

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

SHUFFLE TECH INTERNATIONAL, LLC,

ACES UP GAMING, INC.,

and

POYDRAS-TALRICK HOLDINGS LLC,

Plaintiffs

v.

SCIENTIFIC GAMES CORPORATION,

BALLY TECHNOLOGIES, INC., d/b/a SHFL  
Entertainment or Shuffle Master,

and

BALLY GAMING, INC., d/b/a Bally Gaming and  
Systems,

Defendants

CIVIL ACTION NO. 1:15-CV-03702  
The Hon. Matthew F. Kennelly

**Plaintiffs' Opposition to Defendants'  
Motion to Dismiss Complaint**

## TABLE OF CONTENTS

	<u>Page</u>
<b>I. Summary of argument.....</b>	1
<b>II. Subject matter jurisdiction / existence of a "case or controversy" (Count I) and antitrust standing (Counts II and III).....</b>	1
A. Defendants' assertedly dispositive "case or controversy" authority is not only readily distinguishable, but has been rejected by the Supreme Court and the Federal Circuit; controlling case law confirms both subject matter jurisdiction and standing. .....	1
B. Plaintiffs have antitrust standing. ....	6
<b>III. The Clayton Act's statute of limitations is subject to the discovery rule and, in any event, is tolled by Defendants' fraudulent concealment, both of which are fact-intensive issues not resolvable on a Rule 12(b)(6) motion. ....</b>	8
<b>IV. Defendants' marketplace misrepresentations are actionable under the Lanham Act and Illinois unfair competition and deceptive trade practices statutes. ....</b>	11
<b>V. Scientific Games Corporation is a proper defendant. ....</b>	13
<b>VI. Conclusion .....</b>	15

## TABLE OF AUTHORITIES

<u>Federal Cases</u>	<u>Page(s)</u>
<i>800 Adept v. Murey Sec. Ltd.</i> , 539 F.3d 1354 (Fed. Cir. 2008).....	13
<i>Arrowhead Indus. Water, Inc. v. Ecolochem, Inc.</i> , 846 F.2d 731 (Fed. Cir. 1988).....	2
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	13
<i>Brand v. Comcast Corp.</i> , No. 12-cv-1122 2012 WL 5845639 (N.D. Ill. Nov. 19, 2012) .....	3
<i>Cada v. Baxter Healthcare Corp.</i> , 920 F.2d 446 (7th Cir. 1990) .....	8
<i>Citizens Elec. Corp. v. Bituminous Fire &amp; Marine Ins. Co.</i> , 68 F.3d 1016 (7th Cir. 1995) .....	15
<i>Gen. Elec. Capital Corp. v. Lease Resolution Corp.</i> , 128 F.3d 1074 (7th Cir. 1997) .....	5
<i>Globetrotter Software, Inc. v. Elan Computer Group, Inc.</i> , 362 F.3d 1367 (Fed. Cir. 2004).....	13
<i>Glus v. Brooklyn E. Dist. Terminal</i> , 359 U.S. 231 (1959).....	11
<i>Grip-Pak , Inc. v. Ill. Tool Works, Inc.</i> , 694 F.2d 466 (7th Cir. 1982) .....	4, 6, 7
<i>Hecker v. Deere &amp; Co.</i> , 556 F.3d 575 (7th Cir. 2009) .....	2
<i>Hydril Co. v. Grant Pridenco LP</i> , 474 F.3d 1344 (Fed. Cir. 2007).....	6, 7
<i>In re Bill of Lading Transmission and Processing System Patent Litigation</i> , 681 F.3d 1323 (Fed. Cir. 2012).....	13
<i>In re Copper Antitrust Litigation</i> , 436 F.3d 782 (7th Cir. 2006) .....	8

<u>Federal Cases (cont.)</u>	<u>Page(s)</u>
<i>In re Sulfuric Acid Antitrust Litigation</i> , 743 F.Supp.2d 827 (N.D. Ill. 2010), <i>aff'd</i> 703 F.3d 1004 (7th Cir. 2012).....	8
<i>Judkins v. HT Window Fashion Corp.</i> , 529 F.3d 1354 (Fed. Cir. 2008).....	13
<i>Koh v. Graf</i> , No. 11-CV-02605, 2013 WL 5348326 (N.D. Ill. Sept. 24, 2013).....	5
<i>Maytag Corp. v. Navistar Int'l Transportation Corp.</i> , 219 F.3d 587 (7th Cir. 2000) .....	15
<i>McClure v. Solis</i> , No. 11-cv-642, 2011 U.S. Dist. LEXIS 95381 (N.D. Ill. Aug. 25, 2011) .....	10, 11
<i>Medimmune, Inc. v. Genentech, Inc.</i> , 549 U.S. 118 (2007).....	2, 6
<i>Mervyn v. Atlas Van Lines, Inc.</i> , No. 13-cv-3587, 2013 WL 5519405 (N.D. Ill. Oct. 2, 2013) .....	2, 3, 4
<i>Microchip Tech., Inc. v. Chamberlain Grp., Inc.</i> , 441 F.3d 936 (Fed. Cir. 2006).....	1, 2, 4
<i>Oetiker v. Jurid Werke, GmbH</i> , 556 F.2d 1 (D.C. Cir. 1977).....	8
<i>Panoramic Stock Images, Ltd. v. McGraw-Hill Global Education Holdings, LLC</i> , No. 12-cv-9881, 2014 WL 6685454 (N.D. Ill. Nov. 25, 2014) .....	8
<i>Professional Real Estate Investors, Inc. ["PREI"] v. Columbia Pictures, Indus., Inc.</i> , 508 U.S. 49 (1993).....	13
<i>PSN Ill., Inc. v. Ivoclar Vivadent, Inc.</i> , No. 04 C 7232, 2005 WL 2347209 (N.D. Ill. Sept. 21, 2005).....	12
<i>Ritz Camera &amp; Image, LLC v. SanDisk Corp.</i> , 700 F.3d 503 (Fed. Cir. 2012).....	7
<i>Rotella v. Wood</i> , 528 U.S. 549 (2000).....	8
<i>SanDisk v. STMicroelectronics</i> , 480 F.3d 1372 (Fed. Cir. 2007).....	2

