals.

15.4 **Costs**. Except as provided in this Agreement, each of the Parties and each Opt-In Participant shall pay its own costs and expenses, including attorneys' fees, incurred in connection with the disputes that are settled herein and the negotiation, preparation and implementation of this Agreement including costs and expenses incurred in preparing stipulations, making motions and seeking and obtaining the Required Approvals.

15.5 **Modifications**. This Agreement may be modified only if in writing and signed by each of the Parties affected by the proposed modification. No waiver of any provision of this Agreement or departure from any term of this Agreement shall be effective unless in writing and signed by the Settling Claimants with respect to any waiver requested by the Reliant Parties and by the Reliant Parties with respect to any waiver requested by the Settling Claimants. No modification will be effective unless any approval of the CPUC or FERC that may be required with respect to such modification, **[*132]** if any, has been received.

15.6 **Assignments**. No Party shall, except as provided in Section 4.2.1, assign or transfer this Agreement or its rights or obligations hereunder without the prior written consent of the other affected Parties; provided, however, that any Party may, without the consent of the other Parties (and without relieving itself from liability hereunder), transfer or assign this Agreement to any person or entity succeeding to all or substantially all of the assets of such Party, provided that the assignee agrees in writing to be bound by the terms and conditions hereof.

15.7 **Joint and Several Liability**. Nothing in this Agreement shall be deemed to create any joint and several liability among the Settling Participants.

15.3 **Consents; Acceptance**. Unless otherwise expressly provided herein, any consent, acceptance, satisfaction, cooperation, or approval required of a Party under this Agreement shall not be unreasonably withheld or delayed.

SIGNATURES

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their duly authorized officers or representatives. This Agreement may be executed in any number of counterparts, each of which, when executed, will **[*133]** be deemed to be an original and all of which taken together will be deemed to be one and the same instrument. This Agreement may be executed by signature transmitted to other parties via facsimile or .pdf (portable document format) transmission, which shall be deemed to be the same as an original signature.

SIGNATURES APPEAR ON THE PAGES THAT FOLLOW

Reliant Signature Page

Reliant Signature Page

Reliaut Signature Page

OMOI Signature Page

PG&E Signature Page

SCE Signature Page

SDG&E Signature Page

California Attorney General Signature Page

CERS Signature Page

CEOB Signature Page

CPUC Signature Page

Oregon Attorney General Signature Page

Washington Attorney General Signature Page

California Class Signature Page

Egger Class Signature Page

Local Governmental Party Signature Pages - - Pages for any or all of the following:

The City and County of San Francisco
The City of Oakland
The County of Santa Clara
The County of Contra Costa
Valley Center Municipal Water District
Padre Dam Municipal Water District
Ramona Municipal Water District
Helix Water District
Vista Irrigation District
Yuima Municipal Water District
Fallbrook Public Utility District
Borrego Water District
Metropolitan Transit Development Board

San Diego Trolley, **[*134]** Inc.
San Diego Transit Corporation
Sweetwater Authority

Coordination Proceeding Special Title Rule 1550b

Superior Court of California, County of San Diego

May 30, 2006, Decided; May 30, 2006, Filed

JCCP 4204 & 4205

Reporter
2006 Cal. Super. LEXIS 891 *

Coordination Proceeding Special Title (Rule 1550(b)):, WHOLESALE ELECTRICITY ANTITRUST CASESI&II This document relates to: ALL ACTIONS

Core Terms

Parties, Settlement, Refund, Receivables, Escrow, effective date, Settling, Energy, releases, notice, class action, Proceedings, electricity, Non-Settling, Opt-In, Assigned, Distributions, Allowances, amounts, allocated, Matrix, termination, markets, entity, funds, Offset, transactions, provisions, obligations, terms

Counsel: **[*1]** For Plaintiffs: LERACH COUGHLIN STOIA GELLER, RUDMAN & ROBBINS, LLP, Leonard B. Simon(58310), Frank J. Janecek, Jr. (156306), Christopher Collins (189093), San Diego, LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP, William Bernstein (065200), Joseph R. Saveri (130064), Barry R. Himmelstein (157736), Eric B.Fastiff(182260), Daniel E. Barenbaum (209261), San Francisco, CA, KJESEL, BOUCHER & LARSON, L.L.P., Raymond P. Boucher(l 15364), 8648 Wilshire Boulevard, Beverly Hills, CA, BEST BEST & KRIEGER LLP Robert J. Hanna (66105), James B.Gilpin (151466), 402 West Broadway, 13th Floor, San Diego, CA 92101-3568, Telephone: (619)525-1300, Facsimile: (619)233-6118, KRAUSE & KALFAYAN, James C. Krause (66478), Ralph B. Kalfayan (133464), San Diego, CA.

For Plaintiffs: FRANK J. JANECEK, JR., MILBERG WEISS BERSHAD HYNES & LERACH LLP Leonard B. Simon (58310), Dermis Stewart (99152), Frank J. Janecek, Jr. (156306), Christopher M. Burke (214799), San Diego, CA, LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP, William Bernstein, Joseph R. Saveri, Barry R. Himmeistein, EricB. Fastiff, Daniel E. Barenbaum, San Francisco, CA, KIESEL, BOUCHER & LARSON, L.L.P., Raymond P. Boucher, Beverly Hills, CA, BEST BEST & KRIEGER **[*2]** LLP, Robert J. Hanna, I James B. Gilpin, San Diego, CA, KRAUSE & KALFAYAN, James C. Krause, Ralph B. Kalfayan, San Diego, CA, PATRICIA A. MEYER & ASSOCIATES APC, Patricia A. Meyer, Matthew T. Poelstra, San Diego, CA, LEVINE, STEINBERG, MILLER & HUVER, Harvey Levine, Richard A. Huver, San Diego, CA.

Judges: The Honorable Joan M.Lewis.

Opinion by: Joan M.Lewis

Opinion

JUDGMENT, FINAL ORDER, AND DECREE GRANTING FINAL APPROVAL TO CLASS ACTION SETTLEMENT

The Honorable Joan M. Lewis Coordination Trial Judge

Date: April 28, 2006

Time: 8:30 a.m.

Dept.: 65

This matter is before the Court on the motion for final approval of a proposed class action settlement (the "Settlement") of the above-captioned cases (the "Class Action")[1] entered into between plaintiffs Pamela R. Gordon, Ruth Hendricks, Oscar's Photo Lab, Mary L. Davis, and Sweetwater Authority (collectively, the "Class Representatives"), on behalf of themselves and the Settlement Class, and Reliant,[2] as set forth in the Settlement Agreement made and entered into as of October 12, 2005 (the "Settlement Agreement"). Collectively, Reliant and the Class Representatives are referred to as the "Settling Parties." The "Settlement Class" is defined as "all persons and entities in **[*3]** California who purchased electric power for purposes other than resale or distribution at any time between July 1, 1998 and October 12, 2005."

By its Order Granting Plaintiffs' Application for Preliminary Approval, Conditionally Certifying Settlement Class, and Scheduling Hearing on Final Settlement Approval, dated January 6, 2006 (the "Preliminary Approval Order"), this Court: (a) conditionally certified a settlement class; (b) granted preliminary approval to the Settlement Agreement; and (c) ordered that notice of the Settlement be disseminated to the settlement class, as directed therein, on or before February 12, 2006. in compliance with the Preliminary Approval **[*4]** Order, notice was published to the members of the Settlement Class, gee Declaration of Andrew Novak, submitted in connection with this hearing.

On April 28, 2006, the Settling Parties appeared, before the Court at the final approval and fairness hearing (the "Fairness Hearing"), represented by their respective attorneys. An opportunity to be heard was given to all persons requesting to be heard. The Court has reviewed and considered all of the pleadings and papers filed in connection therewith, and the argument and evidence presented at the hearing in support of the Settlement.

The entire matter of the proposed Settlement having been duly noticed, and having been fully considered by the Court,

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that:

1. This Court has jurisdiction over the claims of the members of the Settlement Class asserted in this proceeding, personal jurisdiction over the Settling Parties (including the members of the Settlement Class), and subject matter jurisdiction to approve the Settlement

2. Notice given to the members of the Settlement Class was reasonably calculated under the circumstances to apprise the class members of the pendency of the Class Action, all material **[*5]** elements of the proposed Settlement, and their opportunity to exclude themselves from, to object to, or to comment on the Settlement and to appear at the Fairness Hearing, The notice was reasonable and the best notice practicable under the circumstances; was due, adequate and sufficient notice to ail class members; and complied fully with the laws of the State of California, the California Code of Civil Procedure, the California Rules of Court, due process, and any other applicable statutes or rules. A full opportunity has been afforded to the members of the Settlement Class to participate in this hearing, ;itnd all members of the Settlement Class and other persons wishing to be heard have been heard. The questions posed by the Court with respect to the Egger class notice (which are the subject of supplemental briefing requested by the Court in the Egger case), do not apply to the notice provided to the Settlement Class in this Class Action. The Court finds that the applicable requirements of *California Code of Civil*

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[1] Specifically, the settled actions are those incorporated in Plaintiffs' Master Complaint filed on March 8, 2002.

[2] "Reliant" means, collectively, defendants Reliant Energy Services, Inc., Reliant Energy Coolwater, Inc., Reliant Energy Ellwood, Inc., Reliant Energy Etiwanda, Inc., Reliant Energy Mandalay, Inc., and Reliant Energy Ormond Beach, Inc., as well Reliant Energy, Inc., Reliant Energy Power Generation, Inc., Reliant Energy California Holdings, Inc., and each of the affiliates and subsidiaries of Reliant Energy, Inc.

Procedure section 382 and California Rules of Court 1856,1859 and 1860 have been satisfied with respect to the Settlement Class and the Settlement. Accordingly, the Court determines that ail members of the Settlement Class are bound by this **[*6]** Judgment, Final Order, and Decree.

3. Class certification is an appropriate method for protecting the interests of the class members and resolving the common issues of fact and law arising out of the alleged violations of California's antitrust and unfair competition laws.

4. California Code of Civil Procedure section 382 provides for class certification when there is an ascertainable class and a well-defined community of interest among class members. The Settlement Class meets this standard for class certification, so that final certification of the Settlement Class is appropriate. There have been no objections to the propriety of class certification.

5. The Court finds for the purposes of settlement that: (a) the Settlement Class is ascertainable; (b) the members of the Settlement Class are so numerous that joinder would be impractical; (c) there is a community of interest between the members of the Settlement Class; (d) there are questions of law and fact that are common to the claims of the respective members of the Settlement Class and those common questions predominate over individual questions; (e) the claims of the Class Representatives are typical of the claims of absent members of the Settlement Class to which they belong; **[*7]** and (e) the Class. Representatives and their counsel ("Class Counsel") have and will fairly and adequately represent the interests of the absent members of the Settlement Class.

6. The Settlement Class meets the predominance and superiority requirements for class certification. Common issues of fact and law predominate in this proceeding, for the claims of members of the Settlement Class hinge on whether a conspiracy existed among Reliant and its competitors and whether Reliant engaged in unlawful and unfair business practices, and whether such alleged misconduct resulted in supra-competitive prices. This Class Action is superior to individual actions because, given the substantial costs associated with litigating an individual action and the relatively small amount of recoverable damages per class member, Reliant would not likely have paid any consideration to the class absent class treatment of the claims of Settlement Class members.

7. Accordingly, pursuant to California Code of Civil Procedure section 382, the Court provides final certification of the Settlement Class for settlement purposes only, and appoints the Class Representatives and Class Counsel to represent the Settlement Class.

8. Three persons, Rarnona J. Law, and **[*8]** Floyd and Anita Wilson, have timely requested exclusion from the Settlement Class, and they are so excluded.

9. The Court hereby grants final approval to the Settlement and finds that it is fair, reasonable, and adequate, and in the best interests of the Settlement Class as a whole. The Settlement Agreement requires Reliant to provide consideration valued at approximately $512 million. The consideration will benefit members of the Settlement Class by, among other things, reducing the cost of electricity purchased by class members.

10. The Settlement is entitled to a presumption of reasonableness, as it was negotiated at arms'-length over an extended period of time by experienced and well-prepared Class Counsel, and only one objection has been received. See 7-*Eleven Owners for Fair Franchising v. Southland Corp. (2001) 85 Cal.App.4th 1135, 1151, 102 Cal. Rptr. 2d 777*. The Court also notes that the California Attorney General, the California Public Utilities; Commission ("CPUC"), and other state and municipal officers and agencies have all endorsed the Settlement as parties to the Settlement Agreement.

11. The Settlement is also fair, reasonable, and adequate, as measured by the relevant criteria. See *Dunk v. Ford Motor Co. (1996) 48 Cal. App 4th 1794, 1801, 56 Cal. Rptr. 2d 483* (listing and applying factors). In light of the available estimates of Reliant's liability, **[*9]** and this Court's October 3, 2005 Order Sustaining Demurrer Without Leave to Amend and Dismissing Master Complaint holding that Plaintiffs' claims are barred in their entirety by federal field preemption, federal conflict preemption, and the federal filed-rate doctrine, the likelihood that Plaintiffs could have actually collected a judgment larger than the Settlement is; dubious at best.

12. Prior to entering into the proposed Settlement, Class Counsel, who have extensive experience in class action and antitrust litigation, were well-informed about the potential risks and rewards of continued litigation, having conducted extensive discovery and investigation, having consulted extensively with experts concerning class members' damages, and having litigated numerous pleading challenges.

13. Finally, the reaction of class members strongly favors settlement approval. While the Settlement Class contains approximately 13 million members, only three of them have chosen to opt-out of the Settlement Class, and only one has objected to the Settlement.

14. The sole objection to the proposed Settlement, by attorney Roger M. Lindmark, is overruled. Mr. Lindmark objects that notice of the proposed Settlement **[*10]** should have been translated into foreign languages and published in foreign language newspapers. The declaration of the Settling Parties' notice expert establishes that the notice was in fact translated into Spanish and numerous Asian languages, and published in 12 Hispanic and 12 Asian language newspapers in California. Mr. Lindmark also objects that the Settlement Agreement and pleadings in the case were not translated into foreign languages. The published notice provided to Settlement Class Members complies with California law, including without limitation, California Rules of Court 1856(d) and 1859(f), and the general requirement of due process. The Court has broad discretion in fashioning an appropriate notice program, and finds that the translated notices were sufficient to apprise non-English speaking Settlement Class members of their rights and options. Finally, Mr. Lindmark objects that a portion of the Settlement consideration should have been diverted to a charity as a *cy pres* award. The Court finds that a *cy pres* award is unnecessary and inappropriate in this case, as there will be no unclaimed funds, because all of the available Settlement consideration will be passed through to Settlement Class members by their **[*11]** respective utilities.

15. Accordingly, the Settlement Agreement, attached hereto as Exhibit A, is approved and made a part of this judgment as if fully set forth herein, and shall have the full force and effect of an order of this Court. The parties shall consummate the Settlement Agreement according to its terms.

16. Under *California Code of Civil Procedure sections 578*,*579*, and *664.6*, the Court, in the interests of justice, there being no just reason for delay, expressly directs the Clerk of the Court to enter this Judgment, Final Order, and Decree, and hereby decrees, mat upon entry, it be deemed as a final judgment with respect to all claims by members of the Settlement Class against Reliant, in accordance with the terms of the Settlement Agreement.

17. Nothing in the Settlement Agreement is intended to release any nonsettlking defendant, or any other nonsettling entity, other than the Reliant Parties (as defined in the Settlement Agreement) and the persons and entities identified in Paragraph 8.3 of the Settlement Agreement Each member of each Settlement Class (including their past, present or future agents, legal representatives, trustees, parents, estates, heirs, executors and administrator) shall not, hereafter, assert any claim, **[*12]** demand, action, suit, or cause of action, whether class or individual, against any such releasee based upon any claim released in the Settlement Agreement

18. Additionally, each member of the Settlement Class hereby expressly waives and releases any and all provisions, rights and benefits conferred by *California Civil Code section 1542*. Each member of the Settlement Class may hereafter discover facts other than or different from those which he, she or it knows or believes to be true with respect to the claims which are the subject matter of the provisions of the Settlement Agreement, but each member of the Settlement Class hereby expressly waives and fully, finally and forever settles and releases, any known or unknown, suspected or unsuspected, contingent or noncontingent claim with respect to the subject matter of the provisions of the Settlement Agreement, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts.

19. Without affecting the finality of this Judgment, Final Order, and Decree, the Settling Parties, including the members of the Settlement Class, have submitted to the exclusive and continuing jurisdiction of this Court and this Court **[*13]** reserves exclusive and continuing jurisdiction over the Settlement and the Settlement Agreement, including the administration and consummation of the Settlement.

20. The Class Action is dismissed with prejudice, and, except as provided herein or in the Settlement Agreement, without costs.

DATED: May 30, 2006

The Honorable Joan M.Lewis

Coordination Trial Judge

Judge of the Superior Court, County of San Diego

Exhibit A

SETTLEMENT AND RELEASE OF CLAIMS AGREEMENT

This Agreement is entered into as of October 12. 2005, by and among each of the Reliant Parties, OMOI, each of the California Parties, each of the Additional Claimants, each of we Class Action Parties, and each of the Local Governmental Parties. Each of the Reliant Parries, OMOI, the California Parties, Additional Claimants, Class Action Parties, and Local Governmental Parlies is a "Party," and collectively they are "Parties" to this Agreement Unless otherwise expressly provided for herein, each capitalized term used in this Agreement shall have the meaning set forth for such term in Article I or as defined elsewhere in this Agreement

RECITALS

A. *Whereas,* various of the Parties are engaged in or interested in complex and disputed regulatory **[*14]** proceedings, appellate proceedings, litigation, and investigations regarding numerous issues and allegations arising from events in the California and western electricity and natural gas markets;

B. *Whereas,* the Parties have determined that it is preferable to settle the disputes addressed herein, rather than litigate;

C. *Whereas,* the Parties entered into a Memorandum of Understanding on August 12, 2005 ("Memorandum of Understanding"), under which they agreed to resolve their disputes and to further memorialize their settlement through this Agreement which will, when fully executed, and subject to the provisions of Section 8.9, supersede in its entirety the Memorandum of Understanding;

D. *Whereas,* this Agreement contemplates a comprehensive resolution of all disputes and other matters addressed herein (i) through the settlement of the regulatory proceedings, appellate proceedings, litigation, and claims identified herein, and (ii) by effectuating the transactions, granting of rights and benefits, and assumption of obligations specified and provided for herein (such comprehensive resolution and such transactions are referred to herein collectively as the "Settlement"); and

E *Whereas,* CHRS **[*15]** and Reliant concurrently are finalizing a settlement of the claims described in Section 8.7.2, below, as contemplated by the Memorandum of Understanding;

Now, Therefore, in consideration of the mutual covenants and agreements, and other good and valuable consideration provided for herein, and subject to and upon the terms and conditions hereof, the Parties agree as follows:

AGREEMENT

1. DEFINITIONS

The following capitalized terms, which arc in addition to other terms with initial capital letters defined in the body of this Agreement, when used in this Agreement, including the Exhibits hereto, shall have the meanings specified in this Article 1.

1.1 **"Additional Claimants"** means the Oregon Attorney General and the Washington Attorney General.

1.2 **"Agreement"** means this Settlement and Release of Claims Agreement, including all Exhibits, as the same may be amended, modified, supplemented, or replaced from time to time.

1.3 **"Assigned Assets"** means, collectively, the refunds and other rights to payment Reliant is assigning to the California Parties, effective as of the Settlement Effective Date, pursuant to Sections 4.3.1, 4.3.2 and 4.3.3 of this Agreement.

1.4 **"Audit Period"** has the meaning set **[*16]** forth in Section 5.6.1.

1.5 **"Available Operating Capacity"** has the meaning set forth in Section 5.1.

1.6 **"Business Day"** has the same meaning as provided in *California Civil Code Section 9*.

1.7 **"California Attorney General"** means the People of the State of California, *ex rel.* Bill Lockyer, Attorney General.

1.8 **"California Class"** means the plaintiff class representatives in the Wholesale Electricity Antitrust Cases, on behalf of themselves, and a settlement class composed of all persons and entities in the State of California who purchased electric power for purposes other than resale or distribution since July 1, 1998, including all persons and entities within the class definition pled in the Master Complaint filed in Wholesale Electricity Antitrust Cases.

1.9 **"California Litigation Escrow"** has the meaning set forth in Section 6.2.

1.10 **"California Parties"** means, collectively, PG&E, SCE, SDG&E, the California Attorney General, CERS, CEOB and the CPUC.

1.11 **"California Utilities"** means PG&E, SCE and SDG&E.

1.12 **"CEOB"** means the California Electricity Oversight Board.

1.13 **"CERS"** means the California Department of Water Resources acting solely under authority and powers created by California Assembly Bill 1 from the First **[*17]** Extraordinary Session of 2000-2001, codified in *Sections 80000 through 80270 of the California Water Code*. CERS docs not include the California Department of Water Resources with respect to the State Water Project.

1.14 **"Class Action Effective Date"** has the meaning set forth in Section 2.5.

1.15 **"Class Actiou Parties"** means the California Class and the Egger Class.

1.16 **"Commandeering Litigation"** means the litigation arising from the commandeering by Governor Davis of the block forward contracts of PG&E and SCE, including the coordinated proceedings pending before the Superior Court for the State of California for the County of Sacramento known as the Inverse Condemnation Cases, Judicial Council Coordination Proceeding No. 4203.

1.17 **"CPUC"** means the California Public Utilities Commission.

1.18 **"CPUC General Order 167"** means the "General Order Implementing and Enforcing Electric Generator General Duty Standards, Maintenance Standards, and ISO's Outage Coordination Protocol" adopted by the CPUC in its Decision 04-05-018, and reported at *2004 Cal. PUC LEXIS 227 (May 6, 2004)*.

1.19 **"Deemed Distribution"** has the meaning set forth in Section 6.4.2.

1.20 **"Deemed Distribution Participant"** means the Market Participants listed on Exhibit C.

1.21 **"Deposit Fund Account"** has the meaning set forth **[*18]** in Section 4.2.4.

1.22 **"Egger Class"** means the plaintiffs in *Egger, et al. v. Dynegy, Inc., et al.,* Case No. 03 CV 1060 RHW (S.D. Cal.) ("Egger"), on behalf of themselves and all persons and entities in Oregon, Washington, Utah, Nevada, Idaho, New Mexico, Montana and Arizona who purchased electric power for purposes other than resale or distribution since July 1, 1998, including all persons and entities within the class definition pled in *Egger.*

1.23 **"Emissions Offset"** means the claim for recovery of emissions costs incurred by a Market Participant's generating units during the refund period as adopted by FERC. *See, e.g., San Diego Gas & Elec. Co. v. Sellers, et al., 96 FERC ¶ 61,120 at 61,519 (Jul. 25, 2001)* (adopting emissions cost adjustment to seller refund liabilities).

1.24 **"Execution Date"** means the dale this Agreement has been executed by the Reliant Parties, OMOI, each of the California Parties, each of the Additional Claimants, and each of the Class Action Parties. The Execution Date may occur independently of any execution or non-execution of this Agreement by the Local Governmental Parties.

1.25 **"FERC"** means the Federal Energy Regulatory Commission.

1.26 **"FERC Allowances Determination"** means the FERC order directing the payment of Fuel Cost Allowances in the FERC **[*19]** Refund Proceedings, regardless of whether such order is subject to requests for stay, rehearing or appeal, provided that such order has not been stayed pending such rehearing or appeal.

1.27 **"FERC Interest Determination"** means the FERC order directing the payment of interest on receivables and refunds based on the ISO and PX settlement reruns and refund calculations, regardless of whether such order is subject to requests for stay, rehearing, or appeal, provided that such order has not been stayed pending such rehearing or appeal.

1.28 **"FERC Interest Rate"** shall have the meaning set forth in *18 C.F.R. § 35.19a(a)(2) (2005)* or any successor thereto.

1.29 **"FERC Receivables Determination"** means the FERC order issued in the FERC Refund Proceedings which provides the Parties with sufficient information to establish the final amount of the Reliant Receivables, regardless of whether such order is subject to requests for stay, rehearing or appeal, provided that such order has not been stayed pending such rehearing or appeal.

1.30 **"FERC Refund Allocation Matrix"** means the matrix attached as Exhibit B that sets forth the various allocation percentages with respect to certain portions of the Settlement Amount that are **[*20]** applicable to each Settling Claimant and others that are owed refunds or other amounts in the FERC Refund Proceedings pursuant to this Agreement.

1.31 **"FERC Refund Determination"** means the FERC order establishing the amount of Reliant Refunds owed to Non-Settling Participants, regardless of whether such order is subject to requests for stay, rehearing or appeal, provided that such order has not been stayed pending such rehearing or appeal.

1.32 **"FERC Refund Proceedings"** means the proceedings conducted before FERC in FERC Docket Nos. EL00-95, *et al.,* EL03-170, EL03-180, *et al.,* PA02-2, 10 and EL03-59 as they relate to sales in the ISO and PX markets and sales to CERS for the period January 1, 2000 - June 20, 2001, and any related appeals and/or petitions for review and any proceedings on remand.

1.33 **"FERC Settlement Order"** means the FERC order granting the Required Approval with respect to FERC, in accordance with Sections 10.1 and 10.1.1 of this Agreement

1.34 **"Final Staff Report"** means the final report entitled "Final Report On Price Manipulation In Western Markets - Fact Finding Investigation Of Potential Manipulation Of Electric And Natural Gos Prices" issued by FERC staff on March **[*21]** 26, 2003 in Docket No. PA02-2.

1.35 **"Fuel Cost Allowance"** means the claim for recovery of fuel costs incurred by generating units made pursuant to FERC orders in the FERC Refund Proceedings. *See, e.g.. San Diego Gas & Elec. Co., el al., 102 FERC ¶ 61,317 at PP 56-63 (Mar. 26. 2003), 103 FERC ¶ 61,078 (Apr. 22, 2003), 105 FERC ¶ 61,066 (Oct. 16, 2003), 107* FERC ¶ (61,166 (May 12, 2004), *108 FERC ¶ 61,219 (Sept. 2, 2004)*.

1.36 **"GADS Data"** has the meaning set forth in Section 5.6.2.

1.37 **"Governmental Authority"** means any nation or government, any state or other political subdivision thereof, and any entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to a government.

1.38 **"ISO"** means the California Independent System Operator Corporation, a California public benefit corporation.

1.39 **"Local Governmental Parties"** means those of the following identified entities that have executed this Agreement on or about the Execution Date, subject to obtaining the approvals referenced in Section 10.2: The City and County of San Francisco; the City of Oakland; the County of Santa Clara; the County of Contra Costa; Valley Center Municipal Water District; Padre Dam Municipal Water District; Raraona Municipal Water District; Helix Water District; Vista Irrigation District; Yuima Municipal Water District; **[*22]** Fallbrook Public Utility District; Borrego Water District; Metropolitan Transit Development Board; San Diego Trolley, Inc.; San Diego Transit Corporation; and Sweetwater Authority.

1.40 **"Market Participants"** means, other than the ISO and PX themselves, those entities that were ISO scheduling coordinators or PX participants or otherwise directly sold energy to or purchased energy from the ISO and/or PX during part or all of the Settlement Period.

1.41 **"Memorandum of Understanding"** has the meaning set forth in Paragraph C of the Recitals.

1.42 **"NERC"** means the North American Electric Reliability Council.

1.43 **"Net Refund Recipient"** means a Settling Participant that is owed net refunds after consideration of amounts that the particular Settling Participant may itself owe to the market in the form of refunds.

1.44 **"Net Payers"** has the meaning set forth in Section 6.4.4.

1.45 **"Non-Scttling Participants"** means Market Participants other than the Reliant Parties, the California Parties, Additional Claimants, Class Action Parties, Local Governmental Parties, and the Opt-In Participants.

1.46 **"OMOP"** means FERC's Office of Market Oversight and Investigations.

1.47 **"Opt-In Participant"** means a Market **[*23]** Participant that has elected to join this Settlement in accordance with Article 9.

1.48 **"Oregon Attorney General"** means the State of Oregon, Department of Justice, Office of the Attorney General, Hardy Myers, Attorney General

1.49 **"Partnership/Oaming Proceeding"** means the proceedings in FERC Docket Nos. EL03-137, *et al.* (including Docket No. EL03-170)and EL03-I80, *et al.* and any related appeals and/or petitions for review and any proceedings on remand.

1.50 **"Party" and "Parties"** have the meanings set forth in the preamble to this Agreement

1.51 **"PG&E"** means Pacific Gas and Electric Company.

1.52 **"PG&E Plan Escrow"** means the escrow established by PG&E pursuant to PG&E's plan of reorganization and other ancillary agreements for payment of its outstanding debts to the PX and to the ISO.

1.53 **"Post-January 17, 2001 Period"** means the period January 18, 2001 through June 20, 2001, but, with respect to PX transactions, not any period included in the Pre-January 18, 2001 Period.

1.54 **"Pre-January 18, 2001 Period"** means the period October 2, 2000 through January 17, 2001. When applied to PX transactions, the Pre-January 18, 2000 period means the period October 2, 2000 through January 31, 2001.

1.55 **[*24] "Pre-Octobcr Period"** means the period May 1, 2000 through October 1, 2000.

1.56 **"PX"** means the California Power Exchange Corporation, a California public benefit corporation.

1.57 **"PX Retained Claims Litigation"** means the actions filed by the PX against former governors and officers of the PX for transactions and events that began prior to the effective date of the PX's plan of reorganization on April 1, 2003. These proceedings are identified in Attachment B-1 to the settlement agreement filed with FERC on September 1, 2005, as part of an offer of settlement in FERC Docket Nos. ER05-167, *et al.*

1.58 **"PX Settlement Clearing Account"** means any and all accounts of the PX or the reorganized PX holding funds in trust pursuant to the terms of the PX Tariff, ISO Tariff, or a court order. The PX Settlement Clearing Account does not include collateral and funds held for payment of chargeback entitlements, which arc maintained in segregated accounts, as those terms are defined in the PX's First Amended Chapter 11 Plan.

1.59 **"PX Wind-Up Charges"** means the charges payable under FERC's orders in FERC Docket Nos. ER05-167, ER02-2234, ER03-139, ER03-79I, ER04-111 and ER04-785 or such other charges that **[*25]** the PX may seek from its Market Participants and that are put into effect through acceptance by FERC of a PX tariff.

1.60 **"Receivables Excess"** means the amount, if any, by which the actual Reliant Receivables are more than $299,546,045 as determined by FERC in the FERC Receivables Determination.

1.61 **"Receivables Shortfall"** or "Receivables Shortfalls" means the amount, if any, by which the actual Reliant Receivables are less than $299,546,045 as determined in the FERC Receivables Determination.

1.62 **"Refund Period"** means the period October 2, 2000 through June 20, 2001.

1.63 **"Refund Excess"** means the amount, if any, by which the funds deposited in the Reliant Refund Escrow for refunds to Non-Settling Participants based on the FERC Refund Allocation Matrix, exceed the amounts needed to satisfy all refund awards made to Non-Settling Participants for any particular period, *e.g.* the Pre-October Period, the Pre-January 18, 2001 Period, or the Post-January 17, 2001 Period, as determined by FERC.

1.64 **"Refund Shortfall"** means the amount, if any, by which the funds deposited in the Reliant Refund Escrow for refunds to Non-Settling Participants based on the FERC Refund Allocation Matrix, are insufficient **[*26]** to satisfy all refund awards made to Non-Settling Participants for any particular period, *e.g.* the Pre-October Period, the Pre-January 18, 2001 Period, or the Post-January 17, 2001 Period, as determined by FERC.

1.65 **"Reliant"** or the **"Reliant Parties"** means Reliant Energy, Inc., Reliant Energy Services, Inc., a Delaware corporation, Reliant Energy Power Generation, Inc., Reliant Energy California Holdings, Inc., Reliant Energy Coolwater, Inc., Reliant Energy Ellwood, Inc., Reliant Energy Etiwanda, Inc., Reliant Energy Mandalay, Inc., Reliant Energy Ormond Beach, Inc. and each of the affiliates and subsidiaries of Reliant Energy, Inc. listed on Exhibit A, which shall be bound to this Agreement by the execution of this Agreement by Reliant Energy, Inc.

1.66 **"Reliant Gaming Settlement"** means the Agreement and Stipulation filed in FERC Docket No. EL03-170 on August 29, 2003 and approved by FERC on March 4, 2004, *Reliant Resources, Inc., 106 FERC ¶ 61,207 (2004)*.

1.67 **"Reliant/OMOI Settlement"** means the Stipulation and Consent Agreement in Docket Nos. EL03-59, IN03-10 and PA02-2, approved by FERC on October 2, 2003, *Reliant Energy Services, Inc., 105 FERC ¶ 61,008 (2003)*, as modified by FERC order issued September 22, 2004, *Reliant Energy Services, Inc., 108 FERC 161,278 (2004)*.

1.68 **"Reliant Receivables"** means all of Reliant's rights and claims **[*27]** to payment by or from the PX and/or the ISO for sales of energy and ancillary services into the California power markets during the period January 1, 2000 through June 20, 2001 (including the amount of interest on unpaid amounts of Reliant Receivables, the right to which attaches to the Reliant Receivables). As of August 12, 2005, the Parties were informed by the PX and ISO that Reliant has a claim to unpaid receivables, before interest, totaling $299,546,045. The Reliant Receivables include $31,253,850, which reflects a reversal of the PX soft cap (as calculated in accordance with FERCs order of April 26, 2001 in the *FERC Refund Proceedings, San Diego Gas & Elec. Co. v. Sellers, 95 FERC ¶ 61,115 (2001))*. The Reliant Receivables shall not reflect any third party Emissions Offsets or Fuel Cost Allowance costs charged to Reliant.

1.69 **"Reliant Refunds"** means the amounts determined by FERC in the FERC Refund Proceedings that Reliant is required to pay to Market Participants.

1.70 **"Reliant Refund Escrow"** has the meaning set forth in Section 6.2.

1.71 **"Required Approvals"** means the approvals set forth in Article 10.1.

1.72 **"RES"** means Reliant Energy Services, Inc.

1.73 **"SCE"** means Southern California Edison Company.

1.74 **"SDG&E"** means San Diego Gas & Electric Company.

1.75 **"Settlement" [*28]** has the meaning set forth in Paragraph D of the Recitals.

1.76 **"Settlement Amount"** has the meaning set forth in Section 4.1.

1.77 **"Settlement Effective Date"** has the meaning set forth in Section 2.4.

1.78 **"Settlement Period"** means the period January 1, 2000 through December 31, 2001.

1.79 **"Settling Claimants"** means the Additional Claimants and the California Parties.

1.80 **"Settling Participants"** means the Settling Claimants and the Opt-In Participants. 1.81 **"Stay Period"** has the meaning set forth in Section 10.3.

1.82 **"Unsettled Participant Refund Amount"** has the meaning set forth in Section 7.2.

1.83 **"Unsettled Reliant Refund Amount"** has the meaning set forth in Section 7.1.3.

1.84 **"Washington Attorney General"** means the Washington State Office of the Attorney General, Rob McKcnna, Attorney General.

1.85 **"WECC"** means the Western Electricity Coordinating Council (formerly the Western Systems Coordinating Council).

1.86 **"Wholesale Electricity Antitrust Cases"** means, collectively, *Gordon* v. *Reliant Energy. Inc., et al.,* Case No. GIC 758487 (San Diego Super. Ct., Nov. 27, 2000); *Hendricks* v. *Dynegy Power Marketing, Inc., et al..* Case No. GIC 758565 (San Diego Super. Ct., Nov. 29, 2000); *Sweetwater **[*29]** Authority v. Dynegy Power Marketing, Inc., et al.,* Case No. GIC 760743 (San Diego Super. Ct., Jan. 16, 2001); *State of California, ex rel. City Attorney for the*

City and County of San Francisco, Dennis J. Herrera v. Dynegy Power Marketing, Inc., et al., Case No. SCV 318189 (San Fran. Super. Ct., Jan. 18, 2001); *Pier 23 Restaurant and Oscar's Photo lab* v. *PG&E Energy Trading, Inc., et al.,* Case No. SCV 318343 (San Fran. Super. Ct., Jan. 24, 2001); and *Bustamante v. Dynegy, Inc., et al.,* Case No. BC 249705 (Los Angeles Super. Ct., May 2, 2001), previously coordinated as Wholesale Electricity Antitrust Cases 1 & II, California Judicial Council Coordination Proceeding Nos. 4204 and 4205.

1.87 "Williams, Dynegy, Duke, Mirant and Enron Settlements" means the settlements among certain suppliers involved in the FERC Refund Proceedings the California Parties, OMOI and others, each of which either was approved by FERC in orders reported at *San Diego Gas & Elcc. Co. v. Sellers, 108 FERC ¶61,002 (Jul. 2, 2004)* (Williams); *109 FERC ¶ 61,071 (Oct. 25, 2004)* (Dynegy); *109 FERC ¶ 61,257 (Dec. 7, 2004)* (Duke); and III FERC ¶ 61,017 (Apr. 13, 2005) (Mirant), or, in the case of Enron, is pending approval before FERC in Docket No. EL00-95 (offer of settlement filed Aug. 24, 2005).

2. **CONDITIONS TO EFFECTIVENESS; SETTLEMENT EFFECTIVE DATE; [*30] TERMINATION**

2.1 **Agreement Binding on Execution Date.** Except (i) as provided in Section 2.3, and (ii) as to OMOI, whose obligations under this Agreement shall not be effective until the issuance of the FERC Settlement Order, mis Agreement shall be a binding obligation of each Party immediately upon the Execution Date. If any Local Governmental Entity has not yet received its approval (referenced in Section 10.2) by the Execution Date, the obligations as to that Local Governmental Entity shall not be effective until such approval is obtained.

2.2 **Opt-In Participants.** Each Opt-In Participant shall be bound by all of the provisions of this Agreement in accordance with Section 9.1.

2.3 **Conditions Precedent to Certain Obligations.** It is a condition precedent to (i) the obligation of a Party to make payments, assign receivables or other rights to payment, assume liabilities, or release claims hereunder, and (ii) the effectiveness of all releases and the withdrawals of claims, defenses, protests, petitions for rehearing and challenges specified hereunder, that the Settlement Effective Date has occurred.

2.4 **Settlement Effective Date.** The "Settlement Effective Date" shall occur on the date, following **[*31]** the Execution Date, that the Required Approval with respect to FERC (as defined in Section 10.1) has been entered, issued, or otlierwise obtained and is in full force and effect and not then stayed, notwithstanding that a request for Stay, rehearing, or appeal may then be pending. The Settlement Effective Date is not dependent on the occurrence of the Class Action Effective Date.

2.5 **Class Action Effective Date.** The Class Action Effective Date with respect to the California Class shall be the date on which the order certifying the California Class for settlement purposes and the final judgment of approval as between Reliant and the California Class is final and no longer subject to any further appeal, and, with respect to the Egger Class, shall be that date on which the order certifying the Egger Class for settlement purposes, and the final judgment of approval of the Settlement as between Reliant and the Egger Class, is final and no longer subject to any further appeal.

2.6 **Termination (Other Than As to Class Action Parties).** Except as provided in Section 2.7, if the Settlement Effective Date has not yet occurred, and unless otherwise agreed to by the Parties (other than the Class Action **[*32]** Parties) in writing, this Agreement shall terminate on the earlier to occur of: (i) the date on which a FERC order rejecting the settlement in whole or in material part (including any refusal on the part of FERC to issue an order directing the PX to release funds from the PX Settlement Clearing Account as required in this Agreement) becomes final and no longer subject to appeal; or (ii) September 1, 2006. Nothing herein shall be construed as obligating any Party to appeal an order that fails to approve this Settlement

2.7 **Effect of Termination.** In the event of termination pursuant to Section 2.6, this Agreement, except for the provisions set forth in this Section 2.7 and in Sections 10.3, 14.1, 14.3,14.4, 14.5, 14.6, 15.3 and 15.4, shall be null and void and of no further effect, with all rights, duties and obligations of the Parties thereafter restored as if this Agreement had never been executed; provided, however, that the Parties may, in the sole discretion of each Party, agree to attempt to modify the Agreement in a manner that would resolve the grounds for which the Required

Approval with respect to FERC was denied, and provided further that the tolling provision set out at Section **[*33]** 8.9 shall survive any such termination.

2.8 **Termination as Between Reliant and the Class Action Parries.** The reciprocal obligations in mis Agreement as between Reliant and each of the Class Action Parties shall terminate on the entry of an order of the pertinent court denying preliminary or final approval of this Agreement as to any such Class Action Party; provided that, if review of any such order is sought, the termination shall not be effective until the order is final. Any such terminauon as between Reliant and the Class Action Parties has no effect on this Agreement as between Reliant and the Settling Participants.

3. SETTLEMENT AND ACKNOWLEDGMENT

3.1 **Settlement and Acknowledgement of Compromise.** The payments and other consideration specified in this Agreement, along with the covenants and obligations set forth in this Agreement, settle and compromise the Parties' and Opt-In Participants' claims in the releases set forth in this Agreement.

4. MONETARY CONSIDERATION PROVIDED BY THE RELIANT PARTIES

4.1 **Settlement Amount.** In consideration of the respective covenants herein, Reliant has provided or shall provide the monetary consideration set forth in Sections 4.1.1, 4.1.2, 4.1.3, 4.1.4 **[*34]** and 4.1.5 (collectively the "Settlement Amount").

4.1.1 **Reliant Receivables (approximately S299,546,045).** The Reliant Receivables shall be assigned to the California Parties free and clear of all liens, claims, encumbrances, and interests of any kind whatsoever, including any liens or encumbrances related to the borrowings referenced in Section 11.4.

4.1.2 **Prior Settlement Amounts ($64,653,274).** Certain of Reliant's prior settlements with FERC trial staff and OMOI shall comprise part of the Settlement Amount as follows:

(i) The settlement amount of $836,000.16 previously negotiated by Reliant with respect to the Reliant Gaming Settlement shall comprise part of the Settlement Amount and shall be distributed pursuant to future FERC orders in the gaming proceedings, FERC Docket Nos. EL03-170. The payment of $836,000.16 shall be in addition to the cash payments provided for in Sections 4.1.2(ii), 4.1.2(iii), 4.1.3 and 4.1.4 of this Agreement.

(ii) The settlement amount of $13,817,274 previously negotiated by Reliant and FERC staff and approved by FERC on January 31, 2003, *102 FERC ¶ 61,108 (2003)*, with respect to withholding during the period June 20-21, 2000, for which sums have already been distributed, shall comprise **[*35]** part of the Settlement Amount, and the allocations already ordered by FERC shall not be revised. All Parties and Opt-In Participants shall withdraw their objections to that settlement.

(iii) The settlement amount of $50,000,000 previously negotiated by Reliant and OMOI in the Reliant/OMOI Settlement shall comprise part of the Settlement Amount, with the allocation as to Parties and Opt-In Participants to be established by the Pre-October Period Allocation percentages in the FERC Refund Allocation Matrix, and any allocations to other parties to be determined by further FERC order in the Partnership/Gaming Proceeding. The payment of such $50,000,000 shall be in addition to the payments provided for in Sections 4.1.2(i), 4.1.2(ii), 4.1.3 and 4.1.4 of this Agreement.

4.1.3 **Cash to Additional Claimants ($7,000,000).** Reliant shall pay $3,500,000 in cash to each of the Additional Claimants for a total of 57,000,000.

4.7.4 **Additional Cash Consideration ($131,503,955).** Reliant shall pay in cash to the California Parties additional consideration of $131,503,955.

4.1.5 **Interest on ISO and PX Transactions (estimated to be 510,000,000 - $25,000,000).** Reliant shall assign to the California Parties, **[*36]** free and clear of all liens, claims, encumbrances and interests of any kind whatsoever, any and all interest that, absent such assignment, Reliant would have been owed by the ISO and PX in relation to transactions from January 1, 2000 through June 20, 2001, which interest amount is estimated as of the date of this Agreement to be between $10,000,000 and $25,000,000. The assigned interest will in no event be less than zero, and Reliant will be responsible for payment to tlic ISO and/or PX of any interest it is detennined to owe to the ISO or PX in excess of interest owed to Reliant.

4.2 **Settlement Amount Assignment and Payment Procedures.** The payment by Reliant of the Settlement Amount shall be accomplished as follows:

4.2.1 **Assignment of Reliant Receivables.** As of the Settlement Effective Diue (i) the Reliant Parties shall, and do hereby, waive and release their claims against the obligors on the Reliant Receivables and assign, sell, transfer, convey and deliver to the California Parties, free and clear of all claims, liens and encumbrances whatsoever, including any liens or encumbrances related to the borrowings referenced in Section \ 1.4, and (ii) the California Parties shall, and **[*37]** do hereby, assume, purchase, acquire and accept, without recourse to the Reliant Parties, all of the Reliant Parties' right, title and interest in and to the Reliant Receivables and all claims, rights of action and defenses otherwise available to the Reliant Parties arising from or relating to the Reliant Receivables, as they may be adjusted at any lime after August 12, 2005, whether in the preparatory rerun, in the FERC Refund Proceedings, or through any other ISO or PX settlement adjustments permitted under applicable ISO or PX tariffs. The foregoing term "without recourse" shall not, however, limit or be construed as limiting in any way any rights the California Parties have with respect to the Reliant Parties pursuant to the express written provisions, representations and warranties of this Agreement. Each of the Reliant Parties hereby irrevocably authorizes the California Parties, and their respective attorneys, agents, and employees, at any time and from time to time to file in any filing office in any Uniform Commercial Code jurisdiction any initial financing statements and amendments thereto that (i) describe the foregoing transfer, and (it) provide any other information required **[*38]** by Part 5 of Article 9 of the Uniform Commercial Code of the jurisdiction in which such filing is made necessary for the sufficiency or filing office acceptance of such financing statements or amendments, including whether such Reliant Party is an organization, its type of organization and the charter or organization identification number issued to such Reliant Party. The California Parties agree to provide the Reliant Parties with a reasonable opportunity to review and comment on any such Uniform Commercial Code filings in advance of making such filings. Further, the Parties acknowledge and agree that: (i) the assignment of Reliant Receivables includes the right to interest on such Reliant Receivables pursuant to the FERC Interest Detennination; (ii) the assignment of the Reliant Receivables pursuant to this Agreement docs not include claims and defenses that arise as a result of the various contractual relationships among the Reliant Parties themselves; (iii) such claims and defenses shall not affect, hinder or impair the Reliant Receivables assigned to the California Parties hereunder; and (iv) the Reliant Receivables shall be used by the California Parties for the payment of refunds and other payments to Settling Participants **[*39]** as provided for under this Agreement or as the California Parries may separately agree upon among themselves as provided in Section 6.2.

4.2.2 **Scope of Assigned Reliant Receivables.** Except as otherwise expressly provided herein, the Reliant Receivables shall include any and all positive or negative allocations of charges or credits that may be made by the ISO or PX that cause an adjustment up or down in the Reliant Receivables as a result of or on account of ISO and PX transactions by or concerning Reliant in the period from January 1, 2000 through June 20, 2001. To the extent that the ISO or PX is determined in any future proceeding or for any reason to owe any additional amounts to Reliant or be owed any additional amounts by Reliant for the period from January 1, 2000 through June 20, 2001, such amounts are assigned to or, subject to the limitations set forth in Sections 6.9 and 8.7, become the responsibility of the California Parties. However, charges or credits that pertain to Reliant transactions in the ISO or PX during periods prior to January 1, 2000 or after June 20, 2001 ore not Reliant Receivables assigned to the California Parties, shall not in any way affect the Reliant **[*40]** Receivables, and shall remain the responsibility of or accrue to the benefit of Reliant. FERC's approval of this Agreement in the FERC Settlement Order shall constitute direction to the ISO and PX to recognize and implement the assignment of the Reliant Receivables, as provided in Sections 4.1.1,4.2.1 and this 4.2.2 and the treatment of PX Wind-Up Charges as provided in Sections 7.4 and 8.7.7.

4.2.3 **Transfer of Assigned Reliant Receivables Amount.** The FERC order described in Section 10-1 below shall be deemed to authorize and direct the PX to make the transfer set forth in Section 6.3.2.

4.2.4 **Payment Associated with the Reliant Gaming Settlement.** Within ten (10) Business Days after the Settlement Effective Date, Reliant shall pay the amount of $836,000.16 to a Deposit Fund Account established by the United States Treasury on behalf of FERC, in accordance with the FERC's orders regarding the Reliant Gaming Settlement and FERC orders in the gaming proceedings, FERC Docket Nos. EL03-137, *et al.* All Parties and Opt-In Participants shall remain free to assert any position they choose concerning the proper allocation by FERC of such settlement amount.

4.2.5 **Payments Associated with the Reliant/OMOl [*41] Settlement.** Within ten (10) Business Days of the Settlement Effective Date, FERC shall cause to be transferred to an account designated by the California Parties any and all amounts paid by Reliant pursuant to the Reliant/OMOl Settlement that are allocable to Parties and Opt-In Participants as established by the allocation percentages for the Pre-October Period in the FERC Refund Allocation Matrix, but not Reliant/OMOl Settlement amounts allocable to Non-Settling Participants which shall be allocated in the Partnership/Gaming Proceeding. Any additional payments owed by Reliant under the Reliant/OMOl Settlement shall be made when due to such account designated by the California Parties rather than the accounts specified in the Reliant/OMOl Settlement. The payment schedule adopted in the Reliant/OMOl Settlement shall not be revised. To ensure the timely performance of its payment obligations under the terms of the Reliant/OMOl Settlement, if, as of January 31, 2006 (or, if later, as of the Settlement Effective Date) the amount remaining to be paid under the Reliant/OMOl Settlement is greater than $10,000,000, then Reliant shall obtain, within ten (10) Business Days thereof, an irrevocable, **[*42]** standby letter of credit in the amount remaining to be paid under the Reliant/OMOI Settlement as of such date. Any such letter of credit shall be, in form and substance, acceptable to the California Parties, and shall be issued by a U.S. commercial bank or foreign bank with a U.S. branch whose non-credit enhanced, senior unsecured long-term debt at all times prior to the expiration of the letter of credit is at least A-from S&P or A3 from Moody's Investor Service.

4.2.6 **Additional Cash Payments.** No later than ten (10) Business Days after the Settlement Effective Date, Reliant shall pay the cash amounts set forth in sub-sections (i) through (iii) of this Section 4.2.6:

(i) $131,503,955 by wire transfer, from funds other than the Reliant Receivables, into an interest bearing escrow account designated as the Reliant Refund Escrow; and

(ii) $3,500,0000 by wire transfer, from funds other than the Reliant Receivables, to the Oregon Attorney General, which shall be deposited into the Department of Justice Client Trust Account established pursuant to *ORS 180.200*, for distribution from that account by the Oregon Attorney General as provided by law for such funds; and

(iii) $3,500,0000 by wire transfer, from **[*43]** funds other than the Reliant Receivables, to the Washington Attorney General, which shall be used for the direct or indirect benefit of energy consumers in the State of Washington at the sole discretion of the Washington Attorney General. Up to twelve percent (12%) of the total amount transferred to the Washington Attorney General may be used to pay for costs, attorneys' fees and administrative expenses incurred by the Washington Attorney General in its investigation and settlement negotiations, including costs, attorneys' fees, and administrative expenses related to implementation of this Agreement.

4.3 **Assignment of Rights to Refunds and Other Rights to Payment (Assigned Assets).**

4.3.1 **Refunds Payable to Reliant Parties.** In addition to payment of the Settlement Amount, the Reliant Parties, except as provided below in Section 4.3.2, shall, and do hereby waive and release their claims to and assign, sell, transfer, convey and deliver to the California Parties, free and clear of all claims, liens, and encumbrances, effective as of the Settlement Effective Date, all of their right, title and interest in and to any additional refunds and associated interest, surcharges, and other charges **[*44]** that are cither directly or indirectly through otiiers allocated to any of the Reliant Parties and to which the Reliant Parties may be found to be entitled in FERC Docket Hos. EL00-95, *et al,* and ELOO-98, *et al.,* including any refunds from suppliers payable to Reliant pursuant to a settlement of the type described in Section 8.7.6 of this Agreement.

4.3.2 **Refunds Payable hy CERS.** In addition to payment of the Settlement Amount, the Reliant Parties shall, and do hereby waive and release their claims to and assign, sell, transfer, convey and deliver to CERS free and clear of all claims, liens, and encumbrances, effective as of the Settlement Effective Date, all of their right, title and interest in and to any refunds and associated interest resulting from any mitigation of sales by CERS of imbalance energy into the ISO real-time market, as well as surcharges and other charges associated with such sales, that may be payable pursuant to FERC's May 12, 2004 Order on Requests for Rehearing and Clarification in Docket Nos. EL00-95, *et al.,* and EL00-98, *et. at.,* and subsequent orders, and all of their right, tide and interest in and to any such refunds and associated interest, surcharges, and **[*45]** other charges that are either directly or indirectly through others allocated to any of the Reliant Parties

4.3.3 **Assignment of Retained Claims Litigation, Commandeering Litigation.** The Reliant Parties waive and release and assign to PG&E, SCE and SDG&E (for the benefit of their ratepayers), free and clear of any interests, liens, claims and encumbrances, effective as of the Settlement Effective Date, any claim that Reliant may have had to proceeds of the PX Retained Claims Litigation and proceeds from the Commandeering Litigation.

4.4 This Section intentionally left blank.

4.5 **Cooperation.** The Parties shall cooperate with each other in providing the data and information necessary to implement this Article 4.

4.6 **Failure of Consideration.** In the event that (i) the assignment of the Reliant Receivables to the California Parties as provided for under Sections 4.1.1 and 4.2.1 or assignment of the Assigned Assets as provided for under Section 4.3 fails as a result a breach by Reliant of its representations and warranties set forth in Section 11.1 and/or Section 11.2 and/or Section 11.4; (ii) the Reliant Receivables or any other rights to payment assigned pursuant hereto fail to transfer to **[*46]** tine California Parties, pursuant to Sections 4.2.3, 4.3 and 6.3, free and clear of all liens, claims, encumbrances and interests of any kind whatsoever; (iii) the cash Transfers required of Reliant pursuant to Sections 4.1.3,4.1.4 and 4.2.6 are not timely made, in whole or in part, as required by this Agreement; or (iv) any Reliant Party takes any of the following actions, or any of the following actions are taken against any Reliant Party, and that action is reasonably likely to have a material adverse effect on the ability of the other Reliant Parties to perform fully and timely their obligations under this Agreement: (a) it commences a voluntary case, or an involuntary case is commenced against it and not dismissed within thirty (30) days thereafter, within the meaning of the United States Bankruptcy Code (*11 U.S.C. § 101 et seq*,), (b) it consents to the appointment of a custodian of it or for all or substantially all of its property, or (c) it makes a general assignment for the benefit of its creditors, then the California Parties may at their option, subject to the Reliant Parties' cure rights set forth below, terminate this Agreement in writing in its entirety *ab initio* except as to the tolling provisions **[*47]** of this Agreement and the other provision of this Agreement identified in Section 2.7, *i.e.,* as though the Settlement Effective Date had never occurred. All notices of termination delivered pursuant to this Section 4.6 shall be in writing and addressed to the Reliant Parties in accordance with the notice provisions set forth herein, and clearly state the grounds for termination, the identity of any Reliant Parties as to which clause (iv) above applies (if applicable), and the date on and after which such termination shall be effective. If the grounds for termination include clause (i) and/or (ii) and/or (iii) above and one or more of the Reliant Parties completely cures all defaults under those clauses that arc identified in the California Parties' notice of termination within five (5) Business Days after the Reliant Parties' receipt of that notice of termination, including payment of interest at the FERC Interest Rate on any payments past due under this Agreement, then this Agreement shall not terminate *ab initio* and all defaults identified in the California Parties' notice of termination with respect to clause (i) and/or clause (ii) and/or clause (iii) above shall be deemed to have **[*48]** been cured.

5. **RELIANT'S NON-MONETARY CONSIDERATION**

5.1 **Extension of Reliant's Must-Offer Obligation.** Upon the termination of Reliant's must-offer obligation pursuant to FERCs Order Approving Stipulation and Consent Agreement, *Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices, 102 FERC ¶ 61,108 at 61,289 (2003)*, Reliant shall continue to abide by a must-offer obligation for two additional years, by which it will submit supplemental energy bids for all uncommitted, Available Operating Capacity, as defined in this Section 5.1, from its generation assets located in California into the ISO imbalance energy market for all hours for which the ISO has issued a 24-Hour Forecast or Alert Notice pursuant to its Operating Protocol E-508 (Sep. 8, 2003). "Available Operating Capacity" is the unloaded and otherwise uncornmittcd capacity at the time a supplemental energy bid is submitted from a generating unit that is either on-line and synchronized or capable of being on-line and synchronized, calculated at the unit's maximum operating level:

(i) Adjusted for legitimate operating limitations, maintenance outages or reductions in capacity;
(ii) Adjusted for any limitations on operation under applicable law;

(iii) Adjusted for limitations under reliability **[*49]** must run agreements;
(iv) Minus capacity coirirnittcd to be scheduled under a bilateral agreement;
(v) Minus capacity subject to real-time control by unaffiliated third-parties;
(vi) Minus capacity committed to provide ancillary services to the ISO either through the ISO's Ancillary Services market or through self-provision by a Scheduling Coordinator;
(vii) Minus capacity committed to self-provide station power; and
(viii) Minus the capacity committed to deliver energy or provide operating reserve to an electric distribution utility to serve retail customers.

5.2 **Reliant Compliance with FERC Market Behavior Rules.** Reliant shall comply with FERC's Docket No. EL01-118 market behavior rules, as they may be in force and amended from time to time. Reliant will not challenge, by means of objection, rehearing, appeal or otherwise, the market behavior rules adopted in the November 17, 2003 order, *Investigation of Perms and Conditions of Public Utility Market-Based Rate A uthorizations,0 105 FERC ¶ 61,218 (2003)*, and the May 19, 2004 order on rehearing, *107 FERC ¶ 61,175 (2004)*, provided that this commitment will not limit or restrict Reliant's right to participate in any future proceeding in the event of a remand to FERC of the market behavior **[*50]** rules by the Court in *Cinergy Marketing & Trading, LP. v. FERC,* Nos. 04-1168, *et al.* (D.C. Cir.), or to defend itself in any FERC investigation or complaint proceeding involving an alleged violation of such market behavior rules or to comment in any future proceeding on the interpretation or application of the market behavior rules.

5.3 **Reliant Compliance with ISO Tariff.** Reliant will comply with applicable ISO tariff provisions; provided, however, that each of the Parties is free to advocate changes in those tariff provisions.

5.4 **Rulianf Cooperation with Respect to Claims Against Other Entities.**

5.4.1 **Cooperation with the California Parties and Class Action Parties.** Reliant will cooperate with the California Parties in pursuing claims and potential claims against suppliers other than Reliant relating to the operation of the California electricity and natural gas markets during the period January 1, 2000 through June 20, 2001, by making available to the California Parties such information and documents as they may specify that are (i) relevant to such claims, (ii) in its possession or control, and (iii) not proprietary or privileged. With respect to issues concerning the California or **[*51]** western electricity markets, Reliant shall make available to the California Parties and the Class Action Parties any current employees or consultants with knowledge of such information as witnesses; provided that, interviews or depositions shall be scheduled at mutually convenient times and the California Parties and Class Action Parties shall coordinate their requests for both documents and witnesses so as to avoid duplication and unnecessary burden on Reliant. With respect to issues concerning natural gas markets, Reliant shall make available to the California Parties any current employees with knowledge of such information as witnesses; provided that, interviews or depositions shall be scheduled at mutually convenient times and the California Parties shall coordinate their requests for both documents and witnesses so as to avoid duplication and unnecessary burden on Reliant. OMOI shall be permitted to attend and ask questions at any interview or deposition conducted pursuant to this Section 5.4,1, and, at its request, shall be provided with copies of any written information provided through such cooperative efforts. With respect to the Class Action Parlies, Reliant will accept service **[*52]** by e-mail or fax delivery of document requests concerning matters relevant to the Class Action Parties' claims arising from the operation of the California or western electricity markets during the period from January 1, 2000 through June 20, 2001, provided Reliant is given reasonable time to comply. Such cooperation as set forth in this Section 5.4.1 shall be effective as of the Settlement Effective Date.

5.4.2 **Responsibility for Costs.** Each of the California Parties or Class Action Parties that invokes its rights under the foregoing provisions to obtain Reliant's cooperation shall reimburse Reliant for reasonable out-of-pocket expenses (except for attorneys' fees) incurred by Reliant in connection with providing that Party or Parties the cooperation specified in Section 5.4.1. Only Parties that have made a request for cooperation under Section 5.4,1 shall be responsible to Reliant for such reimbursement of costs associated with the request.

5.5 **Extension of Certain Power Sales Conditions.** Reliant will comply with the following power sales conditions (from Article IV, Section 3 of the Reliant/OMOI Settlement) with respect to its sales of electricity in the WECC through December 31, **[*53]** 2006. RES will sell power (other than any power that may be the subject of the auction described in Section IV, paragraph 4 of the Reliant/OMOl Settlement) at market-based rates subject to the following conditions;

5.5.1 **Reliant to Provide Monthly Reports to OMOI.** RES's sales of electricity in the United States portion of the V/ECC will be subject to review by FERC. During the period ending December 31, 2006, RES shall provide monthly reports to OMOI, including the information in Section 5.5.2, pursuant to the confidentiality provisions of *18 C.F.R § 388.112 (2005)*. Such reports shall be provided to OMOI within ten (10) Business Days of the end of each calendar month through December, 2006.

5.5.2 **Reports to Include Data on Electricity Trades.** On a transaction-by-transaction basis, RES shall provide to OMOI data on all its completed electricity trades in the United States portion of the WECC. The data shall include counter-party name and buy-sell indication, and if executed on an electronic trading platform, the name of the electronic trading platform. The reports shall further provide price, quantity, transaction date, start and end date, and delivery point for each transaction. RES shall provide any **[*54]** additional information regarding such trades as OMOI reasonably requests.

5.5.3 **Reliant Communications Subject to OMOI Review.** RES shall provide OMOI upon request, pursuant to the confidentiality provisions of *18 C.F.R. § 388.112 (2005)*, with copies of emails, instant messages (*e.g.,* AOL Instant Messages) and telephone conversations of RES's power traders with market participants for transactions in the United States portion of the WECC that OMOI randomly requests for review by OMOI. To facilitate OMOI's review, RES will retain copies of emails of employees trading electricity in the United States portion of the WECC beginning on the effective date of the Reliant/OMOl Settlement and continuing thereafter on a rolling six-month basis. Beginning with the effective date of the Rcliant/OMOI Settlement and continuing for three years thereafter, RES will also retain copies, in audiotape or electronic aud io file format, of all telephone conversations of employees trading electricity in the United States, tn addition, Reliant's Compliance Director for Trading and Compliance Manager for Trading will be located on the trade floor(s) to monitor trading activity and will also randomly monitor emails, instant **[*55]** messages and telephone conversations and will provide to OMOI monthly reports of this monitoring activity, pursuant to the confidentiality provisions of *18 C.F.R. § 388.112 (2005)*.

5.6 **Generation Outage Audit and Compliance Program.**

5.6.1 **Semi-Annual Outage Audits.** For a period of twelve (12) months following the Settlement Effective Date (the "Audit Period"), Reliant shall, at its expense, retain Washington Group International, or if Washington Group International is unable to perform the audit, another independent consulting or engineering company mutually agreed upon by Reliant and the CPUC, to perform semi-annual audits of outages during the Audit Period at Reliant's generating plants in California. The findings of each audit shall be provided directly by that independent company to OMOI and the CPUC, and shall be provided simultaneously to Reliant, without prior review by Reliant The audits shall review whether plant outages were legitimate and of an appropriate duration under the circumstances relevant to each outage.

5.6.2 **CPUC Review of Reliant GADS Data.** Within 30 days of the Settlement Effective Dale, Reliant shall provide to the CPUC Reliant's operations data for the "Generation Availability **[*56]** Data System" ("GADS Data"), compiled by the North American Electric Reliability Council ("NERC"), for the period January 1998 through November 2004. For a period of thirty-six (36) months from the Settlement Effective Date, Reliant shall submit its GADS Data for Reliant's California plants to NERC, and shall simultaneously authorize NERC to release that data and provide it directly to the CPUC. Reliant may request that the CPUC treat all or part of the GADS Data confidentially, and the CPUC will rule on such requests pursuant to the California Public Records Act (Title 1, Division 7, Chapter 3.5 of the California Government Code).

5.6.3 **Reliant Compliance with CPUC General Order 167.** Reliant shall comply with the requirements set forth in CPUC General Order 167, provided, however, that Reliant is free to advocate changes to such requirements, and to challenge the applicability of such requirements to Reliant.

5.6.4 **Reliant Compliance with CPUC Document Requests.** Reliant shall comply with requests by the CPUC for inspection of non-privileged documents under Reliant's control, to the extent required by applicable state and federal law.

5.7 **Antitrust Compliance Program.** Reliant Energy, Inc. **[*57]** shall institute, within thirty (30) Business Days after the Settlement Effective Date, an antitrust compliance program. The antitrust compliance program shall include not less than the following for directors, officers and employees of Reliant Energy, Inc.'s western commercial operations: (i) mandatory antitrust training, which may be computer based training, for each officer and employee; (ii) written compliance standards to be distributed to each officer and employee; (iii) annual review of the compliance program by the officers and directors of Reliant Energy, Inc. responsible for this program; (iv) appointment of an antitrust compliance officer or an antitrust compliance committee, which may be the Ethics or Compliance Officer and the Office of Ethics and Compliance of Reliant Energy, Inc.; (v) confidential reporting systems; (vi) disciplinary mechanisms to ensure enforcement of standards; and (vii) protocols and procedures for initiating and concluding internal investigations. For purposes of this Section 5.7, with respect to Reliant Energy, Inc., the term "employee" shall mean all U.S. exempt employees at the manager level or above for western commercial operations, and the terms **[*58]** "officers" and "directors" shall mean, respectively, the U.S. officers directing western commercial operations and U.S. directors of Reliant Energy, Inc. Nothing in this Section 5.7 is intended to suggest or reflect that any antitrust compliance program currently maintained by Reliant Energy, Inc. is not fully compliant with the requirements set out herein.

5.8 **ISO and PX Information.** The Reliant Parties authorize the ISO and PX to provide to the California Parties on or after the Execution Date any additional information, materials, or data that would otherwise be available to one or more of the Reliant Parties and that are otherwise not available to the California Parties and that are related to Reliant's sales and purchases in the ISO and/or PX markets during the Settlement Period; provided, that except as otherwise provided by applicable law, each of the California Parties agrees that it shall maintain such information in confidence and shall not disclose it to third parties other than (i) to its employees, lenders, counsel, accountants, advisors, or consultants who have a need to know such information for purposes of implementing or administering this Agreement (including the determination **[*59]** or allocation of the settlement proceeds) and who have agreed to keep such information confidential, or (ii) to OMOI, which shall treat any such information so provided as privileged pursuant to *18 C.F.R. § 388.112(c) (2005)* and shall place such information in a non-public file, or (iii) to FERC ora court to the extent necessary to implement this Agreement or to pursue claims against entities other than Reliant relating to the Settlement Period, or (iv) as required by applicable law, rule, or regulation or any administrative, legislative, or judicial order.

6. **DISPOSITION AND ALLOCATION OF THE SETTLEMENT AMOUNT**

6.1 **Allocation and Distribution of the Settlement Amount.** The Settlement Amount to be provided pursuant to Section 4.1 shall be allocated and distributed among certain Market Participants and others in the manner set forth in this Article 6. For purposes of this Article 6, the period May 1, 2000 through June 20, 2001 shall be divided into the Pre-October Period, the Pre-January 18, 2001 Period, and the Post-January 17, 2001 Period.

6.2 **Escrow Accounts.** No later than ten (10) Business Days after the Settlement Effective Dnte, the California Parties shall establish an escrow account (the "Reliant Refund **[*60]** Escrow") for the purpose of receiving, holding and transferring the Reliant Receivables and certain cash payments to the extent provided for herein. The California Parties shall also establish a separate escrow account (the "California Litigation Escrow") for the purpose of receiving, holding and transferring such portion of the Reliant Receivables and cash payments that may be required or permitted herein to be transferred to the California Litigation Escrow as the California Parties may agree upon among themselves. The California Parties may from time to time transfer to the California Litigation Escrow amounts in the Reliant Refund Escrow that are not needed for refunds to others, provided however that no such transfer shall occur before the principal payments described in Section 6.4.7 are effectuated. The costs of creating and maintaining the Reliant Refund Escrow, the California Litigation Escrow, and any other escrow accounts created in connection with this Agreement shall be the responsibility of the California Parties. In the event that both the Reliant Refund Escrow and the California Litigation Escrow are not available to begin receiving funds ten (10) Business Days after **[*61]** the Settlement Effective Date, then all time periods provided in this Agreement for the payment of funds that include payments to or from the Reliant Refund Escrow or the California Litigation Escrow shall be extended by the number of days between the tenth (10th) Business Day after the Settlement Effective Date and the date on which both the Reliant Refund Escrow and the California Litigation Escrow are available to begin receiving funds. Upon payment by the Reliant Parties of the cash consideration required pursuant to Section 4.2.6 of this Agreement, except as expressly provided herein, the Reliant Parties shall have no further liability or obligation to make payments into the Reliant Refund Escrow or the California Litigation Escrow.

6.3 **Transfer of Reliant Receivables.**

6.3.1 **Notice to the ISO and the PX.** No later than six (6) Business Days after the Settlement Effective Date, the California Parties shall advise the ISO and the PX that the full amount of the Reliant Receivables has been assigned to the California Parties pursuant to Section 4.2.1, and such assigned Reliant Receivables shall be applied to the funding of the consideration provided for in this Agreement. The California **[*62]** Parties also shall identify for the PX the amounts of any Deemed Distributions, as provided for in Section 6.4.2.

6.3.2 **Transfer of Reliant Receivables to Reliant Refund Escrow.** No later than ten (10) Business Days after the Settlement Effective Date, the PX shall transfer a cash payment from the PX Settlement Clearing Account to the Reliant Refund Escrow, equal to the then current estimated amount of the Reliant Receivables, excluding interest thereon, (i) less an amount equal to the total of alt Deemed Distributions pursuant to Section 6.4.2, (ii) less an amount equal to all distributions of funds relating to the period January 1, 2000 through June 20, 2001 (including interest thereon) that have been paid by the ISO or the PX to the Reliant Parties after the Execution Date but prior to such cash transfer (such distributions being subject to Section 6.3.4), (iii) plus the amounts owed by Market Participants with negative allocations shown on the FERC Refund Allocation Matrix, provided that, consistent with a settlement among Enron, OMOI, and the California Parties, the amount relating to Enron as shown on the FERC Refund Allocation Matrix shall be transferred without reduction for **[*63]** Fuel Cost Allowance or Emissions Offset (under that agreement Enron is a Net Payer in the amount of $2,370,437). Subject to the provisions of Section 4.5, the Reliant Parties will comply with their obligations as specified in other provisions of this Agreement, but shall have no additional obligations with respect to the amount referenced in this Section 6.3.2, including with respect to whether such amount is actually transferred by the PX or deposited into the Reliant Refund Escrow.

6.3.3 **Transfer of Reliant Receivables to California Litigation Escrow.** Upon a final determination of the amount of the Reliant Receivables in the FERC Receivables Determination, the PX shall transfer and deposit into the California Litigation Escrow the amount, if any, by which the Reliant Receivables exceeds the sum of the amounts transferred to the Reliant Refund Escrow pursuant to Section 6.3.2 and the amounts credited as Deemed Distributions. The Reliant Parties will comply with their obligations as specified in other provisions of this Agreement, but shall have no additional obligations with respect to the amounts referenced in this Section 6.3.3, including with respect to whether such amounts are **[*64]** actually transferred or deposited into the California Litigation Escrow.

6.3.4 **Early Distribution of Reliant Receivables.** In the event the ISO or PX distributes to Reliant any part of the Reliant Receivables subsequent to August 12, 2005 and prior to the final distribution of funds pursuant to Section 6.3.2 (including distributions occurring prior to the Settlement Effective Date), the Reliant Party receiving such Reliant Receivables shall hold such amounts in trust for the California Parties and within fifteen (15) Business Days (or, in the case of such distributions prior to the Settlement Effective Date, within fifteen (15) Business Days after the Settlement Effective Date) transfer an equal amount, plus associated interest at the annual rate of 3.75%, to the Reliant Refund Escrow or such other escrow as the California Parties may designate.

6.4 **Allocation to Market Participants.**

6.4.1 **FERC Refund Allocation Matrix.** The FERC Refund Allocation Matrix, Exhibit B, shows the allocation, as determined by the California Parties, among the California Parties and those other Market Participants that are owed refunds. The FERC Refund Allocation Matrix contains an allocation to three time periods **[*65]** (the Pre-October Period, the Pre-January 18, 2001 Period and the Post-January 17, 2001 Period) of refunds available for Settling Participants. The amounts shown in the FERC Refund Allocation Matrix reflect, among other things, an allowance for the Fuel Cost Allowance claims previously submitted by the Reliant Parties in the FERC Refund Proceedings in the amount reflected in Section 6.4.4. Subject to the adjustments set forth herein, each Settling Participant shall be allocated the net refund amounts shown for that Settling Participant on the FERC Refund Allocation Matrix. All distributions of funds according to the FERC Refund Allocation Matrix shall be paid in cash or as Deemed Distributions (as described in Section 6.4.2) to those entities entitled to receive funds in accordance with the FERC Refund Allocation Matrix and which are either Parties to this Agreement or which are Opt-In Participants as defined in Section 9.1. Refunds with respect to the Pre-October Period shall be allocated only with respect to purchases during the period May 1, 2000 through October 1, 2000. The additional amount shown on the FERC Refund Allocation Matrix as being payable to the California Parties' account **[*66]** shall be allocated pursuant to a separate agreement among the California Parties.

6.4.2 **Deemed Distributions to Deemed Distribution Participants.** Certain Settling Participants, including PG&E, owe pre-refund amounts to the PX or ISO for transactions during the period from January 1, 2000 through June 20, 2001 or owe refunds to the market as calculated in Exhibit Nos. CPX-51 and ISO-30 in the FERC Refund Proceedings for that period and are listed in Exhibit C as Deemed Distribution Participants. Distribution of settlement proceeds to Deemed Distribution Participants under this Agreement will take the form of a reduction (a "Deemed Distribution") against such amounts owed and shall be reflected on the books of the ISO and PX. The Parties agree, and the FERC Settlement Order shall constitute FERC's determination, that the PG&E Plan Escrow may be reduced in an amount equal to PG&E's Deemed Distributions under this Agreement. Other Settling Participants who do not qualify as Net Refund Recipients shall also receive their allocable refunds in the form of an offset against their outstanding market obligations.

6.4.3 **Net Refund Recipients.** Except as provided for Deemed Distribution Participants, **[*67]** the net refunds to be paid to each Settling Participant as shown on Exhibit B shall be paid from the Reliant Refund Escrow in the form of cash.

6.4.4 **Fuel Cost Allowances and Emissions Offsets.** The Settlement and the FERC Refund Allocation Matrix reflect an agreed upon Emissions Offset of $14,604,291 and an agreed upon Fuel Cost Allowance of $63,250,845. The Reliant Parties shall not seek any additional Fuel Cost Allowance or any additional Emissions Offset as against the Settling Participants for the period beginning January 1, 2000 through June 20, 2001. Settling Participants are responsible for their ultimate allocable share of the agreed upon Fuel Cost Allowance and Emissions Offset, with the allocation based on the FERC Allowances Determination. The Fuel Cost Allowance and Emissions Offset provided for herein shall, as to the total amounts applicable to the market as a whole, remain fixed as to the Parties and the Opt-In Settling Participants. The proposed allocation of charges for such allowance to individual Market Participants, which is currently based on gross load, shall be subject to adjustment and "true-up" to comply with the FERC Allowances Determination. Because the charges **[*68]** for Fuel Cost Allowances and Emissions Offsets can exceed the refunds due to a Market Participant, some Market Participants may be shown as owing money in the FERC Refund Allocation Matrix. Such Market Participants that become Settling Participants ("Net Payers") will not receive or be liable for payment until the date that FERC requires Market Participants to pay such allowances in the FERC Refund Proceedings, at which time the payments owed to or owing from such Net Payers will be adjusted based on the FERC Allowances Determination.

6.4.5 **Payment of Interest.** No interest on refunds under this Settlement or on Reliant's Receivables shall be released from the PX Settlement Clearing Account or paid to any Party or Opt-In Participant until the FERC Interest Determination has been issued and taken effect without being stayed. At such time, interest shall be paid to each Party or other Market Participant in accordance with the FERC Interest Determination, except that all net interest otherwise due to Reliant for transactions from January 1, 2000 through June 20, 2001, is assigned and shall be paid to the California Parties as provided for in Sections 4.1.5 and 4.2.1. Notwithstanding the **[*69]** foregoing, the amounts allocated as refunds in the FERC Refund Allocation Matrix for the Pre-October Period shall not bear interest except as may be earned in any escrows or accounts separately established under this Settlement and interest accruals shall further be subject to the limitations set forth in Section 7.3.

6.4.6 **Net Payer.** Any amount shown on the FERC Refund Allocation Matrix as owed by a Party other than Reliant, or by on Opt-In Participant, will be reflected on the books of the ISO and PX as an additional amount owed by that Party or Opt-In Participant. To determine whether an amount is owed for purposes of the foregoing sentence, amounts relating to particular periods, *e.g.* the Pre-October Period, the Pre-January 18, 2001 Period or the Post-January 17, 2001 Period, shall be netted against each other.

6.4.7 **Timing of Payments.** Except as provided in Section 6.4.5, principal payments on refunds reflecting the amount shown in the FERC Refund Allocation Matrix, either in the form of cash from the Reliant Refund Escrow or through the offset of payables provided for in the case of Deemed Distributions, shall be effectuated for Settling Participants, including Opt-In Participants, **[*70]** no later than twenty (20) Business Days after the Settlement Effective Date.

6.4.8 **Distributions to Non-Settling Participants and Disposition of Escrowed Funds.** Amounts specified on the FERC Refund Allocation Matrix as payable to Market Participants who, by not making the election provided in Article 9, become Non-Settling Participants will be retained in the Reliant Refund Escrow until issuance of the FERC Refund Determination. If FERC determines that Reliant owes refunds pursuant to the FERC Refund Determination or interest pursuant to the FERC Interest Determination to any Non-Settling Participant it shall be paid first from the amounts retained in relation to Non-Settling Participants in the Reliant Refund Escrow, until such funds are exhausted, with any balance to be paid pursuant to Section 6.8. To the extent that amounts set aside for Non-Settling Participants in the Reliant Refund Escrow are in excess of the amount necessary to pay such Non-Settling Participants pursuant to the FERC Refund Determination and the FERC Interest Determination, the remaining amount from the Non-Settling Participant set-aside will be transferred to the California Litigation Escrow.

6.5 **Receivables [*71] Shortfalls and Excesses; Refund Shortfalls and Excesses.**

6.5.1 **Pre-Oclober Period.** Subject to Section 6.9, the California Utilities shall be responsible for a share of any Refund Shortfall or Receivables Shortfall allocated to the Pre-October Period. Any such responsibility shall be deemed to be a reversal of amounts allocated to the California Utilities and shall be paid to the ISO and/or the PX, as appropriate, from the amounts allocated to the California Utilities, on a pro rata basis determined with reference to the principal amount of refunds (including Deemed Distributions) allocated to each of the California Utilities in the FERC Refund Allocation Matrix for that period. The California Utilities shall be entitled to payment of any Refund Excess or Receivables Excess allocated to the Pre-October Period. Said amount shall be paid into the California Litigation Escrow and allocated among the California Utilities on a pro rata basis determined with reference to the total principal amount of the refund (including Deemed Distributions) allocated to each of the California Utilities in the FERC Refund Allocation Matrix for that period.

6.5.2 **Pre-January 18, 2001 Period.** Subject to Section **[*72]** 6.9, the California Utilities shall be responsible for a share of any Refund Shortfall or Receivables Shortfall allocated to the Pre-January 18, 2001 Period. Any such responsibility shall be deemed to be a reversal of amounts allocated to the California Utilities under this Agreement and shall be paid to the ISO and/or the PX, as appropriate, from the amounts allocated to the California Utilities, on a pro rata basis determined with reference to the principal amount of refunds (including Deemed Distributions) allocated to each of the California Utilities in the FERC Refund Allocation Matrix for that period. The California Utilities shall be entitled to payment of any Refund Excess or Receivables Excess allocated to the Pre-January 18, 2001 Period. Said amount shall be paid into the California Litigation Escrow and allocated among the California Utilities on a pro rata basis determined with reference to the total principal amount of the refund (including Deemed Distributions) allocated to each of the California Utilities in the FERC Refund Allocation Matrix for that period.

6.5.3 **Post-January 17, 2001 Period.** Subject to Section 6.9 and in accordance with Section 6.11, CERS shall be responsible **[*73]** for any Refund Shortfall or Receivables Shortfall allocated to the Post-January 17, 2001 Period, and shall be entitled to payment of any Refund Excess or Receivables Excess allocated to the Post-January 17, 2001 Period, except to the extent any refunds paid to CERS for the Post-January 17, 2001 Period pursuant to the FERC Refund Allocation Matrix are subsequently reallocated to the California Utilities by agreement of CERS and the California Utilities.

6.6 Impact of FERC Allowances Determination. To the extent Reliant's total Fuel Cost Allowance is determined by FERC in the FERC Allowances Determination to be greater than $63,250,845, Reliant shall be entitled to recover from each Non-Settling Participant that Non-Settling Participant's allocable share of the difference, including, notwithstanding anything to the contrary in Section 4.2, any associated interest on the difference, as determined by FERC. To the extent Reliant's total Fuel Cost Allowance is determined by FERC in the FERC Allowances Determination to be less than $63,250,345, Reliant shall be responsible for paying to each Non-Settling Participant that Non-Settling Participant's allocable share of the difference, including **[*74]** any associated interest on the difference, as determined by FERC. In no case shall the California Parties be responsible for costs, additional refunds, or offsets to refunds associated with Reliant's Fuel Cost Allowance. In particular, the California Parties shall not be responsible to Non-Settling Participants for costs, additional refunds, or offsets to refunds associated with Reliant's Fuel Cost Allowance beyond each Non-Settling Participant's allocated share of the $63,250,845 included in the FERC Refund Allocation Matrix. Reliant shall be responsible for any Emissions Offset and Fuel Cost Allowance amounts or claims allocated to Reliant in connection with Reliant's purchases from other sellers. Reliant shall continue to pursue, at its expense, its Emissions Offset as to Non-Settling Participants, and shall take all reasonable actions as requested by the California Parties to pursue such Emissions Offset.

6.7 **Funds in the California Litigation Escrow; Distributions to Local Governmental Parties.** All funds in the California Litigation Escrow shall be distributed in accordance with a separate agreement among the California Parties which shall provide for the allocation of $3,600,000 **[*75]** among the Local Governmental Parties pursuant to the Local Governmental Allocation Matrix, Exhibit D. If a Local Governmental Party does not execute this Agreement, the consideration that would have been paid to that entity (as identified on the Local Governmental Allocation Matrix) shall be paid to Reliant pursuant to Section 10.2. Distributions from the California Litigation Escrow will accrue interest only from the date the California Litigation Escrow is funded and at the rate of interest earned on the funds held therein.

6.8 **Non-Settling Participants.** Subject to the limitations of Sections 6.9 and 6.10, the California Parties shall pay to the ISO and/or the PX, as appropriate, from the Reliant Refund Escrow, the California Litigation Escrow or otherwise, any refunds due to Non-Settling Participants by the Reliant Parties in connection with transactions in the ISO or the PX markets during the Pre-October Period and Refund Period, as determined by FERC in the FERC Refund Proceedings. Notwithstanding the foregoing, Non-Settling Participants shall not receive any accelerated payment of the Reliant Parties' refunds under the Settlement or this Agreement and shall not be guaranteed any **[*76]** specific level of refunds.

6.9 **Limitations on California Parties' Obligations.** Notwithstanding any other provision of this Agreement, the obligation of any of the California Parties to pay money to Non-Settling Participants (i) shall be limited to payment of claims in the FERC Refund Proceedings arising from Reliant's transactions in the ISO or the PX markets during the Pre-October Period and the Refund Period, and shall not encompass payment of claims arising from other transactions or in any other proceeding, and (ii) shall not, in any event, exceed the total amount of refunds and/or offsets allocated to that California Party pursuant to this Agreement for the applicable period as set forth in the FERC Refund Allocation Matrix. Without limiting the foregoing, nothing in this Agreement shall require the California Parties to bear any liability to any party relating to (i) Reliant sales outside of the ISO and PX for the period January 1, 2000 through June 20, 2001 or (ii) for any Reliant transactions prior to January 1, 2000 or after June 20, 2001.

6.10 **Reliant Settlements with Non-Settling Participants.** The Reliant Parties retain the right to negotiate with and enter into settlements **[*77]** of claims with Non-Settling Participants, and such settlements may, subject to any necessary approvals, establish the amount of refunds payable to such Non-Settling Participants by the Reliant Parties, but, absent written consent of each of the California Parties, acting in their sole discretion, the amount of any such settlement that will be paid from the Reliant Refund Escrow, the California Litigation Escrow, or otherwise by the California Parties may not exceed the amount that would have been allocated to that Non-Settling Participant if it had become an Opt-In Participant

6.11 **CERS Amount.** From the amount of refunds that otherwise are due to CERS pursuant to Section 6.4.1 (excluding any refunds allocated to short term bilateral sales made to CERS by Reliant), an amount determined solely by CERS shall be withheld in the Reliant Refund Escrow, or other escrow specified by CERS, in order to pay any claims against CERS arising under Section 6.5.3 and any of Sections 6.12.1 through 6.12.5 (amounts held in escrow pursuant to this Section 6.11 are denoted as the "CERS Escrow"). CERS may withdraw funds from the CERS Escrow (i) from time to time with the prior written consent of the California **[*78]** Utilities if CERS can demonstrate to the reasonable satisfaction of the California Utilities that, after giving effect to such withdrawal, the CERS Escrow shall have sufficient funds on deposit to satisfy in full the aforementioned obligations, and (ii) in whole or in part following the later to occur of the following, provided that all claims of CERS arising under Section 6.5.3 or any of Sections 6.12.1 through 6.12.5 have been paid in full: (a) issuance by FERC of the FERC Receivables Determination and the final resolution of any requests for rehearing or any appeals thereof, or, if no such requests for rehearing or appeals are filed, the lapse of any period within which such requests or appeals must be filed; (b) issuance by FERC of the FERC Refund Determination and the final resolution of any requests for rehearing or any appeals thereof, or, if no such requests for rehearing or appeals are filed, the lapse of any period within which such requests or appeals must be filed; (c) issuance by FERC of the FERC Interest Determination and the final resolution of any requests for rehearing or any appeals thereform or, if no such requests for rehearing or appeals are filed, the lapse of **[*79]** any period within with such requests for rehearing or appeals must be filed; or (d) issuance by FERC of the FERC Allowances Determination and the final resolution of any requests for rehearing or appeals therefrom or, if no such requests for rehearing or appeals are filed, the lapse of any period within which such requests for rehearing or appeals must be filed.

6.12 **Effect of Subsequent FERC Orders and Appeals.**

6.12.1 **Changed FERC Interest Determination.** If, as a result of a FERC order on rehearing, reconsideration, or remand, or an order by a court of appeals (in each case that is a final order that is no longer subject to appeal), the FERC Interest Determination is changed in a way that increases or decreases the interest amount paid to Settling Participants associated with refunds and other distributions pursuant to this Agreement, then the amount of such interest paid to Settling Participants shall be trued-up among the Settling Participants or between the Settling Participants and the Reliant Refund Escrow, by way of refund or surcharge, with interest at the FERC Interest Rate or such other rate as FERC may determine to be applicable, to give full effect to the change from the **[*80]** FERC Interest Determination. Reliant shall have no additional obligations with respect to a changed FERC Interest Determination.

6.12.2 **Changed FERC Allowances.** If, as a result of a FERC order on rehearing, reconsideration, or remand, or an order by a court of appeals (in each case that is a final order that is no longer subject to appeal), the FERC Allowances Determination is changed in a way that increases or decreases the allocation of Fuel Cost

Allowances and/or the allocation of Emissions Offsets among the Settling Participants, then the amount of Fuel Cost Allowances and/or Emissions Offsets paid to or by each Settling Participant pursuant to this Agreement shall be trued-up among such Stilling Participants, by way of refund or surcharge, with interest at the FERC Interest Rate or such other rate as FERC may determine to be applicable, to give full effect to the change from the FERC Allowances Determination.

6.12.3 **Changed FERC Receivables.** If, as a result of a FERC order on rehearing, reconsideration, or remand, or an order by a court of appeals (in each case that is a final order that is no longer subject to appeal), the FERC Receivables Determination is changed in a way that **[*81]** increases or decreases the amount of the Reliant Receivables, then the amount of Reliant Receivables paid by the ISO and the PX to the California Parties pursuant to this Agreement shall be trued-up among the ISO, the PX and the California Parties, by way of refund or surcharge, with interest at the FERC Interest Rate or such other rate as FERC may determine to be applicable, to give full effect to the change from the FERC Receivables Determination. Reliant shall have no additional obligations with respect to changed FERC Receivables other than as provided in Section 11.4.

6.12.4 **Changed FERC Refund Determination.** If, as a result of a FERC order on rehearing, reconsideration, or remand, or an order by a court of appeals (in each case that is a final order that is no longer subject to appeal), the FERC Refund Determination is changed in a way that increases or decreases the amount of refunds owed by Reliant to any particular Non-Settling Participant for the Pre-October Period, the Pre January IS Period or the Post January 17 Period, then the amount paid to or received from such Non-Settling Participant for the Pre-October Period, the Pre January 18 Period and the Post January 17 Period **[*82]** shall be trued up among the California Parties and such Non-Settling Participant, by way of refund or surcharge, with interest at the FERC Interest Rate or such other rate as FERC may detenmine to be applicable, to give full effect to the change to the FERC Refund Determination. With the exception of the Fuel Cost Allowance, Reliant shall have no additional obligation with respect to changed FERC Refund Determination.

6.12.5 **Payment Procedures.** All payments pursuant to this Section 6.12 shall be made at the time and in the manner specified by FERC or the court of appeals. If neither FERC nor the court of appeals specifies the time and manner for such payments, then such payments shall be made by wire transfer within twenty (20) Business Days after the date that the applicable FERC or court of appeals order changing the FERC Interest Determination, the FERC Allowances Determination, the FERC Receivables Determination, or the FERC Refund Determination has become final and no longer subject to appeal.

6.12.6 **Reliant Refund Escrow Balance.** Any amounts not distributed to Settling Participants pursuant to this Agreement that remain in the Reliant Refund Escrow after all refunds and associated **[*83]** interest have been paid to Settling Participants and Non-Settling Participants, as provided in this Agreement, shall be transferred to the California Litigation Escrow.

7. **ISO AND PX ACCOUNTING AND IMPLEMENTATION**

7.1 **FERC-Directed Compliance.** The FERC Settlement Order shall constitute authorization and direction to the ISO and PX to implement the terms of this Agreement. As a result of the FERC's approval of this Agreement in the FERC Settlement Order, the ISO and/or PX shall be required to do the following:

7.1.1 **General Accounting Treatment.** The ISO and PX shall conform their books and records to reflect the distributions, payments, offsets, transfers, deemed resolution of claims, and status of accounts provided for in this Agreement.

7.1.2 **Accounting Treatment of Assigned Reliant Receivables.** The PX and ISO shall reflect on their books and records all distributions from the PX Settlement Clearing Account to the Reliant Refund Escrow that represent payments of amounts owed by the ISO to Reliant for the Reliant Receivables. The ISO shall recognize, as a reduction in the amounts payable by the PX to the ISO, all distributions from the PX Settlement Clearing Account to the Reliant Refund **[*84]** Escrow that represent payments of amounts owed by the ISO to Reliant for the Reliant Receivables.

7.1.3 **Calculation and Accounting Treatment of Distributions to Settling Participants and Non-Settling Participants.** The ISO and PX shall calculate the amount, if any, that Reliant would owe in refunds if the refund pricing methodology in FERC's orders in the FERC Refund Proceedings were applied for each of three time periods: the Pre-October Period, the Pre-January 18, 2001 Period, and the Post-January 17, 2001 Period ("Unsettled Reliant Refund Amount"), and submit those calculations for approval to FERC at the same time that they submit their calculations of refunds for other Market Participants.

7.1.4 **Calculation and Accounting Treatment of Refunds Owed *to* Reliant.** The ISO and PX shall calculate the amount, if any, that Reliant would be owed in refunds if the refund pricing methodology in FERC's orders in the FERC Refund Proceedings were applied for each of the three time periods: the Pre-October Period, the Pre-January 18, 2001 Period, and the Post-January 17, 2001 Period, and submit those calculations for approval to FERC at the same time that they submit their calculations of refunds **[*85]** owed to other Market Participants. Subject to, and after adjustment on account of, the provisions of Sections 4.3.2 and 8.4.2 of this Agreement, such refunds owed to Reliant for any period shall be reflected on the books of the ISO and PX as payable to the California Parties to implement the assignment provided for in Section 4.3.1 of this Agreement.

7.2 **Calculation of Reliant Refund Amounts For Individual Market Participants.** Following the date of the FERC Refund Determination, but prior to the date on which refunds are to be paid pursuant to the FERC Refund Determination, the ISO and PX shall determine the portion of the Unsettled Reliant Refund Amounts that, absent this Agreement, would be deemed to be owed to each Market Participant that is entitled to receive refunds ("Unsettled Participant Refund Amount"). The ISO and PX shall determine the Unsettled Participant Refund Amount for each Market Participant by multiplying the Unsettled Reliant Refund Amounts for each respective time period (the Pre-October Period (if ordered by FERC), the Pre-January 18, 2001 Period and the Post-January 17, 2001 Period) by each Market Participant's percentage share of total refunds in the combined **[*86]** ISO and PX markets for that time period.

7.2.1 **Accounting Treatment of Distributions to Settling Participants.** The ISO and PX shall reflect on their books and records that Settling Participants have, through this Agreement, been paid in full their share of all Reliant Refunds allocated to them under this Agreement and shall not be entitled to receive the Unsettled Participant Refund Amount if different from the amount of Reliant Refunds allocated to each respective Settling Participant under this Agreement.

7.2.2 **Accounting Treatment of Deemed Distributions.** The PX and ISO shall reflect Deemed Distributions on the books and records of the PX and ISO as reductions in the amounts owed to the PX and/or ISO by any Settling Participant that receives a Deemed Distribution.

7.2.3 **Accounting Treatment of Distributions to Non-Settling Participants.** The ISO and PX shall reflect distributions from the Reliant Refund Escrow to Non-Settling Participants pursuant to Section 6.8 as payments to Non-Settling Participants.

7.3 **Termination of Interest Accrual.** The PX and ISO shall reflect in their books and records, with respect to Settling Participants, that the accrual of interest at the FERC-established **[*87]** rate on principal amounts subject to the FERC Interest Determination as provided for in Section 6.12 ceases upon the distribution of funds from the PX and/or the ISO to the Reliant Refund Escrow pursuant to this Agreement, or as may be accomplished through the implementation of Deemed Distributions, and, for purposes of the accounts of the PX and the ISO, no interest on such funds shall accrue after distribution except as may be earned on transferred amounts while on deposit in the Reliant Refund Escrow,

7.4 **Implementation of Agreement.** FERC's approval of this Agreement in the FERC Settlement Order shall constitute its direction (i) to the ISO and the PX to recognize and implement the assignment of the Reliant Receivables and the treatment of PX Wind-Up Charges in accordance with this Agreement, and (ii) to the PX to reverse any offsets previously made to the Reliant Receivables to reflect PX Wind-Up Charges that Reliant is instead obligated to pay in cash pursuant to Section 8.7.7 of this Agreement.

7.5 **Duty of Cooperation.** Each Party shall reasonably and in good faith cooperate and take all reasonable steps to secure (i) the release of funds from the PX Settlement Clearing Account **[*88]** to the Reliant Refund Escrow as contemplated by this Agreement; (ii) the accounting treatment contemplated under this Article 7; and (iii) any other acts of the PX or the ISO necessary to effectuate the terms of this Agreement. This duty of cooperation shall include making individual or joint requests to the PX or the ISO, executing appropriate waivers, providing data and providing other assistance to the PX and the ISO as necessary to implement this Agreement.

7.6 **Tariff Waivers.** FERC's approval of this Agreement in the FERC Settlement Order shall constitute a grant of such waivers of the ISO and the PX tariffs as may be necessary for the ISO and the PX to disburse such funds as required by this Agreement, to account for transfers, allocations and distributions of funds as required by this Agreement, and to otherwise implement this Agreement.

8. **SCOPE OF SETTLEMENT AND RELEASES; WITHDRAWALS, RELEASES AND WAIVERS**

8.1 **Settlement.**

8.1.1 **Settlement of FERC Refund Proceedings.** In return for the consideration specified elsewhere in this Agreement, and subject to the required regulatory approvals under this Settlement, all claims against Reliant for refunds, disgorgement of profits, billing **[*89]** adjustments, or other monetary or non-monetary remedies in the FERC Refund Proceedings shall be deemed settled, provided that the FERC Refund Proceedings shall not be deemed settled as to Non-Settling Participants, and provided further that nothing herein affects the CERS claim described in Section 8.7.2.

8.1.2 **Impact of Settlement on FERC Refund Proceedings.** Reliant and the California Parties shall not contest the amount of refund liability and/or offsets (exclusive of interest) attributable to Reliant in FERC Docket Nos. EL00-95, *et al.* Reliant and the California Parties will not dispute the outcome of Docket Nos. EL03-59, EL03-170, EL03-180, PA02-2, IN03-10, and FERC's physical withholding investigation, as they relate to Reliant, because they are resolved by this Settlement, and the California Parties will withdraw their petition for rehearing in Docket No EL03-170. Dismissal of objections to the Reliant/OMOl Settlement shall not be deemed an admission by the California Parries that FERC has jurisdiction over the gas issues in the Reliant/OMOl Settlement and approval of this Settlement by FERC shall constitute FERC's acknowledgment that nothing in the orders approving this Settlement **[*90]** or the Reliant/OMOl Settlement shall be deemed to have precedential value against the California Parties in future proceedings concerning FERC's jurisdiction over conduct of participants in natural gas and transportation markets.

8.1.3 **Withdrawal of Certain Protests.** Each California Party that filed a protest in Docket Nos. ER99-2079, ER99-2080, ER99-2081, ER99-2082 and ER99-2083 shall withdraw its protest in those proceedings within twenty (20) Business Days of the Settlement Effective Date.

8.1.4 **Reservation of Claims.** Notwithstanding anything to the contrary in this Agreement, Reliant shall be deemed to retain all claims and defenses it may have against Non-Settling Participants.

8.1.5 **Withdrawal of Certain Outstanding Challenges to FERC Orders.** Except as necessary to assert claims and defenses as provided in Section 8.1.4 above. Reliant and the California Parties shall withdraw all outstanding challenges to the orders in the FERC Refund Proceedings with respect to Reliant and California Parties. The California Parties may continue to assert their respective positions on those issues, and may continue to assert any position on refunds and other relief as related to suppliers other **[*91]** than Reliant.

8.2 **Release of ISO and PX Disputes and PX Chargeback Amounts.** With respect to transactions related to sales of electricity and ancillary services by Reliant or transmission congestion charges applicable to the same, Reliant waives and releases any disputes regarding existing ISO and PX settlements for the period from January 1, 2000 through June 20, 2001 upon the Settlement Effective Date. FERC approval of this Settlement shall constitute an order to release to Reliant the amount of the Reliant chargebacks.

8.3 **Scope of Certain Releases.** The releases set forth in Sections 8.4 through 8.6 shall run to, benefit and be enforceable by any individual who, as a past or present officer, director, agent, or employee of a corporate or organizational party that receives the benefits of such releases insofar as s(he) participated as an officer, director, agent or employee in or might be claimed to be liable for any of the actions or events of potential liability for which a party is released by Sections 8.4 through 8.6, and shall run to, benefit and be enforceable as well by CenterPoint Energy Inc., its affiliates and subsidiaries, and by El Dorado Energy, LLC to the extent any such **[*92]** claim is based on, or arises out of, or relates to conduct of Reliant, its directors, officers, employees or agents, which conduct is the subject of this Agreement. Nothing in this Agreement shall limit the rights of the California Parties to seek relief from any entity other than Reliant for sales of power generated by El Dorado Energy, LLC that were made by any entity other than Reliant; provided, however, that the California Parties shall not seek additional relief from Reliant associated with such sales by an entity other than Reliant.

8.4 **FERC and Federal Power Act Releases.**

8.4.1 **Mutual Releases.** Subject to Section 8.7 below, the California Parties, on the one hand, and Reliant, on the other hand, as of the Settlement Effective Date, hereby release the other from all existing and future claims before FERC and/or under the Federal Power Act arising from or relating to any allegation that, during the Settlement Period:

(i) Reliant or any California Party charged or collected unjust, unreasonable or otherwise unlawful rates, terms or conditions for natural gas, transportation of gas, electric energy, ancillary services, or transmission congestion in the western energy markets; or

(ii) **[*93]** Reliant or any California Party manipulated the western electricity or gas markets in any fashion (including claims of economic or physical withholding, gaming, forms of electricity market manipulation discussed in the Final Staff Report, or any other forms of market manipulation), or otherwise violated any applicable tariff, regulation, law, rule or order relating to the western energy markets.

8.4.2 **Additional Release.** Reliant, as of the Settlement Effective Date, hereby releases each of the California Parties from all existing and future claims before FERC and/or under the Federal Power Act arising from or relating to any allegation that, during the Settlement Period, any California Party is liable for any additional payments to Reliant not provided for herein for congestion charges or for electric energy or ancillary services.

8.4.3 **Waiver Regarding Assigned Assets to CERS.** Effective as of the Settlement Effective Date, Reliant hereby waives, to the extent not assigned to CERS pursuant to Section 4.3.2 of this Agreement, all rights it has or may claim to have to refunds and associated interest resulting from any mitigation of sales by CERS of imbalance energy into the ISO real-time **[*94]** market, as well as surcharges and other charges associated with such sales, that may be payable pursuant to FERC's May 12, 2004 Order on Requests for Rehearing and Clarification in Docket Nos. EL00-95 and EL00-98 and subsequent orders.

8.4.4 **Withdrawal of Claims in PG&E Bankruptcy.** Within ten (10) Business Days following the Settlement Effective Date, Reliant will withdraw with prejudice all claims filed by it in the PG&;E bankruptcy.

8.5 **Gas and Civil Claims Releases.**

8.5.1 **Mutual Releases.** Subject to Section 8.7 below, the California Parties and Additional Claimants, on the one hand, and Reliant, on the other hand, as of the Settlement Effective Date, hereby release the other from all past, existing and future claims for civil damages and/or penalties and/or equitable relief, including disgorgement and restitution, or FERC relief concerning, pertaining to, or arising from, or relating to allegations that, for the Settlement Period, Reliant or any California Party or Additional Claimant:

(i) Charged or collected unjust, unreasonable or otherwise unlawful rates, terms or conditions tor natural gas, transportation of gas, electric energy, ancillary services, or transmission congestion in **[*95]** the western electricity and natural gas markets;

(ii) Manipulated the western electricity or natural gas markets in any fashion (including claims of economic or physical withhoiding, gaming, misreporting to price index publishers, forms of market manipulation discussed in the Final Staff Report, or any other forms of market manipulation);
(iii) Was unjustly enriched by the foregoing released claims or otherwise violated any applicable tariff, regulation, law, rule or order relating to transactions in the western electricity or natural gas markets; or

(iv) Violated any ***antitrust law*** or is liable for any monetary or non-monetary damages or other remedies relating to Reliant's acquisition, operation, or management of facilities for the generation of power in the western United States.

8.5.2 **Additional Release.** Reliant as of the Settlement Effective Date, hereby releases each of the California Parties from all past, existing and future claims for civil damages and/or penalties and/or equitable relief, including disgorgement and restitution, or FERC relief concerning, pertaining to, or arising from, or relating to allegations that any California Party is liable for any additional payments to **[*96]** Reliant not provided for herein for congestion charges or for sales of natural gas, electric energy, or ancillary services during the Settlement Period.

8.6 **Reliant, Class Action Parties and Local Governmental Parties Releases.**

8.6.1 **Mutual Releases.** The Class Action Parties and the Local Governmental Parties, on the one hand, and Reliant, on the other hand, as of the dates specified in Section 8.6.2, hereby forever release the other from all past, existing and future claims for civil damages and/or penalties and/or equitable relief, including disgorgement and restitution, concerning, pertaining to, or arising from or relating to Reliant's actions in connection with the provision of electricity at any time prior to the August 12, 2005 date of the Memorandum of Understanding, including any claims:
(i) For any excessive, unlawful, or unjust and unreasonable charges, rates or prices in California and western electricity markets;
(ii) Relating to the existence or exercise of market power in California and western electricity markets;

(iii) Relating to any alleged violations of any governing electricity-related tariff, order, resolution or rule applicable to California and western electricity **[*97]** markets, including ISO and PX Market Monitoring and Information Protocols;
(iv) Relating to Reliant's acquisition, operation, or management of facilities for the generation of electric power in California and western electricity markets;
(v) Arising from or relating to Reliant's operations in connection with the purchase, sale, trading, marketing or transmission of electric power, including its bidding, trading or participation in California or western electricity markets, or any economic or physical withholding; or
(vi) Any other claim that was alleged or could have been alleged by the Class Action Parties or Local Governmental Parties, including any claim based on alleged conspiracy to restrain trade or fix prices in California or western electricity markets.

Without limitation, the release in this Section 8.6.1 waives and resolves any and all claims, causes of action, demands or other liability of any nature whatsoever that the California Class and/or Egger Class have made, or could have made, or on behalf of whom was made, against Reliant in or before any federal, state, or local court or agency arising out of or related to the foregoing, under any claim or cause of action, including **[*98]** but not limited to claims under *California Business & Professions Code § 17200*, *California Business & Professions Code § 16720*, *California Code of Civil Procedure § 526a*, any federal antitrust statute, or any similar statute or claim of any other state, or any common law tort theory.

8.6.2 **Release Effective Dates.** As to the Class Action Parties, the releases provided in Section 8.6.1 above are effective on the Class Action Effective Date as defined in Section 2.5. As to the Local Governmental Parties, the releases provided in Section 8.6.1 above are effective on the Settlement Effective Date, or such later date should approval under Section 10.2 occur after the Settlement Effective Date.

8.6.3 **No Impact on California Parties - Reliant Releases.** Nothing in the releases set forth in Section 8.6.1 shall be construed as in any manner expanding or otherwise amending or modifying any of the releases provided in this Agreement to Reliant by the California Parties, nor shall Reliant assert the releases set forth in Section 8.6.1 as a bar to claims that may be brought by any of the California Parties with respect to the period subsequent to December 31, 2001, including claims that the California Parties, or any of them, may bring in their representative capacities on behalf of retail electric or natural gas customers. With **[*99]** the exception of the CPUC (which was not a parry to the Memorandum of Understanding) each of the California Parties represents that as of the Execution Date, it was not aware of any claim it may have against Reliant that pertains to the period subsequent to December 31, 2001 (other than any claims that might exist under reliability must run contracts or on-going bilateral contracts) and which would be encompassed within the releases set forth in Section 8.6.1 if the California Parties were providing those some releases.

8.7 **Limitations on Releases.**

8.7.1 **Cooperation with Investigations; Participation in FERC Proceedings.** The California Parties and Additional Claimants may continue to cooperate with all state and federal investigations and to participate in all matters before FERC; provided that, as of the Settlement Effective Date, the California Parties and Additional Claimants shall withdraw from and not prosecute any litigation, administrative proceedings or investigations with respect to Reliant insofar as such prosecution would be inconsistent with the foregoing released claims.

8.7.2 **Reservation of CERS/Rcllant Claims.** The releases set forth in Sections 8.1, 8.2, 8.3, 8.4 and 8.5 **[*100]** do not include any claims by CERS against Reliant or by Reliant against CERS arising from or relating to that certain letter agreement by and between Reliant and CERS dated February 16, 2001, short term purchases due to billing or accounting errors, reconciliation of payments reflected on invoices for transactions conducted, imbalance energy (including unpaid ISO purchases) and accounting disputes relating to imbalance energy procured by CERS, or emissions credits taken by Reliant, all of which claims are hereby expressly preserved and will be addressed in a concurrent settlement agreement between Reliant and CERS which settlement shall address any and all such claims for the period prior to the Execution Date of the Memorandum of Understanding.

8.7.3 **No Waiver by Attorneys General as to Criminal and Certain Other Claims.** The releases set forth in Sections 8.2, 8.3 and 8.4 do not constitute a waiver or release of any claims by the California Attorney General or the Additional Claimants for any actions of or omissions either before or subsequent to the Settlement Effective Date which are either (i) willfully fraudulent; provided, however, that this release does extend to such claims **[*101]** (if any) that are based solely upon acts or omissions that (a) occurred prior to the Settlement Effective Date and (b) are currently known by the California Attorney General's Office or the Additional Claimants; or (ii) criminal.

8.7.4 ***PG&E v. FERC,*** **Ninth Circuit No. 03-72874.** The releases set forth herein include a release of all claims by the California Parties against Reliant in the petition for review now pending before the Ninth Circuit in *PG&E* v. *FERC,* Case Nos. 03-72874, *et al.* However, there is no settlement of the proceeding or release as between FERC and the California Parties. The California Parties may attempt to continue to pursue the proceeding as against FERC. FERC, on the other hand, may seek to have the proceeding dismissed entirely as the result of this Settlement. It is agreed that the outcome of the Ninth Circuit proceeding will have no bearing on amounts owed by or to Reliant, and that Reliant will withdraw from the proceeding.

8.7.5 **Participation in Other Proceedings.** Except as otherwise provided herein, all Parties to this Agreement and those Market Participants that agree to accept the benefits of this Settlement shall remain free to participate, without limitation, **[*102]** in any existing proceeding with respect to parties other than Reliant, or to initiate or participate in any future proceeding to the extent not inconsistent with the releases set forth in Sections 8.2, 8.3, 8.4, 8.5 and 8.6, including proceedings addressing, prospectively, generic issues concerning market structure, scheduling rules, generally applicable market rules, and generally applicable price mitigation.

8.7.6 **California Parties' Settlements.** Reliant agrees not to oppose any settlement between the California Parties and any other supplier that substantially conforms to the terms of this Agreement or with the terms of the Williams, Dynegy, Duke, Mirant and Enron Settlements. If Reliant has a claim to refunds in the FERC Refund Proceedings against any other supplier, then Reliant will seek to join the Williams, Dynegy, Duke, Mirant and Enron Settlements and will join any settlement between the California Parties and such supplier that substantially conforms to the terms of this Agreement or with the terms of the Williams, Dynegy, Duke, Mirant and Enron Settlements and take any and all action reasonably required by the California Parties to implement the terms of the assignments **[*103]** provided for in Section 4.3 of this Agreement, provided that, if such other supplier has a claim to refunds in the FERC Refund Proceedings against Reliant, then such other seller agrees to opt-in to the Settlement, even if the five-day notice period for opt-ins has passed, to the extent it has not already done so.

8.7.7 **Payment of PX Wind-Up Charges.** Reliant will pay in cash to the PX, and not through offsets, any PX Wind Up Charges allocated to Reliant for the period up to the Settlement Effective Date. The California Parties shall be responsible for all PX Wind-Up Charges that Reliant would have been responsible for absent this Agreement with respect to the PX's activities from and after the Settlement Effective Date. To the extent that the PX previously obtained payment from Reliant for PX Wind-Up Charges by set off against the Reliant Receivables, the FERC Settlement Order shall be deemed to direct the PX to reverse such setoff.

8.7.8 **Qualifying Facilities.** Nothing in this Agreement shall prevent the California Parties from taking any position in any proceeding concerning the prices applicable to sales by qualifying facilities, and nothing in this Agreement shall limit the relief **[*104]** that the CPUC may order in any proceeding before it, including the CPUC's Order Instituting Rulemaking into Implementation of *Public Utilities Code Section 390*, Rulemaking 99-11-02,

8.7.9 **Continuation of CPUC Investigation.** Nothing in this Agreement shall restrict the ability of the CPUC to continue its investigation of the manipulation of natural gas prices or services, generator operation and maintenance, or to carry out its responsibilities under California Senate Bill 39 of the 2001-2002 Second Extraordinary Session.

8.7.10 **CPUC Investigatory Authority.** Nothing in this Agreement shall restrict the ability of the CPUC to collect information or investigate any matter for the purposes of making policy and/or legal arguments for rule changes, market reform, market mitigation, or related matters, or from making such policy arguments in any forum, based on information resulting from such investigation.

8.7.11 **Scope of Certain Limitations.** Nothing in Sections 8.7.8, 8.7.9 or 8.7.10 above is intended or shall be construed to (i) permit any of the California Parties to seek additional compensation or other relief as against Reliant with respect to the transactions, conduct and other matters that are encompassed within the **[*105]** releases set forth in Sections 8.4.1 and 8.5.1 or (ii) limit the ability of Reliant to challenge any actions taken or recommendations made by the CPUC in connection with the proceedings or investigations referred to in Sections 8.7.8, 8.7.9 and 8.7.10.

8.7.12 Nothing in the releases set forth in Section 8.6.1 shall be construed in any manner as releasing any claim specifically asserted in the Master Class Action Complaint dated March 9, 2005 filed against Reliant in the cases denominated as the "Price Indexing Cases," coordinated under Natural Gas Anti-Trust Cases I, II, III and IV, California Judicial Council Coordination Proceeding Nos. 4221, 4224, 4226 and 4228.

8.8 **Effectiveness of Releases.** It is the intention of the Parties that the releases granted pursuant to this Article 8 shall be effective as a bar to all causes of action and demands for monetary relief, including costs, expenses, attorneys' fees, damages, losses and liabilities of every kind, known or unknown, suspected or unsuspected, herein above specified in this Article 8. In furtherance of this intention, Reliant on the one hand and the California Parties, the Class Action Parties, the Local Governmental Parties, the **[*106]** Additional Claimants and OMOI, on the other hand, with respect to the specific matters released herein, each knowingly, voluntarily, intentionally and expressly waive, as against each other, any and all rights and benefits conferred by *California Civil Code Section 1542* and any law of any suite or territory of the United States or principle of common law that is simitar to *Section 1542*. *Section 1542* provides:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

In connection with such waiver and relinquishment, the Parties each acknowledge that they are aware that they may hereafter discover facts in addition to or different from those which they now know or believe to be true and with respect to the subject matter of this Agreement, but that it is their intention hereby to fully, finally and forever settle and release all matters, disputes, differences, known or unknown, suspected or unsuspected, that are set forth in this Article 8. This Agreement is intended to include in its effect, without limitation, other than the limitations set forth in Section 8.7, all claims **[*107]** encompassed within the settlement and releases set forth in this Article 8, including those which the Parties may not know or suspect to exist at the time of execution of this Agreement, and this Agreement contemplates the extinguishment of all such claims. The Releases set forth in this Article 8 shall be, and remain in effect as, full and complete releases, notwithstanding the discovery or existence of any such additional or different facts relating to the subject matter of this Agreement. Notwithstanding the waiver of *California Civil Code Section 1542*, the Parties acknowledge and agree that the releases provided for in this Agreement, although intended to be full and complete releases applicable to both known and unknown claims with respect to the matters described, are nonetheless specific to the matters set forth in this Article 8 and are not intended to create general releases as to claims, or potential claims, based on any matters other than those described in this Article 8.

8.9 **Tolling.** Pending the approvals specified in Section 10.1, the Parties agree to continue the currently in place tolling of any statutes of limitations or similar defenses based on the passage of time with respect to the matters released **[*108]** in this Article 8 (and for this purpose the continued tolling provided for in the Memorandum of Understanding shall be deemed to have continued as though provided under this Agreement as well so that no gap shall result from the fact that this Agreement has superseded the Memorandum of Understanding). If this Agreement is terminated pursuant to Sections 2,6 or 4.6 or approval is not obtained as provided in Section 10.1, or if this Agreement is otherwise invalidated, the Parties agree notwithstanding any other provision in this Agreement that the tolling provided for in this provision will remain in effect through the date of such termination, non-approval or invalidation.

8.10 **Compensatory Nature of Settlement.** All payments made by Reliant pursuant to this Settlement represent compensation to Settling Participants for the matters released herein.

9. **MARKET PARTICIPANTS' ELECTION TO PARTICIPATE IN SETTLEMENT**

9.1 **Election to Participate in Settlement.** Subject to the terms of this Agreement, upon the filing of this Agreement at FERC, any Market Participant that elects to be bound by this Agreement may become an Opt-In Participant and shall be bound by this Agreement by notifying FERC that **[*109]** the Market Participant wishes to become a Settling Participant, using the form of notice attached hereto as Exhibit F. Opt-In Participants shall have rights and obligations provided for them under this Agreement, even though such Opt-In Participants shall not be Parties or Settling Claimants hereto. Electronic copies of the notice required by the first sentence of this Section 9.1 shall be served, in accordance with FERC's rules, on each person designated on (i) the ListServ established for the proceedings in FERC Docket Nos. ELOO-95, *et al.,* and (ii) the ListServ established for the Partnership/Gaming Proceeding. Any Market Participant that has not provided such notice and the required service on or before the date that is five (5) Business Days following the issuance by FERC of the FERC Settlement Order shall have no right to participate in the Settlement contemplated in this Agreement, absent the written agreement of the California Parties and the Reliant Parties, and shall be deemed to be a "Non-Settling Participant" for purposes of this Agreement.

9.2 **Releases.** Subject to the terms of this Agreement, each Market Participant electing to be an Opt-In Participant bound by this Agreement **[*110]** pursuant to Section 9.1 shall be deemed to have provided all of the waivers and releases of claims against the Reliant Parties that are set forth in Article 8, and the Reliant Parties shall be deemed to have provided or received the waivers and releases set forth in Article 8 as they relate to such Opt-In Participant.

Non-Settling Participants shall not be deemed to have provided or received any of the waivers, releases, or other benefits set forth in this Agreement. If an Opt-In Participant itself is determined by FERC to owe refunds to the ISO or PX on account of transactions during 2000 and 2001, opting into this Agreement shall not be deemed to reduce or alter the amount of refunds that such Opt-In Participant owes.

10. **REQUIRED APPROVALS; OBTAINING LOCAL GOVERNMENTAL APPROVALS; STAYS**

10.1 **Required Approvals.** The Settlement made pursuant to this Agreement shall be subject to approval by:

10.1.1 **FERC.** FERC in the FERC Settlement Order, which order shall be deemed to authorize and direct the ISO and PX to implement the terms of this Settlement and, if necessary, to grant waiver of any tariff provisions that may provide for contrary resolution of the matters covered by this Settlement; **[*111]** and

10.1.2 **The CPUC.** The CPUC, which approval shall be implemented by the CPUC entering into this Agreement as a Party. CPUC approval shall constitute permission for SCE to consummate this Settlement. Each of the two approvals provided for above shall include approval of all of the terms and conditions of this Agreement in its entirety without material change or condition unacceptable to any adversely affected Party (collectively, the "Required Approvals" and each a "Required Approval"). If any Required Approval, or, if the Settlement Effective Date has not then occurred, any order resulting from a request for rehearing or an appeal of any of the Required Approvals, includes a material change or condition that adversely affects any Party, then each Party so affected shall communicate its consent or lack of consent to such change or condition in writing to the other Parties within five (5) Business Days after the date on which the decision, order, or ruling constituting the Required Approval, or any order resulting from a request for rehearing or appeal of any Required Approval, was issued. The failure of an affected Party to provide written notice to the other Parties in accordance **[*112]** with the foregoing sentence shall constitute acceptance by such Party of the material change or condition. In such cases where an order includes a material change or condition, the Required Approval will be deemed to have occurred on the date all Parlies have indicated consent by providing written notice to the other Parties or by failing to provide timely notice.

10.2 **Approvals for Local Governmental Parties.** This Agreement shall also be subject to approval, with respect to provisions pertaining to Local Governmental Parties, by such Local Governmental Parties' governing boards or councils, if necessary; provided, however, that: (i) the failure of any such Local Governmental Party to obtain the approval of this Agreement by its governing board or council shall not diminish the effectiveness of this Agreement as to all other Parties; (ii) if any Local Government Party has not obtained such approval within ninety (90) days of the Execution Date, Reliant, at its sole and absolute discretion, may elect to terminate the Agreement as to that Local Government Party and, in accordance with Section 6.7, the consideration that would have been paid to that entity (as identified on the Local Governmental **[*113]** Parties' Allocation Matrix, Exhibit D) shall be paid to Reliant.

10.3 **Cooperation Regarding Stay of Lockyer v Reliant.** On August 23, 2005, the court in *Slate of California, ex rel Bill Lockyer, et al. v. Reliant Energy, et al.,* U.S. District Ct. (N.D. Cal.) Case No. C-02-1788-VRW ("*Lockyer v. Reliant*") entered an order staying the action in its entirety pending orders from the FERC and CPUC either approving or disapproving the Settlement. The parlies to *lockyer v. Reliant* shall maintain or seek to extend this stay in full force and effect until the earlier of (i) the Settlement Effective Date or (i) the date this Agreement is terminated (each a "Stay Period"). No collateral estoppel or other prejudice to the rights, claims or defenses of any parry to that case shall arise during or on account of the Stay Period and none of the parties to that case shall have any argument based on the doctrine of laches or similar equitable grounds due to inaction during the applicable Stay Period. During the Stay Period, the parties to *Lockyer v. Reliant* shall not initiate any discovery, and shall not seek to enforce any outstanding discovery, including subpoenas to third parties, in that case.

11. REPRESENTATIONS, [*114] WARRANTIES AND COVENANTS

11.1 **Representations uf all Parties and Settling Participants.** Each Party (except for the Class Action Parties, as to whom this Agreement is subject to court approval and the Local Governmental Parties, as to which governing board or council approval of this Agreement may be necessary) and each Opt-In Participant makes the following representations and warranties, for itself only, to each other Party and Opt-fn Participant, to be effective from and after (i) for the Parties, the Execution Date and (ii) for Opt-In Participants, the date of opt-in pursuant to *Section 9*,*1*:

11.1.1 **Organizational Status, Power and Authority,** Except for any Governmental Authority, it is a corporation or limited liability company duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation. It possesses all necessary power and authority to execute, deliver and perform its obligations under this Agreement.

11.1.2 **Authority to Execute.** If applicable, the execution, delivery, election to participate and performance of this Agreement (i) are within its powers, (ii) have been duly authorized by all necessary action on its behalf and all necessary consents **[*115]** or approvals have been obtained and are in full force and effect, and (iii) do not violate any of the terms and conditions of any applicable law, or materially violate any contracts to which it is a party. In addition, Reliant Energy, Inc. represents and warrants that it has the authority to sign on behalf of, and to bid to the terms and conditions of this Agreement, each of the affiliates and subsidiaries listed on Exhibit A hereto.

11.1.3 **Binding Obligation.** This Agreement constitutes its legal, valid and binding obligation, enforceable against it in accordance with its terms.

11.1.4 **Ownership of Claims.** It is the sole owner of the claims which are being resolved and compromised by it pursuant to this Agreement Except as provided in this Agreement, there has been no sale, assignment, transfer, pledge or hypothecation, or attempted sale, assignment, transfer, pledge or hypothecation, by it of any such rights or claims, whether directly, indirectly, by operation of law or otherwise.

11.2 **Representations of the Reliant Parties.** The Reliant Parties jointly and severally represent and warrant to the California Parties that the exact legal name of each of the Reliant Parties is accurately **[*116]** set forth in the definition of Reliant Parties and that Reliant Energy Services, Inc. is a Delaware corporation and the sole owner of the Reliant Receivables and the Assigned Assets. The Reliant Parties further jointly and severally warrant and represent that the entities listed in Exhibit A are wholly owned by Reliant Energy, Inc., and, to the best of their knowledge, the organizational charts attached hereto as Exhibit A provide true and correct representations of the Reliant organizational structure during the time periods covered by the releases set forth in Article 8 of this Agreement.

11.3 **Understanding of Terms.** In executing this Agreement, or, with respect to Opt-In Participants, in electing to participate in this Agreement:

11.3.1 **Independent Investigation.** Each Party and Opt-In Participant acknowledges that it has relied on its own independent investigation and conducted its own due diligence with respect to the subject matter of this Agreement and in determining whether or not to enter into this Agreement or accept the benefits of this Settlement, including a review of the underlying contracts, agreements, transactions, instruments and applicable law in connection herewith, **[*117]** or has been afforded an opportunity to review relevant information, ask questions and receive satisfactory answers concerning this Settlement and the terms and conditions of this Agreement;

11.3.2 **Expert Evaluation.** Each Party and each Opt-In Participant acknowledges it is experienced in or had the opportunity to consult with experts who are experienced in wholesale and retail electric and gas commodity, risk management and other transactions and possesses the knowledge, experience and sophistication to allow it to fully evaluate and accept the merits and risks of entering into the transactions contemplated by this Agreement or accepting the benefits of this Settlement; and

11.3.3 **Information Access.** Each Party acknowledges that the Reliant Parties made available information and analysis to support their valuation regarding refunds and receivables.

11.4 **Warranties Regarding the Reliant Receivables and Assigned Assets.**

11.4.1 **Amount of Reliant Receivables.** Reliant warrants and represents that the amount of the Reliant Receivables as set forth in Sections 1.68 and 4.1.1 is consistent with all information concerning its claimed receivables, of which it has knowledge as of the Execution Date. **[*118]**

11.4.2 **Encumbrances and Reliant Receivables and Assigned Assets.** Reliant further warrants and represents that, except to secure borrowings under its corporate credit and debt agreements (a schedule of which is set forth as Exhibit G), it has not, as of the date of this Agreement, pledged, hypothecated, encumbered, sold, transferred or otherwise assigned, to any third parly voluntarily, or involuntarily or by way of set off or offset, any portion of (i) its PX or ISO receivables to be included in the Reliant Receivables, and (ii) the Assigned Assets.

11.5 **Covenants.** The Reliant Parties covenant to the California Parties that

11.5.1 At all times between the Execution Date and the Settlement Effective Date, they will not sell, assign, transfer, pledge, hypothecate, encumber, or otherwise transfer in whole or in part to any third party, whether voluntarily or involuntarily or by way of setoff or offset, any of the Reliant Receivables or Assigned Assets; provided, however, assignments, pledges, or encumbrances on a *pari passu* basis with the corporate credit and debt agreements set forth in Exhibit G, hereto, are permitted so long as Reliant Energy Services, Inc. at all times between the Execution **[*119]** Date and the Settlement Effective Date will remain the sole owner of the Reliant Receivables and the Assigned Assets and such assignments, pledges, or encumbrances will not impair Reliant's ability to transfer the Reliant Receivables and the Assigned Assets to the California Parties free and clear of all claims, liens, encumbrances and interests on the Settlement Effective Date as provided herein; and
11.5.2 At all times between the Execution Date and the twentieth (20th) day after the Settlement Effective Date, the Reliant Parties will promptly provide to the California Parties written notice of any change in their legal name or jurisdiction of organization; and

11.5.3 At all times from and after the Settlement Effective Date, the Reliant Parties will, upon the reasonable request and at the sole expense of the California Parties, execute and/or deliver such further documents, agreements, instruments, and account and other books of record, and shall cooperate and do such other and further acts, as may be necessary to effectuate the Reliant Parties' transfer of the Reliant Receivables and the Assigned Assets pursuant to Sections 4.1.1, 4.2.1, 4.2.3, 4.3.1, 4.3.2 and 4.3.3, and enforce **[*120]** the claims, rights of action and defenses of the Reliant Parties acquired in connection therewith.

12. IMPLEMENTATION OF CLASS ACTION SETTLEMENTS

12.1 **Submittal for Notice Order.** California and Egger Class Counsel (collectively "Class Counsel") shall each submit this Agreement to a pertinent court and shall each separately apply for entry of an order (the "Notice Order") in their respective cases to be agreed to by Reliant and Class Counsel. The Egger Class Plaintiffs shall file a separate action in San Diego Superior Court for the purpose of effectuating this Settlement.

12.2 **Notice Order.** The Notice Order in each of the California Class and Egger Class Cases will request, inter alia:

12.2.1 **Class Certification.** Certification of the pertinent Class for settlement purposes only;

12.2.2 **Preliminary Approval.** Preliminary approval of the settlement set forth in this Agreement; and

12.2.3 **Class Notice.** Approval of the form and method of settlement notice or notices, agreed to by Reliant and Class Counsel, which notice shall set forth the general terms of the settlement set forth in this Agreement and the date of the Settlement Hearing as described below. The costs of class notice regarding Reliant's **[*121]** settlement with the Class Action Parties shall be paid 50% by the Class Action Parties and 50% by Reliant.

12.3 **Settlement Hearing.** California and Egger Class Counsel shall each request that after notice is given, the Court(s) hold hearing(s) (the "Settlement Hearings") in which the settlement with the applicable of Classes as set forth herein shall be approved as fair, adequate and reasonable, and enter final judgment of dismissal with prejudice pursuant to the settlement as to Reliant. The judgment of dismissal shall confirm the parties' agreement that the approving Court(s) retain jurisdiction under *California Code of Civil Procedure § 664.6* to enforce the terms of the Agreement that apply to Reliant and the Class Action Parties.

12.4 **Requests for Exclusion.** If prior to the Settlement Hearing in either or both of the California and Egger Class Actions, persons who otherwise would be members of either Class have timely requested exclusion ("Requests for Exclusion") from their respective Class in accordance with the provisions of the applicable Notice Order and the notice given pursuant thereto, and such persons in either Class in the aggregate represent claims in an amount greater than that acceptable to Reliant, then Reliant **[*122]** shall have, in its sole and absolute discretion, the option to terminate this Agreement as to that Class. Copies of all Requests for Exclusion received, together with copies of all written revocations of Requests for Exclusion received shall be delivered to Reliant's counsel within seven (7) Business Days before the applicable Settlement Hearing. Termination by Reliant under this Section 12.4 shall in no manner affect Reliant settlement with the California Parties, the Additional Claimants Parties and any Opt-In Participant.

12.5 **No Solicitation.** California and Egger Class Counsel will neither solicit nor encourage members of either Class to request exclusion.

12.6 **Settlement Class Certification.** Solely for the purposes of the settlement of the California and Egger Cases, the Reliant Parties and the California and Egger Classes agree to the certification of the California and Egger Classes as defined above; and Class Counsel and Reliant agree to request jointly that the Court in each case enter an order, which, among otherthings, certifies the applicable Class. In the event that this Agreement is not finally approved, or is terminated, canceled, or fails to become effective for any reason, **[*123]** any class certification, solely for the purpose of the settlement of the California and/or Egger Cases, shall be null and void and the plaintiffs in those actions and Reliant shall revert to their respective positions immediately prior to the execution of this Agreement. Under no circumstances shall this Agreement be used as an admission or evidence concerning the appropriateness of class certification should the Agreement be terminated in whole or part. Reliant reserves the right to oppose class certification should this Agreement be terminated in whole or part. Termination by Reliant under this Section 12.6, or any other failure of this agreement to become effective as to the California and/or Egger Classes shall in no manner affect Reliant's settlement with the California Parties, the Other Claimant Parties and any Additional Settling Participant.

12.7 **Attorneys' Fees.** Reliant shall not oppose separate requests by California Class Counsel and Egger Class Counsel for awards of attorneys' fees and costs not to exceed $3,342,857 and $557,142, respectively, excluding interest The actual amount of each award shall be determined by the California Class and Egger Class courts, respectively, **[*124]** subject to the above-stated limits. Reliant agrees to pay the actual amounts so awarded, not to exceed the above-stated limits, into such accounts as California Class Counsel and Egger Class Counsel may designate within ten (10) Business Days of the entry of the applicable order(s) awarding attorneys' fees and costs; provided that: (i) in the event of a successful appeal by any person or entity that challenges any award of attorneys' fees or costs, or challenges any other part of this Agreement, each law firm for the Class Action Parties agrees to repay the full amount of all attorneys' fees and costs paid to that law firm that are impacted by the successful appeal, with interest at the annual rate of 4% from the date of an initial payment to and including the date of repayment and to provide reasonable security for such repayment to that counsel in the form set forth in Exhibit H hereto; and (ii) if the trial court has not approved either fee application by March 1, 2006, with respect to such application, Reliant shall pay interest on the amounts that are actually awarded at the annual rate of 4% from March 1, 2006 to and including the date of the payment.

12.8 **Miscellaneous.** All Parties **[*125]** to this Agreement acknowledge and agree that the Settlement Amount described in Section 4.1 constitutes a direct and substantial benefit to the Class Action Parties and shall constitute a setoff or offset with respect to all claims that are released pursuant to Section 8.6.1. The Settling Participants agree not to oppose court approval of Reliant's settlement of the California Class and Egger Class actions, or Class Counsel's applications for attorneys' fees and costs.

13. DISPUTE RESOLUTION

13.1 **Resolution by FERC.** If any disputes arise between the Parties and/or the PX or the ISO in connection with the fulfillment of the Parties' obligations under this Agreement, the Parties shall present such disputes to the FERC for resolution pursuant to FERC's rules and regulations, subject to each Party's rights to seek rehearing and judicial review of FERC's decisions and orders pertaining to the resolution of such disputes. This provision shall not apply, however, to any disputes which may arise with respect to the class action settlement provisions under Sections 12.1 through 12.7.

14. GOVERNING LAW; INTERPRETATION

14.1 **Governing Law.** To the extent not governed by federal law, this Agreement **[*126]** shall be governed by and construed in accordance with the laws of the State of California, without regard to its conflict of laws principles.

14.2 **Entire Agreement.** This Agreement contains the entire agreement among the Parties with respect to the subject matter hereof and there are no agreements, understandings, representations, or warranties among the Parties other than those set forth herein. Each of the Parties expressly disclaims any reliance upon any representations or warranties not stated herein.

14.3 **Headings.** The headings or titles of Articles or Sections used in this Agreement (in bold typeface) are for convenience only and shall be disregarded in interpreting this Agreement.

14.4 **Parties Represented by Counsel.** The Parries acknowledge that they have sought the advice of, and have been advised by, legal counsel of their choice in connection with the negotiation of this Agreement, and that the Parties have willingly entered into this Agreement with a full understanding of the legal and financial consequences of this Agreement.

14.5 **Drafting of Agreement.** The Parties acknowledge that (i) this Agreement is the result of negotiations among, and has been reviewed by, each Party and **[*127]** its respective counsel, and (ii) all Parties contributed to the drafting of this Agreement. Accordingly, this Agreement shall be deemed to be the product of all Parries, and no ambiguity shall be construed in favor of or against any Party on the basis that it drafted the ambiguous provision.

14.6 **Rules of Interpretation.** The following rules of interpretation shall apply to this Agreement, including all Exhibits.

14.6.1 **Singular; Plural.** Unless the context otherwise requires, words used in this Agreement shall include in the singular number the plural and in the plural number the singular.

14.6.2 **Self Reference; Incorporation by Reference; Cross Reference.** Except as otherwise specified herein, all references in this Agreement to an "Article," "Section," or "Exhibit" shall mean an Article, Section, or Exhibit of this Agreement The words "hereof," "herein," and "hereunder," and words of similar import when used in this Agreement, including the Exhibits attached hereto, shall, unless otherwise specified, refer to this Agreement as a whole and not to any particular Article, Section, Exhibit or provision of this Agreement, and all references to Articles, Sections or Exhibits shall be to all **[*128]** subparts of such Articles, Sections or Exhibits. All Exhibits shall be deemed to be incorporated by reference and made a part of this Agreement.

14.6.3 **Inclusive of Permitted Successors.** Unless otherwise stated, any reference in this Agreement to any person or entity shall include its permitted successors and assigns and, in the case of any governmental entity or party, any entity succeeding to its functions and capabilities.

14.6.4 **Inclusive References.** When used herein, the words "include," "includes," and "including" shall not be limiting and shall be deemed in all instances to be followed by the phrase "without limitation."

15. MISCELLANEOUS

15.1 **Notices.** All notices, demands and other communications between or among any of the Parties hereunder shall be in writing and shall be deemed to have been duly given: (i) when personally delivered; (ii) upon actual receipt (as established by confirmation of receipt or otherwise) during normal business hours, otherwise on the first (1st) Business Day thereafter, if transmitted by facsimile or telecopier with confirmation of receipt; (iii) on the date of receipt when mailed by certified mail, return receipt requested, postage prepaid; or (iv) **[*129]** on the date of receipt when sent by overnight courier; in each case, to the individuals and addresses set forth in Exhibit E, or to such other addresses as a Party may from time to time specify by notice to the other Parties given pursuant to this Section 15.1. Email addresses are provided for convenience only and do not constitute notice.

15.2 **Successors and Assigns.** This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective permitted successors and assigns and in the case of any governmental party, any entity succeeding to its functions and capabilities.

15.3 **No Third-Party Beneficiaries; No Admissions.** This Agreement is not intended to confer upon any person or entity that is not a Party or an Opt-In Participant any rights or remedies hereunder, and no one, other than a Party or an Opt-In Participant, is entitled to rely on any representation, warranty, covenant, release, waiver or agreement contained herein. Moreover, except for the purpose of enforcing the terms and conditions of this Agreement as between and among the Parties and the Opt-In Participants, nothing herein shall establish any facts or precedents as between the Parties, **[*130]** the Opt-In Participants, and any third parties as to the resolution of any dispute. Each Settling Participant and Reliant Party expressly denies any wrongdoing or culpability with respect to the claims against it released in this Agreement, or any other matter addressed in this Agreement, and does not, by execution of this Agreement, admit or concede any actual or potential fault, wrongdoing or liability in connection with any facts or claims that have been or could have been alleged against it with respect thereto. Neither this Agreement, nor any act performed or document executed pursuant to or in furtherance of this Agreement: (i) is or may be deemed to be, or may be used by a Settling Participant or a Reliant Party as, an admission of, or evidence of, the validity of any released claim, or of any wrongdoing or liability of any of the Parties or Opt-In Participant; (ii) is or may be deemed to be, or may be used by a Settling Participant or a Reliant Party as, an admission of, or evidence of, any fault or omission of any of the Parties or Opt-In Participant in any civil, criminal, regulatory or administrative proceeding in any court, administrative agency, regulatory authority, or **[*131]** other tribunal; or (iii) shall be offered in evidence or alleged in any pleading by any Settling Participant or any Reliant Party, except to obtain the Required Approval, or to enforce the terms of and obtain the benefits of this Agreement. In no event shall this Agreement, any of its provisions or any negotiations, statements or court proceedings relating to this Agreement or the Settlement in any way be construed as, offered as, received as, used as or deemed to be evidence of any kind in any action, or in any judicial, administrative, regulatory or other proceeding, except in a proceeding to enforce the terms or obtain the benefits of this Agreement or to obtain the Required Approvals.

15.4 **Costs.** Except as provided in this Agreement, each of the Parties and each Opt-In Participant shall pay its own costs and expenses, including attorneys' fees, incurred in connection with the disputes that are settled herein and the negotiation, preparation and implementation of this Agreement including costs and expenses incurred in preparing stipulations, making motions and seeking and obtaining the Required Approvals.

15.5 **Modifications.** This Agreement may be modified only if in writing and signed **[*132]** by each of the Parties affected by the proposed modification. No waiver of any provision of this Agreement or departure from any tenn of this Agreement shall be effective unless in writing and signed by the Settling Claimants with respect to any waiver requested by the Reliant Parties and by the Reliant Parties with respect to any waiver requested by the Settling Claimants. No modification will be effective unless any approval of the CPUC or FERC that may be required with respect to such modification, if any, has been received.

15.6 **Assignments.** No Party shall, except as provided in Section 4.2.1, assign or transfer this Agreement or its rights or obligations hereunder without the prior written consent of the other affected Parties; provided, however, that any Party may, without the consent of the other Parties (and without relieving itself from liability hereunder), transfer or assign this Agreement to any person or entity succeeding to all or substantially all of the assets of such Party, provided that the assignee agrees in writing to be bound by the terms and conditions hereof.

15.7 **Joint and Several Liability.** Nothing in this Agreement shall be deemed to create any joint and several **[*133]** liability among the Settling Participants.

15.3 **Consents; Acceptance.** Unless otherwise expressly provided herein, any consent, acceptance, satisfaction, cooperation, or approval required of a Party under this Agreement shall not be unreasonably withheld or delayed.

SIGNATURES

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their duly authorized officers or representatives. This Agreement may be executed in any number of counterparts, each of which, when executed, will be deemed to be an original and all of which taken together will be deemed to be one and the same instrument. This Agreement may be executed by signature transmitted to other parties via facsimile or .pdf (portable document format) transmission, which shall be deemed to be the same as an original signature.

SIGNATURES APPEAR ON THE PAGES THAT FOLLOW

Reliant Signature Page

Reliant Signature Page

Reliant Signature Page

OMOI Signature Page

PG&E Signature Page

SCE Signature Page

SDG&E Signanire Page

California Attorney General Signature Page

CERS Signature Page

CEOB Signature Page

CPUC Signature Page

Oregon Attorney General Signature Page

Washington Attorney General Signature Page

California Class Signature **[*134]** Page

Egger Class Signature Page

Local Governmental Party Signature Pages - Pages for any or all of the following:

The City and County of San Francisco

The City of Oakland

The County of Santa Clara

The County of Contra Costa

Valley Center Municipal Water District

Padre Dam Municipal Water District

Ramona Municipal Water District

Helix Water District

Vista Irrigation District

Yuima Municipal Water District

Fallbrook Public Utility District

Borrego Water District

Metropolitan Transit Development Board

San Diego Trolley, Inc.

San Diego Transit Corporation

Sweetwater Authority

RELIANT SIGNATURE PAGE
TO SETTLEMENT AND RELEASE OF CLAIMS AGREEMENT
AMONG RELIANT, OMOI, CALIFORNIA PARTIES, ADDITIONAL CLAIMANTS, CLASS ACTION PARTIES, AND LOCAL GOVERNMENTAL PARTIES

RELIANT ENERGY, INC.

By: ______________________

Name: M Jines

Title: SVP

Date: 10/12/05

RELIANT ENERGY SERVICES, INC.

By: ______________________

Name: M Jines

Title: VP

Date: 10/12/05

RELIANT ENERGY POWER GENERATION, INC.

By: ______________________

Name: M Jines

Title: VP

Date: 10/12/05

RELIANT SIGNATURE PAGE
TO SETTLEMENT AND RELEASE OF CLAIMS AGREEMENT
AMONG RELIANT, OMOI, CALIFORNIA PARTIES, ADDITIONAL CLAIMANTS, CLASS ACTION PARTIES, AND LOCAL GOVERNMENTAL PARTIES

RELIANT ENERGY CALIFORNIA HOLDINGS, INC.

By: ______________________

Name: M Jines

Title: VP

Date: 10/12/05

RELIANT ENERGY COOLWATER, INC.

By: ______________________

Name: M Jines

Title: VP

Date: 10/12/05

RELIANT ENERGY ELWOOD, INC.

By: ______________________

Name: MJines

Title: VP

Date: 10/12/05

RELIANT SIGNATURE PAGE
TO SETTLEMENT AND RELEASE OF CLAIMS AGREEMENT
AMONG RELIANT, OMOI, CALIFORNIA PARTIES, ADDITIONAL CLAIMANTS, CLASS ACTION PARTIES, AND LOCAL GOVERNMENTAL PARTIES

RELIANT ENERGY ETIWANDA, INC.

By: ______________________

Name: M Jines

Title: VP

Date: 10/12/05

RELIANT ENERGY MANDALAY, INC.

By: ______________________

Name: MJines

Title: VP

Date: 10/12/05

RELIANT ENERGY ORMOND BEACH, INC.

By: ______________________

Name: MJines

Title: VP

Date: 10/12/05

OMOI SIGNATURE PAGE
TO SETTLEMENT AND RELEASE OF CLAIMS AGREEMENT
AMONG RELIANT, OMOI, CALIFORNIA PARTIES, ADDITIONAL CLAIMANTS,
CLASS ACTION PARTIES, AND LOCAL GOVERNMENTAL PARTIES

THE FEDERAL ENERGY REGULATORY COMMISSION
OFFICE OF MARKET OVERSIGHT AND INVESTIGATIONS

By: Robert Pease

Name: Robert Pease

Title: Deputy Director

Date: October 12, 2005

PG&E SIGNATURE PAGE
TO SETTLEMENT AND RELEASE OF CLAIMS AGREEMENT
AMONG RELIANT, OMOI, CALIFORNIA PARTIES, ADDITIONAL CLAIMANTS,
CLASS ACTION PARTIES, AND LOCAL GOVERNMENTAL PARTIES

PACIFIC GAS AND ELECTRIC COMPANY

By: Roger J. Peters

Name: Roger J. Peters

Title: Senior Vice President & General Counsel

Date: 10/13/05

End of Document

Coordination Proceeding Special Title (Rule 1550(b))

Superior Court of California, County of San Diego

September 24, 2009, Decided; September 24, 2009, Filed

TRANSACREN 27231375

Reporter

2009 Cal. Super. LEXIS 2507 *

Coordination Proceeding Special Title (Rule 1550(b)), CIPRO CASES I & II, This Document Relates To: ALL ACTIONS

Core Terms

patent, Cartwright Act, Sherman Act, settlement, generic, antitrust, effects, anticompetitive, infringement, ciprofloxacin, baseless, settlement agreement, antitrust violation, inequitable conduct, anti trust law, rule of reason, cases, exclusionary, marketing, courts, summary judgment motion, cause of action, allegations, restraint of trade, parties, restrained, material fact, patent holder, federal law, invalidity

Counsel: **[*1]** For BAYER CORPORATION, Defendant: Fred H. Bartlit, Jr., Peter B. Bensinger, Jr., Michael J, Valaik, Paul J. Skiermont, BARTLIT BECK HERMAN PALENCHAR & SCOTT LLP, Chicago, IL.

Judges: Hon. Richard E.L. Strauss, Judge of the San Diego Superior Court.

Opinion by: Richard E.L. Strauss

Opinion

FINAL JUDGMENT

On August 21, 2009, the Court, having folly considered the arguments of all parties, both written and oral, as well as the evidence presented, granted the motion for summary judgment filed by defendant Bayer Corporation, the motion for summary judgment filed by defendants Hoechst Marion Roussel, Inc., The Rugby Group, Inc., and Barr Laboratories, Inc., and the motion for summary judgment filed by Watson Pharmaceuticals, Inc. (collectively, "Defendants"). A true and correct copy of the Court's August 21, 2009 Order granting those motions is attached to this judgment as Exhibit 1. In accordance with that Order,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Named plaintiffs Karyn McGaughey, Barbara Hymes Cohen, Deborah Patane, Donna Moore, Senior Action Network, IUOE Stationary Engineers Local 39 Health and Welfare Plan, and Sheet Metal Workers Health Plan of Southern California ("Named Plaintiffs"), and the plaintiff **[*2]** class defined as,

> [a]ll natural persons, sole proprietorships, partnerships, limited partnerships, corporations, and other entities, in the State of California who indirectly purchased, paid and/or reimbursed for Cipro intended for consumption by themselves, their families, or their members, participants, employees or insureds (the "Class") during the

> period from January 8, 1997 through such time in the future as the effects of Defendants' illegal conduct, as alleged herein, have ceased (the "Class Period"),[1]

take nothing from Defendants, and that the Named Plaintiffs and Class receive none of the relief that they have requested through **[*3]** their complaints.

2. Judgment is hereby entered in favor of Defendants and against Named Plaintiffs and the Class.

3. Defendants Bayer Corporation, Hoechst Marion Roussel, Inc., The Rugby Group, Barr Laboratories, Inc., and Watson Pharmaceuticals, Inc. are entitled to their costs pursuant to *C.C.P. section 1032*, following the procedures set forth in *Rule 3.1700 of the California Rules of Court*.

4. The Clerk of the Court is directed to enter this Judgment, without delay, as a final judgment.

Dated: 9-24-09

/s/ Richard E.L. Strauss

Hon. Richard E.L. Strauss, Judge of the San Diego Superior Court

Exhibit 1

Appearances:

For Appearances, please see sign in sheet, attached hereto and incorporated herein.

