

**UNITED STATES DISTRICT COURT
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., AND
BALLY GAMING, INC.,

Defendants.

Civil Action No. 1:15-cv-03702

The Honorable Matthew F. Kennelly

**DEFENDANTS' REPLY BRIEF IN FURTHER SUPPORT OF THEIR
MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

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I. INTRODUCTION

Stripped of its rhetoric and efforts to expand the Complaint, Plaintiffs' argument that this Court should not dismiss their declaratory judgment and monopolization claims rests on two contentions: (1) that Plaintiffs are a "target" of SHFL; and (2) that an alleged "indemnification" agreement between two of the Plaintiffs and DigiDeal gives Plaintiffs standing. Plaintiffs' response cannot avoid two key facts: (1) SHFL has neither sued nor threatened to sue any of the Plaintiffs for anything; and (2) the license agreement that Plaintiffs attach to their Opposition admits that no indemnification obligation exists because "no claims of infringement have been asserted against functions of the device described in Licensed Subject Matter." In other words, SHFL's lawsuit against DigiDeal does not involve Shuffle Tech's "inventions," which puts the lie to the Opposition's repeated claim that "Shuffle Tech's invention was the target" of SHFL's suit against DigiDeal. Accordingly, this Court does not have declaratory judgment jurisdiction—and Plaintiffs are not the proper plaintiffs to bring monopolization claims involving patents which have never been asserted against them.

In response to SHFL's showing that Plaintiffs' Clayton Act claim is time-barred, Plaintiffs chastise SHFL for failing to cite "controlling" Seventh Circuit law applying the discovery rule to antitrust claims. This so-called "controlling" law involves Sherman Act *conspiracy* claims; not Clayton Act Section 7 *merger* claims, which bar anticompetitive *acquisitions* that by definition occur at a specific point in time and therefore "accrue[] when the transaction occurs." Antitrust Laws and Trade Regulation, Ch. 162, § 162.02[2][e], Matthew Bender. Plaintiffs plead that the two challenged acquisitions were publicly announced in SEC filings and allege no facts suggesting that they were unaware of the acquisitions or could not, with reasonable diligence, have discovered them. Plaintiffs' fraudulent concealment argument

shows just how far they are willing to stretch since Plaintiffs do not (and cannot) allege that the publicly-announced acquisitions were concealed in any way.

Plaintiffs have no response to *PSN Illinois, Inc. v. Ivoclar Vivadent, Inc.*, 2005 WL 2347209 (N.D. Ill. Sept. 21, 2005), which confirms that allegations of inequitable conduct cannot by themselves constitute marketplace misconduct precluded by the Lanham Act. The Lanham Act and Illinois state law causes of action (which Plaintiffs do not try to defend) should also be dismissed. Finally, because Plaintiffs allege no facts to support piercing the corporate veil, this Court should dismiss all counts against the parent company Scientific Games.

II. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' PATENT CLAIM

Plaintiffs do not deny the facts essential to resolution of this issue—Plaintiffs are not parties to the *DigiDeal* litigation, and SHFL has neither sued nor threatened to sue Plaintiffs on the patents-in-suit in that litigation or any other patents. Nor do Plaintiffs allege that they manufacture any of the accused products. Under the *Medimmune* “totality of the circumstances” test (which, contrary to Plaintiffs’ contention, SHFL cited and relied upon in its opening brief), this Court lacks subject matter jurisdiction to hear Plaintiffs’ declaratory judgment action. Defs.’ Op. Br. at 4.

Plaintiffs cite no authority for the proposition that Shuffle Tech’s alleged “indemnification” relationship with the defendant in *DigiDeal* confers jurisdiction on this Court other than the *Microchip* case SHFL cited in its opening brief (at 5). In *Microchip*, of course, the Federal Circuit found that the very relationship that exists between Plaintiffs and DigiDeal in this case—a customer/client relationship—was *insufficient* to confer declaratory judgment jurisdiction on the district court. *Microchip Tech. Inc. v. Chamberlain Grp., Inc.*, 441 F.3d 936, 943 (Fed. Cir. 2006). This case is like *Microchip* in that Plaintiffs have no more than “an

economic interest in clarifying [their] customers' rights under [the] patents, which may have facilitated the sale of [plaintiffs'] products." *Id.*

