ANTITRUST LAW

Unit 3: The Private Cause of Action

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[1] Statistics for 2025 have not yet been published.

Commencing Civil Actions

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

Boyle Construction Management, Inc. Plaintiff, v. Irving Materials, Inc. and Unnamed Co-Conspirators Defendants.	CASE NO. 1:05-cv-0979-SEB-VSS **JURY TRIAL DEMANDED**

CLASS ACTION COMPLAINT

Plaintiff Boyle Construction Management, Inc., on behalf of itself and all others similarly situated, by its attorneys, brings this action for treble damages and injunctive relief under the antitrust laws of the United States, demanding a trial by jury, and makes the following allegations based on information, belief and investigation of counsel, except those allegations that pertain to plaintiff, which are based on personal knowledge:

SUMMARY OF CLAIMS

1. This lawsuit is brought as a class action on behalf of all individuals and entities who purchased ready-mixed concrete directly from defendant or its unnamed co-conspirators yet to be identified, or any predecessors, parents, subsidiaries, or affiliates thereof from at least July 1, 2000 through at least May 25, 2004. Plaintiff alleges that defendant and its co-conspirators entered into and engaged in a combination and conspiracy to suppress and eliminate competition by fixing the price of ready-mixed concrete. The combination and conspiracy constituted an unreasonable restraint of trade under federal antitrust law.

2. Defendant and its co-conspirators carried out their unlawful combination by, *inter alia*, engaging in discussions about the price at which they would sell ready-mixed concrete, agreeing to specific price increases and the timing of such increases, issuing price

announcements or price quotations based on their agreements, and selling ready-mixed concrete at agreed-upon supracompetitive prices.

3. As a result of the unlawful conduct of defendant and its co-conspirators, plaintiff and other members of the Class paid artificially inflated prices for ready-mixed concrete and have suffered antitrust injury to their business or property.

JURISDICTION AND VENUE

4. Plaintiff brings this action for treble damages, costs of suit, attorneys' fees, and injunctive relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26 for the injuries sustained by plaintiff and members of the Class arising from violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

5. Jurisdiction is conferred upon this Court by 28 U.S.C. §§ 1331 and 1337, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15(a) and 26.

6. Venue in this District is proper pursuant to Sections 4, 12 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 22 and 26, and 28 U.S.C. § 1391. The combination and conspiracy charged in this Complaint was carried out in substantial part within this District. Defendants are found, or transact business within this District, and the trade and commerce described in this Complaint was carried out in substantial part within this District.

DEFINITIONS

7. As used herein, the following terms have the meanings set forth below:

a. "Class" includes all Persons in the United States who purchased ready-mixed concrete directly from and Defendant at any time during the Class Period, but excludes Defendants, their co-conspirators, their respective parents, subsidiaries, and affiliates, and federal, state and local government entities and political subdivisions.

b. "Class Period" means the period from at least July 1, 2000 through at least May 25, 2004.

c. "Ready-mixed concrete" means a product comprised of cement, sand, gravel, water, and occasionally additional additives. Ready-mixed concrete can be made on demand and shipped to work sites by concrete mixer trucks.

d. "Person" means any individual, partnership, corporation, or other business or legal entity.

THE PARTIES

8. Plaintiff Boyle Construction Management, Inc. is an Indiana corporation with its principal place of business in Indianapolis, Indiana. Plaintiff purchased ready-mixed concrete directly from defendant Irving Materials, Inc. and other Indianapolis-area companies during the Class Period.

9. Defendant Irving Materials, Inc. ("Irving") is an Indiana corporation with its principal place of business in Greenfield, Indiana. During the Class Period, Irving produced and sold ready-mixed concrete to purchasers in the United States, primarily in the Indianapolis metropolitan area.

10. Various other persons, firms and corporations not named as defendants herein have participated as co-conspirators with Irving and have performed acts in furtherance of the conspiracy. These co-conspirators will be identified as this litigation proceeds and plaintiff will amend its complaint to add them as named defendants at the appropriate time. Upon information and belief, defendant's co-conspirators include, but may not be limited to, other Indianapolis-area companies from which plaintiff purchased ready-mixed concrete directly during the relevant time period.

TRADE AND COMMMERCE

11. During all or part of the Class Period, defendant and its co-conspirators produced and/or sold ready-mixed concrete to purchasers in the United States, primarily in the Indianapolis metropolitan area. These business activities substantially affected interstate trade and commerce.

Moreover, the ready-mixed concrete produced and sold by defendant Irving is comparable to and interchangeable with the ready-mixed concrete produced and/or sold by Irving's competitors.

CLASS ACTION ALLEGATIONS

12. Plaintiff brings this action on behalf of itself and, under Federal Rule of Civil Procedure 23(b)(2) and (b)(3), as representative of the following Class:

> All persons and entities in the United States who purchased ready-mixed concrete directly from defendant or any of its co-conspirators at any time during the Class Period, but excluding defendant, its co-conspirators, their respective parents, subsidiaries, and affiliates, and federal, state and local government entities and political subdivisions.

13. Plaintiff does not know the exact size of the Class, but alleges that defendant and its co-conspirators possess such information. Given the trade and commerce involved, plaintiff alleges on information and belief that the Class numbers at least in the hundreds so that joinder of all members is impracticable.

14. There are questions of law and fact common to the Class, including the existence, scope, and efficacy of the conspiracy alleged.

15. Plaintiff is a member of the Class, and its claims are typical of the claims of Class members generally. Plaintiff's claims arise from the same conduct giving rise to the claims of the Class, and the relief plaintiff seeks is common to the Class.

16. Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff is represented by competent counsel experienced in the prosecution of class action antitrust litigation. Plaintiff's interests coincide with, and are not antagonistic to, those of the Class.

17. Questions of law and fact common to all Class members predominate over any questions affecting only individual Class members. Predominating common questions include, without limitation:

(a) whether defendant and its co-conspirators conspired to fix, raise, stabilize or maintain the price of ready-mixed concrete;

(b) the scope and extent of the conspiracy;

(c) whether the conspiracy affected the prices of ready-mixed concrete paid by Class members during the Class Period;

(d) the identity of each member of the conspiracy;

(e) the time period during with the conspiracy existed;

(f) whether the combination, agreement or conspiracy violated Section 1 of the Sherman Act;

(g) whether plaintiff and other members of the Class are entitled to declaratory or injunctive relief;

(h) the appropriate measure of damages sustained by Plaintiff and other members of the Class; and

(i) whether defendant and its co-conspirators affirmatively and fraudulently concealed the conspiracy.

18. A class action is superior to any other available method for the fair and efficient adjudication of this controversy. Indeed, it is the only realistic method for litigating the large number of claims at issue herein. Class treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously and efficiently. There are no difficulties likely to be encountered in the management of this lawsuit that would preclude its maintenance as a class action, and no superior alternative exists for the fair and efficient adjudication of the controversy.

19. Defendant and its co-conspirators have acted on grounds generally applicable to the Class, thereby making final injunctive relief appropriate with respect to the Class as a whole.

VIOLATIONS ALLEGED

20. Throughout the Class Period, defendant and its co-conspirators engaged in a continuing combination and conspiracy in unreasonable restraint of trade and commerce in ready-mixed concrete in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

21. This combination and conspiracy consisted of an agreement, understanding and concerted action among defendant and its co-conspirators, the substantial objective of which was to raise and maintain at artificially high levels the prices of ready-mixed concrete.

22. For the purpose of forming and effectuating their combination and conspiracy, defendant and its co-conspirators did those things which they combined and conspired to do, including, among other things, discussing, forming and implementing agreements to raise and maintain at artificially high levels the prices for ready-mixed concrete.

23. On June 29, 2005, the United States Department of Justice announced that defendant Irving had agreed to plead guilty and pay a $29.2 million criminal fine, the largest fine ever levied in a domestic antitrust investigation, for conspiring and fixing the price of ready-mixed concrete in violation of the Sherman Act. In addition, four Irving executives agreed to plead guilty, pay fines and serve time in prison for their roles in the conspiracy.

EFFECTS

24. As a result of the combination and conspiracy between defendant and its co-conspirators, prices of ready-mixed concrete were artificially increased.

25. The conduct of defendant and its co-conspirators was undertaken for the purpose and with the specific intent of raising and maintaining prices of ready-mixed concrete and eliminating competition, in *per se* violation of Section 1 of the Sherman Act.

FRAUDULENT CONCEALMENT

26. Throughout the Class Period, defendant and its co-conspirators intended to and did affirmatively and fraudulently conceal their wrongful conduct and the existence of their unlawful combination and conspiracy from plaintiff and other members of the Class, and intended that their communications with each other and their resulting actions be kept secret from Plaintiff and other Class members.

27. Plaintiff and the Class had no knowledge of the wrongful conduct alleged herein or of any of the facts that might have led to discovery thereof, until on or about June 2005, when the U.S. Department of Justice announced the guilty plea entered by Irving Materials, Inc.

28. Plaintiff and members of the Class could not have discovered the combination and conspiracy alleged herein at any earlier date by the exercise of reasonable due diligence, because of the deceptive practices and techniques of secrecy employed by defendant and its co-conspirators to avoid detection of and affirmatively conceal their actions.

29. Based on the foregoing, customers of defendant and its co-conspirators, including plaintiff and members of the Class, were unaware that prices for ready-mixed concrete had been artificially raised and maintained as a result of the wrongful conduct as alleged in this Complaint.

DAMAGES TO PLAINTIFF AND MEMBERS OF THE CLASS

30. As a direct result of the unlawful conduct alleged in this Complaint, prices for ready-mixed concrete sold by defendant and its co-conspirators were fixed and maintained at artificially high and noncompetitive levels. Plaintiff and members of the Class were not able to purchase ready-mixed concrete at prices determined by free and open competition, and consequently have been injured in their business and property in that, *inter alia*, they have paid more for ready-mixed concrete than they would have paid in a free, open, and competitive market. Plaintiff cannot state at this time the precise amount of damages sustained by Plaintiffs

and the Class. A precise determination of damages will require discovery from the books and records of defendant and its co-conspirators. Plaintiff alleges that the damages are substantial.

JURY TRIAL DEMANDED

31. Plaintiff demands a trial by jury, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, of all issues so triable.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff requests:

A. That the Court determine that this action may be maintained as a class action under Rule 23(b)(2) and (b)(3) of the Federal Rules of Civil Procedure, that the Court determine that plaintiff is an adequate and appropriate representative of the Class, that the Court designate plaintiff's attorneys as lead counsel, and that the Court direct that the best notice practicable under the circumstances be given to members of the Class pursuant to Rule 23(c)(2).

B. That the Court adjudge and decree that defendant and its co-conspirators engaged in an unlawful combination and conspiracy in violation of Section 1 of the Sherman Act.

C. That the Court adjudge and decree that defendant and its co-conspirators are jointly and severally liable for threefold the damages resulting from their conduct.

D. That the Court enter judgment for plaintiff and the Class against defendant and it co-conspirators and each of them, jointly and severally, for three times the amount of damages sustained by plaintiff and the Class as allowed by law, together with the costs of this action, including reasonable attorneys' fees.

E. That defendant and its co-conspirators, their respective affiliates, successors, transferees, assignees and the officers, directors, partners, agents and employees thereof, and all other persons acting or claiming to act on their behalf, be restrained from, in any manner:

1) continuing, maintaining or renewing in any manner the contract, combination or conspiracy alleged herein, or from engaging in any other contract, combination or conspiracy having a similar purpose or effect, and from adopting or following any practice, plan, program or device having a similar purpose or effect; and

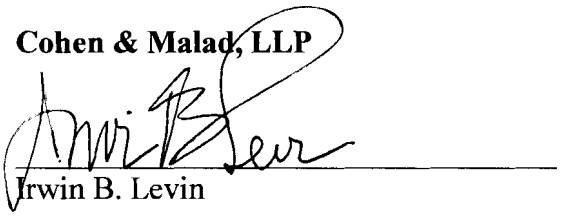
2) communicating or causing to be communicated in any manner to any other person engaged in the production, distribution or sale of any product that defendant and its co-conspirators also produce, distribute or sell, including ready-mixed concrete, information concerning prices or other terms or conditions of any such product, except to the extent necessary in connection with a *bona fide* sales transaction between parties to such communications.

F. That the Court grant such additional relief as may be deemed just and proper.

Dated: June 30, 2005

Respectfully Submitted,

Cohen & Malad, LLP

By: 
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COMMENCING CIVIL ACTIONS

SELECTED FEDERAL RULES OF CIVIL PROCEDURE

Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

Rule 2. One Form of Action

There is one form of action—the civil action.

Rule 3. Commencement of Action

A civil action is commenced by filing a complaint with the court.

Rule 7. Pleadings Allowed; Form of Motions and Other Papers

(a) *Pleadings*.Only these pleadings are allowed:
- (1) a complaint;
- (2) an answer to a complaint;
- (3) an answer to a counterclaim designated as a counterclaim;
- (4) an answer to a crossclaim;
- (5) a third-party complaint;
- (6) an answer to a third-party complaint; and
- (7) if the court orders one, a reply to an answer.

(b) *Motions and Other Papers*
- (1) In General. A request for a court order must be made by motion. The motion must:
  - (A) be in writing unless made during a hearing or trial;
  - (B) state with particularity the grounds for seeking the order; and
  - (C) state the relief sought.
- (2) Form. The rules governing captions and other matters of form in pleadings apply to motions and other papers.

Rule 8. General Rules of Pleading

(a) *Claims for Relief*. A pleading that states a claim for relief must contain:
- (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) *Defenses; Admissions and Denials.*
(1) *In General*. In responding to a pleading, a party must:
(A) state in short and plain terms its defenses to each claim asserted against it; and
(B) admit or deny the allegations asserted against it by an opposing party.
(2) *Denials—Responding to the Substance*. A denial must fairly respond to the substance of the allegation.
(3) *General and Specific Denials*. A party that intends in good faith to deny all the allegations of a pleading — including the jurisdictional grounds —may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.
(4) *Denying Part of an Allegation*. A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.
(5) *Lacking Knowledge or Information*. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.
(6) *Effect of Failing to Deny*. An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) *Affirmative Defenses.*
(1) *In General*. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:
▪ accord and satisfaction;
• arbitration and award;
• assumption of risk;
• contributory negligence;
• duress;
• estoppel;
• failure of consideration;
• fraud;
• illegality;
• injury by fellow servant;
• laches;
• license;
• payment;
• release;

- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) *Mistaken Designation*. If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) *Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.*

(1) *In General*. Each allegation must be simple, concise, and direct. No technical form is required.

(2) *Alternative Statements of a Claim or Defense*. A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) *Inconsistent Claims or Defenses*. A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) *Construing Pleadings*. Pleadings must be construed so as to do justice.

Rule 9. Pleading Special Matters

(b) *Fraud or Mistake; Condition of Mind*. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

Rule 10. Form of Pleadings

(a) *Caption; Names of Parties*. Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties.

(b) *Paragraphs; Separate Statements*. A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—must be stated in a separate count or defense.

(c) *Adoption by Reference; Exhibits*. A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) *Signature*. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) *Representations to the Court*. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) *Sanctions*.

(1) *In General*. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) *Motion for Sanctions*. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) *On the Court's Initiative*. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) *Nature of a Sanction*. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct

by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) *Limitations on Monetary Sanctions*. The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) *Requirements for an Order*. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) *Inapplicability to Discovery*. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

Private Cause of Action

SEMINAL TREBLE DAMAGES CASES

ATLANTA V. CHATTANOOGA FOUNDRY & PIPEWORKS (Sixth Circuit 1902).[1] The City of Atlanta had purchased cast-iron pipe for its municipal waterworks from Anniston Pipe & Foundry Company, one of the members of the Southern Associated Pipe Works. After the government challenged the association in *Addyston Pipe*, Atlanta brought suit in Tennessee against two Tennessee corporations, Chattanooga Foundry and Pipe Company and South Pittsburg Pipe Company (but not against Anniston Pipe), for treble damages under Section 7 of the Sherman Act.[2] The city alleged that it had been injured in its "business or property" because, as a result of the illegal combination, the city paid a higher price for its pipe than it would have in the absence of the combination. There were four primary issues in the case:

1. What was the applicable statute of limitations and did it bar the action?
2. Was Atlanta, as a municipal consumer of pipe, injured in its "business or property" within the meaning of then-Section 7 of the Sherman Act (which later became Section 4 of the Clayton Act)?
3. Was Atlanta, which conducted no interstate business itself, constitutionally barred from making a Sherman Act claim for its injuries?
4. Could Atlanta recover its damages from a member of the conspiracy from whom it did not purchase?

The Supreme Court, in a short opinion by Justice Holmes in 1906, primarily addressed the first issue. As a result, the Sixth Circuit's opinion, written by Judge Horace L. Lurton, is also frequently cited. Judge Lurton became an associate justice of the Supreme Court in 1909, where he served until his death in 1914.

Statute of limitations. The district court dismissed the action as time-barred and did not reach the other questions. The Sherman Act has no express statute of limitations for private treble damage actions, so under general Supreme Court

1. 127 F. 23 (6th Cir. 1902), *aff'd*, 203 U.S. 390 (1906). NOTE: The opinions are almost unintelligible on the facts and the procedural posture on the *two* cases that these opinions address. I am trying to get the complaints and the docket sheets in an effort to get some more clarity on what happened.

2. At the time, Section 7 provided:

> Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Ch. 647, § 7, 26 Stat. 209 (repealed and recodified as amended Clayton Act § 4(a), at 15 U.S.C. § 15(a)).

precedent, the court looked to the statutes of limitations of the state in which the district court resides. The district court examined two Tennessee statutes of limitations: five years for a penalty accruing under the laws of the United States and three years for actions for injuries to personal or real property. The district court held that the actions were not penal but rather for injuries to personal or real property and so dismissed the action. The Sixth Circuit agreed that the action was not penal but disagreed that action was one for injuries to personal or real property to which the three-year statute of limitations applied. Rather, the court of appeals found that a third Tennessee statute, which provided for a ten-year limitations period for cases "not expressly provided for," applied and so reinstated the action. The Supreme Court affirmed.[3]

The application of state statutes of limitations for Sherman Act treble damage actions could create both differences in the ability of plaintiffs to recover depending on the applicable state statute in their respective cases as well as confusion, as here in *Chattanooga Foundry*, over which statute within a state applies.[4] Surprisingly, this remained the state of affairs until 1955, when Congress amended the Clayton Act to include a uniform four-year statute of limitations for federal treble damage actions.[5]

Business or property. The defendant argued that Atlanta had no cause of action under the Sherman Act because its only alleged injury was paying an excessive price for pipe to expand its water system. At most, the defendants urged, Atlanta was injured as a consumer of pipe, so that even if it paid an excessive price as a result of an antitrust violation it did not sustain injury to its "business or property" that Sherman Act requires. The Sixth Circuit quickly found that the overcharge that Atlanta paid for cast iron water pipes for its municipal water system was injury to Atlanta's "business or property" with the meaning of the private treble damages provision:

> It is true that plaintiff is a municipal corporation. Nevertheless it was maintaining a system of waterworks, and furnished water to consumers, charging for same precisely as would a private corporation engaged in a like business. That a municipal corporation may be empowered to engage in the business of furnishing water or gas, or in the operation of street railways, as well

3. NOTE: It is very unclear was happened here. My best guess, pending further research, is that the circuit court overruled the demurrer to the Atlanta complaint as being within the three-year statute of limitations but sustained the demurrer to the Marion complaint as outside the statute of limitations. As best I can tell, the Sixth Circuit reinstated the Marion complaint.

4. For examples, see Bertha Building Corp. v. National Theatres Corp., 269 F.2d 785 (2d Cir. 1959) (application of New York law to action instituted in 1951); Gordon v. Loew's Inc., 247 F.2d 451 (3d Cir. 1957) (application of New Jersey law to action instituted in early 1955); Grengs v. Twentieth Century Fox Film Corp., 232 F.2d 325 (7th Cir. 1956) (application of Wisconsin law).

5. Pub. L. No. 84-137, ch. 283, 69 Stat. 282, 283 (1955) (creating a new Clayton Act § 4B (current version at 15 U.S.C. § 15b)). Section 4B currently reads: "Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act." 15 U.S.C. § 15b. Section 4B became effective until January 7, 1956.

> as many other quasi public occupations, must be conceded. That the profit resulting inures to the public does not alter the fact that when thus engaged it is pro hac vice a business corporation. If its "business" as a corporation engaged in the occupation of supplying water for a consideration has been injured by the unlawful combination complained of, it is just as much entitled to maintain this suit as a private corporation engaged in a like occupation.[6]

The Supreme Court, in an opinion by Justice Holmes, agreed in an even more succinct statement:

> [Atlanta] was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property.[7]

Still, *Chattanooga Foundry* could be distinguished from an individual consumer because Atlanta, even if it was not a business, was operating a municipal water business. The pure consumer case arises in *Reiter v. Sonotone Corp.*,[8] which we examine below.

Federalism. The defendants argued that only plaintiffs injured in their business of interstate commerce or their property while in interstate commerce can maintain a treble damages action under the Sherman Act. Here, Atlanta did not purchase the pipe in question in its business of interstate commerce since the pipe was supplied to Atlanta pursuant to a purchase agreement made and performed in Georgia, even if the defendant shipped the pipe from out of state. The defendants concluded that Atlanta's recourse, if any, should be under Georgia state law.

The Sixth Circuit disagreed:

> If, then, the price of a commodity which is the subject of an interstate contract be unlawfully enhanced by a combination for the purpose of suppressing competition, shall the vendee thus compelled to pay this unlawfully enhanced price be without remedy against the combination because he may happen not to be engaged in the conduct of an interstate business? If the effect of a combination to enhance the price of a commodity which is the subject of interstate commerce be to restrain such commerce, within the meaning of the law of Congress, by reason of its tendency to affect the volume of such trade, then the effect upon the business of one who has paid the enhanced price, in an interstate transaction, must be to correspondingly affect the volume or profit of that business. The difference between what he was thus compelled to pay and the reasonable price of the commodity under natural competitive conditions would be an injury to that business directly resulting from such unlawful combination. The injury to his business, whether it be in its volume or profit, is the same whether that business be inter or intra state—whether he buy to extend his plant, or to sell again in an interstate business. This excessive price is the

6. *Chattanooga Foundry*, 127 F. at 25.
7. *Chattanooga Foundry*, 203 U.S. at 396.
8. 442 U.S. 330 (1979).

> expected and intended result of the unlawful combination to restrain interstate trade in that commodity.[9]

The Supreme Court spoke to the issue only obliquely but in terms that indicate that if the conspiracy operated in interstate commerce so as to bring it within the prohibitions of the Sherman Act, then transactions taken to carry out the objectives of the conspiracy and in doing so cause harm to business or property may be redressed by a treble damages action:

> The fact that the defendants and others had combined with the seller led to the excessive charge, which the seller made in the interest of the trust by arrangement with its members, and which the buyer was induced to pay by the semblance of competition, also arranged by the members of the trust. One object of the combination was to prevent other producers than the Anniston Pipe & Foundry Company, the seller, from competing in sales to the plaintiff. There can be no doubt that Congress had power to give an action for damages to an individual who suffers by breach of the law. The damage complained of must almost or quite always be damage in property, that is, in the money of the plaintiff, which is owned within some particular state. In other words, if Congress had power to make the acts which led to the damage illegal, it could authorize a recovery for the damage, although the latter was suffered wholly within the boundaries of one state. Finally, the fact that the sale was not so connected in its terms with the unlawful combination as to be unlawful in no way contradicts the proposition that the motives and inducements to make it were so affected by the combination as to constitute a wrong. In most cases where the result complained of as springing from a tort is a contract, the contract is lawful, and the tort goes only to the motives which led to its being made, as when it is induced by duress or fraud.[10]

Joint and several liability. The question of whether Atlanta could recover its damages from a member of the conspiracy from whom it did not purchase is what made the case famous. Judge Lurton again quickly reached an answer:

> We have, then, a direct action by this plaintiff against two of the members of this unlawful combine. That there was no purchase made direct from either of them is of no importance. Their guilt is as great as that of the Alabama corporation from whom the plaintiff did buy its pipe. If the agreement between the defendants and their associates was unlawful and tortious, each is responsible for the torts committed in the course of the illegal combination. These defendants have themselves participated in the benefits resulting from the bonus paid by the Alabama member of the association, and have no ground to complain that they have been alone sued.[11]

The Sixth Circuit's opinion is widely regarded as the original statement that liability under Section 1 of the Sherman Act is *joint and several*. This is the usual rule for joint tortfeasors under the common law. *Joint liability* means that each defendant is

9. *Chattanooga Foundry*, 127 F. at 27.
10. *Chattanooga Foundry*, 203 U.S. at 396-97 (internal citations omitted).
11. *Chattanooga Foundry*, 127 F. at 26.

liable for the full amount of the damages caused by the defendants' wrongful acts. *Several liability* means that a defendant is liable for the damages caused by its own wrongful acts. *Joint and several liability* means that a plaintiff may pursue one defendant (or some subgroup collectively) for all of the plaintiff's damages caused by the wrongful acts, even if the plaintiff does not sue all of the wrongdoers, and the liable defendants are left with an "action over" for contribution from the nondefendants for the damages each nondefendant caused but for which the defendants had to pay the plaintiff.

In the antitrust context, this means that a plaintiff may select one or more conspirators as defendants in a treble damages action and recover its full damages (trebled) regardless of whether it purchased from the named defendants or not. As we will see below, however, the Supreme Court in *Texas Industries, Inc. v. Radcliff Materials, Inc.*[12] held that antitrust conspirators have no private cause of action for contribution, so whomever the plaintiff selects to sue and execute any resulting judgment has no right to pursue its co-conspirators for their share of the damages they caused.

12. 451 U.S. 630 (1981).

HANOVER SHOE, INC. v. UNITED SHOE MACH. CORP.
392 U.S. 481 (1968)[1]

MR. JUSTICE WHITE delivered the opinion of the Court.

Hanover Shoe, Inc. (hereafter Hanover) is a manufacturer of shoes and a customer of United Shoe Machinery Corporation (hereafter United), a manufacturer and distributor of shoe machinery. In 1954 this Court affirmed the judgment of the District Court for the District of Massachusetts, 110 F. Supp. 295 (1953), in favor of the United States in a civil action against United under § 4 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 4. *United Shoe Machinery Corp. v. United States*, 347 U.S. 521, 74 S. Ct. 699, 98 L. Ed. 910 [(1954)]. In 1955, Hanover brought the present treble-damage action against United in the District Court for the Middle District of Pennsylvania. In 1965 the District Court rendered judgment for Hanover and awarded trebled damages, including interest, of $4,239,609, as well as $650,000 in counsel fees. 245 F. Supp. 258. On appeal, the Court of Appeals for the Third Circuit affirmed the finding of liability but disagreed with the District Court on certain questions relating to the damage award. 377 F.2d 776 (1967). Both Hanover and United sought review of the Court of Appeals' decision, and we granted both petitions. 389 U.S. 818, 88 S. Ct. 86, 19 L. Ed.2d 68 (1967).

I.

Hanover's action against United alleged that United had monopolized the shoe machinery industry in violation of § 2 of the Sherman Act; that United's practice of leasing and refusing to sell its more complicated and important shoe machinery had been an instrument of the unlawful monopolization; and that therefore Hanover should recover from United the difference between what it paid United in shoe machine rentals and what it would have paid had United been willing during the relevant period to sell those machines.

. . .

II.

The District Court found that Hanover would have bought rather than leased from United had it been given the opportunity to do so. The District Court determined that if United had sold its important machines, the cost to Hanover would have been less than the rental paid for leasing these same machines. This difference in cost, trebled, is the judgment awarded to Hanover in the District Court. United claims, however, that Hanover suffered no legally cognizable injury, contending that the illegal overcharge during the damage period was reflected in the price charged for shoes sold by Hanover to its customers and that Hanover, if it had bought machines at

1. Footnotes have been omitted.

lower prices, would have charged less and made no more profit than it made by leasing. At the very least, United urges, the District Court should have determined on the evidence offered whether these contentions were correct. The Court of Appeals, like the District Court, rejected this assertion of the so-called 'passing-on' defense, and we affirm that judgment.

Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, provides that any person 'who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . .' We think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4.

If in the face of the overcharge the buyer does nothing and absorbs the loss, he is entitled to treble damages. This much seems conceded. The reason is that he has paid more than he should and his property has been illegally diminished, for had the price paid been lower his profits would have been higher. It is also clear that if the buyer, responding to the illegal price, maintains his own price but takes steps to increase his volume or to decrease other costs, his right to damages is not destroyed. Though he may manage to maintain his profit level, he would have made more if his purchases from the defendant had cost him less. We hold that the buyer is equally entitled to damages if he raises the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower.

Fundamentally, this is the view stated by Mr. Justice Holmes in *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 27 S. Ct. 65, 51 L. Ed. 241 (1906), where Atlanta sued the defendants for treble damages for antitrust violations in connection with the city's purchases of pipe for its waterworks system.[2] The Court affirmed a judgment in favor of the city for an amount measured by the difference between the price paid and what the market or fair price would have been had the sellers not combined, the Court saying that the city 'was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property.' *Id*., at 396, 27 S. Ct. at 66. The same approach was evident in *Thomsen v. Cayser*, 243 U.S. 66, 37 S. Ct. 353 (1917), another treble-damage antitrust case. With respect to overcharge cases arising under the transportation laws, similar views were expressed by Mr. Justice Holmes in *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533, 38 S. Ct. 186 (1918), and by Mr. Justice Brandeis in *Adams v. Mills*, 286 U.S. 397, 406-408, 52 S. Ct. 589, 591-592, 76 L. Ed. 1184 (1932). In those cases the possibility that

[2. *Challanooga Foundry* is a follow-on private action by a municipal purchaser against the Southern Associated Pipe Works following the finding in *Addyston Pipe* that the association violated the Sherman Act.]

plaintiffs had recouped the overcharges from their customers was held irrelevant in assessing damages.

United seeks to limit the general principle that the victim of an overcharge is damaged within the meaning of § 4 to the extent of that overcharge. The rule, United argues, should be subject to the defense that economic circumstances were such that the overcharged buyer could only charge his customers a higher price because the price to him was higher. It is argued that in such circumstances the buyer suffers no loss from the overcharge. This situation might be present, it is said, where the overcharge is imposed equally on all of a buyer's competitors and where the demand for the buyer's product is so inelastic that the buyer and his competitors could all increase their prices by the amount of the cost increase without suffering a consequent decline in sales.

We are not impressed with the argument that sound laws of economics require recognizing this defense. A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. On the other hand, it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories.

In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to their customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.

Our conclusion is that Hanover proved injury and the amount of its damages for the purposes of its treble-damage suit when it proved that United had overcharged it

during the damage period and showed the amount of the overcharge; United was not entitled to assert a passing-on defense. We recognize that there might be situations-for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged-where the considerations requiring that the passing-on defense not be permitted in this case would not be present. We also recognize that where no differential can be proved between the price unlawfully charged and some price that the seller was required by law to charge, establishing damages might require a showing of loss of profits to the buyer.

. . .

NOTES

1. As Justice White noted, in 1947 the United States filed a civil action against United, which dominated the shoe machinery industry, alleging that it had violated Section 2 of the Sherman Act by refusing to sell certain important shoe machines and instead insisting that customers lease them. In 1953, Judge Charles E. Wyzanski of the District of Massachusetts sustained the government's complaint, and in 1954 the Supreme Court summarily affirmed per curiam.[1] The Wyzanski decision carried significant precedential weight for many years. But this was a time when the courts treated aggressive unilateral conduct quite harshly under Section 2. If the case had been brought in the last forty years, the government almost certainly would have lost.

2. *Hanover Shoe* established the rule that a plaintiff-purchaser can recover actual damages in the full amount of an anticompetitive overcharge resulting from an antitrust violation, regardless of whether the plaintiff was able to "pass on" some or all of this overcharge to its customers. Because a defendant generally cannot invoke a "passing-on" defense, a direct purchaser may recover the full overcharge as damages even when it bore little or none of the economic burden. Notes 3 through 7 illustrate this result under several market structures.

3. Consider first the case of perfect competition with no fixed costs. Suppose retailers are perfectly competitive, have constant marginal cost and no fixed costs, and use only a wholesale good purchased from a manufacturer as their only input. Competition drives retail price to marginal cost, so retailers earn zero profit, and any change in wholesale price passes through dollar-for-dollar to consumers.

Let the manufacturer impose a supracompetitive overcharge of O per unit. Retailers' marginal cost rises by O, and competition forces the retail price up by O. Retailers still earn zero profit—before and after the manufacturer imposes the overcharge.

Here, *Hanover Shoe* gives retailers a windfall, even though they bear none of the economic burden. Under *Hanover Shoe*, the retailer's legally cognizable injury is the overcharge paid—O per unit, for each unit the retailer purchases—even though each retailer passes through 100% of the overcharge to its customers. The retailer receives a windfall because they recover damages they never had to absorb economically.

1. United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd* 347 U.S. 521 (1954) (per curiam).

Meanwhile, the economic incidence of the overcharge falls entirely on consumers, either through higher prices for those who continue to buy or a deadweight loss for those now priced out of the market.

4. Adding fixed costs to the retailers makes consumer harm worse, but retailers still bear none of the economic burden. Use the same assumptions as in Note 3, except that retailer i now has some fixed cost F_i. In a long-run competitive equilibrium, the retailers will compete down their prices to average total cost (ATC), resulting again in each retailer earning a zero profit. In this model,

$$ATC_i = c + (F_i/Q_i),$$

where c is the retailer's marginal cost (the price of the input sold by the manufacturer) and Q_i is the quantity sold by retailer i.[2]

Before the overcharge, retailers price at ATC and earn zero profit. After the manufacturer imposes overcharge O, retailers' variable cost rises by O, so retail price rises. But the higher retail price reduces quantity from Q_i to Q_i'. With fewer units over which to spread fixed costs, ATC rises by more than O:

$$ATC' = (c + O) + (F_i/Q_i')$$

Since $Q_i' < Q_i$, we have $F_i/Q_i' > F_i/Q_i$. The retail price increase exceeds the overcharge, resulting in a pass-through of greater than 100%.

Even so, retailers still price at their average total costs and hence zero profit before and after the manufacturer imposes the overcharge and so bear none of the economic burden. Under *Hanover Shoe*, each retailer recovers O per unit on the Q_i' units it purchases—damages for an injury it never economically incurred. As in Note 3, the recovery is a pure windfall. Meanwhile, consumers are even worse off here than in Note 3. They absorb the full overcharge plus the amplification from higher per-unit fixed costs, and they still suffer the deadweight loss from reduced quantity.

5. The retailers may be harmed when we expand the model to give retailers some market power, so that their profit-maximizing prices are greater than their average total costs. Even in this case, however, the economic injury to the retailer will be less than the damages it can obtain under *Hanover Shoe*.

A retailer with market power faces downward-sloping residual demand, and when it maximizes its profits, its marginal revenue will equal its marginal cost. For most demand curves—including linear demand—the profit-maximizing pass-through is less than 100%. So, if its marginal cost rises by O, the retailer's profit-maximizing price increase is less than O.

As a result, the retailer absorbs part of the overcharge as a reduced margin on each unit sold. If, for example, its profit-maximizing pass-through rate is 60%, the retailer's margin falls by $0.4O$ per unit. This is a true economic injury on units it sells. Still, under *Hanover Shoe*, the retailer recovers O per unit sold, resulting in a

[2] Note that in this model, since the product is fungible, the price p charged by all retailers must be the same, so that $p = ATC_i = (c + O) + (F_i/Q_i)$. With each F_i determined exogenously, in equilibrium each retailer will adjust its sales to achieve this condition. If the retailer cannot achieve sales necessary to meet this condition, the retailer will exit the market.

0.6O per unit windfall. Consumers are harmed, but less than under the perfect competition conditions of the earlier notes. They pay a higher price, but the price increase is less than O. There is also a deadweight loss from reduced quantity, but because the retail price increase is lower, the deadweight loss is smaller than under perfect competition.

This same analysis applies to oligopolistic markets, where pass-through falls somewhere between perfect competition and monopoly depending on the nature of strategic interaction. The windfall analysis is qualitatively similar: pass-through below 100% means *Hanover Shoe* damages exceed true economic injury.

6. Notes 3 through 5 all involve retailers who can adjust their prices in response to the overcharge. But if a retailer has already committed to selling at a fixed price—through long-term contracts, for example—it cannot pass on any portion of the overcharge. The retailer bears the full burden: its margin falls by O per unit on every unit sold.

7. The following table summarizes Notes 3 through 6:

Market Structure	Retailer Injury	*Hanover Shoe* Recovery	Windfall
Perfect competition, no fixed costs	None	$O \times Q'$	Full
Perfect competition, fixed costs	None	$O \times Q'$	Full
Market power (<100% pass-through)	Partial	$O \times Q'$	Partial
Fixed-price contracts	Full	$O \times Q'$	None

In most market structures, *Hanover Shoe* permits recovery exceeding the retailer's true economic harm. The windfall is largest when retailers operate competitively and can adjust prices freely, and smallest (or nonexistent) when retailers have market power or are locked into fixed-price contracts.

For deterrence purposes, however, the manufacturer loses all of its incremental profits from the overcharge (and, because damages are trebled, roughly three times those incremental overcharge profits), even when those damages are paid to a firm with no actual economic injury.

8. *Hanover Shoe* is typically paired with *Illinois Brick*.[3] Hanover Shoe holds that an antitrust defendant generally may not reduce a direct purchaser's damages by arguing that the purchaser passed on the overcharge to downstream customers. Illinois Brick generally blocks the mirror-image claim by downstream buyers: indirect purchasers usually may not recover damages on the theory that the overcharge was passed on to them. Together, the cases channel federal damages claims primarily to direct purchasers.

[3] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). *Illinois Brick* and the indirect purchaser doctrine is discussed *infra* at pp. 100-02.

REITER V. SONOTONE CORP. (1979).[1]

Question: Whether consumers who pay a higher price for goods purchased for personal use as a result of antitrust violations sustain an injury in their "business or property" within the meaning of Section 4 of the Clayton Act?

Facts: On May 2, 1975, Kathleen R. Reiter, on behalf of herself and others similarly situated, sued Sonotone Corporation and four other firms that manufactured hearing aids for violating Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act.[2] Reiter alleged that the defendants had restricted the territories, customers, and brands of hearing aids offered by their retail dealers, prohibited unauthorized retailers from dealing in or repairing their hearing aids, and conspired among themselves and with their retail dealers to fix the retail prices of the hearing aids. Reiter also alleged that she and the absent putative class members were forced to pay higher prices as a result of the defendants' antitrust violations and sought to obtain treble damages and injunctive relief under Sections 4 and 16, respectively, of the Clayton Act.

Trial court: The defendants moved for summary judgment on the treble damages claim on the grounds, among other things, that Reiter, as a retail purchaser of hearing aids for personal use with no injury other than the higher price she paid as a consumer, was not injured in her "business or property" as required by Section 4 of the Clayton Act to recover treble damages. The district court denied the motion. After noting that neither the legislative history of the antitrust laws nor the case law shed much light on the question, the court held that injury to "property" within the meaning of Section 4 must include injury to the "money of the plaintiff." The court reasoned that if it meant injury only to a commercial interest, then injury to property would be subsumed under an injury to business, thus rendering the inclusion of the term "property" in the act superfluous. That is a somewhat technical ground on which to base such an important interpretation, but no doubt the district court was searching for anything that would permit it to rule that the antitrust laws allowed consumer actions. Still, finding the question one of first impression, controlling in the case, and capable of a difference of opinion, the district court sua sponte certified the question for an interlocutory appeal to the Eighth Circuit and stayed the proceedings pending action by the court of appeals.[3]

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1. 442 U.S. 330 (1979). The description of the facts is taken from the various opinions in the case. *See* Reiter v. Sonotone Corp., 435 F. Supp. 933 (D. Minn. 1977), *rev'd*, 579 F.2d 1077 (8th Cir. 1978), *rev'd*, 442 U.S. 330 (1979).

2. The four other firms were Beltone Electronics Corporation, Dahlberg Electronics, Inc., Textron Incorporated, and Radioear Corporation.

3. Section 1292(b) of the Judicial Code provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made

Eighth Circuit: The Eighth Circuit accepted the interlocutory appeal and reversed. After reviewing the legislative history of both the Sherman and Clayton Acts, the court of appeals held that the antitrust laws were designed to prevent restraints of trade affecting business competition and that Congress' principal concern in enacting the private treble damages provision was to provide a remedy to persons suffering a business injury as a result of an antitrust violation. Moreover, the panel found that Congress included the language "injury to business or property" purposefully to limit the class of potential plaintiffs so as not to overwhelm the courts with antitrust damages litigation. Finally, as a policy matter, the court found that the purpose of the antitrust laws "may not be enhanced by permitting gigantic consumer class actions."[4] The court noted that antitrust class actions are seldom, if ever, tried on the merits because, even if the action is meritless, defendants have overwhelming incentives to settle for economic reasons. The court of appeals concluded that "[t]he deterrent impact of such suits, in our view, does not outweigh their potentially ruinous effect on American business."[5]

Supreme Court: The Supreme Court granted a writ of certiorari and reversed. In a unanimous opinion by Chief Justice Warren E. Burger, the Court noted that Section 4 "contains little in the way of restrictive language."[6] Quoting *Pfizer Inc. v. Government of India*,[7] the Court observed:

> The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. And the legislative history of the Sherman Act demonstrates that Congress used the phrase "any person" intending it to have its naturally broad and inclusive meaning. There was no mention in the floor debates of any more restrictive definition.[8]

In addition, Burger noted the dictionary definition of "property" included "anything of material value owned or possessed."[9] Burger gave short shrift to the Eighth Circuit's reading of the legislative history and instead reviewed the Court's prior opinions that suggested, albeit indirectly, that consumers who pay higher prices due to an antitrust violation are injured in their "property" within the meaning of Section 4. On the Eighth Circuit's policy arguments, Burger noted that consumers in the United States purchase more than $1.2 trillion in goods and services annually. Since the "essence of the antitrust laws is to ensure fair price competition in an open

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> to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b).

4. *Reiter*, 579 F.2d at 1086.
5. *Id.* We will consider class actions and the incentives to settle even meritless cases in Unit 5.
6. *Reiter*, 442 U.S. at 337.
7. 434 U.S. 308 (1978).
8. *Reiter*, 442 U.S. at 337-38 (quoting *Pfizer*; internal quotation marks and citations omitted).
9. *Id*. at 338.

market," it serves the purpose of the antitrust laws to grant them standing to sue.[10] Finally, Burger—perhaps the Court's foremost advocate of limiting the burden on courts—rejected the idea that the burden posed by consumer class actions was a reason to deny consumers standing under Section 4. Instead, Burger noted that private antitrust actions "provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations," and, to the extent that these private suits pose a heavy burden on the courts, it is the responsibility of Congress to provide the resources to courts that they require to execute Congress' mandates.[11]

NOTES

1. Not all injuries to consumers are injuries to "business or property." In *Sharif Pharmacy, Inc. v. Prime Therapeutics, LLC*,[12] J&S Community Pharmacy challenged its termination from the Prime pharmacy network as violating the antitrust laws. Three retail customers joined the action seeking treble damages for injuries. The customers alleged that their insurance only covered pharmacies in the Prime network and that J&S was the only pharmacy within walking distance in the Prime network. They further alleged that, and as a result of J&S' termination, they were injured because they could no longer use J&S to fulfill their prescriptions and were "too poor or physically or mentally weak to regularly travel to a distant pharmacy for their medicine."[13] In addition to rejecting these customer claims for lack of statutory standing under *Illinois Brick*, the Seventh Circuit summarily held (without citation to authority) that such harms "have not been treated as injury to 'business or property' as required to recover damages under the Sherman Act."[14]

10. *Id*. at 342.

11. *Id*. at 344. Justice Brennan did not participate in the decision. Justice Rehnquist filed a concurring opinion noting that his agreement with concerns expressed by the court of appeals about the burden consumer class actions can place on the courts and the ability for plaintiffs to extract unfair settlements in these actions. Rehnquist agreed with the Court's construction of Section 4, and said that these concerns should be addressed by Congress.

12. 950 F.3d 911 (7th Cir. 2020).

13. *Id*. at 915.

14. *Id*.

TEXAS INDUSTRIES, INC. v. RADCLIFF MATERIALS, INC.
451 U.S. 630 (1981)[1]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case presents the question whether the federal antitrust laws allow a defendant, against whom civil damages, costs, and attorney's fees have been assessed, a right to contribution from other participants in the unlawful conspiracy on which recovery was based. We granted certiorari to resolve a conflict in the Circuits. We affirm.

I

Petitioner and the three respondents manufacture and sell ready-mix concrete in the New Orleans, La., area. In 1975, the Wilson P. Abraham Construction Corp., which had purchased concrete from petitioner, filed a civil action in the United States District Court for the Eastern District of Louisiana naming petitioner as defendant; FN2 the complaint alleged that petitioner and certain unnamed concrete firms had conspired to raise prices in violation of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1 . . . [and] sought treble damages plus attorney's fees under § 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15 . . . .

. . .

II

The common law provided no right to contribution among joint tortfeasors. In part, at least, this common-law rule rested on the idea that when several tortfeasors have caused damage, the law should not lend its aid to have one tortfeasor compel others to share in the sanctions imposed by way of damages intended to compensate the victim. Since the turn of the century, however, 39 states and the District of Columbia have fashioned rules of contribution in one form or another, 10 initially through judicial action and the remainder through legislation. Because courts generally have acknowledged that treble-damages actions under the antitrust laws are analogous to common-law actions sounding in tort, we are urged to follow this trend and adopt contribution for antitrust violators.

. . .

Proponents of a right to contribution advance concepts of fairness and equity in urging that the often massive judgments in antitrust actions be shared by all the wrongdoers. In the abstract, this position has a certain appeal: collective fault, collective responsibility. But the efforts of petitioner and supporting amici to invoke principles of equity presuppose a legislative intent to allow parties violating the law to draw upon equitable principles to mitigate the consequences of their wrongdoing. Moreover, traditional equitable standards have something to say about the septic state

1. Internal citations and footnotes usually have been omitted from the text without indication.

of the hands of such a suitor in the courts, and, in the context of one wrongdoer suing a co-conspirator, these standards similarly suggest that parties generally *in pari delicto* should be left where they are found.

The proponents of contribution also contend that, by allowing one violator to recover from co-conspirators, there is a greater likelihood that most or all wrongdoers will be held liable and thus share the consequences of the wrongdoing. It is argued that contribution would thus promote more vigorous private enforcement of the antitrust laws and thereby deter violations, one of the important purposes of the treble-damages action under § 4 of the Clayton Act. See, e. g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344, 99 S. Ct. 2326, 2333, 60 L.Ed.2d 931 (1979); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485, 97 S. Ct.. 690, 695, 50 L.Ed.2d 701 (1977); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262, 92 S. Ct. 885, 891, 31 L.Ed.2d 184 (1972); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139, 88 S. Ct. 1981, 1984, 20 L.Ed.2d 982 (1968). Independent of this effect, a right to contribution may increase the incentive of a single defendant to provide evidence against co-conspirators so as to avoid bearing the full weight of the judgment. Realization of this possibility may also deter one from joining an antitrust conspiracy.

Respondents and amici opposing contribution point out that an even stronger deterrent may exist in the possibility, even if more remote, that a single participant could be held fully liable for the total amount of the judgment. In this view, each prospective co-conspirator would ponder long and hard before engaging in what may be called a game of "Russian roulette." Moreover, any discussion of this problem must consider the problem of "overdeterrence," i.e., the possibility that severe antitrust penalties will chill wholly legitimate business agreements. See *United States v. United States Gypsum Co.*, 438 U.S. 422, 441-442, 98 S. Ct. 2864, 2875-2876, 57 L.Ed.2d 854 (1978).

. . .

III

The contentions advanced indicate how views diverge as to the "unfairness" of not providing contribution, the risks and trade-offs perceived by decisionmakers in business, and the various patterns for contribution that could be devised. In this vigorous debate over the advantages and disadvantages of contribution and various contribution schemes, the parties, amici, and commentators have paid less attention to a very significant and perhaps dispositive threshold question: whether courts have the power to create such a cause of action absent legislation and, if so, whether that authority should be exercised in this context.

. . .

There is no allegation that the antitrust laws expressly establish a right of action for contribution. Nothing in these statutes refers to contribution, and if such a right exists it must be by implication. Our focus, as it is in any case involving the implication of a right of action, is on the intent of Congress.

. . .

In contrast to the sweeping language of §§ 1 and 2 of the Sherman Act, the remedial provisions defined in the antitrust laws are detailed and specific: (1) violations of §§ 1 and 2 are crimes; (2) Congress has expressly authorized a private right of action for treble damages, costs, and reasonable attorney's fees; (3) other remedial sections also provide for suits by the United States to enjoin violations or for injury to its "business or property," and parens patriae suits by state attorneys general; (4) Congress has provided that a final judgment or decree of an antitrust violation in one proceeding will serve as prima facie evidence in any subsequent action or proceeding; and (5) the remedial provisions in the antimerger field, not at issue here, are also quite detailed.

. . .

We are satisfied that neither the Sherman Act nor the Clayton Act confers on federal courts the broad power to formulate the right to contribution sought here.

IV

The policy questions presented by petitioner's claimed right to contribution are far-reaching. In declining to provide a right to contribution, we neither reject the validity of those arguments nor adopt the views of those opposing contribution. Rather, we recognize that, regardless of the merits of the conflicting arguments, this is a matter for Congress, not the courts, to resolve.

The range of factors to be weighed in deciding whether a right to contribution should exist demonstrates the inappropriateness of judicial resolution of this complex issue. Ascertaining what is "fair" in this setting calls for inquiry into the entire spectrum of antitrust law, not simply the elements of a particular case or category of cases. Similarly, whether contribution would strengthen or weaken enforcement of the antitrust laws, or what form a right to contribution should take, cannot be resolved without going beyond the record of a single lawsuit. As in *Diamond v. Chakrabarty*, 447 U.S. 303, 317, 100 S. Ct. 2204, 2212, 65 L.Ed.2d 144 (1980):

> "The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts."

Accord, *United States v. Topco Associates*, 405 U.S. 596, 611-612, 92 S. Ct. 1126, 1135-1136, 31 L.Ed.2d 515 (1972).

Because we are unable to discern any basis in federal statutory or common law that allows federal courts to fashion the relief urged by petitioner, the judgment of the Court of Appeals is

Affirmed.

February 2, 2026

Subject Matter Jurisdiction

SUBJECT MATTER JURISDICTION

U.S. CONSTITUTION

U.S. Const. art. III, § 1

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. art. III, § 2, cl. 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; —between a State and Citizens of another State, —between Citizens of different States, —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. I, § 8, cl. 9

The Congress shall have power . . . To constitute tribunals inferior to the Supreme Court.

JUDICIAL CODE

28 U.S.C. § 1331 (federal question jurisdiction)

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.[1]

1. *Federal question jurisdiction* is provided by Article III of the U.S. Constitution for "Cases, in Law and Equity, arising under . . . the Law of the United States." U.S. Const. art III, § 2, cl. 1. A second major type of federal subject matter jurisdiction is *diversity jurisdiction*, which, subject to certain limitation prescribed by Congress, exists over cases "between Citizens of different States." *Id*. Diversity jurisdiction is unnecessary in cases brought under the federal antitrust laws, since federal question jurisdiction is sufficient.

28 U.S.C. § 1337 (antitrust law jurisdiction)

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, That the district courts shall have original jurisdiction of an action brought under section 11706 or 14706 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

[Sections 1337(b)-1337(c) omitted]

28 U.S.C. § 1367 (supplemental jurisdiction)

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,
(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
(3) the district court has dismissed all claims over which it has original jurisdiction, or
(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

28 U.S.C. § 1332 (diversity jurisdiction)

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

The Modern Reach of the Sherman Act

THE MODERN REACH OF THE SHERMAN ACT

THE CONSTITUTIONAL DIMENSIONS

From the time of its enactment in 1890, the Sherman Act's prohibitions have reached contracts, combinations and conspiracies "in restraint of trade or commerce among the several States, or with foreign nations" as well as monopolization, attempted monopolization, and conspiracies to monopolize "any part of the trade or commerce among the several States, or with foreign nations."[1] These statutory phases invoke the Commerce Clause as both the source—and a limitation on the scope—of federal power to regulate anticompetitive conduct.[2] It is generally accepted that the 1890 Congress intended that the Sherman Act's reach be coextensive with that of the Commerce Clause. In the floor debates on the Sherman Act, for example, Senator Sherman stated that the act should reach "as far as the Constitution permits Congress to go,"[3] and that "[t]he provisions of this trust bill are just as broad, sweeping, and explicit as the English language can make them to express the power of Congress over this subject under the Constitution of the United States).[4] Consistent with the view that the Sherman Act's jurisdiction is coextensive with that of the Commerce Clause, courts have expanded the Sherman Act's reach as they enlarged the reach of the Commerce Clause power.[5] As a result of this expansion, it is hard today to find a case outside of the Sherman Act's subject matter jurisdiction.

COMMERCE CLAUSE. Article I, Section 8, Clause 3 of the U.S. Constitution provides:

> "Congress shall have the power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[6]

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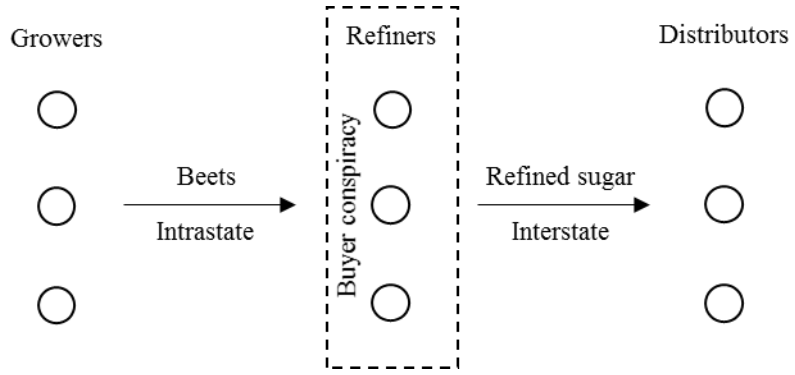
1. Act of July 2, 1890, §§ 1, 2, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1, 2).
2. U.S. Const. art. I, § 8, cl. 3.
3. 20 Cong. Rec. 1167 (1889).
4 21 Cong. Rec. 6314 (1890). For cases to the same effect, see, for example, Summit Health Ltd. v. Pinhas, 500 U.S. 322, 328 & n.7 (1991); United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 298 (1945); United States v. Underwriters Ass'n, 322 U.S. 533, 558 (1944); Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 435 (1932).
5. *See* Summit Health, 500 U.S. at 329 n.8; Hosp. Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 743 (1976); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 201-02 (1974); Mandeville Island Farms, 334 U.S. at 229-35 (1948); *South-Eastern Underwriters*, 322 U.S. at 557-58. For the contrary view that the Sherman Act's reach did not expand with the reach of the Commerce Clause, see *Summit Health*, 500 U.S. at 333 (1991) (Scalia, J., dissenting).
6. U.S. Const. art. I, § 8, cl. 3.

MANDEVILLE ISLAND FARMS V. AMERICAN CRYSTAL SUGAR CO. (1947).[7] Local California beet farmers sued several California beet sugar refiners for treble damages allegedly resulting from a buyer conspiracy to fix the price at which the refiners purchased beets. The defendants moved to dismiss for lack of subject matter jurisdiction since the beets were grown within California, purchased by the defendant refiners in California, and then refined within California. The district court agreed and dismissed the complaint, and the Ninth Circuit affirmed. In its first application of the "substantial effects" test of subject matter jurisdiction, the Supreme Court reversed. The Court held that the Sherman Act jurisdiction existed since the refiners, once they had processed the beets, sold the resulting refined sugar to distributors, some of which were located in different states. Although the opinion is not a model of clarity, the Court held that even if prices of refined sugar sold in interstate commerce were not affected by the alleged conspiracy, the infracompetitive prices paid by the refiners to the growers affected the amount of beets the growers produced and sold to the refiners, and hence on the amount of refined sugar the refiners ultimately sold into the interstate market. In this sense, the intrastate sale of the beets substantially affected interstate commerce and hence was within the subject matter jurisdiction of the Sherman Act.[8]



MCLAIN V. REAL ESTATE BOARD OF NEW ORLEANS, INC. (1980).[9] In *McLain*, the Supreme Court held that subject matter jurisdiction existed over a complaint alleging that the defendant real estate firms and their trade associations violated Section 1 by agreeing to conform to a fixed rate of brokerage commissions on residential property sales in the Greater New Orleans area. The district court

7. 334 U.S. 219 (1947).

8. *See* United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 464 (1949) ("If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.").

9. 444 U.S. 232 (1980).

dismissed the complaint on the pleadings for lack of subject matter jurisdiction given the entirely local nature of the residential estate brokerage activities on which the alleged restraint operated. In reinstating the complaint, the Supreme Court held that the complaint alleged the requisite effect on interstate commerce through the following allegations:

- Funds provided by local banks to finance local real estate transactions were raised in substantial part from out-of-state investors and from interbank loans obtained from interstate financial institutions.
- Multistate lending institutions took mortgages insured under federal programs, which entailed interstate transfers of premiums and settlements.
- Mortgage obligations were traded as financial instruments in the interstate secondary mortgage market.
- Title insurance was furnished by interstate corporations.

NOTES

1. *McLain* represented a significant change in the jurisdictional inquiry. Prior to *McLain*, the question was whether the challenged restraint itself, if successful, would have a substantial effect on interstate commerce. *McLain* held that it was sufficient if the commercial activity—here, residential real estate brokerage services—had a substantial effect on activities that are in interstate commerce even if the challenged restraint did not.