The court's tentative ruling is published but not read on the record. Court hears oral argument and confirms its modified tentative ruling, per agreement of both sides, as follows:

Defendant Bayer Corporation's Motion for Summary Judgment

Defendant Bayer Corporation's Motion for Summary Judgment is GRANTED. Under *CCP § 437c*, if the parties' papers show there is no triable issue of matenal fact and the "'moving party is entitled to a judgment as a matter of law"' (*CCP § 437c(c)*), the court must grant the motion for summary judgment. (*Aguilar v. Atlantic Richfield (2001) 25 Cal.4th 826, 843, 107 Cal. Rptr. 2d 841, 24 P.3d 493*.) Subdivision (p)(2) states: "A defendant or cross-defendant **[*4]** has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action … cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show a triable issue of one or more material facts exists as to that cause of action or a defense thereto.*

The Consolidated Second Amended Complaint (SAC) alleges three causes of action for (1) antitrust in violation of the Cartwright Act, under *California Business and Professions Code Sections 16720, et. seq.*; (2) unfair competition in violation of *California Business and Professions Code Sections 17200 et. seq.*; and (3) common law monopolization. Essentially, Plaintiffs allege Defendant Bayer entered into unlawful and anti-competitive agreements with its horizontal competitors. Defendants Barr Laboratories; Hoechst Marion Roussel, inc. (HMR) and HMR's then subsidiary, Defendant Rugby Group, Inc. (Rugby). Plaintiffs allege these agreements, referred to as reverse payment settlements, (hereinafter the "agreement") effectively allowed Bayer to maintain an exclusive right

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[1] Excluded from the class are all persons who obtained Cipro through the MediCal Prescription Drug Program; governmental entities; the Defendants, their co-conspirators, along with all of their respective parents, subsidiaries and/or affiliates; all persons or entities that purchased Cipro for purposes of resale; any purchaser of Cipro who paid a flat co-payment and who would have paid the same co-payment for a generic substitute under the terms of their health insurance coverage, and any and all judges and justices assigned to hear any aspect of this litigation.

to manufacture and market Cipro in California without competition to bring a generic form of ciprofloxacin **[*5]** to the market place. The result to consumers and Plaintiffs was increased costs of the prescription drug Cipro and increased profits to Bayer. In addition, the other parties to the agreement received large payments for not producing a generic form of Cipro,

As discussed more fully herein, the Court finds that the agreement does not violate the Cartwright Act. The undisputed evidence establishes that no triable issue of material fact exists that the agreement did not fall outside the exclusionary scope of the patent; there is no evidence that the patent suit by Bayer against Barr was objectively baseless; and Plaintiff cannot establish that the settlement was otnerwrse unlawful.

The Cartwrtght Act (§§ 16700-16758) was designed primarily to prevent organization of trusts for control of markets for merchandise, but its definition of trust may, not unreasonably, include any contract "to carry out restrictions in trade or commerce," and to prevent competition in "manufacturing, sale or purchase of merchandise," etc. (*California Kitchens v United Brotherhood of Carpenters & Joiners (1956) 139 Cal App 2d 597, 294 P.2d 468*)California courts interpreting the Cartwright act recognize the persuasive authority of federal decisions under the Sherman Act and have liberally applied the federal Sherman **[*6]** Act doctrine in interpreting the Cartwright Act, (See, e.g., *Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 542, 30 Cal. Rptr. 2d 706*; *Cellular Plus, Inc. v. Superior Court (1993) 14 Cal. App. 4th 1224, 1242, 18 Cal. Rptr. 2d 308*; *Bert G. Gianelli Distributing Co. v. Beck & Co. (1985) 172 Cal. App. 3d 1020, 1042, 219 Cal. Rptr. 203*, overturned on other grounds by Dore v. Arnold Worldwide, Inc. (2006) 39 Cat.4th 384.) The Cartwright Act, like its federal counterpart, "has not been interpreted to penalize natural monopolies." (Freeman v. San Diego Ass'n of Realtors, 77 CaI.App,4th 171,200.)

The Cartwright Act and the federal antitrust laws are interpreted to permit restraints of trade as long as those restraints are reasonable under the circumstances. Following federal law, the Cartwright Act recognizes two distinct categories of offenses: "Per Se" violations, and other potentially harmful conduct that is treated under the so-called "Rule of Reason." Under the per se illegal theory, conduct is conclusively presumed to be unlawful because of its pernicious effects on competition and lack of any redeeming virtue. In other words, it is illegal regardless of any alleged business justification or pro-competitive effects. (Marin County Bd. Of Realtors, inc. v. *Palsson, (1976) 16 Cal.3d 920, 930-31, 130 Cal. Rptr. 1, 549 P.2d 833*.) Under the Rule of Reason analysis, conduct violates the Cartwright Act if the plaintiff shows that the conduct is an unreasonable restraint of trade, meaning conduct that unreasonably impairs competition **[*7]** and harms consumers. The Rule of Reason prohibits only those actions that cause an "unreasonable restraint of trade" (*Standard Oil Co. v. United States (1911) 221 U.S 1, 87, 31 S. Ct. 502, 55 L. Ed. 619*; see also *People v. Building Maint. Contractors Ass'n, Inc. (1953) 41 Cal.2d 719, 727, 264 P.2d 31*.) If an alleged restraint of trade is not per se illegal, the Rule-of-Reason analysis should be applied (see *Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal.3d 842, 855, 94 Cal. Rptr. 785, 484 P.2d 953*-finding the rule of reason to be a factual inquiry into whether a particular action is an unreasonable restraint on trade)].

Plaintiffs allege that the agreement at issue here was a per se violation of the Cartwright Act. (SAC ¶140.) Plaintiff's argue that the agreement at issue is a horizontal agreement between competitors to allocate markets, which have been held to be per se illegal under the Cartwright Act. Plaintiff's urge this Court to find that under California law, "a naked payment from a patent holder to a non-patent holder to abandon its challenge to the patent's validity and stay out of the market for the patented product-thus ensuring supra-competitive prices-must be scrutinized under the rule that agreements not to compete are per se illegal."(Plaintiffs' Opposition, p. 31.)

However, the Court declines to find the agreement is illegal per se, as the per se label is reserved for, "agreements or practices which because of their pernicious **[*8]** effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." (*Marin County Bd. Of Realtors, Inc. v. Palsson, (1976) 16 Cal.3d 920, 930-31, 130 Cal. Rptr. 1, 549 P.2d 833*.) Plaintiffs have cited no California case, nor is there one, supporting that a per se illegal analysis is applicable to the specific agreement at issue here, a reverse payment settlement agreement under the Hatch Waxman Act concerning a patent The California Supreme Court has instructed that "before acceding to the demand for such a formidable rule," "applicable case law" must condemn the conduct. (Marin County, 16 Cai.3d at 931.) Given that this appears to be a case of first impression, there is simply no legal basis to support that the Cartwright Act be interpreted in such a manner so as render the agreement per se illegal, as there has been no authority provided by Plaintiffs demonstrating that California courts have historically found that these agreements have a "pernicious effect" on competition which lacks "any redeeming virtue." Moreover, it is well settled that the law favors settlements and this would extend to patent infringement suite as well. **[*9]** Plaintiffs' reliance on *Vulcan Powder Co. v. Hercules Powder Co. (1892) 95 Cal. 510*, to support that an agreement like this should be determined to be illegal per se because it constitutes an agreement not to compete is unpersuasive. The Court in Vufcan found an antitrust violation because the agreement exceeded the scope of the patent. The contract at issue in that case, unlike here, was not confined to the product (dynamite) produced under the patents, and involved a collaboration among many industry members including some that did not have patent rights to establish a commitment to fix prices. As will be discussed in greater detail below, the agreement here was confined to the product produced under the patent and did not exceed the scope of the patent's right to exclude all infringers from marketing a generic version of Cipro.

Nor is there any basis to support that the agreement is per se illegal under federal law. The federal cases under the Sherman Act have found that these types of agreements are not illegal per se violations of federal ***antitrust law***. Under the Sherman Act, the courts have held that a reverse payment settlement agreement like the one at issue here, (See *Schering-Plough Corp. v. FTC (11th Cir. 2005) 402 F.3d 1056*; *Valley Drug Co. v. Geneva Pharms., Inc., (11th Cir. 2003) 344 F.3d 1294*; fn Re Tamoxifen Citrate Antitrust Litig. (2d Cir. 2006) 466 F.3d at 190) and **[*10]** specifically this very agreement (See In Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro II") *(E.D.N.Y. 2005) 363 F. Supp. 2d 514, 541*; and in Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro III") *(Fed. Cir. 2008) 544 F.3d 1323,1341)* are not illegal per se. The Federal Circuit Court in Cipro III held that, "only agreements that have a predictable and pernicious anticompetitive effect and limited potential for procompetitive effect are deemed to be per se unlawful under the Sherman Act. A finding of per se unlawfulness is appropriate once experience with a particular type of restraint enables the Court to predict with confidence that the rule of reason will condemn it." The court found that this specific agreement was not per se illegal under the Sherman Act as it did not restrict more competition than allowed under the scope of the patent. (Cipro III, at 1332.)

Although Plaintiffs argue that the Court should not follow the federal court decisions, arguing that the Cartwrsght Act Is broader (i.e. prohibits more conduct) than the Sherman Act, the Court is not persuaded that it is broader in any way pertinent to the issues before the Court. The Cartwright Act and the federal Sherman Act share similar language and objectives, and California courts **[*11]** often look to federal . precedents under the Sherman Act for guidance. (*Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 369, 113 Cal. Rptr. 2d 175*.) Although not identical, "judicial interpretations of the Sherman Act are, nevertheless, often helpful because of the similarity in language and purpose between the federal and state statutes." (*Morrison v. Viacom, Inc., (1998) 66 Cal.App.4th 534, 541, 78 Cal. Rptr. 2d 133*.) "Because the Cartwright Act is patterned after the federal Sherman Act and both have their roots in the common law, federal cases interpreting the Sherman Act are applicable in construing the Cartwright Act." (Oakiand-Alameda County Builders' Exchange v. F. P. Lathrop Constr". *Co., (1971) 4 Cal. 3d 354, 362 fn 3, 93 Cal. Rptr. 602, 482 P.2d 226*, citing to *Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 315, 70 Cal. Rptr. 849, 444 P.2d 481]*.) "Although we have referred to federal decisions under the Sherman Act, it is well settled that such cases are authoritative in cases under the Cartwright Act." (*Shasta Douglas Oil Co. v. Work (1963) 212 Cal. App. 2d 618, 625, 28 Cal. Rptr. 190*, citing to *Milton v. Hudson Sales Corp. (1957) 152 Cal.App.2d 418, 440, 313 P.2d 936*.) The Cartwright Act prohibits every trust, defined as "a combination of capital, skill or acts by two or more persons" for specified anticompetitive purposes. The federal Sherman Act prohibits every contract, combination … or conspiracy, in restraint of trade." The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act share similar language and objectives, California **[*12]** courts often look TO federal precedents under the Sherman Act for guidance. (*Chavez v. Whirlpool Corp. (2001) 93 Cal. App. 4th 363, 369, 113 Cal. Rptr. 2d 175*.)

While the Court recognizes that the federal decisional law is not binding on this Court (unless otherwise indicated herein) the Court considers the federal case law concerning this agreement as persuasive authority, especially in light of the lack of controlling California authority on point. Further, the rule enunciated under the Sherman Act in Cipro III mirrors the law in California that it is only those agreements that have a "historical and pernicious" effect which should be found per se illegal. Although Plaintiffs cite to in re Cardizem CD Antitrust Litigation, as federal authority finding a reverse payment settlement per se illegal, the agreement at issue in that case exceeded the exclusionary scope of the gatent involved and restrained non-infringing drugs, and thus does not aid Plaintiffs here, (In re ardizem *CD Antitrust Litigation (6th Cir. 2003) 332 F.3d 896*.)

As discussed more fully below, the agreement here does not restrict more competition than allowed under the scope of the patent. To adopt Plaintiffs' argument that horizontal agreements between competitors to allocate markets are traditionally subject to per se illegal treatment wholly ignores **[*13]** that this agreement concerns a patent which gives the patent holder the legal right to exclude infringing competition. Therefore, the Court does not find the agreement to be illegal per se under the Cartwright Act, as there is no legal basis under California law to do so. Nor is there any basis to support a per se illegal determination under federal decisional law.

This Court also finds that the agreement does not violate the Cartwright Act under the Rule of Reason. To state a Cartwright Act antitrust claim. Plaintiffs must show that: 1) an agreement exists between independent entities; 2) the agreement is in restraint of trade; and 3) the restraint is unreasonable. To prove an unreasonable restrain, Plaintiffs must show the agreement had a "substantially adverse effect on competition in the relevant market." (*Exxon Corp. v. Superior Court (1997) 51 Cal. App. 4th 1672, 1681, 60 Cal. Rptr. 2d 195*.) Plaintiff must show: (1) that an alleged restraint on trade has anticompetitive effects, and (2) that the anticompetitive effects outweigh any pro-competitive benefits. (See *Bert G. Gianei Distrib. Co. v. Beck & Co. (1985) 172 Cal.App.3d 1020, 1048, 219 Cal. Rptr. 203*, overturned on other grounds by *Dore v. Amold Worldwide, Inc. (2006) 39 Cal.4th 384, 46 Cal. Rptr. 3d 668, 139 P.3d 56*.) The focus is on the actual effects that the challenged restraint has had on competition in a relevant market.

As previously discussed, there is no California authority **[*14]** evaluating whether a Hatch Waxman reverse payment settlement agreement violates state ***antitrust law*** (Cartwright Act or otherwise). Thus, the Court turns to federal decisions concerning the Sherman Act as persuasive authority to guide its decision. Federal case law is not only instructive in this regard, it is dispositive.

The federal court cases dealing generally with Hatch Waxman settlements, and specifically with this agreement, have uniformly held that settlements within the scope of the patent do not violate antitrust laws. The federal courts have held that in order to determine whether there is an antitrust violation (under the federal antitrust Sherman Act) the Court must first analyze whether the agreement at issue falls within the exclusionary scope of the patent, If it does, there is no anti-trust violation because the settlement agreement did not cause anticompetitive effects beyond those inherent in the patent. As stated in Tamoxifen and quoted in Cipro II, "Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing ***antitrust law***, as long **[*15]** as the competition is restrained only within the scope of the patent." (id. at 213 (quoting Cipro II at 535.) Additionally, the district and appellate court in Cipro II and ill have already determined that the settlement at issue here did not exceed the scope of the patent and did not have anti-competitive effects beyond the patent. In Cipro HI, the Federal Circuit affirmed the district court's holding that there was no antitrust violation because the settlement agreement fell within the "exclusionary zone" of the patent. The Federal Circuit Court found that because patents are presumed valid and provide the patentee with the right to exclude others (infringers) from the market, the challenged anticompetitive effects of the agreement at issue here were directly attributable to the patent, and therefore, no antitrust remedy was available. (*In re Ciprofloxacin Hydrochloride Antitrust Litig. (Cipro III) (Fed. Cir. 2008) 544 F.3d 1323,1332-1336*.)

The Court finds the result should be no different under the Cartwright Act, as we are dealing with the exact same settlement agreement, involving the same type of Plaintiffs (indirect purchasers), and the same theories of liability. Additionally, the standard articulated in the federal cases comports with California law and is consistent with regard **[*16]** to the antitrust liability concerning patents. The district court in Cipro II, affirmed by the Circuit Court in Cipro III, utilized the same framework, i.e. a rule of reason, in its analysis which differs in no significant respect and is not unlike the rule of reason articulated by the courts for purposes of a state antitrust analysis under the Cartwright Act. Although Plaintiffs argue that the Cartwright Act is more restrictive than the Sherman Act, such argument is unavailing as previously discussed above. Further, while the cases cited by Plaintiffs in this regard recognize that the scope of the Cartwright Act may in some situations be broader than or differ from the Sherman

Act, there is no authority or support which persuades this Court to conclude that the Cartwright Act was intended to be broader than the Sherman Act on the question of reverse payment settlements.

California cases involving antitrust violations and patents likewise hold that conduct falling within the scope of a patent is not an antitrust violation. The grant of a patent is the grant of a statutory monopoly and is an express exception to laws prohibiting monopolies. (*Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 229, 84 S. Ct. 784, 11 L. Ed. 2d 661, 1964 Dec. Comm'r Pat. 425*; *Aetna Casualty & Sur. Co. v. Superior Court (1993) 19 Cal. App. 4th 320, 328, 23 Cal. Rptr. 2d 442*.) In *Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748, 258 P.2d 852*, the California Court of Appeal ruled **[*17]** that in cases in which the exercise of patent rights is involved, a patent holder "brings himself within the proscription of the antitrust laws only when the patentee or his assignee acts beyond that which was necessary or incidental to the scope of this patent" (*Fruit Machinery, (1953) 118 Cal.App.2d 748, 258 P.2d 852*.) In Fruit Machinery, the defendant was a sublicensee of a patented peach-pitting machine who challenged the sublicense agreement on the ground that the plaintiff "created a monopoly" through the sublicense. (*id. at 761*.) The Court rejected the argument, noting that, "Defendant has not shown that the parties in executing and carrying out the sublicense agreement in suit, exercise rights or powers not accorded mem by the patent law or abused any rights or powers accorded them by mat law." (*Id. at 762*.) Thus, California law also supports that unless the agreement goes, "beyond the scope of the patent rights there is no antitrust violation. (Id.)

The undisputed evidence shows that the agreement here was clearly within the scope of the patent. A patent is presumed valid. (*35 U.S.C. 282*) The 444 patent issued on June 2, 1987, and expired December 9, 2003 (UMF No. 3, and evidence cited therein). The FDA granted pediatric exclusivity to Bayer's Cipro until June **[*18]** 9, 2004. (UMF No. 4, and evidence cited therein.) Under the federal food and drug laws, no generic Cipro could lawfully enter the market until June 9, 2004. (*21 U.S.C. §355a(b)(2)(A)(ii)*.) 3 The 444 patent is a compound patent and covers the molecule/compound ciprofloxacin hydrochloride, which is the only active ingredient in ail ciprofloxacin products however formulated. (UMF No. 2, and evidence cited therein) Claim 12 did not change in reexamination. (UMF Nos. 26-28, and evidence cited therein.) Because the patent covers the ciprofloxacin molecule, Bayer had the right to exclude infringing competition from ail forms of generic Cipro, (in Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro I") *(E.D.N.Y. 2003) 261 F. Supp 2d 188, 249*.) In 1991 Barr filed an ANDA with a Paragraph 4 certification, alleging the patent was Invalid. Barr stipulated that its ANDA product infringed on the 444 patent. (UMF Nos. 5-8, 19, and evidence cited therein.) Thus, the Cipro patent precluded all generic competition, including Barr's admitted infringement. On January 16, 1992, Bayer sued Barr alleging that the ANDA infringed on the patent. Barr answered with claims of invalidity and unenforceability. The parties settled. (UMF Nos. 9-17, and evidence cited therein.) **[*19]** Pursuant to file Cipro Settlement, the Generic Defendants agreed not to infringe Bayer's patent with a competing ciprofloxacin product until six months before Bayer's '444 Patent expired, with settlement payments from Bayer as consideration for the resolution of the Generic Defendants' disputed patent challenge. (UMF Nos. 15-24, and evidence cited therein.) As such, the agreement precluded no more competition than was already precluded under the patent, as under the patent, Bayer had the right to exclude all infringers from marketing a generic version of Cipro prior to the expiration of the patent. As the court in Cipro II found, "this is well within Bayer's rights as the patentee. (Cipro II at 524.) California law compels no different conclusion. Thus, Defendants have established that the settlement agreement fell within the exclusionary scope of the patent.

Therefore, there is no antitrust violation under California law (*Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748, 258 P.2d 852*) nor under federal law, "Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing [federal] ***antitrust law***, as long as competition is restrained **[*20]** only within the scope of the patent." (Tamoxifen, 466 F.3d at 213; In re Ciprofloxacin Hydrochloride Antitrust Litig. (Cipro ill) *(Fed. Cir. 2008) 544 F.3d 1323*.) Whether the underlying infringement lawsuit was "objectively baseless" requires a finding that the suit is so baseless, "that no reasonable litigant could realistically expect success on the ments." (*In re Tamoxifen Citrate Antitrust Litig.) (2d Cir. N.Y. 2006) 466 F.3d 187, 213* citing *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., (1993) 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611*.)

However, Plaintiffs failed to allege that Bayer's infringement suit was objectively baseless, was sham litigation, or that there was fraud on the PTO in their SAC, and Plaintiffs cannot defeat the motion for summary judgment by doing so now. A plaintiff cannot defeat a motion for summary judgment by bringing new, unpleaded issues in the opposing papers. (Oakland Raiders v. National Football League (2005) 131 Cal.App.4th 621, 648, 32 Cal. Rptr. 3d 266.) Even if such allegations were included in the SAC, there is no evidence or legal support that the suit was objectively baseless or was a sham. "Bayer's success in its litigations against Schein. Mylan, and Carlsbad forecloses any argument that its lawsuits were shams." (UMF Nos. 29-32, and evidence cited therein; Cipro II, 363 F.Supp.2d at 547.)

Similarly, Plaintiffs cannot meet the objectively baseless standard by resorting to allegations of inequitable conduct since the SAC does not allege inequitable conduct, much less that Bayer's infringement **[*21]** suit against Barr was objectively baseless or a sham. Even if there were such allegations, inequitable conduct is only an equitable defense to a patent infringement suit which, if proven, can render the entire patent unenforceable. (See e.g. Hoffmann-La Roche, Inc. v. Promega Corp. (Fed. Cir. 2003) 323 F.3d 1354, 1372.) As such, Bayer's alleged inequitable conduct in procuring the patent is not relevant to the case at hand as it pertains to Plaintiffs' antitrust claims. The Federal Circuit has held that inequitable conduct is a defense to a patent infringement claim, not an affirmative antitrust claim. (Nobelpharma AB v. Implant Innovations, Inc., (Fed. Cir. 1998) 141 F.3d 1059, 1070.) Moreover, the Court finds that the determination of fraud and inequitable conduct would involve substantial questions of patent law, which this Court does not have jurisdiction to decide. (See Lockwood v. Sheppard, 173 Cal.App.4th 675, 93 Cal. Rptr. 3d 220 (2009) (holding that the court lacked jurisdiction to make a determination regarding PTO procedures.)

Concerning Plaintiffs' arguments that the settlement had anticompetitive effects outside of, or expanding, the scope of the patent (manipulation of the 180-day exclusivity period; preventing other generic challengers from challenging the 444 patent; that the settlement prevented other generic defendants from marketing non-infringing products; or that but for the settlement, **[*22]** Barr "could Rave won" its case against Bayer and generic Cipro could have come to market earlier(SAC ¶¶117, 122, 145(ii), all courts analyzing this specific agreement and considering these very same arguments found that the agreement extended no further than the scope of what the patent protects. (Cipro I,281 F. Supp. 2d at 257; Cipro ill 544 F.3d at 1338-1339.) Moreover, the FDA-did not award Barr the 180-day exclusivity period, there was no evidence of an actual adverse effect on competition due to that provision (Cipro III, 544 F.3d at 1340, n. 14), and it is undisputed that four other generic manufactures challenged the validity of the patent which supports the settlement did not prevent others from challenging the patent. (UMF fslos. 20, 29-33, and evidence cited therein.) Further, since the patent covered the molecule ciprofloxacin, a settlement which precluded only a generic version of Cipro would not restrain or prevent a generic from marketing a non-infringing product Tin Re Tamoxifen Citrate Antitrust Litig. (2d Cir. 2006) 466 F.3d at 190, 214.) Additionally, Plaintiffs' allegations mat Barr would have won the patent challenge are speculative, and are dismissed as, "little more than dubious expectations or desires." (Cipro I, 261 F.Supp.2d at 202.)

Thus, to the extent Plaintiffs attack the presumption of **[*23]** patent validity to argue that the infringement suit was objectively baseless, or other inequitable conduct which would remove the protection of the patent, Plaintiffs have not included such ciaims in the SAC. The SAC is silent as to allegations non-infringement, invalidity, inequitable conduct, or fraud on the PTO. Therefore, Plaintiffs cannot rely on such claims which fall outside of their pleadings to defeat summary judgment. Further, this Court lacks jurisdiction to make such determinations.

Addressing Plaintiffs' argument that this Court should employ a "traditional rule of reason analysis" applied in state trade cases rattier than the "objectively baseless" standard, the outcome would be no different as the Court would still need to evaluate at the outset whether the agreement fell within the scope of the patent, because if it does, there is no antitrust violation. (Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748, 258 P.2d 852.) Thus, under California law, like federal law, mere is only antitrust liability for conduct which goes beyond the exclusionary scope granted by the patent, a salient point Plaintiffs conveniently ignore. Instead, Plaintiffs urge this Court to analyze the agreement and Its effects without taking into account that Bayer **[*24]** had a patent and the legal rights which are granted by the patent. Further, the Court believes that the objectively baseless standard is applicable given the unique nature of the agreement at issue (a pharmaceutical reverse payment settlement that does not arise under state law) which results from a patent infringement action (arising under federal law), and considering that federal courts have utilized this standard in adjudicating such agreements for purposes of determining antitrust liability.

Further, even considering the two "key facts" (size of payment/price hike)upon which Plaintiffs rely to demonstrate the alleged anticompetitive effects on trade under their traditional rule of reason analysis, they either fall within the rights of the patent holder (e.g. the price of the patented product) or are not relevant to the antitrust analysis. Plaintiffs argue that that the size of the payment is a key indicator of the patent's strength and supports a reasonable inference that the patent would have been struck down as invalid. Patent validity is not relevant in the determination of whether She settlement agreements violate antitrust laws. ("The valley Drug court thus took the position **[*25]** that an antitrust court need not consider the potential invalidity of the patent in an exclusion-payment settlement, except in those extreme cases involving fraud on the Patent Office or assertion of a patent known to be invalid, i.e., in circumstances giving rise to an allegation of Walker Process fraud or sham litigation." (*Cipro II (E.D.N.Y. 2005) 363 F. Supp. 2d 514, 525)* AS previously discussed, no such ciaims were alleged in the SAC. Plaintiffs also assert that since the price increased after the settlement, tills also demonstrates the anticompetitive effects of the agreement. However, Bayer had the right to control the price of its product under the patent, and thus, if the settlement was within the scope of the patent, then any price increase is also within the scope of the patent. (*Cipro II, (2005) 363 F. Supp. 2d at 540*; Fruit Machinery (1953) 118 Cal.App,2d at 759; *United States v. Masonite Corp. (1942) 16 U.S. 265, 279*.)

Therefore, the Court finds that as a matter of law, Plaintiffs cannot establish the agreement unreasonably restrains trade because no friable issue of material fact exists that there are no anticompetitive effects on competition beyond the exclusionary scope of the patent itself. Thus, the Court finds that the agreement does not violate the Cartwright Act. This finding, also precludes Plaintiffs' **[*26]** UCL claim and common law monopoly claim as they are based on the same tactual allegations that support the Cartwright Act cLaim. Thus, the Courts determination mat the agreement does not violate the Cartwright Act is fatal to both the UCL claim (*Belton v. Comcast Cable Moldings, LLC. (2007) 151 Cal. App. 4th 1224, 1240*-quoting *Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 375, 113 Cal. Rptr. 2d 175*; see also *RLH Industries, Inc. v. SBC Communications, Inc. (2005) 133 Cal.App.4th 1277,1288, 35 Cal. Rptr. 3d 469)* and the common law monopolization claim. (*Eastman Kodak v. Image Tech. Servs, Inc. (1992) 504 U.S. 451, 481-83, 112 S. Ct. 2072, 119 L. Ed. 2d 265*.) Conduct by a patent holder acting within the scope of the patent is likewise immune from antitrust scrutiny even in the monopolization context. (Fruit Machinery 118 Cai.App,2d 762-63.)

Accordingly, summary judgment is granted.

Defendant's motion to dismiss is denied.

Plaintiffs' evidentiary objections are overruled. Further, to the extent that the objections failed to quote or set forth the objectionable material, they fail to conform to *California Rule of Court Rule 3.1354(b)(3)*.

All requests for judicial notice are granted as to the existence but not truth of the items requested.

Parties wishing to argue before the Court must appear on the date and at the time noticed for the hearing, if none of the parties appears on the date and at the time noticed for the hearing, the tentative ruling shall be adopted as the final ruling of the Court.

Defendants Hoechst Marion Roussel, Inc; The Rugby Group, Inc. and Barr Laboratories, **[*27]** inc's Motion for Summary Judgment

Defendants Hoechst Marion Roussel, Inc; The Rugby Group, Inc.; and Barr Laboratories, Inc.'s Motion for Summary Judgment is GRANTED. Under *CCP § 437c*, if the parties' papers show there is no triable issue of material fact and the "'moving party is entitled to a judgment as a matter of law'" (*CCP § 437c(c)*), the court must grant the motion for summary Judgment. (Aguilar v. Atlantic Richfield (2001) 25 Cal, 4th 826, 843.) Subdivision (p)(2) states: "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of me cause of action … cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show a triable issue of one or more material facts exists as to that cause of action or a defense thereto."

The Consolidated Second Amended Complaint (SAC) alleges three causes of action for (1) antitrust in violation of the Cartwright Act, under *California Business and Professions Code Sections 16720, et. seq.*; (2) unfair competition in violation of *California Business and Professions Code Sections 17200 et. seq.*; and (3) common law monopolization. Essentially, Plaintiffs allege Defendant **[*28]** Bayer entered into unlawful and anti-competitive agreements with its horizontal competitors, Defendants Barr Laboratories; Hoechst Marion Roussel, Inc. (HMR) and HMR's then subsidiary, Defendant Rugby Group, Inc. (Rugby). Plaintiffs allege these agreements, referred to as reverse payment settlements, (hereinafter the "agreement") effectively allowed Bayer to maintain an exclusive right to manufacture and market Cipro in California without competition to bnng a generic form of ciprofloxacin to the market place. The result to consumers and Plaintiffs was increased costs of the prescription drug Cipro and increased profits to Bayer, in addition, the other parties to the agreement received iarge payments for not producing a generic form of Cipro.

As discussed more fully herein, the Court finds that the agreement does not violate the Cartwright Act. The undisputed evidence establishes that no triable issue of material fact exists that the agreement did not fall outside the exclusionary scope of the patent; there is no evidence that the patent suit by Bayer against Barr was objectively baseless; and Plaintiff cannot establish that the settlement was otherwise unlawful.

The Cartwright Act **[*29]** (§§ 16700-16758) was designed primarily to prevent organization of trusts for control of markets for merchandise, but its definition of trust may, not unreasonably, include any contract "to carry out restrictions in trade or commerce," and to prevent competition in "manufacturing, sale or purchase of merchandise" etc. (*California Kitchens v United Brotherhood of Carpenters & Joiners (1956) 139 Cal App 2d 597, 294 P.2d 468*)California courts interpreting the Cartwright act recognize the persuasive authority of federal decisions under the Sherman Act and have liberally applied the federal Sherman Act doctrine in interpreting the Cartwright Act. (See, e.g., *Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 542, 30 Cal. Rptr. 2d 706*; *Cellular Plus, Inc. v. Superior Court (1993) 14 Cal. App. 4th 1224,1242, 18 Cal. Rptr. 2d 308*; *Bert G. Gianelll Distributing Co. v. Beck & Go. (1985) 172 Cal. App. 3d 1020, 1042*, overturned on other grounds by *Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384, 46 Cal. Rptr. 3d 668, 139 P.3d 56*.) The Cartwright Act, like its federal counterpart, "has not been Interpreted to penalize natural monopolies." (*Freeman v. San Diego Ass'n of Realtors, 77 Cal.App.4th 171, 200*.

The Cartwright Act and the federal antitrust laws are Interpreted to permit restraints of trade as long as those restraints are reasonable under the circumstances. Following federal law, the Cartwright Act recognizes two distinct categories of offenses: "Per Se" violations, ana other potentially harmful conduct that is treated under the so-called "Rule of Reason." Under the per se Illegal theory, conduct is conclusively presumed to be unlawful because of its pernicious effects on competition **[*30]** and lack of any redeeming virtue. In other words, it is illegal regardless of any alleged business justification or pro-competitive effects. (*Marin County Bd. Of Realtors, Inc. v. Palsson, (1976) 16 Cal.3d 920, 930-31, 130 Cal. Rptr. 1, 549 P.2d 833*.) Under the Rule of Reason analysis, conduct violates the Cartwright Act if the plaintiff shows that the conduct is an unreasonable restraint of trade, meaning conduct that unreasonably impairs competition and harms consumers. The Rule of Reason prohibits only those actions that cause an "unreasonable restraint of trade" (*Standard Oil Co. v. United States (1911) 221 U.S 1, 87, 31 S. Ct. 502, 55 L. Ed. 619*; see also *People v. Building Maint. Contractors' Ass'n, Inc. (1953) 41 Cal.2d 719, 727, 264 P.2d 31*.) If an alleged restraint of trade is notper se illegal, the Rule-of-Reason analysis should be applied (see Corwin v. Los Angeles Newspaper Sen/ice *Bureau, Inc. (1971) 4 Cal.3d 842, 855, 94 Cal. Rptr. 785, 484 P.2d 953*-finding the rule of reason to be a factual inquiry Into whether a particular action Is an unreasonable restraint on trade)].

Plaintiffs allege that the agreement at issue here was a per se violation of the Cartwnght Act. (SAC ¶140.) Plaintiffs argue that the agreement at issue is a horizontal agreement between competitors to allocate markets, which have been held to be per se illegal under the Cartwright Act. Plaintiffs urge this Court to find that under California law, "a naked payment from a patent holder to a non-patent holder to abandon its challenge to the patent's **[*31]** validity and stay out of the market for the patented product-thus ensuring supra-competitive prices-must be scrutinized under the rule that agreements not to compete are per se il!egal,"(Piaintiffs' Opposition, p. 31.)

However, the Court declines to find the agreement is illegal per se, as the per se label is reserved for, "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." (*Marin County Bd. Of Realtors, Inc. v. Palsson, (1976) 16 Cal.3d 920, 930-31, 130 Cal. Rptr. 1, 549 P.2d 833*.) Plaintiffs have cited no California case, nor is there one, supporting that a per se illegal analysis is applicable to the specific agreement at issue here, a reverse payment settlement agreement under the Hatch Waxman Act concerning a patent. The California Supreme Court has instructed that "before acceding to the demand for such a formidable rule," "applicable case law" must condemn the conduct. (*Marin County, 16 Cal.3d at 931*.) Given that this appears to be a case of first Impression, there is simply no legal basis to support that the Cartwright Act be interpreted in such a manner so as render the agreement **[*32]** per se illegal, as there has been no authority provided by Plaintiffs demonstrating that California courts have historically found that these agreements have a "pernicious effect" on competition which lacks "any redeeming virtue." Moreover, it is well settled that the law favors settlements and tills would extend to patent Infringement suits as well.

Plaintiffs' reliance on Vulcan Powder Co. v. Hercules Powder Co. (1892) 95 Cat 510, to support that an agreement like tills should be determined to be illegal per se because it constitutes an agreement not to compete is unpersuasive. The Court in Vulcan found an antitrust violation because the agreement exceeded the scope of the patent. The contract at issue in that case, unlike here, was not confined to the product (dynamite) produced under the patents, and involved *a* collaboration among many Industry members including some that did not have patent rights to establish a commitment to fix prices. As will be discussed in greater detail below, the agreement here was confined to the product produced under the patent and did not exceed the scope of the patent's right to exclude all infringers from marketing a generic version of Cipro.

Nor is **[*33]** there any basis to support that the agreement is per se illegal under federal law. The federal cases under the Sherman Act have found that these types of agreements are not illegal per se violations of federal ***antitrust law***. Under the Sherman Act, the courts have held that a reverse payment settlement agreement like the one at issue here, (See *Schering-Plough Corp. v. FTC (11th Cir.2005) 402 F.3d 1056*; *Valley Drug Co. v. Geneva Pharms., Inc., (11th Cir. 2003) 344 F.3d 1294*; In Re Tamoxifen Citrate Antitrust Litig. (2d Cir. 2006) *466 F.3d at 190*) and specifically this very agreement (See In Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro It") *(E.D.N.Y. 2005) 363 F. Supp. 2d 514*. 541; and In Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro III") *(Fed. Cir. 2008) 544 F.3d 1323,1341)* are not illegal per se. The Federal Circuit Court in Cipro (III held that, "only agreements that have a predictable and pernicious anticompetitive effect and limited potential for procompetitive effect are deemed to be per se unlawful under the Sherman Act. A finding of per se unlawfulness ss appropriate once experience with a particular type of restraint enables the Court to predict with confidence that the rule of reason will condemn it." The court found that this specific agreement was not per se illegal under the Sherman Act as it did not restrict more competition than allowed under the scope of the **[*34]** patent. (*Cipro III, at 1332*.)

Although Plaintiffs argue that the Court should not follow the federal court decisions, arguing that the Cartwnght Act is broader (i.e. prohibits more conduct) than the Sherman Act, the Court is not persuaded that it is broader in any way pertinent to the issues before the Court. The Cartwright Act and the federal Sherman Act share similar language and objectives, and California courts often look to federal precedents under the Sherman Act for guidance. (*Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363 369, 113 Cal. Rptr. 2d 175*.) Although not identical, "judicial interpretations of the Sherman Act are, nevertheless, often helpful because of the similarity in language andpurpose between the federal and state statutes. (*Morrison v. Viacom, Inc., (1998) 66 Cal.App.4th 534, 541, 78 Cal. Rptr. 2d 133*.) "Because the Cartwright Act is patterned after the federal Sherman Act and both have their roots in the common law, federal cases interpretingthe Sherman Act are applicable in construing the Cartwright Act." (*Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Constr. Co., (1971) 4 Cal. 3d 354, 362 fn 3, 93 Cal. Rptr. 602, 482 P.2d 226*, citing to *Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 315J, 70 Cal. Rptr. 849, 444 P.2d 481*.) *Although we have referred to federal decisions under the

Sherman Act, it is well settled that such cases are authoritative in cases under the Cartwright Act." (*Shasta Douglas OH Co. v. Work (1963) 212 Cal. App. 2d 618, 625, 28 Cal. Rptr. 190*, citing to *Milton v. Hudson Sales Corp. (1957) 152 Cal.App.2d 418, 440, 313 P.2d 936*.) The Cartwright Act prohibits every trust, defined as "a combination of capital, skill or acts by two or more persons" for specified **[*35]** anticompetitive purposes. The federal Sherman Act prohibits every "contract, combination … or conspiracy, in restraint of trade." The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act.share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance." (*Chavez v. Whirlpool Corp. (2001) 93 Cal. App. 4th 363, 369, 113 Cal. Rptr. 2d 175*.)

While the Court recognizes that the federal decisional law is not binding on this Court (unless otherwise indicated herein) the Court considers the federal case law concerning this agreement as persuasive authority, especially in light of the lack of controlling California authority on point. Further, the rule enunciated under the Sherman Act in Cipro ill mirrors the law in California that It is only those agreements that have a "historical and pernicious" effect which should be found per se illegal. Although Plaintiffs cite to In re Cardizem CD Antitrust Litigation, as federal authority finding a reverse payment settlement per se illegal, the agreement at issue in that case exceeded the exclusionary scope of the patent involved and restrained non-infringing drugs, and thus **[*36]** does not aid Plaintiffs here, (*in re Cardizem CD Antitrust Litigation (6th Cir. 2003) 332 F.3d 896*.)

As discussed more fully below, the agreement here does not restrict more competition than allowed under the scope of the patent. To adopt Plaintiffs' argument mat horizontal agreements between competitors to allocate markets are traditionally subject to per se illegal treatment wholly ignores that this agreement concerns a patent which gives the patent holder the legal right to exclude infringing competition. Therefore, the Court does not find the agreement to be illegal per se under the Cartwnght Act, as there is no legal basis under California law to do so. Nor is there any basis to support a per se illegal determination under federal decisional law.

This Court also finds that the agreement does not violate the Cartwright Act under the Rule of Reason. To state a Cartwright Act antitrust claim, Plaintiffs must show that: 1) an agreement exists between Independent entities; 2) the agreement is in restraint of trade; and 3) the restraint is unreasonable. To prove an unreasonable restrain, Plaintiffs must show the agreement had a "substantially adverse effect on competition in the relevant market." (*Exxon Corp. v. Superior Court (1997) 51 Cal. App. 4th 1672, 1681, 60 Cal. Rptr. 2d 195*.) Plaintiff must show: (1) that an alleged restraint **[*37]** on trade has anticompetitive effects, and (2) that the anticompetitive effects outweigh any pro-competitive benefits. (See *Bert G. Gianelli Distrib. Co. v. Beck & Co. (1985) 172 Cal.App.3d 1020, 1048, 219 Cal. Rptr. 203*, overturned on other grounds by *Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384, 46 Cal. Rptr. 3d 668, 139 P.3d 56*.) The focus is on the actual effects that the challenged restraint has had on competition in a relevant market.

As previously discussed, there is no California authority evaluating whether a Hatch Waxman reverse payment settlement agreement violates state ***antitrust law*** (Cartwright Ad or otherwise). Thus, the Court turns to federal decisions concerning the Sherman Act as persuasive authority to guide its decision. Federal case law is not only instructive in this regard, rt is dispositive.

The federal court cases dealing generally with Hatch Waxman settlements, and specifically with this agreement, have uniformly held that settlements within the scope of the patent do not violate antitrust laws. The federal courts have heid that in order to determine whether there is an antitrust violation (under the federal antitrust Sherman Act) the Court must first analyze whether the agreement at issue falls within the exclusionary scope of the patent. If it does, there is no anti-trust violation because the settlement agreement did not cause anticompetitive **[*38]** effects beyond those inherent in the patent. As stated in Tamoxifen and quoted in Cipro II, "Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing ***antitrust law***, as long as the competition is restrained only within the scope of the patent." (*Id. at 213* (quoting *Cipro II at 535*.) Additionally, the district and appellate court in Cipro II and ill have already determined that the settlement at issue here did not exceed the scope of the patent and did not have anti-competitive effects beyond the patent, in Cipro ill, the Federal Circuit affirmed the district court's holding that there was no antitrust violation because the settlement agreement fell within the "exclusionary zone" of the patent. The Federal Circuit Court found that because patents are presumed valid and provide the patentee with the right to exclude others (infringers) from the market, the challenged anticompetitive effects of the agreement at issue here were directly attributable to the patent, and therefore, no antitrust remedy was available. (*In re Ciprofloxacin Hydrochloride Antitrust Utig. (Cipro III) (Fed. Cir. 2008) 544 F.3d 1323,1332-1336*.)

The Court finds the result should be no different under the **[*39]** Cartwright Act, as we are dealing with the exact same settlement agreement, involving the same type of Plaintiffs (indirect purchasers), and the same theories of liability. Additionally, the standard articulated in the federal cases comports with California law and is consistent with regard to the antitrust liability concerning patents. The district court in Cipro II, affirmed by the Circuit Court in Cipro III, utilized the same framework, i.e. a rule of reason, in its analysis which differs in no significant respect and is not unlike the rule of reason articulated by the courts for purposes of a state antitrust analysis under the Cartwright Act. Although Plaintiffs argue that the Cartwnght Act is more restrictive than the Sherman Act, such argument is unavailing as previously discussed above. Further, while the cases cited by Plaintiffs in this regard recognize that the scope of the Cartwright Act may in some situations be broader than or differ from the Sherman Act, there is no authority or support which persuades this Court to conclude that the Cartwright Act was intended to be broader than the Sherman Act on the question of reverse payment settlements.

California cases involving **[*40]** antitrust violations and patents likewise hold that conduct falling within the scope of a patent is not an antitrust violation. The grant of a patent is the grant of a statutory monopoly and is an express exception to laws prohibiting monopolies. (*Sears, Roebuck & Co. v. Stiffel Co. (1964) 378 U.S. 225, 229*; *Aetna Casualty & Sur. Co. v. Superior Court (1993) 19 Cal. App. 4th 320, 328, 23 Cal. Rptr. 2d 442*.) In Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 CaT.App.2d 748; the California Court of Appeal ruled that in cases in which the exercise of patent rights is involved, a patent holder "brings himself within the proscription of the antitrust laws only when the patentee or his assignee acts beyond that which was necessary or incidental to the scope of this patent." (Fruit Machinery, (1953) 118 Ca!.App.2d 748.) In Fruit Machinery, the defendant was a sublicensee of a patented peach-pitting machine who challenged the sublicense agreement on the ground that the plaintiff "created a monopoly" through the sublicense. (*Id. at 761*) The court rejected the argument, noting that, "Defendant has not shown That tile parties, in executing and carrying out the sublicense agreement in suit, exercise rights or powers not accorded them by the patent law or abused any rights or powers accorded them by that law." (*Id. at 762*.) Thus, California law also supports that unless **[*41]** the agreement goes, "beyond the scope of the patent rights" there is no antitrust violation. (Id.)

The undisputed evidence shows that the agreement here was clearly within the scope of the patent. A patent is presumed valid. (*35 U.S.C. 282*) The 444 patent issued on June 2, 1987, and expired December 9 2003: The FDA granted pediatric exclusivity to Bayer's Cipro until June 9, 2004. (UMF No. 17, and evidence cited therein.) Under the federal food and drug laws, no generic Cipro could lawfully enter the market until June 9, 2004. (*21 U.S.C. §355a(b)(2)(A)(ii)*.) The 444 patent is a compound patent and covers the molecule/compound ciprofloxacin hydrochloride, which is the only active ingredient in all ciprofloxacin products however formulated. (UMF No. 1, and evidence cited therein) Claim 12 did not change in reexamination. (UMF Nos. 21-22 and evidence cited therein.) Because the patent covers the ciprofloxacin molecule, Bayer had the right to exclude infringing competition from all forms of generic Cipro. (In Re Ciprofloxacin Hydrochloride Antitrust Litig. ("*Cipro I) (E.DN.Y. 2003) 261 F. Supp. 2d 188, 249*.) Barr stipulated that its ANDA product infringed on the 444 patent. (UMF Nos. 2-5, and evidence cited therein.) Thus, the Cipro patent precluded all generic competition, **[*42]** including Bart's admitted infringement. Bayer initiated patent litigation against Defendant Barr. (UMF No. 6.) The parties entered into a settlement in 1997. Pursuant to the Cipro Settlement Agreement, Defendants agreed not to infringe Bayer's patent with a competing ciprofloxacin product until six months before Bayer's 444 Patent expired, with settlement payments from Bayer as consideration for the resolution of the Generic Defendants' disputed patent challenge. (UMF Nos. 7-15, and evidence cited therein.) As such, the agreement precluded no more competition than was already precluded under the patent, as under the patent, Bayer had the right to exclude all infringers from marketing a generic version of Cipro prior to the expiration of the patent. As the court in Cipro II found, "this is well within Bayer's rights as the patentee." (*Cipro II at 524*.) California law compels no different conclusion. Thus, Defendants have established that the settlement agreement fell within the exclusionary scope of the patent.

Therefore, there is no antitrust violation under California law (*Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748, 258 P.2d 852*) nor under federal law, "Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement **[*43]** is shown to be objectively baseless, there is no injury to the market cognizable under existing [federal] ***antitrust law***, as long as competition is restrained only within the scope of the patent." (*Tamoxifen, 466 F.3d at 213*; *In re Ciprofloxacin Hydrochloride Antitrust Litig. (Cipro III) (Fed. Cir. 2008) 544 F.3d 1323*.) Whether the underlying infringement lawsuit was "objectively baseless" requires a finding that the suit is so baseless, "that no reasonable litigant could realistically expect success on the merits." (*In re Tamoxifen Citrate Antitrust Litlg.) (2d Cir. N.Y. 2006) 466 F.3d 187, 213* citing *Profi Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., (1993) 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611*.)

However, Plaintiffs failed to allege that Bayer's infringement suit was objectively baseless, was sham litigation, or that there was fraud on the PTO in their SAC, and Plaintiffs cannot defeat the motion for summary judgment by doing so now. A plaintiff cannot defeat a motion for summary judgment by bringing new, unpleaded issues in the opposing papers. (*Oakland Raiders v. National Football League (2005) 131 Cal.App.4th 621, 648, 32 Cal. Rptr. 3d 266*.) Even if such allegations were included In the SAC, there is no evidence or legal support that the suit was objectively baseless or was a sham. "Bayer's success in its litigations against Schein, Mylan, and Carlsbad forecloses any argument that its lawsuits were shams." (UMF Nos. 29-32, and evidence cited therein; *Cipro II, 363 F.Supp 2d at 547*.)

Similarly, Plaintiffs cannot meet the objectively baseless standard by resorting to allegations of inequitable **[*44]** conduct since the SAC does not allege inequitable conduct, much less that Bayer's infringement suit against Barr was objectively baseless or a sham. Even if there were such allegations, inequitable conduct is only an equitable defense to a patent infringement suit which, if proven, can render the entire patent unenforceable. (See e.g. *Hoffmann-La Roche, Inc. v. Promega Corp. (Fed. Cir. 2003) 323 F.3d 1354, 1372*.) As such, Bayer's alleged inequitable conduct in procuring the patent is not relevant to the case at hand as it pertains to Plaintiffs' antitrust claims. The Federal Circuit has held that inequitable conduct is a defense to a patent infringement claim, not an affirmative antitrust claim. (Nobelpharma AB v. implant *Innovations, Inc., (Fed. Cir. 1998) 141 F.3d 1059, 1070*.) Moreover, the Court finds that the determination of fraud and inequitable conduct would involve substantial questions of patent law, which this Court does not have jurisdiction to decide. (See *Lockwood v. Sheppard, 173 Cal.App.4th 675, 93 Cal. Rptr. 3d 220 (2009)* (holding that the court lacked jurisdiction to make a determination regarding PTO procedures.)

Concerning Plaintiffs' arguments that the settlement had anticompetitive effects outside of, or expanding, the scope of the patent (manipulation of the 180-day exclusivity period; preventing other genenc challengers from challenging the 444 patent; that **[*45]** the settlement prevented other generic defendants from marketing non-infringing products; or that but for the settlement, Barr "could have won" its case against Bayer and generic Cipro could have come to market earlier(SAC ¶¶117, 122, 145(ii), all courts analyzing this specific agreement and considering these very same arguments found that the agreement extended no further than the scope of what the patent protects. (*Cipro I, 261 F. Supp. 2d at 257*; *Cipro III 544 F.3d at 1338-1339*.) Moreover, the FDA did not award Barr the 180-day exclusivity period, there was no evidence of an actual adverse effect on competition due to that provision (*Cipro III, 544 F.3d at 1340, n. 14*), and it is undisputed that four other generic manufactures challenged the validity of the patent which supports the settlement did not prevent others from challenging the patent. (UMF Nos. 23-26, and evidence cited therein.) Further, since the patent covered the molecule ciprofloxacin, a settlement which precluded only a generic version of Cipro would not restrain or prevent a generic from marketing a non-infringing product. (In Re Tamoxifen Citrate Antitrust Litig. (2d Cir. 2006) *466 F.3d at 190, 214*.) Additionally, Plaintiffs' allegations that Barr would have won the patent challenge are speculative, and are dismissed as, "little **[*46]** more than dubious expectations or desires." (Cipro 1, *261 F.Supp.2d at 202*.)

Thus, to the extent Plaintiffs attack the presumption of patent validity to argue that the infringement suit was objectively baseless, or other inequitable conduct which would remove the protection of the patent, Plaintiffs have not included such claims in the SAC. The SAC is silent as to allegations norHnfringement, invalidity, inequitable conduct, or fraud on the PTO. Therefore, Plaintiffs cannot rely on such claims which fell outside of their pleadings to defeat summary judgment. Further, this Court lacks jurisdiction to make such determinations.

Addressing Plaintiffs' argument that this Court should employ a "traditional rule of reason analysis" applied in state trade cases rather than the "objectively baseless" standard, the outcome would be no dIffrerent as the Court would still need to evaluate at the outset whether the agreement fell within the scope of the patent, because if it does, there is no antitrust violation. Fruit Machinery Co. v. F,M. Ball & Co. (1953) 118 Cai.App.2d 748.) Thus, under California law, like federal law, there is only antitrust liability for conduct which goes beyond the exclusionary scope granted **[*47]** by the patent, a salient point Plaintiffs conveniently ignore. Instead, Plaintiffs urge this Court to analyze the agreement and its effects without taking into account that Bayer had a patent and the legal rights which are granted by the patent. Further, the Court believes that the objectively baseless standard is applicable given the unique nature of the agreement at issue (a pharmaceutical reverse payment settlement that does not arise under state law) which results from a patent infringement action (arising under federal law), and considering that federal courts have utilized this standard in adjudicating such agreements for purposes of determining antitrust liability.

Further, even considering the two "key facts" (size of payment/price hike)upon which Plaintiffs rely to demonstrate the alleged anticompetitive effects on trade under their traditional rule of reason analysis, they either fall within the rights of the patent holder (e.g. the price of the patented product) or are not relevant to the antitrust analysis. Plaintiffs argue that that/the size of the payment is a key indicator of the patent's strength and supports a reasonable inference that the patent would have been struck **[*48]** down as invalid. Patent validity is not relevant in the determination of whether the settlement agreements violate antitrust laws. ("The valley Drug court thus took the position that an antitrust court need not consider the potential invalidity of the patent in an exclusion-payment settlement, except in those extreme cases involving fraud on the Patent Office or assertion of a patent known to be invalid, i.e., in circumstances giving rise to an allegation of Walker Process fraud or sham litigation." (*Cipro II (E.D.N.Y. 2005) 363 F. Supp. 2d 514, 525)* As previously discussed, no such claims were alleged in the SAC. Plaintiffs also assert that since the price increased after the settlement, this also demonstrates the anticompetitive effects of the agreement. However, Bayer had the right to control the price of its product under the patent, and thus, if the settlement was within the scope of the patent, then any price increase is also within the scope of the patent. (*Cipro II, (2005) 363 F. Supp. 2d at 540*; Fruit Machinery (1953) 118 Cai.App.2d at 759; *United States v. Masonife Corp. (1942) 16 U.S. 265, 279*.)

Therefore, the Court finds that as a matter of law, Plaintiffs cannot establish the agreement unreasonably restrains trade because no triable issue of material fact exists that there are no anticompetitive effects on competition **[*49]** beyond the exclusionary scope of the patent itself. Thus, the Court finds that the agreement does not violate the Cartwright Act. This finding also precludes Plaintiffs' UCL claim and common law monopoly claim as they are based on the same Tactual allegations that support the Cartwright Act claim. Thus, the Court's determination that the agreement does not violate the Cartwright Act is fatal to both the UCL claim (*Befton v. Comcast Cable Holdings, LLC, (2007) 151 Cal. App. 4th 1224, 1240*-quoting *Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 375, 113 Cal. Rptr. 2d 175*; see also RLH Industries, Inc. v. SBC Communications, inc. *(2005) 133 Cal.App.4th 1277, 1286, 35 Cal. Rptr. 3d 469)* and the common law monopolization claim. (Eastman Kodak v. Image Tech. Servs, inc. *(1992) 504 U.S. 451, 481-83, 112 S. Ct. 2072, 119 L. Ed. 2d 265*.) Conduct by a patent holder acting within the scope of the patent is likewise immune from antitrust scrutiny even in the monopolization context. (Fruit Machinery 118 CaiApp.2d 762-63.)

Accordingly, summary judgment is granted.

Plaintiffs' evidentiary objections are overruled. Further, to the extent that the objections failed to quote or set forth the objectionable material, they fail to conform to *California Rule of Court Rule 3.1354(b)(3)*.

All requests for judicial notice are granted as to the existence but not truth of the items requested.

Parties wishing to argue before the Court must appear on the date and at the time noticed for the hearing. If none of the parties **[*50]** appears on the date and at the time noticed for the hearing, the tentative ruling shall be adopted as the final ruling of the Court.

Defendant Watson Pharmaceutical Inc.'s Motion for Summary Judgment

Defendant Watson Pharrnaceutica! Inc.'s Motion for Summary Judgment Is GRANTED. Under *CCP § 437c*, if the parties' papers show there is no triable issue of material fact and the "moving party is entitled to a judgment as a matter of law'" (*CCP § 437c(c)*), the court must grant the motion for summary judgment (*Aguilar v. Atlantic Richfield (2001) 25 Cal.4th 826, 843, 107 Cal. Rptr. 2d 841, 24 P.3d 493*.) Subdivision (p)(2) states: "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action … cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show a triable issue of one or more material facts exists as to that cause of action or a defense thereto."

The Court's ruling on Bayer and the Generic Defendants' Motions for Summary Judgment, finding as a matter of taw that the Cipro Settlement Agreement does not unreasonably restrain trade because there **[*51]** are no anticompetitive effects on competition beyond the exclusionary scope of the patent itself, is dispositive as to Defendant Watson's Motion for Summary Judgment. As Defendant Watson's liability is premised on its alleged participation in the agreement, a finding that the agreement does not unreasonably restrain trade defeats Plaintiffs' claims against Defendant Watson. Therefore, the motion can be granted on this basis alone.

However, the undisputed facts and evidence also establish that no triable issue of material fact exists that no agreement or conduct of Defendant Watson restrained trade as to generic ciprofloxacin or caused the injuries claimed by Plaintiffs. Defendant Watson was not involved in the Cipro settlement agreements and had no relationship to HMR or Rugby when those agreements were made. (UMF Nos. 5, 8, 9, and evidence cited therein.) Defendant Watson's relationship with Rugby cannot support Plaintiffs' claims because that purchase caused no restraint on the availability of a generic ciprofloxacin and did not delay the introduction of the generic ciprofloxacin, the only injury alleged by Plaintiffs. (UMF Nos. 8, 7, 9, 10, 13, and evidence cited Therein.) Nor can **[*52]** Defendant Watson's relationship with Schein support Plaintiffs' claims that the Cipro agreement prevented Schein from marketing a generic ciprofloxacin. Bayer's patent was upheld in the litigation brought by Bayer over the Schein ANDA. Thus, Defendant Watson's acquisition of Schein in no way restrained the availability of generic ciprofloxacin. (UMF Nos. 17-27, and evidence cited therein) Further, the court in Cipro I held that Defendant Watson never undertook any conduct that changed the obligations of the parties to the agreements as they existed at the time of Defendant Watsons' acquisition of Rugby or mat had any effect on when or if a generic version woutd be available to Plaintiffs, it concluded that it was Bayer's patent that kept Schein generic ciprofloxacin off of the market, rather than any conduct of *Watson. (Cipro I, 261 F. Supp.2d at 216-217*.)

Accordingly, summary judgment is granted.

Plaintiffs' evidentiary objections are overruled. Further, to the extent that the objections failed to quote or set forth the objectionable material, they fail to conform to *California Rule of Court Rule 3.1354(b)(3)*.

All requests for judicial notice are granted as to the existence but not truth of the items requested.

Exhibit 1

Appearances:

For Appearances, please see sign in sheet, attached hereto and incorporated herein.

The court's tentative ruling is published but not read on the record. Court hears oral argument and confirms its modified tentative ruling, per agreement of both sides, as follows:

Defendant Bayer Corporation's Motion for Summary Judgment

Defendant Bayer Corporation's Motion for Summary Judgment is GRANTED. Under *CCP § 437c*, if the parties' papers show there is no triable issue of material fact and the "'moving party is entitled to a judgment as a matter of law'" (*CCP § 437c(c)*), the court must grant the motion for summary judgment. (*Aguilar v. Atlantic Richfield (2001)*

25 Cal.4th 826, 843, 107 Cal. Rptr. 2d 841, 24 P.3d 493.) Subdivision (p)(2) states: "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action … cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant **[*56]** to show a triable issue of one or more material facts exists as to that cause of action or a defense thereto."

The Consolidated Second Amended Complaint (SAC) alleges three causes of action for (1) antitrust in violation of the Cartwright Act, under California Business and Professions Code Sections 16720, et. seq.; (2) unfair competition in violation of California Business and Professions Code Sections 17200 et. seq.; and (3) common law monopolization. Essentially, Plaintiffs allege Defendant Bayer entered into unlawful and anti-competitive agreements with its horizontal competitors, Defendants Barr Laboratories; Hoechst Marion Roussel, Inc. (HMR) and HMR's then subsidiary, Defendant Rugby Group, Inc. (Rugby). Plaintiffs allege these agreements, referred to as reverse payment settlements, (hereinafter the "agreement") effectively allowed Bayer to maintain an exclusive right to manufacture and market Cipro in California without competition to bring a generic form of ciprofloxacin to the market place. The result to consumers and Plaintiffs was increased costs of the prescription drug Cipro and increased profits to Bayer. In addition, the other parties to the agreement received large payments for not producing a generic form of Cipro.

As discussed more fully herein, the Court finds that the agreement does not violate **[*57]** the Cartwright Act. The undisputed evidence establishes that no triable issue of material fact exists that the agreement did not fall outside the exclusionary scope of the patent; there is no evidence that the patent suit by Bayer against Barr was objectively baseless; and Plaintiff cannot establish that the settlement was otherwise unlawful.

The Cartwright Act (§§ 16700-16758) was designed primarily to prevent organization of trusts for control of markets for merchandise, but its definition of trust may, not unreasonably, include any contract "to carry out restrictions in trade or commerce," and to prevent competition in "manufacturing, sale or purchase of merchandise," etc. (California Kitchens v United Brotherhood of Carpenters & Joiners (1956) 139 Cal App 2d 597, 294 P.2d 468)California courts interpreting the Cartwright act recognize the persuasive authority of federal decisions under the Sherman Act and have liberally applied the federal Sherman Act doctrine in interpreting the Cartwright Act. (See, e.g., Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 542, 30 Cal. Rptr. 2d 706; Cellular Plus, Inc. v. Superior Court (1993) 14 Cal. App. 4th 1224, 1242, 18 Cal. Rptr. 2d 308; Bert G. Gianelli Distributing Co. v. Beck & Co. (1985) 172 Cal. App. 3d 1020, 1042, 219 Cal. Rptr. 203, overturned on other grounds by Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384, 46 Cal. Rptr. 3d 668, 139 P.3d 56.) The Cartwright Act, like its federal counterpart, "has not been interpreted to penalize natural monopolies." (Freeman v. San Diego Ass'n of Realtors, 77 Cal.App.4th 171, 200.)

The Cartwright Act and the federal antitrust laws are interpreted to permit restraints of trade as long as those restraints are **[*58]** reasonable under the circumstances. Following federal law, the Cartwright Act recognizes two distinct categories of offenses: "Per Se" violations, and other potentially harmful conduct that is treated under the so-called "Rule of Reason." Under the per se illegal theory, conduct is conclusively presumed to be unlawful because of its pernicious effects on competition and lack of any redeeming virtue. In other words, it is illegal regardless of any alleged business justification or pro-competitive effects. (Marin County Bd. Of Realtors, Inc. v. Palsson, (1976) 16 Cal.3d 920, 930-31, 130 Cal. Rptr. 1, 549 P.2d 833.) Under the Rule of Reason analysis, conduct violates the Cartwright Act if the plaintiff shows that the conduct is an unreasonable restraint of trade, meaning conduct that unreasonably impairs competition and harms consumers. The Rule of Reason prohibits only those actions that cause an "unreasonable restraint of trade" (Standard Oil Co. v. United States (1911) 221 U.S 1, 87, 31 S. Ct. 502, 55 L. Ed. 619; see also People v. Building Maint. Contractors Ass'n, Inc. (1953) 41 Cal.2d 719, 727, 264 P.2d 31.) if an alleged restraint of trade is not per se illegal, the Rule-of-Reason analysis should be applied (see Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal.3d 842, 855, 94 Cal. Rptr. 785, 484 P.2d 953-finding the rule of reason to be a factual inquiry into whether a particular action is an unreasonable restraint on trade)].

Plaintiffs allege that the agreement at issue here was a per se violation of the Cartwright Act. (SAC ¶140.) Plaintiffs **[*59]** argue that the agreement at issue is a horizontal agreement between competitors to allocate markets, which have been held to be per se illegal under the Cartwright Act. Plaintiffs urge this Court to find that under California law, "a naked payment from a patent holder to a non-patent holder to abandon its challenge to the patent's validity and stay out of the market for the patented product-thus ensuring supra-competitive prices-must be scrutinized under the rule that agreements not to compete are per se illegal."(Plaintiffs' Opposition, p. 31.)

However, the Court declines to find the agreement is illegal per se, as the per se label is reserved for, "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." (*Marin County Bd. Of Realtors, Inc. v. Palsson, (1976) 16 Cal.3d 920, 930-31, 130 Cal. Rptr. 1, 549 P.2d 833*.) Plaintiffs have cited no California case, nor is there one, supporting that a per se illegal analysis is applicable to the specific agreement at issue here, a reverse payment settlement agreement under the Hatch Waxman Act concerning a patent. The California **[*60]** Supreme Court has instructed that "before acceding to the demand for such a formidable rule," "applicable case law" must condemn the conduct. (*Marin County, 16 Cal.3d at 931*.) Given that this appears to be a case of first impression, there is simply no legal basis to support that the Cartwright Act be interpreted in such a manner so as render the agreement per se illegal, as there has been no authority provided by Plaintiffs demonstrating that California courts have historically found that these agreements have a "pernicious effect" on competition which lacks "any redeeming virtue." Moreover, it is well settled that the law favors settlements ana this would extend to patent infringement suits as well.

Plaintiffs' reliance on *Vulcan Powder Co. v. Hercules Powder Co. (1892) 95 Cal. 510*, to support that an agreement like this should be determined to be illegal per se because it constitutes an agreement not to compete is unpersuasive. The Court in Vulcan found an antitrust violation because the agreement exceeded the scope of the patent. The contract at issue in that case, unlike here, was not confined to the product (dynamite) produced under the patents, and involved a collaboration among many industry members including some that did not have patent rights to establish a commitment **[*61]** to fix prices. As will be discussed in greater detail below, the agreement here was confined to the product produced under the patent and did not exceed the scope of the patent's right to exclude all infringers from marketing a generic version of Cipro.

Nor is there any basis to support that the agreement is per se illegal under federal law. The federal cases under the Sherman ACT Have found that these types of agreements are not illegal per se violations of federal ***antitrust law***. Under the Sherman Act, the courts have held that a reverse payment settlement agreement like the one at issue here, (See *Schering-Plough Corp. v. FTC (11th Cir.2005) 402 F.3d 1056*; *Valley Drug Co. v. Geneva Pharms., Inc., (11th Cir. 2003) 344 F.3d 1294*; In Re Tamoxifen Citrate Antitrust Litig. 2d Cir. 2006) *466 F.3d at 190*) and specifically this very agreement (See In Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro II") *(E.D.N.Y. 2005) 363 F. Supp. 2d 514, 541*; and In Re Ciprofloxacin Hydrochloride Antitrust Litig. (Cipro III") *(Fed. Cir. 2008) 544 F.3d 1323, 1341)* are not illegal per se. The Federal Circuit Court in Cipro III held that, "only agreements that have a predictable and pernicious anticompetitive effect and limited potential for procompetitive effect are deemed to be per se unlawful under the Sherman Act. A finding of per se unlawfulness is appropriate once experience with a particular type of restraint **[*62]** enables the Court to predict with confidence that the rule of reason will condemn it." The court found that this specific agreement was not per se illegal under the Sherman Act as it did not restrict more competition than allowed under the scope of the patent. (*Cipro III, at 1332*.)

Although Plaintiffs argue that the Court should not follow the federal court decisions, arguing that the Cartwright Act is broader (i.e. prohibits more conduct) than the Sherman Act, the Court is not persuaded that it is broader in any way pertinent to the issues before the Court. The Cartwright Act and the federal Sherman Act share similar language and objectives, and California courts often look to federal precedents under the Sherman Act for guidance. (*Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 369, 113 Cal. Rptr. 2d 175*.) Although not identical, "judicial interpretations of the Sherman Act are, nevertheless, often helpful because of the similarity in language and purpose between the federal and state statutes." (*Morrison v. Viacom, Inc., (1998) 66 Cal.App.4th 534, 541, 78 Cal. Rptr. 2d 133*.) "Because the Cartwright Act is patterned after the federal Sherman Act and both have their roots in the common law, federal cases interpreting the Sherman Act are applicable in construing the

Cartwright Act" (Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Constr. **[*63]** Co., (197T) *4 Cal. 3d 354, 362 fn 3, 93 Cal. Rptr. 602, 482 P.2d 226*, citing to *Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 315, 70 Cal. Rptr. 849, 444 P.2d 481]*.) "Although we have referred to federal decisions under the Sherman Act, it is well settled that such cases are authoritative in cases under the Cartwright Act." (*Shasta Douglas Oil Co. v. Work (1963) 212 Cal. App. 2d 618, 625, 28 Cal. Rptr. 190*, citing to *Milton v. Hudson Sales Corp. (1957) 152 Cal.App.2d 418, 440, 313 P.2d 936*.) "The Cartwright Act prohibits every trust, defined as "a combination of capital, skill or acts by two or more persons" for specified anticompetitive purposes. The federal Sherman Act prohibits every contract, combination … or conspiracy, in restraint of trade." The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance. (*Chavez v. Whirlpool Corp. (2001) 93 Cal. App. 4th 363, 369, 113 Cal. Rptr. 2d 175*.)

While the Court recognizes that the federal decisional law is not binding on this Court (unless otherwise indicated herein) the Court considers the federal case law concerning this agreement as persuasive authority, especially in light of the lack of controlling California authority on point. Further, the rule enunciated under the Sherman Act in Cipro III mirrors the law in California that it is only those agreements that have a "historical and **[*64]** pernicious" effect which should be found per se illegal. Although Plaintiffs cite to In re Cardizem CD Antitrust Litigation, as federal authority finding a reverse payment settlement per se illegal, the agreement at issue in that case exceeded the exclusionary scope of the patent involved and restrained non-infringing drugs, and thus does not aid Plaintiffs here. (*In re Cardizem CD Antitrust Litigation (6th Cir. 2003) 332 F.3d 896*.)

As discussed more fully below, the agreement here does not restrict more competition than allowed under the scope of the patent. To adopt Plaintiffs' argument that horizontal agreements between competitors to allocate markets are traditionally subject to per se illegal treatment wholly ignores that this agreement concerns a patent which gives the patent holder the legal right to exclude infringing competition. Therefore, the Court does not find the agreement to be illegal per se under the Cartwright Act, as there is no legal basis under California law to do so. Nor is there any basis to support a per se illegal determination under federal decisional law.

This Court also finds that the agreement does not violate the Cartwright Act under the Rule of Reason. To state a Cartwright Act antitrust claim, Plaintiffs must show that: **[*65]** 1) an agreement exists between independent entities; 2) the agreement is in restraint of trade; and 3) the restraint is unreasonable. To prove an unreasonable restrain, Plaintiffs must show the agreement had a "substantially adverse effect on competition in the relevant market." (*Exxon Corp. v. Superior Court (1997) 51 Cal. App. 4th 1672, 1681, 60 Cal. Rptr. 2d 195*.) Plaintiff must show: (1) that an alleged restraint on trade has anticompetitive effects, and (2) that the anticompetitive effects outweigh any pro-competitive benefits. (See Bert G. Gianelli Distrib. Co. v. Beck & Co. (1985) 172 Cal.App.3d T020, 1048, overturned on other grounds by *Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384, 46 Cal. Rptr. 3d 668, 139 P.3d 56*.) The focus is on the actual effects that the challenged restraint has had on competition in a relevant market.

As previously discussed, there is no California authority evaluating whether a Hatch Waxman reverse payment settlement agreement violates state ***antitrust law*** (Cartwright Act or otherwise). Thus, the Court turns to federal decisions concerning the Sherman Act as persuasive authority to guide its decision. Federal case law is not only instructive in this regard, it is dispositive.

The federal court cases dealing generally with Hatch Waxman settlements, and specifically with this agreement, have uniformly held that settlements **[*66]** within the scope of the patent do not violate antitrust laws. The federal courts have held that in order to determine whether there is an antitrust violation (under the federal antitrust Sherman Act) the Court must first analyze whether the agreement at issue falls within the exclusionary scope of the patent. If it does, there is no anti-trust violation because the settlement agreement did not cause anticompetitive effects beyond those inherent in the patent. As stated in Tamoxifen and quoted in Cipro II, "Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing ***antitrust law***, as long as the competition is restrained only within the scope of the patent." (*Id. at 213* (quoting Cipro II at 53b.) Additionally, the district and appellate court in

Cipro II and III have already determined that the settlement at issue here did not exceed the scope of the patent and did not have anti-competitive effects beyond the patent. In Cipro III, the Federal Circuit affirmed the district court's holding that there was no antitrust violation because the settlement agreement fell **[*67]** within the "exclusionary zone" of the patent. The Federal Circuit Court found that because patents are presumed valid and provide the patentee with the right to exclude others (infringers) from the market, the challenged anticompetitive effects of the agreement at issue here were directly attributable to the patent, and therefore, no antitrust remedy was available. (*In re Ciprofloxacin Hydrochloride Antitrust Litig. (Cipro III) (Fed. Cir. 2008) 544 F.3d 1323, 1332-1336*.)

The Court finds the result should be no different under the Cartwright Act, as we are dealing with the exact same settlement agreement, involving the same type of Plaintiffs (indirect purchasers), and the same theories of liability. Additionally, the standard articulated in the federal cases comports with California law and is consistent with regard to the antitrust liability concerning patents. The district court in Cipro II, affirmed by the Circuit Court in Cipro III, utilized the same framework, i.e. a rule of reason, in its analysis which differs in no significant respect and is not unlike the rule of reason articulated by the courts for purposes of a state antitrust analysis under the Cartwright Act. Although Plaintiffs argue that the Cartwright Act is more restrictive than the Sherman Act, such argument is unavailing **[*68]** as previously discussed above. Further, while the cases cited by Plaintiffs in this regard recognize that the scope of the Cartwright Act may in some situations be broader than or differ from the Sherman Act, there is no authority or support which persuades this Court to conclude that the Cartwright Act was intended to be broader than the Sherman Act on the question of reverse payment settlements.

California cases involving antitrust violations and patents likewise hold that conduct falling within the scope of a patent is not an antitrust violation. The grant of a patent is the grant of a statutory monopoly and is an express exception to laws prohibiting monopolies. (*Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 229, 84 S. Ct. 784, 11 L. Ed. 2d 661, 1964 Dec. Comm'r Pat. 425*; *Aetna Casualty & Sur. Co. v. Superior Court (1993) 19 Cal. App. 4th 320, 328, 23 Cal. Rptr. 2d 442*.) In *Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748, 258 P.2d 852*, the California Court of Appeal ruled that in cases in which the exercise of patent rights is involved, a patent holder "brings himself within the proscription of the antitrust laws only when the patentee or his assignee acts beyond that which was necessary or incidental to the scope of this patent." (*Fruit Machinery, (1953) 118 Cal.App.2d 748, 258 P.2d 852*.) In Fruit Machinery, the defendant was a sublicensee of a patented peach-pitting machine who challenged the sublicense agreement on the ground that the plaintiff "created a monopoly" through the sublicense. (*Id. at 761*.) **[*69]** The Court rejected the argument, noting that, "Defendant has not shown that the parties, in executing and carrying out the sublicense agreement in suit, exercise rights or powers not accorded them by the patent law or abused any rights or powers accorded them by that law." (*Id. at 762*.) Thus, California law also supports that unless the agreement goes, "beyond the scope of the patent rights" there is no antitrust violation. (Id.)

The undisputed evidence shows that the agreement here was clearly within the scope of the patent. A patent is presumed valid. (*35 U.S.C. 282*) The 444 patent issued on June 2, 1987, and expired December 9, 2003 (UMF No. 3, and evidence cited therein). The FDA granted pediatric exclusivity to Bayer's Cipro until June 9, 2004. (UMF No. 4, and evidence cited therein.) Under the federal food and drug laws, no generic Cipro could lawfully enter the market until June 9, 2004. (*21 U.S.C. §355a(b)(2)(A)(ii)*J The 444 patent is a compound patent and covers the molecule/compound ciprofloxacin hydrochloride, which is the only active ingredient in ail ciprofloxacin products however formulated. (UMF No. 2, and evidence cited therein) Claim 12 did not change in reexamination. (UMF Nos. 26-28, and evidence cited therein.) Because **[*70]** the patent covers the ciprofloxacin molecule, Bayer had the right to exclude infringing competition from all forms of generic Cipro. (In Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro I") *(E.D.N.Y. 2003) 261 F. Supp. 2d 188, 249*.) In 1991 Barr filed an ANDA with a Paragraph 4 certification, alleging the patent was invalid. Barr stipulated that its ANDA product infringed on the 444 patent. (UMF Nos. 5-8, 19, and evidence cited therein.) Thus, the Cipro patent precluded all generic competition, including Barr's admitted infringement. On January 16, 1992, Bayer sued Barr alleging that the ANDA infringed on the patent. Barr answered with claims of invalidity and unenforceability. The parties settled. (UMF Nos. 9-17, and evidence cited therein.) Pursuant to the Cipro Settlement, the Generic Defendants agreed not to infringe Bayer's patent with a competing ciprofloxacin product until six months before Bayer's 444 Patent expired, with settlement payments from Bayer as consideration for the resolution of the Generic Defendants' disputed patent challenge. (UMF Nos. 15-24, and evidence cited therein.) As such, the agreement precluded no more competition than was already precluded under the patent, as under the patent, Bayer **[*71]** had the right to exclude all infringers from marketing a generic version of Cipro prior to the expiration of the patent. As the court in Cipro II found, "this is well within Bayer's rights as the patentee. (*Cipro II at 524*.) California law compels no different conclusion. Thus, Defendants have established that the settlement agreement fell within the exclusionary scope of the patent.

Therefore, there is no antitrust violation under California law (*Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748, 258 P.2d 852*) nor under federal law, "Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing [federal] ***antitrust law***, as long as competition is restrained only within the scope of the patent." (*Tamoxifen, 466 F.3d at 213*; *In re Ciprofloxacin Hydrochloride Antitrust Litig. (Cipro III) (Fed. Cir. 2008) 544 F.3d 1323*.) Whether the underlying infringement lawsuit was "objectively baseless" requires a finding that the suit is so baseless, "that no reasonable litigant could realistically expect success on the merits." (*In re Tamoxifen Citrate Antitrust Litig.) (2d Cir. N.Y. 2006) 466 F.3d 187, 213* citing Profl Real Estate investors, *Inc. v. Columbia Pictures Indus., Inc., (1993) 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611*.)

However, Plaintiffs failed to allege that Bayer's infringement suit was objectively baseless, was sham litigation, or that there was fraud on the PTO in their SAC, and Plaintiffs cannot defeat the **[*72]** motion for summary judgment by doing so now. A plaintiff cannot defeat a motion for summary judgment by bringing new, unpleaded issues in the opposing papers. (*Oakland Raiders v. National Football League (2005) 131 Cal.App.4th 621, 648, 32 Cal. Rptr. 3d 266*.) Even if such allegations were included in the SAC, there is no evidence or legal support that the suit was objectively baseless or was a sham. "Bayer's success in its litigations against Schein, Mylan, and Carlsbad forecloses any argument that its lawsuits were shams." (UMF Nos. 29-32, and evidence cited therein; *Cipro II, 363 F.Supp.2d at 547*.)

Similarly, Plaintiffs cannot meet the objectively baseless standard by resorting to allegations of inequitable conduct since the SAC does not allege inequitable conduct, much less that Bayer's infringement suit against Barr was objectively baseless or a sham. Even if there were such allegations, inequitable conduct is only an equitable defense to a patent infringement suit which, if proven can render the entire patent unenforceable. (See e.g. *Hoffmann-La Roche, Inc. v. Promega Corp. (Fed. Cir. 2003) 323 F.3d 1354, 1372*.) As such, Bayer's alleged inequitable conduct in procuring the patent is not relevant to the case at hand as it pertains to Plaintiffs' antitrust claims. The Federal Circuit has held that inequitable conduct is a defense to a patent infringement claim, not an affirmative **[*73]** antitrust claim. (*Nobelpharma AB v. Implant Innovations, Inc., (Fed. Cir. 1998) 141 F.3d 1059, 1070*.) Moreover, the Court finds that the determination of fraud and inequitable conduct would involve substantial questions of patent law, which this Court does not have jurisdiction to decide. (See *Lockwood v. Sheppard, 173 Cal.App.4th 675, 93 Cal. Rptr. 3d 220 (2009)* (holding that the court lacked jurisdiction to make a determination regarding PTO procedures.)

Concerning Plaintiffs' arguments that the settlement had anticompetitive effects outside of, or expanding, the scope of the patent (manipulation of the 180-day exclusivity period; preventing other generic challengers from challenging the 444 patent; that the settlement prevented other generic defendants from marketing non-infringing products; or that but for the settlement, Barr "could have won" its case against Bayer and generic Cipro could have come to market earlier(SAC ¶¶117, 122, 145(ii), all courts analyzing this specific agreement and considering these very same arguments found that the agreement extended no further than the scope of what the patent protects. (*Cipro I, 261 F. Supp. 2d at 257*; Cipro Ell 544 F.3d at 1338-1339.) Moreover, the FDA did not award Barr the 180-day exclusivity period, there was no evidence of an actual adverse effect on competition due to that provision (*Cipro III, 544 F.3d at 1340, n. 14*), and it is undisputed that four other generic manufactures **[*74]** challenged the validity of the patent which supports the settlement did not prevent others from challenging the patent. (UMF Nos. 20, 29-33, and evidence cited therein.) Further, since the patent covered the molecule ciprofloxacin, a settlement which precluded only a generic version of Cipro would not restrain or prevent a generic from marketing a non-infringing product. (In Re Tamoxifen Citrate Antitrust Litig. (2d Cir. 2006) *466 F.3d at 190, 214*.) Additionally, Plaintiffs' allegations that Barr would have won the patent challenge are speculative, and are dismissed as, "little more than dubious expectations or desires." (*Cipro I, 261 F.Supp.2d at 202*.)

Thus, to the extent Plaintiffs attack the presumption of patent validity to argue that the infringement suit was objectively baseless, or other inequitable conduct which would remove the protection of the patent, Plaintiffs have not included such claims in the SAC. The SAC is silent as to allegations non-infringement, invalidity, inequitable conduct, or fraud on the PTO. Therefore, Plaintiffs cannot rely on such claims which fall outside of their pleadings to defeat summary judgment. Further, this Court lacks jurisdiction to make such determinations.

Addressing Plaintiffs' argument **[*75]** that this Court should employ a "traditional rule of reason analysis" applied in state trade cases rather than the "objectively baseless" standard, the outcome would be no different as the Court would still need to evaluate at the outset whether the agreement fell within the scope of the patent, because if it does, there is no antitrust violation. (*Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748, 258 P.2d 852*.) Thus, under California law, like federal law, there is only antitrust liability for conduct which goes beyond the exclusionary scope granted by the patent, a salient point Plaintiffs conveniently ignore. Instead, Plaintiffs urge this Court to analyze the agreement and its effects without taking into account that Bayer had a patent and the legal rights which are granted by the patent. Further, the Court believes that the objectively baseless standard is applicable given the unique nature of the agreement at issue (a pharmaceutical reverse payment settlement that does not arise under state law) which results from a patent infringement action (arising under federal law), and considering that federal courts have utilized this standard in adjudicating such agreements for purposes of determining antitrust liability.

Further, even considering **[*76]** the two "key facts" (size of payment/price hike)upon which Plaintiffs rely to demonstrate the alleged anticompetitive effects on trade under their traditional rule of reason analysis, they either fall within the rights of the patent holder (e.g. the price of the patented product) or are not relevant to the antitrust analysis. Plaintiffs argue that that the size of the payment is a key indicator of the patent's strength and supports a reasonable inference that the patent would have been struck down as invalid. Patent validity is not relevant in the determination of whether the settlement agreements violate antitrust laws. ("The Valley Drug court thus took the position that an antitrust court need not consider the potential invalidity of the patent in an exclusion-payment settlement, except in those extreme cases involving fraud on the Patent Office or assertion of a patent known to be invalid, i.e., in circumstances giving rise to an allegation of Walker Process fraud or sham litigation." (*Cipro II (E.D.N.Y. 2005) 363 F. Supp. 2d 514, 525)* As previously discussed, no such claims were alleged in the SAC. Plaintiffs also assert that since the price increased after the settlement, this also demonstrates the anticompetitive effects of **[*77]** the agreement. However, Bayer had the right to control the price of its product under the patent, and thus, if the settlement was within the scope of the patent, then any price increase is also within the scope of the patent. (*Cipro II, (2005) 363 F. Supp. 2d at 540*; *Fruit Machinery (1953) 118 Cal.App.2d at 759*; *United States v. Masonite Corp. (1942) 16 U.S. 265, 279*.)

Therefore, the Court finds that as a matter of law, Plaintiffs cannot establish the agreement unreasonably restrains trade because no triable issue of material fact exists that there are no anticompetitive effects on competition beyond the exclusionary scope of the patent itself. Thus, the Court finds that the agreement does not violate the Cartwright Act. This finding also precludes Plaintiffs' UCL claim and common law monopoly claim as they are based on the same factual allegations that support the Cartwright Act claim. Thus, the Court's determination that the agreement does not violate the Cartwright Act is fatal to both the UCL claim (*Belton v. Comcast Cable Holdings, LLC, (2007) 151 Cal. App. 4th 1224, 1240, 60 Cal. Rptr. 3d 631*-quoting *Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 375, 113 Cal. Rptr. 2d 175*; see also *RLH Industries, Inc. v. SBC Communications, Inc. (2005) 133 Cal.App.4th 1277, 1286, 35 Cal. Rptr. 3d 469)* and the common law monopolization claim. (*Eastman Kodak v. Image Tech. Servs, Inc. (1992) 504 U.S. 451, 481-83, 112 S. Ct. 2072, 119 L. Ed. 2d 265*.) Conduct by a patent holder acting within the scope of the patent is likewise immune from antitrust scrutiny even in the monopolization context. (*Fruit Machinery 118 Cal.App.2d 762-63*.)

Accordingly, summary judgment is granted.

Defendant's motion to dismiss is denied.

Plaintiffs' evidentiary objections **[*78]** are overruled. Further, to the extent that the objections failed to quote or set forth the objectionable material, they fail to conform to *California Rule of Court Rule 3.1354(b)(3)*.

All requests for judicial notice are granted as to the existence but not truth of the items requested.

Parties wishing to argue before the Court must appear on the date and at the time noticed for the hearing. If none of the parties appears on the date and at the time noticed for the hearing, the tentative ruling shall be adopted as the final ruling of the Court.

Defendants Hoechst Marion Roussel, Inc; The Rugby Group, Inc. and Barr Laboratories, Inc.'s Motion for Summary Judgment

Defendants Hoechst Marion Roussel, Inc; The Rugby Group, Inc.; and Barr Laboratories, Inc.'s Motion for Summary Judgment is GRANTED. Under *CCP § 437c*, if the parties' papers show there is no triable issue of material fact and the "'moving party is entitled to a judgment as a matter of law'" (*CCP § 437c(c)*), the court must grant the motion for summary judgment. (*Aguilar v. Atlantic Richfield (2001) 25 Cal.4th 826, 843, 107 Cal. Rptr. 2d 841, 24 P.3d 493*.) Subdivision (p)(2) states: "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action … cannot be established, or **[*79]** that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-compiainant to show a triable issue of one or more material facts exists as to that cause of action or a defense thereto."

The Consolidated Second Amended Complaint (SAC) alleges three causes of action for (1) antitrust in violation of the Cartwright Act, under *California Business and Professions Code Sections 16720, et. seq.*; (2) unfair competition in violation of *California Business and Professions Code Sections 17200 et. seq.*; and (3) common law monopolization. Essentially, Plaintiffs allege Defendant Bayer entered into unlawful and anti-competitive agreements with its horizontal competitors, Defendants Barr Laboratories; Hoechst Marion Roussel, Inc. (HMR) and HMR's then subsidiary, Defendant Rugby Group, Inc. (Rugby). Plaintiffs allege these agreements, referred to as reverse payment settlements, (hereinafter the "agreement") effectively allowed Bayer to maintain an exclusive right to manufacture and market Cipro in California without competition to bring a generic form of ciprofloxacin to the market place. The result to consumers and Plaintiffs was increased costs of the prescription drug Cipro and increased profits to Bayer. In addition, the other **[*80]** parties to the agreement received large payments for not producing a generic form of Cipro.

As discussed more fully herein, the Court finds that the agreement does not violate the Cartwright Act. The undisputed evidence establishes that no triable issue of material fact exists that the agreement did not fall outside the exclusionary scope of the patent; there is no evidence that the patent suit by Bayer against Barr was objectively baseless; and Plaintiff cannot establish that the settlement was otherwise unlawful.

The Cartwright Act (§§ 16700-16758) was designed primarily to prevent organization of trusts for control of markets for merchandise, but its definition of trust may, not unreasonably, include any contract "to carry out restrictions in trade or commerce," and to prevent competition in "manufacturing, sale or purchase of merchandise," etc. (*California Kitchens v United Brotherhood of Carpenters & Joiners (1956) 139 Cal App 2d 597, 294 P.2d 468*)California courts interpreting the Cartwright act recognize the persuasive authority of federal decisions under the Sherman Act and have liberally applied the federal Sherman Act doctrine in interpreting the Cartwright Act. (See, e.g., *Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 542, 30 Cal. Rptr. 2d 706*; *Cellular Plus, Inc. v. Superior Court (1993) 14 Cal. App. 4th 1224, 1242, 18 Cal. Rptr. 2d 308*; *Bert G. Gianelli Distributing Co. v. Beck & Co. (1985) 172 Cal. App. 3d 1020, 1042, 219 Cal. Rptr. 203*, overturned on other grounds by *Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384, 46 Cal. Rptr. 3d 668, 139 P.3d 56*.) The Cartwright Act, like its federal counterpart, "has not been **[*81]** interpreted to penalize natural monopolies." (*Freeman v. San Diego Ass'n of Realtors, 77 Cal.App.4th 171, 200*.)

The Cartwright Act and the federal antitrust laws are interpreted to permit restraints of trade as long as those restraints are reasonable under the circumstances. Following federal law, the Cartwright Act recognizes two distinct categories of offenses: "Per Se" violations, and other potentially harmful conduct that is treated under the so-called "Rule of Reason." Under the per se illegal theory, conduct is conclusively presumed to be unlawful because of its pernicious effects on competition and lack of any redeeming virtue. In other words, it is illegal regardless of any alleged business justification or pro-competitive effects. (*Marin County Bd. Of Realtors, Inc. v. Palsson, (1976) 16 Cal.3d 920, 930-31, 130 Cal. Rptr. 1, 549 P.2d 833*.) Under the Rule of Reason analysis, conduct violates the Cartwright Act if the plaintiff shows that the conduct is an unreasonable restraint of trade, meaning conduct that unreasonably impairs competition and harms consumers. The Rule of Reason prohibits only those actions that cause an "unreasonable restraint of trade" (*Standard Oil Co. v. United States (1911) 221 U.S 1, 87, 31 S. Ct. 502, 55 L. Ed. 619*; see also *People v. Building Maint. Contractors Ass'n, Inc. (1953) 41 Cal.2d 719, 727, 264 P.2d 31*.) If an alleged restraint of trade is not per se illegal, the Rule-of-Reason analysis should be applied (see *Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal.3d 842, 855, 94 Cal. Rptr. 785, 484 P.2d 953*-finding the rule of reason to be a factual inquiry into whether a **[*82]** particular action is an unreasonable restraint on trade)].

Plaintiffs allege that the agreement at issue here was a per se violation of the Cartwright Act. (SAC ¶140.) Plaintiffs argue that the agreement at issue is a horizontal agreement between competitors to allocate markets, which have been held to be per se illegal under the Cartwright Act. Plaintiffs urge this Court to find that under California law, "a naked payment from a patent holder to a non-patent holder to abandon its challenge to the patent's validity and stay out of the market for the patented product-thus ensuring supra-competitive prices-must be scrutinized under the rule that agreements not to compete are per se illegal."(Plaintiffs' Opposition, p. 31.)

However, the Court declines to find the agreement is illegal per se, as the per se label is reserved for, "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." (*Marin County Bd. Of Realtors, Inc. v. Palsson, (1976) 16 Cal.3d 920, 930-31, 130 Cal. Rptr. 1, 549 P.2d 833*.) Plaintiffs have cited no California case, nor is there one, supporting that **[*83]** a per se illegal analysis is applicable to the specific agreement at issue here, a reverse payment settlement agreement under the Hatch Waxman Act concerning a patent. The California Supreme Court has instructed that "before acceding to the demand for such a formidable rule," "applicable case law" must condemn the conduct. (*Marin County, 16 Cal.3d at 931*.) Given that this appears to be a case of first impression, there is simply no legal basis to support that the Cartwright Act be interpreted in such a manner so as render the agreement per se illegal, as there has been no authority provided by Plaintiffs demonstrating that California courts have historically found that these agreements have a pernicious effect" on competition which lacks "any redeeming virtue." Moreover, it is well settled that the law favors settlements ana this would extend to patent infringement suits as well.

Plaintiffs' reliance on *Vulcan Powder Co. v. Hercules Powder Co. (1892) 95 Cal. 510*, to support that an agreement like this should be determined to be illegal per se because it constitutes an agreement not to compete is unpersuasive. The Court in Vulcan found an antitrust violation because the agreement exceeded the scope of the patent. The contract at issue in that case, unlike here, was not confined **[*84]** to the product (dynamite) produced under the patents, and involved a collaboration among many industry members including some that did not have patent rights to establish a commitment to fix prices. As will be discussed in greater detail below, the agreement here was confined to the product produced under the patent and did not exceed the scope of the patent's right to exclude all infringers from marketing a generic version of Cipro.

Nor is there any basis to support that the agreement is per se illegal under federal law. The federal cases under the Sherman ACT have found thaf these types of agreements are not illegal per se violations of federal ***antitrust law***. Under the Sherman Act, the courts have held that a reverse payment settlement agreement like the one at issue here, (See *Schering-Plough Corp. v. FTC (11th Cir. 2005) 402 F.3d 1056*; *Valley Drug Co. v. Geneva Pharms., Inc., (11th Cir. 2003) 344 F.3d 1294*; In Re Tamoxifen Citrate Antitrust Litig. (2d Cir. 2006) *466 F.3d at 190*) and specifically this very agreement (See In Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro II") *(E.D.N.Y. 2005) 363 F. Supp. 2d 514, 541*; and In Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro III") *(Fed. Cir. 2008) 544 F.3d 1323, 1341)* are not illegal per se. The Federal Circuit Court in Cipro III held that, "only agreements that have a predictable and pernicious anticompetitive effect and limited potential **[*85]** for procompetitive effect are deemed to be per se unlawful under the Sherman Act. A finding of per se unlawfulness is appropriate once experience with a particular type of restraint enables the Court to predict with confidence that the rule of reason will condemn it." The court found that this specific agreement was not per se illegal under the Sherman Act as it did not restrict more competition than allowed under the scope of the patent. (*Cipro III, at 1332*.)

Although Plaintiffs argue that the Court should not follow the federal court decisions, arguing that the Cartwright Act is broader (i.e. prohibits more conduct) than the Sherman Act, the Court is not persuaded that it is broader in any way pertinent to the issues before the Court. The Cartwright Act and the federal Sherman Act share similar language and objectives, and California courts often look to federal precedents under the Sherman Act for guidance. (*Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 369, 113 Cal. Rptr. 2d 175*.) Although not identical, "judicial interpretations of the Sherman Act are, nevertheless, often helpful because of the similarity in language and purpose between the federal and state statutes." (*Morrison v. Viacom, Inc., (1998) 66 Cal.App.4th 534, 541, 78 Cal. Rptr. 2d 133*.) "Because the Cartwright Act is patterned after the federal Sherman Act and both have their roots **[*86]** in the common law, federal cases interpreting the Sherman Act are applicable in construing the Cartwright Act." (Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Constr. Co., (197T) *4 Cal. 3d 354, 362 fn 3, 93 Cal. Rptr. 602, 482 P.2d 226*, citing to *Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 315, 70 Cal. Rptr. 849, 444 P.2d 481]*.) "Although we have referred to federal decisions under the Sherman Act, it is well settled that such cases are authoritative in cases under the Cartwright Act." (*Shasta Douglas Oil Co. v. Work (1963) 212 Cal. App. 2d 618, 625, 28 Cal. Rptr. 190*, citing to *Milton v. Hudson Sales Corp. (1957) 152 Cal.App.2d 418, 440, 313 P.2d 936*.) "The Cartwnght Act prohibits every trust, defined as "a combination of capital, skill or acts by two or more persons" for specified anticompetitive purposes. The federal Sherman Act prohibits every contract, combination … or conspiracy, in restraint of trade." The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act.share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance." (*Chavez v. Whirlpool Corp. (2001) 93 Cal. App. 4th 363, 369, 113 Cal. Rptr. 2d 175*.)

While the Court recognizes that the federal decisional law is not binding on this Court (unless otherwise indicated herein) the Court considers the federal case law concerning this agreement as persuasive authority, especially in light of the lack of controlling California **[*87]** authority on point. Further, the rule enunciated under the Sherman Act in Cipro III mirrors the law in California that it is only those agreements that have a "historical and pernicious" effect which should be found per se illegal. Although Plaintiffs cite to In re Cardizem CD Antitrust Litigation, as federal authority finding a reverse payment settlement per se illegal, the agreement at issue in that case exceeded the exclusionary scope of the patent involved and restrained non-infringing drugs, and thus does not aid Plaintiffs here. (*In re Cardizem CD Antitrust Litigation (6th Cir. 2003) 332 F.3d 896*.)

As discussed more fully below, the agreement here does not restrict more competition than allowed under the scope of the patent. To adopt Plaintiffs' argument that horizontal agreements between competitors to allocate markets are traditionally subject to per se illegal treatment wholly ignores that this agreement concerns a patent which gives the patent holder the legal right to exclude infringing competition. Therefore, the Court does not find the agreement to be illegal per se under the Cartwright Act, as there is no legal basis under California law to do so. Nor is there any basis to support a per se illegal determination under federal decisional **[*88]** law.

This Court also finds that the agreement does not violate the Cartwright Act under the Rule of Reason. To state a Cartwright Act antitrust claim, Plaintiffs must show that: 1) an agreement exists between independent entities; 2) the agreement is in restraint of trade; and 3) the restraint is unreasonable. To prove an unreasonable restrain, Plaintiffs must show the agreement had a "substantially adverse effect on competition in the relevant market." (*Exxon Corp. v. Superior Court (1997) 51 Cal. App. 4th 1672, 1681, 60 Cal. Rptr. 2d 195*.) Plaintiff must show: (1) that an alleged restraint on trade has anticompetitive effects, and (2) that the anticompetitive effects outweigh any pro-competitive benefits. (See *Bert G. Gianelli Distrib. Co. v. Beck & Co. (1985) 172 Cal.App.3d 1020, 1048, 219 Cal. Rptr. 203*, overturned on other grounds by *Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384, 46 Cal. Rptr. 3d 668, 139 P.3d 56*.) The focus is on the actual effects that the challenged restraint has had on competition in a relevant market.

As previously discussed, there is no California authority evaluating whether a Hatch Waxman reverse payment settlement agreement violates state ***antitrust law*** (Cartwright Act or otherwise). Thus, the Court Turns to federal decisions concerning the Sherman Act as persuasive authority to guide its decision. Federal case law is not only instructive in this regard, it is dispositive.

The federal court cases dealing generally **[*89]** with Hatch Waxman settlements, and specifically with this agreement, have uniformly held that settlements within the scope of the patent do not violafe antitrust laws. The federal courts have held that in order to determine whether there is an antitrust violation (under the federal antitrust Sherman Act) the Court must first analyze whether the agreement at issue falls within the exclusionary scope of the patent. If it does, there is no anti-trust violation because the settlement agreement did not cause anticompetitive effects beyond those inherent in the patent. As stated in Tamoxifen and quoted in Cipro II, "Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing ***antitrust law***, as long as the competition is restrained only within the scope of the patent." (*Id. at 213* (quoting *Cipro II at 535*.) Additionally, the district and appellate court in Cipro II and III have already determined that the settlement at issue here did not exceed the scope of the patent and did not have anti-competitive effects beyond the patent. In Cipro III, the Federal Circuit affirmed the district **[*90]** court's holding that there was no antitrust violation because the settlement agreement fell within the "exclusionary zone" of the patent. The Federal Circuit Court found that because patents are presumed valid and provide the patentee with the right to exclude others (infringers) from the market, the challenged anticompetitive effects of the agreement at issue here were directly attributable to the patent, and therefore, no antitrust remedy was available. (*In re Ciprofloxacin Hydrochloride Antitrust Litig. (Cipro III) (Fed. Cir. 2008) 544 F.3d 1323, 1332-1336*.)

The Court finds the result should be no different under the Cartwrignt Act, as we are dealing with the exact same settlement agreement, involving the same type of Plaintiffs (indirect purchasers), and the same theories of liability. Additionally, the standard articulated in the federal cases comports with California law and is consistent with regard to the antitrust liability concerning patents. The district court in Cipro II, affirmed by the Circuit Court in Cipro III, utilized the same framework, i.e. a rule of reason, in its analysis which differs in no significant respect and is not unlike the rule of reason articulated by the courts for purposes of a state antitrust analysis under the Cartwright Act. Although Plaintiffs argue **[*91]** that the Cartwright Act is more restrictive than the Sherman Act, such argument is unavailing as previously discussed above. Further, while the cases cited by Plaintiffs in this regard recognize that the scope of the Cartwright Act may in some situations be broader than or differ from the Sherman Act, there is no authority or support which persuades this Court to conclude that the Cartwright Act was intended to be broader than the Sherman Act on the question of reverse payment settlements.

California cases involving antitrust violations and patents likewise hold that conduct falling within the scope of a patent is not an antitrust violation. The grant of a patent is the grant of a statutory monopoly and is an express exception to laws prohibiting monopolies. (*Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 229, 84 S. Ct. 784, 11 L. Ed. 2d 661, 1964 Dec. Comm'r Pat. 425*; *Aetna Casualty & Sur. Co. v. Superior Court (1993) 19 Cal. App. 4th 320, 328, 23 Cal. Rptr. 2d 442*.) In *Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748, 258 P.2d 852*, the California Court of Appeal ruled that in cases in which the exercise of patent rights is involved, a patent holder "brings himself within the proscription of the antitrust laws only when the patentee or his assignee acts beyond that which was necessary or incidental to the scope of this patent." (*Fruit Machinery, (1953) 118 Cal.App.2d 748, 258 P.2d 852*.) In Fruit Machinery, the defendant was a sublicensee of a patented peach-pitting machine who challenged the sublicense **[*92]** agreement on the ground that the plaintiff "created a monopoly" through the sublicense. (*Id. at 761*.) The Court rejected the argument, noting that, "Defendant has not shown that the parties, in executing and carrying out the sublicense agreement in suit, exercise rights or powers not accorded them by the patent law or abused any rights or powers accorded them by that law." (*Id. at 762*.) Thus, California law also supports that unless the agreement goes, "beyond the scope of the patent rights" there is no antitrust violation. (Id.)

The undisputed evidence shows that the agreement here was clearly within the scope of the patent. A patent is presumed valid. (*35 U.S.C. 282*) The 444 patent issued on June 2, 1987, and expired December 9, 2003: The FDA granted pediatric exclusivity to Bayer's Cipro until June 9, 2004. (UMF No. 17, and evidence cited therein.) Under the federal food and drug laws, no generic Cipro could lawfully enter the market until June 9, 2004. (*21 U.S.C. §355a(b)(2)(A)(ii)*.) The 444 patent is a compound patent and covers the molecule/compound ciprofloxacin hydrochloride, which is the only active ingredient in all ciprofloxacin products however formulated. (UMF No. 1, and evidence cited therein) Claim 12 did not change in reexamination. **[*93]** (UMF Nos. 21-22 and evidence cited therein.) Because the patent covers the ciprofloxacin molecule, Bayer had the right to exclude infringing competition from all forms of generic Cipro. (In Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro I") *(E.D.N.Y. 2003) 261 F. Supp. 2d 188, 249*.) Barr stipulated that its ANDA product infringed on the 444 patent. (UMF Nos. 2-5, and evidence cited therein.) Thus, the Cipro patent precluded all generic competition, including Barr's admitted infringement. Bayer initiated patent litigation against Defendant Barr. (UMF No. 6.) The parties entered into a settlement in 1997. Pursuant to the Cipro Settlement Agreement, Defendants agreed not to infringe Bayer's patent with a competing ciprofloxacin product until six months before Bayer's '444 Patent expired, with settlement payments from Bayer as consideration for the resolution of the Generic Defendants' disputed patent challenge. (UMF Nos. 7-15, and evidence cited therein.) As such, the agreement precluded no more competition than was already precluded under the patent, as under the patent, Bayer had the right to exclude all infringers from marketing a generic version of Cipro prior to the expiration of the patent. As the court in Cipro II found, **[*94]** "this is well within Bayer's rights as the patentee." (*Cipro II at 524*.) California law compels no different conclusion. Thus, Defendants have established that the settlement agreement fell within the exclusionary scope of the patent.

Therefore, there is no antitrust violation under California law (*Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748, 258 P.2d 852*) nor under federal law, "Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing [federal] ***antitrust law***, as long as competition is restrained only within the scope of the patent." (*Tamoxifen, 466 F.3d at 213*; *In re Ciprofloxacin Hydrochloride Antitrust Litig. (Cipro III) (Fed. Cir. 2008) 544 F.3d 1323*.) Whether the underlying infringement lawsuit was "objectively baseless" requires a finding that the suit is so baseless, "that no reasonable litigant could realistically expect success on the merits." (*In re Tamoxifen Citrate Antitrust Litig.) (2d Cir. N.Y. 2006) 466 F.3d 187, 213* citing *Profl Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., (1993) 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611*.)

However, Plaintiffs failed to allege that Bayer's infringement suit was objectively baseless, was sham litigation, or that there was fraud on the PTO in their SAC, and Plaintiffs cannot defeat the motion for summary judgment by doing so now. A plaintiff cannot defeat a motion for summary judgment by bringing new, unpleaded issues in the opposing papers. (*Oakland Raiders v. National Football League (2005) 131 Cal.App.4th 621, 648, 32 Cal. Rptr. 3d 266*.) Even if such allegations **[*95]** were included in the SAC, there is no evidence or legal support that the suit was objectively baseless or was a sham. "Bayer's success in its litigations against Schein, Mylan, and Carlsbad forecloses any argument that its lawsuits were shams." (UMF Nos. 29-32, and evidence cited therein; *Cipro II, 363 F.Supp.2d at 547*.)

Similarly, Plaintiffs cannot meet the objectively baseless standard by resorting to allegations of inequitable conduct since the SAC does not allege inequitable conduct, much less that Bayer's infringement suit against Barr was objectively baseless or a sham. Even if there were such allegations, inequitable conduct is only an equitable defense to a patent infringement suit which, if proven, can render the entire patent unenforceable. (See e.g. *Hoffmann-La Roche, Inc. v. Promega Corp. (Fed. Cir. 2003) 323 F.3d 1354, 1372*.) As such, Bayer's alleged inequitable conduct in procuring the patent is not relevant to the case at hand as it pertains to Plaintiffs' antitrust claims. The Federal Circuit has held that inequitable conduct is a defense to a patent infringement claim, not an affirmative antitrust claim. (*Nobelpharma AB v. Implant Innovations, Inc., (Fed. Cir. 1998) 141 F.3d 1059, 1070*.) Moreover, the Court finds that the determination of fraud and inequitable conduct would involve substantial questions of patent law, which this Court does not have jurisdiction **[*96]** to decide. (See *Lockwood v. Sheppard, 173 Cal.App.4th 675, 93 Cal. Rptr. 3d 220 (2009)* (holding that the court lacked jurisdiction to make a determination regarding PTO procedures.)

Concerning Plaintiffs' arguments that the settlement had anticompetitive effects outside of, or expanding, the scope of the patent (manipulation of the 180-day exclusivity period; preventing other generic challengers from challenging the 444 patent; that the settlement prevented other generic defendants from marketing non-infringing products; or that but for the settlement, Barr "could have won" its case against Bayer and generic Cipro could have come to market earlier(SAC ¶117, 122, 145(H), all courts analyzing this specific agreement and considering these very same arguments found that the agreement extended no further than the scope of what the patent protects. (*Cipro I, 261 F. Supp. 2d at 257*; *Cipro III 544 F.3d at 1338-1339*.) Moreover, the FDA did not award Barr the 180-day exclusivity period, there was no evidence of an actual adverse effect on competition due to that provision (*Cipro III, 544 F.3d at 1340, n. 14*), and it is undisputed that four other generic manufactures challenged the validity of the patent which supports the settlement did not prevent others from challenging the patent. (UMF Nos. 23-26, and evidence cited therein.) Further, since the patent **[*97]** covered the molecule ciprofloxacin, a settlement which precluded only a generic version of Cipro would not restrain or prevent a generic from marketing a non-infringing product. (In Re Tamoxifen Citrate Antitrust Litig. (2d Cir. 2006) *466 F.3d at 190, 214*.) Additionally, Plaintiffs' allegations that Barr would have won the patent challenge are speculative, and are dismissed as, "little more than dubious expectations or desires." (*Cipro I, 261 F.Supp.2d at 202*.)

Thus, to the extent Plaintiffs attack the presumption of patent validity to argue that the infringement suit was objectively baseless, or other inequitable conduct which would remove the protection of the patent, Plaintiffs have not included such claims in the SAC. The SAC is silent as to allegations non-infringement, invalidity, inequitable conduct, or fraud on the PTO. Therefore, Plaintiffs cannot rely on such claims which fall outside of their pleadings to defeat summary judgment. Further, this Court lacks jurisdiction to make such determinations.

Addressing Plaintiffs' argument that this Court should employ a "traditional rule of reason analysis" applied in state trade cases rather than the "objectively baseless" standard, the outcome would be no different as the Court would **[*98]** still need to evaluate at the outset whether the agreement fell within the scope of the patent, because if it does, there is no antitrust violation. (*Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748, 258 P.2d 852*.) Thus, under California law, like federal law, there is only antitrust liability for conduct which goes beyond the exclusionary scope granted by the patent, a salient point Plaintiffs conveniently ignore. Instead, Plaintiffs urge this Court to analyze the agreement and its effects without taking into account that Bayer had a patent and the legal rights which are granted by the patent. Further, the Court believes that the objectively baseless standard is applicable given the unique nature of the agreement at issue (a pharmaceutical reverse payment settlement that does not arise under state law) which results from a patent infringement action (arising under federal law), and considering that federal courts have utilized this standard in adjudicating sucn agreements for purposes of determining antitrust liability.

Further, even considering the two "key facts" (size of payment/price hike)upon which Plaintiffs rely to demonstrate the alleged anticompetitive effects on trade under their traditional rule of reason analysis, they either fall **[*99]** within the rights of the patent holder (e.g. the price of the patented product) or are not relevant to the antitrust analysis. Plaintiffs argue that that the size of the payment is a key indicator of the patent's strength and supports a reasonable inference that the patent would have been struck down as invalid. Patenf validity is not relevant in the determination of whether the settlement agreements violate antitrust laws. ("The Valley Drug court thus took the position that an antitrust court need not consider the potential invalidity of the patent in an exclusion-payment settlement, except in those extreme cases involving fraud on the Patent Office or assertion of a patent known to be invalid, i.e., in circumstances giving rise to an allegation of Walker Process fraud or sham litigation." (*Cipro II (E.D.N.Y. 2005) 363 F. Supp. 2d 514, 525)* As previously discussed, no such claims were alleged in the SAC. Plaintiffs also assert that since the price increased after the settlement, this also demonstrates the anticompetitive effects of the agreement. However, Bayer had the right to control the price of its product under the patent, and thus, if the settlement was within the scope of the patent, then any price increase is also within **[*100]** the scope of the patent. (*Cipro II, (2005) 363 F. Supp. 2d at 540*; *Fruit Machinery (1953) 118 Cal.App.2d at 759*; *United States v. Masonite Corp. (1942) 16 U.S. 265, 279*.)

Therefore, the Court finds that as a matter of law, Plaintiffs cannot establish the agreement unreasonably restrains trade because no triable issue of material fact exists that there are no anticompetitive effects on competition beyond the exclusionary scope of the patent itself. Thus, the Court finds that the agreement does not violate the Cartwright Act. This finding also precludes Plaintiffs' UCL claim and common law monopoly claim as they are based on the same factual allegations that support the Cartwright Act claim. Thus, the Court's determination that the agreement does not violate the Cartwright Act is fatal to both the UCL claim (*Belton v. Comcast Cable Holdings, LLC, (2007) 151 Cal. App. 4th 1224, 1240, 60 Cal. Rptr. 3d 631*-quoting *Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 375, 113 Cal. Rptr. 2d 175*; see also *RLH Industries, Inc. v. SBC Communications, Inc. (2005) 133 Cal.App.4th 1277, 1286, 35 Cal. Rptr. 3d 469)* and the common law monopolization claim. (*Eastman Kodak v. Image Tech. Servs, Inc. (1992) 504 U.S. 451, 481-83, 112 S. Ct. 2072, 119 L. Ed. 2d 265*.) Conduct by a patent holder acting within the scope of the patent is likewise immune from antitrust scrutiny even in the monopolization context. (*Fruit Machinery 118 Cal.App.2d 762-63*.)

Accordingly, summary judgment is granted.

Plaintiffs' evidentiary objections are overruled. Further, to the extent that the objections failed to quote or set forth the objectionable material, they fail to conform to *California Rule of Court Rule 3.1354(b)(3)*.

All requests for judicial notice are granted as to the existence but not truth of the items **[*101]** requested.

Parties wishing to argue before the Court must appear on the date and at the time noticed for the hearing. If none of the parties appears on the date and at the time noticed for the hearing, the tentative ruling shall be adopted as the final ruling of the Court.

Defendant Watson Pharmaceutical Inc.'s Motion for Summary Judgment

Defendant Watson Pharmaceutical Inc.'s Motion for Summary Judgment is GRANTED. Under *CCP § 437c*, if the parties' papers show there is no triable issue of material fact and the '"moving party is entitled to a judgment as a matter of law'" (*CCP § 437c(c)*), the court must grant the motion for summary judgment. (*Aguilar v. Atlantic Richfield (2001) 25 Cal.4th 826, 843, 107 Cal. Rptr. 2d 841, 24 P.3d 493*.) Subdivision (p)(2) states: "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action … cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show a triable issue of one or more material facts exists as to that cause of action or a defense thereto."

The Court's ruling on Bayer and the Generic Defendants' **[*102]** Motions for Summary Judgment, finding as a matter of law that the Cipro Settlement Agreement does not unreasonably restrain trade because there are no anticompetitive effects on competition beyond the exclusionary scope of the patent itself, is dispositive as to Defendant Watson's Motion for Summary Judgment. As Defendant Watson's liability is premised on its alleged participation in the agreement, a finding that the agreement does not unreasonably restrain trade defeats Plaintiffs' claims against Defendant Watson. Therefore, the motion can be granted on this basis alone.

However, the undisputed facts and evidence also establish that no triable issue of material fact exists that no agreement or conduct of Defendant Watson restrained trade as to generic ciprofloxacin or caused the injuries claimed by Plaintiffs. Defendant Watson was not involved in the Cipro settlement agreements and had no relationship to HMR or Rugby when those agreements were made. (UMF Nos. 5, 8, 9, and evidence cited therein.) Defendant Watson's relationship with Rugby cannot support Plaintiffs' claims because that purchase caused no restraint on the availability of a generic ciprofloxacin and did not delay the **[*103]** introduction of the generic ciprofloxacin, the only injury alleged by Plaintiffs. (UMF Nos. 6, 7, 9, 10, 13, and evidence cited therein.) Nor can Defendant Watson's relationship with Schein support Plaintiffs' claims that the Cipro agreement prevented Schein from marketing a generic ciprofloxacin. Bayer's patent was upheld in the litigation brought by Bayer over the Schein ANDA. Thus, Defendant Watson's acquisition of Schein in no way restrained the availability of generic ciprofloxacin. (UMF Nos. 17-27, and evidence cited therein) Further, the court in Cipro I held that Defendant Watson never undertook any conduct that changed The obligations of the parties to the agreements as they existed at the time of Defendant Watson's' acquisition of Rugby or tnat had any effect on when or if a generic version would be available to Plaintiffs. It concluded tnat it was Bayer's patent that kept Schein generic ciprofloxacin off of the market, rather than any conduct of *Watson. (Cipro I, 261 F. Supp.2d at 216-217*.)

Accordingly, summary judgment is granted.

Plaintiffs' evidentiary objections are overruled. Further, to the extent that the objections failed to quote or set forth the objectionable material, they fail to conform to *California Rule of Court Rule 3.1354(b)(3)*.

All requests **[*104]** for judicial notice are granted as to the existence but not truth of the items requested.

On August 21, 2009, the Court, having fully considered the **[*53]** arguments of all parties, both written and oral, as well as the evidence presented, granted the motion for summary judgment filed by defendant Bayer Corporation, the motion for summary judgment filed by defendants Hoechst Marion Roussel, Inc., The Rugby Group, Inc., and Barr Laboratories, Inc., and the motion for summary judgment filed by Watson Pharmaceuticals, Inc. (collectively, "Defendants"). A true and correct copy of the Court's August 21, 2009 Order granting those motions is attached to this judgment as Exhibit 1. In accordance with that Order,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Named plaintiffs Karyn McGaughey, Barbara Hymes Cohen, Deborah Patane, Donna Moore, Senior Action Network, IUOE Stationary Engineers Local 39 Health and Welfare Plan, and Sheet Metal Workers Health Plan of Southern California ("Named Plaintiffs"), and the plaintiff class defined as,

> [a]ll natural persons, sole proprietorships, partnerships, limited partnerships, corporations, and other entities, in the State of California who indirectly purchased, paid and/or reimbursed for Cipro intended for consumption by themselves, their families, or their members, participants, employees or insureds (the **[*54]** "Class") during the period from January 8, 1997 through such time in the future as the effects of Defendants' illegal conduct, as alleged herein, have ceased (the "Class Period")[1]

take nothing from Defendants, and that the Named Plaintiffs and Class receive none of the relief that they have requested through their complaints.

2. Judgment is hereby entered in favor of Defendants and against Named Plaintiffs and the Class.

3. Defendants Bayer Corporation, Hoechst Marion Roussel, Inc., The Rugby Group, Barr Laboratories, Inc., and Watson Pharmaceuticals, Inc. are entitled to their costs pursuant to *C.C.P. section 1032*, following the procedures set forth **[*55]** in *Rule 3.1700 of the California Rules of Court*.

4. The Clerk of the Court is directed to enter this Judgment, without delay, as a final judgment.

Dated: __

Hon. Richard E.L. Strauss, Judge of the San Diego Superior Court

I, Renee Evans, declare:

I am, and was at the time of service of the papers herein referred to, over the age of eighteen years, and not a party to the action, and I am employed in the County of San Diego, State of California. My business address is Luce, Forward, Hamilton & Scripps LLP, 600 West Broadway, Suite 2600, San Diego, California 92101; telephone number (619) 236-1414; facsimile number (619) 645-5328.

On September 23, 2009, I served the following document(s): **SEE ATTACHED LIST OF DOCUMENTS SERVED** by JusticeLink Electronic filing on all persons appearing on the Service List.

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[1] Excluded from the class are all persons who obtained Cipro through the MediCal Prescription Drug Program; governmental entities; the Defendants, their co-conspirators, along with all of their respective parents, subsidiaries and/or affiliates; all persons or entities that purchased Cipro for purposes of resale; any purchaser of Cipro who paid a flat co-payment and who would have paid the same co-payment for a generic substitute under the terms of their health insurance coverage, and any and all judges and justices assigned to hear any aspect of this litigation.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 23, 2009, in San Diego, California.

Renee Evans /s/

Renee Evans

End of Document

Microsoft Corp. v. Franchise Tax Bd.

Superior Court of California, County of San Francisco

March 15, 2010, Decided; March 15, 2010, Filed

CASE NO.: CGC-08-471260

Reporter
2010 Cal. Super. LEXIS 2977 *

MICROSOFT CORPORATION, Plaintiff, Vs. FRANCHISE TAX BOARD, Defendant.

Subsequent History: Reversed by, Remanded by, Petition denied by *Microsoft Corp. v. Franchise Tax Bd., 212 Cal. App. 4th 78, 150 Cal. Rptr. 3d 770, 2012 Cal. App. LEXIS 1284 (Cal. App. 1st Dist., Dec. 18, 2012)*

Core Terms

disqualified, antitrust, entertain, disqualification, impartial, anti trust law

Judges: **[*1]** WILLIAM H. FOLLETT, J.

Opinion by: WILLIAM H. FOLLETT

Opinion

RULING ON MOTION TO DISQUALIFY JUDGE; ORDER (*CCP § 170.3(c)(2)*)

Plaintiff's motion to disqualify the trial judge presents a difficult question involving the tension in discerning the line between the duty of a judge to hear all cases assigned to him unless disqualified and the disqualification of the judge whenever "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." *Compare* *Cal. Code Civ. Proc. § 170* *with* *Cal. Code Civ. Proc. § 170.1 subd. (a)(6)(A)*(iii.

FACTUAL BASIS

The objective, underlying facts in this case are not in dispute, having been admitted in the Verified Answer. Judge Karnow of the Superior Court of California, County of San Francisco, was assigned on January 19, 2010, by the Master Calendar Judge to preside at the trial of the above-entitled matter. The case involves Microsoft Corporation's claim to recover corporate taxes paid in fiscal years 1995 and 1996. In off-the-record discussions and later on the record shortly after the case was assigned for trial, Judge Karnow disclosed that he briefly owned Microsoft stock in late 2009 but had disposed of it in December 200.

He did not disclose at that time that he had served as one of multiple attorneys representing **[*2]** Sun Microsystems, Inc. against Microsoft more than eight years ago in multidistrict litigation in federal court. Plaintiff in that case claimed Microsoft violated antitrust laws. Judge Karnow states he was one of "many dozens" of lawyers from several law firms representing Sun Microsystems, Inc. Judge Karnow states his responsibility in the litigation dealt with "marketing and technical design" of the Internet Explorer web browse.

The antitrust litigation was "long and contentious," but settled before trial. According to a press release issued by Judge Karnow's former law firm when he was appointed to the bench, he was a member of the trial team in this "landmark antitrust litigation which resulted in one of the largest antitrust recoveries in history." The press release mentioned no other specific case Judge Karnow handled in his tenure with the fir.

When the instant case was called for trial on January 21, 2010, two days after the initial meeting with Judge Karnow, Microsoft's counsel moved for the Judge to recuse himself based upon his representation of Microsoft's adversary in the antitrust litigation and due to public comments that Judge Karnow made before taking the bench opining **[*3]** that Microsoft violated ***antitrust law***.

After review of the relevant statutes, Judge Karnow denied Microsoft's request to disqualify himself. Both the Judge and Microsoft's counsel agreed, after discussion, that a peremptory challenge under *California Code of Civil Procedure section 170.6* would not then have been timel.

Judge Karnow, before taking the bench, authored a number of published articles and a book of essays on computer technology and the law. In analyzing whether he was disqualified, the Judge stated that he had expressed views before taking the bench five years ago that Microsoft had "done things in the past that indicated antitrust intent - that is, intent to monopolize the market or continue a monopoly or to have an illegal monopoly of a market." He stated that his writings with regard to Microsoft dealt with ***antitrust law***.

> "I think a person who read my materials would probably believe that I felt that… up to a couple of years ago when I was in practice, that Microsoft has intentionally done actions which are in violation of federal and state ***antitrust law***.

Reporter's Transcript of Proceedings of January 21, 2010, pp. 6-7. Microsoft herein also complains that before becoming a judge that he was quoted in an Associated Press **[*4]** report as stating that Microsoft was "guilty" of antitrust allegations investigated by the U.S. Justice Departmen.

Judge Karnow states in his Verified Answer to the charge that his views were shared by many others at the time (pp. 2-4) but that he has no views today as to whether Microsoft is in compliance with antitrust or any other laws. (Verified Answer ¶ 7) In his analysis Judge Karnow notes that the issues in the case at bar, having to do with refund of corporate taxes previously paid to the state, are not pertinent to whether Microsoft violated antitrust laws. Judge Karnow specifically avers that he is not biased against Microsoft and denies that Microsoft cannot receive a fair trial before hi.

ANALYSIS

As stated above, unless disqualified, a judge must hear all cases assigned to him. *Cal. Code Civ. Proc. § 170*; Cal. Code of Jud. Ethics, canon 3B(2), But a judge is disqualified if a "person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." *Cal. Code Civ. Proc. § 170*.l(a)(6)(A)(iii) "The duty of a judge to sit where not disqualified is equally as strong as the duty not to sit when disqualified." *Flier v. Superior Court (1994) 23 Cal. App. 4th 165, 17*.

Judge Rothman in his treatise briefly discusses the general situation at issue:

> "Occasionally **[*5]** a judge will see a party in court that the judge has sued or prosecuted before becoming a judge. In such a situation, absent actual bias, the judge is not required by any of the specific provisions in *Code of Civil Procedure section 170.1* to disqualify himself or herself. A judge should, however, consider whether the particular circumstances of the prior case and contact with the party was such that disqualification is appropriate under *Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii)*. Only after concluding that disqualification is not necessary would disclosure be necessary." Rothman, California Judicial Conduct Handbook § 7.38 (3d ed. 2007.

Thus, while having represented a former adverse party against a current litigant usually does not require recusal, the "particular circumstances" of the prior case and relationship with the party may trigger disqualification because a person aware of the facts *might* entertain a doubt about whether the judge may be impartial. No *actual* bias is required for the judge to be disqualified. "If an average person could entertain doubt about the judge's impartiality, disqualification is mandated." California Judge's Benchguide No. 2 § 2.15 (citing *Catchpole v. Brannon (1995) 36 Cal. App. 4th 237, 246, 42 Cal. Rptr. 2d 440* (disapproved on other grounds in *People v. Freeman (2010) 47 Cal. 4th 993, 103 Cal. Rptr. 3d 723, 222 P.3d 177*). This is an objective standard, not dependent upon the **[*6]** judge's subjective bias or lack thereof. *Briggs v. Superior Court(2001) 87 Cal. App. 4th 312, 31*.

This statutory ground:

> "…represents a legislative judgment that due to the sensitivity of the question and inherent difficulties of proof as well as the importance of public confidence in the judicial system, the issue is not limited to the existence of an actual bias. Rather, if a reasonable man or woman would entertain doubts concerning the judge's impartiality, disqualification is mandated." *Catchpole v. Brannon, supra, at 246* (citations, internal quotations, and brackets omitted.

In this case, the Judge had a history before taking the bench as an adversary and public critic of one of the parties. As a litigator he was on the trial team in "landmark" antitrust litigation that resulted in one of the "largest antitrust recoveries in history." That litigation was long and contentious, and apparently so significant in the Judge's prior career that it was the only case mentioned in the press release issued when he was appointed to the bench. As a news source he was quoted by a wire service as opining that Microsoft was "guilty" of antitrust allegations investigated by the U.S. government. In his published articles on technology and the law, Attorney Karnow at least implied that **[*7]** Microsoft *intentionally* violated antitrust laws and illegally monopolized some aspect of the technology marke.

All the comments predated Judge Karnow taking the bench. There is no evidence presented that the comments and opinions were unfounded or resulted from anything other than reasoned and informed analysis. Nevertheless, such public and repeated statements that Microsoft intentionally violated the law, combined with his involvement in suing the corporation in particularly contentious litigation, might cause a reasonable person to entertain a doubt as to whether the Judge could be impartial to Microsoft in the present proceedings. While there is no hint that the Judge is prejudiced in any way with regard to the issues in the case at bar, prior statements may indicate that the Judge has negative opinions as to Microsoft's predilection to follow the laws and in general act as a responsible corporate citizen. How exactly that would play out in deciding the issues in the case at bar is unclear; however, doubts about the Judge's impartiality toward the plaintiff might be reasonably entertained. Judge Karnow's belief that Microsoft's perceived law breaking was intentional, rather than **[*8]** some inadvertent transgression, lends force to this conclusio.

Counsel for Judge Karnow argue that *Code of Civil Procedure section 170.2, subdivision (6)*, provides "that it is not grounds for disqualification that a judge has expressed an opinion on a legal or factual issue, even when the legal or factual issue is presented in the proceeding." The undersigned has not been able to find where *section 170.2* has been applied to comments made by a judge other that in performance of the judge's duty in some official capacity. While the statute does not clearly so state, it appears intended to provide a judge is not disqualified in a proceeding once he has expressed views or made a ruling in that case or a related case. Thus a judge is not disqualified for statements arising from the judge's participation in the case, such as hearing evidence, ruling on an issue, or presiding at a settlement conference. See Rothman California Judicial Conduct Handbook. *supra,* at § 7.1.

Nothing herein should be taken to indicate that the undersigned believes that Judge Karnow is prejudiced against Microsoft or that the parties could not receive a fair trial before him. The decision herein merely reflects that a reasonable person might entertain a doubt on that issu.

ORDER

For **[*9]** the reasons set forth above, Judge Karnow is hereby disqualified from sitting and acting in the above-entitled matte.

DATED: MAR 11 20.

/s/ William H. Folle.

WILLIAM H. FOLLE.

Judge of the Superior Court, County of Del Norte, Sitting on Assignmen.

CERTIFICATE OF SERVICE BY MAIL [*Code of Civil Procedure 1013a(4)*]

I, Alisa Hollander, Secretary to the Presiding Judge of the San Francisco Superior Court, certify that I am over the age of 18 years and not a party to the within actio.

On March 15, 2010, I served the attached *Ruling on Motion to Disqualify Judge; Order (CCP § 170.3(c)(2))* on all parties in said action by placing a true copy in a sealed envelope with postage thereon fully prepared in the United States mail at San Francisco, California, addressed as follow.

James P. Kleier, Es.

Reed Smith L.

101 Second Street, Suite 18.

San Francisco, CA 941.

David L.

Office of the Attorney Gener.

1515 Clay Street, Suite 20.

Oakland, CA 94612-05.

and .

Hon. Curtis E.A. Karn.

San Francisco Superior Cou.

400 McAllister Street, Department 6.

San Francisco, CA 941.

By interoffice mail on March 15, 2010, at San Francisco, California 9410.

DATED: March 15, 20.

/s/ Alisa Holland.

ALISA HOLLAND.

Secretary to the Presiding Judge of the San Francisco Superior Cou.

Jamaly v. PNC Bank, N.A.

Superior Court of California, County of San Mateo

December 7, 2012, Filed

Case No: CIV505130

Reporter
2012 Cal. Super. LEXIS 14229 *

MAZEN H. JAMALY, Plaintiff, vs. PNC BANK, N.A.; NATIONAL CITY BANK OF INDIANA; BAC HOME LOANS SERVICING, LP; DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR FFMLT TRUST 2006-FF13; KATHRYN A. PYER-MATT; ALAN N. BISHOP; MISSION-BISHOP REAL ESTATE, INC.; and DOES, 1 through 20, inclusive, Defendants.

Prior History: *Jamaly v. PNC Bank, N.A., 2012 Cal. Super. LEXIS 14249 (Cal. Super. Ct., June 7, 2012)*

Core Terms

advertisements, misleading, unfair business practice, Defendants'

Opinion

[*1] ORDER ON DEFENDANTS' DEMURRER TO PLAINTIFF'S SECOND AMENDED COMPLAINT

Date: November 19, 2012

Time: 9:00 a.m.

Dept.: Law and Motion

FAC Filed: September 15, 2011

Honorable Gerald J. Buchwald

ORDER

Upon consideration of the pleadings, papers, and arguments of counsel, and with GOOD CAUSE shown, the Demurrer of Defendants PNC Bank, N.A. (on behalf of itself and as successor by merger to National City Bank of Indiana); Bank of America, N.A., as successor by merger to BAC Home Loans Servicing, L.P.; and Deutsche Bank National Trust Company as Trustee for FFMLT Trust 2006-FF13, Mortgage Pass-Through Certificates, Series 2006-FF13 ("Defendants") to the Second Amended Complaint of Plaintiff Mazen H. Jamaly is SUSTAINED WITHOUT LEAVE TO AMEND. The moving Defendants' Demurrer to the 4th, 6th, 8th, and 9th Causes of Action in the Second Amended Complaint is Sustained Without Leave To Amend.

Demurrer is made to the Plaintiff's 6th Cause of Action (Interference With Contract) against PNC Bank, N.A.; 4th Cause of Action (Aiding & Abetting) against PNC Bank, N.A.; 8th Cause of Action (False Advertising In Violation Of

Bus. & Prof. Code, Section 17500) against Bank of America and Deutsche Bank; and 9th Cause of Action (Unfair Business Practices **[*2]** In Violation Of Bus. & Prof. Code, Section 17200) against all Defendants.

The Court finds, for the reasons that follow, that Plaintiff fails to state these claims notwithstanding multiple opportunities to do so. The Court also notes that the current Second Amended Complaint appears to simply restate the same, substantially identical allegations in each of these four Causes of Action just as they were set out in the prior First Amended Complaint without making any good faith attempt to cure the deficiencies in the prior pleading.

Moving Defendants' Request For Judicial Notice of two deeds of trust recorded May 25, 2006, is Granted to the extent that the Court judicially notices the fact that said deeds were recorded, the date of their execution and recordation, the identity of the parties to said deeds, and the legal effect of the deeds. See, e.g., *Fontenot v. Wells Fargo Bank (2011) 198 Cal. App.4th 256, at 265, 129 Cal. Rptr. 3d 467*.

Regarding the 6th Cause of Action (Interference With Contract), the Court notes that the Second Amended Complaint clearly alleges that Defendants Pyer-Matt, Bishop, and Mission were his loan broker and agent for the purposes of obtaining residential mortgage financing for the Plaintiff. (Second Amended Complaint, ¶ - ¶44; ¶124 - ¶127.) At best, the 6th Cause of Action purports **[*3]** to claim a tortious disruption of that agency relationship.

However, no such claim is actually stated as Plaintiff'still fails to adequately allege a factual basis to satisfy the requisite element of intent. The Second Amended Complaint (¶131) merely states that PNC Bank engaged in conduct it knew was substantially certain to disrupt or interfere with the contractual relations and to render Plaintiff's performance more burdensome and expensive. This is insufficient.

A disruption of the agency relationship that is a foreseeable consequence from Defendant's actions, even if it occurred, is not actionable unless the Defendant acted with the specific intent, purpose or design of causing the disruption. See *Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal.3d 752, 765, 206 Cal. Rptr. 354, 686 P.2d 1158*, overruled on other grounds in *Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal.4th 85, 102-103, 44 Cal. Rptr. 2d 420, 900 P.2d 669*. Defendant must have intended to: (1) perform the acts that caused the interference and (2) cause the interference itself, and this must be alleged. Id.

Regarding the 4th Cause of Action (Aiding & Abetting), this operates off of Plaintiff's earlier Causes of Action against his own loan broker, i.e. his allegations that Defendants Pyer-Matt, Bishop, and Mission breached fiduciary duties to him by committing a fraud. (Second Amended Complaint, ¶18; ¶ 106 - **[*4]** ¶ 111.) Here, in the 4th Cause of Action, Plaintiff attempts to state a claim that Defendant PNC participated in that breach of fiduciary duty by aiding and abetting the Defendant loan broker's misconduct.

As a matter of law, however, no such claim can be stated as against the lender PNC Bank. Under prevailing appellate cases, it is well-established that a lender owes no such fiduciary duties to a borrower in connection with loan origination where the borrower is represented by his or

her own loan broker. See, e.g., *Nymark v. Heart Fed. Savings & Loan Assn. (1991) 231 Cal. App.3d 1089, at 1096-1097, 283 Cal. Rptr. 53*.

Regarding the 8th Cause of Action (False Advertising), Plaintiff'seeks to mount a claim for violation of *Bus. & Prof. Code, Section 17500* that prohibits false advertising in connection with real estate financing. Plaintiff'still states no such claim.

Plaintiff continues to allege only very generally the conclusory fact that the Defendant lenders' "...misleading advertisements have caused injury to Plaintiff." (Second Amended Complaint, 1148.) No facts are alleged to show how or why his injury was caused by the advertisements. This is not adequate to state the kind of injury-in-fact needed to confer standing upon the Plaintiff, as a private attorney general, to sue for *Section 17500* relief. See *Hall v. Time, Inc. (2008) 158 Cal.App.4th 847, 70 Cal. Rptr. 3d 466*.

Even if such standing were **[*5]** adequately alleged, Plaintiff has not alleged facts that show the advertisements were untrue or misleading.

Here, the Second Amended Complaint alleges that Bank of America was acting on behalf of Deutsche Bank and its website contains the following advertisement: "Help is available for homeowners experiencing payment difficulties. We'll do everything possible to come up with a solution to help you. No matter what your situation is, we're here to help." This statement can reasonably be construed to show an intent to perform a service. However, Plaintiff has not alleged facts to show that it is untrue or misleading.

An advertisement is untrue or misleading within the meaning of *Section 17500* if members of the public are likely to be deceived. *Committee on Children's Television v. General Foods Corp. (1983) 35 Cal.3d 197, 211, 197 Cal. Rptr. 783, 673 P.2d 660*. In this case, the Plaintiff merely makes the conclusory allegation that the statement was and is likely to deceive. (¶144.) Plaintiff does not allege any facts to support the conclusion. He states only that he has not been offered any viable loan modification and/or has received only rude and uninformed advice regarding Defendants' ability to help. This is

insufficient as the statement does not promise that a modification will be provided or that Plaintiff will **[*6]** obtain debt relief. It indicates only that Bank of America will assist him in submitting his request for such a modification or other appropriate loan forbearance.

Regarding the 9th Cause of Action (Unfair Business Practices), Plaintiff'still states no claim for violation of *Bus. & Prof. Code, Section 17200*.

Plaintiff continues to allege only very generally the conclusory fact that the Defendant lenders' "…misleading advertisements have caused injury to Plaintiff." (Second Amended Complaint, ¶ 161.) This is not adequate to state the kind of injury-in-fact needed to confer standing upon the Plaintiff, as a private attorney general, to sue for *Section 17200* relief.

Even if such standing were adequately alleged, Plaintiff has not alleged facts that show the use of the advertisements was an unfair business practice violating *Section 17200*.

In this regard, Plaintiff has not sufficiently alleged facts showing how defendants' allegedly misleading advertisements have harmed competition in the mortgage lending marketplace. As reflected in its manifest focus on the primary remedy of injunctive relief, *Business & Professions Code Section 17200*'s purpose is in the nature of a State ***antitrust law***, i.e the purpose is the protection of competition itself, not the protection of individual borrowers. **[*7]** Also, as noted above, Plaintiffs have not alleged the kind of injury-in-fact necessary to confer upon them the standing to sue under *Section 17200* for the statutory purpose of enjoining such business practices that have a harmful impact on competition in the marketplace. See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, at 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527*.

Likewise, the allegedly misleading advertisements in this case, as well as the alleged unfair use of the Yield Spread Premiums, do not qualify as unfair business practices for the purposes of *Section 17200* unless an adverse impact on competition itself is or can be demonstrated. See *Byars v. SCME Mortgage Bankers, Inc. (2003) 109 Cal. App.4th 1134, at 1145 - 1149, 135 Cal. Rptr. 2d 796*, a class

action case where borrowers challenged the use of Yield Spread Premiums as an unfair business practice, affirming summary judgment on the *Section 17200* claim.

Moving attorney is directed to prepare a written form of Order consistent with the Court's ruling for the Court's signature, pursuant to *Calif. Rules of Court, Rule 3.1312*, and to provide Notice thereof to the opposing party/counsel as required by law and the Calif. Rules of Court. The form of Order is to be submitted directly to Judge Gerald J. Buchwald, Department 10.

IT IS SO ORDERED.

Dated: 12/7/12

/s/ [Signature]

GERALD J. BUCHWALD

Go Computer, Inc. v. Microsoft Corp.

Superior Court of California, County of San Francisco

August 8, 2014, Filed

CASE NUMBER: CGC-05-442684, 4106, 2003 WL 22281574, No. MC 00-5994

Reporter
2014 Cal. Super. LEXIS 6371 *

GO COMPUTER, INC., a Washington corporation, S. JERROLD KAPLAN, an individual, Plaintiffs, v. MICROSOFT CORPORATION, a Washington corporation, Defendant., Daniel GORDON, Brandon Welter, David Ellingson, Kari A. Wallace, on behalf of themselves and all others similarly situated, Plaintiffs, v. MICROSOFT CORP., Defendant.

Prior History: *Go Computer, Inc. v. Microsoft Corp., 2014 Cal. Super. LEXIS 6370 (Cal. Super. Ct., July 14, 2014)*

Core Terms

collateral estoppel, fact finding, Cartwright Act, district court, CONSUMERS, monopoly, Internet, monopolize, talking, conclusions of law, operating system, Sherman Act, causation, browser, conspiracy, Windows, anticompetitive, litigated, proceedings, unilateral, government's case, parties, preclusion, DAMAGES, Plaintiffs', exclusionary, competitor, software, legal conclusion, combinations

Counsel: **[*1]** GREGORY S. GILCHRIST (State Bar No. 111536), HOLLY GAUDREAU (State Bar No. 209114), KILPATRICK TOWNSEND & STOCKTON LLP, San Francisco, CA, STEVEN F. BENZ (Admitted Pro Hac Vice), JAMES M. WEBSTER (Admitted Pro Hac Vice), IGOR HELMAN (Admitted Pro Hac Vice), JUSTIN M. PRESANT (Admitted Pro Hac Vice), KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL P.L.L.C., Washington, D.C., Attorneys for Plaintiffs, GO COMPUTER, INC. and S. JERROLD KAPLAN.

ROBERT A. ROSENFELD, JESSICA S. PERS, RUSSELL P. COHEN, ORRICK, HERRINGTON & SUTCLIFFE LLP, Attorneys for Defendant, MICROSOFT CORPORATION.

Richard Grossman, Eugene Crew, Townsend & Townsend & Crew, Attorneys at Law, San Francisco, CA, Craig Corbitt, Jeff Topor, Zelle, Hofmann, Voelbel, Attorneys at Law, San Francisco, CA, Josef Cooper, Cooper & Kirkham, Attorney at Law, San Francisco, CA, For the Plaintiff.

Robert Rosenfeld, Aaron Armstrong, Heller, Ehrman, White, Attorneys at Law, San Francisco, CA, Richard Wallis, Microsoft Corporation, Attorney at Law, Redmond, WA, Charles Curtis, Jr., Heller, Ehrman, White, Attorney at Law, Madison, WI, For the Plaintiff.

EUGENE L. CREW, ESQ., RICHARD L. GROSSMAN, ESQ., TOWNSEND AND TOWNSEND AND CREW, TWO EMBARCADERO **[*2]** CENTER, SAN FRANCISCO, CA, COUNSEL FOR PLAINTIFFS.

MICHELE C. JACKSON, ESQ., LIEFF, CABRASER, HEIMANN & BERNSTEIN, SAN FRANCISCO, CA, COUNSEL FOR PLAINTIFFS.

STEVEN J. AESCHBACHER, ESQ., SENIOR CORPORATE ATTORNEY, MICROSOFT CORPORATION, ONE MICROSOFT WAY, REDMOND, WA, FOR DEFENDANTS.

JOSEF COOPER, ESQ., COOPER & KIRKHAM, SAN FRANCISCO, CA, FOR DEFENDANTS.

FRANCIS SCARPULLA, ESQ., LAW OFFICES OF FRANCIS O. SCARPULLA, SAN FRANCISCO, CA, FOR DEFENDANTS.

Judges: Richard A. Kramer, Paul H. Alvarado, Superior Court Judge

Opinion by: Richard A. Kramer, Paul H. Alvarado

Opinion

STIPULATION AND ORDER RE ADMISSION OF EXHIBITS 6-8 OF PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE INTO EVIDENCE IN BENCH TRIAL THAT CERTAIN FINDINGS WERE NECESSARY AND ESSENTIAL TO A JUDGMENT AGAINST DEFENDANT MICROSOFT CORPORATION

Plaintiffs GO Computer, Inc. and S. Jerrold Kaplan and defendant Microsoft Corporation hereby stipulate to entry of the following exhibits into evidence of which the Court has taken judicial notice on July 21, 2014:

1. The Reporter'S Transcript of Proceedings of the October 10, 2002, hearing in the *Microsoft I-V Cases (Lingo)*, J.C.C.P. No. 4106 (S.F. Super. Ct. Oct. 10, 2002) (Exhibit 6 to Plaintiffs' Request for Judicial Notice **[*3]** under *California Evidence Code §§451* and *452*, filed on May 9, 2014). A true and correct copy of this exhibit is attached hereto as Exhibit 6.

2. Microsoft'S Memorandum Contesting 117 out of 383 Findings of Fact for Which Plaintiffs Seek Offensive Nonmutual Collateral Estoppel, filed in *Microsoft I-V Cases (Lingo)*, J.C.C.P. No. 4106 (S.F. Super. Ct. Dec. 16, 2002), (Exhibit 7 to Plaintiffs' Request for Judicial Notice under *California Evidence Code §§ 451* and *452*, filed on May 9, 2014). A true and correct copy of this exhibit is attached hereto as Exhibit 7.

3. The Order Granting in Part and Denying in Part Plaintiffs Motion for Collateral Estoppel entered by Judge Bruce A. Peterson in *Gordon v. Microsoft Corp.*, No. MC 00-5994, 2003 WL 22281574 (Dist. Ct. Minn. Aug. 20, 2003), which was filed on August 20, 2003, in the District Court of Minnesota (Exhibit 8 to Plaintiffs' Request for Judicial Notice under *California Evidence Code §§ 451* and *452*, filed on May 9, 2014). A true and correct copy of this exhibit is attached as Exhibit 8.

4. The parties stipulate that entry of these documents into evidence is only for the purpose of the Bench Trial that Certain Findings and Conclusions Were Necessary and Essential to a Judgment Against Microsoft Corporation, held on July 21 and 22, 2014, and not for any other purpose.

IT IS SO STIPULATED.

PURSUANT TO STIPULATION BY THE PARTIES, IT **[*4]** IS SO ORDERED.

EXHIBITS TO STIPULATION AND [PROPOSED] ORDER RE ADMISSION OF EXHIBITS 6-8 OF PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE INTO EVIDENCE IN BENCH TRIAL THAT CERTAIN FINDINGS WERE NECESSARY AND ESSENTIAL TO A JUDGMENT AGAINST DEFENDANT MICROSOFT CORPORATION

(On the record at 1:54 p.m.)

THE COURT: Good afternoon.

This is in the matter of the Microsoft cases which is judicial coordinated actions number 4106.

Would counsel state your appearances?

MR. CREW: Yes, Your Honor. Gene Crew, Townsend and Townsend and Crew for the plaintiffs.

MR. GROSSMAN: Richard Grossman, Townsend and Townsend and Crew also.

MR. CORBITT: Craig Corbitt, Zelle Hofmann for plaintiffs.

MR. TOPOR: Jeff Topor, Zelle Hoffman for plaintiffs.

MR. COOPER: Joseph Cooper for plaintiffs, Your Honor.

MR. ROSENFELD: Good afternoon, Your Honor. Bob Rosenfeld with Heller, Ehrman with my partner Chuck Curtis, Aaron Armstrong and Rich Chiles (phonetic spelling) from Microsoft.

THE COURT: Before we start, let me tell you that I need to stop no later than 4:30, and it is not because of the baseball game. If we need to, we could continue next week.

What I'll do is let me give you my thoughts on the motion to apply collateral estoppel **[*5]** to some of the findings of fact that have been made in the U.S. versus Microsoft action.

I find that collateral estoppel is appropriate under the law, and the facts of this case, and that it won't unfairly prejudice Microsoft, and that it will be conducive to judicial economy.

So what I intend to do is to tell you which conclusions of law I think are subject to collateral estoppel, and then beyond that, what I'm going to do is ask the parties, in effect, to meet and confer and see if you can arrive at the findings of fact that support those conclusion of law by way of agreement, and those that you can't agree on, you can leave for me to decide, but so that's what I have in mind.

Let me go through some particular issues that have been raised by the parties, and it's not—I'm not intending to cover every issue. If either party wants to bring to my attention some particular issue I may not have mentioned, why you're welcome to do that.