<u>Federal Cases (cont.)</u>	<u>Page(s)</u>
<i>Serio-US Indus., Inc. v. Plastic Recovery Techs. Corp.</i> , 459 F.3d 1311 (Fed. Cir. 2006).....	11
<i>Sidney Hillman Health Center of Rochester v. Abbott Laboratories, Inc.</i> , 782 F.3d 922 (7th Cir. 2015) .....	8
<i>Teamsters Local 282 Pension Trust Fund v. Angelos</i> , 815 F.2d 452 (7th Cir. 1987) .....	10
<i>Tomera v. Galt</i> , 511 F.2d 504 (7th Cir. 1975) .....	10
<i>Trecker v. Scag</i> , 679 F.2d 703 (7th Cir. 1982) .....	10
<i>U.S. v. Northern Trust Co.</i> , 372 F.3d 886 (7th Cir. 2004) .....	11
<i>Walker Process Equipment, Inc. v. Food Machinery &amp; Chemical Corp.</i> , 382 U.S. 172, 175-76 (1965) .....	7, 8
<i>The Wicker Group v. Standard Register Co.</i> , No. 94-1209-A, 1994 WL 761244 (E.D. Va. Dec. 2, 1994).....	12
<i>Wright v. Associated Ins. Cos. Inc.</i> , 29 F.3d 1244 (7th Cir. 1994) .....	3
<i>Zenith Elecs. Corp. v. Exzec, Inc.</i> , 182 F.3d 1340 (Fed. Cir. 1999).....	11

## Other

FED.R.CIV.P. 8(c).....	11
FED.R.EVID. 201(b)(2) .....	5
FED.R.EVID. 801(d)(2) .....	14

## I. Summary of argument

As the Court is aware, Section III.C. of Defendants' Supporting Memorandum ("Memo") has been withdrawn. Defendants' remaining arguments are equally baseless:

Defendants' attack on Count I is based on a rejected standard for determining the existence of a "case or controversy" for declaratory judgment purposes and on case law that supports Plaintiffs' position. Defendants' argument that Plaintiffs do not have antitrust standing to bring Counts II or III misconstrues controlling Seventh and Federal Circuit precedent and ignores Plaintiffs' indemnification agreement with the sham litigation defendant, the damages suffered by Plaintiffs as a direct result of that action and agreement, and Defendants' targeting of all potential competition, including the competition represented by Plaintiffs' invention. Defendants' statute of limitations attack on Count III ignores the Seventh Circuit's "discovery rule" as well as the fraudulent concealment doctrine. Defendants' challenge to Plaintiff's Lanham Act and state unfair competition counts similarly ignores Plaintiffs' voluminous allegations of marketplace misrepresentations which set out prototypical claims under Section 43(a) of the Lanham Act as well as the pleaded Illinois statutes. Finally, Defendants' half-hearted footnote challenge to Scientific Games Corporation's corporate liability completely ignores SGC's total control of, and integration with, the other named Defendants.

## II. Subject matter jurisdiction / existence of a "case or controversy" (Count I) and antitrust standing (Counts II and III)

### A. *Defendants' assertedly dispositive "case or controversy" authority is not only readily distinguishable, but has been rejected by the Supreme Court and the Federal Circuit; controlling case law confirms both subject matter jurisdiction and standing.*

Defendants argue that: "Because Defendants never sued – or threatened to sue – Plaintiffs for infringing the patents at issue, there is no 'case or controversy' to support Plaintiffs' declaratory relief claim (Count I)." Defendants cite *Microchip Tech., Inc. v. Chamberlain Grp., Inc.*, 441 F.3d 936, 943 (Fed. Cir. 2006), as their concluding and supposedly dispositive

authority. Memo, p.5. *Microchip*, however, is no longer good law and does not, in any event, support Defendants' position.

Critically, *Microchip* was decided on the basis of the Federal Circuit's now-rejected "reasonable apprehension of suit" test for determining the existence of a "case or controversy" in patent cases. That test was effectively overruled by *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) and the Federal Circuit's follow-on decision in *SanDisk v. STMicroelectronics*, 480 F.3d 1372, 1380 (Fed. Cir. 2007) ("The Supreme Court's opinion in *MedImmune* . . . represents a rejection of our reasonable apprehension of suit test."). The appropriate test, to which Defendants give lip service, but never apply, is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune*, 549 U.S. at 127, emphasis added.

