IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

HART INTERCIVIC, INC. Plaintiff, v. DIEBOLD, INCORPORATED and ELECTION SYSTEMS & SOFTWARE, INC. Defendants.	:	C.A. No. 09-678-RBK REDACTED PUBLIC VERSION

DEFENDANT DIEBOLD, INCORPORATED'S OPENING BRIEF
IN SUPPORT OF ITS MOTION TO DISMISS

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I. INTRODUCTION

On September 2, 2009, Diebold, Incorporated ("Diebold") sold its struggling election systems business to Election Systems & Software, Inc. ("ES&S"). Three weeks later, Hart InterCivic, Inc. ("Hart"), an ES&S competitor [redacted], commenced this litigation against ES&S and Diebold. Alleging violations of both the Sherman Act and the Clayton Act, Hart seeks injunctive relief and money damages. Hart's request for a temporary restraining order was denied, and the case is scheduled for a hearing on Hart's motion for a preliminary injunction in May 2010.

Hart purports to allege two causes of action against Diebold. The first is a claimed violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, which bars anti-competitive acquisitions. *See* D.I. 4, Amended Complaint, Count I, ¶¶ 48-55. The second alleges that Diebold conspired with ES&S to monopolize the market for voting systems in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. *See* Amended Complaint, Count IV, ¶¶ 61-62.[1] As set forth below, both of Hart's claims against Diebold fail as a matter of law.

II. NATURE AND STAGE OF PROCEEDINGS

Hart filed this action on September 11, 2009, amended its complaint on September 14, 2009, and filed a motion for temporary restraining order or preliminary injunction on September 23, 2009. On September 30, 2009, after a hearing the previous day, this Court denied Hart's motion for a temporary restraining order. A hearing on Hart's motion for a preliminary injunction is currently scheduled for May 2010. In this Motion, Diebold respectfully requests the Court to dismiss Hart's claims against Diebold.

[1] Hart's other two causes of action are directed solely to ES&S. *See* Amended Complaint, Count II (¶¶ 57-58), Count III (¶¶ 59-60).

III. SUMMARY OF ARGUMENT

1. Section 7 of the Clayton Act prohibits acquisitions that may lessen competition or create a monopoly. By its express terms, Section 7 applies only to those who ***purchase*** the stock or assets of another company; it does not apply to ***sellers***. Because Diebold is a seller—not a purchaser—Hart's claim against Diebold for violating Section 7 of the Clayton Act should be dismissed.

2. Hart's claim against Diebold for conspiracy to monopolize under Section 2 of the Sherman Act likewise should be dismissed. Particularly in light of the heightened pleading standards announced by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), Hart's lone allegation that Diebold sold its election systems business to ES&S does not come close to pleading an actionable conspiracy in violation of the Sherman Act.

3. Hart's claims against Diebold are subject to dismissal for the additional reason that Hart has not pled that ***Diebold's*** conduct in selling Premier to ES&S—the only Diebold conduct that Hart has placed in issue—has caused Hart any injury. Rather, Hart's allegations of injury all flow from conduct Hart suggests ***ES&S*** is likely to engage in post-acquisition. Because Hart has not even alleged that Diebold's conduct has caused or will cause Hart any injury, Hart's claims against Diebold fail as a matter of law.

IV. STATEMENT OF FACTS[2]

A. Diebold

Diebold, an Ohio corporation, is a diversified manufacturing company specializing in ATMs and other banking equipment. Until September 2, 2009, Diebold was the parent of Premier Election Solutions, Inc., a company that sells elections systems products and services to

[2] For purposes of this Motion only, and subject to the pleading requirements discussed below, the facts as set forth in Hart's Amended Complaint are accepted as true.

governmental entities in the United States, and Premier Canada, a vendor of voting machines and election systems to jurisdictions in Canada. Until September 2, 2009, Diebold was also the parent of Data Information Management Systems, Inc. ("DIMS"), which, while owned by Diebold, provided information technology resources to Premier and Premier Canada and their customers. (Collectively, Premier Election Solutions, Premier Canada and DIMS are referred to herein as "Premier."). *See* Amended Complaint ¶¶ 6-10.