Plaintiffs stake their right to have this Court hear their declaratory judgment action on their alleged "indemnity" agreement with DigiDeal, attached as Exhibits A and B to their Opposition, claiming that Section 11.1 of the initial agreement (Exhibit A) obligates them to indemnify DigiDeal for costs incurred defending SHFL's suit against DigiDeal. Opp'n at 2-3, n.3 (referencing Ex. A ¶11.1).¹ That provision expressly *excludes* claims of infringement involving "features not specifically described in Licensed Subject Matter" *Id.* This Court need not decide whether the *DigiDeal* suit involves "Licensed Subject Matter" because Plaintiffs made absolutely clear in their amendment to that agreement (Ex. B) that *it does not*. The First Amendment specifically addresses the *DigiDeal* litigation and provides that:

Shuffle Tech is not liable for the costs of this lawsuit pursuant to Paragraph 11(b) of the License Agreement because, among other reasons, no claims of infringement have been asserted against functions of the device described in Licensed Subject Matter, and the indemnification agreement specifically excludes features not explicitly described in Licensed Subject Matter than have not been specifically approved in writing pursuant to Paragraph 11(a)...

Id. at ¶F.1 (emphasis added). This makes clear that the allegations of infringement in the *DigiDeal* case do not threaten any inventions Shuffle Tech licensed to DigiDeal.

Plaintiffs cannot rely on bare allegations of indemnification in their Complaint that the documents they attached to the Opposition contradict. Instead of providing grounds for this Court's exercise of subject matter jurisdiction, the "indemnification agreement" confirms that Plaintiffs are, at best, paying for litigation in an effort to "clarify [their] customer's rights."

¹ Unless otherwise specified, all exhibits refer to those attached to Plaintiffs' Opposition (Dkt. 43) or Request for Judicial Notice (Dkt. 44).

While this might provide Plaintiffs with some economic benefit, it cannot confer jurisdiction for this Court to hear Plaintiffs' patent count. *Microchip*, 441 F.3d at 943.

III. PLAINTIFFS LACK STANDING TO BRING ANTITRUST CLAIMS

Only a party that can “most efficiently vindicate” the purposes of the antitrust laws has standing to bring a private antitrust action. *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 597-99 (7th Cir. 1995). As SHFL showed in its opening brief, Plaintiffs have not suffered antitrust injury and are not the “proper parties” to bring a monopolization claim. Defs.’ Op. Br. at 5-7. If any party can “most efficiently vindicate” the purposes of the antitrust laws, it is DigiDeal—which makes and sells the DigiShuffle—and it has (tellingly) not brought any such claims. The only concrete injuries Plaintiffs allege are derivative of losses incurred by DigiDeal—downstream royalties, distribution payments, or payments related to the *DigiDeal* litigation.

To have antitrust standing, Plaintiffs must show that their injuries are directly traceable to the anticompetitive conduct they plead, *i.e.*, that they are not overly remote. *Associated Gen. Contractors of Cal., Inc. v. Cal. St. Council of Carpenters*, 459 U.S. 519, 534-35 (1983) (“AGC”).² The Opposition does not come close. Plaintiffs do not contend that either Shuffle Tech or Poydras are market participants (thereby conceding they are not),³ and although they assert that Aces Up is “SHFL’s direct competitor in the relevant market” (supposedly making its

² *AGC* directs courts to consider the following five factors in making this determination: (1) the nature of the plaintiff’s alleged injury and whether it was a participant in the relevant market; (2) the directness of the alleged injury; (3) the speculative nature of the alleged harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages. *Id.* at 539-45. Plaintiffs’ Opposition does not directly address any of these factors.