In addition, *Microchip* expressly recognized that "a manufacturer of a product accused of infringement [may] maintain a declaratory judgment action even though the patentee threatened only the manufacturer's customers with a patent suit," citing *Arrowhead Indus. Water, Inc. v. Ecolochem, Inc.*, 846 F.2d 731 (Fed. Cir. 1988). This statement is directly applicable to the present case. The key point is the existence of a "legal relationship between [the declaratory judgment plaintiff] and [an entity] that had a legal interest adverse to [the defendant], such as the existence of an indemnity agreement between [the declaratory judgment plaintiff] and its customer." *Id.*, at 943, *emphasis added*. Here, Plaintiffs have specifically alleged<sup>1</sup> the existence of such a "legal relationship," which is embodied in two license agreements, i.e., the "Master Patent and Technology License and Sublicense Agreement" and "First Amendment to Patent and Technology License and Sublicense Agreement." These agreements are between Plaintiff Shuffle Tech International, LLC ("Shuffle Tech"), Poydras-Talrick Holdings, LLC ("Poydras"),

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<sup>1</sup> "When considering a Rule 12(b)(6) motion to dismiss, the Court accepts the well-pleaded factual allegations as true and draws all reasonable inferences from them in plaintiff's favor." *Mervyn v. Atlas Van Lines, Inc.*, No. 13-cv-3587, 2013 WL 5519405, at \*2 (N.D. Ill. Oct. 2, 2013), citing *Hecker v. Deere & Co.*, 556 F.3d 575, 580 (7th Cir. 2009).

and DigiDeal Corporation ("DigiDeal"), who was retained to further develop, manufacture and distribute a commercial, casino-suitable version of Shuffle Tech's invention and prototypes. Compl., ¶ 22, and fn. 3 thereto.<sup>2</sup> Those agreements also contain an express indemnification agreement, pursuant to which Shuffle Tech and Poydras were ultimately required to expend over \$950,000 to defend DigiDeal from Defendants' baseless and anti-competitive patent infringement allegations in the sham litigation at issue in this case, i.e., *SHFL Entertainment, Inc. ("SHFL") v. DigiDeal Corp.*, 2:12 -cv-01782 (D. Nev.).<sup>3</sup> *Id.* Plaintiffs' defense of DigiDeal also included the patent reexaminations that, contrary to Defendants totally misleading assertions (Memo, p. 4), resulted in the invalidation of every patent claim asserted by SHFL against DigiDeal. Compl. ¶¶ 26-29.<sup>4</sup>

As further alleged at ¶¶ 19-21 of the Complaint, Shuffle Tech is a developer and manufacturer of card shufflers and the owner and developer of the patented invention under attack by Defendants. Shuffle Tech was not just a passive recipient of patent royalties; it

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<sup>2</sup> Although a Rule 12(b)(6) motion must also confine itself to the pleadings ("Defendants' reference[s] to information outside the four corners of the pleadings dooms this argument in the context of a Rule 12(b)(6) motion." *Mervyn*, at \*2), there are narrow exceptions to the "four corners" rule:

Generally, courts are disinclined to reach past the four corners of the pleadings at the Rule 12(b)(6) stage, but "documents attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to his claim." *Wright v. Associated Ins. Cos. Inc.*, 29 F.3d 1244, 1248 (7th Cir. 1994).

*Brand v. Comcast Corp.*, No. 12-cv-1122, 2012 WL 5845639, at \*3 (N.D. Ill. Nov. 19, 2012). Pursuant to this exception, these agreements are attached as Exhibits A and B.

<sup>3</sup> Pursuant to its indemnification obligations described in ¶¶ 22, 23, 26, and fn.3 of the Complaint, Shuffle Tech also received an assignment of DigiDeal's rights against SHFL: "[L]icensor shall be entitled to any reimbursement of fees and expenses and/or other damages resulting from the present patent infringement litigation payable by SHFL to any of the Parties . . ." Exhibit B, p.10. Ironically, that agreement also documents Shuffle Tech's and Poydras's very real fear that SHFL's sham litigation against DigiDeal "is likely to later include the several Parties as defendants," thus expressly satisfying even the "reasonable apprehension of suit" test. Exhibit B, ¶ F.

<sup>4</sup> Defendants' assertion that "recent PTO actions on the merits confirm the patentability of [sic] disclosed inventions" (Memo, p. 4) is astonishing since every single patent claim asserted against DigiDeal was found invalid over the previously undisclosed prior art, leaving SHFL with such narrow claims that they couldn't possibly be asserted against the DigiDeal shuffler.

developed multiple prototypes of the invention; it tested those prototypes; it obtained certification of those prototypes from Gaming Laboratories International for use in the highly regulated commercial casinos for which those shufflers were intended; and it demonstrated the operation and value of those devices to various entities. *Id.* Similar to the *Grip-Pak* case discussed below, the Shuffle Tech-Poydras-DigiDeal agreements specifically required DigiDeal to engineer a series of shufflers, based on Shuffle Tech's prototypes, which were suitable for mass production and use in commercial casinos. Compl., ¶¶ 21, 22, 24. SHFL sued Digideal because it manufactured and displayed the devices, but Shuffle Tech's invention was the target, as evidenced by SHFL's (highly successful) history of using sham patent litigation to impose costs, deter competition, and acquire, at a distress price, the competitive IP assets of every entity that challenged its monopoly. Compl., ¶¶ 81-85. There is no question that Shuffle Tech, Poydras, or Aces Up Gaming, Inc. ("Aces Up"), or any future manufacturer, licensee or distributor of Shuffle Tech's invention, would be SHFL's next target, which those parties realized as early as July 2013. See fn. 3.