But what I want to do now is just briefly go through some of the contentions opposing the application of collateral estoppel in this case.

Microsoft contends that the federal case did not establish liability under the Cartwright Act which is true in a sense, **[*6]** in the sense that there still remains in this case to be proved the actual injury or causation which are necessary elements in the private damages action. So but I think that it's clear to me from reading the opinions, both the District Court as well as the Court of Appeal's opinions that the Federal Court did establish liability under the Cartwright Act, however, as I say, what's lacking for our purposes under the consumer actions that we have here are the actual injury or causation which the plaintiffs need to prove.

Microsoft also contends that the plaintiffs have not demonstrated the entitlement to collateral estoppel with respect to the individual findings in a Microsoft case, and as I said, in general, I disagree with that. I think that the elements for the application of collateral estoppel were met under the cases that are applicable and under the current authorities.

Microsoft also talks about that they failed to demonstrate that these findings are relevant because they haven't established an industry-wide conspiracy, and I disagree with that in the sense that the plaintiffs don't have to establish an industry-wide conspiracy.

Under the Cartwright Act, what's required is they **[*7]** establish a combination, and if you read the Cartwright Act, it says a combination or agreement, and so, I think there is separate things that are covered by the Cartwright Act, and here, what the plaintiffs have in mind is to show that there are combinations established through coercion with other parties, and I think that it appears that that well may be a violation of the Cartwright Act, if proven.

Microsoft also contends that the plaintiff needs to narrow their case to the claims and issues on which the — on which the government plaintiffs prevailed in the Microsoft case, and that they must limit the scope of their claim of their case to the claims actually litigated in the U.S. versus Microsoft case. I don't think that's correct.

The plaintiff can take advantage of collateral estoppel on those issues that have been resolved in the federal case, and which facts and issues are also—that are at issue in this case, they may also expand their case, if they wish. There is no requirement that in order to take advantage of collateral estoppel they must limit their case to what was presented in the federal case.

In spite of what Microsoft says about what Judge Poliak indicated in the previous **[*8]** hearing, I don't think Judge Poliak indicated that they must be limited, but only that they would face a choice between what they wanted to do, taking advantage of collateral estoppel, which would recuse their burden, but that they could also proceed on other basis which they had to, of course, completely prove.

Let me cover a couple more things that I think — on the tying claim, I think also that the findings and conclusions of the existence and of the tying arrangements are entitled to collateral estoppel, but the plaintiff must prove it was a violation of the Cartwright Act and/or the unfair competition law.

But they are entitled to those findings by way of collateral estoppel.

It is true that the Court of Appeals reversed the finding of liability based upon the tying arrangement, but that was based upon their view that the standard applicable would be the rule of reason as opposed to the per se analysis that was used by the District Court.

I do agree with Microsoft that some of the findings dealing with future events by the Trial Court are not properly the subject of collateral estoppel since we won't be dealing here with what may happen or what was predicted by the Trial Court Judge, **[*9]** but rather I assume we will be dealing with here what the actual effect is of the acts that are claimed to be anticompetitive.

So as I said, what I'll be doing is, what I want to do is to go through, and maybe I should do that right now, is to go through and tell you which conclusions of law on which issues I think should be given collateral estoppel, and of course, all the findings of fact that support those I am going to leave to the parties to work out rather than myself trying to do that I think what I'll do is let me turn to that now. Then we can discuss.

So these are the conclusions of law that I think are entitled to collateral estoppel in this action, and of course, all the findings of fact that support those conclusions, I am going to leave to the parties to resolve or work out.

A, Is that Microsoft had a monopoly power in the relevant market.

B, The relevant market was Intel-compatible PC operating systems, and was properly defined to exclude the Apple Mac OS; in quotation marks information appliances such as the handheld devices; portal websites, and middleware such as Netscape Navigator and Java.

C, Microsoft had a predominant share of the relevant market, and the applications **[*10]** entry barrier prevented competitors from seriously threatening Microsoft's market position.

D, The following license restrictions imposed by Microsoft on OEM's represented uses of Microsoft's market power to protect its monopoly, unredeemed by any legitimate justification, and thus constituted unlawful combinations in restraint of trade, the prohibition on removing the icon for Internet Explorer from the desktop and Start menu, the prohibition on modification of the initial boot sequence, the prohibition on adding icons or folders differing in size or shape from those supplied by Microsoft and,

4, The prohibition on using the Active Desktop feature to promote third party brands and,

E, Two aspects of Microsoft's technological integration of Internet Explorer with Windows, specifically, its decision to exclude Internet Explorer from the Windows Add/Remove programs utility and its commingling of browser Internet Explorer and operating systems Windows code, constituted exclusionary conduct in furtherance of Microsoft's unlawful combinations in restraint of trade as set forth herein.

F, Microsoft's exclusive contracts with internet access providers requiring them to offer Internet Explorer **[*11]** either as the default or as the only browser, had the effect of reducing the potential threat posed to Microsoft's operating system monopoly by Netscape Navigator, and thus were unlawful combinations in restraint of trade.

G, Microsoft's agreements to give preferential support to independent software vendors in exchange for their agreement to use Internet Explorer as the default browser for any hypertext-based user interface, and to implement their help systems through Microsoft's HTML, had an anti-competitive effect, as to which Microsoft offered no pro-competitive justification. Thus, these agreements constituted unlawful combinations in restraint of trade.

H, Microsoft's exclusive agreement with Apple Computer, which required Apple to bundle, IE, with the Mac OS and make IE the default browser on computers running the Mac OS, was anticompetitive, and Microsoft did not offer any pro-competitive justification for it. Thus, this agreement constituted an unlawful combination in restraint of trade;

I, The provisions in Microsoft's first waive agreements with ISV's that required them to promote Microsoft's JVM exclusively in order to obtain technical support from Microsoft were anti-competitive, **[*12]** and constituted unlawful combinations in restraint of trade. Microsoft's deception of ISV's, who were led to believe that Microsoft's Java developer tools would produce cross-platform applications, when in fact, they would produce applications that would only run on the Windows OS, as well as Microsoft's threats of retaliation against Intel if Intel persisted in its efforts to develop a fast, cross-platform JVM, were undertaken by Microsoft in furtherance of this unlawful conduct.

So those are the conclusions of law that the Court believes are subject to collateral estoppel being applied, and I will define, and all the findings of fact that support these conclusions. So that is what I have in mind.

Does—let's start with Mr. Rosenfeld. Was there anything you wanted to add, Mr. Rosenfeld, or talk about?

MR. ROSENFELD: Well, actually, Your Honor, I have a lot to talk about in response to what I understand to be your tentative ruling, and so I—if now is the appropriate time, I would like to do that.

THE COURT: Yes.

MR. ROSENFELD: First, let me just make sure I understand the scope of your tentative ruling.

What you've said is that the acts that you referenced, the conclusions, and with my recollection **[*13]** serving me, those are the, I think, 12 acts that were found to constitute monopoly maintenance under *Section 2* by Judge Jackson, and then by the D.C. Circuit. Those are the acts that you've identified were the conclusions to which you would give collateral estoppel.

THE COURT: I don't know if they were all under the monopoly maintenance or not, but those are the ones that I believe should be given collateral estoppel because what I believe occurred was, one, the District Court found the maintenance of a monopoly by anti-competitive means, and that was affirmed as to the liability, but as to—reversed to some specific anti-competitive acts, and then the other finding was that tying the browser to the operating system violated the Sherman Act, *Section 1* and Cartwright Act and unfair competition law, and that was remanded for application of the rule of the reason.

Now, I am not sure whether all the ones that I outlined were only on the monopoly power finding or not.

MR. ROSENFELD: Well, the one thing we could know, I have a chart about the D.C. Circuit opinion, just to sort of start, that I think would be helpful in talking through this, chart number 1-A.

We know that the only finding, Your **[*14]** Honor, of liability was the section to monopoly maintenance claim. No, the next one. I am sorry. The next one.

The only—the only finding that violated — that the district — excuse me, that the D.C. Circuit found to be an antitrust violation was the section to monopoly maintenance claim.

The Sherman Act, Section 1 claim on exclusive dealing was rejected by Judge Jackson himself.

The illegal tying claim which is a Section 1 claim was rejected by the D.C. Circuit.

The Sherman Act Section 2 monopoly leveraging claim was rejected wholly by the District Court.

The attempted monopolization claim of the web browser market was rejected by the Court of Appeal.

The predatory course of conduct finding was rejected by the Court of Appeal.

The only finding that survived was the monopoly maintenance.

If I could see the next chart dealing with monopoly maintenance just so we know exactly what it is that we are talking about on monopoly maintenance. Start number three.

THE COURT: Well, when you're talking about illegal tying of Windows on the Internet Explorer, you're saying that it didn't survive because they reversed the finding of liability based upon the improper or wrong standard that was used?

MR. ROSENFELD: **[*15]** Well, what happened, Your Honor, was that the Court of Appeals did reverse the finding of tying because it said the wrong standard was used, a per se standard. It remanded it to be considered under the rule of reason, and then the government and the states gave up. They said on remand—

THE COURT: How did they give up?

MR. ROSENFELD: They dropped the claim.

THE COURT: They dismissed the claim?

MR. ROSENFELD: Yes. They dropped the claim and said they would not pursue it on remand.

So the tying claim was dropped.

The only claim that survived was the Section 2 monopoly maintenance claim, and if I can walk to the chart, Your Honor? Is that okay?

THE COURT: (Nods in the affirmative.)

MR. ROSENFELD: Now, as to the Section 2 monopoly claim, first of all, it was drastically altered on appeal, and as the Court indicated, most of the findings of the violation did not withstand appellate scrutiny. But the other thing, and I think which is particularly important here is the causation point. This Section 2 monopoly maintenance claim was decided under a standard, does not apply in private action, and that is the indigenous causation standard. And what that means is that the government in this equitable enforcement **[*16]** action, an action not for damages, did not have to prove that Microsoft's conduct had any effect on competition. And the government said that. In fact, this was one of Microsoft's big appeal issues, and the Court concluded, both the District Court and Court of Appeals, that even if Microsoft had not engaged in the conduct alleged, that Netscape's browser and Sun's Java would not have emerged as substitutes in the market in the foreseeable future. That is in the vernacular, no harm, no fowl. That's a very different standard than applies in this action.

And finally, of course, the Court held in the same context of these monopoly maintenance findings, and I'll come back to this, it wasn't possible on the record before the District Court to determine whether Microsoft overcharged, that is, that Microsoft was charging a price that a profit maximizing monopoly business with monopoly power would charge for Windows 98.

Now, these are the only claims that survived, and they are claims under *Section 2*. And as we said in our brief, Your Honor, the critical issue in this case under the Cartwright Act which is all we are talking about, is how you go from a Sherman *Section 2* claim, which does not **[*17]** require concerted action to a Cartwright Act.

How do you shoehorn those findings into a Cartwright Act claim? And let me be clear, there were findings by Judge Jackson relating to the very contracts that are at issue with the OEM's and with the ICP's, IAP's and so on. Those claims were the core of the exclusive dealing claim that Judge Jackson adjudicated.

Now, it's worth thinking about that a minute. That exclusive dealing claim is under *Section 1* of the Sherman Act. *Section 1* of the Sherman Act is analogous to the Cartwright Act because they both deal with concerted action.

Judge Jackson concluded that under *Section 1* of the Sherman Act there was no violation, but that's not all he did.

Judge Jackson, if we could put up the chart with the relevant language, Judge Jackson said as to those claims, not only is there no violation of Sherman 1, but there is no violation of the analogous state law provisions.

One of those provisions as to Sherman 1 was the California Cartwright Act. So he didn't merely decide that those exclusive dealing contracts didn't violate the Sherman Act. He said explicitly, the plaintiffs concede that their losses don't condemn any act proven in this case that fails **[*18]** to warrant liability under the Sherman Act.

Accordingly, the Court concludes that the evidence in this record does not warrant finding Microsoft liable for exclusive dealing under the laws of any state.

So on the one claim, Your Honor, that is analogous to the Cartwright Act claim involving the very contracts that we are talking about here, Judge Jackson decided there was no violation. Now, that's a critical point, and again, I want to step back from that point for just a minute.

To underscore the difference between the Cartwright Act and the Sherman Act, Sherman *Section 2* deals with unilateral or single firm conduct. California's Cartwright Act doesn't.

The legislature this year in recognition of that fact tried to add, or certain members of the legislature tried to add a provision that would make the Cartwright Act like *Section 2*. It didn't happen, but there couldn't be any plainer recognition of the fact that the Cartwright Act is different from *Section 2*.

The only claims analogous to the *Section 1* claims were analogous to the Cartwright Act, claims were rejected.

Now, I want to go one step further in this because I think it is very important to what we are talking about.

Mr. Crew recognizes **[*19]** in his papers that he has a problem getting from the Sherman Act, *Section 2* violations to a Cartwright Act claim. Now, he argued that this violation means a violation of the Cartwright Act.

But the Attorney General of the State of California took a different view.

And it's very important to the determination in this case. And let my walk through that, if I could.

Judge Jackson did something rather peculiar when he issued these findings, and you're a Trial Judge. You know about this.

He issued 412 findings of fact in a vacuum, that is, he didn't have related conclusions. In fact, he hadn't even asked the parties to submit conclusions of law. He just issued the facts in a vacuum.

I want that. Yes. He issued in a vacuum, and then he said, I want the parties—in fact, he ordered them in a scheduling order to submit proposed conclusions of law based upon this cafeteria of findings that I have provided.

One of those plaintiffs who was asked to submit proposed conclusions of law was the Attorney General of the State of California, and we attached this memo to our brief, I believe exhibit D. Sorry. Exhibit C. Yes. Now, the attorney—the relevant paragraph, Your Honor, we could walk through all of **[*20]** them, but the relevant paragraph is paragraph number five where the Attorney General of the State of California says, Microsoft's illegal maintenance of its monopoly in the PC operating system, those are the claims, the Section 2 claims that you referenced at the beginning of the hearing. He said those claims only violate the UCL. They don't violate the Cartwright Act.

Now, Your Honor, that to us is a very telling determination. Even the Attorney General of California did not have the chutzpah. Mr. Crew has to say a Sherman 2 violation of monopoly maintenance grounds equals violation of the Cartwright Act. In fact, he said exactly the contrary.

But contrast in that very same memorandum of proposed conclusions, the Attorney General does emphasize that the Section 1 claims are, in fact, analogous to California's Cartwright Act claim. But those claims, all of the Section 1 claims were rejected by either District Court or the Court of Appeals. And on the one central claim that was left, the only one, that could provide a basis for a Sherman 1 violation, the Attorney General of the State of California said, no. It doesn't violate the Cartwright Act.

To us, Your Honor, under standard collateral **[*21]** estoppel law, that's dispositive of the issue of whether or not the acts that were found to violate Section 2 in the monopoly maintenance claim can give rise to a Sherman Act — excuse me, to a Cartwright Act claim.

Now, I want to push that a little bit further because I think it is so important here.

Mr. Crew at some level recognized that problem, and so if you read his brief, both his briefs, you'll find a discussion of a combination to monopolize. That's the bridge that Mr. Crew was trying to use to get from Section 2 violations to the Cartwright Act, combination to monopolize.

Putting aside the fact that—and that no California Court or Federal Court has set out what the elements are of that cause of action, putting aside that under federal law that cause of action generally requires specific intent, the main point here is that combination to monopolize claim was not litigated in the government action. You can read the findings of fact, the conclusions of law, the judge's, Judge Jackson's final order, and the DC circuit's opinion. There is no reference to a combination to monopolize. That claim was never litigated.

If I can have the list of collateral estoppel elements, that claim was **[*22]** never litigated, and what is the significance of whether or not a claim is litigated? Well, let me put it in context for this motion. This is not a motion simply to allow in certain evidence or to keep out certain other evidence.

We are going to have a lot of those motions, but this isn't one of them.

This motion will preclude, is an effort to preclude Microsoft from defending itself, from having a right to a jury on a number of claims. And the law is quite clear on this, two key words with clarity and certainty, that the Court must insure that it is fair to Microsoft, to deprive it of that right, and the only circumstances under which that can be done is when the prior decision with clarity and with certainty resolves the identical issues that are litigated here.

The first one, the first standard requirement is that the issue be actually litigated in the prior action.

Now, the significance of the California Attorney General's proposed conclusions of law on this issue is dispositive. The issue of whether those monopoly maintenance findings gave rise to a Section 1 claim or to a California Cartwright Act claim was not litigated.

The California Attorney General did not put that issue in play. **[*23]** By virtue of his not having put it into play, we obviously didn't respond to it. We didn't have to argue to the Court of Appeals that that conduct, that monopoly maintenance conduct, didn't constitute a violation of the Cartwright Act because even the California Attorney General didn't make that argument.

So it was not addressed by the D.C. Circuit. It wasn't ever litigated by the parties, and now Mr. Crew comes in here and wants to preclude us from defending ourselves on that claim.

With all respect, Your Honor, that is unfair, and it is dramatically at odds with the collateral estoppel requirements.

Now, if I could just take a step aside for a minute because I want to go back to this clarity and uncertainty point.

This motion focuses on a very, very narrow swath of the conduct that is at issue in this case, but it has potential, if preclusion is granted, to have a disproportionately significant impact on the outcome of the litigation. And of course, that's what plaintiffs want. But the question is, to use a much over-worked metaphor, is the game or the candor. (Phonetic spelling.) Is it worth it to stretch, to invoke collateral estoppel on this very narrow swath of conduct, and I mean **[*24]** narrow in terms of time period, in terms of actors, in terms of impact, during the damage period. Is it worth it where the risk, if Mr. Crew leads us into error, the whole case will have to be done again? By contrast, if you deny the motion, you haven't denied Mr. Crew anything. He can still put in all the evidence that he wanted to put in before.

Yes. Microsoft will have an opportunity to respond, but all the evidence will get in, and the case can proceed.

Now, I submit, Your Honor, that if you're going to take the more dramatic step of imposing preclusion that we have to make certain that it is, if you will, clear and certain that they are entitled to it, that means whenever in the course of the submissions it looks like somebody is playing fast and lose with the rulings or with the law, that ought to alert you that there is the potential for a significant error here that will have dramatic effect on the outcome of the case.

Now, and I guess the last point I would make is, collateral estoppel is not a matter of right. It is a matter of your discretion. If you conclude all things that could be done fairly to Microsoft, and at the risk of distorting the case, is not too great, it is a **[*25]** matter of your discretion. Mr. Crew has no right to it. He will still be able to get his evidence in.

Now, let's talk about the core of your ruling, aside from, and I think on the Cartwright claim, the determination there has been a violation of the Cartwright Act claim I think under standard collateral estoppel law in light of the record below, that instruction cannot be given consistently with the collateral estoppel requirements, principally because the issue was never litigated, the issue of whether there was a violation of the Cartwright Act, and we know based on the law itself that a violation of *Section 2* does not equal the violation of the Cartwright Act. And the bridge from *Section 2* to *Section 1*, the combination to monopolize not only was never litigated, it was never even mentioned in any of the briefing, in any of the opinions in the underlying action.

So Microsoft would respectfully submit that the preclusion on that basis would be wrong.

Now, let's go from the Cartwright Act claim itself, let's go down a level and talk about concerted conduct, and I want to do that in the context of collateral estoppel requirements. In addition to having to be actually litigated, the findings **[*26]** have to be critical and necessary to require judgment. They have to be findings that the Court relied upon.

Now, let's talk about concerted conduct in the first instance.

We know that the only time a claim of concerted conduct was litigated in the D.O.J. action. In the D.O.J. action, it was in exclusive dealing arrangements and it was rejected.

So in terms of the only concerted action claim out there, it was actually litigated, rejected, can't serve as a basis for collateral estoppel.

Now, let's talk about the acts, the individual acts, particular concerted conduct and whether they give rise to preclusion.

We said in our briefing briefs, Your Honor, and I want to make this distinction, it is one thing to talk about whether a finding was necessary to a judgment, and argue all the theory and so on about whether this fact is critical to that judgment, and I will acknowledge that on a lot of those, as you saw in our papers, even reasonable people can differ about that analysis.

To me, that says it is certainly not clearer that it is certainly not certain, but I don't think we have to go that far. We could come up with a test that nobody can differ about, and that is: Did these findings that **[*27]** Mr. Crew wants to impose upon Microsoft, did they actually figure into the opinion of any of the courts? Because if they weren't cited by Judge Jackson, then it is hard to argue that a finding that he didn't cite, when he was so careful to cite findings, it is hard to argue that a finding he didn't cite was essential to the judgment, but frankly, what Judge Jackson did for collateral estoppel purposes is not the event—is not the main event. The main event is what the Court of Appeals did.

That's Horn Book law on collateral estoppel. So then let's look at what the Court of Appeals did because the Court of Appeals also was very careful, and it cited findings which it was going to rely on them in making its determination that the conduct you identified, Your Honor, violated *Section 2* of the Sherman Act, and just stepping back for a moment, the Court, some 35 acts were alleged to violate *Section 2*. The Court found 12 of them to constitute monopoly maintenance. It identified the findings it relied upon.

Now, in our view, at least nobody can argue about whether they were cited or not and that that ought to be a threshold test for whether the conduct passed the necessary threshold.

And we cited **[*28]** in our brief on a number of occasions how many findings out of the 383 that Mr. Crew was seeking, how many findings were never cited by the District Court or by the Court of Appeals.

Now, let's look at some examples of Mr. Crew in his briefs, because I think it bears a lot on this, and his reply brief on page 3 — can we have a chart? In his reply brief on page 3, he identifies, it is the second bullet down. I will read it.

Judge Jackson cited over 100 acts performed in combination with others in his findings of acts in support of the Sherman *Section 2* violation, 100 acts in support of the combination.

And Mr. Crew was focusing on this because he is saying these act were cited in the certain plan *Section 2* violation, but, they were combinations. So they'll give rise to a Cartwright Act claim.

But let's go back and look. Mr. Crew cites 113 findings of the District Court. Excuse me, yes, of the District Court. 31 of those were not even relied upon by Judge Jackson. 58 of them were not even cited by the Court of Appeals in its decision, and 89 of them supported a claim that ultimately was reversed. So Mr. Crew is telling you, Your Honor, in pursuit of his effort to get collateral estoppel **[*29]** imposed, that there were 100 acts performed in combination with others, and yet if you deconstruct the findings and look at all of them, only 58 findings out of that 113 don't have any of the infirmities that are identified on that chart, and over half of them which are not even cited by the D.C. Circuit.

Now, my point is, that in a world where we are going to preclude Microsoft from getting its name before the jury, in a world where the standard is it has got to be clear, and it has got to be certain that the issue was actually litigated, and that it was necessary to the judgment, a chart like this is devastating to Mr. Crew's claim, but it is not the only one.

Let's have the next chart relating to page 13 and 14 because it is also relevant to precisely the same issue. On page 13and 14 of this brief, the plaintiffs identified findings. They say, summary of findings of concerted action. I think this is in the section where they say Microsoft just doesn't get it, and they go through and they cite 182 findings Now, if you read it, if you read this section, if you read this section carefully, it is not so clear on its face that these actions constitute conspiracies or even combinations. **[*30]**

For example, if Microsoft goes to Netscape and says, let's make a deal, and Netscape says, no, the law is quite clear that's not conspiracy or a combination. And this distinction between conspiracies and combinations is something that most commentators find pretty illusive too, but it takes at least the two to conspire, and it takes at least two to combine. That much we know. So they are not that very different, but Mr. Crew has in his list people we pressured, somebody, maybe that's concerted, maybe it is not, but the one thing we know, there is no determination below that was concerted.

Mr. Crew says we went to Real Networks, and we signed an agreement that had X effect. The problem is Real Networks didn't think it had the effect that Microsoft thought it had and went off and did its own thing anyway.

We went to IBM and said, according to Judge Jackson, if you install this software, we are not going to deal with you. So stop doing it. IBM said, no. No. We are not going to stop. Combination? Conspiracy? If so, Your Honor, the reach of Mr. Crew's theory is truly breathtaking because anything a business does, if we enter into an agreement, if we don't enter into an agreement, if we try **[*31]** to get somebody to do something, and they don't do it, anything we do, anything we do in Mr. Crew's—is a combination or a conspiracy, and that's the issue on unilateral conduct I want to come back to.

But in this context, just reading the language on page 13 and 14 makes clear the scope of Mr. Crew's allegations.

Now, let's go to the numbers. 182 findings identified by plaintiffs as establishing Microsoft's concerted actions. 130 of those were not even cited by the D.C. Circuit.

47 of those cited by Judge Jackson himself—the person who allegedly found this concerted conduct.

114 of them were in our view the subject of a reversed claim leaving again 8 untouched by one of the infirmities.

But the fact that something wasn't cited is not something you have to take my word for or Mr. Crew's word for. That's hard fact. Go through to the opinions and identify whether they are cited or not. Now, if they are not cited, how could they possibly be essential to the judgment? Well, Mr. Crew is going to get up here and argue, if the Court didn't say no, then there—then they are essential to the judgment. A couple problems with that. All right.

The first problem is the D.C. Circuit said repeatedly they **[*32]** drastically altered Judge Jackson's findings. And on page — I believe it is 52 of the opinion, perhaps 104. I am a little confused, but they said some, indeed, most of the findings of remedial violations have been altered. Most have been altered.

Now, I am sorry. I am informed it is page 105, and it is so important, I want to read it. In a case such as the one before us where sweeping equitable relief is employed to remedy multiple violations, and some indeed, most of the findings of remedial violations do not withstand appellate scrutiny. Your Honor, we have a copy of the West version of this, if you would like it because we all use different versions of these opinions. We get them out of West Law. Some people get them out of West, and we can't talk to each other. It is a good argument for a standard, but we will get back to that at trial, but in the official report at page 105, the Court says, where some, indeed most, of the findings of remedial violations do not withstand appellate scrutiny. It goes onto say, the Court has drastically altered the District Court's conclusions on liability. That's at page 105.

Now, my point is, Your Honor, that in those circumstances it really does **[*33]** matter whether the Court of Appeals cited the finding or not.

It really does matter in the context where the Court has drastically limited the scope of the opinion, whether they determined that that particular finding was essential to the judgment, and I think as this chart shows you, again, there is a real question, on the issue, I would say no question. If they are not cited, they are not essential. But the law is, I don't need to be certain either because the law is that if you have to conjecture or have to guess or have to hunt and peck to find out whether something was essential, then you don't get collateral estoppel.

And Mr. Crew in his submission has not demonstrated, and I am using the two examples right out of his reply brief, that the findings that he wants to rely upon are critical and necessary to the judgment.

Now, let me do a quick summary, if it makes sense, Your Honor.

Starting with the Cartwright Act violation, you see that was not actually litigated to the extent there was any claim that looked like a Cartwright Act violation.

Section 1 claim, it was rejected explicitly, by Judge Jackson. You acknowledge and we agree that causation certainly was not demonstrated in the **[*34]** D.O.J. action. And so, no finding of liability in terms of the Cartwright Act violation can possibly be made out here. It wasn't litigated, no causation, and this bridge, this effort to get from the *Section 2* violation to the Cartwright Act violation based upon a combination to monopolize also was not actually litigated. It never was mentioned in the D.C. Circuit or District Court's opinion or any of the proposed findings by anybody. So that wasn't actually litigated.

And then if we go a step further, and we look at specific findings, and we focus on the very ones that Mr. Crew wants to rely upon, we find than the majority of them, the overwhelming majority of them were never cited, never even cited by the D.C. Circuit. And a substantial portion of them were not included in Judge Jackson'S conclusion of law. They even—an even more sizeable portion related to a reversed claim.

At the end of the day they certainly have not met the requirement for a Cartwright Act violation.

Indeed, Your Honor, there is one other observation I would like to make on this subject because I think it bears on the analysis. Page, I believe it is 52 of Judge Jackson's conclusions of law, and again, we have an **[*35]** official copy if that will be helpful, Your Honor.

MR. CREW: What was the page?

MR. ROSENFELD: Page 52 in the official report.

THE COURT: What's the heading?

MR. ROSENFELD: It is at the bottom of the page, The Only Agreements Revealed by the Evidence. I want to find my appropriate chart.

Now, that Section is significant because here Judge Jackson is talking about agreements, something that we've all recognized within *Section 1* and the Cartwright Act.

You say I am going to identified the agreements I am focusing on, and they analyze them in the course of my conclusions. So this is the Section that really does deal with the conduct that is properly considered under the Cartwright Act.

He identifies specific findings, and then he concludes no violation, and we have already been over that ground, no violation under Federal law, no violation under State law. But let's talk about the specific findings in that particular page.

He cited 31 findings on page 52 and 53. Of those findings, 19 were never cited by the Court of Appeals.

Three were cited by the Court of Appeals only as context and background.

Two were cited when the Court of Appeals said this conduct is lawful, all be it in a different context, **[*36]** and five or six, the remaining were cited with reference to the monopoly maintenance. So even of the specific finding, that is Judge Jackson identifies, as bearing precisely on the issue of agreements, even there, and this is not Mr. Crew, this is Judge Jackson. Even there, it is difficult on this record to conclude that those findings were essential to the judgment. And could I have back the collateral estoppel evidence chart, please?

Your Honor, I don't want to take your time and do this with every one of the charts that Mr. Crew came up with in his brief, but we do have two others, if somebody could just give me the other two that are like this? Okay.

Because I just want to make the point to you. It is very important on this clarity and certainty point, Mr. Crew had a couple other categories of exclusionary acts found by the Court of Appeals and other conduct in his brief, and the picture is just the same.

Let's put this one up there first. This is on page seven of Mr. Crew's brief, findings necessary to prove that Microsoft's exclusionary acts caused harm to competition and consumers.

Again, he cites 54 findings. 47 of those were never cited by the D.C. Circuit. 29 of them were not **[*37]** even cited by Judge Jackson himself. And this chart, none of the conduct identified by Mr. Crew passes through the various objections unscathed.

Let's look at the other one. There is one more, Your Honor. Now, this is at page seven, line six through eight, and we have copies of all these charts, and we'll give them to you at the end of the hearing, Your Honor.

These were identified by Mr. Crew as findings necessary to proof of Microsoft'S monopolization. It is not clear why proof of Microsoft monopolization is relevant to the Cartwright claim any way, but passing that he identified 194 findings, with that number, 136 again, were never cited in the D.C. Circuit. 38 of them were not cited by Judge Jackson himself, and 134 of them, in our view, supported a reversed claim. Only six findings merged unscatheed in this presentation by Mr. Crew.

Now, what point do I want to make out of all this? I said at the beginning, Your Honor, a motion for collateral estoppel is not like a motion to let evidence in or whatever. It precludes Microsoft, and the standard precludes Microsoft from defending itself, from getting a jury trial, from getting a trial frankly untainted by a Judge whose conduct everybody **[*38]** understood to be way, way beyond the pair, a Judge who described the findings we are talking about in these terms. He said, I wrote these findings, this way, he said this to the press during the trial. I wrote these findings this way like a mule trainer with a big board. I wanted to get Microsoft's attention.

Not these findings are true and accurate, not these findings are a reflection of what went on in my courtroom, no. I am a mule trainer says Judge Jackson. I want to get Bill Gates's attention. The Court of Appeal said you're an ex-mule trainer for starters. The Court of Appeals also said we are drastically altering these findings, and most of the findings of remedial violation are not sustained.

Now, in those circumstances, to meet the requisite test of clarity and certainty that these findings were, if we could have the collateral estoppel chart back, that these findings were actually litigated, and necessary to the Judge, I submit is an issue that cannot be—is a standard that cannot be met here.

Now, I want to go to the next one briefly because we have talked about it, and that is that it has to be identical to a relevant issue.

On the conspiracy point, we know that the issue of **[*39]** combinations in conspiracies was not litigated before Judge Jackson. At least, it was not litigated in the context of a claim that was sustained because only *Section 2* claimants were sustained, and *Section 2* claims is not required in combination or conspiracy.

We know also, and this is critical, that the cause standard, the causation standard was different. You didn't have to show harm to competition in the Department of Justice proceeding, and Microsoft made that argument repeatedly. The Court said, you don't have to show that Microsoft's acts made any difference.

Now, why does that matter here? Well, it matters a great deal. First of all, it is a different standard, but that's a technical argument. Let me make a practical argument.

In the conclusions you referenced at the beginning of the argument, you said the jury should be told that Microsoft engaged in this conduct, bootup sequence related or whatever, and that it was anti-competitive. Well, how can we tell the jury that something was anti-competitive when the Court of Appeals concluded about that very conduct that there had been no showing that it had any impact on competition at all, that in fact, under the standard being applied **[*40]** by the Court of Appeals, that is—that showing wasn't necessary. As a practical matter, maybe the jury could be told that there was an agreement, but the question of whether it's pro-competative or anti-competitive is a question of whether it had any impact on competition. That's the impact and causation point that you referenced at the beginning that is still open, and Mr. Crew has got to prove that.

And so, in this case, given the standard of causation that was applied, we submit it would be error to tell the jury that this act has been found to be anti-competitive under the standards applicable here because it hadn't, and that's the significance of the causation standard.

Now, the causation issues are very interesting. We talked about this when we were out here before. The Judge, the D.C. Circuit said to the government, look, you didn't prove causation before. You didn't prove actual but for causation.

So on remand, you can try to do it, and the US government stood before Judge Collar-Kotelly, and said, we tried and we can't do it.

You can't do it. And that's why we are saying, Phil Beck on behalf of the government stood before Judge Collar-Kotelly and said, that burden we don't think **[*41]** we could meet. We don't think we could demonstrate this conduct had any effect in competition. That's what the D.O.J. case said. Mr. Crew would like to extract from that case some determination all these acts are anti-competitive for Cartwright Act purposes. It is just not true. It is just not true. And to tell the jury that would inevitably, and this gets to the next point, inevitably prejudice the outcome in this case. Let's talk about that.

This case covers a 15 or more year time period. The D.O.J. case talked about three years or three and a half years. The D.O.J. case was focused on Netscape Navigator, and Sun's Java., and actions, limited actions that Microsoft took focusing on that middleware. That was all the government case focused on.

This case focuses on operating system issues, Windows and Microsoft DOS from the late 80's, or maybe even mid 80's, to now.

So a three-year period, discrete acts versus a 15 or 17 year period. In addition, however, this case focuses on applications, Word, Excel, Office over the same time period.

Issues relating to applications were not at stake in the D O.J. case at all, not at stake at all. The case had nothing to do with it. This is a narrow little **[*42]** bit of conduct, and even more significantly, it's very late in the game.

The class period in this case starts in 1995. The conduct here went from ′95 to ′98 or early ′99. Judge Jackson and the Court of Appeals said, by the way, neither Netscape nor Java, even if Microsoft had done nothing, had the potential to immerge as a significant competitor until at least after ′99, for several years thereafter, finding 411, I believe. So the conduct at issue here probably has no significant impact on the damages in the case, and it is too little, and it is too late. It is a tiny little bit of this case.

So why is Mr. Crew so interested in getting it? I've been trying to think of analogies or metaphors that would make this work, and I am going to apologize for this one, and if you don't like it, I'll blame Curtis (phonetic spelling) who thought of it, but it's—what's the name of that show? Wheel of fortune, wheel of fortune, and I am not going to suggest Mr. Crew is Vanna White, but the wheel of fortune notion does, I think encapsulate what's going on here, Mr. Crew's big long word on the board covers 18 years, 17 years, whatever. A lot of phrases and so on. He thinks if he can get a few letters **[*43]** for this little tiny time period, that's all he has to do, and the jurors will fill in their own word. Even though there may be many words that would use those letters, he is going to take advantage of this little bit of not very significant conduct in the case of this case, to get a significant and prejudicial head start in front of a jury. And that is precisely the problem that the Wheeler Court in the D.C. Circuit emphasized when it said collateral estoppel should be denied where there is a concern it is estoppel on one issue, and we are talking about a very little issue here, and one we have to stretch to get to, where collateral estoppel in the one issue might give plaintiff's a head start larger than warranted in the jury's deliberations on other open issues by skewing or distorting the jury's conduct. And I submit, Your Honor, that is precisely what will happen here, precisely what will happen because of the tremendous difference in the nature of the claims, the nature of the allegations, the time period. We'll hear more about these findings certainly than they deserve as an effort to distort and prejudice the jury.

This case, I think, poses that risk more than any other, at **[*44]** least, that I am aware of.

Now, that gets us through to the identical to irrelevant issue.

Now, we have to get to fairness issues. We've talked a little bit about fairness in the context of distorting the jury's deliberation and thought process by focusing on this little time period. And it is a big risk in terms of these proceedings, and whether preclusions in that context might doom these proceedings to have to be done again.

But let's talk about another fairness point that the other Judges who have looked at the issue, Judge Poliak and Judge O'Melia have focused, on and as you know, this is sort of the Super Bowl of collateral estoppel.

We have a couple motions before, six motions, I believe pending before Judge Watson in Baltimore that are going to be argued two weeks from today, in fact. So this issue is getting more ventilation than it has had since my civil procedure class, a lot of focus on this issue.

Judge Poliak and Judge O'Melia focused on the issue of what we call “cherry picking.”

Maybe you can put the chart up.

The notion plaintiffs could pick the findings that they like and ignore the ones they don't, now, I have big cherry picking and little cherry picking. We could call **[*45]** it dealer's choice, whatever you like. The example of ignoring the findings they don't like at the big picture is they want you to tell the jury, Judge Jackson in the D.C. Circuit found X, Y and Z to be unlawful and anti competitive. Judge Jackson also found that the exclusive dealing of contracts that are very central to plaintiff's claims here were lawful, and were lawful explicitly under California law. Judge Jackson wasn't always clear, but in that particular Court, he was.

Plaintiffs, however they say, oh, no. On that one, we get another bite at the Apple. Microsoft stopped, but we get another bite at the apple. Judge Poliak didn't think so. Judge O'Melia didn't think so. We submit, Your Honor, it is not fair.

The plaintiffs will get up and say you should go back to civil procedure class, Mr. Rosenfeld, because we all know that a defendant can't invoke estoppel against a plaintiff, and the plaintiff didn't participate in the prior case because it would deny. So plaintiffs would tell us here, the plaintiff's due process rights, they didn't get to litigate the claim, and therefore, they can't be precluded, a little bit like our actual litigation test under collateral estoppel. That **[*46]** is an accurate statement of the law.

So if Microsoft came into this courtroom on it's own in filing a motion for collateral estoppel, it would be denied on that basis. That's not what's happening here.

Plaintiffs have made the decision that they want to invoke the collateral estoppel. Having made that decision, they have to invoke it fairly, and to invoke it fairly, it is a little bit like completeness designations in depositions. You've got to tell the whole story. And we've cited an abundant authority in our brief for the proposition when you instruct the jury, you've got to tell them the big picture of what we won as well as what we lost before the D.C. Circuit, a lot more in this column than in this column, and also if plaintiffs are going to invoke estoppel, they have to take the good with the bad, and now, it is their choice. I can't force them to do it, but if they elect to take advantage of collateral estoppel, they can't do it unfairly, and it would be unfair to let them invoke it for claims they won and try again on claims that they lost. That's collateral estoppel cherry picking at large.

Judge O'Melia and Judge Poliak discussed that. Judge Poliak discussed it. Judge O'Melia **[*47]** ruled that way in Arizona, but there is also cherry picking at the more micro level, and I want to take a minute to discuss it because it is very, very important in this case, and it is very unusual.

I will walk to the board, if I can. We've talked a lot about market definition, and you discussed it in your conclusions, Your Honor, and you said the market definition is fine, and it was fine to exclude from that market middleware. And that's, in fact, what Judge Jackson did and what the D.C. Circuit embraced.

Now, that decision to excise middleware from the relevant market was critical to the market definition and market power determination in the case.

It also however is the foundation for the causation point. The reason why middleware was not included in the relevant market, Your Honor, is because Judge Jackson and the Court of Appeals concluded within a relevant time period middleware would not be a viable competitor with Microsoft's windows operating system. In a relevant time period, it wouldn't be able to compete because of where it was in its development, and therefore, for purposes of defining a market, you can't include middleware in that market.

Now, when you get to causation, **[*48]** the D.C. Circuit said, yes. That's the flip side. In fact, if it couldn't have competed and therefore is not part of the relevant market, then Microsoft's conduct that was focused on middleware didn't make any difference. It wouldn't have been able to compete anyway. That's what's we decided when we defined the market, and therefore no harm, no fowl, and both Courts are quite explicit in their determination that there was no finding that but for—excuse me, no finding that Microsoft's wrongful conduct as directed to Netscape and Sun had any effect in perpetuating Microsoft's monopoly, and that was integral to the market definition finding. Now, what does that mean in terms of fairness here?

If plaintiffs are going to be able to have you instruct the jury, Your Honor, that the market is X, and Microsoft has monopoly power in that market, then they have to take the bitter with the sweet, and the bitter is that that market definition assumes away the causation that they need to demonstrate to make out their claim here.

That the jury also has to be told that the reason the market was defined the way it was is because nothing Microsoft could have done would have made any difference to the **[*49]** competitive potential of middleware during the relevant time period.

I submit, Your Honor, and we will argue about this in great detail, I suspect, but that inconsistency is arguably fatal to plaintiff's case. It should get us a directed verdict, if not something in advance, because under the standards of causation in this court, they can't prove it.

This finding bars them from proving it.

Now, I can't come in here and say they are stuck with that causation finding, but if they come in here and want the benefit of the market definition, they have to take the consequence that was essential to that definition. They can't say, we will take the monopoly power finding, Your Honor, but forget about the facts that in reaching that conclusion the Court made these determinations about middleware.

The law of collateral estoppel will not allow that kind of cherry picking. It would be properly unfair.

They just want to take the findings and excise right out of them what is critical on the causation point, and the same is true. We've briefed this abundantly, Your Honor, but the same is true on the pricing point.

This whole case, this whole case is about price, and the allegation, did Microsoft overcharge. **[*50]** And I stood up in court when we were here a week and a half ago and said, this is the only case, I think I said, no one has challenged before Microsoft's pricing practices, partly because we have a strategy, that is low price, high volume, that has sort of been the company's way, very inconsistent with an overcharge.

And the D.O.J. case made that point too and another finding that plaintiff's don't want, finding 65, where they allege that our exclusionary practices of acts caused significant harm to class members by increasing the price, U.S. v. Microsoft, the Court again in the context of talking about market definition, because one of the tests of market power is, have you raised your prices? Are they too high? And the Court said this is an odd case. That particular measure of market power doesn't really seek to suggest to us that Microsoft has been using whatever power it has for nefarious ends. In fact, it is not possible with the available data to determine with any level of confidence whether the price we've been charging is too high or too low.

Now, that's another finding that is fairly significant in the context of the case that you're going to try. It is another finding that **[*51]** was very significant to the definition of market power, and it is another finding that plaintiffs want to run away from, and we submit that would be unfair, and there is no authority for doing it.

Now, what does that mean as a practical matter? It raises a very difficult question of how the jury would be instructed and how these findings could be used in this proceeding. I can envision Mr. Crew standing in front of the jury box and talking about Microsoft, the monopolies, in a case of course, monopoly, Cartwright Act monopoly is not an issue anyway, but I can imagine him saying that, and saying that Court in Washington already decided that.

To be fair, then I ought to be able to stand up and say, yes, that's true, but you know what else they decided? They decided that none of Microsoft's conduct as a monopolist made one wit of difference in the market. That same Court decided that that's what fair play in this case would mean.

Now, my view is, Your Honor, that that kind of problem argues very strenuously for not invoking collateral estoppel in this case because there are lots of those instances, the exclusive dealing claims and others, where this kind of cherry picking is going to rear **[*52]** its head, and the burden on the Court and parties and jury to demarcate the boundaries of what is proper in invoking collateral estoppel in a case like this and what isn't. It is going to be very difficult, particularly difficult in the—particularly difficult in the cherry picking context.

Now I want to go to a related point, if I might, Your Honor. And I want to go back to this notion of demarcating the boundaries of what is proper and what isn't proper in invoking collateral estoppel.

You observed correctly when you came out that no matter what else happens here, you've got to prove causation. You've got to prove damages.

Mr. Crew wants estoppel as to certain of the conduct, and we've already discussed the pro-competitive and whether that particular tag line could be added.

The question is, when a witness is on the stand, and Mr. Crew is trying to prove causation, in most cases he is going to want to talk about the underlying conduct because that's where the causation link usually comes from. You usually can't draw it as the line between the conduct and its effect. And so what is collateral estoppel really going to save us?

When the witness starts testifying about a particular practice, **[*53]** are you going to say, wait a minute. He already instructed the jury about this practice. We don't need to waste the Court's time, and he certainly doesn't get two bites at that Apple.

Let's move on. But then the causation inquiry is going to be in some ways a disembody or disconnected one, and that's the problem with this kind of collateral estoppel, sort of dropping it in the middle.

How are you going to demarcate what lines of inquiry and questioning are foreclosed because of the invocation of collateral estoppel and which one's aren't? Now that would be the worst possible outcome to both preclude Microsoft from defending itself on these issues, and also let Mr. Crew put in all the evidence over and over and over again.

That would be a huge waist of time and a huge risk because if the evidence is going to come in anyway, over and over and over again, why take the risk on collateral estoppel? And I submit in this case, it is a huge risk that it could be demonstrated with clarity and certainty that these findings satisfy the requirements of collateral estoppel.

Now, I want to go to one last point unless somebody tells me here I've missed something, and I want to talk briefly about the **[*54]** unilateral conduct issue.

For purposes of the collateral estoppel motion, I think the showings we have made repeatedly about the findings not being necessary and principally the findings of unilateral conduct answers a lot of this inquiry, but there is nevertheless, and in the context of collateral estoppel, there is a huge issue about between the parties about unilateral conduct, and we are scheduled to file a motion on schedule for Monday, but the Court is closed Monday, on Tuesday, the motion attacking the use of unilateral conduct in the context of the Cartwright Act claim. We are going to find a summary adjudication motion on that on Tuesday.

We think that context, and plaintiffs give and take on that, is the right context to address this question of unilateral conduct.

But let me give you a preview.

We have a dispute here, and an awful lot of the conduct that was at issue in the monopolization case was unilateral. The plaintiffs have given us some expert reports. Several of those expert reports are by technical people who talk about technical design decisions, detailed design decisions about how software works and heartland unilateral conduct.

In our motion, among other things, targets **[*55]** that conduct and says whatever else about this case, Your Honor, that in inescapable unilateral conduct, and plaintiff's other experts when they describe the conduct, they have agreements, and then they have other conduct, and this is in the other conduct category. We are going to brief that, but Mr. Crew's response to this issue is always, no, Bob, you just don't get it. That unilateral conduct is in furtherance, somehow, of these conspiracies. And again, there is a big issue about identifying what conspiracies or combinations we are talking about. We said in our first brief, what is this combination? Is it an industry-wide combination, which we thought makes no sense. Mr. Crew came back and said, no, it is not an industry-wide combination. Well, what is it? What is this combination in the federal proceedings?

Judge Motz had to consider the issue of whether certain agreements between Microsoft and the OEM's were combinations for Sherman 1 purposes, were computed as combination under Sherman 2 combination to our conspiracy to monopolize claim? He said, no. He said, no, those don't count.

But passing that, I think there is a fundamental confusion about what “in furtherance of a conspiracy” **[*56]** means, and let me take a minute.

Conspiracy is like corporations have to operate through real people, through their members and entities or whatever. You come up with a conspiracy, you've got to have an agreement, you've got to have conduct, acts pursuant to or in furtherance of the conspiracy.

You've got damages. Those acts in furtherance of the conspiracy are not other acts by people not involved in the conspiracy or by people involved in the conspiracy but not as part of the conspiracy. The acts that have to be in furtherance of the conspiracy which the overt act requirement act is, one, have to be acts undertaken by the conspirators to further the goal of this conspiracy.

That's what the “in furtherance” requirements means. It is the core. The Saxer case (phonetic spelling) makes clear, it is the core element of a conspiracy claim, you've got to show the conspiracy did something. And the way you do that is by showing acts that were undertaken by the conspirators in furtherance of the so-called objective of the conspiracy. Now that's the law.

What Mr. Crew is attempting to do, Your Honor, is use that language in a very different way. Say, oh, you've got conspiracy, Microsoft imposed **[*57]** whatever these restrictive agreements were on OEM's or ICP's, whatever. That's the conspiracy.

The facts and furtherance are imposition allegedly of these restrictions on the OEM's or ICP's. Then Mr. Crew said Microsoft is doing all this other stuff the way it designs its software and so on.

Those are unilateral acts, but you know what, they further Microsoft's business objectives as well. It wants to be the biggest and the best software manufacturer. One way it does it is this way, and he tries to link all of those acts to those conspiracies, and they are there for getting them in on a Cartwright Act claim, by saying, oh, they are in furtherance too. Then that's the problem we have in this motion and will forget—demonstrate in our summary judgment motion. A lot of the unilateral conduct findings are not linked to any conspiracy and/or combination. I use them interchangeably because the common testers do, and there is no real difference. But we will leave it at that, but the question is, were those unilateral acts linked to specific conspiracies? Who is in this—in this conspiracy?

What did it do? What was its objectives, and what acts were undertaken in pursuing, pursuance of that conspiracy? **[*58]**

Now, again, I don't think for a motion that issue needs to be decided today. I think it will benefit greatly, frankly from the motion we are going to file next week I want to talk just one moment about.

We've got last night, pursuant to the Court's order, we got from the Townsend firm, and I haven't read the whole thing, but we got their sort of trial story, and my understanding is it devotes a fair measure of attention to this issue of what counts as a combination or conspiracy and what was in furtherance of it. Again I haven't had a chance to read it, but some of the folks have read it.

I think to make sure the parties's views cross, it would be useful if we took a few more days in filing our motion to make sure we are responding to what they are now saying because if we don't do that, I have this worry we are going to continue to be moving targets, and we've been pressing for a long time to get this, and to kind of come clean what the case is, they've done it, and I think it would benefit the Court and parties if we took four or five days to file the motion. I leave that to Your.

Plaintiffs basically have briefed the issue in advance. I think—I don't think it would delay the schedule, **[*59]** but I think it would ensure a more focused discussion of what is going to be one of the key issues and an issue that is going to bear on what we are supposed to be doing on the 22nd of October, which is talking about exhibits because about 70 percent of our objections to exhibits were late, to the unilateral conduct issue, and whether these technical design decisions and so on really count for purposes of the Cartwright Act as concerted activity or conduct in furtherance of concerted activity. I will stop with just this wrap-up.

This is, and I don't want to invoke Sadam Husane, not very politic these days, but this is certainly the mother of all collateral estoppel motions. It is difficult beyond belief to figure out what Judge Jackson said, what the D.C. Circuit said and how that relates to a claim that was never raised by the California Attorney General in that litigation, and the risk of distorting the process is huge, and the benefit is minor, minor, minor.

This is such a small portion of the conduct, and plaintiffs are going to get up with their 5,000 exhibits and 300 witnesses to make out these claims, but in fact, the D.O.J. case was so narrowed by the Court of Appeals, that parade **[*60]** of horribles is just that. It is not going to materially increase the length of the case, but granting collateral estoppel, in my view, following plaintiff's request here, will be holding out the distinct possibility that we will have to do this again. That would be inefficiency beyond belief.

In addition, the fairness issues posed by the cherry picking and other peculiar and uniquely-peculiar aspects of this case, counsel very strenuously invoking collateral estoppel, if it is invoked, we are going to have to deal with these boundaries issues, and we are going to have to deal with this question of bitter and sweet because the cherry picking is so patently and palpably unfair, under any reasonable view collateral estoppel could not be allowed.

Now, I think I've covered. Have I missed anything? I will sit down. Thank you for your patients, Your Honor.

THE COURT: Let's take a break. The reporter needs a break. So we will see you back at quarter to 4:00.

(Off the record at 3:32 p.m.)

(On the record at 3:46 p.m.)

THE COURT: Everyone is present.

Mr. Crew?

MR. CREW: Thank you, Your Honor.

I think you said something about 4:30. So—

THE COURT: We will stop at 4:30, and if we need to, we could continue. **[*61]**

MR. CREW: Let me try to move along in order to hopefully get it done by then.

I want to start by saying that, first of all of course, I agree with the rulings you have expressed at the outset, and I want to add there is nothing I've heard from Mr. Rosenfeld since then despite his eloquence that would in my opinion cause you to change any of what you've said, and I want to demonstrate by saying that. First let me do this.

THE COURT: And I should clarify, in case I wasn't clear, what I read were the conclusions of law that I think warrant the factual basis and the findings that need to be included in the instructions.

MR. CREW: In support of those conclusions of law.

THE COURT: Correct.

I didn't mean to imply that those conclusions of law would be part of the instructions.

MR. CREW: Facts will be given to the jury, and I understand that.

THE COURT: Okay.

MR. CREW: If I may, Your Honor, just to back up and start at the beginning here, summarize the events that bring us here today. Our action was brought in February 1999, long before the government action had been decided.

In November of 1999, Judge Jackson issued his findings of fact. In April of 2000, Judge Jackson entered his conclusions of law. **[*62]** We did not move then for collateral estoppel summary judgment even though we could have under the law of collateral estoppel in federal courts.

A judgment is final when the Trial Judge enters the findings. You don't have to wait for the appeal. But we chose to wait, and we did wait, and in June of 2002 the Court of Appeals rendered its unanimous in-bank decisions by seven federal Circuit Judges against Microsoft affirming Judge Jackson's findings of fact, and I should add, conclusions of law that were entered in April of 2000.

Two days after the Supreme Court denied Microsoft's petition for writ of certiorari. We moved for summary judgment on collateral estoppel. Judge Poliak heard that motion last November, and he concluded, you have the transcript that collateral estoppel applied, but he instructed the parties, instead of doing summary judgment, to go to work and prepare jury instructions covering collateral estoppel which we've been doing.

Meanwhile, Judge O'Melia, I believe is his name in the Arizona Court, the case in Arizona under Arizona ***antitrust law*** granted summary judgment against Microsoft on collateral estoppel grounds. That's been attached to Mr. Rosenfeld's papers, and the **[*63]** decision is short and sweet and to the point. It says, as the issue of Microsoft's liability and unlawful conduct has been decided, judicial economy indicates that collateral estoppel applies, and liability will not be an issue in this case. Therefore, plaintiffs motion for summary judgment is granted on the issue of liability.

You know, I don't know whether Mr. Rosenfeld argued that or not, but I think Judge O'Melia was correct, in fact it raises an interesting question.

Microsoft has now lost on the issue of collateral estoppel. Perhaps that is another ground for collateral estoppel that they would be unable to raise collateral estoppel again in another case because one Judge has already decided. In any event, I believe that this Court—

THE COURT: In that summary judgment that was granted, liability was established.

MR. CREW: Right.

THE COURT: So was there then damages?

MR. CREW: Oh, yes. And here too, Your Honor, I want to make one thing very clear about what Mr. Rosenfeld said. We don't—we embrace the opportunity to prove causation and damages to our class.

All we seek is collateral estoppel with respect to the facts that underpin the finding of conclusion of violation of the Cartwright **[*64]** Act, the findings that support that. And we will get to that in a minute.

But causation, that is that those violations caused our class of 13 million consumers harm, monetary harm, and the amount thereof is our obligation, and we don't hesitate to say that we intend to prove that.

So let me just say, continue on. Of course, after that, the next thing that happened, of course, was as soon as this case was reassigned to you, we filed our request for proposed jury instructions on collateral estoppel. Now, as a preface to what I have to say, Judge, I would like to say preference of collateral estoppel upon which plaintiffs and Microsoft surely agree. I am sure we agree at least in the abstract, is that it is a salutary doctrine and that it serves a salutary goal of conserving judicial resources, preventing inconsistent judgments, and sparing the parties of the expense in the vexation of relitigating, issues that have already been decided, thoroughly decided I should add.

Now, we know Microsoft endorses the concept of collateral estoppel because it states that in its opposition that plaintiffs should be collaterally estopped from relitigating here any of those few claims that they might have **[*65]** prevailed upon in the government action.

Now, of course collateral estoppel doesn't work that way. We were not a party there. We weren't there, but the point I want to make is that Microsoft at least endorses the concept of collateral estoppel even though they would extend it to a non-party.

The question though is, will the salutary objective of/TRALT/TRAL/TP-FPL re/ST-FPL/PEP well-served on this record. Robert rob object/TPEUFBG. Judge, the U.S. v. Microsoft case is an exhaustive record, preceding the litigation. It was years of investigation by the Justice Department and the 19 States that joined in it.

The record consists of testimony from well over 100 witnesses, and thousands of exhibits, and the trial itself consumes 7 6 court days.

THE COURT: I thought I read that Judge Jackson limited it to 12 witnesses per side, but I guess that didn't include depositions.

MR. CREW: Deposition testimony. Your Honor, that's correct. Deposition testimony.

It did take 7 6 trial court days, and following that, the Judge entered, you know, 412, you know them, separately numbered and detailed findings of fact, and then months later he entered meticulous conclusions of law.

Now, because of the public importance **[*66]** and the urgency of that case, the District Court of Appeals, Court of Appeals took the very extraordinary step of empaneling an in-bank Court of seven circuit Judges to review the record, and then entered a unanimous affirmance of Judge Jackson's judgment against Microsoft under Sherman 2, *Section 2* of the Sherman Act, and under the laws of 18 or 19 States.

So the answer to the question is, yes, on this record. The case for collateral estoppel could not be more compelling than it is here.

Now, if you didn't have collateral estoppel, and we go, or let me take collateral estoppel. We do have it, what would happen? We have these findings of fact or at least the ones we could agree upon would be read to the jury at the outset of the trial. That's what we propose. How long would it take? It could take a day, it could take a day or two. But behind—

THE COURT: By that, you mean a day meaning five or six hours?

MR. CREW: Yes. I think one could sit down, you know, if they were read to the jury, it would take maybe that much time. But I want to contrast that with what would happen if we did not have collateral estoppel, we believe, applies here.

Behind every one of those 412 findings of fact is a **[*67]** ton of evidence, Judge, Your Honor, that we have conditionally had to designate for trial if we were not to get collateral estoppel. We are getting it, but I am just saying, if we did not, this is what the consequence would be because they still think that this is more efficient to deny collateral estoppel, out of all that evidence that supports those 412 findings of fact that have to be presented to this jury, and the government, the government trial consumes 7 6 court days. So without collateral estoppel we would have to—

THE COURT: Do you think we need, based upon the conclusions that I think merit collateral estoppel, do you think we need all 412 or most of those?

MR. CREW: Not all of them, and we are prepared to sit down, like you suggested with them, and try to reach agreement on the ones. We don't want to bore the jury to death.

But first of all, I wanted to demonstrate to the Court they are all necessary to the Federal Court judgment and relevant to our case. But having said that, we have already withdrawn about three dozen in our presentation.

THE COURT: Yes. I saw—I don't know how many there were, but I thought there was in your reply brief, you indicated that you were withdrawing **[*68]** some of them.

MR. CREW: Right. And you know, we want to be balanced. We don't want to be—by the way we are not cherry picking findings of fact, we accept all the findings of fact. I don't care what they say, all 412 as far as we are concerned. So they accuse us of cherry picking. We are not.

So that's where we are on that. And in terms of the efficiency, the efficient use of judicial resources and minimizing of costs and avoidance of inconsistent judgments in this case, it could not be more compelling a case for collateral estoppel.

Now, in order for us to apply, we have to show certain things, and we have attempted to do so in our papers. We have to show each of those findings, and I want to start with findings of fact before going to the conclusion of law that Microsoft violated 16720 of the Cartwright Act.

In order to get those findings of fact established as collateral estoppel, we have to show that each of those findings of fact we wished to use was actually decided, and that it was necessarily decided, necessary to the judgment, and that it's final, and that it is relevant to our case.

Now, all of those findings include relevant to 17200—I am not — that's not before the Court, but **[*69]** let me take up one of those at a time actually decided.

There can be no question that all the 412 findings of fact were actually decided. The Judge wrote them down, 412 paragraphs worth and published them in the Federal reports. So there is no issue about whether they were actually decided.

Let me take up “necessarily decided.”

Counsel says that we have to show that they were necessary to the judgment, Federal judgment, and we accept that.

We must show they were necessary, or at least under the California test be entirely unnecessary to the judgment. What does “necessary” mean? And this is the process whereby collateral estoppel is determined. We follow that process. What necessary means, this is from the *Hoult versus Hoult, 157 F.3d at 32*. The Court said a finding is necessary if it was central to the root that lead the fact finder to the judgment reached, even if the result could have been achieved by a different shorter and more efficient route.

Now there could be no doubt here both the District Court and Court of Appeals viewed the findings of fact as central to the root that lead them to the judgment reached. And in Wright and Miller, another authority on what is necessary for collateral estoppel purposes, that the **[*70]** primary purpose of the requirement that a finding be necessary to support the earlier judgment is to ensure that sufficient care was taken in making the finding, unquote, to ensure.

Well, there can be no doubt that Judge Jackson overseen by seven Appellate Judges took sufficient care in rendering his finding.

Now, “necessary” also means necessary to any part of the judgment. Here under Sherman 2, *Section 2*, and the antitrust and unfair competition laws of the other states, that's part of the judgment.

Now that makes the necessary question easy to answer since Microsoft has never claimed and could not claim any of the findings of fact were unnecessary to the judgment against Microsoft under, for example, 17200 which Judge Jackson had or the laws of these many other States.

So clearly all these findings are necessary to one part or another of that Federal Court judgment. Nevertheless, what we've done for the Court here to demonstrate how each finding of fact was necessary to the judgment against Microsoft, we have set forth in our opening papers and in our reply, we have set forth first, the elements. This is to get to the necessity question. We have set forth the elements of violation of **[*71]** the Sherman Act and the Cartwright Act, and then we annotated each and every one of those findings of fact to show, and you have it in the appendix, that it was necessary to one or more of each of the elements of the Court's judgment under Sherman 2 and 16720.

Now, Microsoft in response claims that the Court of Appeals somehow rendered most of those findings of fact unnecessary to the Sherman Act claim or the Cartwright Act claim. Microsoft is silent about necessity on the other claims because it, and I am using the word “advisedly,” vacated them. Well, to be clear, no—absolutely no finding of fact was vacated by the Court of Appeals. They were all expressly affirmed under the clearly erroneous test of Federal *Rule 52*.

The Court of Appeals, and this is seven Judges, signature in-bank, unanimously, unanimously affirmed all the findings of fact even though Microsoft never challenged a single finding of fact as unsupported by the evidence under *Rule 52*.

The in-bank Court of seven Judge's observed and repeatedly, and we quote this to you, that Microsoft, and this is one of them, failed to challenge the District Court's key factual findings unquote, and they said that repeatedly.

Not withstanding **[*72]** the in-bank Federal Court unanimously affirmed all the findings of fact after in its words, reviewing the record with painstakingly care, unquote. Now, since Microsoft cannot show that any finding of fact was vacated under *Rule 52* and was actually affirmed by this in-bank Court is forced now to claim that many were somehow rendered unnecessary on two baseless theories, and we heard them this afternoon.

First, Microsoft claims that many were somehow rendered unnecessary to the judgment since the District Court apparently ignored some, and the Court of Appeals apparently ignored some other.

It claims both Courts must have ignored those findings because they were not mentioned by the Court by number. Now, that's their premise.

Your Honor, it is rank speculation to say that any finding of fact was somehow snuffed out as unnecessary to the judgment due to the happenstance that one Court or the other failed to mention it by number.

THE COURT: There is no authority for that either, is it?

MR. CREW: Authority for that, I no know of none, and I serously doubt there is any. Time permitting, you can find authority the other way, but clearly, that would be—that would be a rather insane rule that the **[*73]** finding was somehow rendered unnecessary because Judge Jackson, for example, didn't repeat it in his conclusion of law, or the Court of Appeals in reviewing all 400—even though Microsoft didn't appeal them, didn't mention some of them by number. It is an absurd, respectfully, proposition.

The District Court first had no duty to replete all of its findings of fact in its conclusion of law. Indeed the Federal Rules require that a district court state its findings and its conclusions separately.

Furthermore, the District Court at the outset of its conclusions of law expressly stated that it was basing its conclusion of law on the findings of fact which it had just so painstakingly entered.

The Court of Appeals also, of course, had no obligation to cite all the findings of fact by number which supported the judgment. So it is a real stretch for Microsoft to say because the Court did not mention a finding, we must somehow define the Court of Appeals ignored that finding or disapproved, or considered it somehow unnecessary. And what makes this particularly disingenuous for Microsoft to argue, is that the only reason the Court of Appeals might have had for not mentioning one finding or another **[*74]** is that Microsoft did not mention them on appeal as being unsupported by the evidence. The Court of Appeals had stressed its failure by Microsoft to challenge the findings repeatedly, and Microsoft's response was quoted in our brief, was to tell the Court, basically you can assume, Your Honor's, the in-bank panel, you can assume that all the findings of fact are supported by the evidence.

We still win as a matter of law. Now, that's a gamble that Microsoft took, and it lost it, and it cannot use its failure to appeal those findings of fact as a basis for collaterally attacking those findings today.

Now, secondly, the other argument Microsoft makes is that other findings of fact were impliedly, I guess, vacated, rendered unnecessary because they can provide no support for those legal claims that were reversed, legal claims that were reversed and therefore, provide no support for those legal claims that were affirmed. Therefore, well, there is a hole in the logic here.

The law only requires that a finding be necessary to any part of a judgment. Here, a judgment under the Sherman Act, *Section 2* the antitrust and unfair competition laws of numerous States.

Now, the Court of Appeals expressly **[*75]** rejected the very point that Microsoft seeks to urge upon you here today. It held that all of the findings of fact that supported the reversed claims nonetheless provided full support for the Sherman Act, *Section 2* judgment that was affirmed. And let me demonstrate that for you.

There was three claims that were reversed or reversed and remanded. One was the tying claim, under Sherman 1, and it was reversed because, as Your Honor rightly stated, the Court said, this is a tying and technological context. So it is, no longer do we believe the per se rules apply. It should be rule of reason. So we remand it for retrial under the rule of reason. By the way, that's not the law in California. But nonetheless, that's what the D.C. Circuit held there. However, in doing so, the Court of Appeals held, and I quote, the two practices that plaintiffs have most ardently claimed as tying violations are indeed a basis for liability under plaintiff's Sherman 2, *Section 2* monopoly maintenance claims unquote 253 at 96.

So number one, that's one of the claims that was reversed and remanded. The Court said, nonetheless, all of the findings that support that tying claim under Sherman 1 remain supportive, necessary **[*76]** to the Sherman 2 monopoly maintenance claim. The Court of Appeals said that. Those remain necessary.

Secondly, the other claim was the exclusive dealing claim. Judge Jackson held that there wasn't enough foreclosure in the market to have this exclusive dealing arrangement constitute violation of Sherman 1 under the rule of reason, and but Judge Jackson went onto say that those exclusionary arrangements nonetheless support my conclusion that they violate part of the *Section 2* violation, monopoly maintenance and the Court of Appeals expressly agreed, stating, we affirm, we affirm the District Court's decision holding that Microsoft's exclusionary contracts are exclusionary devices in violation of *Section 2* of the Sherman Act.

So all of those findings that were necessary to the part of the exclusive dealing arrangements were held by the Court of Appeals in agreement with the District Judge. They are necessary to support the Sherman 2 violation. So those findings remained necessary.

And then thirdly, and finally, the Court of Appeals, as Your Honor knows, reversed the attempted monopolization claim under Sherman 2 having to do with the claim Microsoft had attempted to monopolize the browser **[*77]** market. Sherman 2 forbids opposition monopolization, combination to monopolize and attempts to monopolize.

The District Court said this was an attempted monopolization browser market, and the Court of Appeals reversed that because the government had failed to define the tied product market adequately, referring to the browser market which is not—not really part of our case, but nevertheless, that was the reason for the reversal. But the Court of Appeals in reversing because he said they hadn't adequately done their homework on the tied market, the browser market, nonetheless stated, quote, Microsoft's efforts to gain market share in one market, browsers, that's the Court talking, browsers, served to meet the threat to Microsoft's monopoly in another market, operating systems, said the Court, by keeping web browsers from gaining the critical mass of users necessary to attract developer attention away from Windows as the operating system platform for software development.

So even on that third claim, the Court said the findings of fact with respect to the browser market, nonetheless support the Sherman 2 monopoly maintenance, that is, preservation of their monopoly of the operating system **[*78]** market.

So all of those findings remain support for the Sherman Act, *Section 2* judgment.

And the fact is, the Courts failed to mention some or the other, and you know, Microsoft could fault the Judges for not doing that, but it is not necessary, and it is not probative that they were not considered supportive of the judgment that was affirmed.

Let me now, if I may, go to relevance. That's the second thing we have to show. We have to show that with respect to any of these findings we wish to use, collateral estoppel were somehow relevant to our 16720 Cartwright Act claim.

Now, the answer to that question is also provided by the analysis we did concerning the necessity of each finding to each element of the Cartwright Act claim for the necessity test.

Your Honor, if I may, let me hand out, this is—it is set out in our papers in other ways, but this is sort of a—do you mind? Just as we had provided you in our opening papers with the table that showed how each finding was necessary to the Sherman Act and Cartwright Act violations, this table which I've just handed you is a compilation of all the findings and how they are relevant to a Cartwright Act violation that we claim in this case.

Now, **[*79]** let me start by saying it's a matter of simple logic that a finding of fact is relevant to plaintiff's *Section 16720* claim, for the same reason that it is necessary to the Federal Court's *section 16720* judgment, upon which plaintiffs 16720 claim is based.

Now, plaintiff alleges, we have to get what our allegations are so we could make this relevancy test, that Microsoft combined to monopolize the relevant system and application software markets in violation of 16720, Cartwright Act. That's what we allege.

Now, Mr. Rosenfeld said, well, there he goes with this combination to monopolize. Now, there is good law on that. There is such an antitrust tort of combination to monopolize. Sherman 2 forbids monopolization, but it also separately forbids combinations to monopolize as well as attempts to monopolize.

Section 1720, like the Sherman Act, also forbids combinations to monopolize and the elements that are—and I have to go through the same exercise to show relevancy of all these findings to these elements of the Cartwright Act claim they make.

The elements of the combination to monopolize under 17620 are basically five.

One is that Microsoft combined with others to restrain trade.

Two, that **[*80]** Microsoft's purpose were intent, or intent was to monopolize the relevant markets.

Three, that Microsoft committed overt acts in furtherance of its goal of monopolization.

Four, Microsoft had no pro-consumer, pro-competitive justification for its act and;.

Five, that Microsoft's combination to monopolize and its acts and furtherance thereof caused harm to competition. Those and five. And they are in this table, Judge.

That's how I set it up. They are all relevant to one or more of those five elements. This we have to show to the Court to get collateral estoppel with respect to those 412 findings that were rather necessary to the Federal Court judgment. And they are all relevant to one or more of those five elements as we demonstrate there.

Now, all of Judge Jackson's findings of fact regarding Microsoft's conduct reflect either, one, Microsoft's restrictive arrangements with others, and/or two, Microsoft's exclusionary intent which is an elements of our case. We have to show that, and/or three, Microsoft's overt acts in furtherance of its objective, The another element we have to show.

Now the findings of fact, let me take up element one, the combination.

Mr. Rosenfeld said that judgment **[*81]** had nothing to do, nothing to do with combinations. He said, nothing. It was all unilateral acts, Microsoft acting in a vacuum, nothing to do with an arrangement with others. Well the findings, Your Honor, I know you've seen this laced, laced with references to Microsoft's numerous restrictive agreements.

Judge Jackson found Microsoft entered into unlawfully restricted OEM licenses which prohibited OEM's from removing parts from the desktop to exclude competition. The Court of Appeals affirmed Judge Jackson and said those restrictions with OEM's, that's contract, domination, violated *Section 2* of the Sherman Act. Judge Jackson found Microsoft entered into exclusionary agreements with IAP's, and that in exchange for inclusion on the Windows desktop, and I quote the Judge, the leading IAP's agreed Microsoft's insistence to distribute and promote Internet Explorer to the exclusion of Netscape, these findings I have, Your Honor. I know you have them.

The Court of Appeals agreed with Judge Jackson that, and I quote the Court, Microsoft's exclusive contracts combinations, of—with the IAP's are exclusionary devices.

Judge Jackson found Microsoft entered into exclusive deals with ISV's, independent **[*82]** software vendors, and provided early information on changes and upgrades to its operating system to induce ISV's to accept Microsoft's exclusionary agreements.

The Court of Appeals again affirmed Judge Jackson's holding that, and I quote the Court, most's exclusive deals with the ISV's had a substantial effect in further foreclosing rival browsers from the market and thus, quote, have a substantial effect in preserving Microsoft's monopoly.

Judge Jackson found Microsoft coerced Apple into an exclusionary relationship designed to eliminate Netscape from the market. Judge Jackson found that quote, by extracting from Apple terms that significantly diminished the usage of Navigator on the Mac navigating system, Microsoft is a—Navigator's potential to weaken the application varied entry.

The Court of Appeals held Microsoft quote, deal, combination, deal with Apple must be regarded as anti-competitor. Microsoft's successfully pressured Intel. This is a quote, successfully pressured Intel to stop developing software technology that could be used in competition with Microsoft.

That is another combination.

The findings of fact say—show Microsoft pressured, not only Apple, but imposed similar contractual **[*83]** restrictions on real networks. This is findings, 1 through 114, and 40 and employed similar tactics to promote its restrictive combination with other—numerous others, finding under 93.

Judge Jackson found that Microsoft licensed—this is combination, by the way. I am mentioning this only to show that Judge Jackson's findings are riddled with findings of combination.

I venture to suggest that 90 percent of the conduct findings were combination in some way, and the rest were acts and furtherance thereof.

Judge Jackson found Microsoft licensed Lava from Sun under false pretenses claims their intent was to preserve Java's inoperability with other operating systems and then altered its licensed version as to be incompatible with other operating systems and then offered the ISV's, and this is a quote, early Windows '98 basis and other technical information in return for the ISV's commitment to use Microsoft's incompatible versions of Java.

The Court of Appeals condemned this conduct and said it was—part of it was a campaign, and I am quoting the Court, campaign to deceive developers.

Well, that's the combinational. They combined with Sun under false pretenses and then lied to the ISV's in order **[*84]** to induce them to commit to Microsoft. If that's not combinational, then I will—I am wrong. It seems pretty clear it is combination.

These findings of fact which directly reflect Microsoft's combination with others are relevant per se to our Cartwright Act claim because they show the first element of the 16720 violation, combination.

These findings of fact which Microsoft contends are unilateral, therefore lawful are probative, of Microsoft's purpose to monopolize the market, and they constitute acts in furtherance of its purpose, and of course, are directly probative of Microsoft's monopolistic intent.

That's elements two and three of the Cartwright Act violation which we've got here.

Contend acts and furtherance. We are required—Your Honor, we are required to prove to the jury Microsoft combined, that it had exclusionary intent, committed acts in furtherance of. We are required to prove those elements, and so, Microsoft says, well, you can't put in evidence of these overt acts because we think—Microsoft thinks they are unilateral.

Well, I beg to differ with Mr. Rosenfeld. He may be right, and I may be right with the jury. We will see.

But we argue that they are at least probative. There **[*85]** is a plausible inference. They are debatibly probative of Microsoft's intent which we say was to monopolize the market and its acts committed to further that objective. And that's the test for relevancy today, not whether the jury agrees.

Now, it stands to reason, Microsoft could not have gotten all of those other parties, these OEM's, IAP's, ISV's, Apple, Intel and others to comply willingly with Microsoft's exclusionary demands.

So, Microsoft had to do something, and they used coercive tactics. They used coercion.

The findings of fact are laced with the operative version, pressure, punish, force, capitulate. It is all throughout the finding.

Microsoft forced OEM's and others to agree not to deal with Microsoft's competitors, and when many resisted, Microsoft overcame that resistance or sought to overcome that resistance by using two strategies, two.

One, it forced many to agree by openly punishing those who openly resisted, and Judge Jackson really put it best when he stated how Microsoft's, and in his word was, interactions—this is finding 132, Your Honor, 132, after he summarizes all these exclusionary arrangements and these coercive tactics, with Apple. He mentions Intel, Netscape, **[*86]** IBM, all networks, OEM's. He says, all of these quote interactions, interactions between Microsoft and these others quote reveal Microsoft's business strategy of directing its monopoly power towards inducing, inducing. Well, that's combining with other companies to abandon products that threatened Microsoft and toward punishing those companies that resist, unquote.

Microsoft simply punished some in order to compel obedience by others. That was their MO.

Now, there is a common strategy for a monopolist that wants to preserve its monopoly. That's why the Judge commented on the fact Microsoft said, let's use Office as a club on Apple.

Mr. Rosenfeld would stay that's unilateral. It doesn't count. Well, we differ. Now, so, clearly, those kind of unilateral acts, punitive actions taken constitute evidence Microsoft's objective to monopolize the market to illegal arrangements and of its acts in furtherance of that objective.

Now, I said that—before I go on, let me just say that while the Federal Courts, both District Court and Court of Appeals found there was ample evidence of Microsoft's exclusionary intent and exclusionary acts in furtherance of this in exclusionary intent, plaintiffs need **[*87]** only show that Judge Jackson's findings of fact raise a plausible inference of intent, a plausible inference that it was an act in furtherance. The other strategy that they—Microsoft used, I mentioned coercion, in order to get these agreements, was they forced many to agree with Microsoft's demands by denying them a plausible alternative to those who resisted. As to those who resisted Microsoft, and this is what they would do, deliberately created incompatibilities between its products and its competitors' products while simultaneously fusing or bolting its operating system with its applications, and then would engage in what is called Fud (phonetic spelling) by Microsoft, spreading near and certainly in doubt, derogatory and false statements by its competitors to the OEM's so as to force the OEM's into Microsoft's own an exclusive basis.

Your Honor, so you understand how this works, let me just, if I may, he used the metaphor. I would like to use one.

I am a widget maker, and I have a competitor, and I want all my dealers to agree to boycott my competitor. Half agree to my illegal proposal and half do not. So to force the second half to agree with the first half, to boycott my competitor, **[*88]** I simply burn down my competitor's factory. Okay?

That leaves the second half with no choice but to buy from me exclusively. That's what Microsoft did here. Microsoft would say, no, that my arson in that hypothetical was unilateral. But it clearly furthered my objective to monopolize the market by getting all dealers to agree to deal with me to the exclusion of my competitor, and so it was here, Judge Jackson said, this is from his finding, he said Microsoft quote, imposed restrictions.

Here is the key language. He says at first contractual, and later, technical on OEM's and end users' ability, still quoting, to remove its browser from its operating system. its contractual restrictions placed on OEM's would not be sufficient in themselves to crush Netscape's Navigator.

So in 1994—I am quoting Judge Jackson now, Microsoft set out to bind Internet Explorer more tightly to Windows as a technical, I underscore “technical matter.” Mr. Rosenfeld euphemistically called that innocent unilateral conduct. Judge Jackson didn't think so. Judge Jackson quoted Microsoft that Microsoft's—Microsoft bound Windows and Internet Explorer so tightly as to, and I am quoting Judge Jackson's finding 172, to **[*89]** make the use of any browser other than Internet Explorer on Windows a jolting experience, a jolting experience, I quote.

Now that's coercion. That's not innocent unilateral conduct. That's designed to further their objective of monopolizing a market through a network of exclusive — exclusionary combinations and restrictive contracts.

They were not merely innocent unilateral acts. They were designed to further Microsoft's objective, and there they are clearly evidence of the intent. The Court of Appeals agreed. They remanded the technical integration claim to retrial, you know, that will be the tying, the integration to commingling software code between an operating system and browser, for retrial under *Section 1* of the Sherman Act which requires an agreement, but to be retried under the rule of reason.

The Court of Appeals didn't say, hey, that's just design changes, that's unilateral. The Court knew there was no doubt that that was either a combination or act of furtherance of by forcing OEM's and consumers, you have no choice than to agree with me to take my browser if you want my operating system because now I have commingled. I've fused them together.

The Court of Appeals didn't stop **[*90]** on that and say, oh, well, that's unilateral.

Of course, Microsoft deliberately altered Java so as to make it incompatible with other operating systems.

Mr. Rosenfeld said that's just unilateral design changes, and that's what they call it. But they did that so it would then get ISV's to license Microsoft's altered incompatible Java by telling them falsely the ISV's would be compatible.

Well, how do you separate out these unilateral acts are all designed to further the objectives of Microsoft, mainly to monopolize the market through network of combinations, and if they couldn't get an ISV or OEM or ISP to agree, then it took these two coercive measures I just described today to accomplish the agreement, and I am talking about agreement as the California cases define agreement, under the Cartwright Act. Coercees, victims count when determining whether a combination occurred.

It is not like Mr. Rosenfeld says, oh, you've got to show everybody had the same specific intent, not true under California law. Victims count when determining whether or not there is a combination of two or more entities. On that Sun, Java thing, Sun is now suing Microsoft under the Cartwright Act, yes, and Sherman **[*91]** Act too, but under the Cartwright Act for this conduct which Microsoft is telling the Court in that case it is unilateral.

So all of this is either combination conduct, combinational behavior or acts in furtherance of, probative of intent, probative of acts in furtherance, elements, required elements of our prima facie case, Your Honor, and the cases we cited for you, California Supreme Court case, classical, kind of an old shoe of a case, but it's good law in California, Overland Publishing, go to there, unilateral acts to further combination, part of the Cartwright Act violation. Judge Ilston over here in Federal Court, Judge Susan Ilston just this year rejected the very claim Microsoft makes now in this Davis versus Pacific Bell, 204 Fed. Sub 2nd, Fed. 36, namely defendant's claim there, like they claim here, that coercion is unilateral, quote unilateral and thus condoned by the Cartwright Act. Judge Ilston described plaintiff's complaint in that case as follows, and you can see the parallel, plaintiff accused defendant in that case of deliberately interrupting and disconnecting service to migrating customers, delaying handling of orders and misrepresenting the efficacy and legality **[*92]** of defendant's competitors unquote. Judge Ilston held these ostensibly unilateral acts quote amounted to coercion to purposes of the Cartwright Act, unquote because they were designed to force customers to deal with the defendant exclusively rather than for plaintiffs—well, this what was it, disconnecting service to customers in order to force those customers into the defendant's arms? Same thing here. They used their technological strategy, commingling code, fusing products that are totally separate from each other together.

MR. CREW: So OEM's and OEM's customers would have to accept Microsoft products. That's combination or act in furtherance thereof.

And then just finally, I would say, you know, Microsoft objections, to me, the Federal Court's findings of fact on grounds of relevancy under the Cartwright Act are the very same objections that makes it to many of the trial exhibits which are before the Court for resolution in our pretrial conference on October 22nd, and which are more fully addressed in our pretrial conference statement.

But let me say here, Your Honor, that as counsel raise it, I thought it might, and I thought it might be a strategy they would employ, and that is, **[*93]** hold off, Your Honor, don't rule on this collateral estoppel motion, don't rule of these jury instructions. We want another shot with these documents that are coming down the pipe.

Your Honor, these are two separate issues.

The question before Your Honor is whether or not we have demonstrated to your satisfaction that we have satisfied the collateral estoppel requirements which we have just reviewed, and if so, then we need to be sure we could go forward with that collateral estoppel so we could prepare our case without any further delay.

This second question is somewhat related, but the answer to that will flow in large part out of your ruling today, and the ruling today, if I understand it is, that those findings which support those legal claims, summarized for us at the outset are relevant to the Cartwright Act claim, and are therefore binding and conclusive on Microsoft. There is no reason for us to wait and see what they want to say about something else.

So I am asking Your Honor to adhere to your original position which is to rule on this now as you have, I believe, and then save that for—we've got that on October 22nd. But our position is that we've demonstrated in spades that we **[*94]** have satisfied all the elements, it is every single finding, necessity, actually litigated, necessarily litigated, relevant to the complaint and so forth.

A couple more points along that, and I will try to cover, if I may. I ran out of time, Your Honor. Just real quickly on this. We are supposed to—well, they call it cherry picking and also say we can't have collateral estoppel, then also try a larger case. I think I've already indicated your views on that, and that is that we are entitled to put on our case. That's what issue preclusion means. You preclude relitigation of that issue in a larger case. So there is no prejudice.

They claim we would be prejudiced, you tell the jury that they got these findings. Well, that's what collateral estoppel is. That's what it does. Like evidence is prejudicial, if it is relevant. Collateral estoppel findings, sure. They are prejudicial in that sense. But, to the extent that they want to be sure that the jury doesn't get confused and think that that means they violated the law in some other market like we say they did—

THE COURT: Well, we may have to consider some limiting instructions or some instructions.

MR. CREW: Right.

THE COURT: But—

MR. CREW: **[*95]** We favor that, Your Honor. We favor a limiting instruction, and they do too. They said so in the brief. That's exactly what they proposed. We agree with them.

Let me just close, if I may, on this last point, and this is whether or not there is actually a judgment by the Federal Courts that Microsoft violated the Cartwright Act. This is the legal part of the collateral estoppel. The collateral estoppel issue conclusion—this is whether or not there is a judgment on the books Microsoft, based on those findings violated the Cartwright Act. And they say somehow, no, that's not so because long after the trial was over, long after the findings of fact were entered, and as months later as the Judge was considering conclusions of law, the Judge invited proposed collusions of law from both sides. This is not mandatory. This is discretionary with the Judge, the State of California AG apparently in their proposed conclusions of law understated, understated the law to their detriment. In other words, they didn't say that this conduct, that a violation of Sherman 1 or 2, if the conduct was combinational, would violate the Cartwright Act.

But that doesn't tell the whole picture because what happened **[*96]** is that the Court after that, not withstanding this document that was filed at the end of the day after the case had been litigated for years, the Court none the less entered its judgment. And its judgment was that Microsoft has violated Sherman Act *Section 2* and the analogous—analogous Statutes of the various States. And then footnote, and the first law it cites is the Cartwright Act, 16720. The second law it cites is the Unfair Competition Act, 17200.

So whether the State of California accurately stated the law in this paper they filed at the last—at the end of the day, after trial, and after the findings we entered, does absolutely nothing to negate what the District Court held and the Court of Appeals affirmed. And I am quoting the Court, the facts proving that Microsoft unlawfully maintained its monopoly power in violation of *Section 2* of the Sherman Act are sufficient to meet analogous elements of causing of action arising under the laws of each plaintiff's State unquote and then cites the Cartwright Act. So there is no question that a judgment was entered by Judge Jackson and affirmed by the Court of Appeals that Microsoft's violation of *Section 2* of the Sherman Act was ip so **[*97]** facto a violation of the Cartwright Act, and there is no surprise there because the findings are riddled with combination evidence.

If you took out all that combination evidence in that case, you wouldn't have had a finding and conclusion Microsoft violated the Sherman Act.

And combinations to monopolize are part of *Section 2* of the Sherman Act.

So if Microsoft believed that the conclusion by Judge Jackson that its conduct violated 16720 because it violated *section 2* of the Sherman Act, if they thought it was incorrect, it had a right, a right to de novo review by the Court of Appeals. It chose not to exercise that right, and issues not raised on appeal are simply waived. And in any event, there is no error by the District Court from which Microsoft could have appealed since the District Court was not restricted by any motions in the conclusions of law. They are—suggested, advisory by the parties after the case was tried, proposed by the State from, enters conclusions of law that it believed, the Judge believed the findings of fact supported, that's the Judge's independent obligations, and that's what Judge Jackson did.

The District Court was obligated to enter conclusions of law that **[*98]** it believed were warranted by his findings of fact, and he concluded that those findings supported a violation of 16720 of the Cartwright Act.

The Court was not obligated to rubber stamp a proposed conclusion of law that it believed incorrect. But even if the Court had heard, which it did not, there is no basis for Microsoft'S collateral attack of that conclusion of law now given its failure to appeal it then.

This is a principle of collateral estoppel also, that in fact, you know, the Supreme Court, the Judge Renquist in the Supreme Court, Federated Department Stores which is Moite, M 0 I T E, that came out of San Francisco, that was a case that went up years ago, and the Supreme Court said, same issue, said quote, an erroneous conclusion of law reached by the Court in the first suit does not deprive the party invoking collateral estoppel on the second suit of the right to rely upon the plea of res judicata. A judgment based upon an erroneous view of the law is not open to collateral attack. So—unquote. So Mr. Rosenfeld, I mean it was an ingenious argument to come up with. They must have been thrilled when they found this one, two-page document, three-page document with this little **[*99]** paragraph in there at the end of the day and thought there it is, we are home free. We could now attack Judge Jackson's decision. No, no, it can't work. It won't work. They can't collaterally attack that judgment entered by Judge Jackson and affirmed by the Court of Appeals Microsoft violated 16720 of the Cartwright Act.

So that's it, except I wanted to comment a little bit on harmed competition quickly.

THE COURT: I need to catch a plane.

MR. CREW: That's it, Your Honor. I am done. We will submit the balance on the briefs.

THE COURT: If you want to, we could continue next week.

MR. CREW: I don't want to prejudice your missing that plane.

MR. ROSENFELD: Your Honor, we would like the opportunity to reply next week. I would like you to catch the plane, however.

THE COURT: Let's see, Monday is a holiday, and how much time do you think you'll need next week?

MR. ROSENFELD: I could confine myself to 20 or 30 minutes probably at the most.

THE COURT: And?

MR. CREW: I could use another 30 minutes, max, maximum, tops.

THE COURT: How about Wednesday the 16th? We could do it at 2:00?

MR. CREW: That sounds fine, Your Honor.

MR. ROSENFELD: That works for me. Thank you.

One last question, for a plane, we made **[*100]** a request for a few more days to sharpen our motion's response to what they filed last night, say next Friday?

THE COURT: This is in connection with the pre-trial hearing we are having?

MR. ROSENFELD: Actually a summary judgment motion. We filed three motions, and they are presently due to be filed. It was Monday, but that's a holiday. Tuesday, as to one of them, we are asking for a few more days to respond to their pre-trial submission that we got last night that focuses on this conspiracy issue.

MR. CREW: Your Honor, I urge we adhere to the schedule that's in place, and they filed their motions on the date provided. They could still file other papers if they want in response to what we filed yesterday. Although the Court didn't order them to do so, they are free to do so before October 22nd.

THE COURT: But I am unclear as to exactly what it is you're asking—

MR. ROSENFELD: In the pretrial schedule, non-evidentiary dispositive motions are to be filed on the 14th. Now we didn't realize that was a Court holiday as to one of those motions which is the unilateral conduct motion.

THE COURT: Yes?

MR. ROSENFELD: On that one, based upon plaintiff's papers we got last night, their pretrial submission, **[*101]** it sharpens the focus on this unilateral conduct issue. We would like to be able to respond directly to what they said, and to do that, we would need three or four more days so we have a sharpening of the issues for that particular motion.

THE COURT: But when was that motion scheduled for?

MR. ROSENFELD: It was scheduled to be filed Monday or Tuesday. We are asking until the end of the week.

MR. CREW: Your Honor—

THE COURT: Monday or Tuesday of this coming week?

MR. ROSENFELD: Not the hearing, just filing our initial papers.

MR. CREW: The schedule Your Honor approved provides for all non—whatever—non-evidentiary dispositive motions to be filed on or before October 14th. That's Monday. Monday is a holiday. So they want—we understand they want until Tuesday, but we see no reason to extend that cutoff date for either them or us to file those motions. They have plenty of time in their reply brief if they want to comment on whatever we say in opposition, both in our opposition brief and in our paper we filed yesterday, they could do so.

So there is no demonstration to me to grant them more time—

THE COURT: Why don't we do this:

You can—in your reply brief, you can address whatever if there is new **[*102]** matter you think needs to be addressed.

MR. ROSENFELD: My concern, Your Honor, we want to sharpen the issues. The hearing on these issues is not scheduled until after December 13th, so three more days doesn't strike me as a big problem.

MR. GROSSMAN: Your Honor, excuse me. The hearing on evidentiary matters which is what we filed yesterday was scheduled by you at our last status conference for October 22nd, and so we filed our briefing on that.

Now, to the extent that Microsoft wishes to file some dispositive motion on the same subject on Monday or Tuesday, then I suppose that is their right, but what they should do is simply respond to the briefing that was scheduled by you for the—for hearing on the 22nd. They filed their opening brief. We filed our opening brief. They could respond to that in advance of our pretrial conference on the 22nd, and then we are—the idea is to not wait to get rulings from you on these evidentiary matters until sometime in December, as Mr. Rosenfeld suggested, but in fact, as you scheduled to get a hearing on that, on the 22nd so we could begin to prepare a case for trial early next year. And that was the idea, not to delay rulings on evidentiary matters until **[*103]** the eve of trial. The idea was to get pretrial rulings so we could have sufficient time, both sides to prepare their cases. So that was set by you at our status conference for hearing on the 22nd. We've prepared our papers.

Now, if Microsoft also wants to file dispositive motions on the same subject, it seems somewhat silly, but that's their right if they wanted to do that, but there is no reason for them to get extra time on the dispositive motion they've been working on for months now, I assume.

They can simply get the benefit of seeing our opposition to that in advance.

THE COURT: The motion we are talking about is a motion to is it their motion to exclude certain exhibits because they claim their—

MR. ROSENFELD: No. It is not, Your Honor.

Mr. Grossman is confusing two issues. We said the last time we were before you that we were filing summary adjudication motions. This is a summary adjudication motion saying unilateral conduct does not violate the Cartwright Act.

THE COURT: And what is that? You haven't noticed it yet?

MR. ROSENFELD: We have a schedule that says they get filed, they have replies in November—I mean responses in November, replies in December, that motion. That's the motion **[*104]** we are talking about.

THE COURT: Okay.

And what's the last date you're supposed to have filed that?

MR. ROSENFELD: Tuesday. Tuesday because it is a holiday, and I am asking for three or four days.

THE COURT: So you want to file it on the 18th instead of Tuesday?

MR. ROSENFELD: Yes. On Friday.

THE COURT: And it will be set for hearing when?

MR. ROSENFELD: We haven't set a date. Their reply is due in December, and we left a date open for Your Honor's calender when we did the scheduling.

THE COURT: All right.

I will allow you to file the motion on the 18th.

THE COURT: So then we will see you on—did I say Tuesday or Wednesday?

THE CLERK: 16th, Your Honor.

THE COURT: Wednesday at 2:00.

MR. ROSENFELD: I have copies of the exhibits I am happy to give to you and Mr. Crew, Your Honor.

THE COURT: Why don't you give them to Mr. Chuck?

MR. ROSENFELD: Your Honor, I don't—

MR. GROSSMAN: I don't want to keep you from catching your plane, but one small housekeeping matter. The question that was aired several weeks ago on the extension of class period, you have proposed orders on that, and we just wanted to remind the Court we were ready to start the notice period and take the steps necessary for that. Of course, **[*105]** we need your ruling.

THE COURT: Okay.

I will get that out no later than next Tuesday.

MR. GROSSMAN: Thank you very much.

MR. ROSENFELD: Thank you, Your Honor. Go catch your plane.

(Off the record at 4:52 p.m.)

I, ROBERT K. BALIAN, Certified Shorthand Reporter and Official Court Reporter of the Superior Court of the State of California, hereby certify:

That the foregoing contains a true, full and correct transcript of the proceedings given and had in the within-entitled matter, and was reported by me at the time and place mentioned, and thereafter transcribed by me into longhand typewriting, and that the same is a correct transcript of the proceedings.

DATED: October 18, 2002

San Francisco, California

MICROSOFT'S MEMORANDUM CONTESTING 117 OUT OF 383 FINDINGS OF FACT FOR WHICH PLAINTIFFS SEEK OFFENSIVE NONMUTUAL COLLATERAL ESTOPPEL

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Practice
and
Procedure §
4432 (2d
ed. 2002)

I. SUMMARY OF ARGUMENT AND BACKGROUND

On October 10 and 16, 2002, this Court held a hearing on collateral estoppel and ruled that nine legal conclusions reached in *United States v. Microsoft* are entitled to preclusive effect in this litigation. *See* 10/10/02 Tr. at 8:15 to 10: 19. These conclusions track the market power **[*107]** determinations and the specific, limited instances of anticompetitive conduct that were affirmed by the U.S. Court of Appeals for the D.C. Circuit in the Government Case. *See* *United States v. Microsoft Corp., 253 F.3d 34, 53-56, 61-65, 68, 71-78, 346 U.S. App. D.C. 330 (D.C. Cir.)*, *cert, denied*, *534 U.S. 952, 122 S. Ct. 350, 151 L. Ed. 2d 264 (2001)*. This Court directed the parties to meet and confer for the purpose of attempting to reach agreement on which of the district court's findings of fact in *U.S. v. Microsoft* were "necessary" to each of the nine legal conclusions to be given preclusive effect, *see, e.g.*, 10/10/02 Tr. at 8:12-14, [1] and repeatedly emphasized that Microsoft would not waive any of its objections to collateral estoppel by participating in this process, *see, e.g.,* 10/16/02 Tr. at 55:5-6.

The meet and confer process has been a one-way street. Before the hearing in October, plaintiffs' position was that 383 findings should be accorded preclusive effect. At the hearing, the Court noted the specific areas where it would find estoppel while rejecting plaintiffs' more sweeping arguments. Based on that ruling, Microsoft has agreed (subject to all of its ongoing objections) that 266 findings were necessary to the legal conclusions specified by this Court. *See* App. A (listing conclusions and the necessary findings).

Plaintiffs, on the other hand, have not budged from their initial position that 383 findings must be given preclusive effect. They continue to seek collateral estoppel for findings that were not necessary to any of the liability determinations affirmed by the D.C. Circuit — a much narrower subset of the liability findings originally made by the district court in the Government Case. As the D.C. Circuit emphasized, it "drastically altered the scope of Microsoft's liability," and "most… of the [district court] findings **[*109]** of remediable violations [did] not withstand appellate scrutiny." *253 F.3d at 105, 107*. The district court itself, in its November 1, 2002 decision on remand by Judge Kollar-Kotelly, stated that the "vast majority of factual findings entered by the district court, but not cited by the district court as a basis for *§ 2* liability," were "unconnected to specific liability findings" drawn by the Court of Appeals-the very same legal conclusions adopted by this Court. *New York v. Microsoft Corp., 224 F. Supp. 2d 76, 138 (D.D.C. 2002)*.

Thus, plaintiffs' continuing demand for collateral estoppel on almost all of the original findings ignores the D.C. Circuit's decision, the district court's November 1 decision, and this Court's decision to limit collateral estoppel to nine specific legal conclusions that were affirmed on appeal. By definition, findings of fact that were "unconnected to specific liability findings" could not have been "necessary" to the Court of Appeals' decision and thus cannot support the legal conclusions adopted by this Court. [2] Given plaintiffs' position, there is a dispute over 117 remaining

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[1] This Court indicated at one point in its discussion that collateral estoppel would apply to those findings of fact that "support" the nine legal conclusions. 10/10/02 Tr. at 5:5. Microsoft understands the term "support" as synonymous with the "necessary to the judgment" standard used in collateral estoppel analysis, and uses the terms interchangeably in this memorandum. There would be no basis under either federal or California law for deviating from the Restatement (Second) of Judgments' definition of "necessity" discussed in Part 1I-A **[*108]** of this memorandum. *See also* the authorities cited in Microsoft's Mem. In Opp. To Plaintiffs' Proposed Jury Instructions 21-22 & n.22 (Aug. 26, 2002).

[2] As shown in Microsoft's prior collateral estoppel briefing, under both California and federal law, the relevant issue is not which findings were necessary to the district court's original judgment, but rather which findings were necessary to the Court of Appeals' significantly narrower decision. *See* Microsoft's Mem. In Opp. To Plaintiffs' Proposed Jury Instructions 22 & n.23 (Aug. 26, 2002).

findings. We explain below why none of these findings was "necessary" to the nine legal conclusions adopted by this Court through the operation of offensive nonmutual **[*110]** collateral estoppel. [3]

II. ARGUMENT

A. Standard of Decision

As the proponents of collateral estoppel, plaintiffs bear the burden of showing, with "clarity and certainty," which findings were necessary to the Court of Appeals' decision. *Offshore Sportswear, Inc. v. Vuarnet Int'l, B.V., 114 F.3d 848, 850 (9th Cir. 1997)*; *see also* 18 James Wm. Moore et al., *Moore'S Federal Practice § 132.03[2][g]*, at 132-83 (3d ed. 2002) ("The burden of persuasion to establish the prerequisites of issue preclusion is on the party seeking preclusion."). If there is any ambiguity **[*111]** about whether a particular issue was necessary to the prior judgment, collateral estoppel cannot be applied. *Connors v. Tanoma Mining Co., 953 F.2d 682, 684, 293 U.S. App. D.C. 286 (D.C. Cir. 1992)*.

To be eligible for preclusion, findings must be necessary or "essential to the judgment." *Restatement (Second) of Judgments § 27* (1982). In elaborating on this standard, the Restatement explains that "[i]f issues are determined but the judgment is not *dependent upon the determinations*, relitigation of those issues in a subsequent action … is not precluded." *Id.* *§ 27 cmt.h* (emphasis added); *see also* *County of Santa Clara v. Deputy Sheriffs' Ass'n, 3 Cal. 4th 873, 879 n.7, 13 Cal. Rptr. 2d 53, 838 P.2d 781 (1992)* (citing *§ 27 cmt.h* in holding that "broad comments" of the trial court "were unnecessary to the judgment and cannot support a claim of collateral estoppel"). [4] On its face, then, the "necessity" requirement demands much more than simple relevance.

Whether a finding was necessary depends on the perspective of the court that rendered the judgment-the **[*112]** D.C. Circuit. Thus, findings that plaintiffs contend established Microsoft's "intent" were *not* necessary to the judgment because the Court of Appeals expressly limited the utility of such evidence. "[I]n considering whether the monopolist'S conduct on balance harms competition and is therefore condemned as exclusionary for purposes of *§ 2*, our focus is upon the effect of that conduct, not upon the intent behind it." *253 F.3d at 59*; *see also* III Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 651b, at 74 (2d ed. 2002) ("[T]he nature and consequences of a particular practice, not the purpose or intent, are the vital considerations."). Accordingly, using intent as a justification for preclusion would ignore the D.C. Circuit's treatment of such findings and would thereby swallow up the "necessity" requirement as a limitation on estoppel. [5]

In addition, many of the district court's findings were not necessary to the Court of Appeals' liability determinations. The D.C. Circuit reviewed each of the twenty acts found to be anticompetitive by the district court, balancing the anticompetitive harm and the procompetitive effect of the specific conduct at issue. *253 F.3d at 58-78*. The Court of

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[3] In addition to reserving all of its objections to collateral estoppel, Microsoft understands that issues about the formatting and presentation of findings to the jury are not being briefed or decided at this juncture, but will be addressed after this Court has decided which findings are necessary to the legal conclusions it has adopted. *See* 10/16/02 Tr. at 53:23 to 54:18.

[4] *See generally* *Office of Consumers' Counsel v. FERC, 808 F.2d 125, 129, 257 U.S. App. D.C. 230 (D.C. Cir. 1987)* (citing *Restatement § 27 cmt.h* in holding that "[i]ssue preclusion applies only if the first determination was necessary to the judgment"); 18 James Wm. Moore et al., *Moore'S Federal Practice, supra, § 132.03[4][a]*, at 132-106 (3d ed. 2002) ("When … the court makes findings of fact, but the judgment is not *dependent* on those findings, they are not conclusive between the parties in a subsequent action based on a different cause of action.") (emphasis added).

[5] Although plaintiffs contend that many of the findings "were necessary to establish Microsoft'S anticompetitive intent," the Court of Appeals held that evidence of intent "is relevant only to the extent it helps us understand the likely effect of the monopolist'S conduct." *253 F.3d at 59*. Plaintiffs never explain how evidence of Microsoft'S intent toward, for example, Lotus Notes, helped **[*113]** the appellate court understand the likely effect of the acts found to be anticompetitive.

Appeals reversed with respect to eight of those acts, and also reversed the district court'S "conclusion that Microsoft'S course of conduct separately violate[d] *§ 2* of the Sherman Act." *253 F.3d at 78*. The acts encompassed by this Court's legal conclusions are thus the sole basis for the D.C. Circuit'S determination that Microsoft engaged in anticompetitive conduct in violation of *§ 2* of the Sherman Act. *See 253 F.3d at 104* ("Only liability for the *§2* monopoly maintenance violation has been affirmed—and even that we have revised.").

The November 1, 2002 district court decision on remand in the Government Case confirmed that "the appellate court did not have occasion to rely upon the vast majority of factual findings entered by the district court, but not cited by the district court as a basis for *§ 2* liability." **[*114]** *224 F. Supp. 2d at 138*. Accordingly, the district court on remand held that such factual findings, "unconnected to specific liability findings," should not be given weight in fashioning relief. *Id.* This is so "because no court has yet found that the acts identified in the *Findings of Fact*, but not relied upon for the imposition of liability, visited *any* harm upon competition, let alone a harm which was not outweighed by the simultaneous procompetitive effect." *Id. at 139*; *see also* 18A **Charles a.** Wright et al., Federal Practice and Procedure § 4432, at 63 (2d ed. 2002) ("If the appellate court terminates the case by final rulings as to some matters only, preclusion is limited to the matters actually resolved by the appellate court, [regardless of] whether it terminated the case on terms that left it unnecessary to resolve other matters …."). If the court in the Government Case found that the findings were not relied upon for the imposition of liability, plainly they cannot be "necessary" to the judgment and therefore cannot be preclusive here.

B. Plaintiffs Impermissibly Seek Collateral Estoppel for Findings of Fact That Were Not Necessary to the D.C. Circuit's Legal Conclusions Adopted By This Court

The following findings **[*115]** of fact included in plaintiffs' request for estoppel were not necessary to the legal conclusions adopted by this Court because they are unconnected to any of the acts found by the D.C. Circuit to be anticompetitive.

Finding of Fact 78: This finding discusses four technologies (Lotus Notes, Intel'S Native Signal Processing ("NSP") software, and RealNetworks' and Apple'S multimedia playback technologies) that the district court described as "other middleware threats" supposedly "feared" by Microsoft. *United States v. Microsoft Corp., 84 F. Supp. 2d 9, 30 (D.D.C. 1999)*. The four technologies discussed in Finding of Fact 78 have no bearing on any of the acts found to be anticompetitive by the Court of Appeals. Indeed, the appellate court did not even mention those technologies in its opinion, much less rely upon Finding of Fact 78 as a basis for liability. That finding thus does not support—indeed, it is irrelevant to—any of the legal conclusions adopted by this Court.

Findings of Fact 79-89: These findings describe a proposal that Microsoft supposedly made to Netscape in June 1995 and that Netscape rejected. *Id. at 30-33*. The district court relied upon Findings of Fact 79-89 only as evidence of an unlawful *attempt* to monopolize the putative market for Web browsing **[*116]** software. *United States v. Microsoft Corp., 87 F. Supp. 2d 30, 45-46 (D.D.C. 2000)*. The D.C. Circuit "reverse[d] the District Court'S determination of *§2* liability for attempted monopolization." *253 F.3d at 84* [6] Because the June 1995 discussions were unconnected to the Court of Appeals' specific liability findings, Findings of Fact 79-89 do not support any of the legal conclusions adopted by this Court.

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[6] Given that Netscape rejected whatever proposal Microsoft made in June 1995, it is not surprising that the district court relied upon these findings *only* in connection with the *aempt* claim that was reversed. *84 F. Supp. 2d at 32-33 (FF 87-89)*. The district court did not rely upon any of these findings as a basis for its monopoly maintenance ruling, stating only that the findings provided "context" for Microsoft'S subsequent acts. *87 F. Supp. 2d at 39*. Findings that simply provide "context" do not support, and are not necessary to, the Court of Appeals' decision. Not only was Microsoft'S June 1995 proposal to Netscape not among the acts found to be anticompetitive, the Court of Appeals did not even mention the proposal in its opinion or rely upon Findings of Fact 79-89 either as "context" or as an aid to help understand the likely effect of the to the Court of Appeals' specific liability findings, Findings of Fact 79-89 do not support **[*117]** any of the legal conclusions adopted by this Court.

Findings of Fact 90-92: The district court found that Microsoft withheld certain technical information (the so-called Remote Network Access API and a scripting tool) from Netscape in the summer of 1995. *84 F. Supp. 2d at 33-34*. These findings are unrelated to any of acts held to be anticompetitive by the Court of Appeals, which never mentioned Microsoft'S supposed withholding of technical information anywhere in its opinion. In fact, the district court that rendered Findings of Fact 90-92 has now expressly cited them as examples of factual findings that were "unconnected to" any of the liability rulings at either the trial or appellate levels:

> For example, Plaintiffs direct the Court to *Findings of Fact* 90-91, wherein Judge Jackson found that Microsoft knowingly withheld "critical technical information" from Netscape, hindering Navigator'S ability to interoperate with Windows 95. *Id.* ¶ 90. Judge Jackson also found that Microsoft withheld "a scripting tool that Netscape needed to make its browser compatible with certain dial-up ISPs." *Findings of Fact* ¶ 92 Judge Jackson did not ascribe any liability for the above described acts.

224 F. Supp. 2d at 143. Because the court that rendered **[*118]** these findings did not "ascribe any liability" for them and they were unrelated to the D.C. Circuit's liability determinations, Findings of Fact 90-92 do not support any of the legal conclusions adopted by this Court. To tell the jury that they are bound by these facts would be plain, reversible error, as it would suggest that the courts have already determined that the described conduct was unlawful when, in fact, this has never occurred.

Findings of Fact 93-132: These paragraphs contain the district court'S findings relating to Microsoft'S interactions with (i) Intel regarding NSP software, (ii) Apple regarding QuickTime, (iii) RealNetworks regarding streaming media software, and (iv) IBM regarding SmartSuite. *84 F. Supp. 2d at 34-43*. These findings cannot have been necessary to any of the market power or entry barrier conclusions, as there is no reference to NSP, QuickTime, RealNetworks or SmartSuite anywhere in the Court of Appeals' opinion. Nor were these findings necessary to or supportive of acts found to be anticompetitive. either the district court's or the Court of Appeals' determination that Microsoft engaged in anticompetitive conduct in violation of *Section 2*. In its conclusions of law, the district court **[*119]** stated only that Microsoft'S interactions with Intel, Apple, RealNetworks and IBM were analogous to Microsoft'S June 1995 interactions with Netscape, which, in turn, provided no more than "context" for Microsoft'S subsequent acts. *87 F. Supp. 2d at 39* [7] Verifying the ancillary role of these findings, the Court of Appeals did not hold Microsoft liable for any of the conduct described in them. *253 F.3d at 58-78*. Applying collateral estoppel to these findings would thus be highly unfair and wrong as a matter of law [8]

Findings of Fact 136-142: These findings discuss various efforts by Microsoft to increase the usage share of Internet Explorer. Judge Jackson grouped these findings under the heading "Giving Internet Explorer Away and Rewarding Firms that Helped Build Its Usage Share." *84 F. Supp. 2d at 44-46*. The consumer and competitor plaintiffs did not seek preclusion for these findings in the MDL proceedings in Baltimore. These findings cannot be given preclusive effect here because they describe conduct that was found to be *lawful* by the Court of Appeals in the Government Case. The district court relied on Findings of Fact 136-142 as support for its "course of conduct" liability determination, *87 F. Supp. 2d at 44*, which the Court of Appeals reversed, *253 F.3d at 78*. In fact, the Court of Appeals expressly held that providing Internet Explorer "free of charge" and bestowing "blandishments" on firms that distribute and promote it were *not* anticompetitive. *253 F.3d at 68, 75*. No **[*121]** estoppel against Microsoft can be applied for acts found lawful

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[7] In her November 1, 2002 decision, Judge Kollar-Kotelly specifically cited one of those findings—Finding of Fact 129—as an example of a factual finding for which Judge Jackson ascribed no liability, ***224 F. Supp. 2d at 143***, and further stated that Findings of Fact 115-132 "did not provide a clear basis of liability," ***id. at 163 n.68***.

[8] Like other findings discussed above, Findings of Fact 93-132 describe specific conduct by Microsoft that has not "been weighed for competitive and anticompetitive effect." ***224 F. Supp. 2d at 138***. These findings are unrelated to the acts found to be anticompetitive and do not support the D.C. Circuit's market definition and monopoly power determinations. Nor did the appellate court rely on those findings as evidence of intent to help understand **[*120]** the likely effects of Microsoft's conduct. Rather, Findings of Fact 93-132 describe in highly pejorative terms conduct that has not been held to be anticompetitive. The attraction to plaintiffs of having preclusion on these findings is obvious, but so, too, is the prejudice to Microsoft lawful.

Findings of Fact 149-155: These findings generally discuss the status of Web browsers as "separate products." *84 F. Supp. 2d at 48-49*. These findings supported only the *Section 1* tying violation. *See 87 F. Supp. 2d at 49*. The government at trial argued that whether operating systems and Web browsers are separate products was not relevant to the *Section 2* monopoly maintenance claim; accordingly, the district court relied upon Findings of Fact 149-155 *solely* in connection with the *Section 1* tying claim. *See id. at 48-50*. The Court of Appeals vacated the tying violation, *253 F.3d at 84*, and the government subsequently abandoned the tying claim by not pursuing it on remand. "If the matter is dropped after remand without proceeding to a new final judgment, there is no preclusion at all." Wright et al., Federal Practice and Procedure § 4432, at 67 [9]

The D.C. Circuit similarly mentioned Findings of Fact 149-155 *only* in the context of the government'S unsuccessful tying claim and in reversing the district court'S attempted monopolization ruling for failure to define a relevant market limited to Web browsers. *See 253 F.3d at 81-82, 88* (citing FF Ifij 150-151,153). In fact, the district court on remand expressly rejected a proposed remedy that was based on Finding of Fact 155 because that finding was unconnected to any liability determination upheld by the Court of Appeals. *See 224 F. Supp. 2d at 258-59*. These findings thus support only the district court'S vacated and reversed liability determinations, and they have no bearing on the only claim on which the government prevailed on appeal.

Findings of Fact 199-201: These findings describe the "market" for Web browsing functionality. *84 F. Supp. 2d at 58*. The consumer and competitor plaintiffs did not seek preclusion for these findings in the MDL proceedings. No court has relied on these findings for any purpose. They have no connection to any of the legal conclusions adopted by this Court, and thus they cannot have preclusive effect.

Findings of Fact 224-227: These findings **[*123]** describe a provision in Microsoft's licensing agreements with OEMs that prevented OEMs from installing an alternate user interface or "shell" that obscures the Windows desktop. *84 F. Supp. 2d at 65-66*. The consumer and competitor plaintiffs did not seek preclusion for these findings in the MDL proceedings. These findings cannot be given preclusive effect here because they describe conduct that the D.C. Circuit determined was *lawful.* Microsoft asserted that "the prohibition on OEMs automatically launching a substitute user interface upon completion of the boot process" was necessary to protect its copyright. *253 F.3d at 63*. The Court of Appeals agreed, holding that "a shell that automatically prevents the Windows desktop from ever being seen by the user is a drastic alteration of Microsoft's copyrighted work." *Id.* This specific licensing provision is therefore unrelated to any conduct identified by the D.C. Circuit as being unlawful, and the findings describing this provision cannot be subject to estoppel.

Findings of Fact 230-238: The district court found that Microsoft pressured certain OEMs to promote Internet Explorer and not to pre-install Navigator. *84 F. Supp. 2d at 66-68*. Although the district court held these findings established anticompetitive **[*124]** conduct in violation of *Section 2*, *87 F. Supp. 2d at 39* (citing FF 230-38), the Court of Appeals did not [10] Because Findings of Fact 230-238 are unconnected to any of acts held to be anticompetitive by the appellate court, they do not support the D.C. Circuit's decision. In fact, it would be inconsistent with that decision to suggest that Microsoft violated *Section 2* by rewarding OEMs to distribute and promote Internet Explorer, given the appellate court'S conclusion that Microsoft did not violate the Sherman Act by rewarding IAPs to do the same things. *Compare, e.g., 84 F. Supp. 2d at 67 (FF 231) with 253 F.3d at 68*. It would also be inconsistent with the Court of Appeals' insistence that an anticompetitive effect be shown for this Court to now instruct that unsuccessful attempts to pressure OEMs to stop pre-installing Navigator violated *Section 2*. *See 224 F. Supp. 2d at 138*.

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[9] At the October 10, 2002, hearing, the Court suggested that preclusive effect may apply to the findings related to the tying claim. *See* 10/10/02 Tr. at 7:11-18. This would be error and should be reconsidered. It is blackletter law that vacated liability determinations cannot give rise to preclusion. *See* ***224 F. Supp. 2d at 258*** ("Because the claim was not pursued on remand, **[*122]** there exists no finding that Microsoft illegally 'tied' any product to Windows.").

[10] Although Judge Kollar-Kotelly on remand rejected Microsoft's contention that the Court of Appeals implicitly reversed this conclusion in reversing the district court's "course of conduct" liability determination, ***224 F Supp. 2d at 99***, she did not hold that Findings of Fact 230-238 supported the Court of Appeals' decision.

Findings of Fact 241: This finding summarizes the district court's previous **[*125]** findings regarding Microsoft's conduct toward OEMs. *See* *84 F. Supp. 2d at 69*. The consumer and competitor plaintiffs did not seek preclusion for this finding in the MDL proceedings. It is redundant of previous, more specific findings describing Microsoft's conduct, and is therefore not necessary to any of the D.C. Circuit's legal conclusions adopted by this Court. In addition, reading this finding to the jury would be unduly prejudicial as it refers to conduct, such as exchanging valuable consideration for promotion of Microsoft's browser and unrealized threats, that was never found to be anticompetitive. *See* *253 F.3d at 78* (holding lawful "expenditures in promoting [Microsoft's] browser").

Findings of Fact 246-247: These findings describe Microsoft efforts to encourage IAPs to use Internet Explorer by offering "reductions in the referral fees" and "cash bounties." *84 F. Supp. 2d at 70-71*. The consumer and competitor plaintiffs did not seek preclusion for these findings in the MDL proceedings. These findings do not refer to contracts with IAPs to offer Internet Explorer exclusively, making them extraneous to the liability determinations affirmed by the Court of Appeals. In addition, both findings refer to conduct amounting to "expenditures **[*126]** in promoting [Microsoft's] browser," which the D.C. Circuit held was lawful. *253 F.3d at 78*; *see also 224 F. Supp. 2d at 145-46* ("There are no liability findings in this case which condemn Microsoft solely for the use of valuable technical information as consideration in contracting with third parties; only where such agreements required the use of Microsoft technology to the exclusion of third-party technology did the appellate court find antitrust violations."). No court relied on either of these findings to support a liability determination, and thus they are not necessary to any of the legal conclusions adopted by this Court.

Findings of Fact 248-252: These findings discuss Microsoft's development and free distribution of the Internet Explorer Access Kits ("IEAK"). *84 F. Supp. 2d at 71-72*. The consumer and competitor plaintiffs did not seek preclusion for these findings in the MDL proceedings. The Court of Appeals expressly determined that there was nothing anticompetitive about Microsoft's free distribution of the IEAK. *See* *253 F.3d at 68* ("[W]e therefore have no warrant to condemn Microsoft for offering either IE or the IEAK free of charge or even at a negative price."). These findings are also unrelated to Microsoft's contracts with IAPs to offer Internet **[*127]** Explorer exclusively. The legal conclusions identified by this Court made no mention of the IEAK, and the Court of Appeals ascribed no liability to Microsoft's free distribution of the IEAK. It is inexplicable why plaintiffs continue to seek preclusion regarding findings that describe lawful conduct.

Findings of Fact 259-260: These findings involve Microsoft's expenditures to promote Internet Explorer through the Referral Server agreements. *See* *84 F. Supp. 2d at 73-74*. The consumer and competitor plaintiffs did not seek preclusion for these findings in the MDL proceedings. These findings have nothing to do with IAPs' obligation to offer Internet Explorer exclusively under the contracts condemned by the Court of Appeals. Rather, they describe Microsoft's expenditures to encourage IAPs to promote Internet Explorer, conduct that the D.C. Circuit found to be *lawful.* *253 F.3d at 78*; *see also 224 F. Supp. 2d at 145* ("Importantly, however, the appellate court expressly noted that the mere fact that Microsoft exchanged 'costly technical support and other blandishments' in conjunction with the [First Wave] agreements was not a basis for the imposition of liability."). These findings were therefore unnecessary to the liability determination affirmed **[*128]** by the Court of Appeals.

Finding of Fact 295: This finding describes a Promotional Services Agreement in which Microsoft made incentive payments to AOL in exchange for promotion of software that included Internet Explorer. *See* *84 F. Supp. 2d at 82-83*. The consumer and competitor plaintiffs did not seek preclusion for this finding in the MDL proceedings. As with Findings of Fact 259-60, these findings are unrelated to IAPs' agreements to offer Internet Explorer exclusively-the provision found to be unlawful. *See 224 F. Supp. 2d at 164 n.70* (explaining that it is only "the conditioning of the receipt of consideration upon some degree of exclusivity which raises antitrust concerns"). Also like those findings, Finding of Fact 295 refers to Microsoft expenditures in promoting its browser, which were determined to be *lawful.* *253 F.3d at 78*. This finding is thus unnecessary to support any of the legal conclusions adopted by this Court.

Finding of Fact 379: The district court found that various acts by Microsoft "inflicted considerable harm on Netscape'S business." *84 F. Supp. 2d at 103*. That court stated that "Netscape was forced to follow suit" after "Microsoft started licensing Internet Explorer at no charge, not only to OEMs and consumers, but also to IAPs, IS vs. ICPs, **[*129]** and even Apple." *Id.* Finding of Fact 379 does not support any part of the Court of Appeals' decision. In fact, the D.C. Circuit held that the focus of this finding—licensing Internet Explorer at no charge—did not violate *Section 2*. As that court noted, "plaintiffs argued that by pricing below cost on IE (indeed, even paying people to take it), Microsoft was able simultaneously to preserve its stream of monopoly profits on Windows, thereby more than recouping its investment in below-cost pricing on IE." *253 F.3d at 68*. The D.C. Circuit concluded, however, that Microsoft did not violate the Sherman Act by offering Internet Explorer "free of charge or even at a negative price," explaining that "the antitrust laws do not condemn even a monopolist for offering its product at an attractive price." *Id.* The appellate court also pointed out that "[t]he District Court did not assign liability for predatory pricing." *Id.*

Findings of Fact 380-385: Based on a record that closed on June 24, 1999, Findings of Fact 380-385 attempted to predict the future prospects of Netscape Navigator—in particular, whether AOL in future years would take steps to increase Navigator'S usage share and develop Navigator as a platform for **[*130]** applications. *84 F. Supp. 2d at 104-05*. Because the Court of Appeals did not rely in any way upon the predictions set forth in these findings, they do not support its decision. Plaintiffs here should be required to establish Navigator'S usage share and prospects as a platform based on evidence of what actually has happened over the last three and one-half years and what is likely to happen hereafter, not on dated predictions from 1999 that have been overtaken by events.

Findings of Fact 389-393: These findings relate to Microsoft'S development of its own Java Virtual Machine ("JVM") that was incompatible with Sun'S JVM. *84 F. Supp. 2d at 105-06*. The Court of Appeals expressly "reverse[d] the District Court'S imposition of liability for Microsoft'S development and promotion of its JVM." *253 F.3d at 75*. In addition, these findings cannot be said to be "necessary" to the D.C. Circuit's judgment on the ground that they provide necessary background to other Java-related acts found to be anticompetitive (the First Wave Agreements, deception of Java developers, or the threat to Intel). *See* *id. at 75-78*. The relevant background to those other acts is set forth in Findings of Fact 386-388, *84 F. Supp. 2d at 105*, which Microsoft does not challenge under this Court'S standard (subject to Microsoft's ongoing **[*131]** objections to collateral estoppel in general). There is thus no justification for according preclusive effect to Findings of Fact 389-393, which criticize Microsoft for engaging in conduct found to be lawful by the D.C. Circuit.

Findings of Fact 397-398: The district court found that Microsoft bundled a version of its JVM with every copy of Internet Explorer, guaranteeing the presence of Microsoft'S JVM on every PC. *See* *84 F. Supp. 2d at 107-08*. The district court also found that Microsoft adversely affected Netscape'S ability to distribute a Sun-compliant JVM with every copy of Navigator. *Id.* Neither finding supported the Court of Appeals' liability decision. The D.C. Circuit did not assign liability for Microsoft'S inclusion of its JVM with every copy of Internet Explorer. In addition, the Microsoft conduct that affected Netscape'S ability to "afford to do the engineering work necessary to continue bundling up-to-date JVMs with Navigator," *id. at 108 (FF 397)*, was primarily the licensing of Internet Explorer at no charge, which the appellate court held did not violate the Sherman Act. *253 F.3d at 68* [11]

Findings of Fact 402-403: Finding of Fact 402 refers to an agreement with an unidentified ISV, and Finding of Fact 403 refers to a July 18, 1997 agreement with RealNetworks. *See* *84 F. Supp. 2d at 109*. These findings do not support the Court of Appeals' decision. The district court expressly stated that the agreements discussed in these findings were "[i]n addition to the First Wave agreements." *84 F. Supp. 2d at 109*. The First Wave agreements, however, were the only Java-related agreements found to be anticompetitive by the D.C. Circuit. *See* *253 F.3d at 75-76* (citing FF 1401). These other agreements were never even discussed, let alone found unlawful, by the Court **[*133]** of Appeals.

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[11] The D.C. Circuit cited Finding of Fact 397 only in connection with its *reversal* of the imposition of liability for Microsoft'S development and promotion **[*132]** of an incompatible JVM. *253 F.3d at 75*. Although Finding of Fact 398 refers to Microsoft'S Java developer tools, the Court of Appeals held that the development of incompatible developer tools did not violate the antitrust laws. *See* *253 F.3d at 76*; *see also* ***224 F. Supp. 2d at 144-45*** ("[T]he imposition of liability for Microsoft'S Java tools concerned not the tools' incompatibility with cross-platform Java, but Microsoft'S deceptive conduct."). The appellate court went on to hold that Microsoft'S "deception" of Java developers regarding those tools did violate the Sherman Act, *253 F.3d at 76*, but that ruling was supported by Finding of Fact 394, *see* *84 F. Supp. 2d at 106-07*, not by Finding of Fact 398.

Findings of Fact 408-412: These findings purport to summarize the effect on consumers of all of Microsoft's various efforts to protect the applications barrier to entry. *See* *84 F. Supp. 2d at 110-12*. However, many of Microsoft's actions that led to these supposed consumer effects were *found lawful* by the D.C. Circuit. The Court of Appeals reversed on the *§ 1* tying claim, the *§ 2* attempted monopolization claim, the *§ 2* "course of conduct" allegations, and a number of the district court's specific monopoly maintenance determinations-all of which contributed significantly to the effects discussed in these Findings of Fact. Because the findings do not distinguish between conduct found unlawful and conduct ultimately found to be lawful, it would be plain error and highly prejudicial to give preclusive effect to any part of these unsorted findings.

Moreover, none of these findings was necessary to any part of the Court of Appeals' judgment. In its conclusions of law, the district court cited only two of these findings, Findings of Fact 411 and 412, and did so *only* in the section of its conclusions devoted to the so-called "course of conduct" violation that was subsequently reversed by the D.C. Circuit. **[*134]** *Compare* *87 F. Supp. 2d at 44* *with* *253 F.3d at 78*. The only one of these findings cited by the Court of Appeals was Finding of Fact 411, which the appellate court cited not in imposing liability, but in pointing out that "the District Court expressly did *not* adopt the position that Microsoft would have lost its position in the OS [operating system] market but for its anticompetitive behavior." *253 F.3d at 107* (emphasis added); *see also* *id. at 78* [12]

This Court already has determined that "there still remains in this case to be proved the actual injury [and] causation which are necessary elements in the private damages action." 10/10/02 Tr. at 5:18-20. These were precisely the concerns raised a year ago by Judge Poliak in rejecting collateral estoppel for these very same findings. *See, e.g.,* 12/17/01 Tr. at **[*135]** 7:22-8:2, 21:3-28, 23:16-23, 24:17-20, 25:8-18, *attached as* Appendix B to this memorandum. Plaintiffs have offered no reason for seeking to reverse this prior rejection of collateral estoppel for Findings of Fact 408-412.

III. CONCLUSION

For these reasons, Microsoft respectfully requests (subject to its ongoing objections to collateral estoppel, and without waiving any of its arguments on appeal) that the Court conclude that the Findings of Fact identified in attached Appendix A were necessary to the nine specific legal conclusions this Court has ruled are entitled to preclusive effect under the doctrine of offensive nonmutual collateral estoppel. The Court should reject plaintiffs' arguments with respect to all other Findings of Fact.

DATED: December 16, 2002

Appendix A

Below is an overview of the Findings of Fact from the Government Case that appear to be necessary to each of the nine specific conclusions of law adopted by this Court during the October 10, 2002 collateral estoppel hearing. *See* 10/10/02 Tr. at 8:15-10:19. The Findings of Fact that do not appear in this summary were not necessary to any of these legal conclusions, and are not entitled to collateral estoppel under any standard. **[*136]** [1]

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[12] These consumer harm findings were also unnecessary to the Court of Appeals' liability determination given the relaxed causal standard applied by the D.C. Circuit, and collateral estoppel on these issues would be inappropriate given the sharp differences in the legal standards and proof burdens for establishing injury and causation in the two cases. *See* Microsoft's Mem. in Opp. To Plaintiffs' Proposed Jury Instructions 18-20 (Aug. 26, 2002).

[1] As discussed in the accompanying memorandum, Microsoft's position concerning the necessity of these findings to the Court's legal conclusions is subject to all of Microsoft's on-going objections and appellate rights to collateral estoppel identified in its prior written submissions and oral arguments. The Court has emphasized that Microsoft's participation in this process will not waive or otherwise prejudice any of its objections. *See, e.g.,* 10/16/02 Tr. at 55:5-6.

A. “Microsoft had monopoly power in the relevant market.”

The following findings of fact are necessary to this conclusion: 1-67.

B. “The relevant market was Intel-compatible PC operating systems....”

The following findings of fact are necessary to this conclusion: 1-67.

C. “Microsoft had a predominant share of the relevant market, and the applications entry barrier prevented competitors from seriously threatening Microsoft's market position.”

The following findings of fact are necessary to this conclusion: 1-67.

D “The following license restrictions imposed by Microsoft on OEMs … constituted unlawful combinations in restraint of trade:

1. The prohibition on removing the icon for Internet Explorer from the desktop and Start menu; [*137]

2. The prohibition on modification of the initial boot sequence;

3. The prohibition on adding icons or folders differing in size or shape from those supplied by Microsoft; and

4. The prohibition on using the Active Desktop feature to promote third party brands.”

The following findings of fact are necessary to this conclusion: 68-77, 133-135, 144-146, 148, 156-159,165,202-210, 212-223, 228-229, 239-240, and 357-378.

E “Two aspects of Microsoft's technological integration of Internet Explorer with Windows, specifically, its decision to exclude Internet Explorer from the Windows Add/Remove programs utility and its commingling of browser Internet Explorer and operating systems Windows code, constituted exclusionary conduct in furtherance of Microsoft's unlawful combinations in restraint of trade as set forth herein.”

The following findings of fact are necessary to this conclusion: 68-77, 133-135, 160-170, 173-198, and 357-378.

F “Microsoft's exclusive contracts with internet access providers requiring them to offer Internet Explorer either as the default or as the only browser… were unlawful combinations in restraint of trade.”

The following findings of fact are necessary to this conclusion: 68-77, **[*138]** 133-135, 143-148, 242-245, 253-258, 261-294, 296-310, and 357-378.

G “Microsoft's agreements to give preferential support to independent software vendors in exchange for their agreement to use Internet Explorer as the default browser for any hypertext-based user interface, and to implement their help systems through Microsoft's HTML,… constituted unlawful combinations in restraint of trade.”

The following findings of fact are necessary to this conclusion: 68-77, 133-135, 337-340, and 357-378.

H. “Microsoft'S exclusive agreement with Apple Computer, which required Apple to bundle, IE, with the Mac OS and make IE the default browser on computers running the Mac OS,… constituted an unlawful combination in restraint of trade.”

The following findings of fact are necessary to this conclusion: 68-77, 133-135, and 341-375.

I. “The provisions in Microsoft'S [First Wave] agreements with ISV's that required them to promote Microsoft's JVM exclusively in order to obtain technical support from Microsoft were anti-competitive, and constituted unlawful combinations in restraint of trade. Microsoft's deception of ISV's, who were led to

believe that Microsoft's Java developer tools would produce cross-platform [*139] applications, when in fact, they would produce applications that would only run on the Windows OS, as well as Microsoft's threats of retaliation against Intel if Intel persisted in its efforts to develop a fast, crossplatform JVM, were undertaken by Microsoft in furtherance of this unlawful conduct."

The following findings of fact are necessary to this conclusion: 68-77, 133-135, 337-340, 386-388, 394-396, 399-401, and 404-407.

APPENDIX B

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MONDAY, December 17, 2001

MOTION HAS BEEN TENDERED IT WOULD NOT SERVE ANY PRACTICAL PURPOSE AND REALLY DO NOTHING BUT CREATE CONFUSION IF THE COURT WERE TO GRANT THE PLAINTIFFS' MOTION IN ITS PRESENT FORM.

SOME PARTS OF THE FINDINGS THAT WERE MADE BY THE DISTRICT COURT IN THE GOVERNMENT PROCEEDINGS WERE OF COURSE AFFIRMED, AND THAT RELATES TO SOME OF ITS CONCLUSIONS, AND OTHERS WERE REJECTED BY THE COURT OF APPEAL, AND THE PRESENT MOTION REALLY DOES NOT ATTEMPT TO IDENTIFY WHICH IS WHICH.

BEYOND THAT, EVEN IF WE WERE TO IDENTIFY SPECIFIC FINDINGS, IT IS OF COURSE TRUE, AS MICROSOFT ARGUES, THAT FINDINGS AND THE CONCLUSIONS IN THE GOVERNMENT ACTION DO NOT ENCOMPASS ALL OF THE ISSUES THAT HAVE TO BE ADJUDICATED OR THAT **[*140]** ARE RAISED BY THE CLAIMS OF THIS CASE. TO MENTION JUST TWO, FIRST OF ALL, THE FINDINGS AND CONCLUSIONS IN THE GOVERNMENT CASE ENCOMPASS ONLY CERTAIN YEARS. I BELIEVE THE PERIOD WAS FROM MID-1995 THROUGH 1998; WHEREAS, THE PLAINTIFFS IN THIS CASE ARE ALLEGING A BROADER TIME PERIOD, AND I THINK THAT REQUIRES CARE AS TO HOW THAT'S HANDLED. WE CAN'T IGNORE THE DIFFERENCES IN TIME PERIODS.

SECONDLY, WHILE JUDGE JACKSON FOUND THAT THE UNLAWFUL PRACTICES THAT HE CONCLUDED MICROSOFT HAD ENGAGED IN HAD CAUSED HARM TO CONSUMERS, IT IS CERTAINLY TRUE THAT HE DID NOT FIND OR ATTEMPT TO FIND THAT ANY PARTICULAR HARM THAT HAS BEEN ALLEGED IN THIS CASE WAS CAUSED BY THE DEFENDANT'S VIOLATIONS. AND EVEN ASSUMING THAT THE DEFENDANT IS ESTOPPED TO DENY THE ILLEGALITY OF CERTAIN PRACTICES, THERE OBVIOUSLY REMAINS FOR DETERMINATION SIGNIFICANT ISSUES OF CAUSATION AS WELL AS DAMAGES THAT HAVE TO BE LITIGATED HERE. I DON'T THINK THAT IN VIEW OF THOSE ISSUES WE CAN GET VERY FAR BY BROAD, SWEEPING STATEMENTS OF THE SORT THAT THE PLAINTIFFS' MOTION ASKS TO HAVE ADJUDICATED.

SECONDLY, WHILE JUDGE JACKSON FOUND THAT THE UNLAWFUL PRACTICES THAT HE CONCLUDED MICROSOFT HAD ENGAGED IN HAD CAUSED HARM TO CONSUMERS, **[*141]** IT IS CERTAINLY TRUE THAT HE DID NOT FIND OR ATTEMPT TO FIND THAT ANY PARTICULAR HARM THAT HAS BEEN ALLEGED IN THIS CASE WAS CAUSED BY THE DEFENDANT'S VIOLATIONS. AND EVEN ASSUMING THAT THE DEFENDANT IS ESTOPPED TO DENY THE ILLEGALITY OF CERTAIN PRACTICES, THERE OBVIOUSLY REMAINS FOR DETERMINATION SIGNIFICANT ISSUES OF CAUSATION AS WELL AS DAMAGES THAT HAVE TO BE LITIGATED HERE. I DON'T THINK THAT IN VIEW OF THOSE ISSUES WE CAN GET VERY FAR BY BROAD, SWEEPING STATEMENTS OF THE SORT THAT THE PLAINTIFFS' MOTION ASKS TO HAVE ADJUDICATED.

IT SEEMS TO ME THAT THE PROPER APPROACH, AND THERE MAY BE MORE THAN ONE, BUT THE ONE THAT SEEMS TO ME THE MOST PRACTICABLE AS WELL AS PROPER WOULD BE TO INCLUDE IN THE INSTRUCTIONS, WHICH THE COURT IN THIS CASE WILL GIVE TO THE JURY, SPECIFIC FINDINGS OR CONCLUSIONS THAT THE JURY SHOULD BE INSTRUCTED THAT THEY MUST ACCEPT AS TRUE, SO THAT WE WILL STILL BE LEFT WITH THE TASK OF FRAMING A COMPREHENSIVE SET OF JURY INSTRUCTIONS THAT ARE GOING TO ARTICULATE THE ISSUES THAT THE JURY IS GOING TO HAVE TO DECIDE AND PROVIDE THE JURY WITH THE NECESSARY STANDARDS AND GUIDANCE.

AS PART OF THOSE INSTRUCTIONS, IT SEEMS TO ME THE COURT SHOULD BE TELLING THE JURY WHICH **[*142]** FACTS THEY HAVE TO ACCEPT AS BEING TRUE, AND THIS APPROACH IS GOING TO REQUIRE A PRECISE ARTICULATION OF EXACTLY WHAT IT IS THAT THE JURY HAS TO TAKE AS BEING TRUE. I THINK IN THE FIRST INSTANCE THE BURDEN PRESUMABLY IS GOING TO BE ON THE PLAINTIFFS TO ARTICULATE PRECISELY WHAT THOSE MATTERS ARE, AND THEN THIS WILL GIVE THE DEFENDANT AN OPPORTUNITY TO ADDRESS THOSE PRECISE ISSUES, AND THE COURT WILL HAVE TO MAKE SOME DECISIONS, ASSUMING THAT THERE'S NOT COMPLETE AGREEMENT, AS I WOULD NOT EXPECT THERE TO BE.

IN ANY EVENT, IT WILL GET ALL OF US FOCUSED ON THE SPECIFICS AS TO WHETHER OR NOT THIS WAS A FACT THAT WAS FOUND AND ULTIMATELY ADJUDICATED FAVORABLY TO THE GOVERNMENT IN THE GOVERNMENT PROCEEDINGS OR NOT. I WOULD THINK THAT THE TASK OF PINNING DOWN THOSE PRECISE MATTERS IS SOMETHING THAT WE'RE GOING TO HAVE TO TAKE UP IN THE COURSE OF PRETRIAL PROCEEDINGS.

CONSEQUENCES OF ITS OWN UNDESIRABLE CONDUCT.”

THIS IS ON THE QUESTION OF CAUSATION, YOUR HONOR.

THE COURT: BUT MR. CREW, I KNOW WHAT THEY SAID THERE, BUT

THOSE WERE VERY BROAD AND SWEEPING STATEMENTS, AND IT WASN'T NECESSARY FOR PURPOSES OF THOSE PROCEEDINGS TO MAKE SPECIFIC DETERMINATIONS AS TO AMOUNTS OF HARM FOR ONE THING, AND **[*143]** THE CHAIN OF CAUSATION THAT WILL APPLY TO PARTICULAR UNLAWFUL PRACTICES THAT HAVE TO BE ADJUDICATED IN THESE PROCEEDINGS BEFORE ANY AWARDS CAN BE MADE.

I MUST SAY, I DO HAVE A GENERAL CONCERN ABOUT THE APPROPRIATENESS OF JUST THROWING THAT BROAD FINDING INTO THE MIX, BECAUSE IT DOESN'T REALLY ASSIST IN MAKING THE MUCH MORE SPECIFIC DETERMINATION THAT THE JURY IS GOING TO HAVE TO MAKE AS PART OF THESE PROCEEDINGS. IT DOES SEEM TO ME' THAT IT DOES ASSIST AND WILL AVOID ALL KINDS OF RE-LITIGATION TO ACCEPT FACTS WHICH GO TO THE LIABILITY ISSUES, TO THE UNLAWFULNESS OF PARTICULAR CONDUCT, AND TO THE EXTENT THAT WE CAN AVOID GOING THROUGH THAT AGAIN AS PART OF THESE PROCEEDINGS, -THAT SEEMS TO ME THAT THAT IS VERY MUCH CONSISTENT WITH THE OBJECTIVES OF COLLATERAL ESTOPPEL AND WILL IN FACT EXPEDITE THESE' PROCEEDINGS.

NOW, WHEN WE GET TO THE QUESTION OF CAUSATION AND DAMAGES, THESE BROAD, SWEEPING STATEMENTS REALLY AREN'T GOING TO HELP A JURY VERY MUCH, AND THAT IS WHERE THE PLAINTIFF'S EVIDENCE IS GOING TO HAVE TO FOCUS, AND THAT'S WHAT THE PLAINTIFFS I'M SURE ANTICIPATE THEY'RE GOING TO HAVE TO PROVE. I'M NOT REALLY SURE WHAT THROWING IN THOSE STATEMENTS FROM THE FEDERAL OPINIONS IS GOING **[*144]** TO ADD OR IN WHAT RESPECT IT'S GOING TO SIMPLIFY THE JURY'S TASK.

MR. CREW: WELL, MAY I RESPOND TO THAT ONE? IT WILL ADD A LOT, AND IT IS VERY IMPORTANT, AND I'LL TELL YOU WHY.

FIRST OF ALL, I'M NOT TALKING ABOUT THE AMOUNT OF DAMAGES.

WE OBVIOUSLY HAVE TO CALCULATE DAMAGES, AND WE ARE DOING THAT NOW. WE ARE VIRTUALLY COMPLETE ON THAT. I'M NOT TALKING ABOUT THE DAMAGES.

THE COURT: BUT CAUSATION IS A PART OF THIS — CAUSATION AND DAMAGES. YOU CAN'T JUST TAKE ONE WITHOUT THE OTHER.

MR. CREW: WELL, THERE'S THREE: THERE'S A VIOLATION, THERE'S CAUSATION, THERE'S DAMAGES, A, B, C, THOSE ARE THE THREE THINGS. I'M NOT TALKING ABOUT DAMAGES, THE CALCULATION OF HOW MUCH HARM THEY CAUSED TO THE CLASS OF CONSUMERS I'M TALKING ABOUT, AND I'M NOT TALKING ABOUT LIABILITY NOW, BUT I AM TALKING ABOUT CAUSATION, WHICH IS IN PART A PART OF LIABILITY IN TERMS OF HARM TO COMPETITION. YOU DON'T HAVE A VIOLATION UNLESS YOU SHOW HARM TO COMPETITION AND CONSUMERS.

THE COURT: YOU HAVE TO SHOW THAT THERE WAS SOME HARM THAT WAS CAUSED, THAT'S RIGHT. YOU HAVE TO SHOW THE FACT OF DAMAGE, AND THAT OBVIOUSLY EMBRACES THE ISSUE OF CAUSATION.

MR. CREW: RIGHT.

THE COURT: BUT BY THE SAME TOKEN, WHEN YOU GET AROUND TO DETERMINING **[*145]** DAMAGES, IT'S NOT DAMAGES IN THE ABSTRACT, IT IS DAMAGES THAT WERE CAUSED BY THE PARTICULAR PRACTICES FOUND TO BE UNLAWFUL.

MR. CREW: RIGHT.

THE COURT: AND I DON'T THINK THERE'S ANY WAY THAT YOU CAN REMOVE THE ISSUE OF CAUSATION FROM WHAT THE JURY WILL HAVE TO CONSIDER IN ORDER TO DETERMINE RECOVERABLE DAMAGES.

MR. CREW: WELL, YOUR HONOR, I WOULD ARGUE THAT PART OF THE EVIDENCE OF CAUSATION AND HARM TO COMPETITION AND CONSUMERS, NOT ALL, BECAUSE WE HAVE MORE TO DO IN TERMS OF QUANTIFYING IT, IS ESTABLISH BY THE TWO COURTS' DECISIONS BACK EAST ON THIS. IT'S VERY CLEAR, AND LET ME JUST SAY IT'S CLEAR THAT THEY DID BECAUSE THE COURT OF APPEALS SAID IT WAS A REQUIREMENT IN ORDER FOR THE GOVERNMENT TO PROVE A VIOLATION. THE COURT SAID, QUOTE, TO BE CONDEMNED AS EXCLUSIONARY A MONOPOLIST ACT MUST HAVE AN ANTI-COMPETITIVE EFFECT. THAT IS, IT MUST HARM THE COMPETITIVE PROCESS AND THEREBY HARM CONSUMERS, UNQUOTE.

THE COURT SAID THAT OVER AND OVER, SO IT WAS A REQUIREMENT, AND THE COURT HELD THAT THAT REQUIREMENT WAS MET. SO HARM TO COMPETITION AND CONSUMERS WAS FOUND, AND OF COURSE COUNSEL FOR MICROSOFT WANTS THE FINDING NOT TO GET IN, BECAUSE THEY KNOW THAT IT DOES SUPPORT WHAT WE HAVE TO SHOW. **[*146]**

THE COURT: BUT YOU SEE, THAT IS A POTENTIALLY PREJUDICIAL STATEMENT, IT SEEMS TO ME, AND I DON'T SEE WHAT IT'S GOING TO ACCOMPLISH, BECAUSE YOU DO. HAVE TO PROVE THAT PARTICULAR DAMAGES WERE CAUSED BY UNLAWFUL PRACTICES.

NOW, THE FACT THAT THE PRACTICES THAT THE COURT IN WASHINGTON HAS ALREADY ADJUDICATED TO HAVE BEEN UNLAWFUL CAUSED SOME DAMAGE DOESN'T TAKE ANYBODY VERY FAR, IT SEEMS TO ME, IN DETERMINING WHAT DAMAGES WERE CAUSED TO WHOM.

MR. CREW: YOUR HONOR, AT TRIAL MICROSOFT WILL CONTEND THAT THERE WAS NO VIOLATION, BECAUSE MICROSOFT DID NOT HARM COMPETITION AND DID NOT HARM CONSUMERS. IN FACT—

THE COURT: BUT THE COURT IS NOT GOING TO LET MICROSOFT MAKE THAT ARGUMENT. THE JURY IS GOING TO BE TOLD THAT IT HAS BEEN DETERMINED THAT CERTAIN PRACTICES WERE UNLAWFUL. THE JURY WILL BE TOLD THAT, AND THE JURY WILL ALSO BE TOLD THAT THE QUESTION WHICH THEY ARE

GOING TO HAVE TO DECIDE IS WHAT DAMAGES WERE CAUSED BY THE UNLAWFUL PRACTICES. IN BROAD OUTLINE ISN'T THAT THE WAY THIS CASE IS GOING TO BE PRESENTED?

MR. CREW: YES, EXCEPT, YOUR HONOR, THAT IT'S AN ESSENTIAL ELEMENT OF ILLEGALITY UNDER THE ANTITRUST LAWS THAT MICROSOFT'S CONDUCT CAUSED HARM TO COMPETITION AND CONSUMERS.

THE COURT: WELL, **[*147]** TO COMPETITION.

MR. CREW: PARDON?

THE COURT: TO COMPETITION. IT NEEDN'T NECESSARILY HAVE BEEN CONSUMERS. IF THERE WERE NO PASS-THROUGH, AND ALL OF THE HARM WERE INCURRED BY INTERMEDIARIES, THAT WOULD BE SUFFICIENT TO HAVE SUPPORTED THE SHERMAN ACT FINDINGS IN THE GOVERNMENT'S CASE.