2 *McLain* was anticipated by *Goldfarb v. Virginia State Bar.*[10] The Fairfax County Bar Association published a schedule of minimum fees to be charged by their members. The Virginia State Bar was responsible for enforcing the minimum fee schedule and, although there appeared to be little actual enforcement, almost all lawyers in Fairfax Country abided by the schedule. Goldfarb and his wife contracted to buy a house in Fairfax Country. To obtain financing, the Goldfarbs were required to obtain title insurance, which in turn required a title examination performed by a member of the Virginia State Bar. When the Goldfarbs could not find a lawyer who would perform the title examination for less than the fee prescribed by the FCBA minimum fee schedule, the Goldfarbs bought a class action against the FCBA and the Virginia State Bar for horizontal price fixing of legal services related to residential real estate transactions. As one of its defenses, the FCBA argued that any effect on interstate commerce in the provision of local real estate legal services was incidental and remote, so that there was no subject matter jurisdiction over the complaint. The Supreme Court disagreed:

> The County Bar argues, as the Court of Appeals held, that any effect on interstate commerce caused by the fee schedule's restraint on legal services was incidental and remote. In its view the legal services, which are performed wholly intrastate, are essentially local in nature and therefore a restraint with respect to them can never substantially affect interstate commerce. Further, the County Bar

10. 421 U.S. 773 (1975).

> maintains, there was no showing here that the fee schedule and its enforcement mechanism increased fees, and that even if they did there was no showing that such an increase deterred any prospective homeowner from buying in Fairfax County.
>
> These arguments misconceive the nature of the transactions at issue and the place legal services play in those transactions. As the District Court found, "a significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia," and "significant amounts of loans on Fairfax County real estate are guaranteed by the United States Veterans Administration and Department of Housing and Urban Development both headquartered in the District of Columbia." Thus in this class action the transactions which create the need for the particular legal services in question frequently are interstate transactions. The necessary connection between the interstate transactions and the restraint of trade provided by the minimum-fee schedule is present because, in a practical sense, title examinations are necessary in real estate transactions to assure a lien on a valid title of the borrower. In financing realty purchases lenders require, "as a condition of making the loan, that the title to the property involved be examined . . . ." Thus a title examination is an integral part of an interstate transaction and this Court has long held that "there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states."
>
> Given the substantial volume of commerce involved, and the inseparability of this particular legal service from the interstate aspects of real estate transactions, we conclude that interstate commerce has been sufficiently affected.
>
> The fact that there was no showing that home buyers were discouraged by the challenged activities does not mean that interstate commerce was not affected. Otherwise, the magnitude of the effect would control, and our cases have shown that, once an effect is shown, no specific magnitude need be proved. Nor was it necessary for petitioners to prove that the fee schedule raised fees. Petitioners clearly proved that the fee schedule fixed fees and thus "deprive(d) purchasers or consumers of the advantages which they derive from from competition."
>
> Where, as a matter of law or practical necessity, legal services are an integral part of an interstate transaction, a restraint on those services may substantially affect commerce for Sherman Act purposes. Of course, there may be legal services that involve interstate commerce in other fashions, just as there may be legal services that have no nexus with interstate commerce and thus are beyond the reach of the Sherman Act.[11]

SUMMIT HEALTH LTD. V. PINHAS (1991).[12] The Supreme Court addressed the split in *Summit Health Ltd. v. Pinhas*, a garden variety medical staff privileges

11. *Id*. at 783-86 (internal citations and footnotes omitted).
12. 500 U.S. 322 (1991).

termination case. Dr. Simon J. Pinhas filed a complaint alleging that Midway Hospital Medical Center, Summit Health (Midway's corporate parent), and four ophthalmic surgeons on Midway's medical staff conspired to terminate his staff privileges at Midway and so drive him out of the market for ophthalmological services in Los Angeles in violation of Section 1 of the Sherman Act. The complaint alleged that the ophthalmological services offered by Midway were regularly performed for patients from out of state and generated revenues from out of state sources, including third-party payers, and that termination of Pinhas's staff privileges at Midway would preclude him from staff privileges at any other Los Angeles area hospitals. The defendants argued that, even accepting these allegations as true, the complaint must be dismissed because the boycott of a single surgeon could have no measurable effect on interstate commerce. In a 5-4 opinion, the Court reaffirmed the *McLain* rule and held that it is enough that the commercial activity on which the restraint operates—here, ophthalmological services in the Los Angeles area—substantially affects commerce and that jurisdiction does not depend on the "more particularized " showing that the restraint had an effect on commerce.

The minority, in an opinion by Justice Scalia, would have rejected the broader *McLain* rule, required that the restraint itself (if successful) have a substantial effect on interstate commerce, and dismissed the complaint on the grounds that one surgeon's exclusion from practicing in the Los Angeles area could not have substantially affected interstate commerce. Moreover, if the *McLain* rule is adopted, Scalia noted, there remains a serious problem of determining the scope of the commercial activities on which the alleged restraint operated. Even assuming that Dr. Pinhas' exclusion was part of a broader scheme to fix prices, from the allegations that price-fixing scheme could not have extended beyond Midway Hospital and a restraint on prices in one hospital in Los Angeles could not reasonably be presumed to substantially affect interstate commerce. To Scalia, the complaint stated nothing more than a business tort.

A NOTE ON THE CLAYTON ACT

While the Sherman Act has generally been viewed as being jurisdictionally coextensive with the Commerce Clause throughout its evolution, the Clayton and Robinson-Patman Acts have not. Most significantly, prior to an amendment in 1980, Section 7 of the Clayton Act applied only to entities "engaged in commerce."[13] The Robinson-Patman Act and Section 3 of the Clayton Act remain limited to persons "engaged in commerce," where the restraint is "in the course of such commerce," and hence do not have the full reach that Congress could have provided under the

13. *See* United States v. American Building Maintenance Industries, 422 U.S. 271, 285 (1975) (allegation that company had made local purchases of equipment and supplies that were merely manufactured out of state was insufficient to show that company was "engaged in commerce" within the meaning of § 7 of the Clayton Act); Gulf Oil v. Copp Paving Co., 419 U.S. 186 (1974) (finding that "in commerce" requirements of the Robinson-Patman Act were not met).

Commerce Clause. Rather, the reach of these provisions is limited to the *Swift* "stream of commerce" test rather than the full "substantially affects" test.

Statute	Current jurisdictional language	Reach
Sherman Act §§ 1-2, 15 U.S.C. §§ 1-2	Restraints or monopolization of "trade or commerce among the several States, or with foreign nations"	Full Commerce Clause reach
Robinson-Patman Act, 15 U.S.C. § 13	"any person engaged in commerce, in the course of such commerce"	Limited reach
Clayton Act § 3, 15 U.S.C. § 14	"any person engaged in commerce, in the course of such commerce"	Limited reach
Clayton Act § 7, 15 U.S.C. § 18	"No person engaged in commerce or in any activity affecting commerce"	Full Commerce Clause reach

FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT[14]

15 U.S.C. § 6a. Conduct involving trade or commerce with foreign nations

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

Note: The FTAIA also placed identical restrictions on the reach Section 5 of the Federal Trade Commission Act. *See* 15 U.S.C. § 45(a)(3).

NOTES

1. In 1982, Congress enacted the Foreign Trade Antitrust Improvements Act (FTAIA) to address concerns about the extraterritorial reach of the U.S. antitrust laws and to exclude from this reach anticompetitive conduct that causes only foreign injury.[15] More to the point, the FTAIA was "to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets."[16] The early 1980s was a time when some thought that U.S. laws were placing American firms at a competitive disadvantage to non-U.S. foreign in

14. Pub. L. 97–290, title IV, § 402, 96 Stat. 1246 (Oct. 8, 1982).

15. F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 158 (2004).

16. *Id.* at 161 (citing H.R. Rep. No. 97-686, at 1-3, 9-10 (1982)); *see* Hartford Fire Ins. Co. v. Calif., 509 U.S. 764, 796 n.23 (1993) (observing that the FTAIA "intended to exempt from the Sherman Act export transactions that did not injure the United States economy"); Carpet Group Int'l v. Oriental Rug Importers Ass'n, 227 F.3d 62, 71 (3d Cir. 2000) ("Congress enacted the FTAIA for the purpose of facilitating the export of domestic goods by exempting export transactions that did not injure the United States economy from the Sherman Act and thereby relieving exporters from a competitive disadvantage in foreign trade.").

competing in markets outside of the United States, and the FTAIA was intended to place American firms on an equal footing with their foreign counterparts when competing in these non-U.S. markets. The underlying concerns were not particularly well-articulated, but one distinct possibility was that some quarters of business wished to engage in horizontal combinations directed toward foreign markets without running the risk that they would be sued by foreign plaintiffs in U.S. courts for price fixing.[17] If this was in fact the underlying concern, it is not surprising that the legislative record is circumspect on the point.[18]

2. The FTAIA is not a model of clarity in legislative draftsmanship.[19] Essentially, the FTAIA divides non-domestic commerce into two categories: (1) import commerce, and (2) all other foreign commerce, namely export commerce and wholly foreign commerce. By its terms under the *import exclusion*, the FTAIA does not address conduct involving import commerce,[20] so in those cases subject matter jurisdiction is determined by the *ALCOA/Hartford Fire* effects test. The FTAIA then excludes from the reach of the antitrust laws conduct involving all other foreign commerce unless the conduct in question (1) has a "direct, substantial, and reasonably foreseeable effect" on either domestic commerce, import commerce, or the export activities of one engaged in U.S. domestic or import commerce, and (2) this effect "gives rise to a claim" under the antitrust laws.[21] Conduct that satisfies these two conditions is said to fall within the FTAIA's *domestic injury exception*. The Supreme Court has observed that it is not clear whether the Act's "'direct, substantial, and reasonably foreseeable effect' standard amends existing law or merely codifies it,"[22] but if the former the test limits the effects test rather than

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17. The Webb-Pomerene Act of 1918, 15 U.S.C. §§ 61-66, provides for an exemption from U.S. antitrust law for associations engaged solely in export trade, but the statute is restrictive in its conditions, companies invoking the exemption are monitored by the FTC to ensure no spillover effects in the United States, and participation is publicly disclosed. Even prior to the FTAIA, very few companies sought protection under the Webb-Pomerene Act. There are very few cases interpreting the Webb-Pomerene Act. The most widely cited case is United States v. Minnesota Mining & Manufacturing Co., 92 F. Supp. 947 (D. Mass. 1950).

18. *See* H.R. Rep. 97-686, at 4 (noting the existence of concerns but not explaining their nature).

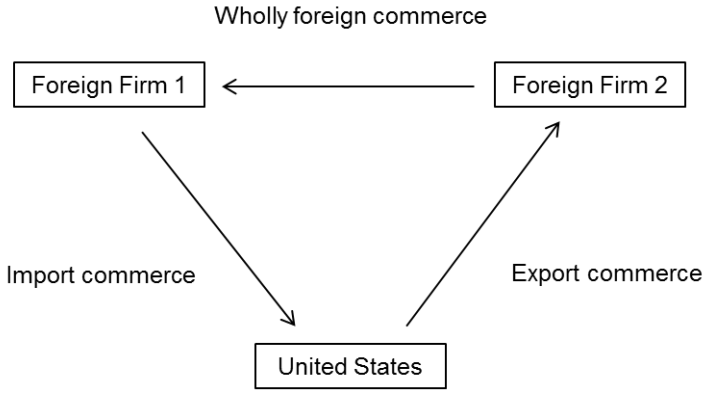
19. *See, e.g.*, United States v. Nippon Paper Indus. Co., Ltd., 109 F.3d 1, 4 (1st Cir. 1997) (noting FTAIA is "inelegantly phrased"); *accord* Biocad JSC v. F. Hoffmann-La Roche, 942 F.3d 88, 94 (2d Cir. 2019) (finding "[t]he FTAIA is cumbersomely worded"); Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 465 (3d Cir. 2011); Turicentro, S.A. v. American Airlines Inc., 303 F.3d 293, 300 (3d Cir. 2002); Carpet Group Int'l v. Oriental Rug Importers Ass'n, 227 F.3d 62, 69 (3d Cir. 2000); McLafferty v. Deutsche Lufthansa A.G., Civ. A. No. 08-1706, 2009 WL 3365881, at *2 (E.D. Pa. Oct. 16, 2009).

20. *See, e.g.*, *Biocad*, 942 F.3d at 94; Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 855 (7th Cir. 2012); *Animal Sci. Prods*., 654 F.3d at 471 n.11; Carrier Corp. v. Outokumpu Oyj, 673 F.3d 430, 438 n.3 (6th Cir. 2012); Dee-K Enters., Inc. v. Heveafil Sdn. Bhd., 299 F.3d 281, 287 (4th Cir. 2002).

21. 15 U.S.C. § 6a; *see Empagran*, 542 U.S. at 161-63; *Animal Sci. Prods*., 654 F.3d at 466; *Carpet Group*, 227 F.3d at 69.

22. *Hartford Fire*, 509 U.S. at 796 n.23.

expands it.[23] The FTAIA is complicated because it requires analysis of the links from extraterritorial conduct to a given type of commerce to a domestic effect to the plaintiff's injury to the plaintiff's claim.



3. Courts of Appeal have differed on whether, for the FTAIA import commerce exclusion to apply (and thus subject the conduct to the *Hartford Fire* test), a defendant or co-conspirator must be the entity sending the goods into the United States. In *Motorola Mobility*,[24] the Seventh Circuit held that the import commerce exclusion does not apply where plaintiffs, rather than defendants, import the price-fixed goods into the United States.[25] By contrast, in *Animal Science Products*,[26] the Third Circuit rejected the argument that import commerce exclusion requires the defendants to be physical importers of goods.[27]

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[23] *See Empagran*, 542 U.S. at 169 (noting that "the FTAIA's language and history suggest that Congress designed the FTAIA to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act's scope as applied to foreign commerce").

[24] Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816 (7th Cir. 2015).

[25] *Id*. at 818; *accord In re* Hard Disk Drive Suspension Assemblies Antitrust Litig., No. 19-MD-02918-MMC, 2023 WL 8007985, at *3 (N.D. Cal. Nov. 17, 2023) (holding the import commerce exclusion does not apply when the plantiffs or a downstream customer of the plaintiffs sent the products containing the price-fixed components to the United States); *In re* TFT-LCD (Flat Panel) Antitrust Litig., 2010 WL 2610641, at *4-6 (N.D. Cal. June 28, 2010) (holding the import commerce exclusion did not apply where "foreign-purchased products" were sent to United States by the plaintiff's affiliates).

[26] Animal Science Products, Inc. v. China Minmetals Corp., 654 F.3d 462 (3rd Cir. 2011).

[27] *Id*. at 470; *accord In re* Optical Disk Drive Antitrust Litig., 2017 WL 11513316, at *4 (N.D. Cal. December 18, 2017) (finding import commerce exclusion applied where the plaintiffs and their subsidiaries, and not the defendants, imported the goods containing the price-fixed components into the United States); *see also* Ningde Amperex Tech. Ltd. v. Zhuhai CosMX Battery Co., No. 2:22-CV-00232-JRG, 2023 WL 4670490, at *2-3 (E.D. Tex. July 20, 2023) (denying a motion to dismiss since "the incorporation of [foreign] batteries into products eventually sold throughout the world, including the United States, can implicate import commerce").

4. Although historically most cases have treated the limitation in the FTAIA as jurisdictional,[28] the weight of authority in modern cases has shifted to substantive elements view.[29] The origin of the split was the Supreme Court's decision in *Hartford Fire*, where Justice Souter, writing for the majority, analyzed the Sherman Act's reach in the case in terms of "jurisdiction."[30] In his dissent, Justice Scalia disputed that characterization and argued that the limitations on the Sherman Act's reach in the case should be analyzed in terms of prerequisites for stating a claim on the merits.[31] Recent Supreme Court cases outside the antitrust area have been wary of labeling statutory requirements as jurisdictional in the absence of a clear congressional indication that the limitations were intended to be jurisdictional.[32]

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[28] For cases treating FTAIA as jurisdictional and imposing the burden of proof on plaintiffs, see, for example, In re Monosodium Glutamate Antitrust Litig., 477 F.3d 535, 537 (8th Cir. 2007); Empagran S.A. v. F. Hoffmann-LaRoche, Ltd., 417 F.3d 1267, 1268-69 (D.C. Cir. 2005); United States v. LSL Biotechnologies, 379 F.3d 672, 677 (9th Cir. 2004); United Phosphorus, Ltd. v. Angus Chemical Co., 322 F.3d 942 (7th Cir. 2003) (en banc); Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420, 424 & n.14 (5th Cir. 2001); Carpet Group Int'l v. Oriental Rug Importers Ass'n, 227 F.3d 62, 71 (3d Cir. 2000) (later overturned); Filetech S.A. v. France Telecom S.A., 157 F.3d 922, 931 (2d Cir. 1998); McLafferty v. Deutsche Lufthansa A.G., Civ. A. No. 08-1706, 2009 WL 3365881, at *2 (E.D. Pa. Oct. 16, 2009); In re Potash Antitrust Litig., 667 F. Supp. 2d 907, 925 (N.D. Ill. 2009); Sun Microsystems Inc. v. Hynix Semiconductor Inc., 534 F. Supp. 2d 1101, 1109 (N.D. Cal. 2007); *In re* Rubber Chems. Antitrust Litig., 504 F. Supp. 2d 777, 781 (N.D. Cal. 2007); Emerson Elec. Co. v. Le Carbone Lorraine, S.A., 500 F. Supp. 2d 437, 443 (D.N.J. 2007); *see also* Boyd v. AWB Ltd., 544 F. Supp. 2d 236, 243 n.6 (S.D.N.Y. 2008) (treating FTAIA as jurisdictional according to Second Circuit precedent but suggesting that FTAIA only limits the plaintiff's substantive cause of action). The House Committee Report states that the purpose of the legislation was to address the "subject matter jurisdiction of United States antitrust law." H.R. Rep. 97-686, at 13.

[29] *See* Biocad JSC v. F. Hoffmann-La Roche, 942 F.3d 88, 93-94 (2d Cir. 2019) ("[T]he requirements of the FTAIA go to the merits of an antitrust claim rather than to subject matter jurisdiction."); United States v. Hui Hsiung, 778 F.3d 738, 751 (9th Cir. 2015); Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 405 (2d Cir. 2014); Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 848 (7th Cir. 2012); Animal Sci. Prods., Inc. v. China MinSee metals Corp., 654 F.3d 462, 468-69 (3d Cir. 2011) ("Assessed through the lens of *Arbaugh's* 'clearly states' test, the FTAIA's language must be interpreted as imposing a substantive merits limitation rather than a jurisdictional bar."); *see also* Turicentro, S.A. v. American Airlines Inc., 303 F.3d 293, 299-300 (3d Cir. 2002) (appearing to treat FTAIA as something other than a limitation on subject matter jurisdiction but entertaining Rule 12(b)(1) motion). There are exceptions. *See* United States v. Van Avermaet, No. 21CR4434TSCZMF, 2024 WL 278088, at *2 (D.D.C. Jan. 25, 2024) ("In this Circuit, the FTAIA applies as a jurisdictional limit on the Sherman Act's reach.") (citing Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 315 F.3d 338, 341 (D.C. Cir. 2003) (*Empagran I*), vacated sub nom. F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (*Empagran II*)).

[30] Hartford Fire Ins. Co. v. Calif., 509 U.S. 764, 795-96 & nn.22-23 (1993).

[31] *Id*. at 813 (Scalia, J., dissenting).

[32] *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 515-16 (2006) ("If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.") (footnote and citation omitted); Morrison v. National Australia

Technically, the resolution turns on whether Congress in enacting the FTAIA used its powers under Article III of the Constitution to define the jurisdiction of the courts or its powers under the Commerce Clause to define the elements of a substantive antitrust claim. The question is more than academic. If the FTAIA is jurisdictional, then a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction would be appropriate at any time during the litigation (including after trial), the court can require evidence and find facts as opposed to just examining the face of the complaint in resolving the question, the plaintiffs would bear the burden of proof on a defendant's motion to dismiss, the question likely would be decided by the court as a matter of law than the trier of fact, the parties cannot waive the requirements of the domestic injury exception, and courts could create no equitable exceptions to the requirements.

Bank Ltd., 561 U.S. 247 (2010) (holding that the extraterritorial reach of Section 10(b) of the Securities Exchange Act of 1934 is a merits issue and not a question of subject matter jurisdiction).

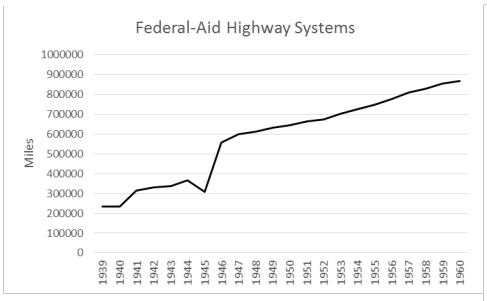
THE *NOERR-PENNINGTON* DOCTRINE

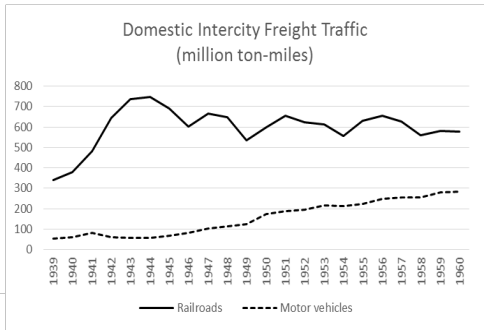
The *Noerr-Pennington* doctrine is a judicial construct that removes concerted or unilateral conduct to induce the government to act from the reach of the antitrust laws, even if the parties desire the government to act egregiously anticompetitive way and the government in fact acts in the way the parties want.

The doctrine, which is usually asserted as a defense to an antitrust claim, has its roots in two Supreme Court cases.

EASTERN RAILROAD PRESIDENTS' CONFERENCE V. NOERR MOTOR FREIGHT, INC. (1961).[33] Long-distance transportation of heavy freight has been the lifeblood of the railroad industry. While for many years that railroad industry had faced only limited competition from truckers due in part to the poor quality of the nation's roads, this began to change with the passage of the Federal-Aid Highway Act of 1944.[34] As long-haul trucking became increasingly competitive with the railroads, the railroads reacted. In 1949, one group, the Eastern Railroad Presidents' Conference (ERRC), an association of the presidents of the presidents of 24 Eastern railroads, contracted with Carl Byoir & Associates, Inc., a New York public relations firm, to develop a publicity campaign to encourage states to adopt truck weight limits and tax rates on heavy trucks and so impede the development of long-haul trucking. The campaign had some success, and was credited with persuading the governor or Pennsylvania to veto the "Fair Truck Bill," which would have increased the weight truckers were permitted to carry on Pennsylvania roads.

On January 17, 1953, the Pennsylvania Motor Truck Association (PMTA), Noerr Motor Freight, Inc., and 40 other individual trucking companies operating in and





33. 365 U.S. 127 (1961). For the lower court opinions in the case, see Noerr Motor Freight, Inc. v. Eastern R. R. Presidents Conference, 113 F. Supp. 737 (E.D. Pa. 1953) (deciding various motions), 155 F. Supp. 768 (E.D. Pa. 1957) (deciding liability), 166 F. Supp. 163 (E.D. Pa. 1958) (entering decree), *decree aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd*, 365 U.S. 127 (1961). For some reporting, see *Truck-Rail Truce Appears To Be Off*, N.Y. TIMES, Nov. 17, 1955, at 53.

34. Pub. L. No. 78-521, 58 Stat. 838 (1944) (establishing a National System of Interstate Highways and providing for a 50 percent federal subsidization of national highways and secondary roads).

through Pennsylvania brought a class action against the ERRC, the 24 railroads represented in the conference, several current and past presidents of these railroads, and Byoir, alleging that the defendants had conspired to restrain trade in and monopolize the long-distance freight business in violation of Section 1 and 2 of the Sherman Act by seeking to destroy interstate competitive highway transportation through the antitrucking publicity campaign. After a four-month trial, the district court found for the plaintiffs. Although the district court held that the Sherman Act did not prohibit mere efforts to influence the passage of new laws or the enforcement of existing ones, the court found that the railroads went further in ways that made their conduct unlawful: (1) they sought to use the lawmaking process to destroy long-haul truckers as competitors, (2) they employed fraudulent techniques to deceive lawmakers into thinking that complaints about the truckers came from disinterested parties and not the railroads, and (3) they sought to destroy the trucker's goodwill with the general public and the truckers' customers independently of any changes in the law.[35] The court entered a decree enjoining the defendants from combining with the object of limiting the growth of long-haul truckers in competition with the defendants by, among other things, seeking to create hostility to the plaintiffs in the minds of the general public or of legislators, law enforcement officers or other public officials; publishing false or defamatory materials about the plaintiffs or their business; or disseminating articles or reports about the plaintiffs or their business without disclosing the defendants' involvement.[36] The Third Circuit affirmed in a per curiam opinion with one judge dissenting.[37]

The Supreme Court, in a unanimous opinion written by Justice Hugo Black, reversed. The Court took as its starting point, as did the district court, that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws."[38] The Court reasoned that "under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the

35. *See* 155 F. Supp. at ___ (E.D. Pa. 1957).

36. *See* 166 F. Supp. at 172-73. The district court also awarded treble damages in the amount of $652,074 to the PMTA for what the court deemed legitimate "defensive" public relation expenses in response to the defendants' illegal activities as well as $200,000 in attorneys' fees. *Id*. at 173. The court also awarded nominal treble damages of $0.18 to each of the individual trucker plaintiffs. *Id*. The individual plaintiffs had stipulated that their only damages resulted from the governor's veto of the Fair Truck Bill, and the district court held that it could not award money damages for injuries proximately resulting from a duly promulgated executive act. *See* 155 F. Supp. at 818, 834-36.

37. 273 F.2d 218 (3d Cir. 1959).

38. 365 U.S. at 135.

Constitution"[39] and that concerted action to influence government action bears no resemblance to the common law restraints of trade to which the Sherman Act was addressed. Moreover, the right to petition the government has constitutional protection and there is no basis in the legislative history of the Sherman Act that Congress sought to impinge on this right. The Court then rejected the district court's reasoning why the defendants' publicity campaign nonetheless violated the Sherman Act. First, the reason the defendants sought new legislation, even if it was solely to destroy the truckers as competitors, was irrelevant to Sherman Act liability:

> The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. . . . Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.[40]

Second, although the deception of the public and lawmakers of the source of information "falls far short of the ethical standards generally approved in this country," it does not make otherwise lawful petitioning activity a violation of the Sherman Act:

> Insofar as that Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical.[41]

Finally, all of the evidence in the record pertained to the railroads' efforts to influence new legislation and the enforcement of existing laws. The Court found it irrelevant that these efforts may have had the incidental effect of harming the truckers' goodwill with the public and hence diminished their business:

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39. *Id*. at 136.
40. *Id*. at 139.
41. *Id*. at 140-41 (footnote omitted).

> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.[42]

Significantly, the Court did note that there may be situations where a lobbying campaign ostensibly directed toward influencing legislation was in fact a "mere sham" to cover efforts to interfere directly with the business of a competitor and where the application of the Sherman Act would be justified. But the Court found that was not the case here.

UNITED MINE WORKERS V. PENNINGTON (1965).[43] By the late 1940s, the coal industry was in serious decline. Capacity expansions during World War II, the post-war contraction of coal demand, decreasing exports as the European coal industry recovered, the emergence of oil and natural gas as alternative fuels (especially for railroads and home heating) in the United States, and increasing mechanization resulted in low prices, low profits, and low wages. The industry was marked by severe labor conflict, particularly over wages, the union welfare fund, and the union's efforts to control miners' working time.

John L. Lewis and other members of the UMW national leadership concluded that the only way for the coal industry to survive was to reduce the cost of coal production so that prices could be competitive in the new environment.[44] To this end, the UMW leadership supported further mechanization of the coal industry and agreed to help finance it, with a share of the increased profits going to higher wages and better working conditions, and increased royalty payments to the union's welfare and retirement fund. These efforts culminated in the National Bituminous Coal Wage Agreement of 1950, a collective bargaining agreement between the United Mine

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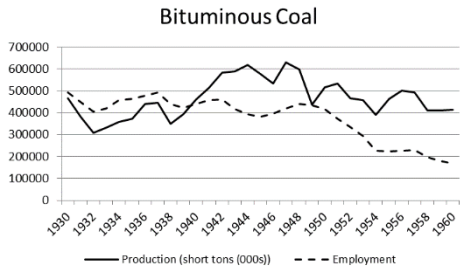
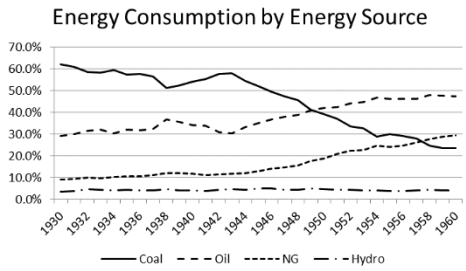
42. *Id*. at 143-44.

43. 381 U.S. 657 (1965). The dissenting and concurring opinion may be found at 381 U.S. 676 (1965). The Sixth Circuit's opinion may be found at Pennington v. United Mine Workers of Am., 325 F.2d 804 (6th Cir. 1963). For the lower court proceedings on remand, see Lewis v. Pennington, 257 F. Supp. 815 (E.D. Tenn. 1966), *aff'd in part, rev'd in part*, 400 F.2d 806 (6th Cir. 1968). For other sources regarding the facts involved in the case, see, for example, THOMAS N. BETHEL, CONSPIRACY IN COAL (1967); Richard A. Couto, *Changing Technologies and Consequences for Labor in Coal Mining*, *in* WORKERS, MANAGERS, AND TECHNOLOGICAL CHANGE 175 (Daniel B. Cornfield ed., 1987).

44. *See Welfare of Miners: Hearing Before the Subcomm. of the H. Comm. Education and Labor*, 80th Cong. 41 (1947) (statement of John L. Lewis, President, United Mine Workers of America); *Coal Mine Health and Safety: Hearings Before the Subcomm. on Labor of the S. Comm. on Labor and Public Welfare on S.355, S.467, S.1094, S.1178, S.1300 and S.1907*, 91 Cong. 458 (1969) (pt. 1) (statement of W.A. Boyle, President, United Mine Workers of America). *See generally* John Peter David, Earnings, Health, Safety, and Welfare of Bituminous Coal Miners since the Encouragement of Mechanization by the United Mine Workers of America. (1972) (unpublished Ph.D dissertation, West Virginia University).





Workers and various coal companies, the most comprehensive industry-wide agreement in the history of the coal industry, and which ended the large-scale labor warfare that had been rampant in the industry.[45] The 1950 agreement increased wages, fixed a standard working day and provided for overtime pay, and raised coal operator royalty payments to the UMW Welfare and Retirement Fund.

Later, in 1954, the UMW, Pittsburgh Consolidation Coal Company (one of the world's largest bituminous coal producers), and the Pocahontas Fuel Company (another large coal producer) filed a petition under the Walsh-Healey Public Contracts Act[46] asking the Secretary of Labor to determine the prevailing minimum wage for bituminous coal miners.[47] Under the act, all coal operators would have to pay their workers at least this amount when supplying bituminous coal under a federal government contract. The Secretary made the requested determination, which had the effect of raising the minimum wage of all coal companies supplying coal to the federal government—most notably to the Tennessee Valley Authority under term contracts—to the level set by the National Bituminous Coal Wage Agreement of 1950 (as amended), even if the coal operators were not signatories to the agreement.[48] A substantial portion of TVA's spot market purchases, however, remained exempt from the Walsh-Healey order. As a result of these developments, many small coal operators could not afford labor costs and ceased doing business.

Phillips Brothers Coal Company, a partnership owned by James M. Pennington, Raymond E. Phillips, and Burse Phillips, and a signatory to the National Bituminous Coal Wage Agreement of 1950, was one of the smaller coal companies to terminate operations in 1958. Later that year, Lewis and the two other trustees of the UMW

45. The agreement did not come together easily. For a description of the bargaining machinations, including a credible threat by President Truman seek authority from Congress to seize the coal mines. *See* MELVYN DUBOFSKY & WARREN VAN TINE, JOHN L. LEWIS: A BIOGRAPHY 482-___ (1977); *Special Message to the Congress on the Coal Strike*, 1950 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN 179 (Mar. 3, 1950).

46. Pub. L. No. 74-846, 49 Stat. 2036 (1936) (codified as amended at 41 U.S.C. §§ 6501-6511).

47. *See* Dep't of Labor, Notice of Proposed Determination of Prevailing Minimum Wages, 20 Fed. Reg. 5690 (Aug. 6, 1955).

48 *See* Dep't of Labor, Part 202—Minimum Wage Determination: Bituminous Coal Industry, 20 Fed. Reg. 8044 (Oct. 26, 1955).

Welfare and Retirement Fund brought a contract action against Pennington and his partners, seeking $55,982.62, alleging that the trustees were owed the amount under the 1950 collective bargaining agreement, but it had not been paid.

The defendants filed an answer, a counterclaim against the plaintiffs, and a cross-claim against the UMW, alleging that the trustees, the UMW, and certain large coal operators had conspired to restrain and monopolize interstate commerce in bituminous coal in violation of Sections 1 and 2 of the Sherman Act. The defendants alleged that the UMW and certain large coal companies had agreed to eliminate the smaller companies from the industry by imposing the terms of the 1950 agreement on all operators regardless of their ability to pay, increasing royalty payments to the welfare fund, seeking the application of the Walsh-Healey Act to set a minimum wage for coal miners supplying the federal government at a level higher than in other industries, urging TVA to curtail its spot market purchases (a substantial portion of which were exempt from the Walsh-Healey order), refusing to lease coal lands to nonunion operators, agreeing not to buy or sell coal mined by nonunion companies, and waging a collusive price-cutting campaign in the TVA spot market through companies in which the UMW had large investments, including West Kentucky Coal Company and its subsidiary, Nashville Coal Company. The defendants claimed actual damages of $100,000 for the period from February 14, 1954, through December 31, 1958, to be trebled under the Clayton Act.

The UMW denied the conspiracy and contended that its conduct was shielded from antitrust liability by the labor exemption and, with respect to the Walsh-Healey and TVA episodes, by the petitioning privilege recognized in *Noerr*. After a five-week jury trial, the jury returned a verdict for Phillips against the trustees and the UMW, fixing damages against the UMW at $90,000, to be trebled. The trial court set aside the verdict against the trustees but denied the UMW's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The Court of Appeals for the Sixth Circuit affirmed. The Supreme Court granted certiorari.

The Supreme Court reversed and remanded. Writing for the Court, Justice White addressed two questions. The first was whether the UMW was exempt from antitrust liability under the labor exemption. The Court acknowledged that the antitrust laws do not bar the existence and operation of labor unions, that a union acting alone may engage in specified conduct without violating the Sherman Act, and that a union may conclude a wage agreement with a multi-employer bargaining unit and seek the same terms from other employers as a matter of its own policy. But the Court held, following *Allen Bradley Co. v. Local Union No. 3, IBEW*, that a union forfeits its exemption when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units for the purpose of eliminating them from the industry. An agreement on wages does not automatically escape Sherman Act scrutiny simply because wages are a mandatory subject of bargaining. Because Phillips alleged precisely such a conspiracy, the trial court correctly denied the UMW's motions for a directed verdict and for judgment notwithstanding the verdict.

The second question was whether the trial court properly instructed the jury regarding the Walsh-Healey and TVA episodes. The Court held that it did not. Under *Noerr*, joint efforts to influence public officials do not violate the antitrust laws even when intended to eliminate competition. The trial court had instructed the jury that the approaches to the Secretary of Labor and to TVA were lawful unless undertaken for the purpose of driving small operators out of business, and so rejected Noerr immunity. The Court disagreed and held that *Noerr* shields such conduct regardless of anticompetitive purpose, whether the conduct stands alone or forms part of a broader scheme that itself violates the Sherman Act. Given the obviously telling nature of this evidence, the error could not be dismissed as harmless. The Court further held that Phillips could not recover any damages attributable to the Secretary of Labor's Walsh-Healey determination, since that was the act of a public official who was not alleged to be a co-conspirator. Accordingly, the Court reversed the judgment and remanded for a new trial with proper instructions.[49]

On remand, the Phillips case was consolidated with several related small-operator antitrust actions against the UMW and, by agreement of the parties, tried to the court without a jury.[50] The petitioning episodes were now out of the case, but the broader conspiracy claim survived: Phillips could still press its allegations that the UMW and the large operators had agreed to impose uniform wage and royalty scales on small operators regardless of their ability to pay, had boycotted nonunion coal, had refused to lease coal lands to nonunion operators, and had waged a predatory price-cutting campaign in the TVA spot market. The Supreme Court had already held that the labor exemption did not shield this conduct. On the remaining evidence, however, the district court found for the UMW, and the Sixth Circuit affirmed the judgment in the UMW's favor on the antitrust claims.[51] The outcome on remand confirmed what the Supreme Court's reasoning had implied: the petitioning evidence—which the Sixth Circuit had previously identified as establishing that the Walsh-Healey determination and the TVA spot market campaign "materially and adversely affected the operations of Phillips"[52]— had been carrying much of the weight at the original trial. Once *Noerr* removed it from consideration, what remained could not sustain the conspiracy.

Pennington's principal doctrinal contribution was to extend *Noerr*'s petitioning immunity beyond its original setting. *Noerr* had involved lobbying a legislature—the most traditional form of petitioning, and the form most obviously protected by the

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[49] The Court was unanimous in its holding on the petitioning question. Justice Douglas, joined by Justices Black and Clark, and Justice Goldberg, joined by Justices Harlan and Stewart, each wrote separately, but their disagreements concerned only the scope of the labor antitrust exemption and not the application of *Noerr*.

[50] Lewis v. Pennington, 257 F. Supp. 815, 816 (E.D. Tenn. 1966), *aff'd in part, rev'd in part*, 400 F.2d 806 (6th Cir. 1968).

[51] The Sixth Circuit also reversed and remanded judgments in favor of two companion operators, Dean Coal Company and W. R. Parton Coal Company, on state-law claims arising from UMW violence during the underlying labor disputes for misapplication of the law.

[52] 325 F.2d at 815.

First Amendment. *Pennington* held that the same immunity attached when the UMW and the large operators sought a favorable wage determination from the Secretary of Labor under the Walsh-Healey Act and lobbied TVA officials to alter their purchasing specifications. The extension was significant because administrative petitioning, unlike legislative lobbying, often targets a discrete competitor's market position rather than general policy; it is, in other words, the setting in which the antitrust concern is sharpest and the temptation to permit a motive inquiry is greatest. The Court nevertheless refused to draw that distinction, treating the right to petition the executive as no less categorical than the right to petition the legislature. The holding was unanimous on this point: though the Justices divided sharply on whether the labor exemption shielded the UMW's broader conduct, all nine agreed that the petitioning episodes could not serve as a basis for antitrust liability. *Pennington* also clarified the practical consequences of the immunity. The Court did not merely hold that petitioning could not support a separate theory of liability; it held that the petitioning evidence had to be excluded altogether, and that any damages attributable to successful petitioning had to be stripped from the verdict. The immunity, in other words, was not just a defense to a claim but a rule of exclusion—one that could reshape the evidentiary landscape of an antitrust case even when other, unprotected conduct remained at issue.

Personal Jurisdiction and Venue

PERSONAL JURISDICTION AND VENUE

CLAYTON ACT

Section 4. Suits by persons injured

(a) *Amount of recovery; prejudgment interest*. Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws *may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy*, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [emphasis added; prejudgment interest provision redacted] [15 U.S.C. § 15(a)]

[Sections 4(b)-4(d) omitted]

Section 16. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, *in any court of the United States having jurisdiction over the parties*, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff. [emphasis added] [15 U.S.C. § 26]

Section 12. District in which to sue corporation

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found. [15 U.S.C. § 22]

JUDICIAL CODE

28 U.S.C. § 1391 Venue generally

(a) *Applicability of Section*. Except as otherwise provided by law—
  (1) this section shall govern the venue of all civil actions brought in district courts of the United States; and
  (2) the proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature.

(b) *Venue in General*. A civil action may be brought in—
  (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
  (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
  (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

(c) *Residency*. For all venue purposes—
  (1) a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled;
  (2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business; and
  (3) a defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.

(d) *Residency of Corporations in States with Multiple Districts*. For purposes of venue under this chapter, in a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

(e) *Actions Where Defendant Is Officer or Employee of the United States*.
  (1) In general. A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the

United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which

(A) a defendant in the action resides,

(B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or

(C) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

(2) Service. The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

(f) *Civil Actions against a Foreign State*. A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

(g) *Multiparty, Multiforum Litigation*. A civil action in which jurisdiction of the district court is based upon section 1369[1] of this title may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.

[1] 28 U.S.C. § 1369 deals with mass tort accidents involving the death of at least 75 natural persons at a discrete location (e.g., airplane crashes).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:08cv1311 (AJT/JFA)
	)	
MICROSEMI CORPORATION,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION [*]

This case is an antitrust enforcement action brought by the United States, through the Antitrust Division of the Department of Justice ("DOJ"), against defendant Microsemi Corporation ("Microsemi"). It is based on Microsemi's acquisition of substantially all of the assets of Semicoa, Inc. ("Semicoa"), an alleged competitor with respect to the manufacture and sale of certain highly specialized electronic components used in aerospace and military applications. In its two count Verified Complaint ("VC"), the Government alleges that Microsemi's acquisition of Semicoa's assets substantially lessened competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and that as a result of the acquisition, Microsemi created a monopoly and obtained monopoly power in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. VC, ¶¶ 4, 48, 51.

Presently pending before the Court is Microsemi's Motion to Dismiss for Improper Venue, Motion to Dismiss for Lack of Personal Jurisdiction, or, in the alternative, Motion to Transfer Venue (collectively "the Motions"). The Court heard oral argument on the Motions on February 20, 2009, following which it took the Motions

[* Reported at 2009 WL 577491]

under advisement. For the reasons stated herein, the Court DENIES Microsemi's Motion to Dismiss for Improper Venue, DENIES its Motion to Dismiss for Lack of Personal Jurisdiction and GRANTS its Motion to Transfer Venue.

I. Background

Microsemi is a Delaware Corporation with its principal place of business in Irvine, California. VC, ¶ 7. It manufactures certain "high reliability" semiconductors that are used in what are known as JANS and JANTXV[1] small signal transistors and "ultra fast recovery rectifier diodes," products which essentially function as switches and one-way valves in regulating the flow of an electric current. VC, ¶¶ 7, 12. These transistors and diodes are manufactured to exacting standards and are used by the military services and the national security agencies of the United States in a wide range of critical space, air, land and sea applications. VC, ¶¶ 1, 11, 12. Microsemi's manufacturing facilities for these products are located in California, Arizona and Massachusetts and these products are shipped to customers throughout the United States. VC, ¶ 7.

Semicoa was a California corporation with its principal place of business in Costa Mesa, California. VC, ¶ 8. It also engaged in the manufacture and sale of JANS and JANTXV small signal transistors and was in the process of becoming a manufacturer of JANTXV and JANS diodes. VC, ¶¶ 8, 35. Semicoa's manufacturing facilities for these products were located in Costa Mesa, California, and its products were shipped to customers throughout the United States. VC, ¶ 8.

[1] "JANS" is the acronym for "Joint Army-Navy Space" and is the designation for the highest reliability grade certified by the Department of Defense. "JANTXV" is the acronym for "Joint Army-Navy Technical Exchange-Visual Inspection" and is the second highest reliability grade certified by the Department of Defense. VC, ¶ 15.

On July 14, 2008, Microsemi and Semicoa completed an asset purchase and sale transaction by which Microsemi acquired from Semicoa the entire portion of its business engaged in the development, manufacture and sale of the JANS and JANTXV small signal transistors and diodes ("the Acquisition"). VC, ¶ 7. The acquired Semicoa assets are located in Costa Mesa, California, together with all the documentation relating to those assets. Microsemi's Mem. in Supp., ("Def. Br."), Ex. A at ¶¶ 6-7. On December 18, 2008, the Government filed this action in this Court. The Government alleges subject matter jurisdiction under Section 4 of the Sherman Act and Section 15 of the Clayton Act, 15 U.S.C. §§ 4 and 25. It alleges venue in this district pursuant to Section 12 of the Clayton Act, 15 U.S.C. § 22 and 28 U.S.C. § 1391(c), with venue proper in this Division pursuant to Local Civil Rule 3(C). VC, ¶¶ 5, 6.

II. Motion to Dismiss for Improper Venue and Motion to Dismiss for Lack of Personal Jurisdiction

Microsemi seeks the dismissal of this action on the grounds that venue is not proper in this Court and that this Court may not constitutionally exercise personal jurisdiction over it. The parties agree that the critical inquiry is whether venue is proper in this Court since the existence of the factual prerequisites for venue would satisfy those necessary for this Court to exercise personal jurisdiction. *See Reynolds Metals Co. v. Columbia Gas Sys., Inc.*, 669 F. Supp. 744, 747 (E.D. Va. 1987) ("[t]he same general due process principles provide the standard for making both venue and personal jurisdiction determinations."). Once a district court has established venue under the Clayton Act, the Court "may properly obtain personal jurisdiction over the defendant through extra-territorial service of process." *Id.*

In support of its position that venue is not proper in this district, Microsemi has submitted sworn declarations that evidence Microsemi's lack of ties to this district and Virginia. On the basis of these declarations, Microsemi contends that it is not an "inhabitant" of Virginia, that it is not "found" in Virginia and that it does not "transact business" in Virginia. Def. Br. at 6. Specifically, Microsemi is not incorporated or registered to do business in Virginia, has no offices or employees in Virginia, does not own or lease any property or facilities in Virginia, does not maintain any bank or financial accounts in Virginia, does not manufacture any products in Virginia, and otherwise has no physical presence in Virginia. Def. Br., Ex. A at ¶¶ 4, 8. In challenging venue, Microsemi relies heavily on the amount of its business revenue derived from sales transactions with Virginia customers, which accounts for only $1.8 million out of its total worldwide sales of $514 million. Def. Br. at 8. Microsemi further points out that $1.7 million of that $1.8 million[2] pertains to a single Virginia customer, Orbital Sciences, and that the contracts associated with those sales arose from unsolicited orders governed by California or New York law, and not Virginia law. Rebuttal Mem. in Supp. of Motions ("Def. Rebuttal Br.") at 3. Moreover, Microsemi asserts that it does not physically ship products directly into Virginia, but rather transfers products to a common carrier at a location outside of Virginia under a shipping arrangement where title to the product passes to Virginia customers outside of Virginia. Def. Br., Ex. A at 9-11.

[2] A second tier subsidiary of Microsemi also sold $475,000 of products to Virginia customers during fiscal year 2008. These sales, however, do not relate to the Government's antitrust claims. Microsemi contends that these sales should not be considered in evaluating whether it "transacts business" in this district. *See* Def. Br. at 10 (citing *Diamond Chem. Co. v. Atofina Chemicals, Inc.*, 268 F. Supp. 2d 1, 12 (D.D.C. 2003)). The Government does not appear to rely on these sales to justify venue in this district.

The Government contends that venue is proper in this district because (1) Microsemi has been selling and shipping its products into Virginia for the past nine years, with "substantive price negotiations by phone or e-mail accompanying these sales;"[3] (2) Microsemi has derived more than $6 million from sales to Virginia over the last four years; (3) Microsemi is one of the "principal suppliers" of Orbital Sciences, located in Virginia, and (4) two "key" Microsemi executives traveled to Virginia on one occasion in 2007 for contract negotiations. *See* Mem. in Opp. To Motions ("Gov. Br.") at 1-5, Ex. B at (3)–(7). On this basis, the Government contends that Microsemi has "continuous and substantial contacts" with customers located in this district sufficient to sustain venue and personal jurisdiction in this district. Gov. Br. at 4.

In response, Microsemi contends that its Virginia related sales in 2008 constituted only 0.35% of its worldwide sales and are therefore not "substantial" but "de minimis" and only a "tiny fraction" of its own worldwide sales, its Virginia customers' overall product costs and the Virginia economy. Def. Br. at 8-9. Microsemi claims that in evaluating whether business operations are "substantial" for venue purposes, "business operations are to be viewed from the perspective of the defendant, as opposed to the perspective of a particular customer of the defendant located in the forum state." Def. Rebuttal Br. at 8. They must also be evaluated, Microsemi contends, as of the time of the challenged transaction. Microsemi also contends that the shipment of goods into a state, without more, does not constitute "transacting business," invoking constitutional

[3] It appears that these sales take place pursuant to the classic "battle of the forms" and that its Virginia customers do not concede that Microsemi's standard form contract governs. *See* Gov. Br., Ex. B, ¶ 4.

limitations on the exercise of personal jurisdiction.[4] Def. Rebuttal Br. at 4-7. Characterizing the evidence in favor of venue in this district as "limited purchases by three customers and a single business trip," Microsemi claims that courts have uniformly refused to find that a company "transacts business" when faced with this limited level of interaction with a forum state.

Venue in this case is governed by Section 12 of the Clayton Act, 15 U.S.C. § 22, which provides in pertinent part:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

The history of this provision is instructive. Enacted in 1914, Section 12 of the Clayton Act added the phrase "or transacts business" to the language of the venue provision in Section 7 of the Sherman Antitrust Act, which had provided for venue only in those districts where the defendant "resides or is found." *See United States v. Scophony Corp. of Am.*, 333 U.S. 795, 807, 808 (1948). Before Section 12 was enacted, the Supreme Court interpreted venue under Section 7 narrowly, refusing to find venue proper where a company, though not physically present in the state, had engaged in certain commercial activities directed to the district on the grounds that these activities did not constitute the sort of "doing business" that caused the company to be "found" there. *See People's Tobacco Co. v. Am. Tobacco Co.*, 246 U.S. 79 (1918) (no venue under Section 7 where the company had withdrawn from the district but continued to advertise in the district,

[4] Microsemi claims that in the last two years, its commercial relationship with Orbital Sciences "has declined significantly" and the alleged "long term" contract is no longer in effect. *See* Def. Rebuttal Br. at 9.

made interstate sales in the district through third parties and sent into the jurisdiction certain individuals who solicited business). In *Eastman Co. v. Southern Photo Co.*, 273 U.S. 359 (1927), the Supreme Court considered whether Section 12 in fact broadened venue or "merely made explicit what had been decided" under Section 7. *Id.* at 361.

In *Eastman*,[5] the Supreme Court found that Congress intended Section 12 to be an expansion of Section 7 and that by extending venue to those districts where the defendant "transacts business," Section 12 of the Clayton Act supplements "the remedial provision of the Anti-Trust Act for the redress of injuries resulting from illegal restraints upon interstate trade." *Id.* at 373. The *Eastman* Court also found that Section 12 had the effect of "relieving the injured person from the necessity of resorting for the redress of wrongs committed by a non-resident corporation, to a district, however distant, in which it resides or may be 'found.'" *Id.* at 373. It therefore found that Section 12 was broadened in order to afford victims of illegal antitrust activity a convenient forum, which it envisioned would often be where the customer was located. *Id.* at 373-74; *see also Scophony*, 333 U.S. at 808. In light of these remedial purposes, the Court in *Eastman* concluded that a corporation "is engaged in transacting business in a district . . . if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character." *Id.* at 373. It further found that a company was "none the less engaged in transacting business" within the meaning of Section 12 of the Clayton Act "because of the fact that such business may be entirely interstate in character and be transacted by agents who do not reside within the district." *Id.* at 373.

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[5] In *Eastman*, the Supreme Court considered whether under the "transacts business" provision of Section 12 a New York corporation could be sued in Georgia when it had no offices or employees located there and its Georgia directed activities did not cause it to "reside" or be "found" there.

In *Scophony,* the Supreme Court observed that *Eastman* "gave the words 'transacting business' a much broader meaning for establishing venue than the concept of 'carrying on business' denoted by 'found' under the preexisting statute and decisions." *Id.* at 807. The Court in *Scophony* also found that "by substituting practical, business conceptions for the previous hair-splitting legal technicalities encrusted upon the 'found'-'present'-'carrying on business' sequence, the Court [in *Eastman*] yielded to and made effective Congress' remedial purpose." *Id.* at 808.

As directed by *Eastman* and *Scophony*,[6] this Court must determine whether venue exists under Section 12 by considering the "practical, non-technical, business standard supplied by 'or transacts business' in the venue provision." *Id.* at 810. That inquiry should reflect a broad, expansive reading of Section 12's "transacts business" provision and the totality of facts and circumstances pertaining to a defendant's interaction with the forum. *See, e.g., Reynolds Metals Co.,* 469 F. Supp. at 748.

The dollar value of sales revenue generated within the proposed venue is typically viewed as the most direct measure of the degree to which one engages in business "of a substantial character." *See Sunbury Wire Rope Mfg. Co. v. United States Steel Corp.*, 129 F. Supp. 425, 427 (E.D. Pa. 1954) ("The selling of its product is the most important part of a business. There can be a substitute for every department of a business but sales. Products or parts of them can be bought instead of manufactured, but there can be no substitute for sales."). Sales revenue, however, is not the only measure of a business activity's "character" for the purposes of evaluating venue in federal antitrust cases.

[6] The Fourth Circuit has not directly considered the meaning of "transacting business" in Section 12.

In order to achieve the remedial purposes recognized in *Eastman* and *Scophony*, this Court should also consider the nature and significance of the defendant's contact with the forum, as seen from the perspective of those who may have claims as a result of illegal antitrust activity. Viewed in that light, the role and impact of the involved products on the business fortunes of customers and competitors in the district is also a pertinent consideration. *See Athletes Foot of Delaware, Inc. v. Ralph Libonati Co.*, 445 F. Supp. 35 (D. Del. 1997) (court found that in evaluating whether sales volumes were "of a substantial character," "the substantiality of business operations is to be determined from the viewpoint of the average businessman rather than the corporate giant.").[7] This Court therefore rejects the proposition that the significance of those contacts is to be evaluated solely from the defendant's perspective or in terms of the amount of revenue generated from a particular forum as a percentage of overall sales. Likewise, for these purposes, the particular structure and mechanisms of the sales, such as shipping arrangements or ordering procedures, is irrelevant. *See B.J. Semel Assocs., Inc. v. United Fireworks Mfg. Co.*, 355 F.2d 827, 832 (D.C. Cir. 1965).[8] This Court also rejects as simply inapposite those cases relied on by Microsemi where a business' operations relative to a particular forum or state were evaluated for the purposes of determining whether general jurisdiction exists over a defendant or whether a defendant is "transacting business" for

[7] The court added: "The proper measure of substantiality of sales within a district is the absolute dollar amount of those sales." *Athletes Foot*, 445 F. Supp. at 47. Otherwise, "a large corporation could, with impunity, engage in the same act which would subject a smaller corporation to jurisdiction and venue." *Id.* at 43 (quoting *Green v. United States Chewing Gum Mfg. Co.*, 224 F. 2d 369, 372 (5th Cir. 1955)).

[8] The *Semel* court stated: "We are unable to believe that the spirit of *Scophony* comports with allowing the seller's shipping practices to determine his amenability to suit under Section 12. Were it otherwise, F.O.B. would always, and without more, compel the buyer to litigate on the seller's home grounds - the very result which Congress sought to avoid in Section 12." *B.J. Semel*, 355 F.2d at 832.

the purposes of state long arm jurisdiction, with sufficient "minimum contacts" for the constitutional exercise of state jurisdiction over a state cause of action under the Due Process Clause of the Fourteenth Amendment. *See e.g., Bay Tobacco, LLC v. Bell Quality Tobacco Prod.*, 261 F. Supp. 2d 483, 491 (E.D. Va. 2003) (evaluating jurisdiction under the Virginia long-arm statute); *cf. Board of Trustees v. McD Metals*, 964 F. Supp. 1040, 1044 (E.D. Va. 1997) ("It is the *Fifth Amendment*, not the *Fourteenth Amendment*, that controls due process analysis in non-diversity, or federal question, cases. Generally, the *due process* inquiry under the *Fifth Amendment* is broader than that under the parallel clause of the *Fourteenth Amendment*.") (emphasis in original).[9]

In this case, the record reflects that before the challenged transaction, Microsemi derived at least $6 million in revenue from sales of the relevant products to customers in Virginia. The vast majority of these sales came from a single customer, Orbital Sciences.

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[9] Microsemi cites three cases decided under Section 12 where venue was rejected on the grounds that sales into a district were not "substantial." First, *Commonwealth Edison Co. v. Fed. Pac. Elec. Co.*, 208 F. Supp. 936, 939 (N.D. Ill. 1962) involves sales of approximately $3,000 by a company with no other ties to the district. Second, *Pocahontas Supreme Coal Co. v. Nat'l Mines Corp.*, 90 F.R.D. 67 (S.D.N.Y. 1981) involved a company with no ties to the Southern District of New York or to New York State, but which made "spot market" sales constituting 0.2 percent of defendant's production to New York customers, although it is unstated whether the sales were to customers in the district. Third, *Sea-Roy Corp. v. Parts R Parts, Inc.*, No. 1:94cv59, 1996 WL 557857 (M.D.N.C. 1996) involved the particular application of Section 12 to a German company that sold plaintiff $1.4 million of the products at issue over an eleven year period in Germany and the products were shipped to North Carolina at plaintiff's risk and expense, where the plaintiff resold them. The German company had no presence in the United States through offices, employees, property, agents, bank accounts or otherwise and was not licensed to do business in the United States. The plaintiff's business relationship with the German company ended several years before suit was filed, although the cause of action arose out of the terminated business relationship. In rejecting venue under Section 12, the court relied on those cases that dealt with considerations solely applicable to foreign corporations and which implicated Due Process considerations under the Fifth Amendment. The court also rejected venue under the North Carolina long arm statute as to asserted state law claims.

While the cost of these products may be a relatively small percentage of Orbital Sciences' overall manufacturing costs, these components play an important role in Orbital Sciences' ability to manufacture and deliver products using these components.