³ That is not surprising. As the Seventh Circuit noted in an unrelated case, “Shuffle Tech makes ‘consumer grade’ automatic card shuffling equipment”—as opposed to “‘casino grade’ gaming equipment”). See *Shuffle Tech, Int’l, LLC v. Wolff Gaming, Inc.*, 757 F.3d 708, 709 (7th Cir. 2014).

standing “self-evident”), the Complaint does not plead any particularized facts to support that assertion. Opp’n at 8 (citing Compl. ¶¶22, 23).⁴

As for Shuffle Tech and Poydras, Plaintiffs’ Opposition focuses on two indirect “injuries”: (1) lost future royalties under Shuffle Tech and Poydras’s licensing agreement with DigiDeal; and (2) litigation expenses Shuffle Tech paid to defend DigiDeal in the *DigiDeal* action. Both losses are derivative, based solely on Plaintiffs’ contractual rights or obligations with DigiDeal rather than a supposed violation of the Sherman Act. Plaintiffs argue that because DigiDeal has standing and Shuffle Tech and Poydras have a licensing and “indemnification” agreement with DigiDeal; they must have standing too. Opp’n at 7. But none of the cases Plaintiffs cite explain how their agreements with DigiDeal give rise to antitrust injury or confer antitrust standing. Nor do Plaintiffs attempt to explain why they are in the “best position to vindicate the antitrust infraction.” *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 395 (7th Cir. 1993).

Plaintiffs selectively quote language from Judge Posner’s decision in *Grip-Pak*, suggesting its “facts fit the instant case like a glove.” Opp’n at 6. But Plaintiffs do not actually address *Grip-Pak*’s facts. *Grip-Pak*’s standing rested not on its status as patent licensor, but on the fact that it was the “target of the anti-competitive scheme.” *Grip-Pak, Inc. v. Ill. Tool Works, Inc.*, 694 F.2d 466, 474 (7th Cir. 1982). The defendant, Illinois Tool Works, had “identified *Grip-Pak* and its principals as significant potential competitors” and, in an effort to “keep it and them out of business,” *sued them* for, *inter alia*, theft of trade secrets and filing a fraudulent patent application. *Id.* at 474, 468. Thus, while acknowledging that the remoteness doctrine

⁴ The most the Complaint alleges about Aces Up is that it was “retained to assist in the manufacture, sales and distribution of the licensed shufflers and was awarded an exclusive (except for DigiDeal) contract and sub-license in certain jurisdictions.” Compl. ¶22. There are no further allegations describing this contractual arrangement (*e.g.*, where Aces Up would have sold the shufflers).

generally bars a patent licensor from obtaining damages indirectly caused by an anticompetitive scheme directed at its licensee, *Grip-Pak* holds that standing exists where the licensor is itself a *direct target* of the scheme. ***That is not the case here.*** Defendants have not accused any of the Plaintiffs of infringing any patent, nor do Plaintiffs allege any anticompetitive actions that directly target them. While Plaintiffs contend there “is no question” that they (or any future licensor or distributor of Shuffle Tech’s technology) would be “SHFL’s next target” (Opp’n at 4), the Complaint is bereft of any allegations that SHFL has ever threatened anything of the sort. The “indemnification” agreement Plaintiffs attach to their Opposition confirms that the *DigiDeal* lawsuit does not even “target” Shuffle Tech’s claimed inventions. Plaintiffs’ subjective fear of being drawn into the *DigiDeal* case (*id.* at 3 n.3) cannot confer antitrust standing, particularly where their only interest in that case is as licensors and (alleged) indemnitors. *See* Ex. C (Certificate of Interested Parties, documenting Shuffle Tech’s interest as “licensor” and “indemnitor” and Poydras’s interest as a “sublicensor”).⁵

Plaintiffs’ reliance on *Hydril Co. v. Grant Prideco LP*, 474 F.3d 1344 (Fed. Cir. 2007) and *Oetiker v. Jurid Werke, GmbH*, 556 F.2d 1 (D.C. Cir. 1977) is also misplaced. Those cases merely underscore the Federal Circuit’s holding in *Ritz Camera & Image LLC v. SanDisk Corp.*, 700 F.3d 503, 507 (Fed. Cir. 2012), that a *Walker Process* claim can be asserted in the absence of a patent dispute; neither addresses the antitrust standing of a patent licensor, distributor, or indemnitor. *Hydril* granted standing to a supplier based on documented threats of patent litigation asserted against its customers, with a reasonable likelihood that such threats will cause the customers to cease dealing with their supplier. 474 F.3d at 1350. Here, the “indemnity

⁵ The fact that representatives from Shuffle Tech and Poydras attended a settlement conference in the *DigiDeal* case (Ex. D) shows no more than their interest as licensors and/or indemnitors; it does not suggest that they were targeted by SHFL in any way.

agreement” attached to Plaintiffs’ Opposition demonstrates that the *DigiDeal* suit does not involve subject matter that Shuffle Tech licensed to DigiDeal—meaning that this case is nothing like *Hydril* where the customer’s infringement was based on its use of the antitrust plaintiff’s technology. *Oetiker* did not deal with antitrust injury or standing at all. Although the court permitted the *Walker Process* claim to proceed despite the patentee’s disclaimer of the patent, the court’s analysis centered around the court’s subject matter jurisdiction to hear the federal antitrust claims, not the plaintiff’s standing. *Oetiker*, 556 F.2d at 6-9.