Shuffle Tech and Poydras were threats to SHFL, as was co-plaintiff, Aces Up, which was under contract and had taken concrete steps to engage "in manufactur[ing], sales and distribution of the licensed shufflers" and "was anticipated [to] lease or sell a minimum of 100 licensed shufflers per quarter, *i.e.*, over 400 licensed shufflers per year." Compl. ¶¶ 22, 23. Inexplicably, Defendants attempt to contradict these latter facts, which were very specifically pleaded, improperly and erroneously asserting, with no support whatsoever, that "Aces Up's[] royalties are keyed to DigiDeal's sales." Memo, p. 7. This assertion is simply untrue, as well as procedurally improper, since these well-pleaded facts must be taken as true and all inference flowing therefrom must be made in Plaintiffs' favor. See *Mervyn*, at \*2, in fn. 1.

The Complaint also alleges that SHFL was not merely an honest patentee seeking in good faith to enforce (or merely preserve, as in *Microchip*) presumptively valid patent rights against an entity it honestly believed was infringing those rights, but a predatory monopolist with a long history of bad faith litigation against every competitor who dared to sell a shuffler to a casino.

Incredibly, SHFL publicly bragged about such tactics. See Compl., ¶¶ 63, 64, quoted in part at p. 11, *infra*. As such, there is no question that Shuffle Tech's invention and prototypes, as well as Aces Up's products and activities, were squarely in SHFL's cross-hairs, thus conferring antitrust standing as well as establishing a clear-cut "case or controversy" for declaratory judgment purposes.

In a further ill-conceived attempt to distance the Plaintiffs from the underlying sham litigation, Defendants assert (Memo, p. 4) that neither Shuffle Tech nor Poydras were identified as interested parties in the underlying sham litigation. This is both improper and erroneous. In fact, the Certificate of Interested Parties filed by DigiDeal on October 28, 2013 with the Nevada court identified both Poydras and Shuffle Tech as interested parties, and specifically identified Shuffle Tech as DigiDeal's indemnitor. That Certificate (Dkt. 69), which is a public record susceptible of judicial notice,<sup>5</sup> is being separately submitted to the Court as Exhibit C. The Minute Entry at Dkt. 57 in that case further shows that Shuffle Tech's Chief Executive Officer, Rick Schultz, and Poydras' Managing Member, Matthew Dickson, were in attendance at the chambers conference with Magistrate Judge Ferenbach on July 12, 2013. That Minute Entry is being submitted, as Exhibit D. As with the assignment of DigiDeal's rights to sue SHFL for the attorney fees and damages caused by their sham litigation (see fn.3), Plaintiffs would be happy to amend their Complaint, if the Court deems it necessary or appropriate, to specifically include these facts (which Plaintiffs did not anticipate to be the subject of controversy) under Rule 15. Shuffle Tech and Poydras can also allege and prove that they negotiated directly with SHFL's Assistant General Counsel, Eric Abbott in April 2014 regarding settlement of the *DigiDeal* case prior to uncovering Defendants' fraud on the PTO.

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<sup>5</sup> Despite Defendants' misuse of the judicial notice doctrine, it has its proper place in this Court's jurisprudence. In *Koh v. Graf*, No. 11-CV-02605, 2013 WL 5348326, at \*8 (N.D. Ill. Sept. 24, 2013), this Court explained that while judicial notice "is a "narrow exception" that applies only to "undisputed fact[s] in the public record," "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned," citing *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1080-81 (7th Cir. 1997) and FED.R.EVID. 201(b)(2).

These facts clearly show that "under all the circumstances ... there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune*, 549 U.S. at 127.

**B. Plaintiffs have antitrust standing.**

Defendants assert that "Because Plaintiffs are neither customers nor competitors of Defendants and claim to have suffered only an indirect injury (a loss of royalty payments due under a license agreement) . . ." they have no antitrust standing. See Memo, pp. 1 and 5 ("Plaintiffs are neither consumers nor competitors of Defendants"). These assertions fail for reasons very similar to those that doomed Defendants' "case or controversy" argument.

As explained by Judge Posner in *Grip-Pak, Inc. v. Ill. Tool Works, Inc.*, 694 F.2d 466, 473-74 (7th Cir. 1982): "A firm that develops and promotes new products does not forfeit the protection of [Clayton Act] section 4 by contracting out the manufacture and sale of the products to firms that specialize in manufacturing and selling rather than in development and promotion" and "[I]t does not follow . . . that a patent licensor may never get antitrust damages. It is not his status as a licensor but his relationship to the violation that determines his right to sue. If he is the defendant's target . . . the tort principle of remoteness, absorbed by implication into section 4, would not prevent him from suing." The Court further noted that "If the allegations of the complaint are true, which for present purposes we must assume they are [the defendant] is determined to prevent anyone else from competing with it . . . On this theory it is a matter of indifference to [the defendant] whether [the plaintiff] manufactures [the product at issue] or licenses others to do so. The important thing is [the] invention. That is what [the defendant] allegedly is trying to destroy." *Grip-Pak* at 474. These facts fit the instant case like a glove.