In *Sunbury Wire Rope Manufacturing Company*, the court concluded in 1954 that "[n]o ordinary businessman would be likely to say that the delivery of almost $600,000 worth of a company's product into the [selected district] within less than two years as part of sales transactions does not constitute the transacting of business in that district." *Sunbury Wire Rope Mfg. Co. v. U.S. Steel Corp.*, 129 F. Supp. 425, 427 (E.D. Pa. 1954). What was said in 1954 about $600,000 can be said about $6 million today. Viewing this case from the perspective of a customer in Orbital Sciences' position, the availability of a forum in this district under Section 12 becomes clearer, as the exercise of venue would accomplish the remedial purposes of Section 12 as articulated in *Eastman* and *Scophony*. That the plaintiff in this case is the United States does not make unavailable what would otherwise be an available venue under Section 12.

For these reasons, this Court finds that venue under Section 12 of the Clayton Act is proper in this district and Defendant's Motion to Dismiss for Improper Venue is DENIED. As all parties agree that this Court has personal jurisdiction if venue is proper, Defendant's Motion to Dismiss for Lack of Personal Jurisdiction is also DENIED.

III. Motion to Transfer

[Ed. Omitted]

For the above reasons, this Court finds that under the factors set forth in Section 1404(a), this case should be transferred to the Central District of California and Defendant's Motion to Transfer the case to the Central District of California is GRANTED.

An appropriate Order will issue.

/s/
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
March 4, 2009

Prudential Standing

CONSTITUTIONAL AND STATUTORY STANDING

Standing is an attribute a plaintiff must have to invoke a court's jurisdiction to adjudicate the plaintiff's claim. It is a necessary element in every justiciable case or controversy.[1] Standing goes to the plaintiff's person, that is, whether the plaintiff is a proper party to bring the action and obtain the relief sought and not to the merits of the claim. Standing is determined by the facts that exist at the time the complaint is filed,[2] and the plaintiff must demonstrate standing separately for each claim[3] and for each form of relief it seeks.[4]

Standing has two components: *constitutional standing* and *statutory standing*.[5] Since the 1980s, statutory standing—often discussed in older cases as *prudential standing*—has been one of the primary constraints on the ability of injured parties to bring private antitrust actions. The Supreme Court has cautioned that the "prudential standing" label can be misleading since the modern approach treats these limits as questions of statutory interpretation defining the scope of the cause of action.[6] Before turning to statutory standing, a brief review of constitutional standing is in order.

CONSTITUTIONAL STANDING

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .[7]

Article III of the Constitution limits the federal "Judicial Power," that is, the jurisdiction of federal courts, to "Cases" and "Controversies."[8] The case or controversy requirement serves two purposes: it confines the power of federal courts

1. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998); Allen v. Wright, 468 U.S. 737, 750 (1984); Warth v. Seldin, 422 U.S. 490, 498 (1975).

2. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 n.4 (1992).

3. *See, e.g.*, Griffen v. Dugger, 823 F.2d 1476, 1483 (11 Cir. 1987); *In re* Terazosin Hydrochloride Antitrust Litig., 160 F. Supp. 2d 1365, 1971 (S.D. Fla. 2001).

4. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 191-92 (2000); see Los Angeles v. Lyons, 461 U.S. 95, 109 (1983) (finding plaintiff had standing to pursue damages but lacked standing to pursue injunctive relief).

5. Bennett v. Spear, 520 U.S. 154, 162 (1997); Warth v. Seldin, 422 U.S. 490, 498 (1975); Barrows v. Jackson, 346 U.S. 249 (1953). For an antitrust case, see Associated Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters, 459 U.S. 519, 535 n.31 (1983) ("Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action.").

6. *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014).

7. U.S. Const. art. III, § 2.

8. *Id.*; *see* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982).

to the adjudication of "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," and it defines the "role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government."[9]

Constitutional standing, which arises from the case or controversy requirement of Article III, has three "irreducible" elements:

1. *Injury-in-fact:* The plaintiff must suffer an "injury in fact," that is, an invasion of a legally protected interest that is "concrete and particularized" and is actual or imminent as opposed to conjectural or hypothetical.[10]
2. *Causation:* There must be a causal connection between the injury and the challenged conduct, that is, the injury must be fairly traceable to the defendant's action.
3. *Redressability:* It must be "likely" rather than "speculative" that the court's decision in favor of the plaintiff will redress the plaintiff's injury.[11]

In injunctive actions, these requirements are modified where the injury for which relief is sought is a future injury resulting either from threatened or continuing wrongful conduct (e.g., a continuing scheme of unlawful tying) or from past conduct with a future effect (e.g., an anticompetitive merger):

9. Flast v. Cohen, 392 U.S. 83, 95 (1968); *accord* United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980); *see* Allen v. Wright, 468 U.S. 737, 750 (1984) (observing that the case or controversy requirement "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded").

10. In TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021), Justice Kavanaugh, writing for a 5-4 majority, observed in the opening of his opinion:

> To have Article III standing to sue in federal court, plaintiffs must demonstrate, among other things, that they suffered a concrete harm. No concrete harm, no standing. Central to assessing concreteness is whether the asserted harm has a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts-such as physical harm, monetary harm, or various intangible harms including (as relevant here) reputational harm.

Id. at 2200 (citing Spokeo, Inc. v. Robins, 578 U. S. 330, 340-341 (2016)).

11. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); *accord* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1545 (2016) (analyzing concreteness and particularization as two district requirements of injury-in-fact); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000); Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-03 (1998); Bennett v. Spear, 520 U.S. 154, 162 (1997); United States v. Hays, 515 U.S. 737, 742-43 (1995). The *Lujan* summary draws on the jurisprudence of many prior cases, including Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979); Simon v. East Ky. Welfare Rights Org., 426 U.S. 26, 38, 41 (1976); and Ass'n of Data Processing Srvs. Orgs. v. Camp, 397 U.S. 150, 152 (1970).

1. *Future injury*. Absent intervention by the court, the plaintiff is likely to suffer future injury by the defendant by the defendant's continuing wrongful conduct and that the requested relief will prevent this future injury.[12]

2. *Continuing injury*. The defendant's past wrongful conduct will continue in the future to injure the plaintiff, and the requested relief will negate or mitigate this injury.[13]

In addition, a plaintiff seeking an injunction must show an imminent threat of irreparable harm, although this requirement is grounded in the traditional limitations on the court's power to grant injunctive relief and not in Article III.[14] Courts often summarize these requirements by saying that the parties have a "personal stake" in the outcome of the litigation.[15]

The party invoking federal jurisdiction has the burden of establishing Article III standing.[16] Although standing must be assessed as of the start of litigation, it may be raised as a defense under Rule 12(b)(1) of the Federal Rules of Civil Procedure at any time during the litigation, including during an appeal. When a live case or controversy ceases to exist, the case is said to become *moot*. Antitrust cases, just as other cases, have been dismissed for lack of Article III standing.[17]

STATUTORY STANDING

Originally, statutory standing was seen as a requirement of judicial self-restraint, not constitutional authority.[18] The Supreme Court's 2014 decision in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*[19] fundamentally reshaped the doctrine, cautioning that describing the inquiry as "prudential standing" can obscure the fact that it is, at bottom, a matter of statutory interpretation concerning the scope of the cause of action.[20] Beyond renaming the inquiry, *Lexmark* dismantled the traditional

12. City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983); *see* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 108 (1998). The future emotional consequences of a past act does not, standing alone, constitute the requisite future injury under this test. City of Los Angeles v. Lyons, 461 U.S. 95, 107 n.8 (1983).

13. *City of Los Angeles*, 461 U.S. at 102.

14. *Id*. at 111.

15. *See* Baker v. Carr, 369 U.S. 186, 204 (1962); *accord* Raines v. Byrd, 521 U.S. 811, 819 (1997); Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477-78 (1990); Los Angeles v. Lyons, 461 U.S. 95, 101 (1983); O'Shea v. Littleton, 414 U.S. 488, 494 (1974); Flast v. Cohen, 392 U.S. 83, 99-101 (1968).

16. Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990).

17. *See, e.g.*, Duty Free Americas, Inc. v. Estee Lauder Cos., 797 F.3d 1248, 1270-73 (11th Cir. 2015); Johnson v. Comm'n on Presidential Debates, 202 F. Supp. 3d 159, 168-70 (D.D.C. 2016).

18. *See* Warth v. Seldin, 422 U.S. 490, 498-99 (1975); Valley Forge Christian College v. Americans United, 454 U.S. 464, 471-76 (1982); Allen v. Wright, 468 U.S. 737, 751 (1984); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Bennett v. Spear, 520 U.S. 154, 162 (1997).

19. 572 U.S. 118 (2014).

20. *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125-28 (2014).

framework of prudential standing: the zone-of-interests test became a question of pure statutory interpretation, while the bar on generalized grievances was recharacterized as a constitutional requirement rooted in Article III rather than a prudential limitation. Under this framework, statutory standing asks whether the plaintiff falls within the class Congress authorized to sue under the statute. Courts generally presume that Congress legislates against background interpretive principles that limit the reach of a statutory cause of action unless the statute indicates otherwise.[21] Statutory standing aims to determine whether the plaintiff is "a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers."[22] In administrative law, this inquiry is often described as the "zone of interests" test,[23] but the principle applies to private rights of action in all areas of the law.[24]

Although there is no single rule to answer every statutory standing question,[25] as a general principle, statutory standing requires that the plaintiff assert its own particularized legal rights rather than those of a third party absent statutory authorization and that the private interest the plaintiff seeks to protect be within the area ("zone of interests") protected by the law that provides the cause of action the plaintiff has invoked.[26] In this sense, statutory standing not only furthers the "concrete adverseness" between the litigants constitutionally essential to the

21. Bennett v. Spear, 520 U.S. 154, 163 (1997); United Food & Commercial Workers Union v. Brown Group, Inc., 517 U.S. 544, 557 (1996).

22. Flast v. Cohen, 392 U.S. 83, 99–100 (1968); *see* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 804 (1985) (statutory standing requirements designed "to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim").

23. *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970) (originating the zone of interests test to determine whether a person aggrieved by an administrative action has standing to challenge the action under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702); Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 224-25 (2012) (applying the zone of interests test under the APA and confirming that the test "is not meant to be especially demanding").

24. Some courts have resisted using the zone of interests rubric in other areas of the law on the view that in administrative law the test has too permissive a tilt toward recognizing standing. *See* Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 226 (3d Cir. 1998); *see also* Bennett v. Spear, 520 U.S. 154, 163 (1997) ("[T]he breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the 'generous review provisions' of the [APA] may not do so for other purposes.") (citations omitted); Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 400 n.16 (1987) ("While inquiries into reviewability or statutory standing in other contexts may bear some resemblance to a 'zone of interests' inquiry under the [APA], it is not a test of universal application.").

25. Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 400 n.16 (1987); *see* Associated Gen. Contractors v. Calif. State Council of Carpenters, 459 U.S. 519, 537 n.33 (1983).

26. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474-75 (1982). Statutory standing also requires courts refrain from adjudicating "abstract questions of wide public significance," Warth v. Seldin, 422 U.S. 490, 499 (1975), although in some circumstances this might rise to a constitutional requirement for a "case" or "controversy" under Article III, Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992).

adversarial process, but also respects the separation of powers by limiting judicial resolution to cases brought by plaintiffs that Congress sought to protect.

Notably, statutory and constitutional standing operate as independent prerequisites to an action. In *TransUnion LLC v. Ramirez*,[27] the Supreme Court held that plaintiffs alleging violations of the Fair Credit Reporting Act lacked Article III standing despite having a statutory cause of action, because they could not demonstrate concrete harm from the alleged violations. *TransUnion* underscores that satisfying statutory standing requirements—falling within the zone of interests and the class Congress authorized to sue—does not automatically satisfy Article III's injury-in-fact requirement.

Because statutory standing limits are grounded in statutory interpretation rather than constitutional constraints on the jurisdiction of the federal courts, courts apply them as part of determining whether the plaintiff has a valid cause of action and not as a limit on subject-matter jurisdiction. At the same time, some historically prudential limits on who may assert a claim—most notably restrictions on third-party standing—have been relaxed in particular circumstances when necessary to vindicate important rights, as in cases permitting litigants to assert the rights of others. This flexibility, however, operates at the level of prudential doctrines such as third-party standing and does not authorize courts to expand the statutory class of plaintiffs beyond what Congress has specified.

The presence of statutory standing is a question of law for the court to decide.[28] Since statutory standing is not a prerequisite to the court's subject matter jurisdiction,[29] a court is not obligated to raise an absence of statutory standing on its own, and a defendant may forfeit the defense if it is not timely asserted. The absence of statutory standing is generally regarded as a defense and must be raised as such by the defendant in a proper motion or the defense will be waived. A motion to dismiss for lack of statutory standing proceeds under Rule 12(b)(6) for failure to state a cause of action for which relief may be granted rather than Rule 12(b)(1) for lack of subject matter jurisdiction.[30] The defense may also be raised in a motion for summary

27. 594 U.S. 413 (2021).

28. *Warth*, 422 U.S. at 498-99; *In re* ATM Fee Antitrust Litig., 686 F.3d 741, 747 (9th Cir. 2012).

29. *In re* Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 108 (D.C. Cir. 2002); *see* Associated Gen. Contractors, Inc. v. Calif. State Council of Carpenters, 459 U.S. 519, 535 n.31 (1983) (antitrust standing not a constitutional requirement); *cf.* Lerner v. Fleet Bank, N.A., 318 F.3d 113, 129-30 (2d Cir. 2003) ("RICO standing" is not jurisdictional).

30. *See, e.g.*, Associated Gen. Contractors v. Calif. State Council of Carpenters, 459 U.S. 519 [CHECK 535–36, 540–46] (1983) (reviewing a decision on a motion to dismiss under Rule 12(b)(6)); Insulate SB, Inc. v. Advanced Finishing Sys., Inc., 797 F.3d 538, 542 (8th Cir. 2015); NicSand, Inc. v. 3M Co., 507 F.3d 442, 449 (6th Cir. 2007) (en banc) (explaining courts "must[ ] reject claims under [Federal Rule of Civil Procedure] 12(b)(6) when antitrust standing is missing").

judgment under Rule 56[31] or a motion for judgment as a matter of law under Rule 50.[32]

STATUTORY STANDING IN ANTITRUST LAW (ANTITRUST STANDING)

When Congress originally enacted the Sherman and Clayton Acts, it sought to bolster enforcement by creating a private right of action so that private parties could act as "private attorneys general" in enforcing these statutes.[33] The idea was that, in seeking relief from threatened or actual injury, private plaintiffs not only obtain redress and vindication for their private harms but also advance the public interest by deterring unlawful anticompetitive conduct.[34] The original Sherman Act created a private right of action providing for treble damages for injuries to "business or property" resulting from a violation of the statute.[35] In 1914, after some question had been raised as to whether a private right of action existed for injunctive and other equitable relief to redress pending or threatened violations of the antitrust laws in the absence of explicit statutory authorization,[36] Congress included such a right in the Clayton Act.[37]

Consistent with the notion of private attorneys general, for much of the history of antitrust law courts have interpreted the private rights of action provisions very expansively. In 1948, for example, the Supreme Court observed in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co*.[38] that the Sherman Act "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers" but rather "is comprehensive in its terms and coverage, protecting all who are made

31. *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3, 9 (1997); Atlantic Richfield Co. v. USA Petroleum Co. 495 U.S. 328, 333 (1990).

32. *See, e.g.*, St. Louis Convention & Visitors Comm'n v. National Football League, 154 F.3d 851, 864-65 (8th Cir. 1998).

33. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985); Associated General Contractors of Calif., Inc. v. Calif. State Council of Carpenters, 459 U.S. 519, 542 (1983); Illinois Brick v. Illinois, 43l U.S. 720, 746 (1977); Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969).

34. *See* California v. Am. Stores Co., 495 U.S. 271, 284 (1990); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485 (1977); Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969); Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 502 (1969); Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 138-40 (1968).

35. Sherman Act § 7, ch. 647, 26 Stat. 209, 210 (1890). The private cause of action was moved to Section 15 of the Clayton Act when that statute was enacted in 1914, so that it would be applicable to all violations of the antitrust laws and not just violations of the Sherman Act. *See* Clayton Act § 4, ch. 323, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15).

36. *See* Minnesota v. Northern Sec. Co. 194 U.S. 48, 70-71 (1904); *see also* Duplex Printing Press Co. v. Deering, 254 U.S. 443, 465 (1921) (noting question); Paine Lumber Co. v. Neal, 244 U.S. 459, 471 (1917) (same).

37. Clayton Act § 16, ch. 323, 38 Stat. 730, 737 (1914) (current version at 15 U.S.C. § 26).

38. 334 U.S. 219 (1948).

victims of the forbidden practices by whomever they may be perpetrated."[39] Later, in *Blue Shield of Virginia v. McCready*,[40] decided in 1982, the Supreme Court noted that Section 4 "'contains little in the way of restrictive language'" and that this "lack of restrictive language reflects Congress 'expansive remedial purpose' in enacting § 4."[41]

Beginning in the late 1970s, however, the Court began to pull back from the idea that an antitrust violation, proximate causation, and some injury to business or property was enough for a private cause of action under Section 4 for treble damages. This was a time when the Burger Court generally, and Chief Justice Warren E. Burger in particular, were concerned about the caseload on the courts, especially from a plethora of complex antitrust cases, and were seeking judicial ways to lighten this load. One way was to create prudential limitations on the ability of plaintiffs to bring complex antitrust actions. The statutory standing requirement under the antitrust laws is commonly called *antitrust standing*.[42] As a general rule, antitrust standing has two components: (1) antitrust injury, and (2) proper plaintiff status, which assures that other parties are not better situated to bring suit.[43]

Antitrust injury. The first statutory standing limitation the Supreme Court created was the requirement that a private antitrust plaintiff may obtain relief only for an *antitrust injury*. In January 1977, the Court held in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[44] that a private plaintiff could recover treble damages under Section 4 of the Clayton Act only for antitrust injury, that is, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[45] The *Brunswick* Court explained that "[t]he injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."[46] In other words, the antitrust injury requirement limits the plaintiff's recovery to only those losses that result from a competition-reducing

39. *Id*. at 236 (citations omitted).

40. 457 U.S. 465 (1982).

41. 457 U.S. at 472 (quoting respectively Reiter v. Sontone Corp., 442 U.S. 330 (1979), and Pfizer Inc. v. India, 434 U.S. 308, 313-14 (l978)).

42. *See, e.g.*, Palmyra Park Hosp. Inc. v. Phoebe Putney Memorial Hosp., 604 F.3d 1291, 1299 (11th Cir. 2010).

43. *See, e.g.*, *In re* Aluminum Warehousing Antitrust Litig., 833 F.3d 151, 157 (2d Cir. 2016). (requiring an antitrust plaintiff to "must plausibly allege that (i) it suffered an antitrust injury and (ii) it is an acceptable plaintiff to pursue the alleged antitrust violations"); Jebaco, Inc. v. Harrah's Operating Co., Inc., 587 F.3d 314, 318 (5th Cir. 2009).

44. 429 U.S. 477 (1977).

45. *Id*. at 489; *accord* Texaco Inc. v. Hasbrouck, 496 U.S. 543, 572-73 (1990); Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990); Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 109 (1986); Blue Shield of Va. v. McCready, 457 U.S. 465, 482 (1982).

46. *Brunswick*, 429 U.S. at 489; *see Altantic Richfield*, 495 U.S. at 339 (holding that "[a]ntitrust injury does not arise for purposes of § 4 of the Clayton Act until a private party is adversely affected by an anticompetitive aspect of the defendant's conduct") (internal citations and footnote omitted).

aspect of the defendant's illegal antitrust behavior.[47] In 1986, the Supreme Court in *Cargill, Inc. v. Monfort of Colorado, Inc.*[48] extended that antitrust injury requirement to private injunctive relief actions under Section 16 of the Clayton Act, so that injunctive relief is available to private plaintiffs only when they are threatened with antitrust injury.[49]

The antitrust injury requirement ensures that the plaintiff's private interests in enforcing the antitrust laws are aligned with the public purpose of the antitrust laws.[50] As a result, if the challenged practice does not have an actual adverse effect on competition as a whole in the relevant market,[51] or if the plaintiff's alleged injury does not result from this lessening of market competition, the plaintiff lacks antitrust injury even if the challenged conduct violates the antitrust laws.[52] Indeed, the Court has explicitly rejected the argument that any loss flowing from per se violation necessarily constitutes antitrust injury or that the challenged conduct's per se

47. *Atlantic Richfield*, 495 U.S. at 334 ("[An] injury, although causally related to an antitrust violation, nevertheless will not qualify as an 'antitrust injury' unless it is attributable to . . . a competition-*reducing* aspect or effect of the defendant's behavior."); Innovation Ventures, LLC v. N.V.E., Inc., 694 F.3d 723, 740 (6th Cir. 2012); Fair Isaac Corp. v. Experian Information Solutions, Inc., 650 F.3d 1139, 1145 (8th Cir. 2011); West Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 101 (3d Cir. 2010); NicSand, Inc. v. 3M Co., 507 F.3d 442, 459 (6th Cir. 2007); J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc., 485 F.3d 880, 887 (6th Cir. 2007); Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc., 467 F.3d 283, 290 (2d Cir. 2006); Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co., 407 F.3d 1091, 1124-25 (10th Cir. 2005); Glen Holly Entm't, Inc. v. Tektronix Inc., 343 F.3d 1000, 1014 (9th Cir. 2003); *In re* Cardizem CD Antitrust Litig., 332 F.3d 896, 910 (6th Cir. 2003); Midwest Gas Servs., Inc. v. Indiana Gas Co., 317 F.3d 703, 713 (7th Cir. 2003); Continental Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 515 (4th Cir. 2003); Eichorn v. AT&T Corp., 248 F.3d 131, 140 (3d Cir. 2001); Pace Elecs., Inc. v. Canon Computer Sys., Inc., 213 F.3d 118, 123-24 (3d Cir. 2000); Full Draw Prods. v. Easton Sports, Inc., 182 F.3d 745, 754 (10th Cir. 1999).

48. *Monfort*, 479 U.S. 104 (1986).

49. Some courts conflate constitutional standing and statutory standing. *See, e.g.*, Menkes v. St. Lawrence Seaway Pilots' Ass'n, No. 06-CV-339, 2007 WL 167715, at *6 (N.D.N.Y. Jan. 18, 2007) (defining antitrust injury to be "(1) an injury-in-fact; (2) that has been caused by the violation; and (3) that is the type of injury contemplated by the statute").

50. *Atlantic Richfield*, 495 U.S. at 342 (noting that antitrust injury requirement ensures "that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place"); West Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 101 (3d Cir. 2010); Palmyra Park Hosp. Inc. v. Phoebe Putney Memorial Hosp., 604 F.3d 1291, 1299 (11th Cir. 2010).

51. *See, e.g.*, Colabella v. American Inst. of Certified Public Accountants, No. 10-cv-2291 (KAM)(ALC), 2011 WL 4532132, at *18 (E.D.N.Y. Sept. 28, 2011) (finding allegation of harm to plaintiff alone insufficient to plead a marketwide reduction of competition, so that plaintiff failed to adequately plead antitrust injury).

52. *Atlantic Richfield*, 495 U.S. at 342 (holding that "injury, although causally related to an antitrust violation, nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anti-competitive aspect of the practice under scrutiny"); Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 582-83 (1986) (finding that plaintiffs cannot recover damages for any conspiracy to charge supracompetitive prices, since although such conduct would violate the Sherman Act, "it could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price").

illegality relieves the plaintiff of establishing antitrust injury.[53] The fact that a particular competitor has lost profits or otherwise has been injured by the defendant's conduct does not necessarily mean that competition has been lessened or that the injured competitor has antitrust standing.[54]

As a general rule, plaintiffs capable of sustaining antitrust injury are limited to customers and competitors in the restrained market[55] and to those whose injuries are the means by which the defendants seek to achieve their anticompetitive ends—typically raising prices in the case of customers and gaining greater control of market output in the case of competitors.[56] Usually, antitrust injury is limited to active "participants' in the defendant's market. But in the appropriate circumstances, nascent firms or potential entrants may sustain antitrust injury. In the first instance, this requires a showing that the plaintiff has sufficient intent and preparedness to enter the market, so that the defendant's conduct and not some reason was the cause of the plaintiff's failure to enter at the time or in the manner it otherwise would have entered.[57]

A central purpose of the antitrust laws is "to assure customers the benefits of price competition,"[58] so an overcharge resulting from an antitrust violation is the primary type of antitrust injury to purchasers. Indeed, an overcharge is the means of shifting wealth to the antitrust violators from others and thereby earn higher profits than they would in the absence of the violation. The overcharge mechanism is straightforward where the antitrust violation is horizontal price fixing, horizontal market division, monopolization, or anticompetitive merger. The same is true for anticompetitive tying arrangements, group boycotts, and price and nonprice vertical restraints, although the mechanism may be more circuitous. Interestingly, although as a policy matter modern antitrust law places a special emphasis on the deadweight loss in consumer welfare that a supracompetitive price creates, prospective customers

53. *Atlantic Richfield*, 495 U.S. at 341-45.

54. Tennessean Truckstop, Inc. v. NTS, Inc., 875 F.2d 86, 88 (6th Cir. 1989); Shamrock Mktg., Inc. v. Bridgestone Bandag, LLC, 775 F. Supp. 2d 972, 978 (W.D. Ky. 2011).

55. *See, e.g.*, West Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 102 (3d Cir. 2010); Carpet Group Int'l v. Oriental Rug Imps. Ass'n, 227 F.3d 62, 76-77 (3d Cir. 2000); Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 429 (3d Cir. 1993); Gregory Mktg. Corp. v. Wakefern Food Corp., 787 F.2d 92, 95 (3d Cir. 1986).

56. *See, e.g.*, Blue Shield of Va. v. McCready, 457 U.S. 465, 479 (1982); *West Penn*, 627 F.3d at 102; Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 320-21 (3d Cir. 2007).

57. Courts that has addressed the issue have identified four indicia of preparedness: (1) the plaintiff's background and experience in the prospective business; (2) the ability to finance entry, and particularly to finance facilities and equipment; (3) the consummation of contracts related to the potential entry; and (4) other affirmative action by the plaintiff to engage in the proposed business or new market. *See, e.g.*, Sanger Ins. Agency v. HUB Int'l, Ltd., 802 F.3d 732, 739 (5th Cir. 2015); Ashley Creek Phosphate Co. v. Chevron USA, Inc., 315 F.3d 1245, 1254-55 (10th Cir. 2003); Andrx Pharms., Inc. v. Biovail Corp. Int'l, 256 F.3d 799, 806-07 (D.C. Cir. 2001); *In re* Dual-Deck Video Cassette Recorder Antitrust Litig., 11 F.3d 1460, 1465 (9th Cir. 1993); Gas Utils. Co. of Ala. v. S. Nat. Gas Co., 996 F.2d 282, 283 (11th Cir. 1993) (per curiam) (focusing on first three factors); Bubis v. Blanton, 885 F.2d 317, 319 (6th Cir. 1989); Biocad JSC v. F. Hoffmann-La Roche, 942 F.3d 88, 103 (2d Cir. 2019) (Katzmann, C.J., concurring).

58. Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 538 (1983).

that are "excluded" from the market because the supracompetitive price exceeds their reservation price, courts do not regard these prospective customers as sustaining antitrust injury. Likewise, some courts have held that customers of nonconspiring firms that raise their prices to supracompetitive levels under the "umbrella" of price-fixing competitors do not sustain antitrust injury. The better view, however, is that both excluded and umbrella customers do sustain antitrust injury—their injuries are the direct result of the competition-reducing effects of the antitrust violation—but for the reasons we examine below they may not be "proper parties" to bring an antitrust claim.

The purpose of foreclosure of competitors in an antitrust violation is to enable the antitrust violator to capture a greater share of the market and so decrease the elasticity of the demand curve for the firm's products. This, in turn, both enables the firm to earn more profits through higher unit sales (through increased market share) as well as increase its profit-maximizing price (through decreased demand elasticity) compared to what would have been the case in the absence of the violation and thereby earn higher profits.[59] So competitors of the antitrust violator that are excluded by reason of the antitrust violation sustain antitrust injury. Exclusion of potential competitors—firms that would like to enter the market but are precluded from doing so by the antitrust violation—presents a slightly more complicated case, since an overly permissive rule would allow bystanders that merely assert that they would have entered the market but for the antitrust violation to satisfy the antitrust injury requirement. Courts straightforwardly handle this by requiring potential competitors to prove that they both (1) had an intention of entering the market, and (2) had prepared to do so.[60] In assessing preparedness, "courts have drawn the line at the point where promotion transcends the level of hopes, desires, and expectations, and reaches a certain stage of maturity and concreteness, a stage where it is accompanied by certain indicia of ultimate success."[61] In considering this question, courts look at the ability of the plaintiff to finance the business and to purchase the necessary facilities and equipment; the consummation of contracts by as art of entering the business; other affirmative actions by the plaintiff to enter the business; and the background and experience of the plaintiff in the prospective business.[62] The

59. *See, e.g.*, *In re* Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188, 210-12 (E.D.N.Y. 2003) (finding plaintiff-purchasers adequately alleged antitrust injury in challenge to a market allocation agreement whereby an incumbent drug paid off potential generic drug entrants not to enter the market and thereby maintain higher prices than would have occurred absent the alleged violation).

60. *See, e.g.*, Sanger Ins. Agency v. HUB Int'l, Ltd., 802 F.3d 732, 738 (5th Cir. 2015); Hayes v. Solomon, 597 F.2d 958, 973 (5th Cir. 1979).

61. Hecht v. Pro-Football, Inc., 570 F.2d 982, 994 (D.C. Cir. 1977); *accord Sanger*, 802 F.3d at 738.

62. *See, e.g.*, *Sanger*, 802 F.3d at 738; Jebaco, Inc. v. Harrah's Operating Co., Inc., 587 F.3d 314, 318 (5th Cir. 2009); Cable Holdings of Ga., Inc. v. Home Video, Inc., 825 F.2d 1559, 1563 (11th Cir. 1987) (holding that the plaintiff lacked preparedness to expand given the capital-intensive nature of the cable industry).

"ultimate question is whether the plaintiff would have been able to take the steps it claimed it was precluded from taking, assuming no violation had occurred."[63]

Indirect purchasers. The second statutory standing limitation the Court created was to exclude *indirect purchasers* as antitrust plaintiffs in treble damage actions under Section 4 of the Clayton Act. In June 1977, less than five months after *Brunswick* was decided, the Court in *Illinois Brick v. Illinois*[64] held that an indirect purchaser—that is, a purchaser that does not buy a price-fixed product directly from a conspirator buys rather buys from a firm that buys from a conspirator—lacks standing under Section 4 to bring a treble damage action against a remote conspirator for any overcharge the purchaser paid as a result of the challenged antitrust violation. *Illinois Brick* held that the possibility of multiple suits by plaintiffs at successive levels in the chain of manufacture and distribution, and duplicative recoveries enabled by the absence of a "passing on" defense under *Hanover Shoe*, increasingly complex evidentiary proceedings by increasingly remote plaintiffs, and damage awards unrelated to the social cost of the type the antitrust laws were designed to prevent all indicated that indirect purchasers should be denied statutory standing to pursue treble damages actions. The courts recognize an exception to the indirect purchaser rule exists where the remote conspirator is in a conspiracy with the seller to the plaintiff to commit the alleged antitrust violation that injured the plaintiff and join the direct seller in the action.[65]

Proper party analysis. While antitrust injury is a necessary element of antitrust standing, it is not sufficient.[66] Even when the injury is of the type the antitrust laws are designed to prevent, it is also important the plaintiff be an "efficient enforcer" of these laws. The Court found that early courts interpreted the provision this way, finding, for example, that the injuries to a stockholder derivative of injuries caused by an antitrust violation to the corporation were too "indirect, remote, and consequential" to support standing under Sherman Act § 7.[67] Moreover, as the Court noted later in *Atlantic Richfield*, the "existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general."[68] When a statute

63. *Sanger*, 802 F.3d at 738 (also noting that there "is a critical distinction between this case and those in which we found no standing; the insufficient preparedness in those cases flowed from obstacles unrelated to the alleged anticompetitive conduct").

64. 43l U.S. 720, 746 (1977).

65. *See, e.g.*, Insulate SB, Inc. v. Advanced Finishing Sys., Inc., 797 F.3d 538, 542 (8th Cir. 2015).

66. Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110 n.5 (1986).

67. Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519, 533-34 (1983) (citing Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910)); *see* Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n.14 (1972) (finding that the lower federal courts have been "virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation").

68. Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 345 (1990); *see* NicSand, Inc. v. 3M Co., 507 F.3d 442, 457 (6th Cir. 2007); Kochert v. Greater Lafayette Health Servs., Inc., 463 F.3d 710, 718 (7th Cir. 2006); Abraham v. Intermountain Health Care Inc., 461 F.3d 1249,

creates a private cause of action with special incentives designed to encourage enforcement by "private attorneys general" to achieve public goals as well as private redress, statutory standing can be used to limit the domain of plaintiffs to those whose private incentives are aligned with these public goals and who can pursue their actions straightforwardly and efficiently.

Procedural considerations. Although antitrust standing is a threshold issue in a private antitrust action,[69] antitrust standing is not jurisdictional and hence can be waived if not properly challenged on the merits.[70] For the same reasons, a motion to dismiss for lack of antitrust standing is governed by Rule 12(b)(6) for failure to state a claim for which relief may be granted rather than Rule 12(b)(1) for lack of subject matter jurisdiction.[71] Of course, if the lack of antitrust standing is predicated on no injury in fact or lack of proximate causation, then there is also an absence of Article III standing that could be challenged under Rule 12(b)(1).

1268 (10th Cir. 2006); Loeb Indus., Inc. v. Sumitomo Corp., 306 F.3d 469, 484 (7th Cir. 2002); Re/Max Int'l., Inc. v. Realty One, Inc., 173 F.3d 995, 1022 (6th Cir. 1999); Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 927 (3d Cir. 1999); Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp., 951 F.2d 1158, 1163 (9th Cir. 1991); Adams v. Pan American World Airways, Inc., 828 F.2d 24, 29 (D.C. Cir. 1987).

69. City of Pittsburgh v. W. Penn Power Co., 147 F.3d 256, 264-65 (3d Cir. 1998).

70. Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774, 778 (7th Cir. 1994) (noting lack of antitrust standing of plaintiff-shareholder, but finding any challenge waiver for failure to raise the issue in the district court).

71. *See, e.g.*, Associated Gen. Contractors v. Calif. State Council of Carpenters, 459 U.S. 519, 551 n.8 & 545-46 (1983) (reviewing a decision on a motion to dismiss under Rule 12(b)(6)); CBC Cos. v. Equifax, Inc., 561 F.3d 569, 572 (6th Cir. 2009); B & H Medical, L.L.C. v. ABP Admin., Inc., 526 F.3d 257, 271 n.10 (6th Cir. 2008); NicSand, Inc. v. 3M Co., 507 F.3d 442, 449 (6th Cir. 2007); Norris v. Hearst Trust, 500 F.3d 454, 456 (5th Cir. 2007); Arroyo-Melecio v. Puerto Rican Am. Ins. Co., 398 F.3d 56, 72 (1st Cir. 2005); Glen Holly Entm't, Inc. v. Tektronix, Inc., 352 F.3d 367, 368 (9th Cir. 2003); Midwest Gas Servs., Inc. v. Indiana Gas Co., 317 F.3d 703, 708 (7th Cir. 2003); Andrx Pharms., Inc. v. Biovail Corp. Int'l, 256 F.3d 799, 805 (D.C. Cir. 2001); Roman v. Cessna Aircraft Co., 55 F.3d 542, 543-45 (10th Cir. 1995); Eisai Inc. v. Sanofi-Aventis U.S., LLC, Civil Action No. 08-4168 (MLC), 2010 WL 3172187 , at *2 (D.N.J. Aug. 10, 2010) (unpublished).

Summary of the Cases

Antitrust injury	
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)	Private plaintiffs may sue under Section 4 for treble damages only for antitrust injuries
Blue Shield of Va. v. McCready, 457 U.S. 465 (1982)	An individual consumer who pays an overcharge as the direct effect of an antitrust violation sustains injury to her "business or property" within the meaning of Section 4
Cargill, Inc. v. Monfort of Colorado, 479 U.S. 104 (1986)	Private plaintiffs may sue under Section 16 for injunctive and other equitable relief only in connection with actual or threatened antitrust injuries
Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990)	Private plaintiffs sustain antitrust injury only from a competition-reducing aspect of the defendants' illegal conduct
Indirect purchasers	
Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)	Indirect purchasers lack antitrust standing to recover treble damages under Section 4
Apple Inc. v. Pepper, 587 U.S. 273 (2019)	Whether a plaintiff is a direct or indirect purchaser is to be determined by a "functional" analysis of the relationship between the plaintiff and the defendant If the defendant acts as a "seller" to the plaintiff, then the plaintiff is a direct purchaser
Proper parties	
Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983)	Provides a general framework for analyzing antitrust standing that looks to: –the nature of the plaintiff's injury and whether it was one Congress sought to redress; – the directness or indirectness of the alleged injury in relation to the violation; – whether the damages are speculative; –the risk of duplicate recovery or complex damage apportionment. – whether there are other types of victims whose injuries are more direct and whose claims would be more judicially manageable

SEMINAL ANTITRUST STANDING CASES\

ANTITRUST INJURY

BRUNSWICK CORP. V. PUEBLO BOWL-O-MAT, INC. (1977).[1] In June 1966, Pueblo Bow-O-Mat and two other operators of bowling centers brought a treble damage action challenging several acquisitions of bowling centers by Brunswick under Section 7 of the Clayton Act.[2]

Brunswick was one of the two bowling equipment largest manufacturers in the United States. Bowling centers require a substantial capital investment in lanes and pinsetters, and prior to 1964 Brunswick financed this investment o extended secured credit terms for bowling centers that purchased its equipment. In the early 1960s, the bowling recreation business went into a severe decline (possibly due to overbuilding), and many bowling centers began to default on their equipment loans. Brunswick made numerous repossessions, but its attempts to dispose of repossessed equipment did not keep pace with its repossessions. Because Brunswick had borrowed money to finance the manufacture and sale of its bowling equipment, the company found itself in serious financial difficulty.

In 1965, Brunswick adopted a new strategy. It would repossess equipment from defaulting bowling centers and attempt to sell it in place to third parties. If no buyer could be found, Brunswick would consider operating the center itself if it could generate a positive cash flow. Brunswick thus began forward integrating into bowling centers, and in 1965 alone took over and began operating 124 centers.

Six of these centers were located variously in Poughkeepsie, New York, Pueblo, Colorado, or in or near Paramus, New Jersey. Plaintiffs, all subsidiaries of Treadway Companies, operated "Bowl-O-Mat" bowling centers in these three areas in competition for retail customers with the Brunswick centers. Plaintiffs alleged that the Brunswick acquisitions in these areas reduced competition in the local relevant markets by introducing a "deep pocket" parent that could support its retail operations by investing in new and more attractive facilities and equipment, pricing near or below cost, obtaining more favorable credit terms, and otherwise disadvantaging smaller bowling centers.[3] Plaintiffs alleged that they suffered monetary damage as a

1. 429 U.S. 477 (1977). The most complete version of the facts is contained in the Ninth Circuit's opinion. NBO Indus. Treadway Cos. v. Brunswick Corp., 523 F.2d 262 (3d Cir. 1975), *vacated and remanded*, 429 U.S. 477 (1977). The district court's decision on Brunswick's post-trial motions is reported at Treadway Cos. v. Brunswick Corp., 364 F. Supp. 316 (D.N.J. 1973), and its decision on injunctive relief is reported at Treadway Cos. v. Brunswick Corp., 389 F. Supp. 996 (D.N.J. 1974).

2. Section 7 prevents acquisitions of stock or assets "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. We will examine the application of Section 7 to mergers and acquisitions in Units 9-14.

3. This is the "entrenchment" theory of conglomerate merger anticompetitive harm recognized in 1965 by the Supreme Court in FTC v. Procter & Gamble Co, 386 U.S. 568 (1967), and thereafter quickly abandoned as a cognizable Section 7 theory.

result of Brunswick's allegedly illegal acquisitions since, in the absence of the Brunswick acquisitions, each of the six centers would have gone out of business and their customers instead would have patronized the local Bowl-O-Mat center.

After a nine and a half week trial in 1973, the jury returned a verdict finding that the six challenged Brunswick acquisitions had violated Section 7 and awarding actual damages of $2,358,030, which trebled amounted to $7,074,090. Brunswick's post-trial motions resulted in the plaintiffs consenting to a remittitur of $499,050, resulting in a treble damages judgment of $6,575,040, the largest antitrust private recovery to date in the history of the U.S. antitrust laws. The district court also ordered Brunswick to divestiture the centers it had acquired that were still operating in the three areas.

On appeal, the Third Circuit agreed that the plaintiff's "deep pockets" theory stated a viable theory of anticompetitive harm under Section 7 and that there was sufficient evidence for the case to go to the jury on this theory.[4] On the question later reviewed by the Supreme Court, the court of appeals held that a plaintiff horizontal competitor of a company acquired by a "deep pocket" defendant could recover treble damages if the plaintiff can show injury that was proximately caused by the deep-pocket defendant's presence in the relevant market, even if that injury did not flow from an actual lessening of competition in the market. Brunswick argued that, as a matter of law, there should be no ability to recover when the challenged activities had the effect of preserving a competitor and reducing consumer prices. The Third Circuit disagreed, reasoning that when the antitrust violation depends on the potential of an actual anticompetitive effect resulting from aggressive competition in the short run to eliminate competitors in the long run (essentially a predation theory), those competitors who lose sales to the defendant during the first stage should be able to recover damages under Section 4.[5] The Third Circuit could have added that allowing recovery in these circumstances also furthers the private attorney general function of private enforcement by deterring illegal conduct before it has the opportunity to ripen into actual public harm. The court of appeals reversed the judgment and remanded, however, finding that the jury charge was deficient in three respects: (1) on subject matter jurisdiction, because of an intervening Supreme Court case;[6] (2) on the Section 7 violation, because the district court placed too much emphasis on market shares relative to other relevant qualitative factors when the acquisitions did not increase market concentration;[7] and (3) on damages, because the instructions effectively assumed that in the absence of Brunswick's acquisitions the six centers would have gone out of business instead of instructing the jury that this was a factual

4. *NBO Indus.*, 523 F.2d at 268-70.

5. *Id*. at 271-73.

6. *Id*. at 270-71, 275. The intervening decision was United States v. American Building Maint. Indus., 422 U.S. 271 (1975), which held that the then-existing "in commerce" language of Section 7 restricted the application of the statute to situations where both the acquiring and acquired companies were engaged in commerce and that it was not sufficient that their activities merely affected commerce.

7. *NBO Indus.*, 523 F.2d at 273-75.

question to be decided on the evidence and because the instructions directed to the jury to accept uncontroverted testimony on the amount of damages when the jury is always free to reject testimony as unreliable.[8] The Third Circuit also vacated the district court's divestiture order, both because of the erroneous jury instructions (where the district court acknowledged that it had relied on the jury verdict in deciding the injunctive relief claim) and because adequate less restrictive relief was available.[9]

The Supreme Court granted certiorari on the question of whether treble damages are available under Section 4 of the Clayton Act where the only injury alleged is that the antitrust violation enabled competitors to continue in business when they otherwise would have failed, thus depriving the plaintiffs of an increase in market share and a corresponding increase in profits. Section 7, the Court observed, is a prophylactic statute, which makes unlawful mergers and acquisitions that have the reasonable potential to be anticompetitive without any requirement that they actually lessen competition.[10] Under the Third Circuit's rule, once a merger is found to violate Section 7, a private party may recover treble damages for any adverse consequence proximately caused by the transaction, regardless of whether the resulting injury had any connection with the potential for the merger being anticompetitive. So, in the instant case, although Brunswick's acquisitions had the *potential* to lessen competition, the plaintiffs did not allege that they were injured by predatory acts that Brunswick was pursuing to realize this potential but rather sought damages for lost profits caused by the increased competition that resulted when Brunswick keep open bowling centers that otherwise would have gone out of business. The Court said that it would be "inimical" to the purpose of the antitrust laws to award damages for this type of injury, which would have equally occurred if the centers were acquired by a "shallow pockets" parent.[11] In the absence of a "clear expression of congressional purpose" to permit this type of recovery,[12] the Court construed Section 4 to permit damage actions only for "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[13] The Court went on to say that antitrust injury "should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."[14] This formulation would have permitted the *Brunswick* plaintiffs, for example, to recover for damages caused by any predatory conduct by Brunswick in operating the acquired bowling centers, even if this conduct temporarily stimulated competition, and would not have required the plaintiffs to wait until they had been driven from the market and competition thereby

8. *Id*. at 275-77.

9. *Id*. at 277-79. The Third Circuit left open the question whether divestiture relief if ever available to a private plaintiff in a Section 7 action. *Id*. at 279.

10. *Brunswick*, 429 U.S. at 485 (1977) (citing authorities).

11. *Id*. at 488.

12. *Id*. (quoting Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972)).

13. *Id*. at 489.

14. *Id*.

lessened.[15] Since the *Brunswick* plaintiffs made no attempt to prove that they had been injured by exclusionary acts, the Court held that Brunswick was entitled to judgment on the damages claim notwithstanding the jury verdict.[16]

15. *Id*. This, of course, begs the question of what constitutes a predatory or exclusionary act for Section 4 purposes

16. *Id*. at 490. For another case rejecting antitrust injury because the challenged activity increased competition, see Fair Isaac Corp. v. Experian Information Solutions, Inc., 650 F.3d 1139, 1145 (8th Cir. 2011) (finding plaintiff FICO did not suffer antitrust injury where the three credit bureaus combined to create a competing joint venture in credit scoring, resulting in FICO's loss of profits from reduced customers and reduced prices).

BLUE SHIELD OF VA. V. MCCREADY (1982).[1] *McCready*, decided by the Supreme Court in 1982, applied the antitrust injury requirement to something akin to a secondary group boycott. Whereas *Reiter* raised the question of whether a consumer end-user suffered injury to his "business or property" within the meaning of Section 4 of the Clayton Act by reason of an overcharge,[2] *McCready* asked whether consumer end-user have statutory standing to bring a treble damages claim.

Blue Shield of Virginia, a joint venture of physicians, was a dominant provider of health care plans to employers for the benefit of their employees.[3] McCready, through her employer, was a subscriber to one of the Blue Shield plans. Among other things, McCready's plan provided reimbursement for psychotherapy services, but only if the services were provided by a psychiatrist or by a psychologist whose services were supervised and billed by a treating physician. McCready received treatment from a clinical psychologist.

When her claims for reimbursement were denied, McCready brought an antitrust class action on behalf of all Blue Shield subscribers who incurred costs for psychotherapy services but were not reimbursed for those costs. Although the various opinions in the case provide different characterizations of McCready's complaint, the Supreme Court majority opinion read the complaint to allege that the physicians who controlled Blue Shield conspired in violation of Section 1 of the Sherman Act to reduce competition in the psychotherapy market by denying compensation to subscribers who obtain services from psychologists, thereby reducing the demand for psychologists and shifting this demand to physicians.[4]

The district court granted Blue Shield's motion to dismiss, holding that McCready did not suffer antitrust injury because she was not a competitor in the market that was competitively endangered by the antitrust violation. While the district court recognized that McCready had suffered an injury by being denied reimbursement, this injury was too indirect and remote from the harm caused to psychologists to be considered antitrust injury. The Fourth Circuit reversed, holding that McCready sustained antitrust injury since she was a direct victim of the alleged

1. 457 U.S. 465 (1982). Justice Brennan wrote the majority opinion. Then-Justice Rehnquist wrote one dissenting opinion, in which Chief Justice Burger and Justice O'Connor joined. Justice Stevens filed a separate dissenting opinion.

2. Reiter v. Sonotone Corp., 442 U.S. 330 (1979).

3. *McCready* arose in the context of the district court's dismissal of the plaintiff's complaint, so that on review all well-pleaded allegations are assumed to be true and all reasonable inferences are drawn in favor of the plaintiff.

4. *McCready*, 457 U.S. at 469-70 & n.4. The district court opinion is unreported. The majority's reading is consistent with the finding by the Fourth Circuit Court of Appeals in a related case brought by psychologists that the Blue Shield reimbursement arrangement violated the Sherman Act. *See* Virginia Acad. of Clinical Psychologists v. Blue Shield of Va., 624 F.2d 476, 485 (4th Cir. 1980).

conspiracy who was injured in her business or property by Blue Shield's refusal to reimburse her.[5]

The Supreme Court affirmed in a 5-4 decision. Unlike *Brunswick*, where there was no allegation that Brunswick engaged in anticompetitive acts to realize its anticompetitive potential, Blue Shield's reimbursement policy was the very mechanism by which the conspirators sought to exclude psychologists and reduce competition in the psychotherapy market.[6] McCready was a direct victim of the conspiracy's anticompetitive acts and her injury—the denial of reimbursement—was an integral aspect of the conspiracy's anticompetitive efforts.[7] Moreover, as a consumer of psychotherapy services, McCready was "within that area of the economy . . . engendered by [that] breakdown of competitive conditions" if the alleged conspiracy succeeded in its goal.[8] Consequently, the majority concluded, although McCready was not a competitor of the conspirators, she sustained antitrust injury because her injury was "inextricably intertwined" with the injury the conspirators sought to inflict on psychologists and the psychotherapy market.[9]

Although the majority's oft-quoted "inextricably intertwined" language is not especially illuminating, the idea is simple: persons directly and foreseeably injured by a defendant's *anticompetitive* acts in furtherance of an antitrust violation sustain antitrust injury and may recover treble damages under Section 4. The majority was explicit: Section 4 "'does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.'"[10]

In his dissent, then-Justice Rehnquist argued that McCready sustained no antitrust injury because she did not allege any anticompetitive effect upon herself, either in the availability of the services McCready sought or the price of the treatment she received.[11] Rehnquist illustrated his approach by contrasting McCready's situation with that of a bank that refused to acquiesce to the demands of a group of psychiatrists that the bank cease extending credit to psychologists and as a result the conspiring psychiatrists boycotted the bank. To Rehnquist, the bank would sustain antitrust injury because, although not the competitive target in this secondary boycott, the bank nonetheless was the target of a separately unlawful collective refusal to deal against it that would impair the bank's ability to compete with other

5. McCready v. Blue Shield of Va., 649 F.2d 228, 231-32 (4th Cir. 1981), *aff'd*, 457 U.S. 465 (1982).

6. *McCready*, 457 U.S. at 479.

7. *Id*.

8. *Id*. at 480-81.

9. *Id*. at 484.

10. *Id*. at 472 (quoting Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948)).

11. *Id*. at 489 (Rehnquist, J., dissenting).

banks.[12] By contrast, McCready, although injured, suffered no competitive impairment. The majority disposed of this argument, citing *Brunswick* for the proposition that antitrust injury does not require an actual lessening of competition.[13] Recall that *Brunswick* had indicated that a competitor who suffered injury resulting from the defendant's unlawful predatory acts sustained antitrust injury and could recover under Section 4 even if the predatory scheme had not yet ripened into an actual lessening of competition and the plaintiff had not yet been driven from the market.[14] The *McCready* majority essentially extended this proposition to non-competitor third parties who were directly and foreseeably injured, even if not competitively impaired, as a result of the defendant's exclusionary acts.[15]

Justice Stevens also filed a dissenting opinion in which he argued that McCready did not suffer injury at all. To Stevens, McCready sustained no injury because she "received in exchange [for her unreimbursed payment] psychotherapeutic services that presumably were worth the payment."[16] But this goes too far. Someone who purchases a price-fixed good at a supracompetitive price also values the good more than the money, but it is well-accepted that the purchaser sustained injury because she paid a higher price than she would have paid in the absence of the antitrust violation. The same is true of McCready: she paid a higher net price for the services she received than she would in the absence of the assumed antitrust violation.

NOTES

1. Typically, only customers or competitors in an anticompetitively affected market can sustain antitrust injury, but *McCready* created an important third category: those who sustain injury that is "inextricably intertwined" with the injury to competition that the antitrust violators sought to inflict.

2. The Sixth Circuit has a good explanation of the "inextricably intertwined" exception:

> This exception was not designed to give standing to claimants whose injuries are a tangential byproduct of monopolistic conduct in a related market. To succeed, the claimant must show that the defendants "manipulated or utilized [the

12. *Id*. at 490 n.7. Rehnquist simply assumed that the bank's ability to compete would be impaired, since there are many situations where this would not be true, but this competitive impairment appears to be central to Rehnquist's finding of antitrust injury in the hypothetical.

13. *Id*. at 482 (majority opinion).

14. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 & n.14 (1977).

15. *But see In re* Potash Antitrust Litig., 667 F. Supp. 2d 907, 939-40 (N.D. Ill. 2009) (granting motion to dismiss indirect purchasers' Sherman Act § 16 claims for injunctive relief in connection with an alleged producer cartel where the injury was "not alleged to be an integral part of the alleged price-fixing conspiracy" and was "not alleged to be a necessary step in furthering the ends of the conspiracy involving the potash market itself" and finding a "general causal relationship" insufficient).

16. *McCready*, 457 U.S. at 493-94 (Steven, J., dissenting).

> claimant] as a fulcrum, conduit or market force to injure competitors or participants in the relevant product and geographical markets."[17]

3. Although the *McCready* exception arises infrequently, in recent years courts have held that the exception applies to an important group of cases where the plaintiffs have alleged that the defendants, although neither suppliers nor competitors of the plaintiffs, anticompetitively manipulated price indexes that the industry uses in pricing products that the plaintiffs purchase.

For example, in the *Zinc* antitrust litigation,[18] plaintiffs, who are the first purchasers of primary zinc to take physical delivery, alleged the defendants, who operate trading and metals warehouses licensed by the London Metals Exchange, conspired to constrain the supply of physical zinc available for delivery from LME warehouses, resulting in the plaintiffs paying artificially high prices for the zinc they purchased. The defendants did not sell zinc or zinc warehouse storage to plaintiffs. Rather, the defendants traded in warrants[19] or other instruments in the forward market for zinc but always closed out their positions before the delivery date and so never sold zinc for delivery to a physical purchaser. Accordingly to the complaint, by artificially creating a supply constraint at the warehouses, defendants were able to increase the price of physical zinc for delivery, which in turn increased the price of their warrants they sold in the trading market as the price of their warehousing services (which was tied to the price of zinc). The district court held that the plaintiffs' alleged injury was "inextricably intertwined" with the defendants' alleged anticompetitive scheme and so fell under *McCready*.[20]

17. Static Control Components, Inc. v. Lexmark Int'l, Inc., 697 F.3d 387 (6th Cir. 2012) (quoting Southaven Land Co., Inc. v. Malone & Hyde, Inc., 715 F.2d 1079, 1086 (6th Cir. 1983).

18. *In re* Zinc Antitrust Litig., 155 F. Supp. 3d 337 (S.D.N.Y. 2016).

19. Warrants are documents of title to specific lots and weights of zinc metal stored in LME-licensed warehouses. They trade as financial instruments until the underlying zinc is sold for delivery.

20. *Id*. 360-61. For an analogous case in aluminum, see *In re* Aluminum Warehousing Antitrust Litig., 95 F. Supp. 3d 419, 441-44 (S.D.N.Y. 2015).

CARGILL, INC. V. MONFORT OF COLORADO, INC. (1986).[1] In 1983, Excel Corporation, a wholly-owned subsidiary of Cargill, Inc., signed an agreement to acquire Spencer Beef, a division of the Land O'Lakes agricultural cooperative. Both Excel and Spencer operated integrated beef-packing plants for the slaughter of cattle and the fabrication of beef into boxed beef. Excel and Spencer were the country's second and third largest beef packers, respectively. Monfort, the country's fifth-largest beef packer, brought suit alleging that the acquisition would violate Section 7 of the Clayton Act and seeking to enjoin the transaction under Section 16 of the Clayton Act.

At trial, Excel argued among other things that Monfort had failed to allege and could not show that it would sustain antitrust injury as a result of the challenged acquisition. All parties agreed that the beef industry was highly competitive and exhibited low profit margins, largely due to intense competition among the major integrated firms. Monfort had alleged that competition between Excel and IBP, a subsidiary of Occidental Petroleum and the nation's largest beef packer, for market share would intensify even further as a result of the acquisition, that this competition would increase the market price for fed cattle and lower the price for fabricated beef, and that the resulting price squeeze would lower profits Monfort would earn and eventually drive it out of the market. Monfort did not allege that Excel or IBP would engage in predatory pricing in boxed beef or act collusively with each other to drive others out of the market. Rather, in a variant of the entrenchment theory of merger anticompetitive harm, Monfort argued that with Cargill's and Occidental's vast financial resources backing Excel and IBP, respectively, the companies could accept far lower profit margins than their competitors while they endeavored to increase market share. Monfort contended that after Excel and IBP had succeeded in driving out the smaller competitors and acquiring increased market shares, competition would decrease, with the companies lowering the price paid for fed cattle to infracompetitive levels and raising the price charged for boxed beef to supracompetitive levels, substantially lessening competition in both markets. Excel argued that any harm to Monfort during the period of heightened competition did not constitute antitrust injury; Monfort argued that since this harm followed directly from the acts that ultimately would reduce competition, it did constitute antitrust injury.

The district court held that Monfort had alleged antitrust injury. It also found that the evidence at trial proved Monfort's theory that the acquisition would violate Section 7 and threatened to harm Monfort irreparably in the way Monfort had alleged, and so issued a permanent injunction enjoining the acquisition's consummation.[2]

1. 479 U.S. 104 (1986).

2. *See* Monfort of Colorado, Inc. v. Cargill, Inc., 591 F. Supp. 683, 690-95, 709-10 (D. Colo. 1983), *aff'd*, 761 F.2d 570 (10th Cir. 1985), *rev'd*, 479 U.S. 104 (1986).