Plaintiffs’ Opposition spends considerable time trying to concoct standing based on Shuffle Tech’s alleged agreement (memorialized in a single line and footnote of the complaint) to “indemnify” DigiDeal against SHFL’s infringement lawsuit in Nevada. Compl. ¶23 n.3, ¶26. As explained above, the agreements attached to Plaintiffs’ Opposition confirm that the *DigiDeal* litigation does not involve “Licensed Subject Matter”; in other words, the lawsuit that Shuffle Tech deems the source of its injury ***does not even involve the subject matter that Shuffle Tech licensed to DigiDeal.*** Notwithstanding this fact, Shuffle Tech ultimately agreed to bear some of the costs of the DigiDeal lawsuit from its share of royalties (*see* Ex. B ¶F(1)). But Plaintiffs cite no authority suggesting that a third party’s payment of litigation costs to defend an alleged sham infringement suit (to which it is *not* a party) constitutes an antitrust injury. Any litigation fees Shuffle Tech owes DigiDeal are a purely individual economic injury to Shuffle Tech, based on the parties’ private agreement. They have no effect on competition in the relevant market and are not an “injury of the type the antitrust laws were intended to prevent.” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).⁶

⁶ Although some courts have found that a party’s *own* litigation expenses in defending a sham infringement suit can constitute antitrust injury, *e.g.*, *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 997 (9th Cir. 1979), Defendants are aware of no case that extends that injury to a non-defendant third party who has agreed to bear the infringement defendant’s legal costs.

Tellingly, Plaintiffs do not allege that Shuffle Tech’s “indemnification” of DigiDeal has caused any broader injury to competition. The closest they come to alleging general market harm is in paragraphs 83-85 of the Complaint (alleging SHFL’s acquisitions of VendingData, Taiwan Fulgent, and TCS John Huxley “depriv[ed] the relevant marketplace of competition”). These allegations have no connection to Shuffle Tech’s payment of DigiDeal’s litigation costs, and are entirely conclusory. There are no well-pled facts alleging any sort of higher prices or reduction in quality caused by the supposed monopolization, let alone well-pled facts which suggest that the private agreement to bear some of DigiDeal’s litigation costs harms competition. *See e.g., Brotech Corp. v. White Eagle Int’l Techs. Grp., Inc.*, 2004 WL 1427136, at *6-7 (E.D. Pa. June 21, 2004) (litigation expenses not antitrust injury in absence of showing that payment of such fees had any effect on the “competitive landscape”—*e.g.*, price, quality, or quantity of claimant’s products); *Chip-Mender, Inc. v. Sherwin-Williams Co.*, 2006 WL 13058, *5-6 (N.D. Cal. Jan. 3, 2006) (attorney’s fees defending infringement suit not antitrust injury because they are purely individual and have no effect on the relevant market); *Varian Semiconductor Equip. Assocs., Inc. v. Advanced Ion Beam Tech., Inc.*, 2009 WL 2425849, at *5-7 (D. Mass. Aug. 4, 2009) (same).⁷

IV. THE STATUTE OF LIMITATIONS FOR PLAINTIFFS’ CLAYTON ACT CLAIMS RUNS FROM THE TIME OF THE ACQUISITIONS

Plaintiffs seek to avoid dismissal of their Clayton Act Section 7 claim by asserting that this Court should apply the discovery rule or find that the four-year statute of limitations is tolled