MR. CREW: YOUR HONOR—

THE COURT: IT DIDN'T REALLY MATTER FOR PURPOSES OF THAT CASE PRECISELY WHO WAS DAMAGED, AS LONG AS THERE WAS SOME DAMAGE. THE FACT OF DAMAGE HAD TO BE ESTABLISHED, AND THAT HAS BEEN ESTABLISHED. THERE WAS SOME HARM TO SOMEBODY:

MR. CREW: YOUR HONOR, IF THE COURT MEANT BY THE WORD CONSUMERS, OEM'S AND INTERMEDIARIES AND NOT THE PUBLIC, THAT'S FINE, I'LL ACCEPT THAT, BUT WHATEVER THEY MEANT BY CONSUMERS, THE COURT FOUND THAT HARM WAS HARMED BY BOTH COMPETITION AND CONSUMER, AND THEY ARE LINKED INEXTRICABLY, YOUR HONOR, BECAUSE THE ONLY WAY YOU SHOW HARM TO COMPETITION IS THROUGH HARM TO CONSUMERS.

HERE IS THE WAY YOU SHOW HARM TO COMPETITION IS REDUCED OUTPUT, HIGHER PRICES, LESS INNOVATION, LESS CHOICE. THAT'S THE WAY YOU SHOW HARM TO COMPETITION. THAT'S THE WAY YOU SHOW HARM TO CONSUMERS.

THE COURT: WELL, LOOK, THE COURT IN THOSE PROCEEDINGS SAID WHAT IT SAID, BUT THE POINT IS IT SEEMS TO **[*148]** ME THAT THERE IS IN FACT A VERY PRACTICAL BENEFIT FROM BEING ABLE TO TELL-THE JURY THAT THE ISSUE OF LIABILITY HAS BEEN DETERMINED. THAT'S NOT A QUESTION WHICH THE JURY NEEDS TO CONSIDER. THE JURY IS NECESSARILY GOING TO HAVE TO DETERMINE WHAT DAMAGES ARE CAUSED TO CALIFORNIA CONSUMERS AS A RESULT OF THOSE VIOLATIONS, AND I'M NOT SURE REALLY WHAT THE BENEFIT IS OF TELLING THE JURY IT'S ALREADY BEEN DETERMINED THAT THERE WAS SOME HARM CAUSED TO SOMEBODY. THERE WAS SOME HARM CAUSED TO CONSUMERS, EVEN PUTTING IT IN THE LANGUAGE YOU'D LIKE TO PUT IT, THAT CONSUMERS WERE HARMED, BECAUSE THE JURY IS STILL GOING TO HAVE TO HEAR THE SAME EVIDENCE AND GO THROUGH THE SAME ANALYSIS TO DETERMINE WHAT THE HARM HAS BEEN, AND THE FACT THAT THERE WAS SOME HARM DOESN'T REALLY GET ANYBODY ANYWHERE, IT SEEMS TO ME.

MR. CREW: WELL, YOUR HONOR, LET ME SAY IT THIS WAY. IF MICROSOFT WOULD RECANT — I WOULDN'T SAY RECANT, IF THEY WOULD CONFIRM, RATHER, THEIR STATEMENT THAT I READ, WHICH WAS THAT PLAINTIFF — AND I'M QUOTING THEM — WAS NOT REQUIRED TO PROVE ACTUAL HARM TO COMPETITION OR CONSUMERS, UNQUOTE, IN ORDER TO SHOW A VIOLATION.

IF THEY WILL STAND BY THAT AND NOT RECANT ON THAT STATEMENT AT TRIAL, THEN **[*149]** WE'RE OKAY, BUT THEY WON'T, AND THEREFORE WE MUST COMPLY WITH THE LAW AND PROVE HARM TO COMPETITION AND CONSUMERS, AND THESE FINDINGS SUPPORT THAT AND AID US IN THAT EFFORT.

STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

I, RHONDA L. AQUILINA, OFFICIAL COURT REPORTER FOR THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO, DO HEREBY CERTIFY:

THAT I WAS PRESENT AT THE TIME OF THE ABOVE PROCEEDINGS;

THAT I TOOK DOWN IN MACHINE SHORTHAND NOTES ALL PROCEEDINGS HAD AND TESTIMONY GIVEN;

THAT I THEREAFTER TRANSCRIBED SAID SHORTHAND NOTES WITH THE AID OF A COMPUTER;

THAT THE ABOVE AND FOREGOING IS A FULL, TRUE, AND CORRECT TRANSCRIPTION OF SAID SHORTHAND NOTES, AND A FULL, TRUE AND CORRECT TRANSCRIPT OF ALL PROCEEDINGS HAD AND TESTIMONY TAKEN;

THAT I AM NOT A PARTY TO THE ACTION OR RELATED TO A PARTY OR COUNSEL;

THAT I HAVE NO FINANCIAL OR OTHER INTEREST IN THE OUTCOME, OF THE ACTION.

Attorneys and Law Firms

Richard M. Hagstrom and Michael E. Jacobs of Zelle, Hofmann, Voelbel, Mason & Gette, Minneapolis, Minn., and Daniel Hume of Kirby, Mclnemey & Squire, New York, N.Y., for plaintiffs.

Robert L. DeMay and David R. Crosby of Leonard, Street and Deinard, Minneapolis, Minn., **[*150]** David B. Tulchin and Kathrine M. Mortensen of Sullivan & Cromwell, New York, N.Y., for defendant.

Opinion

ORDER GRANTING IN PART AND DENYING IN PART

PETERSON, J.

PLAINTIFF'S MOTION FOR COLLATERAL ESTOPPEL

*1 The above-entitled matter came on for hearing before the Honorable Bruce A. Peterson on June 12, 2003. Richard M. Hagstrom, Esq. represented the Plaintiffs. David B. Tulchin, Esq. represented the Defendant.

Based on all the files, records, pleadings, submissions, and arguments, IT IS HEREBY ORDERED:

1. Plaintiffs' Motion for Application of Collateral Estoppel to the findings and conclusions from the government case against Microsoft is granted as to the specific findings and conclusions set forth in section 5 of the accompanying Memorandum.

2. Plaintiffs' motion is denied in all other respects.

3. The accompanying Memorandum is made part of this Order.

MEMORANDUM

Invoking the doctrine of collateral estoppel, Plaintiffs request that the court preclude Microsoft from challenging hundreds of factual findings and legal conclusions from the recent government lawsuit against Microsoft. Because the material findings about the market and Microsoft's anti-competitive conduct made by the District Court **[*151]** in that case clearly meet Minnesota's test for collateral estoppel, Plaintiffs' motion is granted as to the main points established in the government case. Nonetheless, the vast majority of the findings from the government case are not necessary and essential to the antitrust violation affirmed by the Court of Appeals. Equally important, imposing on the jury in this case hundreds of lengthy findings from another case would be overly confusing and burdensome. Accordingly, Plaintiffs' motion is denied as to all but the essential prior findings and conclusions.

FACTS AND PROCEDURAL HISTORY.

Plaintiffs seek damages on behalf of Minnesota consumers for Microsoft's alleged illegal monopolization of the markets for operating systems and applications software. By orders of March 30, 2001, and March 14, 2003, this court certified classes of operating systems consumers and applications consumers in Minnesota. Trial is scheduled for next spring.

Some of Microsoft's conduct at issue in this case was previously the subject of an antitrust action against Microsoft initiated by the Department of Justice and several states in 1998. [1] After a 76 day trial, in November 1999 Judge Thomas Jackson of the Federal **[*152]** District Court for the District of Columbia issued 412 Findings of Fact relating to the relevant market, Microsoft's monopoly power in the market. Microsoft's exclusionary conduct and lack of pro-competitive justification, and the harm to competition and consumers. *84 F.Supp.2d 9*. In April 2000, Judge Jackson issued Conclusions of Law that Microsoft (a) violated *Section 2* of the Sherman Act by illegally maintaining its operating systems monopoly by anti-competitive means, (b) violated *Section 2* by attempting to obtain a monopoly in the internet browser market, and (c) violated *Section 1* of the Sherman Act by unlawfully tying its Internet Explorer web browser to Windows. The court also concluded that Microsoft's liability under the Sherman Act established liability under state ***antitrust law*** as well. *87 F.Supp.2d 30*. In his Conclusions of Law, Judge Jackson denied the government's claim of unlawful exclusive dealing in violation of *Section 1* of the Sherman Act. *Id.*

*2 Microsoft appealed. On June 28, 2001, the United States Court of Appeals for the District of Columbia Circuit affirmed Judge Jackson's conclusion that Microsoft had maintained an operating system monopoly by anti-competitive means. The court reversed the attempted monopolization claim and remanded for trial the claim of illegally tying the Internet Explorer web browser to Windows. *253 F.3d 34*. The Court of Appeals also disqualified the district judge based on his "deliberate, repeated, egregious, and flagrant" ethical violations and remanded the case to a new judge for trial on remedies.

Since the Court of Appeals' affirmance of the monopolization claim, plaintiffs in various of the pending consumer class actions against Microsoft have sought application of collateral estoppel to Judge Jackson's Findings and Conclusions. In *In re Microsoft Corp. Antitrust Litigation*, No. MDL 1332(D.Md), the multidistrict litigation encompassing the federal consumer and competitor actions against Microsoft, Plaintiffs moved for summary judgment on the issue of **[*154]** Microsoft's liability under *Section 2* of the Sherman Act based on the government case and asked the court to accord preclusive effect to 356 of the 412 findings made by Judge Jackson. On November 4, 2002, Judge Frederick Motz denied the motion for summary judgment because the Plaintiffs had not proved damages. Judge Motz also ruled, however, that preclusive effect would be given to Judge Jackson's findings if they were "supportive of the prior judgement", rejecting Microsoft's contention that the prior findings had to be essential or indispensable to the prior judgment. *232 F.Supp.2d 534, 537 (Md.2002)*. Judge Motz invited Microsoft to challenge specific findings not meeting the standard he had set, and Microsoft did so. By letter dated April 4, 2003, Judge Motz ruled that 350 of the 356 preclusive findings proposed by Plaintiffs were supportive of the Court of Appeals judgment. Microsoft sought an interlocutory appeal, and on July 3, 2003, the Fourth Circuit agreed to review Judge Motz' decision.

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[1] The Justice Department action is captioned *United States v. Microsoft Corporation*, Civil No. 98-12322(DDC). The consolidated case brought by a coalition of states and the District of Columbia is captioned *State of New York, et al, v. Microsoft Corporation* ***[*153]*** , Civil No. 98-1233(DDC). The State of Minnesota was a plaintiff in the latter case. These two cases are referred to as the "government case" in this Memorandum.

State courts in Arizona and California have also precluded Microsoft from challenging the vast majority of Judge Jackson's factual findings.

Plaintiffs here ask that Microsoft be precluded from challenging 361 [2] of Judge Jackson's **[*155]** Factual Findings and 33 excerpts from the D.C. Circuit Court opinion and Judge Jackson's Conclusions of Law.

ANALYSIS

1.*Minnesota Antitrust Law*.

As an initial matter, Microsoft contends that a section of the Minnesota ***antitrust law***, *Minn.Stat. § 325D.62*, provides that at most Judge Jackson's findings constitute *prima facie* evidence rather than established facts. Enacted in 1971, the Minnesota statute states:

> A final Judgment or Decree rendered in any civil or criminal proceeding under *Sections 325D.49 to 325D.66* brought by or on behalf of the State of Minnesota, any of its agencies, or any of its political subdivisions, to the effect that a defendant has violated *Sections 325D.49 to 325D.66*, *shall be prima facie evidence* against such defendant in any action or proceeding brought by any other party against such defendant under said sections as to all matters respecting which said judgement or decree would be an estoppel as between the parties thereto …(*emphasis added)*

*3 Minnesota's antitrust statute is based upon *Section 5a* of the original **[*156]** version of the Clayton Act, enacted in 1914. The doctrine of collateral estoppel has expanded since then. In *Parklane Hosiery Company vs. Shore, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)*, the Supreme Court approved the use of offensive collateral estoppel based on a prior declaratory judgment against the defendant company by the Securities and Exchange Commission. Following that decision, Congress amended *Section 5a* to clarify that collateral estoppel is available under the Clayton Act. Minnesota never changed the language of its *Section 325D.62*.

Minnesota's inactivity in the face of significant changes in the law has generated an interesting debate between the parties about whether the prima facie standard in the Minnesota statute now establishes a floor or a ceiling for the significance of prior findings. Did Minnesota intend to retain the prima facie standard to the exclusion of the modem collateral estoppel doctrine? The court need not resolve this dispute. By its own language, the Minnesota statute applies the *prima facie* standard to prior violations of *Minnesota law.* While Judge Jackson did find that Microsoft violated state laws, including Minnesota's, he also, of course, found that there was a federal violation. Thus, Plaintiffs here are certainly entitled **[*157]** to seek application of collateral estoppel to the prior federal violation because the Minnesota statute does not apply the *prima facie* standard to the prior federal violation. Indeed, any other result would make no sense. If Minnesota had not joined in the government litigation, no prior finding of liability under the Minnesota statute would have been made, and Microsoft would have no grounds for arguing that the *prima facie* standard in the Minnesota statute applied. Minnesota consumers should certainly not be in a weaker legal position because their Attorney General took the step of joining and succeeding in the government litigation and thus establishing a Minnesota violation along with the federal violation. Thus, this court will analyze the applicability of collateral estoppel to the prior federal violation without regard to the *prima facie* standard.

2.*Collateral Estoppel in Minnesota*

Under Minnesota law, collateral estoppel may be invoked when: (1) the issue in the later lawsuit is identical to the issue in the prior adjudication, (2) there was a final judgment on the merits in the earlier action, (3) the party against

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[2] In their initial memorandum, Plaintiffs sought application of collateral estoppel to 377 Findings. At the oral argument Plaintiffs withdrew their request as to 16 Findings.

whom collateral estoppel is to be applied was a party or in **[*158]** privity with the party to the prior adjudication, and (4) the party to be estopped has already been provided a full and fair opportunity to be heard on the adjudicated issue. *A & H Vending Company v. Commissioner of Revenue, 608 N.W.2d 544, 547 (Minn.2000)*. Collateral estoppel in Minnesota may be applied to findings only that were "necessary and essential to the prior judgment." *Ellis v. Minneapolis Commission on*

Civil Rights, 319 N.W.2d 702, 704 (Minn.1982), *Falgren v. State Board of Teaching, 545 N.W.2d 901, 905 (Minn.1996)*. In addition, "Courts do not apply collateral estoppel rigidly and focus instead on whether an injustice would be worked upon the party upon whom the estoppel is urged." *Nelson v. American Family, 651 N.W.2d 499, 511 (Minn.2002)*. The application of collateral estoppel is a mixed question of law and fact, and the trial court has considerable discretion in deciding whether the doctrine should be invoked. *Reil v. Benjamin, 584 N.W.2d 442 (Minn.App.1998)*. Microsoft's principal objections to the application of collateral estoppel in this case are that collateral estoppel would work an injustice on it and that most of the prior findings were not necessary and essential to the prior judgment.

3.*Possible Injustice to Microsoft.*

*4 Microsoft raises several reasons why applying collateral estoppel in this case would be unjust to it. Microsoft complains that the plaintiffs should not be able to 'cherry pick' favorable findings **[*159]** from the government case: "the Court should prohibit them from presenting any claims relating to issues on which plaintiffs did not prevail in the government case." Microsoft Memorandum at 28. In effect, Microsoft seeks to apply reciprocal collateral estoppel against the Plaintiffs. But this proposal sidesteps the third and fourth requirements of collateral estoppel law in Minnesota, i.e., that the party against whom collateral estoppel is to be applied must be a party or in privity with a party to the prior adjudication who had a full opportunity to be heard. These plaintiffs were not parties to the government case and cannot be bound by findings adverse to the government in that case since they have not had their own day in court. If the finding of one violation by Microsoft is reliable, it is irrelevant that several other claims by the government were rejected.

Microsoft complains that the application of collateral estoppel would not promote judicial economy or efficiency. Microsoft points out that causation and injury still have to be proven, since these issues were not decided with respect to private antitrust plaintiffs in the government case. Thus, few savings of efficiencies **[*160]** will result if collateral estoppel is applied here. This is hardly an aspect of injustice to Microsoft, however, and just because collateral estoppel would not eliminate a trial does not mean it might not shorten it.

Microsoft contends that the misconduct by Judge Jackson found by the Court of Appeals creates reason to doubt the quality and fairness of the prior litigation. In fact, the opposite is probably true. As a result of the comments to the press made by Judge Jackson, the Court of Appeals reviewed the facts with "painstaking care" and concluded that "[although Microsoft challenged very few of the findings as clearly erroneous, we have carefully reviewed the entire record and discern no basis to suppose that actual bias infected [the trial court'S] factual findings." *Microsoft, 253 F.3d at 117-118*. There appears little doubt that the monopoly claim affirmed by the Court of Appeals was based on solid evidence, accumulated in a hotly contested, fair proceeding, and Microsoft should not be permitted to walk away from it at this point.

Microsoft's remaining claim of injustice is more compelling. Microsoft contends that the application of collateral estoppel would cause juror confusion and distort the resolution **[*161]** of closely related issues. At the oral argument Microsoft counsel emphasized that the government case alleged misconduct only between late 1995 and 1998, as opposed to the 15 year time span at issue in this case. Moreover, the government case addressed only Microsoft's monopoly in operating systems, whereas an applications class has also been certified in this case. Finally, and perhaps most important, the government alleged and proved only that Microsoft illegally *maintained* a monopoly. Here the plaintiffs contend that Microsoft *acquired* a monopoly in operating systems and applications software through anticompetitive conduct. Microsoft points out that simply reading many of the findings does not make clear that they are limited to the period 1995 to 1998, raising a concern about selective use by Plaintiff in a misleading fashion.

*5 While confusion about the scope of the prior findings could perhaps be addressed with jury instructions, the court has an even more practical concern about the voluminous findings put forward by the plaintiffs in this motion. In the single-spaced, two column Westlaw format, Judge Jackson's findings are 80 pages long, and the prose is fact-intensive. Plaintiffs **[*162]** seek leave to present 361 of these 412 findings to the jury as established facts. At the oral argument Plaintiffs' counsel proposed that the findings be read to the jury in the form of a jury instruction at the beginning of the case, and that the jurors receive a copy of the findings in a notebook. As expressed at the oral argument, the court is concerned about the jury's ability to absorb this volume of raw information. Information that comes to a jury through witnesses is presented with background and is sharpened and clarified with direct questions and cross-examination. The jury can put faces to facts and often hears about the same event from more than one witness. Submitting to a jury 361 cold factual findings presents a trial management problem that the plaintiffs provide no precedent for solving. Moreover, it is the court's view that the volume of information proposed by the Plaintiffs to be submitted to the jury exacerbates the likelihood of distortion or confusion of which Microsoft warns. For example, if in closing argument Plaintiffs' counsel refers to numerous previously established facts, which the jurors at that point probably have no independent memory of from the very **[*163]** long jury instruction, how are they going to keep in mind that these facts relate only to Microsoft'S illegal maintenance of a monopoly in the mid-90's, not to any conduct during the more relevant earlier period? As explained further below, the combination of the different issues involved in this case and in the government case and the large number of factual findings made by Judge Jackson, as well as the court'S understanding of the “necessary and essential” requirement in Minnesota collateral estoppel law, causes this court to apply collateral estoppel only to a more limited, understandable outline of the results in the government case.

4.*The meaning of “necessary and essential”.*

According to Judge Motz, under federal law a factual finding may be given preclusive effect only if it was “necessary” to the prior judgment. *232 F.Supp.2d at 536*. Microsoft would read the word “necessary” as “indispensable”; plaintiffs would read it as “supportive”. Judge Motz sided with the plaintiffs, and plaintiffs here ask this court to do so also.

The three case cited by Judge Motz for his conclusion on this point are not very persuasive. None uses the term “supportive” or reflects that concept. The page cited by Judge Motz **[*164]** in *Delaware River Port Authority v. Fraternal Order o/Police, 290 F.3d 567, 572 (C.A.3 (Pa.) 2002)*, explains the doctrine like this:

> Under the doctrine of issue preclusion, a determination by a court of competent jurisdiction on an issue *necessary to support* its judgment is conclusive in subsequent suits based on a cause of action involving a party or one in privity, *(emphasis added)*

*6 The page in *Hoult v. Hoult, 157 F.3d 29, 32* (C.A. 1 (Mass.) 1998) cited by Judge Motz states:

> Confronted with a general verdict in the earlier case, courts commonly ask whether a finding was “necessary” to the judgment, and answer the question by looking primarily to the instructions and the result. But a finding is “necessary” if it was *central to the route that led the factfinder to the judgment reached*, even if the result “could have been achieved by a different, shorter and more efficient route.” *(emphasis added)*

The page in *Synanon Church v. United States, 820 F.2d 421, 425, 261 U.S. App. D.C. 13 (C.A.D.C.1987)* cited by Judge Motz explains its holding as follows:

> Indeed, the holding of fraud on the court was *necessarily predicated* upon the court's finding that pertinent documents and tapes had been destroyed by Synanon… *(emphasis added)*

Thus, these cases seem to indicate that a prior finding-"an express statement is unnecessary to modify the DRPA compact" (*DRPA*), "rapes had occurred" (*Hoult* **[*165]**), and "willful destruction of evidence" (*Synanon Church*)-must be indispensable to the holding, or at least indispensable to the factfinder's logic, before collateral estoppel applies.

One of the reasons given by Judge Motz for rejecting Microsoft's reading of "necessary" as "indispensable" is that "If there were two grounds for a decision, preclusive effect could not be given to the facts underlying either. That clearly is not the law of the Fourth Circuit." *Id. at 537*. However, where alternative grounds for judgment are expressly stated, appellate courts routinely recognize this as a limited exception to the necessity test that does not require that the necessity standard be abandoned. *See, e.g., Matter of Trusts Created by Hormel, 504 N.W.2d 505, 510 (Minn.App. 1993)* ("The fact that the Court listed two grounds to support its decision does not demonstrate that the issue of the settlors' intent was not necessary to the judgment for collateral estoppel purposes.")

Regardless of the accuracy of Judge Motz' analysis of federal law, the language of Minnesota collateral estoppel law is somewhat different. As noted above, Minnesota law requires that prior findings to which collateral estoppel is applied be "necessary and essential" to the prior judgment. The cases do not **[*166]** explain what this means. At the oral argument, the court asked the parties to submit post-hearing letters tracing the origin of this phrase. Both parties found its earliest use in *Hauser v. Mealey, 263 N.W.2d 803, 808 (Minn. 1978)*, and report that it was next used in *Ellis* in 1982. Does "necessary and essential" mean something different from "necessary", interpreted by Judge Motz as "supportive", so that this court should decline to follow his reasoning?

Hauser and *Ellis* did not explain the language, but in their post-hearing letters, both parties noted that both *Hauser* and *Ellis* cited the 1948 version of *Moore's Federal Practice* (2d ed.) as authority for the language. Plaintiffs were unable to locate the version of *Moore's Federal Practice* in use in 1978 or 1982, but did find a retired copy at the University of Minnesota Law School Library that includes the text as of June 1983. Plaintiffs provided selections of the 1983 version of *Moore's Federal Practice*, and this court has since obtained and reviewed Moore's entire 1983 chapter on collateral estoppel. Moore uses the term "necessary and essential", *(see*, e.g., Section 0.443 [2] at p. 759), although apparently the parties could not find any cases cited by Moore which use the same **[*167]** language. Nonetheless, Moore's 1983 chapter on collateral estoppel provides a comprehensive analysis of the doctrine. If this is indeed the source of modem collateral estoppel law in Minnesota, this court must differ from Judge Motz and Plaintiffs.

*7 To begin with, the court notes that the question of what is necessary and essential is a particularly important and difficult one in this case because of the sheer volume of the factual findings put forth by Plaintiffs. Not only did Judge Jackson make hundreds of findings, but each one is usually a narrative paragraph, often containing numerous subsidiary facts such as names, dates, and other details. In the more typical case, collateral estoppel might be sought as to one or a small number of important facts that were central to a prior judgment. In such cases, it perhaps would be relatively simple to determine which facts had the degree of significance to the prior judgment that would give the subsequent court confidence in relying upon them. (For example, did the finding of negligence necessarily mean that Jones' car hit Smith's?) Here Plaintiffs want collateral estoppel applied to hundreds of factual findings with greatly different **[*168]** degrees of importance to the prior judgment. Can hundreds of findings containing thousands of facts from any one trial all be important enough to be set in stone forever?

The result Plaintiffs seek apparently is unprecedented. Neither party has cited a single case in which an appellate court has affirmed the application of collateral estoppel to hundreds of findings of fact by a judge in an earlier case. The only case cited by the parties at all similar is *Pool Waters Products v. Otin Corp. 258 F.3d 1024* (C.A.9 (Cal.) 2001).

In that case the plaintiffs moved the court to give prima facie weight to all of an administrative law judge's 895 findings of fact and six conclusions of law. The Court of Appeals affirmed the trial court's refusal to do so. The Court observed that preclusive effect was attached "only to issues that were necessary to support the judgment in the prior action". *Id. at 1031*. The Court acknowledged that, "It is probable that some of the ALJ's findings of fact the FTC adopted were necessary to the FTC's judgment and would have been identical and relevant to issues raised in the proceedings here." *Id. at 1033*. But the plaintiffs had failed to make the necessary link: "Neither the district court nor the defendant is required to engage in **[*169]** a 'hunt and peck' exercise to ferret out potentially relevant and necessary findings." *Id.* Thus, the only appellate case grappling with the issues presented here provides no guidance on how the court should "ferret out" the preclusive findings from hundreds of candidates. The case makes clear, nonetheless, that serious sifting must be done because not all of hundreds of findings are automatically deemed "necessary to support" a prior judgment.

In short, the volume of the findings submitted by Plaintiffs not only creates the unprecedented jury management problem described above, but it creates another apparently unprecedented problem of how to decide what is necessary and essential and what is not.

Moore seems to answer this question in Section. 443[5.-l], at page 781 of his 1983 treatise:

> *8 Even though an issue was raised and fully litigated in a prior action, and a finding on the issue was made by the court preliminarily to rendition of judgment, the issue is not concluded by the resulting judgment unless the finding made on the issue was, at least alternatively, necessary to the judgment rendered. *Thus an incidental or collateral determination of an issue that was not material in the* ***[*170]*** *prior action does not foreclose reconsideration of that issue in later litigation in which the issue is material (emphasis added)*

Incidental or collateral facts must be relitigated.

Moore used the case of *Landon v. Clark, 221 F. 841 (C.A.2 1915)*, to illustrate how incidental findings should be handled. In a trespass action, the court decided for the defendant and commented that, "the defendant is, and was at the commencement of this action, seised in a fee of that portion" of the pond. In a subsequent suit between the same parties to quiet title, the court's prior statement about the defendant's ownership was claimed to be preclusive. The court disagreed and the Second Circuit affirmed, because the title to the tracts other than the one upon which the alleged acts of trespass had been committed was not material to the prior suit, and the judgment dismissing the prior injunction had not depended upon the finding of title except as to one tract.

To be sure, the materiality requirement does not preclude the application of collateral estoppel to evidentiary findings, as opposed to conclusions of law. Moore explains that express findings of evidentiary fact can be the subject of collateral estoppel, but only if they are material: **[*171]**

> Unless the express finding on the issue of evidentiary fact is essential to, or at least independently adequate as a basis for, resolution of a material issue of ultimate fact, the judgment does not depend upon determination of the issue of evidentiary fact, and a finding on that issue should not be given conclusive effect.

Section 443[5.-2] at page 789.

Now, it is true that Moore occasionally uses the word "supports" in describing the necessary relationship between the prior evidentiary fact and the prior judgment. For example, he says:

> One important instance of the limiting role played by the requirement that an adjudication must support the judgment rendered in order to be conclusive involves findings of evidentiary fact. Despite some authority to the contrary, the better view is that the collateral estoppel effect of a judgment extends to issues of evidentiary fact as well as ultimate fact, provided a finding on the issue was expressly made or can be established by necessary inference. But the estoppel arises only if the issue was material and its determination *supports* the judgment rendered.

Section 443[5.-1] at page 788, *(emphasis added)*

Similarly, he says:

> The generally accepted, and **[*172]** in our view correct, rule in this situation is that the judgment is conclusive of only those issues whose determination *supports* the judgment.

*9 Section 443[5.-1] at page 783, *(emphasis added).* Plaintiffs cite this kind of language in support of their proposition that Judge Motz' analysis applies to Minnesota as well as federal law. In accepting virtually all of the findings offered by plaintiffs, however, Judge Motz did not state that the prior findings must “support” the prior judgment, but that the “specific finding [must] be ‘supportive’ of the prior judgment”. There is a difference. It means something different if I say I support my children financially than if I say I am financially supportive of them. It is clear that Moore uses “support” as a synonym for “necessary or essential”. Moore's analysis only makes sense. The problem of *London v. Clark* is readily apparent from looking at any number of the factual findings made by Judge Jackson. The dates, the people, the details of Microsoft's interactions and communications with other companies, and the specifics of its internal activities are merely incidental to the ultimate conclusion that Microsoft illegally maintained its monopoly. **[*173]** Most of these subsidiary facts could be changed or even dropped from the findings without affecting the ultimate result. They are simply not material. The court has no certainty that all these details were important and contested by Microsoft in defense of the ultimate claims in the prior case. Moore explains the problem with granting preclusive effect to immaterial issues:

> But the adjudication of [an] issue [which] does not dictate the judgment … is thereby deprived to some degree of the *assurances of integrity and correctness* that the judicial process affords to genuinely dispositive adjudications, *(emphasis added)*

This problem is explained in more detail in the [*The Evergreens v. Nunan, 141 F.2d 927 (C.A.2.1994)*], which Moore discusses at length in his treatise. In that case Judge Learned Hand explained the importance of the requirement of necessity:

> It is, as we have said, a condition upon the conclusive establishing of any fact that its decision should have been necessary to the result in the first suit. That is a protection, for it means that *the issue will be really disputed and that the loser will have put out his best efforts, (emphasis added)*

The court is simply not satisfied that Microsoft would have “put out its best efforts” **[*174]** in contesting every one of the many thousands of facts in the 361 Findings offered by the Plaintiffs. The only way the court could answer that question would be to painstakingly review the entire trial record, which would take more time than retrying the case. Accordingly, the court will reason backward from the ultimate finding of illegal monopolization to determine what central facts were necessary and essential, or as Moore also describes them, material, to that result. There are a manageable number of such facts.

5.*The Essential Findings and Conclusions from the Government case.*

In the government case Microsoft was found to have violated the Sherman Act by illegally maintaining a monopoly. Set forth below are the facts which this court determines to be essential to that violation. These facts may be presented to the jury in this case in an instruction and in a notebook. This set of facts includes not only Findings and Conclusions from Judge Jackson, but the Court of Appeals' characterizations of the 12 acts of anticompetitive conduct which it affirmed. Although the excerpts from the Court of Appeals, of course, lack the voluminous detail provided by Judge Jackson, this court believes **[*175]** the detail is not necessary to the ultimate conclusion that Microsoft violated the Sherman Act because of this anticompetitive conduct. A jury told of Microsoft's violation and these facts will understand what it needs to know about the prior case, and what of Microsoft's conduct was illegal. Moreover, the court will have the assurance of knowing that each of these statements given as a proven fact to this jury will be something that was actually and strenuously litigated to an outcome deserving of confidence.

*10 A. *Relevant market* (Jackson Finding No. 18):

> Currently there are no products, nor are there likely to be any in the near future, that a significant percentage of consumers worldwide could substitute for Intel-compatible PC operating systems without incurring substantial costs. Furthermore, no firm that does not currently market Intel-compatible PC operating systems could start doing so in a way that would, within a reasonably short period of time, present a significant percentage of consumers with a viable alternative to existing Intel-compatible PC operating systems. If follows that, if one firm

> controlled the licensing of all Intel-compatible PC operating systems worldwide, **[*176]** it could set the price of a license substantially above that which would be charged in a competitive market and leave the price there for a significant period of time without losing so many customers as to make the action unprofitable. Therefore, in determining the level of Microsoft's market power, the relevant market is the licensing of all Intel-compatible PC operating systems worldwide.

B. *Microsoft's power in the relevant market* (Jackson Findings No. 33-34 and Court of Appeals excerpt):

33. Microsoft enjoys so much power in the market for Intel-compatible PC operating systems that if it wished to exercise this power solely in terms of price, it could charge a price for Windows substantially above that which could be charged in a competitive market. Moreover, it could do so for a significant period of time without losing an unacceptable amount of business to competitors. In other words, Microsoft enjoys monopoly power in the relevant market.

34. Viewed together, three main facts indicate that Microsoft enjoys monopoly power. First, Microsoft's share of the market for Intel-compatible PC operating systems is extremely large and stable. Second, Microsoft'S dominant market share is protected **[*177]** by a high barrier to entry. Third, and largely as a result of that barrier, Microsoft's customers lack a commercially viable alternative to Windows.

> (Court of Appeals description of the applications barrier to entry): That barrier-the "applications barrier to entry"-stems from two characteristics of the software market: (1) most consumers prefer operating systems for which a large number of applications have already been written; and (2) most developers prefer to write for operating systems that already have a substantial consumer base.... This "chicken and egg" situation ensures that applications will continue to be written for the already dominant Windows, which in turn ensures that consumers will continue to prefer it over other operating systems. *253 F.3d at 55*.

C. *Microsoft's unlawful maintenance of that monopoly power through anticompetitive conduct* (excerpts from the Court of Appeals' opinion).

> Microsoft maintained its monopoly power by the following "anticompetitive conduct", i.e., conduct which caused "harm [to] the competitive process and thereby harm [to] consumers." *253 F.3d at 58*.

*11 (1) "preventing OEMs from removing visible means of user access to IE" (i.e., desktop icons, folders and Starat menu **[*178]** entries), *253 F.3d at 61*;

(2) "prohibiting] OEMs from modifying the initial boot sequence" of Windows, *253 F.3d at 61*;

(3) "prohibiting] OEMs … from adding [to the Windows desktop] icons or folders different in size or shape from those supplied by Microsoft," *253 F.3d at 62*;

(4) "prohibiting] OEMs … from using the 'Active Desktop' feature [of Windows] to promote third-party brands," *253 F.3d at 62*;

(5) "excluding IE from the 'Add/Remove Programs' utility" in Windows, *253 F.3d at 64*;

(6) "commingling code related to browsing and other code in the same files" in Windows, *253 F.3d at 64-65*

(7) "agreeing] to provide easy access to LAPs' [Internet access providers] services from the Windows desktop in return for the IAPs' agreement to promote IE exclusively and to keep shipments of internet access software using Navigator under a specific percenttage," *253 F.3d at 68*;

(8) agreeing to give certain ISVs "preferential support" in return for their agreement to " 'use Internet Explorer as the default browsing software for any software they develop with a hypertext-based user interface,"' *253 F.3d at 71-72*;

(9) agreeing to release new versions of Office for the Apple Macintosh in return for Apple's agreement to preinstall Internet Explorer and make it the default Web browser on Apple'S Macintosh operating system, *253 F.3d at 72-74*;

(10) agreeing to give certain **[*179]** ISVs access to Windows technical information in return for their agreement to use Microsoft's Java Virtual Machine ("JVM") as the default JVM for their software, *253 F.3d at 75-76*;

(11) "deceiving Java developers about the Windows-specific nature of' Microsoft's Java developer tools, *253 F.3d at 74*; see also *id at 76-77*;

(12) "coercing Intel to stop aiding Sun in improving the Java technologies," *253 F.3d at 74*; see also *id. at 77-78*.

D. *The conclusion that Microsoft's conduct violated the federal* ***antitrust law*** (quotations from Jackson'S Conclusions of Law):

> "Microsoft's conduct [is deemed] the maintenance of monopoly power by anticompetitive means." *87 F.Supp.2d at 39*; "[T]he predatory nature of the firm's conduct [renders] Microsoft liable under *Section 2* of the Sherman Act." *Id. at 44*.

Two issues about this set of facts should be addressed. First, the only reference to harm is the statement to the jury that the 12 acts of anticompetitive conduct by definition caused harm to the competitive process and thereby to consumers. Judge Jackson, of course, went into great length about exactly what the harm was. Findings 408 through 412 provide a ringing condemnation of what Microsoft has done to consumers and to innovation in the market for operating systems. This court considered whether **[*180]** these paragraphs, or some other detailed description of the harm from Microsoft's conduct, should be provided to the jury in this case. There are problems with Judge Jackson's summary of the harm, however. The court is not convinced that a detailed description of the harm caused by a monopolist's anticompetitive conduct is essential to a finding of liability. The Court of Appeals certainly found it unnecessary to evaluate Judge Jackson's findings about harm in affirming the Section 2 violation. To be sure, the requisite finding of exclusionary conduct requires finding anticompetitive effect, i.e., harm to the competitive process and thereby harm to consumers. *See* *253 F.3d at 58-59*. But it is a far cry from finding that the conduct was harmful to finding what the harm was, how much, and who suffered. Thus, all of Judge Jackson's language about the detrimental effects of Microsoft's conduct does not appear necessary and essential to the violation affirmed by the Court of Appeals. Finally, even if details of the harm were material, some of Judge Jackson's references in Findings 408 through 412 appear to be to some of the 8 acts of anticompetitive conduct which he found but which the Court of Appeals disallowed. **[*181]** Accordingly, no accurate summary of the harm is available.

*12 Second, at the hearing, counsel for Microsoft candidly stated that Microsoft does not contest that 266 of Judge Jackson's Findings were necessary and essential to the finding of monopolization affirmed by the Court of Appeals. Counsel was, however, careful to preserve Microsoft's objections based on the unfairness and injustice to Microsoft discussed above. In response to the court's question at the hearing about why Plaintiffs needed hundreds of specific findings if they were granted collateral estoppel as to the central points in the government case, Plaintiffs' counsel made two responses. First, counsel appropriately noted that the jury would not know the meaning of technical terms. This problem can be solved by Plaintiffs proposing a stipulation or jury instruction to explain acronyms or technical terms. (The stipulation or instruction should also include the limiting instruction regarding the scope of the government case requested by Microsoft.) Counsel's second point was that Judge Jackson's Findings also provide factual support for the claims of the applications class. Interjecting Judge Jackson's detailed Findings **[*182]** on monopolization of the operating system market into Plaintiffs' applications case, of course, is exactly where the problem of juror confusion or distortion would be greatest. Moreover, it seems that few of Judge Jackson's Findings would be directly relevant to the applications case, so it does not appear that the burden on Plaintiffs to relitigate these issues would be very great. For these reasons, in spite of Defendant's concession regarding the necessary and essential quality of the 266 Findings, the court accepts Microsoft's argument about injustice and will not accord them preclusive effect.

6.*Collateral Estoppel as to Conclusions of Law.*

Appendix A to Plaintiffs' memorandum contains the Findings of Fact which the Plaintiffs believe should be subject to collateral estoppel. Appendix A also contains 33 excerpts from the DC Circuit Court's opinion and Judge Jackson's Conclusions of Law. Some of these excerpts overlap the 12 acts of anticompetitive conduct found by the Circuit Court as set forth above. Plaintiffs' motion is denied as to the remaining excerpts because they are either redundant, unnecessary, or irrelevant (such as comments about procedural matters). The court believes **[*183]** the outline of the important results of the government case set forth in the preceding section will provide this jury a fair account of what happened there, without presenting the jury further miscellaneous comments by Judge Jackson and the Court of Appeals taken out of context.

CONCLUSION

Microsoft lost an important claim in the extensive government litigation against it over the past five years.

The material facts supporting that determination of illegal maintenance of monopoly appear to be relevant and material to Plaintiffs' case here. Under the law of collateral estoppel, having had its day in court, Microsoft is not entitled to the relitigation of those issues. Plaintiffs may present to the jury through a jury instruction and notebook the essential findings in the government case as set forth above. No effect shall be given to the remainder of Judge Jackson's Findings or Conclusions or to the statements selected by Plaintiffs from the Court of Appeals opinion.

Parallel Citations

2003-2 Trade Cases P 74,130

SCRANTON v. E

Superior Court of California, County of Santa Clara

October 20, 2014, Decided; October 20, 2014, E-Filed

Case No. 1-13-CV-245579

Reporter

2014 Cal. Super. LEXIS 556 *

JOHN C. SCRANTON, on behalf of himself and a class of persons similarly situated, Plaintiff, v. E*TRADE SECURITIES LLC, Defendant.

Core Terms

trading, options, Customer, halt, current market value, stock, promise, alleges, expiration, automatically, argues, broker, misrepresentation, Disclosure, instructions, omission, good faith, in-the-money, suspension, breach of fiduciary duty, cause of action, demurrer, purposes, class action, Disclaimer, preemption, plaintiff's claim, expiration date, material fact, fair dealing

Judges: [*1] Honorable Peter H. Kirwan, Judge of the Superior Court.

Opinion by: Peter H. Kirwan

Opinion

Order After Hearing Re:

1. Demurrer to Plaintiff's Second Amended Complaint; and

2. Motion to Strike Certain Allegations in Plaintiffs Second Amended Complaint.

The above-captioned motions came on for hearing before the Honorable Peter H. Kirwan on September 12, 2014 at 9:00 a.m. in Department 1. The matter having been submitted, the Court orders as follows:

This is a putative class action by plaintiff John C. Scranton ("Plaintiff"), individually and on behalf of other customers of defendant E*TRADE Securities LLC ("Defendant") who purchased "put" options. According to the operative Second Amended Class Action Complaint ("SACAC"), there are two types of options: "put" options and "call" options. A put option gives the buyer of the option the right to sell a particular asset at a specific price (the "strike price") on or before a certain date (the "expiration date").[1] By purchasing an option, a buyer is not obligated to buy or sell the asset but merely has the right to do so, but option holders will exercise this right as long as doing so would be profitable because an option that expires unexercised becomes worthless.[2] **[*2]** Put options are said to be "in the money" when the current market value of the underlying security is below the put's strike price.[3] Because

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[1] Second Amended Class Action Complaint ("SACAC") ¶ 11,

[2] SACAC ¶ 2.

[3] SACAC ¶ 12.

an underlying security always has a current market value, at any given point in time a put is always "in the money," "out of the money" (current market value is greater than the put's strike price) or "at the money" (current market value is equal to the put's strike price).[4]

Plaintiff further alleges that in a variety of consumer-oriented materials (e.g., various sections of the "Help Center" of Defendant's website[5]), Defendant explicitly promised customers that it would "automatically exercise" their options if it would result in the consumer getting at least $.0l in profit.[6] Despite these promises however, if trading in the underlying security was halted, Defendant did not automatically exercise the options, and would only exercise the options during a trading halt if expressly requested to do so by the customer.[7] Plaintiff alleges this practice lulls Defendant's customers into a false sense of security with respect to whether their expiring "in the money" options would be exercised.[8]

Plaintiff alleges that between November 18, 2010 and January 12, 2011, he purchased 2,000 shares of stock in a company called Duoyuan Global Water Inc. ("DGW").[9] On January 12, 2011, he purchased put options on **[*3]** 1,000 shares of DGW for a total of $377.00, and the strike price on the options was $7.50 with an expiration date for June 18, 2011.[10] On February 18, 2011, he purchased an additional 1,000 shares of DGW, but sold 2,000 shares on April 5, 2011 at $3.22 per share, leaving him with 1,000 shares to "cover" his put — meaning that he could deliver those shares to the put writer at a strike price of $7.50 upon exercise.[11] On April 19, 2011, trading in DGW shares was suspended, and on that date, DGW stock closed at a price of $3.88 per share; trading did not resume until January 26, 2012, when the stock opened at $2.25 per share.[12]

Plaintiff alleges because Defendant had promised that "in the money" options would be "automatically exercised," he took no actions to ensure that his DGW puts were exercised upon expiration.[13] Plaintiff alleges that on the June 18, 2011 expiration date, Defendant broke its promise to Plaintiff and failed to exercise the puts, even though they were clearly "in the money" by a large amount (e,g., at least $3.62 (or 48%)), well over the $.01 threshold at which Defendant promised its customers it would exercise their expiring **[*4]** options.[14] At no point before June 18, 2011 did Defendant contact Plaintiff to ask him for instructions in light of the fact that it was not exercising the puts, despite its promise to the contrary.[15] As a result, the puts expired unexercised, and Plaintiff lost the $7,500 that he would have received had Defendant honored its promise to exercise his puts.[16]

Plaintiff seeks to represent a class of "[a]ll E*TRADE customers who[purchased puts through E*TRADE that were at least $.01 in the money upon expiration, and who suffered losses due to E*TRADE's failure to exercise those in-the-money options upon expiration during tradin halts on the securities underlying those options."[17]

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[4] SACAC ¶¶ 12-13.

[5] SACAC Exhs, 1-2.

[6] SACAC ¶ 2.

[7] SACAC ¶ 2.

[8] SACAC ¶¶ 2-3.

[9] SACAC ¶29.

[10] SACAC ¶¶ 29-30.

[11] SACAC ¶ 31.

[12] SACAC ¶¶ 32-33.

[13] SACAC ¶ 34.

[14] SACAC ¶ 35.

[15] SACAC ¶ 36.

[16] SACAC ¶ 37.

The original Class Action Complaint was filed on April 30, 2013. On September 20, 2013, Plaintiff filed his First Amended Class Action Complaint ("FACAC") asserting five "Counts" for: (1) violation of the California Unfair Competitions Law ("UCLA") (*Cal. Bus. & Prof. Code, § 17200* Ft seq.); (2) violations of the Consumer Legal Remedies Act ("CLRA") (*Cal. Civ Code, § 1750 et seq.*); (3) fraud; (4) negligent misrepresentation; and (5) breach of fiduciary duty.

On December 20, 2013, the Court sustained with leave to amend Defendant's **[*5]** demurrer to the FACAC. The Court held that based on disclosures made in the judicially-noticed Options Clearing Corporation ("OCC") options booklet entitled "Characteristics of Risks and Standardized Options" ("OCC Disclosure Document") and the "E*TRADE Pro User" agreement between Plaintiff and Defendant, Defendant's alleged promise to automatically exercise options that were "in the money" on their expiration date was not rendered or false or misleading where trading is suspended on the expiration date because in that situation, there is no current market value for the underlying asset. The Court found no fraudulent concealment of failure to disclose because the "pop-up" window referred to in the FACAC referred customers to the OCC Disclosure Document, which cautions option holders that while trading is halted, the option holder may have to decide whether to exercise without knowing the current market value of the underlying assets. The Court also found that in the Customer Agreement, Plaintiff disclaimed liability for losses arising out of or relating to a cause which Defendant did not have direct control, including "suspension of grading." The Court observed in footnote that Plaintiff's **[*6]** claims may be barred by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). Finally, the Court held that Defendant's concurrent motion to strike was moot.

On January 31, 2014, Plaintiff filed the operative SACAC, which asserts seven Counts for: (1) breach of fiduciary duty; (2) breach of the covenant of good faith and fair dealing; (3) violation of UCL; (4) in the alternative, violations of New York's Consumer Protection Statute (*N.Y. Gen. Bus. Law §§ 349, et seq.*); (5) violations of the CLRA; (6) fraud; and (7) negligent misrepresentation.

The SACAC alleges substantially the same theories and claims as the FACAC but adds a few new allegations in response to the deficiencies identified in the demurrer. The SACAC alleges that an underlying security "always has a current market value" because it is either "in the money," "out of the money," or "at the money";[18] the phrase "current market value" is not defined in Defendant's Customer Agreement or in the OCC Disclosure Document referred to in the Customer Agreement, and industry practice and common sense dictate that "the current market value of the underlying security is assumed to be no higher than the stock price on the last day on which the security traded"; **[*7]** [19] under current OCC regulations, puts expire on Saturdays, and since stocks do not trade on Saturday, typically "current market value" is determined by reference to the closing price on the preceding Friday;[20] when trading is halted, industry practice is such that "the current market value for purposes of exercising options is assumed to be equal to the 'last trading price' (meaning the price on the last day the stock was traded) on the date of suspension, and in cased more than that price";[21] both the OCC and Defendant operate according to this industry practice;[22] in Plaintiff's case, Defendant used the last trading price of DGW stock throughout the trading halt both to asses the stock's "current market value" and to assess the value of options for which DGW was the underlying security, and thus, Plaintiff's E*TRADE account showed the value of his puts as $3,900 until the day of their expiration, despite the fact that trading was halted on the underlying DGW stock, and when Plaintiff called to discuss why his DGW puts had not been exercised, Defendant's own customer service representative referred to the puts as "in the money" despite the trading halt;[23] Defendant uses the last trading price **[*8]** of halted securities

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[17] SACAC ¶ 39.

[18] SACAC ¶ 13.

[19] SACAC ¶ 16.

[20] SACAC ¶ 17.

[21] SACAC ¶ 18.

[22] SACAC ¶¶ 19-21.

for other purposes relating to its customers' accounts, including determining whether its customers are in compliance with Defendant's requirements for margin accounts;[24] the OCC normally exercises puts on behalf of its "clearing members" (approximately 115 large institutions that participate in the OCC's clearing services) that are more than $.0l "in the money," and in the event of a trading halt, OCC rules provide that the clearing member (e.g., Defendant) is responsible for providing instructions to the OCC if the member desires the OCC to exercise the member's clients' puts (e.g., Plaintiff's DGW puts), which means that nothing in the OCC rules prevents Defendant from automatically exercising "in the money" puts on behalf clients during a trading halt.[25] The SACAC also contains a section of allegations under the heading "No Preemption Under Federal Securities Litigation Uniform Standards Act ("SLUSA")".[26]

Defendant once again demurs to the SACAC and moves to strike portions thereof.

I. JUDICIAL NOTICE

Defendant's request for judicial notice of the SACAC (RJN **[*9]** Exch. 1), the Court's December 20, 2013 Order After Hearing on the demurrer to the FACAC (RJN Exh. 2), and the FACAC (RJN Exh. 3) is **GRANTED** as to the existence of these court records. (See *Cal. Evid. Code, § 452, subd. (d)*.) Defendant's request for judicial notice of the OCC Disclosure Document (RJN Exh. 4) and the E*TRADE Pro User Agreement (RJN Exh. 6) is also **GRANTED** as to the existence of these documents. The OCC Disclosure Document is referenced in the Customer Agreement attached as Exhibit 3 to the SACAC, and the E*TRADE Pro User Agreement is referenced in paragraph 6 of the SACAC. (See *Ascherman v. Gen. Reinsurance Corps. (1983) 183 Cal.App.3d 307, 310-311*.) Defendant's request for judicial notice of a published and generally available historical stock price graph and charts for DGW (RN Bait 5) is **GRANTED** because DGW's historical stock price is a fact that is not reasonably subject to dispute and capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (*Cal. Evid. Code, § 452, subd. (h)*; *In re Carriage of Brigden (1978) 80 Cal.App.3d 380, 385, fn. 3*.)

In a supplemental request, Defendant seeks judicial notice of: (1) OCC Rule 805(j) and (2) Financial Industry Regulatory Authority ("FINRA") Rule 5260. Defendant argues the Court may take judicial notice of these rules under *California Evidence Code section 452 subdivisions (b)* and *(h)* because the OCC and FINRA are Self-Regulatory **[*10]** Organizations exercising authority delegated and under the direct supervision of the Securities and Exchange Commission. Defendant argues OCC Rule 805(j) is relevant because Plaintiff makes an incomplete citation to it in his opposition, and FINRA Rule 5260 is relevant to the issue of whether there can be a current market value for a security when a trading halt is in place. The request is **GRANTED** as to the existence of these regulatory rules. (*Cal. Evid. Code, § 452, subds. (b)*, *(h)*; *Lewis v. Lynch, Pierce, Fenner, & Smith, Inc. (1986) 183 Cal.App.3d 1097, 1104* [judicial notice of rules published by FINRA predecessor].)

II. DEMURER

Defendant argues the misrepresentation claims fail because Plaintiff's options were not "in the money" on the June 18, 2011 expiration date due to the trading halt on DGW stock (Apr. 19, 2011—Jan. 26, 2012), which meant that DGW stock had no "current market value" on the expiration dated. Defendant argues that Plaintiff's attempt to re-define "in the money" in the SACAC fails because he contradicts that OCC Disclosure Document's facial terms, trading on DGW was halted many weeks prior to the option's expiration date, and the allegation that Defendant recorded the last trading price of Plaintiff's options position for some other purposes does not mean it was a

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[23] SACAC ¶ 22.

[24] SACAC ¶ 23.

[25] SACAC ¶ 24.

[26] SACAC ¶¶ 106-109.

reliable **[*11]** indicator of its then-current market value or showed the current market value of the underlying DGW stock. Defendant argues the Customer Agreement is a complete bar to Plaintiff's claims because: (1) in the Customer Agreement, Plaintiff disclaimed liability for any claims that arise out of relate to the suspension of trading; (2) Plaintiff expressly agreed that Defendant would have no obligation to exercise any options absent specific instructions from him; (3) Plaintiff agreed not to hold Defendant liable for any losses resulting from his own failure to act or to give Defendant instructions regarding rights that expire; Plaintiff acknowledged that he was a "self-directed investor" and that Defendant would not provide him with any investment advice or recommendations; and (4) Plaintiff specifically acknowledged that options trading is highly speculative and contains a high degree of risk and would be subject to market rules and the OCC Disclosure Documents, which he promised to read and fully understand.

Defendant further argues that Plaintiff's claims are barred by the SLUSA because: (1) this is a "covered class action" (a lawsuit in which one or more named parties seek to recover **[*12]** damages on a representative basis and questions of law or fact common to those persons predominate over individual ones); (2) each of Plaintiff's causes of action is based on state statutory or common law and is predicated upon alleged misrepresentations or omissions of material fact and alleged acts of deception by Defendant; and (3) the purported misrepresentations are alleged to have been made in connection with the purchase or sale of a covered security, and *Merrill Lynch, Pierced, Fenner & Smith, Inc. v. Dabit (2006) 547 U.S. 71* ("*Dabit*") held that misrepresentation claims of persons holding and failing to sell securities are in connection with the purchase and sale of a covered security.

Defendant argues Plaintiff's consumer protection claims under the UCL, CLRA and New York Consumer Protection Statute fail because Plaintiff fails to allege reliance on the E*TRADE website statements Defendant argues Plaintiff's CLRA claim based on an omission fails as a matter of law because (1) Defendant did not omit any fact contrary to its alleged representations (2) Plaintiff fails to identify any duty on Defendant's part to disclose more about the unusual circumstances of a trading halt; (3) Plaintiff does not allege — and specifically disclaims — that he relied **[*13]** on any statement made by Defendant when he purchased his stock options; and (4) ancillary services in connection with stock options do not fall within the CLRA's ambit. Defendant argues the UCL claim fails because: (1) under the parties' contract, New York law governs their relationship; (2) it does not allege an incipient violation of the ***antitrust law*** for purposes of UCL unfairness, and there was nothing fraudulent or likely to deceive about Defendant's conduct; and (3) the UCL is inapplicable to claims based on securities transactions as a matter of law. Defendant argues Plaintiff's claim under New York's Consumer Protection Statute fails because: (1) Plaintiff fails to plead a false or deceptive practice; and (2) claims arising out of securities transactions are not the type of consumer transactions for which the statute was intended to provide a remedy.

Defendant argues Plaintiff's claim for breach of the covenant of good faith and fair dealing is defective because: (1) Defendant made no promise to exercise "in the money" stock options during a trading halt; and (2) the claim contradicts the express terms of the Customer Agreement regarding the exercise of stock options.

Defendant **[*14]** argues Plaintiff's fraud and negligent misrepresentation claims fail because: (1) Plaintiff fails to allege that Defendant made any statement to him about exercise of options in the event trading was halted; (2) Plaintiff cannot plead reasonable reliance in light of the disclosures in the Customer Agreement and OCC Disclosure Document; (3) the allegations defeat any notion that Defendant acted with intent to deceive given that Defendant allegedly would have received a fee had Plaintiff exercised; and (4) under New York law, Plaintiff must plead the existence of a fiduciary or other special relationship to state a claim for negligent misrepresentation, but a broker-client relationship does not necessarily create a special or fiduciary relationship, and here, Plaintiff was responsible for his investment decisions. Finally, Defendant argues that Plaintiffs breach of fiduciary duty claim fails because: (1) it is predicated on a purported misrepresentation that did not occur; (2) it is barred by the SLUSA; (3) under New York law, no fiduciary duty arises from a customer's relationship with a brokerage firm where the customer controls his or her own account, and here the Customer Agreement **[*15]** states that Plaintiff is responsible for providing Defendant with instructions regarding options exercise and that Defendant is under no duty to make any personalized or individualized assessment for Plaintiff; and (4) under California law, the duty of a securities broker that does not provide investment advice and merely executes customer instructions is limited to those instructions and avoiding misrepresentations.

a. Legal Standards

A demurrer tests the sufficiency of the plaintiff's complaint, i.e., whether the complaint states facts sufficient to constitute a cause of action upon which relief may be based. (*Kong v. City of Hawaiians Gardens Redevelopment Agency (2002) 108 Cal.App.4th 1028, 1037*, citing *Cal. Code Civ. Proc. § 430.10(e)*.) "A demurrer can be used only to challenge defects that appear on the face of the pleading under attack; or from matters outside the pleading that are judicially noticeable." (Weil & Brown, Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007) ¶ 7:8, p. 7-7 [emphasis in original], citing *Blank v. Kirwan (1985) 39 Cal.3d 311, 318*.) The "face of the complaint" includes matters shown in exhibits attached to the complaint and incorporated by reference. (See *Frantz v. Blackwell (1987) 189 Cal.App.3d 91, 94*.) "A demurrer tests the pleadings alone and not the evidence or other extrinsic matters." (*Skf Farms v. Superior Court (1984) 153 Cal.App.3d 902, 905*.) However, on a demurrer, the **[*16]** court may consider material documents referred to in the allegations of the complaint. (*City of Port Hueneme v. Oxnard Harbor Dist. (2007) 146 Cal.App.4th 511, 514*.)

b. Misrepresentation/Omission Claims

As with the FACAC, the SACAC's claims are based primarily on Defendant's written promise on its website that it would automatically exercise all options that were "in the money" on their expiration date.[27] The SACAC acknowledges that whether put options are "in the money" depends on the "current market value" of the underlying security.[28] Likewise, the OCC Disclosure Document, which Plaintiff had to acknowledge having read and understood in the Customer Agreement attached as Exhibit 3 to the SACAC, defined "in the money" as follows: "A put option is said to be in the money if the current market value of the underlying interest is below the exercise price of the option."[29]

In the "pop-up" window printout attached as Exhibit 2 to the SACAC, there is an "Important Note" referring customers to the OCC Disclosure Document for more information on OCC rules governing the automatic exercise of in-the-money equity options at expiration.[30] In the Customer Agreement attached as Exhibit 3 to the SACAC, the customer acknowledges having read and understood the terms, conditions and risk of options trading set forth in the OCC Disclosure Document.[31] The OCC Disclosure Document not only defines "in the money" based on the underlying asset's current market value,[32] but expressly cautions that "[i]f the option is exercisable while trading has been halted in the underlying interests, ***option holders*** may have to decide whether to exercise ***without knowing the current market value of them underlying interests***. This risk can become especially important if an option is close to expiration, and failure to exercise will mean that the option will expire worthless."[33]

In *Piemonte v. Chicago Bd. Options Exchange, Inc. (S.D.N.Y. 1975) 405 F.Supp 711*, the plaintiff sued a securities options auctioneer and others on behalf of holders of option contracts for alleged misrepresentations and breach of fiduciary duty based on statements made in the prospectus of the securities options auctioneer after some of the

[27] SACAC ¶¶ 49, 6268, 78, 84, 91, 99. The SACAC does not appear to allege oral misrepresentations by Defendant. Although Plaintiff alleges that an E*TRADE customer services representative referred to Plaintiff's puts as "in the money," this statement was allegedly made after the expiration date and is cited only in support of Plaintiff's allegation of Defendant's practice with regard to the current market **[*17]** value of stock during a trading halt. (See SACAC ¶ 22.)

[28] SACAC ¶ 12.

[29] Occ Discl. Doc., RJN Exh. 4 at A. 14, original emphasis.

[30] SACAC Exh. 2.

[31] SACAC Exh. 3 at p. 51.

[32] OCC Disc. Doc., RJN Exh. 4 at p. 14.

[33] OCC Disc. Dock., RJN Exh 4 at p. **[*18]** 141, emphasis added.

plaintiff's options were not exercised during a trading halt by the Securities and Exchange Commission. The plaintiff alleged the prospectus "failed to disclose to investors the risk which they face should the option expire on a day on which the underlying shares were suspended from trading The plaintiff claims that investors should have been told that in such a case they would have to decide whether to exercise or not, without any indication of the market value of the underlying stock." (*Piemonte, supra, 405 F.Supp. at pp. 714-715*.) The U.S. District Court granted the securities options auctioneer's motion for summary judgment, finding the statements in the prospectus were not actionable as misrepresentations as a matter of law because the prospectus adequately apprised prospective investors of the risks that they undertook by investing.

> The investor is also repeatedly warned that his option becomes worthless if not exercised before its expiration. **[*19]** Furthermore, there is emphasized under the heading *Additional Risks* on page 6, the passage quoted above pertaining to the possibility of a suspension of trading in the underlying stock. The investor is thus put on notice that on certain days there may be no transactions in the underlying stock. [¶] Once warned of this fact, the investor should realize that at certain times there may be no current market price for the underlying stock and that as a result he must guess as to both the value of his option, and whether he should exercise.

(*Id. at pp. 716-717*.)

"Current market value" reasonably implies present or active trading on a market, and *Piemonte* supports Defendant's position that during a trading halt of stock, there is no current market price for the stock, and thus, the value of the related option is subject to guesswork. (See also, *Sonnenberg v. United States (2d Cir. 1959) 268 F.2d 537, 538* ["shares had no market value in 1941; they were not listed on any stock exchange, nor were there outstanding offers for them"; *Coleman & Co. Secs., Inc. v. Giaqunito Family Trust (S.D.N.Y. 2002) 236 F.Supp.2d 288, 310* ["shares essentially had no market value, as they were not publicly traded"].)

The instant case is somewhat distinguishable from *Piemonte* because of the allegation that Defendant promised to "automatically exercise" all options that were "in **[*20]** the money" on the exercise date.[34] However, the website pages that contained Defendant's alleged promise also referred the customer to the OCC Disclosure Document, which addresses the circumstance of not "knowing the current market value of the underlying interests" during trading halts. Under *Piemonte*, these disclosures are sufficient to preclude Defendant's liability for misrepresentations and omissions with regard to the exercise of put options during trading halts.

As Plaintiff points out in his opposition brief, because this is a demurrer, the Court must assume the truth of the SACAC's allegations that it is industry practice, as well as Defendant's own practice, to use the last trading price to determine current market value in the event of a trading halt. However, even if we accept this allegation of industry practice, it does not change the fact that the alleged promise to automatically exercise options that are "in the money" (based on the current market value) is not rendered false or misleading given the relevant definitions and disclosures made. Plaintiff does not allege that Defendant made any representations regarding industry practice during trading halts such that options holders could reasonably expect the last trading price to be used as a substitute for current market value. Nor is there any basis to conclude that an options holder could reasonably rely on their own understanding of industry practice in order to interpret the "automatically exercised" promise given the relevant definitions and disclosures made. Furthermore, an industry practice using the last trading price essentially as a substitute **[*22]** for current market value is still, in the rationale of *Piemonte*, a "guess" as to the option's value. It is not the actual current market value for purposes of determining whether the option is "in the money," and

[34] In *Piemonte*, the Clearing Corporation's rules provided that an option holder could exercise the option only by causing his broker to file a written exercise notice with the Clearing Corporation on the prescribed form on or before the fixed expiration date. (See *Piemonte supra, 405 F.Supp. at p. 713*.) Notably, the Customer Agreement at issue in the instant matter similarly states that "E*TRADE Securities has no obligation to exercise any option absent specific instructions from me." (See Customer Agmt. at p. 52, Exh. 3 to SACAC.) However, the Courts must also accept Plaintiffs allegation that Defendant promised to automatically exercise any options that were "in the money" on the expiration date, even if this could be understood to conflict with the quoted **[*21]** portion of the Customer Agreement.

Defendant's promise to "automatically exercise" is based on current market value under the express definition of "in the money."

Regarding the SACAC's allegation concerning the OCC's "exercise by exception" process, even if it is the clearing member's (e.g., Defendant) responsibility to provide instructions to the OCC if the member wants to exercise the member's clients' puts, the issue here is not what Defendant could have done under industry or other practices to guess at the current market value of the underlying stock during a trading halt, but whether Defendant misrepresented what it would do in the event of a trading halt when it allegedly promised to "automatically exercise" options that were "in the money." Because the determination of whether an option is "in the money" relies on knowing (not guessing) the current market value, and the SACAC's exhibits show that sufficient disclosures were made regarding the risks of trading halts, the SACAC does not allege a sufficient **[*23]** false representation or omission by Defendant.

Thus, Plaintiff falls to sufficient allege a false representation and/or fraudulent omission to support his causes of action for fraud, negligent misrepresentation, and violation of the UCL,[35] CLRA, and New York Consumer Protection Statute.[36]

c. SLUSA Preemption

Defendant also raises SLUSA preemption. "An action will be dismissed under SLUSA if it (1) is a 'covered class action'; (2) is based on state law; (3) involves a 'covered security''; and (4) alleges a 'misrepresentation or omission of a material fact' or use of 'any manipulative or deceptive device ... in connection with the purchase or sale of a covered security.' [Citations.] A 'covered class action' is a lawsuit in which damages area sought on behalf of more than 50 people. [Citation.] A 'covered security'' is one traded nationally and listed on a regulated national exchange. [Citation.] In determining whether an alleged misrepresentation or omission 'coincides' with a securities transaction, courts look at 'the gravamen'—whether the complaint, as a whole, involves an untrue statement or substantive omission of a material fact, and whether that conduct coincides with a transaction involving a covered security. [Citations.] The court focuses on the substance of the claim, not the plaintiffs' characterization of it. [Citation.]" (*Wells Fargo Banks, N.A. v. Superior Court (2008) 159 Cal.App.4th 381, 386*.)

There is no dispute that the instant action is **[*25]** a "covered class action" that is based on state law and involves a "covered security."[37] Plaintiff argues the claims are not preempted by SLUSA because they do not allege misrepresentations made "in connection with" the "purchase or sale" of a covered security. Plaintiff argues that under the recent U.S. Supreme Court decision in *Chadbourne & Park LLP v. Troice (2014) 134 S. Ct. 1058*, SLUSA does not preempt ordinary state law contract and related claims that are not predicated on misrepresentations but only a promise and failure to perform (e.g., breach of fiduciary duty and breach of covenant of good faith and fair dealing), and SLUSA preemption for misrepresentation claims only lies when the misrepresentations or omissions are material to a decision to purchase or sell a security, and the party buying or selling is a party other than the

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[35] Besides alleging violation of the UCL's fraudulent prong, the SACAC also alleges violation o the unfair prong. However, this claim of unfairness is based on "E*TRADE's misrepresentations." (See SACAC ¶ 73.) Here, the Court finds no misrepresentation to support the claim for unfair business practice.

[36] At paragraph 22 of the SACAC, Plaintiff alleges that his E*TRADE account showed the value of his puts as $3,900 until the day of their expiration, despite the fact that trading was halted. However, there is no allegation of reliance by Plaintiff on what was shown on his E*TRADE account, and the allegation is not pled with sufficient particularity. (See *Lazar v. Sup. Ct. (Rykoff-Sexton, Inc.) (1996) 12 Cal. 4th 631, 645* [e.g., how, when, where, to whom and by what means misrepresentations were tendered].) Furthermore, any such fraud-based claim would be preempted by SLUSA because it would constitute a misrepresentation regarding the value of covered securities that induced Plaintiff **[*24]** to take no action on his decision to exercise his puts and sell the underlying security.

[37] See SACAC ¶¶ 106, 109.

fraudster. Plaintiff contends that because Defendant is both the fraudster and the entity purchasing and selling the securities, it cannot invoke SLUSA preemption.

This Court previously commented in a footnote to its December 20, 2013 Order that under *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit (2006) 547 U.S. 71*, Plaintiff's claims were likely preempted by SLUSA. In *Dabit*, the U.S. Supreme Court held that "holder" misrepresentation claims by **[*26]** brokers of an investment banking firm alleging that the firm's biased investment recommendations induced them to retain or delay selling certain securities were sufficiently "in connection with the purchase and sale" of covered securities for purposes of SLUSA. Here, Plaintiff similarly alleges that Defendant's misrepresentation caused him to fail to manually exercise his options while DGW trading was suspended, which sufficiently" 'coincide[s]' with a securities transaction" for purposes of SLUSA preemption.

Although Plaintiff argues that *Troice* narrowed the scope of SLUSA preemption, *Troice* "[did] not...modify *Dabit*" (see *Troice, supra, 134 S. C. at p. 1066*) and does not compel a different result here. *Troice* involved consolidated class actions alleging a Ponzi scheme from false representations that CDs (uncovered securities) in a particular bank were backed by covered securities. The Supreme Court majority (7-2) held that the claims were not preempted by SLUSA.

> A fraudulent misrepresentation or omission is not made "in connection with" such a "purchase or sale of a covered security" unless it is material to a decision by one or more individuals (other than the fraudster) to buy or to sell a "covered security." We add that in **[*27]** *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U. S. 71, 126 S. Ct. 1503, 164 L. Ed. 2d 179 (2006)*, we held that the Litigation Act precluded a suit where the plaintiffs alleged a "fraudulent manipulation of stock prices" that was material to and "'coincide[d]' with" third-party securities transactions, while also inducing the plaintiffs to "hold their stocks long beyond the point when, had the truth been known, they would have sold." [Citations.] We do not here modify *Dabit*.
> . . . .
>
> The language requires the dismissal of a state-law-based class action where a private party alleges a "misrepresentation or omission of a material fact" (or engages in other forms of deception, not relevant here) "in connection with the purchase or sale of a covered security." [Citation.] The phrase "material fact in connection with the purchase or sale" suggests a connection that matters. And for present purposes, a connection matters where the misrepresentation makes a significant difference to someone's decision to purchase or to sell a covered security, not to purchase or to sell an uncovered security, something about which the Act expresses no concern. [Citation.] Further, the "someone" making that decision to purchase or sell must be a party other than the fraudster. If the only party who decides to buy or **[*28]** sell a covered security as a result of a lie is the liar, that is not a "connection" that matters.
> . . .[E]very securities ease in which this Court has found a fraud to be "in connection with" a purchase or sale of a security has involved victims who took, who tried to take, who divested themselves of, who tried to divest themselves of, or who maintained an ownership interest in financial instruments that fall within the relevant statutory definition. [Citations.]

(*Troice, supra, 134 S. Ct at p. 1066*, italics omitted.)

Plaintiff argues *Troice* is on-point because here, the SACAC contains no allegations that the misrepresentations or omissions were material to any purchase or sale decision, and the decision to refrain from purchasing or selling covered securities was the fraudster's (Defendant). These points are not well-taken. Based on the express allegations of the SACAC, Defendant"s alleged misrepresentations led ***Plaintiff*** not to exercise his options and thereby not sell the stocks. "***Because*** E*TRADE had promised that in-the-money options 'will be automatically exercised,' ***Plaintiff took no actions*** to ensure that his DGW puts were exercised upon expiration."[38] This connection is sufficient for SLUSA preemption because the misrepresentation **[*29]** can be said to have "[made] a

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[38] SACAC ¶ 34, italics added.

significant difference to [Plaintiff's] decision to purchase or to sell a covered security...." (*Troice, supra, 134 S. Ct. at p. 1066*.)

Plaintiff argues that his claims are not based on misrepresentations, but on false promises, and therefore they are more like traditional state law breach of contract claims that do not fall within the scope of SLUSA preemption. However, the SACAC is replete with allegations of misrepresentation and omissions of material fact, and Plaintiff does not assert a cause of action for breach of contract based on the promise that "in the money" puts would be "automatically exercised." As for the section of the SACAC entitled "No Preemption Under Federal Securities Litigation Uniform Standards Act ("SLUSA")", these conclusory allegations designed solely to avoid SLUSA preemption are not dispositive of the issue. "In determining whether an alleged misrepresentation or omission 'coincides' with a securities transaction, courts look at 'the gravamen'—whether the complaint, as a whole, involves an untrue statement or substantive omission of a material fact, and whether that conduct coincides with a transaction involving a covered security. [Citation.] **[*30]** The court focuses on the substance of the claim, not the plaintiffs' characterization of it. [Citation.]" (*Wells Fargo Bank, N.A. v. Superior Court (2008) 159 Cal.App.4th 381, 386*.) Here, the substance of Plaintiff's claims is that Defendant's promise to "automatically exercise" "in the money" puts was misleading and omitted material facts regarding trading halts.

d. Breach of Fiduciary Duty

The relationship between a stock broker and principal is considered to be fiduciary in nature, imposing on the broker the duty of acting in the highest good faith toward the principal. (See *Duffy v. Cavalier (1989) 215 Cal.App.3d 1517, 1531*; *Twomey v. Mitchum, Jones & Templeton, Inc. (1968) 262 Cal.App.2d 690, 708-709*.) In *Twomey*, the appellate court tacitly accepted the premise that a broker may not have an obligation to determine the principal's financial situation and needs where the "sole obligation of the broker-dealer is to carry out the stated objectives of the customer" and the broker "is acting merely as agent to carry out purchases or sales selected by the customer, with or without the broker's recommendation", but the *Twomey* court went on to find that evidence showed the broker's recommendations "were ford all practical purposes the controlling factor in the transactions." (*Twomey, supra, 262 Cal.App.2d at p. 719*.) In *Petersen v. Sec. Settlement Corp. (1991) 226 Cal.App.3d 1445, 1455-1456*, the Court of Appeal cited *Twomey* and similar federal authorities finding no fiduciary duty on clearing **[*31]** agents/brokers in order to hold that there was no fiduciary duty on the clearing broker because the relationship was confined to the simple performance of transactions ordered by a customer or his investment advisor.

However, as *Duffy* instructs, "[t]he question is not whether there is a fiduciary duty, which ***there is in every broker-customer relationship***; rather, it is the scope or extent of the fiduciary obligation, which ***depends on the facts of the case***." (*Duffy, supra, 215 Cal.App.3d at p. 1535*, emphasis added.) In discussing how the fiduciary obligations of a broker may be limited in some circumstances, *Duffy* cites a federal case "where there was a nondiscretionary account with no showing that the defendant stockbroker had any control over the account whatsoever or acted as an investment counselor to the plaintiff, [and] the stockbroker was only a limited agent of the customer. 'Normally the agency relationship created by a non-discretionary account arises when the client places an order and terminates when the transaction ordered is complete. [Citation,] The stockbroker [in such a situation] assumes no continuing obligation to advise his [or her] clients of information that affects their securities. [Citation.]' [Citation.]" **[*32]** (*Id. at pp. 1535-1536*.) Here, although the Customer Agreement states that Defendant has no "obligation" to exercise an option absent specific instructions from the customer,[39] it goes on to state that if there are no instructions and an option is about to expire "in the money", Defendant "may in its sole discretion and without notice to [the customer], exercise the option."[40] Thus, while Defendant is not obligated to exercise "in the money" options absent specific instructions, it retains the discretion to do so, and this discretion is conceivably the basis for Defendant"s "automatically exercise" promise. Accordingly, it cannot be said that Defendant lacks "any control over the account whatsoever" other than to fulfill specific instructions from the customer.

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[39] See SACAC Exch. 3 at p. 52.

[40] *Id.* at p. 53

Likewise, under Defendant's New York and federal authorities, a "nondiscretionary" trading account means "one where ***all trades require*** the client's authorization[.]" (*de* *Kwiatkowski v. Bear Stearns (2d 2002) 306 F.3d 1293, 1295*, emphasis added.) "In the absence of discretionary trading authority delegated by the customer to the broker ... a broker does not owe a general fiduciary duty to his client." (*In re Refco Cap. Markets, Ltd. Brokerage Cust. Sec. Lit. (S.D.N.Y. 2008) 586 F.Supp.2d 172, 193*; see also *Liberman v. Worden* (N.Y. App. Div. 2000) 70l N.Y.S.2d 419, **[*33]** 420 [breach of fiduciary duty claim properly dismissed because "brokerage account upon which the fiduciary relation was allegedly predicated was a standard, nondiscretionary account"].) Here, given that some discretion is retained by Defendant to exercise options without client instructions, and Defendant further promised to "automatically exercise" in-the-money options, Defendant's authorities based on standard, nondiscretionary accounts do not clearly define the scope of Defendant's fiduciary obligations under the facts of this particular case. Thus, the Court is reluctant to conclude as a matter of law that Defendant had no continuing obligation to advise clients of information that could affect their securities such as a trading halt on the underlying stock of options that Defendant had allegedly promised to automatically exercise.

Plaintiff alleges that Defendant "breached its fiduciary duties to Plaintiff and class members when it failed to contact them to request instructions on whether or not they wished to exercise their puts. Any reasonably prudent broker—in particular, one that had assured, and indeed warned, its customers that it would automatically exercise their expiring **[*34]** options—would have contacted Plaintiff and class members about expiring in-the-money puts when trading was halted on the underlying security."[41] A duty to notify customers of a trading halt on the underlying stock of options that would otherwise be automatically exercised if they were in-the-money on the expiration date is consistent with the Restatement (Third) of Agency, which states in relevant part, "An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or should know when...the facts are material to the agent's duties to the principal[.]" (*Restat 3d of Agency, § 8.11(1)*.) Likewise under New York law, "a broker...owes a duty of loyalty to its principal. [Citations.] As part of this duty of loyalty, a broker is obligated to 'use reasonable effort to provide the principal with facts that the [broker] knows. . . when . . . the [broker] knows or has reason to know that the principal would wish to have the facts or the facts are material to the [broker's] duties to the principal; and . . . the facts can be provided to the principal without violating a superior duty owed by the [broker] to another person.' [Citation.]" (*Sotheby's Int's Realty v. Black (S.D.N.Y. 2006) 472 F.Supp.2d 481, 486*.) Here, a trading halt is **[*35]** arguably the type of fact that Plaintiff and similarly-situated customers would wish to know, and it is material to Defendant's obligation to Plaintiff and similarly-situated customers who were expecting their put options to be automatically exercised by Defendant.

Imposing a duty to notify customers of a trading halt would not directly run afoul of the provision in the Customer Agreement in which the customer states, "I alone am responsible for determining the suitability of my investment choices" and "I assume full responsibility for each and every transaction in or for my Account and for my own investment strategies and decisions"[42] because Defendant is not required to give recommendations or financial advice on how to invest. Rather, the issue is whether Defendant, as fiduciary, has a duty to warn its principals of an event that may cause them to lose money (e.g., options expiring worthless during a trading halt).

SLUSA preemption only applies to claims where the gravamen is a misrepresentation or omission of a material fact or the use of manipulative or deceptive devices in connection with the purchase or sale of a covered security. (See *Wells Fargo Bank, supra, 159 Cal.App.4th at p. 386*.) **[*36]** SLUSA would not preempt a breach of fiduciary duty claim that is based on a duty to warn.

However, the Disclaimer of Liability in the Customer Agreement seems to bar even a breach of fiduciary duty claim based on a failure to warn, The disclaimer provision applies to "any Losses arising out of or relating to a cause over which E*TRADE Securities or its affiliates do not have direct control, including ... suspension of trading[,]" Plaintiff's claim against Defendant based its fiduciary obligation to consult customers about trading halts is still a claim for "Losses...relating to...suspension of trading" because the losses flow from the options expiring worthless, which may have been prevented had Defendant consulted Plaintiff of the trading suspension.

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[41] SACAC ¶ 54.

[42] See SACAC Exh. 3 at pp. 31-32

Plaintiff argues the Customer Agreement should be construed more strictly because it was a contract of adhesion, but there are no allegations in the SACAC supporting the adhesive nature of the Customer Agreement. Plaintiff also argues the Disclaimer of Liability provision does not apply because the SACAC alleges that Defendant "direct control" over whether to exercise Plaintiff's options during the trading suspension on the underlying stock, **[*37]** and Defendant also had the ability to make a good faith determination whether Plaintiff's options were "in the money" and to consult Plaintiff about his put options. The phrase "any Losses arising out of or relating to" is broadly worded, and it cannot be disputed that the suspension of DEW stock was out of Defendant's control, or that the claims in the SACAC are for damages arising out of or relating to the suspension of DOW stock.

Plaintiff also argues that such limitations on liability must "clearly and plainly" be called to the attention of the other party in order for Defendant to be relieved of liability. Under California law, "to be effective, an agreement which purports to release, indemnify or exculpate the party who prepared it from liability for that party's own negligence or tortious conduct must be clear, explicit and comprehensible in each of its essential details. Such an agreement, read as a whole, must clearly notify the prospective releasor or indemnitor of the effect of signing the agreement (See *Ferrell v. S. Nev. Off-Road Enthusiasts (1983) 147 Cal.App.3d 309, 318*.) "Whether a contract provision is clear and unambiguous is a question of law, not of fact. [Citations.]" (*Madison v. Superior Court (1988) 203 Cal.App.3d 589, 598*.) Here, the Disclaimer of Liability is in bold-faced type and **[*38]** states the limitation of liability in clear and plain language, going so far as to specifically list "suspension of trading" as a type of "cause over which E*TRADE Securities or its affiliates do not have direct control" for purposes of limiting Defendant's liability. The Court finds that the Disclaimer of Liability provision is sufficiently clear, explicit and comprehensible in each of its essential details.

Under both California and New York law, contractual limitations on liability are unenforceable under certain circumstances (See, e.g., *Cal. Civ. Code, § 1669* [contracts exempting fraud, willful injury or violation of law are unlawful]; *Smith-Hoy v. AMC Prop. Evaluations, Inc. (N.Y. App. Div. 2008) 52 A.D.3d 809, 810-811* ["clear contractual provision limiting damages is enforceable absent a special relationship between the parties, a statutory prohibition, or an overriding public policy [citations].... Moreover, while a party may not limit its liability for damages caused by its own grossly negligent conduct [citation]."].) As currently pled, Plaintiffs breach of fiduciary duty claim does not allege sufficient facts precluding the enforceability of the Disclaimer of Liability provision.

e. <u>Breach of the Implied Covenant of Good Faith and Fair Dealing</u>

The covenant of good faith and fair **[*39]** dealing is implied in every contract to prevent a contracting party from engaging in conduct that, while not technically transgressing the express covenants, frustrates the other party's rights to the benefits of the contract. (*Racine & Laramie, Led. v. Dept. of Parks and Recreation (1992) 11 Cal.App.4th 1026, 1031-1032*.) The covenant of good faith, implied in every contract, prevents parties "from unfairly frustrating the other party's right to receive the benefits of the agreement actually made." (*Guz v. Bechtel Nat., Inc. (2000) 24 Cal.4th 317, 349-350*.) "The prerequisite for any action for breach of the implied covenant off good faith and fair dealing is the existence of a contractual relationship between the parties, since the covenant is an implied term in the contract." (*Smith v. City and County of San Francisco (1990) 225 Cal.App.3d 38, 48-49*.) However, the implied covenant cannot be used to create obligations not contemplated by the contract. (*Pasadena LiAe v. City of Pasadena (2004) 114 Cal.App.4th 1089, 1093*.)

In second cause of action for breach of the covenant of good faith and fair dealing, Plaintiff alleges that under the Customer Agreement, E*TRADE possessed discretionary power to exercise in-the-money options upon expiration, and E*TRADE specifically promised to exercise in-the-money puts, but then interfered with the ability of Plaintiff and class members to receive the funds they were entitled to receive from the exercise of their in-the-money puts **[*40]** by breaking its promise to exercise in-the-money puts upon expiration.[43] E*TRADE allegedly "breached its duty to exercise its discretion in good faith by failing to calculate whether Plaintiff's and class members" options were in-the-money by using the last trading price of the halted underlying securities. E*TRADE acted unfairly and in bad

[43] SACAC ¶¶ 61-62.

faith because, on information and belief, E*TRADE internally uses the last trading price to determine the current market value of halted stocks for the purposes of (1) determining the value of its customers' options, and (2) determining whether its customers are in compliance with E*TRADE's requirements for margin accounts."[44] Plaintiff alleges on information and belief that "cost is the main motivation for E*TRADE's refusal to exercise in-the-money options when trading in the underlying security is halted" because "when trading is halted in the underlying security, the OCC requires E*TRADE to submit positive instructions to the ACC in order to exercise the option" which "causes E*TRADE to incur greater than usual costs associated with options exereise."[45] Plaintiff alleges that "E*TRADE's duty of good faith and fair dealing requires, at minimum that **[*41]** it contact Plaintiff and class members to request instructions on whether to exercise."[46]

However, for the reasons discussed above, any discretion Defendant had to exercise "in the money" puts was based one the stock having a current market value. And requiring Defendant to use the last trading price of halted underlying securities or to contact Plaintiff and class members to request instructions on whether to exercise puts during trading halts would create obligations not imposed by the parties' contract.

Furthermore, as discussed above with regard to the breach of fiduciary duty claim, the Disclaimer of Liability provision appears to be enforceable and, by its terms, would apply to Plaintiff's breach of implied covenant claim because it "aris[es] out of or relat[es] to a cause over which E*TRADE Securities or its affiliates do not have direct control, including ... suspension of trading[.]"

1. Conclusion Re Demurrer

For all of these reasons, the demurer is **SUSTAINED with 20 days' leave to amend** as to the first cause of action for breach of fiduciary duty and second cause of action for breach of the covenant of good faith and fair dealing. The demurrer is **[*42] SUSTAINED WITHOUT LEAVE TO AMEND** as to the third cause of action for violation of the UCL, fourth cause of action for violation of New York''s Consumer Protection Statute, fifth cause of action for violation of the CLRA, sixth cause of action for fraud, and seventh cause of action for negligent misrepresentation.

III. Motion to Striker

The motion to strike is MOOT.

IT IS SO ORDERED.

Dated: 10/20/14

/s/ Peter H. Kirwan

Honorably Peter H. Kirwan

Judge of the Superior Court

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[44] SACAC ¶ 63.

[45] SACAC ¶ 64.

[46] SACAC ¶ 65.

[Go Computer v. Microsoft Corp.](#)

Superior Court of California, County of San Francisco

April 18, 2015, Filed

Case No. CGC-05-442684

Reporter
2015 Cal. Super. LEXIS 10947 *

GO COMPUTER, INC., a Washington Corporation; S. JERROLD KAPLAN, an individual, Plaintiff, v. MICROSOFT CORPORATION, a Washington corporation, Defendants.

Core Terms

operating system, software, products, consumers, monopoly power, restrictions, license, relevant market, collateral estoppel, middleware, anticompetitive, exclusionary, customers, programs, innovation, interfaces, judicial estoppel, pre-installed, invoking, monopoly, exposed, removal, user, former proceeding, developers, technology, foreclose, positions, promotion, browsing

Opinion

[*1] STATEMENT OF DECISION THAT CERTAIN FINDINGS WERE NECESSARY TO A JUDGMENT AGAINST DEFENDANT MICROSOFT CORPORATION

INTRODUCTION

This court set this bifurcated trial to determine whether certain findings of fact and conclusions of law ("Findings") in the federal antitrust litigation known as *United States v. Microsoft Corp.*, ("the Microsoft Litigation") were necessary to the judgment in that litigation. The Microsoft Litigation was brought by a number of governmental entities against Microsoft Corporation ("Microsoft"), the defendant here, for allegedly violating Federal ***antitrust law*** and various state statutes, including California's Cartwright Act (*Cal. Bus. & Prof. Code §§ 16720 et seq*). Certain findings that were made in the Microsoft Litigation are claimed by the plaintiffs in this case to have both relevance to and a preclusive effect on this litigation. This trial phase was solely to determine whether for the purpose of collateral estoppel, the Findings were necessary to the judgment in the Microsoft Litigation. This trial did not seek to establish any other element of collateral estoppel or of relevance that might apply to the use of the Findings in this case.

The Findings which this court determines to be necessary and **[*2]** essential to the judgment in the Microsoft Litigation are set forth in Appendix A to this Statement of Decision.

BACKGROUND

On May 18, 1998, the United States Department of Justice and 19 states commenced the Microsoft Litigation in the United States District Court for the District of Columbia as cases numbered 98-1232 (TPJ) and 98-1233 (TPJ). The two cases alleged, among other things, that Microsoft engaged in conduct that violated *Section 2* of the Sherman Act (*15 U.S.C. § 2*) ("*Section 2*"), as well as the Cartwright Act. After a 76-day bench trial, United States District

Judge Thomas Penfield Jackson determined that Microsoft had maintained a monopoly in the market for Intel-compatible operating systems ("relevant market") in violation of *Section 2*. *United States v. Microsoft Corp. (D.D.C. 1999), 84 F. Supp. 2d 9* and *United States v. Microsoft Corp (D.D.C. 2000) 87 F. Supp. 2d 30*.

The District of Columbia Circuit, sitting *en banc*, affirmed the judgment that Microsoft violated *Section 2*. The Court upheld Judge Jackson's finding that Microsoft possessed monopoly power in the relevant market. *United States v. Microsoft Corp. (D.C. Cir. 2001), 253 F.3d 34, 54, 346 U.S. App. D.C. 330*, *cert, denied* (2001; *534 U.S. 952, 122 S. Ct. 350, 151 L. Ed. 2d 264*, finding that "Windows accounted] for a greater than 95% share" of the market. It also affirmed the conclusion that Microsoft engaged in anticompetitive conduct in maintaining its monopoly by undertaking "a variety of exclusionary acts… to maintain **[*3]** its monopoly by preventing the effective distribution and use of products that might threaten that monopoly." *Id. at 58.* The court listed twelve such exclusionary acts that fell into the broad categories of: (I) using license restrictions, incentives, threats, and other methods to foreclose certain competitors from access to OEMs and ISVs; (2) making it impractical for OEMs and consumers to use competing products by integrating Microsoft's products into core Windows files and making removal impossible; and (3) coercing other companies, such as Intel, into withholding support to Microsoft's competitors and rivals. *Id. at 58-78*.

The Court of Appeals reversed other findings of liability against Microsoft that are not at issue here and remanded the matter to the District Court. On remand, United States District Judge Colleen Kollar-Kotelly (who replaced Judge Jackson on the case) approved the parties' proposed consent decree. *New York v. Microsoft Corp. (D.D.C. 2002), 224 F. Supp. 2d 76, 226*.

ANALYSIS

A. Requirements for Collateral Estoppel

Collateral estoppel precludes re-litigation of issues decided in a prior action. *Lucido v. Superior Court (1990), 51 Cal.3d 335, 341, 272 Cal. Rptr. 767, 795 P.2d 1223*. It is applied in order to "promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of **[*4]** the judicial system, or to protect against vexatious litigation." *Clemmer v. Hartford Ins. Co. (1978) 22 Cal.3d 865, 151 Cal. Rptr. 285, 587 P.2d 1098*. Collateral estoppel "is based on the sound public policy of limiting litigation when a party has already had one fair trial on an issue" (*Vezina v. Continental Cas. Co. (1977), 66 Cal. App. 3d 665, 670, 136 Cal. Rptr. 198)*, and it "causes no injustice when the party to be bound had a full and fair opportunity to litigate the issue to be foreclosed." *Vandenberg v. Superior Court (1999), 21 Cal. 4th 815, 834, 88 Cal. Rptr. 2d 366, 982 P.2d 229*.

Several threshold requirements must be met for collateral estoppel to apply. "First, the issue sought to be precluded from re-litigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, the issue must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." *Lucido, 51 Cal. 3d at 341*. Further, "the public policies underlying collateral estoppel-preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation-strongly influence whether its application in a particular circumstance would be fair **[*5]** to the parties and constitute sound judicial policy." *Id. at 343*. The judgment of a federal court has the same preclusive effect in California state courts as it would h)ve in a federal court. *Levy v. Cohen, (1977) 19 Cal. 3d 165, 173, 137 Cal. Rptr. 162, 561 P.2d 252*.

At issue in this bifurcated trial is the third element of the collateral estoppel inquiry: whether the issue was "necessarily decided" by a court in the prior proceeding. *Lucido, 51 Cal. 3d at 341*; *Martin v. Dep't of Justice (D.C. Cir. 2007) 488 F.3d 446, 376 U.S. App. D.C. 293*. Requiring that findings and conclusions were necessary to the judgment ensures that "the tribunal that decided the first [took] sufficient care in determining an issue that… affect[ed] the result" and that "appellate review [is] available." 18 Wright & Miller, Federal Practice & Procedure:

Jurisdiction § 4421 (2d ed.). The D.C. Circuit considers an issue to be necessary to a prior judgment if its disposition "was the basis for the holding with respect to the issue and not mere dictum." *McLaughlin v. Bradlee (D.C. Cir. 1986), 803 F.2d 1197, 1204, 256 U.S. App. D.C. 119* *Jahr v. District of Columbia (D.D.C. 2013), 968 F. Supp. 2d 186, 191* ("Collateral estoppel applies… where the determination was essential to the judgment, and not merely dictum." (quoting *Modiri v. 1342 Rest. Group, Inc. (D.C. 2006), 904 A.2d 391, 394)*.

B. Elements of a *Section 2* Violation

Two elements of a *Section 2* claim which are central to the issue before this court are (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as **[*6]** distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *United States v. Grinnell Corp. (1966), 384 U. S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778*; *Eastman Kodak Co. v. Image Tech. Servs., Inc., (1992) 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265*. For the purposes of the first of these two elements, monopoly power is "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co (1956), 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264*. The second central element of a *Section 2* claim entails "the use of monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.'" *Eastman Kodak, 504 U.S. at 482-83* (quoting *United States v. Griffith (1948) 334 U.S. 100, 107, 68 S. Ct. 941, 92 L. Ed. 1236)*. If a defendant "adopted its … policies as part of a scheme of willful…maintenance of monopoly power, it will have violated *§ 2*." *Id. at 483*.

Further, in order to establish an antitrust violation under *Section 2*, it is necessary to prove an anti-competitive effect or actual harm to competition., *Bunker Ramo Corp. v. United Bus. Forms, Inc., (7th Cir.1983) 713 F.2d 1272, 1283*.

C. Analysis of the Findings at Issue

The necessity of specific findings to judgment in the Microsoft Litigation requires an analysis of the elements of the *Section 2* violation set forth above. Also important to this analysis is the position Microsoft took in the Court of Appeals regarding these elements. Microsoft argued that the trial court had improperly defined the relevant market and that due to what it asserted was a unique and dynamic market, there was insufficient evidence that Microsoft wielded monopoly **[*7]** power. *United States v. Microsoft, supra, 253 F.3d at 51*. As a result of these arguments, the Court thoroughly analyzed the; District Court's findings of fact and conclusions of law in the context of the elements of the relevant violation of law, thus demonstrating how and why the findings were essential to the District Court's decisions which were upheld on appeal.

The Findings that this court concludes were essential to the definition of the relevant market are numbers 2, 4 and 10.

The Findings that this court concludes were essential to whether Microsoft possessed and wielded monopoly power are numbers 35, 66, 67, 132, 203, 214, 215, 228, 229, 338, and 339.

The Findings that this court concludes were essential to the *Section 2* element of an anti-competitive effect in the relevant market are numbers 410 and 412.

All of the Conclusions set forth in Appendix A were essential to the matters set forth above.

Microsoft argues that Findings 2, 4, and 10, "only provide background information and define technical terms." The argument is somewhat curious in that background information such as the specification of the products in the releyant market, the identity of the accused violator of *Section 2*, and the activities that create the behavior in violation of **[*8]** law provide the context and substance for a conclusion that an antitrust violation occurred. True, these facts can be viewed as "background," but they also provide the substjance necessary to understand who did what to violate *Section 2*. In other words, these "background" facts are all necessary to establish the relevant market and to show the essential elements that "that the defendant holds market power over the relevant market."

Sky Angel U.S., LLC v. Nat'l Cable Satellite Corp. (D.D.C. 2013), 947 F. Supp.2d 88, 102; Southern Pac. Communications Co. v. American Tel. & Tel. Co. (D.C. Cir. 1984), 740 F.2d 980, 1000, 238 U.S. App. D.C. 309 ("[C]ourts frequently approach the problem of measuring market power by defining the relevant product… and computing the defendant's market share. Monopoly power is then ordinarily inferred from a predominant share of the market.").

Microsoft asserts that a number of the Findings at best relate to sweeping anticompetitive behavior that goes well beyond what it argues is a far narrower determination of its liability in the Microsoft Litigation. These Findings deal with behavior toward OEMs, restrictions on ISVs, and behavior relating to middleware products such as Netscape and Java (Findings 203, 214-215, 228-229, and 338-339 and conclusions 3 and 4). The Findings regarding middleware were termed "of importance" by the Court in its analysis of the relevant market and appeared **[*9]** essential to the Court's rejection of Microsoft's argument that the trial court had incorrectly defined the relevant market (*253 F.3d at 53-54*). Also, these Findings demonstrate restrictions and other conditions imposed by Microsoft on OEMs and ISVs, which were necessary to the second element of a *Section 2* violation: that Microsoft engaged in exclusionary conduct and "use[d its] monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor,'" *Eastman Kodak, 504 U.S. at 482-83* (quoting *Griffith, 334 U.S. at 107*), and that the imposed restrictions were not procompetitive. *Grinnell, 384 F.3d at 571* (distinguishing unlawful monopolization from one that developed "as à consequence of a superior product, business acumen, or historic accident"). The middleware product findings are essential in that they relate to the factors rejected in the Microsoft Litigation as a threat to Microsoft's monopoly (even though those products were not operating systems). Given these issues, these Findings were essential to the judgment. *E.I. du Pont de Nemours & Co., 351 U.S. at 395* ("In considering what is the relevant market for determining the control oi price and competition, no more definite rule can be declared than that [products] reasonably interchangeable by consumers for the same purposes make up that part of **[*10]** the trade or commerce, monopolization of which may be illegal.").

Microsoft argues that several of the Findings at issue should be rejected because they relate to a finding of a violation of the Cartwfight Act, which Microsoft argues was not included in a final judgment against it. (Findings (perhaps) 132, (perhaps 338-339, 410, 412, Conclusions 2 and 7). Here, so long as the finding is essential to the judgment in the Microsoft Litigation (e.g., the use of monopoly power), then the fact that it also might support a violation of the Cartwright Act (i.e., using monopoly power to coerce other market participants to become coconspirators) does not render it not essential to the final judgment.

Microsoft also objects to the Findings jregarding the harm caused by Microsoft's conduct (Findings 410 and 412 and Conclusions 2 and 7) as being overbroad relative to the actual violations found. These Findings, however, were necessary to the element of anti-competitive effect, an essential element to the judgment. *United States v. Microsoft, 253 F. 3d at 80* (explaining that "Microsoft's concerns over causation have more purchase in connection with the appropriate remedy issue, i.e., whether the court should impose a structural remedy or merely **[*11]** enjoin the offensive conduct… [but that] causation affords Microsoft no defense to liability for its unlawful actions undertaken to maintain its monopoly in the operating system market"). Similarly, the findings and conclusions made by Judge Kollar-Kotelly once the case was remanded by the Court of Appeals were necessarily decided because they formed the basis for her judgment: the entry of an order enjoining Microsoft from continuing certain practices found to be anticompetitive. [1] *See New York v. Microsoft Corp., 224 F. Supp. 2d at 152*. The fact that Microsoft's licensing restrictions were exclusionary was a necessary factor in the court's determination that its remedial decree must prohibit such exclusionary practices and protect OEMs and ISVs from Microsoft's conduct going forward. Likewise, the District Court's conclusion (conclusion 8) with respect to Cartwright Act liability was necessary to the remedy order that the District Court entered on remand, which granted the California Attorney General remedial power over Microsoft. *United States v. Microsoft Corp (D.D.C. 2002), 231 F. Supp. 2d 144, 198 & n.30*.

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[1] The fact that some of the conclusions on remand restate and summarize the court of appeals' conclusions is of no moment in the determination of necessity. *See* *Yamaha Corp. of Am. v. United States, (D.C. Cir. 1992) 961 F.2d 245, 254, 295 U.S. App. D.C. 158* ("In issue preclusion, it is the prior **[*12]** *judgment* that matters, not the court's opinion explicating the judgment. 'Even in the absence of *any* opinion, a judgment bars re-litigation of an issue necessary to the judgment.'" [quoting *Am. Iron & Steel Inst, v. EPA, (D.C. Cir. 1989) 886 F.2d 390, 397, 280 U.S. App. D.C. 373]*.

D. Microsoft's Claimed Concession

Plaintiffs' assert that Microsoft conceded that 20 of the findings at issue here were necessary to the judgment in the Microsoft Litigation. The basis for this claimed concession was Microsoft's Memorandum Contesting 117 out of 383 Findings of Fact for Which Plaintiffs Seek Offensive Nonmutual Collateral Estoppel (“Microsoft's Memo”) filed on June 6, 2004 in the California JCCP Case No. 4106, called the “Microsoft Cases.” This Court has taken judicial notice of Microsoft's Memo for purposes of this trial only as Exhibit 7 to the Stipulation and Order filed herein on August 8, 2014(the “Stipulated Order”).

Plaintiffs' argument is based on a claim of judicial estoppel, i.e., that Microsoft's Memo conceded that 20 of the findings at issue here were necessary to the judgment in the Microsoft Litigation and that it should not be permitted to take the opposite position now.

California's law of judicial estoppel was summarized in *The Swahn Group, Inc. v. Segal (2010), 183 Cal.App.4th 831, 841, 108 Cal. Rptr. 3d 651*:

> The doctrine of Judicial estoppel precludes **[*13]** a party from taking inconsistent positions in separate proceedings… It is invoked to prevent a party from changing its position in the course of judicial proceedings when such positional changes have an adverse impact on the judicial process…The policies underlying preclusion of inconsistent positions are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings… Judicial estoppel is intended to protect against the litigant from playing fast and loose with the courts…It seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite… [citations and internal quotation marks omitted.]

There are five requirements for the application of judicial estoppel: (1) the same party has taken two positions, (2) the positions were taken injudicial or quasi-administrative administrative proceedings, (3) the party was successful in asserting the first position, (4) the two positions are totally inconsistent, and (5) the first position was not taken as the result of ignorance, fraud or mistake. *Id. at 842*.

Judicial estoppel does not apply to the position **[*14]** that Microsoft took in the Microsoft Memo as compared with that it has taken in this bifurcated trial. First and foremost, Microsoft's position in the Microsoft Memo was expressly “subject to all of its ongoing objections” and thus was not totally inconsistent with its position here where objections to the Findings are raised. Further, the Court in the Microsoft cases did not adopt the position of Microsoft in the sense of accepting it over an opponent's contrary position. Instead, the Court had adopted the opponent's position that collateral estoppel would be applied, directing the parties to reach an accommodation as to the scope of that application (Stipulated Order, Ex. 6, p. 8, lines 3-p. 10, line 23). Microsoft's “concession in the Microsoft Memo is expressly made “based on that ruling” (Microsoft's Memo, page 1, lines 16-18). Finally, in light of how the Court handled the “necessary findings” issue (i.e., to decide that collateral estoppel would apply and to leave it up to the parties to work out the specific findings to be applied, it cannot be said that Microsoft's compliance with that process impugned the integrity of the judicial process or can be viewed as playing “fast **[*15]** and loose” with the court.

CONCLUSION

Based upon the foregoing, this court finds that the Findings set forth in Appendix A were necessary to the judgment in the Microsoft Litigation.

Dated: April 13, 2015

/s/ [Signature]

Judge of the Superior Court

APPENDIX A

United States v. Microsoft Corp., ***84 F. Supp. 2d 9 (D.D.C. 1999)***

Finding of Fact ("FOF") 2: An "operating system" is a software program that controls the allocation and use of computer resources (such as central processing unit time, main memory space, disk space, and input/output channels). The operating system also supports the functions of software programs, called "applications," that perform specific user-oriented tasks. The operating system supports the functions of applications by exposing interfaces, called "application programming interfaces," or "APIs." These are synapses at which the developer of an application can connect to invoke pre-fabricated blocks of code in the operating system. These blocks of code in turn perform crucial tasks, such as displaying text on the computer screen. Because it supports applications while interacting more closely with the PC system's hardware, the operating system is said to serve as a "platform."

FOF 4: An operating system designed to run on an Intel-compatible **[*16]** PC will not function on a non-Intel-compatible PC, nor will an operating system designed for a non-Intel-compatible PC function on an Intel-compatible one. Similarly, an application that relies on APIs specific to one operating system will not, generally speaking, function on another operating system unless it is first adapted, or "ported," to the APIs of the other operating system.

FOF 10: Microsoft licenses copies of its software programs directly to consumers. The largest part of its MS-DOS and Windows sales, however, consists of licensing the products to manufacturers of PCs (known as "original equipment manufacturers" or "OEMs"), such as the IBM PC Company and the Compaq Computer Corporation ("Compaq"). An OEM typically installs a copy of Windows onto one of its PCs before selling the package to a consumer under a single price.

FOF 35: Microsoft possesses a dominant, persistent, and increasing share of the worldwide market for Intel-compatible PC operating systems. Every year for the last decade, Microsoft's share of the market for Intel-compatible PC operating systems has stood above ninety percent. For the last couple of years, the figure has been at least ninety-five percent, **[*17]** and analysts project that the share will climb even higher over the next few years. Even if Apple's Mac OS were included in the relevant market, Microsoft's share would still stand well above eighty percent.

FOF 66: Furthermore, Microsoft expends a significant portion of its monopoly power, which could otherwise be spent maximizing price, on imposing burdensome restrictions on its customers — and in inducing them to behave in ways — that augment and prolong that monopoly power. For example, Microsoft attaches to a Windows license conditions that restrict the ability of OEMs to promote software that Microsoft believes could weaken the applications barrier to entry. Microsoft also charges a lower price to OEMs who agree to ensure that all of their Windows machines are powerful enough to run Windows NT for Workstations. To the extent this provision induces OEMs to concentrate their efforts on the development of relatively powerful, expensive PCs, it makes OEMs less likely to pursue simultaneously the opposite path of developing "thin client" systems, which could threaten demand for Microsoft's Intel-compatible PC operating-system products. In addition, Microsoft charges a lower price to **[*18]** OEMs who agree to ship all but a minute fraction of their machines with an operating system pre-installed. While this helps combat piracy, it also makes it less likely that consumers will detect increases in the price of Windows and renders operating systems not pre-installed by OEMs in large numbers even less attractive to consumers. After all, a consumer's interest in a non-Windows operating system might not outweigh the burdens on system memory and performance associated with supporting two operating systems on a single PC. Other such restrictions and incentives are described below.

FOF 67: Microsoft's monopoly power is also evidenced by the fact that, over the course of several years, Microsoft took actions that could only have been advantageous if they operated to reinforce monopoly power. These actions are described below.

FOF 132: In sum, from 1994 to 1997, Microsoft consistently pressured IBM to reduce its support for software products that competed with Microsoft's offerings, and it used its monopoly power in the market for Intel-compatible PC operating systems to punish IBM for its refusal to cooperate. Whereas, in the case of Netscape, Microsoft tried to induce a company to **[*19]** move its business away from offering software that could weaken the applications barrier to entry, Microsoft's primary concern with IBM was to reduce the firm's support for software products that competed directly with Microsoft's most profitable products, namely Windows and Office. That being said, it must be noted that one of the IBM products to which Microsoft objected, Notes, was like Navigator in that will exposed middleware APIs. In any event, Microsoft's interactions with Netscape, IBM, Intel, Apple, and RealNetworks all reveal Microsoft's business strategy of directing its monopoly power toward inducing other companies to abandon projects that threaten Microsoft and toward punishing those companies that resist.

FOF 203: If OEMs removed the most visible means of invoking Internet Explorer, and pre-installed Navigator with facile methods of access, Microsoft's purpose in forcing OEMs to take Internet Explorer — capturing browser usage share from Netscape — would be subverted. The same would be true if OEMs simply configured their machines to promote Navigator before Windows had a chance to promote Internet Explorer. Decision-makers at Microsoft believed that as Internet Explorer **[*20]** caught up with Navigator in quality, OEMs would ultimately conclude that the costs of pre-installing and promoting Navigator, and removing easy access to Internet Explorer, outweighed the benefits. Still, those decision-makers did not believe that Microsoft could afford to wait for the several large OEMs that represented virtually all Windows PCs shipped to come to this desired conclusion on their own. Therefore, in order to bring the behavior of OEMs into line with it: strategic goals quickly, Microsoft threatened to terminate the Windows license of any OEM that removed Microsoft's chosen icons and program entries from the Windows desktop or the “Start” menu. It threatened similar punishment for OEMs that added programs that promoted third-party software to the Windows “boot” sequence. These inhibitions soured Microsoft's relations with OEMs and stymied innovation that might have made Windows PC systems more satisfying to users. Microsoft would not have paid this price had it not been convinced that its actions were necessary tc ostracize Navigator from the vital OEM distribution channel.

FOF 214: The several OEMs that in the aggregate represented over ninety percent of Intel-compatible **[*21]** PC sales believed that the new restrictions would make their PC systems more difficult and more confusing to use, and thus less acceptable to consumers. They also anticipated that the restrictions would increase product returns and support costs and generally lower the value of their machines. Those OEMs that had already spent millions of dollars developing and implementing tutorial and registration programs and/or automatically-loading graphical interfaces in the Windows boot sequence lamented that their investment would, as a result of Microsoft's policy, be largely wasted. Gateway, Hewlett-Packard, and IBM communicated their opposition forcefully and urged Microsoft to lift the restrictions. Emblematic of the reaction among large OEMs was a letter that the manager of research and development at Hewlett-Packard sent to Microsoft in March 1997. He wrote:

> Microsoft's mandated removal of all OEM boot-sequence and auto-start programs for OEM licensed systems has resulted in significant and costly problems for the HP-Pavilion line of retail PC's.
>
> Our data (as of 3/10/97) shows a 10% increase in W[indows]95 calls as a % of our total customer support calls…
>
> Our registration rate has also dropped **[*22]** from the mid-80% range to the low 60% range. There is also subjective data from several channel partners that our system return rate has increased from the lowest of any OEM (even lower than Apple) to a level comparable to the other Microsoft OEM PC vendors. This is a major concern in that we are taking a step backward in meeting customer satisfaction needs.
>
> These three pieces of data confirm that we have been damaged by the edicts that □ Microsoft issued last fall.
>
> From the consumer perspective, we are hurting our industry and our customers. PC's can be frightening and quirky pieces of technology into which they invest a large sum of their money. It is vitally important that the PC suppliers dramatically improve the consumer buying experience, out of box experience as well as the longer term product usability and reliability. The channel feedback as well as our own data shows that we are going in the wrong direction. This causes consumer dissatisfaction in complex telephone support process, needless in-home repair visits and ultimately in product returns. Many times the cause is user misunderstanding of a product that presents too much complexity to the common user…

> Our Customers hold **[*23]** HP accountable for their dissatisfaction with our products. We bear □ the cost of returns of our products. We are responsible for the cost of technical support of our customers, including the 33% of calls we get related to the lack of quality or confusion generated by your product. And finally we are responsible for our success or failure in the retail PC market.
> We must have more ability to decide how our system is presented to our end users.
> If we had a choice of another supplier, based on your actions in this area, I assure you [that you] would not be our supplier of choice.
> I strongly urge you to have your executives review these decisions and to change this unacceptable policy.

FOF 215: Even in the face of such strident opposition from its OEM customers, Microsoft refused to relent on the bulk of its restrictions. It did, however, grant Hewlett-Packard and other OEMs discounts off the royalty price of Windows as compensation for the work required to bring their respective alternative user interfaces into compliance with Microsoft's requirements. Despite the high costs that Microsoft's demands imposed on them, the OEMs obeyed the restrictions because they perceived no alternative to **[*24]** licensing Windows for pre-installation on their PCs. Still, the restrictions lowered the value that OEMs attached to Windows by the amount of the costs that the restrictions imposed on them. Furthermore, Microsoft's intransigence damaged the goodwill between it and several of the highest-volume OEMs.

FOF 228: Like most other software products, Windows 95 and Windows 98 are covered by copyright registrations. Since they are copyrighted, Microsoft distributes these products to OEMs pursuant to license agreements. By early 1998, Microsoft had made these licenses conditional on OEMs' compliance with the restrictions described above. Notwithstanding the formal inclusion of these restrictions in the license agreements, the removal of the Internet Explorer icon and the promotion of Navigator in the boot sequence would not have compromised Microsoft's creative expression or interfered with its ability to reap the legitimate value of its ingenuity and investment in developing Windows. More generally, the contemporaneous Microsoft documents reflect concern with the promotion of Navigator rather than the infringement of a copyright. Also notable is the fact that Microsoft did not adjust its OEM **[*25]** pricing guidelines when it lifted certain of the restrictions in the spring of 1998.

FOF 229: Finally, it is significant that, while all vendors of PC operating systems undoubtedly share Microsoft's stated interest in maximizing consumer satisfaction, the prohibitions that Microsoft imposes on OEMs are considerably more restrictive than those imposed by other operating system vendors. For example, Apple allows its retailers to remove applications that Apple has pre-installed and to reconfigure the Mac OS desktop. For its part, IBM allows its OEM licensees to override the entire OS/2 desktop in favor of a customized shell or to set an application to start automatically the first time the PC is turned on. The reason is that these firms do not share Microsoft's interest in protecting the applications barrier to entry.

FOF 338: Because of the importance of “time-to-market” in the software industry, ISVs developing software to run on Windows products seek to obtain beta releases and other technical information relating to Windows as early and as consistently as possible. Since Microsoft decides which ISVs receive betas and other technical support, and when they will receive it, the ability **[*26]** of an ISV to compete in the market-place for software running on Windows products is highly dependent on Microsoft's cooperation. Netscape learned this lesson in 1995.

FOF 339: In dozens of “First Wave” agreements signed between the fall of 1997 and the spring of 1998, Microsoft has promised to give preferential support, in the form of early Windows 98 and Windows NT betas, other technical information, and the right to use certain Microsoft seals of approval, to important ISVs that agree to certain conditions. One of these conditions is that the ISVs use Internet Explorer as the default browsing software for any software they develop with a hypertext-based user interface. Another condition is that the ISVs use Microsoft's “HTML Help,” which is accessible only with Internet Explorer, to implement their applications' help systems.

FOF 410: By refusing to offer those OEMs who requested it a version of Windows without Web browsing software, and by preventing OEMs from removing Internet Explorer — or even the most obvious means of invoking it — prior to shipment, Microsoft forced OEMs to ignore consumer demand for a browserless version of Windows. The same actions forced OEMs either to ignore **[*27]** consumer preferences for Navigator or to give them a Hobson's choice of both browser products at the cost of increased confusion, degraded system performance, and restricted memory.

By ensuring that Internet Explorer would launch in certain circumstances in Windows 98 even if Navigator were set as the default, and even if the consumer had removed all conspicuous means of invoking Internet Explorer, Microsoft created confusion and frustration for consumers, and increased technical support costs for business customers. Those Windows purchasers who did not want browsing software — businesses, or parents and teachers, for example, concerned with the potential for irresponsible Web browsing on PC systems — not only had to undertake the effort necessary to remove the visible means of invoking Internet Explorer and then contend with the fact that Internet Explorer would nevertheless launch in certain cases; they also had to (assuming they needed new, non-browsing features not available in earlier versions of Windows) content themselves with a PC system that ran slower and provided less available memory than if the newest version of Windows came without browsing software. By constraining the **[*28]** freedom of OEMs to implement certain software programs in the Windows boot sequence, Microsoft foreclosed an opportunity for OEMs to make Windows PC systems less confusing and more user-friendly, as consumers desired. By taking the actions listed above, and by enticing firms into exclusivity arrangements with valuable inducements that only Microsoft could offer and that the firms reasonably believed they could not do without, Microsoft forced those consumers who otherwise would have elected Navigator as their browser to either pay a substantial price (in the forms of downloading, installation, confusion, degraded system performance, and diminished memory capacity) or content themselves with Internet Explorer. Finally, by pressuring Intel to drop the development of platform-level NSP software, and otherwise to cut back on its software development efforts, Microsoft deprived consumers of software innovation that they very well may have found valuable, had the innovation been allowed to reach the marketplace. None of these actions had pro-competitive justifications.

FOF 412: Most harmful of all is the message that Microsoft's actions have conveyed to every enterprise with the potential **[*29]** to innovate in the computer industry. Through its conduct toward Netscape, IBM, Compaq, Intel, and others, Microsoft has demonstrated that it will use its prodigious market power and immense profits to harm any firm that insists on pursuing initiatives that could intensify competition against one of Microsoft's core products. Microsoft's past success ir hurting such companies and stifling innovation deters investment in technologies and businesses that exhibit the potential to threaten Microsoft. The ultimate result is that some innovations that would truly benefit consumers never occur for the sole reason that they do not coincide with Microsoft's self-interest.

Conclusion of Law ("COL") 2, ***id. at 39*****:** Because Microsoft achieved this result through exclusionary acts that lacked procompetitive justification, the Court deems Microsoft's conduct the maintenance of monopoly power by anticompetitive means.

COL 3, *id. at 43*: With respect to the ISV agreements, Microsoft has put forward no procompetitive business ends whatsoever to justify their exclusionary terms.

COL 4, *id. at 43*: Microsoft used its monopoly power to prevent firms such as Intel from aiding in the creation of cross-platform interfaces.

COL 7, *id. at 44*: Microsoft's **[*30]** anticompetitive actions trammeled the competitive process through which the computer software industry generally stimulates innovation and conduced to the optimum benefit of consumers.

COL 8, *id. at 54 n.7*: The facts proving that Microsoft unlawfully maintained its monopoly power in violation of *§ 2* of the Sherman Act are sufficient to meet analogous elements of causes of action arising under the laws of each Plaintiff'state. *See Cal. Bus. & Prof. Code §§ 16720*, *16726*, *17200*.

D.C. Circuit Op. 1, ***id. at 53*****:** Operating systems also function as platforms for software applications. They do this by "exposing"-i.e., making available to software developers-routines or protocols that perform certain widely-used functions. These are known as Application Programming Interfaces, or "APIs."

D.C. Circuit Op. 2, *id. at 53*: Software developers wishing to include that function in an application need not duplicate it in their own code. Instead, they can "call"-i.e., use-the Windows API.

D.C. Circuit Op. 3, *id. at 53*: Windows contains thousands of APIs, controlling everything from data storage to font display.

D.C. Circuit Op. 4, *id. at 53*: [A] middleware product written for Windows could take over some or all of Windows's valuable platform functions-that is, developers might begin to rely upon APIs **[*31]** exposed by the middleware for basic routines rather than relying upon the API set included in Windows. If middleware were written for multiple operating systems, its impact could be even greater. The more developers could rely upon APIs exposed by such middleware, the less expensive porting to different operating systems would be. Ultimately, if developers could write applications relying exclusively on APIs exposed by middleware, their applications would run on any operating system on which the middleware was also present.

D.C. Circuit Op. 5, *id. at 56*: Because the applications barrier to entry protects a dominant operating system irrespective of quality, it gives Microsoft power to stave off even superior new rivals. The barrier is thus a characteristic of the operating system market, not of Microsoft's popularity, or, as asserted by a Microsoft witness, the company's efficiency.

New York v. Microsoft Corp., ***224 F. Supp. 2d 76 (D.D.C. 2002)***

Remedies Op. 1, *id. at 152*: A significant portion of the liability findings concerns Microsoft's treatment of OEMs, specifically with regard to Microsoft's imposition of exclusionary restrictions in conjunction with the Windows operating system licenses provided to OEMs. The licenses sharply limited OEMs' flexibility and choices **[*32]** in configuring the PC desktop. The limitations were exclusionary in that they bound OEMs' configuration of the desktop in a manner which tended to favor Microsoft software and services at the expense of software and services offered by other entities.

Remedies Op. *2, id. at 159*: Specifically, the removal of end-user access to certain Microsoft technologies will eliminate, or at least substantially reduce, the deterrent effect of the presence of the Microsoft technology upon the OEM's inclination to install an alternative technology.

Remedies Op. 3, *id. at 166*: The Windows license is fundamental to an OEM's ability to conduct business, and hence, the threat of termination is a powerful tool which Microsoft can utilize to exert undue influence over a particular OEM.

Remedies Op. 4, *id. at 169*: Accordingly, the Court's remedial decree will limit Microsoft's ability to enter into agreements in which the other party agrees to support Microsoft's operating system products exclusively or in a fixed percentage. This provision will address those industry participants with whom Microsoft entered into unlawful and anticompetitive exclusive agreements, namely ISVs, IAPs, and OEMs, as well as those industry participants, such **[*33]** as ICPs and IHVs, who are ready targets for the imposition of similarly unlawful exclusive agreements.

[Rutledge v. Hewlett-Packard, Co.](#)

Superior Court of California, County of Santa Clara

May 16, 2016, Decided; May 16, 2016, Filed

Case No. 1-03-CV-817837

Reporter
2016 Cal. Super. LEXIS 489 *

ED RUTLEDGE, I BRAUN DEGENSHEIN, and SUSANNA GIULIANO-GHARAMANI on behalf of themselves and all others similarly situated, Plaintiffs, v. HEWLETT-PACKARD, CO. and Does 1 through 10, Defendant(s).

Core Terms

class action, settlement, cases, consumer, Antitrust, district court, Purchaser, co-lead, plaintiffs', cable television, nationwide, coordinated, co-counsel, negotiated, Indirect, million settlement, class member, derivative, discovery, dealers, Cable, securities litigation, appointed, damages, court approved, lead counsel, credit card, certification, partnerships, challenging

Counsel: **[*1]** For Plaintiffs: RobertS. Green (SBN 136183), GREEN & NOBLIN, P.C., Larkspur, CA; Robert M. Bramson (SBN 102006), Jendlc Welling (SBN 209480), BRAMSON, PLUTZIK, MAHLER & BIRKHAEUSER, LLP, Walnut Creek, CA; William A. Kershaw (SBN 057486), Kershaw, Cook & Talley PC, Sacramento, CA.

For HP Inc. f/k/a Hewlett-Packard Company, Defendant: Michael J. Stortz (SBN 139386), Drinker Biddle & Reath LLP, San Francisco, CA; Daniel J. Bergeson (SBN 105439), Bergeson LLP, San Jose, CA.

Judges: Hon. Peter H. Kirwan, Judge of the Superior Court.

Opinion by: Peter H. Kirwan

Opinion

STIPULATION AND [PROPOSED] ORDER APPOINTING ADDITIONAL CLASS COUNSEL

WHEREAS, by order dated January 31, 2007, the Honorable J. Komar appointed the law firms of Green Welling, LLP, and Kershaw. Cutter & Ratinoff LLP as class;

WHEREAS, Green Welling, LLP has appeared on behalf of Plaintiffs and the Class through a current and former principals Robert S. Green and Jenellc Welling, respectively;

WHEREAS, Kershaw, Cutter & Ratinoff LLP has appeared on behalf of Plaintiffs and the Class through its principal William Kershaw;

WHEREAS, on or about November 30, 2011, Jenelle Welling disassociated with Green Welling, LLP;

WHEREAS, on February 12, 2012, Robert S. Green **[*2]** notified the Court that Green Welling, LLP changed from a limited liability partnership, to a professional corporation and likewise changed its name to Green & Noblin, P.C.;

WHEREAS, on February 12, 2012, Robert S. Green also notified the Court of Jenelle Welling's association with the Bramson, Plutzik, Mahler & Birkhaeuser, LLP firm;

WHEREAS, on February 12, 2016 William Kershaw notified the Court that Kershaw, Cutter & Ratinoff had changed its name to Kershaw, Cook & Talley LLP; and

WHEREAS, the law firm resumes of Green & Noblin, P.C., Bramson, Pluztik, Mahler & Birkhaeuser, LLP, and Kershaw, Cook & Talley LLP, are attached hereto as Exhibit A.;

Based on the foregoing information and representation of Plaintiffs' counsel, IT IS HEREBY STIPULATED between Plaintiff and Defendant, that the firms of Green & Noblin, P.C., Kershaw, Cook & Talley LLP and Bramson, Plutzkik, Mahler & Kirkhaeuser, LLP may be appointed by the Court as class counsel in this matter.

Dated: May 16, 2016

BRAMSON, PLUTZIK, MAHLER & BIRKHAEUSER, LLP

By: /s/ Jenelle Welling

Jenelle Welling

Dated: May 16, 2016

GREEN & NOBLIN, P.C.

By: /s/ Robert S. Green

Robert S. Green

Dated: May 13, 2016

Kershaw, Cook & Talley, LLP

By: /s/ Bill **[*3]** Kershaw

Bill Kershaw

Attorneys for Plaintiffs I Braun Degenshein and Susanna Giuliano-Ghahramani

Dated: May 13, 2016

DRINKER BIDDLE & REATH LLP

By: /s/ Michael J. Stortz

Michael J. Stortz

Attorneys for Defendant

HP Inc. f/k/a Hewlett-Packard Company

[PROPOSED] ORDER

For good cause shown, it is ordered that the law firms Green & Noblin, P.C., Kershaw, Cook & Talley LLP and Bramson, Plutzik, Mahler & Birkhaeuser, LLP are hereby appointed by the Court as class counsel in this matter.

Hon. Peter H. Kirwan

Judge of the Superior Court

EXHIBIT A

FIRM RESUME

Litigation Approach

The Firm's business strategy is to aggressively develop and pursue opportunities in the field of class action litigation. The Firm's principals have many years of experience prosecuting class action claims relating to antitrust violations, consumer protection, truth in lending practices, financial services, securities offerings, accounting malpractice, breach of fiduciary duties of corporate officers and directors, and products liability.

The aggressive, result-oriented approach to client representation applied by the Firm and its principals has been demonstrated in the following litigation:

• John Doe v. SuccessfulMatch.com, Case No. **[*4]** 1-22-CV-21120, Superior Court of Santa Clara County. Robert Green served as the Lead Trial Counsel in this class action asserting claims under California's UCL and CLRA statutes. In October 2014, a jury awarded the plaintiffs approximately $1.5 million in compensatory damages and $15 million in punitive damages. The Court entered judgment on the verdict and added injunctive and declaratory relief. The case later settled as part of a nationwide class in which class members received over 100% of their asserted damages.

• *In re TFT-LCD (Flat Panel) Antitrust Litigation*, Case No. 07-mdl-1827 SI. The Firm served a critical role developing the evidence that lead to a $1.1 billion settlement in this indirect purchaser antitrust class action settled earlier this year. Members of the Firm were involved in all phases of the litigation over a five-year period, including research and drafting of our initial complaint and later motions and pleadings, managing document review and deposition preparation teams, and identifying and organizing exhibits and other evidence for trial.

• *In re Lithium Ion Batteries Antitrust Litigation*, Case No. 13-md-2420 YGR. The Firm was selected by the Court to serve **[*5]** on the Steering Committee for indirect purchasers' counsel following a litigated selection process. The Firm represents the cities of Palo Alto and Richmond, California, among other purchasers of the affected products.

• *In re Domestic Drywall Antitrust Litigation*, Case No. 13-md-2437. The Firm was appointed Co-Lead Counsel for indirect purchasers in this multi-district litigation pending in Philadelphia.

• *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 02-mdl-1486 PJH. The Firm worked extensively on this indirect purchaser antitrust action, both in San Francisco Superior Court in a coordinated action, and in the federal antitrust action. Principals of the Firm were active in conducting depositions, such as Dell and Nanya executives among others, along with conducting legal and factual research, drafting significant pleadings and running document review teams. The case settled for in excess of $300 million.

• *In re Static Random Access Memory (SRAM) Antitrust Litigation*, Case No. 07-mdl-1819 CW. The Firm participated in all phases of this direct purchaser class action from researching and drafting complaints up through and including final trial preparations. The case **[*6]** settled for approximately $75 million just days before trial.

• *In re Chase Bank USA, N.A. "Check Loan Litigation*. The Firm served on the Executive Committee running this national MDL proceeding in which JPMorgan Chase & Co., the nation's largest issuer of credit cards, agreed to settle for $100 million. The case is a class action lawsuit charging that the bank acted improperly when it more than doubled the minimum monthly payment requirement for over 1 million customers who entered into balance transfer loans with "fixed" interest rates. The Court approved the final settlement on November 19, 2012. The Firm was active in prosecuting the action, from origination, through motions, fact discovery, expert discovery, summary judgment and trial preparation. *See In re: Chase Bank, USA, N.A. "Check Loan"* *Contract Litigation, 274 F.R.D. 286 (N.D. Cal. 2011)*.

• *Hellum v. Breyer (Prosper Marketplace, Inc.) Unregistered Securities Litigation*. Green & Noblin serve as counsel for the class in this action asserting the sale of unregistered securities. The action settled for $10 million in 2014. The court certified a class of approximately 50,000 purchasers of loan notes from Prosper Marketplace, Inc. and denied summary judgment. At the time of settlement, **[*7]** we were preparing for an imminent trial. The Firm's work resulted in a ruling by the Court of Appeal clarifying the pleading requirements for controlling officers and directors under both California and federal securities laws. *See, Hellum v. Breyer, 194 Cal.App.4th 1300, 123 Cal. Rptr. 3d 803 (2011)*.

• *In re Cathode Ray Tube (CRT) Antitrust Litigation*, MDL No. 1917, Case No. 07-5944 SC. The Firm served on document review and deposition preparation teams for this indirect purchaser class action case in the Northern District of California. The case settled in 2015 for over $500 million.

• *In re Textainer Partnership Securities Litigation*. Robert Green served as Lead Trial Counsel in these consolidated cases. The cases settled for $10 million after Plaintiffs obtained a ruling in their favor at the conclusion of Phase 1 of the trial in San Francisco Superior Court. The Plaintiffs asserted breach of fiduciary duty claims in connection with a sale of assets transaction that resulted in the dissolution of six limited partnerships.

• *McKesson Inc. Derivative Litigation*. McKesson-HBOC, Inc. lost $9 billion in stock market capitalization in one day during April 1999 after announcing that prior financial statements would be restated due to accounting errors. Rather **[*8]** than pursuing the individuals and companies who participated in the conduct that led to the accounting restatements, the company sued its own shareholders in a case that was promptly dismissed by the Ninth Circuit U.S. Court of Appeals. As co-counsel for plaintiff shareholders seeking to recover money on behalf of the corporation from the wrongdoers, the Firm obtained an important decision from the Delaware Supreme Court expanding the rights of shareholders to obtain and inspect corporate documents where there is a proper purpose for investigating potential wrongdoing. *See* *Saito v. McKesson HBOC, Inc., 806 A.2d 113 (Del. Supr. 2002)*. A substantial settlement on behalf of the Company was approved by the Delaware Chancery Court on February 12, 2006.

• *In re Providian Credit Card Cases*. Robert Green was appointed co-lead counsel in this national class action brought on behalf of Providian credit card customers who were improperly charged late fees, higher interest rates on balance transfers, and fees for add-on products, including Credit Protection, PricePro, Drive Pro, HealthPro, and credit line increases. The San Francisco Superior Court approved a settlement for $105 million, which covered restitution to Providian customers, "in-kind" payments **[*9]** to customers, and the costs and expenses of the litigation.

Attorneys

Robert S. Green litigates cases of national import across a spectrum of subjects. In antitrust litigation, Mr. Green was named to the Steering Committee of the Lithium Ion Batteries Indirect Purchaser Litigation, and served on important discovery and trial preparation roles in the SRAM, DRAM, and LCD-TFT Thin Film Transistor class actions. In credit card class actions, Mr. Green was one of the Lead Counsel in the Chase Bank "Check Loans" Litigation which settled for $100 million in 2012 and in the Providian Credit Card Cases that settled for $75 million in 2001. Mr. Green successfully argued the Ninth Circuit Appeal in DeMando v. Capital One Bank. In securities litigation, Mr. Green has been named Lead Counsel by state and federal courts from California to New York, participated in or served as lead counsel in three trials, two of which lasted six months, and obtained settlements of $35.75 million for Securities Act claims in the STEC Securities Litigation, $10 million for unregistered securities claims in the Prosper Marketplace Litigation, and $10 million for limited partner claims in the Textainer Limited Partners **[*10]** Securities Litigation. In consumer and defective product cases, Mr. Green was a key member of the trial team in a three month trial against Ford Motor Company in connection with Ford Explorer/Firestone Tire Rollover Litigation that resulted in a substantial settlement at the conclusion of the trial. Mr. Green also successfully prosecuted defective computer claims against HP and Toshiba, defective software claims against Sony, defective dashboard electronics claims against Audi and internet fraud claims against Webloyalty.com.

Mr. Green is AV Preeminent Peer Review Rated by Martindale-Hubbell and was named a finalist for Consumer Attorney of the Year in 2013 by the Consumer Attorneys of California in connection with his work on the Chase Bank "Check Loans" Litigation. Mr. Green is recognized as one of the "Super Lawyers" of Northern California. Mr. Green graduated with honors from the University of the Pacific, McGeorge School of Law in 1984. He received his Masters of Business Administration degree from California State University-Sacramento in 1989 and his undergraduate degree with distinction from Oregon State University in 1981. Mr. Green is an active member of the National Association **[*11]** of Consumer Attorneys (NACA). Mr. Green is an Editorial Advisor for the Consumer Financial Services Law Report and is on the Partners' Council for the National Consumer Law Center. Mr. Green also served on the Board of Marin AIDS Interfaith Network. Publications by Mr. Green include Developments in Credit Card Litigation, published by the Review of Banking and Financial Services; and Litigating Credit Card Cases, published by the Consumer Advocate. Mr. Green is licensed to practice in California.

James Robert Noblin has practiced complex business litigation since 1984, focusing primarily on antitrust and unfair competition cases. Mr. Rob Noblin graduated from Harvard Law School *cum laude* in 1983. He received his undergraduate degree *summa cum laude* from the University of Southern California in 1980. After graduating from law school, Mr. Noblin was a law clerk for the Honorable William A. Norris of the United States Court of Appeals for the Ninth Circuit from 1983 - 1984.

Mr. Noblin has tried over 10 cases to a jury as either the lead or a principal trial lawyer, including the six-week trial resulting in a verdict of over $70 million that was upheld in *Image Tech. Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997)*. His other representative cases **[*12]** include: *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1043 (9th Cir. 2008)* *ABC Int'l Traders, Inc. v. Matsushita Elec. Corp., 14 Cal. 4th 1247, 61 Cal. Rptr. 2d 112, 931 P.2d 290 (1997)*; *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979 (9th Cir. 2000)* *Brill Media Co., LLC v. TCW Group, Inc., 132 Cal. App. 4th 324, 33 Cal. Rptr. 3d 371 (2005)*; *Proctor v. Vishay Intertechnology Inc., 584 F.3d 1208 (9th Cir. 2009)*; *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California, 190 F.3d 1051, 1053 (9th Cir. 1999)* *Consol. Credit Agency v. Equifax, Inc.*, CV-03-*1229 CAS(CWX), 2005 WL 6218038 (C.D. Cal. Jan. 26, 2005)*; *Hanson v. Morgan Stanley Smith Barney, LLC, 762 F. Supp. 2d 1201, 1209 (C.D. Cal. 2011)*; and *Lori Rubinstein Physical Therapy, Inc. v. PTPN, Inc., 148 Cal. App. 4th 1130, 56 Cal. Rptr. 3d 351 (2007)*.

He also contributed to Chapter 20, *California Antitrust and Unfair Competition Law, Revised Edition*, published by the California State Bar Antitrust and Unfair Competition Section and has published articles on antitrust topics, including *United States v. AMR Corp. and Judicial Hostility Toward Predatory Pricing Cases*, Antitrust Report (Jan. 2002); *The Tumult in State* ***Antitrust Law****: Cel-Tech and the California Example in Little FTC Act Cases*, Antitrust Report (June 1999); and *The Confluence of Muddied Waters: Antitrust Consequential Damages and the Interplay of Proximate Cause, Antitrust Injury, Standing and Disaggregation*, 13 St. John's Journal of Legal Commentary 145 (1998).

Professionals

Brian Cullen has over twenty years of experience in creating, managing, and employing document management systems and electronic discovery tools, primarily related to antitrust, securities, and environmental litigation. He received his undergraduate degree from Grinnell College and his JD, cum laude, from the University of San Francisco School of Law, where he externed for the Hon. Ming Chin of the California Supreme Court. Prior **[*13]** to joining Green & Noblin, Mr. Cullen worked as chief research assistant at the San Francisco Superior Court and as a project manager and research analyst for a leading electronic discovery vendor, where he served as its senior professional services representative in Asia. Since joining the Firm, Mr. Cullen has led teams of attorneys in developing documentary evidence of illegal conspiratorial and other antitrust behavior in the *TFT-LCD* and the pending *Cathode Ray Tube* actions.

BRAMSON, PLUTZIK, MAHLER & BIRKHAEUSER, LLP

Bramson Plutzik, Mahler & Birkhaeuser, LLP is a San Francisco Bay Area law firm that specializes in representing plaintiffs in class actions, derivative suits and other complex litigation nationwide.

Members of the firm serving as lead or co-lead counsel have successfully handled class actions in which hundreds of millions of dollars have been recovered for the class members. Among these cases are: *In re Unocal Toxic Spill Litigation*, in which $80 million was recovered for victims of a release of toxic chemicals; *Clark v. Ford Motor Credit Co.*, in which the plaintiff class recovered $58.25 million; *Klussman v. Cross Country Bank*, in which the class achieved a $21 million **[*14]** recovery; *Nguyen v. Verizon Wireless*, which also produced a $21 million recovery; *Patrick v. Blue Shield of California*, in which $20 million was recovered for the class; *Gross v. Barnett Bank*, in which over $19 million was recovered; *Ganal v. Toyota Motor Credit*, in which an $18 million recovery was achieved; *Henderson v. First Interstate Bank of California*, in which $16.25 million was recovered for the plaintiff class; *Guyette v. Viacom, Inc.*, in which a settlement was negotiated that included a cash payment to the class of $13 million; *Reed v. Bank of America*, in which $9 million was recovered; *In re Worlds of Wonder Securities Litigation*, a securities fraud action which resulted in a $9 million recovery; *Whitehouse v. Westcorp Financial Services, Inc.*, in which an $8 million settlement was achieved. The firm's partners have represented clients in class action and derivative cases in federal and state courts throughout the United States.

In addition to its expertise in class actions and derivative litigation, the firm has also achieved prominence in the areas of telecommunications law and First Amendment litigation. The firm's efforts in these areas have resulted in significant published decisions, **[*15]** including two favorable rulings from the United States Supreme Court -- *Community Communications v. City of Boulder, 455 U.S. 40, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982)* and *City of Los Angeles v. Preferred Communications, 476 U.S. 488, 106 S. Ct. 2034, 90 L. Ed. 2d 480 (1986)*. *See also* *Preferred Communications v. City of Los Angeles, 13 F.3d 1327 (9th Cir.)*, *cert. denied*, *114 S.Ct. 2738 (1994)*.

Robert M. Bramson

Robert M. Bramson has more than thirty years of experience in the litigation of antitrust and consumer cases, class actions and other complex litigation. Mr. Bramson received his undergraduate degree in economics, summa cum laude, from the University of California at Berkeley in 1977, and obtained his law degree from the Boalt Hall School of Law in 1981.

Mr. Bramson has represented both plaintiffs and defendants in numerous antitrust cases, and has acted as lead counsel in two such actions taken to trial - *Pacific West Cable Co. v. City of Sacramento*, et al. (E.D. Cal.) ($12 Million settlement on 24th day of trial, at close of plaintiff's case; Sherman Act *§2* monopolization claims) and *Colemanet al. v. Sacramento Cable Television* (Sacramento Sup. Ct.) ($2.4 Million judgment after 17-day trial; class action/*B & P §17200* case; *B & P §17024* discriminatory pricing claims).

Mr. Bramson specializes in antitrust, business torts and communications litigation, as well as in class action cases. He served for many years on the Board of Directors of the National Association of Consumer Advocates and **[*16]** co-chaired its class action committee. He is a contributing author to the National Consumer Law Center's publication Consumer Class Actions. He acted as reporter for the National Association of Consumer Advocates in preparing its influential *Standards and Guidelines For Consumer Class Actions, 176 F.R.D. 375 (1997)*.

Mr. Bramson's lecture topics have included "Strategic and Ethical Issues in Litigating 17200 Cases" (Bar Association of San Francisco, San Francisco 2001), "Equitable Remedies In Class Actions and Under California's *Section 17200* Statute" (National Association of Consumer Advocates, Chicago 2000), "Ethical Issues Arising in Class Action Settlements" (National Consumer Law Center, Wash. DC and San Diego 1999 and 1998) "California's *Business & Professions Code Section 17200*" (California Bar Association, Lake Tahoe 1997), "Preparation of Competitive Business Practices Cases" (Continuing Education of the Bar, Sacramento 1997), and "The Cable Communications Policy Act of 1984" (California State University, Fullerton 1993).

Robert M. Bramson Representative Cases

Klussman v. Cross Country Bank (Alameda County Superior Court) Honorable Ronald Sabraw and Honorable Lawrence Appel, presiding. Co-counsel for a consumer class against credit card issuer. Shortly before trial was due to commence, a settlement was **[*17]** negotiated that resulted in the recovery of consideration exceeding $21 million.

Boltz v. Buena Vista Home Entertainment, et al.(Los Angeles Superior Court) Honorable Anthony Mohr, presiding. Co-counsel on behalf of a nationwide class of hard of hearing persons seeking "close captioning" of content on the DVDs distributed to the public by four major motion picture studios. Case was settled by stipulations to industry-changing injunctions requiring greater captioning.

Acree v. General Motors Acceptance Corp. (Sacramento Superior Court; Third District Court of Appeal) Honorable James Long, presiding. Class action challenging insurance charges imposed upon borrowers by defendant. Following extended trial and multiple appeals, judgment for class and award of fees against defendant totaling approximately $7,000,000 upheld on appeal.

In re Unocal Refinery Litigation (Contra Costa Superior Court) Honorable Ignacio Ruvulo, presiding. One of two co-lead counsel for a class of victims exposed to a toxic chemical spill. Following extensive discovery, including several months of daily depositions, an $80,000,000 settlement was negotiated.

Pacific West Cable Company v. City of Sacramento, et al. (U.S. **[*18]** District Court, E.D. Cal.) Honorable Milton L. Schwarz, presiding. Antitrust jury trial on behalf of plaintiff. Case settled for $12,000,000 after month-long presentation of plaintiff's case in chief.

Coleman v. Sacramento Cable Television (Sacramento Superior Court) Honorable Roger K. Warren, presiding. Judgment of $2,400,000 obtained for clients in *Bus. & Prof. Code §17200* "quasi-class" case, following 26 day trial.

Campisi v. Chavez, et al. (Arbitration) Charles E. Farnsworth, Esq., Referee, presiding. Defended clients against claims of breach of contract and breach of fiduciary duty. Three week arbitration proceeding resulting in ruling limiting plaintiff to amount stipulated as due.

Pacific West Cable Company v. City of Sacramento, et al. (U.S. District Court, E.D. Cal.) Honorable Milton L. Schwarz, presiding. Twenty-nine day jury trial challenging municipal cable franchising activities. Favorable jury verdicts (see *672 F. Supp. 1322*) led to $6,000,000 settlement for client as well as injunction permitting access to the market.

Nor-West Cable Communications Partnership v. City of St. Paul (U.S. District Court, D. Minn.) Honorable Joseph Alsop, presiding. Three month jury trial challenging municipal policy fostering monopolization **[*19]** of local cable television market.

Furniture Creations, Inc. v. Universal Furniture (Los Angeles Superior Court) Honorable Robert Einstein, presiding. Three week jury trial in breach of contract case resulting in $1,000,000 verdict for clients.

Robert M. Bramson Selected Published Decisions:

Klussman v. Cross Country Bank, 134 Cal.App.4th 1283, 36 Cal. Rptr. 3d 728 (2005).

Acree v. General Motors Acceptance Corp., 92 Cal.App.4th 385, 112 Cal. Rptr. 2d 99 (2001).

Heartland Communications, Inc. v. Sprint Corp., 161 F.R.D. 111 (D. Kan. 1995).

Preferred Communications, Inc. v. City of Los Angeles, 13 F.3d 1327 (9th Cir.), *cert. denied*, *512 U.S. 1235 (1994)*.

Gordon v. Ford Motor Credit Corp., 868 F. Supp. 1191 (N.D. Cal. 1992).

Century Federal, Inc. v. City of Palo Alto, 710 F.Supp. 1559 (N.D. Cal. 1988).

Pacific West Cable Company v. City of Sacramento, 672 F. Supp. 1322 (E.D. Cal. 1987) and *693 F. Supp. 865 (E.D. Cal. 1988)*.

Colorado Springs Cablevision, Inc. v. Lively, 579 F. Supp. 252 (D. Colo. 1984).

Alan R. Plutzik

Alan R. Plutzik specializes in complex business litigation in federal and state courts. Areas of particular emphasis include consumer class actions, securities fraud and corporate governance litigation, antitrust and communications law. Mr. Plutzik is admitted to practice in California and the District of Columbia Bar (inactive member) and is a member of the bars of the United States Supreme Court, the Second, Third, Eighth, Ninth, Tenth and District of Columbia Circuits and a number of federal district courts.

Mr. Plutzik joined the firm upon his graduation from the University of California at Berkeley's Boalt Hall School of Law in 1977. He received his undergraduate degree from St. John's College, Annapolis, Maryland, in 1971, and holds an M. A. from Stanford University.

Mr. Plutzik has handled a wide variety of class actions and derivative cases. He has **[*20]** represented, among other clients,

- investors in securities class actions
- shareholders in corporate derivative suits;
- victims of consumer fraud;
- parties alleging breach of contract by insurance companies and other corporations;
- limited partners challenging conduct by their general partners;
- consumers and businesses harmed by price-fixing and other anticompetitive conduct;
- employees in ERISA and wage/hour cases;
- property owners in litigation challenging policies that affect their property rights;
- purchasers of mislabeled and defective products;
- home buyers in suits brought under the Real Estate Settlement Procedures Act;
- victims of toxic pollution; and
- Subscribers to cellular, landline telephone, cable TV and Internet-delivered services.

Mr. Plutzik has also represented technology companies in litigation and arbitration, and broadcasters, cable television companies, communications common carriers and consumers in litigation and in administrative proceedings before the Federal Communications Commission and the California Public Utilities Commission. He has been designated a Northern California SuperLawyer.

Mr. Plutzik has written or lectured on topics that include class actions, **[*21]** California consumer law, substantive and procedural issues under the federal securities laws, First Amendment issues applicable to the media, cable television franchising and legal issues arising from cable television companies' access to utility poles and real estate developments. He has appeared as a guest radio commentator on the Len Tillem Show on KGO-Radio in San Francisco, discussing class actions, consumer protection law and investor rights.

Mr. Plutzik has served as a judge *pro tem* on the Contra Costa County Superior Court. He is also Co-President of the Warren W. Eukel Teacher Trust, a charity that honors outstanding teachers in Contra Costa County, California.

Alan R. Plutzik Representative Cases

In re Pacific Bell Late Fee Litigation (Contra Costa County Superior Court). Mr. Plutzik is co-lead counsel for the plaintiffs in a consumer class action challenging the validity of a landline telephone company's late fees in light of California statutory limitations on liquidated damages. A $38 million settlement was negotiated and approved by the Court.

Patrick v. California Physicians' Service dba Blue Shield of California (San Francisco County, California Superior Court and United States District **[*22]** Court for the Northern District of California). Mr. Plutzik represented the plaintiffs in a class action for consumer fraud, unfair business practices and violations of ERISA arising from allegedly deceptive and unfair practices by a health insurance company in connection with patient co-payments for hospital treatment. A settlement of $20 million was negotiated after the close of discovery.

In re Cellphone Termination Fee Cases - Handset Locking Actions (Alameda County, California Superior Court). Mr. Plutzik served as co-lead counsel in five coordinated cases challenging the secret locking of cellphone handsets by major national wireless carriers to prevent consumers from activating them on competitive carriers' systems. Settlements were approved in all five cases on terms that required the cellphone carriers to disclose their handset locks to consumers and to provide unlocking codes nationwide on reasonable terms and conditions. The settlements fundamentally changed the landscape for cellphone consumers nationwide regarding the locking and unlocking of cellphone handsets.