The Tenth Circuit affirmed in all respects.[3] Indeed, the Tenth Circuit appears to have rejected any antitrust injury requirement in Section 16 injunctive relief actions, holding that Section 16 requires only a showing of a threatened injury proximately related to the putative antitrust violation.[4]

In a 6-2 decision, the Supreme Court reversed. Justice Brennan, writing for the majority, held that the threat of antitrust injury is a necessary condition to standing under Section 16 for injunctive relief, just as actual antitrust injury is a necessary condition to standing under Section 4 for treble damages.

> The wording concerning the relationship of the injury to the violation of the antitrust laws in each section is comparable. Section 4 requires proof of injury "by reason of anything forbidden in the antitrust laws"; § 16 requires proof of "threatened loss or damage by a violation of the antitrust laws." It would be anomalous, we think, to read the Clayton Act to authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred.[5]

In analyzing whether Monfort had proven that it was threatened with antitrust injury, the Court without explanation did not examine the alleged price squeeze but considered only the pricing of boxed beef. First, the Court held that if Excel lowered its prices postmerger to a level at or only slightly above its costs, Monfort would not sustain antitrust injury. The Court noted that Monfort had conceded that its viability would not be threatened by prices at these levels, so that the only threat of harm under this scenario was a loss of profits. The Court held a loss of profits from aggressive, nonpredatory pricing designed to increase market share was not the type of practice forbidden by the antitrust laws.[6] By contrast, the Court acknowledged that harm resulting from below cost, predatory pricing is capable of inflicting antitrust injury during the below-cost pricing period because it is a practice aimed at eliminating competition by harming competitors through artificial price competition.[7] But the Court rejected this as a theory applicable in this case since Monfort had not alleged or proven that price predation was a reasonably probable result from the merger.[8] The court did not reach the question of whether the merger violated Section 7 because the lack of antitrust injury negated the possibility that the plaintiff was entitled to any relief.

3. Monfort of Colorado, Inc. v. Cargill, Inc., 761 F.2d 570 (10th Cir. 1985), *rev'd*, 479 U.S. 104 (1986).

4. *Monfort*, 761 F.2d at 574.

5. *Cargill*, 479 U.S. at (1986).

6. *Id*. at 115-17.

7. *Id*. at 118 & n.13.

8. *Id*. at 119. The majority also expressed skepticism that the facts could have supported a claim of price predation in any event, both because Excel probably lacked the capacity to absorb the market share of its rivals once prices had been cut, which would have made a unilateral price predation scheme irrational, and because there was no evidence that barriers to entry would be high when market prices were supracompetitive. *Id*. at 119 n.15.

Justice Stevens, writing for himself and Justice White, dissented. Stevens would have limited the requirement of antitrust injury to treble damage actions under Section 4 and held that, in light of the prophylactic nature of Section 7 and the broad language of Section 16, any competitor in a market sufficiently threatened with a loss of competition to violate Section 7 should be authorized to seek equitable relief.[9]

9. *Id*. at 128-29.

ATLANTIC RICHFIELD CO. V. USA PETROLEUM CO. (1990).[1] In 1983, USA Petroleum Company, an independent retailer of gasoline, sued Atlantic Richfield (ARCO), an integrated oil company, for conspiring with its ACRO-brand dealers to set the maximum price at which ARCO and its branded dealers would sell gasoline at retail at below-market levels. USA, which competed directly with ARCO-brand dealers at the retail level, alleged that ARCO's strategy was to eliminate the independents by fixing and subsidizing below-market prices and that USA had been injured in its business by competing with dealers charging these below-market prices.

The district court granted summary judgment to ARCO, holding that even if USA could establish a vertical maximum price-fixing agreement to maintain low prices—which at the time was per se illegal[2]—it could not demonstrate the requisite antitrust injury without showing that the prices were predatory. The prices could not be predatory, however, given ARCO's low market share and the ease of entry into the market.[3]

A divided panel of the Court of Appeals for the Ninth Circuit reversed.[4] Acknowledging that its decision conflicted with decisions in the Seventh Circuit,[5] the majority rejected ARCO's argument that USA did not suffer antitrust injury because its alleged injury was not the type of injury that the rule against maximum resale price maintenance was meant to prevent. After an extensive review of the case law, the Ninth Circuit held that the Supreme Court did not distinguish maximum vertical price fixing as a separate species of antitrust violation but rather viewed it as one form of price fixing. Moreover, the court held that conspiratorial maximum price fixing, unlike unilateral maximum price setting at issue in *Cargill*, is subject to the per se rule and unlawful even if it is not predatory. To the majority, then, the proper question was whether USA allegedly suffered the kind of injury that antitrust rules against price fixing were meant to prevent. Since the rules against price fixing were designed to price short-term and short-term disruptions in the marketplace due to interference with the free-market pricing mechanism, and since USA alleged that it was injured precisely by this interference, USA adequately alleged antitrust injury.

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1. 495 U.S. 328 (1990).

2. *See* Albrecht v. Herald Co., 390 U.S. 145 (1968). In 1997, the Supreme Court overruled *Albrecht* and returned maximum vertical price fixing (often called maximum resale price maintenance) to rule of reason scrutiny in State Oil Co. v. Khan, 522 U.S. 3, 18 (1997). In 2007, the Court in Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007), rejected the application of the per se rule to minimum vertical price fixing, so that now all bilateral vertical restraints on pricing are subject to the rule of reason. We will examine maximum and minimum resale price maintenance in Unit 22.

3. For now, just believe that this is the law. We will explore the requirements for a claim of predatory pricing in Unit 16.

4 USA Petroleum Co. v. Atlantic Richfield Co., 859 F.2d 687 (9th Cir. 1988), *rev'd*, 495 U.S. 328 (1990).

5. *See* Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1418-20 (7th Cir. 1989); Local Beauty Supply, Inc. v. Lamaur, Inc., 787 F.2d 1197, 1201-03 (7th Cir. 1986); Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 708-09 (7th Cir. 1984).

In a 7-2 decision, the Supreme Court rejected the Ninth Circuit's reasoning and reversed and remanded. In an opinion written by Justice Brennan, the author of *Cargill*, the Court held that a firm does not sustain antitrust injury when it loses sales to a competitor charging nonpredatory prices pursuant to a maximum vertical price fixing conspiracy. Brennan noted that *Brunswick* required antitrust injury both to be "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful,"[6] and that *Cargill* "reaffirmed that injury, although causally related to an antitrust violation, nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anti-competitive aspect of the practice under scrutiny."[7] This puts the focus on the relationship between the specific act that proximately caused the plaintiff's injury rather than the characterization of the antitrust violation. While the Court assumed arguendo that *Albrecht* properly held that maximum vertical price fixing was per se illegal,[8] "[w]hen a firm, or even a group of firms adhering to a vertical agreement, lowers prices but maintains them above predatory levels, the business lost by rivals cannot be viewed as an 'anticompetitive' consequence of the claimed violation."[9] Rather, a competitor "complaining about the harm it suffered from nonpredatory price competition 'is really claiming that it [is] unable to raise prices.'"[10] The Court also rejected the argument that USA could prove antitrust injury if it could show that the long-term effect of a maximum vertical price-fixing scheme would be to eliminate USA and other retailers from the market and so ultimately reduce competition. "Rivals cannot be excluded in the long run by a nonpredatory maximum-price scheme unless they are relatively inefficient."[11]

Apparently, under this logic, the elimination of an inefficient firm, like the inability to raise prices, is not an anticompetitive consequence of the antitrust violation. To the Court, "[t]he antitrust laws were enacted for 'the protection of *competition*, not *competitors*.'"[12] This begs the question of what is harm to competition, but the language of the majority's opinion strongly indicates that an act in furtherance of an antitrust violation has an anticompetitive consequence only if it harms consumers—say through higher prices as a result of conspiratorial price-fixing or the reduction of rivalry from efficient competitors—and that the plaintiff's injury qualifies as an antitrust injury only if lies in the chain of causation from the defendant's act to the consumer's harm.[13] The Court said that the theory of

6. *Atlantic Richfield*, 495 U.S. at 334 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)).

7. *Id*. (citing Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 109-10 (1986)).

8. *Id*. at 335 & n.5 (citing Albrecht v. Herald Co., 390 U.S. 145 (1968)).

9. *Id*. at 337.

10. *Id*. at 338 (quoting Roger D. Blair & Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 VAND. L. REV. 1539, 1554 (1989)).

11. *Id*. at 337 n.7.

12. *Id*. at 338 (citing Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (emphasis in original)).

13. *See id.* at 340 ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give

anticompetitive harm from maximum vertical price fixing was that the practice would restrain nonprice competition by the dealers subject to the price caps, since "prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay.[14] Other anticompetitive harms might include the risk of an erroneous judgment that sets the price caps too low to enable the restrained dealers to compete with other brands in the marketplace or the maximum price cap somehow morphing into a minimum price floor.[15] As an unrestrained retail competitor, USA was not involved in any of these harms and indeed could charge higher prices and offer customers superior services if that is what customers desired.

More generally, the Court rejected USA's argument that the antitrust injury need not be shown for injuries resulting from per se illegal violations of the antitrust laws. The rule of per se illegality is a presumption of the unreasonableness that applies to a class of conduct, but the *Atlantic Richfield* Court recognized aspects of a per se illegal scheme might be procompetitive or competitively neutral. Since antitrust injury only applies to harm that "corresponds to the rationale for finding a violation of the antitrust laws in the first instance" and "stems from a competition-reducing aspect or effect of the defendant's behavior," antitrust injury in per se cases must be proved independently even in per se cases.[16] "Indeed, insofar as the per se rule permits the prohibition of efficient practices in the name of simplicity, the need for the antitrust injury requirement is underscored."[17]

rise to antitrust inury."); *id*. at 345 ("Respondent's injury, moreover, is not "inextricably intertwined" with the antitrust injury that a dealer would suffer, [Blue Shield of Va. v.] McCready, 457 U.S., [465] at 484, 102 S. Ct., at 2551 [(1984)], and thus does not militate in favor of permitting respondent to sue on behalf of petitioner's dealers."); *see also* Port Dock & Stone Corp. v. Oldcastle Northeast, Inc., 507 F.3d 117, 122 (2d Cir. 2007) ("We can ascertain antitrust injury only by identifying the anticipated anticompetitive effect of the specific practice at issue and comparing it to the actual injury the plaintiff alleges.").

14. *Atlantic Richfield*, 495 U.S. at 366 (quoting Albrecht v. Herald Co., 390 U.S. 145, 152-53 (1968)); *accord Port Dock*, 507 at 122.

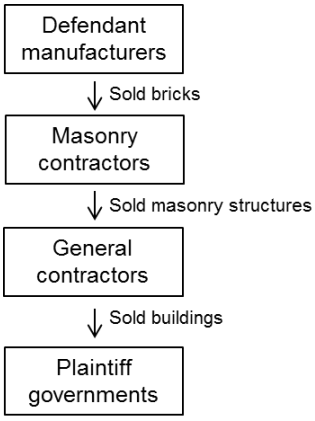
15. *Atlantic Richfield*, 495 U.S. at 365-66.

16. *Id*. at 342, 344.

17. *Id*. at 344.

INDIRECT PURCHASERS

ILLINOIS BRICK CO. V. ILLINOIS (1977).[1] The State of Illinois and 700 local governmental entities brought suit against various concrete block manufacturers alleging that the defendants had engaged in a horizontal price-fixing conspiracy in violation of Section 1 of the Sherman Act. The plaintiffs, which purchased their concrete blocks indirectly through independent intermediaries not part of the manufacturers' conspiracy, sought treble damages for the overcharges they allegedly paid as a result of the conspiracy.



The plaintiffs, relying on *Hanover Shoe*, moved for partial summary judgment against the plaintiffs that were indirect purchasers on the grounds that only direct purchasers could sue for an overcharge. The district granted the motion, but on the grounds that the plaintiffs, who purchased buildings from general contractors incorporating the supracompetitively price bricks, were too remote from the original sale. The Seventh Circuit reversed, holding that although *Hanover Shoe* precluded a defendant from offsetting its damages by the amount of the overcharge that a direct purchaser-plaintiff passed on to its customers, an indirect purchaser could also obtain treble damages if they could trace the injury from the original sale and prove the amount of the overcharge that was passed on to them.

The Supreme Court granted certiorari and reversed in a 6-3 decision. The majority, in an opinion written by Justice White, took as its point of departure that *Hanover Shoe* must either be applied symmetrically—if a defendant cannot offset damages that were passed on by a direct purchaser plaintiff, then an indirect purchaser plaintiff cannot recover for its passed on overcharge—or else the defendant would be at risk of multiple liability for the same (passed-on) overcharge. So if indirect purchasers are to be permitted to sue for their overcharges, *Hanover Shoe* must be overturned. White then found that *Hanover Shoe* was properly decided. First, considerations of stare decisis are particularly strong in the area of statutory construction, since Congress is free to change the law to reject the Court's interpretation. Second, the concerns expressed in *Hanover Shoe* about the complexities a passing-on defense are multiplied if indirect purchasers are permitted to pursue their claims: not only would passed-on overcharges have to be calculated at the direct purchaser level, they would also have to be traced and apportioned through

1. 431 U.S. 720 (1977). The facts are taken from the various opinions in the case. *See* Illinois v. Ampress Brick Co., 67 F.R.D. 461 (N.D. Ill. 1975), *rev'd*, 536 F.2d 1163 (7th Cir. 1976), *rev'd*, 431 U.S. 720 (1977).

the chain of distribution and sale to the various indirect purchasers to the remote ultimate customers. This would enormously increase the burden on the courts, even in cases, unlike this one, where the products are not transformed at each level in the chain of distribution and sale. Finally, since indirect purchasers with small stakes may not pursue their antitrust treble damages claims, the legislative purpose of creating "private attorneys general" to further the enforcement of the antitrust laws and deter violations would be better served if the rewards from litigation to direct purchasers—and hence their incentives to being antitrust claims—were not diminished by a reduction in their recoveries from a passing-on offset as well as by an increase in the costs of prosecution due to the complexities introduced by the defense. Accordingly, the Court held that indirect purchasers lacked standing to pursue treble damages claims for passed-on overcharges and reversed the Seventh Circuit.

Justice Brennan, joined by Justices Marshall and Blackmun, dissented. To Brennan, although Section 4 is in part intended to aid antitrust enforcement and deter violations, another important if not more primary purpose is to compensate the victims of antitrust violations. A plaintiff that is a genuine victim of antitrust violation, even if an indirect purchaser, should be able to seek redress under Section 4 to the extent that it can prove both causality and the amount of the overcharge it paid. Moreover, Brennan did not believe that *Hanover Shoe* needed to be applied symmetrically. Brennan read *Hanover Shoe* to be more about preserving the incentives of direct purchasers to act a "private attorneys general" by maximizing their rewards in litigation. Nor was Brennan overly concerned about introducing additional complexities into antitrust treble damages litigation, since he believed that the questions raised by tracing and apportioning damages through a chain of distribution and sale were not more difficult than the usual questions confronted in this type of litigation. Brennan did agree that there was "some abstract merit" in the concerns about multiple recoveries, but he believed that as a practical matter this was not a significant danger. Multiple cases pending at the same time could be centralized in the same court through intradistrict consolidation, interdistrict transfer, and multidistrict consolidation, so that the court could apportion damages to all plaintiffs in a consistent manner. And the likelihood of an action being brought after a prior action based on the same violation had been litigated was small at best, given the extended length of time it takes to try an antitrust case and the four-year statute of limitations within which a plaintiff must commence its action.

NOTES

1. The *Illinois Brick* rule denying indirect purchasers antitrust standing to pursue treble damages under Section 4 does not extend to injunctive and other equitable relief under Section 16, where the prospect of multiple damage recoveries for the same violation or litigation complexities due to tracing causality and apportioning damages though a chain of distribution and sale do not arise.[2]

2. *See, e.g.*, Ginsburg v. InBev NV/SA, 623 F.3d 1229, 1233 (8th Cir. 2010); *In re* Warfarin Sodium Antitrust Litig. (Warfarin Sodium I), 214 F.3d 395, 399–400 (3d Cir. 2000); Lucas Auto.

2. The Supreme Court has recognized two narrow exceptions to *Illinois Brick*: (1) where an indirect purchaser obtained goods from a direct purchaser pursuant to a pre-existing "cost-plus contract," and (2) where the direct purchaser is owned or controlled by another party (either the indirect purchaser or the seller).[3] These only rarely arise in practice.

3. State antitrust laws also provide for private rights of action for damages. Many of these states do not recognize the *Illinois Brick* rule as a matter of judicial interpretation[4] or because of the passage of an "*Illinois Brick* repealer" statute.[5] The Supreme Court has rejected a preemption challenge to these state repealer statutes and affirmed the right of the states to provide indirect purchasers with a private right of action under state law for antitrust injuries resulting from a violation of the state's substantive antitrust law.[6] Federal courts exercising supplemental jurisdiction over state law antitrust claims will adjudicate indirect purchaser claims if state law permits.[7]

Eng'g, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1235 (9th Cir. 1998); Campos v. Ticketmaster Corp., 140 F.3d 1166, 1172 (8th Cir. 1998); McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 856 (3d Cir. 1996); *In re* Beef Indus. Antitrust Litig., 600 F.2d 1148, 1167 (5th Cir. 1979); Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573, 590-94 (3d Cir. 1979).

3. *Illinois Brick*, 431 U.S. at 726 n.2

4. *See, e.g.*, Bunker's Glass Co. v. Pilkington PLC, 75 P.3d 99, 102 (Ariz. 2003); Mack v. Bristol-Myers Squibb Co., 673 So. 2d 100, 108 (Fla. Dist. Ct. App. 1996); Comes v. Microsoft Corp., 646 N.W.2d 440, 447 (Iowa 2002); Hyde v. Abbott Labs., Inc., 473 S.E.2d 680, 683 (N.C. Ct. App. 1996); Freeman Indus., LLC v. Eastman Chem. Co., 172 S.W.3d 512, 517 (Tenn. 2005)

5. *See, e.g.*, Ala. Code § 6-5-60(a); Cal. Bus. & Prof. Code § 16750; D.C. Code § 28-4509; Haw. Rev. Stat § 480-13(a)(1); 740 Ill. Comp. Stat. Ann. 10/7; Iowa Code § 553.12; Kan. Stat. Ann. § 50-161(B); Me. Rev. Stat. Ann. tit. 10, § 1104(1); Mich. Comp. Laws Ann. § 445.778; Minn. Stat. Ann. § 325D.57; Miss. Code. Ann. § 75-21-9; Neb. Rev. Stat. § 59-821; Nev. Rev. Stat. Ann. § 598A.210; N.M. Stat. Ann. § 57-1-3; N.Y. Gen. Bus. Law § 340(6); N.D. Cent. Code Ann. § 51-08.1-08; Or. Rev. Stat. § 646.780(1)(a); S.D. Codified Laws § 37-1-33; Utah Code § 76-10-3109; Vt. Stat. Ann. tit. 9, § 2465(b); Wis. Stat. Ann. § 133.18(1)(a).

6. California v. Arc America Corp., 490 U.S. 93 (1989).

7. *See, e,g., id.*; *In re* Air Cargo Shipping Servs. Antitrust Litig., 697 F.3d 154 (2d Cir. 2012); *In re* Korean Air Lines Co., 642 F.3d 685 (9th Cir. 2011); Illinois *ex rel.* Burris v. Panhandle Eastern Pipe Line Co., 935 F.2d 1469 (7th Cir. 1991); *In re* Automotive Parts Antitrust Litig., Master File No. 12–md–02311, 2014 WL 2993742 (E.D. Mich. July 3, 2014).

APPLE INC. V. PEPPER (2019).[1] In *Apple v Pepper*, the Supreme Court held that a consumer who purchased an Apple application for their iPhone through the Apple App Store was a direct purchaser and had standing to sue even though the app developer, not Apple, set the purchase price for the app.

Apple sells apps directly to consumers through its App Store. In 2019, the App Store contained about 2 million apps. Independent developers create the vast bulk of these apps. To sell an app in the App Store, developers contract with Apple to carry their app and pay Apple a $99 annual membership fee. Developers set the retail price to be charged by the App Store (subject to Apple's requirement that the price ends in $0.99). Apple deducts a 30% commission on the sales price for every app sale and remits the remaining 70 percent of the purchase price to the developer. Apple contractually prohibits developers from selling iPhone apps except through the App Store and discourages consumers from purchasing apps through other channels by threatening to void their iPhone warranties if they do.

Several individual consumers who purchased Apple apps through the App Store between 2007 and 2013 brought a class action against Apple, alleging that Apple had monopolized and attempted to monopolize the aftermarket for iPhone applications in violation of Section 2 of the Sherman Act. The plaintiffs alleged that Apple created a "closed system" whereby consumers could only purchase iPhone apps through the App Store and used its monopoly over the distribution system to charge a supracompetitive 30% commission. According to the complaint, "Apple sells the apps (or, more recently, licenses for the apps) directly to the customer, collects the entire purchase price, and pays the developers after the sale. The developers at no time directly sell the apps or licenses to iPhone customers or collect payments from the customers."[2]

The district court granted Apple's Rule 12(b)(6) motion to dismiss on the grounds that the plaintiffs were indirect purchasers from Apple and lacked standing under *Illinois Brick*. Analogizing the case to an earlier decision in the *ATM Fee* antitrust litigation,[3] the district court rejected plaintiffs' argument that they were direct purchasers from Apple. In the *ATM Fee* case, plaintiff-cardholders alleged that they paid a transactions fee to the ATM owner that contained an allegedly supracompetitive interchange fee set by a conspiracy among the card-issuing banks. The district court found, and the Ninth Circuit affirmed, that the plaintiff-cardholders lacked standing because the ATM owners—not the plaintiffs—paid the interchange fee to the banks and then passed on the overcharge to the plaintiffs in the transaction fee. Similarly, the *Pepper* district court found that the complaint effectively alleged that the developers—not the plaintiff-consumers—paid the allegedly

1. 587 U.S. 273 (2019), *aff'g sub nom. In re* Apple iPhone Antitrust Litig., 846 F.3d 313 (9th Cir. 2017), *rev'g and remanding* 2013 WL 6253147 (Dec 02, 2013).

2. 2013 WL 6253147, at *2 (quoting Second Amended Consolidated Complaint ¶ 41).

3. In re ATM Fee Antitrust Litig., No. C 04-02676 CRB, 2010 WL 3701912, at *2 (N.D. Cal. Sept. 16, 2010), *aff'd*, 686 F.3d 741 (9th Cir.2012) (district court's Order Granting Defendants' Motion for Summary Judgment).

supracompetitive commission to Apple, although the overcharge was passed on to the plaintiffs in the app's retail price.

The Ninth Circuit reversed and remanded. The court of appeals characterized Apple functionally as a distributor of iPhone apps that sold apps directly to purchasers through its App Store. As such, plaintiff-consumers were direct purchasers from Apple and had standing to sue. The court rejected Apple's analogy that Apple was like a shopping mall owner that leased space to stores because "third-party developers of iPhone apps do not have their own 'stores.'"[4] The court also held that the formal money flow among the parties was irrelevant, especially since Apple could alter the money flow to avoid liability without changing any substance of the transaction. Likewise, the court held that the form of payment Apple receives is irrelevant, finding the distinction between a markup and a commission immaterial. Finally, the court held that its conclusion did not turn on who determines the ultimate price the buyer pays for an iPhone app. Rather, "[t]he key to the analysis is the function Apple serves rather than the manner in which it receives compensation for performing that function."[5]

In a 5-4 decision, the Supreme Court affirmed. Justice Kavanaugh, writing for the majority, began his analysis by stating that "[i]t is undisputed that the iPhone owners bought the apps directly from Apple."[6] The majority found the allegation decisive:

> The iPhone owners purchase apps directly from the retailer Apple, who is the alleged antitrust violator. The iPhone owners pay the alleged overcharge directly to Apple. The absence of an intermediary is dispositive. Under *Illinois Brick*, the iPhone owners are direct purchasers from Apple and are proper plaintiffs to maintain this antitrust suit."[7]

Like the Ninth Circuit, the majority rejected a rule urged by Apple that the "seller" within the meaning of *Illinois Brick* is the person that sets the price the customer pays. The majority found three problems with Apple's theory. First, the theory contracts the text of Clayton Act § 4, which broadly provides a private right of action for treble damages to parties injured by reason of an antitrust violation, as well as the precedent of *Illinois Brick*. Second, Apple's rule "would draw an arbitrary and unprincipled line among retailers based on retailers' financial arrangements with their manufacturers or suppliers."[8] Third, Apple's rule "would provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust claims by consumers and thereby thwart effective antitrust

4. 846 F.3d at 324. The court of appeals declined to address the question of whether Apple also sold distribution services to app developers within the meaning of *Illinois Brick*. *Id*.

5. *Id*. at 324.

6. 587 U.S. at 278. It apparently was undisputed because on a motion to dismiss the factual allegations of the complaint are taken as true, and the complaint alleged that Apple sold apps directly to iPhone owners through the Apple App Store. *See supra* note 2 and accompanying text.

7. 587 U.S. at 281.

8. *Id*. at 282.

enforcement."[9] Finally, the majority held that the proper party analysis underlying *Illinois Brick* does not support Apple's rule:

- Apple's rule does not facilitate more effective enforcement of antitrust laws since consumers may be the most effective enforcers of the antitrust laws against Apple in this situation.
- Apple's rule does not avoid complicated damages calculations since the damages calculation may be just as complicated in a retailer markup case as it is in a retailer commission case
- Apple's rule does not eliminate duplicative damages against antitrust defendants since this is not a case where multiple parties at different levels of the distribution chain are all trying to recover their respective portions of a passed-through overcharge initially levied by the supplier at the top of the chain.

Justice Gorsuch, writing for the four-member dissent, would have found that the *Illinois Brick* rule applies to the claim as alleged and would have reversed. To Gorsuch, the majority "recast[ ] *Illinois Brick* as a rule forbidding only suits where the plaintiff does not contract directly with the defendant. This replaces a rule of proximate cause and economic reality with an easily manipulated and formalistic rule of contractual privity."[10]

> The lawsuit alleges that Apple is a monopolist retailer and that the 30% commission it charges developers for the right to sell through its platform represents an anticompetitive price. The problem is that the 30% commission falls initially on the developers. So if the commission is in fact a monopolistic overcharge, the developers are the parties who are directly injured by it. Plaintiffs can be injured only if the developers are able and choose to pass on the overcharge to them in the form of higher app prices that the developers alone control.[11]

Moreover, Gorsuch would have found permitting standing under the majority's rule raises the same concerns that animated the *Illinois Brick* indirect purchaser rule:

- *Does not lead to more effective antitrust enforcement*: It is easy to avoid liability under the majority's rule: to evade the majority's test, all Apple must do is amend its contracts so that instead of collecting payments for apps sold in the App Store and remitting the balance (less its commission) to developers, Apple simply specifies that consumers directly pay the developer, who will then remit a 30% commission to Apple.
- *Complicated damages calculations*: A court will have to determine whether and to what extent each app developer was able—and then opted—to pass on some or all of the commission to app purchasers.

9. *Id*. at 284.
10. *Id*. at 289 (Gorsuch, J., dissenting).
11. *Id*. at 292.

- *Possible duplicative damages*: If Apple's 30% commission is a monopolistic overcharge, then the app developers have a claim against Apple to recover whatever portion of the commission they did not pass on to consumers.

PROPER PARTY ANALYSIS

ASSOCIATED GENERAL CONTRACTORS V. CALIFORNIA STATE COUNCIL OF CARPENTERS (1983).[1] In *AGC*, the Supreme Court provided the modern framework for statutory standing for private plaintiffs seeking to invoke Section 4 of the Clayton Act. The *AGC* Court noted that a "literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation" and indeed that at least one prior case appeared to read the statute that way.[2] But the Court held that Section 4 should not be read so broadly: "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation."[3] Instead, Section 4 should be read as Congress intended when it passed the provision originally as Section 7 of the Shearman Act in 1890, namely through the prism of the common law.[4]

AGC was decided on February 22, 1983, about seven months after *McCready*. The majority opinion was written by Justice Stevens (the sole dissenter in *McCready*) and was joined by seven other justices. Justice Marshall, the author of the *Brunswick*), was the sole dissenter. *AGC* arose out of a dispute between the parties to a multiemployer collective bargaining agreement. The plaintiff-unions and Associated General Contractors of California (AGCC), which is a membership corporation composed of various building and construction contractors, and their respective predecessors had been parties to collective bargaining agreements governing the terms and conditions of employment in construction-related industries in California for over 25 years. In addition, approximately 3000 contractors that are not members of AGCC had entered into "memorandum agreements" with the unions binding them to the terms of the master collective bargaining between the unions and AGCC. The unions' complaint, brought as a class action for themselves and on behalf of numerous affiliated local unions and district councils, alleged among other things that AGCC, its members, and other industry employers conspired to encourage non-member contractors not to enter collective bargaining agreements with the unions, coerce land owners and other purchasers of construction services to hire contractors and subcontractors who were not signatories to the collective bargaining agreements (i.e., non-union shops), coerce members and non-members to hire non-union shop subcontractors, and in various ways breach their collective bargaining agreements with the unions. The unions alleged that this conduct violated

1. 459 U.S. 519 (1983).

2. *AGC*, 459 U.S. at 529 & n.20 (citing Mandeville Farms v. Sugar Co., 334 U.S. 219, 236 (1948) ("The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.").

3. *ACG*, 459 U.S. at 534 (quoting Hawaii v. Standard Oil Co., 405 U.S. 251, 263, n.14 (1972)).

4. *Id*. at 531 ("The repeated references to the common law in the debates that preceded the enactment of the Sherman Act make it clear that Congress intended the Act to be construed in the light of its common-law background.").

Section 1 of the Sherman Act and the California antitrust state (the Cartwright Act), breached the collective bargaining agreements with the unions, and comprised the torts of intentional interference with contractual relations and intentional interference with business relationships. The unions claimed damages of $25 million, to be trebled to $75 million under Section 4 of the Clayton Act.

The district court dismissed the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief could be granted.[5] The district found that complaint alleged "a rather vague, general conspiracy to weaken and destroy the plaintiff unions by hiring non-union persons and various other alleged acts of sabotage" and that the challenged actions "appear typical of disputes a union might have with an employer, which in the normal course are either presented to the National Labor Relations Board for resolution of charges that defendants have engaged in unfair labor practices or, if the acts arguably constitute violations of the collective bargaining agreements, are presented through the contract grievance machinery and ultimately to an arbitration panel."[6] This type of conduct is normally exempt from antitrust scrutiny under the labor exemption. Moreover, the court found that "[t]he essence of plaintiffs' claim seems to be that defendants violated the antitrust laws insofar as they declined to enter into agreements with plaintiffs to deal only with subcontractors which were signatories to contracts with plaintiffs."[7] The Supreme Court only months earlier had held that these types of agreements were outside the labor exemption and prohibited by the antitrust laws.[8] The district court accordingly dismissed the antitrust claim. The court also dismissed the four other non-antitrust claims in the complaint.

On appeal, the Ninth Circuit affirmed the dismissal of the non-antitrust counts but reversed the dismissal of the antitrust claims.[9] The Ninth Circuit held that the district court had mischaracterized the complaint and instead saw it as alleging a "conspiracy to boycott union-signatory subcontractors," either directly or through secondary boycotts.[10] In support of its finding that the unions had standing under Section 4 of the Clayton Act, the court of appeals first found that the unions had satisfactorily alleged "factual causation" because the alleged AGCC conspiracy to establish an industry-wide boycott against all subcontractors with whom the unions had signed agreements would have injured the unions have been injured in their business of organizing carpentry industry employees, negotiating and policing collective

5. California State Council of Carpenters v. Associated Gen. Contractors, 404 F. Supp. 1067 (N.D. Cal. 1975), *aff'g in part and rev'g in part*, 648 F.2d 527 (9th Cir. 1980), *rev'd*, 459 U.S. 519 (1983).

6. *Id*. at 1069.

7. *Id*. at 1070.

8. Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975).

9. California State Council of Carpenters v. Associated Gen. Contractors, 648 F.2d 527 (9th Cir. 1980), *rev'd*, 459 U.S. 519 (1983)

10. 648 F.2d at 529. A direct boycott is where a group refuse to deal with a target firm. A secondary boycott is where the group refuses to deal with anyone that deals with the target firm.

bargaining agreements, and securing jobs for their members.[11] But the court recognized that factual causation by itself was not sufficient; the unions also had to demonstrate "legal causation" by showing that its injury "was of the type that the antitrust laws were intended to prevent."[12] In the Ninth Circuit at the time, legal causation was determined by the "target area" test, which requires the plaintiff to be "within the area of the economy which (defendants) reasonably could have or did foresee would be endangered by the breakdown of competitive conditions."[13] Here, the unions satisfied the target area test because injury to the unions' business was the specifically intended result of the AGCC's boycott of union-signatory subcontractors.[14]

The Supreme Court, in an opinion written by Justice Stevens for eight members of the Court, reversed the Ninth Circuit's reinstatement of the antitrust claims. Stevens assumed that the unions' complaint alleged an antitrust violation. The issue for Stevens was whether the unions has statutory standing under Section 4 of the Clayton Act to pursue their claim. Stevens concluded that they were not:

> There is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of "proximate cause," and the struggle of federal judges to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages. It is common ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing. In both situations the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case. Instead, previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.
>
> The factors that favor judicial recognition of the Union's antitrust claim are easily stated. The complaint does allege a causal connection between an antitrust violation and harm to the Union and further alleges that the defendants intended to cause that harm. As we have indicated, however, the mere fact that the claim is literally encompassed by the Clayton Act does not end the inquiry. We are also satisfied that an allegation of improper motive, although it may support a plaintiff's damages claim under § 4, is not a panacea that will enable any complaint to withstand a motion to dismiss. Indeed, in *McCready*, we specifically held: "The availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators."
>
> A number of other factors may be controlling. In this case it is appropriate to focus on the nature of the plaintiff's alleged injury. As the legislative history shows, the Sherman Act was enacted to assure customers the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market. Last Term in *Blue Shield of Virginia v. McCready*, we identified the relevance of this

11. *Id*. at 537.
12. *Id*.
13. *Id*. (quoting *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 199 (9th Cir. 1973)).
14. *Id*. at 538.

central policy to a determination of the plaintiff's right to maintain an action under § 4. McCready alleged that she was a consumer of psychotherapeutic services and that she had been injured by the defendants' conspiracy to restrain competition in the market for such services. The Court stressed the fact that "McCready's injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws." After noting that her injury "was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market," the Court concluded that such an injury "falls squarely within the area of congressional concern."

In this case, however, the Union was neither a consumer nor a competitor in the market in which trade was restrained. It is not clear whether the Union's interests would be served or disserved by enhanced competition in the market. As a general matter, a union's primary goal is to enhance the earnings and improve the working conditions of its membership; that goal is not necessarily served, and indeed may actually be harmed, by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals. At common law-as well as in the early days of administration of the federal antitrust laws-the collective activities of labor unions were regarded as a form of conspiracy in restraint of trade. Federal policy has since developed not only a broad labor exemption from the antitrust laws, but also a separate body of labor law specifically designed to protect and encourage the organizational and representational activities of labor unions. Set against this background, a union, in its capacity as bargaining representative, will frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains. In each case its alleged injury must be analyzed to determine whether it is of the type that the antitrust statute was intended to forestall. In this case, particularly in light of the longstanding collective bargaining relationship between the parties, the Union's labor-market interests seem to predominate, and the *Brunswick* test is not satisfied.

An additional factor is the directness or indirectness of the asserted injury. In this case, the chain of causation between the Union's injury and the alleged restraint in the market for construction subcontracts contains several somewhat vaguely defined links. According to the complaint, defendants applied coercion against certain landowners and other contracting parties in order to cause them to divert business from certain union contractors to nonunion contractors. As a result, the Union's complaint alleges, the Union suffered unspecified injuries in its "business activities." It is obvious that any such injuries were only an indirect result of whatever harm may have been suffered by "certain" construction contractors and subcontractors.

If either these firms, or the immediate victims of coercion by defendants, have been injured by an antitrust violation, their injuries would be direct and, as we held in *McCready*, they would have a right to maintain their own treble damages actions against the defendants. An action on their behalf would encounter none of the conceptual difficulties that encumber the Union's claim. The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the Union to perform the

office of a private attorney general. Denying the Union a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied.

Partly because it is indirect, and partly because the alleged effects on the Union may have been produced by independent factors, the Union's damages claim is also highly speculative. There is, for example, no allegation that any collective bargaining agreement was terminated as a result of the coercion, no allegation that the aggregate share of the contracting market controlled by union firms has diminished, no allegation that the number of employed union members has declined, and no allegation that the Union's revenues in the form of dues or initiation fees have decreased. Moreover, although coercion against certain firms is alleged, there is no assertion that any such firm was prevented from doing business with any union firms or that any firm or group of firms was subjected to a complete boycott. Other than the alleged injuries flowing from breaches of the collective bargaining agreements-injuries that would be remediable under other laws-nothing but speculation informs the Union's claim of injury by reason of the alleged unlawful coercion. Yet, as we have recently reiterated, it is appropriate for § 4 purposes "to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm."

The indirectness of the alleged injury also implicates the strong interest, identified in our prior cases, in keeping the scope of complex antitrust trials within judicially manageable limits. These cases have stressed the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other. Thus, in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed.2d 1231 (1968), we refused to allow the defendants to discount the plaintiffs' damages claim to the extent that overcharges had been passed on to the plaintiffs' customers. We noted that any attempt to ascertain damages with such precision "would often require additional long and complicated proceedings involving massive evidence and complicated theories." In *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed.2d 707 (1977), we held that treble damages could not be recovered by indirect purchasers of concrete blocks who had paid an enhanced price because their suppliers had been victimized by a price-fixing conspiracy. We observed that potential plaintiffs at each level in the distribution chain would be in a position to assert conflicting claims to a common fund, the amount of the alleged overcharge, thereby creating the danger of multiple liability for the fund and prejudice to absent plaintiffs.

. . .

The same concerns should guide us in determining whether the Union is a proper plaintiff under § 4 of the Clayton Act. As the Court wrote in *Illinois Brick*, massive and complex damages litigation not only burdens the courts, but also undermines the effectiveness of treble-damages suits. In this case, if the Union's complaint asserts a claim for damages under § 4, the District Court would face problems of identifying damages and apportioning them among directly victimized contractors and subcontractors and indirectly affected employees and union entities. It would be necessary to determine to what extent

> the coerced firms diverted business away from union subcontractors, and then to what extent those subcontractors absorbed the damage to their businesses or passed it on to employees by reducing the workforce or cutting hours or wages. In turn it would be necessary to ascertain the extent to which the affected employees absorbed their losses and continued to pay union dues.
>
> We conclude, therefore, that the Union's allegations of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the Union, are insufficient as a matter of law. Other relevant factors—the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy—weigh heavily against judicial enforcement of the Union's antitrust claim. Accordingly, we hold that, based on the allegations of this complaint, the District Court was correct in concluding that the Union is not a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act. The judgment of the Court of Appeals is reversed.[15]

NOTES

1. *ACG* is a difficult case to read and not well understood by the courts or the bar. The rule of the case is that a plaintiff that has suffered an injury to its business or property traceable to an antitrust violation still may lack statutory standing to bring a private treble damages action under Section 4 of the Clayton Act. Whether it has standing depends on the court's assessment of a litany of factors, including:

   a. The nature of the plaintiff's injury and whether it was one Congress sought to redress.

   b. The causal connection between the violation and the harm.

   c. The extent to which the relationship between the alleged antitrust violation and the plaintiff's alleged injury is tenuous and speculative.

   d. The potential for duplicative recovery or complex apportionment of damages.

   e. The directness of the injury and the existence of more direct victims of the alleged conspiracy.[16]

15. *AGC*, 459 U.S. at 535-46 (internal citations and footnotes omitted).

16. The Second Circuit reorganized these factors into perhaps a more understandable form:
   (1) "the directness or indirectness of the asserted injury";
   (2) "the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement";
   (3) the speculativeness of the alleged injury; and
   (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.

Applying these factors, the Court concluded that the plaintiff union lacked antitrust standing because: (1) the causal chain consisted of several "somewhat vaguely defined" links, (2) motive was not a significant issue in the case, (3) the type of injury was not one Congress sought to address because the union was "neither a consumer nor a competitor in the market in which trade was restrained", (4) the union's alleged injury was too indirect; (5) the injury was speculative because the effects of the conspiracy were indirect and could have been caused by independent factors, and (6) there was an alternative class of plaintiffs better situated to pursue the claims, which created a risk of duplicative damages.

2. *Umbrella damages*. Consider a cartel, comprising most but not all of the competitors in the market, that raises price. The non-conspirator competitors, each for their own reasons, decide unilaterally to charge prices just under the cartel price under the "umbrella" of the cartel. The overcharge paid by customers purchasing from the non-conspirators at are called "umbrella damages." Does such a customer have a claim under Clayton Act § 4 against the conspirators?

This is a question of antitrust standing, which for this purpose we can consider three subquestions: (1) Was the umbrella customer "injured in his business or property by reason of anything forbidden in the antitrust laws" as required by Section 4? (2) Did the umbrella customer sustain antitrust injury under *Brunswick*? (3) Is the umbrella customer a proper party—that is, an "efficient antitrust enforcer"—under *Associated General Contractors*?

As to the express requirements of Section 4, the defendants were engaged in a per se illegal horizontal price-fixing conspiracy that successfully raised the prices charged by its members and under *McCready* any overcharge paid by the umbrella customer was an injury to its business or property. But was the injury caused "by reason of" the defendants' horizontal price-fixing conspiracy or did the decision by the non-conspirator seller ride under the cartel price break the chain of causality? Causality is also called into the question the greater the gap between the prices the cartel members charge and the price the customer pays to the non-conspirator seller.

As to antitrust injury, the umbrella overcharge reflected a distortion of the competitive process not distinguishable from that of a conspirator that departed from the cartel price rule, albeit only slightly.

The most serious questions, however, are likely to arise in whether the umbrella customer is an efficient antitrust enforcer. We have already discussed the basic question of causation in connection with the Section 4 requirements. Direct purchasers from members of the conspiracy would not have to confront issues regarding causality and they presumably would every as much of an incentive to bring an antitrust challenge against the conspiracy. Similarly, direct purchasers from conspiratorial members would have less speculative damages, since they would not

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Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 66 (2d Cir. 1988) (quoting *AGC*, 459 U.S. at 540-45); *accord* Gelboim v. Bank of Am. Corp., 823 F.3d 759 (2d Cir. 2016); Port Dock & Stone Corp. v. Oldcastle, Northeast, Inc., 507 F.3d 117, 121 (2d Cir. 2007); Paycom Billing Serv., Inc. v. Mastercard Int'l, Inc., 467 F.3d 283, 290-91 (2d Cir. 2006).

have to confront questions of how the non-conspirators settled on the price each charged (especially if prices are negotiated).

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

IN RE: PLASMA-DERIVATIVE PROTEIN THERAPIES ANITRUST LITIGATION	)))))	Judge Joan B. Gottschall MDL No. 2109 Case No. 09 C 7666

MEMORANDUM OPINION & ORDER

The County of San Mateo ("San Mateo") filed suit against defendants CSL Limited, CSL Behring LLC, and CSL Plasma (collectively, "CSL"), Baxter International Inc. ("Baxter"), and Plasma Protein Therapeutics Association ("PPTA"), alleging that the defendants violated § 1 of the Sherman Act, 15 U.S.C. § 1, as well twenty-five states' antitrust laws and fourteen states' unfair competition or consumer protection laws, by virtue of a conspiracy to "restrict output to artificially raise, fix, maintain and/or stabilize the prices of Plasma-Derivative Protein Therapies in the United States." (*See* Indirect-Purchaser Plaintiff's Class Action Compl. ¶ 280, ECF No. 367-2.) The defendants have moved to dismiss the complaint, arguing that San Mateo lacks standing to pursue its claims, and that certain of San Mateo's state law claims fail for various reasons. For the reasons stated below, the court grants in part and denies in part the defendants' motion and requests additional briefing as to certain issues.

I. BACKGROUND

[*Editor's summary*: This multi-district litigation consisted of almost twenty actions brought on behalf of direct and indirect purchasers of plasma-derivative protein therapies against the defendants. In their consolidated amended complaint, the direct purchaser plaintiffs alleged that CSL and Baxter, the two largest domestic producers of plasma-derivative therapies, conspired along with PPTA, a trade association, to restrict supplies of plasma-derivative therapies and to raise prices in violation of Section 1 of the Sherman Act.

One of the actions was a putative class-action suit filed by a single named plaintiff, San Mateo, which was brought on behalf of indirect purchasers of plasma-derivative therapies. In its complaint, San Mateo explained that it operated a medical center through which it administers a county-wide health care system. As part of that program, the medical center indirectly purchased plasma-derivative protein therapies for use in treating patients, for sale to patients via its pharmacies, and for laboratory use. Prior to 2007, San Mateo purchased these therapies from spot markets organized by independent distributors or by group purchasing organizations ("GPOs") to which San Mateo belonged. Thereafter, San Mateo began purchasing annual allocations of the therapies either from distributors who had purchased the therapies from manufacturers, or from GPOs that negotiated contracts with manufacturers on behalf of their members. Despite these alternate arrangements, San Mateo claimed it was forced to keep purchasing plasma-derivative protein therapies on the spot market at a higher price due to supply shortages caused by the defendants' conspiracy.

San Mateo alleged the same violation of Section 1 of the Sherman Act that the direct purchasers alleged. It also alleged violations of various state antitrust laws and state unfair competition or consumer protection laws.

The defendants moved to dismiss San Mateo's complaint on several grounds, including that San Mateo lacked antitrust standing under *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983).]

II. LEGAL STANDARD

[OMITTED]

III. ANALYSIS

A. Article III Standing and Class Certification

[OMITTED]

B. Antitrust Standing

To establish antitrust standing, San Mateo must demonstrate both that (1) it has suffered an "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful," *Cargill*, 479 U.S. at 109 (quotation marks and citation omitted); and (2) it is the "proper party" to maintain an antitrust action. *See AGC*, 459 U.S. at 535 n.31 ("Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action."); *Kochert*, 463 F.3d at 715-16 (citing *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 597-98 (7th Cir. 1995)); *Sw. Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374 (7th Cir. 1987). The court has little difficulty in concluding that San Mateo alleges an antitrust injury, because San Mateo claims that the defendants conspired to reduce output, thereby forcing San Mateo to pay higher prices. This is a core antitrust injury. *See U.S. Gypsum Co.*, 350 F.3d at 626-27 ("A private plaintiff must show antitrust injury—which is to say, injury by reason of those things that make the practice unlawful, such as reduced output and higher prices."); *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris Inc.*, 196 F.3d 818, 825 (7th Cir. 1999) ("To recover under the antitrust laws, the plaintiff must show that its injury flows from that which makes the conduct an antitrust problem: higher prices and lower output.").

The "proper plaintiff" determination is less straightforward. In general, a court evaluates that issue by reference to the Supreme Court's *AGC* opinion, which requires "a case-by-case analysis [of] the link between a plaintiff's harm and a defendant's wrongdoing." *Loeb Indus. Inc.*

v. Sumitomo Corp., 306 F.3d 469, 484 (7th Cir. 2002) (citing *AGC*, 459 U.S. at 535-36). A number of factors are considered: "(1) the causal connection between the violation and the harm; (2) the presence of improper motive; (3) the type of injury and whether it was one Congress sought to redress; (4) the directness of the injury; (5) the speculative nature of the damages; and (6) the risk of duplicate recovery or complex damage apportionment." *Id.* (citing *AGC*, 459 U.S. at 537-45); *see Kochert*, 463 F.3d at 718.

Here, the defendants argue that *AGC* governs both the state and federal antitrust claims, and that the application of the *AGC* factors demonstrates San Mateo's lack of antitrust standing. San Mateo responds that *AGC* is inapplicable because this case involves horizontal price fixing on behalf of indirect purchasers "who are 'down a chain of supply' of the price-fixed product." (*See* Mem. in Opp'n at 13 (quoting *In re Aftermarket Filters Antitrust Litig.*, 2009 WL 3754041 at *7).) Furthermore, San Mateo claims that to apply *AGC* here would be to undermine the states' intent in enacting their own indirect purchaser antitrust legislation. San Mateo also argues that it has antitrust standing based on the factors set forth in *AGC*.

It is not clear whether San Mateo directs its "supply chain" argument to only the state law antitrust claims, or whether it argues that the reasoning in *Aftermarket Filters* applies to its federal antitrust claim as well. In any event, *Aftermarket Filters* is the only authority San Mateo cites in support of its argument that *AGC* is generally inapplicable to the case. In *Aftermarket Filters*, the district court concluded that "*AGC* was obviously never intended to apply to [a] situation involving claims of price fixing down a chain of distribution, because in the federal context such claims were already barred by *Illinois Brick*," and that "*AGC* has no application to actions brought by Direct and Indirect Purchasers alleging a conspiracy to fix prices in an entire physical market." *In re Aftermarket Filters Antitrust Litig.*, 2009 WL 3754041, at *7. The court

seemingly went on to limit *AGC* to cases in which "the defendants' conduct causes damage in two separate but related markets." *Id.* (citing *Loeb Indus. Inc. v. Sumitomo Corp.*, 306 F.3d 469, 481-85 (7th Cir. 2002)).

To the extent that *Aftermarket Filters* supports San Mateo's argument, this court must respectfully disagree with the reasoning set forth therein. *AGC* is not so limited. First, *Illinois Brick* does not resolve the question at hand, because *Illinois Brick* bars indirect purchasers only from bringing federal antitrust claims for damages. Injunctive relief under § 16 of the Clayton Act remains available, and necessitates an antitrust standing inquiry. *See Int'l Bhd. of Teamsters*, 196 F.3d at 823, 828 (noting that the "direct-purchaser doctrine of *Illinois Brick* and the direct-injury doctrine of *Associated General Contractors* are analytically distinct" and are "independent obstacle[s] to recovery"). And in any event, the antitrust standing doctrine was not created by the Supreme Court in *AGC*; instead, the *AGC* analysis "was an attempt by the Court to synthesize and clarify the confusing collection of the then-extant antitrust-standing rules." *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 850-51 & n.13 (3d Cir. 1996) ("Recognizing that these alternative formulations for assessing antitrust standing often led to contradictory and inconsistent results, the Supreme Court in *AGC* attempted to articulate a unified set of factors that could be applied generally in determining antitrust standing."). Thus, courts have understood *AGC* to incorporate the principles of *Illinois Brick*, *id.*, and they have applied the *AGC* factors to cases that involve a single chain of distribution. *See, e.g.*, *In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 401 (3d Cir. 2000) (evaluating § 16 claim for injunctive relief brought by indirect purchasers of a prescription drug by reference to the *AGC* factors). While courts also have applied *AGC* to cases that involve "two separate but related markets," this court cannot identify any reason to limit *AGC* to such a scenario.

The court therefore will apply *AGC*, at least to the federal claim. As an indirect purchaser, San Mateo may seek only injunctive relief. This fact necessarily modifies the court's analysis, because "standing under § 16 raises no threat of multiple lawsuits or duplicative recoveries." *See Cargill*, 479 U.S. at 110-111 n.6. Still, the *AGC* analysis remains "effectively the same." *Sw. Suburban Bd. of Realtors, Inc.*, 830 F.2d at 1377-78. In effect, the court is left to consider the presence of improper motive, the causal connection between the violation and the harm, and the directness of the injury. San Mateo has alleged, *inter alia*, that the defendants intentionally signaled each other, "scrubbed" meeting minutes to hide evidence of their conspiracy, and purposefully restricted supplies of plasma-derivative protein therapies in order to raise prices. "As intent and motive may be generally averred in a pleading, *see* Fed. R. Civ. P. 9(b), this is a sufficient allegation of improper motive." *Omnicare, Inc. v. Unitedhealth Group, Inc.*, 524 F. Supp. 2d 1031, 1043 (N.D. Ill. 2007). San Mateo also has alleged a causal connection between the Sherman Act violation and the harm it purports to have suffered, as it alleges that it paid higher prices by virtue of the conspiracy to reduce output.

But it is the directness of the injury that weighs "particularly heavily" in the court's mind, because "'[t]he existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general.'" *See Kochert*, 463 F.3d at 718-19 (quoting *AGC*, 459 U.S. at 542). In this case, the existence of a less remote party to vindicate the public interest is no hypothetical proposition: the direct purchasers are actively pursuing their claims, and they seek damages and the same injunctive relief sought by San Mateo. By denying San Mateo leave to proceed, the court will not "leave a significant antitrust violation undetected or unremedied." *Id.* (citing *AGC*, 459 U.S. at 542). The court

concludes that, based upon prudential considerations, San Mateo lacks antitrust standing to pursue its federal antitrust claim.

C. Subject Matter Jurisdiction and the MDL

[ANALYSIS OMITTED]

IV. CONCLUSION

For the reasons stated above, the court concludes that San Mateo has Article III standing to pursue its state-law claims, but lacks antitrust standing to pursue its federal claim. The federal claim therefore is dismissed, and the remaining issues are held in abeyance pending the

completion of briefing as to this court's subject matter jurisdiction under CAFA and the propriety of keeping this case as part of the multi-district referral.

ENTER:

/s/
JOAN B. GOTTSCHALL
United States District Judge

DATED: January 9, 2012

Collateral Estoppel

STATUTORY COLLATERAL ESTOPPEL

CLAYTON ACT

Section 5. Judgments

(a) *Prima facie evidence; collateral estoppel*. A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel, except that, in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under section 45 of this title which could give rise to a claim for relief under the antitrust laws. [15 U.S.C. § 16(a)]

[Sections 5(b)-(i) omitted]

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

IN RE: MICROSOFT CORPORATION ANTITRUST LITIGATION

(Kloth, et al. v. Microsoft Corp.; Netscape Communications Corp. v. Microsoft Corp.; Sun Microsystems, Inc. v. Microsoft Corp.; Burst.com, Inc. v. Microsoft Corp.) (MDL No. 1332)

No. 03-1817

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
J. Frederick Motz, District Judge.
(CA-00-1332-MDL, CA-00-2117-1, CA-02-2738-1, CA-02-2739-1, CA-02-2952-1)

Argued: October 29, 2003

Decided: January 15, 2004

Before WIDENER, NIEMEYER, and GREGORY, Circuit Judges.

Reversed and remanded by published opinion. Judge Niemeyer wrote the opinion, in which Judge Widener joined. Judge Gregory wrote a separate opinion concurring in part and dissenting in part.

COUNSEL

ARGUED: David Bruce Tulchin, SULLIVAN & CROMWELL, L.L.P., New York, New York, for Appellant. John Bucher Isbister, TYDINGS & ROSENBERG, L.L.P., Baltimore, Maryland, for

Appellees. **ON BRIEF:** Richard C. Pepperman, II, Marc De Leeuw, SULLIVAN & CROMWELL, L.L.P., New York, New York; Robert A. Rosenfeld, Matthew L. Larrabee, HELLER, EHRMAN, WHITE & MCAULIFFE, L.L.P., San Francisco, California; Michael F. Brockmeyer, Jeffrey D. Herschman, PIPER RUDNICK, L.L.P., Baltimore, Maryland; Charles W. Douglas, SIDLEY, AUSTIN, BROWN & WOOD, Chicago, Illinois; Thomas W. Burt, Richard L. Wallis, Linda K. Norman, Steven J. Aeschbacher, MICROSOFT CORPORATION, Redmond, Washington, for Appellant. Thomas M. Wilson, III, TYDINGS & ROSENBERG, L.L.P., Baltimore, Maryland; Lloyd R. Day, Jr., James R. Batchelder, Robert M. Galvin, DAY, CASEBEER, MADRID & BATCHELDER, L.L.P., Cupertino, California; Michael A. Schlanger, Kirk R. Ruthenberg, SONNENSCHEIN, NATH & ROSENTHAL, Washington, D.C.; Spencer Hosie, Bruce J. Wecker, HOSIE, FROST, LARGE & MCARTHUR, San Francisco, California; Parker C. Folse, III, Ian B. Crosby, Edgar G. Sargent, SUSMAN GODFREY, L.L.P., Seattle, Washington; Stephen D. Susman, James T. Southwick, SUSMAN GODFREY, L.L.P., Houston, Texas; Christopher Lovell, Victor E. Stewart, Jody Krisiloff, Peggy Wedgworth, LOVELL, STEWART & HALEBIAN, L.L.P., New York, New York; Stanley M. Chesley, WAITE, SCHNEIDER, BAYLESS & CHESLEY, Cincinnati, Ohio; Robert Yorio, CARR & FERRELL, L.L.P., Palo Alto, California; Michael D. Hausfeld, COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C., Washington, D.C., for Appellees.

OPINION

NIEMEYER, Circuit Judge:

In 1998, the United States and several of the States filed a civil action against Microsoft Corporation in the District of Columbia for violations of the Sherman Act. The district court in that action found that Microsoft (1) illegally maintained a monopoly in the market of "licensing of all Intel-compatible PC operating systems worldwide," (2) attempted to monopolize a "putative browser market," and (3) entered into an illegal tying arrangement by bundling its Internet Explorer web browser with its Windows operating system, in viola-

tion of §§ 1 and 2 of the Sherman Act. The Court of Appeals for the D.C. Circuit affirmed, with limitations, the district court's conclusion that Microsoft illegally maintained a monopoly in the PC operating systems market but reversed the district court's other conclusions. *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

Based in large part on the factual findings made in that District of Columbia litigation, the plaintiffs in the cases now before this court have asserted a broad range of antitrust violations against Microsoft. On the plaintiffs' motions to foreclose Microsoft from relitigating 356 factual findings made by the district court in the District of Columbia litigation, the district court in these actions entered a pretrial order applying the doctrine of "offensive collateral estoppel" to preclude Microsoft from relitigating 350 of the factual findings. The district court made its decision about each finding by determining that the finding was "supportive of" the judgment affirmed by the Court of Appeals for the D.C. Circuit. *In re Microsoft Corp. Antitrust Litig.*, 232 F. Supp. 2d 534, 537 (D. Md. 2002). On appeal, Microsoft contends that the standard that the district court used to apply offensive collateral estoppel to factual findings from the District of Columbia litigation was too broad, unfairly denying Microsoft an opportunity to litigate those facts in this action.