⁷ The Opposition fails to inform the Court that there is a pending dispute concerning Shuffle Tech’s obligation to indemnify DigiDeal. *See DigiDeal Corp. v. Poydras-Talrick Holdings LLC*, 2:14-cv-00277-JLQ (E.D. Wash). The existence of that litigation makes Shuffle Tech’s indemnification obligations uncertain, further underscoring the speculative and tenuous nature of Plaintiffs’ asserted injury. That uncertainty counsels strongly against standing—even if a private indemnification agreement could confer antitrust standing. *See AGC*, 459 U.S. at 537-45 (court must take into account the speculative nature of the alleged harm, risk of duplicative recovery, and complexity in apportioning damages).

by Defendants’ “fraudulent concealment.” Plaintiffs’ Opposition demonstrates a fundamental misunderstanding of the distinction between an action challenging a merger under Section 7 of the Clayton Act and a conspiracy or monopolization claim under Sections 1 or 2 of the Sherman Act. Here, Defendants invoke the statute of limitations to seek dismissal only of Plaintiffs’ Section 7 claim—not their monopolization claim. A Clayton Act claim challenging an “anticompetitive merger or acquisition accrues when the transaction occurs.” Antitrust Laws and Trade Regulation, Ch. 162, § 162.02[2][e], Matthew Bender (“Bender”); *see also* *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 269 (8th Cir. 2004). This is because, “[u]nlike a conspiracy or the maintaining of a monopoly, a merger is a discrete act” that typically “occur[s] in the public eye and at a reasonably certain date.” *Id.* at 271-72. The harm to competition Section 7 proscribes is caused by the fact of the merger itself, which necessarily occurs at the time of the transaction. *See* 15 U.S.C. § 18 (prohibiting mergers and acquisitions that “substantially [] lessen competition, or [] tend to create a monopoly”).

Plaintiffs claim that the discovery rule postpones accrual of the limitations period to when Plaintiffs discovered the alleged injury in a Section 7 challenge to an **acquisition**; the cases Plaintiffs cite, however, apply the discovery rule to **conspiracy** claims under the Sherman Act. The discovery rule applies in conspiracy cases because “**unlike mergers** . . . , initial violations of the Sherman Act usually occur in secret[,]” thereby hindering discovery of the injury. *Midwestern Mach.*, 392 F.3d at 272 (emphasis added). For example, in *In re Copper Antitrust Litigation*, the court found that publicly-available information would not necessarily have revealed the defendant’s involvement in the alleged conspiracy. 436 F.3d 782, 789-90 (7th Cir. 2006). Similarly, in *In re Sulfuric Acid Antitrust Litigation*, the publications cited by defendants “fail[ed] to make any mention of collusive behavior that could potentially give rise to liability

under the Sherman Act.” 743 F.Supp.2d 827, 855-56 (N.D. Ill. 2010). The date of discovery is simply not relevant in a merger challenge, where the acquisitions “occur[ed] in the public eye and at a reasonably certain date.” *Midwestern Mach.*, 392 F.3d at 272.⁸

Even if this Court were to apply the discovery rule to a Clayton Section 7 claim, Plaintiffs have pled themselves out of court by alleging facts that show their claim is time-barred.⁹ Plaintiffs admit that the two acquisitions they challenge as anticompetitive were publicly announced in May 2004 (Compl. ¶¶72-73) and March 2009 (*id.* ¶¶80-81), and even refer to SEC filings regarding those transactions (*id.* ¶¶72 & 80). There are no allegations that Plaintiffs were unaware of the acquisitions and could not, through the required exercise of reasonable diligence (*In re Copper Antitrust Litigation*, 436 F.3d at 789), have discovered them. Plaintiffs’ Section 7 claim is indisputably time-barred.

Plaintiffs resort to misdirection by asserting that that “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.” Opp’n at 9. This alleged conduct has nothing to do with the two mergers that Plaintiffs contend violated the Clayton Act’s prohibition against acquisitions that

⁸ In *In re Evanston Northwestern Healthcare*, 2008 WL 2229488, at *3-4 (N.D. Ill. May 29, 2008), the court applied the discovery rule to determine when a Section 7 claim accrued. But in doing so it erroneously relied on the same authority that Plaintiffs cite here, which applied the discovery rule in the context of a Section 1 conspiracy claim. As detailed above—and as antitrust treatises and Circuit authority from multiple circuits make clear—the discovery rule is inapplicable in the context of a challenge to an acquisition under the Clayton Act. *See* Bender § 162.02 (statute of limitation ordinarily runs on a merger challenge from the date of acquisition); 2 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶320c5 (4th ed. 2014) (same); *Midwestern Mach.*, 392 F.3d at 269; *Z Techs. Corp v. Lubrizol Corp.*, 753 F.3d 594, 604 (6th Cir. 2014) (same).