B. Diebold's Sale Of Its Election Systems Business

On September 2, 2009, Diebold and ES&S closed a transaction through which Diebold sold to ES&S all of the outstanding stock of Premier and DIMS, and all of the assets of Premier Canada. Amended Complaint ¶ 15. The sale of Premier to ES&S was the culmination of Diebold's ongoing efforts to divest itself of Premier [redacted].

With its sale of Premier to ES&S, Diebold has exited the election systems business. Aside from wrapping up several matters related to the sale, Diebold does not have any ongoing relationship with ES&S or any financial interest in Premier and Hart makes no allegations to the contrary. Nor is Diebold otherwise involved in the election systems market.

C. Hart's Claims Against Diebold

Hart purports to assert two causes of action against Diebold. First, Hart alleges that, in selling Premier to ES&S, Diebold has violated Section 7 of the Clayton Act, 15 U.S.C. § 18. *See* Amended Complaint, Count I, ¶ 50. In addition, Hart asserts, based solely upon Diebold's sale of Premier to ES&S, that "Diebold and ES&S conspired to monopolize the market for voting machines and election systems" in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. *See* Amended Complaint, Count IV, ¶ 61. Offering no other facts in support of its conspiracy claim

against Diebold,[3] Hart seeks injunctive relief and treble damages from Diebold based upon "the defendants' conspiracy to monopolize." Amended Complaint, Request for Relief, subpart D.

V. ARGUMENT: HART'S COMPLAINT FAILS TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED AGAINST DIEBOLD.

A. Hart Has Failed To State A Claim Against Diebold Under Section 7 Of The Clayton Act.

Section 7 of the Clayton act provides:

> No person subject to the jurisdiction of the Federal Trade Commission shall ***acquire*** the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, 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 (emphasis added).

The unambiguous language of Section 7 thus prohibits any person from ***acquiring*** the assets of another company if the acquisition would result in a combination likely to lessen competition or to create a monopoly. As a matter of settled law, a Section 7 claim does not lie against an entity ***selling*** stock or assets, but rather must be brought against the ***acquiring*** company.

Indeed, based on the plain language of the statute, courts have consistently dismissed Section 7 claims brought against sellers of assets. *See, e.g., Dailey v. Quality Sch. Plan, Inc.*,

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[3] While Hart makes a variety of other statements about "Diebold," most of them do not involve the conduct of Diebold at all, but instead relate to the operation of the Premier companies that ES&S now owns. Moreover, none of these allegations are relevant to its claims against Diebold. For example, Hart alleges that Diebold "experience[d] low customer satisfaction" and has been "criticized by election officials" (Amended Complaint ¶ 35), and that it "goug[ed] locked-in customers," "misrepresent[ed]" its systems, "exert[ed] improper and undue influence on government officials," and "initiate[d] litigation upon losing competitive bidding contests" (Amended Complaint ¶ 36). While demonstrably false, none of these allegations are relevant to either of the claims Hart has levied against Diebold.

380 F.2d 484, 488 (5th Cir. 1967); *Gerlinger v. Amazon.com, Inc.*, 311 F. Supp. 2d 838, 852 (N.D. Cal. 2004); *Arbitron Co. v. Tropicana Prod. Sales, Inc.*, No. 91 Civ 3697, 1993 U.S. Dist. Lexis 5587, at *13-23 (S.D.N.Y. Apr. 28, 1993); *Tim W. Koerner & Assocs., Inc. v. Aspen Labs, Inc.*, 492 F. Supp. 294, 300 (S.D. Tex. 1980), *aff'd*, 683 F.2d 416 (5th Cir. 1982); *Record Club of Am., Inc. v. Capitol Records, Inc.*, No. 3315, 1971 U.S. Dist. Lexis 11738, at *6 n.9 (S.D.N.Y. Sept. 8, 1971); *cf. Fricke-Parks Press, Inc. v. Fang*, 149 F. Supp. 2d 1175, 1185 (N.D. Cal. 2001).