Because the "supportive of" standard is not the appropriate standard for applying collateral estoppel, we reverse and remand, directing the district court to give preclusive effect only to factual findings that were necessary — meaning critical and essential — to the judgment affirmed by the D.C. Circuit.

I

Several competitors of Microsoft — Netscape Communications Corporation, Sun Microsystems, Inc., Burst.com, Inc., and Be Incorporated — as well as a class of consumers commenced these actions against Microsoft for various violations of the antitrust laws and related laws, and in April 2002 these actions were transferred to the District of Maryland under multidistrict litigation procedures. *See* 28 U.S.C. § 1407.

In August 2002, several of the plaintiffs filed pretrial motions under Federal Rule of Civil Procedure 16(c) to foreclose Microsoft,

under the doctrine of collateral estoppel, from relitigating 356 of the 412 factual findings made by the district court in the District of Columbia litigation. *See United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999). The district court granted the motions with respect to 350 of those findings. *In re Microsoft Corp. Antitrust Litig.*, 232 F. Supp. 2d 534 (D. Md. 2002). In reaching its conclusion, the court recognized that it could foreclose Microsoft from relitigating only those facts that were "necessary to the prior judgment," *id.* at 537, but it concluded that the doctrine "is sufficiently served by requiring that a specific finding be *supportive of* the prior judgment," *id.* (emphasis added).

On Microsoft's motion, the district court certified for review under 28 U.S.C. § 1292(b) its interlocutory order, which the court characterized as a ruling that "facts found by Judge Jackson [for the District of Columbia District Court] that were *supportive of* (rather than *indispensable to*) the liability judgment against Microsoft in the government case should be given collateral estoppel effect in the cases encompassed in this MDL proceeding." By order dated July 3, 2003, we granted Microsoft leave to appeal.

II

Under the traditional rubric of *res judicata*, once a matter — whether a claim, an issue, or a fact — has been determined by a court as the basis for a judgment, a party against whom the claim, issue, or fact was resolved cannot relitigate the matter. Judicial efficiency and finality have demanded such a policy.

The doctrine of "collateral estoppel" or "issue preclusion," which the district court applied in this case, is a subset of the *res judicata* genre. Applying collateral estoppel "forecloses the relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom [collateral estoppel] is asserted had a full and fair opportunity to litigate." *Sedlack v. Braswell Servs. Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998) (internal quotation marks and citation omitted). To apply collateral estoppel or issue preclusion to an issue or fact, the proponent must demonstrate that (1) the issue or fact is identical to the one previously litigated; (2) the issue or fact was

actually resolved in the prior proceeding; (3) the issue or fact was critical and necessary to the judgment in the prior proceeding; (4) the judgment in the prior proceeding is final and valid; and (5) the party to be foreclosed by the prior resolution of the issue or fact had a full and fair opportunity to litigate the issue or fact in the prior proceeding. *See id.*; *Polk v. Montgomery County, Maryland*, 782 F.2d 1196, 1201 (4th Cir. 1986) (using "necessary, material, and essential" for the third prong); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 703-04 n.6 (4th Cir. 1999) (using "critical and necessary"); *C.B. Marchant Co. v. Eastern Foods, Inc.*, 756 F.2d 317, 319 (4th Cir. 1985) (using "necessary and essential"); *see also* Restatement (Second) of Judgments § 27 & cmt. h (1982) (using "essential to the judgment," meaning that the judgment must be "dependent upon the determinations").

When a *plaintiff* employs the doctrine of collateral estoppel or issue preclusion "to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party," it is known as "offensive collateral estoppel." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.4 (1979). And when a *defendant* employs the doctrine "to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant," it is known as "defensive collateral estoppel." *Id.* Recognizing a greater possibility for unfairness from the use of offensive collateral estoppel, the Supreme Court has held that in lieu of prohibiting its use altogether, district courts should be granted "broad discretion to determine when it should be applied." *Id.* at 331. But this discretion should not be exercised to permit the use of offensive collateral estoppel "where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant," particularly in several specified ways. *Id.* Thus, when exercising its discretion, a court should consider the following nonexclusive factors: (1) whether the plaintiff could have easily joined in the action against the defendant in the earlier action, (2) whether the defendant had an incentive in the prior action to have defended the action fully and vigorously; (3) whether the defendant had won litigation other than the prior action that determined the same issues or facts favorably to the defendant; (4) whether procedural opportunities are available in the pending action that were not available in the prior action. *See id.* at 331-32. In sum, the doctrine

of offensive collateral estoppel or offensive issue preclusion may be used cautiously to preclude a defendant from relitigating a fact actually found against the defendant in prior litigation when the fact was critical and necessary to the judgment in the prior litigation, so long as the plaintiff using the fact could not have easily joined the prior litigation and application of the doctrine would not be unfair to the defendant. The caution that is required in application of offensive collateral estoppel counsels that the criteria for foreclosing a defendant from relitigating an issue or fact be applied strictly. *See, e.g., Jack Faucett Assocs. v. AT&T*, 744 F.2d 118, 124 (D.C. Cir. 1984) ("The doctrine [of offensive collateral estoppel] is detailed, difficult, and potentially dangerous").

The single criterion at issue in this appeal is whether the district court correctly applied the requirement that facts subject to collateral estoppel be "critical and necessary" to the judgment in the prior litigation. While the district court correctly stated this criterion, it interpreted and applied it to foreclose relitigation of any fact that was "supportive of" the prior judgment. We believe that this interpretation changes the criterion, rendering it too broad to assure fairness in the application of the doctrine. "Supportive of" is a term substantially more inclusive than the stated criterion of "critical and necessary."

Tellingly, in describing the scope of the "critical and necessary" criterion, we have used the alternative word "essential." *See, e.g., Polk*, 782 F.2d at 1201 ("necessary, material, and essential"); *C.B. Marchant*, 756 F.2d at 319 ("necessary and essential"). And all of the terms that we have used — critical, necessary, essential, and material — are words of limitation. *See* Webster's Third New International Dictionary 1510-11 (1993) (defining "necessary" to mean logically required, essential, indispensable); Random House Dictionary 1283-84 (2d ed. 1987) (defining "necessary" to mean "essential, indispensable, or requisite"). Because a fact that is "supportive of" a judgment may be consistent with it but not necessary or essential to it, the term "supportive of" is a broader term than "critical and necessary." The term "supportive of" sweeps so broadly that it might lead to inclusion of all facts that may have been "relevant" to the prior judgment. Such a broad application of offensive collateral estoppel risks the very unfairness about which the Supreme Court was concerned in *Park-*

lane, 439 U.S. at 330-31, and we conclude therefore that it is inappropriate.

In addition, the "supportive of" standard, when applied to offensive collateral estoppel, would foreclose further litigation of findings for which the defendant had no opportunity for appellate review in the prior litigation. *See* 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4421, at 559 (2d ed. 2002); 18 James Wm. Moore et al., *Moore's Federal Practice* § 132.03[4][b][iv], at 113, § 132.03[4][k][ii], at 123-24 (3d ed. 2003). If a trial court were to make an unnecessary or collateral finding in a case and the defendant appealed the judgment, the appellate court, in affirming the judgment, would generally not reach the unnecessary findings. Thus, such findings would evade appellate review. *See* 1B James Wm. Moore et al., *Moore's Federal Practice* ¶ 0.443[5.-1], at 585-86 (2d ed. 1996). Yet, under a "supportive of" standard, these unnecessary or collateral findings, which are practically immune to appellate review, would still foreclose further litigation, as long as they tended generally to confirm the affirmed judgment. In contrast, when only "necessary" findings are given preclusive effect, the defendant will have received a full opportunity for litigation in the prior proceeding, including the opportunity for appellate review.

In support of its broader interpretation of "necessary," the district court cited *Delaware River Port Auth. v. Fraternal Order of Police*, 290 F.3d 567, 572 (3d Cir. 2002); *Hoult v. Hoult*, 157 F.3d 29, 32 (1st Cir. 1998); and *Synanon Church v. United States*, 820 F.2d 421, 424-25 (D.C. Cir. 1987). But none of these opinions employed the district court's broadening interpretation. *See Delaware River Port Auth.*, 290 F.3d at 572 (using "necessary to support [the] judgment" in the prior action); *Hoult*, 157 F.3d at 32 (using a "'necessary component of the decision reached'" in the earlier action (quoting *Dennis v. Rhode Island Hosp. Trust Nat'l Bank*, 744 F.2d 893, 899 (1st Cir. 1984))); *Synanon Church*, 820 F.2d at 424 (using "actually and necessarily determined by a court of competent jurisdiction" in a prior proceeding).

The district court also reasoned that if "necessary" were to be construed as strictly as is suggested by "indispensable" and "essential," we could not have reached the decision that we did in *Ritter v. Mount*

St. Mary's Coll., 814 F.2d 986 (4th Cir. 1987). The district court observed that the more restricted meaning would require that if there were two independently sufficient grounds for a prior decision, preclusive effect could not be given to either ground. Yet we gave preclusive effect to two independently sufficient grounds in *Ritter*.

But *Ritter* does not undermine the generally restrictive meaning of necessary. In *Ritter*, the court observed the principle that "where the court in the prior suit has determined two issues, either of which could independently support the result, then neither determination is considered essential to the judgment. Thus, collateral estoppel will not obtain as to either determination." 814 F.2d at 993. In the circumstances of that case, however, which involved no prior judgment from another proceeding but rather a prior ruling *in the same case*, we noted that "if the parties were not bound by the facts found in the very same case which they were litigating, then the judgments of courts issued during trial would become irrelevancies." *Id.* at 992. Even though we enforced an earlier factual finding applied to a motion decided later *in the same case* — essentially applying a law-of-the-case principle — we called it collateral estoppel and applied it in the exceptional circumstances of that case, where the parties were the same, the issues were the same, the facts were the same, and even the court was the same. *Id.* at 994. Indeed, the case itself was the same. *Id.* at 992-94. But when issue preclusion is considered in the context of two separate litigations, the restrictive principle recognized in *Ritter* remains viable — that if a judgment in the prior case is supported by either of two findings, neither finding can be found essential to the judgment. *Id.* at 993; *see also Tuttle*, 195 F.3d at 704; *C.B. Marchant*, 756 F.2d at 319.

III

On remand, when the district court applies the "critical and necessary" standard to the facts found in the District of Columbia litigation, it must take care to limit application to facts that were necessary to the judgment *actually affirmed* by the D.C. Circuit. The D.C. Circuit held that Microsoft illegally maintained a monopoly in the market of "licensing of all Intel-compatible PC operating systems worldwide" through 12 specified acts of anticompetitive conduct, described by the D.C. Circuit in *United States v. Microsoft Corp.*, 253 F.3d 34, 50-80

(D.C. Cir. 2001). Microsoft may be precluded from relitigating the facts necessary to this judgment under the doctrine of offensive collateral estoppel.

To support their argument that all 350 factual findings were necessary to the District of Columbia judgment, the plaintiffs contend that the D.C. Circuit "affirmed all 412" of the district court's factual findings. In making this assertion, the plaintiffs seem to be suggesting that the scope of the judgment in the District of Columbia litigation was broader than the judgment actually affirmed by the D.C. Circuit. But the D.C. Circuit did not affirm all 412 factual findings. The D.C. Circuit considered all of the factual findings *only* when considering whether the improprieties of the district judge evidenced a bias against Microsoft that would have invalidated all of his factual findings. *See Microsoft*, 253 F.3d at 117-18. While the D.C. Circuit ultimately rejected this bias argument, it did not review the 412 factual findings to determine whether they were clearly erroneous or whether they should be affirmed on appeal. Indeed, because the D.C. Circuit reversed two of the three claims found by the district court, the district court's judgments on those two claims were deprived of all preclusive effect. *See* 18 James Wm. Moore et al., *Moore's Federal Practice* § 131.30[1][a] (3d ed. 2003). On remand the district court must limit itself to those facts critical and necessary to the judgment actually affirmed by the D.C. Circuit.

In sum, we reverse the ruling of the district court that offensive collateral estoppel will apply to any fact found in the District of Columbia litigation that is supportive of the judgment, and remand for application of the doctrine under the standards stated in this opinion.

REVERSED AND REMANDED

GREGORY, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority's conclusion that preclusive effect should only be given to factual findings that were necessary to, rather than supportive of, the judgment affirmed by the Court of Appeals for the District of Columbia. I respectfully dissent, however, from the majority's rigid construction of the term "necessary." In my view, this rigid construction of "necessary" is inconsistent with both the purposes of

collateral estoppel and the contextual approach taken by the Supreme Court and our sister circuits when defining "necessary."

I

The majority construes "necessary" to mean critical and essential. *Ante* at 3. In so doing, the majority cites to and relies on dictionary definitions of "necessary." *Id.* at 6. As the Supreme Court has noted, however, dictionary definitions provide little guidance as to the proper construction of "necessary." In the landmark case of *McCulloch v. Maryland*, the Court expressly held that the term "necessary" must be construed in accordance with the context in which it is used:

> It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character, peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. *A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases*.

17 U.S. 4 Wheat. 316, 414 (1819)(emphasis added). In *McCulloch*, the Supreme Court considered whether the Necessary and Proper Clause required that the incorporation of a bank be *absolutely* necessary to the exercise of Congress's enumerated powers. *Id.* at 401. In rejecting such a rigid construction of "necessary," the Court held that the Necessary and Proper Clause only requires that a statute be conducive to and plainly adopted to serve the end for which it was enacted. *Id.* at 414, 417, 421. The Supreme Court has since reaffirmed this construction of the Necessary and Proper Clause. In *Jinks v. Richland County*—a decision issued last term—the Court held that 42 U.S.C. § 1367(d) satisfies the requirements of the Necessary and Proper Clause because it is "'conducive to the due administration of justice' . . . and is 'plainly adapted' to that end." ___ U.S. ___, ___, 123 S.Ct. 1667, 1671 (2003). In so holding, the Court noted: "[W]e long ago rejected the view that the Necessary and Proper Clause

demands that an Act of Congress be '*absolutely* necessary' to the exercise of an enumerated power." *Id.*

Further illustrating the Supreme Court's contextual approach for construing "necessary" is its tax law jurisprudence. Rather than relying upon dictionary definitions, the Court has construed "necessary" in a manner that is best suited for this highly technical area of law. For instance, in determining whether an expense can be properly deducted as an "ordinary" and "necessary" business expense, the Court has "consistently construed the term 'necessary' as imposing only the minimal requirement that the expense be 'appropriate and helpful' for 'the development of the [taxpayer's] business.'" *Comm'r v. Tellier*, 383 U.S. 687, 689 (1966)(quoting *Welch v. Helvering*, 290 U.S. 111, 113 (1933)). Such a construction reflects the Court's understanding that a correct construction of "necessary" cannot turn on dictionary definitions.

II

A number of our sister circuits have followed the Supreme Court's contextual approach when construing "necessary" and have thus declined to mechanically apply dictionary definitions of "necessary." The D.C. Circuit, for example, has expressly stated: "[I]t is crucial to understand the context in which ["necessary"] is used in order to comprehend its meaning." *Cellular Telecomm. & Internet Ass'n v. FCC*, 330 F.3d 502, 510 (D.C. Cir. 2003). In *Cellular Telecomm. & Internet Ass'n*, the D.C. Circuit considered whether the FCC's enforcement of wireless number portability rules was "necessary" for the protection of consumers. *Id.* at 504. In construing the term "necessary," the D.C. Circuit noted that "a dictionary definition by no means tells us what 'necessary' means in every statutory context," *id.* at 510, because "the word 'necessary' does not always mean absolutely required or indispensable." *Id.* at 509-10. The court further observed: "'[C]ourts have frequently interpreted the word 'necessary' to mean less than absolutely essential, and have explicitly found that a measure may be 'necessary' even though acceptable alternatives have not been exhausted.'" *Id.* at 510 (quoting *Natural Res. Def. Council v. Thomas*, 838 F.2d 1224, 1236 (D.C. Cir. 1988)). Accordingly, the D.C. Circuit held that the FCC need not show that enforcement of its wireless

number portability rules "is *absolutely required* or *indispensable* to protect consumers." *Id.* at 511.

Similarly, the Second Circuit noted in *FTC v. Rockefeller* that the use of the term "necessary" does not automatically render something "'absolutely needed' or 'inescapable'" because "'necessary' is not always used in its most rigid sense." 591 F.2d 182, 188 (2d Cir. 1979). The specific issue before the Second Circuit in *Rockefeller* was whether an investigation conducted by the FTC fell under a statutory provision authorizing the FTC to "'gather and compile information' from, and to 'investigate,' banks 'to the extent that such action is *necessary* to the investigation' of non-banking targets." *Id.* (quoting Pub. L. 93-153 § 408(e), 87 Stat. 592)(emphasis added). Given its more flexible construction of "necessary," the court held that an ancillary investigation of a bank is "necessary" if it "arise[s] reasonably and logically out of the main investigation" of nonbanking targets. *Id.* In so holding, the court rejected the argument that "'necessary' means that the [FTC] must pursue all other 'reasonably available alternatives' before engaging in the ancillary investigation." *Id.*

More importantly, for present purposes, two of our sister circuits have expressly declined to adopt a rigid construction of "necessary" in the context of collateral estoppel. In *Hoult v. Hoult*, the First Circuit held that "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*.'" 157 F.3d 29, 32 (1st Cir. 1998)(quoting *Commercial Assocs. v. Tilcon Gammino, Inc.*, 998 F.2d 1092, 1097 (1st Cir. 1993))(emphasis added). Similarly, the Federal Circuit has stated:

> *At the outset, [when determining the applicability of collateral estoppel] it is important to note that the requirement that a finding be "necessary" to a judgment does not mean that the finding must be so crucial that, without it, the judgment could not stand*. Rather, the purpose of the requirement is to prevent the incidental or collateral determination of a nonessential issue from precluding reconsideration of that issue in later litigation.

Mother's Rest. Inc. v. Mama's Pizza, Inc., 723 F.2d 1566, 1571 (Fed. Cir. 1983)(emphasis added). Two circuits have thus concluded that a

finding need not be indispensable to a prior judgment in order to be deemed "necessary" to that judgment. A conclusion which is directly in conflict with the one reached by the majority today.

III

Despite this case law, the majority adopts a rigid construction of "necessary," whereby preclusive effect is only accorded to findings deemed indispensable to a prior judgment. As previously noted, the majority holds that findings are "necessary" to a prior judgment and thereby entitled to preclusive effect if they are critical and essential to that judgment. *Random House Webster's College Dictionary* 317 (2000)(defining "critical" to mean of essential importance, indispensable); *id.* at 451 (defining "essential" to mean absolutely necessary, indispensable); *Webster's Third New International Dictionary* 538 (1981)(defining "critical" to mean indispensable); *id.* at 777 (defining "essential" to mean indispensable). The majority concludes that such a rigid construction is required due to the potential unfairness that can result from the application of offensive collateral estoppel. *Ante* at 5-6. While it is true that we must cautiously apply the doctrine of offensive collateral estoppel, we must also take care to construe the requirements for this doctrine in a manner that furthers its purpose. As noted by the Supreme Court, offensive and defensive collateral estoppel serve "to 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.'" *United States v. Mendoza*, 464 U.S. 154, 158 (1984)(quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). The majority's rigid construction of "necessary," however, runs contrary to these purposes. Indeed, the majority's rigid construction of "necessary" frustrates these purposes. Very few findings, while a material element of a prior judgment, can be considered indispensable. Consequently, under the majority's construction of "necessary," litigants and courts will be forced to reconsider an issue that constituted or was a material element of a prior judgment even though that issue was fully contested and resolved in a previous proceeding.

For instance, a finding during a dispute concerning the amount of a contractor's lien on real property that the contract in question contains a provision placing a limit on the contractor's compensation is not indispensable because it does not determine the actual amount of

the contractor's lien. Nonetheless, such a finding is a material element of the judgment because it establishes that the compensation to which the contractor is entitled cannot exceed a certain amount. Accordingly, the parties should be precluded in a subsequent suit from relitigating whether the contract in question placed a limit on the contractor's compensation if this issue was fully and fairly contested during the initial proceeding. Allowing this issue to be relitigated defeats the purposes of collateral estoppel, which, as previously noted, are "to 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.'" *Id.*

IV

As a means of drawing an appropriate balance between the costs and purposes of offensive collateral estoppel, I believe a finding should be deemed "necessary" to a prior judgment if it concerns a matter that was "distinctly put in issue and directly determined by a court of competent jurisdiction," *Montana v. United States*, 440 U.S. 147, 153 (1979)(quoting *S. Pac. R. Co. v. United States*, 168 U.S. 1, 48-49 (1897)), and a material element of the judgment. Although less rigid than the construction adopted by the majority, this construction of "necessary" offers the same protection against the potential unfairness of offensive collateral estoppel with which the majority is concerned while better serving the purposes of this doctrine. By requiring that a matter be directly put in issue, determined and a material element of a prior judgment, this construction of "necessary" prevents nonessential dicta and ancillary findings from being accorded preclusive effect.

With respect to the present case, application of this less rigid construction of "necessary" would not unfairly prejudice Microsoft, the party against whom collateral estoppel is being asserted. Microsoft had sufficient incentive to vigorously contest every issue raised during the government's antitrust case given that its continued existence as a single entity was directly at issue. Moreover, Microsoft understood that the findings rendered in the government's antitrust case would determine, in large part, whether private parties would commence civil actions against Microsoft. Accordingly, Microsoft should be precluded from relitigating issues that were distinctly raised, deter-

mined and a material element of the judgment affirmed by the D.C. Circuit.

V

For the foregoing reasons, I concur in the conclusion that preclusive effect should only be accorded to factual findings that were "necessary" to the judgment affirmed by the D.C. Circuit. I respectfully dissent, however, from the majority's determination that a factual finding must be indispensable to a prior judgment in order to be "necessary" to that judgment. In my view, factual findings made during the course of a proceeding are "necessary" to the judgment rendered in that proceeding if they concern a matter that was "distinctly put in issue and directly determined," *Montana*, 440 U.S. at 153, and a material element of that judgment. Accordingly, on remand, I believe preclusive effect should be accorded to factual findings that meet the construction of "necessary" as set forth in my opinion.

APPEALS OF INTERLOCUTORY DECISIONS

JUDICIAL CODE

28 U.S.C. § 1292. Interlocutory Decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

[Sections 1292(c)-1292(d) omitted (dealing with the jurisdiction of specialized federal appellate courts)]

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE MICROSOFT CORP. ANTITRUST LITIGATION	*	
	*	MDL 1332
	*	
	*	**"Consumer Track"**
	*	
	*	**"Competitor Track"**
	*****	

MEMORANDUM

Microsoft has filed a motion requesting that I certify for interlocutory appeal the order I entered on April 4, 2003, granting plaintiffs' Rule 16(c) motions for preclusive effect with respect to certain findings of fact entered by Judge Jackson in *United States v. Microsoft*.

Certification for an interlocutory appeal is proper where: (1) the order to be appealed involves a controlling question of law; (2) there is substantial ground for difference of opinion on that question of law; and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). I find that each of these factors is satisfied here. Accordingly, I will grant the motion in order to give the Fourth Circuit an opportunity to determine whether to consider on interlocutory appeal my ruling that facts found by Judge Jackson that were *supportive of* (rather than *indispensable to*) the liability judgment against Microsoft in the government case should be given collateral estoppel effect in the cases encompassed in this MDL proceeding.

A.

My collateral estoppel ruling clearly is not "controlling" of these proceedings in the sense that it is substantively dispositive of their outcome. However, the ruling does control many aspects of the proceedings in substantial respects, particularly the scope of the discovery now underway in the four

competitor cases and the scope of the evidence of the trial in the consumer class action (now scheduled to begin in September 2003). I am satisfied that this constitutes a sufficient basis for me to certify my ruling for an interlocutory appeal. *See* 19 James Wm. Moore et al., *Moore's Federal Practice* ¶ 203.31[3] (3d ed. 2003) (a controlling question of law is one that "has the potential of substantially accelerating disposition of the litigation"); *McNeil v. Aguilos*, 820 F. Supp. 77, 79 (S.D.N.Y. 1993) ("A controlling question [of law] may be one that substantially affects a large number of cases."). Nothing is more central to the proper structuring of the private antitrust litigation against Microsoft than the question of whether Microsoft is entitled to relitigate findings found against it in the government case. In my view it would therefore be irresponsible of me not to place these cases in a posture where the Fourth Circuit has the opportunity to review my resolution of that question now if it chooses to do so.[1]

B.

I am satisfied there is a substantial basis for a difference of opinion on the meaning of the phrase "necessary to the judgment," as it is used in determining collateral estoppel effect. That is particularly

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[1]In opposing Microsoft's motion, plaintiffs rely heavily upon an unreported Fourth Circuit decision, *Fannin v. CSX Transportation*, 1989 W.L. 42583, at *5 (4th Cir. 1989) (unpublished), for the proposition that fact intensive issues are "not the kind of 'controlling' question[s] proper for interlocutory review." (*See* Comp. Pls.' Opp. at 7; *see also* 16 Charles A. Wright, et al., *Federal Practice & Procedure* § 3930, at 429-30 (2d ed. 1996).). In its reply Microsoft counters that it is requesting interlocutory review only of the pure legal question of properly defining the standard for offensive collateral estoppel effect. I am not sure that the Fourth Circuit would or should decide the question entirely in a vacuum as Microsoft's reply might suggest. Analysis of the question may require an examination of the findings in the government case and their impact upon the issues presented here. Nevertheless, I do not believe that *Fannin* and similar cases render an interlocutory appeal inappropriate. They are based upon an appropriate reluctance to delve at a preliminary stage into the facts indigenous to the case in which an interlocutory appeal is sought, not upon a concern about consideration of facts decided in a separate and independent action which are relevant in defining and providing context for the question as to which interlocutory appeal is sought.

true in these proceedings in light of the conclusion reached by Judge Kollar-Kotelly in *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 138 (D.D.C. 2002), that "the vast majority of factual findings entered by . . . [Judge Jackson], but not cited by . . . [Judge Jackson] as a basis for §2 liability" were "unconnected to specific liability findings" affirmed by the D.C. Circuit on appeal.[2]

C.

Providing the Fourth Circuit with the opportunity to determine whether to grant an interlocutory appeal on my collateral estoppel ruling may also materially advance the ultimate termination of the litigation. As I have previously indicated (and as is obvious), my ruling is foundational to the structure within which this MDL litigation will be conducted, defining both the scope of evidence at the trial of the consumer class action and the scope of discovery in the competitor cases. There would be a senseless waste of private and public resources and an unconscionable delay in the final resolution of these proceedings if the Fourth Circuit were not given the opportunity to decide the collateral estoppel issues on an interlocutory appeal and ultimately were to find I had erred in my ruling.

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[2]By mentioning Judge Kollar-Kotelly's conclusion in this regard, I do not mean to suggest I erred in my collateral estoppel ruling. The monumental task confronting Judge Kollar-Kotelly was to tailor remedies to the specific liability findings of the D.C. Circuit. In performing that task Judge Kollar-Kotelly (quite appropriately, in my judgment) in effect determined which of Judge Jackson's factual findings were indispensable to the Court of Appeals' liability findings. Had she not done so, the cloth would have been cut too broad. Judge Kollar-Kotelly was not, however, asked to resolve the different question of how to define the meaning of the phrase "necessary to the judgment" for collateral estoppel purposes or of determining what facts were supportive of the judgment in the government case (if "necessary to judgement" means, as I have found, "supportive of" it). Those are the issues presented here, and they require a different analysis and raise different policy concerns. Giving collateral estoppel effect in private antitrust litigation to facts supportive of the judgment in the government case does not imply, in and of itself, that certain remedies flow from those findings. It merely means that Microsoft cannot relitigate facts it had a full and fair opportunity to litigate in the government case.

I also consider it relevant that this is an MDL proceeding. The Fourth Circuit has stated in another context that in multi-district litigation "[e]ven accounting for the peculiar facts of each case, it is clearly more efficient to provide for review by one appellate court in one proceeding rather than leaving open the possibility that [the trial court's] decisions could be reconsidered by each of the transferor courts . . . ." *In re Food Lion, Inc.*, 73 F.3d 528, 532-33 (4th Cir. 1996). Similarly, focusing particularly on the issue of the appropriateness of certification of a question for interlocutory appeal, Judge Sweet has stated: "[d]elaying review would burden not only the parties, but the judicial system itself." *In re Aircrash off Long Island, N.Y. on July 17, 1996*, 27 F. Supp. 2d 431, 435 (S.D.N.Y. 1998); *see also* 17 James Wm. Moore et al., *Moore's Federal Practice* ¶ 112.06[3] (3d ed. 2003).

In sum, I find that the three prerequisites for certifying an interlocutory appeal under 28 U.S.C. §1292(b) are satisfied and that it is in the public interest for the Fourth Circuit to be given the opportunity to decide whether now to review my collateral estoppel ruling.

Date: May 9, 2003

/s/
J. Frederick Motz
United States District Judge

Statute of Limitations

STATUTE OF LIMITATIONS

Clayton Act

Section 4b. Limitation of actions

Any action to enforce any cause of action under section 15, 15a, or 15c[1] of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act. [Clayton Act Clayton Act § 4B, 15 U.S.C. § 15b]

[1] Section 15 is the right of action for treble damages granted to private persons injured in their business or property; Section 15a is the right of action for treble damages granted to the United States when it is injured in its business or property; and Section 15c is a right of action for treble damages granted to state attorneys general to sue on behalf of natural persons residing in their respective states for injuries to their property.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE: READY-MIXED CONCRETE PRICE FIXING LITIGATION,	)	
THIS DOCUMENT RELATES TO: ALL ACTIONS	)	MASTER DOCKET NO. 1:05-CV-00979-SEB-VSS

ORDER DENYING THE IMI DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff Boyle Construction Management, Inc., on behalf of itself and all individuals and entities who purchased ready-mixed concrete directly from defendant (hereinafter "the Class" or "Plaintiffs"), filed a Complaint alleging antitrust violations against Irving Materials, Inc. ("IMI") and unnamed co-conspirators on June 30, 2005, one day after IMI reached a plea agreement with the United States based on violations of the Sherman Act, 15 U.S.C. § 1. This matter is now before the Court on IMI, Fred R. ("Pete") Irving, John Huggins, Daniel C. Butler and Price Irving's (collectively the "IMI Defendants") motion for judgment on the pleadings seeking to bar the claims brought by the Class which arose prior to the four-year statute of limitations, pursuant to Federal Rule of Civil Procedure 12(c). For the reasons set forth below, the Court DENIES this motion.

LEGAL ANALYSIS

I. Standard of Review

A party moving to dismiss under Fed. R. Civ. P. 12(c) bears a weighty burden. The party must show beyond a doubt that the non-moving party "cannot prove any facts that support his claim for relief." N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend, 163 F.3d 449, 452 (7th Cir. 1998); Craigs, Inc. v. General Elec. Capital Corp., 12 F.3d 686, 688 (7th Cir. 1993). Where, as here, the parties submit no evidence outside the pleadings, a motion for judgment on the pleadings is reviewed under the standard of a Fed. R. Civ. P. 12(b)(6), Fed. R. Civ. P., motion to dismiss. Guise v. BMW Morg., LLC, 377 F.3d 795, 798 (7th Cir. 2004); R.J. Corman Derailment Serv., LLC v. Int'l Union of Operating Eng'rs, 335 F.3d 643, 647 (7th Cir. 2003). On a Rule 12(b)(6) motion, we treat all well-pleaded factual allegations as true. We also construe all reasonably drawn inferences from the facts in a light most favorable to the party opposing the motion: in this case, the Class. Lee v. City of Chicago, 330 F.3d 456, 459 (7th Cir. 2003); Szumny v. Am. Gen. Fin., 246 F.3d 1065, 1067 (7th Cir. 2001).

II. Statute of Limitations

The IMI Defendants seek judgment on the pleadings with respect to the claims against them arising out of purchases made prior to June 30, 2001, the date which allegedly marks the four-year statute of limitations. In their original motion, the IMI Defendants state:

> 1) The Clayton Act's four year statute of limitations, 15 U.S.C. § 15b, bars the Class's claims for any period prior to June 30, 2001.
>
> 2) The statute of limitations accrues at the time of the Class's alleged purchase at an allegedly inflated price. Thus, the Class's claims in this suit filed on June 30, 2005 are barred with respect to any purchase made prior to June 30, 2001.
>
> 3) The Class's attempt to plead fraudulent concealment to toll the statute does not satisfy the fraud pleading standards of particularity established by FRCP 9(b).
>
> 4) Accordingly, the IMI defendants are entitled to judgment on the pleadings with respect to all claims beyond the four year period.

IMI's Motion 1-2.

The IMI Defendants' subsequent reply acknowledged an intervening case, In re Copper Antitrust Litigation, 436 F.3d 782, 789-90 (7th Cir. February 6, 2006), "which requires that the Court deny, in part, this Motion" based on its holding that the four-year statute of limitations for antitrust actions is subject to the discovery accrual rule. IMI's Reply at 1; citing Copper at 789-90. However, the IMI Defendants maintain that their motion should be denied only in part because Plaintiffs' allegations of fraudulent concealment cannot survive under the Seventh Circuit's standard, which requires overt acts "above and beyond" the wrongdoing to establish fraudulent concealment. IMI Reply at 1-3, citing Flight Attendants v. Commissioner of Internal Revenue, 165 F.3d 572, 577 (7th Cir. 1999).

A. Discovery Rule

As stated previously, during the pendency of this motion, the Seventh Circuit issued the opinion in Copper, which articulates the application of the discovery rule in antitrust actions.

> As an initial matter, plaintiffs' antitrust claims are subject to a four-year statute of limitations. 15 U.S.C. § 15b; see also Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971) ("The basic rule is that damages are recoverable under the federal antitrust acts only if suit therefor is 'commenced within four years after the cause of action accrued' . . . ." (quoting 15 U.S.C. § 15(b)). Generally, an antitrust "cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." Zenith, 401 U.S. at 338. As in other areas of the law, however, in the absence of a contrary directive from Congress this rule is qualified by 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." See Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990). "This principle is based on the general rule that accrual occurs when the plaintiff discovers that 'he has been *injured* and who *caused* the injury.'" Barry Aviation, Inc. v. Land O'Lakes Mun. Airport Comm'n, 377 F.3d 682, 688 (7th Cir. 2004) (quoting United States v. Duke, 229 F.3d 627, 630 (7th Cir. 2000) (emphasis in original).

Copper at 789.

In the case at bar, the Class was initially injured when it purchased the illegally-priced product. Zenith, 401 U.S at 339. However, the discovery rule "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." Copper at 789 (internal citation omitted). The Complaint states that the Class "had no knowledge of the wrongful conduct alleged

herein or of any of the facts that might have led to discovery thereof, until on or about June 2005, when the U.S. Department of Justice announced the guilty plea entered by Irving Materials, Inc." Compl. ¶ 27. Taking this well-pleaded allegation as true, the four-year statute of limitations began to accrue on June 1, 2005, the earliest date at which the Class could have discovered that it was injured and who caused the injury; according to the Complaint. See Compl. ¶¶ 52, 47. Accordingly, the IMI Defendants' Motion for Judgment on the Pleadings—that the Class's damages incurred before June 30, 2001 are barred by the Statute of Limitations—is hereby DENIED based on the required application of the discovery rule.

B. Fraudulent Concealment

The IMI Defendants ask the Court to grant their "motions for judgment on the pleadings, or for dismissal pursuant to Rule 12(b)(6), that plaintiff[s] may not extend or toll the limitations period because the asserted fraudulent concealment is legally insufficient." IMI's Reply at 6.

Quoting again from the decision in Copper, the Seventh Circuit states:

> Fraudulent concealment is a type of tolling within the doctrine of equitable estoppel. Fraudulent concealment "presupposes that the plaintiff has discovered, or, as required by the discovery rule, should have discovered, that the defendant injured him, and denotes efforts by the defendant—above and beyond the wrongdoing upon which the plaintiff's claim is founded—to prevent the plaintiff from suing in time." Copper at 791 (quoting Cada v. Baxter Healthcare Corp.,920 F.2d 446, 451 (7th Cir. 1990).

The IMI Defendants' argument thus misses the mark.[1] Whether or not the Complaint properly pled fraudulent concealment is irrelevant. As stated above, the four-year statute of limitations began to accrue on June 1, 2005, the earliest date according to the Complaint at which the Class could have discovered that it was injured and who caused the injury. Therefore, all of the Class's claims as stated in the Complaint are timely, and the statute of limitations does not bar those purchases made prior to June 30, 2001. Because all claims are timely there is no reason to discuss whether fraudulent concealment was properly pled in order to toll the statute of limitations. The statute of limitations simply does not need to be tolled.

CONCLUSION

For the reasons stated above, the Court DENIES the IMI Defendants' Motion for Judgment on the Pleadings. IT IS SO ORDERED.

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[1] In our view, the Class's argument is off-base as well. The Class argues in its Surreply that it pleaded with particularity that the Defendants engaged in independent affirmative acts of concealment, "above and beyond" the alleged price-fixing such as attending secret meetings and deliberately precluding the creation of evidence by restricting note-taking. Surreply at 3; citing Compl. ¶¶ 50-51. These alleged affirmative and fraudulent acts of concealment were allegedly designed specifically to prevent Plaintiffs and other Class members from detecting Defendants' unlawful conduct. Id. The Class argues that "[u]nder the standard confirmed in Copper, Plaintiffs' allegations of fraudulent concealment easily satisfy the generous standard for a motion for judgment on the pleadings, and support the conclusion that 'fraudulent concealment should be invoked to toll the statute of limitations.'" Surreply at 3-4; citing Copper, 436 F.3d at 790.

Date: 09/29/2006

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

Copies to:

[Copy list omitted]

TOLLING DURING PENDENCY OF GOVERNMENT ACTIONS

Clayton Act

Section 5(i). Tolling during pendency of government actions

(i) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect to every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued. [15 U.S.C. § 16(i)]

Jury Trials

RIGHT TO A JURY TRIAL

U.S. CONSTITUTION

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. [U.S. Const. amend. VI]

Amendment VII

In Suits at common law,[1] where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. [U.S. Const. amend. VII]

FEDERAL RULES OF CIVIL PROCEDURE

Rule 38. Right to a Jury Trial; Demand

(a) *Right Preserved*. The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.

(b) *Demand*. On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand—which may be included in a pleading—no later than 14 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).

(c) *Specifying Issues*. In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may—within 14 days after being served with the demand or within a shorter time

[1] The Supreme Court has read the Seventh Amendment to preserve the right of trial by jury in civil cases as it "existed under the English common law when the amendment was adopted." Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1913); *see* Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446-48 (1830).

ordered by the court—serve a demand for a jury trial on any other or all factual issues triable by jury.

(d) *Waiver; Withdrawal*. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

(e) *Admiralty and Maritime Claims*. These rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim under Rule 9(h).

Rule 39. Trial by Jury or by the Court

(a) *When a Demand Is Made*. When jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless:

(1) the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record; or

(2) the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial.

(b) *When No Demand Is Made*. Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.

(c) *Advisory Jury; Jury Trial by Consent*. In an action not triable of right by a jury, the court, on motion or on its own:

(1) may try any issue with an advisory jury; or

(2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial.

JUDICIAL CODE

28 U.S.C. § 1861

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose. [28 U.S.C.§ 1861]

Verdicts and Judgments

VERDICTS

Rule 48. Number of Jurors; Verdict; Polling

(a) *Number of Jurors*. A jury must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).

(b) *Verdict*. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.

(c) *Polling*. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.

Rule 49. Special Verdict; General Verdict and Questions

(a) *Special Verdict*.

(1) *In General*. The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. The court may do so by:

(A) submitting written questions susceptible of a categorical or other brief answer;

(B) submitting written forms of the special findings that might properly be made under the pleadings and evidence; or

(C) using any other method that the court considers appropriate.

(2) *Instructions*. The court must give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue.

(3) *Issues Not Submitted*. A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.

(b) *General Verdict with Answers to Written Questions*.

(1) *In General*. The court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide. The court must give the instructions and explanations necessary to enable the jury to render a general verdict and answer the questions in writing, and must direct the jury to do both.

(2) *Verdict and Answers Consistent*. When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers.

(3) *Answers Inconsistent with the Verdict*. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may:

(A) approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict;

(B) direct the jury to further consider its answers and verdict; or

(C) order a new trial.

(4) *Answers Inconsistent with Each Other and the Verdict*. When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial.

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

(a) *Judgment as a Matter of Law*.

(1) *In General*. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) *Motion*. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) *Renewing the Motion after Trial; Alternative Motion for a New Trial*. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) *Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial*.

(1) *In General*. If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) *Effect of a Conditional Ruling*. Conditionally granting the motion for a new trial does not affect the judgment 's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) *Time for a Losing Party's New-Trial Motion*. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) *Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal.* If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error

(a) *Requests*.

(1) *Before or at the Close of the Evidence*. At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give.

(2) *After the Close of the Evidence*. After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

(b) *Instructions*. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and

(3) may instruct the jury at any time before the jury is discharged.

(c) *Objections*.

(1) *How to Make*. A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

(2) *When to Make*. An objection is timely if:

(A) a party objects at the opportunity provided under Rule 51(b)(2); or

(B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) *Assigning Error; Plain Error*.

(1) *Assigning Error*. A party may assign as error:

(A) an error in an instruction actually given, if that party properly objected; or

(B) a failure to give an instruction, if that party properly requested it and—unless the court rejected the request in a definitive ruling on the record—also properly objected.

(2) *Plain Error.* A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings

(a) *Findings and Conclusions*.

(1) *In General*. In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58

(2) *For an Interlocutory Injunction*. In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(3) *For a Motion*. The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

(4) *Effect of a Master's Findings*. A master's findings, to the extent adopted by the court, must be considered the court's findings.

(5) *Questioning the Evidentiary Support*. A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(6) *Setting Aside the Findings*. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) *Amended or Additional Findings*. On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

(c) *Judgment on Partial Findings*. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

Rule 54. Judgment; Costs

(a) *Definition; Form*. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) *Judgment on Multiple Claims or Involving Multiple Parties*. When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) *Demand for Judgment; Relief to Be Granted*. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) *Costs; Attorney's Fees*. [*Omitted*]

Rule 58. Entering Judgment

(a) *Separate Document*. Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:

(1) for judgment under Rule 50(b);

(2) to amend or make additional findings under Rule 52(b);

(3) for attorney's fees under Rule 54;

(4) for a new trial, or to alter or amend the judgment, under Rule 59; or
(5) for relief under Rule 60.

(b) *Entering Judgment*.
(1) *Without the Court's Direction*. Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:
(A) the jury returns a general verdict;
(B) the court awards only costs or a sum certain; or
(C) the court denies all relief.
(2) *Court's Approval Required*. Subject to Rule 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:
(A) the jury returns a special verdict or a general verdict with answers to written questions; or
(B) the court grants other relief not described in this subdivision (b).

(c) *Time of Entry*. For purposes of these rules, judgment is entered at the following times:
(1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or
(2) if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs:
(A) it is set out in a separate document; or
(B) 150 days have run from the entry in the civil docket.

(d) *Request for Entry*. A party may request that judgment be set out in a separate document as required by Rule 58(a).

(e) *Cost or Fee Awards*. Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

Rule 59. New Trial; Altering or Amending a Judgment

(a) *In General*.
(1) *Grounds for New Trial*. The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:
(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or
(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.
(2) *Further Action After a Nonjury Trial*. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and

conclusions of law or make new ones, and direct the entry of a new judgment.

(b) *Time to File a Motion for a New Trial*. A motion for a new trial must be filed no later than 28 days after the entry of judgment.

(c) *Time to Serve Affidavits.* When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) *New Trial on the Court's Initiative or for Reasons Not in the Motion*. No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) *Motion to Alter or Amend a Judgment*. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Damages

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
URETHANE ANTITRUST LITIGATION	)	MDL No. 1616
	)	Case No. 04-1616-JWL
This document relates to:	)	
The Polyether Polyol Cases	)	
	)	

VERDICT FORM

We, the jury, impaneled and sworn in the above-entitled case, upon our oaths, do make the following answers to the questions propounded by the Court:

1. Do you find that Class Plaintiffs have proved by a preponderance of the evidence that Dow participated in a conspiracy to fix, raise, or stabilize prices for urethane chemicals (as set forth in Instructions 12 through 18)?

Yes X No _____

If your answer to Question 1 is "Yes", proceed to Question 2. If your answer to Question 1 is "No", stop here and your deliberations are complete; do not answer any remaining questions, and proceed to the signature page.

2. Do you find that Class Plaintiffs have proved by a preponderance of the evidence that the conspiracy involving Dow caused Class Plaintiffs to pay more for urethane chemicals than they would have paid absent a conspiracy (as set forth in Instruction 19)?

Yes X No _____

If your answer to Question 2 is "Yes", proceed to Question 3. If your answer to Question 2 is "No", stop here and your deliberations are complete; do not answer any remaining questions, and proceed to the signature page.

3. Does the injury found in the answer to Question 2 above include overpayments prior to November 24, 2000?

Yes _____ No X

If your answer to Question 3 is "Yes", proceed to Question 4. If your answer to Question 3 is "No", proceed to Question 5.

4. Do you find that Class Plaintiffs have proved their claim of fraudulent concealment by a preponderance of the evidence (as set forth in Instructions 23 and 24)?

Yes _____ No _____

If your answer to Question 4 is "Yes", proceed to Question 5. If your answer to Question 4 is "No", proceed to Question 6.

5. State the amount of damages proved by Class Plaintiffs (as set forth in Instructions 20 and 21).

$ 400,049,039.00

Stop here and your deliberations are complete; do not answer any remaining questions, and proceed to the signature page.

6. State the amount of damages proved by Class Plaintiffs, excluding any amounts relating to purchases prior to November 24, 2000 (as set forth in Instructions 20 and 21).

$ _____

Your deliberations are complete. Please have the foreperson sign and date this verdict form and notify the Court that you have reached a verdict.

2-20-2013
Date

[redacted]
Foreperson

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: URETHANE ANTITRUST LITIGATION	)	MDL No: 1616
	)	Case No: 04-md-1616-JWL
This judgment relates to: The Polyether Polyol Cases	)	

JUDGMENT IN A CIVIL CASE

(x) JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED pursuant to the Jury Verdict returned on February 20, 2013, and the Memorandum and Order filed on May 15, 2013, that judgment is entered against defendant The Dow Chemical Company and in favor of the plaintiff class, after trebling pursuant to 15 U.S.C. § 15, in the amount of One Billion, Two Hundred Million, One Hundred Forty-Seven Thousand, One Hundred Seventeen dollars ($1,200,147,117.00), with interest thereon at a rate of 0.11 percent as provided by law.

IT IS SO ORDERED.

Dated this 15th day of May, 2013 in Kansas City, Kansas

s/ Sharon Scheurer
Deputy Clerk for
TIMOTHY M. O'BRIEN
Clerk of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
URETHANE ANTITRUST LITIGATION	)	MDL No. 1616
	)	Case No. 04-1616-JWL
This document relates to:	)	
The Polyether Polyol Cases	)	
	)	

MEMORANDUM AND ORDER

In this multi-district class action, the claim by plaintiff class that defendant Dow Chemical Company ("Dow") conspired with other manufacturers to fix prices for certain urethane chemical products, in violation of the Sherman Act, 15 U.S.C. § 1, was tried to a jury over a period of four weeks. On February 20, 2013, the jury returned a verdict in plaintiffs' favor. By Memorandum and Order dated May 15, 2013, the Court denied Dow's motion to decertify the class and Dow's motion for judgment as a matter of law or for a new trial (Doc. # 2879). In that order, the Court also modified the class certified in the case to exclude purchases in 2004, and it ordered plaintiffs to provide a proposed notice to the class of that modification. Also on May 15, 2013, the Clerk of Court issued a judgment in favor of the plaintiff class, including trebling the amount of the jury's verdict pursuant to 15 U.S.C. § 15, in the amount of $1,200,147,117.00, with interest at a rate of 0.11 percent as provided by law.

This matter now comes before the Court on plaintiffs' motion to amend the judgment (Doc. # 2885); Dow's motion to amend the judgment (Doc. # 2897); and plaintiffs' motion for approval of their notice to the class and for tolling of the statute of

limitations (Doc. # 2903). For the reasons set forth below, plaintiffs' motion to amend the judgment is **granted**; Dow's motion to amend the judgment is **granted in part and denied in part**, as set forth herein; and plaintiffs' motion for approval of the notice and for tolling is **granted**.

1. In its motion, Dow makes a number of arguments against the entry of any judgment against it in favor of plaintiff class based on the verdict issued by the jury. For instance, Dow argues that the verdict was ambiguous; that an award of aggregate damages was improper; that individual damage determinations for each class member were required; that any award cannot be distributed in the absence of jury adjudication of each class member's damages; and that Dr. McClave's model is insufficient and was rejected by the jury. Dow also argues that the commonality and predominance required for class certification are lacking. The Court has already rejected these arguments in denying Dow's motion for decertification and its motion for judgment as a matter of law or a new trial. As the Court noted then, any arguments not based specifically on trial testimony should have been raised much earlier, either at the certification stage, after receipt of Dr. McClave's report, or in a *Daubert* motion. The Court further notes that Dow failed to argue at trial that the jury could not find aggregate damages or that a separate trial was required for an adjudication of individual members' damages. Moreover, these arguments are not new merely because a judgment has now been entered or because they are now made in the context of opposing plaintiffs' plan for allocation. Finally, Dow has not provided any basis for reconsideration of the Court's

prior rejection of these arguments; indeed, Dow has not bothered to address the Court's reasoning from its prior orders in once again making these arguments. Accordingly, the Court denies this aspect of Dow's motion to amend the judgment.

2. Dow also challenges the judgment's trebling of the jury's award of damages, based on its argument that the jury was required to find damages individually for each class member, which individual awards could then be trebled. The Court rejects this argument. Dow has not persuaded the Court that aggregate damages could not be awarded here, and it has provided no authority suggesting that an aggregate award should not be trebled in accordance with the clear language of 15 U.S.C. § 15. The Court thus denies this basis for challenging the judgment.

3. Dow makes only a few comments about the form of the judgment. Both sides agree that the judgment should be amended to account for settlements reached by the class with other defendants totaling $139,300,000. Accordingly, both sides' motions are granted on that issue, and the judgment shall be amended to be in the amount of $1,060,847.117.00.

4. Dow notes that under Fed. R. Civ. P. 23(c)(3)(B), the judgment in a class action must include a definition of the class certified under Rule 23(b)(3). Plaintiffs agree that the judgment should be amended in this way. Accordingly, the judgment will be amended to include the definition of the class (as presently constituted after

modification by the Court).[1]

5. Dow argues that the judgment should be amended to include a judgment in its favor with respect to any transaction prior to November 24, 2000. The jury found that the injury suffered by the class from the conspiracy involving Dow did not include any overcharges prior to that date. The Court does not agree, however, that Dow is entitled to such a judgment as requested. Plaintiffs brought a claim of antitrust conspiracy, on which it prevailed. The fact that they did not prevail to the full extent of that claim or recover all of the damages they sought does not entitle Dow to a judgment on some portion of plaintiffs' claim. Dow did not assert its own claim with respect to the pre-November 24 period (for a declaration of no liability, for instance), and Dow has not cited any authority suggesting that it is nevertheless entitled to a judgment in its favor for the time period for which plaintiffs did not recover. The Court denies Dow's motion for such an amendment.[2]

6. The final issue with respect to the judgment is plaintiffs' request that the

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[1]Dow also questions whether the Court approved the form of judgment in accordance with Rule 58(b)(2)'s requirement of court approval after a verdict with answers to written questions, like the verdict in this case. The Court did approve the judgment issued by the Clerk in this case, although that approval was not noted expressly on the record. To remove all doubt, the amended judgment will include a notation of the Court's approval.

[2]Dow notes that plaintiffs have not opposed this requested amendment in their brief. The Court does not agree, however, that it therefore should not consider the merits of this request. Plaintiffs do not have a real interest in this issue, as the requested amendment would essentially affect only non-parties. Thus, the Court has an independent duty to consider the proper form of the judgment.

judgment be amended to include approval of plaintiffs' proposed plan of allocation of the damages among the class members. *See Cook v. Rockwell Int'l Corp.*, 618 F.3d 1127, 1137-38 (10th Cir. 2010) (judgment was final on class action claim where it included a plan of allocation that established the formula for the division of damages among class members and the principles that would guide the disposition of unclaimed funds). Under plaintiffs' proposed plan, a particular company (the administrator previously appointed by the Court for distribution of settlement amounts in this case) would be appointed as administrator; the damage award would be distributed to class members on a pro rata basis in accordance with each member's estimated overcharges for the period from November 24, 2000, through December 31, 2003, as calculated by plaintiffs' testifying expert, Dr. James McClave; the Court would establish and approve appropriate procedures, similar to those approved for the settlement amounts, for approval of the proposed final allocation and notice to the class; distribution would not take place until after any appeal; the costs and expenses of the administrator would be paid from the judgment fund; and any remaining unclaimed funds would be distributed to participating class members. In their reply brief, plaintiffs concede that the Court could also approve a *cy pres* distribution of unclaimed funds, and they suggest that the Court would be in a better position to make that determination after the expiration of the claims period, when the amount of unclaimed funds will be known.

Dow attacks plaintiffs' proposed plan of allocation as an improper adjudication of individual members' damages, which Dow argues must be performed by a jury. The

Court has already rejected that argument, both as untimely and on the merits. In addition, although Dow has an interest in making sure that the judgment against it is proper, the Court agrees with plaintiffs that Dow has no interest in the particular manner in which the total damages found by the jury are distributed among the class members. *See, e.g., Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1258-59 (11th Cir. 2003) (Supreme Court precedent "suggests that a defendant has no interest in how the class members apportion and distribute a damage fund among themselves") (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 481 n.7 (1980)); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) ("Where the only question is how to distribute the damages, the interests affected are not the defendant's but rather those of silent class members.").

The Court concludes that plaintiffs' proposed plan for the distribution of the damages is reasonable and appropriate, and the judgment shall be amended to incorporate that plan. That plan establishes the method for distribution of the damages, leaving only a mechanical application for the administrator. Thus, the Court concludes that the resulting judgment will be final under the requirements discussed by the Tenth Circuit in its *Cook* opinion. *See Cook*, 618 F.3d at 1137-38. Moreover, the Court agrees with plaintiffs that any final determination concerning the disposition of unclaimed funds should be left until the expiration of the claims period. *See, e.g., In re Universal Serv. Fund Tel. Billing Practices Litig.*, 2013 WL 2476587 (D. Kan. June 7, 2013) (determining whether to distribute unclaimed funds to participating class members or to

order a *cy pres* distribution). Accordingly, plaintiffs' motion to amend is granted to that extent.[3]

7. As noted above, when the Court modified the definition of the class to exclude 2004 purchases, it ordered plaintiffs to submit a proposed notice to the class of that modification. In moving for approval of their proposed notice, plaintiffs have also requested an order tolling the statute of limitation for claims based on 2004 purchases, for a period extending from May 15, 2013 (the date of the modification order) to 60 days after the mailing of the notice. Dow concedes that courts have allowed for such periods of tolling after decertification, and it states that it does not oppose tolling for the requested period. Accordingly, the Court orders that the statute of limitations for claims by former or present class members based on 2004 purchases is hereby tolled for the period from May 15, 2013, to 60 days after the mailing of the notice approved in this order.

Dow does take issue with language in the proposed notice suggesting that the statute of limitations for such claims was tolled for some period prior to May 15, 2013, as Dow seeks to reserve the right to argue in the future that there was no such tolling under the *American Pipe* doctrine. Plaintiffs have agreed to remove such language from

[3]Plaintiffs also moved that the judgment be amended to include a confirmation of their right to an award of their costs, including attorney fees, pursuant to 15 U.S.C. § 15; in their reply brief, however, plaintiffs have effectively withdrawn that request by their agreement with Dow that any such issue should be addressed after any appeals are resolved.

the notice, and they have submitted a revised notice with that change. The Court approves that revision by plaintiffs and the language in that proposed notice relating to this tolling order.

8. Finally, Dow opposes the notice as proposed by plaintiffs on the ground that it does not set out the circumstances relating to the Court's ultimate modification of the class definition. Dow would include various statements that would set forth Dow's position with respect to plaintiffs' abandonment of a claim that would include 2004 transactions. The Court agrees with plaintiffs, however, that the circumstances giving rise to the modification should not be included in the notice. Such exclusion avoids any risk of including argument by Dow (with the Court's apparent imprimatur) in the notice.

The Court has reviewed the revised notice proposed by plaintiffs, and it finds that notice to be reasonable and proper. Accordingly, the Court approves the revised notice submitted by plaintiffs, and plaintiffs are ordered to send that notice to former and present class members forthwith.

IT IS THEREFORE ORDERED BY THE COURT THAT plaintiffs' motion to amend the judgment (Doc. # 2885) is **granted**.

IT IS FURTHER ORDERED BY THE COURT THAT defendant Dow's motion to amend the judgment (Doc. # 2897) is **granted in part and denied in part**, as set forth herein.

IT IS FURTHER ORDERED BY THE COURT THAT plaintiffs' motion for approval of its class notice and for tolling of the statute of limitations is **granted**. The statute of limitations for claims by former or present class members based on 2004 purchases is hereby tolled for the period from May 15, 2013, to 60 days after the mailing of the notice approved in this order. Plaintiffs revised proposed notice to former and present class members is hereby approved.