In re Cellphone Termination Fee Cases - Early Termination Fee Cases (Alameda County, California Superior Court **[*23]** and Federal Communications Commission). Mr. Plutzik is Liaison Counsel and a member of the plaintiffs' Executive Committee in connection with claims challenging the validity under California law of early termination fees imposed by national cellphone carriers. In one of those cases, against Verizon Wireless, a nationwide settlement was reached after three weeks of trial in the amount of $21 million. In a second case, which was tried to verdict and affirmed on appeal, the Court ruled after trial that more than $73 million of flat early termination fees that Sprint PCS had collected from California consumers over an eight-year period were void and unenforceable, and enjoined Sprint from collecting an additional $225 million of such charges that had been billed but not paid.

Guyette v. Viacom, Inc. (Alameda County, California Superior Court). Mr. Plutzik was co-counsel for a class of cable television subscribers who alleged that the defendant had improperly failed to share certain tax refunds with the subscribers. A settlement was negotiated shortly before trial under which defendants paid the class $13 million in cash.

Green v. Metropolitan Life Insurance Co. (San Francisco County, California **[*24]** Superior Court). Mr. Plutzik was co-counsel for a California class of MetLife policy holders in a class action alleging that MetLife had engaged in "twisting," "churning" and other misconduct in the sale of replacement life insurance policies. After the California class was certified, the case settled on a nationwide basis for consideration in excess of $1 billion.

In re Pacific Lumber Company Securities Litigation (United States District Court, Southern District of New York). Mr. Plutzik was counsel for the plaintiff class in a securities class action arising out of a tender offer for Pacific Lumber Company by a corporate raider. The plaintiff class recovered in excess of $140 million.

In re Worlds of Wonder Securities Litigation (United States District Court, Northern District of California). Mr. Plutzik was co-lead counsel for the plaintiff class in a securities fraud class action against officers, directors, venture capitalists and auditors of failed toy company in a case raising complex accounting and auditing issues. After percipient and expert discovery, summary judgment, appeal and remand, a settlement was reached against the company's auditor, Deloitte & Touche, LLP, for $9 **[*25]** million. The case resulted in a number of published opinions - *e.g., In re Worlds of Wonder Securities Litigation, 35 F.3d 1407 (9th Cir. 1994)*, *cert. denied*, *516 U.S. 868 (1995)*; *694 F. Supp. 1427 (N.D. Cal. 1988)*; *721 F. Supp. 1140 (N.D. Cal. 1989)*; *1990 U.S. Dist. LEXIS 18396*, [1990-91 Transfer Binder] Fed. Sec. L. Rep. (CCH) 95,689 (N.D. Cal. 1990); *147 F.R.D. 208 (N.D. Cal. 1992)*.

McCall v. Newkirk Capital LLC (Connecticut Superior Court, New Britain Judicial District). Mr. Plutzik represented a class of investors in 90 limited partnerships in a suit arising out of a consolidation, or "rollup," of the partnerships. A settlement was negotiated and approved by the Court that provided for the class to receive significant consideration, including cash, additional partnership units and a restructuring of certain assets and agreements with the general partner and its affiliates.

In re Daisy Systems Securities Litigation (United States District Court, Northern District of California). Mr. Plutzik represented a plaintiff class in a securities fraud class action against the directors and officers of a Silicon Valley company. A $13.1 million settlement was reached.

Hodge v. Franklin Select Realty Trust (San Mateo County, California Superior Court). Mr. Plutzik was co-counsel for a shareholder class in a claim against directors and officers of a real estate investment trust and others, arising out of merger **[*26]** with two other related companies. A settlement of $4 million was negotiated.

Barnett v. Glenborough Pension Investors (San Mateo County, California Superior Court). Mr. Plutzik was co-counsel for a plaintiff class of limited partners in a claim against general partners, attorneys and lenders arising from the restructuring of a real estate limited partnership. A settlement of approximately $3 million was reached after the close of expert discovery.

In re Technical Equities Federal Securities Litigation (United States District Court, Northern District of California). Mr. Plutzik represented the plaintiff class in securities fraud class action against directors, officers, auditors, attorneys, lenders and investment bankers of a public corporation that operated a complex Ponzi scheme. A global classwide settlement in the amount of $13 million was reached shortly before trial. *See* *In re Technical Equities Federal Securities Litigation, 1988 U.S. Dist. LEXIS 15813*, [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) P 94, 093 (N.D. Cal. Oct. 3, 1988)

Daniels v. Centennial Group (Orange County, California Superior Court). Mr. Plutzik was co-counsel for the plaintiff class in a claim for fraud, negligent misrepresentation and breach of fiduciary duty against general partners **[*27]** and promoters arising from a "roll-up" of six real estate limited partnerships. A settlement of approximately $4 million was reached on behalf of the investors. The case resulted in an important published opinion regarding the standards for class certification under California law - *Daniels v. Centennial Group, Inc., 16 Cal.App.4th 467, 21 Cal. Rptr. 2d 1 (1993)*.

Harbor Finance Partners v. BKP Capital Management et al. (San Francisco County Superior Court). Mr. Plutzik was co-counsel for a plaintiff class consisting of both individual and institutional investors in an action asserting claims of misrepresentation, breach of fiduciary duty and unfair business practices against a hedge fund, its general partner, its auditor and others. The action settled on terms favorable to the class.

Condes v. Evercom et al. (Alameda County, California Superior Court). Mr. Plutzik was co-counsel for a class of recipients of inmate telephone calls. A partial class settlement which, together with individual settlements, resulted in the recovery of more than $1 million was negotiated and approved by the Court.

NV Security, Inc. v. Fluke Networks, Inc. (U.S. District Court, Central District of California). Mr. Plutzik was counsel in a class action on behalf of purchasers of allegedly **[*28]** defective telephone line equipment. A settlement was negotiated that included monetary and injunctive relief for class members.

McCullough v. Jameson (United States District Court for the Northern District of California) - Individual and derivative case on behalf of shareholders of a privately held oil company for alleged misappropriation of corporate opportunities and other breaches of fiduciary duties. The case settled favorably.

Stock Options Backdating Derivative Cases (United States District Court, Northern District of California) - Mr. Plutzik served as Liaison Counsel in a number of corporate derivative cases in the United States District Court for the Northern District of California alleging the improper backdating of stock options, including *In re Integrated Silicon Solutions Derivative Cases, In re Actel Derivative Cases* and *In re Chordiant Derivative Cases*. Successful results were achieved in all of those cases.

In re Washington Public Power Supply Securities Litigation (United States Court of Appeals for the Ninth Circuit) - Mr. Plutzik represented a class action law firm in a case that established important principles regarding the compensation of plaintiffs' counsel in federal **[*29]** class actions. The case resulted in a published opinion. *In re Washington Public Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1300 (9th Cir. 1994)*.

Antitrust Direct and Indirect Purchaser Class Actions - Mr. Plutzik has served in a leadership position in numerous antitrust class actions, including *In re Methionine Direct Purchaser Antitrust Litigation* (United States District Court for the Northern District of California), *In re California Indirect Purchaser MSG Antitrust Litigation* (San Francisco County Superior Court) and *In re California Infant Formula Indirect Purchaser Antitrust Litigation* (San Francisco County Superior Court).

California Community Television Association v. Pacific Gas & Electric Company (Alameda County, California Superior Court), *Group Cable v. PG&E* (United States District Court for the Northern District of California) and *California Community Television Association v. Pacific Gas & Electric Company* (California Public Utilities Commission) - associational and class action cases alleging antitrust and related business tort claims for denial of access to utility poles on reasonable terms, and administrative action seeking regulatory ruling setting fair and reasonable prices and terms, brought on behalf of California cable television companies against **[*30]** a public utility. The cases were settled on terms that permitted favorable conditions of access to the poles.

Lucero v. Frederick's of Hollywood, Inc. (Santa Clara County, California Superior Court). Mr. Plutzik served as lead counsel for an employee class in this wage and hour class action. A $950,000 settlement was approved by the Court.

USA Media Group LLC v. Truckee Donner Public Utility District (United States District Court for the Eastern District of California). Mr. Plutzik represented a cable television company in a claim brought against a public utility district for constitutional and antitrust violations and related state-law claims arising from restrictions imposed by the public utility district on the cable television company's access to utility poles owned by the public utility district, which was planning to offer competitive cable television service. The case settled on terms that permitted the cable television company to continue to obtain access the poles on reasonable terms and conditions.

Tele-Communications of Key West, Inc. v. United States (United States District Court, District of the District of Columbia). Mr. Plutzik represented a cable television company in **[*31]** constitutional litigation arising from its provision of service on Homestead Air Force Base. *Telecommunications of Key West, Inc. v. United States, 757 F.2d 1330 (D.C. Cir. 1985)*.

Citizens Cable Communications Co. v. Cox Cable Communications Co. (United States District Court for the Northern District of Indiana). Mr. Plutzik represented a cable television company in litigation arising from an option to purchase a cable television system in a neighboring community. The case settled favorably during trial.

Daniel E. Birkhaeuser

Daniel E. Birkhaeuser received his law degree from the University of California, Davis in 1988. While at Davis, he served as an Editor of the *U.C. Davis Law Review*.

Following graduation, Mr. Birkhaeuser joined the law firm of McCutchen, Doyle, Brown and Enersen. At the McCutchen firm, he represented plaintiffs and defendants in a wide variety of complex civil litigation matters including real estate, bankruptcy and environmental litigation. In 1991, Mr. Birkhaeuser co-chaired an eight week trial in *Quadrant Corporation v. First Interstate Bank*, Contra Costa County Superior Court Action No. C90-03855 recovering for his client over $15 million which, at that time, was the largest jury verdict in Contra Costa County history.

In 1992, Mr. Birkhaeuser began **[*32]** to focus his career on class action litigation at the trial and appellate levels. One such matter, *Harris v. Chase Manhattan Bank, N.A. (1994) 34 Cal. App. 4th 1563*, resulted in a favorable decision, the reasoning of which was affirmed by the California Supreme Court in a companion case entitled *Smiley v. Citibank (1995) 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441, 900 P.2d 690*, and ultimately by the United States Supreme Court in the same case. *Smiley v. Citibank (1996) 517 U.S. 735, 116 S. Ct. 1730, 135 L. Ed. 2d 25*.

Mr. Birkhaeuser joined the firm in 1994 and became a partner in 1997. At the firm, he has prosecuted class action cases involving insurance, false nutritional labeling, price fixing and securities fraud. Mr. Birkhaeuser served in a leadership position in *In Re Kansas Vitamin Antitrust Litigation* and *In re Wisconsin Vitamin Antitrust Litigation*, which were coordinated through proceedings in the District of Columbia and consolidated with *parens patriae* actions brought by attorneys general in 23 jurisdictions. He served on plaintiffs' Executive Committee in *In re DRAM California Indirect Purchaser Antitrust Litigation* and *In re California Polyester Indirect Purchaser Antitrust Litigation*, and serves as Liaison Counsel in *In Re Korean Ramen Indirect Purchaser Antitrust Litigation*. He has also represented indirect purchaser plaintiffs in antitrust matters alleging price fixing in the "Flash **[*33]** Memory," Cathode Ray Tube, Automobile, and Paper industries. He has also served as a judge *pro tem* in the Contra Costa Superior Court.

Other Significant Cases:

Van Warmerdam v. Honey Hill Farms (arbitration) Honorable William Boone, presiding. Lead counsel in complex contract dispute resulting in verdict in client's favor on complaint and cross-complaint.

Meadow Wood Land Company v. Landmark Vineyards, Ltd, et. al., First Appellate District No. AO43692. Lead counsel for defendants and respondents in case which settled favorably after the filing of Respondents' brief on appeal.

Lesher Communications, Inc. v. City of Walnut Creek, 52 Cal. 3d 531, 277 Cal. Rptr. 1, 802 P.2d 317 (1991). Landmark decision under California Environmental Quality Act addressing City's ability to amend general plan by voter initiative.

Acree v. General Motors, Inc., 92 Cal. App. 4th 385, 112 Cal. Rptr. 2d 99 (2001). Important decision defining scope of covenant of good faith and fair dealing and reasonableness of fee award after class action trial against tenacious defendant.

Morelli v. Weider Nutrition Group, Inc., 275 A.D.2d 607, 712 N.Y.S. 2d 551 (1st Dept. 2000). Case of first impression holding that plaintiffs' claims for false nutritional labeling were not preempted by the Nutritional Labeling and Education Act.

Figueroa v. Sharper Image Corp., 517 F. Supp. 2d 1292 (S.D. Fla. 2007). Lead counsel for objector/class member in state court action who, joined by attorneys general from 35 states, successfully defeated settlement of later-filed federal action **[*34]** on the ground that the settlement was unfair.

Vassalle v. Midland Funding, 708 F. 3d 747 (6th Cir. 2013) Co-lead counsel for objector in which the Court rejected a proposed class action settlement of claims relating to affidavits containing false representations of personal knowledge.

Jennifer S. Rosenberg

Jennifer S. Rosenberg is senior counsel with the firm. She received her A.B. in political science, with great distinction in general scholarship, in 1981 from the University of California at Berkeley. She is a member of Phi Beta Kappa. Ms. Rosenberg obtained her law degree from the University of California at Berkeley (Boalt Hall) in 1985.

From 1985 to 1987, Ms. Rosenberg was an associate with the law firm of McKenna, Conner & Cuneo, specializing in banking law. Before joining Bramson, Plutzik, Mahler & Birkhaeuser, she was associated with McCutchen, Doyle, Brown & Enersen, practicing commercial litigation and land use litigation. As an adjunct professor at the University of San Francisco, she has taught business law and business ethics in the undergraduate and MBA programs of the McLaren School of Business.

Ms. Rosenberg is a contributing writer for Justice Maria Rivera's *California Practice Guide: Civil Procedure Before Trial Forms* (The Rutter **[*35]** Group), the companion volume to Weil & Brown, *California Practice Guide: Civil Procedure Before Trial* (The Rutter Group). She is the principal drafter and editor of the Guide's class action forms. She has published articles in *California Lawyer* and *Business Voice* magazines and edited the 1994 edition of Remy, Thomas & Moose's *Guide to the California Environmental Quality Act*.

At Bramson, Plutzik, Mahler & Birkhaeuser, Ms. Rosenberg has focused on the prosecution of consumer class actions. Ms. Rosenberg is admitted to practice in California and is a member of the bars of the federal district courts of California and of the Ninth Circuit. She has acted as a judge pro tem for civil matters and as a small claims appeals judge in Superior Court, as well as a fee arbitrator.

Selected Published Decisions:

Ayyad v. Sprint Spectrum, L.P., 210 Cal.App.4th 851, 148 Cal. Rptr. 3d 709 (2012)

Figueroa v. Sharper Image Corporation, 517 F.Supp.2d 1292 (S.D. Fla. 2007)

Acree v. General Motors Acceptance Corporation, 92 Cal. App. 4th 385, 112 Cal. Rptr. 2d 99 (2001)

Mangini v. Aerojet-General Corporation, 230 Cal.App.3d 1125, 281 Cal. Rptr. 827 (1991)

Michael S. Strimling

Michael S. Strimling has extensive experience in complex litigation and class actions. He received his J.D. from Boalt Hall Law School at U.C. Berkeley and was admitted to the California Bar in 1980. As well as actively prosecuting class actions and mass tort litigation while at Lieff, Cabraser, Heimann & Bernstein, at Bramson, Plutzik, Mahler & Birkhaeuser, LLP, and of **[*36]** counsel in other complex litigation, he has defended class actions while associated with Bartko, Zankel, Tarrant & Miller and Wendel, Rosen, Black & Dean.

In addition, Mr. Strimling has served as the Research Attorney for the Complex Litigation Department of Santa Clara County Superior Court, as a Senior Research Attorney to the California Sixth District Court of Appeal, as a Research Attorney to the Alameda County Superior Court, as a Legal Advisor to the Solomon Islands government in the United States Peace Corps, and as a three-term member of the California State Bar's Committee on the Administration of Justice. In addition to admission before State and Federal District Courts he has been admitted to the Bar and argued before the U.S. Court of Federal Claims in Washington, D.C., lectured in continuing legal education seminars, published articles on derivative litigation, and been admitted to the New Zealand and Solomon Islands Bar.

Jenelle Welling

Jenelle Welling graduated from the University of California, Hastings College of the Law in 2000, where she was honored with the American Jurisprudence Award in both Moot Court and Trial Advocacy. She also was a member of the Hastings Women's **[*37]** Law Journal. Prior to law school, Ms. Welling received a Masters Degree in Public Policy from the University of California at Berkeley. She graduated with Highest Honors from the University of California at San Diego with a Bachelor of Arts degree in Political Science. Recognized as a Rising Star by the

Super Lawyers of Northern California in 2010 and 2011, Ms. Welling is a member of the National Association of Consumer Advocates, the Consumer Attorneys of California, and the Contra Costa County Bar Association. Her primary practice area is complex and class action litigation in consumer financial services and consumer products. She also practices in antitrust and commercial litigation. She has lectured on the Truth in Billing Act, mediating consumer class actions, and presented seminars on the basics of consumer class action litigation for plaintiffs' lawyers.

Some of the clients and plaintiff classes Ms. Welling has represented include:

• *In re: Ford Explorer Cases, J.C.C.P. Nos. 4266 & 4270*. Ms. Welling, along with co-counsel, represented a class of California consumers alleging that Ford withheld material information about the rollover propensity of the Ford Explorer. Ms. Welling **[*38]** was a member of the 5-person trial team that presented plaintiffs' case over the course of a 50-day trial, and was primarily responsible for presenting expert testimony in support of restitution under Business & Professions Code §17200 totaling more than $500 million. The case settled on the eve of closing argument and ultimately provided injunctive relief that will inure to the benefit of consumers nationwide, as well as the opportunity for monetary redress for consumers in California, Texas, Illinois, and Connecticut.

• *In re CARB Compliant Gasoline Cases II, JCCP No. 4449*. Jenelle Welling served as co-liaison counsel in this anti-trust action filed in California Superior Court. Plaintiffs allege that Union Oil Company misled the California Air Resources Board (CARB) into adopting standards for the composition of summertime reformulated gasoline that overlapped with Union Oil Company's then undisclosed and pending patents. Through this alleged deception and other alleged anti-competitive acts, California consumers in the downstream market allegedly overpaid for summertime CARB-complaint gasoline. A settlement providing $48 million in cy pres was approved by the court in 2008.

• *In re: Baycol Cases I and II*. This action **[*39]** alleges that Bayer's advertisement and sale of the cholesterol drug Baycol, which was ultimately pulled from the market for safety risks, violated California's Unfair Competition Law. In February 2011, Ms. Welling successfully overturned an appellate opinion, and obtained a ruling in Plaintiff's favor on important class action procedural issues. *See In re Baycol Cases I and II, (2011) 51 Cal.4th 751, 122 Cal. Rptr. 3d 153, 248 P.3d 681*.

• *Brothers v. Hewlett-Packard*. In this case, Ms. Welling secured speedy relief for owners nationwide of certain HP laptop computers that were alleged to contain a defect associated with an advanced graphics card. Consumers received a new, equally performing graphics card at no expense and a refund of 100% of expenses associated with any repair of the alleged defect. This case also generated the first decision within the Ninth Circuit establishing federal jurisdiction under CAFA for Magnuson-Moss claims without the 100 plaintiff jurisdictional requirement. *See Brothers v. Hewlett Packard, Co.*, Case No. 06-02254, 2007 WL 485979 (N.D. Cal. Feb. 12, 2007).

• *In re: Tenet Healthcare Cases II*. Jenelle Welling served on the Plaintiffs' Executive Committee in this consolidated action that obtained redress for uninsured consumers who received treatment from one of Tenet Healthcare's 42 California hospitals. The complaint alleged Tenet charged **[*40]** exorbitant and unconscionable prices, for example, marking up prescription drugs 1,038% on average, to increase revenues and profits. A national settlement was approved in August 2005 that provides for restitution, injunctive relief and $4 million of cy pres damages. The settlement has been hailed as a model for how the nation's uninsured population should be billed for hospital care.

• *Prata v. Bank One*. Ms. Welling, along with co-counsel, represented the plaintiff class in this case involving "Same as Cash" credit card financing claims. The Superior Court in Los Angeles approved a $3 million cash settlement for California consumers who participated in the "Same as Cash" financing plan. Litigation of this case resulted in a oft-cited opinion interpreting Bus. & Prof. Code § 17200, *Prata v. Sup. Ct. (2001) 91 Cal. App. 4th 1128, 111 Cal. Rptr. 2d 296*.

• *Starkey v. Rusnak BMW*. Ms. Welling led this class action asserting that expensive BMW wheels on new cars were secretly replaced before sale with lower value after market wheels. The action was resolved quickly to the benefit of the class, and included an agreement by the dealer to refrain from selling after market wheels on new cars.

• *Prata v. GE Capital*. Ms. Welling, along with co-counsel, restored another $2.5 million to Californians **[*41]** who were duped by the "Same as Cash" advertising slogan and program that GE bought from Bank One. GE also agreed to refrain from using the "Same as Cash" slogan to advertise financing plans that require minimum monthly payments.

Paul F. Mahler (Of Counsel)

Paul F. Mahler is a 1980 graduate of the University of California, Boalt Hall School of Law. After working several years in-house at a major educational company headquartered in San Francisco, Mr. Mahler joined the firm in 1985, became a partner in 1997 and is currently of counsel to the firm.

Mr. Mahler handles business transactions, representing primarily small and medium-sized businesses. Mr. Mahler's transactional work includes entity formation and agreements among owners; the purchase and sale of assets, stock or other interests; intellectual property issues; employment matters; and commercial real estate matters, primarily in leasing. His clients include high technology companies, biotechnology companies, accounting and insurance firms and companies with significant retail store operations.

The law firm of Kershaw, Cook & Talley, PC (KCT) is dedicated to advancing the rights of consumers, employees and injured victims in class **[*42]** actions, mass torts and other complex consumer and antitrust litigation, and in matters involving mass catastrophic injury. The attorneys of the firm have lead responsibility in obtaining recoveries through judgments or settlements aggregating over $1 billion for their clients. The partners have served as lead or co-lead counsel in a number of significant national class action and mass tort proceedings, and have been appointed to the executive or plaintiffs' steering committees in both state and federal courts. William A. Kershaw is Past President of the Sacramento County Bar Association, Past Chair of the California Consumer Protection Council, and Past President of the St. Michael's Episcopal Day School. He has also been named a Northern California Super Lawyer for 12 consecutive years, Best of the Bar 2014-2015 by Sacramento Business Journal, AV Preeminent rated by Martindale-Hubbell, Superb Rated by AVVO, and selected by his peers as a 2015 Top Lawyer in the Sacramento region. Some of the firm's more prominent successes and ongoing cases include:

• *In re American Honda Motor Co., Inc. Dealerships Relations Litigation*, MDL 1069, U.S. District Court, Baltimore, Maryland. An antitrust **[*43]** and RICO class action where Mr. Kershaw served as plaintiffs' lead class counsel. Class action complaint filed in E.D., California; transferred to MDL; limited liability class certified. More than 80 cases are included in this MDL proceeding. The Court approved a global settlement of $330 million (plus) in *Borman Motor Company, et al. v. American Honda Motor Company, Inc., et al*. a class action brought by current and former Honda and Acura dealers alleging RICO and antitrust violations and fraud related to misallocation of cars. *Borman II* was a case evolving from the MDL involving misconduct on the part of certain of Honda's counsel, resulting in an additional settlement of $60 million.

• *Bayshore Ford Truck Sales, Inc., et al. v. Ford Motor Company*, USDC, District of New Jersey, No. 99 CV 741 (JCL), filed as a class action on behalf of all Ford heavy truck dealers for breach of contract damages arising from Ford's unilateral sale of its heavy-truck business to Freightliner, William A. Kershaw was appointed co-lead class counsel on behalf of the dealer class. The class was certified as to liability and thereafter continued as individual damage cases on behalf of 77 dealers. Mr. Kershaw **[*44]** served as co-lead trial counsel in a bellwether jury trial on behalf of 11 dealerships and obtained $45 million jury verdict following month-long trial. The case litigated on allegations that Ford violated its franchise agreement by failing to supply the dealers with heavy trucks pursuant to that contract. The 11 bellwether dealers were located throughout the United States.

• *Nguyen et al. v. BMW of North America, LLC*, Case No. 3:10-cv-02257, in the Northern District of California. In this class action, Mr. Kershaw and Mr. Talley represented plaintiffs alleging BMW failed to replace defective high pressure fuel pump components and altered the vehicle's software after discovering design flaws in BMW models with N54 engines. The case resolved in a settlement, valued at $211,470,000, on behalf of approximately 200,000 class members.

• *George Lussier Enterprises, Inc. dba Lussier Subaru, et al. v. Subaru of New England, Inc., et al*. USDC, District of New Hampshire, No. C-99-109-B. This is an antitrust case where Mr. Kershaw served as lead class counsel for plaintiffs in this class action filed by Subaru dealers in New England alleging antitrust and RICO violations relating to the vehicle **[*45]** allocation process administered by Subaru of New England. Mr. Kershaw successfully sought class certification.

• *Sharma et al. v. BMW of North America, LLC*, Case No. 3:13-cv-02274, in the Northern District of California, is a putative class action on behalf of California consumers who purchased or leased BMW X5, X3, and 5 series vehicles that were defectively designed by locating certain electrical components in the lowest part of the trunk where they became damaged by water intrusion under ordinary driving conditions. Plaintiffs allege that water intrusion in the vehicle trunk compartment results in electronic malfunction and related safety hazards.

• *Automotive Leasing Corporation v. Mahindra & Mahindra, LTD.*, USDC, Northern District of Georgia, No. 1:12-CV-2048-TWT, filed as a class action on behalf of 110 vehicle dealers seeking to recover franchise fees paid to operate Mahindra dealerships in the United States. The class action alleges Mahindra, an Indian car manufacturer, reneged on the deal and refused to refund the dealers over $60 million paid in franchise fees. Mr. Talley pursued claims under various "Dealers Day in Court" acts and the case settled in 2015 for a confidential **[*46]** amount.

• *Campbell v. PricewaterhouseCoopers, LLP* (Case No. 06-CV-02376-LKK-GGH). Mr. Kershaw served as lead class counsel in the first certified class action against a big four accounting firm for failure to pay overtime to PwC Audit Associates as well as other compensation based on their alleged non-exempt status under California's wage and hour laws. The complaint was filed alleging failure to pay overtime compensation in violation of *California Labor Code section 510*, failure to timely provide and pay for meal period and rest breaks in violation of *Labor Code section 512* and *226.7* and failure to provide accurate pay records and waiting time penalties all in violation of California Business & Professions code 17200. Federal Court, sitting in the Eastern District of California, granted plaintiffs' motion for summary judgment on liability finding that PwC's Audit Associates were non-exempt hourly employees and that PwC had improperly designated them as exempt. The case went up and down to the 9th circuit three times on class certification and summary judgment before it settled three months before trial.

• Currently serving on the Plaintiffs' Steering Committee for the *DePuy ASR™ Hip System Cases*, California Judicial Council Coordination Proceeding **[*47]** No 4649 pending in the Superior Court in San Francisco County. These proceedings are working cooperatively with MDL 2197, *In re: DePuy Orthopaedics, Inc., ASR™ Hip Implants Products Liability Litigation*. William A. Kershaw and Stuart C. Talley currently represent over 100 plaintiffs who have had the *DePuy ASR™ Hip System* implanted into their bodies.

• Currently serving on the Plaintiffs' Steering Committee for the *In re Stryker Rejuvenate and ABG II Hip Implant Products Liability Litigation* (MDL No. 2441) pending in the United States District Court, District of Minnesota. This MDL has partially settled, and with others on the PLCC, Mr. Kershaw is taking discovery of key Stryker employees.

• *Contratto v. Ethicon, Johnson & Johnson, Lifecore, et al* U.S. District Court, Northern CA. No. C03-3804MJJ ARB, a mass tort action involving some sixty plaintiffs initially filed in the Northern District of California and ultimately prosecuted in Florida State Court, West Palm Beach, Florida. The action sought damages caused by the medical device, Intergel, a product intended to reduce adhesions in women undergoing abdominal surgery. However, in certain women, the device caused injury by actually **[*48]** increasing adhesions. The case was prosecuted over three years resulting in a global settlement on behalf of all the firm's clients. The settlement amount and the terms of the settlement are confidential.

• Mr. Kershaw served as co-lead class counsel and represented over 23,000 current and former UPS drivers in the case of *Cornn, et al. v. United Parcel Service, Inc.* (N.D. Cal C 03 2001 TEH), which settled for an $87 million cash payment and other monetary benefits that were valued at more than $4 million. Our research revealed that the $91 million settlement is the largest class-action settlement in California history based solely on meal and rest period violations and itemized statement violations. In addition to the monetary benefits, the *Cornn* litigation also served as a catalyst to change the complained of practices within UPS. Eight months after the *Cornn* case was filed, UPS completely changed its meal and rest break policies and procedures throughout California. Again, this was a significant benefit obtained for the class. As a result of this case, thousands of UPS drivers are now able to work a healthy schedule and receive their meals and breaks as required by California law. **[*49]** There are a few final points about the settlement that are worth highlighting. First, half of the settlement proceeds were paid as "penalties and interest," which resulted in a significant tax savings to class members. Second, a non-reversionary settlement was negotiated, with any unclaimed funds being paid in equal parts to the San Francisco and Los Angeles Food Banks. Third, not a single class member objected to the *Cornn* settlement, which was approved by Judge Thelton E. Henderson.

• *A & J Liquor Co., Inc., et al., v. State Compensation Insurance Fund, et al.*, California Superior Court, County of San Francisco, No. 975982. Mr. Kershaw and Mr. Cook served as lead class counsel in a certified class filed on behalf of purchasers of workers' compensation insurance alleging breach of implied covenant of good faith and fair dealing, breach of contract and fraud for over-estimating the cost of workers' compensation claims resulting in higher insurance premiums. The case was exceptionally complex involving millions of data record and extensive actuarial analysis by the country's leading experts well versed in regression methodologies. The case was tried to a defense verdict after a seven-month **[*50]** trial.

• *Southeast Texas Medical Associates, LLP et al., v. VeriSign, Inc., et al.*, California Superior Court, County of Santa Clara, No. 105CV035550. Mr. Kershaw and Mr. Talley were lead class counsel on behalf of consumers against VeriSign, the nation's largest provider of Internet security certificates. Plaintiffs allege that VeriSign violated California's unfair competition and deceptive business practices law relating to the sale of its Internet security certificates. VeriSign charged more for its Secure Site Pro certificate that claimed to provide the consumer with a higher level of Internet security, but in fact, there was no practical difference between the higher and lower priced certificates VeriSign offered consumers. The case has currently settled and class plaintiffs are in the process of seeking final approval of a proposed $39,000,000.00 settlement which will provide refunds and damages for a nationwide class of potentially 400,000 class members.

• *Ellen Schenk, et al. v. Jenny Craig, Inc., et al*. California Superior Court, County of Orange, No. 635478 (1993), class action under the Consumers Legal Remedies Act. Mr. Kershaw served as co-lead class counsel. The case was **[*51]** certified as a liability class and as a mandatory settlement class; the court approved a settlement fund valued at $46 million consisting of cash and vouchers for products.

• *In re Vicryl Sutures Litigation*, Judicial Council Coordination proceeding No. 4148, Alameda County Superior Court, California; *Neely, et al. v. Ethicon, Inc., et al*. Civil No. 1:00CV569(Th) U.S. District Court for Eastern District of Texas: This was a mass tort action initiated involving product liability cases proceeding in multiple federal and state courts throughout the United States. Mr. Kershaw and Mr. Talley served as lead class counsel in this nationwide products liability class action against Ethicon, Inc. on behalf of persons who suffered injuries caused by contaminated medical sutures designed, manufactured, distributed and sold by Ethicon, Inc. and Johnson and Johnson. Following a highly contested certification process and hearing seeking certification of a *FRCP 23(c)(4)(A)* class, the case was litigated to a successful resolution in a confidential proceeding.

• *Brock, et al. v. McCormick Mortuary, Inc., et al*. California Superior Court, County of Orange, No.750989 consolidated with No. 74080. Mr. Kershaw served as lead **[*52]** class counsel in this wrongful cremation class action; the case was brought on behalf of the families of more than 4,500 persons who were cremated at the McCormick Crematory in Orange County; the Court approved a $10.8 million settlement and appointed Mr. Kershaw and his firm as settlement fund administrator for distribution of the settlement proceeds to absent class members.

• *In re GCC Richmond Works Cases*, J.C.C.P. No. 2906, California Superior Court, County of Contra Costa (toxic spill at General Chemical plant in Richmond, California involving 65,000 class members). Mr. Kershaw served on the plaintiffs' management committee on behalf of plaintiffs he participated in administration and distribution of a

$180 million common fund settlement to class members; and was instrumental in establishing a claims center in Richmond, California.

• *Bushnell, et al. v. Cremar, Inc., et al*. California Superior Court, County of Orange, No. 657778, a mass tort involving wrongful cremations. Mr. Kershaw served as lead class counsel. The case was certified as a liability class and settled as a mandatory settlement class. Mr. Kershaw's firm was appointed as settlement administrator to administer the **[*53]** claims of 16,000 class members in a court approved settlement of $17.1 million, which Mr. Kershaw negotiated as lead counsel.

• *Dorothea Locke and Agnes Boehner v. Pomona Cemetery Association, et al.*, (and related actions), California Superior Court, County of Los Angeles, No. 001190. Mr. Kershaw served as lead class counsel in a wrongful cremation class action; a litigation class of 10,000 class members was certified; final approval of a settlement class was ordered. The court approved a $3.475 million settlement fund.

• *Noerdinger, et al. v. City of Santa Clara, dba Mission City Memorial Cemetery, et al*. California Superior Court, County of Santa Clara, Mass Tort No. 672565. Mr. Kershaw served as co-lead class counsel in a wrongful cremation case certified as a liability class, involving 3,500 decedents, and as a mandatory settlement class. The court approved a $4.1 million settlement.

• *Curran, et al. v. Oeberst Financial Corp., et al., No. Civ. S-85-1685 MLS (E.D. Cal.) (1985)* securities fraud. Mr. Kershaw served as lead defense counsel for a primary defendant. A class was certified for settlement purposes and settlement was granted final approval.

• *Neptune Society Cases*, Coordinated **[*54]** Action Nos. 1814 and 1817, California Superior Court, County of Sacramento (mass tort). Class action filed on behalf of family members alleging improper dumping of cremated remains in Amador County. Mr. Kershaw served as lead class counsel, and coordinated with individual cases. The case involved approximately 5,300 decedents. The case was certified as a liability class; and certified as a mandatory class for settlement purposes. The court approved a $32.5 million settlement. Mr. Kershaw supervised the distribution of settlement proceeds, presenting and resolving disputed claims, and pursuing equitable remedy of final disposition of all cremated remains on the Elkin property (obtained legislative relief relative to the Elkin property).

• *Paxil*: Antitrust action challenging unlawful tactics under patent laws to prevent generic versions of anti-depressant from entering the market. Case resolved very favorable for the class.

• *Sony DVD Litigation*: Multi-state consumer class actions alleging that Sony manufactured and sold defective DVD players

• *In re Sulzer Hip Prosthesis and Knee Prosthesis Liability Litigation*, U.S.D.C., Northern District of Ohio, Eastern Division, Case No. 1:01-CV-900 **[*55]** MDL Docket No. 1401. Mr. Kershaw served as a member of the Plaintiffs' Executive Committee in the California State Coordinated Proceedings. The case resulted in a nationwide settlement on behalf of people implanted with a defective hip prosthesis.

• *GTI v. Microsoft Corp.;* MDL case 1:00-MD-01332-JEM; Mr. Kershaw served on the Executive Committee in litigation against Microsoft for violations of section 2 of the Sherman Act involving unreasonable restraints on trade and allegations of illegal monopoly.

• *In re Computer Monitors Class Action Litigation*, No. JCCP-3159, California Superior Court, County of San Francisco (Coordinated Proceedings). Mr. Kershaw served as co-lead class counsel in this nationwide action involving consumer claims under the California Consumers Legal Remedies Act and the Business and Professions Code, as well as common law claims, against computer monitor manufacturers and retailers for false and deceptive advertising.

• *In re American Online Spin-Off Accounts Litigation*. Mr. Talley served as co-lead class counsel in this MDL proceedings/class action alleging that AOL fraudulently billed consumers for "Spin-Off Subaccounts" without authorization or knowledge of **[*56]** thousands of its account holders. The MDL Panel ordered the cases consolidated in the District Court of the Central District of California before Judge Ronald Lew. Case resolved in nationwide settlement in conjunction with Illinois state court proceeding.

• *Nichols, et al. v. SmithKline Beecham Corporation*, USDC, Eastern District of Pennsylvania, No. 00-CV-6222. Attorneys from KCT served as members of the Discovery Committee in this case involving allegations that defendant "ever-greened" its monopoly on the anti-depressant drug, Paxil, by abusing the patent system in filing frivolous second-generation patents to improperly extend its monopoly, and then filing frivolous patent infringement suits and appeals to delay adverse rulings.

• *Sconce/Lamb Cremation Cases*, Coordination No. 2005 (Los Angeles County Superior Court). Mr. Kershaw served as co-lead class counsel. This case involves the improper handling of cremated remains of approximately 19,000 decedents. The case was certified on a mandatory basis for settlement purposes. The court approved was a $16.5 million settlement, plus a $1.6 million settlement on behalf of the Carolina Biological subclass, which had been certified for settlement **[*57]** purposes. Mr. Kershaw represented petitioners in a California Supreme Court decision arising out of this litigation, *Christiansen v. Superior Court, 43 Cal.3d 868, 2 Cal.Rptr.2d 79*.

• *Sacramento River Spill Cases I and II*, Coordinated Proceeding Nos. 2617 and 2620 (mass tort - involving a toxic spill in the Sacramento River in Dunsmuir, California following derailment of a Southern Pacific railcar in the Sacramento River; class certified for settlement purposes). Mr. Kershaw served on the plaintiffs' litigation committee; set up and administered a claims office in Dunsmuir, California; and was instrumental in negotiating a $15.5 million settlement, which was approved by the court and distributed to the class.

• *Hoeffner, et al. v. Viera Flying Service, et al*. No. 97AS02993, Judicial Council Coordination Proceeding No. 4078, coordinated in California Superior Court, County of Sacramento. Mr. Kershaw and his firm served as liaison and lead class counsel assisting with and overseeing arrangements for the respectful disposition of cremated remains. An equitable class was certified relating to cremated remains located by the Contra Costa County sheriff's department. The class action brought by family members of persons whose cremated remains were entrusted **[*58]** to Vieira Flying Service for scattering. Case settled for $4.1 million.

Kossen v. Nestle USA, Inc.

Superior Court of California, County of San Francisco

May 18, 2016, Filed

Case No. CGC-0.8-476890.

Reporter

2016 Cal. Super. LEXIS 14487 *

JOSHUA A. WEAVER and JEREMY S. KOSSEN, on behalf of themselves and a class of persons similarly situated, Plaintiffs, v. NESTLE USA, INC., Defendant. AND CONSOLIDATED CASES:.Patricia McAllister v. Nestle USA, Inc., et al. (SF Superior Case No. CGC-1 0-496030).Andrea Clark v. Nestle USA, Inc., et al. (SF Superior Case No. CGC-1 0-496175).John Rinaldi v. Nestle USA, Inc., et al. (SF Superior Case No. CGC-1 0-496212).

Core Terms

conspiracy, increased price, Chocolate, Manufacturers, prices, Plaintiffs', interdependence, district court, costs, Purchaser, reasonable inference, summary judgment, conspired, competitors, email, antitrust, price-fixing, products, cases, oligopolistic, announced, markets, conspiracy evidence, initiated, purported, domestic, singles, cocoa, price fixing, actuation

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Judges: Honorable, Mary E. Wiss, Judge.

Opinion by: Mary E. Wiss

Opinion

STIPULATED ORDER OF DISMISSAL WITH PREJUDICE

WHEREAS a status conference was held before the Court on May 14,2014, at which the Court was advised that the MDL Court in *In re Chocolate Confectionery Antitrust Litig*., MDL No. 1935 (M.D. Pa.) entered summary judgment in favor of the defendants, including Nestle USA, Inc. ("Nestle USA"), and against the direct purchaser class plaintiffs and the individual direct purchasers; and

WHEREAS the Court also was advised that as to each purported class of indirect plaintiffs remaining in the MDL after summary judgment, including those plaintiffs asserting claims by California consumers identical to the claims asserted in this matter, stipulated orders of dismissal with prejudice were entered by the MDL Court dismissing all remaining claims with leave **[*2]** to re-file only in the event the Third Circuit were to reverse the summary judgment ruling; and

WHEREAS after the May 14, 2014 status conference, the direct purchaser class plaintiffs and most of the individual direct purchasers filed notices of appeal;

WHEREAS ON May 28, 2014, this Court ordered the above-captioned matter stayed pending further order of this Court and instructed the parties to advise the Court after the appeal taken from the MDL Court's summary judgment ruling was decided by the Third Circuit;

WHEREAS the Third Circuit on September 15, 2015 filed its opinion affirming the summary judgment ruling of the MDL Court (attached as exhibit A) and entered Judgment pursuant to *Fed. R. App. P. 36* (Attached as Exhibit B);

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and between Plaintiffs Joshua A. Weaver, Jeremy S. Kossen, Patricia McAllister, Andrea Clark, and John Rinaldi and Defendant Nestle USA, subject to the approval of the Court, that the above-entitled actions, including the consolidated cases, be and hereby are dismissed with prejudice. Each side will bear its own attorneys' fees and costs.

Respectfully submitted,

Dated: May. 16, 2016

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Re: Stipulated Order of Dismissal with Prejudice

IT IS SO ORDERED

Dated: May 18, 2016

/s/ [Signature]

The Honorable Mary E. Wiss

Judge of ttie San Francisco Superior Court

EXHIBIT A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 14-2790 through 14-2795

In re: CHOCOLATE CONFECTIONARY ANTITRUST LITIGATION

The Kroger Co., Safeway, Inc., Walgreen Co.,

Hy-Vee, Inc., Albertsons LLC,

The Great Atlantic and Pacific Tea Company, Inc.,

and HEB Grocery Company L.P.,

Appellants in 14-2790

Giant Eagle, Inc.,

Appellant in 14-2791

United Supermarkets, LLC,

Appellant in 14-2792

Meijer, Inc., Meijer Distribution, Inc.,

Publix Super Markets, Inc., Super Valu Inc.,

and Affiliated Foods, Inc.,

Appellants in 14-2793

Card & Party Mart II Ltd., Jones Wholesale Grocery, Inc.*, PITCO Foods, and The Lorain Novelty Co., Inc.,

as representatives of the Direct Purchaser Class, *Appellants in 14-2794*

*Pursuant to Clerk Order of July 3, 2014

CVS Pharmacy, Longs Drug Stores California, Inc.,

Rite Aid Corporation, Rite Aid Hdqtrs., Corp.,

and the Golub Corporation,

Appellants in 14-2795

On Appeal from the United States District Court

for **[*5]** the Middle District of Pennsylvania

(M.D. Pa. No.l-08-mdl-01935)

District Judge: Honorable Christopher C. Conner

Argued Thursday, April 30, 2015

Before: FISHER, HARDIMAN and ROTH, *Circuit Judges*.

(Filed: September 15, 2015)

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OPINION OF THE COURT

FISHER, *Circuit Judge*.

In these consolidated antitrust conspiracy cases, two groups of plaintiffs, one a certified class of direct purchasers of chocolate products ("the Direct Purchaser Class"), and the other a group of individual plaintiffs ("the Individual Plaintiffs") (collectively, "the Plaintiffs"), appeal the District Court's summary judgment in favor of defendants The Hershey Company ("Hershey"); Hershey Canada, Inc.; Nestle USA, Inc.; and Mars, Inc. and Mars Snackfood U.S., LLC (collectively, "Mars") (all appellees are collectively referred to as "the Chocolate Manufacturers").

According to the Plaintiffs, the Chocolate Manufacturers conspired to raise prices on chocolate candy products in the United States three times between 2002 and 2007. The Plaintiffs assert numerous errors on appeal, but at its core, this case is about how courts should view evidence of a contemporaneous antitrust conspiracy in a foreign market when that evidence is offered to prove the existence of an antitrust conspiracy in the U.S. market. Here the foreign conspiracy **[*8]** involved the Chocolate Manufacturers' Canadian brethren: Hershey Canada,[1] Mars Canada, Inc., and Nestle Canada (collectively, "the Canadian Chocolate Manufacturers"), as well as others.

We agree with the District Court that the Canadian conspiracy evidence is ambiguous and does not support an inference of a U.S. conspiracy for two simple reasons. First, the people involved in and the circumstances surrounding the Canadian conspiracy are different from those involved in and surrounding the purported U.S. conspiracy, and second, the evidence that the Chocolate Manufacturers in the United States knew of the unlawful Canadian conspiracy is weak and, in any event, relates only to Hershey. Because we also conclude that the Plaintiffs' other traditional conspiracy evidence is insufficient to create a reasonable inference of a U.S. price-fixing conspiracy, we will affirm.[2]

I.

A. The U.S. Chocolate Industry

The U.S. chocolate confectionary market is dominated by three companies: Hershey, Mars, and Nestle USA. Hershey is a publicly traded company based in Hershey, Pennsylvania, and sells such famous brands as Hershey's Milk Chocolate Bar and Reese's Peanut Butter Cups. Mars is a privately held company **[*9]** headquartered in Virginia and is the parent company of Mars Snackfood U.S. Among Mars's most notable brands are M&Ms and Milky Way. Nestle USA is a U.S.-based company wholly owned by Switzerland-based Nestle S.A. Nestle USA sells such popular brands as Nestle Crunch and Butterfinger. Besides offering a variety of chocolate candy brands, the Chocolate Manufacturers offer a variety of sizes. Some sizes, such as single- and king-size bars ("singles" and "kings"), are for immediate consumption, while others, including bags containing miniature or bite-size candies, are for future consumption. This case focuses on immediate consumption candy sizes.

The U.S. chocolate market is highly concentrated. During the relevant period, these three companies controlled more than 75% of the U.S. market, with Hershey controlling approximately 42%, Mars controlling approximately 28%, and Nestle USA controlling roughly 8%.

The primary raw materials for the various chocolate products at issue are generally the same: cocoa, sugar, dairy products, peanuts, almonds, fats, and oils. Naturally, the costs of these ingredients affect the prices of the chocolate products. To hedge against cost increases for these **[*10]** ingredients, the Chocolate Manufacturers take advantage of futures exchanges. For example, in a 2002 internal report, Hershey understood that through futures contracts, its coverage on cocoa costs "through mid-2004" was "favorable versus [its] principal competitors." J.A. 4620. Still, between 2002 and 2007, it is undisputed that cocoa prices increased. *See* J.A. 6273-7'4 (acknowledging that Hershey's actual cocoa costs increased from 2002 to 2006).

Parallel price increases—in which one company raises prices and its rivals follow—-are not uncommon in this industry. Although the price increases have not followed a consistent playbook—some have involved changes in

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[1] Hershey Canada is the only one of the Canadian Chocolate Manufacturers that is a party to this appeal.

[2] Because we conclude that the District Court correctly granted summary judgment for the Chocolate Manufacturers, we do not reach the secondary question of whether the District Court abused its discretion by excluding a portion of the Individual Plaintiffs' economic expert's report calculating the damages caused by Nestle USA.

candy weight while others have involved delays between the initial and subsequent pricing actions—the Chocolate Manufacturers raised prices together in 1979, 1981, 1984, 1986, 1991, and 1995.

B. The Purported U.S. Conspiracy

According to the Plaintiffs, the Chocolate Manufacturers conspired to raise U.S. list prices on chocolate candy products three times between 2002 and 2007. On December 7, 2002, following a seven-year period of stagnant prices, Mars announced list price increases on singles and six packs by 3.5 cents per bar **[*11]** effective December 9, 2002. On December 9, Hershey announced an identical price increase on singles and a slightly lesser price increase on six packs; in addition, Hershey announced price increases on kings and ten packs (all effective January 2003). On December 11, Nestle USA's prices moved too, effectively matching Mars and Hershey's price increases on singles, Hershey's price increase on kings, and Mars's greater price increase on six packs. Days later, Mars matched Hershey's increase on kings and exceeded Hershey's increase on ten packs.

Next, in November 2004, Mars initiated another price increase, this time on future consumption products. Nearly one month later, Hershey followed Mars's price increase on future consumption products and also raised prices on singles, kings, and six packs. Soon after, Mars matched Hershey's increases. Nestle USA followed with nearly identical increases several days later. Finally, on March 23, 2007, Mars initiated the final increase during the alleged conspiracy period when it increased prices on singles and kings. Hershey matched the increases on April 4, and Nestle USA followed the next day.

The conspiracy was furthered, the Plaintiffs argue, by **[*12]** the Chocolate Manufacturers exchanging information on each other's planned price increases before publicly announcing those increases. For example, an internal Hershey document shows that Hershey had information as early as September 2002 that Mars was "considering a price increase' due to rising cocoa costs," J.A. 5300, and in announcing the 2002 Mars price increase to the Hershey board of directors, Hershey's CEO, Rick Lenny, characterized the Mars increase as "roughly in line with expectations," J.A: 4620.

In addition, the Plaintiffs highlight various opportunities the Chocolate Manufacturers had to conspire. For example, in 2002, at a time when the U.S. chocolate market was not thriving, the Hershey Trust, Hershey's controlling shareholder, put Hershey up for sale. Hershey's rivals, including Nestle and Cadbury, were among the interested buyers. Through the proposed sale process, Nestle and Cadbury obtained information about Hershey's business, but the record is unclear to what extent Hershey's most sensitive information, such as commodities cost coverage, changed hands and who received it. The Hershey Trust terminated the sale process in September 2002, shortly before the first **[*13]** price increase in the purported conspiracy.

The Plaintiffs also point north to Canada, where the Canadian chocolate market was embroiled in its own antitrust conspiracy at the same time as the purported U.S. conspiracy. Like the U.S. market, the Canadian market is very concentrated, with the three Canadian Chocolate Manufacturers controlling roughly 66% of the market. Hershey is the parent company of Hershey Canada, and Mars is the parent company of Mars Canada. Hershey Canada and Mars Canada report to and need final approval from U.S.-based executives on pricing decisions, but the Canadian subsidiaries are separate legal entities, operate exclusively in Canada, and run their own day-to-day operations. Nestle Canada, on the other hand, is a subsidiary of Switzerland-based Nestle S.A., so it is different from Hershey Canada and Mars Canada in that it does not report to a U.S. parent company.

From 2002 to 2007, Mars Canada, Hershey Canada, Nestle Canada, and Cadbury Adams Canada ("Cadbury Canada") allegedly conspired to limit competition on trade spend[3] and to raise prices. The trade spend conspiracy began in 2002 when ITWAL, a direct purchaser and major distributor in Canada, sent notices **[*14]** to the Canadian Chocolate Manufacturers asking them to reign in trade spend. ITWAL's efforts were successful, yielding commitments from the Canadian Chocolate Manufacturers that they would reduce trade spend. In April 2002, ITWAL's president sent a notice to each of the Canadian Chocolate Manufacturers stating, "[I]t appears your efforts

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[3] Trade spend refers to rebates, allowances, discounts, and promotions that manufacturers individually negotiate with retailers that effectively lower the price that the customer pays.

to 'dry up' this activity may be starting to work!" J.A. 7128. Driving home the point, ITWAL's president sent another notice in December of that year to all the Canadian Chocolate Manufacturers stating, "I WOULD LIKE TO EXTEND CONGRATULATIONS TO YOU ALL AS WE WIND UP THE YEAR WITH RESPECT TO YOUR *CONCERTED* AND COMMITTED EFFORTS TO CLEAN UP THE DYSFUNCTIONAL RETAIL TRADE SPENDING." J.A. 7157 (emphasis added).

Additionally, there is evidence suggesting a price-fixing conspiracy among the Canadian Chocolate Manufacturers, including secret meetings involving pricing discussions. In 2005, for example, Nestle Canada CEO Bob Leonidas told Cadbury Canada President David Sculthorpe that Nestle Canada would be increasing prices and proved it with a copy of a not-yet-issued price-increase announcement, and Sculthorpe promised that Cadbury Canada would follow. **[*15]** J.A. 11817-19.

The Canadian scheme was ultimately the subject of a criminal investigation by the Canadian Competition Bureau. Cadbury Canada cooperated with the investigation, and Hershey Canada did as well, with Hershey pleading guilty to one count of price fixing stemming from a 2007 incident and paying a $4 million (Canadian) fine. J.A. 13564-65. In 2013, Nestle Canada, Mars Canada, ITWAL, Leonidas, and ITWAL's president were indicted in Canada. The Canadian case is still pending.

C. The Procedural History

The cases on appeal have a long history. They began as ninety-one separate civil actions that were filed against the Chocolate Manufacturers as well as their Canadian counterparts and several Cadbury entities. In addition to various state law claims, the actions brought claims under *§§ 4* and *16* of the Clayton Act, *15 U.S.C. §§ 15*, *26*, alleging that the defendants engaged in a U.S. price-fixing conspiracy in violation of *§ 1* of the Sherman Act, *15 U.S.C. § 1*. In 2008, the Judicial Panel on Multidistrict Litigation consolidated the actions for pretrial proceedings in the U.S. District Court for the Middle District of Pennsylvania pursuant to *28 U.S.C. § 1407(a)*.

After the cases were consolidated, each of the defendants moved to dismiss **[*16]** the complaints for failure to state a claim under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, but on March 4, 2009, the District Court denied the motions except as to certain state law claims. *See In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 548-49 (M.D. Pa. 2009)*.[4] At the pleading stage, the District Court decided that the Plaintiffs had adequately pled a price-fixing conspiracy in violation of the Sherman Act. In so holding, the District Court relied on allegations regarding the contemporaneous Canadian conspiracy and the Canadian chocolate market's integration with the U.S. chocolate market. *Id. at 576-77*. In 2011, all the Cadbury defendants were dismissed after they reached a settlement with the various groups of plaintiffs. As part of the agreement with the Direct Purchaser Class, Cadbury agreed to fully cooperate with the Plaintiffs during discovery. J.A. 2642.

On December 7, 2012, the District Court certified a class of all direct purchasers of chocolate candy products for resale from the Chocolate Manufacturers between December 9, 2002 and December 20, 2007, which formed the Direct Purchaser Class. The Individual Plaintiffs, comprising mostly grocery and drug stores, pursued their claims individually. In certifying the Direct Purchaser Class, the District Court denied *Daubert*[5] challenges to the **[*17]** Class's economic experts, Dr. Robert D. Tollison and Dr. James T. McClave. *In re Chocolate Confectionary Antitrust Litig., 289 F.R.D. 200, 213 (M.D. Pa. 2012)*. Briefly, Dr. Tollison opined that the U.S. chocolate market was conducive to price fixing and that a price-fixing conspiracy did occur in this case, while Dr. McClave testified to the class-wide damages caused by the Chocolate Manufacturers' supracompetitive prices.

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[4] Several defendants also moved to dismiss for lack of personal jurisdiction under *Rule 12(b)(2)*. After initially deferring ruling on these motions, the District Court ultimately granted the motions as to Mars Canada, Nestle S.A., and Nestle Canada. *See In re Chocolate Confectionary Antitrust Litig., 641 F. Supp. 2d 367, 373 (M.D. Pa. 2009)*.

[5] *Daubert v. MerrellDow Pharm., Inc., 509 U.S. 579 (1993)*.

In May 2013, the District Court considered another *Daubert* motion, this time challenging the testimony of the Individual Plaintiffs' economic expert, Dr. Christopher A. Vellturo. The District Court granted the motion to exclude part of Dr. Vellturo's testimony and reports on the Individual Plaintiffs' damages caused by Nestle USA's alleged overcharges because Dr. Vellturo based his calculations on Mars's profit margin data, not Nestle USA's. The Individual Plaintiffs appeal that decision here.[6] As for the remainder of Dr. Vellturo's testimony, the District Court denied the *Daubert* motion, concluding that Dr. Vellturo's other opinions, including his opinion that the Canadian conspiracy facilitated or "actuated" the implementation of the U.S. conspiracy, were admissible. J.A. 100-03.

At the close of discovery, each of the Chocolate Manufacturers **[*18]** filed separate summary judgment motions as to the Individual Plaintiffs' claims and the Direct Purchaser Class's claims. On February 26, 2014, the District Court granted summary judgment in favor of the Chocolate Manufacturers. *See* *In re Chocolate Confectionary Antitrust Litig., 999 F. Supp. 2d 777, 780 (M.D. Pa. 2014)*. The Plaintiffs' claims failed, the District Court reasoned, because they could not show that the Chocolate Manufacturers acted against their self-interest and because there was no traditional conspiracy evidence. In the District Court's view, the Plaintiffs' evidence was as consistent with lawful competition as with an illegal conspiracy and therefore could not raise a reasonable inference of a price-fixing conspiracy. *Id. at 805*. This decision is the central issue on appeal.

The Plaintiffs filed timely appeals.

II.

The District Court had jurisdiction under *15 U.S.C. § 15(a)* and *28 U.S.C. §§ 1331* and *1337*. We have jurisdiction under *28 U.S.C. § 1291*. We exercise plenary review over the District Court's summary judgment and apply the same standard the District Court did. *In re Baby Food Antitrust Litig., 166 F.3d 112, 123-24 (3d Cir. 1999)*.

Because substantive ***antitrust law*** is intertwined with our standard of review, we first discuss the underlying legal principles. The Plaintiffs' claims arise from *§ 1* of the Sherman Act, which prohibits "[ejvery contract, combination in the form of trust **[*19]** or otherwise, or conspiracy, in restraint of trade or commerce." *15 U.S.C. § 1*. Although its language is broad, *§ 1* only prohibits *unreasonable* restraints of trade. *In re Flat Glass Antitrust Litig., 385 F.3d 350, 356 (3d Cir. 2004)*. Therefore, in some cases, courts must apply "the so-called rule of reason," a case-by-case inquiry designed to assess whether challenged conduct is an anticompetitive practice. *Baby Food, 166 F.3d at 118*.

Other restraints of trade, however, have such little redeeming competitive value that they are deemed *per se* unreasonable. *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 316 (3d Cir. 2010)*. Horizontal price fixing among competitors—what the Plaintiffs claim happened here—is a classic example of a restraint of trade analyzed under the *per se* standard.[7] *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*. Price-fixing agreements "are all banned because of their actual or potential threat to the central nervous system of the economy." *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59(1940, 60 S. Ct. 811, 84 L. Ed. 1129)*.

In *per se* cases like this one, "the plaintiff need only prove that the defendants conspired among each other and that this conspiracy was the proximate cause of the plaintiffs injury." *InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 159 (3d Cir. 2003)*. Without proof of concerted action, the plaintiffs claim fails because the "very essence of a *section 1* claim … is the existence of an agreement." *Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 999 (3d Cir. 1994)*. Therefore, proof of a "unity of purpose or a common design and understanding or a meeting of minds in an unlawful arrangement" **[*20]** is required. *Id*. (internal quotation marks omitted). Such proof may come in the form of direct evidence, e.g., an explicit admission from a participant that an antitrust conspiracy existed, or circumstantial evidence. *InterVest, 340 F.3d at 159*. An important corollary to the agreement requirement is that *§ 1*

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[6] As explained earlier, we do not reach this issue because we will affirm the District Court's summary judgment. *See supra* note 2.

[7] A horizontal price-fixing agreement occurs when competitors on the same market level agree to fix or control prices for their goods or services.

liability cannot be predicated on a defendant's unilateral actions, no matter its anticompetitive motivations. *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* ("Independent action is not proscribed [by *§ 1*]."); *InterVest, 340 F.3d at 159*.

Returning to our standard of review, the summary judgment standard in antitrust cases is generally no different from the standard in other cases. *Flat Glass, 385 F.3d at 357*. Here as elsewhere, summary judgment is appropriate when the evidence "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. We also review the record as a whole and in the light most favorable to the nonmovant, drawing reasonable inferences in its favor. *See Flat Glass, 385 F.3d at 357*.

There is, however, "an important distinction" in antitrust cases. *Id*. "[AJntitrust law limits the range of permissible inferences from ambiguous evidence in a *§ 1* case." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. "[Cjonduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support **[*21]** an inference of antitrust conspiracy." *Id*. Therefore, unless the plaintiff "presents] evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently," summary judgment is appropriate. *Id*. (quoting *Monsanto, 465 U.S. at 764*). The purpose of this standard is to avoid mistaken inferences that could impose liability for lawful conduct and, consequently, "chill the very conduct the antitrust laws are designed to protect." *Id. at 594*; *accord Flat Glass, 385 F.3d at 357*.

Under *Matsushita*, the range of acceptable inferences that may be drawn from ambiguous or circumstantial evidence "'var[ies] with the plausibility of the plaintiffs' theory and the dangers associated with such inferences.'" *Flat Glass, 385 F.3d at 357* (quoting *Petruzzi's IGA Supermarkets, Inc. v. Darling-Del. Co., 998 F.2d 1224, 1232 (3d Cir. 1993))*. If the plaintiffs theory "makes no economic sense" and if drawing inferences in its favor would deter procompetitive conduct, the plaintiff must produce "more persuasive evidence" to support its claim. *Id*. (internal quotation marks omitted).[8]

Importantly, even when armed with a plausible economic theory, a plaintiff relying on ambiguous evidence alone cannot raise a reasonable inference of a conspiracy sufficient to survive summary judgment. *Matsushita, 475 U.S. at 597 n.21* ("We do **[*22]** not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy."); *Rossi v. Standard Roofing, Inc., 156 F.3d 452, 466 (3d Cir. 1998)*. At the same time, "defendants are [not] entitled to summary judgment merely by showing that there is a plausible explanation for their conduct; rather the focus must remain on the evidence proffered by the plaintiff and whether that evidence tends to exclude the possibility that the defendants were acting independently." *Rossi, 156 F.3d at 467* (internal quotation marks and brackets omitted).[9]

III.

The Plaintiffs build their case on a logical enough foundation: three parallel price increases by the Chocolate Manufacturers between 2002 and 2007. Moreover, the Plaintiffs' theory—that the Chocolate Manufacturers conspired to fix prices at supracompetitive levels—"makes perfect economic sense." *Flat Glass, 385 F.3d at 358*. If true, the alleged conduct is also not procompetitive. *Id*. But despite the facial plausibility of the Plaintiffs' theory and

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[8] We illustrated the point well in *Flat Glass* by comparing the theories involved in *Matsushita* and *Petruzzi's, see 385 F.3d at 358*, and we summarize that discussion here. In *Matsushita*, the Supreme Court criticized the alleged multi-firm, predatory pricing scheme as inherently "speculative," so the Court refused to draw an inference of a conspiracy from ambiguous evidence. *See 475 U.S. at 588-91, 597-98*. In *Petruzzi's*, by contrast, we drew more liberal inferences in the plaintiffs favor because the plaintiffs theory—that the defendants conspired not to compete with each other on existing customer accounts—made "perfect economic sense." *998 F.2d at 1232*. The only way for the defendants in *Petruzzi's* to increase profits in this manner was by agreement. Moreover, this conduct of refusing to compete was obviously not procompetitive. *Id*.

[9] The "strictures of *Matsushita* d[o] not apply" when plaintiffs use direct evidence to prove a conspiracy because "no inferences are required from direct evidence to establish a fact," thus negating any concern about the reasonableness of the inferences drawn from that evidence. *Petruzzi's, 998 F.2d at 1233*. Nor are these concerns implicated when there is "strong circumstantial evidence" because such evidence is "sufficiently unambiguous." *Id*. (internal quotation marks omitted).

the circumstantial evidence supporting it, we must be cautious. The U.S. chocolate market is "a textbook example of an oligopoly,"[10] J.A. 2187, and we cannot infer too much from mere evidence of parallel pricing among oligopolists, *Flat* Gto,385F.3dat358. **[*23]**

Our caution is based on the economic theory of interdependence, which recognizes the differences between competitive markets (markets with many smaller firms) and oligopolistic markets (concentrated markets with only a few firms). In competitive markets, the theory goes, any one firm's change in output or price would go unnoticed by its competitors because the effects of that firm's increased sales "would be so diffused among its numerous competitors." *Id. at 359* (internal quotation marks omitted). In a concentrated or oligopolistic market, by contrast, a single firm's change in output or price "will have a noticeable impact on the market and on its rivals." *Id*. (internal quotation marks omitted). Therefore, the theory of interdependence posits that "any rational decision [by an oligopolist] must take into account the anticipated reaction of the other firms." *Id*. (internal quotation marks and brackets omitted). The upshot is oligopolists may maintain supracompetitive prices through rational, interdependent decision-making, as opposed to unlawful concerted action, if the oligopolists independently conclude that the industry as a whole would be better off by raising prices. *Id*.

Even **[*24]** though this practice of parallel pricing, known as "conscious parallelism," produces anticompetitive outcomes, it is lawful under the Sherman Act for two reasons. *Id. at 359-60*. First, conscious parallelism is not an agreement, *id. at 360*; instead, it "can be a necessary fact of life" in oligopolies, *Baby Food, 166 F.3d at 122*. Second, conscious parallelism is lawful not because it "is desirable (it is not)," but because courts have no effective remedy for the problem. *Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 484 (1st Cir. 1988)* (Breyer, J.); *accord* *Flat Glass, 385 F.3d at 360*.

Accordingly, evidence of conscious parallelism cannot alone create a reasonable inference of a conspiracy. *Baby Food, 166 F.3d at 122*. To move the ball across the goal line, a plaintiff must also show that certain plus factors are present. *Flat Glass, 385 F.3d at 360*. Plus factors are "proxies for direct evidence" because they "tend[] to ensure that courts punish concerted action—an actual agreement—instead of the unilateral, independent conduct Of competitors." *Id*. (internal quotation marks omitted). Although we have not identified an exhaustive list of plus factors, they may include "(1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) 'evidence implying a traditional conspiracy.'"*Id*. (quoting **[*25]** *Petruzzi's, 998 F.2d at 1244*).

Yet in cases alleging parallel price increases, as opposed to some other form of concerted action, "the first two factors largely restate the phenomenon of interdependence." *Id.; see also* *Petruzzi's, 998 F.2d at 1244* (acknowledging that evidence of actions against self-interest may overlap with lawful interdependence in parallel pricing cases, but concluding that the overlap concern is absent when the challenged conduct involves parallel non-pricing decisions). Evidence of a motive to conspire means the market is conducive to price fixing, and evidence of actions against self-interest means there is evidence of behavior inconsistent with a competitive market. *See* *Flat Glass, 385 F.3d at 360-61*. By nature, oligopolistic markets are conducive to price fixing and will often exhibit behavior that would not be expected in competitive markets. *Id*. Therefore, these factors are neither necessary nor sufficient to preclude summary judgment, at least where the claim is price fixing among oligopolists. *Id. at 361 n.12*.

That leaves traditional non-economic evidence of a conspiracy as the most important plus factor in cases like this one. *Id. at 361*. This plus factor looks for "proof that the defendants got together and exchanged assurances of common action or otherwise adopted **[*26]** a common plan even though no meetings, conversations, or exchanged documents are shown." *Id*. (internal quotation marks omitted).

With these principles in mind, we now turn to whether the Plaintiffs have identified enough evidence to survive summary judgment.

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[10] An oligopoly is a market "in which a few relatively large sellers account for the bulk of the output." 2B Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 404a, at 10 (4th ed. 2014).

IV.

Lacking direct evidence, the Plaintiffs rely on circumstantial evidence to raise a reasonable inference of a conspiracy. The District Court found, and the parties do not dispute, that the Plaintiffs presented sufficient evidence of parallel pricing. Therefore, our analysis focuses on whether there are sufficient plus factors to defeat summary judgment.

A. Motive

The District Court found that the Plaintiffs had adduced sufficient evidence of the Chocolate Manufacturers' motive to enter into a price-fixing conspiracy, and again, no one disputes this conclusion on appeal. Given the market concentration and high barriers to entry, the U.S. chocolate confectionary market was ripe for collusion. But evidence of motive without more does not create a reasonable inference of concerted action because it merely restates interdependence. *See Flat Glass, 385 F.3d at 360*.

B. Actions Against Self-interest

The District Court next held that the Plaintiffs had not provided enough **[*27]** evidence to show that the Chocolate Manufacturers acted contrary to their self-interest by raising prices in 2002, 2004, and 2007. Unlike the first plus factor, the parties vigorously dispute the correctness of the District Court's conclusion on this point. To the Plaintiffs, the District Court's analysis is flawed, rife with inferences drawn against them and contradicted by their expert evidence concluding that cost increases could not explain the price increases. To the Chocolate Manufacturers, the District Court analyzed the issue correctly by noting the Plaintiffs' inability to rebut the Chocolate Manufacturers' several legitimate and procompetitive justifications for the price increases as well as their divergent tactics and strategies implementing the price increases.

Part of the disagreement here appears to be based on a misconception about what this factor means: as discussed above, evidence of actions against self-interest means there is evidence of behavior that is inconsistent with a competitive market. So in *Flat Glass*, we found this factor present based on the lack of evidence showing that the price increases were due to increases in costs or demand. *See 385 F.3d at 362*. Similarly here, **[*28]** the Plaintiffs' economic experts uniformly opined that cost increases could not explain the price increases. *See* J.A. 5135 (Vellturo Report) ("I find that increased costs were a minor (if significant at all) consideration in Defendants' subject price increases."); J.A. 13893 (Tollison Declaration) ("[Closts provide no rational economic explanation for price increases...."); J.A. 14058— 60 (McClave Report) ("My model shows... that prices were elevated to levels during the class period well above those justified by changes in cost and demand."). Further, the Plaintiffs' experts rejected criticisms that their analyses did not account for cost variables beyond raw material costs. These conclusions find at least some support from non-expert evidence in the record. *Compare* J.A. 4618-19 (October 2002 memorandum from Hershey CEO Lenny to the Hershey board of directors noting "extremely sluggish retail environment" and explaining that Hershey would riot raise prices in the near term in part because Hershey was covered on costs), *with* J.A. 7654 (announcing December 2002 Hershey price increase). Therefore, we agree with the Plaintiffs (and disagree with the District Court and the Chocolate Manufacturers) **[*29]** to this extent: the aforementioned evidence shows that the U.S. chocolate market may not have been acting consistently with a competitive market.

This is not to say that the record evidence uniformly supports the Plaintiffs' position; to the contrary, there is substantial support for the Chocolate Manufacturers' contention that their actions were consistent with, and the result of, competition. For example, there is evidence showing that the price increases were taken *in anticipation of* rising costs; that costs actually did go up during the conspiracy period; that the Chocolate Manufacturers tried to catch each other by surprise with the timing of, arid the products associated with, the price increases; and that the prevalent practice of line pricing[11] by retailers made it rational and self-interested for the Chocolate Manufacturers to follow price increases initiated by a rival.

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[11] Line pricing is the practice engaged in by retailers of setting the same retail price for competing candy products of the same size. Given the practice of line pricing, the Chocolate Manufacturers contend that once one manufacturer raises list prices, it

Our conclusion is instead a recognition of the case's summary judgment posture, where we must draw reasonable inferences in the Plaintiffs' favor. At this stage, the admissible testimony from the Plaintiffs' experts, coupled with other record evidence suggesting that the price increases were not fully **[*30]** explained by cost increases, does the trick. Although the Chocolate Manufacturers have marshaled considerable evidence in support of their positions, "we must accept that the [Plaintiffs' have presented some admissible evidence that higher prices during the period of the alleged conspiracy cannot be fully explained by causes consistent with active competition...." *In re High Fructose Corn Syrup Antitrust Litig, 295 F.3d 651, 660 (7th Cir. 2002)* (Posner, J.).

But the Plaintiffs' victory on this point is a hollow one. As previously noted, given this factor's purpose of identifying conduct inconsistent with a competitive market, it often restates interdependence. *Flat Glass, 385 F.3d at 362* ("All the above indicates that the price increases were collusive, but not whether the collusion was merely interdependent or the result of an actual agreement."). To prove a conspiracy here, the evidence "must go beyond mere interdependence. Parallel pricefixing must be so unusual that in the absence of an advance agreement, no reasonable firm would have engaged in it." *Baby Food, 166 F.3d at 135*.

The Plaintiffs have fallen well short of this standard. Even if we credit the Plaintiffs' arguments, all they show is that costs—which they acknowledge were increasing—did not justify the price increases observed in 2002, 2004, and 2007. **[*31]** To the Plaintiffs' experts, the fact that cost increases couldn't explain the price increases seems to be enough to show a price-fixing agreement. *See* J.A. 2187-88 (Vellturo Report) (claiming that above-competitive pricing must result from an express or tacit agreement); J.A. 13891-93 (Tollison Report) (opining that price increases taken without cost increases should have been defeated because other firms would be better off not following). But evidence of a price increase disconnected from changes in costs or demand only raises the question: was the anticompetitive price increase the result of lawful, rational interdependence or of an unlawful price-fixing conspiracy? *See* *Flat Glass, 385 F.3d at 362*; *Petruzzi's, 998 F.2d at 1244* ("JTJt is quite likely that oligopolists acting independently might sell at the same above-marginal cost price as their competitors because the firms are interdependent and competitors would match any price cut."); *Clamp-All, 851 F.2d at 484* ("One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry."). The Plaintiffs' experts do not answer this question.[12]

The Individual Plaintiffs acknowledge interdependence but persist by arguing that Hershey, in particular, acted **[*32]** against its self-interest by following Mars's price increases rather than maintaining lower prices to increase its market share. For support, the Individual Plaintiffs point to Hershey's favorable cost positions in 2002 relative to its rivals as well as Mars's decision not to follow Hershey's 2001 price increase on packaged candy, a decision which led to Mars increasing its market share.

Deciding not to follow a price increase initiated by a rival is just one rational response that an oligopolist can take, a fact acknowledged by economists, including the Individual Plaintiffs' economic expert, Dr. Vellturo. J.A. 2187 (recognizing the "wide range of 'competitive' results" in oligopolistic markets); 6 Phillip E. Areeda & Herbert

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makes sense for all to follow. If a retailer raises the retail price on all competing candy products of a given size in response to one manufacturer raising list prices, the other manufacturers will suffer a decline in sales volume due to the higher retail price and lose out on any increased revenue unless they follow the list price increase. *See* J.A. 1084; *see also* J.A. 1278 (Mars 2002 document explaining it would follow Hershey's price increase on kings because "the market would move to the higher price with or without us").

[12] This case is quite different from *Petruzzi's*, where we said the economic evidence went "a long way" in meeting the plaintiffs burden. *998 F.2d at 1241*. There the alleged conspiracy was not price fixing but instead an agreement to compete only on new customer accounts and not to compete on existing customer accounts (i.e., competition ended once a defendant "won" a new account). The industry (fat and bone rendering) was homogeneous, meaning the only basis for competition among the defendants was price. The economic evidence in *Petruzzi's* showed a price differential between new and existing accounts (new accounts were offered a significantly better price than were existing accounts), which could only rationally be explained by an unlawful agreement *Id*. Here, by contrast, the Plaintiffs' economic evidence is based on parallel price increases among oligopolists without corresponding cost increases, a result which, as previously noted, is as consistent with interdependence as with a conspiracy.

Hovenkamp, ***Antitrust Law*** ¶ 1429b, at 222-23 (3d ed. 2010) (discussing how firms in an oligopolistic market may in some instances choose to follow price increases while in others choose not to follow). That Hershey may have maintained a temporary cost advantage over its rivals did not make it irrational for Hershey to follow a price increase if it believed it would ultimately be better off by doing so. Indeed, the evidence is fully consistent with Hershey recognizing **[*33]** its temporary cost advantage but also recognizing how a price increase may still be to its benefit as well as the benefit of the chocolate industry as a whole. *See* J.A. 4619 (letter from Hershey CEO Lenny to the Hershey board explaining why Hershey would not initiate a price increase in the near term but also noting that Hershey was "prepared to follow" any price increase initiated by a rival and adopting a "wait and see" strategy). This follow-the-leader strategy is especially reasonable in the U.S. chocolate market given the prevalent practice of line-pricing by retailers. Therefore, even focusing on Hershey and its cost advantages, the Plaintiffs cannot tell us whether Hershey's decision to follow the price increase was due to interdependence or an unlawful agreement.

Moreover, focusing on Hershey's cost advantage over its rivals says nothing of Mars's and Nestle USA's decisions to raise prices. Even if Hershey's motivations for following the price increase were anticompetitive, unilateral anticompetitive conduct is not proscribed by *§ 1* of the Sherman Act. *See* *InterVest, 340 F.3d at 159*.

In sum, although there is some evidence that the Chocolate Manufacturers acted inconsistently with a competitive market, the **[*34]** evidence does not go beyond interdependence and therefore does not create an inference of a conspiracy.

C. Traditional Conspiracy Evidence

We now consider the most important plus factor in this case: whether there is enough traditional conspiracy evidence to create a reasonable inference that the Chocolate Manufacturers conspired to fix prices. The Plaintiffs identify several categories of traditional conspiracy evidence, but the most important is evidence of the contemporaneous Canadian conspiracy. We therefore discuss the Canadian conspiracy evidence first, followed by the Plaintiffs' other traditional conspiracy evidence.

1. The contemporaneous Canadian conspiracy

The Individual Plaintiffs and the Direct Purchaser Class do not ascribe the same meaning to the Canadian conspiracy evidence. According to the Individual Plaintiffs, it is reasonable to infer a domestic conspiracy from the evidence of a Canadian conspiracy based on the fact that the Canadian market is a similar adjacent market involving the same participants. The Individual Plaintiffs further contend that a jury should be permitted to weigh evidence of the Canadian conspiracy in assessing the credibility of the Chocolate Manufacturers' **[*35]** explanations for the U.S. price increases. Finally, the Individual Plaintiffs argue, based on testimony from their economic expert, that the Canadian conspiracy "actuated" or facilitated the U.S. conspiracy. According to Dr. Vellturo's actuation theory, the sharing of information between the Chocolate Manufacturers and their Canadian counterparts led the Chocolate Manufacturers to observe the success of the Canadian conspiracy and implement a tacit or express U.S. conspiracy. *See* J.A. 2191— 92. On appeal, the Direct Purchaser Class distances itself from the actuation theory, arguing instead that the Canadian conspiracy is relevant to assessing the Chocolate Manufacturers' conduct because it enhances the plausibility of a domestic conspiracy.

We have not considered what inferences may be permissibly drawn from evidence of a foreign antitrust conspiracy about the existence of a domestic antitrust conspiracy. The Areeda treatise guides our analysis, and we quote from it at length:

> Illegal behavior elsewhere in time or place does not generally allow the inference of an immediate conspiracy. If the immediately challenged behavior would not imply a conspiracy among firms that are similar to **[*36]** the defendants [but that are not involved in a conspiracy elsewhere], then a distinct conspiracy in the past or in a different market has little power to explain the present behavior. But if there is other evidence of a present conspiracy, the defendants' sins elsewhere may cast doubt on the truthfulness of their innocent explanations.

> Of course, the scope of a proved conspiracy will often be uncertain. It may be difficult to define the boundaries of a conspiracy proved to cover an adjacent time period, product, or region. Competitors who were conspiring in this market yesterday may still be doing so today. Parties who are conspiring in New York may be doing the same in New Jersey.
>
> If immediate parallelism is as likely to result from present interdependence as from proved conspiracy in the past, we should not lightly assume in fact or presume in law that the earlier conspiracy continues. Contemporaneous conspiracies in adjacent geographic markets could reasonably be deemed sufficient to transfer to the defendants at least the burden of going forward with evidence of an explanation that performance is different in the second market, that any motivation for conspiracy in one market does **[*37]** not extend to the other, or that the personnel or other circumstances make it unreasonable to interpret the proved conspiracy as extending to the adjacent market.

Areeda & Hovenkamp, *supra*, ¶ 1421a, at 160.

The Second and Eleventh Circuits have taken positions consistent with the Areeda treatise. In *In re Elevator Antitrust Litigation, 502 F.3d 47, 51-52 (2d Cir. 2007)* (per curiam), the Second Circuit concluded that a claim of a domestic or worldwide conspiracy in the elevator and elevator services markets was unsupported by allegations of a conspiracy in the European elevator market given the absence of "any evidence of linkage between" the foreign and domestic conduct. Without such a link, the plaintiffs' argument was merely "'if it happened there, it could have happened here.'" *Id. at 52*. Similarly, in *Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1316-17 (11th Cir. 2003)*, the Eleventh Circuit held that a district court did not abuse its discretion in excluding evidence of contemporaneous foreign conspiracies involving cigarette manufacturers that were also charged with a domestic antitrust conspiracy. The court reasoned that without "some palpable tie between these overseas activities and [the manufacturers'] pricing actions in the United States, the foreign undertakings … do not tend to exclude the possibility of independent **[*38]** action in the setting of domestic cigarette prices." *Id. at 1317*.

We are persuaded by the sensible approach articulated by the Areeda treatise and inherent in the reasoning of the courts in *Elevator* and *Williamson Oil. A* conspiracy elsewhere, without more, generally does not tend to prove a domestic conspiracy, especially when the conduct observed domestically is just as consistent with lawful interdependence as with an antitrust conspiracy. To hold otherwise would sanction the use of unabashed propensity reasoning—the fallacy that "if it happened there, it could have happened here"—to prove a domestic conspiracy using evidence of a foreign conspiracy. But if two markets are sufficiently similar or adjacent and the relevant activities therein are sufficiently linked or tied in some way, e.g., the people involved in the conspiracies are the same or overlapping, it may be reasonable to use evidence of a foreign conspiracy to support an inference of a domestic conspiracy.[13]

Based on our review of the record, we conclude that the Plaintiffs have not adequately linked the Canadian conspiracy to the purported U.S. conspiracy to justify using the former to support an **[*39]** inference of the latter. First, the people involved in the Canadian conspiracy are different from those involved in the purported U.S. conspiracy. Granted, Mars Canada and Hershey Canada are subsidiaries whose executives report to and receive final approval from U.S. executives on certain decisions, including pricing decisions.

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[13] Our decision in *Flat Glass* is not to the contrary. There we noted in dicta that evidence of a defendant's price fixing in a market for original equipment manufacturer glass would be relevant to the claim that the same defendant also conspired to fix prices in the market for flat glass, a closely related but distinct product market in the same geographic area. *See* *385 F.3d at 377--78*. The evidence in *Flat Glass* involved identical companies and one executive who participated in the price-fixing conspiracies in both product markets. It is therefore consistent with the rule stated above because the people and companies involved in both conspiracies overlapped.

Nor does the standard we adopt here conflict with *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*. *Continental Ore* is inapposite because the relevant foreign conduct in that case was part of a single conspiracy that "was effectuated both here and abroad," *id. at 706*, and the Plaintiffs do not contend a single conspiracy existed here.

But the evidence does not show that any U.S. executives were involved in the Canadian trade spend or price-fixing conspiracies. The evidence instead shows that the conspiratorial conduct occurred in Canada when Canadian executives and ITWAL agreed to limit trade spend or raise prices in concert, not when they received final approval from U.S. executives on price changes. And as for Nestle USA, the case is stronger yet. Nestle Canada is not a subsidiary of Nestle USA, and Nestle Canada's pricing decisions did not need Nestle USA's approval.

Second, although the Canadian and U.S. markets are in a sense adjacent, they are not adjacent in the same way that the New York and New Jersey markets are, to use the example from the Areeda treatise. The Canadian Chocolate Manufacturers are distinct legal entities operating in a different country, and their wrongdoing does **[*40]** not tend to show that the Chocolate Manufacturers engaged in similar wrongdoing in the United States. *Cf.* Ins. Brokerage, 618 F.3d at 341 n.44 ("[A] subsidiary is a distinct legal entity and is not liable for the actions of its parent or sister corporations simply by dint of the corporate relationship.");

Third, the circumstances surrounding the Canadian conspiracy are markedly different from the purported U.S. conspiracy, and comparing the two reveals gaping holes in the Plaintiffs' proof in this case. In Canada, ITWAL played a primary role in instigating, organizing, and facilitating the Canadian conspiracy; the Plaintiffs here identify no similar U.S. player. In Canada, the conspiracy involved concerted action on trade spend in addition to price fixing; the purported U.S. conspiracy only involved price fixing. In Canada, the Canadian Chocolate Manufacturers' most senior executives exchanged pricing information and agreed to fix prices, *see, e.g*., J.A. 14106 (describing a November 22, 2007, telephone call between a Nestle Canada executive and a Hershey Canada executive in which the Hershey Canada executive promised that Hershey Canada would follow a Nestle Canada price increase); J.A. 11817-18 (Sculthorpe of Cadbury **[*41]** Canada testifying to a meeting with Leonidas of Nestle Canada where Leonidas said Nestle Canada was raising prices and Sculthorpe said Cadbury Canada would follow); the Plaintiffs here can point to hardly any communications, let alone pricing communications, among the Chocolate Manufacturers' U.S. executives. And in Canada, Cadbury Canada's cooperation with the Canadian Competition Bureau's investigation yielded evidence of conspiratorial conduct in Canada; Cadbury's settlement with the Plaintiffs here required cooperation as a condition of the settlement, but despite that cooperation, no similar evidence was uncovered in the United States.

As to the actuation theory, we reject its application here for the reasons stated by the District Court.[14] The actuation theory posits that conspiratorial "conduct and outcomes" in Canada facilitated an unlawful U.S. conspiracy. J.A. 2192. The theory therefore presumes a factual foundation, namely that the U.S. decision makers knew of the *unlawful conduct* in Canada and their knowledge of that conduct gave them confidence to raise U.S. prices by a tacit or express agreement. *See* J.A. 2186 (concluding that the U.S. price increases were the result "of **[*42]** collusion (either tacit or express) that was actuated as a result of information and confidence collected by [the Chocolate Manufacturers] on the development, execution and conduct of conspiratorial action among their Canadian operations").[15]

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[14] We have doubts about the actuation theory and whether it unduly blurs an already fine line between lawful interdependence and unlawful conspiracies, especially when the alleged conspiracy involves price fixing among oligopolists supposedly formed by a tacit agreement. "[EJven when each firm rests its own [pricing] decision upon its belief that competitors will do the same," that only shows interdependence, not a conspiracy. Clamp-All, 851 F.2d at 484. But because the District Court concluded that Dr. Vellturo's theory was admissible and the Chocolate Manufacturers do not challenge that decision on appeal, we reject the theory's application on its own terms.

[15] Dr. Vellturo's explanation of the actuation theory in his report drives home the point. There he opines that before 2002, the Chocolate Manufacturers were unable to raise prices together. Posing a thought experiment, he says to "consider a scenario in which U.S. executives from each Defendant with pricing authority for both the U.S. and Canada fly to a meeting in Canada" and "[w]ithout ever uttering an express word regarding U.S. prices, the three executives agree to raise prices in Canada by 10%." J.A. 2193. The thought experiment continues with the executives returning to the U.S. and monitoring the Canadian outcomes, and then, without any further communication, one firm announces a price increase of 10% in the U.S. Dr. Vellturo opines that under these circumstances, the "coordinated anticompetitive agreement in Canada has significantly changed the information known about likely responses to a price increase in the U.S. by these same companies," with the price leader expecting the

And for good reason. Unless there is direct or circumstantial evidence showing that the U.S. Chocolate Manufacturers knew of the unlawful Canadian conspiracy, the U.S. Chocolate Manufacturers would have no basis to know whether the Canadian parallel trade spend reductions and pricing were the result of a conspiracy or interdependence. If we inferred the existence of a U.S. conspiracy based on evidence that only shows that U.S. executives observed the parallel outcomes in Canada but had no knowledge of the cause of those outcomes (a conspiracy or interdependence), we would chill lawful conduct. We would essentially prohibit an oligopolist from recognizing its interdependence in a foreign market and applying those lessons in a domestic market, even though interdependence at home or abroad is lawful under the Sherman Act. If interdependence alone is not unlawful, we fail to see how evidence that effectively shows "interdependence **[*43]** squared" suddenly would create a reasonable inference of a U.S. conspiracy. Therefore, for the actuation theory to make a meaningful dent in the Plaintiffs' burden, they must show more than similar *outcomes* in Canada and the United States; they must instead show that the unlawful Canadian *conduct* actuated, facilitated, or informed the U.S. *conduct*[16]

The District Court correctly found factual support for the actuation theory lacking in this case, either in the form of the U.S. Chocolate Manufacturers' direct participation in or knowledge of the Canadian conspiracy. First, the theory finds no support in a 2007 email from Humberto Alfonso, a U.S.-based Hershey executive, connecting Eric Lent, the new General Manager of Hershey Canada, with Schulthorpe, Cadbury Canada's President. In the email, Alfonso wrote, "In keeping with the good advice from 'The Godfather,' keep close to your competition." J.A. 8380. Because Alfonso participated in the 2007 U.S. pricing decision, and perhaps also because he appears to have referenced the sinister words of Michael Corleone from *The Godfather Part II*,[17] the Direct Purchaser Class wants us to infer something more sinister from this social introduction—that **[*44]** Alfonso encouraged or facilitated the Canadian conspiracy. But social contacts between competitors without more are not unlawful. *See* [*Baby Food, 166 F.3d at 133*]. Without anything else to suggest Alfonso's further involvement in the Canadian conspiracy, and with Alfonso's sworn declaration that he sent the email only as a social introduction and lacked knowledge of the Canadian conspiracy, *see* J.A. 12996-97, we cannot read this email as anything other than a social introduction.

Nor does Leonidas, CEO of Nestle Canada, establish the necessary link between the Canadian and U.S. markets. According to the Plaintiffs, Leonidas played a key role in the Canadian conspiracy and regularly interacted with U.S. executives, including with Nestle USA's team when Nestle considered buying Hershey in 2002. But this purported common player did not have pricing authority for the U.S. market and none of Leonidas's documented communications with U.S. executives hinted at illegal conduct in Canada, leaving a significant gap in the inferences the Plaintiffs ask us to draw to connect the two conspiracies.

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other companies to follow the price increase. J.A. 2194. This thought experiment presumes not only that the conspirators in the U.S. knew of the Canadian conspiracy but also that the U.S. conspirators are the *same people* as the Canadian conspirators.

Moreover, at oral argument, counsel for the Individual Plaintiffs clearly explained that Dr. Vellturo premised his theory on evidence showing "that the U.S. executives with pricing authority at a minimum knew that there was a [sic] joint conduct in Canada, [and] at a maximum directed that it occur." Oral Argument at 25:38, *available at* http://www2.ca3.uscourts.gov/oralargument/audio/14-2790InReChocolateConfectionaryAntitrust.mp3.

That being said, Dr. Vellturo backtracked in his deposition by asserting that the U.S. Chocolate Manufacturers' awareness of the Canadian conspiracy was "not essential to [his] opinion." J.A. 2529. In that case, we acknowledge that the factual prerequisites for this variation of the actuation theory—that the Chocolate Manufacturers monitored Canadian prices and communicated (lawfully) with their Canadian affiliates—are satisfied. But under this variant theory, the inference of a U.S. conspiracy is tenuous because the U.S. result of parallel pricing is perfectly consistent with interdependence. *See* Areeda & Hovenkamp, *supra*, ¶ 1422b, at 170 (noting that facilitating devices alone do not imply a traditional conspiracy because "any parallelism in subsequent behavior will often be of the sort that can be satisfactorily explained by oligopolistic interdependence alone and without regard to the facilitating practice").

[16] To the extent Dr. Vellturo's opinion is based only on similar outcomes, *see supra* note 15, it is insufficient on its own to create a reasonable inference of a conspiracy.

[17] "My father taught me... keep your friends close, but your enemies closer." *The Godfather Part II* (Paramount Pictures 1974).

A set of emails from Hershey Canada executives to Hershey executives in the U.S. is also not enough. In 2003, **[*45]** Bruce Brown, Hershey Canada's General Manager, emailed Burt Snyder, the Interim President of Hershey International, shortly after Nestle Canada initiated a price increase. Speaking of the Canadian market, Brown said he had "some intelligence" that "[Mars] is anxious to follow [Nestle's] price increase but would rather have Hershey or Cadbury announce ahead of them." J.A. 7174. Brown went on to call Cadbury "the wild card" because he had heard rumors of Cadbury taking a price increase but also of Cadbury offering deep discounts to certain stores. *Id*. Snyder responded by approving the proposed price increase. In 2005, Brown emailed J.P. Bilbrey, the President of Hershey International, to say Brown "had heard rumours swirling around about a potential competitive price increase (Nestl[e]/Cadbury) in Canada... and had it confirmed last week, although details are sketchy." J.A. 8316. And in October 2007, following a meeting between Hershey Canada General Manager Lent and Leonidas where Leonidas told Lent that Nestle Canada would be increasing prices, JA. 11941, an email circulated among Hershey executives in the U.S., noting that "[Lent] knows Nestl[e]'s [p]ricing in Canada, and hears [Mars/Cadbury] **[*46]** following," and that Cadbury Canada and Nestle Canada had "floated" price increases. J.A. 8421-22. The October 2007 emails, however, made no reference to the meeting between Lent and Leonidas.

Even assuming the Plaintiffs are correct that an inference could be drawn from these emails that some Hershey executives in the United States were aware of the Canadian conspiracy (an inference better supported by some emails than others), that is all they show; they say nothing about what Mars and Nestle USA knew. Indeed, the record is devoid of evidence showing that Mars and Nestle USA knew of the Canadian conspiracy.[18] Even if the Canadian conspiracy informed Hershey's unilateral actions, it could not have facilitated a U.S. conspiracy if two of the three purported conspirators (including Mars, the price leader in all three instances) were unaware of the Canadian conspiracy.

In sum, under any of the theories presented by the Plaintiffs, there must be a sufficient factual basis for the Canadian conspiracy to be relevant to or facilitative of the purported U.S. conspiracy. Because such evidence is lacking, the contemporaneous Canadian conspiracy does not support a reasonable inference of a U.S. **[*47]** conspiracy, and we move on to consider other traditional conspiracy evidence.

2. Possession of advance pricing information

The Plaintiffs also highlight evidence that they argue shows that the Chocolate Manufacturers exchanged pricing information before they publicly announced the price increases. Specifically, the Plaintiffs point to an internal Hershey document from 2002 reflecting that Hershey knew as early as September 2002 that "Mars [wa]s considering a price increase due to rising cocoa costs," J.A. 5300, even though Mars did not publicly announce a price increase until December. According to the Direct Purchaser Class, only a small group of Mars senior executives knew about the planned price increase in September, and Hershey reacted by changing its internal pricing system in anticipation of a price increase, both of which, the Direct Purchaser Class argues, support an inference that the information was more than rumor and came from Mars executives. Hershey insists that it did not obtain the information from Mars, citing an internal pricing presentation from October 2002 stating that "[third] party cocoa suppliers believe Mars will soon take a price increase." J.A. 4606. That **[*48]** Hershey had advance warning

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[18] A September 2005 email from Don Robinson, President of Mars Canada, to Robert Gamgort, President of Mars North America, does not show that Mars executives in the U.S. knew of the Canadian conspiracy. In that email, Robinson said that "an industry wide price increase has been rumoured for a few weeks" and reported the price increases already taken and being taken by Mars Canada's competitors. J.A. 1395. Unlike the aforementioned 2003 Brown to Snyder email, for example (which suggested that Hershey Canada contemplated a coordinated response to a Nestle Canada price increase with its rivals), this Mars email does not include information that tends to show a Canadian conspiracy.

Nor does a March 2002 email from Frank Higgins, Vice President of Marketing for Nestle USA, to other Nestle USA executives show that Nestle USA knew of the ongoing Canadian conspiracy. In that email, Higgins reported on a Hershey Canada price increase and promised he would "get[] more information from Nestl[e] Canada to assess the likelihood that they will increase prices in the US." J.A. 7394. This email shows that Nestle USA monitored outcomes in Canada but says nothing of whether Nestle USA knew the price increases there were the result of interdependence or a conspiracy.

of Mars's price increase is further supported, the Plaintiffs contend, by a memo from Hershey CEO Lenny to the Hershey board stating that the Mars 2002 price increase was "roughly in line with expectations," J.A. 4620.

Additionally, the Direct Purchaser Class points to a 2004 Hershey memo, again from Lenny to the Hershey board, stating that Hershey "received confirmation that both Mars and Nestl[é] have also raised their prices on loose bars." J.A. 5276. Lenny's statement came two days before Nestle USA publicly announced its price increase. According to the Hershey vice president who passed the information about Nestle USA's price increase on to Lenny, the information came from a customer, not Nestle USA. *See* J.A. 12999.

The "mere possession of competitive memoranda" is not evidence of concerted action to fix prices. *Baby Food, 166 F.3d at 126*. In *Baby Food*, the plaintiffs also relied on the defendants' possession of documents that contained competitor pricing information in advance of any public announcements. Low-level employees gathered some of the information, but the defendants provided no explanation as to how they obtained other information. Still, we decided that this evidence **[*49]** did not support the plaintiffs' conspiracy claim. *Id*. For information that came from low-level employees, we viewed it as less worrisome than if it had come from upper-level executives. *Id. at 125-26* & n.8. We also insisted on proof that such information "had an impact on pricing decisions." *Id. at 125*. Even for the advance information from unexplained sources, we noted that "it makes common sense to obtain as much information as possible of the pricing policies and marketing strategies of one's competitors." *Id. at 126*.

In *Flat Glass*, we distinguished *Baby Food* and held that the evidence showing possession of advance pricing information supported an inference of conspiracy. The evidence in *Flat Glass* showed that the information exchanges occurred among the conspiring companies' upper ranks and that the exchanges affected prices. *See* *385 F.3d at 369* (citing example of a fax from one competitor to another revealing the sender's planned price increase and noting that the fax recipient announced an identical price increase before the fax sender). We summarized the evidence:

[H]ere the exchanges of information are more tightly linked with concerted behavior and therefore they appear more purposive. Several of the key documents emphasize **[*50]** that the relevant price increases were not economically justified or supportable, but required competitors to hold the line. Others suggest not just foreknowledge of a single competitor's pricing plans, but of the plans of multiple competitors. Predictions of price behavior were followed by actual price changes. The inference of concerted rather than interdependent action is therefore stronger.

Id.

On the spectrum of advance pricing evidence, the Plaintiff's evidence here is much closer to the evidence in *Baby Food* than to the evidence in *Flat Glass*. The Plaintiffs have no direct or strong circumstantial evidence that the information came from Hershey's competitors, much less their upper-level executives. The information is also limited to advance pricing information and, unlike in *Flat Glass*, does not reveal pricing plans dependent on others following. Furthermore, the two-day notice of Nestle USA's 2004 price increase came after Hershey had already announced its price increase, so it is hard to say it affected Hershey's pricing decision. Finally, the record shows that the Chocolate Manufacturers' pricing actions were intended to, and in some cases did, catch their rivals by surprise. **[*51]** *See* J.A. 1261 (Mars 2002 internal document explaining how Mars leading a price increase could "disrupt[] distracted competition"); J.A. 3641 (Hershey 2004 email from David West stating he was "[a]ngry at [him]self' that Hershey did not anticipate Mars's 2004 price increase on packaged products); J.A. 5274 (Mars 2007 email from Gamgort praising Mars's 2007 price increase as brilliantly timed because it "caught [Hershey] and [Nestle USA] totally by surprise").

In sum, gathering the price information of competitors can be just as consistent with lawful interdependence as with a price-fixing conspiracy. *See* *Baby Food, 166 F.3d at 126*. The evidence summarized above does not support an inference of a conspiracy.

3. Opportunity and improper communications

The Plaintiffs also contend that the Chocolate Manufacturers had opportunities to conspire during the proposed sale of Hershey and at trade show meetings. The Plaintiffs' evidence is essentially that the executives from the Chocolate Manufacturers were in the same place at the same time, which is insufficient to support a reasonable inference of concerted activity. *See* Petruzzi's, 998 F.2d at 1235. Even if we assume that Nestle USA learned of Hershey's commodities cost coverage during the 2002 **[*52]** sale process (which is far from clear),[19] there is nothing to suggest that Hershey and Nestle USA used the sale process to hatch a price-fixing conspiracy, especially because Mars, the price leader in 2002, was uninvolved in the sale process. This evidence of mere opportunities to conspire stands in stark contrast to the evidence of secret meetings and communications in the Canadian conspiracy and cannot alone support an inference of a conspiracy.

Relatedly, the Direct Purchaser Class argues that there is evidence of improper communications among the Chocolate Manufacturers' employees and that these communications support an inference of a conspiracy. The Class cites (1) a 2004 email between Nestle USA managers showing that a Hershey employee had given a Nestle USA employee information about Hershey's pricing promotions on multipack products, J.A. 9270; (2) a January 2007 email between two Mars sales executives about a conversation with a Hershey manager and information learned about Hershey's promotional activities, J.A. 9269; and (3) a September 2007 email between Mars executives relaying that one had obtained information about costs from his counterpart at Hershey, J.A. 9267. These **[*53]** sporadic communications among individuals without pricing authority are insufficient to create a reasonable inference of a conspiracy. *See* Baby Food, 166 F.3d at 125. Moreover, the September 2007 communication occurred after the 2007 price increase, so it could not have affected the relevant pricing decisions. Accordingly, we will not infer a conspiracy from this evidence.

4. Departure from pre-conspiracy conduct

The Plaintiffs argue further that the Chocolate Manufacturers departed from their pre-conspiracy conduct by deciding to follow price increases during the conspiracy period and that this is traditional conspiracy evidence. For a change in conduct to create an inference of a conspiracy, the shift in behavior must be a "radical" or "abrupt" change from the industry's business practices. *Toys "R"* Us, Inc. v. FTC, 221 F.3d 928, 935 (7th Cir. 2000). The Plaintiffs have failed to show such a shift here.

First, the Plaintiffs' argument is not premised on an apples-to-apples comparison. To show a shift in conduct, the Plaintiffs rely on a "failed" September 2001 price increase on *packaged candy* initiated by Hershey. Instead of following the price increase, Mars responded by reducing its weight on M&M packaged candy and maintaining prices, but three **[*54]** months later, Mars raised prices on miniatures packaged chocolate candy. J.A. 6192-93. The Plaintiffs also cite a January 2002 proposed price increase by Hershey on certain *boxed chocolates* that Hershey rescinded when it received pushback from customers. By contrast, the 2002 and 2007 parallel price increases involved only *singles* and *kings*, and the 2004 parallel price increases involved *singles* and *kings* as well as packaged candy. In fact, the Chocolate Manufacturers did not exactly follow each other on packaged products in the 2002 price increases, lending further support to the notion that different considerations factored into the pricing decisions for immediate consumption products and future consumption products. Putting aside the fact that Mars actually responded to Hershey's 2001 price increase and did not simply stand pat, the "failed" price increases in 2001 and early 2002 involved different products at different times than the parallel price increases in 2002, 2004, and 2007.

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[19] *Compare* J.A. 7105 (2002 Hershey internal document explaining that "the bidders conducted extensive due diligence reviews and were provided with additional information as requested (in some instances for competitive and regulatory reasons only certain non-operational personnel of potential bidders were provided information)"), *and* J.A. 13295-96 (Direct Purchaser Class's expert acknowledging the complete lack of record evidence showing that either Nestle S.A. or Nestle USA received information about Hershey's commodities cost coverage), *with* J.A. 12843^15 (Cadbury officer acknowledging that Cadbury received information about Hershey's commodities cost coverage in an email from an investment banker working for Hershey during the sale process).

Second, the focus of the Plaintiffs' argument is unduly narrow. Historically, parallel pricing in the U.S. chocolate market has not been at all uncommon. *See* J.A. 1087 (detailing parallel pricing in **[*55]** 1981 and 1983); J.A. 1105-06 (detailing a 1979 weight reduction on singles initiated by Hershey and matched by Mars; a 1986 price increase on singles, kings, and six packs initiated by Mars and matched by Hershey; a 1991 price increase on singles, kings, and six packs initiated by Hershey and matched by Mars; and a 1995 price increase on singles, kings, and six packs initiated by Hershey and matched by Mars and Nestle USA). Moreover, after the alleged conspiracy period, the Chocolate Manufacturers have raised prices in parallel three other times. J.A. 2866-67. The Plaintiffs do not argue that all of these parallel price increases resulted from an unlawful conspiracy, so we fail to see why we should infer a conspiracy existed between 2002 and 2007 from behavior that is in fact consistent with how this industry has historically operated.

Third, it is generally unremarkable for the pendulum in oligopolistic markets to swing from less to more interdependent and cooperative. *See* Areeda & Hovenkamp, *supra*, ¶ 1431a, at 229 (noting that the degree of interdependence "may be either weak or strong and may vary from time to time within a given market").

Accordingly, the evidence presented by the **[*56]** Plaintiffs does not show an abrupt shift in behavior that can support a reasonable inference of a conspiracy.

5. Pretextual explanations for price

increases

Finally, we address the Plaintiffs' argument that the Chocolate Manufacturers' pretextual explanations for their price increases support a reasonable inference of a conspiracy. *See* *Fragale & Sons Beverage Co. v. Dill, 760 F.2d 469, 474 (3d Cir. 1985)* (recognizing that pretextual explanations for disputed conduct "would disprove the likelihood of independent action"). The Chocolate Manufacturers publicly explained their price increases by citing rising costs. The Plaintiffs contend these cost-based explanations were cover for the real reason—to advance a price-fixing conspiracy.

The same evidence that we credited earlier as showing that cost increases did not justify the price increases does not necessarily show pretext, i.e., that the Chocolate Manufacturers lied when they gave their cost-based explanations for their price increases. The Plaintiffs acknowledge that raw materials costs went up during this period; they simply dispute whether the increases were enough to justify the price increases. *See* J.A. 13892 (Tollison Report) (acknowledging that "cocoa prices did rise during the class period"); J.A. **[*57]** 6273-74 (same). Nor do the Plaintiffs dispute that other input costs, such as labor and energy costs, increased during this period.

Moreover, contemporaneous internal documents show that some who worked for the Chocolate Manufacturers were concerned about cost increases during the conspiracy period. *See, e.g.*, J.A. 1031 (Nestle USA 2002 internal document suggesting budget revisions "due to increased cocoa prices"); J.A. 1261 (Mars 2002 internal document proposing price increase in December 2002 in part because of "emerging material cost pressures" and because of belief that "all" the Chocolate Manufacturers "will likely face significant cost pressures in 2003"); J.A. 7649 (September 2002 email from Hershey's David West noting "organizational momentum around pricing behind commodity prices," but expressing disagreement with that organizational view); J.A. 1114 (citing March 2003 Hershey annual report that expressed concern about cocoa costs going up in 2004). *But see, e.g.*, J.A. 4619 (October 2002 report from Hershey CEO Lenny to the Hershey board explaining cost coverage on cocoa through 2004); J.A. 7906 (December 2004 email from Hershey CEO Lenny discussing how to publicly explain **[*58]** the 2004 price increase given Hershey's "outspoken[ness] about [Hershey's] 'coverage' on cocoa and to a lesser extent on all input costs"). Therefore, to the extent the Plaintiffs' pretext argument is that costs were going up but not enough to justify a price increase, their showing of pretext is weak.

But even if the evidence of pretext were stronger, it would still be insufficient to survive summary judgment because pretext alone does not create a reasonable inference of a conspiracy. *See* *Miles Distribs., Inc. v. Specialty Constr. Brands, Inc., 476 F.3d 442, 452 (7th Cir. 2007)* ("[W]e hold that [pretextual reasons] are insufficient to create a genuine issue of fact without other evidence pointing to a price-fixing agreement."); *DeLong Equip. Co. v.*

Washington Mills Abrasive Co., 887 F.2d 1499, 1514 (11th Cir. 1989) (citing *Fragale, 760 F.2d at 474*) (same); *H. L. Moore Drug Exch. v. Eli Lilly & Co., 662 F.2d 935, 941 (2d Cir. 1981)* ("[T]he mere fact that a business reason advanced by a defendant for its [action] is undermined does not, by itself, justify the inference that the conduct was therefore the result of a conspiracy.").

Requiring something more than pretext to survive summary judgment makes particular sense in cases like this one. In their pretext argument, the Plaintiffs rely on the same evidence they did in arguing that the Chocolate Manufacturers acted contrary to their interests—evidence which we have already said is insufficient to defeat summary **[*59]** judgment. That evidence is also insufficient here. That rising costs may not have been the full or even real reason for increasing prices does not show whether the real reason was interdependence or a conspiracy. Therefore, allegations of pretext must be accompanied by other traditional conspiracy evidence or economic evidence to create a reasonable inference of a conspiracy. Because such other evidence is lacking here, any evidence of pretext is insufficient to preclude summary judgment.

D. Summary of the Evidence as a Whole

Considering the evidence as a whole, the Plaintiffs have failed to create a reasonable inference that the Chocolate Manufacturers more likely than not conspired to fix prices in the U.S. chocolate market. Compared to other cases where we decided that summary judgment should not have been granted, the Plaintiffs' case here is relatively weak. *Cf. Flat Glass, 385 F.3d at 369* (reversing summary judgment for the defendants based in part on evidence about price increases that required cooperation of competitors and coordinated price increases suspiciously close in time to meetings and communications involving the conspirators); *Petruzzi's, 998 F.2d at 1234-37* (reversing summary judgment for the defendants based on witness testimony **[*60]** about a "code" among the defendants not to compete on existing accounts and about discussions of price fixing at trade association meetings; taped conversations in which a conspirator told another company to "play by the rules"; and economic evidence showing that the only rational explanation for the price data was an unlawful conspiracy).

Evidence of a disconnected foreign conspiracy, limited possession of advance pricing information, mere opportunities to conspire without suspect meetings or conversations about pricing, conduct that is consistent with pre-conspiracy conduct, and a weak showing of pretext do not support a reasonable inference of a conspiracy. Granted, we held that some of this evidence individually was insufficient "without more," but taken together, the aforementioned evidence does not provide the necessary "more" to survive summary judgment. In short, all of this evidence is as consistent with interdependence as with a conspiracy, and as such, it does not tend to exclude the possibility that the Chocolate Manufacturers acted lawfully.

Although our analysis does not exactly mirror the District Court's, we agree with the District Court's conclusion: the evidence in **[*61]** this case calls for summary judgment in favor of the Chocolate Manufacturers.

V.

For the foregoing reasons, we will affirm the District Court's summary judgment.

EXHIBIT B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 14-2790 through 14-2795

In re: CHOCOLATE CONFECTIONARY ANTITRUST LITIGATION

The Kroger Co., Safeway, Inc., Walgreen Co.,

Hy-Vee, Inc., Albertsons LLC,

The Great Atlantic and Pacific Tea Company, Inc.,

and HEB Grocery Company L.P.,

Appellants in 14-2790

Giant Eagle, Inc.,

Appellant in 14-2791

United Supermarkets, LLC,

Appellant in 14-2792

Meijer, Inc., Meijer Distribution, Inc.,

Publix Super Markets, Inc., Super Valu Inc.,

and Affiliated Foods, Inc.,

Appellants in 14-2793

Card & Party Mart II Ltd., Jones Wholesale Grocery, Inc.*,

PITCO Foods, and The Lorain Novelty Co., Inc.,

as representatives of the Direct Purchaser Class,

Appellants in 14-2794

*Pursuant to Clerk Order of July 3, 2014

VS Pharmacy, Longs Drug Stores California, Inc.,

Rite Aid Corporation, Rite Aid Hdqtrs., Corp.,

and the Golub Corporation,

Appellants in 14-2795

On Appeal from the United States District Court

for the Middle District of Pennsylvania

(M.D. Pa. No.l-08-mdl-01935)

District Judge: Honorable Christopher C. Conner **[*62]**

Argued Thursday, April 30, 2015

Before: FISHER, HARDIMAN and ROTH, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued on April 30, 2015.

On consideration whereof, it is now hereby ORDERED and ADJUDGED that the order of the District Court entered April 17, 2014, and amended May 7, 2014, be and the same is hereby AFFIRMED. All of the above in accordance with the opinion of this Court.

Costs taxed against appellants.

Attest:

s/ Marcia M. Waldron

Clerk

Dated: September 15, 2015

Vaughan v. Kulda

Superior Court of California, County of San Mateo

June 9, 2016, Decided; June 10, 2016, Filed

Case No. CIV 533436

Reporter
2016 Cal. Super. LEXIS 9319 *

ERIC VAUGHAN; DENISE VAUGHAN, Plaintiffs, v. DEREK KULDA; JULIETTE KULDA; DEREK KULDA and JULIETTE KULDA dba ST JOSEPH'S DESIGN, INC, a business entity; ST JOSEPH'S DESIGN, INC., a California Corporation; DEREK KULDA CONSTRUCTION COMPANY, INC., a California corporation; DOES ONE through TWENTY, inclusive, AND RELATED CROSS ACTION

Prior History: *Vaughan v. Vaughan, 2015 Cal. Super. LEXIS 15019 (Cal. Super. Ct., Nov. 25, 2015)*

Core Terms

allegations, Exhibits, unlicensed, contractor, unfair business practice, contractor's license, Demurrer, Notice

Judges: [*1] GERALD J. BUCHWALD, JUDGE OF THE SUPERIOR COURT.

Opinion by: GERALD J. BUCHWALD

Opinion

ORDER ON KULDA DEFENDANTS' DEMURRER TO 14TH AND 15TH CAUSES OF ACTION

Before the Court is the Defendants Derek Kulda, Juliette Kulda, St. Joseph Design, Inc., and Derek Kulda Construction Company, Inc.'s (hereafter "Kulda Defendants") Demurrer to the 14th and 15th Causes of Action in Plaintiffs Eric Vaughan and Denise Vaughan's First Amended Complaint herein. Hearing was previously held, and the matter has been under submission since March 11, 2016.

For the reasons which follow, the **Demurrer is Sustained With Leave To Amend** so that Plaintiffs may have the opportunity to allege facts, if they can, supporting a basis for liability falling outside of the Option Agreements on which their claims of Business & Professions Code violations arise.

(1) **Contractors License Law Claim**. The 14th Cause of Action asserts the Kulda Defendants' violation of *Calif. Business & Professions Code, Section 7031*, the Contractors License Law that prohibits construction work by an unlicensed contractor and compels mandatory disgorgement of all money received for an unlicensed contractor's work. See, e.g., *Alatriste v. Cesar's Exterior Designs, Inc. (4th Dist. 2010) 183 Cal. App.4th 656, 108 Cal. Rptr. 3d 277*, affirming summary judgment in favor of homeowner's recovery of monies paid to unlicensed **[*2]** landscaping contractor.

Here, Plaintiffs Vaughan seek a return of at least $700,000.

By their current allegations, Plaintiffs claim that the parties had a construction contract for Defendant St. Joseph's Design, Inc. to build a home at 175 El Granada Blvd., in El Granada, California. More specifically, they claim that St. Joseph's Design, Inc. was an unlicensed entity that entered into a "construction-related" contract with the Vaughans involving construction and charged money related to those alleged construction services. It is further alleged that St. Joseph's Design, Inc. is the signatory on the contract, was not licensed at all times as required by law, was not the owner of the property, and performed the unlicensed work between May 2007 and February 2009. By their allegations, the Vaughans further contend that St. Joseph Design, Inc.'s receipt of monies for this home construction triggers *Section 7031* disgorgement remedies. They so allege notwithstanding that St. Joseph Design, Inc. separately contracted to have the work done by Defendant Derek Kulda Construction Company, Inc. which is, and was at the times material, a fully licensed contractor.[1]

These material allegations, however, are at odds with and refuted by the very terms of the Option Agreements that are attached as Exhibits to, and thereby incorporated into, Plaintiff Vaughans' First Amended Complaint. Those Exhibits show, on their face, a long-term "Agreement of Lease with Option to Buy", under which the Vaughans made payments of pre-paid rent and/or payments as consideration for the Option to buy the property. Those Exhibits also show the payments going to Derek and Juliette Kulda who signed the Option Agreements in their individual capacities and not as officers on behalf of St. Joseph's Design, Inc.[2] Accordingly, St. Joseph's Design, Inc., the alleged unlicensed contractor, was not a party to the Option Agreements and no claim is stated against St. Joseph's Design, Inc.

Plaintiffs' allegations making countervailing references to wording in the Option Agreements that identifies "Derek and Juliette Kulda (dba St. Joseph's Design, Inc)" do not convert St. Joseph's Design, Inc. into a signatory who can be held to any obligation to perform under those Option Agreements. This Court need not accept such allegations that are clearly untrue under substantive law. See *Seidler v. Municipal Court (2nd Dist. 1993) 12 Cal. App.4th 1229, at 1233, 16 Cal. Rptr. 2d 90*.

"St. Joseph's Design, Inc." was clearly not a fictitious trade name of the Kuldas individually, but instead was the name of a stand-alone California corporation. Compare *Pinkerton's Inc. v. Superior Court (4th Dist. 1996) 40 Cal.App.4th 1342*, where the defendant corporation Pinkerton's, Inc. itself went by a fictitious business name of Pinkerton Security & Investigation Services.

Where such Exhibits to the pleadings are in direct conflict with the pled allegations, the Court may look to those exhibits as conclusively refuting the claims made.

See, e.g., *Mission Oaks Ranch, Ltd. v. County of Santa Barbara (2nd Dist.1998) 65 Cal. App.4th 713, at 723-724, 77 Cal. Rptr. 2d 1*, holding that a contract stating that engineering **[*5]** consultant's obligation to provide a complete and accurate EIR was owed solely to the County refuted Plaintiff project developer's allegations that it was an intended third-party beneficiary of the contract. In affirming the trial court's dismissal after demurrer and motion to strike in that case, the appeals court relied on 4 Witkin, Calif. Proc. (3rd Edition 1985) pg. 433, Pleading § 385, as to recitals in Exhibits, such as contracts, attached to pleadings. There the law was summarized as follows: "The [contract's] recitals, if contrary to allegations in the pleading, will be given precedence, and the pleader's inconsistent allegations as to the meaning and effect of an unambiguous document will be disregarded."

See also *Holland v. Morse Diesel Internat., Inc. (1st Dist. 2001) 86 Cal. App.4th 1443, at 1447, 104 Cal. Rptr. 2d 239*, a case where the issue was whether or not the Plaintiff was an unlicensed contractor who was subject to *Section 7031* and precluded from recovery of sums for his work. There the appeals court noted that, in reviewing

[1] In their Supplemental Request For Judicial Notice **[*3]** filed Feb.2, 2016, Plaintiffs Vaughan have submitted, and tabbed as Exhibit 3, a Copy of a Grant Deed recorded 8-27-08 showing St. Joseph Design, Inc., a California Corporation as the owner of the El Granada property. As an owner of the property, St. Joseph Design, Inc. was not required to have a contractor's license to hire a licensed contractor to build a house. See *People v. Moss (LA Super. Ct, App. Dept. 1939) 33 Cal. App. 2d Supp. 763, 87 P.2d 932*.

[2] Compare the form of execution **[*4]** of the Lease/Option Agreements by the Kuldas individually with their execution of the Grant Deed referenced in the foregoing Footnote 1, where the Kuldas executed the Grant Deed before a notary public as corporate officers of St. Joseph's Design, Inc., as owner of the property.

the matter on appeal, "... [w]e may also take notice of exhibits attached to the complaint. If facts appearing in the exhibits contradict those alleged, the facts in the exhibits take precedence." Citing *Mead v. Sanwa Bank of California (4th Dist. 1998) 61 Cal. App.4th 561, 567-568, 71 Cal. Rptr. 2d 625*.

See also *Stoddard v. Treadwell (1864) 26 Cal. 294, 303*, where the contract attached to the complaint disclosed **[*6]** the true relationship between the parties and repudiated the Plaintiff's allegations to the contrary; *Cohen v. Ratinoff (2nd Dist 1983) 147 Cal. App.3d 321, 327, 195 Cal. Rptr. 84*, to the same effect.

Accordingly, in the opinion of this Court, and I so find, what Plaintiffs have stated here is a claim for breach of a Lease/Option Agreement for return of pre-paid rents and/or return of Option payments, a claim made against Derek and Juliette Kulda individually, where their option to buy was never exercised.

A fair and balanced reading of the pleadings is that this is not a case involving any construction contract to which the Contractors License Law applies.[3] *Section 7031* does not preclude someone from retaining monies for acts for which no contractor's license is required.

Compare *MKB Management, Inc. v. Melikian (2nd Dist. 2010) 184 Cal. App.4th 796, 108 Cal. Rptr. 3d 899*, where a copy of the pertinent agreement being sued upon was attached to the complaint and conclusively showed that the Plaintiff was a property manager who did not need to be licensed, either as a contractor or as a realtor, for many of the services that he agreed to perform.

And, in any event, the alleged **[*7]** unlicensed contractor St. Joseph's Design, Inc., was never a party to the agreement that is set forth, and cannot be sued on that agreement. See, e.g., *Ratcliff Architects v. Vanir Construction Management, Inc. (1st Dist. 2001) 88 Cal. App. 4th 595, at 604, 106 Cal. Rptr. 2d 1*.

(2) **Unfair Business Practice Claim**. By their 15th Cause of Action, the Plaintiff Vaughans assert that the Kulda Defendants have engaged in unfair business practices under *Calif. Business & Professions Code, Section 17200*. The alleged unfair business practice is the purported performance of construction work without being licensed to do so, this claim being pled by a very general, short one-paragraph averment.

Again, no actionable claim is stated. This is so because this Cause of Action is devoid of any allegations that specifically plead an antitrust injury to business competition.

Section 17200 is a State ***antitrust law*** intended to protect the integrity of business competition itself. As the California Supreme Court has stated, to show a business practice is unfair under *Section 17200*, the plaintiff must show that the defendant's conduct "...threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, at 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527*.

That is why the relief afforded **[*8]** under *Section 17200* is primarily injunctive. I.e. an injunction to restrain the further carrying on of the unfair business practice that is shown to stifle competition in the relevant commercial marketplace. See *Calif. Bus. & Prof. Code, Sections 17203* and *17535*. And that is why monetary recovery under *Section 17200* is generally limited to recovery of the expenses of litigation (attorneys fees and costs) incurred by a private plaintiff acting in the place of the State's attorney general in bringing and prosecuting the *Section 17200* claim. See, e.g., *Ramos v. Countrywide Home Loans, Inc. (4th Dist. 2000) 82 Cal. App.4th 615, 98 Cal. Rptr. 2d 388*.

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[3] Given the particular pleading, including the related Exhibits, of this 14th Cause of Action, the Court may so interpret and construe the agreement, on Demurrer, as a matter of law. See, e.g., *Careau v. Security Pacific Business Credit, Inc. (2nd Dist. 1990) 222 Cal. App.3d 1371, at 1403, 272 Cal. Rptr. 387*.

While a Plaintiff invoking *Section 17200* does need to show "injury-in-fact" to obtain standing to pursue the case, *Section 17200* does not protect individual direct competitors from each other. See, e.g., *Law Offices of Mathew Higbee v. Expungement Assistance Services (4th Dist. 2013) 214 Cal. App.4th 544, at 552, 153 Cal. Rptr. 3d 865*, a case involving alleged unfair competition by means of unlicensed practice of law, in which the appeals court recognized that the fundamental purpose of *Section 17200* is to promote "...fair competition in commercial markets for goods and services..." and thereby achieving protection for both competitors and consumers. Nor does *Section 17200* protect individual consumers injured by unfair business practices. See, e.g. *Barquis v. Merchants Collection Assn. (1972) 7 Cal.3d 94, at 110, 101 Cal. Rptr. 745, 496 P.2d 817*, interpreting predecessor *Civil Code, Section 3369* and recognizing that the statute's protection of consumers from false business advertising was "...directed toward 'the right **[*9]** of the *public* to protection from fraud and deceit [,]' as toward the preservation of fair business competition."

In this case, Plaintiff Vaughans make no allegations whatsoever about harm to business competition itself in the relevant commercial marketplace. Furthermore, by this 15th Cause of Action Plaintiffs seek restitution of pre-paid rents paid or of consideration paid for the option to buy. Whichever it is, pre-paid rent or option money, such restitution is not mandatory but lies within the equitable discretion of the Court. And Plaintiff Vaughans have not sufficiently alleged facts rising to the level of an equitable basis for such relief. See *Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal. 4th 163, at 180, 96 Cal. Rptr. 2d 518, 999 P.2d 706*.

Ruling/Order. In short, Plaintiff Vaughans state a claim for neither Contractor License Law violations nor for Unfair Business Practices. Having failed to do so, they cannot proceed on either theory of action at this time.

The Kulda Defendants' Demurrer to the 14th and 15th Causes of Action is Sustained With Leave To Amend. Amended pleadings, if any, to be filed and served within 20 days of Notice of Entry of this Order.

As to each Party's respective Request for Judicial Notice, the Court takes Judicial Notice of the Exhibits To the First **[*10]** Amended Complaint as stated above and of the Grant Deed referred to herein, those requests being Granted. Requests for Judicial Notice are otherwise Denied.

IT IS SO ORDERED.

Dated: June 9th, 2016.

/s/ Gerald J. Buchwald

GERALD J. BUCHWALD

JUDGE OF THE SUPERIOR COURT

Vukov v. Glendale Adventist Med. Ctr.

Superior Court of California, County of Los Angeles

August 2, 2016, Decided; August 2, 2016, Filed

Case No. EC064306

Reporter
2016 Cal. Super. LEXIS 46610 *

JUDITH VUKOV, M.D., an individual and JUDITH VUKOV, M.D., INC, a California Corporation, Plaintiff, v. GLENDALE ADVENTIST MEDICAL CENTER, a California corporation, LUKAS ALEXANIAN, M.D., an individual, DOES 1 through 50, inclusive, Defendants.

Subsequent History: Reversed by, in part, Affirmed by, in part, Remanded by *Vukov v. Glendale Adventist Med. Ctr., 2018 Cal. App. Unpub. LEXIS 2262, 2018 WL 1616330 (Cal. App. 2d Dist., Apr. 4, 2018)*

Core Terms

cause of action, allegations, demurrer, amended complaint, original complaint, roster, emergency room, leave to amend, quasi-legislative, new cause of action, outrageous conduct, fair procedure, retaliation, intentional infliction of emotional distress, management decision, declaration, courts, insulting language, unfair competition, business practice, new patient, Cartwright Act, pleadings, Tortious, removal, reveals, unfair, application for preliminary injunction, public interest, complaints

Counsel: **[*1]** For Defendants GLENDALE ADVENTIST MEDICAL CENTER AND LUKAS ALEXANIAN, M.D.: Colin M. McGrath, MANATT, PHELPS & PHILLIPS, LLP.

Judges: Hon. William D. Stewart, Judge of the Superior Court.

Opinion by: William D. Stewart

Opinion

JUDGMENT IN FAVOR OF DEFENDANTS GLENDALE ADVENTIST MEDICAL CENTER AND LUKAS ALEXANIAN, M.D.

Defendants Glendale Adventist Medical Center's and Dr. Lukas Alexanian's Demurrer to Plaintiffs Judith Vukov, M.D.'s and Judith Vukov, M.D., Inc.'s First Amended Complaint came on for hearing at 8:30 a.m. on July 1, 2016 in Department A of the above-entitled Court.

After full consideration of the papers filed in support of and in opposition to the Demurrer, the Court adopted as its final order its tentative decision sustaining the Demurrer as to each cause of action in the First Amended Complaint without leave to amend. The Court's adopted tentative decision is attached hereto as Exhibit 1 and is incorporated herein by this reference.

THEREFORE,

In accordance with the aforesaid final order, JUDGMENT is hereby entered in favor of Defendants Glendale Adventist Medical Center and Lukas Alexanian, M.D. Plaintiffs shall take nothing by their Complaint in this action.

Defendants Glendale Adventist Medical Center **[*2]** and Lukas Alexanian, M.D. are the prevailing parties as defined by *California Code of Civil Procedure section 1032(a)(4)*, and are entitled to recover their costs of suit incurred herein as defined in *California Code of Civil Procedure section 1033.5* in the amount of $.

Date: AUG 0 2 2016

/s/ [Signature]

Hon. William D. Stewart

Judge of the Superior Court

Submitted on July 5, 2016 by:

MANATT, PHELPS & PHILLIPS, LLP

By: /s/ [Signature]

Colin M. McGrath

Attorneys for Defendants

GLENDALE ADVENTIST MEDICAL CENTER AND LUKAS ALEXANIAN, M.D.

EXHIBIT 1

DEPARTMENT A LAW AND MOTION RULINGS

DEMURRER

Calendar: 12

Case No: EC064306

Date: 7/1/16

MP: Defendants, Glendale Adventist Medical Center and Lukas Alexanian RP: Plaintiff, Judith Vukov, M.D.

ALLEGATIONS IN FIRST AMENDED COMPLAINT:

This case arises from the Plaintiff's claim that the Defendants improperly removed her from the on call roster of the emergency room at the Glendale Adventist Medical Center. The Plaintiff seeks damages and an injunction to reinstate her hospital privileges until she had been afforded a fair procedure.

CAUSES OF ACTION IN FIRST AMENDED COMPLAINT:

1) Violation of *Health and Safety Code section 1278.5*

2) Tortious Interference with Prospective Economic Advantage

3) Tortious Inteference with Right to Pursue a Calling or Profession

4) Unfair Competition in Violation of *Business and Professions Code section 17200*

5) Violation **[*3]** of the Cartwright Act

6) Wrongful Termination of Flospital Privileges

7) Intentional Infliction of Emotional Distress

RELIEF REQUESTED:

1. Demurrer to each cause of action.

2. Strike eight portions of pleadings.

DISCUSSION:

This hearing concerns the Defendant's demurrer and motion to strike directed at the First Amended Complaint.

1. New Causes of Action in First Amended Complaint

An initial issue is that the Plaintiff added new causes of action without obtaining leave of Court. On March 11, 2016, the Court sustained the Defendants' demurrers to each cause of action in the Complaint and granted leave to amend. The original Complaint included the following five causes of action:

1) Violation of Common Law Right to Fair Procedure

2) Violation of Unfair Competition Law

3) Interference with Prospective Economic Advantage

4) Intentional Infliction of Emotional Distress

5) Negligent Infliction of Emotional Distress

When a Court grants leave to amend after finding that a cause of action lacks sufficient facts, it is leave to amend only the cause of action to which the motion was directed. *People ex rel. Department of Public Works v. Clausen (1967) 248 Cal. App. 2d 770, 785, 57 Cal. Rptr. 227*. Accordingly, the Plaintiff has leave to amend the five causes of action in her original Complaint.

On March 21, 2016, **[*4]** the Plaintiff filed a First Amended Complaint that included the following seven causes of action:

1) Violation of *Health and Safety Code section 1278.5*

2) Tortious Interference with Prospective Economic Advantage

3) Tortious Inteference with Right to Pursue a Calling or Profession

4) Unfair Competition in Violation of *Business and Professions Code section 17200*

5) Violation of the Cartwright Act

6) Wrongful Termination of Hospital Privileges

7) Intentional Infliction of Emotional Distress

In her First Amended Complaint, the Plaintiff decided to change the entire theory of her case. Instead of claiming that the Defendants removed her from the call roster at the emergency room in denial of fair procedure, the Plaintiff now claims that the Defendants removed her from the roster in suffered retaliation for her complaints about conditions at the hospital. The Plaintiff deleted her causes of action for violation of right to fair procedure and negligent infliction of emotional distress and added the first cause of action for violation of *Health and Safety Code* *section 1278.5*, the third cause of action for tortious interference with right to pursue a profession, the fifth cause of action for violation for the Cartwright Act, and the sixth cause of action for wrongful termination of hospital privileges. The fifth **[*5]** cause of action claims that the Defendants violated antitrust laws and that her removal has an anti-competitive effect on the market. None of these claims were in the original Complaint.

The Court continued the hearing so that the Plaintiff could file a supplemental briefing on this issue. The Plaintiff attempted to find support in *Patrick v. Alacer Corp. (2008) 167 Cal. App. 4th 995, 84 Cal. Rptr. 3d 642*. At page 1015, the Court of Appeal found that a new cause of action for declaratory relief was proper because it directly responded to the Court's reason for sustaining an earlier demurrer. When it sustained the demurrer, the Court had found that the plaintiff did not allege that she had standing as a beneficial shareholder to bring shareholder derivative claims. The new declaratory relief cause of action supported her standing claim by seeking a declaration that the plaintiff had a community property interest in the corporation, which would show that she was a beneficial shareholder. The Court found that this new cause of action was allowed because it established the plaintiff's standing, which had been the basis for the order sustaining the demurrer.

However, in the pending case, the new causes of action do not address the basis for the ruling on the prior **[*6]** demurrer. The Court found that the original Complaint did not plead sufficient facts to constitute claims based on the theory that the Plaintiff's removal from the call roster at the emergency room was a denial of fair procedure. In her First Amended Complaint, the Plaintiff had removed that theory and added a new theory that the Defendants' removed her from the roster in retaliation for her complaints about conditions at the hospital.

The Plaintiff did not address the basis for the original ruling by showing that she could bring a claim based on her theory that she was denied fair procedure in her new causes of action. Instead, she removed her original theory and added four new causes of action based on her new theory that she was removed in retaliation for her complaints.

For example, the fifth cause of action in her First Amended Complaint seeks relief under the Cartwright Act, which is a California state ***antitrust law*** prohibiting anti-competitive activity that mirrors federal antitrust laws, such as the Sherman Antitrust Act and the Clayton Antitrust Act. This new cause of action does not address the original theory that the Plaintiff was denied fair procedure. A review of the Court **[*7]** file reveals no order granting leave to add these four new causes of action. Accordingly, the Court will sustain the Defendant's demurrers to the first, third, fifth, and sixth causes of action without leave to amend because they were added without leave of Court.

2. Court's Prior Ruling and Sham Pleading Doctrine

On March 11, 2016, the Court found that the allegations in the original Complaint showed that the Defendants had engaged in a quasi-legislative decision when it shifted from an open to a closed panel for the emergency room roster. This case arises from the management of hospital business, i.e., the change from an open to a closed roster for the emergency room on call list. An important public interest exists in preserving a hospital's ability to make managerial and policy determinations and to retain control over the general management of the hospital's business. *Mateo-Woodburn v. Fresno Cmty. Hosp. & Medical Ctr. (1990) 221 Cal. App. 3d 1169, 1184-1185, 270 Cal. Rptr. 894*. A managerial decision concerning operation of the hospital made rationally and in good faith by the board to which operation of the hospital is committed by law should not be countermanded by the Courts unless it clearly appears it is unlawful or will seriously injure a significant public interest. Id. Judges are **[*8]** untrained and courts ill-equipped for hospital administration, and it is neither possible not-desirable for the courts to act as supervening boards of directors for every hospital in the state. Id. In her original Complaint, the Plaintiff alleged in her first and second causes of action that the Defendants' decision to exclude her from the emergency on-call roster or panel was done without fair procedure and was an unfair business practice. The Plaintiff had alleged facts showing that she had a "turbulent relationship" with the Defendant, Lukas Alexanian, who was the medical director of the psychiatric unit, that Dr. Alexanian has a "bullying" method of communication and a belligerent management style, and that the removal from the emergency on-call roster was unprofessional. The Court found that the Plaintiff had identified a managerial decision concerning the operation of the hospital and that there are no allegations that the Defendants' decision to remove the Plaintiff from the on-call list was clearly unlawful or that it would seriously injure a significant public interest.

Further, the Plaintiff had alleged in paragraphs 1 and 6 of her original Complaint that the Defendants' decision **[*9]** to shift from an open to a closed panel for the emergency room roster was a management decision. Under California, the decision whether a hearing is required is based on whether the decision is quasi-legislative or quasi-adjudicative. A decision is considered quasi-legislative if it is one of general application intended to address an administrative problem as a whole and not directed at specific individuals. *Major v. Mem'l Hosps. Ass'n (1999) 71 Cal. App. 4th 1380, 1398*. Generally speaking, a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts. Id. In a quasi-legislative proceeding there is no constitutional right to any hearing. Id.

Here, the original Complaint showed that the decision to shift from an open to a close panel for the emergency room roster was one of general application that addressed the administration of the doctors who will provide services for the emergency room. It was not directed at specific individuals. Accordingly, the Court found that this was a quasi-legislative decision for which a hearing is not required.

When the Plaintiff filed her First Amended Complaint, she removed these allegations **[*10]** without explanation. Further, the Plaintiff changed the theory of her case to claim that she was removed from the call panel as retaliation for her complaints about conditions in the hospital.

Under the sham-pleading doctrine, admissions in an original complaint that has been superseded by an amended pleading remain within the Court's cognizance and the alteration of such statements by amendment designed to conceal fundamental vulnerabilities in a plaintiff's case will not be accepted. *Lockton v. O'Rourke (2010) 184 Cal. App. 4th 1051, 1061, 109 Cal. Rptr. 3d 392*. When a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings, the policy against sham pleading permits the Court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency (italics added for emphasis). *Owens v. Kings Supermarket (1988) 198 Cal. App. 3d 379, 384, 243 Cal. Rptr. 627*. If the party fails to do so the Court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint. Id.

A review of the First Amended Complaint reveals no explanation for the inconsistencies, e.g., the removal of allegations that **[*11]** showed that the decision was a management decision of general application that addressed the administration of the hospital. Further, the Plaintiff's First Amended Complaint ignored the admissions that the Plaintiff made in support of her application for a preliminary injunction, in which she stated that Dr. Alexanian enforced the requirements against her because he is hostile and angry towards her and because he does not like her taking longer to discharge patients. The Court has already considered a substantial amount of evidence in this case showing that the Defendants' decision to move from an open panel to a closed panel for the emergency room was an administrative decision and not retaliation against the Plaintiff and this was one of the bases for denying the Plaintiff's application for a preliminary injunction. The Plaintiff did not file any motion for reconsideration to request modification of the Court's finding that the management decision was quasi-legislative in the Court orders that denied her application for a preliminary injunction or that sustained the Defendants' demurrer to the original Complaint. In addition, the Plaintiff's opposition fails to address the prior **[*12]** evidence, fails to address the Court's prior findings and rulings, and fails to offer any explanation for the near total change in the theory of her case. The Plaintiff attempts to argue that the Court could not have made the decision that the adminstrative policy was quasi-legislative on a demurrer. However, a Court's conclusion whether an action was adjudicatory or quasi-legislative is an issue of law. *Major v. Mem'l Hosps. Ass'n (1999) 71 Cal. App. 4th 1380, 1400*. The Court found that the administrative decision was quasi-legislative first on the Plaintiff's application for a preliminary injunction, after considering the Plaintiff's evidence, and then on the Defendants' demurrer, after considering the Plaintiff's pleadings. As noted above, the Plaintiff did not file any motion for reconsideration of the orders that were based on this decision.

The Court continued the hearing so that the Plaintiff could submit further briefing on this issue. The Plaintiff continues to fail to explain her decision to omit allegations without explanation in her original Complaint that were the basis for her original theories, e.g., that the decision was a management decision. Since these omitted allegations showed that her claims were barred by California law, **[*13]** her new pleading is a sham pleading because it attempts to avoid the identified defects by omitting them.

Further, the Plaintiff's supplemental brief does offer any explanation for the facts in the Plaintiff's declaration that she submitted to this Court in support of her application for a preliminary injunction. Under California law, Courts will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed. *Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal. App. 3d 593, 604, 176 Cal. Rptr. 824*. This allow the Court, on a demurrer, to consider statements of the Plaintiff or her agent that are inconsistent with the allegations of the pleading before the Court. Id. Here, the facts in the Plaintiff's declaration show that her claims are based on the denial of fair procedure in a management decision regarding the operation of the hospital. These facts are inconsistent with and contradict her new theories that she was removed in retaliation for her complaints about the hospital and that her removal was an act of unfair competition in the marketplace.

Accordingly, the Courtwill disregard the inconsistent allegations in the First Amended Complaint and read into **[*14]** the amended complaint the allegations from the original complaint, i.e., the allegations in paragraphs 1 and 6 showing that the Plaintiff alleged that the Defendants' decision was a management decision and, as discussed below, the allegations in paragraph 37 that the Defendants' conduct damaged her ability to obtain new patients.

3. Second Cause of Action for Tortious Interference with Prospective Economic Advantage The Defendants argue that the Plaintiffs has not alleged sufficient facts because she has no protected economic interest in the possibility of obtaining money through future patients. Under California law, the tort consists of the following elements:

1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff;

2) the defendant's knowledge of the relationship;

3) intentional acts on the part of the defendant designed to disrupt the relationship;

4) actual disruption of the relationship; and

5) economic harm to the plaintiff proximately caused by the acts of the defendant.

Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co. (1996) 47 Cal. App. 4th 464, 475, 54 Cal. Rptr. 2d 888.

The Plaintiff alleges in paragraph 56 of her third cause of action that the Defendants' conduct damaged her relationship with insurance **[*15]** carriers and government medical programs. There are no allegations that demonstrate any method by which the Defendants' decision to exclude the Plaintiff from the call list for its emergency room interfered with any relationship with an insurer carrier or government medical program, i.e., how it prevented the Plaintiff from doing business with any identified insurance carriers or government medical programs.

Instead, this allegation appears to have been added to overcome the actual claim, which are the allegations in paragraph 37 of her original Complaint that the Defendants caused damages to the Plaintiff because they impaired her ability to obtain new patients. These allegations were removed and the First Amended Complaint offers no explanation for removing these allegations.

Further, the Plaintiff has made admissions in evidence she submitted to the Court that her claim is based on the inability to obtain new patients. When she filed her application for preliminary injunction, the Plaintiff stated facts in paragraphs 25 to 28 of her declaration to show that she generates new patient referrals by being on the on-call roster, that she has no accounts receivable after nearly a year of **[*16]** not being on the list, that no money is coming in, that she may have to declare bankruptcy, and that it is critical that she be reinstated because of her financial situation.

The Plaintiff's claims are that she has suffered damages as a result of her exclusion from the on-call roster due to her inability to obtain new patients. California law holds that a physician cannot have an existing relationship with speculative future patients. Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 546, 30 Cal. Rptr. 2d 706. Since the Plaintiff cannot has an existing economic relationship with new patients, i.e., future patients, the Plaintiff's cause of action does not plead sufficient facts.

Therefore, the Court will sustain the Defendant's demurrer to the second cause of action. Since the Plaintiff attempted to amend by deleting material and concealing fundamental defects in this cause of action, the Court will not grant the Plaintiff leave to amend.

4. Fourth Cause of Action for Violation of Business and Professions Code section 17200 A comparison of this cause of action in the First Amended Complaint to the cause of action in the original Complaint reveals that the Plaintiff removed her previous allegations about an administrative decision that changed the type of roster used for the emergency room and replaced **[*17]** them with her new theory that she suffered retaliation as a result of complaining about conditions in the hospital. Now, the Plaintiff alleges that the Defendants' retaliation violated Health and Safety Code section 1278.5 and the Cartwright Act.

Business and Professions Section 17200 defines unfair competition to be any unlawful, unfair, or fraudulent business practice. In order to plead a claim under Business and Professions Code section 17200, there must be allegations demonstrating that the Defendants engaged in an unlawful, unfair, or fraudulent business act or practice. Paulus v. Bob Lynch Ford, Inc. (2006) 139 Cal. App. 4th 659, 676-677, 43 Cal. Rptr. 3d 148. This includes anything that can properly be called a business practice and that at the same time is forbidden by law. Id. Further, to plead this statutory claim, the pleadings must state with reasonable particularity the facts supporting the statutory elements of the violation. Khoury v. Maly's of California, Inc. (1993) 14 Cal. App. 4th 612, 619, 17 Cal. Rptr. 2d 708.

A review of the fourth cause of action reveals that it is based on the violations of law in the first cause of action, which was for violation of Health and Safety Code section 1278.5, and the fifth cause of action which was for violation of the Cartwright Act. As noted above, both of these causes of action were added without leave of Court and bothwill be removed by demurrer. Since this cause of action relies upon these other claims, and since these other claimswill be removed because **[*18]** they were added without leave, this cause of action does not plead a claim.

Further, there are no allegations that plead, with reasonable particularity the statutory elements of any violation of a statute. The Plaintiff alleges only conclusions that the Defendants engaged in unlawful or unfair business practices.

Finally, California law holds that an action under Business and Professions Code section 17200 is not an all-purpose substitute for a tort or contract action. Paulus v. Bob Lynch Ford, Inc. (2006) 139 Cal. App. 4th 659, 676-677, 43 Cal. Rptr. 3d 148. The Plaintiff does not seek an injunction or restitution, which are the remedies allowed under section 17203 for this cause of action. Instead, in paragraph 77, the Plaintiff alleges that she has suffered a loss of earnings, loss of benefits, and loss of earning capacity. By seeking these improper remedies, the Plaintiff reveals that she is attempting to use the section 17200 claim as an all-purpose substitute for a tort or contract claim and not as a claim to address unfair competition. This is an improper use of Business and Professions Code section 17200.

Further, the Plaintiff claimed in her original Complaint that the management decision to change the roster for the emergency room was an unfair business practice. Under California law, an important public interest exists in preserving a hospital's ability to make managerial **[*19]** and policy determinations and to retain control over the general management of the hospital's business. Mateo-Woodburn v. Fresno Cmty. Hosp. & Medical Ctr. (1990) 221 Cal. App. 3d 1169, 1184-1185, 270 Cal. Rptr. 894. A managerial decision concerning operation of the hospital made rationally and in good faith by the board to which operation of the hospital is committed by law should not be countermanded by the Courts unless it clearly appears it is unlawful or will seriously injure a significant public interest. Id. Judges are untrained and courts ill-equipped for hospital administration, and it is neither possible nor desirable for the courts to act as supervening boards of directors for every hospital in the state. Id. The Court found that the Plaintiff's allegations in her original unfair business practices claim were insufficient because they showed a quasi-legislative decision that the Court should not countermand. In her First Amended Complaint, the Plaintiff deleted these allegations without explanation.

Therefore, the Court will sustain the Defendant's demurrer to the fourth cause of action. Since the Plaintiff attempted to amend by deleting material and concealing fundamental defects in this cause of action, the Court will not grant the Plaintiff leave to amend.

5. Seventh Cause of Action **[*20]** for Intentional Infliction of Emotional Distress The Defendants argue that there are no allegations showing that they engaged in outrageous conduct. The elements of the tort of intentional infliction of emotional distress are the following:

1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress;

2) the plaintiff's suffering severe or extreme emotional distress; and

3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. *Christensen v. Superior Court (1991) 54 Cal.3d 868, 903, 2 Cal. Rptr. 2d 79, 820 P.2d 181*

Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community. Id. In addition, the outrageous conduct must be of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind. Id.

The Plaintiff alleges in paragraph 93 that the Defendant, Lukas Alexanian, engaged in outrageous conduct by berating and humiliating the Plaintiff with yelling and profanity. Ordinarily, insulting language, without more, does not constitute outrageous conduct. *Johnson v. Ralphs Grocery Co. (2012) 204 Cal. App. 4th 1097, 1108-1109, 139 Cal. Rptr. 3d 396*. The Restatement view is that liability does not extend to mere insults, indignities, threats, **[*21]** annoyances, petty oppressions, or other trivialities. The Court noted "The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind." Id.

The allegations that the Defendant berated and humiliated the Plaintiff with yelling and profanity show insulting language. This does not constitute outrageous conduct for the purposes of an intentional infliction of emotional distress claim.

In the opposition, the Plaintiff argues that she is over 70 and an "elder". Apparently, the Plaintiff's attorney believes that people over the age of 70 are more susceptible to insulting language. This argument is not supported by any citation to legal authority holding that people over the age of 70 are more likely to suffer emotional distress from insulting language. Instead, the Plaintiff cites, in a footnote on page 14, to a case regarding statutory elder abuse claims, *Smith v. Bennett, Inc. (2005) 133 Cal.App.4th 1507, 35 Cal. Rptr. 3d 612*. A review of the case reveals no holding that insulting language is a form of "elder abuse" or that it is outrageous conduct, for **[*22]** the purposes of an intentional infliction of emotional distress claim, to direct insulting langage at people over the age of 70.

Therefore, the Court will sustain the Defendant's demurrer to the seventh cause of action. California law imposes the burden on the Plaintiff to demonstrate the manner in which she can amend her pleadings to state the claim against the *Defendants. Goodman v. Kennedy (1976) 18 Cal.3d 335, 349, 134 Cal. Rptr. 375, 556 P.2d 737*. The Plaintiff offers no manner by which she can plead that insulting language is outrageous conduct for the purposes of this cause of action. Accordingly, the Court will not grant leave to amend.