In *Hydril Co. v. Grant Pridco LP*, 474 F.3d 1344, 1350 (Fed. Cir. 2007), the Federal Circuit similarly held that "[A] valid *Walker Process* claim may be based on enforcement activity directed against the plaintiff's customers . . . [this] is the kind of economic coercion that the antitrust laws are intended to prevent . . . Without customers, a supplier has no business.").

This point is equally applicable to the relationship between a patentee and his exclusive contract manufacturer in this case, DigiDeal, without whom "he has no business."

Under controlling case law, Plaintiffs would have antitrust standing to bring a *Walker-Process* action even if they had no standing to assert their declaratory judgment claim. As explained in *Ritz Camera & Image, LLC v. SanDisk Corp.*, 700 F.3d 503, 507 (Fed. Cir. 2012), quoting *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 175-76 (1965):

Nothing in *Walker Process* supports [defendant's] argument that the rules governing standing to bring patent validity challenges should be imported into an antitrust case simply because one element of the antitrust cause of action requires proof of improper procurement of a patent. In fact, the Supreme Court in *Walker Process* rejected an argument closely analogous to [such an] argument here. The Court stated that it found no merit in the proposition that rules defining who may bring suit "to cancel or annul a patent" should also dictate the boundaries of antitrust standing.

Defendants concede that DigiDeal would have antitrust standing to bring this action. Under *Hydril* and *Grip-Pak*, it follows that Shuffle Tech and Poydras, by virtue of their manufacturing, distribution and selling license and indemnification agreement with DigiDeal, also have standing. As *Grip-Pak* [at 473-74] makes clear, antitrust plaintiffs do "not forfeit [antitrust] protection . . . by contracting out the manufacture and sale of the [accused] products . . . It is not [their] status as a licensor but [their] relationship to the violation that determines [their] right to sue . . . The important thing is the invention. That is what [the antitrust defendant] allegedly is trying to destroy." Given Plaintiffs' detailed allegations with respect to Defendants' documented intent and multiple attempts to snuff out every competitive threat to Defendants' absolute monopoly in commercial card shufflers, these quotes from the controlling case law could not be more apt. DigiDeal's assignment of its rights against SHFL to collect any fees or damages against SHFL arising out of the underlying sham litigation only further solidifies and expands Shuffle Tech's standing and potential damages recovery.

It is irrelevant that Digideal had not discovered the extent of SHFL's fraud and been able to plead counter-claims in the underlying sham litigation prior to the stay of that case pending re-examination on April 17, 2014. As explained in *Ritz Camera*, there is "no reason to limit the

scope of *Walker Process* standing to cases in which the patents have been 'tarnished' in another proceeding. *Walker Process* contains no such limitation, and applying such a requirement would have the undesirable effect of subjecting injured parties' claims to the litigation strategies of others. *Ritz Camera*, 700 F.3d at 508 n. 2.

To put the final nail in this coffin, the D.C. Circuit has allowed a *Walker Process* claim to proceed even though the patentee had disclaimed its patent and eliminated any risk of an infringement suit against the plaintiff. See *Oetiker v. Jurid Werke, GmbH*, 556 F.2d 1, 5 (D.C. Cir. 1977).

Aces Up's antitrust standing, as SHFL's direct competitor in the relevant market (See Compl., ¶¶ 22, 23), should be self-evident.

**III. The Clayton Act's statute of limitations is subject to the discovery rule and, in any event, is tolled by Defendants' fraudulent concealment, both of which are fact-intensive issues not resolvable on a Rule 12(b)(6) motion.**

The Seventh Circuit has held that, "in the absence of a contrary directive from Congress," antitrust actions are subject to the "discovery rule, which 'postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured.' " *In re Copper Antitrust Litigation*, 436 F.3d 782, 789 (7th Cir. 2006) (quoting *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990)). In other words, a plaintiff's claim accrues not when the conduct or injury occurs, but when the plaintiff "discovers that he has been *injured* and who has *caused* the injury." *Id.* See also, *In re Sulfuric Acid Antitrust Litigation*, 743 F.Supp.2d 827, 854 (N.D. Ill. 2010), *aff'd* 703 F.3d 1004, 1014 (7th Cir. 2012) (reh. den. 2013) (statutes of limitations in antitrust cases run upon discovery of the injury).<sup>6</sup> Defendants' motion totally ignores this controlling Seventh Circuit case law, relying

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<sup>6</sup> Also see, *Sidney Hillman Health Center of Rochester v. Abbott Laboratories, Inc.*, 782 F.3d 922, 926 (7th Cir. 2015), quoting *Rotella v. Wood*, 528 U.S. 549, 554 (2000) ("discovery of the injury is what starts the clock"); *Panoramic Stock Images, Ltd. v. McGraw-Hill Global Education Holdings, LLC*, No. 12-cv-9881, 2014 WL 6685454, at \*3 (N.D. Ill. Nov. 25, 2014) (limitations period starts when plaintiff discovers, or with due diligence should have discovered, the injury that forms the claim's basis).

entirely on a Sixth Circuit case where allegations of fraudulent concealment were not present and a treatise (without citing to the portions of the treatise addressing the discovery rule and fraudulent concealment doctrines).