IT IS SO ORDERED.

Dated this 26th day of July, 2013, in Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
URETHANE ANTITRUST LITIGATION	)	MDL No. 1616
	)	Case No. 04-1616-JWL
This document relates to:	)	
The Polyether Polyol Cases	)	
	)	

AMENDED JUDGMENT IN A CIVIL CASE

(x) JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED pursuant to the Jury Verdict returned on February 20, 2013, and the Memorandum and Order filed on May 15, 2013, and the Memorandum and Order filed on July 26, 2013, that judgment is entered against defendant The Dow Chemical Company and in favor of Seegott Holdings, Inc., Industrial Polymers, Inc., Quabaug Corporation, and the Plaintiff Class (defined below) for purchases between November 24, 2000 and December 31, 2003, after trebling pursuant to 15 U.S.C. § 15, and set off of prior settlements, in the amount of One Billion, Sixty Million, Eight Hundred Forty-Seven Thousand, One Hundred Seventeen dollars ($1,060,847,117), with interest thereon at a rate of 0.11 percent as provided by law. The Plaintiff Class, to whom notice has been directed pursuant to Fed. R. Civ. P. 23(c)(2), includes the following (excepting those who have requested exclusion):

> All persons and entities who purchased Polyether Polyol Products (defined below) directly from a defendant at any time from January 1, 1999 through December 31, 2003 in the United States and its territories (excluding all governmental entities, any defendants, their employees, and their respective parents, subsidiaries and affiliates). Polyether Polyol Products are: propylene oxide-based polyether polyols; monomeric or polymeric diphenylmethane diisocyanates (MMDI or PMDI – collectively, MDI); toluene diisocyanates (TDI); MDI-TDI blends; or propylene oxide-based polyether polyol systems (except those that also contain polyester polyols).

IT IS FURTHER ORDERED that the Court's Order adopting and approving a Plan of Allocation, dated July 26, 2013, is hereby incorporated by reference into this amended judgment. Implementation of the Plan of Allocation shall be stayed until such time as the case is remanded to this Court from any appeal, or until after the expiration of time allowed for filing such appeal, if no appeal is filed within that time.

IT IS SO ORDERED.

Dated this 26th day of July, 2013, in Kansas City, Kansas.

s/ Sharon Scheurer
by Deputy Clerk
TIMOTHY M. O'BRIEN
Clerk of the District Court

Form approved this 26th day of July, 2013, in Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

INTEREST IN DAMAGE AWARDS

28 U.S.C. § 1961. Interest [post-judgment]

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.[1]

(b) – (c) [*Omitted*]

15 U.S.C. § 15. Suits by persons injured [pre-judgment interest portion[2]]

(a) [*Private right of action sentence omitted*] The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

[*Remainder of 15 U.S.C. § 15 omitted*]

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[1] For example, for the week ending December 23, 2016, the weekly average 1-year constant maturity Treasury yield was 0.87%. *See* Post-Judgment Interest Rate—2016, *available at* http://www.utd.uscourts.gov/documents/int2016.html.

[2] Prejudgment interest is very rarely granted by the courts.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION

This Order Relates To:

Best Buy Co., Inc., et al. v. Hitachi, Ltd., et al.,No. 11-cv-05513-JST

Best Buy Co., Inc., et al. v. Technicolor SA, et al., No. 13-cv-05264-JST

Target Corp. v. Chunghwa Pictures Tubes, Ltd., et al., No. 3:07-cv-05514-JST

Target Corp. v. Technicolor SA, et al., Case No. 3:11-cv-05514-JST

Alfred H. Siegel, as Trustee of the Circuit City Stores, Inc. Liquidating Trust v. Hitachi, Ltd., et al., No. 11-cv-05502-JST

Alfred H. Siegel, as Trustee of the Circuit City Stores, Inc. Liquidating Trust v. TechnicolorSA, et al., No. 13-cv-05261-JST

Sears, Roebuck and Co., et. al. v. Chunghwa Picture Tubes, Ltd., et al., No. 11-cv-5514

Sears, Roebuck & Co. and Kmart Corp. v. Technicolor SA., No. 3:13-cv-05262;

Sharp Electronics Corporation, et al. v. Hitachi, Ltd., et al., No. 13-cv-01173-JST

Sharp Electronics Corp., et al. v. Koninklijke Philips Electronics N.V., et al., No. 13-cv-2776-JST

ViewSonic Corporation v. Chunghwa Picture Tubes, Ltd., et al., No. 14-cv-02510

MDL No. 1917

Case No. C-07-5944 JST

ORDER RE MOTIONS *IN LIMINE* RE PLAINTIFFS' OTHER ACTIONS AND DAMAGES

The parties organized the pending motions *in limine* into nine categories. See ECF No. 4603, Ex. A. This order addresses the fifth category, entitled "Motions re Plaintiffs' Other Actions and Damages," which contains five motions: four filed by Direct Action Plaintiffs ("DAPs") and one filed by Defendants. Id. at A-6, A-7, A-8. Defendants' motion is entitled "Defendants' Motion *In Limine* No. 7: Motion to Exclude Dr. Frankel's Inflation Adjusted Damages." ECF Nos. 3578 ("Inflation Mot."), 3641 ("Inflation Opp'n"), 3751 ("Inflation Reply"). The DAPs submitted their motions as part of a larger filing entitled "Motions *In Limine* (Nos. 1-18)." ECF No. 3558 ("DAP Mot."), 3676-4 ("DAP Opp'n"), 3757-4 ("DAP Reply"). They are listed as motions number one, five, six, and eight within that filing. DAP Mot. at 2, 23, 24, 30. The motions are fully briefed and suitable for disposition without oral argument pursuant to Local Rule 7-1(b). The Court finds as follows:

Motion	**Ruling**
Defendants' MIL No. 7: Motion to Exclude Dr. Frankel's Inflation Adjusted Damages	GRANTED
DAPs' MIL No. 1: Motion To Exclude Evidence Or Argument Regarding Plaintiffs' Competitive Intelligence Practices	GRANTED IN PART and DENIED IN PART
DAPs' MIL No. 5: Motion To Exclude Evidence Or Argument Regarding Plaintiffs' Ability To Seek Treble Damages and Attorneys' Fees And Costs	GRANTED IN PART and DENIED IN PART
DAPs MIL No. 6: Motion to Exclude Evidence Or Argument Regarding Other Actions And Settlements In This MDL	GRANTED IN PART and DENIED IN PART
DAPs MIL No. 8: Motion To Exclude Evidence Or Argument Regarding Plaintiffs' Alleged Failure To Mitigate Their Damages	GRANTED

I. DEFENDANTS MIL NO. 7: MOTION TO EXCLUDE DR. FRANKEL'S INFLATION ADJUSTED DAMAGES

Defendants move the Court to exclude certain DAP's inflation-adjusted damages on the grounds that inflation-adjusted damages are indistinguishable from prejudgment interest barred by the Clayton Act. See 15 U.S.C. § 15(a). The motion is GRANTED.

"The fundamental principle of damages is to restore the injured party, as nearly as possible,

to the position he would have been in had it not been for the wrong of the other party." United States v. Hatahley, 257 F.2d 920, 923 (10th Cir. 1958). Consistent with that principle, courts often award prejudgment interest in order to "compensate the plaintiff for the delay between the time the cause of action arose and the verdict." Conte v. General Housewares Corp., 215 F.3d 628, 640 (6th Cir. 2000); see also Boston Children's Heart Foundation, Inc. v. Nadal-Ginard, 73 F.3d 429, 442 (1st Cir. 1995) ("Interest is compensation fixed by law for the use of money or, alternatively, as damages for its detention.").

Because federal statutes do not define the rate of prejudgment interest, an award of prejudgment interest in a federal question case is addressed to the sound discretion of the trial court. See E.E.O.C. v. Wooster Brush Co. Employees Relief Assoc., 727 F.2d 566, 579 (6th Cir. 1984). "Discretion is not, however, authorization to decide who deserves the money more. . . . Compensation deferred is compensation reduced by the time value of money . . . . *That is why prejudgment interest is an ingredient of full compensation.*" Matter of Milwaukee Cheese Wisconsin, Inc., 112 F.3d 845, 849 (7th Cir. 1997) (emphasis added). Viewed another way,

> [b]y committing a tort, the wrongdoer creates an involuntary creditor. . . . In voluntary credit transactions, the borrower must pay the market rate for money. (The market rate is the minimum appropriate rate for prejudgment interest, because the involuntary creditor might have charged more to make a loan.) Prejudgment interest at the market rate puts *both* parties in the position they would have occupied had compensation been paid promptly.

Matter of Oil Spill by Amoco Cadiz Off Coast of France on Mar. 16, 1978, 954 F.2d 1279, 1331 (7th Cir. 1992).

In the Ninth Circuit, "the measure of interest rates prescribed for post-judgment interest in 28 U.S.C. § 1961(a) is also appropriate for fixing the rate for pre-judgment interest . . . unless the trial judge finds, on substantial evidence, that the equities of the particular case require a different rate." W. Pac. Fisheries, Inc. v. SS President Grant, 730 F.2d 1280, 1289 (9th Cir. 1984). Accordingly, the interest rate for prejudgment interest in the Ninth Circuit is typically "calculated . . . at a rate equal to the weekly average 1-year constant maturity Treasury yield . . . ." 28 U.S.C. § 1961.

The Clayton Act, however, generally prohibits an award of prejudgment interest. 15

U.S.C. § 15(a). As the Third Circuit explains,

> the award of prejudgment interest . . . serves a remedial purpose by making the plaintiff whole for the intervening loss of use of the money he would have had . . . but for the defendant's unlawful acts. Under . . . section 4 of the Clayton Act, 15 U.S.C. § 15, [however,] the award of multiple [*i.e.*, treble] damages is designed to take the place of this interest loss, along with all other remedial and punitive factors necessary to vindicate the policies of the underlying substantive law.

Trio Process Corp. v. L. Goldstein's Sons, Inc., 638 F.2d 661, 663 (3d Cir.1981). Ensuring full compensation is even less of a concern where, as here, an indirect purchaser claims to have standing pursuant to Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323 (9th Cir. 1980). Such a plaintiff, if successful at trial, is awarded the entire overcharge amount, notwithstanding that its actual damages are likely to be less. See id. at 327 (finding "nothing wrong with the plaintiff winning a windfall gain, so long as the defendant does not suffer multiple liability, with its potential for windfall loss").

The parties agree that the Clayton Act prohibits prejudgment interest. The DAPs argue, however, that "[t]he statutory exclusion of prejudgment interest does not change what is the true measure of the DAPs' damages." Inflation Opp'n at 2. The "true measure," according to the DAPs, includes an adjustment for inflation. Defendants argue that the DAPs are making a semantic argument and that the prohibition on prejudgment interest includes a prohibition on an adjustment for inflation. Inflation Mot. at 3 (citing Auraria Student Housing at the Regency v. Campus Village Apartments, 2014 WL 4651643, at *4 (D. Colo. Sept. 18, 2014) ("The Court . . . finds that the experts' calculations of 'discount rates', 'opportunity cost', and 'present value of past economic harm' are in substance nothing other than calculations of prejudgment interest employing different nomenclature."). The Court agrees with Defendants.

There are two ways antitrust plaintiffs are made worse off as a result of the passage of time between the date of purchase and the date of judgment. First, plaintiffs incur an opportunity cost during that period as a result of not being able to use the funds spent to pay the overcharge. See, e.g., In re Linerboard Antitrust Litig., 504 F. Supp. 2d 38, 63-67 (E.D. Pa. 2007) (discussing opportunity cost). Second, even if the judgment provides plaintiffs with an award equal to the

nominal amount they paid for the overcharge, the purchasing power of that amount will have decreased by the date of judgment such that the present value of the harm will be greater than the present value of the award, assuming that the economy has experienced inflation since the purchase date.

The DAPs concede the Clayton Act's prohibition on prejudgment interest includes a prohibition on compensating plaintiffs for opportunity cost – or, in the DAPs' words, "the time value of money" or "one's inability to use one's money." Inflation Opp'n at 3; see also In re Linerboard Antitrust Litig., 504 F. Supp. 2d at 64 (explaining why these are just different terms for opportunity cost). The DAPs view "inflation," however, "[a]s an entirely different concept" from prejudgment interest. Id. Accordingly, the DAPs argue they ought to be able to present evidence to the jury to "account for inflation since 1995 by adjusting the dollar overcharges to express damages in constant February 2014 dollars." ECF No. 3575-3 ("Frankel Report") at 18.

In support, the DAPs assert they are entitled to "their complete damages." Inflation Opp'n at 2. They cite Illinois Brick Co. v. Illinois, 431 U.S. 720, 748 (1977), which held that antitrust plaintiffs could recover the full amount of an overcharge even if they passed on part of the overcharge to their customers. Defendants' motion has nothing to do with a pass-on defense, and the DAPs' argument and authority are inapposite.

Next, the DAPs claim that "the true measure of the DAPs' damages" must account for inflation because the value of money decreases overtime. Inflation Opp'n at 2. The Court acknowledges that "[c]ompensation deferred is compensation reduced." Matter of Milwaukee Cheese Wisconsin, Inc., 112 F.3d at 849. The issue, however, is whether the Clayton Act nevertheless prohibits inflationary adjustments, notwithstanding this economic truism. The answer to that question turns not on economics but on how prejudgment interest is defined as a matter of law.

Prejudgment interest "compensate[s] the plaintiff for the delay between the time the cause of action arose and the verdict." Conte, 215 F.3d at 640. The compensation for the delay is not partial; it aims to "mak[e] the plaintiff whole." Trio Process Corp., 638 F.2d at 663. Accordingly, the Court finds that prejudgment interest is any award that compensates a plaintiff for the

reduction in a judgement's real value due to the passage of time between when the violation occurred and when a judgment is rendered. See Conte, 215 F.3d at 640; Matter of Milwaukee Cheese Wisconsin, Inc., 112 F.3d at 849; Trio Process Corp., 638 F.2d at 663. The DAPs' claim to the "present value" of their "complete damages" is therefore just a rose by another name. See William Shakespeare, Romeo and Juliet, act 2, sc. 2; Philip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 393a (4th ed. 2014) ("The prohibition of pre-judgment interest . . . provides an incentive to disguise pre-judgment interest as something else. For example, the plaintiff may convert its past actual damages to current dollars. . . . While this may seem 'fair,' it is nonetheless equivalent to an award of pre-judgment interest . . . .").

The DAPs rely heavily on Multiflex v. Samuel Moore & Co., 709 F.2d 980, 996-97 (5th Cir. 1983). See Inflation Opp'n at 3-4. In Multiflex, the Fifth Circuit allowed damages that reflected the opportunity cost of missed investment opportunities. See 709 F.2d at 996 (allowing a damages estimate that included "the interest that might have been earned on the funds if placed in alternative investments"). But that is exactly the type of prejudgment interest the DAPs acknowledge is prohibited by the Clayton Act. See Inflation Opp'n at 3 ("[Prejudgment i]nterest is a measure of the time value of money. It reflects that over time, one's inability to use one's money should be compensated."). Moreover, Multiflex does not address inflationary adjustments at all. In any event, this Court believes that Multiflex was wrongly decided. The plaintiffs in that case were able to secure prejudgment interest notwithstanding the Clayton Act's prohibition by asking the court for an element of prejudgment interest (the opportunity cost of capital) instead of using the phrase "prejudgment interest" itself. Accord In re Linerboard, 504 F. Supp. 2d 38, 63-67, n.14-17; Areeda & Hovenkamp, supra, ¶ 393a (criticizing Multiflex and noting that "[t]he amount that the lost profit would have earned [*i.e.* the opportunity cost of capital] is clearly equivalent to interest. The [Multiflex] court seems to have been misled by the fact that the plaintiff made an economic argument rather than a transparent claim for statutory or common law pre-judgment interest. This would seem to be an error.").

The other authority cited by the DAPs is on point. See Inflation Opp'n at 4-5 (citing

several district court opinions outside the Ninth Circuit that awarded plaintiffs an adjustment for inflation). This Court, however, disagrees with the reasoning in those cases as well. For example, in Law v. Nat'l Collegiate Athletic Ass'n, the defendants filed a post-trial motion arguing the adjustment of the antitrust damage award to present value based on the Consumer Price Index ("CPI")[1] was the functional equivalent of awarding prejudgment interest. See 185 F.R.D. 324, 345-49 (D. Kan. 1999). The court rejected the motion, reasoning that interest and inflation are conceptually distinct. See id. at 346. Whether interest rates for loans and the CPI are conceptually distinct, however, is irrelevant. "Prejudgment interest" is a legal term of art used for the amount courts award to compensate plaintiffs for reductions in value due to the passage of time. Such an award is prejudgment interest regardless of whether a court decides to calculate it using the Consumer Price Index, Treasury yields, or some other metric.[2]

The DAPs' argument also fails because its underlying economic reasoning is flawed. The DAPs' position is based on the idea that interest and inflation are "entirely different concepts," "irrelevant" to each other, and "completely different." Inflation Opp'n at 3-4 (citing Law, 185 F.R.D. at 346 (claiming interest and inflation are distinct because "[t]he function of the [inflation] adjustment is to reflect changing purchasing power of a dollar over time. Interest, on the other hand, is a function of the balance between the supply and demand for loanable funds.")). The distinction is overstated. As inflation increases, so do lenders' costs, causing the supply curve for loans to shift to the left, which in turn results in an increase in the price of borrowing – i.e., interest rates. Moreover, there is a well-known concept in economics known as "Fisher's Theory" which states that a change in the expected inflation rate will cause *the same proportionate change* in interest rates. See Irving Fisher, The Theory of Interest (1930). For the DAPs' position to be plausible, courts would have to be using real interest rates[3] instead of nominal rates when

[1] The CPI is a measure of inflation.

[2] See, e.g., Knoll, Michael S. and Colon, Jeffrey M., "The Calculation of Prejudgment Interest" (2005). *Scholarship at Penn Law.* Paper 120 (describing different ways to calculate prejudgment interest and arguing that prejudgment interest ought to be computed using the defendant's unsecured borrowing rate).

[3] Real interest rates are calculated by taking the nominal rate and subtracting the inflation rate.

calculating prejudgment interest. In the Ninth Circuit, however, prejudgment interest is generally calculated based on the Treasury yield – which is a nominal rate. W. Pac. Fisheries, Inc., 730 F.2d at 1289. Other circuits also use nominal rates of interest. See, e.g., Cement Div., Nat. Gypsum Co. v. City of Milwaukee, 31 F.3d 581, 587 (7th Cir. 1994), aff'd, 515 U.S. 189 (1995) (holding that in the Seventh Circuit "the best starting point is to award interest at *the market rate*, which means an average of *the prime rate* for the years in question") (emphasis added).

In sum, any compensation "for the delay between the time the cause of action arose and the verdict" is, by definition, prejudgment interest. Conte, 215 F.3d at 640. Because an adjustment for inflation is squarely within that definition, the DAPs' argument fails. It also fails for the independent reason that it is based on economically unsound reasoning.

Defendants' motion is GRANTED.

[*Remainder of order omitted*]

Injunctive Relief

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE VITAMIN C ANTITRUST LITIGATION	06-MD-1738 (BMC) (JO)
This document relates to:	
ANIMAL SCIENCE PRODUCTS, INC., et al., Plaintiffs,	05-CV-0453
v.	
HEBEI WELCOME PHARMACEUTICAL CO. LTD., et al., Defendants.	

SPECIAL VERDICT FORM

We, the jury, unanimously agree to the answers to the following questions and return them under the instructions of this Court as our verdict in this case:

Question 1: Did plaintiffs prove, by a preponderance of the evidence, that the following defendants knowingly entered into an agreement or conspiracy with the purpose of or predictable effect of fixing the price or limiting the supply of Vitamin C?

A. Hebei Welcome Pharmaceutical Co., Ltd.

X
YES

NO

B. North China Pharmaceutical Group Corp.

X
YES

NO

If your answer to any part of Question 1 is "Yes," please answer Question 2. If your answers to both parts of Question 1 are "No," please go to the end of the verdict form, and sign and date it where indicated.

Question 2A: Did plaintiffs prove, by a preponderance of the evidence, that the plaintiff class was in fact injured as a result of defendants' alleged violation of the antitrust laws?

X
YES

NO

Question 2B: Did plaintiffs prove, by a preponderance of the evidence, that defendants' alleged illegal conduct played a substantial part in bringing about or causing their injury, and that the injury was a direct and proximate result of the unlawful activity?

X
YES

NO

Question 2C: Did plaintiffs prove, by a preponderance of the evidence, that defendants' alleged illegal conduct resulted in plaintiffs and the class members paying higher prices for their vitamin C purchases than they would have paid had the agreements not existed?

X
YES

NO

If your answer to all parts of Question 2 is "Yes," please answer Question 3. If your answers to any part of Question 2 is "No," please go to the end of the verdict form, and sign and date it where indicated.

Question 3: Did defendants prove, by a preponderance of the evidence, that defendants were actually compelled by the Government of China to enter into agreements fixing the price or limiting the supply of vitamin C exported from China from the period of December 1, 2001 to June 30, 2006 and that defendants faced the prospect of penalties or sanctions for not complying with the directives or commands of the Chinese government in this regard?

YES	NO
	X

If your answer to Question 3 is "No," please answer Question 4. If your answer to Question 3 is "Yes," please go to the end of the verdict form, and sign and date it where indicated.

Question 4: Did plaintiffs prove, by a preponderance of the evidence, that they suffered damages in an amount that is ascertainable and not speculative?

X	
YES	NO

If your answer to Question 4 is "Yes," please answer Question 5. If your answer to Question 4 is "No," please go to the end of the verdict form, and sign and date it where indicated.

Question 5: What amount of damages have plaintiffs proved, by a preponderance of the evidence, that the plaintiff class suffered as a result of defendants' conduct?

$ $54.1 m
(Please fill in total dollar amount)

[SIGNATURE PAGE FOLLOWS]

The jury foreperson must sign and date this form.

Signed: _____ Date: 3/14/13

Foreperson

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE VITAMIN C ANTITRUST LITIGATION	06-MD-1738 (BMC) (JO)
This document relates to:	
ANIMAL SCIENCE PRODUCTS, INC., et al., Plaintiffs, v. HEBEI WELCOME PHARMACEUTICAL CO. LTD., et al., Defendants.	**MEMORANDUM DECISION AND ORDER** 05-CV-0453

COGAN, District Judge.

On March 14, 2013, a jury reached found defendants Hebei Welcome Pharmaceutical Co., Ltd. ("Hebei") and North China Pharmaceutical Group Corp. ("NCPGC")[1] liable to plaintiffs[2] for violating the Sherman Act. Currently before the Court are two post-trial motions. First, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, defendants have renewed their motion for judgment as a matter of law on three grounds. Second, the Injunction Class has moved for an order permanently enjoining defendants from entering into any agreements to fix the price or limit the supply of vitamin C. Familiarity with the facts and procedural history of

[1] All other defendants in this action settled either prior to or during trial. The jury's verdict only addressed the liability of Hebei and NCPGC.

[2] The Court certified two plaintiff classes in this action, the Director Purchaser Damages Class and the Injunction Class.

this action is presumed. For the reasons set forth below, defendants' motion is denied and the Injunction Class's motion is granted.

I. Defendants' Renewed Motion for Judgment as a Matter of Law

[*Section omitted*]

II. The Motion for a Permanent Injunction

Finally, the Injunction Class seeks a permanent injunction, lasting ten years, against defendants under Section 16 of the Clayton Act, which authorizes the district courts to issue "injunctive relief . . . against threatened loss or damages by a violation of the antitrust laws." 15 U.S.C. § 26. The parties agree that the determination of whether to issue an injunction is governed by the four-part test set forth in eBay Inc. v. MerchExchange, L.L.C., 547 U.S. 388, 126 S. Ct. 1837 (2006). Under that test, "a plaintiff seeking a permanent injunction must . . . .

demonstrate (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." Id. at 391, 126 S. Ct. at 1839. I address each requirement in turn.

First, with regard to irreparable injury, in order to obtain a Section 16 injunction, a plaintiff "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 89 S. Ct. 1562, 1580 (1969). Here, the Injunction Class has already proven injury, as demonstrated by the jury verdict. Defendants argue that the jury verdict only applies to the class period – December 2001 through June 2006 – and that there is no evidence that the anticompetitive conspiracy is continuing. But that argument is unpersuasive. See In re Data Gen. Corp. Antitrust Litig., MDL Dkt. No. 369, 1986 WL 10899, at * (N.D. Cal. July 30, 1986) (imposing an injunction despite the observation that "a permanent injunction almost by definition must rest on outdated facts").

Moreover, there is evidence that anticompetitive conduct is likely to recur if not enjoined. Documentary evidence indicates that the conspirators discussed performing future actions "in a more hidden and smart way" and testimony established that, after this lawsuit was filed, conspirators stopped keeping notes of their meetings. Defendants have not renounced their conduct and they continue to contest their liability. See Coleman v. Cannon Oil Co., 849 F. Supp. 1458, 1472 (M.D. Ala. 1993) (issuing a permanent injunction in an antitrust case where, among other things, defendants "failed to acknowledge their wrong-doing").

For the indirect purchasers, who comprise the vast majority of Injunction Class members, the injury they already suffered and any similar injury they are likely to suffer in the future is irreparable. Indirect purchasers of vitamin C cannot bring a federal claim for damages, see generally Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061 (1977), and many also lack a state law-based cause of action for damages. Further, "[h]arm might be irremediable, or irreparable, for many reasons, including that a loss is difficult to . . . measure, or that it is a loss that one should not be expected to suffer." Salinger v. Colting, 607 F.3d 68, 81 (2d Cir. 2010). It undoubtedly would be difficult to measure the injury that anticompetitive conduct would cause indirect vitamin C purchasers and no Injunction Class member should be expected to suffer injury as a result of illegal anticompetitive conduct. Accordingly, I conclude that the first eBay factor is satisfied.

For many of the same reasons, I conclude that the Injunction Class does not have an adequate remedy at law and the second eBay factor is satisfied. As noted, many indirect vitamin C purchasers cannot bring any claim for damages if defendants engage in further anticompetitive conduct. Further, even direct purchasers are only entitled to damages equal to the overcharge paid for vitamin C as a result of illegal conduct. As the eight-year (and still ongoing) history of this action attests, prosecuting international antitrust claims are difficult, costly, and time-consuming. Should defendants recommence their anticompetitive conduct, the Injunction Class will have to incur considerable expense in order to vindicate its rights.

With regard to the third eBay factor, the balance of hardships, contrary to defendants' contention, the injunction sought is neither "drastic" nor "extraordinary." It prohibits agreements "to fix the price or limit the supply of vitamin C sold in the United States in violation of Section 1 of the Sherman Act." In other words, all the injunction does is prohibit defendants from

committing what, independently, would constitute an illegal act. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 60 S. Ct. 811, 841 (1940) ("[T]his Court has consistently and without deviation adhered to the principle that price-fixing arrangements are unlawful per se under the Sherman Act."). Mandating compliance with the law can hardly be considered burdensome. And, as discussed, the Injunction Class would have to incur considerable expense if it had to vindicate its rights through another litigation. Thus, I conclude that the balance of hardships favors the injunction.

Finally, the fourth eBay factor concerns the public interest. Civil damages suits to enforce the antitrust laws are unquestionably in the public interest. See Zenith, 395 U.S. at 133, 89 S. Ct. at 1582 ("[T]reble-damage cases, which are brought for private ends, . . . also serve the public interest in that they effectively pry open to competition a market that has been closed by defendants' illegal restraints.") (internal quotation marks omitted). Defendants contend that a permanent injunction "would interfere with the Chinese government's sovereign authority and its ability to regulate its own domestic affairs." This argument ignores the fact that the jury found defendants liable based on voluntary, uncompelled conduct. If, in the future, the operation of the permanent injunction comes into conflict with China's sovereign regulatory authority, defendants, or any other enjoined party, may seek to have the injunction vacated or limited on that basis. However, the Court will not deny the Injunctive Class relief to which it is otherwise entitled on the basis of speculative and uncertain future interference with the regulatory authority of another nation. Therefore, I conclude that a permanent injunction is in the public interest and that the Injunction Class is entitled to the permanent injunction it seeks.

CONCLUSION

Defendants' renewed motion for judgment as a matter of law [688] is denied and the Injunction Class's motion for a permanent injunction [693] is granted. An Amended Judgment and Decree will issue by separate order.

SO ORDERED.

Digitally signed by Brian M. Cogan

U.S.D.J.

Dated: Brooklyn, New York
November 25, 2013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE VITAMIN C ANTITRUST LITIGATION	:	MASTER FILE 06-MD-1738 (BMC) (JO)
This document relates to:	:	
ANIMAL SCIENCE PRODUCTS, INC., et al.,	:	
Plaintiffs,	:	05-CV-0453
v.	:	
HEBEI WELCOME PHARMACEUTICAL CO. LTD., et al.,	:	
Defendants.	:	

AMENDED JUDGMENT AND FINAL DECREE

The jury having rendered its verdict in this case in favor of plaintiff, the Ranis Company, Inc., as representative of the Direct Purchaser Class,[1] in the amount of Fifty Four Million One Hundred Thousand Dollars ($54,100,000.00), and in favor of plaintiff, Animal Science Products, Inc., as representative of the Injunction Class,[2] and the Court, upon motion of plaintiff, having

[1] The Direct Purchaser Damages Class consists of all persons or entities, or assignees of such persons or entities, who directly purchased vitamin C for delivery in the United States, other than pursuant to a contract containing an arbitration clause, from any of Defendants or their co-conspirators, other than Northeast Pharmaceutical (Group) Co. Ltd., from December 1, 2001 to June 30, 2006. Excluded from this class are all governmental entities, defendants, their co-conspirators, and their respective subsidiaries or affiliates.

[2] The Injunction Class consists of all persons or entities, or assignees of such persons or entities, who purchased vitamin C manufactured by Defendants for delivery in the United States, other than pursuant to a contract with a Defendant containing an arbitration clause, from December 1, 2001 to the present, requiring injunctive relief against Defendants to end Defendants' antitrust violations.

directed entry of judgment upon trebling the damage award pursuant to 15 U.S.C. § 15(a), less Nine Million Dollars ($9,000,000) received from former defendants, and the Court, having entered its Memorandum Decision and Order of November 26, 2013, granting the motion of the Injunctive Class for a permanent injunction, it is hereby:

ORDERED AND ADJUDGED, that The Ranis Company, as class representative, will take damages of defendants – Hebei Welcome Pharmaceutical Co., Ltd. and North China Pharmaceutical Group Corp. – jointly and severally, in the amount of One Hundred Fifty Three Million Three Hundred Thousand Dollars ($153,300,000); and it is further

ORDERED, ADJUDGED AND DECREED, as follows:

1. Defendants, their officers, directors, agents, servants, employees, successors, assigns and those persons acting in concert with them who receive actual notice of this injunction, are each ENJOINED and RESTRAINED from agreeing, directly or indirectly, to fix the price or limit the supply of vitamin C sold in the United States in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Any party may seek modification of this Order, at any time, by written motion and for good cause based on changed circumstances or otherwise.

3. This Court shall retain jurisdiction to enforce this Order. In the event that any part of this Order is violated by the parties named herein or other persons, Plaintiffs may, by motion with notice to the attorneys for the defendants, apply for sanctions or other relief that may be appropriate.

4. Unless this Court grants an extension, the injunction will expire without further action of this Court ten years from the date of its entry, or if timely appealed, ten years after the final order of the highest-level appellate court.

SO ORDERED.

_____
U.S.D.J.

Dated: Brooklyn, New York
November 27, 2013

A NOTE ON THE *VITAMIN C* LITIGATION

The *Vitamin C* litigation was a consolidated private antitrust action in which U.S. purchasers alleged that Chinese vitamin C manufacturers and exporters coordinated conduct to fix prices or limit the supply of vitamin C sold in the United States, including vitamin C exported from China during the class period. The case proceeded on behalf of two certified classes: a direct purchaser damages class and an injunction class. By the time of trial and verdict, all the defendants had settled, either before trial or during trial, except for Hebei Welcome Pharmaceutical Co., Ltd. and North China Pharmaceutical Group Corp.

The materials you just read begin with the *special verdict form*, which memorializes the jury's findings that Hebei and North China knowingly entered into an agreement or conspiracy with the purpose, or predictable effect, of fixing the price or limiting the supply of vitamin C and finding actual damages from the conspiracy to be $54.1 million (pp. 191-97). The verdict form also reflects the jury's rejection of the defendants' foreign sovereign compulsion defense: the defendants did not prove that the Government of China actually compelled them to enter into the challenged agreements or that they faced penalties or sanctions for noncompliance. Second, Judge Cogan's November 26, 2013, *memorandum decision and order* resolves the principal post-trial motions by denying defendants' renewed Rule 50(b) motion[1] and granting the injunction class's request for a ten-year permanent injunction under Section 16 of the Clayton Act (pp. 198-204). Third, the *amended judgment and final decree*, dated November 27, 2013, implements the verdict and those post-trial rulings by entering a trebled damages judgment of $153.3 million (three times $54.1 million in actual damages minus $9 million for amounts received from former defendants), enjoining agreements to fix the price or limit the supply of vitamin C sold in the United States, allowing modification on a showing of changed circumstances, retaining jurisdiction to enforce the decree, and providing that the injunction expires ten years after entry or, if timely appealed, ten years after the final order of the highest-level appellate court (pp. 205-07).

After entry of the amended judgment and final decree, the case took an unusual appellate path driven primarily by foreign law and international

[1] *See* Fed. R. Civ. P. 50(b) (permitting a party to renew a motion for judgment as a matter of law after trial if the motion was made under Rule 50(a) before the case was submitted to the jury).

comity rather than by ordinary challenges to the sufficiency of the trial evidence. The appeal thus bypassed the typical review of the district court's denial of the Rule 50(b) motion, focusing instead on legal questions about deference to foreign sovereigns and comity-based abstention. In September 2016, the Second Circuit vacated the judgment, reversed the district court's denial of defendants' motion to dismiss, and remanded with instructions to dismiss the complaint with prejudice on international comity grounds.[2] The court concluded that the case presented a "true conflict" because, crediting the Chinese Ministry of Commerce's description of China's export regulation regime, the defendants could not comply with both Chinese requirements and U.S. antitrust law.[3] In reaching that conclusion, the panel held that when a foreign government appears and offers an official statement of its own law, federal courts should defer to that statement so long as it is reasonable. It treated that deference as central to the comity analysis.

In June 2018, the Supreme Court unanimously vacated the Second Circuit's judgment in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*[4] The Court held that a foreign sovereign's statement about its own law is entitled to "respectful consideration" under Federal Rule of Civil Procedure 44.1, but it is not binding, and the weight due depends on context, including factors such as clarity, thoroughness, support, consistency, and the statement's purpose.[5] The Court also reaffirmed that Rule 44.1 permits courts to consider "any relevant material or source" when determining foreign law and remanded for reconsideration under the proper standard.

On remand, the Second Circuit again ordered dismissal in August 2021, in a divided opinion.[6] Applying the Supreme Court's framework, the majority gave substantial weight to the Ministry's submissions, found a

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[2] *In re* Vitamin C Antitrust Litig., 837 F.3d 175 (2d Cir. 2016).

[3] The litigation marked the first time the Ministry of Commerce of the People's Republic of China (MOFCOM) appeared as amicus curiae in a U.S. court, a fact that fundamentally shaped the judiciary's approach to the comity analysis and the level of deference afforded to the Ministry's interpretation of its own laws.

[4] Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 585 U.S. 33 (2018).

[5] Rule 44.1 governs the determination of foreign law:

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

Fed. R. Civ. P. 44.1.

[6] Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. (In re Vitamin C Antitrust Litig.), 8 F.4th 136 (2d Cir. 2021).

true conflict between Chinese export regulation and the Sherman Act, and held that principles of international comity required dismissal. International comity is a common law doctrine of judicial restraint under which a federal court may decline to exercise jurisdiction when adjudication would unduly interfere with a foreign sovereign's regulatory regime. Having found a true conflict, the court weighed the relevant comity factors—including China's interest in its export regulation, the United States' interest in enforcing the antitrust laws, and the likely international friction from proceeding—and concluded that dismissal was the appropriate accommodation.[7] The dissent argued that the majority treated the Ministry's submissions as practically dispositive, notwithstanding the Supreme Court's instruction that such submissions receive only respectful, nonbinding consideration, and that the majority discounted trial record evidence, including the jury's rejection of actual compulsion, in both the foreign law analysis and the comity balance.[8] The Supreme Court denied certiorari on October 3, 2022, leaving the Second Circuit's comity dismissal as the final disposition of the case.[9]

The subsequent history underscores three procedural lessons. First, foreign law is treated as a question of law for the court under Rule 44.1, and the Supreme Court's decision emphasizes both the breadth of permissible sources and the nonbinding character of a foreign sovereign's submission. Second, the case illustrates the distinction between a foreign sovereign compulsion defense and an international comity dismissal, and it shows how comity can operate as a case-dispositive doctrine even after a merits trial and entry of final injunctive and monetary relief. Third, while the Supreme Court rejected conclusive deference, the post-remand Second Circuit decision shows that substantial deference can still be outcome-determinative when the court finds a true conflict—here, by finding the Ministry's submissions "reasonable" under the Supreme Court's test—and concludes that the comity factors favor abstention.

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[7] In conducting its comity analysis, the court weighed factors derived from the *Timberlane* balancing test, including: (1) the degree of conflict with foreign law or policy; (2) the nationality and location of the parties and their places of business; (3) the extent to which enforcement by either state can be expected to achieve compliance; (4) the relative significance of the effects on the U.S. as compared with those elsewhere; (5) the extent to which there is explicit purpose to harm or affect American commerce; (6) the foreseeability of such effect; and (7) the relative importance to the violations charged of conduct within the U.S. as compared with conduct abroad. *See* Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 614-15 (9th Cir. 1976).

[8] Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 8 F.4th 136, 170-80 (2d Cir. 2021) (Nardini, J., dissenting).

[9] Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., No. 21-1283 (U.S. Oct. 3, 2022) (mem.) (cert. denied).

Declaratory Relief

DECLARATORY RELIEF

JUDICIAL CODE

28 U.S.C. § 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to [exceptions omitted], any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

[Section (b) omitted]

28 U.S.C. § 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Post-Judgment Recovery

RECOVERY OF JUDGMENT

SELECTED FEDERAL RULES OF CIVIL PROCEDURE

Rule 69. Execution

(a) In General.

(1) *Money Judgment; Applicable Procedure*. A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

(2) *Obtaining Discovery*. In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person—including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located.

[Section (b) omitted (regarding judgments against certain public officers)]

United States District Court

SOUTHERN DISTRICT OF NEW YORK

JUDGMENT NO. _____ DOCKET NO. _____

THE PRESIDENT OF THE UNITED STATES OF AMERICA
To the Marshal of the Southern District of New York, GREETING:

YOU ARE COMMANDED, that of the goods and chattels of _____

_____

_____

in your district you cause to be made the sum of _____

_____ dollars and _____ cents, ($ _____)

which lately in the United States District Court of the United States for the Southern District of New York, in the Second Circuit, _____

recovered against the said _____

_____

in an action between _____

_____

PLAINTIFF and _____

_____

DEFENDANT, in favor of said _____

_____

as appears by the record filed in the Clerk's Office of said District Court on the _____ day of _____, in the year of _____

and if sufficient personal property of the said judgment debtor cannot be found in your District, that then you cause the same to be made out of the real property belonging to such judgment debtor on the above-mentioned day, or at any time thereafter, in whose hands soever the same may be, and return this execution within sixty days after its receipt by you, to the Clerk of said District Court.

WITNESS, the Honorable Loretta A. Preska, Chief Judge of the United States District Court, for the Southern District of New York, at the City of New York, on the _____ day of _____ in the year of our Lord _____, and of the Independence of the United States the two hundred thirty-third year.

(year)

_____
CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -x

Plaintiff, ____ Civ. _____ ( )

- against - **SATISFACTION OF JUDGMENT**

Defendant.
- -x

WHEREAS, a judgment was entered in the above action on the _____ day of _____, _____ in favor of _____ and against _____ in the amount of $_____ plus interest from the _____ day of _____, _____ with costs to be taxed, and costs in the amount of $_____ having been taxed on the _____ day of _____, _____, and said judgment with interest and costs thereon having been fully paid, and it is certified that there are no outstanding executions with any Sheriff or Marshall,

THEREFORE, full and complete satisfaction of said judgment is hereby acknowledged, and the Clerk of the Court is hereby authorized and directed to make an entry of the full and complete satisfaction on the docket of said judgment.

Dated: New York, New York
_____

[name of law firm]

By: _____
[attorney's name]
Attorneys for _____
[address]

STATE OF NEW YORK)
) ss.:
COUNTY OF _____)

On the _____ day of _____, _____ before me personally came _____ to me known and known to be a member of the firm of _____, attorneys for _____ in the above-entitled action, and to be the same person described in and who executed the within satisfaction of judgment and acknowledged to me that he executed the same.

_____
Notary Public

Judgment Sharing Agreements

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

INFINEON TECHNOLOGIES AG, et al.,

Defendants.
_____/

No. C 06-4333 PJH

ORDER DENYING MOTION TO VOID JUDGMENT SHARING AGREEMENT

Plaintiff States' motion to void certain defendants' judgment sharing agreement came on for hearing before this court on November 14, 2007. Plaintiff States, various individual States and their government entities acting through their Attorneys General (collectively "plaintiff States"), appeared through their respective counsel, Kathleen E. Foote, Emilio E. Varanini, and Charles M. Kagay. Defendants, the Infineon Technologies entities, Micron Technology, the Hynix Semiconductor entities, the NEC entities, and the Elpida Memory entities (collectively "defendants") appeared through their counsel, Joel S. Sanders, Harrison J. Frahn, Julian Brew, Robert B. Pringle, and Michael F. Tubach. Having read all the papers submitted, including the judgment sharing agreement, provided to the court at the hearing for its *in camera* review,[1] and carefully considered the relevant legal authority, the court hereby DENIES plaintiff States' motion to void the judgment sharing agreement, for the reasons stated at the hearing, and as follows.

BACKGROUND

On July 14, 2006, plaintiff States filed the underlying action against numerous defendants engaged in the manufacture and sale of dynamic random access memory

[1] The copy of the judgment sharing agreement reviewed *in camera* will be filed under seal by separate order filed concurrently herewith, for purposes of appellate review.

("DRAM"), including the above-named defendants. As set forth in the current iteration of the plaintiff States' complaint, plaintiff States generally allege that all defendants participated in an unlawful horizontal price-fixing conspiracy in the U.S. market for DRAM. See generally Third Amended Complaint ("TAC"). This action is related to a separate antitrust MDL action, pending on this court's docket since 2002, alleging a similar price-fixing conspiracy against similar or the same defendants.

As a result of the ongoing litigation before the court, the above-named defendants entered into a judgment sharing agreement ("JSA") with each other. The JSA creates a contractual right of contribution among the signatory defendants, and allocates among these defendants the responsibility for the damages portion of any judgment, based on specified percentages related to their market shares (i.e., "Sharing Percentage"). See Declaration of Joel S. Sanders ISO Opposition to Mot. to Void JSA ("Sanders Decl."), ¶¶ 2, 5.

The JSA also governs settlements between the signatory defendants and plaintiff States.[2] It expressly allows signatory defendants to settle with the plaintiff States on any terms, at any time. In order for a signatory defendant's individual settlement to extinguish all continuing obligations under the JSA, however, a settling signatory defendant must first (a) negotiate and obtain a proportionally equal settlement offer (i.e., an offer consistent with the defendants' negotiated Sharing Percentages) for all other signatory defendants; and (b) after one or more of the other signatory defendants have declined this settlement offer, obtain an agreement from plaintiff States to exclude the settling signatory defendant's Sharing Percentage from any judgment that plaintiff States seek to enforce against the other signatory defendants. See Sanders Decl., ¶ 6; see also Declaration of Nicole Gordon ISO Mot. to Void JSA ("Gordon Decl."), ¶ 4.

[2] In point of fact, the JSA contemplates settlements with other plaintiff groups, in addition to the plaintiff States, as a result of claims brought in other, related actions. However, since the instant motion is brought by the plaintiff States alone, the court refers to the JSA's provisions with respect to these plaintiffs, specifically.

These settlement provisions are the subject of the instant motion. Plaintiff States seek to void the JSA, on grounds that the above provisions violate public policy.

DISCUSSION

The plaintiff States' overriding argument is that the JSA impermissibly discourages settlement by restraining a signatory defendant's ability to settle individually with plaintiff States. They assert that, by doing so, the JSA contravenes public policy, and should be voided.

Preliminarily, neither the court nor the parties before it have been able to discern the existence of any controlling legal authority suggesting that JSAs are generally impermissible, or that they inherently violate public policy. Thus, the issue before the court is simply whether the provisions contained in *defendants*' JSA contravene public policy, or otherwise warrant voidance of the agreement as a whole. While there is a paucity of legal authority directly on point, controlling or otherwise, review of the submitted case law most analogous to the present situation compels the court to answer this question in the negative.[3]

In Cimarron Pipeline Constr., Inc. v. Nat'l Council on Compensation Ins., 1992 WL 350612 (W.D. Okla. 1002), the court considered plaintiffs' challenge to a judgment sharing agreement that, as with defendants' JSA, allocated liability shares among signatory defendants, and furthermore required that settlements between plaintiffs and individual signatory defendants meet specific requirements. See id. at **1-2. The district court denied plaintiffs' motion to invalidate the agreement, noting that the Supreme Court has specifically recognized that although a legal *right* to contribution has not been created by Congress, "contribution among antitrust defendants may further certain favorable policy goals." Id. at *2. To that end, the district court concluded that absent "a clear and specific prohibition against the right of contribution," the defendants' agreement requiring

[3] To the extent that plaintiff States contend that Ninth Circuit precedent in securities actions should provide persuasive guidance here, the court rejects this argument, finding such cases inapposite, in view of those cases' reliance on statutory contribution rights.

contribution would "not be invalidated." See id. at *2. The court furthermore noted that plaintiff had failed to present evidence "that the [d]efendants' sharing agreement has had a negative impact upon settlement negotiations." Id. at *3.

Another district court reached the same conclusion in In re Brand Name Prescription Drugs Antitrust Litig.. See 1995 WL 221853, *1 (N.D. Ill. 1995). Relying on several antitrust treatises and sources, the district court concluded that, in the antitrust context, sharing agreements do not necessarily pose a barrier to individual settlements, but rather provide a means of discouraging coerced settlements and serve to ameliorate the "harsh results" of joint and several liability in antitrust cases. Significantly, the court there noted that judgment sharing agreements among antitrust defendants "commonly provide" – as is the case here – that "if any signatory defendant settles, it must require the plaintiff to reduce any ultimate judgment against the other signatories by the settling defendant's percentage share of liability under the agreement. Alternatively, the settling defendant remains contractually liable to the other signatories for its share of the judgment." See id. at *3. The terms of the judgment sharing agreement at issue was also remarkably similar to the JSA now before the court. It provided that any defendant could settle at any time; however, any settling defendant would remain liable for the payment of any judgment obtained against any of the other defendants based upon the settling defendants' product sales, unless the settling defendant procured a settlement agreement with plaintiff that expressly provided that the settling defendants' settlement would be excluded from any ultimate judgment secured against the non-settling defendants. Id. at *1.

In opposition to these cases, plaintiffs submit In re San Juan Dupont Plaza Hotel Fire Litig., 1989 WL 996278 (D. Puerto Rico 1989). In re San Juan Dupont did not involve a judgment sharing agreement in the antitrust context. Nonetheless, the court granted plaintiffs' motion to void a judgment sharing agreement that similarly sought to allocate liability among joint tortfeasor defendants. The agreement before the In re San Juan Dupont court established a formula by which defendant signatories would pay for eventual

judgments, dispensed with any contribution claims that the signatories may have had among themselves, and provided that the *only* method by which the participants could settle their claims was through the judgment sharing agreement's outlined methods. See id. at *2. In granting the plaintiffs' motion to void the agreement, the district court found that there was a "conscious effort by the signatories to impede the ongoing settlement process" in the case. Id. at *1. The court found the provision restricting outside settlements particularly objectionable, as it denoted that the real purpose behind the agreement was "to prevent resolution of plaintiffs' claims using the armor of a defense cooperation" agreement. Id. at *2. Even if this provision were modified to allow for individual settlements, however, the agreement could still not be saved, in view of the court's concerns regarding "the improper underlying motive and potential ill effects of the entire document." Id. at *3. As proof of improper motive, the court pointed to separate provisions in the agreement obligating all signatories to decline all admissions of liability and aid to the plaintiffs, and prohibiting signatories from providing witnesses, assistance, or other support to plaintiffs. Id.

In sum, even those cases that recognize the court's role in evaluating and monitoring the use of judgment sharing agreements have upheld the general permissibility of such agreements, holding such agreements improper only where: (1) they contain provisions that impose absolute prohibitions on a signatory defendant's right to settle with plaintiffs individually; and/or (2) they contain provisions demonstrating an improper motive to prevent resolution of litigated claims; and/or (3) the evidence otherwise demonstrates that defendants' judgment sharing agreement has had an adverse impact upon settlement negotiations.

Here, plaintiffs have failed to demonstrate that any of these criteria have been satisfied. First, defendants' JSA does not prohibit individual settlements by signatory defendants. To the contrary, it expressly allows for them. The agreement simply provides that, in order for an individually settling defendant to extinguish all contribution obligations

under the agreement, an attempt must first be made to secure a joint settlement agreement for all signatory defendants, and barring that, the settling defendant must include terms in its individual settlement that reduce the non-settling defendants' judgment by the settling defendant's Sharing Percentage. In this respect, the latter element is similar to the defense sharing agreements previously upheld by both the Cimarron and In re Brand Name courts, and the former element – requiring an attempt to secure a joint settlement agreement with all signatory defendants – promotes, rather than discourages, settlement. Second, defendants' JSA contains no provisions that evidence an improper motive to prevent resolution of plaintiff States' claims – e.g., by preventing admissions of liability or cooperation with plaintiffs – as was the case in In re San Juan Dupont. Finally, plaintiff States have failed to introduce any evidence that defendants' JSA has had an adverse impact on settlement negotiations thus far. There is no evidence demonstrating that signatory defendants have either refused, or been unwilling to discuss or negotiate settlement with plaintiff States because of their obligations pursuant to the JSA. Nor is there any reason to believe at this juncture, when viewed in the factual context of the underlying litigation as a whole – i.e., two settlements have already been negotiated with other defendants, and two other entity defendants are not signatories to the JSA – that such will be the case in future.

Moreover, while plaintiff States are certainly correct that defendants' JSA, by creating a contractual right of contribution amongst the signatory defendants, lessens the sting of joint and several liability, the court in no way finds this to be evidence of an improper motive. Defendants' agreement does nothing to limit defendants' exposure to joint and several liability in litigation before the court, or to otherwise prevent plaintiff States from seeking a judgment against one or all signatory defendants (or non-signatory defendants, for that matter), in accordance with the principles of joint and several liability. Indeed, in view of the acknowledged realities of joint and several liability in antitrust cases, defendants' judgment sharing agreement may be viewed as rational and efficient behavior.

In short, absent some established law making the provisions of defendants' JSA illegal, or proof that settlement has in fact been deterred, the court can discern no basis for invalidating defendants' agreement.[4]

CONCLUSION

For all the foregoing reasons, plaintiff States' motion is DENIED. For the reasons stated at the hearing, the court also STRIKES plaintiff States' addendum filed in support of their motion, for noncompliance with the local rules. Both parties' evidentiary objections are OVERRULED.

IT IS SO ORDERED.

Dated: November 29, 2007

PHYLLIS J. HAMILTON
United States District Judge

[4] To the extent that the plaintiff States have also argued that the JSA violates public policy by arbitrarily allocating civil penalties, the court rejects this argument, for the reasons stated at the hearing. Defendants' alternative objections to plaintiff States' motion, based on standing and ripeness grounds, are also OVERRULED.

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

IN RE BROILER CHICKEN ANTITRUST LITIGATION	No. 16 C 8637 Judge Thomas M. Durkin

ORDER

The majority of Defendants in this case (the briefs say 14 of them) have entered into what is titled a "judgment sharing agreement." The second amended judgment sharing agreement (or JSA) is the subject of the motion. A copy was provided to the Court, along with the motion and the briefs in support and opposition to it. Having heard oral argument, the motion is denied for the following reasons.

Because antitrust claims carry the risk of treble damages and attorney's fees and a verdict against multiple defendants allows joint and several liability with no right of contribution, a defendant with a very small market share could be required to pay damages attributable to the entire conspiracy. Who has to pay such a large verdict among liable defendants is entirely up to the winning plaintiffs. A ruinous or bankruptcy producing collection action could occur. Defendants believe, and some commentators have written, that this situation could lead to coercive settlements. Plaintiffs disagree and say that joint and several liability is an essential part of the overall antitrust enforcement scheme.

Plaintiff challenge two parts of the JSA. One is the language in § 6(D):

> Settling plaintiff agrees to reduce the dollar amount collectible from non-settling parties pursuant to any final

> judgment by a percent equal to the settling parties sharing percentage as calculated pursuant to the JSA.

Plaintiffs contend this provision allows Defendants to effectively disable joint and several liability, which they argue is contrary to Congressional intent to maximize deterrence for antitrust violations. Plaintiffs also argue that the JSA violates Section 1 of the Sherman Act in that it constitutes a group boycott prohibiting settlements that do not include this language.

The second part of the JSA that plaintiffs challenge is the requirement that each JSA defendant provide the others with a copy of any settlement agreement. The plaintiffs believe this exchange of settlement agreements lacks any justification and puts the defendants at a competitive advantage with respect to each Direct Action Plaintiff, thereby discouraging settlement.

Defendants concede that federal antitrust law has long imposed joint and several liability on co-conspirators and that by entering into the JSA, and in particular § 6(D), they seek to eliminate or soften the impact of joint and several liability on the settlement defendants. But they also point out that such agreements have been common for many years.

The widespread use of JSAs is reflected in the paucity of case law finding them unlawful or even criticizing their use. There is no binding authority either way on the validity of the challenged sections of the JSA from either the Supreme Court or the Seventh Circuit. And almost all of the district courts to have addressed language similar to that of § 6(D) at issue here have found its use to be lawful. *See*, *e.g.*, *California v. Infineon Techs. AG*, 2007 WL 6197288 (N.D. Cal. Nov. 29, 2007); *In re*

Brand Name Prescription Drugs Antitrust Litig., 1995 WL 221853 (N.D. Ill. Apr. 11, 1995);[1] *Cimarron Pipeline Const., Inc. v. Nat'l Council on Comp. Ins.*, 1992 WL 350612, (W.D. Okla. Apr. 10, 1992). These courts found JSAs permissible as long as they do not impose absolute prohibitions on a signatory defendant's right to settle with a plaintiff individually or contain provisions demonstrating an improper motive to prevent resolution of litigated claims, or that the JSA otherwise has an adverse impact on settlement negotiations. None of those factors are present here.

As an initial observation, there is nothing improper about a JSA, and "they are generally appropriate." *See* Manual of Complex Litigation (4th ed.), at 178. "These agreements serve the legitimate purposes of controlling parties' exposure and preventing plaintiffs from forcing an unfair settlement by threats to show favoritism in the collection of any judgment that may be recovered." *Id.*

The Court would be more skeptical of an agreement that "expressly prohibit[ed] or indirectly discourage[d] individual settlements." *Id.* But that is not the case here. To the contrary, it expressly allows for them, providing that any "party may settle a plaintiff claim, in whole or in party, at any time for monetary or non-monetary consideration or injunctive or other relief." The JSA describes as an "unqualified settlement" any settlement that does not require a settling plaintiff to reduce the dollar amount collectible from non-settling parties pursuant to any final judgment by a percentage equal to the settling parties sharing percentage (generally

[1] The Court finds Judge Kocoras's reasoning in *In re Brand Name* persuasive and adopts it here.

the settling defendant's market share). Defendants are free to enter into unqualified settlements, which do not contain this judgment sharing language.

Plaintiffs' primary argument is that the JSA somehow jeopardizes joint and several liability. But nothing in the JSA destroys Plaintiffs' entitlement to the full remedies under the law for a trial verdict in their favor. The JSA does not—and cannot—change the fact that any defendant who loses at trial will be subject to joint and several liability with no right of contribution. The JSA simply provides incentives for defendants to reach an agreement with a plaintiff to give up some of the remedies it has if it had gone to trial, such as joint and several liability and treble damages. That's an unremarkable proposition. Parties on both sides of settlement agreements give up something and that is simply the nature of settlement agreements. If a plaintiff wants joint and several liability and treble damages on the table, that will always remain a possibility through the avenue of trial. Obviously, a plaintiff can hold out for a better settlement because a defendant is avoiding the risk of joint and several liability and treble damages. That's part of the risk analysis that does into every decision by both parties to settle. These are settlements between sophisticated parties represented by sophisticated lawyers who are eminently capable of advising their clients regarding the balance of those risks.

When viewed in that light, Plaintiffs' arguments become less compelling. The bottom line is that no agreement between defendants can alter a plaintiff's rights. A plaintiff's rights can only be altered with the plaintiff's consent. The idea that JSA's

trample Congressional intent is illusory. Plaintiffs always have the right to pursue full remedies provided by federal law by refusing to settle.

Congress never passed a law prohibiting JSAs in the antitrust context. There is no question from the briefs each side submitted that Congress knew of JSAs and could have passed a law to prohibit them if Congress believed such agreements served to undermine some statutory or regulatory scheme Congress thought needed to be protected. Plaintiffs argue that provisions in the Antitrust Criminal Penalty Enhancement & Reform Act indicate Congressional disapproval of JSAs. But nothing in that Act prohibits JSAs, and there's a limit to how much can be read into Congressional inaction on a subject. The bottom line is there is no law that prohibits JSAs, either expressly or by implication.