The *Arbitron* case is illustrative. There, Tropicana sought to amend its counterclaims to allege that Arbitron had violated Section 7 of the Clayton Act. The proposed amendment arose from an agreement between a subsidiary of Arbitron that sold syndicated grocery tracking services, and one of that subsidiary's competitors, Information Resources, Inc. ("IRI"). Pursuant to the agreement, the Arbitron subsidiary exited the grocery tracking services market and assigned all of its customer contracts to IRI. *Arbitron Co.*, 1993 U.S. Dist. Lexis 5587, at *2.

Denying Tropicana's motion to amend to add a Clayton Act claim on the grounds that the claim would be subject to immediate dismissal, the Court stated:

> The section 7 claim against Arbitron is meritless and clearly could not withstand a motion to dismiss. ***As the seller in the challenged transaction, Arbitron is not subject to the statutory proscription of section 7.*** Any section 7 claim based upon the transaction at issue ***could only be brought against the acquiring company***, IRI.

Arbitron Co., 1993 U.S. Dist. Lexis 5587 at *16-17 (emphasis added).

Because, as in *Arbitron*, Diebold ***sold*** Premier and thus did not ***acquire*** any assets in connection with that transaction, a Section 7 claim cannot be asserted against Diebold. Accordingly, Hart's first cause of action against Diebold should be dismissed.

B. Hart Has Failed To State A Claim Against Diebold Under Section 2 Of The Sherman Act.

1. Courts Have Imposed A Stringent Standard For Pleading A Sherman Act Section 2 Conspiracy Claim.

Hart's conclusory allegation that Diebold has engaged in a conspiracy to monopolize in violation of Section 2 of the Sherman Act based solely upon its sale of Premier to ES&S is likewise flawed. Section 2 prohibits monopolization and conspiracies to monopolize.[4] It applies when a single entity engages in monopolization, or when two or more entities combine in some manner to monopolize. *See, e.g., American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946) (affirming judgment finding that defendants, all current market participants, conspired to monopolize by engaging in collusive practices to ensure that all defendants would buy tobacco at same price and in same markets); *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 74 (2d Cir. 1988) (plaintiff stated a claim for conspiracy to monopolize when tennis association, its chairman, and its administrator dissuaded tournament owners and producers from associating with plaintiff).

To state a claim for conspiracy to monopolize, a plaintiff must allege: (1) concerted action by the parties; (2) the parties engaged in such action with the specific intent to achieve the unlawful result of a monopoly; and (3) the commission of at least one act in furtherance of the conspiracy. *See, e.g., Int'l Distribution Ctrs., Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 795 (2d

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[4] Specifically, Section 2 of the Sherman Act provides that:

> [e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

15 U.S.C. § 2.

Cir. 1987); *see also Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc.*, 516 F. Supp. 2d 324, 341 (D. Del. 2007); *Arbitron*, 1993 U.S. Dist. Lexis 5587, at *29.

Even prior to the United States Supreme Court's landmark decision in *Twombly*, 550 U.S. 544 (discussed below), courts required a plaintiff seeking to assert Sherman Act conspiracy claims to plead specific facts in support of those claims. In *Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972), for example, the Second Circuit noted that "a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal." Similarly, in *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984), the Seventh Circuit reiterated that, to satisfy Rule 12(b)(6), a claimant must do more than simply make a conclusory allegation of "conspiracy":

> The pleader may not evade these [Rule 12(b)(6)] requirements by merely alleging a bare legal conclusion; if the facts do not at least outline or adumbrate a violation of the Sherman Act, the plaintiffs will get nowhere merely by dressing them up in the language of antitrust.

745 F.2d at 1106 (quotation and citation omitted).

Applying these standards, the *Arbitron* court refused to allow Tropicana to amend its counterclaims to include a Section 2 conspiracy-to-monopolize claim. The court noted that "Tropicana set[] forth a conclusory allegation of conspiracy without providing any allegations concerning the underlying nature of the alleged conspiracy." 1993 U.S. Dist. Lexis 5587, at *31. The court found any allegation of specific intent "conspicuously absent," *id.* at *32, adding that "there is no alleged conduct from which the Court could infer such intent." *Id.* at *30. The court thus concluded that "[t]he conspiracy claim, as alleged in the proposed amendment, fails to state adequately a claim upon which relief could be granted and, thus, could not withstand a motion to dismiss." *Id.* at *31 (citing *Teletronics Prop. Ltd. v. Medtronic, Inc.*, 687 F. Supp. 832, 838-39 (S.D.N.Y. 1988)).