In this case, Shuffle Tech was not even in the casino shuffler business, and therefore could not have suffered any "injury" from SHFL's conduct, let alone "discover that [it] has been injured" until, at the earliest, it had developed its first prototype and obtained certification of that device in March 2012, demonstrated it the following month, obtained a financing commitment from Poydras, and entered into its contract with DigiDeal in September 2012. Compl., ¶¶ 20-22. Moreover, the event that brought each Plaintiff's "injury" to a head was SHFL's suit against DigiDeal, which occurred in October 12, 2012, ten days after DigiDeal first offered the accused shuffler at the Global Gaming Expo on October 2-4, 2012. Compl., ¶¶ 24-25. Each of these dates are obviously well within the four year period preceding the filing of this suit on April 28, 2015. Equally obviously, the \$950,000 that Shuffle Tech and Poydras expended to defend DigiDeal (Compl., ¶ 26) did not occur instantaneously; nor was the anti-competitive nature of SHFL's unlawful acquisitions, let alone their harm to Plaintiffs, immediately discovered. Moreover, the discovery of those facts was significantly delayed by SHFL's own failure to comply with Digideal's discovery requests. Compl., ¶¶ 32, 40, and 45. In any event, it should be obvious that Plaintiffs' knowledge of Defendants' fraudulent and anti-competitive activities and the consequent harm to Plaintiffs only came to light between the filing of SHFL's Complaint on October 12, 2012 and the filing of the final Requestor Reply in the '935 re-exam in May 2014, which still did not reflect SHFL's fraudulent withholding of the Roblejo and Luciano prior art prototypes. Under the Seventh Circuit's discovery rule, the statute of limitations has clearly not run on Plaintiffs' Clayton Act claim.

Moreover, even if the discovery rule did not exist, genuine issues of material fact would remain as to whether Plaintiffs' accrual dates should be tolled on the grounds of fraudulent concealment, which is invoked when the Defendant takes affirmative steps to divert attention, mislead, or prevent discovery of his wrongdoing, exactly as alleged here. See *Tomera v. Galt*,

511 F.2d 504, 510 (7th Cir. 1975); *Teamsters Local 282 Pension Trust Fund v. Angelos*, 815 F.2d 452, 456 n. 4 (7th Cir. 1987). "Hiding" the misconduct, "throwing up a smokescreen," or "misrepresentation" of facts comprising the cause of action can each toll the limitations period. *Trecker v. Scag*, 679 F.2d 703, 708 (7th Cir. 1982).

This is exactly what occurred in this case. In the *CARD v. SHFL* litigation, after CARD discovered SHFL's fraud on the PTO and amended their counter-claims, SHFL agreed to stay the litigation and then paid \$50 million to acquire CARD and suppress CARD's discovery of evidence of SHFL's fraudulent and inequitable conduct. Compl., ¶¶ 60-73. SHFL subsequently misrepresented the acquisition to its shareholders and the market place via its press release in INVESTOR'S BUSINESS DAILY, as pleaded in ¶ 64. As further alleged (¶¶ 74-83), after losing their patent infringement case against Vending Data on summary judgment, SHFL bought Vending Data for the same reason, to preclude that company from taking action against SHFL for its fraudulent and bad faith conduct as detailed by Vending Data's Winston & Strawn attorneys in that case. Compl., ¶ 83. To further conceal their misconduct, SHFL then hired Vending Data's Winston & Strawn attorneys to represent SHFL and to prevent them from taking action against SHFL on behalf of any other potential competitor. Compl., ¶ 79, n.7. As noted, *infra*, those same attorneys represented Defendants in this case until four days ago.

SHFL also failed to produce requested discovery in the underlying *Digideal* sham litigation that would have enabled DigiDeal and its indemnitors, Shuffle Tech and Poydras, to discover SHFL's long-running conspiracy to defraud and its pattern of baseless patent litigation and subsequent acquisitions of litigation-weakened competitors, as set out at ¶¶ 32, 40, 45, 66, 83. Had SHFL complied with its obligations to the Nevada court, to DigiDeal, and to the PTO, it would have fully disclosed this crucial evidence during discovery in the underlying sham litigation and in the PTO prosecution and reexamination of the fraudulently procured patents asserted against DigiDeal. But it didn't. SHFL cannot be allowed to now benefit from its own continued wrongdoing. "To decide the case we need look no further than to the maxim that no

man may take advantage of his own wrong." *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232 (1959).

As set out with great specificity in the Complaint, SHFL affirmatively concealed and misrepresented all of this critical information, thereby preventing Plaintiffs from learning of SHFL's fraud until some time significantly after October 12, 2012. Those actions toll the running of the Clayton Act's four-year statute of limitations until Plaintiffs actually discovered that concealed information (which actually occurred less than a year ago). The "discovery rule" and the "fraudulent concealment" doctrine independently compel this same result.