Plaintiffs' contention that a JSA is otherwise unlawful under antitrust law is rejected. Coordination among defendants on how to address litigation is not a group boycott. As discussed, defendants remain free to settle with any plaintiff on any terms. As such, Defendants are not engaged in a boycott. Moreover, federal antitrust law does not speak to settlement agreements, and the agreements in this case, as far as the Court knows, do not concern the commercial transactions between plaintiffs and defendants in the operations of their businesses. Multiple plaintiffs and multiple defendants often agree with their group about a variety of ways to deal with various litigation matters. This situation is no different. Unless it deprives an opposing party of a right the law grants that opposing party, there is nothing unlawful about it. For the same reason, a JSA is not unlawful under Illinois law.

The Court also finds that the JSA does not discourage settlements. In this case, there have been defendants who are not party to a JSA who have settled with class plaintiffs, and defendants who are parties to the JSA who have settled with class plaintiffs. I'm not privy to the settlement agreement of non-class plaintiffs. But the mere fact that defendants have reached an agreement among themselves in the form of a JSA that is entirely rational and not illegal, even it is lessens the negotiating power of a plaintiff, is not a basis to declare it or parts of it unlawful or unenforceable.

The JSA may make it more difficult for a plaintiff to settle on more advantageous terms. But that is a product of the parties balancing the risks and costs of continuing to proceed with this litigation. It is not the Court's role to interfere with that private cost-benefit analysis or the ensuing private agreements unless there is something illegal about those agreements. As discussed, the Court rejects Plaintiffs' arguments that JSAs in general and this JSA in particular are illegal.

The JSA also provides that each JSA defendant must provide the others with a copy of any settlement agreement to which a JSA defendant is a party, within seven days after executing the agreement. The plaintiffs claim this lacks any legitimate justification, puts the defendants at a competitive disadvantage with respect to each Direct Action Plaintiff, and discourages settlement. But nothing prevents a settling plaintiff from insisting on language in a settlement agreement that says to a settling defendant that they must keep the settlement agreement confidential. The cases Plaintiffs cite to support the idea that settlement agreements are confidential all deal with a productions of settlement agreements, which is irrelevant to the circumstances

at issue here. Plaintiffs are free to decide whether to insist on confidentiality of any settlement agreement. The JSA does not materially impair that right.

For all those reasons, Plaintiffs' motion [5163] is denied.

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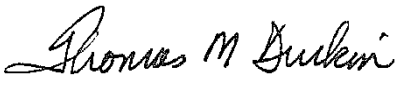

Honorable Thomas M. Durkin
United States District Judge

Dated: May 4, 2022

Attorneys’ Fees

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Masimo Corporation, Plaintiff, v. **Tyco Health Care Group, L.P. and Mallinckrodt, Inc.** Defendants.	**CASE No. CV 02-4770 MRP (AJWx)** **ORDER GRANTING ATTORNEYS' FEES AND COSTS**

I.

INTRODUCTION AND BACKGROUND

The procedural background of this case is well documented in the Court's prior orders and will only be summarized briefly here. In March 2005, a jury found Defendants Tyco Healthcare Group LP and Mallinckrodt, Inc. ("Tyco") liable to Plaintiff Masimo Corporation ("Masimo") for violations of §§ 1-2 of the Sherman Act and § 3 of the Clayton Act. The conduct involved "Pulse Oximetry Systems," which measure a patient's heart and lung function via a non-invasive procedure for calculating blood oxygen saturation.

Following the jury verdict, Tyco filed a RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR ALTERNATIVELY, A NEW TRIAL. On March 22, 2006, the Court sustained the jury verdict based on the anticompetitive harm caused by Market Share Discounts and Sole Source

Contracts, but vacated the jury's liability finding in connection with other alleged anticompetitive conduct. The Court also vacated the jury's damage award, because it was not sustainable by the proof introduced at trial. The Court then ordered a new trial to determine damages because (1) the damages model provided by Masimo provided no principled way to allocate damages caused by each anticompetitive practice, and (2) Sole Source Contracts with the Novation Group Purchasing Organization had only minimal anticompetitive effects, and therefore could not serve as a major component of a damages award as Masimo had proposed.

After the parties stipulated to a bench retrial on damages, this Court found Tyco liable for $14.5 million. This damage amount is trebled under the Clayton Act.

Masimo now requests attorneys' fees in the sum of $10,150,757.30 and costs in the sum of $886,861.30 pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15. Tyco objects to several components of that request, specifically: (1) fees and costs relating to the damages retrial; (2) fees incurred in Masimo's activities before the United States Senate, the Department of Justice and the Federal Trade Commission; (3) any enhancement to account for the delay in payment; (4) fees associated with the attendance of attorney Steven C. Jensen at trial and costs attributed to Knobbe Martens Olson Bear L.L.P. ("the Knobbe firm"); (5) fees and costs incurred in two mock proceedings conducted by Masimo's attorneys; and (6) fees at the rate of $1100 per hour for the work of Stephen D. Susman, an attorney at Susman Godfrey L.L.P. ("the Susman firm").

II.

LEGAL STANDARDS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that a successful plaintiff may recover reasonable attorneys' fees and costs associated with the suit. The starting point, or "lodestar," for determining the amount of a reasonable fee is the number of hours expended on litigation multiplied by a reasonable hourly rate. *D'Emanuele v. Montgomery Ward & Co.*, 904 F.2d 1379, 1383 (9th Cir. 1990). There is a strong presumption that the lodestar figure computed by this method represents a reasonable attorneys' fee, but it may be adjusted upwards or downwards in rare circumstances to account for factors not subsumed within its calculation. *Id.*

at 1383-84.

The prevailing party bears the burden of documenting the appropriate hours expended in litigation and submitting evidence of those hours worked. *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1993). The opposing party has the burden of rebuttal to challenge the accuracy or reasonableness of the hours charged. *Id.* at 1398. The court must exclude from the calculation hours that it determines were not "reasonably expended" on litigation because they were excessive, redundant, or otherwise unnecessary. *Van Gerwen v. Guaranteed Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000)(citing *Hensley v. Eckerhart*, 461 U.S. 424, 435-36 (1983)).

The court must then determine a reasonable hourly rate based on the experience, skill, and reputation of the attorneys requesting fees. *D'Emanuele*, 904 F.2d at 1384 (citing *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986)). While the rates charged by attorneys for the prevailing party may be relevant, market rates in the community should ultimately guide the court. *Id. See also Guam Society of Obstetricians and Gynecologists v. Ada*, 100 F.3d 691, 702 (9th Cir. 1996). The burden is on the fee applicant to produce satisfactory evidence -- in addition to the attorney's own affidavits -- that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984).

Finally, to account for the delay in payment from the time of billing to time of award, the court may augment an award based on historical billing rates with interest for the delay, or adjust the award by using current billing rates. *D'Emanuele*, 904 F.2d at 1384 (citing *Missouri v. Jenkins*, 471 U.S. 274 (1989)). However, such an adjustment is firmly in the court's discretion. *Jordan v. Multnomah*, 815 F.2d 1258, 1263 n.7 (9th Cir. 1987). *See also Barjon v. Dalton*, 132 F.3d 496, 502-03 (9th Cir. 1997); *Gates*, 987 F.2d at 1407 (explaining that "*Jenkins* does not require an enhancement for delay under all circumstances, but rather permits an adjustment 'where appropriate'"). These adjustments are appropriate if the fee amount would otherwise be unreasonable in light of the "totality of circumstances." *Jordan*, 815 F.2d at 1263 n.7. The court must be wary of granting the plaintiff a windfall when substituting current rates for historical rates because "changes in hourly rates reflect not only inflation but also an attorney's increased

experience and skill." *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 663 (7th Cir. 1986).

III.

DISCUSSION

Since Masimo prevailed in the suit, it is entitled to reasonable fees and costs under the Clayton Act. *See Hasbrouck v. Texaco, Inc.*, 879 F.2d 632, 635 (9th Cir. 1989). Tyco does not dispute this conclusion. Accordingly, the Court devotes the rest of this order to the calculation of the award.

Masimo seeks fees at current rates and costs for work completed by three law firms: the Susman firm, the Knobbe firm, and Blecher and Collins ("the Blecher firm"). Masimo's fee requests are summarized in the following chart:

		Historical[1]		Current[2]	
Firm Name	**Hours**	**Average Rate**	**Total Amount**	**Average Rate**	**Total Amount**
Susman firm	21353.54	$356.02	$7,602,377.55	$444.73	$9,496,491.30
Knobbe firm	992.20	$465.65	$462,023.80	$520.81	$516,749.50
Blecher firm	498.40	$275. 91	$137,516.50	$275.91	$137,516.50
Total	22844.14	$359.04	$8,201,917.85	$444.35	$10,150,757.50

Masimo also seeks compensation for costs incurred by the firms, amounting to $870,275.10 in costs incurred by the Susman firm, $11,531.43 by the Knobbe firm, and

[1]"Historical" rates refer to the attorneys' rates at the time the work was billed. For example, attorney Marc. M. Seltzer billed at a rate of $550 per hour for his work on May 19, 2002. In 2007, Mr. Seltzer billed at $850 per hour.

[2]In the alternative to a fee augmented by current rates, Masimo requests an enhancement by interest amounting to $1,125,399 over the amount calculated with historical rates.

$5,054.85 by the Blecher firm.

Tyco does not dispute the vast majority of Masimo's requests and presents six specific objections. Four relate to the hours expended and scope of work for which Masimo requests fees, addressed in Section A; one relates to the reasonableness of Mr. Susman's fee rates, addressed in Section B; and one disputes Masimo's entitlement to an enhancement due to the delay in payment, addressed in Section C.

A. Hours Expended

The first step in calculating the "lodestar" is determining the number of hours reasonably expended in the course of the litigation. Masimo seeks a fee award for approximately 23,000 hours of work. Tyco makes four specific objections to the scope of the work that this figure includes, and seeks to exclude certain blocks of work from the fee award. Each of these objections is addressed in turn.

1. Damages Retrial

The parties disagree as to whether fees and costs associated with the damages retrial should be included in Masimo's fee award.

Generally, a party may receive fees for a retrial so long as the mistake that made the retrial necessary is not attributable to unreasonable conduct by the party. *See Shott v. Rush-Presbyterian-St. Lukes Med. Ctr.*, 338 F.3d 736, 741 (7th Cir. 2003). In *Shott*, the Seventh Circuit reversed a district court's fee award for fees associated with the first of two trials because the fee applicant pursued an unreasonable strategy of confusing the jury with largely irrelevant information and opposed a jury instruction that would have alleviated the confusion. *Id.* at 741-42. As a consequence of this strategy, the trial court felt that a new trial was necessary in case the jury reached its decision when focused on irrelevant information. *Id.* at 741. The Seventh Circuit did not think it appropriate to award a litigant attorneys' fees "for a trial that was voided by her unreasonable strategy." *Id.* at 743.

Masimo contends that the retrial was caused by a combination of its arguments, the

Court's findings with respect to Sole Source contracts, and Tyco's failure to object to Dr. Leitzinger's testimony. Tyco argues that Masimo is not entitled to fees for work associated with the damages retrial because the effort and expense of that retrial is attributable solely to Masimo's improper tactics and strategy.

Under *Shott*, the court clearly has discretion to deny fees for the damages retrial if it was a result of an unreasonable strategy. In its March 22, 2006 order, this Court determined that a retrial was necessary in part due to Masimo's flawed damages model which provided "no way" to account for damages caused by each individual anticompetitive practice. *See Masimo Corp. v. Tyco Health Care Group*, L.P., 2006 WL 1236666, *14 (C.D. Cal. 2006). The Court explained that Masimo's allocation of damages amongst the anticompetitive practices "did nothing to separate the substantial overlap of conduct and this led to what appears to have been a substantial duplication of damages." *Id.*

The damages retrial was also predicated on the Court's finding that Novation Sole Source contracts could only have had a minimal impact on the market within the damages period at issue. *Id.* As the Court could not recalculate damages in accordance with that finding because Masimo's damages model included Novation contracts, a retrial on damages was necessary. *Id.* Masimo's arguments and damages model regarding Sole Source contracts and Novation, while ultimately determined to be without basis in the Court's March 22, 2006 decision, were not so unreasonable as to rise to the level of *Shott*. *See, e.g., O'Rourke v. City of Providence*, 235 F.3d 713, 737 (1st Cir. 2002) (holding that attorney's introduction of irrelevant evidence was not "misconduct" sufficient to deny fees). For these reasons, the Court awards Masimo $1,006,167.05 in fees attributable to the damages retrial.

2. Matters before the United States Senate, Department of Justice, and Federal Trade Commission

Tyco seeks to exclude from any damages award hours spent on several matters that appear only tangentially related to the litigation here. Citing *Hasbrouck v. Texaco*, 879 F.2d 632 (9th Cir. 1989), Masimo argues that its attorneys' efforts in matters before various federal

government entities are compensable because they were reasonably conducted to obtain government help for its cause. In *Hasbrouck*, the Ninth Circuit affirmed a fee award for counsels' preparation of an amicus brief to the Supreme Court in a different case because a legal issue in that case directly bore on the litigation at hand. *Id.* at 638.

The court in *Hasbrouck* found a clear and direct connection between the litigation and the Supreme Court case (including the precedential value of a favorable decision the latter case). *Id.* Here, the connection between Masimo's activities in front of these various outside organizations to this litigation is far more tenuous. *See also Rock Creek Ltd. Partnership v. State Water Resources Control Bd.*, 972 F.2d 274, 278-279 (9th Cir. 1992) (denying attorneys' fees for ancillary administrative and state proceedings because they lacked the "intimate connection" or direct relationship with the federal claim subject to a fee award). There is no suggestion that these tangential activities offered any reasonable prospect of substantially contributing to the litigation. The Court therefore concludes that attorney expenditures on these matters should be excluded from the fee award for the Masimo v. Tyco litigation.

3. Fees and Costs associated with Masimo's Mock Summary Judgment and Second Mock Trial.

Tyco objects to Masimo's fee request with respect to a mock summary judgment argument and the second of two mock jury trials on the grounds that those proceedings were unnecessary and excessive.

Masimo suggests that courts "routinely award fees and costs associated with mock trials, even when there is more than one." PLAINTIFF MASIMO CORPORATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS APPLICATION FOR ATTORNEYS' FEES AND COSTS, at 9 ("Masimo Br."). The cases on which Masimo relies, however, distinguish between reasonable expenditures and those that were excessive and unnecessary. *See, e.g., Charles v. Daley*, 846 F.2d 1057, 1076-77 (7th Cir. 1988) (expressing skepticism about holding in-person moot courts on both the east and west coasts and describing them as "excessive expenditures"); *United Steelworkers of America v. Phelps Dodge Corp.*, 896 F.3d 403, 407 (9th Cir. 1990) (finding that a single moot court trial run could be included in a fee award so long as the number of hours

spent was reasonable).

Here, the activities in question fall on the unnecessary, redundant, and unreasonable side of the line. The mock summary judgment argument cost $51,000 and was conducted well before Tyco had filed for summary judgment and the summary judgment oral argument was never even heard before this Court. Masimo's mock argument on the issue can only be described as over-lawyering and over-preparation, and is not entitled to compensation. *Cf. Finkelstein v. Bergna*, 804 F. Supp. 1235, 1239 (N.D. Cal. 1992) (denying a fee award because the lawyers' timing of second mock trial activities were imprudent, as the issue was largely moot).

The same can be said about the second mock trial because it followed so closely after the first one. Masimo's attorneys' held a mock trial in May 2004 costing about $81,000. Just three months later, they conducted a second mock trial. The attorneys billed thousands of dollars for tasks such as traveling to this second mock trial (which was conducted in Los Angeles). The total sought for the second mock trial amounts to over $205,000. The Court recognizes that there may be situations where multiple mock trials are reasonable expenditures, if, for example, a substantial period of time has lapsed between exercises or the nature of the case has changed so as to require a second trial. Neither of those situations is at issue here in the three month period between May and August of 2004. Masimo's attorneys quite reasonably could have avoided the duplicative and excessive second mock trial with more prudent timing and careful planning the first time around. In failing to do so they accumulated thousands of dollars in excessive and redundant fees and costs which Masimo now seeks to recover from Tyco.

The Court accordingly excludes fees and costs related to the mock summary judgment argument and the second mock trial from the award. This exclusion amounts to $265,519 at historical rates, with an additional $5,228 for costs.

4. Fees for Mr. Jensen's Attendance at the Antitrust Trial and Costs Submitted by the Knobbe firm.

Masimo seeks, and Tyco objects to, $78,275 in fees associated with Mr. Jensen's attendance at trial, as well as $11,531.43 in costs for the Knobbe firm.[3] The Court is not convinced by Masimo's arguments, or Mr. Jensen's extremely vague block billing statements, that his attendance was necessary to this litigation. *See In re Donovan*, 877 F.2d 982, 996 (D.C. Cir. 1989) (maintaining that while counsel is free to retain duplicative attorneys, it is not free to "exercise its judgment in a fashion that unnecessarily inflates the losing party's fee liability") (internal citations omitted). Mr. Jensen has a series of entries marked simply "Antitrust Trial" or "Trial and Trial Preparation" in his statement, and to the Courts' recollection his time was not spent at counsel's table or actively participating in the antitrust litigation. To the extent that Mr. Jensen conducted other activities included in those time entries that might be compensable, the Court finds that Masimo has not met its burden to produce satisfactory documentation of his hours and did not "maintain billing records in a manner that will enable a reviewing court to identify distinct claims." *Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 905 (9th Cir. 1995) (citing *Hensley*, 461 U.S. at 437).

The documentation is similarly flawed with respect to costs sought on behalf of the Knobbe firm. Mr. Jensen has failed to submit an itemized list of the components that compose the $11,531 figure, or any further detail whatsoever. As Masimo seeks nearly $900,000 in total costs, the Court considers it reasonable to deny Masimo the $11,531 in costs for which it has not submitted proper accounting.

5. Conclusion

The number of hours in these calculations reflects the magnitude of attorneys' work on this matter over a several year period. The Susman firm, for example, has submitted a billing statement over 250 pages long with entries dating back to April 2002. Clearly the hours are

[3]The Court notes that this $78,275 figure is about 17% of the fees that Masimo seeks on behalf of Mr. Jensen's work.

illustrative of the high stakes involved in this litigation and the amount of preparation and effort necessary for such a complex antitrust case. But in the Court's view, the extraordinary number of hours also involves time which must be characterized as unnecessary, redundant, and excessive for which Tyco should not be required to pay.

After considering Tyco's objections, the Court finds that Masimo is entitled to fees for the work its lawyers have itemized, with the exception of (1) fees associated with efforts ancillary to the litigation, (2) fees and costs associated with unnecessary and excessive mock trial and summary judgment exercises; (3) and fees associated with Mr. Jensen's attendance at trial and costs submitted by the Knobbe firm.

B. Reasonable Hourly Rates

The next step in determining the lodestar amount is to identify a reasonable hourly rate, defined as the "prevailing market rate in the community for similar services of lawyers of reasonably comparable skill, experience, and reputation." *D'Emanuele*, 904 F.2d at 1384 (citing *Chalmers*, 796 F.2d at 1210-11). In this case, the fee rates used to determine the "historical" amounts stem from the firms' actual billing rates. Each of the three firms claims that their rates are competitive with other firms in the legal community.[4] JENSEN DECL. at 1; BLECHER DECL. at 4-5; SELTZER DECL. at 1.

Tyco limits its objection of billing rates to the rates sought for the work of Mr. Susman, which ranged from $900 to $1100 per hour, and averaged $1002.96 per hour over the course of the litigation. It contends that Masimo has not shown that Mr. Susman's billing rates are reasonable and proposes a lower rate of $700 per hour for Mr. Susman's work.

Masimo has not offered a comparison of Mr. Susman's rates to others in the community. Nonetheless, Mr. Susman is one of the foremost trial attorneys in the country, and while his

[4]Notably, out of the three declarations submitted on behalf of law firms, only Mr. Blecher's offers some analysis of the legal rates in the community when concluding that the rates of his firm fall within the range for rates of law firms in Los Angeles providing similar services. The other declarations provide no support for the assertions that their rates are competitive in the community.

billing rate is presumably at the upper end for attorneys in the community (and indeed, in the country), he offers clients abilities and a skill set that are largely unique and particularly valuable in a case of this complexity. His average rate of about $1000 per hour is not so far above the range for other lawyers in the community (and other lawyers in this case) that it outweighs these considerations. Thus, the Court finds that Mr. Susman's regular hourly rates are reasonable for his work in this case.

As Tyco makes no other objections to the reasonableness of the rates proposed by Masimo, the Court finds that the "historical" rates are within the range of reasonable hourly rates for the services rendered at the time they were rendered.

C. Enhancement for Delay in Payment

Masimo seeks to augment its fee award to account for the delay in payment. Tyco vigorously objects to any augmentation on the grounds that the fee award is reasonable without any addition for the delay in payment. The question for this Court is "the reasonableness of the fee in light of the totality of the circumstances and the relevant factors, including delay in payment." *Jordan v. Multnomah County*, 815 F.2d 1258, 1263 n.7 (9th Cir. 1987).[5]

As has been discussed, other than Mr. Blecher's declaration, Masimo has not provided any evidence that indicates where the requested billing rates fall in comparison to prevailing market rates, either historically or today. The affidavits merely offer conclusory statements that the actual rates are believed to be competitive. Especially pertinent here, Masimo has not explained why the historical rates are rendered "unreasonable" in light of the delay in payment.

The evidence that has been submitted shows just the opposite: Masimo's recovery will be

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[5]Citing *Missouri v. Jenkins*, 491 U.S. 274, 282 (1989), Masimo contends that the "case law unambiguously establishes that, in fee-shifting cases, historical hourly rates should be adjusted to account for delay of payment absent exceptional circumstances." REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF MASIMO CORPORATION'S APPLICATION FOR ATTORNEYS' FEES AND COSTS, at 3 ("Masimo Reply Brief"). But that case concludes only that "an adjustment for delay in payment is within the *contemplation*" of the statute that provides for a fee award. *Id.* at 284. Indeed, Justice Brennan explicitly states an adjustment for delay is one "appropriate factor" in the determination of a reasonable attorney's fee. *Id.*

sufficient without augmentation. Masimo's submissions show that the four attorneys who accumulated the largest fees for Masimo are Mr. Susman, Mr. Seltzer, Vineet Bhatia, and Stephen E. Morrissey. These attorneys account for 71% of the fees requested on behalf of the Susman firm, and approximately 66% of the total fees requested by Masimo. Their average billing rates for the 5 year period are $1002.96, $677.36, $462.85, and $390.81 respectively. Mr. Jensen, whose work accounts for about 5% of the total fees sought, billed at an average rate of $508. Considering the rates submitted by Mr. Blecher – the only attorney to submit any evidence backing his rates – these average rates are well within the range of market rates *today*.[6] The Court can only conclude that the rates of the other lawyers represented the very top end for attorney billing rates within the Los Angeles area for similar services when the work was performed. As Masimo has not submitted any evidence or made any arguments that suggest otherwise, enhancement is not necessary to render the award reasonable. *See, e.g.*, *Barjon v. Dalton*, 132 F.3d 496, 502-03 (9th Cir. 1997) (denying enhancement because, amongst other reasons, the requested rates were at the upper end of the market). Thus, while the Court found in Section B that the historical rates are "in the range of market rates," it does not think that any augmentation is necessary, or appropriate, in light of the fact that they are at the top of that range.

This result is further supported by the fact that the delay in payment is not as significant as Masimo contends. While it is true that Masimo began incurring fees as early as 2002, nearly half of the total fees can be attributed to work done in 2005 or later, and 75% in 2004 or later.

Moreover, the use of current billing rates, as Masimo proposes, would quite clearly grant the party a windfall in this case. The award increases by roughly 25% when current rates substitute for historical ones, even though most of the hours stem from the past three years. The example provided in Note 1 illustrates the point: Mr. Seltzer's billing rate has increased

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[6]Indeed, Mr. Susman's average rate of $1000 for the work completed in 2002-2007 is at the high end when compared to top billing rates in the country today. *See* Nathan Koppel, *Lawyers Gear Up Grand New Fees*, The Wall Street Journal, Aug. 22, 2007. Obviously his fee does not need to be augmented to be "reasonable."

approximately 55% between 2002 to 2007, and 42% between 2004 and 2007. To permit Masimo to collect for all of Mr. Seltzer's work at his current rate would enhance the award 55% for his work in 2002, and 42% for his work in 2004. Mr. Seltzer is unquestionably an exceptional lawyer, but this enhancement would push the award for his work in this case well outside the range of reasonableness and would compensate Masimo for considerations other than the delay in payment.[7]

In summary, the Court finds that an award measured by "historical" rates is a reasonable fee award because the delay was not sufficient in length to support enhancement of fees that already represent the high end of those in the community, and Masimo's proposed use of current rates would result in overcompensation to it.

D. Lodestar

The Court treats the lodestar – the calculations presented in Sections A, B, and C - as a reasonable fee without adjustment.

[7]Masimo submits an alternative enhancement calculation using prime interest rates in its Reply Brief. But its submission of the alternative calculation does not alter the Court's determination that the award measured by historical rates is well within the range of reasonable without enhancement.

IV.

CONCLUSION

The fees and costs sought by Masimo and the Court's deductions and awards are summarized in the following table:

	Fees	**Costs**	**Total**
Masimo's Request (Historical Rates)	$8,201,917.85	$886,861.30	$9,088,779.15
Deductions	1. $43,573.75 (fees for ancillary proceedings) 2. $78,275 (Mr. Jensen's trial fees) 3. $51,085 (fees for mock summary judgment) 4. $205,434 (fees for second mock trial)	1. $5,228 (costs for mock proceedings) 2. $11,531.43 (Knobbe costs)	$395,127.18
Awarded	$7,823,550.10	$870,101.87	$8,693,651.97

In accordance with this Order, Masimo is awarded $7,823,550.10 in attorneys' fees and $870,101.87 in costs pursuant to Section 4 of the Clayton Act.

IT IS SO ORDERED

DATED: November 5, 2007

Mariana R. Pfaelzer

Honorable Mariana R. Pfaelzer
United States District Judge

Consolidation of Related Actions

CONSOLIDATION OF RELATED ACTIONS

FEDERAL RULES OF CIVIL PROCEDURE

Rule 42. Consolidation

(a) *Consolidation*. If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) *Separate Trials*. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE FLASH MEMORY ANTITRUST LITIGATION

No. C 07-0086 SBA

ORDER OF CONSOLIDATION[*]

Over the last several months, this Court has related numerous actions to *Trong Nguyen v. Samsung Electronics Co., Ltd., et al.*, C 07-0086 (SBA). These cases involve many of the same defendants and share overlapping factual and legal claims. The plaintiffs in these actions allege the defendants conspired to fix, raise, maintain, or stabilize the prices of, or allocate the market for, Flash Memory, resulting in Flash Memory prices to be higher than they otherwise would have been. Most of these cases asserts causes of action under section 1 of the Sherman Act; the California Cartwright Act; the California Unfair Competition Law; and Antitrust and Unfair Competition Laws of the various States.

Federal Rule of Civil Procedure 42(a) provides that "[w]hen actions involving a common question of law or fact are pending before the court, it . . . may order all actions consolidated . . . ." A district court has "broad discretion under this rule to consolidate cases pending in the same district." *Investors Research Co. v. United States Dist. Ct.*, 877 F.2d 777 (9th Cir. 1989). Moreover, the Court may order a consolidation of cases *sua sponte*. *See In re Adams Apple, Inc.*, 829 F.2d 1484, 1487 (9th Cir. 1987).

Accordingly, the Court finds that *Trong Nguyen v. Samsung Electronics Co., Ltd., et al.*, C 07-0086 (SBA) and the cases related to it involve common questions of fact and law. Therefore, pursuant to Rule 42(a), those cases captioned 07-cv-2286-SBA; 07-cv-2066-SBA; 07-cv-1020-SBA; 07-cv-1147-SBA; 07-cv-1236-SBA; 07-cv-1360-SBA; 07-cv-1388-SBA; 07-cv-1418-SBA; 07-cv-1459-SBA; 07-cv-1460-SBA; 07-cv-1489-SBA; 07-cv-1613-SBA; 07-cv-1665-SBA; 07-cv-1680-SBA; 07-cv-1735-SBA; 07-cv-1823-SBA; 07-cv-1829-SBA; 07-cv-3971-SBA; 07-cv-4252-SBA, are hereby consolidated

[* Reported at 2007 WL 3026677]

with *Trong Nguyen v. Samsung Electronics Co., Ltd., et al.*, C 07-0086. Any future cases found by this Court to be related to 07-0086 shall likewise be consolidated with this action. All dates and deadlines set in any action other than in 07-0086 are VACATED. The dates and deadlines currently set in 07-0086 shall apply to all proceedings. Counsel are instructed that this consolidated action will be known as *In re Flash Memory Antitrust Litigation*, and all future filings shall be under Case Number 07-0086 SBA.

IT IS SO ORDERED.

October 16, 2007

Saundra Brown Armstrong
United States District Judge

Transfer of Venue

CHANGE OF VENUE

JUDICIAL CODE

28 U.S.C. § 1404 Change of Venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.[1]

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) Transfers from a district court of the United States to the District Court of Guam, the District Court for the Northern Mariana Islands, or the District Court of the Virgin Islands shall not be permitted under this section. As otherwise used in this section, the term "district court" includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term "district" includes the territorial jurisdiction of each such court.

[1] As amended by the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (2011). Prior to the amendment, transfer under Section 1404 was limited to only those districts where the action might have been brought originally.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

The Valspar Corporation, *et al.*,

Plaintiffs,

Civ. No. 13-3214 (RHK/LIB)
MEMORANDUM OPINION AND ORDER

v.

E.I. DuPont de Nemours and Company, *et al.*,

Defendants.

Richard Ihrig, James M. Lockhart, James P. McCarthy, John C. Ekman, Jessica L. Meyer, Lindquist & Vennum LLP, Minneapolis, Minnesota, for Plaintiffs.

Shari Ross Lahlou, Crowell & Moring LLP, Washington, D.C., C. Todd Koebele, Peter W. Wanning, Murnane Brandt, PA, St. Paul, Minnesota, for Defendant E.I. DuPont de Nemours and Company.

James Arthur Reeder, Jr., Erica L. Krennerich, Vinson & Elkins LLP, Houston, Texas, Lawrence Zelle, Lindsey A. Davis, Zelle Hofmann Voelbel & Mason LLP, Minneapolis, Minnesota, for Defendant Huntsman International LLC.

INTRODUCTION

Plaintiff The Valspar Corporation ("Valspar")[1] is one of the largest paint and coating producers in the world. In order to manufacture its products, it utilizes titanium dioxide – a dry, powdered chemical used for whiteness and brightness – purchased from a number of suppliers, including Defendants E.I. DuPont de Nemours and Company ("DuPont") and Huntsman International LLC ("Huntsman"). Valspar alleges in this

[1] Technically there are two Plaintiffs, The Valspar Corporation and its wholly owned subsidiary, Valspar Sourcing, Inc. Following the parties' lead, the Court refers to them jointly with the singular "Valspar."

action that these Defendants, along with others, conspired to artificially inflate titanium dioxide prices in violation of federal antitrust law. Presently before the Court are the Motions of DuPont and Huntsman to transfer Valspar's claims to the District of Delaware and the Southern District of Texas, respectively. For the reasons that follow, their Motions will be granted.[2]

BACKGROUND

Over the years, Valspar has purchased significant quantities of titanium dioxide from Defendants. It alleges that as early as 2002, Defendants conspired with one another and others to manipulate, raise, or maintain the market and price for titanium dioxide sold in the United States. According to Valspar, this conspiracy was successful and resulted in it paying "supra-competitive, artificially inflated prices." (Compl. ¶¶ 30, 189.)

It is undisputed that at least some of the purchases Valspar made from DuPont and Huntsman were governed by agreements containing forum-selection clauses. For example, Valspar and DuPont entered into a "Supply Contract" for the purchase of titanium dioxide, effective from January 1, 2003, to January 1, 2006, which provided the contract would be "governed by and construed in accordance with the laws of the State of Delaware" and that "the courts within Delaware will be the only courts of competent jurisdiction." (Wanning Aff. Ex. 1, ¶ 15.) Similarly, Valspar and Huntsman entered into

[2] Also named as Defendants in this action are Kronos Worldwide, Inc. ("Kronos") and Millennium Inorganic Chemicals, Inc., now known as Cristal USA Inc. ("Cristal"); they have separately moved to dismiss claims for violation of Minnesota Statutes § 325D.49 (Count II) and for unjust enrichment (Count III). After their Motions were filed, however, Valspar agreed to voluntarily dismiss these claims, leaving only the federal antitrust claim for resolution. (See Doc. Nos. 72, 79.) Hence, these Motions will be denied as moot.

a "Sales Agreement" for the purchase of titanium dioxide, effective January 1, 2011, through December 31, 2012, providing it would be governed by Texas law and that Valspar "irrevocably submit[ted] to the exclusive jurisdiction of the Federal court . . . located in the Southern District of Texas, Houston Division, . . . solely in respect of the interpretation and enforcement of the provisions of this Agreement, and in respect of the transactions contemplated hereby." (Reeder Decl. Ex. A at 5.)

Invoking these clauses here, DuPont and Huntsman have separately moved to transfer Valspar's claims to the fora designated in their respective agreements.[3] Each Motion has been fully briefed and is ripe for disposition.

STANDARD OF REVIEW

Title 28 U.S.C. § 1404(a) provides "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." In the "typical case," therefore, a district court considering a § 1404(a) motion "must evaluate both the convenience of the parties and various public-interest considerations" to determine whether transfer is warranted. Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex., __ U.S. __, 134 S. Ct. 568, 581 (2013). The plaintiff's choice of forum is entitled to "some weight" in the analysis, and the burden rests with the movant to overcome that weight by showing

[3] DuPont and Huntsman also have moved to dismiss based on the forum-selection clauses. But for reasons previously stated, the Court believes transfer (not dismissal) is the appropriate way to enforce those clauses. (See Doc. No. 92 at 1-2.)

(1) the parties' private interests and (2) other public-interest considerations militate in favor of transfer. Id. at 581 & n.6.[4]

"The calculus changes, however, when the parties' contract contains a valid forum-selection clause." Id. at 581. In that instance, the plaintiff's choice of forum "merits no weight," and a court "should not consider arguments about the parties' private interests," as they previously agreed (contractually) to litigate in a specified forum. Id. at 581-82. Furthermore, the plaintiff, as the party flouting the chosen forum, bears the burden of demonstrating the public-interest factors merit transfer. Id. at 583. Yet, such factors "will rarely defeat a transfer motion," and a district court "should ordinarily transfer the case to the forum specified" in the parties' agreement. Id. at 581-82.

ANALYSIS

I. A procedural first step

At the outset, the Court pauses to address a procedural issue raised by the pending Motions.

The parties originally assumed the claims against DuPont and Huntsman could be transferred pursuant to 28 U.S.C. § 1404(a) while leaving behind in this Court the claims against the remaining Defendants. In other words, the parties simply accepted that a *portion* of a case may be transferred, rather than an action in its entirety. But as the Court noted in its March 7, 2014 Order (Doc. No. 92), § 1404(a) provides that "a district court

[4] A court faced with a motion to transfer also must determine "whether the action might have been brought in the proposed transferee district." Austin v. Nestle USA, Inc., 677 F. Supp. 2d 1134, 1136 (D. Minn. 2009) (Kyle, J.) (citation omitted). Here, it is undisputed the claims against DuPont and Huntsman "might have been brought" in the proposed transferee districts.

may transfer any *civil action* to any other district or division where it might have been brought." (emphasis added). Hence, it plainly authorizes only the transfer of an entire lawsuit. In re Flight Transp. Corp. Sec. Litig., 764 F.2d 515, 516 (8th Cir. 1985) (§ 1404(a) "contemplates a plenary transfer"); see also Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1518 (10th Cir. 1991) ("Section 1404(a) only authorizes the transfer of an entire action, not individual claims.").

To accomplish what DuPont and Huntsman seek, therefore, the Court must proceed in two steps. First, it must sever the claims against these Defendants under Federal Rule of Civil Procedure 21, creating entirely new civil actions against them, and only *then* may it transfer the severed civil actions pursuant to § 1404(a). See Toro Co. v. Alsop, 565 F.2d 998, 1000 (8th Cir. 1977) (*per curiam*) (recognizing propriety of district court severing claims under Rule 21 and then transferring them under § 1404(a)). But while the second step of this process – § 1404(a) – was discussed in the parties' briefs, no mention was made of Rule 21 or the factors to be considered when determining whether severance is appropriate. Accordingly, the Court requested supplemental briefing on those issues. (See Doc. No. 92 at 3.)

Having now reviewed those additional submissions, it is clear the legal analysis is unaffected. Severance under Rule 21 is committed to the Court's sound discretion, see, e.g., Reinholdson v. Minnesota, 346 F.3d 847, 850 (8th Cir. 2003), and in exercising that discretion, courts typically consider the same general factors elucidating the § 1404(a) analysis, including judicial economy, efficiency, witness convenience, the location of and access to sources of proof, the potential for delay, and similar factors. See, e.g., Vutek,

Inc. v. Leggett & Platt, Inc., No. 4:07CV1886, 2008 WL 2483148, at *1 (E.D. Mo. June 17, 2008); Crestone v. Gen. Cigar Holdings, Inc., No. 00 Civ. 3686, 2002 WL 424654, at *2-3 (S.D.N.Y. Mar. 18, 2002). Indeed, the parties' supplemental briefs largely rehash their arguments regarding § 1404(a).

Accordingly, Rule 21 is essentially irrelevant to the Court's analysis. If the Court were to conclude the pertinent factors render transfer appropriate under § 1404(a), then severance, too, would be proper. See, e.g, Monje v. Spin Master, Inc., No. CV-09-1713, 2013 WL 6498073, at *4 (D. Ariz. Dec. 11, 2013) (noting that in these circumstances, "[s]everance is a necessary precursor to . . . transfer, and it is justified by the same reason[s]"). And as set forth below, the Court concludes that the relevant factors indeed militate in favor of transfer here.

II. The § 1404(a) analysis

Seizing upon the Supreme Court's recent decision in Atlantic Marine, DuPont and Huntsman argue the claims against them must be transferred under § 1404(a) because of the forum-selection clauses in their agreements with Valspar. Valspar responds that (1) its claims fall outside the reach of the forum-selection clauses and (2) even if the clauses apply, the Court should exercise its discretion not to transfer the claims to avoid "claim splitting." Neither contention is persuasive.

A. The forum-selection clauses are applicable

Valspar first argues the forum-selection clauses are irrelevant here because its antitrust claims are not encompassed by them. (Mem. in Opp'n (Doc. No. 75) at 6-8.) It alleges that it paid artificially inflated prices for titanium dioxide due to an unlawful

conspiracy among Defendants, and to succeed on these claims, it contends it must only "show an agreement in the form of a contract, combination, or conspiracy that imposes an unreasonable restraint of trade." (Id.) As the agreements (purportedly) "do not establish a price for" titanium dioxide, and because its claims do not challenge the moving Defendants' performance under the agreements or even require the Court to interpret them, their "mere existence," argues Valspar, "is insufficient to support the conclusion that [its] antitrust claims are within the scope of the forum selection clauses." (Id.) There are two problems with this argument.

First, Valspar has its facts wrong. It contends the agreements with DuPont and Huntsman did not set the price for its purchases of titanium dioxide, but that is simply not the case. (See Wanning Aff. Ex. 1, ¶ 4 (Valspar-DuPont agreement setting per-ton prices for different types of titanium dioxide); Reeder Decl. Ex. A at 2 (Valspar-Huntsman agreement setting price per pound for titanium dioxide).) As DuPont aptly notes, "[t]he very essence of Valspar's claim is a challenge to those contractually agreed-upon prices," which set the minuend for determining Valspar's (alleged) damages.[5] (DuPont Reply (Doc. No. 87) at 5.) As a result, "Valspar's claims necessarily implicate [the] agreements." (Id.)

[5] A "minuend" is a number from which another number (known as the "subtrahend") is subtracted. http://www.merriam-webster.com/dictionary/minuend (last visited April 21, 2014). Here, Valspar's alleged damages equal the allegedly "inflated" price it agreed to pay for titanium dioxide (the minuend) minus the amount it would have paid absent the alleged "conspiracy" (the subtrahend). See, e.g., City of Pittsburgh v. W. Penn Power Co., 147 F.3d 256, 268 n.20 (3rd Cir. 1998) ("The proper measure of damages for a price-fixing violation under the Sherman Act is the difference between the prices actually paid and those that would have been paid absent the conspiracy.").

Second, and more importantly, the forum-selection clauses are broader than Valspar contends – and broad enough to reach the antitrust claims alleged here. The clause in the Huntsman agreement, for example, provides that Valspar "irrevocably submit[s] to the exclusive jurisdiction of the Federal court . . . located in the Southern District of Texas, Houston Division, . . . solely in respect of the interpretation and enforcement of the provisions of this Agreement, *and in respect of the transactions contemplated hereby*." (Reeder Decl. Ex. A at 5 (emphasis added).) The "transactions contemplated" by the agreement were Valspar's purchases of titanium dioxide from Huntsman, allegedly at artificially inflated prices. It is these very purchases that form the basis of Valspar's claims against Huntsman and, indeed, give it standing to sue here. The same is true with respect to Valspar's claims against DuPont. (See Wanning Aff. Ex. 1, ¶ 15 (providing that Delaware courts "will be the only courts of competent jurisdiction" under the agreement).) In the Court's view, therefore, the claims alleged in this action fall within the scope of the forum-selection clauses.

This can hardly come as a surprise to Valspar, as another federal court has already reached the same conclusion. In 2010, a putative class of titanium-dioxide purchasers commenced an antitrust action against DuPont, Huntsman, and others in the United States District Court for the District of Maryland (the "Maryland Action"), alleging that the defendants had engaged in a price-fixing conspiracy.[6] There, as here, certain defendants argued that forum-selection clauses in their supply agreements – clauses identical to those at issue in this case – applied to the plaintiffs' claims, while the plaintiffs argued their

[6] The action was certified as a class and later settled, but Valspar opted out of the settlement.

claims were beyond the reach of those clauses. The Maryland court agreed with the defendants, noting that "[b]ecause the Sherman Act claims in this case involve each customer's purchase of titanium dioxide *pursuant to their agreements*, the forum selection clauses are triggered." In re Titanium Dioxide Antitrust Litig., 962 F. Supp. 2d 840, 858 (D. Md. 2013) (emphasis added). The court specifically rejected the argument Valspar makes here – the plaintiffs' claims did "not arise out of the agreements to purchase titanium dioxide" – because they had "a potential cause of action only if they purchased titanium dioxide from one of the [defendants], and each [plaintiff] purchased pursuant to a contract." Id. This Court perceives no reason to reach a different result.[7]

B. The forum-selection clauses must be enforced

With the applicability of the forum-selection clauses established, the outcome of the instant Motions essentially becomes a foregone conclusion. As the Supreme Court noted in Atlantic Marine, when a defendant invokes a valid forum-selection clause, "a district court should transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer." 134 S. Ct. at 575. In the Court's view, no "extraordinary circumstances" that "clearly disfavor transfer" are present here.

Valspar's argument for rejecting the forum-selection clauses sounds in efficiency. It notes that its claims allege Defendants conspired to "fix" the price of titanium dioxide,

[7] Valspar relies upon Imation Corp. v. Quantum Corp., Civ. No. 01-1798, 2002 WL 385550 (D. Minn. Mar. 8, 2002) (Kyle, J.), Terra International, Inc. v. Mississippi Chemical Corp., 119 F.3d 688 (8th Cir. 1997), and In re Wholesale Grocery Products Antitrust Litigation, 707 F.3d 917 (8th Cir. 2013), but those cases do not aid its cause. Terra actually *affirmed* the district court's decision to enforce a contractual forum-selection clause even though the plaintiff had alleged *tort* claims. See 119 F.3d at 694-95. And in Imation and Wholesale Grocery Products, unlike here, the agreements in question did not set the price for the plaintiffs' purchases and thus were unrelated to the plaintiffs' claims.

and there exists a strong preference for co-conspirators to be tried together in one action. See, e.g., United States v. Joiner, 418 F.3d 863, 868 (8th Cir. 2005). But that preference is not absolute, see id., and the Court does not believe the efficiency and economy achieved by trying interrelated claims in one forum should trump the forum-selection clauses agreed to by Valspar. See, e.g., 1-Stop Fin. Serv. Ctrs. of Am., LLC v. Astonish Results, LLC, No. A-13-CA-961, 2014 WL 279669, at *6 (W.D. Tex. Jan. 23, 2014) (argument that severance and transfer of related claims "would result in an 'egregious waste of judicial resources'" did not "rise to a level sufficient to deny a motion to transfer"). In fact, the efficiency and economy that could be achieved by a single trial would largely inure to *Valspar's* benefit – precisely what the Supreme Court has counseled is *not* a relevant consideration. Atl. Marine, 134 S. Ct. at 582 (a court "should not consider arguments about the [plaintiff's] private interests"); see also Excentus Corp. v. Giant Eagle, Inc., Civ. A. No. 13-178, 2014 WL 923520, at *10 (W.D. Pa. Mar. 10, 2014). It is always more expeditious to try related claims in one forum rather than several, but allowing efficiency and economy to rule the day would effectively swallow Atlantic Marine's holding in every case with multiple defendants.

Valspar also argues that only *certain* of its purchases from Huntsman occurred while agreements containing forum-selection clauses were in place, and hence "claims relating to [] years [when no such clause existed] should remain in Minnesota regardless." (Mem. in Opp'n at 11.) But this contention falters for the very reasons offered elsewhere by Valspar. With *some* of the claims against Huntsman subject to forum-selection clauses and thus transferable, in the Court's view it makes eminent sense

to transfer *all* of the claims against it – even those arguably *not* subject to such clauses – in order to promote the very efficiency Valspar espouses. Leaving only a portion of the claims against Huntsman pending in this Court while transferring others would run the risk of inconsistent verdicts and wasted resources that Valspar seeks to avoid. See, e.g., Compass Bank v. Palmer, No. A-13-CA-831, 2014 WL 355986, at *7 (W.D. Tex. Jan. 30, 2014) ("Because the Court must transfer the case with respect to the Notes containing forum selection provisions, it makes little sense to . . . keep the matter . . . with respect to the Notes without such venue restrictions.").

CONCLUSION

Based on the foregoing, and all the files, records, and proceedings herein, it is **ORDERED**:

1. Valspar's claims against DuPont are **SEVERED** pursuant to Federal Rule of Civil Procedure 21. The Clerk of the Court is directed to establish a new docket number for the resulting case, to docket this Order as the first entry in the newly created case, and to attach all documents filed in this case up to the date of this Order to that first docket entry. The plaintiffs in the newly created case are The Valspar Corporation and Valspar Sourcing, Inc. The defendant in the newly created case is E.I. DuPont de Nemours and Company. It is further ordered that DuPont's Motion to Transfer (Doc. No. 62) is **GRANTED** and the newly created case is **TRANSFERRED** to the United States District Court for the District of Delaware. The Clerk of the Court is directed to take all steps necessary to effectuate this transfer in an expeditious fashion;

2. Valspar's claims against Huntsman are **SEVERED** pursuant to Federal Rule of Civil Procedure 21. The Clerk of the Court is directed to establish a new docket number for the resulting case, to docket this Order as the first entry in the newly created case, and to attach all documents filed in this case up to the date of this Order to that first docket entry. The plaintiffs in the newly created case are The Valspar Corporation and Valspar Sourcing, Inc. The defendant in the newly created case is Huntsman International, LLC. It is further ordered that Huntsman's Motion to Transfer or, in the alternative, to Dismiss (Doc. No. 41) is **GRANTED IN PART** and the newly created case is **TRANSFERRED** to the United States District Court for the Southern District of Texas. The Clerk of the Court is directed to take all steps necessary to effectuate this transfer in an expeditious fashion;

3. The Motions to Dismiss filed by Defendants DuPont (Doc. No. 53), Cristal (Doc. No. 44), and Kronos (Doc. No. 54) are **DENIED AS MOOT**; and

4. The hearing on the above Motions, currently scheduled for May 14, 2014, is **CANCELED**.

Date: April 21, 2014

s/Richard H. Kyle
RICHARD H. KYLE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. H&R BLOCK, INC., *et al.*, Defendants.	Civil Action No. 11-00948 (BAH)

MEMORANDUM OPINION

Counsel on opposite sides of this pending motion both used the same terms to describe the merits of their respective positions as "not even a close call." While this may be a sign that the case is closer than either side will let on, in this case, the Court finds that the weight of the argument is against the movants. The United States, through the Antitrust Division of the Department of Justice, brought this civil case to enjoin the proposed acquisition of a digital do-it-yourself tax preparation company known as TaxACT by H&R Block, another company that sells digital do-it-yourself tax preparation products. The defendants have moved to transfer this case from the District of Columbia to the United States District Court for the Western District of Missouri, where H&R Block is headquartered. For the reasons that follow, the Court denies the motion to transfer venue.

I. BACKGROUND

The United States, through the Antitrust Division of the Department of Justice (the "DOJ" or the "plaintiff"), filed this action on May 23, 2011. The DOJ seeks to enjoin Defendant H&R Block, Inc. from acquiring Defendant 2SS Holdings, Inc. ("TaxACT"), which sells digital do-it-yourself tax preparation products marketed under the brand name TaxACT. Compl. ¶ 10. H&R Block is a Missouri corporation headquartered in Kansas City, Missouri. *Id.* ¶ 9. 2SS

Holdings, or TaxACT, is a Delaware corporation headquartered in Cedar Rapids, Iowa. *Id.* ¶ 10. Defendant TA IX, L.P. ("TA"), a Delaware limited partnership headquartered in Boston, Massachusetts owns a two-thirds interest in TaxACT.[1] *Id.* ¶ 11.

According to the complaint, last year an estimated 35 to 40 million taxpayers filed their taxes using digital do-it-yourself tax preparation products ("Digitial DIY Tax Preparation Products"). *Id.* ¶ 1. In the U.S. Digital DIY Tax Preparation Product market, the three largest firms collectively have about 90% of the market share. *Id.* The leading company in the market is Intuit, Inc., the maker of "TurboTax." *Id.* ¶ 3. H&R Block's proposed acquisition of TaxACT, if allowed to proceed, would combine the second- and third-largest providers in the market – i.e., H&R Block and TaxACT, respectively. *Id.*

The complaint alleges that TaxACT is a "maverick" competitor that has a history of "disrupting" the Digitial DIY Tax Preparation market and has forced its competitors, including H&R Block and Intuit, "to offer free products and increase the quality of their products for American taxpayers." *Id.* ¶ 28. The first major instance of TaxACT's maverick behavior alleged in the complaint occurred in 2004 in relation to the Free File Alliance ("FFA"), a public-private partnership of digital DIY tax preparation companies and the Internal Revenue Service designed to offer qualified individuals the ability to prepare and e-file free federal income tax returns. *Id.* TaxACT aggressively pursued lower prices by introducing an offer through the FFA that was free to all individual U.S. taxpayers in 2004. *Id.* Other members of the FFA, including H&R Block and Intuit, then matched TaxACT's offering, but lobbied the government to limit the number of taxpayers to whom FFA members could offer free federal filing. *Id.* ¶ 29. In October

[1] 2nd Story Software, Inc. ("2SS") is a wholly-owned subsidiary of 2SS Holdings, Inc., which is the entity being purchased by H&R Block. Declaration of Lance Dunn, dated May 27, 2011 ("Dunn Decl."), ¶¶ 2, 4. Both 2SS and 2SS Holdings, Inc. share the same address in Cedar Rapids, Iowa.

2005, the IRS did limit the type and number of customers that could be offered a free product through the FFA. *Id.*

The complaint goes on to allege other areas in which TaxACT has aggressively competed with H&R Block and Intuit by providing high-quality products and services at low cost. *See id.* ¶¶ 30-40. The DOJ alleges that the acquisition of TaxACT by H&R Block would reduce competition in the industry and make anticompetitive coordination between the two major remaining market participants – H&R Block and Intuit – substantially more likely. *Id.* ¶¶ 40-49. The DOJ alleges that therefore the proposed acquisition violates Section 7 of the Clayton Act, 15 U.S.C. § 18, and accordingly it seeks an injunction blocking H&R Block from acquiring TaxACT. *Id.* ¶¶ 53-55.

On May 27, 2011, four days after the DOJ filed its complaint, Defendants H&R Block, TaxACT, and TA moved for an expedited hearing and a transfer of venue from this Court to the United States District Court for the Western District of Missouri, the home district of H&R Block's headquarters in Kansas City, Missouri. *See* Defs.' Mot. for Expedited Hr'g, ECF No. 6; Mem. of Points and Authorities in Support of Defs.' Mot. to Transfer Venue ("Defs.' Mem."). The plaintiff opposes the transfer.

On May 31, 2011, the Court granted the defendants' motion for an expedited hearing on their motion to transfer venue. Minute Order dated May 31, 2011. On June 3, 2011, the Court heard oral argument on the defendants' motion, which is now before the Court.

II. DISCUSSION

A. Legal Standard

Under the federal venue transfer statute, 28 U.S.C. § 1404, a district court may transfer a case to another district "[f]or the convenience of parties and witnesses, in the interest of justice."

28 U.S.C. § 1404(a). The Court may only transfer a case to another district "where it might have been brought." *Id*. This statute "vests discretion in the District Court to adjudicate motions for transfer on an 'individualized, case-by-case consideration of convenience and fairness.'" *Otter v. Salazar*, 718 F. Supp. 2d 62, 63-64 (D.D.C. 2010) (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)). Courts evaluate a series of public and private interest factors in determining whether to grant a transfer of venue. *Bederson v. United States,* 756 F. Supp. 2d 38, 46 (D.D.C. 2010). "The private interest factors that are considered include: (1) the plaintiff's choice of forum; (2) the defendant's choice of forum; (3) where the claim arose; (4) the convenience of the parties; (5) the convenience of the witnesses; and (6) the ease of access to the sources of proof." *Id.* "The public interest factors . . . include: (1) the local interest in making local decisions regarding local controversies; (2) the relative congestion of the transferee and transferor courts; and (3) the potential transferee court's familiarity with the governing law." *Id.* "[C]ourts have imposed a heavy burden on those who seek transfer and a court will not order transfer unless the balance is strongly in favor of the defendant." *United States v. Microsemi Corp.*, No. 1:08cv1311, 2009 WL 577491, at *6 (E.D. Va. Mar. 4, 2009).

B. Application of the Transfer Criteria

As a threshold issue, transfer of venue pursuant to Section 1404(a) is only permissible if the receiving district is one where the case could have been brought in the first instance. The Clayton Act's venue provision provides, in relevant part, that "[a]ny suit, action, or proceeding under the antitrust laws against a corporation may be brought . . . in any district wherein it may be found or transacts business." 15 U.S.C. § 22. All the parties agree, as does the Court, that the plaintiff could have brought this case in either the Western District of Missouri or in this District because the defendants, who sell tax preparation products nationally, transact business in both

districts. Since the suit could have been brought in either district, the Court will now turn to an analysis of the relevant public and private interest factors.

1. Private Interest Factors

As noted above, the private interest factors that courts typically consider are: (1) the plaintiff's choice of forum; (2) the defendant's choice of forum; (3) where the claim arose; (4) the convenience of the parties; (5) the convenience of the witnesses; and (6) the ease of access to the sources of proof. In this case, these factors do not support transfer, particularly because of the substantial deference to which the plaintiff's choice of forum is entitled.

a. The Parties' Choice of Forum

"[A] plaintiff's choice of forum is ordinarily a 'paramount consideration' that is entitled to 'great deference' in the transfer inquiry." *F.T.C. v. Cephalon, Inc.*, 551 F. Supp. 2d 21, 26 (D.D.C. 2008) (quoting *Thayer/Patricof Educ. Funding LLC v. Pryor Res.*, 196 F. Supp. 2d 21, 31 (D.D.C. 2002)). Some courts have also found "that the government's choice of venue in an antitrust case is 'entitled to heightened respect.'" *Id.* (quoting *United States v. Brown Univ.*, 772 F. Supp. 241, 242 (E.D. Pa.1991)). Deference to the plaintiff's chosen forum is minimized, however, where that forum has no meaningful connection to the controversy. *See id.* at 26-27; *Schmidt v. Am. Inst. of Physics*, 322 F. Supp. 2d 28, 33 (D.D.C. 2004) ("[D]eference is mitigated . . . where the plaintiff's choice of forum has no meaningful ties to the controversy and no particular interest in the parties or subject matter.") (internal quotation marks omitted).

The defendants argue that the plaintiff's choice of venue here is not entitled to the usual high level of deference because "this matter has no meaningful ties to Washington, D.C." Defs.' Mem. at 9. According to the defendants, the only connection between this forum and this case is that "the DOJ and its attorneys reside in Washington, D.C." *Id.* The defendants contend that the

Western District of Missouri is a more appropriate venue because the "acquisition agreement that is being challenged in this action was negotiated, drafted, and executed in Missouri and Iowa," at the headquarters of H&R Block and TaxACT, respectively. Defs.' Mem. at 11.

The plaintiff responds that this matter does have some meaningful connection to this district, not only because this district contains the DOJ's headquarters and is where the investigation into the proposed transaction took place, but also because certain facts underlying the complaint took place here. *See* Pl.'s Mem. at 10. Specifically, the DOJ points to its allegations that the first major instance of TaxACT's maverick market activity that prompted a competitive reaction from H&R Block occurred through the Free File Alliance, the public-private partnership between the IRS, which is headquartered in Washington, D.C., and participating tax preparers. *Id.* at 11. The DOJ has alleged that TaxACT disrupted the FFA by making its free filing product offering available to everyone, and that, in response, other members of the FFA, including H&R Block and Intuit, lobbied the government to restrict the availability of free federal e-filing. *Id.* (citing Compl. ¶ 28). Ultimately, in October 2005, the IRS did restrict the availability of free product offerings through the FFA.[2] *Id.* (citing Compl. ¶ 29).