2. *Twombly* Raised The Bar For Pleading A Sherman Act Claim Even Higher.

The Supreme Court's decision in *Twombly* imposes even higher pleading requirements—both in general and with respect to Sherman Act claims in particular. In *Twombly*, the plaintiffs alleged that the Baby Bell telephone companies had conspired to thwart competition for local telephone service in violation of Section 1 of the Sherman Act. 550 U.S. at 551-52. Although the complaint was sprinkled with allegations of "agreement" and "conspiracy," it was devoid of specific facts supporting those allegations. *Id.* at 564-66. The Court held that the complaint failed to state a claim for relief under Section 1 of the Sherman Act. *Id.* at 570. Basic pleading standards, the Court stated, require that the facts alleged "raise a right to relief above the speculative level." *Id.* at 555.

Overruling the oft-quoted pleading standard from *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," the *Twombly* Court demanded that the complaint identify a "plausible" conspiracy on its face to survive a motion to dismiss. 550 U.S. at 556. A plaintiff's pleading obligation "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. In the Section 1 context, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Id.* at 556-57. Clearly influenced by the tremendous burden and expense of discovery in complex antitrust cases, the Court refused to sustain the complaint based on unpleaded facts conjured by the fertile imaginations of counsel or the reviewing court. *Id.* at 559-60.

Since *Twombly* and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (expanding *Twombly*'s pleading requirements beyond the antitrust context), courts have recognized the heightened standard that a plaintiff must meet to survive a motion to dismiss. In the Third Circuit, "a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) (citation and punctuation omitted). "'[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—that the pleader is entitled to relief.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1950). "This 'plausibility' determination will be 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Id.* (same).

Applying these standards in the context of antitrust conspiracy claims—including claims of conspiracy to monopolize under Section 2, *see W. Penn. Allegheny Health Sys. v. UPMC*, No. 09cv0480, 2009 U.S. Dist. Lexis 100935, at *94-96 (W.D. Pa. Oct. 29, 2009)—courts have regularly granted motions to dismiss when the complaints fail to plausibly allege conspiracies. *See St. Clair v. Citizens Fin. Group*, No. 08-4870, 2009 U.S. App. Lexis 16465, at *6 (3d Cir. July 23, 2009); *id.* at *8 (dismissing monopolization claim as too conclusive under *Twombly* when plaintiff alleged that defendants "effectively barricaded entry into the market"); *Oshinsky v. N.Y. Football Giants, Inc.*, No. 09-cv-1186, 2009 U.S. Dist. Lexis 107608, at *31 (D.N.J. Nov. 17, 2009) ("[A]s *Twombly* makes clear, it is not enough to simply conclude that an agreement exists."). Given *Twombly*'s acknowledgement of the costs of discovery, "the importance of the Court's role in acting as a gatekeeper, especially in antitrust cases, cannot be understated." *W. Penn.*, 2009 U.S. Dist. Lexis 100935, at *53-54. "Pursuant to *Twombly*, district courts must assess the plausibility of an alleged illegal agreement ***before*** parties are forced to engage in

protracted litigation and bear excessive discovery costs." *Tam Travel, Inc. v. Delta Airlines, Inc. (In re Travel Agent Comm'n Antitrust Litig.)*, 583 F.3d 896, 909 (6th Cir. 2009) (emphasis in original).

Twombly and its progeny, combined with the many earlier cases recognizing that an antitrust plaintiff must plead specific facts in support of a conspiracy claim, set a high bar for pleading a cause of action under Section 2 of the Sherman Act. As set forth below, Hart has failed to surmount that bar.