⁹ Dismissal under Rule 12(b)(6) is appropriate when a plaintiff effectively pleads himself out of court by alleging facts demonstrating that his suit is barred by the statute of limitations. *See Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 901 (7th Cir. 2004); *Zitzka v. Vill. of Westmont*, 2007 WL 3334336, at *2 (N.D. Ill. Nov. 6, 2007).

substantially lessen competition. None of Plaintiffs' allegations of fraud on the PTO and sham litigation constitute elements of Plaintiffs' Clayton Act Section 7 challenge to the publicly-announced mergers.

Plaintiffs' reliance on the fraudulent concealment doctrine is equally unavailing. Even if this doctrine were relevant to a claim challenging a publicly-announced merger under Section 7 of the Clayton Act, fraudulent concealment requires Plaintiffs to plead "affirmative steps after the original wrongdoing to divert attention, mislead, or prevent discovery." *In re Sulfuric Acid Antitrust Litig.*, 743 F. Supp. 2d at 854 (emphasis added) (citation omitted). None of Plaintiffs' allegations plausibly suggest that SHFL sought to divert attention from or prevented discovery of the fact that SHFL had acquired CARD and VendingData. Quite the opposite; Plaintiffs admit that SHFL's acquisitions of both CARD and VendingData were publicly disclosed in SEC filings (Compl. ¶¶72 & 80), and further allege that SHFL's former CEO, Mark Yoseloff, "bragged about [SHFL's] sue-and-acquire strategy to the press" (*id.* ¶64). Certainly, nothing about his alleged statement constitutes an "affirmative step" to hide SHFL's acquisition of CARD.

More fundamentally, Plaintiffs' assertions that SHFL sought to suppress discovery of SHFL's allegedly "fraudulent and inequitable conduct" (Opp'n at 10) again conflates their Sherman and Clayton Act claims. Plaintiffs' repeated references to allegations of monopolization misconduct have no bearing on the limitations period governing their Clayton Act claim.¹⁰

¹⁰ Plaintiffs' suggestion that SHFL hired Winston & Strawn in an effort to prevent the firm from taking action against SHFL on behalf of any other potential competitor (Opp'n at 10) is without foundation and unrelated to Plaintiffs' Clayton Act claim.

V. PLAINTIFFS' UNFAIR COMPETITION CLAIMS MUST BE DISMISSED BECAUSE THEY ARE BASED ON ALLEGED ABUSE OF THE JUDICIAL PROCESS, NOT MARKETPLACE MISCONDUCT

Plaintiffs do not dispute the fundamental legal principle at issue here—that a claim of inequitable conduct, without more, cannot support a claim for unfair competition under the Lanham Act. The Supreme Court noted long ago that “[p]atents would be of little value if infringers of them could not be notified of the consequences of infringement, or proceeded against in the courts. Such action, considered by itself, cannot be said to be illegal.” *Virtue v. Creamery Package Mfg. Co.*, 227 U.S. 8, 37-38 (1913). Something more is required in addition to the patent owner’s actions undertaken to enforce its patents or notify others of infringement. The Federal Circuit noted as much in *Zenith*, where it made clear that the conduct required to support a claim for unfair competition under the Lanham Act must involve “*marketplace misconduct*, not abuse of the administrative and judicial process.” *Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1349 (Fed. Cir. 1999) (emphasis added).