The DOJ alleges that the elimination of TaxACT's alleged maverick activities is a key motivation for H&R Block's proposed acquisition of the company and that the interactions among the FFA, IRS, and the defendants relating to TaxACT's activities within the FFA are likely to implicate disputed issues of fact in this case. *Id.* at 4, 11, 17. The DOJ has represented to the Court that current or former IRS employees based in or near this district would likely be called to testify about these issues. *Id.* at 17. The DOJ underscored this point at oral argument

[2] While the IRS is headquartered in Washington, D.C., the FFA itself is headquartered in Clifton, Virginia, which is in a neighboring district. *See* Pl.'s Mem. at 11 n.6.

by presenting the Court with a regulatory submission from the defendants in which they asserted that "If anyone has been a maverick in on-line tax preparation, it is the IRS . . . through the introduction of free, online tax preparation by the FFA—not TaxACT."

Given these factual allegations, the Court finds that it cannot conclude that this matter has "no meaningful ties" to this district. In *F.T.C. v. Cephalon*, a case relied upon heavily by the defendants, another court in this district granted a motion to transfer venue after finding that the case had no meaningful ties to this district. *Cephalon*, 551 F. Supp. 2d at 26-27. In *Cephalon*, however, the FTC did not "seriously contest that the District of Columbia ha[d] no meaningful connection to [the] action." *Id.* at 27. That is not so here, where the DOJ has identified at least some relevant factual issues that do relate to this district. *See U.S. ex rel. Westrick v. Second Chance Body Armor, Inc.*, No. 04-280, 2011 WL 1048183, at *3 (D.D.C. Mar. 24, 2011) ("The [defendants] carry a weighty burden to demonstrate that the plaintiffs' forum choice should be disturbed . . . Since there is at least some meaningful relationship between the plaintiffs' claims and the parties and this district, the [defendants] have not carried that burden.").[3]

Since the defendants have not established that this case has no meaningful ties to this district, the Court must follow the ordinary rule and accord the plaintiff's choice of forum substantial deference in the transfer inquiry.

b. Where the Claim Arose

This case involves allegations that a proposed business transaction would result in anticompetitive effects in violation of the antitrust laws. Since the defendants sell online tax

[3] In addition to the factual allegations linking this case to this district, the DOJ also notes that this district, as the location of DOJ's headquarters, is DOJ's home district. *See* Pl.'s Mem. at 9. In *United States v. Microsemi*, a case relied upon by the defendants, a district court in the Eastern District of Virginia granted a motion to transfer venue in an antitrust case in part because DOJ had failed to file in its home district. *See Microsemi*, 2009 WL 577491, at *7 ("DOJ is not located in Virginia, but has its headquarters in Washington, DC. . ."). Unlike in *Microsemi*, in this case, the DOJ has filed in its home district.

preparation software to taxpayers nationwide, any anticompetitive effects of the proposed transaction would be felt by consumers across the country and not in any district in particular. In some antitrust cases, motions to transfer venue have been granted, in part, because the market affected by alleged anticompetitive activity was located in a specific geographic area. *See F.T.C. v. Lab. Corp. of America*, No. 10 Civ. 2053, at Tr. 38 (D.D.C. Dec. 3, 2010). (hereinafter, "*LabCorp*") (identifying the relevant market that would suffer anticompetitive effects as located in southern California). Given the national market implicated by this case, no similar factor here weighs in favor of transfer to any particular district.

To the extent that the DOJ's claim can be said to arise from the conduct of the defendants in planning and negotiating the proposed acquisition, it appears that those activities emanated from the defendants' corporate headquarters in Kansas City, Missouri and Cedar Rapids, Iowa. The Court does not find that fact sufficient to override the substantial deference to which the plaintiff's choice of venue is entitled, however. In addition, since 28 U.S.C. § 1404 provides that the Court may transfer venue "[f]or the convenience of parties and witnesses, in the interest of justice," the consideration of where the claim arose is best viewed as a proxy for where the witnesses, parties, and evidence are likely to be located in a typical case. These factors are evaluated more directly below.

c. Convenience of the Parties and Witnesses

Courts recognize that litigating in a particular forum is likely to inconvenience one party or another unless all the parties reside in the chosen district. *Second Chance Body Armor*, 2011 WL 1048183, at *4. For the convenience of the parties factor to weigh in favor of transfer, "litigating in the transferee district must not merely shift inconvenience to [another party], but rather should lead to an overall increase in convenience for the parties." *Id.* In evaluating the

convenience of the parties, courts therefore consider whether "litigating in a particular forum would cause a party to suffer a hardship, such as from significant expense." *Id.* (citing *Kotan v. Pizza Outlet, Inc.*, 400 F. Supp. 2d 44, 50 (D.D.C. 2005)). The defendants have not identified a compelling hardship that would result from litigating in this district rather than the Western District of Missouri.

The defendants express concern that requiring their employees to testify in Washington, D.C. "is likely to lead to a substantial disruption of the companies' business" since the "primary executives responsible for developing and testing the companies' digital tax products would be forced to spend much of their time traveling, absent from their offices, during the time period in which the companies are preparing for the next tax season." Defs.' Mem. at 13. While H&R Block employee-witnesses would be spared travel time were this case transferred to the Western District of Missouri, employee-witnesses for the other two defendants would still be burdened by having to travel to Kansas City, Missouri. As discussed below, the differences in both travel time and expense from Cedar Rapids, Iowa to Kansas City, Missouri or Washington, D.C. are insignificant. In practical terms, no matter where this case is pending, employee-witnesses from all the defendants will be distracted with counsel consultations, and preparation for and participation in proceedings in this case, particularly if this matter continues on a fast-paced schedule.

Moreover, the defendants are sophisticated companies that transact business with consumers throughout the country. Indeed, the nature of the proposed acquisition illustrates the defendants' level of resources and sophistication. Under the Agreement and Plan of Merger, H&R Block would acquire TaxACT for $287.5 million in cash. Compl. ¶ 12. Further, that agreement contains a forum selection clause calling for any disputes over the merger agreement

between the defendants to be litigated in Delaware, which is relatively close to this district. Pl.'s Mem. at 13-14. While the merger agreement's Delaware forum selection clause is not at issue in this case, the fact that the defendants negotiated and agreed to such a clause indicates their ability to avail themselves of legal protections offered by different fora around the country – including fora remote from their home districts.

It would undoubtedly be more convenient for H&R Block to litigate in its home district, but the same is true for the plaintiff, and a transfer that would merely shift the inconvenience among the parties is not warranted.

The convenience of witnesses is the single factor that weighs in favor of transfer here, but, on the facts of this case, the Court finds that it alone does not overcome the deference to which the plaintiff's choice of venue is entitled.

The majority of anticipated witnesses in this case are current employees of H&R Block and TaxACT based in Kansas City, Missouri and Cedar Rapids, Iowa. Defs.' Mem. at 12. Some potential non-party witnesses are former H&R Block employees who also reside in the Kansas City area. *Id.* at 13. Other potential non-party witnesses include employees of the other major companies in the digital DIY tax preparation market, such as Intuit, based in Mountain View, California; FreeTaxUSA, based in Provo, Utah; OnlineTaxPros, based in Russellville, Arkansas; and TaxSlayer, based in Evans, Georgia. *Id.*; Affidavit of Tony Gene Bowen, sworn to May 27, 2011 ("Bowen Aff."), ¶ 10. Finally, some current and former IRS employees who are located in or near this district are also likely witnesses. Pl.'s Mem. at 17.

When considering the convenience of the witnesses, courts typically give greater weight to the convenience of non-party witnesses than to the convenience of party witnesses. *See Microsemi*, 2009 WL 577491, at *8. In this case, non-party witnesses are likely to come from

around the country, including retired H&R Block employees in Kansas City, retired IRS employees in this district, and employees from competitor companies based in California, Utah, Georgia, and Arkansas. While it might be inferred that a witness would prefer to testify in his or her home district, the defendants have not demonstrated that non-party witnesses located neither in this district nor in the Western District of Missouri would be more willing to testify in the Western District of Missouri than here. *See Cephalon*, 551 F. Supp. 2d at 28 ("Cephalon has not demonstrated that any of the third-party witnesses employed by the generic manufacturers-who are located in neither forum-would be unwilling to testify here but willing to do so in the Eastern District of Pennsylvania.")

Party witnesses, who make up the majority of the anticipated witnesses in this case, are likely to include H&R Block employees in Kansas City, TaxACT employees in Cedar Rapids, and current IRS employees from this district. Defs.' Mem. at 12; Pl.'s Mem. at 17; *see also* Bowen Aff. ¶¶ 6-8; Dunn Decl. ¶ 12. As noted above, however, the convenience of party witnesses is accorded less weight in the transfer analysis. *See Microsemi*, 2009 WL 577491, at *8; *see also United States v. Brown Univ.*, 772 F. Supp. 241, 243 (E.D. Pa. 1991) ("This factor does not warrant transfer when witnesses are employees of a party and their presence can be obtained by that party.").

In terms of witness travel time and expense, the Court finds that while the Western District of Missouri is obviously more convenient for the witnesses located there, the evidence does not show that the Western District of Missouri is substantially more convenient than this district for the witnesses from Cedar Rapids, Iowa. The driving time from TaxACT's headquarters in Cedar Rapids to the courthouse in Kansas City is approximately five and a half hours. Declaration of Lawrence E. Buterman, dated June 2, 2011 ("Buterman Decl."), ¶ 16.

Based on a discount airfare database search for September 2011 flights, the flying time from Cedar Rapids to Kansas City is approximately three and a half hours, including a layover. *Id.* ¶ 15. The flying time from Cedar Rapids to Washington, D.C., is also approximately three and a half hours, including a layover. *Id*. The defendants suggest, however, that the complete travel time for air travel from Cedar Rapids to Washington may be six or seven hours. Dunn Decl. ¶ 14. Based on the airfare database search, flying to Kansas City from Cedar Rapids was over $200 more costly than flying to Washington, D.C. Buterman Decl. ¶ 15. Considering all the evidence before the Court, the Court does not find traveling from Cedar Rapids to Washington, D.C. to be substantially more inconvenient than traveling to Kansas City.

Overall, the convenience of the witnesses factor favors transfer, since there appear to be several important party and non-party witnesses located in the Western District of Missouri. *See* Bowen Aff. ¶¶ 6-8. This fact alone, however, is not sufficient to oust the plaintiff's chosen venue. Even in the *Cephalon* case where, unlike here, the court found that there were no meaningful ties with the plaintiff's selected district, the convenience of the witnesses factor still did not compel a transfer. *See Cephalon*, 551 F. Supp. 2d at 28-29. To the contrary, the *Cephalon* court observed that "[t]aken alone, this factor would not warrant transferring the case," and concluded merely that when "viewed collectively it modestly aids Cephalon's showing." *Id.* Instead, the *Cephalon* court found the "most compelling point" in favor of transfer in that case to be "the risk of inconsistent judgments that would arise" absent transfer due to the existence of a related case pending in the transferee district. *Id.* at 29. Indeed, the *Cephalon* court found the plaintiff to have been "rather openly shopping for a circuit split" with respect to one of the issues in that case. *Id.* at 30. Similarly, in *LabCorp*, another case relied upon by the defendants in which a court in this district granted a transfer, related litigation in the transferee district was

likewise an important factor favoring transfer. *See LabCorp*, No. 10 Civ. 2053, at Tr. 39-40. In this case, there are no comparable compelling factors favoring transfer.

To sum up, the convenience of the witnesses factor does slightly favor transfer, but not overwhelmingly so, because non-party witnesses, whose convenience carries the most weight in the analysis, are likely to be drawn from various districts around the country. In this case, the convenience of the witnesses factor alone is insufficient to warrant transfer, especially since the plaintiff's choice of venue is entitled to deference and since the case lacks other factors that strongly favor a transfer.

d. Ease of Access to Sources of Proof

In this digital age of easy and instantaneous electronic transfer of data, the Court does not find that the "ease of access to sources of proof" factor should carry too much weight in the transfer analysis, particularly in a case such as this, where both sides are sophisticated litigants and have the necessary resources to manage and exchange documents electronically. *See Nat'l R.R. Passenger Corp. v. R. & R. Visual, Inc.*, No. 05-822, 2007 WL 2071652, at *6 (D.D.C. July 19, 2007) ("[T]echnological advances have significantly reduced the weight of the ease-of-access-to-proof factor."). While many documents underlying the proposed acquisition undoubtedly originated in Kansas City and Cedar Rapids, they can easily be transmitted to this district and, indeed, the plaintiff points out that the defendants electronically produced all of the documents provided to the government during its regulatory investigation of the transaction. *See* Pl.'s Mem. at 18. Further, during discovery, the defendants are likely to seek the plaintiff's documents, which are located in this district. *See id.* at 19. Accordingly, the Court gives little weight to this factor.

2. Public Interest Factors

The three public interest factors that courts typically consider on a motion to transfer venue are (1) the local interest in making local decisions regarding local controversies; (2) the potential transferee court's familiarity with the governing law; and (3) the relative congestion of the transferee and transferor courts. In this case, none of these factors clearly favor transfer.

The local interest in making decisions regarding local controversies is a neutral factor here because, as defendants concede, this case has national economic significance and does not present an essentially local matter. *See* Defs.' Mem. at 19; *see also Cephalon*, 551 F. Supp. 2d at 31 (finding that the local interest factor was not applicable to a case of "nationwide significance, the resolution of which will have the same effect if rendered by this Court or the" transferee court).

The potential transferee court's familiarity with governing law is also a neutral factor here because this case presents issues of federal antitrust law with which federal courts in both districts are presumed to have equal familiarity. *See Demery v. Montgomery Cnty., MD*, 602 F. Supp. 2d 206, 211 (D.D.C. 2009).

The Court also finds that the relative congestion of the transferee and transferor courts does not clearly weigh in favor of transfer. According to December 2010 statistics published by the Administrative Office of the United States Courts, the District of Columbia has 267 cases pending per judge, a median time of 8 months from filing to disposition in civil cases, and a median time of 39.7 months from filing to trial. For the Western District of Missouri, the same statistics show 417 cases pending per judge, a median time of 7.9 months from filing to disposition in civil cases, and a median time of 36.2 months from filing to trial.[4] These statistics

[4] These statistics are based on the Federal Court Management Statistics for December 2010, *available at* http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx. *See Signode v. Sigma Technologies*

do not indicate any substantial differences in disposition times between the districts and, if anything, show that the judges in the Western District of Missouri carry a significantly larger number of pending cases per judge.

In any event, these statistics provide, at best, only a rough measure of the relative congestion of the dockets in the two districts. They do not, for example, reflect the differences in the caseloads carried by different individual judges in each district. Any disparities between the lengths of time from filing to trial may also reflect differences other than congestion, such as differences in the types of cases that are likely to be tried in each district and the level of discovery and pre-trial motion practice required in those cases. Significantly, these statistics may also rapidly become outdated, particularly in this district where four new judges joined the Court during the first six months of 2011. Accordingly, the Court finds it appropriate to treat the relative congestion of the dockets in the two districts as a neutral factor in the transfer analysis.

III. CONCLUSION

The defendants have not met their burden to show that a transfer of this case to the Western District of Missouri is warranted in the interests of justice. Apart from the convenience of the witnesses factor, which tips slightly in the defendants' favor, none of the other factors typically considered by courts clearly favors transfer. Moreover, the precedents upon which the defendants chiefly rely all involve circumstances favoring transfer that are absent here. For example, *Cephalon* and *LabCorp* involved pending litigation in the transferee district that created a risk of inconsistent judgments, while in *Microsemi*, the government plaintiff filed

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Int'l, LLC, No. 09 C 7860 (N.D. Ill. Mar. 24, 2010) (taking judicial notice of the Administrative Office of the United States Courts' statistics). The defendants rely upon outdated March 31, 2010 statistics showing that, compared with the District of Columbia, the Western District of Missouri has a slightly shorter length of time from filing to disposition of civil cases (7.1 months versus 8.4 months) and shorter length of time from filing to trial (17.0 versus 41.2 months). Defs.' Mem. at 17 (citing Federal Court Management Statistics 2010, available at http://www.uscourts.gov/Viewer.aspx?doc= /uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/C05Mar10.pdf).

neither in its home district nor in the district preferred by the defendants. Given the deference to which the plaintiff's choice of venue is ordinarily entitled, and which the Court has found applies here, transfer would be inappropriate in this case. The defendants have not met their "heavy burden" to demonstrate that the balance of transfer factors is strongly in their favor. *Microsemi*, 2009 WL 577491, at *6.

For the reasons stated above, in exercise of its discretion under 28 U.S.C. § 1404, the Court denies the defendants' motion to transfer venue to the United States District Court for the Western District of Missouri.

DATED: June 6, 2011

/s/ Beryl A. Howell
BERYL A. HOWELL
United States District Judge

Multidistrict Litigation

MULTIDISTRICT LITIGATION

JUDICIAL CODE

28 U.S.C. § 1407. Multidistrict Litigations

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by—

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which

material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

(g) Nothing in this section shall apply to any action in which the United States or a State is a complainant arising under the antitrust laws. "Antitrust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56).

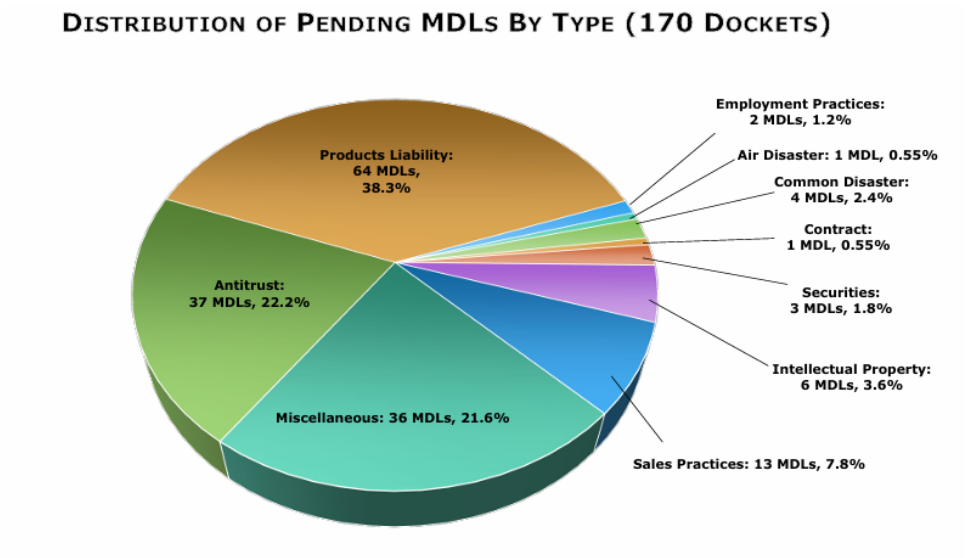
NOTES

1. MDLs can involve large number of separate civil actions. Here are some examples:

Examples of Recent Antitrust MDLs

MDL	Initial Transfer Date	Actions Consolidated
In re Automotive Parts Antitrust Litig., No. 2:12-md-02311 (E.D. Mich.)	2012	382
In re Generic Pharmaceuticals Pricing Antitrust Litig., No. 2:16-md-02724 (E.D. Pa.)	2016	215
In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig., No. 1:05-md-01720 (E.D.N.Y.)	2005	135
In re Domestic Airline Travel Antitrust Litig., No. 1:15-mc-01404, MDL No. 2656 (D.D.C.)	2015	111
In re Rail Freight Fuel Surcharge Antitrust Litig. (No. II), No. 1:20-mc-00008, MDL No. 2925 (D.D.C.)	2020	111
In re Air Cargo Shipping Services Antitrust Litig., No. 06-md-1775 (E.D.N.Y.)	2006	110
In re Blue Cross Blue Shield Antitrust Litig., No. 2:13-cv-20000 (N.D. Ala.)	2012	108
In re Chocolate Confectionary Antitrust Litig., 999 F.Supp.2d 777 (M.D. Pa. 2014), *aff'd*, 801 F.3d 383 (3d Cir. 2015)	2008	91
In re Packaged Seafood Products Antitrust Litig., No. 3:15-md-2670 (S.D. Calif.)	2015	84
In re LIBOR-Based Financial Instruments Antitrust Litig., No. 1:11-md-02262, MDL No. 2262 (S.D.N.Y.)	2011	81
In re Cathode Ray Tube (CRT) Antitrust Litig., Master File No. 4:07-cv-5944, MDL No. 1917 (N.D. Cal.)	2008	75
In re Disposable Contact Lens Antitrust Litig., No. 3:15-md-2626 (M.D. Fla.)	2015	60
In re Granulated Sugar Antitrust Litig., No. 0:24-md-3110 (D. Minn.)	2024	58
In re RealPage, Inc., Rental Software Antitrust Litig., No. 3:23-md-3071 (M.D. Tenn.)	2023	48
In re Google Digital Advertising Antitrust Litig., No. 1:21-md-3010 (S.D.N.Y)	2021	48
In re Apple Inc. Smartphone Antitrust Litig., No. 2:24-md-3113 (D.N.J.)	2024	45
In re Google Play Store Antitrust Litig., No. 3:21-md-2981 (N.D. Calif.)	2021	21
In re Deere & Company Repair Services Antitrust Litig., No. 3:22-cv-50188 (N.D. Ill.)	2022	16

Note: The numbers in Column 3 represent the cumulative total of civil actions consolidated over the lifespan of the litigation, rather than the current pending caseload. These estimates include actions originally transferred by the Judicial Panel on Multidistrict Litigation (JPML), subsequent "tag-along" actions, and related cases filed directly in the transferee district, based on historical JPML statistical reports and court dockets.



Source: Calendar Year Statistics of the United States Judicial Panel on Multidistrict Litigation 11 (2024). Statistics for 2025 have not yet been published.

February 7, 2026

United States Judicial Panel on Multidistrict Litigation **Report Date: 2/2/2026**

MDL Statistics Report - Docket Type Summary

MDL Filters:

Status: **Transferred**

Limited to **Active Litigations**

Docket Type Summary

Grouped by:

MDL Number

DOCKET	Transferee Judge	District	MASTER DOCKET	DATE FILED	Date Transferred	DATE CLOSED
Air Disaster						
3155 IN RE: Air Crash at Toronto Pearson International Airport on February 17, 2025	Blackwell, Jerry W.	MN	0:25-md-3155	05/22/2025	08/08/2025	
Number of **Air Disaster** Litigations Listed: **1**						
Antitrust						
1663 IN RE: Insurance Brokerage Antitrust Litigation	Cecchi, Claire C.	NJ	2:04-cv-5184	11/19/2004	02/17/2005	
1720 IN RE: Payment Card Interchange Fee and Merchant Discount Antitrust Litigation	Cogan, Brian M.	NYE	1:05-md-1720	07/28/2005	10/19/2005	
1917 IN RE: Cathode Ray Tube (CRT) Antitrust Litigation	Tigar, Jon S.	CAN	3:07-cv-5944	11/29/2007	02/15/2008	
2311 IN RE: Automotive Parts Antitrust Litigation	Behm, F. Kay	MIE	2:12-md-2311	10/11/2011	02/07/2012	
2406 IN RE: Blue Cross Blue Shield Antitrust Litigation	Manasco, Anna M.	ALN	2:25-md-10000	09/06/2012	12/12/2012	
2460 IN RE: Niaspan Antitrust Litigation	Savage, Timothy J.	PAE	2:13-md-2460	04/26/2013	09/17/2013	
2542 IN RE: Keurig Green Mountain Single-Serve Coffee Antitrust Litigation	Broderick, Vernon S.	NYS	1:14-md-2542	03/20/2014	06/03/2014	
2656 IN RE: Domestic Airline Travel Antitrust Litigation	Kollar-Kotelly, Colleen	DC	1:15-mc-1404	07/06/2015	10/13/2015	
2670 IN RE: Packaged Seafood Products Antitrust Litigation	Sabraw, Dana M.	CAS	3:15-md-2670	08/28/2015	12/09/2015	
2704 IN RE: Interest Rate Swaps Antitrust Litigation	Oetken, J. Paul	NYS	1:16-md-2704	02/26/2016	06/02/2016	
2724 IN RE: Generic Pharmaceuticals Pricing Antitrust Litigation	Rufe, Cynthia M.	PAE	2:16-md-2724	05/19/2016	08/05/2016	
2862 IN RE: Diisocyanates Antitrust Litigation	Hardy, W. Scott	PAW	2:18-mc-1001	07/10/2018	10/03/2018	
2867 IN RE: Local TV Advertising Antitrust Litigation	Kendall, Virginia M.	ILN	1:18-cv-6785	07/31/2018	10/03/2018	
2918 IN RE: Hard Disk Drive Suspension Assemblies Antitrust Litigation	Chesney, Maxine M.	CAN	3:19-md-2918	08/09/2019	10/08/2019	
2931 IN RE: Delta Dental Antitrust Litigation	Bucklo, Elaine E.	ILN	1:19-cv-6734	12/13/2019	03/27/2020	
2966 IN RE: Xyrem (Sodium Oxybate) Antitrust Litigation	Seeborg, Richard	CAN	3:20-md-2966	08/12/2020	12/16/2020	
2981 IN RE: Google Play Store Antitrust Litigation	Donato, James	CAN	3:21-md-2981	11/05/2020	02/05/2021	
2998 IN RE: Pork Antitrust Litigation	Tunheim, John R.	MN	0:21-md-2998	03/10/2021	06/09/2021	
3010 IN RE: Google Digital Advertising Antitrust Litigation	Castel, P. Kevin	NYS	1:21-md-3010	04/30/2021	08/10/2021	
3030 IN RE: Deere & Company Repair Services Antitrust Litigation	Johnston, Iain D.	ILN	3:22-cv-50188	02/25/2022	06/01/2022	
3031 IN RE: Cattle and Beef Antitrust Litigation	Tunheim, John R.	MN	0:22-md-3031	03/10/2022	06/03/2022	
3062 IN RE: Crop Protection Products Loyalty Program Antitrust Litigation	Schroeder, Thomas D.	NCM	1:23-md-3062	11/22/2022	02/06/2023	
3071 IN RE: RealPage, Inc., Rental Software Antitrust Litigation (No. II)	Crenshaw, Waverly D.	TNM	3:23-md-3071	01/04/2023	04/10/2023	
3097 IN RE: Concrete and Cement Additives Antitrust Litigation	Liman, Lewis J.	NYS	1:24-md-3097	12/19/2023	04/12/2024	
3107 IN RE: Passenger Vehicle Replacement Tires Antitrust Litigation	Lioi, Sara	OHN	5:24-md-3107	02/27/2024	06/07/2024	

3110 IN RE: Granulated Sugar Antitrust Litigation	Blackwell, Jerry W.	MN	0:24-md-3110	03/19/2024	06/07/2024
3113 IN RE: Apple Inc. Smartphone Antitrust Litigation	Neals, Julien Xavier	NJ	2:24-md-3113	03/30/2024	06/07/2024
3119 IN RE: Shale Oil Antitrust Litigation	Garcia, Matthew L.	NM	1:24-md-3119	05/08/2024	08/01/2024
3121 IN RE: MultiPlan Health Insurance Provider Litigation	Kennelly, Matthew F.	ILN	1:24-cv-6795	05/20/2024	08/01/2024
3148 IN RE: GoodRx and Pharmacy Benefit Manager Antitrust Litigation (No. II)	McElroy, Mary S.	RI	1:25-md-3148	01/13/2025	04/02/2025
3152 IN RE: Construction Equipment Rental Antitrust Litigation	Ellis, Sara L.	ILN	1:25-cv-3487	05/05/2025	08/13/2025
3154 IN RE: Respimat Pharmaceuticals Antitrust Litigation	Casper, Denise J.	MA	1:25-md-3154	05/19/2025	08/07/2025
3160 IN RE: Archery Products Antitrust Litigation	Brimmer, Philip A.	CO	1:25-md-3160	07/21/2025	10/16/2025
3161 IN RE: CCell Closed Cannabis Oil Vaporization Systems and Components Products Antitrust Litigation	Chhabria, Vince	CAN	3:25-md-3161	07/29/2025	10/01/2025
3162 IN RE: Class Action Settlement Administration Litigation	Bates, John D.	DC	1:25-mc-179	08/13/2025	12/12/2025
3167 IN RE: Broiler Chicken Grower Antitrust Litigation (No. III)	Shelby, Robert J.	UT	2:25-md-3167	09/23/2025	12/16/2025

Number of **Antitrust** Litigations Listed: **36**

MDL-2121

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: FRETTED MUSICAL INSTRUMENTS ANTITRUST LITIGATION

MDL No. 2121

TRANSFER ORDER

Before the entire Panel: Plaintiff in one Southern District of California action (*Giambusso*) has moved, pursuant to 28 U.S.C. § 1407, for coordinated or consolidated pretrial proceedings of this litigation in the Southern District of California. This litigation currently consists of seven actions listed on Schedule A and pending in three districts as follows: four actions in the Southern District of California, two actions in the Central District of California and one action in the Northern District of Illinois.[1]

All responding parties agree that centralization is appropriate, but disagree on the most appropriate transferee district for this litigation. Defendants National Association of Music Merchants, Inc. (NAMM), Guitar Center, Inc. (Guitar Center) and Fender Musical Instruments Corp. (Fender) support centralization in the Southern District of California as do plaintiffs in several potential tag-along actions. The remaining responding plaintiffs in constituent or tag-along actions favor centralization in the Central District of California, the District of the District of Columbia or the Eastern District of Texas.

On the basis of the papers filed and hearing session held, we find that these actions involve common questions of fact. Centralization under Section 1407 in the Southern District of California will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation. All actions were spawned by the same Federal Trade Commission investigation, and consent decree. Common factual questions relate to allegations that NAMM conspired with its retail and/or manufacturing members to fix, raise, maintain or stabilize the prices of musical

[1] The parties have notified the Panel that 27 related actions are pending: ten actions in the Central District of California, eight actions in the Southern District of California, four actions in the District of District of Columbia, two actions in the Eastern District of Texas, and one action each in the Northern District of Illinois, the Southern District of Illinois and the Western District of Kentucky. These actions are potential tag-along actions. *See* Rules 7.4 and 7.5, R.P.J.P.M.L., 199 F.R.D. 425, 435-36 (2001). Under Panel Rule 7.5 (a), requests for reassignment of the eight Southern District of California potential tag-along actions are made in accordance with local rules for the assignment of related actions. *Id*. at 436.

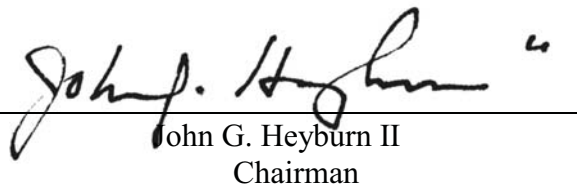
instruments and/or equipment in violation of the federal antitrust statutes and/or state unfair competition statutes. Some plaintiffs define the involved products as acoustic and electric guitars, violins, amplifiers and strings, referred to as fretted musical instruments. Plaintiffs in other actions define the involved products more broadly, i.e., as acoustic or electric guitars, drum sets, keyboards, mixers, amplifiers or related accessories. All actions, however, arise out of the same allegedly infringing conduct and involve common discovery and other pretrial proceedings. Centralization of all actions in one MDL docket will, therefore, eliminate duplicative discovery; prevent inconsistent pretrial rulings; and conserve the resources of the parties, their counsel and the judiciary.

We select the Southern District of California as transferee district. Plaintiffs in more than fifteen known actions and responding defendants support centralization in a California district. Defendants NAMM and Guitar Center are headquartered in California. Fender has a manufacturing facility there. Accordingly, the Southern District of California is a convenient district for parties, witnesses, and access to documents.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, the actions listed on Schedule A and pending outside the Southern District of California are transferred to the Southern District of California and, with the consent of that court, assigned to the Honorable Larry A. Burns for coordinated or consolidated pretrial proceedings with the actions pending there and listed on Schedule A.

IT IS FURTHER ORDERED that this docket is renamed as follows: IN RE: Musical Instruments and Equipment Antitrust Litigation.

PANEL ON MULTIDISTRICT LITIGATION



John G. Heyburn II
Chairman

Robert L. Miller, Jr.	Kathryn H. Vratil
David R. Hansen	W. Royal Furgeson, Jr.
Frank C. Damrell, Jr.	David G. Trager

IN RE: FRETTED MUSICAL INSTRUMENTS ANTITRUST LITIGATION MDL No. 2121

SCHEDULE A

Central District of California

Allen Hale v. Guitar Center, Inc., et al., C.A. No. 2:09-6897
Mark O'Leary v. Guitar Center, Inc., et al., C.A. No. 2:09-7015

Southern District of California

David Giambusso v. National Association of Music Merchants, Inc., et al., C.A. No. 3:09-2002
Colby Giles v. Guitar Center, Inc., et al., C.A. No. 3:09-2146
Rory W. Collins v. Guitar Center, Inc., et al., C.A. No. 3:09-2151
David Keel v. Guitar Center, Inc., et al., C.A. No. 3:09-2156

Northern District of Illinois

Alex Teller v. Guitar Center, Inc., C.A. No. 1:09-6104

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

SANTA WILLIAMS,

Plaintiff,

-vs- **Case No. 6:09-cv-1056-Orl-19GJK**

DELTA AIR LINES, INC., AIRTRAN HOLDINGS, INC., AIRTRAIN AIRWAYS, INC. ,

Defendants.

ORDER

This case comes before the Court on the following:

1. Motion to Change Venue by AirTran Holdings, Inc., and AirTran Airways, Inc. (Doc. No. 7, filed June 29, 2009);
2. Motion to Change Venue by Delta Air Lines, Inc. (Doc. No. 8, filed June 29, 2009);
3. Response in Opposition to Motions to Change Venue by Plaintiff Santa Williams (Doc. No. 29, filed July 16, 2009); and
4. Notice of Action by the Judicial Panel on Multidistrict Litigation and Suggestion for Expedited Ruling on Venue Motions, filed by AirTran Holdings, Inc. and AirTran Airways, Inc. (Doc. No. 31, filed July 17, 2009).

Background

This action arises from an alleged price fixing scheme, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (2006), between AirTran Holdings, Inc., AirTran Airways, Inc. (collectively, "AirTran"), and Delta Air Lines, Inc. ("Delta"), to jointly impose fees for the first

piece of luggage checked by customers traveling between Atlanta, Georgia and various destinations. (Doc. No. 1 ¶¶ 55-62.) Two other cases based on the same conduct have been filed in this District, seven cases have been filed in the Northern District of Georgia, and one case has been filed in the District of Nevada.[1] Airtran and Delta have moved to transfer venue of the cases filed in this District to the Northern District of Georgia. (Doc. Nos. 7, 8.)

Analysis

The parties agree that these cases feature substantially similar claims and therefore should be transferred somewhere for some form of consolidation. Their dispute concerns the details of transfer: when, to where, and by what mechanism.

Defendants AirTran and Delta seek immediate transfer to the Northern District of Georgia under 28 U.S.C. § 1404(a). Under that statute, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." *Id.* Factors to consider in determining the propriety of transfer include:

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[1] The cases pending in this District are: *Williams v. Delta Air Lines, Inc.*, No. 6:09-cv-1056-ORL-19GJK (M.D. Fla, complaint filed June 18, 2009); *Gale v. Delta Air Lines, Inc.*, No. 6:09-cv-1085-ORL-19GJK (M.D. Fla., complaint filed June 23, 2009); and *Levine v. AirTran Airways, Inc.*, No. 6:09-cv-1130-ORL-19DAB (M.D. Fla., filed June 30, 2009). The cases pending in the Northern District of Georgia are: *Avery v. Delta Air Lines, Inc.*, No. 1:09-cv-1391 (N.D. Ga., complaint filed May 22, 2009); *Edelson v. Delta Air Lines, Inc.*, No. 1:09-cv-1455 (N.D. Ga., complaint filed June 1, 2009); *Goldstein v. Delta Air Lines, Inc.*, No. 1:09-cv-1456 (N.D. Ga., complaint filed June 1, 2009); *Siegel v. Delta Air Lines, Inc.*, No. 1:09-cv-1585 (N.D. Ga., complaint filed June 12, 2009); *Whittelsey v. Delta Air Lines, Inc.*, No. 1:09-cv-1655 (N.D. Ga., complaint filed June 19, 2009); *Powell v. Delta Air Lines, Inc.*, No. 1:09-cv-1706 (N.D. Ga., complaint filed June 25, 2009), and *Jachimowcz v. Delta Air Lines*, No. 1:09-cv-1938 (N.D. Ga., complaint filed July 17, 2009). The case pending in the District of Nevada is *Mertes v. Delta Air Lines, Inc.*, Case No. 2:09-cv-01288 (D. Nev., complaint filed on July 16, 2009). These cases will be referred to collectively as the "baggage fee cases."

> (1) the convenience of the witnesses; (2) the location of relevant documents and the relative ease of access to sources of proof; (3) the convenience of the parties; (4) the locus of operative facts; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the relative means of the parties; (7) a forum's familiarity with the governing law; (8) the weight accorded a plaintiff's choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the circumstances.

Manuel v. Convergys Corp., 430 F.3d 1132, 1135 n.1 (11th Cir. 2005). In addition, "[w]here two actions involving overlapping issues and parties are pending in two federal courts, there is a strong presumption across the federal circuits that favors the forum of the first-filed suit under the first-filed rule." *Id.* (citations omitted); *accord KVAR Energy Savings, Inc. v. Tri-State Energy Solutions, LLP*, Case No. 6:08-cv-85-ORL-19KRS, 2009 WL 103645, at *15 (M.D. Fla. Jan. 15, 2009); *Autonation, Inc. v. Whitlock*, 276 F. Supp. 2d 1258, 1264 (S.D. Fla. 2003) (citing *Supreme Int'l Corp. v. Anheuser-Busch, Inc.*, 972 F. Supp. 604, 606 (S.D. Fla. 1997)).

Williams, on the other hand, requests that the Court take no action on the Motions to transfer. Williams and Laura Greenberg Gale, the plaintiff in another baggage fee case pending in this District, have moved the Judicial Panel on Multidistrict Litigation ("the Panel") to consolidate the baggage fee cases under 28 U.S.C. § 1407 in this District. (Doc. No. 29 at 7 n.2.) Three of the plaintiffs in the baggage fee cases pending before Northern District of Georgia have moved the Panel to have the baggage fee cases consolidated in the Northern District of Georgia under this same statute. (*Id.*)

Section 1407 permits "civil actions involving one or more common questions of fact [that] are pending in different districts" to be "transferred to any district for coordinated or consolidated pretrial proceedings." Unlike section 1404(a), section 1407 does not authorize full transfer of the case; although the transferee court has jurisdiction to rule on any pretrial motions, including

dispositive motions, the transferee court must remand the action to the transferor court for trial. *Id.*; *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 33-41 (1998) (determining that a court which had received transfer under section 1407, despite the authority to rule on "pre-trial motions," could not transfer a consolidated case to itself under section 1404 in lieu of remanding the case).[2]

The specific question presented by Defendants' Motions and Williams' Response is whether a court should rule on a motion to transfer under section 1404 while motions to transfer under section 1407 are currently pending before the Panel. The parties recognize that there is no controlling law mandating either result. Instead, each side cites expediency as support for its position: Defendants argue that the granting of their motions will probably obviate the need for the Panel to consider transfer under section 1407, (Doc. No. 7 at 3 n.3), while Williams argues that transfer under 1404(a) could be wasteful because, irrespective of this Court's action, the Panel may decide to transfer the cases to this District or elsewhere under section 1407, (Doc. No. 29 at 4).

Sections 1404 and 1407 are not mutually exclusive; they may be used in concert to further the common goal of expediently trying multidistrict litigation. *See Lexecon*, 523 U.S. at 39 (citing H.R. Rep. No. 90-1130, at 4 (1968)). However, Williams contends that centralization under section 1407 "is deemed preferable over [section] 1404 when substantially similar claims have been lodged against substantially similar defendants" because transfer under section 1407 best serves the convenience of the parties and witnesses, promotes the just and efficient conduct of this litigation,

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[2] Further, unlike section 1404(a), cases may be transferred under section 1407 to judicial districts in which venue would be improper under 28 U.S.C. § 1391. *In re New York City Mun. Sec. Litig.*, 572 F.2d 49, 51 (2d Cir. 1978). However, Williams does not contend that venue would be improper in the Northern District of Georgia.

eliminates duplicative discovery, prevents inconsistent pretrial rulings, and conserves the resources of the parties, their counsel, and the judiciary. (Doc. No. 29 at 10.) Williams may be correct that transfer under 1407 is "preferable" in certain instances, but the Court does not accept that statement as a general rule.

In some cases, the venue question may be close, and different judges may reach differing conclusions on pending section 1404 motions. *E.g.*, *In re Oxycotin Antitrust Litig.*, 314 F. Supp. 2d 1388, 1389-90 (J.P.M.L. 2004) (consolidating, under section 1407, forty-four actions pending in twelve districts and involving eight defendants, despite pending motions to transfer under 1404). In such a case, waiting for action by the Panel may be preferable because it is the only mechanism by which all cases will end up in the same district for pretrial coordination. But in this particular case section 1404(a) points toward an obvious forum: the Northern District of Georgia. The "first-filed rule" strongly militates in favor of transfer to the Northern District of Georgia, and that District is the center of the conduct that gave rise to these cases.[3] As a result, such factors as (1) the

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[3] Williams contends, "Because it is undisputed that Defendants are doing business in the Middle District of Florida, and two of the Defendants are headquartered there, Defendants cannot reasonably contend that litigation in the Middle District of Florida would be inconvenient." (Doc. No. 29 at 16.) These two Defendants are AirTran Holdings, Inc., and AirTran Airways, Inc., both of which are apparently part of the same airline brand. (*See id.*; Doc. No. 1 ¶ 2 (collectively referring to the AirTran entities as a single airline).) Williams acknowledges that Delta is headquartered in the Northern District of Georgia. (Doc. No. 1 ¶¶ 9-10.) Although Williams is correct that "the claims in this matter did not arise in the Northern District of Georgia alone," the common thread that runs throughout all of the alleged conduct is that it concerns flights to and from the airlines' hub airport within the Northern District of Georgia. (*E.g.*, *id.* ¶¶ 2, 17 (describing the "intense competition" between AirTran and Delta for flights to and from the hub)). In light of these facts, the Court rejects the notion that AirTran's Orlando headquarters makes this the District with the "greatest nexus" to the case. For the reasons specified below concerning why transfer under section 1404(a) is preferable to transfer under section 1407, the Court also rejects Williams' argument that this case presents "compelling circumstances" sufficient to overcome the "first-filed" rule. *See Covergys Corp.*, 430 F.3d at 1135 (describing the "compelling circumstances" exception).

convenience of the witnesses, (2) the location of relevant documents and the relative ease of access to sources of proof, (3) the convenience of the parties, (4) the locus of operative facts, and (5) the availability of process to compel the attendance of unwilling witnesses support transfer to the Northern District of Georgia. In sum, the appropriate forum for pretrial proceedings and, most importantly, *trial* is the Northern District of Georgia.

That being the case, expediency is not served by waiting for a Panel decision. If this Court grants Defendants' Motions, and the Panel would have chosen the Northern District of Georgia for section 1407 transfer anyway, this Court's decision moots the issue as to transfer of the instant case. If the Court grants Defendants' Motion, and the Panel chooses to transfer the baggage fee cases elsewhere for pretrial proceedings under 1407, the case will return to the appropriate forum, the Northern District of Georgia, on remand. Even if the Court grants Defendants' Motions, and the Panel chooses to transfer the baggage fee cases to back this District for Multidistrict Litigation pretrial proceedings, the cases would then be returned to the appropriate forum, the Northern District of Georgia, for trial.[4] Accordingly, the Court perceives no benefit in waiting for a Panel decision, and this case shall be immediately transferred to the Northern District of Georgia under 28 U.S.C. § 1404(a).[5]

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[4] Whether the cases would stay in the Northern District of Georgia after the section 1407 remand would, of course, depend on the nature of the pretrial proceedings that occurred in this District. If this Court handled various pretrial dispositive motions or conducted a "bellwether trial," this Court's familiarity with the subject matter might persuade the judges of the Northern District of Georgia to transfer the baggage fee cases back to this District. *See* Manual for Complex Litigation, Fourth, § 20.133 (2004) (listing methods for the "transferee court to resolve multidistrict litigation through trial while remaining faithful to the *Lexecon* limitations"; noting that courts receiving remand under section 1407 may transfer the case back to the 1407 transferee for trial under section 1404).

[5] Further, the Court notes that the Panel granted a ten-day extension permitting up until (continued...)

Conclusion

The Motion to Change Venue by AirTran Holdings, Inc. and AirTran Airways, Inc. (Doc. No. 7, filed June 29, 2009), and the Motion to Change Venue by Delta Air Lines, Inc. (Doc. No. 8, filed June 29, 2009) are **GRANTED**.[6] The Clerk of the Court is directed to transfer this action to the United States District Court for the Northern District of Georgia with a certified copy of this Order. The Clerk shall close the case file in this Court. Defendants shall immediately inform the Judicial Panel on Multidistrict Litigation of this Order.

DONE and **ORDERED** in Chambers in Orlando, Florida on July 28, 2009.

Patricia C. Fawsett

PATRICIA C. FAWSETT, JUDGE
UNITED STATES DISTRICT COURT

Copies furnished to:

Counsel of Record

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[5](...continued)
July 31, 2009, for all parties to submit responses to the pending section 1407 motions to transfer. (Doc. No. 31-2 at 1-2.) The "[P]anel has been known to await [the] resolution [of certain pretrial motions, including motions to transfer under section 1404] before ruling on the [s]ection 1407 question." Hon. John F. Nangle, *From the Horse's Mouth: The Workings of the Judicial Panel on Multidistrict Litigation*, 66 Def. Couns. J. 341, 343 (1999).

[6] The Court will enter separate orders of transfer in *Gale v. Delta Air Lines, Inc.*, No. 6:09-cv-1085-ORL-19GJK and *Levine v. AirTran Airways, Inc.*, 6:09-cv-1130-ORL-19DAB.

Clerk of Court for the United States District Court for the Northern District of Georgia

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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In re:

LIBOR-Based Financial Instruments Antitrust Litigation.

This Document Relates to:

Exchange-Based Plaintiff Action
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MEMORANDUM AND ORDER

11 MD 2262(NRB)

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

In our Memorandum and Order of November 29, 2011, we granted counsel's request to consolidate the class action complaints then-pending before the Court pursuant to Federal Rule of Civil Procedure 42(a). (Docket No. 66 at 10.) In the course of our research, we have realized that the consolidation pursuant to Rule 42(a) was in error given that our authority over actions transferred from districts outside of the Southern District of New York extends only to pretrial matters, while Rule 42 effectuates consolidation for all purposes (including trial). See 17 Moore's Federal Practice § 112.07[b] (3d ed. 2012) (citing Shulman v. Goldman, Sachs & Co. (In re Penn Cent. Commercial Paper Litig.), 62 F.R.D. 341, 344 (S.D.N.Y. 1974), aff'd 515 F.2d 505 (2d Cir. 1975)).

This error does not affect the class structure and motion schedule that has been put into place, as such measures fall

within the Court's authority to coordinate and consolidate pretrial proceedings pursuant to 28 U.S.C. § 1407. See In re Packaged Ice Litig., No. 08 Md. 1952 (E.D. Mich.) (similarly appointing interim class counsel for distinct classes of plaintiffs, directing the filing of amended complaints for each class, and ruling on dispositive motions as to each class); In re Rail Freight Fuel Surcharge Antitrust Litig., No. 07 Md. 1869 (D.D.C.) (same).

Accordingly, we reverse our previous consolidation order pursuant to Rule 42(a) and instead consolidate the class action complaints pending in the MDL for pretrial purposes only.

SO ORDERED.

Dated: New York, New York
July 18, 2012

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: FRESH DAIRY PRODUCTS ANTITRUST LITIGATION MDL No. 2340

ORDER DENYING TRANSFER

Before the Panel:[*] Pursuant to 28 U.S.C. § 1407, plaintiffs in an action pending in the Eastern District of Pennsylvania move to centralize this litigation in that district. Their motion encompasses four actions – movants' action and three actions pending in the Northern District of California, as listed on Schedule A. Responding defendants[1] support centralization, but in the Northern District of California. Plaintiffs in the Northern District of California actions did not submit a response.

After considering all argument of counsel, we will deny the motion, although we acknowledge that the four actions share certain factual issues as to whether defendants engaged in coordinated efforts to limit the production of raw farm milk, through premature "herd retirements," in order to increase the price of raw farm milk and thereby intentionally inflate the price of dairy products. At the same time, there are, as a practical matter, really only two actions in this docket, as the three Northern District of California actions have been consolidated. *See In re Transocean Ltd. Sec. Litig.*, 753 F. Supp. 2d 1373, 1374 (J.P.M.L. 2010) ("As we have stated in the past, where only a minimal number of actions are involved, the moving party generally bears a heavier burden of demonstrating the need for centralization."). Moreover, the putative statewide classes in the consolidated actions consist of *indirect* purchasers of milk products, whereas movants' action is brought on behalf of a putative nationwide class of *direct* purchasers of such products. The classes thus do not appear to overlap.[2] Plaintiffs in the consolidated actions share counsel, and at least some defendants (including, for example, National Milk Producers Association and Dairy Farmers of America, Inc.) are represented by the same law firms in both movants' action and the consolidated actions. Given the limited number of actions, we believe that informal cooperation among the involved attorneys is quite

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[*] Judge John G. Heyburn II took no part in the decision of this matter.

[1] National Milk Producers Federation; Dairy Farmers of America, Inc.; Land O' Lakes, Inc; Dairylea Cooperative, Inc.; and Agri-Mark, Inc.

[2] Although we have centralized litigations involving both direct purchaser putative class actions and indirect purchaser putative class actions, those MDLs generally have involved a greater number of actions at the outset. *E.g.*, *In re: BP Prods. North Am., Inc. Antitrust Litig. (No. II)*, 560 F. Supp. 2d 1377, 1378 (J.P.M.L. 2008) (centralizing seventeen actions).

practicable.[3] *See In re: Boehringer Ingelheim Pharm., Inc., Fair Labor Standards Act (FLSA) Litig.*, 763 F. Supp. 2d 1377, 1378 (J.P.M.L. 2011).

IT IS THEREFORE ORDERED that the motion, pursuant to 28 U.S.C. § 1407, for centralization of these actions is denied.

PANEL ON MULTIDISTRICT LITIGATION

Kathryn H. Vratil
Acting Chairman

W. Royal Furgeson, Jr.
Paul J. Barbadoro
Charles R. Breyer

Barbara S. Jones
Marjorie O. Rendell

[3] At oral argument, movants' counsel appeared to acknowledge that the need for centralization in this docket was not acute.

IN RE: FRESH DAIRY PRODUCTS ANTITRUST LITIGATION MDL No. 2340

SCHEDULE A

Northern District of California

Matthew Edwards, et al. v. National Milk Producers Federation, et al., C.A. No. 3:11-04766
Jeffrey Robb, et al. v. National Milk Producers Federation, et al., C.A. No. 3:11-04791
Boys and Girls Club of the East Valley, et al. v. National Milk Producers Federation, et al., C.A. No. 3:11-05253

Eastern District of Pennsylvania

Stephen L. LaFrance Holding Inc., et al. v. National Milk Producers Federation, et al., C.A. No. 2:12-00070

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: 1-800 CONTACTS ANTITRUST LITIGATION MDL No. 2770

ORDER DENYING TRANSFER

Before the Panel:[*] Plaintiffs in the District of District of Columbia *Bartolucci* action, which since has been transferred to the District of Utah, move to centralize six actions in the District of District of Columbia. The actions, which are listed on the attached Schedule A, are pending in the Eastern District of Pennsylvania (two actions) and the District of Utah (four actions). The Panel has been informed of an additional federal action involving related issues in the Eastern District of Arkansas.

All responding plaintiffs support centralization in the District of District of Columbia, in the first instance. In the alternative, plaintiffs in the two Eastern District of Pennsylvania actions (*Bean* and *Zimmerman*) suggest the Eastern District of Pennsylvania as transferee district, while plaintiffs in the District of Utah *Thompson* action suggest the District of Utah.

Common defendant 1-800 Contacts, Inc., opposes centralization. 1-800 Contacts agrees that these actions should be litigated in a single venue – the District of Utah, but argues that the better mechanism for achieving this is transfer under 28 U.S.C. § 1404.

On the basis of the papers filed and the hearing session held, we deny the *Bartolucci* plaintiffs' motion. As all parties acknowledge, these Sherman Act putative class actions share factual issues stemming from allegations that 1-800 Contacts entered into reciprocal "bidding agreements" with more than a dozen of its rivals under which the parties agreed not to compete against one another in certain online search advertising auctions.[1] There also is no dispute that these actions should be litigated together. The only real dispute is whether Section 1404 or Section 1407 is the better means for accomplishing that objective.

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[*] One or more Panel members who could be members of the putative class in this litigation have renounced their participation in that class and have participated in this decision.

[1] Allegedly, under these bidding agreements, the parties agreed not to bid in any search advertising auctions for any of their respective trademarked terms or variations thereof. In addition, many of the agreements required the parties to employ "negative keywords" directing the search engines not to display the competitor's advertisement in response to a search query that included any of the other party's trademarked terms or variations thereof. Thus, for example, a consumer who tried to locate and purchase contact lenses online using a query such as "1-800 Contacts" would be unable to find sellers of contact lenses other than 1-800 Contacts.

As we repeatedly have held, "where 'a reasonable prospect' exists that the resolution of a Section 1404 motion or motions could eliminate the multidistrict character of a litigation, transfer under Section 1404 is preferable to Section 1407 centralization." *E.g., In re: 3M Co. Lava Ultimate Prods. Liab. Litig.*, — F. Supp. 3d —, 2016 WL 4153598, at *1 (J.P.M.L. Aug. 5, 2016) (quoting *In re: Gerber Probiotic Prods. Mktg. and Sales Practices Litig.*, 899 F. Supp. 2d 1378, 1380 (J.P.M.L. 2012)). Such a prospect plainly exists here. The two earliest-filed actions in the District of Utah were transferred to that district under Section 1404 from the Northern and Southern Districts of California, respectively, in late 2016. More recently, the District of District of Columbia court transferred the *Bartolucci* and *Henry* actions to the District of Utah on 1-800 Contacts' opposed Section 1404 motion. In the two Eastern District of Pennsylvania actions, 1-800 Contacts' Section 1404 motions are pending. Given these circumstances, centralization under Section 1407 is not warranted.

IT IS THEREFORE ORDERED that the motion for centralization of these actions is denied.

PANEL ON MULTIDISTRICT LITIGATION

Sarah Vance

Sarah S. Vance
Chair

Marjorie O. Rendell
Lewis A. Kaplan
R. David Proctor
Charles R. Breyer
Ellen Segal Huvelle
Catherine D. Perry

IN RE: 1-800 CONTACTS ANTITRUST LITIGATION MDL No. 2770

SCHEDULE A

Eastern District of Pennsylvania

BEAN v. 1-800 CONTACTS, INC., C.A. No. 2:16-05726
ZIMMERMAN, ET AL. v. 1-800 CONTACTS, INC., C.A. No. 2:16-06417

District of Utah

THOMPSON, ET AL. v. 1-800 CONTACTS, INC., ET AL., C.A. No. 2:16-01183
STILLINGS v. 1-800-CONTACTS, INC., C.A. No. 2:16-01257
BARTOLUCCI, ET AL. v. 1-800 CONTACTS, INC., C.A. No. [pending]
HENRY v. 1-800 CONTACTS, INC., ET AL., C.A. No. [pending]

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: TFT−LCD (FLAT PANEL) ANTITRUST LITIGATION

MDL No. 1827

(SEE ATTACHED SCHEDULE)

CONDITIONAL REMAND ORDER

The transferee court in this litigation has advised the Panel that coordinated or consolidated pretrial proceedings in the action(s) on this conditional remand order have been completed and that remand to the transferor court(s), as provided in 28 U.S.C. §1407(a), is appropriate.

IT IS THEREFORE ORDERED that the action(s) on this conditional remand order be remanded to its/their respective transferor court(s).

IT IS ALSO ORDERED that, pursuant to Rule 10.2 of the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation, the transmittal of this order to the transferee clerk for filing shall be stayed 7 days from the date of this order. If any party files a notice of opposition with the Clerk of the Panel within this 7−day period, the stay will be continued until further order of the Panel. This order does not become effective until it is filed in the office of the Clerk for the United States District Court for the Northern District of California.

IT IS FURTHER ORDERED that, pursuant to Rule 10.4(a), the parties shall furnish the Clerk for the Northern District of California with a stipulation or designation of the contents of the record to be remanded.

Inasmuch as no objection is pending at this time, the stay is lifted.

Jul 08, 2013

CLERK'S OFFICE
UNITED STATES
JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

FOR THE PANEL:

Jeffery N. Lüthi
Clerk of the Panel

IN RE: TFT−LCD (FLAT PANEL) ANTITRUST LITIGATION

MDL No. 1827

SCHEDULE FOR CRO

TRANSFEREE			TRANSFEROR			
DIST	**DIV.**	**C.A.NO.**	**DIST**	**DIV.**	**C.A.NO.**	**CASE CAPTION**
CAN	3	09−05840	ILN	1	09−06610	Motorola, Inc. v. AU Optronics Corporation et al
CAN	3	10−00117	NYE	2	09−04845	Electrograph Systems, Inc. et al v. Epson Imaging Devices Corporation et al
CAN	3	11−00058	WAW	2	10−01939	Costco Wholesale Corp. v. Au Optronics Corp. et al

* − denotes that the civil action has been severed.