Finally, an assertion of untimeliness is an affirmative defense and is typically not a valid basis to dismiss a complaint, since a complaint need not anticipate and attempt to defeat all potential affirmative defenses. *McClure v. Solis*, No. 11-cv-642, 2011 U.S. Dist. LEXIS 95381, at \*2 (N.D. Ill. Aug. 25, 2011), citing FED.R.CIV.P. 8(c); *U.S. v. Northern Trust Co.*, 372 F.3d 886, 888 (7th Cir. 2004).<sup>7</sup> Accordingly, a statute of limitations defense is ill-suited to resolution on a Rule 12(b)(6) motion. This is particularly true when fact-intensive issues, e.g., Plaintiffs' awareness that they were injured by Defendants' conduct, are required to be taken into account.

#### **IV. Defendants' marketplace misrepresentations are actionable under the Lanham Act and Illinois unfair competition and deceptive trade practices statutes.**

Contrary to Defendants' contentions, well-established case law "impose[s] [Lanham Act] §43(a) liability on a patentee for [false] marketplace statements [directed to patent enforcement activities] . . . if the statements are proven to have been made in bad faith." *Serio-US Indus., Inc. v. Plastic Recovery Techs. Corp.*, 459 F.3d 1311, 1321 (Fed. Cir. 2006), citing *Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1354 (Fed. Cir. 1999) ("Obviously, if the patentee knows that the patent is invalid, unenforceable or not infringed, yet represents to the marketplace that a competitor is infringing the patent, a clear case of bad faith representations [under the Lanham Act] is made out."). See also, *The Wicker Group v. Standard Register Co.*, No. 94-1209-A, 1994

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<sup>7</sup> "The argument that an employment discrimination claim is untimely is an affirmative defense and as such typically not a valid basis to dismiss the complaint; after all, the Complaint need not anticipate and attempt to defeat potential affirmative defenses." *McClure v. Solis*, at \*2.

WL 761244, at \*5 (E.D. Va. Dec. 2, 1994) (patentee's misrepresentations of the scope of its patent rights were sufficient to state a claim under Ohio unfair competition law).

Here, Defendants completely ignore the Complaint's allegations that Defendants made knowingly false threats and misrepresentations to customers and others in the public marketplace, that their patents were valid and enforceable, that their products were covered by the patents at issue and that the products of Plaintiffs and others infringed those patents, knowing that such statements were false. Compl., ¶¶ 63, 64, 82, 108, 118-120, 125, 130, and 135-137. The Complaint further alleges that sales made by Defendants, based on such misrepresentations, have caused substantial damage to the market, to Plaintiffs and other providers of card shufflers, and to casinos and their customers, in the form of lost sales, damages to goodwill, higher prices, and diminished competition, including with respect to the sale of card shufflers to casinos in Illinois. *Id.* Defendants' conduct clearly "was intended to interfere with [Plaintiffs'] expected business relationships with third parties, as required to state a claim for unfair competition under Illinois common law." *PSN Ill., Inc. v. Ivoclar Vivadent, Inc.*, No. 04 C 7232, 2005 WL 2347209, at \*5 (N.D. Ill. Sept. 21, 2005).

Defendants' press releases and the statements by their chief executive officers and General Counsel further proclaimed SHFL's intent to convince the market that there was no "alternative" to its shufflers and to intimidate any would-be competitors from entering the relevant market. See, e.g., Compl., ¶ 63, documenting the statement of SHFL's former General Counsel, that "...the mere showing of the [CARD] one2six has the potential ability to disrupt Shuffle Master's order taking and sales process. *It could confuse customers into believing that there is an alternative to Shuffle Master's shufflers available to them.*" Similarly, in a news article published a few months after SHFL bragged of forcing the distress sale of CARD (Casino Austria Research & Development) by suing and imposing overwhelming litigation costs "sufficiently high even for a company the size of their parent." Compl., ¶ 64. While this statement, which was published in INVESTOR'S BUSINESS DAILY, accurately reflected SHFL's

nefarious intent to engage in sham litigation, it was false in that it did not reveal SHFL's motivation to conceal the evidence of its fraud which had been discovered by CARD.

The required "objective" and "subjective" components of a "bad faith misrepresentation" under the Lanham Act and state unfair competition law are met by: (1) plausible allegations that the patent validity or infringement claims at issue are "objectively baseless" (*Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 362 F.3d 1367, 1377 (Fed. Cir. 2004)); and (2) that the patentee, knowing his claims to be baseless, had the requisite subjective "bad faith" when making the misrepresentations at issue. *800 Adept v. Murey Sec. Ltd.*, 539 F.3d 1354, 1370 (Fed. Cir. 2008). See also, *Judkins v. HT Window Fashion Corp.*, 529 F.3d 1334, 1338-39 (Fed. Cir. 2008), citing *Professional Real Estate Investors, Inc. v. Columbia Pictures, Indus., Inc.*, 508 U.S. 49, 60 (1993). The objectively baseless nature of Defendants' marketplace assertions of patent validity and infringement have been comprehensively pleaded. Compl., ¶¶ 32, 35, 38-39, 42-44, 46, 48, 50-51, 54, 63, 64, 67, 72, 76, 82, 87-98, 118-119, 122-123, 125, 130, 135, 137. Defendants have also conveniently admitted their bad faith. Compl., ¶¶ 63-64.