6. Motion to Strike

In light of the sustaining of the demurrers to each cause of action, the Court will take the motion to strike off calendar.

RULING:

SUSTAIN demurrers to each cause of action without leave to amend.

Take off calendar motion to strike as moot.

PROOF OF SERVICE

I, Nancy Tokuda, declare as follows:

I am employed in Los Angeles County, Los Angeles, California. I am over the age of eighteen years and not a party to this action. My business address is MANATT, PHELPS & PHILLIPS, LLP, 11355 West Olympic Boulevard, Los Angeles, California 90064-1614. On July 5, 2016, I served the within:

[PROPOSED] JUDGMENT IN FAVOR OF [*23] DEFENDANTS GLENDALE ADVENTIST AND MEDICAL CENTER AND LUKAS ALEXANIAN, M.D.

on the interested parties in this action addressed as follows:

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☒ (BY MAIL) By placing such document(s) in a sealed envelope, with postage thereon fully prepaid for first class mail, for collection and mailing at Manatt, Phelps & Phillips, LLP, Los Angeles, California following ordinary business practice. I am readily familiar with the practice at Manatt, Phelps & Phillips, LLP for collection and processing of correspondence for mailing with the United States Postal Service, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

I declare under penalty of perjury under the laws of the State of California that the **[*24]** foregoing is true and correct and that this declaration was executed on July 5, 2016 at Los Angeles, California.

/s/ [Signature]

Nancy Tokuda

[Cal. Physicians Serv. v. Johnson](#)

Superior Court of California, County of Los Angeles

October 21, 2016, Decided; October 21, 2016, Filed

Case No.: BC600453

Reporter

2016 Cal. Super. LEXIS 38698 *

CALIFORNIA PHYSICIANS SERVICE, Plaintiff, v. MICHAEL JOHNSON, et al., Defendants).

Core Terms

disclosure, confidential, cause of action, confidential information, Declaration, argues, injunction, allegations, attorney-client, handbook, secrets, declaratory relief, unfair competition, breached, campaign, communications, probability, non-public, fiduciary, disclose, parties

Judges: **[*1]** Hon Samantha P. Jessner, Judge.

Opinion by: Samantha P. Jessner

Opinion

ORDER RE:

DEFENDANT MICHAEL JOHNSON'S SPECIAL MOTION TO STRIKE

Defendant Michael Johnson's Special Motion to Strike is DENIED. ***Judicial Notice***

Plaintiff requests the court take judicial notice of the existence of online blog entries and online L.A. Times articles to establish publication. The request is granted. (*Scott v. JPMorgan Chase Bank, NA. (2013) 214 Cal.App.4th 743, 761, 154 Cal. Rptr. 3d 394*.)

Rulings on Plaintiff's Evidentiary Objections

Declarations of Sheryl L. Katz

Objection Nos. 1-2 - SUSTAINED.

Declaration of Michael Johnson

Objection No. 3 - SUSTAINED

Reply Declaration of Michael Johnson

Objection Nos. 4-10, 13-24, 31-32 - OVERRULED

Objection Nos. 11-12, 25-30 - SUSTAINED

Rulings on Defendant's Evidentiary Objections

Epstein Declaration

Objection No. 1 - SUSTAINED

Objection Nos. 2-23 - OVERRULED

Jacobs Declaration

Objection Nos. 24-44 - OVERRULED

Egan Declaration

Objection Nos. 45- 51 - OVERRULED

Menz Declaration

Objection Nos. 52-54 - OVERRULED

Objection Nos. 55-56 - SUSTAINED

Gettings Declaration

Objection Nos. 57-66 - OVERRULED

Objection Nos. 67-68 - SUSTAINED

Objection Nos. 69-87 - OVERRULED

Morrison Declaration

Objection Nos. 88-91 - OVERRULED

Step One: Acts in furtherance of the constitutional right of petition or free speech. ***[*2]*** The Complaint alleges that Defendant Johnson "has repeatedly publicly divulged confidential and attorney-client privileged information about Blue Shield's confidential corporate strategy, tax status, and legal strategies, including Blue Shield's confidential, nonpublic communications with the Franchise Tax Board, and confidential executive compensation matters." (Compi. ¶ 12.) The Complaint is also premised upon allegations that Defendant improperly retained confidential and attorney-client privileged documents belonging to Blue Shield. (Compi. ¶¶ 20, 25, 30, 37, 44.) The Complaint seeks two forms of relief: (1) the return or destruction of all confidential or privileged Blue Shield documents; and (2) the prohibition of Johnson's future use and disclosure of Blue Shield's confidential or privileged information.

Retention

As argued by Plaintiff in Opposition, the alleged improper retention of confidential materials and Plaintiffs request for their return or destruction is not conduct in furtherance of Defendant's right to petition or free speech. While defendant argues that the entire Complaint is subject to *CCP § 425.16* and asks the court to strike the entire complaint, defendant only focuses on **[*3]** the portions of the Complaint relating to disclosure. As a result, defendant has failed to establish the application of *CCP § 425.16* to the alleged improper retention of confidential information. Because each cause of action is supported by unprotected conduct, namely the wrongful retention of confidential information, each cause of action shall survive in part. The motion is DENIED to the extent it seeks to strike the entirety of the Complaint or the entirety of each cause of action asserted therein.

Disclosure

Defendant clearly articulates the legal basis for finding the allegations in the Complaint relating to Defendant's alleged disclosure of confidential and attorney-client privileged information is protected activity under CCP § 425.16. (Mo. at 4-7.) However, in Opposition, Plaintiff merely focuses on the non-speech conduct at issue when addressing the first prong inquiry. (Opp. at 7-8.) The only two disclosures specifically identified in the Complaint are the disclosure of "confidential, non-public communications with the Franchise Tax Board, and confidential executive compensation matters." (Compi. ¶ 12.) The Complaint alleges that Defendant's disclosures breached the alleged contract between the parties, **[*4]** (Compi. ¶ 20), breached the implied covenant of good faith and fair dealing, (Compi. ¶ 25), violated *Labor Code § 2860*, (Compi. ¶ 30), breached Defendant's fiduciary duty, (Compi. ¶ 37), breached the duty of loyalty, (Compi. ¶ 41), and violated unfair competition law, (Compi. ¶ 44). Therefore, each cause of action is at least partially supported by Defendant's alleged disclosure of information.

In Opposition, Plaintiff identifies six disclosures made by Defendant that it deems actionable:

(1) disclosure of confidential tax communications with the FTB and the FTB's findings in connection with the tax audit;

(2) disclosure of tax implications and strategy of how Plaintiff legally structured the Carel st acquisition, which Defendant learned from General Counsel;

(3) disclosure of an attorney-client privileged estimate of Plaintiff s value that Defendant learned from General Counsel;

(4) disclosure of the retirement compensation paid by Plaintiff to departing CEO Bruce Bodaken;

(5) disclosure that the FTB was examining Plaintiffs tax exemption and initially revoked the exemption; and

(6) disclosure of copies or summaries of Plaintiff s correspondence with the FTB regarding its tax exemption.

(Gettings Deci. ¶ **[*5]** 4.) Each of these disclosures were made to the public and journalists. *(Id.* ¶¶ 5-13.) The disclosures surrounded Plaintiffs acquisition of Carelst, which is governed by the Health & Safety Code and was the subject of news reports. (Rothner Deel. Ex. A; Johnson Deel. Ex. D-E.) The disclosures clearly fall within the definition of protected activity provided by *CCP § 425.16(e)*. *(See generally Integrated Healthcare Holdings, Inc. v. Fitzgibbons (2006) 140 Cal.App.4th 515, 523, 44 Cal. Rptr. 3d 517* ("We have little trouble concluding Fitzgibbons's e-mail message concerned 'a public issue' and 'an issue of public interest' under *section 425.16, subdivision (e)(4)*. IHHI's acquisition and operation of four Orange County hospitals was the subject of public hearings held by both the California Senate and the Orange County Board of Supervisors, and discussed in numerous articles in newspapers and other periodicals.").) Defendant has met his initial burden to establish that a portion of each cause of action arises from Defendant's exercise of free speech rights.

Therefore, the burden shifts to plaintiff to provide evidence to establish its claims based upon the public disclosure of information have "minimal merit." *(Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal.4th 260, 291, 46 Cal. Rptr. 3d 638, 139 P.3d 30* ("The plaintiff need only establish that his or her claim has 'minimal merit… '"). When addressing the use of confidential information, **[*6]** "the proper inquiry in the context of an anti-SLAPP motion is whether the plaintiff proffers sufficient evidence for such an inference." *(Oasis West Realty, LLC v. Goldman (2011) 51 Cal.4th 811, 822, 124 Cal. Rptr. 3d 256, 250 P.3d 1115*.)

Step Two: Probability of Prevailing on the Merits

If moving parties successfully have shifted the burden, then opposing parties must demonstrate a probability of prevailing on the merits of the complaint. *(Equilon Ent., LLC v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 67, 124 Cal. Rptr. 2d 507, 52 P.3d 685*; *CCP § 425.16(b)(1)*.) "[A]n action may not be dismissed under this statute if the plaintiff has presented admissible evidence that, if believed by the trier of fact, would support a cause of action against the defendant." *(Taus v. Loftus (2007) 40 Cal.4th 683, 729, 54 Cal. Rptr. 3d 775, 151 P.3d 1185*.) "The plaintiff need only establish that his or her claim has 'minimal merit'.. .to avoid being stricken as a SLAPP." *(Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal.4th 260, 291, 46 Cal. Rptr. 3d 638, 139 P.3d 30*.) "The plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *(Zamos v. Stroud (2004) 32 Cal.4th 958, 965, 12 Cal. Rptr. 3d 54, 87 P.3d 802*.) "The plaintiff cannot simply rely on the allegations in the complaint…, but must provide the court with sufficient evidence to permit the court to determine whether there is a probability that the plaintiff will prevail on the claim." *(ComputerXpress, Inc. v. Jackson (2001) 93 Cal.App.4th 993, 1010, 113 Cal. Rptr. 2d 625.)*

First, Plaintiff argues that it has stated a claim for declaratory **[*7]** relief. However, the Complaint does not contain a separate claim for declaratory relief. Plaintiff cites *Olszewski v. Scripps Health (2003) 30 Cal.4th 798, 807, 135 Cal. Rptr. 2d 1, 69 P.3d 927*, which merely found that the Court of Appeal "acted properly in modifying the judgment to include a declaration that defendants' lien against plaintiff was invalid … In her complaint, plaintiff adequately pled a claim for declaratory relief under *Code of Civil Procedure section 1060* even though she did not separately identify such a cause oí action." Specifically, the Court found that the complaint "asked the court to adjudge the rights and duties of plaintiff and defendants with respect to defendants' lien and alleged facts establishing an actual controversy appropriate for declaratory relief." *Id.* The instant Complaint does not seek to adjudicate the rights and duties of both parties, but rather seeks to enjoin Defendant from further disclosure. While the Complaint's prayer for relief asserts a request for two "declaration[s]," the declarations requested are effectively and practically requests for injunctive relief prohibiting Defendant from retaining, using, or disclosing confidential and/or attorney-client privileged documents. (Compi, at 7.) Plaintiffs attempt to raise an unstated and unpled declaratory relief **[*8]** cause of action, which merely seeks the same relief as the underlying claims is improper. *(See e.g. California Ins. Guarantee Assn. v. Superior Court (1991) 231 Cal.App.3d 1617, 1623-24, 283 Cal. Rptr. 104* ("The declaratory relief statute should not be used for the purpose of anticipating and determining an issue which can be determined in the main action. The object of the statute is to afford a new form of relief where needed and not to furnish a litigant with a second cause of action for the determination of identical issues.").) Moreover, "[a]s is true with summary judgment motions, the issues in an anti-SLAPP motion are framed by the pleadings." *(Paiva v. Nichols (2008) 168 Cal.App.4th 1007, 1017, 85 Cal. Rptr. 3d 838.)* The Complaint does not state a claim for declaratory relief.

Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing (First and Second Causes of Action)

Plaintiff also argues that Defendant violated "written obligations to BSC in the Employee Handbook, Code of Conduct, Telecommuting Agreement, and Attestations." (Opp. at 11.) Johnson argues that the employee handbook expressly states that it is not a contract: "Nothing in this Handbook, or any Blue Shield of California policies, rules or guidelines, or the Code of Business Conduct, is intended to be and is not a **[*9]** contract (express or implied), nor does it otherwise create any legally enforceable contractual obligations on the part of the Company." (Johnson Deel. Ex. C.) However, this provision is contained solely in a section regarding at-will employment and makes no reference to the other sections of the handbook. Johnson expressly agreed "to abide by the policies, rules and regulations" contained in the handbook. (Johnson Deel. Ex. B.) The handbook contains confidentiality provisions which provide that any employee that "has access to confidential employee information must keep this information confidential." (Johnson Deel. Ex. C at 8.) The provision further provides:

All records and files maintained by the Company are confidential and remain the property of the Company. Such information may not be used by any employee … for obtaining personal gain or profit. Records and files are not to be disclosed to any outside party … without the express permission of Corporate Legal. … all employees at Blue Shield of California are required to sign a Confidentiality Agreement. However, all employees are subject to these confidentiality covenants regardless of whether there is a separate confidentiality **[*10]** agreement or not.

(Id.) Moreover, Johnson attested that he certified that he would comply with the Code of Conduct and not disclose confidential information. (Gettings Deel. Ex. N-9.) The Code of Conduct specifically provides that employees agree to keep employee salary information confidential. (Eagan Deel. Ex. 7 at 25, 27.) Johnson expressly acknowledged his agreement to abide by the Handbook and the Code of Conduct. (Gettings Deel. Ex. N-9; Johnson Deel. Ex. B-C.) The evidence indicates that Johnson publicly disclosed Plaintiffs attorney-client informatior (Jacobs Deel. ¶¶ 6-22), publicly disclosed confidential communications between Plaintiff and the FTB (Gettings Deel. ¶ 5, Ex. A-2 - A-16), and publicly disclosed non-public executive compensation. (Gettings Deel. ¶ 9, Ex. D-l-D-7.) Taken as a whole, Plaintiffs evidence is sufficient to meet its burden of establishing that its breach of contract claim and breach of the

implied covenant of good faith and fair dealing claims have minimal merit. ***Violation of Labor Code § 2860 (Third Cause of Action)***

Labor Code § 2860 provides "[e]verything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to **[*11]** the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment." "The disclosure by an employee of trade secrets and other confidential information obtained by him in the course of his employment is a breach of trust, and it is well settled that a court of equity will restrain any threatened disclosure or use thereof to the detrimeni of the employer. The character of the secrets, if peculiar and important to the business is not material. They may be secrets of trade, secrets of title, secrets of process of manufacture, or any other secrets of the employer important to his business. This principle is carried into the State *Labor Code, section 2860*." *(Santa Monica Ice & Cold Storage Co. v. Rossier (1941) 42 Cal.App.2d 467, 470, 109 P.2d 382*; *Riess v. Sanford (1941) 47 Cal.App.2d 244, 246, 117 P.2d 694* (same).) "The language in the statute has been applied to protect employee misappropriation of trade secrets and confidential information gained during employment." *(KGB, Inc. v. Giannoulas* (1980) 104 Cai.App.3d 844, 855.) As the above authorities make clear, all that is required for a violation of *Labor Code § 2860* is a detriment to the employer. There is no requirement, as urged by defendant, that defendant attain a monetary benefit. As with the breach of contract cause of action, Plaintiff has satisfied the minimal merit standard for this claim relating to **[*12]** the disclosure of confidential information.

Breach of Fiduciary Duty (Fourth Cause of Action); Breach of Duty of Loyalty (Fifth Cause of Action)

"The duty of loyalty is breached, and may give rise to a cause of action in the employer, when the employee takes action which is inimical to the best interests of the employer." *(Stokes v. Dole Nut Co. (1995) 41 Cal.App.4th 285, 295, 48 Cal. Rptr. 2d 673*.) "A fiduciary duty is undertaken by agreement when one person enters into a confidential relationship with another. As the court explained in *Barbara A. v. John G, supra, 145 Cal.App.3d 369, 193 Cal.Rptr. 422*, a confidential relationship arises "where a confidence is reposed by one person in the integrity of another, and … the party in whom the confidence is reposed,… voluntarily accepts or assumes to accept the confidence. *(GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc. (2000) 83 Cal.App.4th 409, 417, 99 Cal. Rptr. 2d 665* disapproved of on other grounds by *Reeves v. Hanlon (2004) 33 Cal.4th 1140, 1154, 17 Cal. Rptr. 3d 289, 95 P.3d 513*.) The breach of fiduciary du:y cause of action is supported by the same facts as the other causes of action. Additionally, Plaintiff provides evidence that Johnson created a blog/website called "makeitrightblueshield" while employed with Plaintiff and met with numerous individuals regarding his plan to pressure Plaintiff "to live up to its nonprofit mission." (Gettings Deel. ¶ 14, Ex. 1-3 -1-9.) Plaintiffs evidence establishes minimal merit to the breach of fiduciary duty **[*13]** and breach of loyalty claims.

Unfair Competition (Sixth Cause of Action)

The sixth cause of action asserts liability pursuant to *Business & Professions Code § 17200*. (Compi. ¶¶ 44-45.) Plaintiff cites *People v. Los Angeles Palm, Inc. (1981) 121 Cal.App.3d 25, 33, 175 Cal. Rptr. 257*, which noted "[a]n unlawful business activity includes anything that can properly be called a business practice and that at the same time is forbidden by law." (Opp. at 13.) In *Los Angeles Palm*, the unlawful business practice at issue was the improper crediting of tips against minimum wages, a clear business act or practice. Plaintiff also relies upon *Balboa Ins. Co. v. Trans Global Equities (1990) 218 Cal.App.3d 1327, 1342, 267 Cal. Rptr. 787*, which did not address the statutory unfair competition provisions: "California has a statute allowing a court to enjoin unfairly competitive acts. (See *Bus. & Prof. Code, §§ 17200* & *17203*.)… Plaintiffs have not argued here or below that they seek relief under this statute. Accordingly, it appears they have confined their claim to common law unfair competition." *(Balboa Ins. Co. v. Trans Global Equities (1990) 218 Cal.App.3d 1327, 1342, 267 Cal. Rptr. 787*.) Defendant argues for the first time in Reply, that a statutory claim cannot be brought against a former employee unless that employee seeks a commercial advantage or personal gain from their conduct. However, *Courtesy Temporary Service, Inc. v. Camacho (1990) 222 Cal.App.3d 1278, 1291, 272 Cal. Rptr. 352*, cited by defendant, does not stand for this proposition, but rather found that misappropriation of confidential information to unfairl) compete and **[*14]** solicit the employer's customers was sufficient. Nothing in *Courtesy, supra* createc a personal gain or commercial advantage requirement. Pursuant to *Business & Professions Code § 17200*, "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice." However, the code is meant to be construed broadly to prohibit conduct that destroys or prevents fair and honest competition. (*Bus. & Prof. Code §§ 17001-17002*.) The disclosure of a company's confidential information would prevent or destroy fair and honest competition by precluding a company from relying upon confidentiality in the same manner as its competitors. Defendant provides no authority compelling a determination that the disclosure of confidential information to the detriment of a corporation is not actionable under *Business and Professions Code Section 17200*. The court finds that Plaintiff has established the minimal merit necessary to pursue this claim.

Application of Labor Code §1102.5

Johnson argues that *Labor Code § 1102.5* precludes enforcing any confidentiality obligation against him. *Labor Code Section 1102.5* provides:

An employer, or any person acting on behalf of the employer, shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, to a person **[*15]** with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

Notably, nothing in *Labor Code § 1102.5* applies to disclosures to the general public and the Complaint makes no reference to disclosures to "a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry." Additionally, none of the six disclosures identified by Plaintiff (Gettings Deel. ¶ 4) involve such disclosures. There is no basis for the application of *Labor Code § 1102.5* to the instant matter.

Noerr-Pennington Doctrine [*16]

Johnson also argues that he is immune from liability under the *Noerr-Pennington* doctrine. "The *Noerr-P ennington* doctrine, which arose in the context of ***antitrust law***, holds that those who petition government for redress are generally immune from antitrust liability. In *Eastern R. Conf. v. Noerr Motors (1961) 365 U.S. 127, 137*, the Supreme Court concluded that the Sherman Antitrust Act does not punish political activity through which the people freely inform the government of their wishes. The *Noerr-P ennington* doctrine was extended by the Supreme Court in *California Transport v. Trucking Unlimited (1972) 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642* to the approach of citizens to administrative agencies and to courts. It has been applied to commercial speech and competitive activity, as well as to anticompetitive activity. [Citation]. The immunity applies to virtually any tort, including unfair competition and interference with contract." *(Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn. (2006) 136 Cal.App.4th 464, 478, 39 Cal. Rptr. 3d 43*.) As noted above, the Complaint does not contain any allegations regarding Defendant's approach to administrative agencies or court.

Defendant argues that the *Noerr-Pennington* doctrine protects public relations campaigns *(Tichinin v. City of Morgan Hill (2009) 177 Cal.App.4th 1049, 1067, 99 Cal. Rptr. 3d 661* ("In the context of the right to petition, collateral protection has been extended to a railroad's public relations campaign aimed at influencing passage of favorable legislation **[*17]** *[Noerr, supra, 365 U.S. at pp. 140-143, 81 S.Ct. 523*.]"); *Sosa v. DIRECTV, Inc. (9th Cir. 2006) 437 F.3d 923, 935* ("the law of this circuit establishes that communications between private parties are sufficiently within the protection of the Petition Clause to trigger the *Noerr-Pennington* doctrine, so long as they are sufficiently related to petitioning activity.").) However, as noted in Opposition, the cases involving public relations campaigns involved collective lobbying activities, *(Noerr, supra at 140-43* (involving 24 railroads' campaign toward obtaining governmental action), and Defendant's testimony indicates that his public campaign was not aimed at petitioning the government, but rather to "pressure Blue Shield to take its nonprofit mission more seriously." (Gettings Deel. Ex. 1-3; 1-7/ Therefore, Defendant has failed to establish the applicability of the *Noerr-Pennington* doctrine. *Additional Arguments*

Defendant also argues that the confidentiality agreement serves an unlawful purpose because a confidentiality provision "cannot serve to impede a state agency's investigatorial prerogatives." (Mo. at 10-11.) Defendant relies upon *Cariveau v. Halferty (2000) 83 Cal.App.4th 126, 99 Cal. Rptr. 2d 417*, which involved an employee's affirmative obligation under the rules of the NASD to report the conduct of his or her employer. No such affirmative obligation existed here. Defendant **[*18]** also cites *DArrigo Bros, of California v. United Farmworkers of America (2014) 224 Cal.App.4th 790, 806*, which cited *Cariveau.* However, *D'Arrigo* involved a breach of contract cause of action asserting that an employee breached a contract by assisting the general counsel ol the Agricultural Labor Relations Board. *DArrigo, supra at 800* ("In its complaint D'Arrigo asserted that the breach occurred by pursuing, and assisting the ALRB general counsel in pursuing, allegations that D'Arrigo had unlawfully promised benefits to employees.").) The Complaint at issue here contains no such allegations. Defendant's argument fails.

Defendant further argues that the Complaint contains an unconstitutionally vague request for an injunction. However, Defendant cites no authority for the proposition that an overbroad injunction request in a complaint is sufficient to support a motion to strike under *CCP § 425.16*. Defendant cites *Evans v. Evans (2008) 162 Cal.App.4th 1157, 1169, 76 Cal. Rptr. 3d 859*, which involved an overbroad trial court order, which prohibited a defendant from publishing "any false and defamatory statements on the Internet." Here, no court order has been issued. Defendant has cited no authority for the proposition that a Complaint's prayer for injunctive relief, rather than a court order, must be narrowly tailored. The breadth of any injunction issued in this matter is to be **[*19]** determined after a trial on the merits, not at the pleading stage.

Finally, Defendant argues that the court may not enjoin a completed act. "Ordinarily, injunctive relief is available to prevent threatened injury and is not a remedy designed to right completed wrongs. [Citations.] 'It should neither serve as punishment for past acts, nor be exercised in the absence of any evidence establishing the reasonable probability the acts will be repeated in the future. Indeed, a change in circumstances at the time of the hearing, rendering injunctive relief moot or unnecessary, justifies denial of the request.' [Citation.] Unless there is a showing that the challenged action is being continued or repeated, an injunction should be denied." *(Madrid v. Perot Systems Corp. (2005) 130 Cal.App.4th 440, 464-65, 30 Cal. Rptr. 3d 210*.) Defendant also cites *City of Cohort v. Singletary (2012) 206 Cal. App.4th 751, 771-74, 142 Cal. Rptr. 3d 74* in support of this argument. In *Singletary*, the court found that there was no evidence that the defendant "has continued to attempt to profit from his bribery, such that an injunction should issue." *(City of Colton v. Singletary (2012) 206 Cal.App.4th 751, 772, 142 Cal. Rptr. 3d 74*.) *Singletary* did not involve the disclosure of confidential information in the possession of a defendant, as is the issue here. Moreover, while Johnson attested that he did not have any "plans at this point to disclose any nonpublic information," he affirmatively **[*20]** stated that there was other non-public information that he considered disclosing in connection with his campaign. (Gettings Deel. Ex. N-6.) Additionally, Johnson has affirmatively testified that he would ignore confidentiality and attorney-client privilege designations. (Gettings Deel. Ex. H-17.) The evidence is sufficient for purposes of an anti-slapp motion, to establish a threat of future disclosure of confidential information.

The court finds that Plaintiff has established a probability of prevailing on the merits sufficient to defeat Defendant's motion. As a result, defendant's motion is DENIED.

Plaintiff is ordered to give notice.

DATED: October 21, 2016

/s/ Samantha P. Jessner

Hon Samantha P. Jessner

Los Angeles Superior Court

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Angeles v. Wells Fargo Bank, N.A.

Superior Court of California, County of San Mateo

July 21, 2017, Decided; July 24, 2017, Filed

CASE NO. 16CIV02108

Reporter
2017 Cal. Super. LEXIS 6466 *

FERNANDO ANGELES, an individual, Plaintiff, v. WELLS FARGO BANK, N.A.; QUALITY LOAN SERVICE CORPORATION; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS; AND DOES 1 THROUGH 10, INCLUSIVE, Defendant.

Core Terms

Demurrer, allegations, foreclosure, cause of action, Mortgage

Counsel: **[*1]** For WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR STRUCTURED ASSET MORTGAGE INVESTMENTS II INC., BEAR STEARNS MORTGAGE FUNDING TRUST 2006-AR2, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AR2; AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., ERRONEOUSLY SUED AS "MORTGAGE ELECTRONIC REGISTRATION SYSTEMS", Defendants: THOMAS A. WOODS (SB #210050), STOEL RIVES LLP, Sacramento, CA; BAO M. VU (SB #277970) STOEL RIVES LLP, San Francisco, CA.

For Plaintiff: Patricia Rodriguez, RODRIGUEZ LAW GROUP, INC., Fernando Angeles.

Judges: HON. RICHARD H. DUBOIS.

Opinion by: RICHARD H. DUBOIS

Opinion

ORDER SUSTAINING DEMURRER TO SECOND AMENDED COMPLAINT WITHOUT LEAVE TO AMEND

ORDER

Having considered the pleadings, written submissions of the parties, the entire file in this case, and all other matters properly before the Court, the Court hereby adopts its tentative ruling in its entirety as follows:

For the reasons set forth below, Defendants Defendants Wells Fargo Bank, National Association, as Trustee for Structured Asset Mortgage Investments II Inc., Bear Stearns Mortgage Funding Trust 2006-AR2, Mortgage Pass-Through Certificates, Series 2006-AR2 ("Wells Fargo"),[1] and Mortgage Electronic Registration Systems, Inc.'s ("MERS"), **[*2]** (collectively with Wells Fargo, referred to herein as "Defendants")[2] Demurrer to Plaintiff Fernando

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[1] (erroneously sued as "Wells Fargo Bank, N.A.")

[2] (erroneously sued as "Mortgage Electronic Registration Systems")

Angeles' Second Amended Complaint (SAC) is SUSTAINED WITHOUT LEAVE TO AMEND in its entirety. *Code Civ. Proc. Sect. 430.10(e)*.

Plaintiff filed his Opposition to the Demurrer late, and served it improperly. The Opposition was due July 3, 2017, but was filed July 5, 2017, and was served by regular mail. *Code Civ. Proc. Sect. 1005(b)* requires that the Opposition be served by overnight delivery. The court will, however, deal with the merits of the demurrer.

Defendants' Request for Judicial Notice supporting the Demurrer is GRANTED as to Exhs. 1, 2, and 4 (seeking judicial notice of the FAC, SAC, and the Court's previous Order sustaining the Demurrer to the FAC) (*Evid. Code Sect. 452(d)*), and DENIED as to Ex. 2 (redline comparison of the FAC and SAC). Despite denying the Request for Judicial Notice as to Defendants' computer-generated redline comparison of the FAC and SAC, the Court has, on its own, compared the allegations of the FAC and SAC. Following the Court's previous Order sustaining Defendants' Demurrer to the FAC, Plaintiff filed a SAC (the subject of this Demurrer) which, for the most part, is unchanged from the allegations in the FAC. The fact that Plaintiff has **[*3]** filed a SAC containing essentially the same allegations as in the FAC weighs against granting further leave to amend.

For purposes of the Demurrer, all material facts in the pleadings are assumed to be true. *Ellenberger v. Espinosa (2004) 30 Cal. App. 4th 943, 947, 36 Cal. Rptr. 2d 360*. However, deductions or conclusions of fact or law are not accepted as true. *Blank v. Kirwan (1985) 39 Cal. 3d 311, 318, 216 Cal. Rptr. 718, 703 P.2d 58*. As to the First Cause of Action for wrongful foreclosure, as explained in the Court's ruling on Defendants' Demurrer to the FAC, the SAC again does not allege that a foreclosure sale has taken place. There can be no wrongful foreclosure without a foreclosure. *Ghurnan v. Wells Fargo Bank, N.A., 989 F.Supp.2d 994, 1002-3 (E.D. Ca. 2013)*.

Further, with respect to all seven asserted causes of action, Plaintiffs claims are premised on an alleged "failed securitization" (*see, e.g.*, SAC, Par. 77, 79, 81, 93-95, 105, 111, 120), which, according to Plaintiff, deprives Defendants of the authority to conduct a non judicial foreclosure sale. Specifically, Plaintiff's SAC alleges the foreclosure sale, if and when it takes place, will be tainted by a 2012 invalid assignment of the Deed of Trust (DOT) into a Securitized Trust. This argument fails because Plaintiff lacks standing to challenge an alleged void assignment *pre-foreclosure. Yvanova v. New Century Mortgage Corp. (2016) 62 Cal.4th 919, 924, 199 Cal. Rptr. 3d 66, 365 P.3d 845* ("We do not hold or suggest that a borrower may attempt **[*4]** to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed."); *Saterbak v. JPMorgan Chase Bank, N.A. (2016) 245 Cal.App.4th 808, 815, 199 Cal. Rptr. 3d 790* ("Yvanova's ruling is expressly limited to the post-foreclosure context.").

Moreover, and as a separate basis for sustaining the Demurrer, the *Yvanova* court recognized a borrower's standing to challenge a foreclosure only where the alleged facts, if true, would render the assignment *void* rather than *voidable*. *62 Cal. 4th 942-943*. Here, even if true, the allegations pertaining to an alleged assignment of the DOT after the closing date of a pooling and servicing agreement would render the assignment voidable, not void. *Saterbak v. JPMorgan Chase Bank, N.A., 245 Cal.App.4th 808, 813, 199 Cal. Rptr. 3d 790 (2016)*. The SAC concedes this by alleging the assignment is voidable rather than void. *See* SAC, Par. 64-66, 72, 73, 100, 105. Thus, by Plaintiffs own allegations, he lacks standing to challenge Defendants' authority to foreclose, which precludes each asserted cause of action.

As to the Second Cause of Action for violation of *Civ. Code Sect. 2924(a)*, in addition to the foregoing, *Sect. 2924(a)* does not "provide for a judicial action to determine whether the person initiating the foreclosure process is indeed authorized." *Gomes v. Countrywide Home Loans, Inc. (2011) 192 Cal.App.4th 1149, 1155, 121 Cal. Rptr. 3d 819*. Nor is there merit to Plaintiff's contention that Defendants lack authority to foreclose because **[*5]** the Note and DOT were "split." *See* *Linkhart v. US. Bank, NA., 2010 WL 1996895 at (S.D. Ca. 2010)* (rejecting this argument as "specious.").

As to the Fifth Cause of Action for unfair business practices under *Bus. & Prof. Code Sect. 17200 et. seq.*, in addition to the foregoing, the Demurrer is sustained on grounds Plaintiff lacks standing because, given that no foreclosure sale has taken place, the allegations do not set forth any injury-in-fact. *See* *Bus. & Prof. Code Sect.*

17204 ("injury-in-fact" means loss of money or property). Plaintiff argues "damage" in that his principal has continued to rise. (SAC, Par. 119). But there is no allegation Plaintiff has actually paid any amount on his mortgage in well over a year. See FAC, Ex. C, D.

Further, *Sect. 17200* claim again does not sufficiently allege injury to competition, which is the essence of a 17200 claim. This deficiency was noted in the Court's Order sustaining the Demurrer to Plaintiff's FAC, yet the SAC does not remedy the problem. The SAC lacks allegations that specifically plead an antitrust injury to business competition. *Section 17200* is a State ***antitrust law*** intended to protect the integrity of business competition itself. As the California Supreme Court has stated, to show a business practice is unfair under *Section 17200*, the plaintiff must show that the defendant's conduct "...threatens **[*6]** an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527*. That is why the relief afforded under *Section 17200* is primarily injunctive, *I.e.*, an injunction to restrain the further carrying on of the unfair business practice that is shown to stifle competition in the relevant commercial marketplace. See *Calif. Bus. & Prof. Code, Sections 17203* and *17535*. While a Plaintiff invoking *Section 17200* does need to show "injury-in-fact" to obtain standing to pursue the case, *Section 17200* does not protect individual direct competitors from each other. *See Law Offices of Mathew Higbee v. Expungement Assistance Services (2013) 214 Cal. App.4th 544, 552, 153 Cal. Rptr. 3d 865*, The SAC again lacks sufficient allegations of harm to the public interest, or deception to members of the public.

As to the Seventh Cause of Action for equitable estoppel, in addition to the foregoing, Plaintiff has not alleged any, act by Defendants that reasonably could have caused him to change his position to his prejudice. Nor are the allegations regarding the alleged voidable assignment of the DOT a basis to argue equitable estoppel here, Even if the **[*7]** SAC's allegations are accepted as true, Defendants are not "taking advantage of [their] own wrong." They are exercising a contractual right to foreclose on property securing a loin that is in default.

Given that the Court previously granted Plaintiff leave to amend the PAC to attempt to cure the identified deficiencies in the asserted claims, but Plaintiff filed a new complaint with essentially the same allegations, permitting further leave would be futile.

IT IS SO ORDERED.

DATED: 7-21-2017

/s/ Richard H. Dubois

HON. RICHARD H. DUBOIS

San Francisco Print Media Co. v. Hearst Corp.

Superior Court of California, County of San Francisco

August 22, 2017, Decided; August 22, 2017, Filed

Case No. CGC-13-532369

Reporter
2017 Cal. Super. LEXIS 5757 *

SAN FRANCISCO PRINT MEDIA COMPANY, Plaintiff, v. HEARST CORP., ET AL., Defendants.

Core Terms

advertising, prices, costs, print, sales, competitor, variable, meeting competition, damages, newspapers, affirmative defense, loss leader, summary adjudication, regression, allocated, sales below cost, argues, digital, Supplemental, opines, aggregated, undisputed, bundled, destroy the competition, display advertising, discounts, predatory, secret, motion to exclude, products

Judges: [*1] Curtis E.A. Karnow, Judge Of The Superior Court.

Opinion by: Curtis E.A. Karnow

Opinion

ORDER (1) GRANTING HEARST'S MOTION FOR SUMMARY JUDGMENT; (2) GRANTING HEARST'S MOTION TO EXCLUDE TESTIMONY FROM EICHMANN; (3) GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION OR, IN THE ALTERNATIVE, SEVERANCE OF AFFIRMATIVE DEFENSES; (4) GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO EXCLUDE TESTIMONY FROM KLEIN; (5) GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO EXCLUDE TESTIMONY FROM RUBINFELD

Plaintiff The San Francisco Print Media Company operates the San Francisco Examiner. Plaintiff alleges that Defendants Hearst Communications, Inc., Hearst Corporation, Frank Vega, Mark Adkins, and Jeff Bergin (together Hearst)[1] violated the Unfair Practices Act (UPA) in their operation of the San Francisco Chronicle (Chronicle). I may refer to plaintiff as the Examiner and the defendants together as Hearst or the Chronicle.

Motions. On August 10, 2017 I heard argument on eleven motions the parties had set for that morning. Those motions were: (1) Hearst's Motion for Summary Judgment; (2) Hearst's Motion to Exclude Testimony from Eichmann; (3) Plaintiff's Motion for Summary Adjudication **[*2]** or, in the Alternative, Severance of Affirmative Defenses; (4) Plaintiff's Motion to Exclude Testimony from Klein; (5) Plaintiff's Motion to Exclude Testimony from Rubinfeld; (6) Plaintiff's Motion to Seal (Regarding Plaintiff's Opposition Papers); (7) Plaintiff's Motion to Seal (Regarding Plaintiff's Moving Papers); (8) Hearst's Motion to Strike or, in the Alternative, Seal (Regarding Plaintiff's Moving Papers); (9) Hearst's Motion to Seal (Regarding Plaintiff's Opposition Papers); (10) Hearst's Motion to Seal (Regarding Hearst's Reply Papers); (11) Plaintiff's Motion to Strike, or, in the Alternative, Seal (Regarding Hearst's

[1] The Third Amended Complaint also names San Francisco Chronicle LLC. That entity never did any business of any kind, never owned or operated the Chronicle, and was dissolved on April 12, 2013. Bergin Deck ¶ 4.

Reply Papers). I provided the parties written tentatives on one of the sealing motions and on the rest of the other motions.

Causes of action. The Examiner's first cause of action is for below cost sales under Business and Professions Code (B+P) § 17043; the second cause of action is for secret unearned discounts under B+P § 17045; the third cause of action is for loss leader sales under B+P § 17044; the fourth cause of action is under B+P § 17200 (UCL) which as a predicate statute rises or falls on its pleaded predicates.

General Background. The Examiner and **[*3]** Chronicle compete for newspaper advertising in San Francisco. The Examiner brings this case because the advertising product at issue, which it claims to be "frill run run-of-print" (FRROP) advertising, Tr. 4:24-25, is allegedly sold by the Chronicle below cost with the intent to injure the Examiner. Nevertheless, the parties agree that (i) the Chronicle's advertising prices—even those which are allegedly illegal—are far in excess of the Examiner's prices, and (ii) the Chronicle sets FRROP pricing for all the Bay Area counties, not just San Francisco; whereas the Examiner's geographical market is San Francisco, plus to some extent San Mateo.

Although given my rulings some of these motions are moot, I provide my review of each motion in order to facilitate appellate review.

The sealing motions are treated in a separate order.

Objections to Evidence

1. Plaintiff's Moving Papers

1-9. Plaintiff's Exhibit 13-16, 19, 21-24: Overruled. These exhibits all present the same issues. The exhibits are relevant to support the inference that the Chronicle viewed the Examiner as a competitor. The fact that the exhibits are dated prior to the limitations period goes to the weight to be afforded to the evidence. **[*4]**

10. Plaintiff's Exhibit 85: Overruled. This objection is apparently limited to the answer at page 184:19-185:5. While the question at issue could have been better worded, it is sufficiently clear that the form objection should not be sustained.

11. Plaintiff's Exhibit 99: Sustained. This is hearsay offered for the truth of the matter asserted with no exception.

2. Plaintiff's Opposition Papers

12. Plaintiff's Exhibit 117: Overruled in part, sustained in part. The deponent recounted that the Chronicle was discussed during sales team meeting at the Examiner and that he was shocked by some of the things discussed at the meeting i.e., advertisers the Chronicle had, their rates, and/or their exclusivity. This testimony should not be considered for the truth of the statements made by other individuals at the meetings, i.e., that the Chronicle had advertisers that the Examiner did not. However, the fact that the Examiner held such meetings and that the deponent found the information at the meetings "shocking" may be considered.

13. Plaintiff's Exhibit 120: Overruled. The deponent is answering the question that was asked. It does not appear that the deponent is basing his response on any out of **[*5]** court statements.

14. Plaintiff's Exhibit 132: Overruled. This appears to be limited to the cited testimony from page 92 of the deposition transcript. The deponent confirmed that she knew what a "loss leader" was and that she believed that the Chronicle sold loss leaders. The absence of a clear statement by the deponent as to what her understanding of a loss leader is goes to the weight to be afforded to the testimony.

Motions to Exclude Experts

1. Legal Standard

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

Evid. Code § 801.

"[U]nder *Evidence Code section 801*, the trial court acts as a gatekeeper **[*6]** to exclude speculative or irrelevant expert opinion." *Sargon Enters., Inc. v. Univ. of S. Cal., 55 Cal.4th 747, 770, 149 Cal. Rptr. 3d 614, 288 P.3d 1237 (2012)*. "[T]he gatekeeper's role 'is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" *Id. at 772*. Trial courts properly exclude expert testimony that is "(1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." *Id. at 771-72*.

2. Eichmann

Eichmann, Plaintiff's expert, offers three pertinent opinions. First, he performs an analysis of the Chronicle's allocated cost of producing one page of "full run run-of-print" (FRROP) advertising under various assumptions. Plaintiff uses Eichmann's cost analysis to support the assertion that Hearst sold FRROP advertising below cost. Second, Eichmann performs a regression analysis to evaluate the cross-price elasticity between the Chronicle and the Examiner. Plaintiff uses this analysis to demonstrate that it was harmed by the Chronicle's predatory pricing and to quantify the extent of the harm. Third, as an alternative and less **[*7]** accurate[2] measure of the existence and extent of damages, Eichmann compares the Examiner's performance to a national average during the same time period (his "yardstick" analysis).

None of these three opinions is reliable and none is admissible.

a. Cost Analysis

Eichmann cannot testify as to the appropriate allocation of costs to FRROP print advertising because he relied on speculation regarding the import of the Sillers analysis.[3]

A "fully allocated cost" method is used to calculate costs for the purposes of the UPA. *Turnbull & Turnbull v. ARA Transp., Inc., 219 Cal.App.3d 811, 819-20, 822, 268 Cal. Rptr. 856 (1990)*. "The concept of fully allocated cost has been equated with average total cost, which 'reflects that portion of the firm's total costs - both fixed and variable - attributable on an average basis to each unit of output.'" *Id. at 820*; *see also* *Pan Asia Venture Capital Corp. v.*

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[2] The Examiner's counsel described it as "crude". Transcript of Argument dated August 10, 2017 (Tr.) at 27:22.

[3] The Eichmann Report is attached as Exhibit 5 to Hearst's Compendium of Evidence in support of, among other things, Hearst's motion to exclude Eichmann's testimony.

Hearst Corp., 74 Cal.App.4th 424, 432, 88 Cal. Rptr. 2d 118 (1999) ("cost has been described as the initial expense of producing the article together with 'its share of the load of carrying on the business through which it is sold'"). Fixed costs are those that do not vary with changes in output, while variable costs are those that do vary with changes in output. Pan Asia, 74 Cal.App.4th at 432. Although "the concept of cost may appear simple," it "can often prove deceptively hard to grasp in the real world." Id. at 435. "Authorities in the field argue **[*8]** passionately over the many possible models and approaches." *Id.* There is no set formula for the computation of costs. Id. at 436. The ultimate question is: "what did it cost a particular defendant to produce or sell a given article at a specific point in time?" *Id.*

The product at issue in this case is FRROP advertising. Thus Eichmann tries to quantify the Chronicle's costs — both fixed and variable — attributable on an average basis to each unit of FRROP. Eichmann Report ¶ 24.

Eichmann himself lacks the foundational knowledge to conduct a cost analysis. He relied on the analysis performed by John Sillers, which was not itself an analysis of fully allocated cost. Tr. 9:16-18.

Eichmann is an economic consultant. Eichmann Report ¶ 1. He opines that the Chronicle's annual cost per page of paid advertising for the years 2011 through 2015 was between $13,134 and $25,030 per page, depending on the year and various assumptions. *Id.* at ¶ 24. To reach that conclusion, Eichmann (1) reviewed an analysis of costs prepared by Sillers as well as testimony from Sillers (Eichmann Report ¶¶ 7-9); (2) applied the methodology used by Sillers to the Chronicle's actual costs, (a) including by allocating 100% of the **[*9]** Chronicle's costs for "Production Payroll, Newsprint Handlers Payroll, Production & N&I, Newsprint and Ink Handlers Payroll, Supplements, Editorial Payroll, and Editorial Expense" to the Chronicle's cost per advertising page based solely on his review of the Sillers analysis (Hearst Ex. M at 102:6-20; Eichmann Report ¶¶ 10-11; but (b) in the alternative, allocating only a percentage of the costs for "Editorial Payroll" and Editorial Expense" to the expenses in producing the advertising, as opposed to the circulation, product; (3) added direct costs to account for a contractual payment to Transcontinental Inc. ("Transcon"), an entity that provides printing services for the Chronicle (Eichmann Report ¶¶ 13-15; (4) apportioned specified indirect costs — "Advertising Payroll, Advertising, G&A Payroll, G&A Benefits, G&A Other, Postage, Occupancy Costs, Depreciation[,]" and, in an alternative analysis, the "Editorial Payroll" and "Editorial Expense" as costs of producing print advertising at a rate that was derived from the ratio of paid advertising pages to total pages in the Chronicle or, in the alternative, the Chronicle's print revenue as a percent of total revenue (Eichmann Report ¶¶ **[*10]** 16-18); and (5) added indirect costs to account for hypothetical loan servicing costs on a cash infusion Hearst made to the Chronicle (Eichmann Report ¶¶ 19-20).

In his deposition Eichmann admitted hat he does not know whether Sillers undertook a UPA cost allocation. Hearst Ex. M at 49:18-50:19.[4] Eichmann admittedly did not know a variety of critical details about the Sillers document and its foundations: (a) what newsprint handlers do; (b) what "Production & N&I" refers to; (c) what "supplements" refers to; and (d) what comprises "editorial payroll." *Id.* at 99:3-100:14. He doesn't know anything about the newspaper industry, Eichmann Depo. 9:20-13:20, and so has no basis from his own experience or expertise to know anything about how costs should be allocated for any purpose. When confronted at deposition with the position that 75%[5] of the newsprint and ink costs should be allocated to producing editorial content for subscribers, Eichmann responded

4 Sillers' own testimony regarding his "analysis of costs" does not support Eichmann's assumption. In his declaration Sillers described his analysis as "an analysis of cost" but stated that his analysis had nothing to do with the UPA. Plaintiff's Ex. 28 at 3-4. In deposition Sillers explained that he parsed out the various expenses relevant to a print product per page and compared that to an average rate per page to ascertain the level at which the Chronicle would break even. Plaintiff's Ex. 29 at 86:3-7 (omitting the portion of the transcript containing the question), 86:15-24, 87:6-22, 88:1-9. This does not show Sillers was attempting to allocate the costs necessary to produce and sell the FRROP advertising product as distinct from the costs of producing and selling for example editorial content that is paid for by subscribers. Compare Pan Asia Venture Capital Corp. v. Hearst Corp., 74 Cal. App. 4th 424, 426, 88 Cal. Rptr. 2d 118 (1999). There are many ways in which to calculate costs, and the UPA's method of fully allocated costs is only one of those. Turnbull & Turnbull v. ARA Transportation, Inc., 219 Cal. App. 3d 811, 820-21, 268 Cal. Rptr. 856 (1990).

5 Eichmann himself calculated that the Chronicle consists of 75% editorial pages and 25% advertising pages. Hearst Ex. Mat 98:10-15.

that he was relying "on Mr. Sillers' cost accounting methodology as [his] guide for determining what should be allocated to what." *Id.* at 100:22-101:17. Yet while purporting to rely on the expertise of Sillers, Eichmann nevertheless made a **[*11]** series of modifications to what he understood Sillers to have done, without explanation, Rubinfeld Decl. ¶ 90. Indeed, the Examiner's counsel touted this departure from the Sillers document at argument. Tr. 15.

The Sillers analysis does not provide a reasonable basis for an opinion regarding the proper allocation of certain costs, i.e., newsprint and ink costs. Plaintiff relies on a declaration submitted by Sillers and his deposition testimony to support its position that Sillers was, in effect, conducting the same allocation envisaged by the UPA. But he wasn't. There, Sillers described his analysis as "an analysis of cost" but stated that his analysis "had nothing to do with the [UPA]." Plaintiff's Ex. 28 at ¶¶ 3-4. The deposition excerpts provided by Plaintiff are similarly useless. There, Sillers testified that he "pars[ed] costs in a manner to determine a rate floor" "to make an argument for rate discipline" in describing "an analysis that he had heard of trying to determine the direct cost of either an advertising page or a page that would be available for advertising." Plaintiff's Ex. 29 at 83:2-23, 84:8-19. In response to a question omitted from the excerpt provided by Plaintiff, **[*12]** Sillers explained that "it" would take various levels of expenses relevant to an unspecified print product and parse out expenses per page, and then compare that to an average rate per page of income to determine the "break even" point as to newsprint and expenses. *Id.* at 86:3-7. Sillers then testified that there would be indirect expenses or overhead, without stating how they would be allocated. *See id.* at 87:6-22.[6] Hearst provides an expert opinion that a review of the Sillers analysis reveals that it is not, in fact, an effort to allocate costs to FRROP print advertising. Rubinfeld Report ¶¶ 86-89.[7]

Eichmann himself has no experience in allocating costs in the context of a newspaper that is circulated on a subscription basis and contains paid advertising and so he cannot rely on Sillers' internal report without any "independent analysis, study, work, or expertise" to offer an expert opinion on the appropriate manner to allocate costs to Hearst's FRROP advertising product. Hearst's Ex. M at 102:15-20. In short, Eichmann cannot explain why the Sillers memo is an adequate foundation for a fully allocated cost analysis, which means he can't explain the basis for his own opinions.[8] Thus **[*13]** the Examiner's argument that Eichmann can use the Sillers memo because he, Eichmann, had decided based on his own "assessment" that it is "reasonable"[9] is a bootstrap, futile argument: Eichmann doesn't have the foundation to make that assessment.[10]

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[6] Plaintiff offers some tangential evidence in an effort to support the challenged allocation decisions. *See* Plaintiff Ex. 126 at 39:8-21 (print advertising priced to cover newsprint, ink, sales, salaries, and commissions and tried to maximize margin to cover the rest of the operations), Ex. 134 at 32:18-33:6 (in newspaper industry, the pricing of advertising is significantly tied to profitability). But there is no indication that Eichmann relied on this highly generalized evidence, which is not surprising because it does nothing to support Eichmann's calculations.

[7] Hearst attaches the Rubinfeld Report as Exhibit 1 to the Declaration of Daniel L. Rubinfeld.

[8] *Compare, Taylor v. Trimble*, No B276723 *___ Cal.App.5th ___ 2017 WL 3187388 at n.15 (July 27, 2017)* (expert opinion that does not contain reasoned explanation illuminating why the facts have convinced the expert is not reliable), citing *Jennings v. Palomar Pomerado Health Systems, Inc., 114 Cal.App.4th 1108, 1118, 8 Cal. Rptr. 3d 363 (2003)*.

[9] Opposition at 13 note 5.

[10] Although not part of the Examiner's Separate Statement of Disputed Facts or responses to the Statement of Hearst, at argument the Examiner's counsel suggested that Eichmann may have relied on the opinion of Hopson, Tr. 12. This isn't so. But even had Eichmann so relied, there is nothing substantial to rely on. Hopson's opinion was that the "burden" of profitability is carried by advertising. Tr. 12:8-14, especially at line 14. While this mimics the word "burden" from case law (e.g. *Pan Asia Venture Capital Corp. v. Hearst Corp., 74 Cal. App. 4th 424, 431, 88 Cal. Rptr. 2d 118 (1999)*, quoting *Turnbull & Turnbull v. ARA Transportation, Inc., 219 Cal.App.3d 811, 822, 268 Cal. Rptr. 856)*, it doesn't support Eichmann's allocation of 100% of the Chronicle's costs such as ink and paper to advertising, or otherwise support Eichmann's use of the Sillers document and its categories. The truth is that Eichmann simply didn't account for the fact that the Chronicle has substantial subscription income which obviously contributes to the Chronicle's 'profitability'—he just 'puts that to the side.' Tr. 79-80.

Eichmann cannot offer an opinion on the appropriate allocation of costs. The import of the Sillers analysis is speculative. *Evid. Code §§ 720(a)*, *802(b)*; *Sargon, 55 Cal.4th at 771-72*; *Sanchez v. Kern Emergency Med. Transportation Corp., 8 Cal.App.5th 146, 155, 213 Cal. Rptr. 3d 830 (2017)* (an expert who gives only a conclusory opinion does not assist the jury to determine what occurred).

b. Regression Analysis

Eichmann conducted a regression analysis in an effort to estimate the competition between the Chronicle and the Examiner as well as the damages incurred by the Examiner as a result of the alleged below-cost pricing. Eichmann Report ¶¶ 29-45; Supplemental Eichmann Report ¶¶ 5-19.[11] Eichmann opines that Plaintiff suffered $6,509,364 in lost profits from 2012 through 2015 and will lose an additional $7,234,270 in future lost profits. Supplemental Eichmann Report ¶ 19.

While I discuss this analysis below on context, I preliminarily note that generally speaking regression analysis can be used to determine whether there is a correlation between one factor and another, **[*14]** and multiple regression analysis can be used to determine whether one factor among others has such a correlation, and in some cases can show the extent of that correlation. This can be a powerful tool, but "when inappropriately used, regression analysis can confuse important issues while having little, if any, probative value," Daniel Rubinfeld "Reference Guide on Multiple Regression," REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (3rd ed. 2011).[12] Multiple regression analysis is a statistical tool frequently used in the courts.[13] It allows one to estimate the impact of one of many independent variables on a dependent variable.[14] Thus, we might have a variable to be explained—the *dependent* variable—and competing explanatory candidates for that value—the *independent* or *explanatory* variables. In an employment discrimination case for example, the dependent variable might be the alleged discriminatory impact (i.e. failure to be hired or promoted), and the explanatory variables might include other possible reasons such as level of education, experience, seniority, and so on. While not all independent variables can be included, for a series of reasons, id. at 314, "[f]ailure to include a major explanatory **[*15]** variable that is correlated with the variable of interest in a regression model may cause an included variable to be credited with an effect that actually is caused by the excluded variable." *Id.* That is, the model would consist of speculation. As we will see below, that's exactly what happened here.

Importantly, *explanatory* variables are not *instrumental* variables (IVs). Rubinfeld Ex. 29 at ¶¶ 24, 27, 32 (last sentence). To put it simply, explanatory variables as we have seen are possible explanations (or, more accurately, possible correlates) for the value of the dependent variable; but instrumental variables are in effect hedges against bias in that calculation. *Id.*[15] Neither Eichmann (id.) nor his attorneys understand the difference,[16] despite the

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[11] The Supplemental Eichmann Report is attached as Exhibit 6 to Hearst's Compendium of Evidence in support of *inter alia*, Hearst's motion to exclude Eichmann's testimony.

[12] Available at e.g., http://www.au.af.mil/au/awc/awcgate/fjc/manual_sci_evidence.pdf. This Guide is recommended by Judge *Posner in ATA Airlines, Inc. v. Fed. Exp. Corp., 665 F.3d 882, 891 (7th Cir. 2011)*. The author is the same Rubinfeld acting as defendant's expert in this case. Eichmann acknowledges Rubinfeld's expertise, as he wrote the book in the area. Rubinfeld Ex. 29 at ¶ 14 & n.15 (citing Eichmann statements)

[13] Franklin M. Fisher, "Multiple Regression in Legal Proceedings," 80 COLUM. L. REV. 702 (1980). *See e.g., In re Neurontin Mktg. & Sales Practices Litig., 712 F.3d 21, 42 (1st Cir. 2013)*.

[14] Fisher, "Multiple Regression in Legal Proceedings" above note 13 at 705-706.

[15] Catherine Bonser-Neal. "Why "Fiscal Austerity? A Review of Recent Evidence on the Economic Effects of Sovereign Debt." *22 Ind. J. Global Legal Stud. 543*. 571 n.48 (2015) ("Instrumental variables estimation involves using a variable or an "instrument." which is correlated with the independent explanatory variable which suffers from the endogeneity bias but which is not impacted by the dependent variable"): Oscar Bernal. et al., "The Importance of Conflicts of Interest in Attributing Sovereign Credit Ratings." 47 INT'L REV. L. & ECON. 48. 52 (2016) (discussing use of instrumental variable as "necessary step to improve our

discussions in Hearst's papers and, more importantly, the discussions in Rubinfeld's report (Rubinfeld Ex. 29 at e.g., ¶¶ 24, 25, 27, 32).

Eichmann's regression analysis was meant to measure the cross elasticity of demand between print advertising in the Examiner and the Chronicle to evaluate whether the products are substitutes. Eichmann Report ¶ 30. In his original analysis, Eichmann used four instrumental **[*16]** variables (IVs) to control for simultaneity problems - unobserved factors that may affect the price for both firms. *Id.* at ¶¶ 35-37. After completing his report, Eichmann learned that he had used an incorrect data-set to perform his analysis. Supplemental Eichmann Report ¶ 5. As a result, Eichmann was required to run his analysis again. But in so doing, Eichmann changed the IVs. *Id.* at ¶¶ 9-12. Had he not switched out the IVs, his results would have been nonsensical. But as defendant explains, the switch made Eichmann's results even less reliable that his original test.

Hearst first contends that Eichmann's analysis should be discarded because it is improperly premised on the assumption that the Chronicle and the Examiner operate in a two-player market. Motion, 12-13. Second, Hearst asserts that Eichmann's analysis does not account for the industry-wide decline in the price of newspaper advertising in recent years, rendering it unreliable. *Id.* at 13-14. Third, Hearst argues that Eichmann improperly aggregated all of the Chronicle's sales, including sales outside of the Examiner's geographic footprint, sales on days when the Examiner was not published, sales that were not below cost, **[*17]** and sales from customers who did not want to place an ad in the examiner. *Id.* at 15-16. Fourth, Hearst contends that Eichmann failed to take into account the Chronicle's practice of making bundled sales. *Id.* at 16-17. Fifth, Hearst asserts that Eichmann selected inappropriate instrumental variables (IVs). *Id.* at 17-21. Sixth, Hearst argues that, contrary to Eichmann's model, few customers switched between the papers such that Eichmann's analysis should be rejected as contrary to the evidence. *Id. at 21-23*.

While most of Hearst's attacks show only that the Eichmann analysis is exceedingly weak, two of them independently demonstrate that it is unreliable to the extent that it is inadmissible: Eichmann did not account for the decline in newspaper sales, and as forecast above he failed properly to select IVs.

i. Two-Player Market

The explicit purpose of Eichmann's report is to provide a "Statistical Estimation of Competition Between The Chronicle and The Examiner." Eichmann Report ¶¶ 29-30 (Plaintiff's damages depend on how closely the Examiner competes with the Chronicle, which may be estimated by measuring the elasticities of demand). Eichmann did not take "marginal competition from other advertising **[*18]** sources (e.g., TV Radio, Outdoor, Internet, etc.)" into account in his regression analysis. Eichmann Report ¶ 10 n. 28, Hearst Ex. M at 157:18-158:9. Rubinfeld opined that this renders Eichmann's regression analysis invalid if there are other competitors in the market. Rubinfeld Report ¶¶ 44-45, 55. In his supplemental report, Rubinfeld is more forceful: "Because [Eichmann] rules out competition from other newspapers and the Internet he has virtually assured regression results that mirror his initial assumption." Supplemental Rubinfeld Report ¶ 10; *see also* Supplemental Rubinfeld Report ¶ 17 (Eichmann's opinion is unreliable because he did not include a variable to account for industry-wide decline in newspaper sales).[17]

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confidence in the empirical results as it helps dealing with potential bias in the estimates when some of the regressors are suspected to be endogenous"). It is especially critical in this case to note that IVs should be selected to deal with endogeneitv (or 'simultaneity') bias. because as we see below, the new IVs Eichmann chose didn't account for endogeneity.

[16] In their opposition, the Examiner's counsel announce their intention to justify Eichmann's use of his instrumental variables (Opposition at 17:4 (caption)) but then proceed to discuss explanatory variables (*id.* at 17:20) together with the *Bazemore* case which also only discusses explanatory variables. *Bazemore v. Friday, 478 U.S. 385, 399-400, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986)*. "If a party's lawyer cannot understand the testimony of the party's own expert, the testimony should be withheld from the jury. Evidence unintelligible to the trier or triers of fact has no place in a trial. See *Fed.R.Evid. 403*, *702*." *ATA Airlines, Inc. v. Fed. Exp. Corp., 665 F.3d 882, 896 (7th Cir. 2011)*.

[17] Hearst attaches the Supplemental Rubinfeld Report as Exhibit 2 to the Declaration of Daniel L. Rubinfeld.

The Examiner argues that the assumption that the Chronicle and the Examiner compete in a two-player market is appropriate. Opposition, 14-15. Tr. 22:18-25 ("no question" there is a two player market according to the Examiner); id. at 24:10. There is some minimal if disputed[18] support for the two player assumption. Specifically, where the Examiner is in circulation, the Chronicle and the Examiner are the two players with respect to newspaper advertising. Plaintiff's Ex. **[*19]** 4 at 141:13-142:18. The assumption is weak, because on the one hand the Examiner uses Chronical data from across all its FRROP ads—the entire Bay Area—and on the other hand proffers a San Francisco only two-player market. The Examiner *could* have used data that related only to the Chronicle's San Francisco zone, but inexplicably did not. See also, Reply at 9:15-17.

ii Omitted variable bias: decline in print advertising

Eichmann agrees that print advertising revenues "are on the decline nationwide as other platforms, predominantly digital, have gained an increasing share of advertising revenues." Eichmann Decl. ¶ 38; Eichmann Report ¶ 48. Neither his reports nor his declaration disclose the reason for his conscious and explicit decision to ignore competition from non-print sources in his analysis. Eichmann Report ¶ 10n.28. Eichmann's deposition can be understood to suggest some potential explanations. In one instance, Eichmann stated that he did not include a variable to account for the negative growth in the print advertising industry because that factor would impact both the Chronicle and the Examiner, whereas he was interested in "understanding the competitive relationship between the **[*20]** two of them." Hearst Ex. M at 190:7-17. In another, Eichmann admitted that he assumed that "someone seeking to advertise in a newspaper is seeking to advertise in a newspaper and not some other form of advertisement." Hearst Ex. M at 157:18-158:9. Eichmann did not support this assumption, but instead admitted that he just didn't have access to data that would enable him to specify his model to account for, e.g., internet advertising. *Id.* at 171:11-16. As a result, it appears that this "assumption" was one of practical necessity, not one that is justified by requirements of the model.

Plaintiff cites federal authority addressing whether an omitted variable in the regression analysis should go to admissibility of an expert's opinion, or merely the weight to be afforded to it. Plaintiff relies principally on *Bazemore v. Friday, 478 U.S. 385, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986)*, where the Court explained: "While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors 'must be considered unacceptable as evidence of discrimination.' [Citation.] Normally, failure to include variables will affect **[*21]** the analysis' probativeness, not its admissibility." *Bazemore, 478 U.S. at 400*. But the Court also noted that there "may, of course, be some regressions so incomplete as to be inadmissible as irrelevant; but such was clearly not the case here." *Id. at 400 n.10*.

In the 30 years since *Bazemore*, a number of federal courts have found exactly this problem, and others have more generally examined the issue of when an omitted variable is so significant that it renders a regression analysis inadmissible.[19] There seems to be no California authority on the matter. Under Sargon, the trial court's role as a

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[18] The BANG papers compete. Bergin Decl. ¶¶ 22, 35; Hearst's Ex. 3 at 7-8.

[19] *See* *Smith v. Virginia Commonwealth Univ., 84 F.3d 672*. 676 14th Cir. 19961 (regression "must include all the major factors") (emphasis in original); *Griffin v. Board of Regents, 795 F.2d 1281, 1290 n. 16 (7th Cir.1986)* (same); *Bickerstaff v. Vassar College, 196 F.3d 435, 449 (2d Cir.1999)* (regression analysis not admissible because major variable omitted); *In re Processed Egg Prod. Antitrust Litig., 81 F.Supp.3d 412, 430-31 (E.D. Pa. 2015)* (holding that expert opinion was admissible because the defendants did not identify an omitted factor that rendered the expert's analysis unreliable); *Crawford v. Newport News Industrial Corp.*, 2017 WL 3222547. at *5 (E.D. Va. July 28, 2017) (failing to account for "job classifications" in an analysis of salaries rendered regression analysis inadmissible because "job classifications" was a major factor); *In re Wireless Tel. Servs. Antitrust Litig., 385 F.Supp.2d 403, 428 (S.D.N.Y. 2005)* (where defendants pointed to two major developments that could explain why the average wholesale price for wireless handsets exceeded those for comparable consumer electronic products and/or their component parts — the shift from analog to digital technology and the related advances in handset features — the plaintiff's "failure to test for these obvious and significant alternative explanations" rendered its analysis "essentially worthless" and inadmissible).

gatekeeper is to ensure "that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Sargon, 55 Cal.4th at 772*. The trial court's gatekeeping role does not involve choosing between competing expert opinions - the gatekeeper's focus is solely on principles of methodology and not the conclusions they generate. *Id.*

There is no dispute that the market for newspaper print advertising is contracting as a result of competition from other forms of advertising. The Examiner and the Chronicle have different **[*22]** FRROP footprints: an FRROP advertisement placed in the Examiner will be distributed within a very limited portion of the geographic area in which the Chronicle's FRROP advertisement is placed. Bergin Decl. ¶¶ 22, 35. An FRROP advertisement placed in the Chronicle will also be distributed in other areas in which advertisers have other print advertising options. *Id.* Eichmann's failure to account for these distinctions at best severely weakens his opinions. However, those specific issues go to the weight of his opinions.

But the declining demand for print advertising presents more significant problems. Eichmann concedes that the market for print advertising is declining. Eichmann Decl. ¶ 38; Eichmann Report ¶ 48. Rubinfeld opines that the "correspondence" between the decline in the Examiner's sales and the decline in the Chronicle's prices is "likely" due to the decline in newspaper readership and the demand for newspaper advertisements, which simultaneously drove down both the Examiner's sales and the Chronicle's prices. Supplemental Rubinfeld Report ¶ 17; see also Rubinfeld Report ¶¶ 57-59. Rubinfeld opines that Eichmann's results are driven by the failure to control for the shrinking **[*23]** market for print advertising. *Id.* Eichmann's only response is his deposition testimony, i.e., that he did not believe he needed to control for the declining demand because it was being experienced by both the Examiner and the Chronicle. Hearst's Ex. M at 190:7-17.[20] Eichmann does not explain why he failed to control for the declining market for newspaper advertising through an explanatory variable. *Compare* Rubinfeld Report ¶ 59 (criticizing Eichmann's deposition testimony). Rubinfeld has identified explanatory variables that Eichmann could have used. See Rubinfeld Report ¶ 58.

This is fatal. The Examiner has not shown that an expert econometrician would employ an analysis that fails to account for the decline in the market for newspaper advertising; whereas Hearst has produced fully supported evidence that an expert would do so. *See Sargon, 55 Cal.4th at 772* (discussing role of trial court as gatekeeper). The failure to test for obvious alternative explanations renders Eichmann's opinion worthless. *See In re Wireless Tel. Servs. Antitrust Litig., 385 F.Supp.2d at 428*; *see also In re Linerboard Antitrust Litig.*, 497 F.Supp.2d at 678.[21] This error, alone, warrants the exclusion of Eichmann's opinions derived from his regression analysis.

ii. Aggregation of Chronicle Sales and Bundling

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[20] This position is very odd. The point of a multiple regression analysis is to sort through a series of possible explanations for a value (here, loss of Examiner's ad sales), testing whether one of them (here, presumably the downward pricing of the Chronicle's ads) correlates, holding fixed the other explanatory variables. But noting only correlated downward pricing (as between the Chronicle and the Examiner) without testing against other obvious explanations (such as industry-wide decrease in ad revenues) just begs the question of the reason for the Examiner's losses.

[21] Some cases suggest that a party objecting to a regression analysis on the basis of a major omitted variable should run an analysis demonstrating that including the variable makes a difference. *E.g., In re Live Concert Antitrust Litig., 863 F. Supp. 2d 966*, 974 C.D. Cal. 2012) ("There must be some indication that the excluded variables would have impacted the results"); *Palmer v. Shultz, 815 F.2d 84, 101, 259 U.S. App. D.C. 246 (D.C. Cir. 1987)*. Hearst does not run its own regression analysis with the omitted explanatory variables, but it did use Plaintiff's specifications but using Chronicle's quantity. instead of the Examiner's quantity, as the dependent variable. Supplemental Rubinfeld Report ¶ 13. If Eichmann is using the right model, and if he's right that there is a two player market, then his formulas should produce sensible results for both the Examiner and the Chronicle. But they don't: they implies the patently bizarre conclusion that Chronicle's price increases lead to an increase in demand for its product. *Id.*

Eichmann included all Chronicle FRROP sales **[*24]** in his analysis. E.g., Eichmann Deck ¶¶ 16-21. Hearst argues that it was error to do so because: (1) some advertising sales for the Chronicle would have gone to advertisers who would not have wanted to purchase advertising in the Examiner given its narrower geographic footprint; (2) the Chronicle sells advertising on Saturdays, a day on which the Examiner is not in circulation; (3) some Chronicle sales were not below cost and could not have violated the UPA; and (4) the Chronicle sometimes sold FRROP advertising in bundles with other products, such as digital advertising, ultimately selling a fundamentally different product. Motion, 15-17. Eichmann responds to some of these criticisms stating that (1) when conducting an elasticity analysis to examine the sensitivity and effects of changes in prices on the part of the Chronicle to demand for advertisers within the Examiner, all transactional prices (regardless of their relationship to the Chronicle's costs) should be included because each transactional data point assists in establishing the price sensitivity between the parties (Eichmann Decl. ¶ 17); (2) the fact that some advertisements run in both the geographical region covered by **[*25]** the Examiner and neighboring areas is not a reason to exclude the transaction — the data nevertheless reflect transactions in the market and provide greater explanatory power for the model (Eichmann Decl. ¶ 19); (3) customers that primarily transact with the Chronicle are properly included because, again, the data reflect transactions in the market and provide greater explanatory power for the model (Eichmann Decl. ¶ 19); and (4) bundling puts downward pressure on the prices of all bundled products, including FRROP advertising (Eichmann Decl. ¶¶ 20-21).

For the purposes of evaluating the strength of the relationship between the demand for the Examiner and the price for the Chronicle, Eichmann's rationale for his inclusion of all Examiner products is sufficient. Eichmann Decl. ¶ 19 (Chronicle FRROP transactions that overlap with Examiner FRROP footprint may impact demand for Examiner, hence data should be included). To the extent the pool of transactions from which Eichmann conducted his analysis was over-inclusive, this should (assuming his model is otherwise appropriate) result in a weaker link between the Chronicle's prices and the demand for the Examiner. This would presumably drive **[*26]** down the damages estimate.

iii. Instrumental Variables

The experts agree that it is important to select appropriate IVs to conduct a cross-price elasticity analysis to control for simultaneity bias. Compare Eichmann Decl. ¶¶ 23-27; *with* Supplemental Rubinfeld Report ¶¶ 20-23. The selection of improper IVs can render the analysis unreliable. Supplemental Rubinfeld Report ¶ 22. Eichmann agrees that the selection of improper IVs can call into question the extent of the observed sensitivity, but (he says) does not implicate the existence of price sensitivity. Eichmann Decl. ¶ 28.

Eichmann used five IVs: (1) Producer Price Index for Newsprint Mills: Uncoated Groundwood Paper; (2) Unemployment Rate in California; (3) Total Advertising Employees in California; (4) Producer Price Index for Newspaper Ad Sales; and (5) Producer Price Index for Internet Ad Sales. Supplemental Eichmann Report ¶ 12. But see Eichmann Decl. ¶ 27 (identifying a *different* list of variables that Eichmann claims he used in his supplemental analysis).[22]

Rubinfeld criticizes Eichmann's selection of these IVs as improper, opining (a) that variables (4) and (5) are "clearly endogenous variable and obviously improper to use as **[*27]** instruments; (b) that variables (2) and (3) are "not likely to be exogenous cost shifters;" and (c) that, admittedly, variable (1) may be a good estimate of the Examiner's cost for newsprint. Supplemental Rubinfeld Report ¶¶ 28-29; *see also* Supplemental Rubinfeld Report ¶¶ 24-37 (Eichmann does not have a proper understanding of the selection of IVs). Further, Rubinfeld applies two tests to Eichmann's IVs and concludes that the IVs are endogenous — where the IVs should be exogenous if they were

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[22] These were not the IVs used in Eichmann's original analysis, which used an improper data set. Hearst accuses Eichmann of selecting IVs to rig the results based on his decision to change the IVs. Motion, 20. At deposition, Eichmann explained that certain IVs no longer had explanatory power with the complete data set, but the new IVs did have explanatory power. Hearst's Ex. M at 314:4-19. The Examiner does not otherwise explain the switch in IVs.

properly selected — and "weak," in the sense that they are a poor replacement for the useful information in the endogenous regressor. *Id.* at ¶¶ 38-41.

Eichmann responds, conceding in general terms that "[a] few of [Rubinfeld's] points are valid." Eichmann Decl. ¶ 28. Eichmann does not specify which points he concedes are valid. Nor does he offer any rebuttal to Rubinfeld's critiques regarding his selection of IVs.[23] Eichmann also concedes that a failure to adequately address simultaneity bias can "call[] into question" the "extent" of the Examiner's sensitivity to the Chronicle's prices. *Id.* Eichmann responds, however, that failure to properly specify IVs does not call into question the existence **[*28]** of the observed sensitivity. *Id.* at ¶¶ 28, 34-35.

Plaintiff argues that Rubinfeld's criticism of Eichmann's IVs goes to the weight afforded to Eichmann's analysis, not its admissibility. Opposition, 17-18 (citing, *e.g., Bazemore*, discussed above). This argument relies on *Bazemore* and its progeny. But *Bazemore* is not on point; this is not a dispute regarding explanatory variables but the failure to understand and use the correct Ws. Eichmann does not actually dispute there are valid criticisms of his IV selection and that these call into question the extent of the impact the Chronicle's prices had on demand for the Examiner — a cornerstone of his damages analysis.

Eichmann does not contest the point that one should have at least one suitable IV for *each* endogenous variable. Supplemental Rubinfeld Report ¶ 21. Eichmann went from bad to worse when he switched his IVs from his first to his second report. Most of Eichmann's Ws are not exogenous; and he actually replaced on exogenous cost-shifters with two which are endogenous. *Id. at 28-19*.[24] Because IVs are used to ameliorate endogenous bias, this is exactly wrong (see text at notes 15 & 16, above).

Eichmaim argues that his inference at least as to **[*29]** causation is unaffected. *Sargon*, however, is focused on methodology. Eichmarm's analysis should be excluded due to the methodological errors in selecting IVs.

iv. Customer Switching

Hearst argues Eichmann's regression analysis should be excluded because it is contradicted by the fact that a relatively small percentage of advertisers switched from the Examiner to the Chronicle. Motion, 21-23. Rubinfeld's switching analysis suggests that the extent of the relationship between the demand for the Examiner and the price of the Chronicle is overstated. It does not establish that there is no overlap, as Rubinfeld confirms that customers have switched from the Examiner to the Chronicle in a manner that could be consistent with Plaintiff's theory. Rubinfeld Report ¶ 75.

c. Yardstick Analysis

As an alternative measure of damages, Eichmann compared the Examiner's decline in revenues from the sale of display advertising to national data. Eichmann Report ¶¶ 46-52. Eichmann concluded that the yardstick analysis "corroborate[d] the damages implied by the elasticity of demand analyses," but concluded that the higher damages figures yielded by the elasticity of demand analyses were more reliable because **[*30]** the yardstick analysis did "not take into consideration the effects of higher Chronicle prices on the Examiner's expected revenue." *Id.* at ¶ 52.

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[23] At deposition, Eichmann described the process through which he selected IVs. Hearst's Ex. M at 310:13-314:19. He does not describe a consideration of whether the IVs were exogenous or endogenous variables. Instead, he suggests he chose the Ws by plugging potential Ws into an unspecified test, *id.*, that he never describes nor for which he states a source. The test may not really exist. Rubinfeld Suppl. Decl. at ¶ 33.

[24] Hearst notes that Eichmann cited one source for the revised IVs: Rubinfeld's concededly authoritative textbook. Motion at 20:9-10. Rubinfeld explains that Eichmann misread the book. Rubinfeld Supp. Decl. ¶14.

Eichmann's implied assumption — that the Examiner's advertising revenues should change that same rate as the national average — is unsupported. Plaintiff relies on federal authority to demonstrate the "routinely accept[ed]" use of "yardstick" measurements in antitrust cases. Opposition, 19-20. Plaintiff implicitly argues that the motion should be denied unless Hearst can affirmatively demonstrate that Eichmann's yardstick is flawed, as by producing an alternative yardstick. *Id.* at 20.

While in the abstract yardstick measurements might be admissible, they of course have to be reliable.[25] Eichmann has not explained the basis for his selection of aggregated national data as a yardstick. Eichmann Decl. ¶ 48. He offers no justification for his implicit premise that the Examiner, an entity that competes in the San Francisco market, has been impacted to the same degree as a composite, national average, print advertiser by the shift to digital advertising. *See Id.* at ¶¶ 46, 48-49. There has to be some reason to believe that the yardstick market and the **[*31]** measured market (here, relevant ad market in San Francisco) are analogous. E.g., *Castro v. Sanofi Pasteur Inc., 134 F. Supp. 3d 820, 838 (D.N.J. 2015)*. Eiclunann's damages opinion based on his yardstick analysis is not supported by the material on which he relied and is speculative. Eichmann cannot testify regarding his yardstick approach. *Sargon, 55 Cal.4th at 771-72*.[26]

3. Klein

Klein is a defense expert who intends to offer various opinions to rebut Plaintiff's expert, Eichmann. His opinions include: (1) cash payments from Hearst's parent company to the Chronicle were not a loan and as such cannot be a basis to impute loan servicing costs; (2) a one-time contractual payment was a "loss" and not a "cost" as that term is defined under the UPA; and (3) Sillers' analysis is not, on its face, an allocation of costs consistent with the UPA. Plaintiff moves to exclude those opinions.[27]

a. Cash Infusion — Loan Servicing Costs

As noted above, a fully-allocated cost method is used to compute costs for the purposes of the UPA. It is undisputed that Hearst "infused" the Chronicle with $1.2 billion in cash. Motion, 3-4; Opposition, 4 (referring to the $1.2 billion as an "investment"). While Hearst plans to eventually have the Chronicle "pay back" the money through "profit **[*32]** performance," the Chronicle is not being charged any fees or interest on the $1.2 billion. Motion, 4; Plaintiff's Ex. 48 at 132:2-8 (stating that the Chronicle intends to pay Hearst back for all of the losses that were covered over the years through profit performance over time); Plaintiff's Ex. 51 at 64:25-66:8 (acknowledging Chronicle's obligation to Hearst). Eichmarm, Plaintiff's expert, imputed loan servicing costs on the $1.2 billion payment in his cost allocation. Hearst's Klein opines that the $1.2 billion payment was not a loan such that there are no servicing costs. Plaintiff argues Klein relies only on assumptions to conclude the cash infusion is not a loan, and that the Klein's opinion is contrary to the UPA.

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[25] E.g., *CDW LLC v. NETech Corp., 906 F.Supp.2d 815, 824* (S.D. hid. 2012) (yardstick is only acceptably reliable under Daubert if the yardsticks are sufficiently comparable that they may be used as accurate predictors of what the target would have done); ***Loeffel Steel Prod, Inc. v. Delta Brands, Inc., 387 F.Supp.2d 794, 812-17 (N.D. Ill. 2005)*** (refusing to permit expert testimony based on companies that were not properly comparable); *Washington v. Kellwood Co., 105 F.Supp.3d 293,314-18 (S.D.N.Y. 2015)* (distinguishing cases in which there is no evidence to support the yardstick comparison from cases where there is some evidence to support the yardstick comparison, the weight of which is measured by jury).

[26] I reject the Examiner's suggestion that it is Hearst's burden to produce an alternative yardstick. It may well be that there is no suitable yardstick, in which case the yardstick approach is not suitable. William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 20:61 (5th ed., as of June 2017 update) ("For instance, the yardstick method can be a highly effective method of calculating the amount of damage caused by a price-fixing cartel, but only if there exists a closely analogous market that was not cartelized during the period in question. If data on such a market is not available, the plaintiff will have to utilize a different methodology").

[27] Plaintiff also understood that Klein intended to offer an opinion on a fourth topic. In opposition, Hearst states that the fourth topic raised by Plaintiff's motion is not at issue. Accordingly, Klein may not provide testimony on that fourth topic.

Klein's opinion is not contrary to the UPA and it finds support in the record. The fully allocated cost method takes into account the firm's total costs attributable on an average basis to each unit of output. Turnbull, 219 Cal.App.3d at 820. The statutory terms "cost of doing business" and "overhead expense" are defined to mean "all costs of doing business *incurred* in the conduct of the business[,]" specifically including "interest on borrowed capital". B+P § 17029 (emphasis added). The record supports **[*33]** the conclusion that Hearst did not fund the Chronicle with borrowed money and so the Chronicle did not, as a matter of fact, incur loan service or interest payments. Motion, 4; Plaintiff's Ex. 51 at 67:21-23, 112:12-17 (Chronicle not charged any kind of interest by Hearst). Klein's opinions on the cash infusion should not be excluded.[28]

b. Transcon Payment

The parties agree Hearst made a $200 million payment to Transcontinental Northern California (Transcon) to renegotiate the Chronicle's printing contract. Motion, 4-5; Opposition, 4. Klein opines that the payment should be considered a "loss" and not a cost of doing business. See Motion, 8; Opposition, 5. Plaintiff seeks to bar this testimony, arguing Klein's opinion is unsupported, speculative, and contrary to the purposes of the UPA.

Whereas Klein's opinion on with respect to the cash infusion addressed whether there *were* any costs at all, Klein's opinion as to the Transcon payment addresses the characterization of a payment that both parties agree was made. Eichmann treated it as a cost of printing because it was a payment made to Transcon to re-negotiate a printing contract. Klein says it is a loss, and not a cost, because it was **[*34]** an early termination payment necessary to get out of a bad printing contract and to negotiate a more favorable contract. Opposition, 15-16; Hearst's Ex. JJ at 139:12-140:22. Klein also offers the alternative opinion that Eichmann has not properly allocated the cost so that its burdens correlate to the benefits it generates because he assigned the entirety of the cost to FRROP. *See* Hearst's Ex. JJ at 139:12-140:22.

Here, to the extent Klein's principal opinion that the Transcon payment is not a cost amounts to anything more than a legal conclusion, it is contradicted by the statute. *Compare* Opposition, 16; *with* B+P § 17029 ("Cost of doing business" or "overhead expense" means "all costs of doing business incurred in the conduct of the business"). Klein should not be permitted to testify that the contract payment was a "loss" and not a "cost" under the UPA. This is simply legal argument under the guise of expert testimony.[29]

c. Opinion Regarding Sillers' Analysis

Klein reviewed the Sillers report and opines that Sillers performed a break-even analysis, not a cost allocation. Opposition, 16-17; Hearst's Ex. JJ at 193:21-194:4, 195:3-11, 208:5-16, 218:20-220:1. Klein also opines regarding the differences **[*35]** between a break-even analysis and a cost allocation. Hearst's Ex. JJ at 193:21-194:4, 195:3-11, 208:5-16, 218:20-220:1. The purpose of Klein's opinion is to rebut Eichmarm, and in particular to call into question Eichmann's reliance on the Sillers analysis. Opposition, 16-17.

Plaintiff seeks to exclude this opinion because Klein did not consider the evidence including a sworn declaration and the deposition testimony provided by Sillers. Motion, 14. But Plaintiff can point to nothing material to Klein's opinion in the declaration or deposition testimony that Plaintiff contends Klein should have considered. Plaintiff's Exhibits 28-29. There is nothing to suggest that Klein "assumed facts contrary to the undisputed facts of the case" or "considered a significantly incomplete universe of information." Sanchez v. Kern Emergency Med. Transportation

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[28] Plaintiff criticizes Klein for his failure to consider specific pieces of financial information. Motion, 12-14. But Plaintiff has not established that Klein could not, as an expert in his field, rely on the information that he *did* rely on, or that he is required to consider the information identified by Plaintiff.

[29] In the course of providing other opinions, Klein may assume that the Transcon sum is a 'contract termination payment,' if there is admissible evidence to support that assumption.

Corp., 8 Cal.App.5th 146, 162, 213 Cal. Rptr. 3d 830 (2017); *Shiner v. CBS Corp., 240 Cal.App.4th 246, 253-54 (2015)* (experts did not provide evidence of plaintiff's exposure to asbestos, such that summary their conclusions were properly excluded at summary judgment). This is because Sillers does not, himself, describe his analysis as a cost allocation under the UPA as opposed to some other exercise related to the Chronicle's costs. This opinion is not excluded.

d. Opinions as to Chronicle's Actual Advertising [*36] Costs and/or Chronicle's Pricing Below Cost

Klein does not intend to offer an opinion on these topics. Opposition, 18. Accordingly, the motion is moot in this respect.

4. Rubinfeld

The Examiner seeks to exclude Rubinfeld's opinions on three subjects. These are (1) Rubinfeld's switching analysis; (2) Rubinfeld's opinions regarding the appropriate market; and (3) Rubinfeld's opinions regarding Sillers' cost analysis. The first two opinions are intended to cast doubt on Eichmann's cross-price elasticity analysis. The third opinion is intended to undermine Eichmann's cost allocation.

a. Switching Analysis

Rubinfeld performed a "switching analysis" as part of his attack on Eichmann.. Rubinfeld assumes Plaintiff could only have suffered harm if advertisers view the Chronicle and the Examiner as competing alternatives for FRROP advertising and decide to purchase advertising space based, at least in part, on the price offered by each newspaper. Rubinfeld Report ¶ 70.[30] After stating that Eichmann had attempted — and failed — to use cross-price elasticity to measure the amount of substitution between the two newspapers (an opinion not discussed here), Rubinfeld conducted his own analysis to support **[*37]** his conclusion that advertisers do not generally view the Chronicle and the Examiner as substitutes, in order to further discredit Eichmann's approach. *Id.* at ¶¶ 70-71.

The first step in Rubinfeld's analysis was to isolate advertisers that had placed advertisements in both the Chronicle and the Examiner between January 2010 and March 2016. *Id.* at ¶ 72. Within these advertisers, he divided them into six categories: (1) advertisers with insufficient purchases to categorize a purchasing pattern; (2) advertisers that almost exclusively used the Examiner; (3) advertisers that almost exclusively used the Chronicle; (4) advertisers that generally shifted purchases from the Chronicle to the Examiner over time; (5) advertisers that generally used both newspapers at the same time and did not shift purchases; and (6) advertisers that generally shifted purchases from the Examiner to the Chronicle over time. *Id.* at ¶ 74. Rubinfeld opined that only the sixth category could fit Plaintiff's theory of harm. *Id.* at ¶ 75. He divided that category into four sub-categories: (a) the shift occurred over a time period of greater than one year; (b) the Chronicle's prices did not change or the price increased; **[*38]** (c) the Chronicle's price was generally not below Eichmann's cost estimate; and (d) the advertiser "potentially fits Plaintiff's story." *Id.* Rubinfeld found that few advertisers fell into 6(d), the only category that he treated as consistent with Plaintiff's theory of recovery. *See id.* at ¶ 79, Fig. 13.

Plaintiff's motion to exclude has two prongs: (1) Rubinfeld's approach misunderstood Plaintiff's theory and, as a result, failed to properly categorize the advertisers that fit Plaintiff's theory; and (2) Rubinfeld was not able to demonstrate sufficient familiarity with the details of his analysis at his deposition. Motion, 7-8.

First, Plaintiff is comet that some data Rubinfeld has implicitly concluded does not "potentially fit[] the Plaintiff's story" does, in fact, potentially fit. Specifically, advertisers that advertised exclusively in the Chronicle and advertisers that advertised virtually exclusively in the Chronicle do, at least "potentially," fit Plaintiff's story that

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[30] The Rubinfeld Report is attached as Exhibit 93 to the Omnibus Declaration of Jeffrey A. Atteberry.

Hearst was able to keep business away from the Examiner with predatory pricing. At the same time, this is not a challenge to the substance of Rubinfeld's analysis and opinions — that advertisers do not view the **[*39]** Chronicle and the Examiner as substitutes that are interchangeable based on price because relatively few advertisers switched from the Chronicle to the Examiner — but a challenge to his characterization of the legal import of his conclusions. Accordingly, this does not justify the exclusion of Rubinfeld's analysis.

Second, it is true that Rubinfeld was unable to recount at his deposition significant points, such as the precise number of advertisements that were necessary to categorize a purchasing pattern. *See* Plaintiff's Ex. 85 at 166:12-167:11, 167:18-168:25, 169:7-11, 169:17-170:2. General phrasing such as "almost exclusively" and "generally shifted" makes it impossible to understand and evaluate Rubinfeld's methodology. Hearst's answer is simply to invite Plaintiff to reverse engineer Rubinfeld's analysis to present a competing interpretation of the data. Opposition, 14. But the general nature of the categories into which Rubinfeld has sorted the advertisers and his failure to explain the methodology used to complete this sorting — such as the numerical cut-offs that would result in inclusion in one category or another — preclude the conclusion that Rubinfeld's approach was methodologically **[*40]** sound. This opinion is excluded under *Sargon*.

b. Opinions Regarding the Market for Advertising

Rubinfeld opines that Eichmann did not take a correct view of the "market for advertising in the San Francisco Bay Area" when he assumed "that the SF Chronicle and the SF Examiner compete alone in the market for newspaper advertising in a geographic area delineated by the geography of their advertisers taken as a group." Rubinfeld Report ¶¶ 53-54. Rubinfeld also opines that "if [Eichmann's] speculation regarding a two-player market is not correct, then his model is improperly specified and biased." *Id.* at ¶ 56. Rubinfeld implies that the "correct view" of the market would include various national newspapers and other forms of advertising. *Id.* at ¶ 54. These opinions generally support one line of Rubinfeld's broader attack on Eichmann's analysis of cross-price elasticity.

Plaintiff argues that Rubinfeld should not be permitted to offer his "correct view" of the market for advertising and should not be permitted to criticize Eichmann's regression analysis for taking an incorrect view of the market. Motion, 16-19.[31]

Rubinfeld does not have a basis to provide expert testimony to opine on the "correct **[*41]** view" of the market for advertising in the San Francisco Bay Area. Rubinfeld Report ¶ 54. On its face, his opinion is based solely on "testimony of witnesses familiar with Chronicle and Examiner advertising sales." *Id.* At deposition, Rubinfeld admitted that he has not conducted separate studies to determine what advertising alternatives compete with the Chronicle's print display advertising. Plaintiff's Ex. 85 at 193:21-194:19; Plaintiff's Ex. 85 at 103:24-109:10 (extended discussion of whether Rubinfeld performed an analysis that was limited to display advertising in San Francisco). Here, Rubinfeld is not providing an opinion based on his expertise in econometrics but, instead, is regurgitating statements of others. Rubinfeld should be precluded from offering opinion testimony in ¶ 54 of his report, although of course he may rely on the admissible evidence from others in formulating his other opinions; and he is not otherwise limited in his testimony on this subject.

c. Opinions Regarding Sillers' Cost Analysis

The issues here generally track the issues regarding the similar motion with respect to Klein. Rubinfeld opined that Sillers did not calculate the Chronicle's fully-allocated **[*42]** cost per advertising page, but instead determined how much revenue the Chronicle would need to generate per page of FRROP advertising in order to arrive at zero profit before income tax, assuming all other revenues remained constant. Rubinfeld Report ¶¶ 86, 88. Rubinfeld concludes that Eichmann cannot rely on the Sillers analysis to justify his cost allocation. *Id.* at ¶ 90. Moreover,

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[31] Plaintiff has done nothing to undercut Rubinfeld's discussion of the bias created through the incorrect assumption of a two-player market in a regression analysis. Rubinfeld Report ¶¶ 55-56.

Rubinfeld opines that Eichmann has not supported his own methodology because it is not, in fact, the same as the Sillers analysis. *Id.*

Plaintiff argues that Rubinfeld should not be permitted to offer these opinions because (1) Rubinfeld cannot contend that Sillers' analysis was not "a cost-allocation exercise" without considering Sillers' deposition testimony and declaration; and (2) Rubinfeld did not express an opinion with respect to the Chronicle's cost allocation. Motion, 19-20. Plaintiff's first attack fails for the same reason it failed as to Klein. Plaintiff's second attack is irrelevant. Rubinfeld's criticism of Eichmann is based on his expertise in reviewing the Sillers analysis, on its face. *See* Plaintiff's Ex. 85 at 296:13-297:16. This is enough.[32] He may opine.

Motions for Summary Judgment [*43] and/or Adjudication

1. The UPA

"A purpose of the Unfair Practices Act is to foster and encourage competition by prohibiting unfair practices by means of which fair and honest competition is destroyed or prevented." *Indep. Journal Newspapers v. United W. Newspapers, Inc., 15 Cal.App.3d 583, 586, 93 Cal. Rptr. 299 (1971)*. Plaintiff alleges that Hearst engaged in unfair practices prohibited by the UPA.

a. Below Cost Sales

"It is unlawful for any person engaged in business within this State to sell[33] any article or product[34] at less than the cost[35] thereof to such vendor, or to give[36] away any article or product, for the purpose of injuring competitors or destroying competition." B+P § 17043 (footnotes added); CACI No. 3301. To establish a sale below cost, a plaintiff must establish the defendant's sales price, its cost in the product, and its cost of doing business. *G.H.I.I. v. MTS, Inc., 147 Cal.App.4th 256, 275 (1983)*.

b. Loss Leader Sales

"It is unlawful for any person engaged in business within this State to sell or use any article or product as a 'loss leader' as defined in Section 17030 of this chapter." B+P § 17044; CACI No. 3302.

> "Loss leader" means any article or product sold at less than cost:
> (a) Where the purpose is to induce, promote or encourage the purchase of other merchandise; or
>
> (b) Where the effect is a tendency or capacity to mislead or deceive purchasers or prospective **[*44]** purchasers; or
> (c) Where the effect is to divert trade from or otherwise injure competitors.

B+P § 17030.

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[32] Contrary to Plaintiff's argument in reply, Rubinfeld did not disclaim his opinion that the Sillers analysis is not a cost allocation exercise, as is clear from the cited deposition excerpt. *Compare* Reply, 8-9.

[33] "Sell" includes "selling, offering for sale or advertising for sale." B+P § 17022.

[34] "Article or product" includes "any article, product, commodity, thing of value, service or output of a service trade." B+P § 17024.

[35] "Under *sections 17026* and *17029 of the Business and Professions Code*, cost means invoice cost plus the vendor's full cost of doing business or six percent." *G.H.I.I. v. MTS, Inc., 147 Cal.App.4th 256, 275 (1983)*.

[36] "Give" includes "giving, offering to give or advertising the intent to give." B+P § 17024.

To violate the prohibition on "loss leader" sales, a sale below cost must occur. *Indep. Journal, 15 Cal.App.3d at 587*. Accordingly, a plaintiff must establish the defendant's sales price, its cost in the product, and its cost of doing business. *G.H.I.I., 147 Cal.App.4th at 275*.

c. Secret Unearned Discounts

"The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful." B+P § 17045.

There are three elements to this claim: (1) there must be a "secret" allowance of an "unearned" discount; (2) there must be "injury" to a competitor; and (3) the allowance must tend to destroy competition. *Diesel Elec. Sales & Serv., Inc. v. Marco Marine San Diego, Inc., 16 Cal.App.4th 202, 212, 20 Cal. Rptr. 2d 62 (1993)*; CACI No. 3320 (including as separate elements that the plaintiff must be harmed and that the defendant's conduct must have been a substantial factor in causing the harm).

d. Meeting Competition

"The prohibitions of this chapter against locality discriminations,[37] **[*45]** sales below cost, and loss leaders do not apply to any sale made: ... (d) In an endeavor made in good faith to meet the legal prices of a competitor selling the same article or product, in the same locality or trade area and in the ordinary channels of trade.[38]" B+P *§ 17050(d)* (footnotes added); CACI No. 3333.

The terms "competitor" and "locality or trade area" are applied practically without a particular definition. *People v. Pay Less Drug Store, 25 Cal.2d 108, 116, 153 P.2d 9 (1944)*. Moreover, a merchant is not required to ascertain the "legal prices" of its competitors before invoking the exception because it is impossible to ascertain the legal prices of competitors' goods without auditing their books. *Id. at 117*. Instead, a merchant is required to endeavor in good faith to meet the legal prices of a competitor. *Id.*

e. Burden Shifting

"In all actions brought under this chapter proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, together with proof of the injurious effect of such acts, is presumptive evidence of the purpose or intent to injure competitors or destroy competition." B+P § 17071.

> "[T]he obvious and only effect of the presumption created by section 17071" is to require the defendant "to go forward with proof to negate the presumption of wrongful intent." **[*46]** (*Western Union Financial Services, Inc. v. First Data Corp. (1993) 20 Cal.App.4th 1530, 1540,25 Cal.Rptr.2d 341*, italics added.) "[T]he allocation of evidentiary burdens [under section 17071 is] as follows: 'Assuming proof of injury to a competitor has been

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[37] "Locality discrimination means a discrimination between different sections, communities or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this State, by selling or furnishing an article or product, at a lower price in one section, community or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof, than in another." B+P § 17031.

[38] "'Ordinary channels of trade' means those ordinary, regular and daily transactions in the mercantile trade whereby title to an article or product, in no way damaged or deteriorated, is transferred from one person to another. [¶] 'Ordinary channels of trade' does not include bankruptcy sales of stocks, closeout goods, dents, sales of goods bought from a business or merchant retiring from business, fire sales and sales of damaged or deteriorated goods, which damage or deterioration results from any cause whatsoever. This listing is not all inclusive but as example only." B+P § 17028.

> made, California law allows plaintiffs to establish a prima facie case with proof of prices below average total cost. The defendant then has the burden of negating the inference of illegal intent or establishing an affirmative defense.' [Citation.]" (*Turnbull & Turnbull v. ARA Transportation, Inc., supra*, 219 CatApp.3d 811, 824-825, *219 Cal. App. 3d 811, 268 Cal.Rptr. 856*.) The presumption "may be rebutted by establishing one of the statute's affirmative defenses, such as meeting competition, *see* *Cal. Bus. & Prof.Code § 17050*, or by showing that the sales 'were made in good faith and not for the purpose of injuring competitors or destroying competition.' [Citation.]" (*William Inglis, etc. v. ITT Continental Baking Co., supra, 668 F.2d 1014, 1049*; see also *Dooley's Hardware Mart v. Food Giant Markets, Inc., supra, 21 Cal.App.3d 513, 518, 98 Cal.Rptr. 543*.) "After proof of the sales below cost and injury resulting therefrom, there is no undue hardship cast upon the defendants to require them to come forward with evidence of their true intent as against the prima facie showing, or with evidence which will bring them within a specified exception in the act." (*People v. Pay Less Drug Store, supra, 25 Cal.2d 108, 115, 153 P.2d 9*.) Once the presumption is rebutted, "the burden shifts back to the moving party to offer actual proof of injurious intent." (*Western Union Financial Services, Inc. v. First Data Corp., supra, at p. 1540, 25 Cal.Rptr.2d 341*.)

Bay Guardian Co. v. New Times Media LLC, 187 Cal.App.4th 438, 464-65, 114 Cal. Rptr. 3d 392 (2010).

2. Hearst's [*47] Motion

Hearst moves for summary judgment or, in the alternative, summary adjudication of each of Plaintiff's causes of action and Plaintiff's "claims for damages and for future damages."

a. Below Cost Sales

Hearst moves for summary adjudication of Plaintiff's claim pursuant to B+P § 17043 on the bases that: (1) Plaintiff cannot establish sales below cost; (2) Plaintiff cannot establish that any below cost sales were a substantial factor in causing it injury; (3) the undisputed facts demonstrate that Hearst did not act with an unlawful purpose to injure Plaintiff or destroy competition; and (4) Hearst is entitled to summary adjudication in its favor because it was acting to meet competition. Motion, 15-31.

i. Sales Below Cost

Hearst identifies two discrete issues within this element: (1) Whether Plaintiff can, and is required to, identify particular below-cost sales; and (2) Whether Plaintiff can present any cognizable evidence of Hearst's costs. Motion at 16-19.

The first argument challenges Plaintiff's decisions to (1) aggregate the Chronicle's prices and costs into averages; and (2) to include FRROP sales that were part of bundles in this aggregation. *Id.* at 16-19. The second argument **[*48]** challenges evidence Plaintiff submitted in support of the aggregated case. *Id.* at 17-18. Plaintiff opposes by arguing: (1) costs may be averaged; (2) the Chronicle's costs can properly be derived from the Sillers analysis and from Eichmann's expert report; (3) the Chronicle's financial records, analyzed by Eichmann, show that the Chronicle's average advertising rate was below the Chronicle's costs; (4) Plaintiff has identified specific below-cost sales; (5) the Chronicle's deficits corroborate below-cost sales; and (6) Eichmann's report is based on a proper consideration of the Chronicle's allocated costs, average costs and prices, and bundled products. Opposition, 17-24.

Hearst's moving papers note there is no evidence of any below cost sales, indeed as noted elsewhere in this order, the Examiner has disclaimed reliance on such evidence. See e.g. Hearst Undisputed Material Facts #1 & Plaintiff's Reponses.

If Eichmann's cost allocation is admissible, it is sufficient to enable Plaintiff to survive summary adjudication on this element. But as noted above, it is not admissible. The issue is therefore whether plaintiff has any other evidence of below cost sales within the meaning of the **[*49]** UPA.

Plaintiff may, as a matter of law, rely on aggregated costs and aggregated prices to demonstrate that below cost sales have occurred. Utilizing average costs is appropriate. *Turnbull & Turnbull, 219 Cal.App.3d at 820* (the concept of fully allocated costs has been equated with average total cost attributable on an average basis to each unit of output). Hearst takes issue, however, with Plaintiff's approach insofar as Plaintiff intends to utilize Hearst's average price for FRROP advertising to demonstrate that Hearst sold FRROP advertising below cost. Motion, 16-17. Neither Party has cited any authority evaluating such an approach. With respect to this element, it is enough to say that Plaintiff will have proven that Hearst made FRROP advertising sale(s) below cost if Plaintiff proves that Hearst's average sales price was less than its fully allocated costs. B+P § 17043 (making it unlawful to sell *any article or product at less than cost* for the purpose of injuring competitors or destroying competition).

However, aside from the inadmissible Eichmann report on the subject, there is no evidence of sales below fully allocated costs. On this record, only speculation could find the Sillers memo[39] states those costs or is a basis **[*50]** to formulate them. It was speculation for Eichmann to decide the nature of the Sillers memo, and it would be speculation for a jury to make such an inference. Hearst's Response to Plaintiff's Separate Statement ¶¶ 164-67. There is no basis to conclude that Sillers' analysis was an admission of the proper allocation of costs under the UPA, and such evidence as there is points directly away from that—such as the fact that Sillers was *not* attempting to perform such an allocation. E.g., Hearst Undisputed Material Facts # 8. It is not helpful to suggest that allocations of costs are usually fact issues, *e.g., Turnbull & Turnbull, 219 Cal.App.3d at 822-23*; the problem here is that there is no admissible evidence of the fact, or of reasonable inference that can be made from the admissible evidence.[40]

Bundling. Hearst contends that Eichmann improperly included "bundled" products, contracts for sale of both FRROP advertising and other forms of advertising, in his model. Motion, 18-19; *see, e.g.*, Bergin Decl. ¶ 10 (describing product bundles). The Examiner responds that each type of advertising is properly considered separately because it is invoiced separately. Opposition, 23; *see* Hearst's Response **[*51]** to Plaintiff's Separate Statement ¶¶ 141, 204 (discussing contents of Hearst invoices and contracts).

Fisherman's Wharf Bay Cruise Corp. v. Superior Court, 114 Cal.App.4th 309, 326, 7 Cal. Rptr. 3d 628 (2003) notes that the UPA "focuses literally on whether the defendant sold '*any article or product*' at less than cost. Under the individual item approach, the invoice cost of a product becomes the benchmark to determine if statutory sales below cost have occurred." Because this case does not address bundling, the Examiner turns to *Bebe Au Lait, LLC v. Mothers Lounge, LLC, 2014 WL 4744758, at *3 (N.D. Cal. Sept. 23, 2014)*. That court applied *Fisherman's Wharf* to conclude that a plaintiff had sufficiently alleged sales below cost where the defendant allegedly sold an item for $11.90, inclusive of shipping. The cost of the item was $5.00 and the cost of shipping was $2.00, generating an aggregate cost of only *$7.00. Bebe Au Lait, 2014 WL 4744758, at *3*. But the company invoiced the item as a $2.00 cost and charged the remainder of the $11.90 as shipping costs, even though its shipping costs were only $2.00. This is, in substance, what Plaintiff asks the court to do here.

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[39] Plaintiff's Response to Hearst's Separate Statement ¶ 6 (identifying only the Sillers analysis and the Eichmann report as evidence of Hearst's fully allocated costs).

[40] There must be a reason to make an inference; without that, the inference is speculation and not permitted. *Minnegren v. Nozar, 4 Cal. App. 5th 500, 507, 208 Cal. Rptr. 3d 655 (2016)*. Speculative inferences—those that are "mere possibilities"—will not save a party from summary judgment. *Yuzon v. Collins, 116 Cal. App. 4th 149, 166, 10 Cal. Rptr. 3d 18 (2004)*; *Collin v. Calportland Co., 228 Cal. App. 4th 582, 592, 176 Cal. Rptr. 3d 279 (2014)*. Accord, Barry A. Lindahl, 1 MODERN TORT LAW: LIABILITY AND LITIGATION § 15:21 (2d ed. June 2017 update) (prevailing rule in most states is that an inference must be reasonably probable, and not merely possible). That is, this is not a situation in which we have two conflicting inferences, each of which is permissible thus blocking summary judgment, similar to the situation in e.g., *Lantz v. Workers' Comp. Appeals Bd., 226 Cal. App. 4th 298, 319, 171 Cal. Rptr. 3d 829 (2014)*.

Hearst relies on a California trial court's tentative ruling which I have not used,[41] and several federal opinions. For example, in *Maquet Cardiovascular LLC v. Saphena Med Inc., 2017 WL 2311308, at *3 n.2 (N.D. Cal. May 26, 2017)*, the court ruled that an attack on a "bundle" arrangement under B+P § 17043 was untenable unless the cost and product margin of **[*52]** the product as a whole were considered, as a contrary reading could outlaw buy-one-get-one promotions:[42]

Hearst's "bundles" consist of a variety of advertising it sells. It appears these products are separately invoiced, invoking the rationale of *Bebe Au Lait*'s application of *Fisherman's Wharf* The bundling here is not a "give away" of ancillary products. And any concern that lawful business practices will be effectively outlawed by this interpretation of the statute is assuaged by the observation that the statute only prohibits conduct undertaken with the purpose to injure competitors or competition. *Fisherman's Wharf, 114 Cal.App.4th at 330, 330 n.6*.

Finally, as a result of Plaintiff's approach to aggregating transactions to establish liability, Plaintiff may not rely on specific below cost sales to satisfy its burden to prove the existence of sales below cost in this case. In a December 14, 2016 Joint Case Management Conference Statement, Plaintiff represented to Hearst and to the Court that "no advertiser depositions are necessary or even relevant" in light of Plaintiff's reliance on Eichmann's analysis. Hearst's Ex. 16 at 4.[43] Coming in the context of sustained, serious discovery disputes as Hearst was trying to decide **[*53]** what discovery to take to meet plaintiff's case, this had a decisive impact on Hearst's plans and as a result it foreseeably did not take advertiser depositions. (See also, Tr. 68:19-69; 96:17 et seq.) Plaintiff cannot be permitted to bring an aggregated action to trial on the basis of a handful of asserted below cost sales, where Plaintiff expressly disclaimed such an approach.

Before we leave the topic of the Examiner's evidence on below cost sales, I note a variant offered by the Examiner in its Opposition and at argument (Tr. at 8:19) that it's uncontested that the Chronicle operated at a loss, a serious loss, for years. (It is true there were losses for years. Tr. 26:9-11.) Plaintiff seems to believe: (i) that is fundamental, patent evidence of pertinent below costs sales (id., & at 18-19), (ii) one doesn't even need an expert to know it (Tr. at 8:23), (iii) it is equally obvious that given such losses the Examiner must have been affected (e.g., Tr. 19-20; 29:10-12), and (iv) indeed that it is equally obvious the losses were *deliberately* incurred to harm the Examiner. (Tr. 89:5-9).

The reasoning is fallacious. First, it is perfectly consistent with an overall loss on operations **[*54]** (which at the Chronicle includes the editorial publishing) to have a profit (even on a fully allocated basis) on some *part* of the operations, such as advertising or specifically the FRROP advertising product at stake here. Secondly, even were there a loss on FRROP advertising within the meaning of the UPA, it may well have had no effect at all on the Examiner (even in a two player market) because the Chronicle's ad prices were much higher than those of the Examiner. To exaggerate with an analogy for sake of emphasis, there is no reason to think that if Rolls Royce lowers by half the price of its Phantom from $420,000, that will have any effect on a buyer in the market for a Toyota; or that Rolls Royce would intend its price reduction to have an effect on Toyota.

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[41] If appellate division decisions are of "debatable strength as precedents," *Velasquez v. Superior Court, 227 Cal.App.4th 1471, 1477,11*. 7 (2014), then superior court orders—and tentative ones at that—have less. But see, *Gateway Cmty. Charters v. Spiess, 9 Cal. App. 5th 499, 50511*.3 (2017) (appellate division opinion has "persuasive" but "is not binding precedent"); *Irvin v. Contra Costa Cty. Employees' Ret Amin, 13 Cal. App. 5th 162, 220 Cal. Rptr. 3d 510, at n.3 (2017)*, *pet rev. filed* Aug. 9, 2017 (superior court order considered "for its persuasive value, unlike a nonpublished decision from the Court of Appeal. (*Brown v. Franchise Tax Bd. (1987) 197 Cal.App.3d 300, 306, fn. 6, 242 Cal.Rptr. 810*.)").

[42] Hearst also cites cases pertaining to "giving away" ancillary products in conjunction with products that a defendant normally sells, in which case courts have considered the products being "given away" to be part of a package and performed the UPA analysis as to that package. *See* *Ameritox, Ltd v. Millennium Labs., Inc., 2013 WL 136210, at *4 (M.D. Fla. Jan. 10, 2013)*.

[43] On page 5 of the same document the Examiner argued that third-party advertiser depositions would only be worthwhile if a statistically valid sample of advertisers could be deposed. But the Examiner and its expert disclaim that approach too. Tr. 21:2-4. See also, Tr. 20:22 et seq. (disclaiming transaction by transaction approach); Plaintiff's Statement of Disputed Facts ¶ 1 (same).

Harm to Plaintiff

Hearst pins its argument on the admissibility of Eichmann's testimony, which Hearst contends is the only evidence of causation and damages. Motion, 19. As discussed in connection with Hearst's motion to exclude, Eichmann's testimony should not be admitted. But Plaintiff need not demonstrate an anticompetitive impact to establish liability under B+P § 17043. *Bay Guardian Co. v. New Times Media LLC, 187 Cal.App.4th 438, 456, 114 Cal. Rptr. 3d 392 (2010)*. Accordingly, Plaintiff is not required to make any **[*55]** showing on this element to survive Hearst's motion.

iii. Purpose of Injuring Plaintiff or Destroying Competition

The Presumption. Hearst contends that its evidence is sufficient to rebut any presumption that may arise under B+P § 17071 and that there is no contradictory evidence to create a triable issue. Motion, 20-30. Plaintiff argues that there is evidence of harm sufficient to give rise to the presumption under § 17071, and the presumption is not rebutted. Plaintiff also argues that even if the presumption is not triggered[44] there is in any event direct evidence of Hearst's intent to harm the Examiner. Opposition, 25-32.

Because there is no evidence of pertinent below costs sales, the presumption of § 17071 is not available.[45] Hearst also contends that Plaintiff is not entitled to the presumption because Plaintiff cannot show that it suffered injury as a result of Hearst's conduct. This is correct, given my resolution of that issue above, discussed in the context of the motion to exclude Eichmann's opinions.

The Test. B+P § 17043 only prohibits below-cost sales if done specifically to injure competitors or to destroy competition.[46] *Knowing* that such injury **[*56]** will or may eventuate is not enough, *Cel-Tech*, 20 Cal.4th at 174-75; there must be proof of a "desire" to do that injury. *Id. at 175*. Especially in two-competitor markets—and the Examiner insists that's what this case is about—evidence showing an increase in (or intent to increase) the defendant's market share, which generally requires taking it away from the other participant, will usually not show the statutory scienter. E.g., *W. Union Fin. Servs., Inc. v. First Data Corp., 20 Cal. App. 4th 1530, 1541, 25 Cal. Rptr. 2d 341 (1993)*. Plaintiff's in predatory pricing cases under § 17043 must show more than "diverting trade from" competitors, *id. at 539-41*.

This highly focused examination of scienter is important: intent is the very "gravamen" of the UPA claim. *Bay Guardian, 187 Cal.App.4th at 456*; *Cel-Tech, 20 Cal.4th at 173-175*. It is not enough to prove an "intent was "simply to increase sales," or market share, *Fisherman's Warf*, the Examiner must have evidence specifically that Hearst intended to eliminate the Examiner (the only other competition in the Examiner's two-player market); evidence that Hearst took its actions 'knowing' that injury could occur is not enough.

The Evidence. First, Hearst has submitted sufficient evidence that it did not set its prices with a purpose of injuring Plaintiff or destroying competition to satisfy its initial burden. Bergin Decl. ¶¶ 27-28; Bentz Decl. ¶ 22. Hearst

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[44] Compare, *Bay Guardian Co. v. New Times Media LLC, 187 Cal. App. 4th 438, 457, 114 Cal. Rptr. 3d 392 (2010)*. The presumption is also described at e.g., *W. Union Fin. Servs., Inc. v. First Data Corp., 20 Cal. App. 4th 1530, 1540, 25 Cal. Rptr. 2d 341 (1993)*.

[45] *Pan Asia Venture Capital Corp. v. Hearst Corp., 74 Cal. App. 4th 424, 432, 88 Cal. Rptr. 2d 118 (1999)*; Ara Jabagchourian, et al., "Proving Wrongful Purpose Under the Unfair Practices Act: Plaintiff and Defense Perspectives," 22 COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 40, 45 (2013) ("To trigger the presumption, the plaintiff must prove two elements: 1) a below-cost sale; and 2) injury to either the plaintiff or the market.").

[46] *Bay Guardian, 187 Cal.App.4th at 456*; *Cel-Tech Commc'ns, Inc. v. LA. Cellular Tel. Co., 20 Cal.4th 163, 174-75, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. "The intent or purpose of the below-cost sale is at the heart of the statute, and distinguishes the violation from a below-cost pricing strategy undertaken for legitimate, nonpredatory business reasons." *Bay Guardian, 187 Cal. App. 4th at 456*.

also **[*57]** submitted testimony that the Chronicle sold FPROP advertising at the highest prices it could command. Bergin ¶ 8; Bentz ¶ 7; Hearst's Ex. Z at 100:12-101:22. Hearst bolsters this showing by reference to the undisputed decline in the print newspaper industry. *E.g.*, Eichmann Report ¶¶ 46-48. Hearst also points to evidence that it focused more on other competitors — digital advertisers and the BANG newspapers — and maintained prices higher than the Examiner's. Hearst's Ex. 7 at 23, Ex. 8 at 22, Ex. 9 at 21; Eichmann Report at Ex. 8.

We turn to Plaintiff's evidence of illegal "purpose": (1) the Chronicle rewarded salespersons for shifting advertisers' budgets away from competitors (Hearst's Response to Plaintiff's Separate Statement ¶¶ 126-28 [discussing share shifting program]); (2) in a handful of discrete instances, the Chronicle used below-cost pricing to "steal" significant revenue streams from the Examiner (Hearst's Response to Plaintiff's Separate Statement ¶¶ 127-28 [discussing internal communications regarding a sale that took business away from the Examiner and others]); and (3) Sillers, the Chronicle's Director of Finance, created a "Theoretical P&L" for the Examiner evaluating **[*58]** the losses the Examiner would suffer if it sold advertising at specified price points (Hearst's Response to Plaintiff's Separate Statement ¶¶ 149-55 [discussing Theoretical P&L][47]). Opposition, 25-27. The Examiner has also noted (4) the Chronicle's sales to Advanced Male Medical and Mancini Sleepworld (Hearst's Response to Plaintiff's Separate Statement ¶¶ 129-31 [discussing Examiner's loss of business from one customer after that customer advertised with the Chronicle; Hearst notes in its response to these purported facts (# 131 is disputed) the reason for the shift appear to be the performance of the ads in the Chronicle]); (5) testimony from the Examiner's staff regarding the difficulty competing with the Chronicle's prices (Plaintiff's Ex. 117 at 310:1-18 [testimony that unidentified persons at sales meetings, possibly the deponent himself, were "shocked" by the Chronicle's advertising rates]); and (6) Eichmann's analysis. Opposition, 30-32.

All the evidence cited by the Examiner is consistent with simply an intent to take market share from the other player in a two player market. That is, none of the evidence is of an illegal purpose. While I must make all reasonable inferences **[*59]** in favor of the Examiner here, that does not extend to inferring illegal intent from evidence consistent with legal intent, any more than evidence a driver was clocked at 55 m.p.h. in a 55 m.p.h. zone is evidence that she was speeding.

One must be very careful, especially in predatory pricing cases, not to punish legal competition—which benefits consumers and is the point of having the antitrust laws—under the guise of inferring illegal acts:

> Our Supreme Court has cautioned: "Pricing practices are not unfair merely because a competitor may not be able to compete against them. Low prices often benefit consumers and may be the very essence of competition.... Courts must not prohibit 'vigorous competition' nor 'render illegal any decision by a firm to cut prices in order to increase market share.'"

Fisherman's Wharf Bay Cruise Corp. v. Superior Court, 114 Cal. App. 4th 309, 326, 7 Cal. Rptr. 3d 628 (2003), quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 189, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. Indeed, it is this key element of predatory purpose which saves the statute from a constitutional attack and which distinguishes legal from illegal acts. *Fisherman's Wharf, 114 Cal. App.4th at 327*.[48]

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[47] Neither Sillers nor the individuals to whom he sent the Theoretical P&L testified with respect to its purpose. *See* Hearst's Response to Plaintiff's Separate Statement ¶¶ 155-57 (undisputed facts regarding recipients of Theoretical P&L and their testimony regarding the same). Other officers at the Chronicle testified that it was prepared in with an eye towards acquiring the Chronicle. *Id.* at ¶¶ 158-60. This neither disprove or proves an intent to harm the Examiner's business, nor provides a basis to infer either conclusion.

[48] "The intent or purpose of the below-cost sale is at the heart of the statute, and distinguishes the violation from a below-cost pricing strategy undertaken for legitimate, nonpredatory business reasons." *Bay Guardian Co. v. New Times Media LLC, 187 Cal. App. 4th 438, 456, 114 Cal. Rptr. 3d 392 (2010)*. The issue of distinguishing legal from illegal acts is particularly acute under state law, because as contrasted to federal law, California's use of average total costs "increases the likelihood that a court will find that the defendant priced below its costs, because average total cost is the most expansive economic concept possible for measuring cost." Kathleen Foote et al., CALIFORNIA ANTITRUST AND UNFAIR COMPETITION LAW, Monopolization and the Unfair Practices Act § 6.06 (updated as of April 2017), 2014 WL 9967440.

While the federal and state predatory pricing statutes are importantly different, each has an element specifically designed to draw the line between what may be two very similar situations: **[*60]** those where we have (1) intense competition leading to lower prices and benefits to consumers, *vs.* (2) predatory pricing leading to lower prices and short term benefits to consumers but ultimately the loss of competition. Federal law draws this line directly, by requiring proof that the predator has a realistic chance of recouping losses after competition is destroyed;[49] California law does not require that proof,[50] but draws the line with a strict scienter requirement. The serious concern of getting the line drawing right underlying state law are those that underlie federal law too:

> As we have said in the Sherman Act context, "predatory pricing schemes are rarely tried, and even more rarely successful," *Matsushita, supra*, 475 U.S. at 589, 106 S.Ct. at 1357, and the costs of an erroneous finding of liability are high. "[T]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; because 'cutting prices in order to increase business often is the very essence of competition...[;] mistaken inferences ... are especially costly, because they chill the very conduct the antitrust laws are designed to protect.' [Citations]. It would be ironic indeed if the standards for **[*61]** predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high.

Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226-27, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993).

As the Supreme Court has noted, it is essential that predatory pricing laws not discourage firms "to cut prices in order to increase market share. The antitrust laws require no such perverse result," *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 116, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*.[51] So it is that under California law the scienter requirement not be deemed satisfied with evidence that the defendant intended to increase market share, which, in a two-player market—and most especially in a market which all parties concede to be a *shrinking* one—*must* come at the expense of the other player. It may be difficult to find evidence of predatory intent, to be sure, but it is not impossible. There could be direct evidence, and there can be circumstantial evidence.[52]

But the Examiner has no evidence other than of seeking market share, and hence cannot proceed on its predatory pricing claim.

iv. Meeting Competition Defense

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[49] E.g. ***William Inslis & Sons Bakins Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1034 (9th Cir. 1981)***; *Weverhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 319 (2007)*. citine *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*.

[50] *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 219, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*.

[51] Perhaps especially in ***antitrust law*** we must be cautious in using inferences to dub illegal what is as likely legal conduct. E.g., *Eddins v. Redstone, 134 Cal. App. 4th 290, 329, 35 Cal. Rptr. 3d 863 (2005)* ("Because the evidence is as consistent with permissible competition as with illegal conspiracy, the evidence is insufficient to support the alleged antitrust conspiracy. (***Aguilar, supra, 25 Cal.4th at p. 852, 107 Cal.Rptr.2d 841, 24 P.3d 493***.)").

[52] E.g., Ara Jabagchourian, David Meyer, "Proving Wrongful Purpose Under the Unfair Practices Act: Plaintiff and Defense Perspectives," 22 COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 40, 44-15 (2013) ("Absent such [direct] evidence, proving unlawful purpose would most likely come through circumstantial evidence. One method of establishing circumstantial evidence would include looking at the defendant's past conduct and demonstrating a significant shift in pricing practice while showing a significant erosion in revenue or profits. A second method would be showing an overall purpose of harming the plaintiff through evidence of other targeted conduct towards the plaintiff in conjunction with a below-cost pricing scheme. A third method would be proving that the defendant was focused on plaintiff's pricing scheme and not of others in the same market") The Examiner does not offer this sort of evidence.

Hearst moves for summary judgment on the basis that it has conclusively established its affirmative defense that it set its prices to meet competition. The meeting competition defense is discussed in **[*62]** more detail in connection with Plaintiff's cross-motion for summary adjudication of that defense. Because the Parties have generated a common pool of evidence relating to their cross motions, the result reached there — that the jury must weigh the competing evidence to determine whether, as a matter of fact, Hearst set its prices to meet competition from other print advertisers within the Chronicle's FRROP footprint — is also reached here.[53] Hearst is not entitled to summary judgment on the basis of its meeting competition defense.

b. Loss Leader Sales

Hearst moves for summary adjudication of Plaintiff's claim pursuant to B+P § 17044 on the bases that (1) Plaintiff cannot establish sales below cost; (2) Plaintiff cannot establish that loss leaders were a substantial factor in causing it injury; (3) the undisputed facts demonstrate that Hearst did not act with an unlawful purpose to injure Plaintiff or destroy competition; and (4) Hearst is entitled to summary adjudication in its favor because it was acting to meet competition. Motion, 32-34. In opposition, Plaintiff relies on a couple snippets of deposition testimony and one alleged example of a loss leader being used in practice. Opposition, **[*63]** 32-33. And Plaintiff argues that the loss leaders are covered by the Examiner's estimation of damages. Plaintiff's showing is not sufficient.

Hearst has sustained its burden of showing as an initial matter that the Examiner cannot show loss leaders. Statement of Undisputed Material Facts ## 33 et seq.

As noted above in connection with § 17043, the Examiner committed to trying this action on an aggregated basis.[54] But it has not attempted to aggregate the Chronicle's prices charged in loss leader sales. Rather, Plaintiff presents a few anecdotal examples of loss leader sales. Opposition, 32-33. The deposition excerpts do not cure this deficiency. Hearst's Response to Plaintiff's Separate Statement ¶¶ 136-38 (discussion of deposition excerpts).

Second, Plaintiff has not presented evidence that the unspecified loss leader sales were entered into with an intent to harm competition within the meaning of *Western Union*. Plaintiff argues that Hearst used loss leaders to build market share in digital advertising and to take business away from print advertising. Aside from relying wholly on anecdotal evidence, this argument fails because, at best, this case would be analogous to *Western Union* ***[*64]*** — Hearst used print advertising as a loss leader to capture a share of the digital business. *See* *W. Union, 20 Cal.App.4th at 1540* (competitor is entitled to attempt to capture customer base from another competitor). Relatedly, Plaintiff presents no model to quantify its damages caused by the loss leader claim, precluding Plaintiff from relying on the presumption of intent to injure.

c. Secret Unearned Discounts

Hearst moves for summary adjudication of Plaintiff's claim pursuant to § 17045 on the bases that: (1) Plaintiff cannot establish any secret unearned discounts; (2) any secret unearned discounts did not, as a matter established by undisputed facts, have a tendency to destroy competition; and (3) any secret unearned discounts were not, as a matter established by undisputed facts, a substantial factor in causing harm to Plaintiff. Motion, 34-40. In opposition, Plaintiff's state that they will not prove the secret-discount claim on a transaction-by-transaction basis but that they have identified examples of secret discount sales. Plaintiff's Statement of Genuine Disputes ¶ 73.

In addition to the secret allowance of an unearned discount, this claim requires the plaintiff to prove both an injury to a competitor and **[*65]** a tendency to destroy competition. *ABC Internal Traders, Inc. v. Matsuhita Elec. Corp., 14*

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[53] While the order of burden shifting differs, that does not impact the ultimate result.

[54] *Compare* Plaintiff's Response to Separate Statement re Interrogatory 32 (Defendant's Ex. 26) (no additional customer specific facts re loss leader contentions).

Cal.4th 1247, 1262 (1997). Plaintiff may contend that all of the Chronicle's below-rate-card sales involve secret unearned discounts. Opposition, 35. Even if those transactions can properly be treated as secret unearned discounts, Plaintiff's aggregate proof of harm hinged on the admissibility of Eichmann's regression analysis. As that analysis is neither admissible nor directed at secret unearned discounts, as opposed to below cost sales, summary adjudication of this claim is proper.

d. Unfair Competition Law (UCL)

Hearst moves for summary adjudication of Plaintiff's UCL claim on the basis that it is concededly limited to a claim under the unlawful prong predicated on the UPA violations discussed above. Motion, 40. In opposition, Plaintiff implies that it may be able to proceed under the "unfair" prong even if its UPA claim fails, but suggests nothing and refers to no evidence but the predatory pricing issues discussed above in this order. Opposition, 35.

e. Claims for Damages and for Future Damages

To the extent summary judgment is not granted in full, Hearst moves for summary adjudication of Plaintiff's "claims for damages and for future damages" on the bases that (1) Plaintiff **[*66]** cannot establish causation, injury, or damages; and (2) there is no legal basis for future damages "in perpetuity." Motion, 40. Absent a stipulation from the parties, a court may only address claims for punitive damages on summary adjudication. *Compare* C.C.P. § 437c(f)(1); *with* C.C.P. § 437c(t); *see also* C.C. § 3294; Catalano v. Superior Court, 82 Cal.App.4th 91, 96-97, 97 Cal. Rptr. 2d 842 (2000) (discussing summary adjudication of claims for punitive damages). This alternative request for relief cannot be reached.

3. Plaintiff's Motion

The Examiner seeks summary adjudication of these affirmative defenses: (1) meeting competition; (2) standing; (3) unclean hands; (4) laches; (5) public policy; (6) first amendment rights; (7) due process and equal protection rights; (8) adequate remedy at law; (9) unavailability of treble, punitive, exemplary, or any other enhanced damages, to the extent any of these affirmative defenses withstand the motion, the Examiner requests that the court sever the affirmative defenses for early resolution by the jury. Motion, 27.

a. Meeting Competition

Hearst intends to put on evidence that its FRROP pricing was, on aggregate, necessary both to meet competition for (1) print advertising from, among other things, the Bay Area News Group (BANG); and (2) digital advertisers. Opposition, 8. Plaintiff **[*67]** argues that this defense should be summarily adjudicated for two reasons. First, Plaintiff contends that, as a matter of law, Hearst's meeting competition defense is limited to competition for print advertising within San Francisco. Reply, 4-7; Motion, 15-22. Second, Plaintiff contends that, as a matter of fact, Hearst has not produced evidence that its FRROP prices were set to meet competition from any competitor. Reply, 7-10; Motion, 21-22. While Hearst cannot base its affirmative defense directly on the prices charged for digital advertising, Hearst can invoke prices of competitors for print advertising throughout the range of its FRROP distribution footprint. Hearst has presented evidence sufficient to survive summary adjudication of this affirmative defense.

i. Scope of the Relevant Competition

Plaintiff's claims are predicated on allegation that Hearst sold a product — FRROP print display advertising in the Chronicle — below cost for the purpose of injuring a competitor or destroying competition. B+P § 17043. Hearst's affirmative defense is predicated, *e.g.*, on the allegation that, assuming Hearst sold that product (FRROP print display advertising in the Chronicle) below cost, **[*68]** Hearst did so in "an endeavor made in good faith to meet the legal prices of a competitor selling the same article or product, in the same locality or trade area and in the ordinary channels of trade." B+P *§ 17050*. The extent to which Hearst may defend its pricing by reference to competition from digital advertising and newspapers that are outside of San Francisco turns on factual disputes. The evidentiary record is taken up separately.

AA. The Same Article or Product

The first issue presented by Plaintiff's motion is whether the "same article or product" language confines Hearst to putting on evidence of only competitors for print display advertising in newspapers. The statute defines the term "article or product" is defined in a circular fashion. *Section 17024*. The phrase "same article or product" in *§ 17050(d)* does appear to have a limiting effect, as *§ 17050(e)* does not use such narrow language, but instead provides a defense, where applicable, to attempts to meet the legal prices of a competitor selling "the same or a *similar or comparable* article or product." (Emphasis supplied.) The implication is that the defense of *§ 17050(d)* cannot be invoked where a defendant is meeting prices for "similar or comparable" products; **[*69]** the products must be the "same."

The Parties do not present authority defining the "same article or product" language. Hearst offers *Dooley 's Hardware Mart v. Food Giant Markets, Inc., 21 Cal.App.3d 513, 518, 98 Cal. Rptr. 543 (1971)*. The loss leaders at issue were Tide detergent, Folger's Coffee, and C & H Sugar. *Id. at 515*. The opinion does not state whether the "staples" as to which the defendant was meeting competition included laundry detergent, coffee, or sugar. The case is not useful with respect to the meaning of the term "same article or product." Plaintiff provides some cases. *Sandler v. Gordon, 94 Cal.App.2d 254, 255, 210 P.2d 314 (1949)*; *E&H Wholesale, Inc. v. Glaser Bros., 158 Cal.App.3d 728, 738-39, 204 Cal. Rptr. 838 (1984)*; *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc., 668 F.2d 1014, 1024 (9th Cir. 1981)*.[55] None of this authority discusses the "same article or product" phrase.

Whether two products are the "same" is not a pure question of law — it requires a factual understanding of the products in question. Plaintiff, the party bearing the initial burden of production under *Aguilar*, has presented some evidence that print advertising and digital advertising are different products. *See* Plaintiff's Ex. 4, 95:9-16 110:16-19, 115:17-116:3, 116:7-117:5, 56-59, 66-68, 75-82.

Hearst relies on evidence that print and digital advertising are "substitutes" to support its argument that they are the 'same' product. Opposition, 14-15. This evidence, however, consists only of testimony to the effect **[*70]** that print advertising revenues are on the decline as a result of the rise in digital advertising. Eichmann Report ¶ 48; Bergin Decl. ¶ 5; Bentz Decl. ¶ 3; Hearst's Exs. H at 277:18-278:3, P at 32:18-38:3, 66:17-68:19, *FF at 157*:1-157:17, 199:15-200:19, 338:16-339:22, GG at 80:22-81:8, 98:23-99:13, *LL at 224*:19-225:19; Rubinfeld Report ¶¶ 33, 39-40; Supplemental Rubinfeld Report ¶¶ 12,17. This testimony does not demonstrate that print advertising and digital advertising are the 'same' product, but rather that digital advertising is a new alternative to print advertising that is outcompeting print advertising.

In short, the evidence is generally consistent — print advertising and digital advertising are not the same product.[56] Accordingly, Hearst may not rely on evidence that it was meeting prices for digital advertising[57] to support its

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[55] Plaintiff's citation to dicta in an appellate decision that was subsequently superseded by a decision of the California Supreme Court does not carry weight. Motion, 16 (citing *People v. Pay Less Drugstore, 143 P.2d 762, 769 (Cal. Ct. App. 1943)*, *affirmed by People v. Pay Less Drugstore, 25 Cal.2d 108, 153 P.2d 9 (1944)*.

[56] Hearst also argues, and offers undisputed evidence, that print advertising and digital advertising are at times sold in bundles. Opposition, 13-14 (citing evidence). Hearst argues that in such instances, the bundle is the product. *Id.* at 13. If this argument is correct, then the meeting competition defense is of no moment as to bundled packages, because the product in this case is FRROP print advertising.

meeting competition defense.[58] The meeting competition defense is limited to meeting competitors' prices for the "same article or product," not simply reducing prices to remain viable in the face of technological advancements that introduce new and more competitive profits.

BB. Same Locality or Trade Area

The second issue is whether, as a matter of law, the statutory "same **[*71]** locality or trade area" language precludes Hearst from relying on evidence that it priced its FRROP print display advertising to meet competition from other newspapers that sell print display advertising within the scope of Hearst's FRROP distribution, where those other newspapers compete with Hearst *outside* of the geographical region implicated by Plaintiff's claims. "Locality" and "trade area" are not defined terms. The terms are to be applied practically without a particular definition. *Pay Less Drug Store, 25 Cal.2d at 116*.

This dispute arises because the FRROP distribution of the Examiner and the Chronicle are not co-extensive. The Examiner's distribution footprint is wholly encompassed within the larger distribution footprint of the Chronicle. Motion, 19-20; Bergin Decl. ¶¶ 22, 35; Hearst's Ex. 3 at 7-8. The Chronicle's distribution footprint also overlaps with other newspapers that sell print display advertising, including BANG. Bergin Decl. ¶¶ 22, 35; Hearst's Ex. 3 at 7-8. FRROP advertising is, by definition, an advertising product that is distributed throughout the entirety of a newspapers distribution footprint. Hearst Ex. FF at 164:24-165:3. As a result, when the Chronicle sells FRROP advertising, a jury could **[*72]** reasonably infer the Chronicle is competing with pertinent advertisers in all localities or trade areas in which its newspapers are distributed.

Plaintiff's argument for a narrower statutory construction is derived from a reading of the statute that focuses on the term "locality" and reaches the conclusion that the "locality" is the area where the plaintiff and the defendant "heavily compete." Motion, 19. Setting aside Plaintiff's failure to account for the language of the statute, which permits the defense to be raised where a defendant meets prices from competitors in the same "locality *or trade area*," Plaintiff ignores *Pay Less'* instruction that the statutory language is to be applied practically. Plaintiff also fails to account for the role of the "meeting competition" defense in the statutory scheme. In this case, Plaintiff alleges that Hearst prices FRROP advertising in the Chronicle below cost to harm competition in San Francisco. *Section 17043*. Hearst is entitled to defend itself by arguing that the price of its product, FRROP advertising, was not set to harm competition, but was set to meet competition. *Sections 17050(d)*, *17071*. The product at issue is FRROP advertising. As noted above, FRROP advertising **[*73]** is sold to advertisers in a single purchase that covers a newspaper's entire FRROP foot print. Hearst's Exs. G at 48:16-51:12, *FF at 164*:24-165:3. For the Chronicle, this includes regions of the Bay Area that are beyond the scope of the Examiner's distribution. Motion, 19-20; Bergin Decl. ¶¶ 22, 35; Hearst's Ex. 3 at 7-8. So Hearst may rebut Plaintiff's evidence that Hearst set its FRROP pricing for the purpose of harming competition in San Francisco by showing that its pricing was necessary to meet competition for print display advertising in other areas in which FRROP print display advertising is consumed.

Whether there is sufficient evidence to conclude that Hearst did, in fact, set its prices to meet competition is discussed below.

ii. Evidence with Respect to Pricing to Meet Competition

Assuming Hearst can rely on competition from digital advertising or competition from print display advertising outside of San Francisco, Hearst must still present evidence that its allegedly unlawful pricing was "an endeavor made in good faith to meet the legal prices of a competitor." B+P *§ 17050(d)*.

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[57] This does not necessarily preclude Hearst from using evidence of the rise of digital advertising as background for an industry-wide decrease in print advertising prices, with which Hearst was attempting to keep pace.

[58] In any event, Hearst's evidence in support of its defense is not specific as to whether the competitor is advertising via print or digital media. Thus deciding this legal dispute is not essential to the resolution of this motion.

Plaintiff presents evidence that Hearst did not set its advertising prices in response to specific prices charged by **[*74]** other advertisers. Plaintiff's Ex. 33 at 105:17, Ex. 84 at 221:7-11; Hearst's Response to Separate Statement ¶¶ 76-77 (undisputed testimony that the Chronicle did not have a policy to match the prices BANG was charging and that the Chronicle's Director of Key Accounts could not recall an instance of the Chronicle matching a competitor's rate for ROP sales). And Plaintiff asserts that Hearst cannot produce any evidence that it did, in fact, set its FRROP display advertising prices to meet the prices from any competitor. Motion, 21.

Hearst argues that it has produced evidence that the Chronicle was individually negotiating prices to meet the competitive prices in the Bay Area market. Opposition, 19-20; Bergin Decl. ¶¶ 11 ("The Chronicle was forced to negotiate prices to meet the prices that the market would bear, including the prices of competitors selling advertising space"), 14 (referring to competition from "the Internet, Facebook, Google, broadcast television, cable television, radio, and billboards" and reiterating that the Chronicle was "attempting to meet competitive prices set by the market"); Bentz Decl. ¶¶ 12-13 (echoing Bergin); Defendant's Ex. Z at 105:16-106:4 (deposition **[*75]** testimony to the effect that advertising prices are individually negotiated, such that the Chronicle sold advertising space at lower prices to retain business), Ex B at 53:4-15 (deposition testimony to the effect that the Chronicle individually negotiated pricing to obtain maximum value on an individual-by-individual basis); Ex C at 46:21-47:11 (deposition testimony that the Chronicle can obtain rate card advertising rates in some categories but must individually negotiate lower rates to obtain business in other categories).[59] Plaintiff responds that the evidence marshalled by Hearst is insufficient as a matter of law to support a "meeting competition" defense. Reply, 7-10.

Hearst's evidence does not identify with specificity the prices that it believed any competitors were charging for any specified product — be it print advertising, digital advertising, or a bundle that included different forms of advertising. Rather, Hearst's evidence goes to the general point that Hearst sold its FRROP advertising for the highest price it could obtain-prices that it believed were generally higher than other competitors.[60] The question, for present purposes, is whether this evidence is sufficient **[*76]** for a jury to conclude, drawing all inferences in Hearst's favor, that Hearst set its prices for FRROP advertising to meet, but not beat, the prices of competitors selling FRROP advertising within the scope of Hearst's FRROP footprint.

California authority on the "meeting competition" defense is sparse. *Dooley's Hardware Mart v. Food Giant Markets, Inc., 21 Cal. App. 3d 513, 519, 98 Cal. Rptr. 543 (1971)* affirmed a trial court ruling applying the defense. But one cannot discern if the ruling was that the defendant had made out the "meeting competition" affirmative defense or supplied "evidence establishing otherwise that they did not have the requisite wrongful intent." In *People v. Pay Less Drug Store, 25 Cal. 2d 108, 117, 153 P.2d 9 (1944)*, the Court explained that there is no absolute requirement to ascertain a competitor's legal prices, but only to endeavor in good faith to meet the legal prices of a competitor. There, the defendants failed to make out the defense because the defendants continued their "long continued course of selling below cost after the lowered prices were abandoned by their competitors." *Id.* The California Civil Jury Instructions provide some gloss on the "good faith" requirement in *Pay Less*. The model instruction directs the jury to consider "all of the facts and circumstances present," including, without limitation, the nature **[*77]** and source of the information on which the defendant relied; the defendant's prior experience, if any, with similar information or with persons who provided the information; the defendant's prior pricing practices; and the

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[59] Hearst also points to Plaintiff's evidence of a sale made by the Chronicle at $3,000 per page as an effort to meet the Examiner's prices for the same customer, which were lower. Opposition, 10-11; Plaintiff's Exs. 36, 86-87. In the absence of evidence indicating that Hearst had knowledge of the Examiner's price at the time of the sale, this evidence does not support Hearst's assertion that the sale in question was priced in an effort to meet the Examiner's competition. *Compare* Bergin Decl. ¶ 14 (stating that the Chronicle understood that it "generally" charged the highest print newspaper advertising prices in the Bay Area). Similarly, Hearst points to an internal document indicating that Hearst made a particular advertising sale at a price point that was chosen because the Chronicle was negotiating the Examiner and needed to win the business. Plaintiff's Ex. 21. But, again, this does not indicate what the Examiner's price was, including whether Hearst was aware of the Examiner's offered price and/or if Hearst sold advertising below the Examiner's offered price.

[60] The truth of this general point is disputed. But, drawing all inferences in favor of Hearst, Hearst has established, for present purposes, that it sold its FRROP advertising for the highest price it could obtain in negotiations with individual advertisers.

defendant's general practices. CACI No. 3335. The ultimate question, as defined there, is whether the defendant reasonably believes that it was offering a price that would meet the competitor's price. *Id.*

Here, Hearst has produced evidence sufficient to support the conclusion, drawing all inferences in its favor, that it reasonably believed it was offering individually negotiated advertising prices that would meet, but not beat, the prices offered by competitors selling print display advertising. This includes evidence that (1) print advertising was in decline in the face of other forms of advertisement, which would drive down the prices that could be obtained by both the Chronicle and its competitors; (2) the Chronicle's larger FRROP footprint meant that its prices were higher than smaller newspapers; and (3) the Chronicle in fact believed its prices were generally higher than the prices offered by competitors. Eichmann Report ¶ 48; Bergin Decl. ¶¶ 5, 11, 22, 35; Bentz Decl. **[*78]** ¶¶ 3, 12-13; Hearst's Exs. 3 at 7-8, B at 53:4-15, C at 46:21-47:11, H at 277:18-278:3, P at 32:18-38:3, 66:17-68:19, *FF at 157*:1-157:17, 199:15-200:19, 338:16-339:22, Z at 105:16-106:4, GG at 80:22-81:8,98:23-99:13, *LL at 224*:19-225:19; Rubinfeld Report ¶¶ 33, 39-40; Supplemental Rubinfeld Report ¶¶ 12, 17.

Summary adjudication of this defense is not appropriate.

b. Standing

In its second affirmative defense, Hearst asserts that "Plaintiff lacks standing to bring all or some of the claims alleged." Answer, 1. It is undisputed that Plaintiff has standing to assert UPA and UCL claims from November 2011 to the present. Motion, 24; Opposition, 24; Reply, 13. Hearst alleges lack of standing prior to that date on the basis of undisputed evidence that the Examiner was acquired by David Black on November 30, 2011. Plaintiff's Responses to Defendant's Separate Statement of Disputed and Undisputed Facts ¶ 95. Moreover, Hearst asserts that Plaintiff has not established that it has standing to assert claims prior to November 30,2011. Opposition, 24.

Plaintiff's standing to sue is undisputed as to each of the claims at issue in this lawsuit. B+P §§ 17070, 17204. The dispute between the parties appears to be the scope **[*79]** of damages the Examiner may seek, or perhaps the admissibility of evidence pertaining to the period before November 2011.[61] These are not standing issues. Because Plaintiff's standing is undisputed, the second affirmative defense is summarily adjudicated in Plaintiff's favor.

c. Unclean Hands

In its ninth affirmative defense, Hearst asserts that Plaintiff "is barred from any recovery or relief in this action by the doctrine of unclean hands and/or *in pari delicto*." Answer, 3. In their papers, the parties focused only on the availability of the unclean hands defense with respect to claims pursuant to the UPA. Motion, 23; Opposition, 22-23. In reply, Plaintiff concedes that the unclean hands defense may, as a matter of law, be considered in connection with the equitable remedies sought under the UCL. Reply, 12 n.5; *see also* *Cortez v. Purolator Air Filtration Prod. Co., 23 Cal.4th 163, 179-80, 96 Cal. Rptr. 2d 518, 999 P.2d 706 (2000)*. This concession is fatal to Plaintiff's motion, which was based purely on the legal viability of the unclean hands defense. Summary adjudication of an affirmative defense is not proper unless it will wholly resolve the defense. *C.C.P. § 437c(f)(1)*. This claim cannot be summarily adjudicated.

d. Laches

The eleventh affirmative defense cites laches. This may apply to UCL remedies. Opposition, **[*80]** 25; Reply, 13-14; *Cortez, 23 Cal.4th at 179-80*.

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[61] The Examiner may actually agree that its damages model only addresses the period 2012 forward. Reply at 13.

Hearst notes evidence that Plaintiff's were aware of the challenged conduct since "at least as early as 2012," whereas this action was filed in June 2013. Def.Ex. 11 at 11. Hearst also argues that Plaintiff's delay in bringing this action as prejudicial for various reasons. Opposition, 25. Plaintiff does not respond to Hearst's factual showing or argument, instead relying on its legal argument that laches is not available as a defense to a claim under the UPA, Reply, 13-14, but because the defense applies to UCL it cannot be summarily adjudicated.

e. Public Policy

The fifteenth affirmative defense cites California public policy. Hearst clarifies these policies are policies rooted in the First Amendment and the unclean hands doctrine, regardless of whether those defenses strictly apply. Opposition, 24. To the same extent those defenses may be raised with respect to the proper relief under the UCL, as discussed elsewhere.

f. First Amendment

The sixteenth affirmative defense asserts the Examiner's claims are barred by free speech and free press clauses of the United States and California constitutions. Plaintiff argues Hearst should not be permitted to submit evidence pertaining to its First Amendment defense to the **[*81]** jury, but cites no authority. Plaintiff's actual argument — that the underlying statutes are constitutional — do not completely dispose of Hearst's affirmative defense.

g. Due Process and Equal Protection

In its seventeenth affirmative defense, Hearst alleges that Plaintiff's claims are barred by the due process and equal protection clauses of the United States and California constitutions. Hearst clarifies that it intends to argue that permitting Plaintiff to prove its case on an aggregated basis violates its constitutional due process rights, and that it is premature to determine the defense now. Opposition, 28. *Id.* Plaintiff does not respond to this argument. Reply, 25-26.

h. Adequacy of Remedy at Law

The eighteenth affirmative defense asserts that Plaintiff's claims for equitable relief are bared because the Examiner has an adequate remedy at law. Plaintiff does not dispute that Hearst may resist injunctive relief under the UCL based on the adequacy of legal remedies. Reply, 11. Accordingly I may not fully resolve the defense now. *Prudential Home Mortg. Co. v. Superior Court, 66 Cal.App.4th 1236, 1249-50, 78 Cal. Rptr. 2d 566 (1998)*.

i. Treble, Punitive, Exemplary, or any Other Enhanced Damages

The nineteenth affirmative defense asserts the unavailability of punitive and related damages. The defense may be valid **[*82]** for at least one cause of action and accordingly summary adjudication is denied.

j. Severance

Assuming the issue of severance is properly raised in this motion, Plaintiff has not provided a persuasive basis to sever the trial of the affirmative defenses. The "meeting competition" defense is closely connected with Plaintiff's case. E.g., §§ 17043, 17050(d), 17071. Nor has the Examiner shown any utility to severing the other defenses.