3. Hart's Sherman Act Claim Against Diebold Does Not Satisfy The Applicable Pleading Standard

Hart seeks to support its Section 2 conspiracy claim against Diebold with the lone allegation that "Diebold and ES&S conspired to monopolize the market for voting machines and election systems ***by entering into and consummating the September 2 acquisition***." Amended Complaint ¶ 61 (emphasis added). Hart offers nothing beyond this single, conclusory statement. Nowhere does Hart allege, for example, that Diebold has some ongoing financial interest in Premier or ES&S, or that Diebold otherwise has any interest in the enterprise that Hart alleges will now possess monopoly power.

Nor does Hart allege—or even offer facts that would give rise to a reasonable inference—that Diebold sold its election systems business to ES&S with specific intent to create an unlawful monopoly or otherwise to violate the antitrust laws. Indeed, such allegations would be sheer fantasy, as Diebold has exited the business and its management has no idea what ES&S may ultimately be planning with respect to its ownership and operation of Premier.[5] Diebold thus is

[5] As Hart's own complaint alleges, as part of the sale of Premier, Diebold has agreed not to compete in the election systems business. *See* Amended Complaint ¶ 18.

not a participant in any ongoing enterprise that might possess monopoly power, and has no economic incentive to conspire to violate the antitrust laws.

Again, the *Arbitron* decision is persuasive precedent. In rejecting Tropicana's Section 2 claims, the *Arbitron* court noted that "as a result of the transaction, Arbitron (through [its subsidiary]) ceased doing business in the relevant market. It is axiomatic that ***a company cannot be liable for attempted monopolization with respect to a transaction which results in that company exiting the market.***" 1993 U.S. Dist. Lexis 5587, at *28 (emphasis added). *See also Int'l Rys. of Centr. Am. v. United Brands Co.*, 532 F.2d 231, 239-40 (2d Cir. 1976) (abandonment of unprofitable business cannot be basis of violation of Section 2 of Sherman Act).

In reviewing antitrust claims, courts have routinely taken note of the economic motivations—or lack thereof—that underlie the conduct in issue. In *Paladin Associates, Inc. v. Montana Power Co.*, 97 F. Supp. 2d 1013 (D. Mont. 2000), for example, the plaintiff alleged that the defendants had conspired to monopolize certain natural gas markets in violation of Section 2 of the Sherman Act. In examining that claim, the court referred to the "general principle" that "a defendant's economic motive is highly relevant. ***Courts should not infer a conspiracy if the defendant has no 'rational[] economic motive to conspire.***'" *Id.* at 1031 (emphasis added), (quoting *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 466 (3d Cir. 1998); citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596 (1986)). Concluding that "the alleged conspiracy does not make economic sense" and that the defendants had "no rational economic reason to conspire," the court entered summary judgment in favor of the defendants. *Id.* at 1034; *see also In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 312 (3d Cir. 1983) (holding that defendant that had sold its consumer electronics business—thereby exiting the consumer electronics market—could not be guilty of conspiring to monopolize that market), *rev'd on other*

grounds, 475 U.S. 574 (1986); *In re Pressure Sensitive Lablestock Antitrust Litig.*, 566 F. Supp. 2d 363, 377 (M.D. Pa. 2008) (denying conspiracy claim against seller under Section 1 of the Sherman Act, asking "what motive or incentive does [the seller] have to be participating in the conspiracy by getting out of the industry?").

Likewise, here, Diebold had no economic motive to engage in a conspiracy to monopolize with ES&S. Diebold sold Premier and completely abandoned the election systems business. Diebold has no ongoing financial connection to that business in general or Premier or ES&S's operations in particular. There is simply no economic rationale for Diebold to conspire with ES&S to monopolize an election systems market in which Diebold no longer competes. Hart has not offered, and cannot offer, any allegation to the contrary.[6]

For these reasons, Hart has failed to plead an actionable Section 2 claim against Diebold. Accordingly, Hart's Section 2 claim is subject to dismissal as to Diebold.

C. Hart Has Not Alleged That Diebold's Sale Of Premier To ES&S, In And Of Itself, Is Likely To Cause It Any Injury-In-Fact.