Moreover, "To survive a [Rule 12(b)(6)] motion to dismiss, a complaint must [only] contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although the plausibility standard requires "more than a sheer possibility that a defendant has acted unlawfully," [it] does not require "probability." *In re Bill of Lading Transmission and Processing System Patent Litigation*, 681 F.3d 1323, 1331-32 (Fed. Cir. 2012). There can be no legitimate question that Plaintiffs have stated convincing, not just plausible, claims under the Lanham Act and the cited Illinois statutes.

## V. Scientific Games Corporation is a proper defendant.

Defendants assert, albeit only in a footnote (Memo, p.1, fn. 1), that the Court should dismiss Scientific Games Corporation ("SGC") "because there are no allegations of parental liability." This argument ignores the corporate realities of this case. As alleged in the Complaint, Defendant Bally Gaming, Inc. ("BGI") is owned by Defendant Bally Technologies,

Inc. ("BTI") which does business as SHFL Entertainment or Shuffle Master. Compl., ¶¶ 10, 11 and fn. 1. SHFL Entertainment, Inc. has been dissolved. Its activities have been continued by the Bally entities as part of Defendant SGC, which operates as a unitary entity and reports its income on a consolidated basis to the Securities Exchange Commission ("SEC"). *Id.* Subsequent to the filing of the Complaint, SGC issued a May 7, 2015 press release<sup>8</sup> directed to its consolidated financial results for the quarter ended March 31. The first page states:

In our first full quarter following our merger with Bally, we made significant progress in our strategies to integrate Bally operations and unify our organization," said Gavin Isaacs, President and Chief Executive Officer. (Emphasis added.)

SGC's May 11, 2015 SEC form 10-Q further states, at p.12:

We report our operations in three business segments.... Each of our business segments is managed by a separate executive who reports to our chief executive officer (who is our "chief operating decision maker" under applicable accounting standards)..... Our Gaming business segment ... sells and leases shufflers.<sup>9</sup>

SGC's public statements confirm that it does not operate via corporate entity, but by business segments, each managed by an executive reporting directly to the CEO. Per that corporate structure, SGC has purposefully moved to "integrate Bally operations" to "unify our organization."

It is also informative that SGC's CEO, Mr. Isaacs, was SHFL's CEO in October 2012, when SHFL sued DigiDeal. (Compl., ¶ 26). Mr. Isaacs had previously been Executive VP and COO of Bally from 2006 through 2011. See, <http://www.scientificgames.com/about/board-of-directors/>. Likewise, Richard Haddrill, SGC's Executive Vice Chairman and Board member, was Bally's CEO until SGC acquired Bally. *Id.* Similarly, Katie Lever, SGC's General Counsel, was also SHFL's General Counsel when SHFL initiated its sham patent litigation proceedings against DigiDeal. She continued in the same position with Bally after it acquired SHFL in November 2013. <http://www.scientificgames.com/investors/corporate-overview/Senior->

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<sup>8</sup> <http://www.scientificgames.com/investors/investor-news/> As a public announcement and party admission under FED.R.EVID. 801(d)(2), this is also proper subject of judicial notice and, if necessary, could also be specifically added to Plaintiffs' Complaint.

<sup>9</sup> <http://www.sec.gov/Archives/edgar/data/750004/000075000415000008/sgms331201510q.htm>

Management. Derik Mooberry, SGC's Group Chief Executive of Gaming, was Bally's Senior Vice President of Games and Interactive Research & Development. *Id.*<sup>10</sup> In other words, the same people who were calling the shots at SHFL and Bally are calling the shots for SGC.

There was also a continuity of outside legal representation for all Defendants until this Tuesday, when Winston & Strawn, which represents SHFL in the DigiDeal case and had represented SGC and Bally in this case, filed its withdrawal papers (Dkt. 41). The same firm also represented SHFL in the recently concluded PTO reexaminations in which they withheld prior art references from the PTO. Compl., ¶¶ 32, 51, 79, 87, 96.

"Corporations are liable for the acts of their officers and directors....," as well as their agents. *Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016, 1021 (7th Cir. 1995). Additionally, "[T]he surviving corporation in a merger bears all of [the merged firm]'s liabilities." *Maytag Corp. v. Navistar Int'l Transportation Corp.*, 219 F.3d 587, 591 (7th Cir. 2000). Under these basic legal principles SGC is liable for the prior conduct of SHFL and Bally by virtue of its "merger" and is liable for the continuing culpable acts of the same people as officers and directors of, and counsel for, SGC itself. At the very least, these facts are sufficient to permit Plaintiffs to proceed with their case, to conduct discovery on these issues, and to amend their Complaint as may be necessary to place all of these facts and issues before the Court.

## VI. Conclusion

For the foregoing reasons, Defendants' motion to dismiss should be denied in its entirety.

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<sup>10</sup> These should not be disputed points and, even if these sources do not rise to the level that permits judicial notice, Plaintiffs could certainly amend on the basis of these indisputable facts.

July 17, 2015

Respectfully submitted,

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**Certificate of Service**

I certify that on July 17, 2015 I will electronically file the foregoing and any exhibits with the Clerk of Court using the CM/ECF system, which will then send a Notification of Electronic Filing (NEF) to all counsel of record.

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