Conclusion

(1) Hearst's Motion for Summary Judgment is granted, because I have summarily adjudicated in its favor the claims for below cost sales, loss leader, secret unearned discounts, and under the Unfair Competition Law. I have not adjudicated in Hearst's favor the meeting competition defense or the 'claims for damages and future damages' claims but nevertheless there are no Plaintiff's claims remaining for trial. The trial date of 16 October 2017 and all future dates are vacated. Hearst should now promptly prepare a form of judgment, have it reviewed by the Examiner's counsel for form, and then present it to me.

(2) Hearst's Motion to Exclude Testimony from Eichmann is granted.

(3) Plaintiff's Motion for Summary Adjudication or, in the Alternative, Severance **[*83]** of Affirmative Defenses is granted to the extent of the standing defense, and is otherwise denied.

(4) Plaintiff's Motion to Exclude Testimony from Klein is granted as to the Transcom payment and is otherwise denied.

(5) Plaintiff's Motion to Exclude Testimony from Rubinfeld is granted as to the switching analysis and market for advertising (¶ 54 of his report), and is otherwise denied.

Dated: August 22, 2017

/s/ Curtis E.A. Karnow

Curtis E.A. Karnow

Judge Of The Superior Court

[Imhoff v. Goin](#)

Appellate Division, Superior Court of California, Los Angeles County

January 16, 2018, Opinion Filed

CASE NO.: BC593161

Reporter
2018 Cal. Super. LEXIS 4 *

MARGARET IMHOFF, individually and on behalf of all others similarly situated, Plaintiff, vs. SUZANNE GOIN; CAROLYN STEIN; LUCQUES CATERING, INC.; DAVID LENTZ; DIRTY CHICKEN, INC, JON SHOOK; VINNY DOTOLO; O&A HOSPITALITY LCC; 1104 WILSHIRE LLC; JOSIAH CITRIN; RUSTIC CANYON FOOD AND WINE, INC.; JOSH LOEB; ZOE NATHAN; and DOES 1-100, inclusive, Defendants.

Prior History: *Imhoff v. Goin, 2016 Cal. Super. LEXIS 14818 (Cal. Super. Ct., Sept. 19, 2016)*

Core Terms

notice, class member, restaurants, surcharge, Defendants', class action, ascertainable, card, Cartwright Act, damages, customers, records, class certification, certification, member of the class, conspiracy, questions, Adequacy, parties, Reply, staff, self-identify, predominate, employees, benefits, defenses, courts, individual class member, personal notice, common issue

Judges: **[*1]** MAREN E. NELSON, Judge of the Superior Court.

Opinion by: MAREN E. NELSON

Opinion

ORDER TENTATIVELY CERTIFYING CLASS

I. BACKGROUND

Plaintiff Margaret Imhoff ("Plaintiff") commenced this class action on September 1, 2015, against Defendants Suzanne Goin, Carolyn Stein, Lucques Catering, Inc., David Lentz, Dirty Chicken, Inc., Jon Shook, Vinny Dotolo, O&A Hospitality, LLC, 1104 Wilshire, LLC, Josiah Citrin, Rustic Canyon Food and Wine, Inc., Josh Loeb, and Zoe Nathan (collectively, "Defendants") for violation of: (1) the Cartwright Act (*Bus. & Profs Code, §16720 et seq.*); and (2) the Unfair Competition Law (*Bus. & Profs. Code, §17200 et seq.*).

Defendants are competitors and owners/operators of restaurants in Los Angeles who allegedly met and agreed to levy a 3% to 3.5% employee benefit surcharge on their customers' bill beginning in September 1, 2014 in order to start health care coverage October 1, 2014. (Compl., ¶¶39, 41; Sterrett Decl., Exs. B [Newsletter], C [Press Release].) Plaintiff alleges this was advantageous for Defendants because an individual restaurant implementing the surcharge would be placed at a competitive disadvantage. (Compl., ¶¶40, 42.) Plaintiff argues this conduct constitutes horizontal price fixing, harms consumers, and is illegal per se in California **[*2]** under the Cartwright Act and Unfair Competition Law.

There are 17 restaurants at issue. Lucques, A.O.C., The Hungry Cat, Tavern, and The Larder are owned and operated by Defendants Suzanne Goin, Carolyn Stein, Lucques Catering, Inc., and David Lentz. (Compl., ¶¶17-20.) Animal, Son of a Gun, Trois Mec, Petit Trois, and Jon & Vinny's are owned and operated by Defendants Dirty Chicken, Inc., Jon Shook, and Vinny Dotolo. (*Id.*, ¶¶21-23.) Melisse and Lemon Moon are owned and operated by Defendants O&A Hospitality, LLC, 1104 Wilshire, LLC, and Josiah Citrin. (*Id.*, ¶¶24-26.) Rustic Canyon, Huckleberry Cafe & Bakery, and Milo & Olive are owned and operated by Rustic Canyon Food and Wine, Inc., Josh Loeb, and Zoe Nathan. (*Id.*, ¶¶27-29.) Defendants identify two more restaurants: Lucques Catering, Inc. and the Larder at Burton Way. (Patrick Decl., Ex. A [Chart].)

Defendants demurred to the Complaint. The demurrer was overruled. This motion for class certification followed.

Plaintiff seeks to certify a class of:

“All natural persons who were customers at one or more of Defendants' California restaurants on or after September 1, 2014.

Excluded from the class are: retail employees; corporate officers, **[*3]** members of the board of directors, and senior executives of Defendants; and any and all judges and justices, and chambers' staff, assigned to hear or adjudicate any aspect of this litigation.“

(Mot. at p.3.)

Extensive pleadings and evidentiary objections thereto were filed.[1] The Court heard oral argument on October 27, 2017. For the reasons that follow, the Court now issues its ruling, tentatively concluding that the class, as proposed, may not be certified but that a more limited class may be certified. However, given that much of what Plaintiff argues regarding class certification was contained only in her Reply, and given that the Court relies on authorities published after oral argument, the parties will be afforded thirty (30) days after entry of this (Tentative) Order to assert any objections thereto.

II. LEGAL STANDARD

A class action is authorized “when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . .” (*Cal. Code Civ. Proc. § 382*.)

“The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, **[*4]** and substantial benefits from certification that render proceeding as a class superior to the alternatives.” (*Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1021, 139 Cal. Rptr. 3d 315, 273 P.3d 513* (“*Brinker*”); *Dailey v. Sears, Roebuck and Co. (2013) 214 Cal.App.4th 974, 988, 154 Cal. Rptr. 3d 480*.)

These requirements are commonly articulated in terms of four primary requirements:

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[1] Defendants submit evidentiary objections to the declarations of Dan Montrenes and Dr. Charles J. Cicchetti, Ph.D.

The evidentiary objections to Montrenes' declaration are sustained (Nos. 1-9). Montrenes states his qualifications as to his ability to opine on the general practices of credit card processing companies and his experience in the field, from which he bases his opinions as to how to ascertain class members. However, he shows no knowledge as to Defendants' payment processing systems or what data they maintain (See Dec. Para. 7). His opinions are thus irrelevant and speculative.

The evidentiary objections to Dr. Cicchetti's declaration are sustained as to Nos. 1, 3 and 8 as they constitute inadmissible legal conclusions. No. 2 is overruled as his statement is based on his economic opinion of whether the 3% surcharge is a harm to Defendants' consumers. Nos. 4-7 regarding his methodology for calculating damages are overruled as the objections are not proper evidentiary objections but are disagreements on the merits of the opinion.

“Numerosity” — The proposed class is numerous in size (see *Rose v. City of Hayward (1981) 126 Cal.App.3d 926, 934, 179 Cal. Rptr. 287*);

“Ascertainability” — It is possible to ascertain who is a member of the class by resort to common, objective characteristics (*Hicks v. Kaufman & Broad Home Corp. (2001) 89 Cal.App.4th 908, 915, 107 Cal. Rptr. 2d 761*) because “the right of each individual to recover [is] not [] based on a separate set of facts applicable only to him” (*Vasquez v. Superior Court (1971) 4 Cal.3d 800, 809, 94 Cal. Rptr. 796, 484 P.2d 964*);

“Community of Common Interest” — Common questions of law or fact predominate and class representatives have claims or defenses typical of the class and can adequately represent the class (*Richmond v. Dart Industries, Inc. (1981) 29 Cal.3d 462, 470, 174 Cal. Rptr. 515, 629 P.2d 23*); and

“Superiority” — Proceeding with the case as a class action is superior to other methods of adjudication (*Fireside Bank v. Superior Court (2007) 40 Cal. 4th 1069, 1089, 56 Cal. Rptr. 3d 861, 155 P.3d 268*).

III. ANALYSIS

A. Ascertainability

The primary purpose of the ascertainability requirement is to provide notice to all potential class members. (*Hicks v. Kaufman & Broad Home Corp. (2001) 89 Cal.App.4th 908, 914, 107 Cal. Rptr. 2d 761*.) In this regard it is important to note that judgments in class actions have preclusive res judicata effects that bind absent class members. (*Id.*) If class members are to receive individualized monetary damages, due process requires notice and **[*5]** an opportunity to opt out. (*Carter v. City of Los Angeles (2014) 224 Cal.App.4th 808, 823, 169 Cal. Rptr. 3d 131* [quoting *Wal-Mart Stores, Inc. v. Dukes (2011) 564 U.S. 338, 360], 824* [“[T]he takeaway from *Wal-Mart* is that the *due process clause* requires notice and opt-out rights to class members unless ‘the relief sought must perforce affect the entire class at once ....’”].) “A class representative has the burden to define an ascertainable class.” (*Sevidal v. Target Corp. (2010) 189 Cal.App.4th 905, 918, 117 Cal. Rptr. 3d 66*.)

What constitutes an ascertainable class has been the subject of considerable recent case law. Plaintiff relies on *Aguirre v. Amscan Holdings, Inc. (2015) 234 Cal. App. 4th 1290, 184 Cal. Rptr. 3d 415*, arguing that at this stage of the proceedings she need identify neither a method for giving notice to the proposed class nor the names of individual class members but need only put forth a class definition that is precise, objective and presently ascertainable. Based thereon, Plaintiff asserts that individual class members can then “self-identify.”

Under the “self-identification” theory a class is ascertainable for purposes of class certification “if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description.” (*Sevidal, 189 Cal.App.4th 905, 920, 117 Cal. Rptr. 3d 66*.) Although not entirely free from doubt, it appears that it is also required that the parties and the Court be able to **[*6]** confirm that those who self-identify as members of the class are in fact class members by way of some form of objective evidence. (*Sotelo v Medianews Group Inc. (2012) 207 Cal. App. 4th 639, 650, 143 Cal. Rptr. 3d 293*; *Estrada v FedExGround Package System Inc. (2007) 154 Cal. App. 4th 1, 64 Cal. Rptr. 3d 327*.)

Plaintiff further argues, for the first time in her Reply, that she need not establish a means of giving personal notice to class members and argues that under the notice provisions contained in *California Rules of Court, Rule 3.766(f)* notice in this case may be given by placing notice in newspapers, on defendants' websites, and by placing signage in the restaurants at issue. (Reply at page 5, lines 10-16.) In. this regard Plaintiff relies on *Aguirre*, which held that a “representative plaintiff need not identify, much less locate, individual class members to establish the existence of an ascertainable class.” (*Aguirre, supra, 234 Cal.App.4th at p. 1301*.) *Aguirre* further held that the representative plaintiff need not establish a means for providing personal notice of the action to individual class members.

Aguirre's holdings were discussed in *Noel v. Thrifty Payless, Inc. 17 Cal. App. 5th 1315, 226 Cal. Rptr. 3d 465 (2017)*:

We do not endorse the view that individual members of the class must be *identified by name* at the time of a class certification motion, but we do not think it violates class action doctrine or public policy to require some showing of a *means of identifying* them and a description of how notice **[*7]** might be given. The court may require personal notice in a specific case, depending in part on the amount of loss at stake for each individual class member and the size of the class.

Aguirre acknowledged, as have other cases, that the purpose of the ascertainability requirement is the due process concern of facilitating notice to the class. (*Aguirre, supra, 234 Cal.App.4th at pp. 1300-1301*.) That being so, we do not think a trial court should be precluded from inquiring into the means of giving notice at the class certification stage. Yet, the only inquiry into identity of class members allowed under *Aguirre* is to determine whether the class will be ascertainable "at the remedial stage" based on self-identification. (*Id. at p. 1300*.) To ignore the issue of identifying class members for notice purposes gives short shrift to the due process considerations in play at the certification stage, a consequence of the holding of *Aguirre* in which we do not concur."

(*Noel v. Thrifty Payless, Inc. (2017) 17 Cal.App.5th 1315, 1332, 226 Cal. Rptr. 3d 465*.)

The Court concurs with the analysis in *Noel* and, to the extent it rejects *Aguirre*, adopts the reasoning of *Noel* pursuant to *Auto Equity Sales v Superior Court (1962) 57 Cal. 2d 450, 456, 20 Cal. Rptr. 321, 369 P.2d 937* (Where there is more than one appellate court decision, and such appellate decisions are in conflict, the court exercising inferior jurisdiction can and must make a choice **[*8]** between the conflicting decisions). Specifically, the Court finds that it is not sufficient for Plaintiff to merely put forth a class definition under which members can self-identify at the remedial stage of the proceedings. Because absent class members are bound by findings in a class of which they are a member it is a due process imperative that they be given the best possible notice under the circumstances and an opportunity to opt out *prior to* a liability finding if they do not desire to be bound by the Court's findings. Thus, as *Noel* recognized, in determining whether a class is ascertainable, Plaintiff bears the burden to show a *means* of identifying class members and a description of how notice might be given. As was aptly noted by the Court in *Sotelo v. Medianews Group, Inc., 207 Cal. App. 4th at 649*: "[W]here the proposed class contains an unknown number of members who have no recorded relationship with respondents, a serious notice issue results. The theoretical ability to self-identify as a member of the class is useless if one never receives notice of the action."

The Court further concurs that, as recognized in *Sotelo* and *Estrada*, where class members self-identify they must be able to objectively show that they are, in fact, members **[*9]** of the class.

Given these considerations this case has two ascertainability issues. First, the class definition is overly broad, as it includes both those who did and those who did not pay the surcharge at issue. Further, it contains no cut off period. Plaintiff concedes that if an individual did not pay the 3% surcharge he or she should not be included in the class. This includes those individuals who patronized restaurants that did not impose the surcharge (Reply ISO Motion for Class Certification at page 2:27- 3: 2).

Plaintiff asks that the Court modify the class definition to include only those that actually paid the surcharge. The Court may undoubtedly modify Plaintiff's proposal to define a narrower class. (*Hicks v. Kaufman & Broad Home Corp., supra, 89 Cal.App.4th at 916*.) However, there remains the fact that Plaintiff fails to show that there are objective records from which the class can be given personal notice of the action prior to establishing liability nor does she show that membership in the class can be confirmed at the remedial stage by defendants' records.

Plaintiff initially argued that this information could be derived from the defendants' credit card records, relying upon the opinion of her expert, Dan Montrenes. Mr. Montrenes **[*10]** opined in his Declaration in support of this motion that customers who dined at the restaurants in question could be identified from either the daily receipts issued to the merchants from their respective point of sale systems or the monthly merchant processing statements. It was asserted that from these records the credit card numbers of the purchasers could be obtained and that from that data the card issuers could then identify the customers at issue.

The difficulty with this testimony is that in deposition it became clear that Mr. Montrenes had no familiarity with any credit card processing system of any defendant nor did he review any of defendants' business records to determine whether the daily or monthly records he identifies exist, or, if they do, whether the data therein can then be used by the card issuer to identify class members or what time and expense might be involved in such an exercise.[2] (See Ex. B to Patrick Dec. at page 77, lines 5-7; page 118: 1-12.) Further, Montrenes testified that the data identifying specific persons using a credit card is maintained only by the card issuer, and that the first 5 digits of a patron's credit card are required for the issuer to **[*11]** identify the customer, but that Defendants' point of sale systems may not retain information to obtain a complete credit card number. (*Id.* at 34:19-35:10, 49:5-13, 130:3-10.) Further, the deposition showed that not all class members would be identified by Montrenes' proposed methodology even if the data were available. Class members who paid in cash, by gift card, and the like, would be excluded. Finally, the methodology would not determine who paid the credit card bill in question. (Id. at page 106, lines 8-15; 107:12-110:3; 110:8-112:25.) This would need to be determined by examination of individual diners' credit card receipts (See Exhibit B to Styne Dec), as there is no evidence that the amount that appears on the restaurants' daily or monthly records or the customers' monthly statements includes anything other than a gross amount charged. In short, it does not appear that there is a feasible way to give personal notice to class members.

This does not entirely foreclose the possibility of an ascertainable class. In her Reply, Plaintiff proposed that such notice may be dispensed with in favor of publication notice, either in newspapers or on defendants' websites, or by the placing of signage in **[*12]** defendants' restaurants. It is established that "where members of a class have a substantial claim, individual notice is required because it is essential for them to decide whether to remain as members of the class and become bound by the rule of res judicata; whether to intervene with their own counsel; or whether to "opt out" and pursue their independent remedies [W]hen the membership of the class is huge, the damages are minimal, and res judicata and the other problems listed in the first group are insignificant, notice by publication is adequate." (*Cooper v. American Sav. & Loan Assn. (1976) 55 Cal. App. 3d 274, 127 Cal. Rptr. 579*.)

From the limited evidence presented it would appear that the publication form of notice suggested may be appropriate. There is, however, no information available to Defendants to confirm the class' membership. Thus, once the notice is given, self-identifying class members' status as class members could only be confirmed by presentation of their individual receipt showing that they paid the surcharge.

Because the form of notice was first suggested in the Reply Defendants were given no opportunity to respond thereto. Further, no party has addressed the propriety of confirming class membership by reference to individual receipts. Accordingly, **[*13]** the Court tentatively finds that publication notice (i.e. on defendants' websites, in their newsletters, and with signage in their restaurants) would be adequate and that a class is ascertainable only to the extent it consists of:

"All natural persons who were customers at one or more of Defendants' California restaurants between September 1, 2014 and the date of certification who paid an employee benefit surcharge and who maintain a receipt showing such payment. Excluded from the class are: defendants' employees, corporate officers, members of the board of directors, and senior executives of Defendants; and any and all judges and justices, and chambers' staff, assigned to hear or adjudicate any aspect of this litigation."

The parties shall have until February 20, 2018 to file any objection to this proposed definition or the proposed form of notice.

B. Numerosity

There is "[n]o set number ... required as a matter of law for the maintenance of a class action." (See *Rose v. City of Hayward (1981) 126 Cal.App.3d 926, 934, 179 Cal. Rptr. 287* [citing examples wherein classes of as little as 10

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[2] Insofar as the Court can ascertain, Plaintiff did not obtain any discovery from Defendants as to the type of records they or their card processers maintain.

[*Bowles v. Superior Court (1955) 44 Cal.2d 574, 283 P.2d 704]* and 28 [*Hebbard v. Colgrove (1972) 28 Cal.App.3d 1017, 105 Cal. Rptr. 172]* were upheld].)

Plaintiff states that "the precise number and specific identity of each class member is presently unknown to Plaintiff," but estimates that it can be inferred **[*14]** there are thousands of class members. (Mot. at p.8.) Plaintiff presents evidence that Lucques Catering, Inc. collected $177,106 in revenue as of August 5, 2016, and Rustic Canyon Food and Wine collected $149,755.84 in 2014 and 2015 from the surcharge (see Sterrett Decl., Exs. D [Lucques Form Interrogatory No. 17.1 Response] and F [Publication]).

This element is not disputed by Defendants and is established as to the proposed revised class defined above.

C. Commonality

"[T]he 'ultimate question' for predominance is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.]" (*Duran v. U.S. Bank Nat. Assn. (2014) 59 Cal.4th 1, 28, 172 Cal. Rptr. 3d 371, 325 P.3d 916* ("*Duran*"), quoting *Collins v. Rocha (1972) 7 Cal.3d 232, 238, 102 Cal. Rptr. 1, 497 P.2d 225*.) "'As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.'" (*Brinker at 1022*.) "However . . . class treatment is not appropriate 'if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover following **[*15]** the 'class judgment" on common issues." (*Duran at 28*, quoting *City of San Jose v. Superior Court (1974) 12 Cal.3d 447, 459, 115 Cal. Rptr. 797, 525 P.2d 701*.) At the certification stage, the Court need not reach the merits of a case. (*Brinker at 1023*.)

Courts are required to carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts. (*See* *Under v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435, 97 Cal. Rptr. 2d 179, 2 P.3d 27*.) As the Supreme Court stated in *Duran*: "trial courts deciding whether to certify a class must consider not just whether common questions exist, but also whether it will be feasible to try the case as a class action." (*Duran at 27*.) Plaintiff must establish by a "preponderance of the evidence that the class action proceeding is superior to alternate means for a fair and efficient adjudication of the litigation." (*Sav-on Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, 332, 17 Cal. Rptr. 3d 906, 96 P.3d 194*.) Thus, it is not sufficient to show that there are some common issues of law or fact. "Defenses that raise individual questions about the calculation of *damages* generally do not defeat certification. [Citation.] However, a defense in which *liability itself* is predicated on factual questions specific to individual claimants poses a much greater challenge to manageability. This distinction is important." (*Duran* 30, emphasis in original.)

(i) Common Issues Predominate [*16] With Respect to the Cartwright Act Claim

Plaintiff identifies several common questions of law and fact, including: (1) whether Defendants' conduct violated the Cartwright Act; (2) whether Defendants' conspiracy and associated agreements, or any one of them, constitute a per se violation of the Cartwright Act; (3) whether Defendants fraudulently concealed their conduct; (4) whether Defendants' conspiracy and associated agreements restrained trade, commerce, or competition in the Los Angeles restaurant industry; (5) whether, under principles of California ***antitrust law***, Plaintiff and the class suffered injury as a "but for" cause of Defendants' conduct; (6) the effect of Defendants' conduct upon, and the injury caused to, the business or property of Plaintiff and the class; (7) the type and measure of damages suffered by Plaintiff and the class; and (8) whether Defendants should be enjoined to prevent future harm to the class and other California residents. (Compl., ¶35; Mot. at p.11.)

With regard to a Cartwright Act claim, "[t]he basic considerations applicable to class certification have been summarized: Liability in an antitrust action requires proof of two sets of facts: (1) an antitrust **[*17]** violation and (2) a resultant injury to plaintiffs. This latter requirement is also known as 'impact,' 'causation,' 'fact of damage,' and 'fact of injury.' If plaintiffs have stated claims of illegality and impact which can be proved predominantly with facts applicable to the class as a whole, rather than by a series of facts relevant to only individual or small groups of plaintiffs, then prosecution of this case as a class action is appropriate and desirable. [Citation.] If classwide proof of illegality and impact is not possible, the class must be decertified." (*Rosack v. Volvo of America Corp. (1982) 131 Cal.App.3d 741, 752, 182 Cal. Rptr. 800* ("*Rosack*") [quoting *Presidio Golf Club v. National Linen Supply Corp.* (N.D. Cal. 1976) 1976-2 Trade Cases ¶61, 221, pp. 70, 627, 70, 629] [internal quotations omitted].) Proof of injury (impact) is more troublesome than proof of violation, but may be inferred, such that each class member must prove he/she absorbed some portion of the overcharges, when a conspiracy to fix prices has been established and plaintiffs have established that they purchased the affected goods or services. (*Rosack at 753*; *B.W.I Custom Kitchens v. Owens-Illinois, Inc. (1987) 191 Cal. App. 3d 1341, 1348-50, 235 Cal. Rptr. 228* ("*B.W.I.*").)

In this case whether a conspiracy existed is susceptible to common proof. The question applicable across the class is: was there a conspiratorial agreement? **[*18]** (*Id.* at 1349; *In re Cipro Cases I and II (2004) 121 Cal.App.4th 402, 410, 17 Cal. Rptr. 3d 1*.) Plaintiff provides various newsletters from several of the restaurants at issue showing that they agreed to include a 3% healthcare surcharge. For example, Rustic Canyon Wine Bar and Seasonal Kitchen's newsletter volume 45 provides a section entitled "3% Health Care Surcharge," wherein it states, "We've recently sat down with other like-minded local chefs and restaurant owners like Suzanne Goin, Carolyn Stein & David Lentz, John Shook & Vinny Dotolo, and Josiah Citrin to come up with a plan to offer coverage and have decided to implement a 3% employee benefit surcharge added to all of our checks beginning September 1st to pay the October 1 premium." (Sterrett Decl, Ex. B; see also Ex. C [The Hungry Cat restaurant's press release].) Defendant does not deny the existence of such newsletters or that some of the restaurants did in fact add 3% healthcare surcharges to the bills. They note, however, that the fact of the meeting and the discussion was not hidden but well publicized; some restaurants did not adopt the surcharge; others adopted a higher surcharge; some made clear that the charge was optional; others indicate their staffs were trained to explain the charge and removed **[*19]** it upon request. All of those facts make clear that whether an antitrust violation or conspiracy exists is a common question of law and fact that is susceptible to common proof.

Proof of injury (or impact/causation) is somewhat more nuanced. Under California law impact may be inferred when a conspiracy to fix prices has been proven and plaintiffs have established they purchased the price-fixed goods or services. (*B.W.I. at 1350*.) "Once a price-fixing conspiracy has been established, it follows that the class has been injured to some extent." (*Rosack at 760*.) Thus, "impact can be treated as a common question for certification purposes." (*Id. at 753*.) Plaintiff provides Defendant Lucques Catering, Inc.'s discovery responses showing aggregate $177,106 it collected from the 3% surcharge and Rustic Canyon's publication indicating it collected $149,755.84. (Sterrett Decl., Exs. D, F. See *Bruno v. Superior Court (1981) 127 Cal.App.3d 120, 129, 179 Cal. Rptr. 342* FN4 [stating that due process does not prevent calculation of damages on a class-wide basis and that an aggregate calculation is more accurate than summing all individual claims].) Defendants also admit that Rustic Canyon, Huckleberry, Milo & Olive, A.O.C., The Larder at Burton Way, Lucques, Melisse, and The Hungry Cat added a 3% charge, while **[*20]** The Larder at Maple Drive and Tavern added a 3.5% charge. (Patrick Decl., Ex. A [Chart]; Loeb Decl, ¶3, Exs. 1-11; Styne Decl, ¶¶3-5, 10, Exs. A-D; Imhoff Decl, Ex. 1.)

Accordingly, proof of injury is also susceptible to common proof and may be determined on a class wide basis.[3]

In opposition, Defendants argue that various defenses they plan to assert raise individual issues. Specifically, they argue that loss mitigation mechanisms were available to putative class members (i.e., they could agree to pay the surcharge, ask to remove it, or lower their tip to negate it), making this an individualized, restaurant-by-restaurant and meal-by-meal question. As an initial matter it is doubtful that loss mitigation defenses are permitted with respect to a Cartwright Act claim. (See *Clayworth v. Pfizer, Inc. (2010) 49 Cal.4th 758, 111 Cal. Rptr. 3d 666, 233 P.3d 1066* ["Passing on" defense rejected.]) The very issue of whether a mitigation defense is permissible is, of itself, a common question.

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[3] The unrefuted evidence is that Animal, Son of a Gun, Trois Mec, Petit Trois, John & Vinny's, and Sweet Rose Creamery did not impose the surcharge. (See Dec. of Josh Loeb, Vincent Dotolo, Jon Shook.)

Nor is Defendants' "but for" argument persuasive. The gist of this argument is that there is no showing that "but for" the alleged agreement prices would not have been raised. In this regard, defendants' expert notes that an increase in minimum wage as of July 1, 2014 and the adoption of **[*21]** the Affordable Care Act suggest that market forces would have caused the surcharge in any event. This too is a common factual question. See *Catalano, Inc. v. Target Sales, Inc. (1980) 446 U.S. 643, 649, 100 S. Ct. 1925, 64 L. Ed. 2d 580* [where Sherman Act violation based on competitors' agreement of horizontal price fixing of credit terms found although other "but for" causes such as other reasons to increase prices may arguably be relevant, "the fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful *per se*.")

Defendants also take issue with Plaintiff's retained economist, Dr. Charles J. Cicchetti, Ph.D., and his opinion that damages can be established on a classwide basis. As an initial matter, and as noted *supra*, there is a presumption of impact (damages) when a horizontal market-wide restraint of trade is shown. (*In re Cipro Cases, supra, 121 Cal. App. 4th at 413*; *B.W.I. at 1350*.) Further, that there may be a difference of expert opinion as to how to calculate damages on a classwide basis does not counsel against class certification. Some of the defendants admitted in discovery that they have exact figures in their own records to show the amount they received as a result of imposition of the surcharge (see Sterrett Decl., Exs. D [Lucques Form Interrogatory No. 17.1 **[*22]** Response] and F [Publication]). Further, given that the class is to be limited to those that have receipts that show that they paid the surcharge, the calculation of damages either as a whole or individually amounts to a math exercise only.

In short, the Cartwright Act claim is susceptible to common proof and common questions of law and fact predominate. If the Court determines that Defendants' proposed defenses are legally viable and that individual inquiry will be need to establish liability as to class members, decertification can be requested at that time.

(ii) Common issues predominate with the UCL claim

The parties do not discuss the UCL claim in detail, and Plaintiff only attempts to do so in reply (at pp. 12-13). However, as evidenced by the complaint, the UCL claim is derivative of Plaintiff's first cause of action for violation of the Cartwright Act. (See Compl., ¶¶53-54.) Plaintiff seeks equitable class-wide relief for, among other things, restitution. (*Id.*, ¶57(c).) As this claim is derivative of the first cause of action, common issues predominate here as well. "[R]estitution under the UCL may be ordered without individualized proof of harm...." (*People ex rel. Bill Lockyer v. Fremont Life Ins. Co. (2002) 104 Cal.App.4th 508, 532, 128 Cal. Rptr. 2d 463*.)

D. Superiority/Manageability

Closely **[*23]** related to the issue of commonality is that of manageability and superiority. Courts are required to carefully weigh the respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts. (*See* *Under v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435, 97 Cal. Rptr. 2d 179, 2 P.3d 27*.) As the Supreme Court stated in *Duron*, "trial courts deciding whether to certify a class must consider not just whether common questions exist, but also whether it will be feasible to try the case as a class action." (*Duran at 27*.)

"Manageability of the class with regard to proof of the amount of each class member's damages may present an independent ground for failure to certify the class." (*Rosack at 754*.)

Here, a class action mechanism is a superior method to adjudicate the claims. Plaintiff states that individually, class members would not have the resources to pursue this action on their own and it would be inefficient for the Court to try as the injuries alleged are relatively small in amount, and thus a class action is a superior method. "Cartwright Act defendants should not be 'permitted to retain ill gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in **[*24]** large amounts.'" (*Clayworth v. Pfizer, Inc. (2010) 49 Cal.4th 758, 784, 111 Cal. Rptr. 3d 666, 233 P.3d 1066* FN21.)

As for manageability, Plaintiff provides not trial plan. Nonetheless, in limiting the class as described above the Court does not foresee any significant manageability issues.

E. Adequacy and Typicality

"'The adequacy inquiry ... serves to uncover conflicts of interest between named parties and the class they seek to represent.' [Citation.] '... To assure "adequate" representation, the class representative's personal claim must not be inconsistent with the claims of other members of the class.' [Citations.] Similarly, the purpose of the typicality requirement 'is to assure that the interest of the named representative aligns with the interests of the class.' [Citation.] 'Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought.' [Citations.] The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.' [Citation.]" (*Johnson v. GlaxoSmithKline, Inc. (2008) 166 Cal.App.4th 1497, 1509, 83 Cal. Rptr. 3d 607*.)

Furthermore, "[a]dequacy of representation depends on whether the plaintiff's **[*25]** attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." (*See* McGhee v. *Bank of America (1976) 60 Cal. App. 3d 442, 450, 131 Cal. Rptr. 482*.)

(i) Adequacy and Typicality of Plaintiff

Plaintiff states she has been actively involved in this action since its inception, understands the risk of pursuing this case, and is committed to pursue the case to completion to the best interest of the putative class members. (Imhoff Decl., ¶¶3-5.) In opposition, Defendant provides evidence of putative class members to show that Plaintiff's interests are antagonistic to their views—namely, that while she views the surcharge as a negative impact, various putative class members have indicated their support for such coverage. (See Lucques' Guest Declarations, Rustic Canyon's Customer Declarations.) Absent a widespread showing of antagonism in the class suit where the conflict goes to the very subject matter of the litigation, adequacy of representation will not be called into question. (*Richmond v. Dart Industs., Inc. (1981) 29 Cal. 3d 462, 470, 174 Cal. Rptr. 515, 629 P.2d 23*.) Here, Defendants have not upheld their burden in showing such widespread antagonism. Patrons who are opposed to the action can elect not to participate in it.

Defendants also argue that Plaintiff was a patron of **[*26]** only 1 of 17 restaurants at issue in this action on only one occasion and thus is not typical of other diners at other restaurants. Plaintiff alleges that on April 24, 2015 (during the class period), she dined at Rustic Canyon Restaurant and was charged a 3% health surcharge of $3.60, which she viewed as mandatory. (Imhoff Decl., ¶2, Ex. 1 [Receipt].) Plaintiff has identified 17 restaurants in her complaint. As the chart attached to the Patrick Decl., Ex. A, shows, the defendants were not entirely uniform in imposing the surcharge. Some did not impose it at all. Some imposed 3%. Some imposed 3.5%. Some indicated it was optional. For example, The Huckleberry Brunch Menu states, "*A 3% charge is added to all checks to cover the costs of offering fully covered healthcare to our employees. Feel free to ask us if you have any questions about the charge. Thank you for supporting a healthier and happier staff." (Loeb Decl., Ex. 2 [Huckleberry Menu].) In contrast, the Rustic Canyon receipt states, "A 3% charge is added to the restaurant to all checks to help offer fully covered healthcare to all of our employees. Please let us know if you have questions *or if you'd like the charge removed* **[*27]** . Thanks for supporting a healthier staff!" (Loeb Decl., Ex. 9 [Rustic Canyon Receipt] [emphasis added].) Similarly, Melisse's receipts and menu state. "A 3% Charge is added for Health Insurance Benefits for our employees. (This can be removed upon request)." (1104 Wilshire, LLC's Staff Declarations at Eric Szymanski Decl., Exs. A-B.)

The fact that Imhoff viewed the charge as "mandatory" when her receipt indicated the charge could be removed, does not render her inadequate. This fact is not shown to be unique to her nor necessarily show a defense unique to her given the current state of the law. Further, how Plaintiff is inadequate to represent those who dined at other establishments is not shown. While different diners may have had different experiences and some may have not been subject to the charge, either because the restaurant did not charge it at all or it was removed, there is no showing that Plaintiff's experience was unique or subjects her to unique defenses.

Adequacy is thus shown.

(ii) Adequacy of Counsel

Plaintiff's counsel, Sterrett Law and the Law Office of Ara Jabagchourian, are qualified to litigate this action as they have shown their experience in class actions, including **[*28]** antitrust actions. (Sterrett Decl., ¶¶4-9; Jabagchourian Decl., ¶¶5, 7-14, Exs. A-C.) This is not disputed by Defendants. Adequacy of counsel has been established.

IV. CONCLUSION

The Court tentatively finds that a class is certifiable to the extent it consists of:

“All natural persons who were customers at one or more of Defendants' California restaurants between September 1, 2014 and the date of certification who paid an employee benefit surcharge and who maintain a receipt showing such payment. Excluded from the class are: defendants' employees; corporate officers, members of the board of directors, and senior executives of Defendants; and any and all judges and justices, and chambers' staff, assigned to hear or adjudicate any aspect of this litigation.”

The parties shall have until February 20, 2018 to file any objection to this definition or to argue any further points regarding certification based upon the proposed definition and method of giving notice. A further hearing shall be held 3/21, 2018 at 11:00am Prior thereto counsel shall meet and confer and discuss the language of a proposed notice in the event the Court proceeds as indicated herein. Proposals for notice language shall **[*29]** be filed 5 court days in advance of 3/21, 2018.

January 16, 2018

/s/ Maren E. Nelson

MAREN E. NELSON

Judge of the Superior Court

LBM Props. LLC v. DirecTV Inc.

Superior Court of California, County of Los Angeles

January 25, 2018, Decided; January 25, 2018, Filed

LASC Case No: BC540043

Reporter
2018 Cal. Super. LEXIS 4046 *

LBM PROPERTIES, LLC ("LBM"), a California Limited Liability Company, POSAMAR, LLC ("Posamar"), a California Limited Liability Company, AMILA, LLC ("Amila"), a California Limited Liability Company, and GEORGE KEFALAS, an individual, on behalf of themselves and all others similarly situated, Plaintiffs, v. DIRECTV, Inc., a Delaware corporation, et al., Defendants.

Prior History: *LBM Props., LLC v. DirecTV, LLC, 2016 Cal. Super. LEXIS 14844 (Cal. Super. Ct., Nov. 7, 2016)*

Core Terms

installation, landlord, injunction, consumers, dishes, class certification, injunctive relief, ascertainable, preliminary injunction, class action, class member, Plaintiffs', predominate, permission, documents, roof, unfair, satellite, merits, tenant, installation of equipment, authorization, questions, damages, courts, class representative, likely to suffer, satellite dish, certification, permanently

Judges: **[*1]** Kenneth Freeman, Judge of the Superior Court.

Opinion by: Kenneth Freeman

Opinion

COURT'S RULING AND ORDER RE:

1) PLAINTIFFS' MOTION FOR CLASS CERTIFICATION; AND

2) PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I.

BACKGROUND

Plaintiffs, a group of owners of Multi-Dwelling Units ("MDUs"), brought this putative class action against Defendant DirecTV. Plaintiffs allege that DirecTV "uses an illegal sham process which enables it to violate the rights of the owners of MDUs in, *inter alia*, the State of California by permanently affixing its satellite dishes and associated equipment to rooftops, external walls and other common or restricted areas without Landlord consent.[1] Plaintiffs bring this action to stop this alleged policy and practice.[2]

[1] Complaint, ¶2.

Plaintiffs allege that DirecTV delivers its satellite television service to subscribers who reside in MDUs by means of satellite dishes and associated equipment that it installs in, on, or near the MDUs.[3] Because the DirecTV system requires unrestricted "line of sight" access to a satellite, the Equipment is typically affixed permanently to the exterior of the MDU in which the subscriber resides and in which the subscriber's television is to be used.[4] Plaintiffs allege that DirecTV **[*2]** knows that it is, and at all times relevant, was, improper and illegal to permanently affix its Equipment to common or restricted areas of an MDU, such as the MDU's exterior walls or rooftop, without first obtaining the authorization of the Landlord.[5]

The Plaintiffs allege that while the Federal Communications Commission had issued a regulation that limits restrictions by Landlords on attachment of devices (such as DirecTV's equipment) to property "within the exclusive use or control" of a tenant, it did not diminish the ability of Landlords of MDUs to prohibit the installation or use of such equipment in common or restricted access areas not within the tenant's exclusive use or control.[6] DirecTV allegedly knows that it cannot permanently attach its equipment to the exterior wall or roof of an MDU without Landlord consent. However, DirecTV's policy and procedure for obtaining authorization for such attachment purportedly fails to take proper account of the Landlord's rights.[7]

According to the Complaint, DirecTV requests that its *subscribers* submit to it a written authorization form ("the Form"). The Form allegedly acknowledges that installation of the Equipment is improper without prior **[*3]** approval of the Landlord, and purports to release DirecTV from any liability arising from the installation of the Equipment.[8] The Installation Form gives MDU tenants two alternatives: i) either obtain the landlord's written authorization for the installation of the equipment by getting the Landlord to sign and return Part 1 of the installation form to DirecTV; or ii) simply sign the Form themselves and return to DirecTV Part 2 of the Installation Form, which states: "Landlord approval of a DirecTV System installation at [address] has been verbally approved by my landlord (or is not required pursuant to my lease or rental agreement)."[9]

However, the Plaintiffs allege that DirecTV's purpose in allowing customers to obtain "consent" through part 2 of the Form is to help it circumvent the requirement that it obtain the required Landlord consent, thereby enabling DirecTV to sell its services to prospective customers.[10] Part 2 of the Form allegedly enables DirecTV "to document and perpetuate the fiction that it has obtained the required Landlord consent when it knows that it has not."[11] Plaintiffs allege that DirecTV has had and adheres to a uniform sham practice and policy designed to evidence **[*4]** the fiction that it has obtained consent from the Landlord and thereby justify the wrongful installation of the Equipment — a policy and practice that was conceived by, is directed by, and is implemented under the direction of, the corporate decision-makers in DirecTV's Los Angeles County corporate headquarters.[12]

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[2] *Id.*

[3] Complaint, ¶9.

[4] *Id.*

[5] Complaint, ¶11.

[6] Complaint, ¶11.

[7] Complaint, ¶11.

[8] Complaint, ¶12.

[9] Complaint, ¶12.

[10] Complaint, ¶14.

[11] *Id.*

[12] Complaint, ¶15.

Plaintiffs allege that DirecTV has a duty to avoid actions which are likely to breach a legal duty and injure a foreseeable class of persons such as Landlords.[13] It is allegedly reasonable for companies to obtain actual permission from Landlords prior to permanently installing their equipment on a Landlord's MDU, and it is unreasonable to have a policy of making installations without Landlord permission.[14] Rather than meet this reasonable standard of care, Plaintiff alleges that DirecTV instead authorized installation of its Equipment "based on nothing more than the representation of tenants by accepting Part 2 of the Installation Form."[15]

Based on these allegations and the other allegations more fully set forth in the operative pleading (and following Defendant's prior motion to strike), Plaintiffs allege a sole claim for violation of *Business & Professions Code §§17200 et seq.*

Plaintiffs have two (2) motions before **[*5]** the Court. In the first motion, Plaintiffs seek an order certifying the following injunctive relief class:

> All persons or entities ("Landlords") that own and rent or lease residential MDUs in the State of California upon or in common or restricted areas of which Defendant DIRECTV, LLC, or its agents ("DIRECTV") have permanently installed DIRECTV Equipment.

In the second motion, Plaintiffs move for a preliminary injunction, restraining Defendant DirecTV, LLC or its agents during the pendency of this action from entering into common or restricted areas and/or attaching its equipment thereto, of residential multi-dwelling units in the State of California based solely on the representation of a renter who wishes to subscribe to DirecTV's services that the landlord has authorized the installation or that no permission of the landlord is required for the installation.

For the reasons discussed *infra*, the motion for class certification of the injunctive relief class is granted. The motion for a preliminary injunction is denied.

II.

ISSUE WITH DOCUMENTS LODGED UNDER SEAL

Plaintiffs have lodged with the Court copies of unredacted documents in support of the motion for class certification, pursuant **[*6]** to the parties' stipulated protective order. However, where a party wants to use at trial (or on a summary judgment motion) documents that are subject to a confidentiality agreement or protective order, and does *not* want the documents sealed, he or she must:

> — lodge the unredacted documents with the court clerk as required on a motion to seal (¶ *9:417*);
> — file redacted copies of the documents (redacted so as to conceal the protected portions); and
>
> — give notice to opposing parties that the documents will become part of the public court file unless they file a timely motion to seal. See California Practice Guide, Civil Procedure Before Trial, ¶9:420 (The Rutter Group 2017) (citing *CRC 2.551(b)(3)* and Savaglio v. Wal-Mart Stores, Inc., supra, 149 CA4th at 601, 57 CR3d at 224).

Under *CRC 2.551(b)(3)(B)*, if the party that produced the documents and was served with the notice under (A)(iii) fails to file a motion or an application to seal the records within 10 days or to obtain a court order extending the time to file such a motion or an application, the clerk must promptly transfer all the unredacted records subject to the

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[13] Complaint, ¶17.

[14] *Id.*

[15] *Id.*

confidentiality agreement or protective order and any pleadings, memorandums, declarations, and other documents that disclose the contents of the records from the envelope, container, **[*7]** or secure electronic file to the public file. If the party files a motion or an application to seal within 10 days or such later time as the court has ordered, these documents are to remain conditionally under seal until the court rules on the motion or application and thereafter are to be filed as ordered by the court. See *CRC 2.551(b)(3)(B)*.

Thus, the Court can and has considered the lodged, unredacted documents. In doing so, however, the Court notes that either party may file an application to seal the documents within 10 days of this order. The application must include an appropriate proposed order for the Court's signature. Unless a non-filing party objects, no hearing will be required for the application. The application must state clearly on the first page that, pursuant to today's Ruling and Order, no hearing date was required by the Court or requested by any non-filing party. If no application to seal is made within 10 days, the lodged documents will be publicly filed.

III.

MOTION FOR CLASS CERTIFICATION

A. Standards governing motions for class certification

CCP § 382 allows the Court to certify a class action "when the question is one of a common interest, of many persons, or when the parties are numerous, **[*8]** and it is impracticable to bring them all before the court..." Additionally, "[T]here must be questions of law or fact common to the class that are substantially similar and predominate over the questions affecting the individual members; the claims of the representatives must be typical of the claims or defenses of the class; and the class representatives must be able to fairly and adequately protect the interests of the class." *Wershba v. Apple Computer, Inc. (2001) 91 Cal.App. 4th 224, 237-238, 110 Cal. Rptr. 2d 145*.

Stated differently, there are two broad requirements for a class action: 1) an ascertainable class; and 2) a well-defined community of interest. *Hicks v. Kaufman & Broad Home Corp. (2001) 89 Cal. App. 4th 908, 913, 107 Cal. Rptr. 2d 761*. *See also* *Brinker Rest. Corp. v. Sup. Ct. (2012) 53 Cal.4th 1004, 1021, 139 Cal. Rptr. 3d 315, 273 P.3d 513* (a plaintiff seeking certification "must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives").

In determining whether the class is ascertainable, courts consider the size of the class, the class definition, and the means to identify class members. *Reyes v. San Diego County Board of Supervisors (1987) 89 Cal. App. 3d 1263, 1274*. The community of interest factor is established by showing: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) **[*9]** class representatives who can adequately represent the class. *Linder v. Thrifty Oil Co. (2000) 23 Cal. 4th 429, 435, 97 Cal. Rptr. 2d 179, 2 P.3d 27*.

Further, under California law, a class action is not "superior" where there are numerous and substantial questions affecting each class member's right to recover, following determination of liability to the class as a whole. *City of San Jose v. Superior Court (Lands Unlimited) (1974) 12 Cal.3d 447, 459, 115 Cal. Rptr. 797, 525 P.2d 701*.

California follows the procedures set forth under *Federal Rules of Civil Procedure 23* for class actions, whenever California authority is lacking. *City of San Jose v. Superior Court, supra, 12 Cal. 3d at 453*.

The potentially mandatory and discretionary factors applicable to class certification include:

- whether there is an ascertainable class (mandatory);

- ■ whether there is a well-defined community of interest as to common questions of law or fact that predominate (mandatory);
- ■ whether the class is so numerous that joinder of all members is impractical;
- ■ whether the claims of the representative plaintiff are typical of the class;
- ■ whether substantial benefits accrue to the litigants and courts;
- ■ whether the proposed class is manageable;
- ■ whether the person representing the class is able to fairly and adequately protect the interests of the class; and
- ■ whether a class action is superior (including whether individual plaintiffs would bring claims for small sums).

E.g., *Feitelberg v. Credit Suisse First Boston, LLC (2005) 134 Cal.App.4th 997, 1014, 36 Cal. Rptr. 3d 592*; *Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435, 97 Cal. Rptr. 2d 179, 2 P.3d 27*; *Prince v. CLS Transp., Inc. (2004) 118 Cal.App.4th 1320, 1324, 13 Cal. Rptr. 3d 725*; *In re Cipro Cases land* ***[*10]*** *II (2004) 121 Cal.App.4th 402, 409*.

The burden of proof on a motion for class certification is on the party seeking certification. *Washington Mutual Bank, NA. v. Superior Court (Briseno) (2001) 24 Cal. 4th 906, 922, 103 Cal. Rptr. 2d 320, 15 P.3d 1071*; *Soderstedt v. CBIZ S. California, LLC (2011) 197 Cal.App.4th 133, 154, 127 Cal. Rptr. 3d 394*. This usually requires demonstration of predominance of common issues of law and fact, and manageability of the proposed class. *Lockheed Martin Corp. v. Sup.Ct. (Carrillo) (2003) 29 Cal.4th 1096, 1103-1104, 131 Cal. Rptr. 2d 1, 63 P.3d 913*; California Practice Guide, Civil Procedure Before Trial, ¶14:99.2 (The Rutter Group 2017). In making the determination as to whether the requirements for a class action have been met, the court may consider not only the parties' pleadings but also extrinsic evidence, including declarations and discovery responses. California Practice Guide, Civil Procedure Before Trial, ¶14:99 (The Rutter Group 2017). The court must examine together all of the evidence presented by the moving and opposing parties "under the prism of plaintiffs theory of recovery." *Department of Fish & Game v. Sup.Ct. (Adams) (2011) 197 Cal.App.4th 1323, 1349, 129 Cal. Rptr. 3d 719*

The burden is on the party seeking class certification to establish each of the class prerequisites through substantial evidence. *Say-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, 327*. In weighing the evidence, the Court does not evaluate whether the claims asserted are legally or factually meritorious. *Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 439-440, 97 Cal. Rptr. 2d 179, 2 P.3d 27*.

B. *CCP §382* controls, not the Federal Rules of Civil Procedure, for the putative injunctive relief class

Plaintiffs argue that the standards of *Federal Rule of Civil Procedure 23(b)(1)(A)* and *23(b)(2)* govern the motion for certification **[*11]** of this injunctive relief class. Recently, however, the Court of Appeal for the Fourth District stated:

> [T]here is no gap in California precedent to be filled by reference to *Federal Rules of Civil Procedure, rule 23(b)(1)(A)* or *(b)(2)*(28 U.S.C.) on the issue of what class certification standards must be met when a plaintiff seeks only declaratory or injunctive relief on behalf of a class. *Even when the plaintiff seeks solely declaratory or injunctive relief*, California case law follows the well-established requirements that our Supreme Court has consistently stated, namely, (as relevant here) that the plaintiff must establish that (1) the class is ascertainable; (2) common Questions predominate; and (3) a class action would provide substantial benefits, making it superior to other procedures for resolving the controversy. *Hefczyc v. Rady Children's Hospital-San Diego (2017) 17 Cal.App.5th 518, 535-536, 225 Cal. Rptr. 3d 641* (emphasis added).

In light of this authority, Plaintiffs' reliance on Federal *Rule 23(b)(2)* for the notion that "the party seeking certification must show that 'the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole'"[16] is not persuasive. Nor is the Plaintiffs' argument that **[*12]** "[f]or a class to be certified under these

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[16] Motion at 11:14-17 (citing FRCivPro 23(b)(2)).

sections, '[it is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole,' even if not all class members have been injured by the challenged practice."[17]

Accordingly, Plaintiffs must demonstrate that the class certification requirements as set forth under California law (referenced *supra*) are satisfied.

C. <u>Discussion</u>

With the above standards in mind, Plaintiffs seek an order certifying the following injunctive relief class:

> All persons or entities ("Landlords") that own and rent or lease residential MDUs in the State of California upon or in common or restricted areas of which Defendant DIRECTV, LLC, or its agents ("DIRECTV") have permanently installed DIRECTV Equipment.

As the party moving for class certification, the evidentiary burden to demonstrate the class elements are satisfied falls on Plaintiffs.

<u>Ascertainability/Numerosity</u>

"Ascertainability requires a class definition that is 'precise, objective and *presently* ascertainable.' Otherwise, it is not possible to give adequate notice to class members or to determine after the litigation has concluded who is barred from relitigating." California **[*13]** Practice Guide, Civil Procedure Before Trial, ¶14:23 (The <u>Rutter Group</u> 2017) (citing *Global Minerals & Metals Corp. v. Sup.Ct. (National Metals, Inc.) (2003) 113 Cal.App.4th 836, 858, 7 Cal. Rptr. 3d 28* (emphasis added)). The class should be defined in terms of objective characteristics and common transactional facts that will enable identification of the class members when such identification becomes necessary. *Hicks v. Kaufman & Broad Home Corp., supra, 89 Cal.App.4th at 915*.

The goal is to use terminology that will convey sufficient meaning "to enable persons hearing it to determine whether they are members of the class plaintiffs wish to represent." *Global Minerals & Metals Corp. v. Sup.Ct. (National Metals, Inc.), supra, 113 Cal.App.4th at 858*. Importantly, a class may be ascertainable even if the definition includes ultimate facts or conclusions of law. *Hicks, supra, 89 Cal.App.4th at 915-916*. "Class members are 'ascertainable' *where they may be readily identified without unreasonable expense or time by reference to official records*." *Thompson v. Automobile Club of Southern California, supra, 217 Cal.App.4th 719, 728* (internal citations omitted; emphasis added); *see also* *Bridgeford v. PacificHealth Corp. (2012) 202 Cal.App.4th 1034, 1041, 135 Cal. Rptr. 3d 905*. "In determining whether a class is ascertainable, the trial court examines the class definition, the size of the class and the means of identifying class members. [Citation.]" *Lee v. Dynamax, Inc. (2008) 166 Cal.App.4th 1325, 1334*.

"Courts have recognized that 'class certification can be denied for lack of ascertainability when the proposed definition is overbroad and the plaintiff offers no means by which only those class members who have claims can be **[*14]** identified from those who should not be included in the class.' [Citation.]" *Sevidal v. Target Corp. (2010) 189 Cal.App.4th 905, 921, 117 Cal. Rptr. 3d 66*.

Further, no set number is required as a matter of law for the maintenance of a class action. *Hebbard v. Colgrove (1972) 28 Cal.App.3d 1017, 1030, 105 Cal. Rptr. 172*. California case law indicates that as few as ten (10) or twenty-eight (28) members satisfies numerosity. *Bowles v. Superior Court (1955) 44 Cal.2d 574, 283 P.2d 704*; *Hebbard, 28 Cal.App.3d at 1030*.

<u>Numerosity</u>

[17] Motion at 11:17-20 (citing *Walters v. Reno (9th Cir. 1998) 145 F.3d 1032, 1047)*.

In support of numerosity, Plaintiffs reference the deposition of DirecTV's Person Most Knowledgeable ("PMK"), Adrian Dimech. Dimech testified that DirecTV installs over one million systems per year.[18] Plaintiffs also reference the 38,000 electronic signatures appearing on Part 2 of its consent form, which DirecTV produced in discovery.[19]

This evidence establishes that the putative class is sufficiently numerous.

Ascertainability

With respect to ascertainability, the Court previously determined in its earlier motion to strike that the class was ascertainable. The Court's September 11, 2015 Ruling and Order Re: Defendants' Motion to Strike Class Allegations stated:

> [A]t the pleading stage, the Court determines that class 2 is ascertainable, with respect to the UCL claim. The Court recognizes that the UCL does not "authorize an award for injunctive relief and/or restitution on behalf of a consumer who was never **[*15]** exposed in any way to an allegedly wrongful business practice." *Davis-Miller v. Automobile Club of Southern California (2011) 201 Cal.App.4th 106, 121, 134 Cal. Rptr. 3d 551*. However, in the Court's view, subclass 2 would not necessarily be overbroad as to the UCL class. The named Plaintiffs themselves have alleged injury in fact pursuant to the UCL's standing requirements, as articulated in *In re Tobacco II Cases (2009) 46 Cal.4th 98* and its progeny (holding that only the class representatives in a UCL claim must meet the standing requirements of injury and causation). In the Court's view, subclass 2 is ascertainable, insofar as it seeks relief pursuant to the UCL.[20]

Here, the class is defined in a straightforward manner. Persons who hear the class definition would know whether they are landlords that own and rent or lease residential multi-dwelling units where DirecTV has installed equipment in common or restricted areas. Further, the class is defined in terms of objective characteristics.

As alleged in the complaint, DirecTV requests that its subscribers submit to it a written authorization form ("the Form"). The Form allegedly acknowledges that installation of the Equipment is improper without prior approval of the Landlord, and purports to release DirecTV from any liability arising from the installation of the Equipment.[21] The Installation **[*16]** Form gives MDU tenants two alternatives: i) either obtain the landlord's written authorization for the installation of the equipment by getting the Landlord to sign and return Part 1 of the installation form to DirecTV; or ii) simply sign the Form themselves and return to DirecTV Part 2 of the Installation Form, which states: "Landlord approval of a DirecTV System installation at [address] has been verbally approved by my landlord (or is not required pursuant to my lease or rental agreement)."[22]

In the Court's view, actual consent by certain landlords would not be relevant in assessing whether, on a going-forward basis, DirecTV continues to implement a policy that would allow installations to occur potentially *without* a landlord's consent.

For these reasons, ascertainability is satisfied at the class certification stage.

Do common questions predominate?

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[18] Dimech Depo. at 26:7-8 (Exh. 2 to Rosenberg Decl.).

[19] A portion of these forms for Orange County DirecTV installations from October 18, 2013 through October 27, 2013 is attached as Exhibit 7 to the Rosenberg Declaration.

[20] September 11, 2015 Ruling and Order re: Defendants' Motion to Strike Class Allegations at 8:17-9:4.

[21] Complaint, ¶12.

[22] Complaint, ¶12.

a. General standards on the "commonality" element

In deciding whether the common questions "predominate," the courts must identify the common and individual issues; consider the manageability of those issues; and, taking into account the available management tools, weigh the common issues against the individual issues to determine which of **[*17]** them predominate. California Practice Guide, Civil Procedure Before Trial, ¶14:16 (The Rutter Group 2017) (referencing *Dunbar v. Albertson's, Inc. (2006) 141 Cal.App.4th 1422, 1432-1433, 47 Cal. Rptr. 3d 83)*.

Additionally, a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages. *Vasquez v. Superior Court (1971) 4 Cal.3d 800, 815-816, 94 Cal. Rptr. 796, 484 P.2d 964*. However, a class action "will not be permitted...where there are diverse factual issues to be resolved, even though there may be many common questions of law." *Brown v. Regents of Univ. of Calif (1984) 151 Cal. App. 3d 982, 988-89, 198 Cal. Rptr. 916*. "[E]ach member must not be required to individually litigate numerous and substantial questions to determine his right to recover following the class judgment." *City of San Jose, supra, at 460*.

In *Arenas v. El Torito, Inc. (2010) 183 Cal.App.4th 723, 108 Cal. Rptr. 3d 15*, the Court of Appeal observed:

> The focus in a class certification dispute is not entirely on the merits but on the procedural issue of what types of questions are likely to arise in the litigation—common or individual. Thus, the existence of some common issues of law and fact does not dispose of the class certification issue. (Rather, in order to justify class certification, the Supreme Court held, "[T]he proponent of certification must show ... that questions of law or fact common to the class predominate over **[*18]** the questions affecting the individual members ...." *Arenas v. El Torito, Inc., 183 Cal.App.4th at 732* (citations omitted).

Critically, the court in *Jaimez v. Daiohs USA, Inc. (2009) 181 Cal.App.4th 1286, 1298, 105 Cal. Rptr. 3d 443* recognized that that 'the trial court must evaluate whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment ...." (citing *Ghazaryan v. Diva Limousine, Ltd. (2008) 169 Cal.App.4th 1524, 1531, 87 Cal. Rptr. 3d 518)* (emphasis added).

However, "when the merits of the claim are enmeshed with class action requirements, the trial court must consider evidence bearing on the factual elements necessary to determine whether to certify the class." *Bartold v. Glendale Fed'l Bank (2000) 81 Cal.App.4th 816, 829, 97 Cal. Rptr. 2d 226*; *Brinker Restaurant Corp. v. Sup. Ct. (Hohnbaum), supra, 53 Cal.4th at 1023-1024*; *JP. Morgan & Co., Inc. v. Sup.Ct. (Heliotrope Gen., Inc.) (2003) 113 Cal.App.4th 195, 222, 6 Cal. Rptr. 3d 214*; *see* *Wal-Mart Stores, Inc. v. Dukes (2011) 131 S.Ct. 2541, 2551—*class determination will "(Orequently. . . entail some overlap with the merits of the plaintiffs underlying claim"]

Such issues include, e.g., "whether substantially similar questions are common to the class and predominate over individual questions or whether the claims or defenses of the representative plaintiffs are typical of class claims or defenses." *Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 443, 97 Cal. Rptr. 2d 179, 2 P.3d 27*; *see* *Brinker Restaurant Corp. v. Sup. Ct. (Hohnbaum), supra, 53 Cal.4th at 1024* ("whether common or individual questions predominate will often depend upon resolution of issues closely tied to the merits"); *Morgan v. Wet Seal, Inc. (2012) 210 Cal.App.4th 1341, 1358, 149 Cal. Rptr. 3d 70*.

Predominance is a comparative concept, and 'the necessity for class members to individually establish eligibility does not mean individual fact questions predominate.' [Citation.]" *Medrazo v. Honda of North Hollywood, supra*, 166 Cal.App.4th at 99-100 (emphasis added). **[*19]** Common issues are predominant when such issues would be primary to each individual action. *Caro v. Procter & Gamble Co. (1993) 18 Cal.App.4th 644,447*-48.

b. Discussion on commonality

According to Plaintiffs, DirecTV employs a policy of depending on the tenant to provide consent for installation of the equipment. Specifically, Plaintiffs reference the Demich Deposition, where he testified that DirecTV employs such a policy.[23] Demich confirms that DirecTV accepts a dwelling occupant's representation that an owner or authorized agent of the owner has consented to the installation of DirecTV equipment in common areas of an MDU as sufficient authorization to go ahead with the installation.[24] Demich confirmed that it is DirecTV's general policy that if a customer who provides a signature in §2 of the consent form, DirecTV does not independently verify the installation has actually been approved by the landlord.[25]

DirecTV's training manual sets forth its policy with obtaining permission for installation. The manual states in applicable part as follows:

> **Landlord Permission Form**
>
> This form is only required if the customer is renting the property where you will be installing DIRECTV service. Because you are modifying the property..., it is important that the customer **[*20]** has received permission from their landlord to do so.
> The form is signed by the customer, not the landlord. The form states that the customer has, in fact, received permission from the landlord to install DIRECTV equipment. You do not need to speak with or receive a signature from the landlord. The customer is responsible for getting this permission.[26]

Michael Kefalas, one of the managers of Plaintiff LBM Properties, states that he has never succeeded in having DirecTV remove an unauthorized satellite dish, and is unable to identify which dish on a roof belongs to which tenant (and DirecTV has never assisted him in doing so).[27]

Frederick Nichols, another putative class member, testified that in 2013, he and his wife discovered that DirecTV, without having sought or obtained permission, and without his prior knowledge, had installed a satellite dish on the roofs of two of his multi-unit rental properties in Torrance.[28] He says that the installations damaged the roofs.[29] Nichols said that had he been asked, he would not have agreed to the installation of these dishes on the roofs of his properties.[30]

Mark Sanger states that two DirecTV satellite dishes were installed on the rooftop of his building **[*21]** without his prior knowledge or consent.[31] He states that in November 2014, he contacted DirecTV and demanded the dishes be removed; however, DirecTV did not remove them.[32]

Ken Wayte states that in December 2014, following installation of a new roof, he was surprised to discover that DirecTV had installed a satellite dish on the roof of the Property.[33] He says he did not consent to the installation of

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[23] Demich Depo., Exh. 2 to Rosenberg Decl. at 20:9-20:25, 17:21-18:2, and 22:24-24:7.

[24] Denich Depo., Exh. 2 to Rosenberg Decl. at 17:21-18:2.

[25] Demich Depo. at 20:18-25.

[26] See Exh. 5 to Rosenberg Decl. at DTVPROD0005886.

[27] Kefalas Decl., ¶4.

[28] Nichols Decl., ¶3.

[29] Nichols Decl., ¶6.

[30] Nichols Decl., ¶8.

[31] Sanger Decl., ¶3

[32] *Id.*

[33] Wayte Decl., ¶3.

that dish, and that nobody ever contacted him to ask permission to make the installation.[34] Wayte says that had he been asked, he *would* not have agreed to the installation of a dish on the roof of the property.[35]

William Risconsin similarly states that in August 2016, he discovered that a new DirecTV satellite dish had been improperly installed directly onto his roof without his knowledge or consent, with wires attached to the newly refurbished building exterior.[36] He also became aware that a second DirecTV satellite dish had earlier been improperly installed directly onto the roof without his knowledge or consent.[37] A third older DirecTV satellite dish installation that he had been aware of was properly mounted onto a vertical faux chimney, but for some unknown reason was not being used.[38] Risconsin **[*22]** states that he did not agree to the installation of these two satellite dishes, and DirecTV never asked him for permission to install them.[39] Risoncon says that had he been asked, he would not have agreed to installation of these dishes on the roof of the property.[40]

John Landsberger says that in March 2015, he discovered that about nine new DirecTV satellite dishes had been improperly installed directly onto the roof of his building.[41] He says that DirecTV told him that of the nine satellite dishes that had been installed on the property, there were only three signed authorization documents in its records.[42] The others had been installed by subcontractors or retailers who sold DirecTV service.[43] Landsberger states that he did not agree to the installation of any of these satellite dishes, and DirecTV never asked him for permission to install them.[44] Had he been asked, he would not have agreed to the installation of these dishes on the roof of the property.[45]

Katharine Beckwith states that in 2014 or earlier, she discovered that DirecTV, without having sought or obtained her permission, and without her prior knowledge, had installed a satellite dish on the roof of the property.[46]

The **[*23]** evidence before the Court indicates that DirecTV has a uniform policy with respect to its authorization form. DirecTV's company-wide policy is that it accepts a tenant's representation that the landlord has authorized the installation of the equipment in common areas (in the event that the landlord has not provided written authorization for the installation). This is a common question which predominates among the class. Even if individual landlords provide written authorization, this same policy would have applied equally to them, as well. The question is whether this policy constitutes an unfair business practice in violation of the UCL. Such a question would be suitable on a class-wide basis for this putative class seeking injunctive relief.

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[34] Wayte Decl., ¶4.

[35] *Id.*

[36] Risconsin Decl., ¶3.

[37] *Id.*

[38] *Id.*

[39] Risconsin Decl., ¶5

[40] *Id.*

[41] Landsberger Decl., ¶3.

[42] *Id.*, ¶5.

[43] *Id.*

[44] Landsberger Decl., ¶7.

[45] *Id.*

[46] Beckwith Decl., ¶3.

The Court is not persuaded that it would be required to conduct individualized determinations with respect to consent (including examining individual leases to determine if a tenant had a lawful right to have a satellite dish installed) and whether an individual class member's rights were violated by DirecTV. While this argument may be persuasive in assessing whether a given tenant suffered damages (or otherwise is entitled to restitution under **[*24]** the UCL), Plaintiffs here solely seek certification of an injunctive relief class. If unlawful, the Court would be empowered to issue an injunction to prohibit the policy on a going-forward basis.

For these reasons, the Court finds that Plaintiffs have submitted substantial evidence supporting the notion that common questions predominate over individualized assessments.

Typicality

The purported class representative's claim must be "typical" but not necessarily identical to the claims of other class members. It is sufficient that the representative is similarly situated so that he or she will have the motive to litigate on behalf of all class members. *Classen v. Weller (1983) 145 Cal.App.3d 27, 45, 192 Cal. Rptr. 914*. Thus, it is not necessary that the class representative have personally incurred all of the damages suffered by each of the other class members. *Wershba v. Apple Computer, Inc., supra, 91 Cal.App.4th at 228*.

"Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought. The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." **[*25]** *Seastrom v. Neways, Inc. (2007) 149 Cal.App.4th 1496, 1502, 57 Cal. Rptr. 3d 903*.

Here, Plaintiffs' claims are typical. Mr. Kefalas, the managing agent for each of the Plaintiffs, has testified about Plaintiffs' experiences with the installations of DirecTV equipment on the properties. Kefalas claims that the Plaintiffs did not authorize the installation of the equipment, and that DirecTV has refused to remove the equipment when asked to do so. The Plaintiffs' experience is similar to those of the other putative class members who have submitted declarations (as set forth above).

DirecTV raises a number of arguments in opposition to typicality. First, Defendant attacks the notion that there is no evidence that the putative class of landlords was subjected to similar unauthorized attachments. Again, however, it is the allegedly unlawful policy, on a going-forward basis, which Plaintiffs seek to enjoin. They were all subjected to the same policy; whether a given landlord suffered damages does not detract from typicality for purposes of the injunctive relief class.

DirecTV also argues that Plaintiffs do not satisfy typicality because they are subject to unique defenses, including that their claim for injunctive relief is moot. Specifically, DirecTV says it has formulated **[*26]** a Restricted Address List, meaning that its satellite dishes no longer will be installed on the properties of those on the list (including Plaintiffs). This, according to DirecTV, renders the Plaintiffs' claim moot and renders their claim atypical.

The argument, however, is not persuasive. As Plaintiffs note in the reply, DirecTV's mootness argument is based on its unilateral placement of Plaintiffs' properties on the "Resident Address List." There was no voluntary settlement with the Plaintiffs (which, if this was the case, would likely be grounds for a finding that Plaintiffs lack typicality). If DirecTV's argument was followed to its logical conclusion, any time it was sued by a putative class member challenging the authorization policy, it could simply place that person or entity on its "Resident Address List" and avoid litigation of the allegedly unlawful policy. Absent a court order prohibiting an allegedly unlawful policy, a defendant could resume its practice in the future.

For these reasons, the Court determines Plaintiffs have satisfied the typicality requirement.

Adequacy of Representation

"The primary criterion in determining adequacy of representation is whether the representative, **[*27]** through qualified counsel, vigorously and tenaciously protected the interests of the class." *Simons v. Horowitz (1984) 151 Cal. App. 3d 834, 846, 199 Cal. Rptr. 134*. Additionally, the class representative must "raise claims reasonably expected to be raised by the members of the class." *City of San Jose, supra, 12 Cal. 3d at 464*. The fiduciary duty must be undertaken free of demonstrable conflicts of interest with other class members. *Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 625-26, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. The "adequacy of representation" requirement has not been precisely differentiated from the typicality requirement. *Caro v. Procter & Gamble*, supra, 18 Cal. App. 4th at 670. Other cases have stated that "adequacy of representation" depends on whether plaintiffs attorney is qualified to conduct the proposed litigation and plaintiffs interests are not antagonistic to the interests of the class. *McGhee v. Bank of America (1976) 60 Cal. App 3d 442, 450, 131 Cal. Rptr. 482*.

Here, since typicality has not been "precisely differentiated" from the adequacy requirement, and since Plaintiffs have claims typical of those of the class, they are adequate class representatives. The Court is not persuaded by DirecTV's arguments in opposition that the Plaintiffs' interests are in conflict with those of the putative class members because "the issuance of Plaintiffs' requested injunction would narrow landlords' choices and impose additional administrative costs and burdens upon them."[47] Again, the injunctive relief **[*28]** class seeks a remedy on a prospective basis. In any event, there is nothing which indicates that there would in fact be administrative costs or burdens to landlords if the injunction were to issue.

Mr. Kefalas, for his part, states that he has reviewed the complaint and written discovery in this action; has assisted in responding to said discovery on behalf of all Plaintiffs; has searched Plaintiffs' files to retrieve documents to produce; has acted as designee to testify on behalf of Plaintiff (and spent a day testifying in that capacity); has spent hours in in-person meetings and conferring by telephone with counsel; and continues to act on behalf of Plaintiffs and the class.[48]

DirecTV does not challenge the qualifications of class counsel. Class counsel Rosenberg notes that her firm, Bramson, Plutzik, Mahler & Birkhaeuser, prosecutes class actions, derivative suits, and other complex litigation nationwide.[49] These cases include consumer protection, business torts, securities, antitrust, and communications, with particular emphasis on class actions, in both state and federal courts. The firm, Ms. Rosenberg represents, has been appointed lead or co-lead counsel or a member of a litigation **[*29]** executive committee dozens of times, and in those capacities has recovered millions of dollars for class members.[50] Ms. Rosenberg attaches as Exhibit 10 a copy of the firm's resume.

Similarly, co-counsel Mark Kindall of Izard, Kindall & Raabe, states that his firm has been appointed, or has acted, as lead counsel or co-led counsel in over 60 cases throughout the country.[51] Plainly, class counsel is qualified.

For these reasons, Plaintiffs have demonstrated they are adequate class representatives, and that their counsel is adequate.

Superiority

In deciding whether a class action would be "superior" to individual lawsuits, the Court will usually consider:

1) The interest of each member in controlling his or her own case personally;
2) The difficulties, if any, that are likely to be encountered in managing a class action;

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[47] Opposition at 7:26-27.

[48] Kefalas Decl., ¶3.

[49] Rosenberg Decl., ¶3.

[50] Rosenberg Decl., ¶3.

[51] Kindall Decl., ¶2.

3) The nature and extent of any litigation by individual class members already in progress involving the same controversy; and
4) The desirability of consolidating all claims in a single action before a single court.

California Practice Guide, Civil Procedure Before Trial, ¶14:16 (The Rutter Group 2017) (citing FRCivPro 23(b)(3)); *see also Basurco v. 21st Century Ins. Co. (2003) 108 Cal.App.4th 110, 120, 133 Cal. Rptr. 2d 367* and *Newell v. State Farm Gen. Ins. Co. (2004) 118 Cal.App.4th 1094, 1101, 13 Cal. Rptr. 3d 343*.

Further, under California **[*30]** law, a class action is not "superior" where there are numerous and substantial questions affecting each class member's right to recover, following determination of liability to the class as a whole. *City of San Jose v. Superior Ct., supra, 12 Cal.3d 447, 459*.

Here, each member of the class would not have an interest in controlling his or her own case personally, given the fact that the Plaintiffs, by virtue of the instant motion, seek only injunctive relief. Obtaining such individual relief would not justify the costs of individually bringing such an action. There are not significant difficulties which are apparent, and which are likely to be encountered in a class of this nature (given the fact that the Court will be assessing the legality of DirecTV's use of the authorization form). It would be desirable to consolidate all such claims before a single court. As discussed *supra*, individualized issues would not outweigh the common issues, and thus, the case would be manageable, overall — given what appears to be a uniform policy of DirecTV not verifying a landlord's consent when Part 2 of the installation form is selected. There also does not appear to be any similar litigation already in progress involving the same controversy between Plaintiffs **[*31]** and Defendant DirecTV. On balance, it would be desirable to consolidate the injunctive relief claim under the UCL in a single action.

Accordingly, the Court finds that the superiority factor is satisfied.

Conclusion

The Court determines that Plaintiffs have demonstrated, by substantial evidence, that the criteria supporting class certification are satisfied. For these reasons, the motion for certification of the injunctive relief class is granted.

IV.

MOTION FOR PRELIMINARY INJUNCTION

A. General standards on preliminary injunctions

CCP §526 provides the basis for which the Court may issue (or deny issuance of) an injunction. *CCP §527(a)* authorizes issuance of injunctions before trial "if sufficient grounds exist therefor."

Injunctions will rarely be granted (absent specific statutory authority) where a suit for damages provides a clear remedy. *Thayer Plymouth Center, Inc. v. Chrysler Motors (1967) 255 Cal.App.2d 300, 307, 63 Cal. Rptr. 148*; Pacific *Designs Sciences Corp. v. Sup.Ct. (Maudlin) (2004) 121 Cal.App.4th 1100, 1110*. Conversely, injunctive relief is more likely to be granted where a damages remedy is precluded by law. *Department of Fish & Game v. Anderson-Cottonwood Irrig. Dist. (1992) 8 Cal.App.4th 1554, 1564, 11 Cal. Rptr. 2d 222*.

Further, *CCP §526(a)(2)* lists the traditional consideration of "irreparable harm." Irreparable harm is often related to the "inadequate legal remedy" (i.e., the damages remedy is inadequate because some immeasurable harm is threatened). But it is also a separate consideration. **[*32]** Courts look for more than a mere dispute. Relief is unlikely unless someone will be badly hurt in a way which cannot be later repaired. California Practice Guide, Civil

Procedure Before Trial, ¶9:522 (The Rutter Group 2017) (referencing *People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater (1981) 118 Cal.App.3d 863, 870-871, 173 Cal. Rptr. 476*.

Moreover, the threat of irreparable harm must be imminent, as opposed to a mere possibility of harm some time in the future: "An injunction cannot issue in a vacuum based on the proponents' fears about something that may happen in the future. It must be supported by actual evidence that there is a realistic prospect that the party enjoined intends to engage in the prohibited activity." California Practice Guide, Civil Procedure Before Trial, ¶9:522 (The Rutter Group 2017) (referencing *Korean Philadelphia Presbyterian Church v. California Presbytery (2000) 77 Cal.App.4th 1069, 1084, 92 Cal. Rptr. 2d 275)*.

While the statute makes no reference to the traditional equitable concern of "balancing equities," it is a crucial factor in the judge's determination: i.e., the court must exercise its discretion "in favor of the party most likely to be injured.. ..If denial of an injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the preliminary injunction." *Robbins v. Sup. Ct. (1985) 38 Cal.3d 199, 205, 211 Cal. Rptr. 398, 695 P.2d 695*.

While **[*33]** the Court has broad discretion in ruling on an application for preliminary injunction, such discretion must be exercised in light of the following interrelated factors:

1) Are the plaintiffs likely to suffer greater injury from denial of the injunction than defendants are likely to suffer if it is granted? *Shoemaker v. County of Los Angeles (1995) 37 Cal.App.4th 618, 633, 43 Cal. Rptr. 2d 774*.

2) Is there a reasonable probability that plaintiffs will prevail on the merits? *Robbins, supra, 38 Cal.3d at 206*.

The Court's determination must be guided by a "mix" of the potential-merit and interim-harm factors: the greater plaintiff's showing on one, the less must be shown on the other to support an injunction. *Butt v. State of California (1992) 4 Cal.4th 668, 678, 15 Cal. Rptr. 2d 480, 842 P.2d 1240*; *Pleasant Hill Bayshore Disposal, Inc. v. chip-It Recycling, Inc.* (2001) 91 Cla.App.4th 678, 696.

Importantly, the avowed purpose of a preliminary injunction is to preserve the status quo pending a trial on the merits. *Continental Baking Co. v. Katz (1968) 68 Cal.2d 512, 528, 67 Cal. Rptr. 761, 439 P.2d 889*. See also California Practice Guide, Civil Procedure Before Trial, ¶9:558 (The Rutter Group 2017) (referencing *White v. Davis (2003) 30 Cal.4th 528, 554, 133 Cal. Rptr. 2d 648, 68 P.3d 74*; *Costa Mesa City Employees' Ass'n. v. City of Costa Mesa (2012) 209 Cal.App.4th 298, 305)*. It is not an adjudication of the ultimate rights in controversy; it merely represents the trial court's discretionary decision whether the defendant should be restrained from exercising a claimed right pending trial. California Practice Guide, Civil Procedure Before Trial, **[*34]** ¶9:639 (The Rutter Group 2017); *Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, 286, 219 Cal. Rptr. 467, 707 P.2d 840*. For "affirmative" or "mandatory" injunctions that alter the status quo, rather than simply preserve it, many courts hold the party seeking the injunction to the higher standard of showing a "clear" or "substantial" likelihood of success. *Dahl v. HEM Pharmaceuticals Corp., 7 F.3d 1399, 1403 (9th Cir.1993)*; *Daniels Cablevision, Inc. v. San Elijo Ranch, Inc. (S.D. Cal. 2001) 158 F.Supp.2d 1178, 1180*.

The burden is on the plaintiff to show all elements necessary to support issuance of a preliminary injunction. California Practice Guide, Civil Procedure Before Trial, ¶9:632.1 (The Rutter Group 2017); *O'Connell v. Sup.Ct. (Valenzuela) (2006) 141 Cal.App.4th 1452, 1481, 47 Cal. Rptr. 3d 147*.

B. Discussion

Plaintiffs have moved for a preliminary injunction restraining Defendant DirecTV, LLC or its agents during the pendency of this action from entering into common or restricted areas and/or attaching its equipment thereto, of residential multi-dwelling units in the State of California based solely on the representation of a renter who wishes to subscribe to DirecTV's services that the landlord has authorized the installation or that no permission of the landlord is required for the installation

As noted above, the Court must weigh two interrelated factors in assessing whether to impose an injunction: whether there is a reasonable probability that Plaintiffs will prevail on the merits at trial; and whether **[*35]** plaintiffs are likely to suffer greater injury from denial of the injunction than defendants are likely to suffer if it is granted. The Court must also consider whether Plaintiffs have an adequate remedy at law.

1. Likelihood of success on the merits

The first consideration is whether Plaintiffs have demonstrated a likelihood of success on the merits on the sole remaining claim in the case, violation of the UCL.

a. Standing Issue

At the outset, Defendant DirecTV contends that Plaintiffs do not have standing to sue under the UCL because they are neither consumers nor competitors.

Under Business and Professions Code ("B&P Code") *§ 17200*, "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *B&P Code §17203* provides:

> Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to **[*36]** restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. Any person may pursue representative claims or relief on behalf of others *only if the claimant meets the standing requirements of* *Section 17204* and complies with *Section 382 of the Code of Civil Procedure*, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state. (Emphasis added.)

In turn, *B&P Code §17204*, which was amended by Proposition 64, allows a private person to bring an action for violation of the UCL when *he "has suffered injury in fact* and has lost money or property *as a result of* such unfair competition." *Durell v. Sharp Healthcare (2010) 183 Cal.App.4th 1350, 1359, 108 Cal. Rptr. 3d 682* (emphasis added).

In *Camacho v. Automobile Club of Southern California (2006) 142 Cal.App.4th 1394, 1403, 48 Cal. Rptr. 3d 770*, the Court applied the following test for an "unfair" IJCL claim by a consumer: (1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided. *See also* *Klein v. Chevron U.S.A., Inc. (2012) 202 Cal.App.4th 1342, 1376, 137 Cal. Rptr. 3d 293* (citing *Camacho*). Whether a practice is unfair is generally a question of fact which requires consideration and weighing of evidence **[*37]** from both sides. *Klein, supra, 202 Cal.App.4th at 1376* (citing *Camacho, supra, at 1403*).

Defendants cite *Linear Technology Corp. v. Applied Materials, Inc. (2007) 152 Cal.App.4th 115, 61 Cal. Rptr. 3d 221* for the proposition that Plaintiffs do not have standing because they are neither business competitors or consumers. However, *Linear Technology Corp.* was distinguished by the Central District in *In re Yahoo! Litigation (2008) 251 F.R.D. 459*. The district court noted:

> Defendants argue that because the UCL "was enacted to protect consumers and competitors," *O'Brien v. Camisasca Automotive Mfg., Inc., 161 Cal.App.4th 388, 73 Cal.Rptr.3d 911, 918 (2008)*, plaintiffs, which are neither consumers nor defendants' competitors, lack standing under the UCL. Defendants rely on the following language in *Linear Tech. Corp. v. Applied Materials, Inc., 152 Cal.App.4th 115, 135, 61 Cal.Rptr.3d 221 (2007)*:

> "where a UCL action is based on contracts not involving either the public in general or individual consumers who are parties to the contracts, a corporate plaintiff may not rely on the UCL for the relief it seeks."
>
> The foregoing language in *Linear Tech.*, which was decided after the enactment of Proposition 64, appears not to have recognized the apparent change in the UCL's standing requirement that the Court recognized in its October 30, 2006 Order. The *Linear Tech.* court relied on the discussion in *Rosenbluth Ina, Inc. v. Super. Ct., 101 Cal.App.4th 1073, 124 Cal.Rptr.2d 844 (2002)*, regarding standing under the UCL pre-Proposition 64. However, even if this is the case, *Linear Tech.* and *Rosenbluth* do not preclude plaintiffs' claims under the UCL.
>
> Read in context, the above-quoted **[*38]** language from *Linear Tech.* does not necessarily prevent *any* corporate plaintiff from proceeding under the UCL in a case arising from a contract that does not involve either the public or individual consumers. The holdings of both *Linear Tech.* and *Rosenbluth* turn less on the fact that the alleged victims in those cases were businesses, and more on the fact that these entities were sophisticated and individually capable of seeking relief for their injuries. The alleged victims in *Linear Tech.* were Silicon Valley corporations—as distinct from "powerless, unwary consumers"—each of which "presumably [had] the resources to seek damages or other relief should it choose to do so." *Linear Tech., 152 Cal.App.4th at 135, 61 Cal.Rptr.3d 221* (quoting *Rosenbluth, 101 Cal.App.4th at 1078, 124 Cal.Rptr.2d 844*) (ellipses omitted). The potential UCL plaintiffs in *Rosenbluth* were "sophisticated corporations, most in the Fortune 1000 ..." *Rosenbluth, 101 Cal.App.4th at 1078, 124 Cal.Rptr.2d 844*.

See *In re Yahoo! Litigation (C.D. Cal. 2008) 251 F.R.D. 459, 474-475* (emphasis in original).

Thus, under *In re Yahoo!*, the focus is on the sophistication of the plaintiffs, rather than whether the plaintiffs were businesses or not. Here, as in *In re Yahoo!*, the Court cannot make a finding that the proposed class is "so uniformly sophisticated and capable of seeking relief against defendants." *In re: Yahoo! at 475*. Accordingly, Plaintiffs would have standing to **[*39]** prosecute the UCL claim.

(2) Mootness of individual claims

DirecTV also argues that Plaintiffs cannot demonstrate a likelihood of success because their individual claims are moot. DirecTV raises the mootness issue in opposing the class certification motion, arguing Plaintiffs' claims are atypical. As discussed *supra*, Defendants have not shown the claims are moot.

(3) Substantive discussion of likelihood of success

Separately, the Court must assess whether Plaintiffs have demonstrated a likelihood of success on the merits of their UCL claim. The claim is premised on the assertion that DirecTV's failure to seek or obtain permission from landlords before installing its equipment in common or restricted areas of MDUs is an unfair business practice under the UCL.

Plaintiffs' theory of the case is that DirecTV does not seek such permission in advance of installation on the putative class members' property. Plaintiffs have referenced the three tests determining whether a business practice is "unfair" under the UCL — the "Traditional Test," the "FTC Act Test," and the "Tethering Test."

The "traditional test" deems a business practice "unfair" where it "offends an established public policy or when **[*40]** the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *West v. JPMorgan Chase Bank, NA., 214 Cal.App.4th 780, 806, 154 Cal. Rptr. 3d 285 (2013)*. The determination of whether a practice is unfair under the statute "necessarily involves an examination of its impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer." *Motors, Inc., supra*, 102 Cal.App.3d at 740; *accord* *Progressive West Ins. Co. v. Superior Court, 135 Cal.App.4th 263, 286, 37 Cal. Rptr. 3d 434 (2005)*.

As noted above, in *Camacho v. Automobile Club of Southern California, supra, 142 Cal. App. 4th 1394*, the Court held that in determining whether or not a practice is "unfair" in a consumer context, courts should amity the test employed in assessing alleged violations of *§ 5* of the Federal Trade Commission Act, *15 U.S.C. § 45(a)*, under which a business practice is deemed unfair if it (1) causes substantial harm (2) that is not outweighed by countervailing benefits to consumers or competition, and (3) consumers could not reasonably have avoided the harm.

Finally, in *Cel-Tech Communications v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 186, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*, the Supreme Court held that in cases involving anticompetitive conduct by a competitor, conduct is "unfair" if it "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." As Plaintiffs note, some **[*41]** lower courts have extrapolated that test beyond claims between direct competitors, holding that a business practice is "unfair" where the public policy which is a predicate to the action is "tethered" to specific constitutional, statutory or regulatory provisions" that are or are threatened to be violated either in letter or spirit. E.g., ***Scripps Clinic v. Superior Court, 108*** *Cal.App.4th 917, 940, 134 Cal. Rptr. 2d 101 (2003)*.

With these standards in mind, as Plaintiffs note, "the landowner's right to exclude [is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Loretto v. Teleprompter Manhattan CA TV Corp. (1982) 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868* (citing *Kaiser Aetna v. United States (1979) 444 U.S. 164, 176, 100 S. Ct. 383, 62 L. Ed. 2d 332)*. *Loretto* invalidated a New York statute that provided a landlord must permit a cable television company to install its cable facilities upon his property and may not demand payment from the company in excess of an amount determined by a state commission to be reasonable. The Court held that the New York statute operated as a taking of a portion of the plaintiff's property for which she was entitled to just compensation under the Fifth Amendment (as made applicable to the States by the Fourteenth Amendment). The Court noted that the installation "of plates, boxes, wires, bolts, and screws to the building" or of wires and outlets in particular units constitutes a physical invasion of **[*42]** the property. *Loretto at 438*; *see also* *Gulf Power Co. v. United States (N.D. Fla. 1998) 998 F.Supp. 1386, 1391-92* (holding that *Loretto* established a *per se* takings rule, in that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve); affirmed at *187 F.3d 1324 (11th Cir. 1999)*.

Other courts have applied the *Loretto* rule to non-governmental actors. For instance, the U.S. District Court in *Daniels Cablevision, Inc. v. San Elijo Ranch, Inc. (S.D. Cal. 2001) 158 F.Supp.2d 1178* denied a cable company's motion for preliminary injunction in its suit against a real estate developer, claiming entitlement to lay cable in a utility trench without paying the fee demanded by the developer. *See also* *Century Sw. Cable Television, Inc. v. CHF Assocs. (9th Cir. 1994) 33 F.3d 1068, 1071*.

The question is whether DirecTV's admitted practice of relying on the word of tenants to obtain a landlord's consent is one which, consistent with the traditional UCL "unfair" test set forth above (which is the test the Court determines is appropriate to apply here), is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. Here, while this process is not immoral, unethical, oppressive, or unscrupulous, it could be substantially injurious to consumers (i.e., the members of the putative class of MDU owners) for DirecTV to rely solely on the word of tenants in installing the satellite dishes and related **[*43]** equipment on the MDU owners' property. While DirecTV argues that a tenant, and not DirecTV, has a preexisting relationship with his or her landlord (and is thus in the best position to obtain any needed consent), and that it is perfectly legal to install equipment with consent (*citing* *Church of Christ in Hollywood v. Sup. Ct. (2002) 99 Cal.App.4th 1244, 1252, 121 Cal. Rptr. 2d 810)*, the alleged practice may actually result in an end-run around the consent requirement.

Indeed, the Declarations of the putative class members submitted in support of the motion for class certification (the declarations are also submitted in support of the motion for preliminary injunction) all state that the dishes were installed without their prior knowledge or consent.[52] Without verifying that the MDU owner has provided consent, there is a significant risk that the practice could be injurious to consumers.

In sum, Plaintiffs have demonstrated a reasonable likelihood of success on the merits to support issuance of the preliminary injunction.

2. Whether Plaintiffs are likely to suffer greater injury from denial of the injunction than defendants are likely to suffer if it is granted

The next consideration is whether Plaintiffs are likely to suffer greater injury from denial of the injunction than defendants **[*44]** are likely to suffer if it is granted. It is here where issuance of the injunction would be problematic.

If the Court were to grant the motion for *preliminary* injunction, without litigating the ultimate issue in the case, it would be changing DirecTV's long-standing nationwide policy.[53] DirecTV represents that if its current practice is blocked pending trial, untold numbers of installations will necessarily be delayed or cancelled. This assuredly would result in significant injury to DirecTV. Further, as DirecTV states, changing the policy would require DirecTV to rewrite all training materials and consumer forms, and retraining all employees and contractors engaged in this type of work.[54] On the other hand, if the injunction is denied pending trial, it would preserve the current status quo and would keep DirecTV's policy in place. While Plaintiffs may in fact suffer some injury from denial of the preliminary injunction, this is outweighed by the injury DirecTV would suffer if the motion is granted at the present time, in advance of trial.

Related to the "balance of harms" inquiry is whether Plaintiffs have shown DirecTV's conduct threatens irreparable injury. According to Plaintiffs, unless **[*45]** enjoined, DirecTV's installation practices will lead to continued abuse of the property rights of Plaintiffs and other landlords — more unconsented entry, more unauthorized permanent installations of dishes and other hardware, and more damage to roofs and walls.[55] However, Plaintiffs have not demonstrated at this time that, pending an actual trial on the UCL claim, the harm would be "irreparable."

Plaintiffs argue that the harm is irreparable because DirecTV, as a matter of policy, refuses to remove these dishes.[56] Plaintiffs further contend that suing for damages would be infeasible, as "they are too difficult to assess and uneconomical to obtain."[57] At the present time, however, without having tried these issues, the Court is not in a position to determine that, in fact, Plaintiffs would suffer irreparable harm if the injunction were denied.

For these reasons, Defendant has shown that it is likely to suffer greater injury from granting the injunction than Plaintiffs would suffer from denial of the injunction

3. Adequacy of Remedy at Law

Another consideration for the Court in assessing whether to issue the preliminary injunction is whether Plaintiffs have an adequate remedy at law. Injunctions **[*46]** will rarely be granted (absent specific statutory authority) where a suit for damages provides a clear remedy. *Thayer Plymouth Ctr., Inc. v. Chrysler Motors Corp. (1967) 255*

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52 See, e.g., Nichols Decl., ¶3; Sanger Decl. ¶3; Wayte Del., ¶4; Risconsin Decl., Landsberger Decl., ¶7.

53 Edelstein Decl., Exh. A (Dimech Tr. At 50:9-55:18.

54 Opposition at 5:25-27.

55 Motion at 14:26-29.

56 Reply at 9:26-27.

57 Reply at 10:1-2.

Cal.App.2d 300, 63 Cal. Rptr. 148; 307; *Pacific Decision Sciences Corp. v. Sup. Ct. (Maudlin) (2004) 121 Cal.App.4th 1100, 1110, 18 Cal. Rptr. 3d 104*.

Here, it is unclear whether the Plaintiffs' remedy at law is adequate. DirecTV denies causing any damage when it installs a satellite dish, but even so, DirecTV claims that any damages could be remedied by removal of the dish and/or repairs compensable in money damages (and putative class members have testified to the same).[58] At this time, and without having conducted a trial on the matter, Plaintiffs have not made the requisite showing that their remedy at law is inadequate.

V.

RULING AND ORDER

For the foregoing reasons, the motion for certification of the injunctive relief class is granted. The motion for preliminary injunction is denied. The Court sets a further status conference in this matter for March 21, 2018 at 2 p.m. The parties shall submit a joint statement by March 15, 2018, outlining their proposals for proceeding with the subsequent phases of the litigation.

Dated: January 25, 2018

/s/ Kenneth Freeman

Kenneth Freeman

Judge of the Superior Court

End of Document

[58] Edelstein Decl., Exhs. B-E, Risconsin Tr. At 26:3-27:19; Landsberger Tr. At 37:21-38:15; Sanger Tr. At 12:20-13:14, 21:2-15; Nichols Tr. At 14:10-15:9, 20:5-22:11, 34:22-36:16, 41:25-42:11.

[Reibstein v. Rmd Group Llc E-File](#)

Superior Court of California, County of San Diego

May 11, 2018, Decided

37-2017-00049274-CU-BT-CTL

Reporter

2018 Cal. Super. LEXIS 54760 *

Reibstein v. RMD Group LLC [E-File]

Core Terms

cause of action, gratuity, tips, suggestions, contends, servers, unfair, demurrer, prong, alleged violation, business practice, restitution, customer, alleges

Counsel: **[*1]** ROBERT G LOEWY, counsel, present for Plaintiff(s).

Christopher S. Morris, specially appearing for counsel Jacob A. Gillick, present for Defendant(s).

Judges: John S. Meyer.

Opinion by: John S. Meyer

Opinion

MINUTE ORDER

The Court hears oral argument and confirms the tentative ruling as follows:

Defendant RMD Group, LLC brings this demurrer to plaintiff's complaint.

In ruling on a demurrer, the Court assumes that the complaint's properly pleaded material factual allegations are true and will give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context. The Court does not, however, assume the truth of contentions, deductions, or conclusions of fact or law. *Evans v. City of Berkeley (2006) 38 Cal.4th 1, 6*; *Moore v. Regents of University of California (1990) 51 Cal.3d 120, 125*.

Defendant makes a number of challenges that extend to many, if not all, causes of action.

The alleged business practice is defendant including miscalculated gratuity suggestions on bills presented for split checks. Defendant contends this is not a "business practice," but rather a mistake or accident.

A practice generally means "the 'habitual doing of certain things, the doing of an act more than once' ... [or] '[r]epeated or customary action, habitual performance; a succession of acts of similar kind; habit, custom ...'" **[*2]** *Wilson v. Stearns (1954) 123 Cal.App.2d 472, 479*. Based on the allegations in the complaint, this was a practice.

Defendant contends that tips are gifts from the customer to the server. "A tip is not intended for the proprietor of a restaurant. It is a gratuity, i.e., 'a free gift, a present.'" *Herbert's Laurel-Ventura v. Laurel Ventura Holding Corp. (1943) 58 Cal.App.2d 684, 694*.

On the other hand, "a tip is connected directly with the service and its quality. He who tips thereby expresses not his own self-conceit, but his gratification with the service by compensating the servant over and above the regular remuneration for the service." *Roberts v. C.I.R. (9th Cir. 1949) 176 F.2d 221, 224*.

The essential characteristic of a gift is the absence of consideration. *Id., at 223*. Arguably, consideration is present when a tip is given: consideration for the services provided by the server.

Defendant contends that the tips belong to the employee, thus defendant has not benefited from the overtipping.

Plaintiff contends that "this scheme has unquestionably benefitted the company. In effect, it allows RMD to pay its staff an extra $20-$40 per shift, without raising menu prices and without cutting into the company's profits. It also provides RMD a strategic advantage over its competitors, allowing it to attract the best serving talent, while ostensibly keeping menu prices low." [Oppo., 2:5-10] **[*3]**

This appears to be a factual dispute that cannot be resolved on demurrer.

Defendant asserts that plaintiff is seeking restitution from the wrong defendant. "Plaintiff is seeking restitution from the wrong defendant In reality, restaurant received no benefit from gratuity..." [Moving, 9:26-28] Defendant suggests that the server is the only one who can provide restitution.

Restitution is defined as "compelling a UCL defendant to return money obtained through an unfair business practice to thow persons in interest from whom the property was taken, that is, to persons who had ownership interest in the property or those claiming through that person." *Korea Supply co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1144-45*.

Plaintiff likens the facts here with *Matoff v. Brinker Restaurant Corp. (C.D. Cal. 2006) 439 F.Supp.2d 1035*, where the restaurant required servers to share tips with bartenders. Here, plaintiff is claiming that defendant caused the overcharge and then gave the excess money to the servers. These are credit card transactions, so the money from the credit card would go the defendant, who in turn would pay the servers. "If Defendant unlawfully misappropriated Plaintiff's tips, Plaintiff may seek restitution even if Defendant directed the misappropriated funds to the bartenders." *Id., at 1038*.

Defendant contends that the complaint **[*4]** acknowledges that defendant has stopped the practice of putting suggested gratuities on their bills, thus there is nothing to enjoin. However, the complaint actually alleges that there has only been a representation that the practice has stopped.

The first cause of action alleges violation of *Bus. &Prof. §17500*, false/misleading statements in advertising.

B&P §17500 makes it unlawful for any person with intent to dispose of property or to perform services to make any statement concerning that property or those services which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.

Defendant contends that plaintiff has not alleged a connection between the intent to dispose of property or to perform services and the gratuity suggestions.

At the time the alleged statement was made (the suggested gratuities on the bill), food and drink had already been consumed and services performed. There is no allegation that defendant provided the suggested gratuities with the intent to dispose of property or to perform services. There are insufficient facts alleged to constitute this cause of action.

The second cause of action alleges violation of the CLRA. **[*5]** It prohibits "unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer" in certain manners. Civ.C. *§1770(a)*

The alleged business practice is including miscalculated gratuity suggestions on bills presented for split checks. Although that practice may have resulted in the overpayment of tips, it did not result or intend to result in the sale of goods or services. There are insufficient facts alleged to constitute this cause of action.

The third cause of action alleges violation of the unlawful prong of *Bus.&Prof. §17200*. This cause of action is dependent on the first two causes of action. Thus, it fails to state sufficient facts to constitute a cause of action.

The fourth cause of action alleges violation of the unfair prong of Bus.&Prof. §17200.

To show a business practice is unfair, the plaintiff must show "the conduct is tethered to any underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of an ***antitrust law***." *Graham v. Bank of America, N.A. (2014) 226 Cal.App.4th 594, 613*.

Plaintiff alleges that it was unfair to fail to correct the miscalculations or to **[*6]** conceal the fact that the gratuity suggestions were false. This is insufficient to support the "unfair" allegation.

In opposition, plaintiff contends that the alleged practice violates the spirit of the antitrust laws, giving defendant an unfair advantage over competitors in recruitment and retention of servers, and by allowing defendant to keep menu prices lower. This is not, however, alleged in the complaint.

The fifth cause of action alleges violation of the fraudulent prong of *Bus.&Prof. §17200*.

"The fraud prong of the UCL may be shown if members of the public are """likely to be deceived.""" (*Buller v. Sutter Health (2008) 160 Cal.App.4th 981, 986, 74 Cal.Rptr.3d 47*.) However, "'[a]bsent a duty to disclose, the failure to do so does not support a claim under the fraudulent prong of the UCL.'" (*Id. at p. 987, 74 Cal.Rptr.3d 47*.) Additionally, the UCL "imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong." (*In re Tobacco II Cases (2009) 46 Cal.4th 298, 326, 93 Cal.Rptr.3d 559, 207 P.3d 20*.) In other words, the plaintiff "must allege he or she was motivated to act or refrain from action based on the truth or falsity of a defendant's statement, not merely on the fact it was made." (*Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 327, fn. 10, 120 Cal.Rptr.3d 741, 246 P.3d 877*.). *Graham v. Bank of America, N.A. (2014) 226 Cal.App.4th 594, 613-614*

There are sufficient facts alleged to constitute this cause of action. The alleged fraudulent practice is including miscalculated gratuity **[*7]** suggestions on the bill. It is alleged that the purpose of including the suggestions are for the benefit of customers, so they do not have to take out their calculators or figure out the math. Whether a reasonable customer would notice the suggestions were excessive is a factual issue. It may not be unreasonable for a customer to assume those figures are correct, especially if the rest of the bill is correct. Plaintiff alleges she relied on the suggested gratuity calculations and was deceived into paying more than she intended.

The sixth cause of action is for breach of the implied covenant of good faith and fair dealing. Plaintiff advises in a footnote that plaintiff is not proceeding on this cause of action.

The seventh cause of action is for reformation of contract.

"When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." Civ.C. §3399.

The contract **[*8]** is not identified in the complaint, thus there are insufficient facts alleged to constitute the cause of action.

THEREFORE, the demurrer to the first, second, third, fourth and seventh causes of action is **SUSTAINED WITH LEAVE TO AMEND**. The demurrer to the fifth cause of action is **OVERRULED.** The demurrer to the sixth cause of action is **SUSTAINED WITHOUT LEAVE TO AMEND**.

Plaintiff shall file and serve her First Amended Complaint no later than May 25, 2018.

IT IS SO ORDERED.

/S/[John S. Meyer]

Judge John S. Meyer

[Greenkraft, Inc. v. Gemayels](#)

Superior Court of California, County of Orange

January 8, 2019, Decided

30-2018-00979579-CU-FR-CJC

Reporter

2019 Cal. Super. LEXIS 57491 *

Greenkraft, INC. v. Gemayels

Core Terms

cause of action, unfair, parties, amended complaint, fraudulent, protective order, subpoenas, estoppel, alleges

Counsel: **[*1]** Saleen K. Erakat, from Callahan & Blaine, APLC, present for Plaintiff(s).

Peter Sunukjian, from Briggs & Alexander, APC, present for Defendant(s).

Judges: Walter Schwarm.

Opinion by: Walter Schwarm

Opinion

MINUTE ORDER

Tentative Ruling posted on the Internet .

Parties represent to the Court they have reviewed its tentative ruling posted online. Argument heard.

The Court adopts and MODIFIES its ruling as to Motion No. 1 as follows:

Motion No. 1:

Defendants' (George Patrick Gemayel and Gem Works LLC) Demurrer to Second Amended Complaint (filed on 10-2-18) is SUSTAINED as to the Fifth Cause of Action with leave to amend. The Demurrer is SUSTAINED as to the Seventh Causes of Action WITH leave to amend. The Demurrer is OVERRULED as to the Ninth Cause of Action.

The Fifth Cause of Action alleges a cause of action for Breach of Contract. Defendant contends that Commercial Code *section 2201* prevents Plaintiff from enforcing this contract. *Commercial Code section 2201* states, "(1) Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars ($ 500) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and **[*2]** signed by the party against whom enforcement is sought or by his or her authorized agent or broker [Â¶] (2) Between merchants if within a reasonable time a writing in confirmation and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of *subdivision (1)* against the party unless written notice of objection to its contents is given within 10 days after it is received." *Commercial Code section 2104, subdivision (1)*, explains, "'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."

The Second Amended Complaint (SAC) concedes that the alleged contract was an oral contract. (SAC, Â¶Â¶ 13 and 62.) It appears that Plaintiff does not dispute the alleged contract involved the sale of goods for more than $ 500. (Plaintiff Greenkraft, Inc.'s Opposition to Defendants' Demurrer to Plaintiff's Second Amended Complaint (Opposition), filed on 12-21-18; **[*3]** 3:15-5:3; SAC, Â¶ 62.)

It does not appear that Plaintiff qualifies as a merchant within the meaning of *Commercial Code section 2204, subdivision (1)*. Although the SAC alleges "… Plaintiff ordered 210 vehicles … from Walter's Auto Sales …" (SAC, Â¶ 14), it does not allege that Plaintiff employed Walter's Auto Sales as an agent or broker. The SAC does not sufficiently plead that Plaintiff's business involves the sale of vehicles. The SAC describes Plaintiff's business as "… a manufacturer of alternative fuel automotive products." (SAC, Â¶ 10.) There are no clear allegations in the SAC that establish Plaintiff and Defendant are "merchants" in connection with the purchase and sale of vehicles within the meaning of *Commercial Code section 2104, subdivision (1)*. Thus, the SAC does not adequately plead that the alleged contract falls within *Commercial Code section 2201, subdivision (2)*.

Paragraph 70 of the SAC indicates Plaintiff sent an invoice to Gem Works LLC for the first 70 vehicles, and that Gem Works LLC paid for these vehicles. (SAC, Â¶Â¶ 63-64.) This allegation may sufficiently allege a writing within *Commercial Code section 2201, subdivision (2)*, as to the first 70 vehicles. The SAC, however, does not appear to claim damages resulting from the sale of the first 70 vehicles. The SAC does not sufficiently plead that any portion of the contract after the sale **[*4]** of the first 70 vehicles falls within *Commercial Code section 2201, subdivision (2)*. Therefore, *Commercial Code section 2201, subdivision (1)*, prevents the enforcement of the contract as to the remaining vehicles.

Allied Grape Growers v. Bronco Wine Co. (1988) 203 Cal.App.3d 432, 443, states, "Furthermore, the great weight of authority from sister state jurisdictions holds that estoppel can be applied to overcome the Uniform Commercial Code's statue of frauds provision as long as a court is not enforcing a mere oral promise. There must be some form of detrimental reliance." (The SAC does not adequately allege detrimental reliance. The SAC pleads, "… as a result of that contract, Greenkraft ordered 210 vehicles from Mercedes Benz." (SAC, Â¶ 62.) The SAC does not allege that Plaintiff paid for these 210 vehicles. The loss of profits from the Agreement does not appear sufficient to demonstrate detrimental reliance. (SAC, Â¶ 21.)

Based on the above, Plaintiff has failed to allege sufficient facts to avoid the application of *Commercial Code section 2201, subdivision (1)*, as to the Fifth Cause of Action. Thus, the court sustains Defendants' Demurrer as to the Fifth Cause of Action.

As to the Seventh Cause of Action, "[t]he UCL does not proscribe specific activities, but broadly prohibits 'any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading **[*5]** advertising.' [Citation.]" (*Puentes v. Wells Fargo Home Mortg., Inc. (2008) 160 Cal. App. 4th 638, 643-644*).

Saunders v. Superior Court (1994) 27 Cal.App.4th 832, 838-839, states, "Section 17200 defines unfair competition as 'any unlawful, unfair or fraudulent business act or practice ' The 'unlawful' practices

prohibited by section 17200 are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made. [Citation.] It is not necessary that the predicate law provide for private civil enforcement. [Citation.] As our Supreme Court put it, section 17200 'borrows' violations of other laws and treats them as unlawful practices independently actionable under section 17200 et seq. [Citation.] 'Unfair' simply means any practice whose harm to the victim outweighs its benefits. [Citation.] 'Fraudulent,' as used in the statute, does not refer to the common law tort of fraud but only requires a showing members of the public '"are likely to be deceived."' [Citation.]"

Arce v. Kaiser Foundation Health Plan, Inc. (Arce) (2010) 181 Cal.App.4th 471, 489-490, explains, "If the trial court were to find that Applied Behavior Analysis therapy and speech therapy for autism spectrum disorders are covered services under the terms of the health care plan, then Kaiser's alleged practice of categorically denying coverage for such services to the putative class could constitute a breach of contract. A breach of contract in turn may **[*6]** form the predicate for a UCL claim, '"provided it also constitutes conduct that is 'unlawful, or unfair, or fraudulent."' [Citations.]' [Citation.] With respect to the unfairness prong of Business and Professions Code section 17200, appellate courts have recognized that 'a systematic breach of certain types of contracts (e.g., breaches of standard consumer or producer contracts involved in a class action) can constitute an unfair business practice under the UCL. [Citations.]' [Citations.]"

Consequently, it's not clear that Plaintiff's references to *Civil Code sections 1572*, *1709*, and *1710*, each which outlines circumstances in which civil liability attaches to fraud, are sufficient to establish the "unlawful" prong.

"… 'When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes section 17200, the word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.' [Citation.]" (*Bardin v. DaimlerChrysler Corp. (2006) 136 Cal.App.4th 1255, 1266-1267*.) Although Plaintiff brieÂ¶y references the "unfair" prong, it offers no argument which supports its application.

Here, Plaintiff **[*7]** alleges, "The fraudulent conduct of Defendants has deceived members of the public, including, but not limited to, Mercedes Benz …. (SAC, ¶78.) Plaintiff does not provide authority supporting that a single entity qualifies as a "members of the public within the meaning of Business and Professions Code section 17200. Absent authority which indicates the deception of a single entity is sufficient to support fraudulent conduct under Business and Professions Code section 17200, the court sustains the Defendants' Demurrer as to the Seventh Cause of Action.

As to the Ninth Cause of Action for Promissory Estoppel, *Flintco Pacific, Inc. v. TEC Management Consultants, Inc. (2016) 1 Cal.App.5th 727, 734*, describes the elements necessary to establish promissory estoppel. Paragraphs 87-92 adequately of the SAC adequately plead a claim for promissory estoppel. Defendants' primary argument is that an alleged contract prevents a claim for promissory estoppel. (Defendants' Demurrer to Second Amended Complaint (Demurrer), filed on 10-2-18; 7:4-21.) *Adams v. Paul (1995) 11 Cal.4th 583, 593*, provides, "Moreover, a party may plead in the alternative and may make inconsistent allegations. [Citations.]" Therefore, the court overrules Defendants' Demurrer as to the Ninth Cause of Action.

In summary, the court Defendants' (George Patrick Gemayel and Gem Works LLC) Demurrer to Second Amended Complaint is SUSTAINED as **[*8]** to the Fifth Cause of Action with leave to amend. The Demurrer is SUSTAINED as to the Seventh Cause of Action with leave to amend. The Demurrer is OVERRULED as to the Ninth Cause of Action. Plaintiff is to file an amended complaint within 14 days of the date of service of the notice of this order.

Defendants are to give notice.

Motion No. 2:

Defendants (George Patrick Gemayel and Gem Works LLC) Motion for Protective Order (filed on 8-20-18) is continued to 3-12-19 at 1:30 p.m. in Department C19 for the reasons set forth below.

The Motion seeks a protective order as to eleven deposition subpoenas which collectively contain 345 requests for production. Plaintiff Greenkraft, Inc.'s Opposition to Defendant's Motion for Protective Order (Opposition), filed on 12-21-18, states, "With respect to the subpoenas, Greenkraft has agreed to withdraw certain requests, Defendants have agreed to withdraw objections to certain requests and the parties have jointly agreed to modify others… [T]he parties have significantly limited the outstanding disputes between them with respect to the subpoenas." (Opposition; 5:11-15.) Defendants' Reply to Plaintiff Greenkraft's Opposition to Defendants' Motion for

Protective **[*9]** Order (Reply), filed on 10-3-18, states, "Nevertheless, the parties did agree to the modification of certain subpoenas in question here." (Reply; 2:13.) (See also, 12-21-18 Erakat Decl., Â¶ 3.)

Although these briefs attempt to articulate the remaining disputes, they do so without providing context or identifying the remaining requests at issue. The court appreciates the parties' attempt to resolve these disputes without court intervention. To the extent the parties still require the court's assistance to resolve any remaining disputes, the court requires a Joint Statement that identifies each subpoena and Request for Production which remains in dispute and the subject of the dispute. The parties are to submit this joint statement no later than 1-31-19.

Defendants are to give notice.

Motion for Protective Order continued to 03/12/2019 at 01:30 PM in Department C19.

Case Management Conference continued to 03/12/2019 at 01:30 PM in Department C19.

Shandong Lihong Tech. Ltd. Crop v. Masimo Corp.

Superior Court of California, County of Orange

January 14, 2019, Decided; January 14, 2019, Filed

CASE NO: 30-2018-01002779-CU-BT-CJC

Reporter

2019 Cal. Super. LEXIS 18904 *

Shandong Lihong Technology Limited Corp v. Masimo Corporation

Core Terms

unfair, cause of action, fair dealing, leave to amend, allegations, competitor, demurrer, alleged facts, first cause, good faith, unfair act, unfair business practice, covenant of good faith, member of the public, contracting parties, fraudulent practice, breach of contract, breach of covenant, notice of ruling, violation of law, anti trust law, public policy, conditions, consumers, deception, threatens, benefits, deceived, unfairly, harmed

Opinion

[*1] MINUTE ORDER

There are no appearances by any party.

The Court, having taken the above-entitled matters under submission on January 11, 2019, and having fully considered the arguments of all parties, both written and oral, now rules as follows:

NOTICE OF RULING

Defendant Masimo Corporation's demurrer to Plaintiff Shandong Lihong Technology Limited Crop's First Amended Complaint ("FAC") is sustained with 15 days leave to amend.

Violation of *Business and Professions Code Section 17200* (First Cause of Action)

In the first cause of action, Plaintiff alleges violation of *Business and Professions Code section 17200* (the "UCL"). The UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Under the unlawful prong, a violation of law may be actionable as unfair competition under the UCL. (*Lueras v. BAC Home Loans Servicing, LP (2013) 221 Cal.App.4th 49, 81, 163 Cal. Rptr. 3d 804*.) "An unfair business practice occurs when that practice offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers… An unfair business practice also means the public policy which is a predicate to the action must be tethered to specific constitutional, statutory or regulatory provisions." (*Ibid.* [internal citations omitted].) A fraudulent **[*2]** practice "require[s] only a showing that members of the public are likely to be deceived and can be shown even without allegations of actual deception, reasonable reliance and damage." (*Ibid.* [internal citations omitted].)

The UCL "was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive." (*Cel-Tech*

Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 181, 83 Cal. Rptr. 2d 548, 973 P.2d 527 [internal citations and quotations omitted.) While the UCL's scope is broad, it is not unlimited. In order to give businesses fair notice of what they can and cannot do, the California Supreme Court has cautioned that "[c]ourts may not simply impose their own notions of the day as to what is fair or unfair." (*Id. at p. 182*.) For this reason, the California Supreme Court developed a test when the plaintiff is commercial competitor whether the conduct or practice is "unfair." "When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes *section 17200*, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable **[*3]** to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Id. at p. 187*.) In articulating this test, the California Supreme Court was careful to emphasize that harm "to a competitor is not equivalent to [harm] to competition," and that "only the latter is the proper focus of antitrust laws." (*Id. at p. 186*.) "The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." (*Kasky v. Nike, Inc. (2002) 27 Cal.4th 939, 949, 119 Cal. Rptr. 2d 296, 45 P.3d 243*; *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra, 20 Cal.4th at p. 180*.)

Here, the FAC does not allege an unlawful business act or practice. The FAC also does not allege a fraudulent practice because it does not allege facts to show that members of the public are likely to be deceived. (See *Lueras v. BAC Home Loans Servicing, LP, supra, 221 Cal.App.4th at p. 81*.)

The FAC's allegations of Defendant's alleged use of Plaintiff's customers' names and addresses and plaintiff's market information, also does not constitute an unfair conduct or practice. Plaintiff's allegations, if true, allege unfair acts in a more generalized moral sense. However, they fail to allege an unfair act or practice as set forth in *Cel-Tech.* (See *Celebrity Chefs Tour, LLC v. Macy's Inc. (S.D. Cal. 2014) 16 F.Supp.3d 1141, 1156*.) Plaintiff's allegations merely indicate harm to its commercial interests, rather than harm to competition. Accordingly, the demurrer as to the **[*4]** first cause of action is sustained with 15 days leave to amend.

Breach of Contract (Second Cause of Action)

The elements for a cause of action for breach of contract are "the existence of the contract, performance by the plaintiff or excuse for nonperformance, breach by the defendant and damages." (*First Commercial Mortgage Co. v. Reece (2001) 89 Cal.App.4th 731, 745, 108 Cal. Rptr. 2d 23*.) Plaintiff does not allege any facts to show how Defendant breached the distribution agreement. Accordingly, the demurrer as to the second cause of action is sustained with 15 days leave to amend.

Breach of Covenant of Good Faith and Fair Dealing (Third Cause of Action)

To state a claim for a breach of the implied covenant of good faith and fair dealing, Plaintiff must allege all of the following: (1) that plaintiff and defendant entered into a contract; (2) that plaintiff did all, or substantially all of the significant things that the contract required it to do, or that it was excused from having to do those things; (3) that all conditions required for defendant's performance had occurred; (4) that defendant unfairly interfered with plaintiff's right to receive the benefits of the contract; and (5) that plaintiff was harmed from defendant's conduct. (CACI no. 325.) "The covenant of good **[*5]** faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Ind. (2000) 24 Cal.4th 317, 349, 100 Cal. Rptr. 2d 352, 8 P.3d 1089*.) "With the exception of bad faith insurance cases, a breach of the covenant of good faith and fair dealing permits a recovery solely in contract." (*Spinks v. Equity Residential Briarwood Apartments (2009) 171 Cal.App.4th 1004, 1054, 90 Cal. Rptr. 3d 453* [internal citations omitted].)

Here, Plaintiff does not allege facts to show breach of the implied covenant of good faith and fair dealing. For instance, Plaintiff does not allege facts to show that all conditions required for Defendant's performance had occurred. Accordingly, the demurrer as to the third cause of action is sustained with 15 days leave to amend.

The Clerk shall give notice of the ruling.

UFCW & Employers Benefit Trust v. Sutter Health

Superior Court of California, County of San Francisco

March 14, 2019, Decided; March 14, 2019, Filed

Case No. CGC-14-538451 Consolidated with Case No. CGC-18-565398

Reporter

2019 Cal. Super. LEXIS 342 *; 2019-1 Trade Cas. (CCH) P80,742

UFCW & EMPLOYERS BENEFIT TRUST, et al., Plaintiffs, v. SUTTER HEALTH, ET AL., Defendants.PEOPLE OF THE STATE OF CALIFORNIA, ex rel. XAVIER BECERRA, Plaintiff, v. SUTTER HEALTH, Defendant.

Core Terms

Cartwright Act, monopolize, monopoly, vertical, specific intent, restraint of trade, tampering, cases, conspiracy, supplier, bids, price fixing, distributor, prices, summary judgment, cause of action, Sherman Act, complaints, unreasonable restraint, initial burden, argues, subcontractors, prohibitions, constitutes, settlement, financing, commerce, dealers, parties, summary adjudication

Judges: **[*1]** Anne-Christine Massullo, Judge of the Superior Court.

Opinion by: Anne-Christine Massullo

Opinion

ORDER RE SUTTER'S MOTION FOR SUMMARY ADJUDICATION OF COUNTS I AND III

INTRODUCTION

Plaintiffs UFCW & Employers Benefit Trust ("UEBT") and the People of the State of California (the "People") filed substantially similar complaints. Through the present motion, Sutter[1] moves for summary adjudication of Counts I and III of both complaints. Plaintiffs jointly oppose.

The matter was set for hearing on March 11, 2019. The Court provided the parties with a tentative ruling. Having considered the argument of the parties in addition to the pleadings on file, Sutter's motion is denied.

LEGAL STANDARD

"A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding. The motion may be made at any time after 60 days have elapsed since the general appearance in the action or proceeding of each party against whom the motion is directed or at any earlier time after the general appearance that the court, with or without notice and upon good cause shown, may direct." (*Cal. Code of Civ. Proc., § 437c(a)(1)*.) "A party may move for summary adjudication as to one or more **[*2]** causes of action within an action, one or more affirmative defenses, one or more claims for

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1 The parties refer to the moving Defendants as "Sutter Health et al. ('Sutter')." (Notice of Motion, 1; see also Opposition, 1.)

damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in *Section 3294 of the Civil Code*, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (*Id.*, *§ 437c(f)(1)*.)

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atl. Richfield Co. (2001) 25 Cal.4th 826, 843, 107 Cal. Rptr. 2d 841, 24 P.3d 493*.)

"First, and generally, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Id. at 850*.) "There is a triable issue of material fact if, and only if, **[*3]** the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*) "[A] defendant bears the burden of persuasion that 'one or more elements of the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto." (*Ibid.*)

"Second, and generally, the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Ibid.*) "A burden of production entails only the presentation of 'evidence.'" (*Ibid.*)

"Third, and generally, how the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on *which* would bear *what* burden of proof at trial." (*Id. at 851*.) "Thus, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, **[*4]** he must present evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not-otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact. By contrast, if a defendant moves for summary judgment against such a plaintiff, he must present evidence that would require a reasonable trier of fact not to find any underlying material fact more likely than not-otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact." (*Ibid.*)

The pleadings delimit the scope of the issues and frame the outer measure of materiality in a summary judgment proceeding. (*Hutton v. Fidelity Nat'l Title Co. (2013) 213 Cal.App.4th 486, 493, 152 Cal. Rptr. 3d 584*.) The burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability as alleged in the complaint; a moving party need not refute liability on some theoretical possibility not included in the pleadings. (*Ibid.*)

DISCUSSION AND ANALYSIS

I. Count I

Count I is a claim for price tampering in violation of the Cartwright Act. (See UEBT Complaint ¶¶ 138-144; People's Complaint ¶¶ 140-146.) In short, the theory of liability **[*5]** set forth in the complaints is that Sutter's contracts with Network Vendors unlawfully control and tamper with the price terms that Self-Funded Payors may offer the enrollees of their Health Plans. (UEBT Complaint ¶ 138; People's Complaint ¶ 140.) The purpose of Sutter's contractual restrictions is to eliminate price competition and thereby stabilize and maintain prices for general acute care hospital services and ancillary products at supra-competitive levels in violation of the Cartwright Act. (UEBT Complaint ¶ 138; People's Complaint ¶ 140.) The conduct constitutes either a per se violation of California's antitrust laws or an unreasonable and unlawful restraint of trade. (UEBT Complaint ¶ 142; People's Complaint ¶ 144.)

There are two layers to Sutter's argument. First, Sutter contends that, as a matter of law, the only "price tampering" prohibited by the Cartwright Act is price fixing. (Motion, 11-12.) Second, Sutter argues that, as a matter of fact, Sutter did not fix prices. (*Id.* at 12-14.) Sutter asserts that Plaintiffs' rely on vertical restraints that indirectly resulted in prices. (*Id.* at 14-15.) Sutter argues that this theory is not cognizable. (*Id.* at 14-17.)

Plaintiffs disagree. **[*6]** First, Plaintiffs contend that claims based vertical tampering with price and price structures are cognizable under the Cartwright Act. (Opposition, 8-13.) Plaintiffs assert that they have evidence to support such a theory. (*Id.* at 13-14.) Second, if Sutter's legal position is correct, Plaintiffs argue that Plaintiffs have evidence of vertical price fixing. (*Id.* at 14-16.)

A. The Cartwright Act

Under the Cartwright Act, a "trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: ... (d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State. [¶] (e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any combination of any of the following: ... (2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure. [¶] (3) Establish or settle the price of any article, commodity or transportation between them or themselves **[*7]** and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity. [¶] (4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected." (*Cal. Bus. & Prof. Code, § 16720(d)*, *(e)(2)-(4)*.)

The Cartwright Act is this state's principal ***antitrust law***. (*In re Cipro Cases I & II (2015) 61 Cal.4th 116, 136, 187 Cal. Rptr. 3d 632, 348 P.3d 845*.) The act's principal goal is the preservation of consumer welfare. (*Ibid.*) "At its heart is a prohibition against agreements that prevent the growth of healthy, competitive markets for goods and services and the establishment of prices through market forces. [Citation.] 'The act 'generally outlaws any combinations or agreements which restrain trade or competition or which fix or control prices' [citation], and declares that, with certain exceptions, 'every trust is unlawful, against public policy and void.' [Citations.]" (*Ibid.* [internal citations omitted].)

"Though the Cartwright Act is written in absolute terms, in practice not every agreement within the four corners of its prohibitions has been deemed **[*8]** illegal." (*Ibid.*) Instead, based on common law prohibitions against restraints of trade, the broad prohibitions in the act are subject to an implied exception similar to one that validates reasonable restraints of trade under the federal Sherman Antitrust Act. (*Id. at 136-37, 146*.)

B. Vertical Price Tampering[2]

It is undisputed that the Cartwright Act prohibits both horizontal and vertical price fixing. (See, e.g., Motion, 12.) Where the parties part company is on the question of whether the Cartwright Act imposes liability on agreements that "might in any manner" affect prices. (Compare Motion, 12; Opposition, 9.)

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[2] Plaintiffs do not base their claims on any agreement of any kind between Sutter and other hospitals or healthcare providers. (Plaintiffs' Response to Separate Statement ¶ 7.) Accordingly, the court need not discuss horizontal price fixing or horizontal price tampering.

Plaintiffs' argument is rooted in the broad language of the statute. (Opposition, 8-9.) But, as observed above, the statute does not prohibit every agreement that falls within the four corners of its prohibitions. (*In re Cipro, 61 Cal.4th at 136-37*.) Under the common law, reasonable restraints of trade are permitted. (*Ibid.*)

Accordingly, the first question presented here is whether vertical price tampering is, or may be, prohibited by the Cartwright Act. On that question, Plaintiffs direct the court's attention to *Oakland-Alameda County Builders' Exchange v. F.P. Lathrop Construction Co. (1971) 4 Cal.3d 354, 93 Cal. Rptr. 602, 482 P.2d 226* (*"Lathrop"*). (See Opposition, 9-10.) There, the California Supreme Court held that "the rules of the Oakland-Alameda **[*9]** County Bid Depository impose requirements on participating subcontractors and general contractors which involve illegal price tampering and group boycotts." (*Lathrop*, 4: Cal.3d at 369.) The bid depository rules provided the exclusive process by which general contractors could obtain bids from subcontractors in formulating their bids on prime contracts. (See *id. at 357*.) First, subcontractors submitted their bids to a lockbox by an appointed time. (See *ibid.*) Second, general contractors could use only the bids that had been submitted to the lockbox to formulate their bids for the prime contract, without any opportunity to negotiate lower bids. (See *ibid.*) The process violated the Cartwright Act for two reasons. First, it stifled price competition amongst subcontractors. (*Id. at 362-64*.) Second, it required general contractors to boycott subcontractors who failed to comply with the bid depository rules. (*Id. at 364-65*.)

Sutter argues that *Lathrop* is factually distinguishable because the bid depository rules precluded horizontal price competition — competition between subcontractors. (Motion, 16; Reply, 3.) Further, Sutter argues that cases involving vertical price competition are limited to vertical price fixing — situations **[*10]** in which the supplier fixes the price at which the distributor will sell the product. Among other cases, Sutter highlights *Kunert v. Mission Financial Services Corp. (2003) 110 Cal.App.4th 242, 1 Cal. Rptr. 3d 589* and *Exxon Corp. v. Superior Court (1997) 51 Cal.App.4th 1672, 60 Cal. Rptr. 2d 195*. (See Motion, 13-14; Reply, 4.)

In *Kunert*, the Court of Appeal evaluated whether the Kunerts could amend their complaint to state a claim for vertical price-fixing based on certain proposed allegations. (*Kunert, 110 Cal.App.4th at 262*.) The Court explained that a "vertical price-fixing agreement, commonly known as resale price maintenance, involves the efforts of a supplier to control the distribution of its product or service by retailers or distributors. [Citation.] Such an agreement limits the distributor's freedom to sell the supplier's product at a price independently selected by the distributor [citation]; instead, the supplier establishes the price at which its distributors may sell the supplier's products, resulting in maintenance of the resale price at a single level. The supplier's price restrictions are often enforced through the supplier's refusal to deal with a particular distributor. [Citation.] A vertical price-fixing or resale price maintenance agreement between supplier and distributor 'destroys horizontal competition as effectively as would a horizontal agreement among **[*11]** distributors or retailers' [citation] and is per se unlawful under the Cartwright Act. [Citation]" (*Id. at 263* [internal quotations omitted].) The proposed allegations were insufficient because "[t]he essence of resale price maintenance is the supplier's—in this case, Mission Financial's—control of the resale price of its automobile financing, setting it at the same level for all its dealers and thus restricting competition among the dealers on the financing rate. The Kunerts have not and cannot in good faith assert that Mission Financial set the financing rate dealers must charge their customers, or made any effort whatsoever to restrict the financing rate charged by the dealer." (*Id. at 263-64*.)

In *Exxon*, Exxon franchisee service station dealers alleged that Exxon violated, *inter alia*, the Cartwright Act by requiring them to pay excessive rates for gasoline. (*Exxon, 51 Cal.App.4th at 1677*.) The Court of Appeal analyzed the restraint as a vertical non-price restraint that is tested under the rule of reason such that the plaintiffs were required to prove that the restraint had an anticompetitive effect in the relevant market in order to prevail. (*Id. at 1680-81*.)

Sutter's cases, especially read in conjunction with *Lathrop*,[3] do not establish that "vertical **[*12]** price tampering" is lawful so long as it does not rise to the level of price fixing. Rather, "price tampering," as described in Count I, may be actionable under the Cartwright Act. Sutter concedes that if Sutter is correct that the "price tampering" described in the complaints constitutes only a "non-price vertical restraint," the result is that the restraints are "evaluated just like any other alleged unreasonable restraint of trade" — not that the claim is invalid. (Motion, 23; *Exxon, 51 Cal.App.4th at 1680-81*; *Kunert, 110 Cal.App.4th at 263-64* [concluding that the Kunerts could not plead vertical price-fixing because they could not allege that Mission Financial set financing rates *or* "made any effort whatsoever to restrict the financing rate charged by the dealer"].)[4]

C. Sutter's Initial Burden

To meet its initial burden, Sutter must meet Plaintiffs' theory of liability as alleged in the complaints. (See *Hutton, 213 Cal.App.4th at 493*.) Sutter has not done so.

To carry its initial burden, Sutter refers to interrogatory responses in an effort to show that Plaintiffs have disclaimed any intent to show horizontal price tampering or vertical price fixing. (See Sutter Separate Statement ¶¶ 1-9.) This is consistent with Sutter's legal argument that "vertical price tampering" **[*13]** is not a cognizable offense, only vertical price fixing. But Sutter concedes that "non-price vertical restraint[s]" are evaluated "like any other alleged restraint of trade." (Motion, 23.) Plaintiffs alleged that what the conduct they alleged constituted "price tampering" constitutes "an unreasonable and unlawful restraint of trade." (UEBT Complaint ¶ 142; People's Complaint ¶ 144.) Accordingly, consistent with Sutter's own argument, demonstrating that Plaintiffs' cannot prove price fixing does not indicate that the conduct they describe as "price tampering" is lawful. Accordingly, Sutter has not carried its initial burden of producing evidence that Plaintiffs will be unable to establish an element of their first cause of action.

II. Count III

Count III is a claim for combination to monopolize in violation of the Cartwright Act. (See UEBT Complaint ¶¶ 156-160; People's Complaint ¶¶ 158-162.) In short, the theory of liability set forth in the complaints is that Sutter compelled Health Plan Vendors to agree to contract terms through which Sutter unlawfully restrains trade with the purpose and effect of obtaining or maintaining monopoly power with the relevant geographic markets, which **[*14]** in turn allows Sutter to demand supra-competitive prices. (UEBT Complaint ¶¶ 156-157; People's Complaint ¶¶ 158-159.)

There are again two layers to Sutter's argument. First, Sutter argues that a "combination to monopolize" claim can only be maintained where the members of the combination shared a specific intent to monopolize the market. (See Motion, 17-20.) Second, Sutter contends that, as a matter of fact, the Health Plan Vendors, or insurers, did not have a specific intent to help Sutter monopolize the market. (*Id.* at 20-23.)

Plaintiffs' disagreement is with the Sutter's first line of argument. Plaintiffs assert that they need not show that all combining parties shared a specific intent to monopolize to support a claim for a combination to monopolize. (See Opposition, 16-19.)

A. Essential Elements

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[3] The *Lathrop* court did not focus on any distinction between horizontal and vertical price competition. Instead, it underscored the fact that one of the central purposes of the Cartwright Act is to promote price competition. (*Lathrop, 4 Cal.3d at 362-63*.)

[4] The point Sutter is making here is that Sutter believes that all three theories of liability set forth in Counts I, II, and III should have been included in a single cause of action for unreasonable restraint of trade. (Motion, 23.) However, Sutter does not cite authority to support its implied assertion that the court should remove valid and distinct theories of liability from the case because they could have been alleged as a single cause of action.

1. The Cartwright Act

"[T]he Cartwright Act is not derived from the Sherman Act, but rather from the laws of other states, and the Cartwright Act and the Sherman Act differ in wording and scope." (*Asahi Kasei Pharma Corp. v. CoTherix, Inc. (2012) 204 Cal.App.4th 1, 8, 138 Cal. Rptr. 3d 620* (citation omitted).) "The Cartwright Act bans combinations, but single firm monopolization is not cognizable under the Cartwright Act. [Citations.] To maintain an action for combination in restraint **[*15]** of trade under the Cartwright Act, 'the following elements must be established: (1) the formation and operation of the conspiracy; (2) illegal acts done pursuant thereto; and (3) damage proximately caused by such acts. [Citation.]' [Citation.] " (*Ibid.* [internal citations omitted].)[5]

"[A]greements to establish or maintain a monopoly are restraints of trade made unlawful by the Cartwright Act. [Citations.] Under general antitrust principles, a business may permissibly develop monopoly power, i.e., 'the power to control prices or exclude competition' [citation], through the superiority of its product or business acumen. To acquire or maintain that power through agreement and combination with others, however, is quite a different matter. [Citation.]" (*In re Cipro, 61 Cal.4th at 148*; see also *Lowell v. Mother's Cake & Cookie Co. (1978) 79 Cal.App.3d 13, 23, 144 Cal. Rptr. 664* ["Though not specifically listed, monopoly is a prohibited restraint of trade. The offense of monopoly involves the willful acquisition of the power to control prices or exclude competition from commerce in a particular geographic are with respect to a specific product"].)

2. *In re Cipro*

The *In re Cipro* Court was presented with a "reverse payment" patent settlement whereby a brand-name drug manufacturer paid a generic in exchange **[*16]** for the generic dropping its patent challenge and consenting to stay out of the market. (*In re Cipro, 61 Cal.4th at 130*.) Summarizing its ruling, the Court stated that parties "illegally restrain trade when they privately agree to substitute consensual monopoly in place of potential competition that would have followed a finding of invalidity or noninfringement." (*Ibid.*) In its analysis, the Court addressed whether reverse payment settlements are subject to a rule of reason analysis and, if so, how the analysis should be structured. (*Id. at 148*.) In that context, the Court made the foregoing observation that agreements to establish or maintain a monopoly are unlawful restraints of trade. (*Ibid.*) As an example, the Court noted that a firm may not pay its only potential competitor not to compete in return for a share of the profits that firm can obtain by being a monopolist. (*Ibid.*) In the meat of its analysis, the Court described how the rule of reason analysis applies where a plaintiff challenges a reverse payment patent settlement. (See *id. at 151-160*.) The focus of the analysis is on whether the settlement fund includes a payment made in exchange for a delay in market entry. (See *ibid.*) Specific intent is never discussed.

3. Plaintiffs' [*17] Argument

Plaintiffs' argument is straightforward. A "combination to monopolize" is a restraint of trade. (Opposition, 16; *In re Cipro, 61 Cal.4th at 148* ["agreements to establish or maintain a monopoly are restraints of trade made unlawful by the Cartwright Act"].) The elements of a claim for a combination in restraint of trade do not include a shared specific intent to create a monopoly. (Opposition, 16-17; *Asahi Kasei, 204 Cal.App.4th at 8*; *Kolling v. Dow Jones & Co. (1982) 137 Cal.App.3d 709, 720, 187 Cal. Rptr. 797* ["the 'conspiracy' or 'combination' necessary to support an antitrust action can be found where a supplier or producer, by coercive conduct, imposes restraints to which distributors involuntary adhere"].) Accordingly, Plaintiffs conclude that they need not show a shared specific intent to create a monopoly.

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[5] Count II of the complaints is a separate claim for unreasonable restraint of trade in violation of the Cartwright Act. (See UEBT Complaint ¶¶ 146-154; People's Complaint ¶¶ 148-156.)

4. Sutter's Arguments

a. Whether Counts II and III are Duplicative

First, Sutter argues that the court should disregard Plaintiffs' reference to the elements of a combination in restraint of trade because Plaintiffs pled a separate cause of action for "unreasonable restraint of trade." (Reply, 8; see also Motion, 23.) As detailed more fully below, the manner in which Plaintiffs organized their legal theories does not govern the court's determination of the essential elements of the Plaintiffs' legal claims. **[*18]**

Turning to the complaints, Plaintiffs allege that the "combination to monopolize" addressed in Count III violates the Cartwright Act because, at minimum, it constitutes an unreasonable restraint of trade. (UEBT Complaint ¶ 158; People's Complaint ¶ 160.) In Count II, Plaintiffs allege that similar conduct constituted, at minimum, an unreasonable restraint of trade, but do not allege that Sutter had the specific intent to obtain or maintain monopoly power. (See UEBT Complaint ¶¶ 146, 152, 157; People's Complaint ¶¶ 148, 154, 159.) Accordingly, Plaintiffs alleged that the conduct addressed in Counts II and III is unlawful under the Cartwright Act for the same reason — it constitutes an unreasonable restraint of trade. (UEBT Complaint ¶¶ 152, 158; People's Complaint ¶¶ 154, 160.)

Sutter suggests that if its motion is granted the Count III theory can, in the absence of specific intent to monopolize, be pursued under Count II. (Motion, 23.) But Sutter's motion seeks relief that would remove the Count III theory from the case. Sutter has not cited authority to support the proposition that a distinct theory of liability can be removed from a case on summary adjudication because it was pled **[*19]** as a separate cause of action. Instead, Sutter argues that Count III is invalid because Plaintiffs do not have evidence of a specific intent to monopolize shared by the insurers. The court's present analysis is limited to that challenge.

b. Sherman Act

Second, Sutter contends that the specific intent requirement it would impose is required by analogous cases interpreting the Sherman Act. (See Motion, 18-19.) However, a review of those cases does not lead to the conclusion that Plaintiffs must prove a shared specific intent to monopolize to prevail on Count III.

Under *Section 2* of the Sherman Act: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court." (*15 U.S.C. § 2*.)[6]

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[6] Under *Section 1* of the Sherman Act: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court." (*15 U.S.C. § 1*.) Plaintiffs suggest that the court should analogize their claim to a claim for conspiracy to monopolize under *Section 1*, which Plaintiffs contend lacks a specific intent requirement. (See Opposition, 19; *City of Vernon v. Southern California Edison Co. (9th Cir. 1992) 955 F.2d 1361, 1371* [stating in dicta that a *Section 1* conspiracy to monopolize may exist even where one of the conspirators participates involuntarily or under coercion].) This line of argument is tangential. Plaintiffs' primary argument is that federal law is inapposite. (See Opposition, 18.) The reason that Sutter turns to *Section 2* of the Sherman Act is because it deals specifically with monopolization. It is the strength of the analogy between *Section 2* and California law that determines the weight to be given to Sutter's argument.

Section 2 of the Sherman Act applies to both actual monopolies and the preliminary steps that can lead to monopoly, but **[*20]** conduct falling short of a monopoly is not illegal unless it is part of a plan to monopolize or to gain such other control of a market as is equally forbidden. (See *United States v. Aluminum Co. of America (2d Cir. 1945) 148 F.2d 416, 431-32*.) Attempt-to-monopolize and conspiracy to monopolize claims require a specific intent to monopolize any part of the trade or commerce, but conspiracy claims do not require proof that the conspiracy resulted in a dangerous threat of achieving monopoly power. (See, e.g., *Auraria Student Housing at the Regency, LLC v. Campus Village Apartments, LLC (10th Cir. 2016) 843 F.3d 1225, 1233* [attempt-to-monopolize and conspiracy to monopolize claims require a specific intent to monopolize any part of the trade or commerce, but conspiracy claims do not require proof that the conspiracy resulted in a dangerous threat of achieving monopoly power]; *Rebel Oil Co., Inc. v. Atlantic Richfield Co. (9th Cir. 1995) 51 F.3d 1421, 1437 n.8*.) Sutter explains that specific intent is necessary because "combination or conspiracy to monopolize is an inchoate offense—it prohibits an agreement to monopolize even if monopolization does not in fact occur." (Motion, 19.)

There are two California cases that treat agreements to establish or maintain a monopoly as unlawful restraints of trade under the Cartwright Act. (See *In re Cipro, 61 Cal.4th at 148*; *Lowell, 79 Cal.App.3d at 23*; see also *Dimidowich v. Bell & Howell (9th Cir. 1986) 803 F.2d 1473, 1478* [citing *Lowell* for the proposition that monopoly is a prohibited restraint of trade under the Cartwright Act and **[*21]** stating, in dicta, that a claim for conspiracy to monopolize between two actors is cognizable under the Cartwright Act].) Sutter notes that the discussions in those cases include citations to cases interpreting *Section 2* of the Sherman Act. (Motion, 17-19; *Lowell, 79 Cal.App.3d at 23* [citing *United States v. Grinnell Corp. (1966) 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778* and *Aluminum Co.* to support the proposition that the "offense of monopoly involves the willful acquisition of the power to control prices or exclude competition from commerce in a particular geographic area with respect to a specific product]; *In re Cipro, 61 Cal.4th at 148-49* [citing numerous federal cases in explaining examples of prohibited conduct][7].)

The fact that California cases cited to *Section 2* cases in outlining general principles of monopoly law does not, in itself, indicate that the Cartwright Act tracks *Section 2* of the Sherman Act. Instead, *In re Cipro* adopts an approach to evaluating the anticompetitive effects of an agreement to establish or maintain a monopoly in the unique reverse patent settlement context by formulating an analysis focusing on whether the settlement eliminates competition beyond the point at which competition would have been expected in the absence of the agreement.[8] (*In re Cipro, 61 Cal.4th at 151-60*.) This is consistent with the language in *In re Cipro, Lowell*, and **[*22]** *Dimidowich* that monopoly is one form of prohibited restraint of trade. The upshot is this: an agreement to monopolize is prohibited by the Cartwright Act if it constitutes an unreasonable restraint on trade. This is consistent with the theory pled in the complaints. (DEBT Complaint ¶ 158 [alleging that combination to monopolize constituted an unreasonable restraint of trade]; People's Complaint ¶ 160 [same].)[9] Shared specific intent amongst all co-conspirators is not an essential element of that offense. (*Kolling, 137 Cal.App.3d at 720*.)

B. Sutter's Initial Burden

Because Plaintiffs are not required to prove that the insurers had a specific intent to help Sutter form a monopoly, Sutter has not carried its initial burden. (See Sutter Separate Statement ¶¶ 2, 10-65 [the facts on which the motion

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[7] *In re Cipro* did not only cite cases decided under *Section 2* of the Sherman Act. (See *Palmer v. BRG of Georgia, Inc. (1990) 498 U.S. 46, 111 S. Ct. 401, 112 L. Ed. 2d 349* [*Section 1* case].)

[8] During oral argument Sutter suggested that *In re Cipro* is limited to reverse patent settlement cases. The court respectfully rejects such a limited interpretation of the opinion.

[9] This conclusion is also consistent with Sutter's position that the claim is nothing more than a further theory that Sutter unreasonably restrained trade. (Motion, 23.) At the same time, it is consistent with Plaintiffs' argument that a "combination to monopolize" is analyzed like any other restraint of trade. (Opposition, 16-17.) To the extent there is nothing more here than a disagreement as to whether the theory should have been pled as part of the second cause of action rather than as the third cause of action, Sutter has not explained why this pleading formality makes a difference.

is based are intended to show that the insurers with which Sutter contracted did not act out of a desire to help Sutter secure a monopoly or to restrain trade]; Motion, 17-23 [argument predicated on the absence of specific intent].)

CONCLUSION AND ORDER

For all these reasons, Sutter's motion is denied.[10]

IT IS SO ORDERED.

Dated: March 14, 2019

/s/ Anne-Christine Massullo

Anne-Christine Massullo

Judge of the Superior Court

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[10] Plaintiffs submitted objections to evidence in conjunction with their opposition papers and Sutter did the same in conjunction with its reply papers. The motion is denied because Sutter did not meet its initial burden, even if its evidence is considered. Accordingly, the court does not rule on the evidentiary objections. (*Cal. Code of Civ. Proc., § 437c(q)*.)

LexisNexis

Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.

Appellate Division, Superior Court of California, Los Angeles

April 29, 2019, Decided; April 29, 2019, Filed

Case No.: SC090481

Reporter

2019 Cal. Super. LEXIS 92933 *

FLAGSHIP THEATRES OF PALM DESERT, LLC dba CINEMAS PALME D'OR, a California Limited Liability Corporation, Plaintiff, v. CENTURY THEATRES, INC., a California Corporation, et. al., Defendants.

Core Terms

billed, antitrust, spent, attorney's fees, timekeepers, Defendants', post-contingency, spoliation, lodestar, movie, preparation, deposition, time spent, clearances, discovery, tasks, pre-contingency, equated, contingency fee agreement, fee request, litigated, damages, motions, cases, full amount, distributors, contingency, multiplier, presenting, inflated

Judges: **[*1]** LISA HART COLE, Judge of the Superior Court.

Opinion by: LISA HART COLE

Opinion

ORDER ON GRANTING PLAINTIFF'S MOTION FOR ATTORNEYS' FEES IN THE AMOUNT OF $8,041,102

The history of this case is well documented by both counsel in their respective pleadings on Plaintiff's Motion for Attorneys' fees. After 12 years of litigation, which included three motions for summary judgment, two appeals and a five week trial, the jury rendered a verdict of $1,250,000, which when trebled by law,[1] awarded a total judgment for the Plaintiff of $3,750,000. The Cartwright Act further provides for unilateral fee-shifting awarding reasonable attorneys' fees to the prevailing Plaintiff.[2] The general purpose of the one-sided attorneys' fee provision is to insulate treble damages recoveries from expenditures for legal fees thus encouraging private persons to pursue otherwise costly and complex antitrust cases.[3]

There is no dispute that Plaintiff is entitled to attorneys' fees. The focused challenge is to the reasonableness of the amount of attorneys' fees sought ---$21,700,672.98.[4]

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[1] Cal. Business & Professions Code § 16750(a)

[2] See, B&P § 16750(a); Carver v. Chevron U.S.A., Inc., (2004) 119 CA4th 498, 503094

[3] *See,* Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., (9th Cir. 1982) 676 F.2d 1291, 1312-1313.