While Plaintiffs’ Complaint is replete with allegations that Defendants wrongfully obtained the patents in suit and engaged in “sham” litigation in the *DigiDeal* suit and in four others not involving the patents at issue in this case, it contains only vague assertions of the “marketplace misconduct” (as opposed to conduct related to the enforcement of patents or prosecution of patent litigation) required to separately state a cause of action under the Lanham Act. *Id.* Plaintiffs’ Opposition identifies numerous paragraphs in the Complaint that allegedly contain “knowingly false threats and misrepresentations to customers and others in the public marketplace ... knowing that such statements were false.” Opp’n at 12 (citing Compl. ¶¶63, 64, 82, 108, 118-120, 125, 130, and 135-37). Though numerous, none of these allegations are of “marketplace conduct” made apart from efforts to enforce patents. Paragraph 63 relates to statements made in the CARD litigation itself, while Paragraph 64 refers only to the costs of

patent litigation. Paragraph 82 refers to a discussion in advance of the lawsuit against VendingData. It is undisputed that neither the CARD nor the VendingData litigations involved the patents as to which Plaintiffs seek declarations of invalidity and unenforceability in this case. The remaining allegations that Plaintiffs cite (¶¶108, 118-120, 125, 130, and 135-37) are contained in the specific counts of the Complaint, add no further factual allegations, and do nothing more than refer to “predatory” acts, the overwhelming majority of which, as noted above, have nothing to do with “marketplace conduct,” but are related to the alleged inequitable conduct in obtaining the two patents at issue in this case.

This case is not materially different from *PSN Illinois, Inc.*, 2005 WL 2347209, from which Plaintiffs quote isolated language but ignore its facts and holding. There, as here, the counterclaim at issue was based on lawsuits filed by the patent owner, and the patent owner’s alleged misrepresentations to the PTO. *Id.* at *3. There, as here, the party alleging the unfair competition claim failed to distinguish between alleged abuse of the judicial process and marketplace conduct, and the court properly dismissed its Lanham Act claim. In addition, the court separately analyzed the Illinois state law causes of action for unfair competition and deceptive trade practices and found them similarly unsupported. *Id.* at *5-6. Plaintiffs did not respond in any way to support their Illinois state law causes of action, which this Court should dismiss.

VI. SCIENTIFIC GAMES IS NOT A PROPER DEFENDANT

Plaintiffs insist that Scientific Games, the corporate parent of the other two defendants, is a proper defendant, but offer no reason to depart from the bedrock principle that a parent corporation is not liable for the acts of its subsidiaries. *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). Plaintiffs do not dispute that there are no independent allegations supporting Scientific Games’ liability, meaning its status as a defendant rests solely on its ownership of

Bally Technologies (d/b/a SHFL)'s stock.¹¹ Establishing derivative liability against Scientific Games would thus require piercing SHFL's corporate veil. *Id.* at 62. No allegations support veil-piercing here. The Complaint does not allege a failure to observe corporate formalities, abuse of the corporate form, commingling of finances, inadequate capitalization, or any other facts that would suggest an alter ego relationship between SHFL and Scientific Games. *See Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 378-79 (7th Cir. 2008) (veil piercing appropriate only where "there is such unity of interest and ownership that the separate personalities of the corporation and [its parent] no longer exist, and when adherence to the fiction of a separate corporate existence would sanction a fraud or promote injustice," and listing factors commonly considered in veil-piercing analysis) (internal quotations and citations omitted).

Scientific Games' recent integration of SHFL's operations into its corporate structure and the continuity of certain executives and legal counsel (Opp'n at 14-15) do not warrant veil-piercing. These extra-complaint "facts," even if judicially noticeable, merely reflect a traditional post-merger corporate reorganization (which in any event occurred well after the relevant facts in the Complaint). *See Judson*, 529 F.3d at 381 (stock control and common officers are insufficient to pierce the corporate veil because they are "common business practice[s] that exist[] in most parent and subsidiary relationships") (internal quotations and citation omitted).

Neither of the cases Plaintiffs cite compels a different result; indeed, neither addresses the veil-piercing doctrine at all. *Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016, 1021-22 (7th Cir. 1995), deals with common law principles of *respondeat superior* and vicarious liability among corporations and their employees, and *Maytag Corp. v. Navistar Int'l*

¹¹ Indeed, the only references to Scientific Games in the Complaint are in the paragraphs supporting personal jurisdiction and venue. Compl. ¶¶5, 9, 10.

Transp. Corp., 219 F.3d 587, 591-92 (7th Cir. 2000), analyzes the responsibility of a surviving corporation for its predecessor's liabilities following a bankruptcy liquidation. Discovery on these issues is also inappropriate in the absence of any allegations suggesting Scientific Games has any place in this case. It should be dismissed.

VII. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiffs' Complaint in its entirety with prejudice.

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Respectfully submitted,

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