To make out an antitrust claim against Diebold, Hart must not only plead and prove that Diebold has acted in violation of the antitrust laws, it must also plead and prove that Diebold's actions have caused (or, with respect to Hart's claim for injunctive relief, are likely to cause) some injury to Hart. *See City of Pittsburgh v. W. Penn. Power Co.*, 147 F.3d 256, 265 (3d Cir. 1998). It is thus not enough that Hart allege an antitrust violation, it must also allege that the violation caused injury. With respect to Diebold, however, Hart has not done so, as Hart has not alleged that it has been or will be harmed by anything Diebold has done.

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[6] On the other hand, as a competitor in the election systems business [redacted], Hart's potential motives in prosecuting this lawsuit extend far beyond simply ensuring continued competition in the industry. *See* Transcript of Sept. 29, 2009 Hrg. on Hart's Motion for Temporary Restraining Order, at 15:7-8 (Hart's counsel: "We are not in here claiming that we're completely altruistic in having taken the effort to bring this matter.").

As discussed above, the only Diebold conduct that Hart references in asserting that Diebold has violated the antitrust laws is its sale of Premier to ES&S. While Hart makes a number of other incendiary assertions regarding the conduct of Diebold and/or Premier prior to the sale to ES&S (*see* fn. 3 above), none of them are in any way tied to an alleged conspiracy to monopolize or to any other claimed antitrust violation. And nowhere does Hart allege that Diebold has or will participate in any antitrust violations that might occur post-acquisition.

In contrast, all of Hart's allegations of injury relate to practices it suggests ***ES&S*** will engage in having acquired Premier. For example, Hart alleges that:

> the September 2 acquisition will vest ***ES&S*** with excessive market power and undue influence over the competitive bidding contests by:
>
> a. significantly reducing the number of qualifying bidders for future election systems contracts;
>
> b. imparting ***ES&S*** with excessive influence over the scope and content of jurisdictions' RFPs;
>
> c. giving control of an unduly large proportion of the industry-wide budget for research and development in products, software, and services related to election systems, and, thus, control over the path and pace of industry innovation, to a single firm [***ES&S***] with a reputation for a lack of innovation;
>
> d. rendering it easier for ***ES&S*** to pursue lowball bidding with back-loading and strategies that raise rivals' costs.

Amended Complaint ¶ 45 (emphasis added). Elsewhere in its complaint, Hart similarly alleges that "[u]nless restrained and unwound, . . . ***ES&S*** will more easily achieve regulatory capture in connection with competitive bidding contests by jurisdictions and will exert greater undue influence over the specification of RFPs." Amended Complaint ¶ 49 (emphasis added).

In short, Hart's theory of injury here is clear: Hart claims that ***ES&S***, armed with the increased market share associated with its acquisition of Premier, will use its market power to

engage in predatory conduct to the detriment of Hart. Hart does not allege that Diebold's sale of Premier to ES&S, in and of itself, will cause injury. Rather, Hart alleges that ***ES&S*** will use the market share that it has acquired through its purchase of Premier in a predatory, anti-competitive, manner.

Because Hart has not alleged that it has incurred any injury from the lone act of Diebold that it references in its complaint—that is, Diebold's sale of Premier to ES&S—Hart cannot make out an actionable cause of action against Diebold. For this additional reason, Hart's claims against Diebold should be dismissed.

VI. CONCLUSION

Both of Hart's claims against Diebold fail as a matter of law. As a ***seller***, Diebold is not subject to a claim under Section 7 of the Clayton Act. And Hart has failed to plead a violation of Sherman Act Section 2 conspiracy claim against Diebold. Indeed, because Diebold has left the election systems market altogether, a Sherman Act Section 2 claim against Diebold is facially implausible. In addition, Hart's complaint fails to allege that Diebold's conduct has caused Hart any injury. Accordingly, Diebold respectfully requests that Hart's claims against Diebold be dismissed.

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Dated: December 22, 2009

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF which will send notification of such filing(s) to all counsel of record. In addition, the following have been served as noted:

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