[4] Lodestar of $15,500,480.70 with a 1.4 multiplier, Flagship Reply, 33:11-13

Plaintiff's Position

Plaintiff correctly argues that private enforcement of the Cartwright Act in and of itself serves an important public interest. In order **[*2]** to attract qualified counsel to accept such risky and expensive cases, attorneys' fees are mandatory. "Antitrust plaintiffs are 'entitled to recover a reasonable attorney's fee for every item of service which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer...to protect his client's interest in pursuit of a successful recovery... ."[5] Depending on the facts of each case, an enhancement multiplier is sometimes applied to balance the risk and expense against the important public interest benefit.

Lead counsel, Tom Boeder, is a highly qualified antitrust litigator and one of only a few attorneys in the United States with experience in movie industry antitrust matters and knowledge of circuit dealing disputes.[6] Mr. Boeder explains that he originally took the case on "hourly rate plus disbursements basis,"[7] but as the case dragged on the firm agreed to a contingency fee agreement, the terms of which were not disclosed by Plaintiff in its motion. As revealed by the Defendants, however, a March 7, 2012 contingency fee agreement provides for Perkins Coie to recover the past due/pre-contingency amount of $870,279, plus 40% of any additional money recovered in **[*3]** the lawsuit. The remaining 60% of the recovery, including attorneys' fees, would go to Flagship.[8] Over the 12 years of litigation, Mr. Boeder was ably assisted by several other attorneys and paralegals both in Seattle and Los Angeles, most significantly by Elvira Castillo and Donald Kula.

Plaintiff addresses its lodestar analysis seeking to recover all hours reasonably spent to establish and defend a fee claim.[9] Due to the length of the litigation and the difficulty in accounting for the many timekeepers who worked on the case (some of whom may no longer be employed at the firm) counsel opted to use "timekeeper historical rates, *i.e.*, the rates in place at the time the work was done."[10] According to Mr. Kula, the "Perkins Coie timekeepers used in the lodestar calculation presented in this motion are comparable to, or lower than, the prevailing rates for such services of the kind and quality of the services provided by Perkins Coie to Flagship in this case."[11] Counsel argues that the "lean" staffing approach in this case was designed to be efficient and cost effective by delegating work to lower rate timekeepers, devoting only two partners to the case, and maintaining a core team as consistently **[*4]** as possible throughout the litigation.[12] Finally, Mr. Boeder reviewed the billing and wrote off a total of $163,651.75,[13] in addition to applying historical hourly rather than current hourly rates, in further support of counsels' conservative billing approach.[14] Plaintiff values its lodestar at $15,500,480.70. Plaintiff's billing expert, Kenneth Moscaret, opines that, "Perkins has exercised billing judgment in both the manner in which it has handled, managed, staffed, and billed the current action, but also in submitting the instant fee motion.."[15]

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[5] Flagship Reply, 8:7-9, citing *Theme Propositions, Inc. v. News Am. Mktg. FSI, Inc. (N.D. Cal. 2010) 731 F.Supp2d 937, 941*.

[6] Boeder Declaration and Boeder Qualifications Declaration.

[7] Flagship Mot. for Attys' Fees, 3:14.

[8] Decl. Clement Glynn, Exhibit 2.

[9] *Citing, Serrano v. Unruh (1982) 32 Cal.3d 621, 639, 186 Cal. Rptr. 754, 652 P.2d 985*. *See generally*, Flagship Motion for Attorneys' Fees, 9:11-11:28.

[10] Flagship Motion, 9:20-21.

[11] Kula declaration, 112.

[12] *See*, Flagship Motion, 12:1-13:23.

[13] Specifically, the amounts written off include amounts Mr. Boeder determined to be duplicative or inefficient, all individual time entries of $1,000 or less, and purely administrative tasks.

[14] *See*, Flagship Motion 1:125; Boeder Decl. ¶ 17; Kula Decl. ¶ 12, Exh. A.

[15] Moscaret Decl., 4:3-4

Plaintiff seeks a 1.4 enhancement multiplier to its lodestar for several reasons. In light of the complexity of the case, the challenges posed during the 12 years of litigation and Defendants' aggressive litigation tactics, Plaintiff urges that the public interest benefits for independent theaters and movie goers goes far beyond the Plaintiff's monetary recovery. Mr. Boeder advises that this is one of only two private movie industry antitrust circuit dealing cases that an independent movie theater plaintiff has actively litigated through verdict, and further that *Flagship 1*[16] resulted in an important Cartwright Act jurisprudence. **[*5]** Although *Flagship I* alone is significant, "the most enduring measure of success in this case....are the public interest benefits that pursuit of the litigation by Flagship has generated," which include increased access by independent movie theater goers to desirable first run commercial films.[17] As of 2016, at least three major Hollywood movie studios have publicly announced or implemented a policy of no longer honoring any exhibitor requests for clearance/exclusivity on the movies they distribute. Based on that, Mr. Boeder opines that the results of this case are changing the industry standard. Plaintiff relies on Kenneth Moscaret's expert opinion in support of the reasonableness of both the lodestar and multiplier. Plaintiff values the attorneys' fees, with the 1.4 multiplier, at $21,700,672.98.

Defendants' Position

Defendants take issue with various aspect of Plaintiff's lodestar. The following are Defendants' main criticisms based on counsels' own analysis and that of their billing expert, Clement L. Glynn:

- Block Billing/Modified Block Billing - Perkins Coie regularly "block billed" (or "modified block billed") entries **[*6]** that lump all tasks performed during a given day into a single "block" of time, making it impossible to assess the reasonableness of that time on a per-task basis.[18] Block-billing is generally disfavored[19] and warrants a percentage reduction.
- Inflated hours post 2012 contingency fee agreement - During the first six years of litigation Plaintiff billed 3,000 for approximately $1,200,000 in fees. After counsel and Flagship reached a contingency fee agreement, Plaintiff billed 30,000 hours for approximately $13,600,000 in fees.[20] Defendants attribute this significant increase to lack of reasonable billing supervision and restraint.[21]
- Spoliation of evidence - Counsel billed 2,761 hours, nearly $1,300,000, defending its own spoliation of evidence, which resulted in Plaintiff's loss of two years' worth of evidence/damages at trial and a mutually costly four-year delay in the case.[22]
- Fees for numerous non-lawyers - Counsel seeks to include non-lawyer tasks, such as a jury consultant, as attorney fees.

Defendants correctly argue that the Plaintiff bears the burden of proving the reasonableness of its proffered lodestar. Although Perkins Coie's rates may have been reasonable, the time **[*7]** spent on various tasks allegedly is not.[23] Defendants' urge a further downward adjustment to the lodestar due to Flagship's limited success at trial: "[A] reduction in the fee amount is 'appropriate if the relief, however significant, is limited in comparison to the scope

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[16] *See, Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc. (2011) 198 CA4th 1366, 131 Cal. Rptr. 3d 519*

[17] Boeder Decl. ¶¶ 9, 11, 12.

[18] Century/Cinemark's Opposition to Flagship's Motion, 6:17-7:16

[19] See, California State Bar Committee on Mandatory Fee Arbitration, Detecting Attorney Bill Padding, Arbitration Advisory 2003-01 at 7 (Jan, 29, 2003

[20] *Ibid.*, at 7:17-8:10.

[21] *Ibid.*, at 11:12-14

[22] *Ibid.*, at 8:11-19

[23] *Ibid*, at 11:20-12:12.

of the litigation as a whole'"[24] Defendants' recommend that the court adopt a "holistic approach" and reduce Plaintiff's fee award by "at least" 50%, or $7,395,740.[25] Defendants concludes that a maximum fee of $3,679,870 is appropriate.[26]

Similarly, Defendants dispute that any multiplier is appropriate. This case did not have a wide-ranging effect on the film exhibition industry, independent theaters, or movie goers according to the Defendants.[27] Flagship's attempt to take credit for ending clearances is allegedly misguided because the case was not about clearances but rather about circuit dealing.[28] Further, it is temporally impossible to attribute the 2018 verdict in this case to the 2016 decision by a few distributors to no longer honor clearances.[29] Aside from the lack of evidence to support Plaintiff's claim that this lawsuit is causally related to any policy change in the Coachella Valley or anywhere else, Defendants **[*8]** artfully suggest that, "[i]t is a bridge too far for Flagship to urge that a case not challenging clearances somehow ended all clearances nationwide."[30] Finally, Defendants conclude that the *Flagship I* decision is not significant in light of other more significant State and Federal opinions,[31] and that the case has only been cited once since 2011 for an issue not related to circuit dealing or any antitrust proposition.[32]

<u>*Discussion*</u>

Introduction

Plaintiff's lodestar is patently irreconcilable when comparing the pre-contingency and post-contingency hours and fees. During the first six years of this case, prior to the March 7, 2012 contingency fee agreement, Perkins Coie billed $1,193,442.45 based on 3,000 hours of work utilizing 23 time keepers. During the second six years of this case, Perkins Coie billed $13,598,038, based on 30,000 hours of work utilizing 78 timekeepers. In other words, counsel actually billed 10 times the number of hours and over 11 times the amount of fees in the second half of the litigation. These numbers alone defy any sense **[*9]** of reasonableness. Flagship attributes the extreme differential in hours and fees during the second half of the litigation to Norton Fulbright's entry into the case by, "ratcheting up the tone, tenor and tenaciousness of the litigation."[33] Plaintiff questions what Defendants' billed during the litigation and implies that their own fees would be viewed favorably in comparison.[34] The second half of the litigation

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[24] *Ibid.*, at 26:23-24; Citing *Hensley v. Eckerhart (1983) 461 U.S. 424, 439, 103 S. Ct. 1933, 76 L. Ed. 2d 40*.

[25] Defts.' Opp. 25:23-26:4; Glynn Decl. ¶¶ 1(c), 31, 34, 43.

[26] *Ibid.*, at 35:26

[27] *Ibid.*, at 30:3-30:3-32:4

[28] *Ibid.*, at 31:17 - 32:4; citing *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc. (2011) 198 CA4th 1366, 131 Cal. Rptr. 3d 519*

[29] *Ibid.*, at 31:7-13.

[30] *Ibid.*, at 32:2-4

[31] *Citing, Redwood theatres, Inc. v. Festival Enter., Inc. (1988)200 CA3d 687, 248 Cal. Rptr. 189*

[32] *Ibid.*, 32:5 - 23, *Citing Orange Cnty. Water Dist., v. Sabic Innovative Plastics US, LLC (2017) 14 CA5th 343, 222 Cal. Rptr. 3d 83*.

[33] Flagship Reply, 7:18-20.

[34] The parties engaged in discovery prior to the filing of the motion. There is no evidence that Flagship requested Norton Fulbright's bills or that such request was not honored.

included a second trip to the Court of Appeal over the spoliation issue (*Flagship II*)[35] which Plaintiff's urge was more complicated than *Flagship I*. As for the two years spent litigating the spoliation issue, Plaintiff blames Norton Fulbright's overreaching in seeking terminating sanctions instead of lesser evidentiary and damages sanctions ultimately imposed by the Court of Appeal.[36] Plaintiff and its expert conclude that the time expended was reasonable and necessary, and that any reduction in an antitrust case based on a reduced jury award is improper, merely inviting error.

Objectively, the first half of this case was litigated just as strenuously as the second half, but for the actual trial. During the first six years the parties engaged in written discovery, deposition of **[*10]** all principle players, Defendants' successful motion for summary judgment, a successful appeal of that summary judgment ruling and trial preparation. *Flagship I* was an intricate decision addressing not only the appropriate scope of discovery, but a discussion of all relevant antitrust cases. Plaintiff proudly describes this decision as significant for Cartwright Act jurisprudence and even more significant with respect to the law on circuit dealing: "*Flagship I* is the most detailed analysis of which Plaintiff is aware of the law on circuit dealing claims by any court, state or federal, in the context of private antitrust action."[37] It is disingenuous for Plaintiff to tout the importance of *Flagship I* when discussing its contribution to antitrust jurisprudence and to later minimize the complexity of the appeal when justifying magnified post-contingency fees for the *Flagship II*.

Comparison of time spent pre and post-contingency

The relative time spent on equivalent tasks during the first and second halves of the case shows a tremendous disparity in billing practices. Defendants' expert, Mr. Glynn, presented some glaring comparisons in this regard. For example, Mr. Tabor and Mr. Mason were **[*11]** each deposed during both periods of the case. In 2008, three timekeepers spent approximately 30.6 hours preparing for and presenting Mr. Tabor and Mr. Mason for deposition, which equated to $12,883 in fees. In 2013, seven timekeepers spent roughly 306 hours preparing for and presenting them for second depositions, which equated to $108,212 in fees.[38] In 2008, ten timekeepers spent 768.7 hours on the appeal of the Motion for Summary Judgment, resulting in *Flagship I*, which equated to $343,325 in fees. In 2014, 19 timekeepers spent 1,944 hours on the spoliation appeal, which equated to $958, 862 in fees.[39] In 2008, timekeepers spent 37.8 hours preparing for and taking two Cinemark depositions, an average of 19 hours per deposition, which equated to $17,696 in fees. In 2017, timekeepers spent 428 hours preparing for and taking four short Cinemark deposition, which equated to $246,889 in fees, or an average of 107 hours per deposition.[40] Plaintiff's explanation for what appears to be grossly inflated hours is Norton Fulbright tenacious litigation tactics, such as attacking the Flagship principals personally, and that the broadened scope of discovery required more deposition preparation. While **[*12]** both may be true, the explanation rings hollow in light of the massively disproportionate billing practices between the first and second halves of the litigation.

Spoliation issue

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[35] *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc., No. B257148, 2016 Cal. App. Unpub. LEXIS 3812, 2016 WL 3091192 (Cal .App. May 24, 2016)*

[36] *Ibid.*; Flagship Reply 23:7-24:8.

[37] Flagship Motion for Fees, 4:3-6

[38] Glynn Decl., ¶¶25(a), (d)

[39] Glynn Decl., ¶25(1)

[40] Glynn Decl., ¶25(d)

Whether it is equitable for a Plaintiff to recover fees for its own unintentional spoliation of material evidence has not been addressed by a published opinion.[41] Mr. Glynn opines that the approximately $1.3 million Flagship incurred in, "litigating the spoliation issue should not be awarded, as they were the result of Plaintiff's improper conduct."[42] Defendants' correctly note that the case was set for trial just weeks after the trial court's issuance of terminating sanction, and that the parties had largely prepared for trial.[43] The spoliation issue delayed the trial for four years, which resulted in repeated trial preparation for both sides.

It makes little sense for Defendants to pay all Flagship's fees to correct a mistake created by Flagship itself. Mr. Tabor admittedly, although unintentionally, destroyed nearly two years' worth of email that were critical to the litigation. Email exchanged between the Flagship principals, as well as with the Defendants and other distributors, were the keystone of proving Plaintiff's **[*13]** circuit dealing claims. The destruction of two years' worth of emails was a weighty event worthy of an equally weighty response by any competent attorney. Norton Fulbright cannot be blamed for seeking the sanction most beneficial to their clients, which was then granted by an experienced trial judge. For a second time, Flagship rose from the ashes after their successful appeal, but at a cost. Flagship was precluded from presenting any evidence or seeking any damages from the nearly two year period of the lost emails. This result ultimate impacted the recovery available to Flagship and thus the success of the case.

Plaintiff's success

The result a Plaintiff obtains at trial is significant when evaluating reasonable attorneys' fees. The Supreme Court in *Hensley v. Eckart* holds: "The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.' ....[D]id the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?"[44] Later, the Supreme Court in *Farrar* ***[*14]*** *v. Hobby* followed this analysis to its logical extension: "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all."[45] In *Chavez v. City of Los Angeles*, the California Supreme Court, citing *Hensley* and *Farrar* found, '"under state law as well as federal law, a reduced fee award is appropriate when a claimant achieves only limited success.'"[46]

Flagship takes issue with Defendants' reliance on *Hensley* and *Farrar* because both are civil rights and not anti-trust cases: "Because the fee-shifting provision of ***antitrust law***, like the Cartwright Act, are designed to 'encourage the

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[41] Defendant cites to *Burton Ways Hotels, Ltd. V. Four Seasons Hotels, Ltd., (CD. Cal. Jan. 21, 2015) No. CV 11-303-PSG, 2015 U.S. Dist. LEXIS 189845, 2015 WL 13081297* (applying California law, the court did not award fees incurred by counsel in defending its client from the repercussions of the client's negligent spoliation conduct because to do so "would be unjust.") *Fed.R.Civ.Proc 37(e)* ("If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (l)upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice....) addresses the appropriate sanctions for unintentional spoliation of evidence, it does not discuss the propriety of fees expended in defense of a spoliation motion.

[42] Glynn Dec, ¶ 11(b)

[43] Mason Decl., ¶9, citing to Boeder Depo. 245:5-246:9

[44] *Hensley v. Eckart*[44] *(1983) 461 U.S. 424, 434, 103 S. Ct. 1933, 76 L. Ed. 2d 40*

[45] *Farrar v. Hobby (1992) 506 U.S. 103, 115, 113 S. Ct. 566, 121 L. Ed. 2d 494* (citation omitted)

[46] ***Chavez v. City of Los Angeles (2010) 47 Cal.4th 970, 989, 104 Cal. Rptr. 3d 710, 224 P.3d 41***, citing *Sokolow v. County of San Mateo (1989) 213 Cal.App.3d 231, 249, 261 Cal. Rptr. 520*, and *Riverside v. Rivera (1986) 477 U.S. 561, 574, 106 S. Ct. 2686, 91 L. Ed. 2d 466*.

detection and cessation of anticompetitive behavior' and to 'encourag[e] private parties to bring antitrust action,' Flagship should recover its attorney's fees regardless of the amount of damages awarded."[47] Rather, Flagship urges the court to reject the *Hensley* and *Farrar* analysis and rely on *U.S. Football League v. Nat'l Football League*. However, even in that case the Court held: "*That the [Plaintiff] only received nominal damages is relevant in determining the amount of fees allowed and may be a factor used in reducing a fee* ***[*15]*** *award*, but it does not affect the entitlement to an award."[48] The trial court in *Nat'l Football League* did reduce the Plaintiff's attorneys' fee award by 20% due to the nominal recovery, which was undisturbed on appeal.

Flagship asked the jury for a minimum of $9.1 million in damages, which is significantly less than it envisioned before *Flagship II*. The jury awarded $1.25 million - about 14% of Plaintiff's request. Although significantly more than nominal, even the Plaintiff is hard-pressed to consider this reward a monetary success. Plaintiff emphasizes that the monetary award is only one measure of its success. In addition to two successful appeals, Mr. Boeder notes that this is only one of only two private movie industry antitrust circuit dealing cases that an independent movie theater plaintiff has actively litigated through verdict.[49] And as discussed above, Plaintiff urges that the "most enduring measure of success" is the public benefits, including increased access by independent movie theaters to first-run movies and the agreement by three major Hollywood movie studios rejecting clearances.[50]

In contrast, Defendants underrate any result Plaintiff's may have achieved. **[*16]** Over the course of the case, Plaintiff abandoned its claim for unfair competition and interference with prospective economic advantage and pursued circuit dealing exclusively. Plaintiff's initial assertion of a conspiracy theory among dozens of distributors was slowly abandoned as the trial progressed.[51] Defendants' minimize the impact of *Flagship I* on antitrust jurisprudence and give Plaintiff no credit for a few distributors rejection of clearances.

Three distributors did stop honoring clearances 10 years into the litigation. Whether each distributor's individual decision was the result of this litigation is a matter of speculation. Their decision is just as likely to have been based purely on a profit analysis. Similarly, it is impossible to attribute the benefit to the public of increased access to first run films based on this case or to quantify that benefit based on Mr. Boeder's opinion alone. However, *Flagship I* is unique given the dearth of antitrust decisions regarding circuit dealing since the 1948 U.S. Supreme Court decision of *United States v. Paramount Pictures*.[52] *Flagship I* provides a valuable summary of the case law on circuit dealing from 1948 through the 1988 decision **[*17]** in *Redwood Theatres, Inc. v. Festival Enters., Inc.*[53]

Conclusion

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[47] *See*, Flagship Reply, 28:12-28:24; *Citing,* *U.S. Football League v. Nat'l Football League (9th Cir. 1989) 887 F.2d. 408, 412*.

[48] *U.S. Football League v. Nat'l Football League (2d Cir. 1989) 887 F.2d 408, 411-412* (emphasis added).

[49] Boeder Decl., ¶9, citing *Seven Gables Corp. v. Sterling Recreation Org. Co., (W.D. Wash. 1988) 686 F.Supp. 1418*, as the other case, also litigated by Mr. Boeder

[50] Boeder Decl., ¶¶ 11, 12[50] Plaintiff's conspiracy theory provided the basis for the court's ruling admission of hearsay evidence at trial, which was the major issue in Defendants" Motion for New Trial.

[51] Plaintiff's conspiracy theory provided the basis for the court's ruling admission of hearsay evidence at trial, which was the major issue in Defendants" Motion for New Trial.

[52] *United States v. Paramount Pictures (1948) 334 U.S. 131, 68 S. Ct. 915, 92 L. Ed. 1260*

[53] *Redwood Theatres, Inc. v. Festival Enters., Inc. (1988) 200 CA3d 687, 248 Cal. Rptr. 189*

Plaintiff bears the burden of proving the fees it seeks are reasonable.[54] When awarding fees, it is incumbent upon the court to calculate the lodestar by carefully compiling the time spent and reasonable hour rate for each attorney.[55] Once the lodestar is calculated, that figure may be adjusted upward or downward to account for various factors, including the novelty and difficulty of the issues, the skill in presenting them, the risk associated with a contingent fee arrangement and the Plaintiff's success in the litigation.[56] One critical factor is arriving at a reasonable attorney fee is the degree of success obtained by the prevailing party.[57]

It is difficult to overlook the huge disparity of hours, timekeepers and tasks billed between the pre and post-contingency fee period. When Perkins Coie had a client reviewing the bills and bearing the responsibility for paying them, the bills were seemingly reasonable and conservative. After entry of the contingency fee agreement, every second of every timekeeper's breathing moment spent on the case appears to be included. And why not? When a client is reviewing and paying the **[*18]** bills an attorney exerts discipline to warrant that the fees are reasonable, or else the client will complain. The opposite is true when Flagship benefits directly from as many hours Perkins Coie can include in the fee request. Rather than having to pay money to its lawyer, Flagship actually reaps a significant financial reward from an inflated bill.

As was mentioned at the hearing, Plaintiff's billing presentation was exceedingly disappointing, particularly in light of the tremendous respect this court has for Mr. Boeder and his colleagues. Because the post-contingency fee hours appeared bloated by a factor often and the fees by a factor of 11, it was tempting to simply reduce the post contingency fees by 90%. In addition, non-recoverable costs were included as fees[58] and block-billing or modified block-billing was deemed an acceptable practice by both the firm and its expert.[59] Finally, Plaintiff's failure to take any responsibility, either factually or financially, for its role in its own spoliation of evidence is baffling. These issues cast a negative shadow over the legitimacy of the lodestar Plaintiff proposed.

In analyzing the fee request, the pre-contingency fees were used as **[*19]** a benchmark. Plaintiff's billing rate was not challenged by the Defendant and has been accepted without change. The fees initially charged to Flagship are reasonable given the unique nature of the litigation, the complexity of the issues and specialized skill involved in litigating these claims. The full pre-contingency fee request is awarded in each "category" as defined by and based on the figures provided by Perkins Coie.[60] Pre-contingency fees requested for certain tasks, such as deposition preparation or a summary judgment motion, were used as a guide in determining a reasonable amount of post-contingency fees for similar tasks. Due consideration was given to increased billing rates associated with the passage of time. Given the billing presentation, an entry-by-entry review was impossible to determine the reasonable time spent on a task or group of tasks - and fortunately, not required.[61] Consequently, a percentage

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[54] *See, Cntr. For Biologicial Diversity v. Cnty. of San Bernardino (2010) 188 CA4th 603, 615*.

[55] *See, Ketchum v. Moses (2001) 24 Cal.4th 1122, 1131-1132, 104 Cal. Rptr. 2d 377, 17 P.3d 735*, citing *Serrano v. Priest (1977) 20 Cal.3d 25, 48, 141 Cal. Rptr. 315, 569 P.2d 1303*.

[56] *Ibid*, at 132

[57] *Hensley, 461 U.S. at 436*

[58] I.e., $182,832 for Flagship's in-house Jury Consultant; $$78,00 for a Consulting Manager. *See* generally, Boeder Decl., Exh. B; Glynn Decl., Exh. 1

[59] Plaintiff admits that 32% of the their billing entries were block bill, and argues that those billing entries were far from vague. Flagship Reply, 13:7-15.

[60] Decl. Boeder, Exhs. C, D. Exhibit D defines the "phases" of the litigation broken down by time periods.

[61] "The fee applicant (whether a plaintiff or a defendant) must, of course, submit appropriate documentation to meet the burden of establishing entitlement to an award.' But trial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may

reduction on a group of tasks was the only way to determine a reasonable lodestar, while giving full deference to pre-contingency fee requests.

At all times, recognition is given to Plaintiff prevailing in a 12-year, hard-fought litigation which dealt with complex issues **[*20]** at great risk. Perkins Coie has waited six years to see any money and although the jury award was significantly less than hoped, Flagship indeed prevailed. These factors were balanced with billing deficiencies and an apparent lack of billing restraint after March 7, 2012.

Fee Analysis

The following analysis follows Perkins Coie's categories of fees:[62]

1. Case Investigation/Development
   - Requested amount $828,839
   - Amount awarded $369,446
     - Rational: During the first 6 years of the case, Perkins Coie billed $122,080 for this category of work. During the second 6 years of the case, $706,759 was billed. Since there are separate categories for pleadings and discovery, it is unclear exactly what justifies incurring six times the fees for this category during the same number of years. The bills do not provide illumination on this point. The full $122,080 is awarded for the first 6 years. 35% of the remaining requested fees, or $247,366, is awarded for the second 6 years. ($122,080+$247,366=$369,446)
2. Pleadings
   - Requested amount $127,463.00
   - Amount awarded $127,463.00
     - Rational: The number of hours spent appear reasonable given the complexity and uniqueness of the issues involved. The hours spent **[*21]** post-contingency (65.9) do not appear inflated.
3. Discovery
   - Requested amount $5,203,389
   - Amount awarded $3,246,124
     - Rational: During the first 6 years of the case, Perkins Coie billed $438,126. This full amount is awarded. During the second 6 years of the case, $4,765,263 was billed. When comparing similar depositions taken before and after the contingency fee agreement, it is impossible to reconcile the increased hours spent by the many additional timekeepers. I.e. Fees for the Tabor/Mason depos taken in 2008 ($12,883) and 2013 ($108,212)[63]; Fees for two Cinemark depos taken in 2008 ($17,696) and four short Cinemark depos in 2017 ($246,889). In reply, Mr. Boeder explains that the depositions were longer, the case increased in complexity, the examples Defendants' cited were cherry-picked, and the time spent was reasonable and necessary to defend against Defendants' personal attacks.[64] Mr. Boeder's explanation does not adequately explain the significant increase in time spent on preparation for depos that may have taken twice as long but consumed more than twice the number of hours by many multiples. Additionally, the fees requested for discovery included $255,799 related to the spoliation **[*22]** of emails by Mr. Tabor.[65] Only 25% of the $255,799 related to spoliation is awarded, or $63,950, leaving a requested balance of $4,509,464. The breadth of discovery increased after *Flagship I*, but that does not account for the gross time differential spent

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take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time. *Fox v. Vice (2011) 563 U.S. 826,838, 563 U.S. 826, 838, 131 S. Ct. 2205, 180 L. Ed. 2d 45*

[62] Boeder Decl. Exhs. C, D

[63] Glynn Decl., Exh. 6 and 7

[64] Flagship Reply, 19:15-21:14; Boeder Reply Decl. ¶¶ 7-9

[65] Glaynn Decl., Exh. 25, pages 1-24

before and after the contingency agreement. 60% of the remaining requested balance is awarded, or $2,744,048 is awarded. ($438,126+$63,950+$2,744,048=$3,246,124)

4. Motions
   - Amount requested $882,976
   - Amount awarded $340,777

     ○ Rationale: During the first 6 years of the case, Perkins Coie billed $48,823 in this category. This full amount is awarded. During the second 6 years of the case $834,153, was billed. Although Plaintiff created the categories of work performed, none of the declarations or billing sheets provided a break-down of which motions or types of motions are included in this category. Given the billing as presented, it would be difficult, if not impossible, to cull through the billing sheets to ferret out whether the time spent was reasonably. In short, Plaintiff has not met its burden in this category to show that the hours billed are reasonable. What is known is that nearly one-third of the billings are block-billings **[*23]** and that the time spent on pre-contingency fee motions, which include all motions prior to the final preparation for trial before April 2014, is significantly less than time spent on post-contingency motions. Of note, pretrial motions do not include Summary Judgment motions or Motions In Limine, which will be discussed below. 35% of the post-contingency fee request, or $291,954 is awarded. ($48,823+291,954=$340,777)
5. Summary Judgement
   - Amount requested $882,976
   - Amount awarded $494,690

     ○ Rationale: Plaintiff responded to three Summary Judgment Motions. The first motion, and arguably the most complex, involved the scope of discovery which relied on an in-depth analysis of circuit dealing in antitrust cases. The requested fees for this motion are $115,587, and this full amount is awarded. The second MSJ equated to fees of $423,250, more than three time the cost of the first, without any explanation other than that it occurred post-contingency. The reasonable fee for the second MSJ is $169,300. The third MSJ equated to fees of $630,956, more than four times the cost of the first, and one-third more than the second, again without any explanation. In fact, the third MSJ heard before this **[*24]** court, largely overlapped with the first MSJ. The reasonable fee for the third MSJ is $209,803. ($115,587+$l 69,300+$209,803=$494,690)
6. Appeals
   - Amount requested $1,302,188
   - Amount awarded $499,068

     ○ Rationale: *Flagship I* was billed at $340,876, and this full amount is awarded. *Flagship II* was billed at $958,740. The fee differential between these two is irreconcilable. The reasonable fee for *Flagship II* should be 50% of that amount, or $479,370. The spoliation issue is completely attributable to Plaintiff's unintentional conduct. As a result, only one-third of the reasonable appeal costs, $158,192, is awarded for the *Flagship II* appeal. ($340,876+$158,192=$499,068)
7. Settlement/Mediation
   - Amount requested $234,547
   - Amount awarded $121,382
     ○ Rationale: The pre-contingency fee request in this category is $45,939; the post-contingency fee request is $188,607. No explanation is provided for this substantial increase in expenditure for settlement. Specifically, $163,356 was spent in Phase 4, without any justification. 40% of the post contingency fees, or $75,443, is awarded. ($45,939+$75,443=$121,382)
8. Pre-Trial
   - Amount requested $3,098,122
   - Amount Awarded $1,555,795

     ○ Rationale: During **[*25]** the first 6 years of the case, Perkins Coie billed $13,469. This full amount is awarded. Post-contingency but pre-spoliation, when both counsel agree that the case was nearly ready for trial, $948,070 was billed. This means that Plaintiff spent an additional $2,136,583 preparing for trial the second time. Many, if not most of the original Motions In Limine were re-purposed for the trial. Of course, counsel needed to reacquaint themselves with the case after a 4 year delay. Regardless, after careful review, the cumulative post-contingency fees appear inflated by a factor of 50%. This conclusion is based not only the experience in dealing with Flagship's bills in general, but also on this court's experience in reviewing attorney's bills from top firms in Los Angeles. As a result, 50% of the remaining requested fees, or $1,542,326, is awarded. ($13,469+$1,542,326=$1,555,795)

9. Trial
   • Amount requested $1,309,301
   • Amount awarded $916,511

     ○ Rationale: Although the Trial fees excessive, they did not appear as inflated as fees requested in other categories. There were an excessive number of timekeepers and hours claimed, particularly towards the end of the trial. Unfortunately, given the previous **[*26]** billing abuses, it is difficult to ferret out unreasonable from reasonable time spent by performing a line by line analysis.[66] Regardless, the trial was hard- fought with some unexpected turns along the way requiring long days of work. As a result, 70% of the requested amount, or $916,511, is awarded.

10. Post-Trial
   • Amount requested $739,692
   • Amount awarded $369,846
     ○ Rationale: This area became a bit confusing. In Plaintiff's motion, it appears that it was requesting approximately $275,000 for preparation of the instant fee application. In Plaintiff's Reply, Plaintiff attributes $709,000 for the "work expended on Fee Motion,"[67] which is nearly the full amount requested but likely includes time spent on discovery. Preparation of this fee application is indeed time consuming. Even after reviewing the motion, errors were noted and corrected in the reply. Again, given the previous billing abuses and the confusion created by the figures in the reply, 50% of the requested amount, or $369,846, is awarded.

The total award to Flagship for its attorneys' fees is $8,041,102.

Each category was assessed individually with due consideration to the hours expended and the reasonableness of those hours. **[*27]** No multiplier is awarded as none is appropriate given the factors discussed above. In reducing fees in each category by various percentages, the following factors were taken into account: Billing deficiencies such as block or modified block-billing; Non-attorney hours included as attorney fees; the minor "write-off amount[68] of the recorded time given the gross disparity of hours billed between the pre and post contingency fee period; Risk associated with pursuing a unique antitrust claim; Risk of pursuing such claim partly on a contingent fee basis; Professional stamina required to pursue a 12-year litigation; Limited monetary and speculative public interest success of the lawsuit; and, prior experience with the billing practices of top law firms involved in complex litigation.

The court commends all counsel for their vigorous and professional pursuit of success for their clients. It has been an honor presiding over this case.

DATED: April 29, 2019

/s/ Lisa Hart Cole

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[66] However, *See* Glynn decl. ¶¶ 25(n), (o)

[67] Flagship Reply, 33:12. It is assumed that discovery is included in this estimate.

[68] Mr. Boeder wrote off $163,650 from Flagship's initial lodestar of $14,800,000. See, Boeder Decl. ¶17; Flagship Mot. for Attys. Fees at 18:8-26

LISA HART COLE

Judge of the Superior Court

Shandong Lihong Tech. v. Masimo Corp.

Superior Court of California, County of Orange

April 29, 2019, Decided

30-2018-01002779-CU-BT-CJC

Reporter
2019 Cal. Super. LEXIS 42196 *

Shandong Lihong Technology Limited Corp v. Masimo Corporation

Core Terms

unfair, alleges, fraudulent business, cause of action, statute of limitations, demurrer, unfair competition, business practice, fair dealing, good faith, discovery, covenant, customer, notice

Counsel: **[*1]** There are no appearances by any party.

Judges: Deborah Servino, Judge.

Opinion by: Deborah Servino

Opinion

MINUTE ORDER

The Court, having taken the above-entitled matters under submission April 26, 2019, and having fully considered the arguments of all parties, both written and oral, now rules as follows:

NOTICE OF RULING:

Defendant Masimo Corporation's demurrer to Plaintiff Shandong Lihong Technology Limited Corp.'s Second Amended Complaint ("SAC") is sustained with 15 days leave to amend.

A demurrer presents an issue of law regarding the sufficiency of the allegations set forth in the complaint. (*Lambert v. Carneghi (2008) 158 Cal.App.4th 1120, 1126*.) The challenge is limited to the "four corners" of the pleading (which includes exhibits attached and incorporated therein) or from matters outside the pleading which are judicially noticeable under Evidence Code sections 451 or *452*. Although California courts take a liberal view of inartfully drawn complaints, it remains essential that a complaint set forth the actionable facts relied upon with sufficient precision to inform the defendant of what plaintiff is complaining, and what remedies are being sought. (*Leek v. Cooper (2011) 194 Cal.App.4th 399, 413*.)

Fraud/Intentional Misrepresentation (First Cause of Action)

The elements of fraud are "(a) misrepresentation (false representation, concealment, **[*2]** or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Lazar v. Superior Court (1996) 12 Cal.4th 631, 638*.) Every element of fraud must be pleaded with specificity. The particularity requirement for fraud requires the pleading of facts showing how, when, where, to whom, and by what means the representations were made. (*Stansfield v. Starkey (1990) 220 Cal.App.3d 59, 73*.) This is to provide the defendant with notice and to give the court enough information to assess whether there is a foundation for the charge of fraud. (*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 216*.)

Plaintiff alleges that the fraudulent misrepresentation was that the Distribution Agreement was between Plaintiff and "Masimo International, SARL," when it was actually between Plaintiff and Defendant "Masimo Corporation." (SAC, 47-48.) Masimo International, SARl is a subsidiary, wholly-owned by Defendant. (SAC, ¶ 17.) If the Distribution Agreement was instead with Defendant, Plaintiff alleges it would not have provided its confidential customer and market information "because the relationship between Defendant and Plaintiff is between manufacturer and distributor, where Plaintiff is compensated by sales commission." (SAC, ¶ 27.)

Plaintiff's claim for fraud **[*3]** is not pled with the required specificity for fraud claims. There are no facts alleged showing "how, when, where, to whom, and by what means the representations were tendered." (*Lazar v. Superior Court, supra*, 12 Cal.4th at p. 645.) Contrary to Plaintiff's assertion in its opposition, the allegations in the SAC and the Distribution Agreement (Exh. C to SAC) do not satisfy the specificity requirement.

Furthermore, Plaintiff's claim for fraud appears to be barred by the three-year statute of limitations. (See *Code Civ. Proc., § 338, subd. (d)*.) Plaintiff has not pled facts to support the application of the delayed discovery rule. (*Cansino v. Bank of America (2014) 224 Cal.App.4th 1462, 1472*.) To do so, a plaintiff is required to "specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence," to avail itself of the delayed discovery rule and sufficiently plead a fraud claim. (*McKelvey v. Boeing North Am., Inc. (1999) 74 Cal.App.4th 151, 160*.) Here, Plaintiff alleges the Distribution Agreement was entered into on January 23, 2009, and alleges that it relied upon the Distribution Agreement in numerous instances. (See, e.g., SAC, 50, 52, 58, 92.) But, Plaintiff does not alleged any facts to show that the delayed discovery rule applies. Accordingly, the demurrer as to the first cause of action is sustained **[*4]** with 15 days leave to amend.

Unfair Business Practices (Second Cause of Action)

In the second cause of action, Plaintiff alleges violation of *Business and Professions Code section 17200* (the "UCL"). The UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." A UCL action is equitable in nature and damages cannot be recovered. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 179-180*.) To state a UCL claim, Plaintiff must allege acts or injuries within the terms of *Business and Professions Code section 17200*. It requires a person to have suffered injury in fact and have lost money or property as a result of unfair competition in order to have standing for a UCL cause of action. (*Pfizer Inc. v. Superior Court (2010) 182 Cal.App.4th 622, 630*.)

The UCL does not proscribe specific activities, but broadly prohibits any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. The UCL governs anti-competitive business practices as well as injuries to consumers, and has as a major purpose the preservation of fair business competition. By proscribing "any unlawful business practice," the UCL "borrows" violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable. Because the UCL is written in the disjunctive, **[*5]** it establishes three varieties of unfair competition-acts or practices which are unlawful, or unfair, or fraudulent. In other words, a practice is prohibited as "unfair" or "deceptive" even if not "unlawful" and vice versa. (*Puentes v. Wells Fargo Home Mortgage, Inc. (2008) 160 Cal.App.4th 638, 643-644*.)

Here, it appears that Plaintiff is proceeding under two varieties of unfair competition - fraudulent business act/practice and unfair business act/practice. The alleged fraudulent business act or practice was that Defendant induced Plaintiff to enter into a Distribution Agreement on January 23, 2009 to obtain confidential customer and market information. (SAC, 63-83.) Plaintiff alleges three deceptive acts: (1) acquiring Plaintiff's confidential customer information via the Distribution Agreement in order to take over the market; (2) fraudulently using "Masimo International, SARL" to enter the Distribution Agreement; and (3) forming two new entities to switch the distribution. (SAC, 69-80.) These allegations do not allege a fraudulent business act or practice. To the extent

Plaintiff is proceeding under the fraudulent business act or practice, that portion of the UCL claim is barred by the statute of limitations. The statute of limitations for this claim is four **[*6]** years. (*Bus. & Prof. Code, § 17208*.) On its face, this portion of the UCL claim appears to be time-barred as the alleged fraudulent business act or practice started in 2009.

Plaintiff also alleges that Defendant's misappropriation of the confidential customer information and subsequent switching business to the other two entities under Defendant's control constitute unfair competition. (SAC, 84-88.) Under the unlawful prong, a violation of law may be actionable as unfair competition under the UCL. (*Lueras v. BAC Home Loans Servicing, LP (2013) 221 Cal.App.4th 49, 81*.) "An unfair business practice occurs when that practice offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers... An unfair business practice also means the public policy which is a predicate to the action must be tethered to specific constitutional, statutory or regulatory provisions." (*Ibid*. [internal citations omitted].) The UCL "was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra*, 20 Cal.4th at p. 181 [internal citations and quotations omitted].) While the UCL's scope is broad, it is not unlimited. **[*7]** In order to give businesses fair notice of what they can and cannot do, the California Supreme Court has cautioned that "[c]ourts may not simply impose their own notions of the day as to what is fair or unfair." (*Id. at p. 182*.) For this reason, the California Supreme Court developed a test when the plaintiff is commercial competitor whether the conduct or practice is "unfair." "When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes *section 17200*, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Id. at p. 187*.) In articulating this test, the California Supreme Court was careful to emphasize that harm "to a competitor is not equivalent to [harm] to competition," and that "only the latter is the proper focus of antitrust laws." (*Id. at p. 186*.) "The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." (*Kasky v. Nike, Inc. (2002) 27 Cal.4th 939, 949*; *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra*, 20 Cal.4th at p. 180.)

Here, the SAC's allegations of Defendant's alleged **[*8]** use of Plaintiff's customers' names and addresses and Plaintiff's market information does not constitute an unfair conduct or practice. As previously explained in this court's ruling on the demurrer to the First Amended Complaint, "Plaintiff's allegations, if true, allege unfair acts in a more generalized moral sense. However, they fail to allege an unfair act or practice as set forth in *Cel-Tech*." (1/13/2019 Minute Order.) Plaintiff's allegations merely indicate harm to its commercial interests, rather than harm to competition. Accordingly, the demurrer to the second cause of action is sustained with 15 days leave to amend.

Breach of the Covenant of Good Faith and Fair Dealing (Third Cause of Action)

In the third cause of action, Plaintiff alleges a breach of the covenant of good faith and fair dealing.

Defendant argues that this claim is barred by the statute of limitations. Pursuant to *Code of Civil Procedure section 337*, the statute of limitations for contract-related actions is four years. Defendant contends that because the Distribution Agreement was entered into in 2009, this claim is time-barred. However, Plaintiff appears to be alleging that Defendant unfairly interfered with Plaintiff's right to receive the benefits **[*9]** of the contract with activity in 2015. (SAC, 33-38, 95.) Accordingly, the statute of limitations does not bar this claim on its face.

To state a claim for a breach of the implied covenant of good faith and fair dealing, Plaintiff must allege all of the following: (1) that plaintiff and defendant entered into a contract; (2) that plaintiff did all, or substantially all of the significant things that the contract required it to do, or that it was excused from having to do those things; (3) that all conditions required for defendant's performance had occurred; (4) that defendant unfairly interfered with plaintiff's right to receive the benefits of the contract; and (5) that plaintiff was harmed from defendant's conduct. (CACI no. 325.) "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Ind. (2000) 24 Cal.4th 317, 349*.) "With the exception of bad faith insurance cases, a breach of the covenant of good **[*10]** faith and fair dealing permits a recovery solely in contract." (*Spinks v. Equity Residential Briarwood Apartments (2009) 171 Cal.App.4th 1004, 1054* [internal citations omitted].)

Here, Plaintiff alleged that it entered into the Distribution Agreement with "Masimo International, SARL." (SAC, ¶ 17.) But really, the agreement was between Plaintiff and Defendant. (SAC, ¶ 24.) Plaintiff alleges that it performed all duties under the Distribution Agreement for more than five years. (SAC, ¶ 92.) But, Plaintiff failed to set forth facts to show that all conditions required for Defendant's performance had occurred. (See SAC, at pp. 14-15.) Accordingly, the demurrer as to the third cause of action is sustained with 15 days leave to amend.

The Clerk is ordered to give notice of the ruling.

[MD Synergy Sols., LLC v. Xavient Info. Sys.](#)

Superior Court of California, County of Los Angeles

October 8, 2019, Decided; October 8, 2019, Filed

Case No.: 18STCV07988

Reporter
2019 Cal. Super. LEXIS 6838 *

MD SYNERGY SOLUTIONS, LLC, Plaintiff, v. XAVIENT INFORMATION SYSTEMS, INC., et al., Defendants.

Notice: [EDITOR'S NOTE: THIS ORDER HAS BEEN SIGNED BY THE JUDGE, BUT SIGNATURE TEXT WAS ILLEGIBLE IN THE ORIGINAL DOCUMENT AND THEREFORE THE JUDGE'S NAME IS NOT DISPLAYED.]

Core Terms

demurrer, cause of action, unfair, alleges, confer, prong, sufficient facts, Unfair Competition Law, fraudulent, pled, business practice

Judges: [*1] Gregory W. Alarcon, Superior Court Judge.

Opinion by: Gregory W. Alarcon

Opinion

RULING RE: Defendants' Demurrers to Plaintiff's Fourth Cause of Action in Second Amended Complaint

The demurrer is overruled.

Legal Standard

A demurrer for sufficiency tests whether the complaint alleges facts sufficient to constitute a cause of action. *Code Civ. Proc., § 430.10*; *Young v. Gannon (2002) 97 Cal.App.4th 209, 220, 118 Cal. Rptr. 2d 187*. The court "may consider all material facts pleaded in the complaint and those arising by reasonable implication therefrom; it may not consider contentions, deductions or conclusions of fact or law. *Id.* (citing *Moore v. Conliffe (1994) 7 Cal.4th 634, 638, 29 Cal. Rptr. 2d 152, 871 P.2d 204*; *Montclair Parkowners Assn. v. City of Montclair (1999) 76 Cal.App.4th 784, 790, 90 Cal. Rptr. 2d 598)*. The court treats all facts alleged in the complaint to be true. *Picton v. Anderson Union High School Dist. (1996) 50 Cal.App.4th 726, 732, 57 Cal. Rptr. 2d 829*.

When considering demurrers, courts "are required to construe the complaint liberally to determine whether a cause of action has been stated, given the assumed truth of the facts pleaded." *Picton v. Anderson Union High School Dist. (1996) 50 Cal.App.4th 726, 733, 57 Cal. Rptr. 2d 829* (citing *Rogoff v. Grabowski (1988) 200 Cal.App.3d 624, 628, 246 Cal. Rptr. 185)*. "[A]n order sustaining a demurrer without leave to amend is reviewable for abuse of discretion 'even though no request to amend [the] pleading was made (citations omitted).'" Demurrers, Cal. Prac. Guide Civ. Pro. Before Trial Ch. 7(I)-A.

"Before filing a demurrer … the demurring party shall meet and confer in person or by telephone with the party who filed the pleading … for the purpose of determining whether **[*2]** an agreement can be reached that would resolve the objections to be raised in the demurrer." *Code Civ. Proc., § 430.41*. To properly file a demurrer with the court, the party must also file a declaration noting that he or she "met and conferred with the party who filed the pleading subject to demurrer, and that the parties did not reach an agreement resolving the objections raised in the demurrer, [or] (B) That the party who filed the pleading subject to demurrer failed to respond to the meet and confer request of the demurring party or otherwise failed to meet and confer in good faith." Code Civ. Proa, *§ 430.41(A)* & *(B)*.

Discussion

Meet and Confer

Defendants Xavient Information Systems, Inc.'s and Rajeev Tandon's Counsel attaches a declaration and exhibits showing efforts to meet and confer. Lee Decl. ¶¶ 5-9, Exs. C-E. Defendants Xavient Information Systems, Inc.'s and Rajeev Tandon's Counsel attempted to set up a telephonic meet and confer with MD Synergy Solutions' counsel, but MD Synergy Solutions' counsel ultimately decided to cancel the meet and confer. Ex. E to Lee Decl. The court should find that electronic mail correspondences between the parties satisfy the meet and confer requirements.

Fourth Cause of Action - Violation ***[*3]*** *of California Business & Professions Code, §17200*

MD Synergy Solutions alleges as the fourth cause of action in the SAC that Defendants violated *Section 17200*. MD Synergy Solutions alleges that Defendants violated *section 17200* by committing business practices that were unlawful, unfair, *and* fraudulent. SAC ¶ 97. MD Synergy Solutions alleges violations of the first three prongs. To plead a cause of action under *Section 17200* of the Unfair Competition Law ("UCL"), a party needs to successfully allege that the other party engaged in a "business act or practice" that was "unlawful, unfair, *or* fraudulent." *Bus. & Prof. Code §17200* (emphasis added). These are three separate grounds of liability. *Hutton v. Fidelity National Title Co., (2013) 213 Cal.App.4th 486, 497-498, 152 Cal. Rptr. 3d 584*. MD Synergy Solutions needs to identify the business act or practice and explain in its SAC how that business act or practice was "unlawful, unfair, or fraudulent" by pointing to specific facts. MD Synergy Solutions's SAC makes conclusory statements as to the unfair and the fraudulent prongs.

Unlawful

To make an unlawful claim under *section 17200* of the Unfair Competition Law, a party must allege a "violation of another law … [to] statfe] a cause of action under the UCL's unlawful prong." *Berryman v. Merit Property Management, Inc. (2007) 152 Cal.App.4th 1544, 1554, 62 Cal. Rptr. 3d 177*.

In this case, MD Synergy Solutions alleges that Defendants engaged in conduct that violated *California Business and Professions Code Section 16600 et seq. Section 16600* provides that "every contract by which **[*4]** anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." MD Synergy Solutions specifically alleges in paragraph 97g of the SAC that all Defendants imposed "unlawful restrictive covenants and non-compete agreements on staff who had performed services for [MD Synergy Solutions], including on [MD Synergy Solutions]' own staff that were wrongly treated as Xavient's employees. . . ." Since MD Synergy Solutions alleges that Defendants broke a law when they forced MD Synergy Solutions' employees to sign non-compete agreements, MD Synergy Solutions has successfully alleged a claim under *section 17200* of the Unfair Competition Law.

Defendants make arguments that are addressed below.

First, Defendants argue that the Unfair Competition Law ("ULC") does not apply to business practices that MD Synergy Solutions alleges that Defendants committed because those actions occurred outside of California. "Neither the language of the UCL nor its legislative history provides any basis for concluding the Legislature intended the UCL to operate extraterritorially .... [T]he presumption against extraterritoriality applies to the UCL in full force." *Sullivan v. Oracle Corp. (2011) 51 Cal.4th 1191, 1207, 127 Cal. Rptr. 3d 185, 254 P.3d 237*. However, a review **[*5]** of paragraph 97 of the SAC, for the purposes of the demur, reveals no allegations showing that the seven business practices occurred outside of California. Therefore, since it is not obvious from the face of the SAC that the actions did not occur in California, Defendants may not use this as a ground to seek a demurrer.

In addition, Defendant argues that MD Synergy Solutions cannot belatedly use Defendants' alleged Breach of Fiduciary Duty as the underlying law for an "unlawful" *section 17200* Unfair Competition Law because MD Synergy Solutions did not plead a violation of this law as the basis for its *Section 17200* claim. However, although Defendants are correct in noting that MD Synergy Solutions did not plead a Breach of Fiduciary duty as the law that Defendants broke, pled sufficient facts to plead a cause of action under the unfairness prong, as mentioned above, MD Synergy Solutions has pled sufficient facts to allege a claim under *section 17200* of the Unfair Competition Law.

Unfair

"When a plaintiff ... claims to have suffered injury from a *direct competitor's* 'unfair' act or practice invokes *section 17200*, the word 'unfair' in that section means conduct that [1] threatens an incipient violation of an ***antitrust law***, or [2] violates **[*6]** the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or [3] otherwise significantly threatens or harms competition." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527* (emphasis added). Since *Cel-Tech*, the various appeals courts have used different tests for unfair.

The Supreme Court of California left to door open to plaintiffs to use public policy arguments as to why a particular business practice is unfair, but, the Supreme Court of California warned that "the public policy triggering the violation must be tethered to a constitutional or statutory provision [citations] or a regulation carrying out statutory policy." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., (1999) 20 Cal.4th 163, 185, 83 Cal. Rptr. 2d 548, 973 P.2d 527*.

In the SAC, MD Synergy Solutions does not allege that Defendant Xavient and Tandon (as CEO of Xavient) were in direct competition with MDSS, or that Defendants' acts violate the spirt or policy of any ***antitrust law***, or that Defendants' actions significantly threaten or harms competition. MD Synergy Solutions alleges that Defendant Xavient is an "information technology consulting and software services company" and that Plaintiff is a "technology applications and software" company. SAC ¶¶ 16-17. Likewise, MD Synergy Solutions SAC alleges that both companies **[*7]** operated in different business sectors. *Ibid.* (alleging that Plaintiff operated in the health care sector and that Defendants operated in the telecom and banking sectors).

The implication that arises from the previous allegations is that, by virtue of being technology companies, MD Synergy Solutions and Defendants were in direct competition. However, MD Synergy Solutions' SAC makes conclusory statements and fails to identify an established public policy that Defendants conduct violated, and did not connect the violation of an established public policy with constitutional, statutory, or regulatory provision. MD Synergy Solutions also failed to allege which antitrust laws Defendants actions violated.

Although MD Synergy Solutions has not pled sufficient facts to plead a cause of action under the unfairness prong, as mentioned above, MD Synergy Solutions has pled sufficient facts to allege a cause of action under the unlawful prong of *section 17200*.

Fraudulent

"A fraudulent business practice under *section 17200* 'is not based upon proof of the common law tort of deceit or deception, but is instead premised on whether *the public* is likely to be deceived.'" *Progressive West Ins. Co. v. Superior Court (2005) 135 Cal.App.4th 263, 284, 37 Cal. Rptr. 3d 434* (quoting *Pastoria v. Nationwide Ins., supra, 112 Cal.App.4th at p. 1498, 6 Cal.Rptr.3d 148*); *Klein v. Earth Elements, Inc. (1997) 59 Cal.App.4th 965, 970, 69 Cal. Rptr. 2d 623)*. MD Synergy Solutions argues that it is a member **[*8]** of the public. Pl.'s Opp. at 8, line 16. MD Synergy Solutions' SAC alleges that MD Synergy Solutions was deceived. SAC ¶ 100. However, being a part of something does not turn you into the thing itself. MD Synergy Solutions has not alleged facts that Defendants have engaged in actions that are likely to deceive the public.

Although MD Synergy Solutions has not pled sufficient facts to plead a cause of action under the unfairness prong, as mentioned above, MD Synergy Solutions has pled sufficient facts to allege a cause of action under the unlawful prong of *section 17200*.

Accordingly, Defendants' demurrer is OVERRULED.

Dated: October 8, 2019

/s/ Gregory W. Alarcon

Gregory Alarcon

Superior Court Judge

Biofrontera Inc. v. Dusa Pharms.

Superior Court of California, County of Orange

March 10, 2020, Decided

30-2018-01003843-CU-BT-CJC

Reporter

2020 Cal. Super. LEXIS 37309 *

Biofrontera Inc. v. DUSA Pharmaceuticals, Inc.

Core Terms

samples, cause of action, demurrer, subdivision, unfair, notice, alleges, unfair competition, leave to amend, dermatologist, practices, cognizable, grounds, lose money, Pleadings, Pricing, demurrer to amended complaint, original complaint, sustain a demurrer, written request, injury in fact, alleged facts, first cause, distributor, products, parties

Counsel: **[*1]** There are no appearances by any party.

Judges: Walter Schwarm.

Opinion by: Walter Schwarm

Opinion

MINUTE ORDER

The Court, having taken the above-entitled matter under submission on 02/18/2020 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

Motion No. 1:

Defendant's (DUSA Pharmaceuticals, Inc.) Demurrer to Second Amended Complaint (Demurrer), filed on 10-22-19 under ROA No. 161, is SUSTAINED without leave to amend. The court GRANTS Defendant's Request for Judicial Notice in Support of Its Demurrer to, and Motion to Strike Portions of, Biofrontera Inc.'s Second Amended Complaint (filed on 10-22-19 under ROA No. 163), as to Exhibit Nos. 1, 2, 3, 4, 6, and 7. pursuant to Evidence Code section 452, subdivision (d). As to the remaining exhibits, the court DENIES the request for judicial notice as immaterial to the court's ruling. (See Zucchet v. Galardi (2014) 229 Cal.App.4th 1466, 1474, fn. 5, citing Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal.4th 739, 748, fn. 6).

The court GRANTS Defendant's Request for Judicial Notice in Support of Its Motion for Judgment on the Pleadings on the Second Amended Complaint's **[*2]** Alleged Fourth Cause of Action (filed on 10-22-19 under ROA No. 156) as to Exhibit Nos. 1-7 pursuant to Evidence Code section 452, subdivision (d). As to Exhibit No. 8, the court DENIES the request for judicial notice as immaterial to the court's ruling. (See Zucchet v. Galardi (2014) 229 Cal.App.4th 1466, 1474, fn. 5, citing Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal.4th 739, 748, fn. 6).

"A demurrer tests the pleading alone, and not the evidence or the facts alleged.... To the extent there are factual issues in dispute, however, this court must assume the truth not only of all facts properly pled, but also of those facts that may be implied or inferred from those expressly alleged in the complaint. [Citations.]" (City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1998) 68 Cal.App.4th 445, 459.) Code of Civil Procedure section 452, states, "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." Perez v. Golden Empire Transportation Transit District (2012) 209 Cal.App.4th 1228, 1238, provides, "This rule of liberal **[*3]** construction means that the reviewing court draws inferences favorable to the plaintiff, not the defendant. [Citations.]" William S. Hart Union High School District (C.A.) (2012) 53 Cal.4th 861, 872, provides, "To survive a demurrer, the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged. [Citation.]" "Thus, the complaint ordinarily is sufficient if it alleges ultimate rather than evidentiary facts. [Citations.]" (Doe v. City of Los Angeles (Doe) (2007) 42 Cal.4th 531, 550.)

Bernardo v. Planned Parenthood Federation of America (2004) 115 Cal.App.4th 322, 351-352 (Bernardo), states, "An 'unlawful' business practice or act within the meaning of the UCL 'is an act or practice, committed pursuant to business activity, that is at the same time forbidden by law. [Citation.]' [Citation.] The California Supreme Court has explained that '[b]y proscribing "any unlawful" business practice, "[Business and Professions Code] section 17200 'borrows' violations of other laws and treats them as unlawful practices" that the unfair competition law makes independently actionable. [Citation.]' **[*4]** [Citation.]" (Italics in Bernardo.)

McKell v. Washington Mutual, Inc. (McKell) (2006) 142 Cal.App.4th 1457, 1473, provides, "A business practice is unfair within the meaning of the UCL if it violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits. [Citations.] The determination whether a business practice is unfair ' " 'involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim.... [Citations.]' [Citation.]"' [Citation.]" Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (Cel-Tech) (1999) 20 Cal.4th 163, 187, "We thus adopt the following test: When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes 17200, the word 'unfair' in that section means conduct that threatens an incipient violation of ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable **[*5]** to or the same as a violation of the law, or otherwise significantly threatens or harms competition."

Business and Professions Code section 17204 provides, "Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or a district attorney... or by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." Peterson v. Cellco Partnership (Peterson) (2008) 164 Cal.App.4th 1583, 1590, explains, "Section 17204 of the UCL governs a plaintiff's standing to assert a UCL claim. [Citation.] Prior to the enactment of Proposition 64 in November 2004, the UCL 'did not predicate standing "on a showing of injury or damage"' and was thus 'subject to abuse by attorneys who used it as the basis for legal " 'shakedown' " schemes' and frivolous lawsuits. [Citations.] To address this problem, Proposition 64 amended section 17204 to accord standing only to certain specified public officials and to any person who ' " 'has suffered injury in fact and has lost money or property as a result of such unfair competition.' "' [Citations.] Thus, in the aftermath of Proposition 64, only **[*6]** plaintiffs who have suffered actual damage may pursue a private UCL actions. A private plaintiff must make a twofold showing: he or she must demonstrate injury in fact and a loss of money or property caused by unfair competition. [Citation.]" (Italics in original.)

"In addition to alleging facts sufficient to who violations of Regulation X and Regulation Z, plaintiffs who are not California residents must also allege facts to show that the alleged violations occurred in California because California's unfair competition law does not apply extraterritorially." (Aghaji v. Bank of America, N.A. (Aghaji) (2016) 247 Cal. App. 4th 1110, 1119; See also, Sullivan v. Oracle Corporation (2011) 51 Cal.4th 1191, 1207-1208.)

Defendant challenges the first (Unfair Competition), second (Unfair Competition□Unlawful Pricing) and third (Unfair Practices□Unfair Sampling) causes of action pursuant to Code of Civil Procedure section 430.10, subdivision (e).

First Cause of Action□Unfair Competition:

Defendant contends, "Despite acknowledging this Court's prior dismissal of its prior, identical First Cause of Action on the grounds that the 'allegations related to DUSA's sampling practices did not establish a **[*7]** connection to California[,] Biofrontera remarkably contends that its mere regurgitation of those same defective Sampling Allegations, verbatim, in the SAC now somehow places those allegations within the territorial ambit of the UCL." (Demurrer; 1:17-20, footnote 3 omitted; Emphasis and italics in original.) Defendant's Opposition to DUSA Pharmaceuticals, Inc.'s Demurrer to Second Amended Complaint (Opposition) filed on 2-3-20 under ROA No. 189 asserts, "This Court previously ruled that the FAC's allegations related to DUSA's unlawful sampling practices did not establish a connection to California.... Biorfrontera's SAC makes plain that DUSA's excessive sampling practices arose in California and harmed Biofrontera in California. (Opposition; 3:25-4:1.) Paragraph 41 of the Second Amended Complaint (SAC) alleges the conduct underlying the first cause of action. Paragraph 41 states, "Under the governing case law, Biofrontera need not plead that DUSA or physicians failed to comply with the specific requirements of a statute regulating medical product samples. DUSA's sampling practices qualify as 'unfair competition' under the UCL's 'unfair' prong because excessive free samples significantly **[*8]** threaten and harm competition, regardless of whether physicians submitted written requests for the samples or complied with other statutes and regulations. In other words, the unfairness of DUSA's sampling practices turns on their effect on competition, not compliance with particular statutes." Thus, Plaintiff bases the first cause of action on the alleged act of Defendant's sampling practices by providing excessive free samples to physicians. To support that Defendant provided excessive free samples to physicians, the SAC pleads, "Most recently, a dermatologist in El Cajon, California told Biofrontera that DUSA made him 'a deal that I couldn't refuse.' A DUSA representative offered this dermatologist approximately 36 product samples of Levulan® to offset the cost of replacing an old BLU-U® light lamp. The dermatologist accepted the excessive product samples. Biofrontera's sales representative observed a new DUSA lamp and excessive Levulan® samples the next time he visited this practice." (SAC, ¶ 18.) As to harm, the SAC pleads, "DUSA's sampling practices specifically harm, and continue to harm, Biofrontera in California by making it harder for Biofrontera to obtain revenue and market **[*9]** share in California. Biofrontera has lost sales in California because it cannot make sales to dermatologists who have received DUSA's unfair excessive samples. DUSA's conduct in California, in turn, directly harm's Biofrontera's competitive standing and revenue generation in Orange County California, specifically, and California generally." (SAC, ¶ 19; see also, SAC, ¶¶ 44, 45, 56, 57, 63, 64, and 65.) The SAC does not allege any other act of excessive sampling except for the act relating to the dermatologist in El Cajon. Plaintiff's original Complaint, filed on 7-6-18, referred the court to 21 U.S.C. § 353, subdivision (d)(3)(A) regarding the distribution of drug samples to physicians. (Defendant's RJN; Exhibit 1, ¶ 16.) Plaintiff does not cite to 21 U.S.C. § 353, subdivision (d)(3)(A) in the SAC. 21 U.S.C. § 353 describes the procedure that authorizes the distribution of drug samples by a drug manufacturer or distributor. 21 U.S.C. § 353, subdivision (d), states in part, "The manufacturer or authorized distributor of record of a drug subject to subsection (b) may, by means other than mail or common carrier, distribute drug samples only if the manufacturer or authorized distributor **[*10]** of record makes the distributions in accordance with subparagraph (A) and carries out the activities described in subparagraphs (B) through (F) as follows: [¶] (A) Drug samples may only be distributed□ [¶] (i) to practitioners licensed to prescribe such drugs if they make a written request for drug samples, or [¶] (ii) at the written request of such a licensed practitioner, to pharmacies of hospitals or other health care entities...." 21 U.S.C. § 353 is relevant because it reflects the public policy as to the procedure by which a drug manufacturer or authorized distributor may provide drug samples. Paragraph 18 of the SAC does not allege facts that the El Cajon dermatologist obtained the samples in violation of 21 U.S.C. § 353, subdivision (d)(3)(A). Paragraph 18 of the SAC does not allege facts that the El Cajon dermatologist obtained the samples without making a written request. The court finds that Plaintiff, through the SAC, still has not shown that wrongful conduct occurred in California based on the act of excessive sampling. The only alleged act of excessive sampling relates to the El Cajon dermatologist. (SAC, ¶ 18.) As discussed above, paragraph 18 is insufficient to allege **[*11]** a violation of 21 U.S.C. § 353, subdivision (d)(3)(A). The SAC does not allege how the El Cajon dermatologist received the 36 product samples without making a written request. The SAC does not sufficiently demonstrates a violation of public policy or an incipient violation of ***antitrust law***. Further, assuming that paragraph 18 of the SAC is sufficient to allege a wrongful act, a single act of excessive sampling is insufficient to demonstrate immoral, unethical, oppressive or unscrupulous conduct that causes injury to consumers, or otherwise significantly threatens or harms competition. The court finds that the SAC does not sufficiently demonstrate that Defendant committed a wrongful act regarding the act of excessive sampling. Thus, the court finds that the SAC does not demonstrate that an act of "unfair" competition occurred in California. As a result, the court SUSTAINS the Demurrer to the first cause of action without leave to amend. (See below.)

Second Cause of Action□Unfair Competition (Unlawful Pricing):

Paragraph 50 of the alleges the conduct underlying the second cause of action. Paragraph 50 states in part, "DUSA's unfair pricing scheme manipulates Levulan®'s ASP and allows DUSA **[*12]** to make more profit on each sale than it otherwise could. DUSA's manipulation of the ASP through FC means that DUSA charges physicians artificially low prices for the drug that do not reflect the market's actual willingness ot pay. DUSA can charge artificially low prices because it used the ASP reported through its distributor to recoup additional profit on each sale of Levulan®." (SAC, ¶ 50.) The SAC alleges that Defendant is a company organized under the laws of New Jersey and that it entered into a contract with its distributor, Foundation Care. (SAC, ¶¶ 12 and 22.) Paragraphs 20-27 of the FAC describe the alleged pricing scheme by manipulating the ASP. The SAC, however, does not show that the wrongful conduct, the alleged manipulation of 'creating a spread' (FAC, ¶ 24), occurred in California. Therefore, the court SUSTAINS the Demurrer to the second cause of action without leave to amend. (See below.)

Third Cause of Action□Unfair Sampling (Unfair Practices Under California Business & Professions Code § 17403):

Business and Professions Code section 17403 states, "It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost **[*13]** thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition." Paragraph 62 of the SAC alleges the conduct underlying the third cause of action. Paragraph 62 states, "DUSA is engaged in business in California and has sold or offered to sell its products, including without limitation Levulan® free of charge. DUSA has given, and continues to give, away free product samples with the intent to injure Biofrontera and destroy fair competition in the PDT market. See supra ¶¶ 15-19, 33-46. In other words DUSA acted with the purpose of injuring competitors and destroying competition. See id." (SAC, ¶ 62.) It appears that this allegation pertains to the giving away of free products samples as alleged in paragraph 18 of the SAC. Paragraph 18 of the SAC, as to the El Cajon dermatologist, is the only alleged act regarding the distribution of excessive samples or the giving away of samples. The SAC does not allege any facts demonstrating that DUSA has sold its products in California for less than their cost. Further, 21 U.S.C. § 353, subdivision (d)(3)(A), authorizes the giving away of drug samples to practitioners as long as there **[*14]** is compliance with 21 U.S.C. § 353, subdivision (d)(3)(A). The SAC does not adequately allege the intent element of Business and Professions Code section 17403 because 21 U.S.C. § 353, subdivision (d)(3)(A), authorizes the distribution of drug samples, the. (Bay Guardian Co. v. New Times Media, LLC (2010) 187 Cal.App.4th 438, 456-457.) Since the SAC does not plead facts alleging that Defendant has sold its products for less than their cost with the required intent, the court SUSTAINS the Demurrer to the third cause of action without leave to amend. (SAC).

Virgina G. v. ABC Unified School Dist. (1993) 15 Cal.App.4th 1848, 1852 stated, "Where a demurrer is sustained or a motion for judgment on the pleadings is granted as to the original complaint, denial of leave to amend constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment." "The court abuses its discretion in sustaining the demurrer without leave to amend if the plaintiff can show a reasonable possibility of curing the defect in the complaint by amendment. [Citation.] Heritage has the burden of proving that an amendment would cure the defect. [Citation.]" (Heritage Pacific Financial, **[*15]** LLC v. Monroy (2013) 215 Cal.App.4th 972, 994.) As to this action, the court has previously granted leave to amend twice, and granted a motion for leave to amend. (See the court's 11-21-18, 5-21-19, and 9-17-19 Minute Orders (On 6-10-19, the parties filed a stipulation that extended the time for Plaintiff to file a SAC based on the Motion for Leave to Amend to File a Second Amended Complaint filed on 6-14-19.) Plaintiff's Opposition does not request leave to amend based upon a reasonable possibility of curing the defects. Therefore, the court SUSTAINS Defendant's (DUSA Pharmaceuticals, Inc.) Demurrer to Second Amended Complaint, filed on 10-22-19 under ROA No. 161, without leave to amend.

Defendant is to give notice.

Motion No. 2:

Defendant's (DUSA Pharmaceuticals, Inc.) Motion for Judgment on the Pleadings on the Second Amended Complaint's Alleged Fourth Cause of Action (Motion), filed on 10-22-19 under ROA No. 155, is DENIED. Defendant challenges the fourth cause of action (Unfair Competition□Groundless Threat) because it "... fails to state sufficient facts to constitute a cause of action by not seeking cognizable remedies under California Business and Professions Code section 17200...." **[*16]** (Notice to Demurrer; 1:8-10.) Initially, it does not appear that this Motion is procedurally proper. Code of Civil Procedure section 438, subdivision (f)(2), provides, "(f) The motion provided for in this section may be made only after one of the following conditions has occurred:... [¶] (2) If the moving party is a defendant, and the defendant has already filed his or her answer to the complaint and the time for the defendant to demur to the complaint has expired." Here, Defendant has not filed an answer to the Second Amended Complaint (SAC). Further, the time to demur has not expired because Defendant filed a demurrer to the SAC as addressed

Motion No. 1.

Assuming the Motion is procedurally proper, the court will address the merits because the parties did not discuss the applicability of Code of Civil Procedure section 438, subdivision (f)(2).

Code of Civil Procedure section 438, subdivision (g), states, "The motion provided for in this section may be made even though either of the following conditions exist: [¶] "(1) The moving party has already demurred to the complaint or answer, as the case may be, on the same grounds as is the basis for the motion provided for in this section and **[*17]** the demurrer has been overruled, provided that there has been a material change in applicable case law or statute since the ruling on the demurrer. [¶] (2) The moving party did not demur to the complaint or answer, as the case may be, on the same grounds as is the basis for the motion provided for in this section."

On 7-6-19, Plaintiff (Biofrontera Inc.) filed the original Complaint that contained the Unfair Competition□Groundless Threat cause of action as the third cause of action. On 8-10-18, Defendant filed a demurrer to the original Complaint. Defendant challenged the subject cause of action pursuant to Code of Civil Procedure section 430.10, subdivision (e), on the grounds that the original Complaint did not state facts sufficient to state a cause of action. (See Defendant's Notice of Demurrer filed on 8-10-18.) On 11-1-18, the court overruled the demurrer to this cause of action. (11-1-18 Minute Order.)

On 11-26-18, Plaintiff filed an Amended Complaint that contained the Unfair Competition□Groundless Threat cause of action as the fourth cause of action. On 1-15-19, Defendant filed a demurrer to the Amended Complaint. Defendant challenged the fourth cause of action in the Amended **[*18]** Complaint pursuant to Code of Civil Procedure section 430.10, subdivision (e), on the grounds that the Amended Complaint did not state facts sufficient to state a cause of action. (See Defendant's Notice of Demurrer filed on 1-15-19.) On 4-16-19, the court issued a tentative ruling and requested supplemental briefing. (4-16-19 Minute Order.) The court's 4-16-19 Minute specifically continued the hearing on the Demurrer to the Amended Complaint. On 5-21-19, the court overruled Defendant's demurrer to the fourth cause of action in the Amended Complaint (5-21-19 Minute Order).

As to the demurrer to the Amended Complaint pertaining to the fourth cause of action, this demurrer specifically explained that this cause of action lacked merit because it did not seek a cognizable remedy. For example, Page 15 at line 8 of Defendant's Demurrer to Amended Complaint (filed on 1-15-19 under ROA No. 15) states, "This claim cannot survive demurrer because it does not see a cognizable UCL remedy." The argument heading on Page 15 of the 1-15-19 demurrer states, "The Amended Complaint's Fourth Cause of Action Fails to State a Claim Because It Does Not Seek a Cognizable Remedy under the UCL." (Emphasis in **[*19]** original.)

This Motion, as discussed above, challenges the fourth cause of action because it "... fails to state sufficient facts to constitute a cause of action by not seeking cognizable remedies under California Business and Professions Code section 17200...." (Notice to Demurrer; 1:8-10.) The current Motion is based on the same grounds as that in Defendant's 1-15-19 Demurrer to the Amended Complaint. Under Code of Civil Procedure section 430.10, Defendant's 8-10-18 and 1-15-19 specified the grounds for the demurrers pursuant to Code of Civil Procedure section 430.10, subdivision (e). The current Motion again challenges the Unfair Competition□Groundless Threat for failing to state facts sufficient to state a cause of action. The court's 5-21-19 Minute Order overruling Defendant's

Demurrer to the fourth cause of action encompasses the same grounds as raised in this Motion. Thus, it appears that the Motion does not comply with Code of Civil Procedure section 438, subdivision (g)(1).

However, since both parties have briefed the merits of the Motion, the court will address the merits of the Motion. The court finds that the Motion adequately alleges a legally cognizable remedy. Kwikset **[*20]** Corporation v. Superior Court (Kwikset) (2011) 51 Cal.4th 310, 323-324, states, "Proposition 64 requires that a plaintiff have 'lost money or property' to have standing to sue. The plain import of this is that a plaintiff now must demonstrate some form of economic injury. [Citations.] [¶] There are innumerable ways in which economic injury from unfair competition may be shown. A plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary. [Citation.] Neither the text of Proposition 64 nor the ballot arguments in support of it purport to define or limit the concept of 'lost money or property,' nor can or need we supply an exhaustive list of the ways in which unfair competition may cause economic harm. It suffices to say that, in sharp contrast to the state of the law before passage of Proposition 64, a private plaintiff filing suit now must establish that he or she has **[*21]** personally suffered such harm. [¶] Notably, lost money or property□economic injury□is itself a classic form of injury in fact. [Citations.] However, because economic injury is but one among many types of injury in fact, the Proposition 64 requirement that injury be economic renders standing under section 17204 substantially narrower than federal standing under article III, section 2 of the United States Constitution, which may be predicated on a broader range of injuries. [Citation.] [¶] While the economic injury requirement is qualitatively more restrictive than federal injury in fact, embracing as it does fewer kinds of injuries, nothing in the text of Proposition 64 or its supporting arguments suggests the requirement was intended to be quantitatively more difficult to satisfy. Rather, we may infer from the text of Proposition 64 that the quantum of lost money or property necessary to show standing is only so much as would suffice to establish injury in fact; if more were needed, the drafters could and would have so specified. [Citation.] In turn, federal courts have reiterated that injury in fact is not a substantial or insurmountable hurdle; as then Judge Alito put it: 'Injury-in-fact **[*22]** is not Mount Everest.' [Citation.] Rather, it suffices for federal standing purposes to ' "allege] some specific, 'identifiable trifle' of injury."' [Citations.]" (Footnotes 6 and 7 omitted.)

Here, paragraph 71 alleges, "Biofrontera has also suffered injury in fact and has lost money or property as a result of DUSA's unfair competition. Because of DUSA's baseless threat to Kane and West, Biofrontera has been directly injured in its efforts to sell the BF-RhodoLED® lamp and Ameluz® to West. West has informed Biofrontera that it will no longer purchase certain Biofrontera products. DUSA's threat, in other words, directly causes Biofrontera to lose sales, market share, and goodwill." This allegation is sufficient to allege a legally cognizable injury from a pleading standpoint within the meaning of Kwikset.

Based on the above, the court DENIES Defendant's (DUSA Pharmaceuticals, Inc.) Motion for Judgment on the Pleadings on the Second Amended Complaint's Alleged Fourth Cause of Action filed on 10-22-19 under ROA No. 155. Defendant is to give notice.

Motion No. 3:

Based on the court's rulings as to Motion No. 1, the court DENIES Defendant's (DUSA Pharmaceuticals, Inc.) Motion to Strike Portions **[*23]** of the Second Amended Complaint (Motion), filed on 10-22-19 under ROA No. 165, without prejudice to Defendant re-filing this Motion.

First, the Motion does not comply with California Rules of Court, rule 3.1322. California Rules of Court, rule 3.1322 (a), states, "A notice of motion to strike a portion of a pleading must quote in full the portions sought to be stricken except where the motion is to strike an entire paragraph, cause of action, count, or defense. Specifications in a notice must be numbered consecutively." Here, the Notice of this Motion does not number the specifications in the notice consecutively.

Second, to the extent that some of the items Defendant seeks to strike pertain to the first three causes, the Motion is MOOT because the court has sustained the Demurrer to the first three causes of action without leave to amend, and has denied Motion No. 2.

Therefore, the court DENIES Defendant's (DUSA Pharmaceuticals, Inc.) Motion to Strike Portions of the Second Amended Complaint, filed on 10-22-19 under ROA No. 165, without prejudice to Defendant re-filing a Motion to Strike that complies with California Rules of Court, rule 3.1322, and pertains to items based on the current **[*24]** status of the Second Amended Complaint.

Defendant is to give notice.

Wun- Ling Chang v. Blue Cross of Cal.

Superior Court of California, County of Los Angeles

April 3, 2020, Decided; April 3, 2020, Filed

LASC Case No: 19STCV02777

Reporter

2020 Cal. Super. LEXIS 1475 *

WUN-LING CHANG, M.D., INC., on behalf of itself and all others similarly situated, Plaintiff, v. BLUE CROSS OF CALIFORNIA d/b/a ANTHEM BLUE CROSS; ANTHEM BLUE CROSS LIFE AND HEALTH INSURANCE COMPANY, and DOES 1 through 20, Inclusive, Defendants.

Core Terms

providers, emergency service, reimbursement, non-contracted, unfair, enrollees, demurrer, alleges, health care service plan, patient, restitution, declaratory relief, business practice, factors, consumer, fraudulent, injunctive relief, unfair competition, violates, insurance company, contracting, methodology, pleading stage, stabilization, argues, customary, remedies, rates, prejudgment interest, prompt payment

Judges: [*1] Kenneth Freeman, Judge of the Superior Court.

Opinion by: Kenneth Freeman

Opinion

COURT'S RULING AND ORDER RE: DEFENDANTS' DEMURRER TO PLAINTIFF'S SECOND AMENDED COMPLAINT

I.

BACKGROUND

Plaintiff, a medical corporation, has brought this putative class action against Defendants Blue Cross of California dba Anthem Blue Cross and Anthem Blue Cross Life and Health Insurance Company (collectively, "Anthem"), which operate a health care service plan. Plaintiff alleges that Anthem has violated California's emergency services reimbursement laws. Plaintiff alleges that health care service plans such as Blue Cross of California are subject to the Health and Safety Code ("H&S Code").[1] *H&S Code § 1371.4(b)* states that a health care service plan "shall reimburse providers for emergency services and care provided to its enrollees, until the care results in stabilization of the enrollee, except as provided in subsection (c)."[2] Subsection (c) provides, in part, that "[p]ayment for

[1] Second Amended Complaint ("SAC"), ¶8.

[2] *Id.*

emergency services and care may be denied only if the health care service plan...reasonably determines that the emergency services and care were never performed."[3]

According to the SAC, "'[r]egulations of the Department of Managed Health Care provide that a health **[*2]** care service plan must pay 'the reasonable and customary value for the health care services rendered based upon statistically credible information that is updated at least annually and takes into consideration: (i) the provider's training, qualifications, and length of time in practice; (ii) the nature of the services provided; (iii) the fees usually charged by the provider; (iv) prevailing provider rates charged in the general geographic area in which the services were rendered; (v) other aspects of the economics of the medical provider's practice that are relevant; and (vi) any unusual circumstances in the case....'"[4]

Plaintiff alleges that "Blue Cross of California has engaged in a practice of failing to pay the reasonable rates of non-contracting providers when they have performed emergency services for its enrollees as hospital-admitted patients."[5] Further, Blue Cross allegedly "has failed to implement claims procedures to adequately identify and reimburse non-contracted providers for emergency services provided to its enrollees, as required by California law, including failing and refusing to recognize services performed by non-contracting specialists as emergency services when **[*3]** those services are performed on an emergent basis in a hospital instead of in an emergency room."[6] Per the SAC, "[v]arious types of specialists, such as surgeons, infectious disease experts, and others, frequently provide services to a patient on an emergent basis, after the patient has been admitted to the hospital, but prior to the time when care has resulted in the stabilization of the patient."[7] Blue Cross allegedly "does not identify and recognize these emergency, pre-stabilization services, and unlawfully and improperly calculates payment for services based on its non-contracted rates that are well below the reasonable value of the specialists' emergency services."[8]

Further, Plaintiff alleges that insurance companies such as Anthem Blue Cross Life and Health Insurance Company are subject to the Insurance Code.[9] *Section 10112.7*, the SAC alleges, provides that "A group or individual health insurance policy issued, amended, or renewed on or after January 1, 2014 that provides or covers any benefits with respect to services in an emergency department of a hospital shall cover emergency services for non-contracted providers in a manner that is not more restrictive than for contracted providers." **[*4]** [10]

However, Defendant Anthem has allegedly "engaged in a practice of failing to pay the appropriate rates of non-contracting providers when they have performed emergency services for its enrollees as hospital-admitted patients."[11] The Defendants have allegedly "failed to implement claims procedures to adequately identify and reimburse non-contracted providers for emergency services provided to its enrollees, as required by California law, including failing and refusing to recognize services performed by non-contracting specialists as emergency services when those services are performed on an emergent basis in a hospital instead of in an emergency room."[12]

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[3] *Id.*

[4] SAC, ¶9 (citing *28 CCR § 1300.71 (a)(3)(B)*.

[5] SAC, ¶10.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] SAC, ¶11.

[10] *Id.*

[11] SAC, ¶12.

[12] *Id.*

The second broad area of allegedly unlawful conduct under the SAC is Defendant Anthem's violation of prompt payment laws in violation of *Health and Safety Code §§ 1371* and *1371.35*, and *Insurance Code § 10123.13*. Despite its obligations, Defendant Anthem has allegedly failed to make timely payment of claims that involve emergency services, or has underpaid those claims, and has not paid the interest and penalties due for late payments.[13]

The third broad area of allegedly unlawful conduct is Anthem's alleged failure to remit payment to non-contracting providers. Anthem's obligation to pay non-contracting **[*5]** providers for emergency services requires that Anthem directly remit reimbursement payments to the non-contracting providers for those services.[14] Further, California law allegedly does not permit Anthem to reduce the reimbursement paid to the provider for any patient share of cost (i.e., co-payment, co-insurance, and/or deductible amounts), but must remit full reimbursement to the provider and address such patient share issues with the patient.[15] The complaint alleges that despite these obligations, Anthem has improperly and unlawfully made payment to the patients for the emergency services rendered by the non-contracting providers, including reduction of reimbursement for emergency services by patient share of cost.[16]

Based on these allegations and the other allegations set forth in the SAC, Plaintiff alleges claims for violation of *Business and Professions Code §§ 17200, et seq.*, declaratory relief, and quantum meruit. Plaintiff brings these claims on behalf of the following putative class:

> All licensed medical providers (including provider groups) who have submitted claims for reimbursement to Anthem for services provided to a patient with Anthem health coverage, where the provider was a non-contracted provider with Anthem and Anthem **[*6]** (a) did not pay a claim for emergency services, (b) did not meet the prompt payment deadlines and did not pay the appropriate interest or penalty, and/or (c) paid the patient instead of the non-contracted provider. Excluded from this definition are claims arising under federal plans, such as ERISA, FEHBA, Medicare Advantage, and Medi-Cal plans.[17]

Defendants demur to the SAC. For the reasons discussed *infra*, the demurrer is overruled. The Court strikes the request for late payment penalties and the references to a "fraudulent" UCL claim.

II.

DEMURRER TO SAC

A. Standards governing demurrers

CCP § 430.10(e) is grounds for a demurrer when the complaint fails to state facts sufficient to constitute a cause of action. For purposes of ruling on a demurrer, material facts properly pleaded in the complaint must be taken as true. *Serrano v. Priest (1971) 5 Cal.3d 584, 491*. A demurrer may challenge only defects that appear on the face of the pleading or from matters which are judicially noticeable. *Blank v. Kirwan (1985) 39 Cal.3d 311, 31*; *Donabedian v. Mercury Ins. Co. (2004) 116 Cal.App.4th 968, 994, 11 Cal. Rptr. 3d 45*; California Practice Guide, Civil Procedure Before Trial, ¶7:8 (The Rutter Group 2019).

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[13] SAC, ¶16.

[14] SAC, ¶17.

[15] *Id.*

[16] SAC, ¶18.

[17] SAC, ¶22.

The function of a demurrer is to test the legal sufficiency of a complaint, but not the truthfulness of the allegations. *Donabedian v. Mercury Ins. Co., supra, 116 Cal.App.4th at 994*; *Lewis v. Safeway, Inc. (2015) 235 Cal.App.4th 385, 388, 185 Cal. Rptr. 3d 228*; *SJJC Aviation Services, LLC v. City of San Jose (2017) 12 Cal.App.5th 1043, 1051-1052, 219 Cal. Rptr. 3d 637*; California Practice Guide, Civil Procedure Before **[*7]** Trial, ¶7:5 (The Rutter Group 2019). Demurrers are to be sustained where a pleading fails to plead adequately any essential element of the cause of action. *Cantu v. Resolution Trust Corp. (1992) 4 Cal.App.4th 857, 879-80, 6 Cal. Rptr. 2d 151*.

"'A demurrer tests the pleadings alone and not the evidence or other extrinsic matters. Therefore, it lies only where the defects appear on the face of the pleading or are judicially noticed (*Code Civ. Proc, §§ 430.30*, *430.70*). The only issue involved in a demurrer hearing is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action.'" *Hahn v. Mirda (2007) 147 Cal.App.4th 740, 747, 54 Cal. Rptr. 3d 527*. *Accord* *McKenney v. Purepac Pharmaceutical Co. (2008) 162 Cal.App.4th 72, 79*.

When considering demurrers, courts read the allegations liberally and in context. *McKenney, supra*, 167 Cal.App.4th at 77; *Taylor v. City of Los Angeles Dept. of Water and Power (2006) 144 Cal.App.4th 1216, 1228, 51 Cal. Rptr. 3d 206*. "If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer." *Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 38, 77 Cal. Rptr. 2d 709, 960 P.2d 513* (emphasis added).

B. Discussion

Defendant Anthem Blue Cross demurs to the UCL claim and to the declaratory relief claim in the SAC. Defendant Anthem Blue Cross Life and Health Insurance Company demurs to the complaint in its entirety. The Defendants raise several arguments in the demurrer, which are taken in turn.

1. Violation of the UCL

a. The UCL Generally

Business and Professions Code ("B&P Code") *§ 17200, et seq.* forms **[*8]** part of California's Unfair Competition Law ("UCL"). Under *B&P Code § 17200*, "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *B&P Code § 17203* provides:

> Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of *Section 17204* and complies with *Section 382 of the Code of Civil Procedure*, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.

The UCL's scope is broad, and the UCL's "coverage is sweeping, embracing anything that can **[*9]** properly be called a business practice and that at the same time is forbidden by law." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527* (internal citations and quotation marks omitted). "The statutory language referring to 'any unlawful, unfair *or* fraudulent practice...makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law. Because *Business and Professions Code section 17200* is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent. In other words, a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa." *Id.* (Internal citations and quotation marks omitted).

"The unfair competition statute is not confined to anticompetitive business practices, but is also directed toward the public's right to protection from fraud, deceit, and unlawful conduct." *Hewlett v. Squaw Valley Ski Corp. (1997) 54 Cal.App.4th 499, 519-520, 63 Cal. Rptr. 2d 118*; California Practice Guide, *B&P Code § 17200* Practice, ¶3:17 (The Rutter Group 2019).

(1) Fraudulent business practices under the UCL

"The fraudulent business practice prong of the UCL has been understood to be distinct from common law fraud. 'A [common law] fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who **[*10]** incurs damages. None of these elements are required to state a claim for injunctive relief under the UCL. [Citations.] This distinction reflects the UCL's focus on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices." *In re Tobacco II (2009) 46 Cal.4th 298, 312, 93 Cal. Rptr. 3d 559, 207 P.3d 20*. "No proof of direct harm from a defendant's unfair business practice need be shown, such that '[a]negations of actual deception, reasonable reliance, and damage are unnecessary.'" *Day v. AT&T(1998) 63 Cal.App.4th 325, 332, 74 Cal. Rptr. 2d 55* (citing *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 211, 197 Cal. Rptr. 783, 673 P.2d 660)*. A business practice is "fraudulent" within the meaning of *§ 17200* if "members of the public are likely to be deceived." *Committee on Children's Television v. General Foods Corp. (1983) 35 Cal.3d 197, 211, 197 Cal. Rptr. 783, 673 P.2d 660*; *Kasky v. Nike, Inc. (2002) 27 Cal.4th 939, 119 Cal. Rptr. 2d 296, 45 P.3d 243*; *Prata v. Sup.Ct. (2001) 91 Cal.App.4th 1128, 1144, 111 Cal. Rptr. 2d 296*.

(2) "Unlawful" UCL Claim

Section 17200's prohibition of "unlawful" business practices proscribes "anything that can properly be called a business practice and that at the same time is forbidden by law." *People v. McKale (1975) 25 Cal.3d 626, 634, 159 Cal. Rptr. 811, 602 P.2d 731*; *Barquis v. Merchants Collection Ass 'n. (1972) 7 Cal.3d 94, 113*. Virtually any law or regulation - federal or state, statutory or common law - can serve as a predicate for a *§ 17200* "unlawful" violation. Stern, William: *Business & Professions Code § 17200* Practice, 13:56 (2019). Thus, if a "business practice" violates any law - literally - it also violates *§ 17200* and may be redressed under that section. *Id.*

Where the UCL claim is based on allegations the defendants **[*11]** violated another statute, the plaintiff must allege facts showing that her purchase was caused by the underlying violation. *Medina v. Safe-Guard Products, Inc. (2008) 164 Cal.App.4th 105, 115, 78 Cal. Rptr. 3d 672* (dismissing UCL claim of buyer of vehicle service contract against an unlicensed seller because buyer did not allege that he "relied on [defendant's] having a license required by the vehicle service contract statutes, or that [defendant's] unlicensed status *caused* him to part with the money he paid for the tire and wheel contract").

Where a plaintiff is barred from proving the statutory violation alleged as a basis for the plaintiff's UCL claim, the UCL claim is also barred. *Ingels v. Westwood One Broad. Servs. (2005) 129 Cal.App.4th 1050, 1060, 28 Cal. Rptr. 3d 933*.

(3) "Unfair" Conduct under the UCL - Consumer Claims

In *Camacho v. Automobile Club of Southern California (2006) 142 Cal.App.4th 1394, 1403, 48 Cal. Rptr. 3d 770*, the Court applied the following test for an "unfair" UCL claim by a consumer: (1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and

(3) it must be an injury that consumers themselves could not reasonably have avoided. *See also* *Klein v. Chevron U.S.A., Inc. (2012) 202 Cal.App.4th 1342, 1376, 137 Cal. Rptr. 3d 293* (citing *Camacho*).

Other courts have determined that the definition of "unfair" under the UCL is uncertain. *Durell v. Sharp Healthcare (2010) 183 Cal.App.4th 1350, 1364, 108 Cal. Rptr. 3d 682*. However, the *Durell* court adopted the following definition of "unfair" in the context of UCL, non-competitor **[*12]** actions: "'[t]o show a business practice is unfair, the plaintiff must show the conduct 'threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.''" *Durell, 183 Cal.App.4th at 1366* (citing *Byars v. SCME Mortgage Bankers, Inc. (2003) 109 Cal.App.4th 1134, 1147, 135 Cal. Rptr. 2d 796)*. *See also* *Scripps Clinic v. Superior Court (2003) 108 Cal.App.4th 917, 940, 134 Cal. Rptr. 2d 101* ("'where a claim an unfair act or practice is predicated on public policy, we read *Cel-Tech* to require that the public policy which is a predicate to the action must be 'tethered' to specific constitutional, statutory or regulatory provisions'") (citing *Gregory v. Albertson's, Inc. (2002) 104 Cal.App.4th 845, 854, 128 Cal. Rptr. 2d 389)*.

However, the Second District has consistently followed the *Camacho* definition for consumer claims. *See* *Rubenstein v. The Gap, Inc. (2017) 14 Cal.App.5th 870, 880, 222 Cal. Rptr. 3d 397*; *Klein, supra*; *Davis v. Ford Motor Credit Co. (2009) 179 Cal.App.4th 581, 584, 594-597, 101 Cal. Rptr. 3d 697*; *Dougherty v. American Honda Motor Co., Inc. (2006) 144 Cal.App.4th 824, 838-839*. This Court, therefore, adopts the *Camacho* definition for consumer claims based on the UCL's "unfair" prong.

b. Analysis

As alleged in the SAC, there are three (3) overarching bases for the UCL claim: 1) Anthem's violation of emergency services reimbursement laws; 2) Anthem's violation of prompt payment laws; and 3) Anthem's failure to remit payment to non-contracting providers.[18]

(1) UCL Unlawful Violation and the Knox-Keene Act

H&S Code §§ 1340, et seq. is known as the Knox-Keene Health Care Service Plan **[*13]** Act of 1975 (the "Knox-Keene Act" or "the Act"). The Knox-Keene Act applies to health care service plans and specialized health care service plan contracts as defined by statutes. Cal. Jur. 3d Insurance Contracts § 281 (2019). One treatise describes the purpose of the Act as follows:

> The purpose of the Act is to promote the delivery of health and medical care to the people of this state who enroll in, or subscribe for the services rendered by, a health care service plan or specialized health care service plan by, among other things, assuring the continued role of the professional as the determiner of the patient's health needs, assuring that subscribers and enrollees are educated and informed of the benefits and services available, helping to assure the best possible health care for the public at the lowest possible cost by transferring the financial risk of health care from patients to providers, and assuring that subscribers and enrollees receive available and accessible health and medical services rendered in a manner providing continuity of care. 39A Cal. Jur. 3d Insurance Contracts *§ 281* (referencing *H&S Code § 1342(a)*, *(b)*, *(d)*, and *(g)*).

A key component of the Knox-Keene Act addresses the obligation of **[*14]** insurers to reimburse emergency room services to health care providers that are out of the insurers' network ("out-of-network providers"). *H&S Code § 1371.4* addresses that obligation:

> (a) A health care service plan that covers hospital, medical, or surgical expenses, or its contracting medical providers, shall provide 24-hour access for enrollees and providers, including, but not limited to, noncontracting

[18] See generally SAC, ¶¶8-18.

> hospitals, to obtain timely authorization for medically necessary care, for circumstances where the enrollee has received emergency services and care is stabilized, but the treating provider believes that the enrollee may not be discharged safely. A physician and surgeon shall be available for consultation and for resolving disputed requests for authorizations. A health care service plan that does not require prior authorization as a prerequisite for payment for necessary medical care following stabilization of an emergency medical condition or active labor need not satisfy the requirements of this subdivision.
>
> (b) A health care service plan, or its contracting medical providers, shall reimburse providers for emergency services and care provided to its enrollees, until the care results in stabilization **[*15]** of the enrollee, except as provided in subdivision (c). As long as federal or state law requires that emergency services and care be provided without first questioning the patient's ability to pay, a health care service plan shall not require a provider to obtain authorization prior to the provision of emergency services and care necessary to stabilize the enrollee's emergency medical condition.
>
> (c) Payment for emergency services and care may be denied only if the health care service plan, or its contracting medical providers, reasonably determines that the emergency services and care were never performed; provided that a health care service plan, or its contracting medical providers, may deny reimbursement to a provider for a medical screening examination in cases when the plan enrollee did not require emergency services and care and the enrollee reasonably should have known that an emergency did not exist. A health care service plan may require prior authorization as a prerequisite for payment for necessary medical care following stabilization of an emergency medical condition. *H&S Code § 1371.4(a)*, *(b)*, and *(c)*.

The Department of Managed Health Care ("DMHC") is charged with the administration and enforcement **[*16]** of the laws relating to health care service plans. *Children's Hospital Central California v. Blue Cross of California (2014) 226 Cal.App.4th 1260, 1271, 172 Cal. Rptr. 3d 861* (referencing *H&S Code § 1341*). "To carry out its duties, the DMHC is authorized to promulgate regulations." *Id.* (Citing *H&S Code § 1344*).

One such regulation promulgated by the DMHC appears at *28 CCR § 1300.71*. *Section 1300.71(a)(3)(B)* "defines 'Reimbursement of a Claim' for noncontracted providers." *Children's Hospital, supra, 226 Cal.App.4th at 1271*. As explained by the *Children's Hospital* court:

> Such reimbursement means "the payment of the reasonable and customary value for the health care services rendered." The reasonable and customary value is to be "based upon statistically credible information that is updated at least annually" and takes six factors into consideration. These factors are: "(i) the provider's training, qualifications, and length of time in practice; (ii) the nature of the services provided; (iii) the fees usually charged by the provider; (iv) prevailing provider rates charged in the general geographic area in which the services were rendered; (v) other aspects of the economics of the medical provider's practice that are relevant; and (vi) any unusual circumstances in the case." *Children's Hospital Central California v. Blue Cross of California (2014) 226 Cal.App.4th 1260, 1271, 172 Cal. Rptr. 3d 861* (citing *28 CCR § 1300.71(a)(3)(B)*).

These factors are known as the "*Gould* factors" (stemming from *Gould v. Workers' Comp. Appeals Bd. (1992) 4 Cal.App.4th 1059, 6 Cal. Rptr. 2d 228*). "If a provider disputes the payor's calculation of the fair and reasonable value **[*17]** of the health care services he has rendered, the provider is free to seek resolution of that dispute in a court of law or through any other available civil remedy." *Children's Hospital, supra, 226 Cal.App.4th at 1273*.

The *Children's Hospital* court also observed:

> [I]n adopting *section 1300.71(a)(3)(B)*, the DMHC established the minimum criteria for reimbursement of a claim, not the exclusive criteria. The DMHC refused to set specific amounts noting that neither billed charges nor government rates are determinative of the reasonable value of the medical services. Rather, the DMHC intended that reasonable value be based on the concept of quantum meruit and that value disputes be resolved by the courts. In fact, the DMHC has acknowledged that, unlike the courts, it "'lacks the authority to set specific reimbursement rates under theories of *Quantum meruit* and the jurisdiction to enforce a

reimbursement determination on both the provider and the health plan.'" Children's Hospital, 226 Cal.App.4th at 1273 (citing Bell v. Blue Cross of California (2005) 131 Cal.App.4th 211, 218, 31 Cal. Rptr. 3d 688).

With this background in mind, Defendant Anthem argues that the Plaintiff UCL claim (and, for that matter, the declaratory relief claim) essentially seeks to regulate and supervise health plans (and the prompt pay laws), in contravention of the DMHC's authority. Paragraph 26, for instance, alleges in **[*18]** pertinent part that "Anthem has violated the UCL by systematically and repeatedly violating California's emergency services reimbursement laws, prompt payment laws, failing to timely remit reimbursement, interest, and penalties, and to otherwise comply with California's prompt payment laws, remitting payments to Anthem's enrollees instead of to providers, and performing other unfair acts of which plaintiff is presently unaware."[19] There are two theories of alleged unlawful conduct: 1) Anthem's failure "to implement claims procedures to adequately identify and reimburse non-contracted providers for emergency services provided to its enrollees, as required by California law"[20] ; and 2) Anthem's failure to "unlawfully and improperly calculate[] payment for services based on its non-contracted rates that are well below the reasonable value of the specialists' emergency services."[21]

According to Defendant Anthem, one court has rejected the notion that the failure to implement a reimbursement methodology that complies with the *Gould* factors violates California's prompt pay laws. *See NorthBay Healthcare Grp. -* Hosp. Div. v. Blue Shield of Cal. Life & Health Ins. (N.D. Cal. 2018) 342 F.Supp.3d 980, 988. In *NorthBay Healthcare Group*, the federal district court granted the motion of Blue **[*19]** Shield (a health care service plan) for summary judgment against a nonprofit healthcare organization (NorthBay Healthcare Group). Among other claims, NorthBay alleged that Blue Shield engaged in unfair business practices under the UCL for failing to compensate NorthBay hospitals for non-contracted services, and manipulating data inputted to a flawed methodology to underpay non-contracted claims. *NorthBay Healthcare Group*, 342 F.Supp.3d at 985. The *NorthBay Healthcare* court determined that there was "no unlawful conduct that can be deduced from NorthBay's claim that BlueShield 'improperly' applied the [*Gould*] considerations....[T]he regulation and the *Gould* factors it is based on...are considered minimum criteria.... The re is no mandatory methodology to apply beyond taking consideration of the factors. Even if Blue Shield improperly applied the considerations as NorthBay alleges, implicit in that claim is that Blue Shield did consider them consistent with the minimum requirements of Section 1300.71."

With that said, though, the *NorthBay* court also recognizes that "[a]mple case law *supports a right to predicate UCL claims for inadequate or unpaid reimbursements on violations of* Section 1371.4*." NorthBay HealthCare Group*, 342 F.Supp.3d at 987 (referencing Children's Hospital Cent. Cal. supra, 226 Cal.App.4th at 1275 (emphasis added); Cal. Pac. Reg'l. Med. Ctr., No. 13-CV-00540-NC, 2013 WL 2436602, at *5 (N.D. Cal. June 4, 2013); Prospect Med. Grp., Inc. v. Northridge Emergency Med. Grp. (2009) 45 Cal.4th 497, 505, 87 Cal. Rptr. 3d 299, 198 P.3d 86)).

Bell v. Blue Cross of California, supra, 131 Cal.App.4th at 216 states that the DMHC's "jurisdiction **[*20]** is not exclusive and there is nothing in section 1371.4 or in the Act generally to preclude a private action under the UCL or at common law on a quantum meruit theory." Bell, 131 Cal.App.4th at 216. The *Bell* court further referenced the DMHC's support of private enforcement, and the DMHC's position "that a 'provider's private action or reimbursement under the ...UCL does not infringe upon the Department's jurisdiction over the Knox-Keene Act." Bell at 218. The *NorthBay* court ultimately rejected the UCL claim in that case, since it sought "to enjoin the *methodology* Blue Shield uses under Section 1300.71(a)(3)(B) and the *Gould* factors, not challenge the actual reasonable and customary value *derived* from that methodology." *NorthBay*, 342 F.Supp.3d at 987 (emphasis added).

Thus, the question presented is whether Plaintiff is challenging Anthem's *methodology* to reimburse out-of-network providers for emergency services, or the actual and reasonably customary value of the services provided *derived from* that methodology. Taking a liberal reading of the complaint at the pleading stage, the failure "to implement

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[19] SAC, ¶26.

[20] SAC, ¶10.

[21] *Id.*

claims procedures to adequately identify and reimburse non-contracted providers for emergency services provided to its enrollees, as required by California law" alleged at ¶10 could be read **[*21]** to fall into the latter category. For Plaintiffs part, it is not challenging Anthem's methodology by which Defendant Anthem calculates the "reasonable and customary value" of medical services, or that Anthem improperly applies any of the *Gould* factors.[22]

Plaintiff, in other words, argues that it is alleging Defendant Anthem's *total failure* to apply the *Gould* factors - not *how* those factors are applied - and is seeking "to recover the value allegedly owed for a reasonable and customary reimbursement" under *Gould* and *section 1300.71(a)(3)(B)*.[23] The allegation of a failure to identify and reimburse non-contract providers for emergency services does not appear to challenge the methodology employed by Anthem. Therefore, the Court does not find that permitting the "unlawful" UCL claim to go forward at the pleading stage would allow Plaintiff to "assume general regulatory powers over health maintenance organizations through the guise of enforcing *Business and Professions Code section 17200*[.]" *Samura v. Kaiser Foundation Health Plan, Inc. (1993) 13 Cal.App.4th 1284, 1301-1302*.

The necessary implication under *§ 1371.4* is that the *Gould* factors must be followed. To the extent those factors are not being followed at all (Plaintiff argues there has been a "total failure" to follow the *Gould* factors), this provides the necessary predicate for a UCL "unlawful" **[*22]** violation. In that sense, *NorthBay* is not persuasive at the pleading stage.

If, following discovery, it becomes apparent that it is really Anthem's *methodology* Plaintiff is contesting, and that Plaintiff is in fact challenging *how* the *Gould* factors are applied (as opposed to *whether* the factors are applied) then this could be the appropriate subject of a motion for summary adjudication. Under these circumstances, at the pleading stage, a UCL unlawful claim has been stated, premised on a violation of the Knox-Keene Act.

(2) "Fraudulent" UCL claim

While the SAC invokes the definition of unfair competition under *§ 17200* as including any unlawful, unfair, or fraudulent business practice, the SAC itself does not allege a basis for a UCL claim based on fraudulent acts. As such, the references to the UCL "fraudulent" allegation are stricken.

(3) "Unfair" UCL claim

Defendant Anthem argues the UCL "unfair" claim fails because Plaintiff is neither a competitor of Defendant Anthem nor a consumer of Anthem's services. As observed by the *NorthBay* court, "[t]he 'unfair' prong of the UCL prohibits a business practice if it 'violates established public policy or if it is immoral, unethical, oppressive or unscrupulous **[*23]** and causes injury to consumers which outweighs its benefits.'" *NorthBay Healthcare Group, supra*, 342 F.Supp.3d at 988. *B&P Code § 17204* provides that actions for UCL relief may be brought, among others, "by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition."

There is no carve-out under the UCL requiring "unfair" claims to be brought by either a competitor or a consumer. *Herr v. Nestle U.S.A., Inc. (2003) 109 Cal.App.4th 779, 135 Cal. Rptr. 2d 477* establishes that a plaintiff need not be a consumer or a competitor in order to bring a UCL "unfair" claim. The *Herr* court rejected as meritless the defendant's argument that the UCL was intended to protect consumers and competitors, and not employees (and that the plaintiff's remedy for age discrimination was therefore limited to FEHA). *Herr, 109 Cal.App.4th at 789*. In doing so, the *Herr* court referenced *B&P Code § 17205* which provides that "[u]nless otherwise expressly provided, the remedies or penalties provided by this chapter are *cumulative to each other and to the remedies or penalties available under all other laws of this state*." While two federal district court cases *[Centre for Neuro Skills v. Blue*

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[22] See Opposition at 7:8-10.

[23] Opposition at 7:13-15.

Cross of California, 2013 WL 5670889, at *9 (E.D. Cal. Oct. 15, 2013) and Almost v. Equilon Enters., 2012 WL 3945528, at *9 (N.D. Cal. Sept. 12, 2012)) dismissed UCL claims where the plaintiffs were not consumers or competitors, *Herr* is a Court of Appeal decision out of our own Second District, and is binding. Thus, the Defendant's argument **[*24]** that the UCL "unfair" claim cannot go forward on grounds that Plaintiff is neither a consumer nor a competitor with Anthem is not persuasive.

(4) Monetary and Injunctive Relief

Defendant Anthem next argues that there is no basis for the monetary or injunctive relief sought.

(a) Restitution

Under the UCL, "to establish the right to restitution under § 17203, a plaintiff must do more than merely prove he or she has suffered economic injury as the result of unfair competition. 'Restitution under section 17203 is confined to restoration of any interest in 'money or property, real or personal, which may have been *acquired* by means of such unfair competition.' ... A restitution order against a defendant thus requires both that money or property have been lost by a plaintiff, on the one hand, and that it have been acquired by a defendant, on the other.'" Beraze v. Wilshire Landmark, LLC 2014 WL 729216 (Feb. 24, 2014) at *10 (citing Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 336, 120 Cal. Rptr. 3d 741, 246 P.3d 877).

The Court in Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 131 Cal. Rptr. 2d 29, 63 P.3d 937 referenced the definition of "restitution" set forth in Kraus v. Trinity Management Services, Inc. (2000) 23 Cal.4th 116, 96 Cal. Rptr. 2d 485, 999 P.2d 718 - an order "'compelling a UCL defendant to return money obtained through an unfair business practice *to those persons in interest from whom the property was taken*, that is, to persons who had an ownership interest in the property or those claiming through that person.'" Korea Supply at 1144-145 (citing Kraus, 23 Cal.4th at pp. 126-127) (emphasis **[*25]** added.) See also B&P Code § 17203. The Court further noted that "[u]nder the UCL, an individual may recover profits unfairly obtained to the extent that these profits represent monies given to the defendant or benefits *in which the plaintiff has an ownership interest."* Korea Supply at 1148 (emphasis added). In other words, "[t]he object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." *Id.*

"[T]he notion of restoring something to a victim of unfair competition includes two separate components. The offending party must have obtained something to which it was not entitled *and* the victim must have given up something which he or she was entitled to keep." Day v. AT&T Corp. (1998) 63 Cal.App.4th 325, 340, 74 Cal. Rptr. 2d 55.

Damages are unavailable under §§ 17200, et seq. *See* Bank of the West v. Superior Court (1992) 2 Cal.4th 1254, 1266, 10 Cal. Rptr. 2d 538, 833 P.2d 545; Heller v. Norcal Mut. Ins. Co. (1994) 8 Cal.4th 30, 45, 32 Cal. Rptr. 2d 200, 876 P.2d 999; Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal.4th 163, 179, 83 Cal. Rptr. 2d 548, 973 P.2d 527.

According to Defendant Anthem, the measure of the monetary relief Plaintiff seeks cannot be characterized as restitution, because it has no vested interest in any money or property in Anthem's possession. To the contrary, Anthem argues the monetary relief is, in essence, damages, which Plaintiff cannot recover under its UCL claim.

The question here is whether the money Plaintiff seeks was once in its possession, or represents a sum in which Plaintiff has a **[*26]** vested/ownership interest. Plaintiff's position is that the unpaid amounts for emergency services are akin to earned wages. These allegations are sufficient to survive the demurrer.

Defendant Anthem relies on Korea Supply, supra, for the notion that the monetary relief sought is damages and not restitution. In *Korea Supply*, the plaintiff (KSC) was a business representing manufacturers of military equipment. KSC was representing a company called MacDonald Dettwiler and Associates, Ltd. in a bid for a contract from the government of the Republic of Korea. MacDonald ultimately lost the bid to Lockheed Martin Tactical Systems, Inc. KSC sued Lockheed Martin under the UCL, alleging that it would have received a $30 million commission had MacDonald won the bid, and that Lockheed Martin had engaged in various unfair business practices in procuring the bid. The California Supreme Court concluded that the sum KSC sought was nonrestitutionary disgorgement of profits, and that KSC's characterization of the relief sought as "restitution" was inaccurate because KSC had neither an ownership interest or a vested interest in the money it sought to recover.

Defendant argues that "[j]ust as KSC's interest in the commission **[*27]** in *Korea Supply Company* was not 'vested' because it was contingent on an uncertain event (i.e., MacDonald winning the bid) so too here Plaintiff's *restitutionary* interest in the reasonable and customary value of her services is contingent on an uncertain event (*i.e.*, the identification of claims for reimbursement as emergent)."[24]

However, *Korea Supply* is distinguishable on that point. In *Korea Supply*, "KSC merely alleged that it had an economic expectancy in that it was acting as MacDonald Dettwiler's broker and it expected a commission if the contract was awarded to MacDonald Dettwiler." *Korea Supply, 29 Cal.4th at 1157*. In contrast, Plaintiff here alleges that it, as well as the class, have *performed* the alleged emergent services for which they have not been compensated due to Defendant's failure to characterize those services as emergent. At the pleading stage, the measure of Plaintiff's monetary loss may be viewed as restitution.

John Muir Health v. Global Excel Management, 2015 WL 1359154 (N.D. Cal. March 25, 2015) aids in the analysis. In that case, plaintiff (a non-profit corporation that provides medical care to patients) sued defendant (a Canadian for-profit corporation that arranges for the provision of health care services to its enrollees and/or pays for or reimburses part or all of the cost **[*28]** for those services). Plaintiff alleged that it provided medical treatment to certain individuals enrolled in in defendant's health plan, and billed defendant certain sums for the treatment of the enrollees. Defendant paid only a portion of the sums allegedly owed to the plaintiff, despite plaintiff's demands for an additional $459,985.90. Following various amendments, the plaintiff alleged claims for quantum meruit and violation of the UCL. Defendant moved to strike various portions of the complaint, including the request for $459,985.90 sought in the UCL claim. Defendant argued in part that this amount did not represent restitution (and was unavailable under the UCL); instead, the defendant opined that the amount was "really a damages claim in disguise, because it has requested the same amount in its quantum meruit claim." *John Muir Health v. Global Excel Management, 2015 WL 1359154 at *4*.

The federal district court denied the motion to strike. The court first observed that a plaintiff can state valid claims for the same amount as both damages and restitution. *John Muir Health v. Global Excel Management* at *5. The court reasoned that "Plaintiff can state a valid claim that it conferred a benefit directly on Defendant-namely, the stabilizing emergency **[*29]** care of Defendant's enrolled beneficiary.... Plaintiff can also allege that Defendant had a legal duty to reimburse it for this benefit under *section 1371.4(b)*, that Defendant failed to do so, and that Plaintiff is entitled to restitution as a result." *John Muir Health v. Global Excel Management* at *5.

The situation in *John Muir Health* is analogous to the case at bar. Like in *John Muir Health*, plaintiff's UCL claim seeks a reimbursement of funds which it claims are due and owing for services rendered (and which conferred a benefit on Defendant). Due to Defendant Anthem's alleged UCL violation and failure to characterize services as emergent, Plaintiff can allege that Defendant had a legal duty to reimburse it for the alleged emergent services performed and that it is entitled to restitution.

For these reasons, Plaintiff has adequately stated a basis, at the pleading stage, to seek restitution.

(b) Injunctive relief

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[24] Defendant's Reply at 6:9-13.

Defendant Anthem also challenges the prayer for injunctive relief under the UCL. *In re Tobacco Cases II, supra*, discussed the scope of a Court's authority to order injunctive relief:

> "A trial court has broad authority to enjoin conduct that violates *section 17200*. [Citation.] That authority is expansive but not unlimited. Although the **[*30]** [UCL] imposes liability for past acts, in order to grant injunctive relief under *section 17204* or *section 17535*, there must be a threat that the wrongful conduct will continue. 'Injunctive relief will be denied if, at the time of the order of judgment, there is no reasonable probability that the past acts complained of will recur, i.e., where the defendant voluntarily discontinues the wrongful conduct.' " (*Colgan, supra, 135 Cal.App.4th at p. 702, 38 Cal.Rptr.3d 36*.) " 'The grant or denial of a permanent injunction rests within the trial court's sound discretion and will not be disturbed on appeal absent a showing of a clear abuse of discretion.' " [Citation.] *In re Tobacco II Cases, supra, 240 Cal.App.4th 779, 802-803*.

The Legislature "intended ... to permit courts to enjoin ongoing wrongful business conduct in whatever context such activity might occur." *See* *Barquis v. Merchants Collection Ass'n (1972) 7 Cal.3d 94, 111*; see also *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 210, 197 Cal. Rptr. 783, 673 P.2d 660*. However, "[t]he general rule is that 'injunctive relief will be denied if at the time of the order or judgment, there is no reasonable probability that the past acts complained of will recur, i.e., where the defendant voluntarily discontinues the wrongful conduct.'" California Practice Guide, *B&P Code § 17200* Practice, ¶8:35 (The Rutter Group 2019) (citing *California Service Station & Auto. Repair Ass'n. v. Union Oil of Calif. (1991) 232 Cal.App.3d 44, 57, 283 Cal. Rptr. 279)*. "Injunctive relief has no application to wrongs which have been completed [citation], absent a showing **[*31]** that past violations will probably recur." *People v. Toomey (1984) 157 Cal.App.3d 1, 20, 203 Cal. Rptr. 642*. *B&P Code § 17205* states that the remedies provided under the UCL "are cumulative to each other and to the remedies or penalties available under all other laws of this state."

Further, injunctions may be granted, among other instances, "[w]here pecuniary compensation would not afford adequate relief and "[w]here it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief." *Civil Code § 3422*.

Defendant argues that injunctions are not proper where there is a plain, complete, speedy and adequate remedy at law. Here, though, as set forth above, the remedies under the UCL are cumulative to other potential remedies. Thus, despite the alternative allegation of quantum meruit relief, Plaintiff also is entitled to plead its UCL violation.

Moreover, there is no legal remedy sought in the instant complaint in the form of damages. The terms of any injunction would have to be based on further events in the case, as they develop, and Plaintiff is not tasked with defining the precise scope of that injunction at the pleading stage. For now, Plaintiff seeks injunctive relief (in addition to restitution and interest) "to correct Anthem's failure **[*32]** to comply with California's emergency services reimbursement laws, the prompt payment laws, and the practice of paying Anthem enrollees instead of the non-contracting providers."[25] This is sufficient at the pleading stage.

(c) Prejudgment interest and statutory penalties

Defendant argues that Plaintiff cannot recover statutory penalties and interest under the UCL, because those penalties have not been adjudicated, and because the statutory remedy does not vest until final judgment.

Defendant's pleading challenge is a demurrer, and not a motion to strike. A demurrer does not lie to a portion of a cause of action. See *Kong v. City of Hawaiian Gardens Redevelop. Agency (2003) 108 Cal.App.4th 1028, 1046, 134 Cal. Rptr. 2d 260)*. In any event, though, the Court of Appeal in *Espejo v. The Copley Press, Inc. (2017) 13 Cal.App.5th 329, 221 Cal. Rptr. 3d 1* stated as follows with respect to a court's authority to award prejudgment interest in a UCL action:

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[25] SAC, ¶28.

> Although a court may not award prejudgment interest under *Civil Code section 3287, subdivision (a)*, to a restitutionary award under the UCL, the court nevertheless has discretion in *equity* to award prejudgment interest on a UCL award as a component of restitution. The policy underlying an award of prejudgment interest is to make the injured party whole for the accrual of wealth that could have been produced during the period of loss. *Espejo v. The Copley Press, Inc. (2017) 13 Cal.App.5th 329, 375, 221 Cal. Rptr. 3d 1* (citations omitted; emphasis added). **[*33]**

Thus, it is apparent that the Court, in its equitable discretion, could award prejudgment interest on a UCL award. It is premature to strike the prayer for prejudgment interest at this time.

With respect to statutory penalties, "[i]n a suit under the UCL, a public prosecutor may collect civil penalties, but a private plaintiff's remedies are 'generally limited to injunctive relief and restitution.'" *Demetriades v. Yelp, Inc. (2014) 228 Cal.App.4th 294, 300, fn.3, 175 Cal. Rptr. 3d 131* (citing *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527* and *B&P Code §§ 17203*, *17206*). Plaintiff's prayer seeks, among other relief, "late payment penalties[.]"[26] The Court was unable to find authority that provides that late payment penalties are an available remedy under a private plaintiff's UCL claim.[27] Accordingly, the Court strikes the request for late payment penalties.

(5) Declaratory relief claim

Defendant demurs to the declaratory relief claim, on grounds that the Plaintiff's claims exclusively concern past events (emergency services rendered by Plaintiff) "and should not be a substitute for the procedure contemplated by the Legislature (*i.e., quantum meruit* claims)."[28] Defendant further submits that declaratory relief "is particularly inappropriate where the Court can readily make the requested determination when evaluating Plaintiffs **[*34]** other causes of action."[29]

To state a claim for declaratory relief, a plaintiff must allege:

1. Person interested under a written instrument or a contract; or
2. a declaration of his or her rights or duties;
a. with respect to another; or
b. in respect to, in, over or upon property; and,
3. an actual controversy.

CCP § 1060; *Ludgate Ins. Co. v. Lockheed Martin Corp. (2000) 82 Cal. App. 4th 592, 605-06, 98 Cal. Rptr. 2d 277*; *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 549, 305 P.2d 20*. *See also* *City of Cotati v. Cashman (2002) 29 Cal. 4th 69, 80, 124 Cal. Rptr. 2d 519, 52 P.3d 695* ("'an actual, present controversy must be pleaded specifically" and "the facts of the respective claims concerning the [underlying] subject must be given.'"); *Osseous Technologies of Amer., Inc. v. DiscoveryOrtho Partners LLC (2010) 191 Cal.App.4th 357, 364, 119 Cal. Rptr. 3d 346*. Procedurally, with exceptions, a demurrer must be overruled, if an actual controversy is alleged, even if plaintiffs are not entitled to a judgment in their favor. *Osseous Technologies of Amer., Inc. v. DiscoveryOrtho Partners LLC (2010) 191 Cal.App.4th 357, 364, 119 Cal. Rptr. 3d 346* (judges lack discretion to dismiss claims for declaratory relief where complaints are sufficiently alleged and reveal that the relief is entirely appropriate); *Lockheed Martin Corp. v. Continental Ins. Co., (2005) 134 Cal. App. 4th 187, 221, 35 Cal. Rptr. 3d 799*, *disapproved on other grounds by* *State v. Allstate Ins. Co. (2009) 45 Cal.4th 1008, 1036 n.11, 90 Cal. Rptr. 3d 1, 201 P.3d 1147*; *Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4lh 592, 606; *Farmers Ins. Exchange v. Zerin (1997) 53 Cal.*

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[26] SAC, Prayer, ¶1.

[27] The *Cortez* decision does not hold that such penalties are available to a private plaintiff. In light of the *Demetriades* court's recognition that a private plaintiff's penalties are generally limited only to injunctive relief and restitution, *Cortez* is not persuasive.

[28] Demurrer at 14:1-4.

[29] Demurrer at 14:10-11.

App. 4th 445, 460, 61 Cal. Rptr. 2d 707 ("[s]trictly speaking, a demurrer is not an appropriate weapon to attack a claim for declaratory relief inasmuch as the plaintiff is entitled to a declaration of its rights, even if adverse.") Also, "[t]he mere circumstance that another remedy is available is an insufficient ground **[*35]** for refusing declaratory relief, and doubts regarding the propriety of an action for declaratory relief pursuant to [CCP §] 1060 generally are resolved in favor of granting relief." *Filarsky v. Sup. Ct. (2002) 28 Cal.4th 419, 433, 121 Cal. Rptr. 2d 844, 49 P.3d 194*.

The SAC alleges as follows, with respect to the declaratory relief claim:

> [A]n actual controversy now exists between Plaintiff and Anthem regarding their rights and liabilities under the emergency services reimbursement laws, the prompt payment laws, and Anthem's obligation to pay non-contracting providers instead of Anthem enrollees. These claims do not include any claims arising under federal plans, such as ERISA, FEHBA, Medicare Advantage, and Medi-Cal plans.[30]

Taking a liberal reading of the SAC, Anthem's alleged practice is ongoing. Thus, Defendant's argument that declaratory relief "should not be used to adjudicate past events" is not persuasive.[31] Further, while there may be other remedies available to address Defendant Anthem's allegedly wrongful conduct, this would not be grounds for refusing declaratory relief, if proven true. In any event, while Plaintiff may ultimately be required to make an election of remedies at an appropriate stage of the case, the demurrer to the declaratory relief claim is premature, **[*36]** and is overruled.

(6) Demurrer as to ABCLH

Separately, Defendant ABCLH demurs to the complaint in its entirety (as opposed to just the UCL and declaratory relief claims, to which Defendant Anthem Blue Cross demurs), on grounds that ABCLH is not a health plan and is not subject to the Knox-Keene Act. Instead, *Blue Cross of California, Inc., supra*, 180 Cal.App.4th at 1242 recognized that "ABCLH is not a health care service plan, but a life and disability insurer subject to the Insurance Code and regulated by the California Department of Insurance."

With respect to Defendant ABCLH, the SAC alleges:

> Anthem Blue Cross Life and Health Insurance Company has engaged in a practice of failing to pay the appropriate rates of non-contracting providers when they have performed emergency services for its enrollees as hospital-admitted patients. Anthem Blue Cross Life and Health Insurance Company has failed to implement claims procedures to adequately identify and reimburse non-contracted providers for emergency services provided to its enrollees, as required by California law, including failing and refusing to recognize services performed by non-contracting specialists as emergency services when those services are performed on an emergent basis in a hospital instead **[*37]** of in an emergency room. Anthem Blue Cross Life and Health Insurance Company does not identify and recognize these emergency services, provided after the patient has been admitted to the hospital, but prior to the time when care has resulted in the stabilization of the patient, and unlawfully and improperly makes payments that are below the rates Anthem Blue Cross Life and Health Insurance Company applies to contracted providers, and well below the reasonable value of the specialists' emergency services.[32]

According to Defendants, the SAC's allegations against ABCLH fail because it is not subject to the DMHC. While it is true that ABCLH, as a life and disability insurer, is not subject to the DMHC (but is instead regulated by the Department of Insurance), the SAC also invokes *Insurance Code §§ 10112.7* and *10123.13* as bases for the claims. Paragraphs 11 and 15 allege:

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[30] SAC, ¶31.

[31] Demurrer at 13:24.

[32] SAC, ¶12.

> 11. Insurance companies such as Anthem Blue Cross Life and Health Insurance Company are subject to the Insurance Code. *Insurance Code section 10112.7* provides that "A group or individual health insurance policy issued, amended, or renewed on or after January 1, 2014, that provides or covers any benefits with respect to services in an emergency department of a hospital shall cover emergency **[*38]** services for non-contracted providers in a manner that is not more restrictive than for contracted providers.
> ...
>
> 15. Similarly, pursuant to *Insurance Code section 10123.13*, health insurers must reimburse any claim, or if contested, any uncontested portion of a claim, as soon as practicable, but no later than 30 working days after receipt of the claim, or provide written notice that the claim is contested or denied and the specific reasons therefor within the same time limits. For any claim contested or denied on the basis that the plan has not received sufficient information, reimbursement must be paid with 30 working days after receipt of any necessary information. For any claim not timely reimbursed, interest accrues at a rate of 10% per annum.[33]

As Defendants note, Plaintiffs cannot premise a UCL claim on violation of *Insurance Code § 790.03* (and particularly *§ 790.03(h)(3)*). *Bates v. Hartford Life and Ace. Ins. Co.* (CD. Cal. 2011) 765 .Supp.2s 1218, 1221. *Section 790.03(h)(3)* defines as an "unfair method[] of competition and unfair and deceptive act[] or practice[] in the business of insurance" an insurer's knowing "fail[ure] to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies."

The allegations **[*39]** above, however, while seemingly overlapping in part with the conduct prohibited by *§ 790.03(h)(3)*, also are broader. In *Zhang v. Superior Court (2013) 57 Cal.4th 364, 159 Cal. Rptr. 3d 672, 304 P.3d 163*, the California Supreme Court the California Supreme Court determined that "when insurers engage in conduct that violates both the UIPA and obligations imposed by other statues or the common law, a UCL action may lie. The Legislature did not intend the UIPA to operate as a shield against any civil liability." *Zhang, 57 Cal.4th at 384*. While *Zhang* was admittedly a first party case (*Zhang, supra, at 369, fn.2*), there is no specific prohibition on third party actions based on grounds independent from *§ 790.03*, where that insurer's conduct also violates *§ 790.03*. Thus, it it is premature at the pleading stage to eliminate entirely the allegations against Defendant ABCLH.

III.

RULING AND ORDER

For the foregoing reasons, the demurrer is overruled in its entirety. In overruling the demurrer, however, the Court also strikes the request for late payment penalties and the references to a "fraudulent" UCL claim.

The Court sets a further status conference in this matter for Tuesday, August 18, 2020 at 2 p.m. The parties shall submit a joint statement to the Court by August 11, 2020 addressing proposals for how to proceed in subsequent phases of the litigation. **[*40]**

Dated: April 3, 2020

/s/ Kenneth Freeman

Kenneth Freeman

Judge of the Superior Court

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[33] SAC, ¶¶11, 15.

Tonti v. Capo by the Sea

Superior Court of California, County of Orange

June 18, 2020, Decided; June 18, 2020, Filed

CASE NO: 30-2019-01116243-CU-PO-CJC

Reporter
2020 Cal. Super. LEXIS 5277 *

Tonti vs. Capo by the Sea, Inc.

Notice: [EDITOR'S NOTE: THIS ORDER HAS BEEN SIGNED BY THE JUDGE, BUT SIGNATURE TEXT WAS ILLEGIBLE IN THE ORIGINAL DOCUMENT AND THEREFORE THE JUDGE'S NAME IS NOT DISPLAYED.]

Subsequent History: Later proceeding at *Tonti v. Capo by the Sea, Inc., 2020 Cal. Super. LEXIS 6004 (Cal. Super. Ct., Sept. 10, 2020)*

Affirmed by *Tonti v. Naficy, 2023 Cal. App. Unpub. LEXIS 437 (Cal. App. 4th Dist., Jan. 23, 2023)*

Core Terms

cause of action, demurrer, unfair, allegations, unfair competition, willful misconduct, practices, notice, amend

Counsel: **[*1]** For Plaintif: Thomas R. Bradford, from Peterson Bradford Burkwitz Olorunbunmi Hambolu, from Prindle, Goetz, Barnes & Reinholtz LLP.

Opinion

MINUTE ORDER

EVENT ID/DOCUMENT ID: 73308573

EVENT TYPE: Motion to Strike Complaint

MOVING PARTY: K. Mitchell Naficy

CAUSAL DOCUMENT/DATE FILED: Motion to Strike, 01/21/2020

EVENT ID/DOCUMENT ID: 73287360

EVENT TYPE: Demurrer to Complaint

MOVING PARTY: K. Mitchell Naficy

CAUSAL DOCUMENT/DATE FILED: Demurrer, 01/21/2020

Tentative Ruling posted on the Internet.

Plaintiff, Defendant Naficy submit on the Court's tentative ruling.

The Court **CONFIRMS** the tentative ruling as follows:

Demurrer

Defendant K. Mitchell Naficy's ("Naficy") Demurrer to plaintiff Alison Tonti's ("Plaintiff") Complaint is **SUSTAINED.**

Plaintiff is given leave to file a First Amended Complaint within 15-days of receipt of notice of the Court's ruling.

A demurrer challenges the defects appearing on the face of the pleading or from other matters properly subject to judicial notice. *Blank v. Kirwan (1985) 39 Cal.3d 311, 318, 216 Cal. Rptr. 718, 703 P.2d 58*. The issue is the sufficiency of the pleading, not the truth of the facts alleged. Thus, no matter how unlikely or improbable, the allegations made must be accepted as true for the purpose of ruling on the demurrer. *Del E. Webb Corporation v. Structural Materials Co. (1981) 123 Cal.App.3d 593, 604, 176 Cal. Rptr. 824*. Absent court **[*2]** orders or other items subject to judicial notice, or items attached as exhibits to the complaint, the court may not consider the contents of pleadings or other exhibits when ruling on a demurrer. *Day v. Sharp (1975) 50 Cal.3d 904, 914*; *Sosinsky v. Grant (1992) 6 Cal.App.4th 1746, 1749*.

"In our examination of the complaint we are guided by the well settled principles governing the testing of its sufficiency by demurrer: A demurrer admits all material and issuable facts properly pleaded. [Citations omitted.] However, it does not admit contentions, deductions or conclusions of fact or law alleged therein. [Citations omitted.]" *Daarv. Yellow Cab Co. (1967) 67 Cal.2d 666, 672*

Under *Section 430.10(e)* the test is whether the complaint states any valid claim entitling plaintiff to relief, even if plaintiffs cause of action is improperly titled, or an improper remedy is stated. *Quelimane Co., Inc. v. Stewart Title Guar. Co. (1998) 19 Cal.4th 26, 38, 77 Cal. Rptr. 2d 709, 960 P.2d 513*. Under a general demurrer, plaintiff's complaint must fail to state a valid cause of action for the demurrer to be sustained.

Finally, if a demurrer is sustained as to any cause of action or causes of action, it is an abuse of discretion to deny leave to amend if there is any reasonable possibility that plaintiff can state a good cause of action. *Goodman v. Kennedy (1976) 18 Cal.3d 335, 349, 134 Cal. Rptr. 375, 556 P.2d 737*. But if a party cannot amend to state a valid cause of action, or the party opposing the demurrer cannot state how a valid **[*3]** cause of action can be pled, which the opposing party has the burden of proof on, then the demurrer should be sustained without leave to amend. *Hendy v. Losse (1991) 54 Cal.3d 723, 742, 1 Cal. Rptr. 2d 543, 819 P.2d 1*.

Naficy demurs to the 3rd cause of action for Intentional Conduct and the 6th cause of action for Unfair Competition as the fail to allege sufficient facts to constitute a cause of action. *CCP § 430.10(e).*

1) 3rd COA - Intentional Conduct

There is no cause of action for "Intentional Conduct." Plaintiff argues that the cause of action is actually one for "willful misconduct."

Willful misconduct, "is not a separate tort, but simply " ‘ "an aggravated [] form of negligence, differing in quality rather than degree from ordinary lack of care" [citation].' [Citation.] Its pleading requirements are similar to negligence but stricter." *Berkley v. Dowds (2007) 152 Cal. App. 4th 518, 526, 61 Cal. Rptr. 3d 304*. ""[T]he well-known elements of any negligence cause of action [are] duty, breach of duty, proximate cause and damages." Id. "The act or omission must be even more specifically described in order to raise it to the level of willful misconduct. [Citation.] No claim of willful misconduct can be stated without alleging the specific act or omission that caused the injury. [Citation.] In addition, " ‘[t]hree essential elements must be present **[*4]** to raise a negligent act to the level of wilful misconduct: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril."" *Id., at 528*.

Plaintiff alleged that Naficy never examined her. Complaint ¶¶ 10-13. She also alleged that she told Doe that she did not feel comfortable taking Benzodiazepine. Complaint ¶ 13. There are no facts alleging Naficy had, "(1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril." *Berkley, supra, 152 Cal. App. 4th at 528*.

Additionally, Plaintiff alleges in this cause of action that Naficy (and all defendants), "engag[ed] in unauthorized practice of medicine or the unlawful control of licensed health care providers by unlicensed persons." Complaint ¶ 25. However, Plaintiff also alleges in the Complaint that Naficy is licensed to practice medicine. Complaint ¶ 3.

Plaintiff has failed to allege sufficient facts to constitute a cause of action against Naficy. *CCP § 430.10 (e).* The Demurrer **[*5]** is sustained as to this cause of action with leave to amend within 15-days of receipt of notice of the Court's ruling.

2) 6th COA - Unfair Competition

"The California Unfair Competition Law ["UCL"] *([Bus. & Prof. Code] § 17200 et seq.)* defines '"unfair competition" as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."" *Graham v. Bank of America, N.A. (2014) 226 Cal.App.4th 594, 609, 172 Cal. Rptr. 3d 218*.

"In contrast to its limited remedies, the unfair competition law's scope is broad. The unfair competition law's scope is broad. Unlike the Unfair Practices Act, it does not proscribe specific practices. Rather, as relevant here, it defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or practice." [Citation.] Its coverage is "sweeping, embracing ' "anything that can properly be called a business practice and that at the same time is forbidden by law." ' " [Citations.] It governs "anti-competitive business practices" as well as injuries to consumers, and has as a major purpose "the preservation of fair business competition." [Citations.] By proscribing "any unlawful" business practice, *"section 17200* 'borrows' violations of other laws and treats them as unlawful practices" that the unfair competition law makes independently **[*6]** actionable. [Citations.] [¶]

However, the law does more than just borrow. The statutory language referring to "any unlawful, unfair or fraudulent" practice (italics added) makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law. *"Because Business and Professions Code section 17200* is written in the disjunctive, it establishes three varieties of unfair competition-acts or practices which are unlawful, or unfair, or fraudulent. 'In other words, a practice is prohibited as "unfair" or "deceptive" even if not" unlawful" and vice versa.'" *Cel-Tech Commc'ns, inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527*.

"When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes *section 17200*, the word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id., at 187*.

There are no apparent allegations of violations of antitrust laws or the spirit thereof, nor are there allegations Naficy's actions significantly threatened or harmed competition. While Plaintiffs Opposition states **[*7]** that she alleges Naficy violated *Bus. & Prof. Code § 2400,* the allegations do not support that. *Bus. & Prof. Code § 2400* states:

"Corporations and other artificial legal entities shall have no professional rights, privileges, or powers. However, the Division of Licensing may in its discretion, after such investigation and review of such documentary evidence as it may require, and under regulations adopted by it, grant approval of the employment of licensees on a salary basis by licensed charitable institutions, foundations, or clinics, if no charge for professional services rendered patients is made by any such institution, foundation, or clinic." *Id.*

There are no allegations as how *Bus. & Prof Code § 2400* would apply specifically to Naficy. Additionally, there are no allegations that Naficy was running the business or making business decisions for Capo. The one case cited by

Plaintiff, *Cobbs v. Grant (1972) 8 Cal. 3d 229, 104 Cal. Rptr. 505, 502 P.2d 1*, does not involve any allegations of unfair competition.

This cause of action fails to allege sufficient facts to constitute a cause of action against Naficy. *CCP § 430.10(e)*. The Demurrer is sustained as to this cause of action with leave to amend within 15-days of receipt of notice of the Court's ruling.

Mission Hosp. Reg'l Med. Ctr. v. Heritage Provider Network

Superior Court of California, County of Orange

July 30, 2020, Filed

30-2019-01102657-CU-BC-CJC

Reporter

2020 Cal. Super. LEXIS 20763 *

Mission Hospital Regional Medical Center v. Heritage Provider Network, Inc

Core Terms

unfair, poststabilization, cause of action, health care service plan, Provider, unfair competition, Patients, enrollee, business practice, implied-in-fact, authorization, practices

Counsel: **[*1]** For Plaintiff:Edward A. Stumpp, from Helton Law Group, APC.

For Defendant:Lloyd Vu, from Doll Amir & Eley Llp.

Judges: Theodore Howard, Judge.

Opinion by: Theodore Howard

Opinion

MINUTE ORDER

EVENT ID/DOCUMENT ID: 73335435

EVENT TYPE: Demurrer to Complaint

RELATED WITH CASES:

19-12101130 St. Joseph Hospital of Orange vs Heritage Provider Network, Inc. 19-1103466 Mission Hospital Regional Medical Center vs Heritage Provider Network, Inc. 19-1104195 St. Jude Hospital, Inc vs Heritage Provider Network, Inc.

Remote hearing held.

Tentative Ruling posted on the Internet.

The Court hears oral argument and **CONFIRMS** the tentative ruling as follows: Defendants Heritage Provider Network, Inc., Regal Medical Group, Inc., and Affiliated Doctors of Orange County Medical Group, Inc. ("Defendants" all together), Demurrer to plaintiff Mission Hospital Regional Medical Center's ("Plaintiff") Complaint is **OVERRULED**. Defendants are to file their Answer within 10-days of service of written notice of the Court's ruling.

Defendants demur to the second cause of action for Breach of Implied-In-Fact Contract for Post-Stabilization Services, and the third cause of action for Unfair Business Practices (*Cal. Bus. & Prof*.

Code § 17200 et seq.) on the basis that they do not **[*2]** state facts sufficient to constitute the causes of action. CCP §§ 430.10(e). **1) COA #2 - Breach of Implied-In-Fact Contract for Post-Stabilization Services** "An implied contract is one, the existence and terms of which are manifested by conduct." Civ. Code § 1621. "For an implied-in-fact contract, a plaintiff must show: "that he or she prepared the work; that he or she disclosed the work to the offeree for sale; under all circumstances attending disclosure it can be concluded that the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered (i.e., the offeree must have the opportunity to reject the attempted disclosure if the conditionswere unacceptable); and the reasonable value of the work."" Goldberg v. Cameron, 482 F. Supp. 2d 1136, 1150 (N.D. Cal. 2007). "An implied contract "consists of obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words." [Citation.] In order to plead a cause of action for implied contract, "the facts from which the promise is implied must be alleged." [Citation.] A course of conduct can show an implied promise. [Citations.] Emergency Physicians alleged an express contract between PacifiCare and FHN in which FHN paid for emergency services. **[*3]** Emergency Physicians further alleged that PacifiCare refused to pay for these services." *California Emergency Physicians Med.*

Grp. v. PacifiCare of California (2003) 111 Cal. App. 4th 1127, 1134, disapproved of on other grounds by Centinela Freeman Emergency Med. Assocs. v. Health Net of California, Inc. (2016) 1 Cal. 5th 994.

As to payment for post-stabilized care, "[i]f there is a disagreement between the health care service plan and the provider regarding the need for necessary medical care, following stabilization of the enrollee, the plan shall assume responsibility for the care of the patient either by having medical personnel contracting with the plan personally take over the care of the patient within a reasonable amount of time after the disagreement, or by having another general acute care hospital under contract with the plan agree to accept the transfer of the patient as provided in *Section 1317.2, Section 1317.2a*, or other pertinent statute. However, this requirement shall not apply to necessary medical care provided in hospitals outside the service area of the health care service plan. If the health care service plan fails to satisfy the requirements of this subdivision, further necessary care shall be deemed to have been authorized by the plan. Payment for this care may not be denied." [Emphasis added.] Health & Safety Code § 1371.4(d).

Further, "[a] health care service plan that is contacted **[*4]** by a hospital pursuant to Section 1262.8 shall, within 30 minutes of the time the hospital makes the initial telephone call requesting information, either authorize poststabilization care or inform the hospital that it will arrange for the prompt transfer of the enrollee to another hospital." Health & Safety Code § 1371.4(j)(1).

Finally:

"A health care service plan that is contacted by a hospital pursuant to Section 1262.8 shall reimburse the hospital for poststabilization care rendered to the enrollee if any of the following occur: (A) The health care service plan authorizes the hospital to provide poststabilization care. (B) The health care service plan does not respond to the hospital's initial contact or does not make a decision regarding whether to authorize poststabilization care or to promptly transfer the enrollee within the timeframe set forth in paragraph (1). (C) There is an unreasonable delay in the transfer of the enrollee, and the noncontracting physician and surgeon determines that the enrollee requires poststabilization care." Health & Safety Code § 1371.4(j) (2).

In the present Complaint, Plaintiff has alleged there was an implied-in-fact contract on the basis that it is required to provide emergency care to the Patients covered under Defendants' health care plan and that it was **[*5]** required to provide additional post-stabilization treatment to the Patients. Complaint ¶¶ 12-16, 20-22, 36. For the post-stabilization treatment, Plaintiff contacted Defendants and/or their agents to inform them their members had presented to Plaintiff for emergency services, to verify coverage, and request authorization. Complaint ¶¶ 20-21, 37. Defendants either verified eligibility and coverage or failed to timely respond. Complaint ¶¶ 20-21, 38. At no time during Plaintiff's care of the Patients, did Defendants assert they were not financially responsible for that care and in their actions manifested their agreement to pay for claims. Complaint ¶¶ 39-40. Plaintiff alleges it performed its obligations under the contract (Complaint ¶ 45) and that Defendants breached the terms of the contract by failing to or refusing to pay for the services and/or paying unilaterally discounted rates (Complaint ¶ 46). Plaintiff has pled facts sufficient to state this cause of action.

Although Defendants argue that there was no "meeting of minds" regarding what the appropriate costs would be, a determination of what a "reasonable and customary value" does not appear to be necessary as *Health & Safety Code §§ 1371.4(d)* and *(j)* indicate **[*6]** that payment for post-emergency stabilization care may not be denied if the provider contacts the insurance company for authorization and there is no response within 30 minutes, as is what Plaintiff alleges occurred. By paying some portion of the bills, although a reduced portion, Defendants have essentially acquiesced that an implied-in-fact contract existed between the parties. The amount of actual damages and whether Plaintiff's billed amount is reasonable and customary is something for the trier of fact to determine and is not appropriate for a demurrer.

Plaintiff has properly pled sufficient facts to support this cause of action. **2) COA #3 - Unfair Business Practices (*Cal. Bus. & Prof. Code § 17200 et seq.*)** "The California Unfair Competition Law ["UCL"] *([Bus. & Prof. Code] § 17200 et seq.)* defines "'unfair competition" as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."'" *Graham v. Bank of America, N.A. (2014) 226 Cal.App.4th 594, 609*. "In contrast to its limited remedies, the unfair competition law's scope is broad. The unfair competition law's scope is broad. Unlike the Unfair Practices Act, it does not proscribe specific practices. Rather, as relevant here, it defines "unfair competition" to include "any unlawful, unfair or fraudulent business **[*7]** act or practice." [Citation.] Its coverage is "sweeping, embracing ' "anything that can properly be called a business practice and that at the same time is forbidden by law." ' " [Citations.] It governs "anti-competitive business practices" as well as injuries to consumers, and has as a major purpose "the preservation of fair business competition." [Citations.] By proscribing "any unlawful" business practice, "*section 17200* 'borrows' violations of other laws and treats them as unlawful practices" that the unfair competition law makes independently actionable. [Citations.] [¶] However, the law does more than just borrow. The statutory language referring to "any unlawful, unfair or fraudulent" practice (italics added) makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law. "Because *Business and Professions Code section 17200* is written in the disjunctive, it establishes three varieties of unfair competition-acts or practices which are unlawful, or unfair, or fraudulent. 'In other words, a practice is prohibited as "unfair" or "deceptive" even if not " unlawful" and vice versa.'" *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 180*. "When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes **[*8]** *section 17200*, the word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id., at 187*.

Generally, medical care providers have a private right of action to bring violations of the Knox-Keene Act under the UCL and common law. *NorthBay Healthcare Grp. - Hosp. Div. v. Blue Shield of California Life & Health Ins., 342 F. Supp. 3d 980 (N.D. Cal. 2018)*. This includes UCL claims for inadequate or unpaid reimbursements in violation of *Health and Safety Code section 1371.4*. *Id., at 986-89*.

In the present matter, the UCL cause of action is based on a slew of allegations regarding untimely and improper payment for services rendered under various code sections including *28 CCR § 1300.71, Health and Safety Code §§ 1262.8 and 1371.4(b).* Complaint ¶ 53. Although Defendants suggest that Plaintiff seeks to have this Court, "assume the regulatory jurisdiction of the DMHC in determining whether Defendants' "practices" and "methods" are in compliance with the Knox-Keene Act and its corresponding regulations," this cause of action as pled does not appear to ask the Court to determine the validity of Defendants' methodology in applying repayments, but rather requests the Court determine the reasonable value of the services **[*9]** rendered. The, "DMHC intended. . . that value disputes be resolved by the courts." *CHCC, supra, 226 Cal.App.4th at 1273*.

As both causes of action have been adequately pled, the Demurrer is **OVERRULED** in its entirety.

Defendants are to file their Answer within 10-days of service of written notice of the Court's ruling.

Plaintiff to give notice.

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